

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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Saskatoon, Saskatchewan

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Volume 127

Inquiry Proceedings



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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Morning.

DAVID ALAN ASPER, continued:

BY MR. HODSON:

Q I just want to pick up where we were yesterday, Mr. Asper. We were talking about the applications that were drafted, we were looking at the end of December '88, and I think you told us that Mr. Wolch gave you a memorandum to combine a number of drafts and come up with an application to be filed with the Minister under 617. We went through your draft application and you identified some areas that you thought were important, we also went through the draft of Heather Leonoff, her draft.

And then if I could call up 213440. And this, I think this is around December 22, but -- this is December 22, '88, it's a letter from David Milgaard to Hersh, and so it's within a couple of days of the memorandum that says, "lookit, get the combined drafts", and I just want to go through parts of this. And it looks as though David Milgaard and Joyce Milgaard were also



1 asked to give their input on the written document;
2 is that correct?

3 A Yes.

4 Q And so, here, what David says to Mr. Wolch:

5 "In a battering ...",

6 I think:

7 "... of this sort I've developed a fear
8 of never winning. My "two part"
9 presentation idea saw a way for me to
10 possibly lose to the Minister of Justice
11 but win by holding back a "part two"
12 until I at least exonerated myself
13 publicly. It has been a hard plan to
14 let go of, but the application is very
15 strong as it stands now. Please express
16 my thank you for Heather for her work.
17 Actually that is a thank you to all of
18 you ..."

19 What can you tell us about this two -- and we
20 will see this in some other documents about
21 two-part presentation, holding back something;
22 are you able to shed any light on that?

23 A I don't recall, I -- there was -- David was very,
24 very interested in a video re-enactment, and I
25 don't know if that's what he is referring to. He



1 was also very keen on using the platform, if you
2 will, to advance the matters that he was dealing
3 with in terms of prisoner rights and prisoner
4 issues within -- inside the system, and that's
5 what he may be referring to here, but I don't
6 specifically recall this.

7 Q Do you recall any discussion or any strategy about
8 holding back information from the Federal Minister
9 of Justice initially, or perhaps using it later on
10 in the process, some strategy of that nature?

11 A Well it's interesting you ask that, because as I
12 reread the Court of Appeal decision last night I
13 now, I now recall why the -- my first draft, which
14 was an evolution of the document that I had
15 created in 1986, became the application that was
16 ultimately submitted and was a much leaner
17 version. Because, yes, we felt that the analysis
18 that we had of the facts of the Nichol John
19 evidence was something that, if we put up front in
20 the application, would get rejected too easily by
21 the Department of Justice on the basis that it had
22 already been argued, that it wasn't new. So we
23 felt that, we actually felt that if we could get
24 in the door with something new, that we would hold
25 back the factual analysis until we were in the



1 door.

2 But in terms of something, some
3 special something that we were going to hold back,
4 I'm not aware of that, no.

5 Q If we can go to the next page, and it appears that
6 Mr. Milgaard has some comments on the application
7 and I wasn't able to tell which version, I'm not
8 sure that it matters, but he would have had, I
9 take it, one of the drafts, either Heather
10 Leonoff's draft or his draft or your draft, but
11 one version of the application in some form he'd
12 be looking at, and if I could just maybe point
13 this out he says:

14 "In regard to the application itself,
15 there are two anomalies I noticed. I
16 feel you should check them out. One is
17 suggesting in the application that
18 Rasmussen identified me. The
19 Saskatchewan Appeal Court ... does not
20 have him identify me. The other anomaly
21 has James Ferris saying the "lumps in
22 the frozen snow" were found February
23 4th."

24 And:

25 "The ... Appeal Court has this taking



1 place on the afternoon ..."

2 So it looks as though he would have had some
3 document, Mr. Milgaard, that he was commenting
4 on; is that correct?

5 A Yes.

6 Q And then, again, down at the bottom -- scroll
7 down, please -- it says:

8 "The only other area I want to do
9 something about is the paragraph with
10 the words 'window of opportunity' in it.
11 If we go on record suggesting a window
12 of opportunity may exist, I would like
13 to qualify it just a little more with
14 one sentence at the end of the
15 paragraph. This is how:

16 'The problem with this acceptance is
17 that the physical evidence refutes
18 the suggestion of any vehicle being
19 stuck in this scene area.'

20 That's it application wise!"

21 And then the next page --

22 A He's correct, by the way, I noticed that last
23 night, on the date that the Court of Appeal refers
24 to on the finding of the lumps of snow.

25 Q Yeah.



1 A They were actually --

2 Q I think there is an error, I think they do in fact
3 state January 31 and the evidence was, I think,
4 February 4, if I'm not mistaken?

5 A Yes.

6 Q So then if we can go ahead to 157792. And this
7 looks to be another version of the draft; is this
8 Mr. Milgaard's writing, can you tell?

9 A Yes, it could very well be.

10 Q And he's got some comments about *Criminal Code* and
11 junior, and I think "junior" is a reference to
12 David Marshall -- or Donald Marshall?

13 A Donald Marshall, yes.

14 Q And then here, we saw a document earlier about
15 9(2), Police Procedures Reality and Logic was a
16 document that David Milgaard had prepared?

17 A Yes.

18 Q Correct?

19 A Yes.

20 Q So would he be, would that note be referring to
21 that argument?

22 A It could be, yes.

23 Q And I think you've already told us that was not
24 put in the application for the reasons you stated?

25 A Yes.



1 Q Then if we could go to 000002. And this is
2 actually the letter that's accompanying the
3 application, and I think it's similar, I haven't
4 compared it exactly with the December 19th draft,
5 I just want to go through parts of this with you.
6 Mr. Wolch writes:

7 "The preparation of an Application
8 pursuant to Section 617 is difficult in
9 the sense that there is hardly a
10 precedent to follow and one does not
11 know how much detail is required. We
12 were prepared to make an Application
13 based on the frailties of the conviction
14 even prior to obtaining the extremely
15 important evidence of Dr. Ferris. Dr.
16 Ferris' evidence and credentials as
17 explained in the Application that
18 follows is scientific evidence of a very
19 compelling nature which, in our opinion,
20 had it been available at the time, would
21 have clearly resulted in an acquittal."

22 And was that your view, Mr. Asper, that if Dr.
23 Ferris' evidence and opinion had been available
24 to the jury, it would have resulted in an
25 acquittal?



1 A In 1988 I would have agreed with those -- with
2 that wording, absolutely. I think, I think the
3 better wording might have been "could have
4 affected the verdict", but --

5 Q And do I take it from your answer that your view
6 about the value of Dr. Ferris' opinion has changed
7 today, your view of it today, with hindsight? I'm
8 sorry, I took from your answer, you said "well
9 back then I would have agreed with it"?

10 A Well I -- look, look, I'm a witness at this
11 moment, if you'd like me to be an advocate I could
12 be an advocate and I would say, if I am playing
13 the role of advocate I would certainly take the
14 position it would have resulted in an acquittal.

15 Q No, and I guess I --

16 A And I would take that position today.

17 Q No, let me back -- and I maybe misread your answer
18 when I asked you the question about was it your
19 opinion that, if Dr. Ferris' evidence had been
20 available to the jury, it would have clearly
21 resulted in an acquittal, and I think your answer
22 was "well at the time --"

23 A Yes.

24 Q "-- it would have been, yes"?

25 A Yes.



1 Q And I took it from that, and maybe I took it
2 incorrectly, that today you would have a different
3 view than you would have in '88? And maybe I'm
4 misinterpreting your answer.

5 A No, I don't have a different view, I might have
6 just said the word "could have" instead of "would
7 have".

8 Q Okay. Just on, we talked a bit about Dr. Ferris'
9 opinion yesterday, what -- obviously you would
10 have talked to David Milgaard about the opinion
11 and its value and what it meant; is that fair?

12 A Yes.

13 Q And what would you have told him about what the
14 value was of Dr. Ferris' opinion?

15 A What would I have told David?

16 Q Yes. And let me maybe help you out a bit. In a
17 general sense --

18 A I have -- well, okay, we have to -- this is very
19 difficult because I have to provide answers in the
20 context of what we knew in 1988.

21 Q Right.

22 A And I can answer, today, what I would have thought
23 in '88, except we now know that Dr. Ferris'
24 opinion has been undermined by the fact that David
25 is a secretor.



1 Q Right.

2 A So what --

3 Q No, and I --

4 A -- what, I need to understand what era I'm working
5 in?

6 Q Okay. I want you to go back to 1988, at the time
7 you got Dr. Ferris' opinion, --

8 A Yes?

9 Q -- and what I am trying to understand or have you
10 explain to us is what would have been explained to
11 David Milgaard about the value of this opinion?

12 A Ah.

13 Q And the reason I ask that is because we'll see in
14 some later documents, in some of his letters that
15 he writes, the -- he seems to be placing a great
16 deal of weight on the fact that Dr. Ferris proves
17 he is innocent and that someone should just look
18 at that and sort of un -- get the key out and
19 unlock his cell, so to speak. And so I'm trying
20 to understand what would -- can you tell us what
21 would have been communicated to him about the
22 value of Dr. Ferris in getting -- the value of his
23 opinion in getting the investigation re-opened?

24 A Oh, we would have, I assume I would have or we
25 would have given him a copy of the actual report



1 and we would have explained to him, I would
2 assume, that the evidence was either no evidence
3 at all or exculpatory.

4 Q Okay. If you can just go back to the letter,
5 please, have it back up on the screen. Would you
6 have conveyed to him, in this type of language,
7 that if Dr. Ferris' evidence had been available to
8 the jury it would have, in your opinion, resulted,
9 clearly resulted in an acquittal?

10 A Yeah, I'm sure we would have said that to him, we
11 would have -- well, we gave him this letter, we
12 gave him a copy of this letter.

13 Q And so again, from his perspective -- and I
14 appreciate you can't, well, you can't speak for
15 him -- but would it be fair to say that the
16 impression that you left with him is that Dr.
17 Ferris' opinion exonerated him and, if the jury
18 would have had it, he would have been acquitted,
19 and now that you have it that the authorities --

20 A It wouldn't surprise me if that was his opinion.

21 Q Okay. If we can go to the next page, and we spent
22 some time about your understanding of the, what
23 was required under 617 or 690. I'll just read
24 this and then have a few questions and get you to
25 elaborate.



1 "In preparing the Application we have
2 deliberately attempted to be as concise
3 as possible and at the same time present
4 the matter in an objective fashion. We
5 are certainly prepared to elaborate on
6 any point of concern or answer any query
7 that may arise or that we have perhaps
8 not foreseen. For example, the witness
9 Nichol John, whose statement gave rise
10 to what is now known in our Courts as a
11 Milgaard application, gave a statement
12 that was prejudicial to David Milgaard.
13 We are in a position to factually
14 demonstrate the errors in that statement
15 and that it cannot possibly be true, but
16 we have not done that because Nichol
17 John testified in Court that the
18 statement was not true.

19 The purpose of this letter in
20 accompanying the Application is to
21 emphasize that the Application is
22 deliberately concise and if your
23 officials wish any additional references
24 or material or wish any particular issue
25 addressed we are more than willing to



1 oblige and cooperate in any way
2 possible."

3 And we've talked a bit about these types of
4 issues, what goes in, what goes out. Can you
5 elaborate, Mr. Asper, on what were some of the
6 issues and what prompted you to take this
7 approach in filing the application?

8 A I think we relied -- as I say, as I went over the
9 material again last night, Heather Leonoff in our
10 firm was an appellate specialist and I seem to
11 recall that Heather was very nervous about
12 attempting to re-argue the facts of the case in
13 the application because it would have made it too
14 easy to simply reject it, so we -- the decision
15 was made to remove all of the work that I had done
16 in my draft and, as I said earlier today, to make
17 it leaner and to not raise too many things that
18 would make it too easy to have the application
19 rejected outright and summarily.

20 Q And, sorry, rejected outright on the basis that
21 you were re-arguing something that the jury and
22 the Court of Appeal had already dealt with?

23 A That's correct.

24 Q Now -- and we talked a bit yesterday about the
25 Nichol John and the 9(2) and I think you told us



1 that based on your draft you felt, David Asper,
2 that that was important information that ought to
3 go with the application I think is -- and you were
4 overruled I think were your words; is that right?

5 A Yes, yes.

6 Q What about the preliminary hearing publicity
7 argument, did that fall by the wayside as well?

8 A Yes.

9 Q I want to go back, and again I'll take you through
10 the application itself in a moment, but what it
11 basically contains is the scientific evidence of
12 Dr. Ferris and the Deborah Hall affidavit as the
13 two prongs, and if I can go back, and we've
14 covered I think in your evidence and certainly
15 other evidence what information had been gathered
16 by the Milgaards, if I can call it that, over the
17 course of the year, so at December 28, 1988 is
18 when you file your application. I just want to
19 review the information of the Milgaards, either
20 through you or Mr. Carlyle-Gordge had collected,
21 and get your comments as to whether you considered
22 filing this information with the authorities and,
23 if so, why you didn't, and the first one would be
24 the Ron Wilson interviews in 1980, and I think
25 they were both in 1980 or '81, the ones we read



1 yesterday, where Joyce Milgaard interviewed him on
2 the telephone, and I think when we went through
3 them, I think you made some comments that yes, he
4 seemed to be backing off some of his evidence,
5 although he didn't recant, but I think you also
6 told us that that was information that would have
7 been of assistance to David's case. Is that fair?

8 A Yes. I have to say, I'm a little concerned about
9 my timing of what we had when, and the reason I
10 say that is because I thought we had transcripts
11 from the beginning and clearly we didn't.

12 Q You are talking Court transcripts?

13 A Court transcripts, trial transcripts, and we
14 received information, it looks, in different
15 phases, at different times, and I'm feeling very
16 uncertain about answering what we had at a certain
17 time, I have to say that, I'm just feeling very
18 uncertain about that.

19 Q Well, let's go back -- you remember the Ron Wilson
20 interviews and those were typed up?

21 A Yes, I do, I mean, I remember that, and I think we
22 had that early.

23 Q Right. And so those two transcripts, did you
24 consider sending the two transcripts of the
25 interview with Ron Wilson saying here, Federal



1 Justice, here's what Ron Wilson told us back in
2 1981, this is helpful information, follow up or
3 something of that nature? Did you consider doing
4 that?

5 A I don't recall it, no.

6 Q Was there a reason that those Ron Wilson interview
7 transcripts would not be sent, was it a case of we
8 thought about it and decided not to send them in
9 for a specific reason?

10 A I don't recall any consideration of that.

11 Q And in the, I think in the application materials
12 itself, I don't think there's any mention about
13 Ron Wilson or his evidence specifically, is there,
14 about -- at least as a grounds for the re-opening?

15 A No, there aren't.

16 Q And secondly, and I think we can maybe group these
17 together, we went through yesterday Peter
18 Carlyle-Gordge's interviews of Albert Cadrain,
19 Dennis Cadrain and Estelle Cadrain I think in the
20 early 1983 time frame, and was there any reason
21 that those interviews were not provided to the
22 authorities with the application in December of
23 '88?

24 A I don't recall discussing it.

25 Q So again, was it -- are you able to tell us



1 whether it was a deliberate decision, let's not
2 file it, or was it just not considered, or can you
3 shed any light on whether it was a deliberate
4 decision or it just didn't happen, to not include
5 it?

6 A I don't recall discussing it. It may well be that
7 this fell within the umbrella idea that if we
8 could somehow open the door, then everything would
9 become, everything would, all the evidence would
10 sort of be put on the table, so to speak, but I
11 don't recall specific discussion of what, whether
12 we should put those transcripts in or out.

13 Q And the next one would be the Nichol John
14 interview of I think 1980 or '81 with Tony
15 Merchant, '81 with Tony Merchant and Joyce
16 Milgaard. Would your answer be the same with
17 respect to that transcript, that it -- I mean, it
18 wasn't put into the authorities, and are you able
19 to shed any light as to whether that was a
20 deliberate decision not to put it in or whether it
21 just happened?

22 A I'm afraid I don't recall.

23 Q And I also note that David Milgaard's affidavit
24 that was sworn on November 26th, 1986 was not
25 included with the application and I'll take you to



1 a letter I think about, I think in August of '89
2 or thereabouts where it was sent in. Was that
3 something -- can you tell us why that wasn't
4 included with the application?

5 COMMISSIONER MacCALLUM: What's the date,
6 please? The date, I'm sorry.

7 BY MR. HODSON:

8 Q His affidavit was sworn August 26, 1986 and, I'm
9 sorry, it was filed with the minister within the
10 following year, and we'll go to that in the
11 chronology, but was there a reason that it wasn't
12 filed with the original application?

13 A I don't recall.

14 Q And if we can just go back and have the letter up,
15 please, and the next page, and you say:

16 "We are taking the liberty of forwarding
17 a copy of this material directly to
18 Mr. Ron Fainstein, who we understand to
19 be the counsel in the Department of
20 Justice who is responsible for the
21 conduct of applications pursuant to
22 Section 617 of the Criminal Code of
23 Canada."

24 So I take it there would be some -- would that --
25 I think you told us yesterday you didn't have any



1 direct dealings with Federal Justice, but that
2 Mr. Wolch did; is that right?

3 A Yes.

4 Q And so is it fair to conclude from this that you
5 knew at the time of your filing that, who from
6 Justice would be at least initially looking at it?

7 A Yes.

8 Q Actually, let's go through the application and
9 then I'll come back to this question. If we can
10 go to the next page, please, and the relief you
11 are seeking here is a new trial or to refer the
12 matter to a Court of Appeal or the Supreme Court
13 of Canada for a further appeal. Do you recall
14 yesterday I showed you a couple of documents, I
15 think they were, one was a letter of Mr. Wolch to
16 Legal Aid that talked about a third, sort of a
17 third round of relief being directing a police
18 force to conduct an investigation. Do you
19 remember seeing that?

20 A Yes.

21 Q And again, was there any reason that that was not
22 included in the relief requested, was it something
23 that was thought about and dropped or can you shed
24 any light on that?

25 A No, it's not -- that's not a remedy available to



1 the minister under section 617. I suspect that
2 what Mr. Wolch was looking for earlier was on an
3 informal basis for the Department of Justice to do
4 what we had hoped it would do all along; namely,
5 obtain the services of a neutral and independent
6 investigative arm.

7 Q And so again, and we'll see this when we get into
8 1990, you dealt with Sergeant Rick Pearson with
9 the RCMP when he was dealing with the
10 investigation of Larry Fisher?

11 A I did.

12 Q And so was that the type of investigation you were
13 contemplating back before you filed?

14 A I wish we had Sergeant Pearson from the beginning.

15 Q And then if we can go down, the -- you talk here
16 about:

17 "... this case is worthy of review by
18 the Minister of Justice on the basis of
19 advances in scientific technology have
20 called into question the scientific
21 evidence presented at the trial."

22 What -- and we've talked a bit about this
23 already. What would have been the scientific
24 advances that you would be relying on here?

25 A I'm not sure that there were any advances



1 actually. I think that what Dr. Ferris had done
2 is really just go back and apply, to a large
3 measure, what scientific process that would have
4 been available at the time to just reach
5 conclusions that had greater clarity.

6 **Q** And I think in some of your earlier drafts, Mr.
7 Asper, you basically stated that although this
8 science was available at the time, it really
9 hasn't changed based on a number of factors, I
10 think you said we don't think the jury and others
11 understood it because if they did they should have
12 acquitted; is that a fair statement?

13 **A** Yes.

14 **Q** So would this be -- again you talked before about
15 efforts to make sure that this was new evidence.
16 Would this be an attempt to try and get the
17 secretor issue as new evidence or fresh evidence
18 as opposed to evidence having been argued at
19 trial?

20 **A** I suppose so, yes.

21 **Q** And I suppose if back on your point earlier about
22 re-arguing the case, if you put in the application
23 that said lookit, this was argued at trial, we
24 think the jury didn't get it right, we just want
25 to re-argue it again, that you might be met with



1 the same response as some of the other arguments
2 you had; is that correct?

3 A Yes, yes.

4 Q Go to the next page, we talked a bit about the
5 timing and the importance and I think in your
6 earlier draft, and I just want to get back to this
7 time frame, because I think this goes to the
8 impossibility argument, and I'm not trying to
9 debate with you, Mr. Asper, your read of the
10 evidence or anything of that nature. When we went
11 through the charge to the jury and with
12 Mr. Tallis, his sense, if I can call it that, of
13 the evidence was that Gail Miller left at 6:45 and
14 was killed sometime after that and that as far as
15 when David Milgaard, Ron Wilson, Nichol John were
16 asked, stopping a woman for directions and getting
17 stuck somewhere, that if you work back from the
18 Trav-a-leer Motel, that would be the best guide as
19 to when you put them there as opposed to when Ron
20 Wilson said they got into the city, and I think
21 Mr. Tallis said that that would put them
22 somewhere, whether it's in the vicinity or not,
23 but somewhere where they stopped a woman for
24 directions around that time, 6:45 to 7:10, on the
25 basis that working back from what time they got to



1 the Trav-a-leer.

2 He also told us that I think he
3 felt that it was a very favourable charge to the
4 jury by putting it at 7:10 because Mr. Rasmussen's
5 evidence was it could have been as late as 7:30.

6 He also then testified that the
7 Danchuks was a known time of I think 7:40 and if
8 you work back from there, that will tell you when
9 they might have been at the Trav-a-leer, so -- and
10 again I appreciate that everybody is just trying
11 to take these times and figure out this window of
12 opportunity, and the reason I raise that is
13 because in this material you have put in the
14 evidence that they got stuck at 6:30 and that
15 David got back to the car at 6:45 which, if that
16 were the evidence at trial, presumably the trial
17 judge or the jury would have said, well, she
18 didn't leave until 6:45, it couldn't have been
19 him.

20 A Yes.

21 Q And so --

22 A It wasn't him.

23 Q Well, no, but, I mean, as far as putting, taking
24 the evidence and looking at the evidence at trial
25 on the issue of timing and whether or not it was



1 possible based on that timing, and what I'm
2 wondering is on the times, when you looked at the
3 evidence, did you conclude that it was, that this
4 was the timing; in other words, that 6:45 was the
5 latest Dave would have been away from the car if
6 Ron Wilson's evidence was correct?

7 A Well, clearly that would have been my view at the
8 time. I think part of the problem was that one
9 could construct several different scenarios based
10 on the evidence and I think we just had to land on
11 something.

12 Q Okay. If we can go to the next page, and this
13 might assist and then I'll come back, because
14 here, and we talk about Gail Miller leaving, you
15 say, at approximately seven a.m., was last seen
16 alive at approximately 6:45 a.m. I think the --

17 A That was the evidence of Miss Nyczai.

18 Q Yeah. And I think the trial judge, when he put it
19 to the jury, said that she could have left as
20 early as 6:45 a.m., and again, would it be fair to
21 put it this way, Mr. Asper, that you would be
22 taking a look at the evidence and saying lookit,
23 we think based on this evidence, that here are the
24 times that can be justified by the evidentiary
25 record and they show that David couldn't have been



1 there when they said he was supposed to, and
2 others may have different views about the time,
3 but you were putting forward what you felt would
4 be a credible and supportable position?

5 A Yes, yes. This reflected our reading of the
6 facts.

7 Q Now, the next page, you say here, or it's said in
8 the application -- I take it, did this end up
9 being Heather Leonoff's draft as opposed to yours
10 of the application?

11 A Yes. I would assume -- I think Heather had the
12 final run over the document.

13 Q But anyway, here, if I can -- presumably, though,
14 this ended up being a group effort; in other
15 words, it's something that everybody had some
16 input into?

17 A Oh, yes.

18 Q So here:

19 "The only forensic evidence that
20 possibly tied Milgaard to the crime --"
21 And I think "possibly" was added in a later
22 draft,
23 "-- was the fact that a sperm sample
24 found at the scene of the crime
25 contained "A" antigens."



1 And we touched on this yesterday. Was it your
2 view that that frozen semen was put in as
3 evidence to actually physically connect David
4 Milgaard to the crime, or as physical evidence?

5 A Absolutely.

6 Q And then if we can scroll down, go to the next
7 page -- sorry, go back to the bottom of the page.
8 We talk again about the timing, and again I think
9 this is similar, Gail Miller didn't leave until
10 seven, Milgaard was out of the car, based on the
11 evidence, until 6:45, from 6:45 on Milgaard was
12 always in the company of another individual.
13 Obviously the jury must have found that people
14 were wrong about the times.

15 "Even if we accept this evidence, "the
16 window of opportunity" for Milgaard was
17 no more than about ten minutes."

18 So I think, is it fair to say that you are
19 putting forward an interpretation of the evidence
20 to say lookit, it's physically impossible, but
21 the jury must have found otherwise based on
22 differences in times, and if you look at a
23 different way of doing it, that the -- the
24 worst-case scenario, if I can call it, would be a
25 10 minute opportunity?



1 A Well, Mr. Hodson, my impression of the -- you
2 know, this is very dangerous to do, but if I were
3 a juror listening to the evidence or on the basis
4 of only reading the transcript, but if you can put
5 yourself in the place of a juror, as I say, there
6 was -- I'm not sure the jury would have actually
7 paid much attention to the details of time and
8 location other than to conclude that David was in
9 the area and had an opportunity, I don't know that
10 the jury would have been fixated on these kinds of
11 details because the stories were so conflicting,
12 and my recollection is even they were internally
13 inconsistent during the examination-in-chief and
14 in cross, so what would stick in the mind of a
15 juror is they were in the area and they were apart
16 and Milgaard had an opportunity. I don't think
17 anybody was thinking how long it was or where it
18 was other than it must have been close to where
19 Miss Miller had been seen.

20 Q And so what was the purpose then of putting
21 forward this submission in this application about
22 the timing?

23 A Well, again, I think you have to do some sort of
24 statement of facts and there is an interpretation
25 of the facts that yields this statement of facts.



1 Q Just scroll down --

2 A And if this statement of facts is correct, then,
3 you know, Milgaard would have been back in the car
4 prior to Gail Miller leaving the home, her house,
5 according to that reading of the evidence.

6 Q And I think you said, or maybe it's obvious, that
7 the jury must have concluded otherwise, must have
8 concluded that he was in the area and away from
9 the car at the time when Gail Miller was around;
10 is that a fair --

11 A That's the implication obviously, yes.

12 Q So here the application states:

13 "It is submitted that the strongest
14 pieces of evidence tying David Milgaard
15 to the offence was the evidence of the
16 witnesses Melnyk and Lapchuk, and the
17 evidence of the forensic expert which
18 purported to tie David Milgaard to the
19 offence by showing that a person with
20 David Milgaard's blood type had been
21 responsible for the crime. The
22 Applicant has directed his efforts at
23 discounting these two particular pieces
24 of evidence."

25 My question here, Mr. Asper, was that your view



1 at the time, that these two were the strongest
2 pieces of evidence, or was that part of the
3 submission in the sense that your two pieces of
4 new evidence related to those two subject
5 matters?

6 A Yes, yes, that was our position, and in re-reading
7 the Court of Appeal decision last night, you can
8 see certainly the Court of Appeal thought Melnyk
9 and Lapchuk were pretty important too.

10 Q And, I'm sorry, maybe I didn't state my question
11 clearly enough, was it a case of advocating and
12 saying lookit, you know your two pieces of fresh
13 evidence are Dr. Ferris, being the semen stain,
14 and the Deb Hall evidence on the motel room
15 reenactment, those are your two bullets, if I can
16 call them that, in this application. Did you then
17 as advocates say, well, let's state that those are
18 the two most damaging pieces of evidence against
19 our client as you've stated here because that's
20 the two pieces of new evidence we have, and I'm
21 not being critical of it, I'm just trying to find
22 out, or was it a case of saying you know what, it
23 happens to be -- let me put it this way, if you
24 would have had Ron Wilson's recantation at this
25 time, would you have said that was the most



1 damaging piece of evidence at trial? Do you
2 follow what I'm getting at?

3 A No, no, I think that we had -- as I said
4 yesterday, I think that we had concluded that the
5 motel room incident really was a *coup de gras* for
6 the Crown's case, rightly or wrongly that's what
7 we thought, and if you took that away and if you
8 took away the physical evidence and potentially
9 used it to exclude David as the perpetrator, then
10 the witness of Cadrain, the evidence of Cadrain,
11 John and Wilson was otherwise refutable. As I
12 said yesterday, it laid the foundation for then
13 looking at the facts of the case.

14 Q Okay. If we can go to the next -- actually, just
15 go to the bottom here, this is the basis for the
16 617 review. If we can go to the next page. So
17 here are the two prongs:

18 "(1) Debra Hall, who was not called at
19 trial, has provided an affidavit
20 contradicting the evidence of Melnyk and
21 Lapchuk."

22 We talked about that yesterday and I think you
23 are saying she's saying the incident didn't
24 happen; correct?

25 A Right.



1 Q And:

2 "(2) Advances in scientific technology
3 have allowed the Applicant to discredit
4 the forensic evidence called at his
5 trial and to provide evidence that
6 exculpates him as the perpetrator of the
7 crime."

8 And again I think we've touched on that yesterday
9 and again this morning.

10 Then we go down to fresh
11 evidence, the evidence of Deborah Hall, and you
12 state here:

13 "The witness Melnyk was arrested a few
14 days before Milgaard's trial and was
15 charged with armed robbery. At that
16 time he advised the police of his
17 conversation with Milgaard in the hotel
18 room."

19 We have heard evidence before the Commission, and
20 in fact I think it may have even been in Ron
21 Wilson's -- pardon me, I think it was in Craig
22 Melnyk's evidence at trial, Chief Justice Bence
23 asked him some questions about how he came to be
24 in touch with the police, and I think the
25 evidence we've heard, Mr. Asper, is to the effect



1 that it may have been at a party the Saturday
2 before the trial that Lapchuk and Melnyk
3 mentioned to Ron Wilson this information about
4 the motel room and that the next day when Wilson
5 was being transported to Saskatoon he told the
6 police about what Melnyk and Lapchuk had said and
7 then Wilson went, or then the police went back to
8 them. Do you recall what information you would
9 have had at this time about how Melnyk and
10 Lapchuk got to the police, and the version that I
11 gave you, were you aware of that?

12 A I don't recall what we would have had that would
13 have led to the making of that, those sentences.

14 Q And then here you say on counsel, you say:

15 "It would appear that counsel on behalf
16 of Milgaard was caught by surprise by
17 the evidence of Melnyk and Lapchuk. At
18 no time did he seek out or attempt to
19 talk to the witness Debra Hall."

20 A Yeah.

21 Q On what basis was that submission made, about what
22 Mr. Tallis did or didn't do about Deborah Hall?

23 A I don't know. Mr. Wolch may have spoken with
24 Mr. Tallis. I'm not sure about that point.

25 Q Did you have any information --



1 A No.

2 Q And I don't know if you had a chance to look at
3 Mr. Tallis', or hear his evidence before the
4 Commission, he described what he did after he got
5 the statements of Melnyk, Lapchuk and Frank and
6 that he in fact asked Mr. Caldwell to find Deborah
7 Hall and Ute Frank and then he interviewed Ute
8 Frank. Are you familiar with the evidence he gave
9 recently?

10 A Yes. This is probably what Deborah Hall told us,
11 that Mr. Tallis hadn't attempted to contact her.

12 Q Okay. The evidence that Mr. Tallis gave about,
13 and I think what he said is David Milgaard told
14 him that Ute Frank was a friend and would help and
15 that he interviewed Ute Frank and Ute Frank told
16 Mr. Tallis I think a fairly damning account of the
17 motel room, that it was not favourable to David,
18 and on the basis of that Mr. Tallis didn't call
19 Ute Frank as a witness and I think his evidence
20 was he didn't want to find Deborah Hall because he
21 was concerned that she may say similar to Ms.
22 Frank. You are familiar with what Mr. Tallis has
23 told the Commission on that subject?

24 A Yes, yes.

25 Q Had you become aware of that prior to what you



1 heard Mr. Tallis, or reading what he said to this
2 Commission, was that something you were aware of?

3 A We may have -- yeah, Mr. Tallis -- yes, Mr. Tallis
4 may have told us that in preparation for the
5 Supreme Court.

6 Q Okay. So back in '92 his interview of Ute Frank
7 and his decisions about not calling her and his
8 decisions about Deborah Hall, is that something
9 you would have been aware of then in '92?

10 A I think we were, and I was trying to locate Ute
11 Frank's statement because I seem to recall we had
12 it and it was quite neutral, didn't say anything,
13 and there is correspondence in the binder that you
14 gave me where we were sort of trading barbs with
15 the Department of Justice about what's in the
16 statement.

17 Q Yeah, I do have her statements and we'll bring it
18 up at that point, and her statement to the police
19 I think is that she was in the room, but it
20 doesn't say much by way of description, I think
21 she says she asked David whether he did it and he
22 smiled at her or something like that, but we'll go
23 through that, but just back on the question of
24 seeking out or attempting to talk to the witness
25 by Mr. Tallis --



1 A I think that came from Deborah Hall.

2 Q And:

3 "Debra Hall was never interviewed by the
4 police. It was only upon being
5 contacted by counsel this behalf of
6 David Milgaard that she provided the
7 affidavit ..."

8 Then we go down to the forensic evidence. Would
9 you have had any discussion -- well, you told us
10 you didn't have any discussion directly with
11 Mr. Tallis before the application was filed. Do
12 you know if Mr. Wolch had talked to Mr. Tallis
13 before this application was filed?

14 A I don't recall.

15 Q The documents, and I think the documents suggest
16 that it wasn't until later in 1989 that there was
17 a letter sent, Mr. Tallis' evidence was that he
18 met with Eugene Williams March 21 of 1990 and that
19 he had not met with either you or Mr. Wolch prior
20 to that time, although he may have had a phone
21 call, and from that evidence, and from the
22 documents, I take it that there would have been no
23 contact between you or Mr. Wolch or anybody from
24 your firm with Mr. Tallis prior to the December
25 28th, 1988 application being filed?



1 A It's possible. I just don't recall. I certainly
2 didn't have any contact with him.

3 Q Or were you aware of anybody else contacting him?

4 A I don't recall.

5 Q And then the forensic major thrust, go to the next
6 page, and again here, we've touched on this
7 before:

8 "The evidence was crucial in the case
9 because it provided the only forensic
10 evidence presumably connecting the
11 Applicant to the crime. It is the
12 position of the Applicant that the
13 evidence was misunderstood by all
14 parties concerned and that if an
15 independent panel of forensic
16 specialists was to examine that evidence
17 they would conclude that it would
18 exonerate, as opposed to tie David
19 Milgaard to the offence."

20 And I think again just to repeat, you've told us
21 that was your view at the time based on your read
22 of the transcript, that that evidence was in fact
23 used by the Crown to tie David Milgaard to the
24 offence?

25 A Yes. Well, I mean, to be -- I mean, to be very



1 precise about it, the Crown neutralized the
2 exonerative effect, I would say, at the trial. I
3 don't think it's fair to, for Mr. Caldwell to say
4 that he used it as a sword because I think Mr.
5 Paynter was quite clear. I think what happened,
6 just -- and again it's difficult on a reading of
7 the transcript, it looks like Mr. Caldwell was
8 able to neutralize the evidence that it would have
9 excluded David.

10 Q Back to a neutral, that it does neither?

11 A Yes, but as I said yesterday, the effect of which
12 is a nudge, nudge, wink, wink to the jury that it
13 might have been David, but even though the
14 evidence doesn't say it, nudge, nudge, it might
15 have been.

16 Q If, if we can go to the next page, you say:

17 "The significance of the evidence
18 concerning the antigens appears to have
19 been lost at the time of the trial. The
20 Trial Judge makes no mention of this
21 issue in his Charge to the Jury. The
22 Court of Appeal does talk about the
23 blood evidence. It is unclear whether
24 the Court of Appeal appreciated the
25 significance of the evidence. The Court



1 of Appeal did not point out that David
2 Milgaard was a non-secretor. They did
3 not point out that if there were "A"
4 antigens found in the seminal fluid,
5 that that seminal fluid could not have
6 come from David Milgaard."

7 I think, Mr. Asper, we determined yesterday, or
8 that you acknowledged that you didn't have Mr.
9 Tallis' address to the jury, and again just for
10 the record that was not on the Court file at the
11 time you searched it, that's the evidence we've
12 heard, and that it was prepared in early 1992
13 based upon shorthand notes of a deceased court
14 reporter that were typed up. You've now had a
15 chance to look at Mr. Tallis' address to the
16 jury; is that correct?

17 A Yes.

18 Q And I think we went through that with Mr. Tallis,
19 I don't intend to bring it up, but in there he --
20 and he told us -- he put forward an argument to
21 the jury that said "the frozen semen exonerates
22 David Milgaard or should be viewed as that"; would
23 you agree with that general interpretation?

24 A Yes.

25 Q If you would have had that address to the jury at



1 the time you made this application in December of
2 1988 can you tell us whether that might have
3 influenced your thinking on what you put forward
4 or how you put it forward?

5 A I can't say that it would have affected our
6 thinking, I just, I don't know.

7 Q And similarly with the Court of Appeal, and again
8 the record is clear there were no factums filed at
9 that time on the Court file, and what Mr. Tallis
10 has told the Inquiry is that he did, in oral
11 argument to the Court of Appeal, put forward the
12 argument, the same argument that he put to the
13 jury. I think in the Court of Appeal decision
14 they talk about the evidence of the A antigens,
15 there is no, I don't think there's any mention in
16 there about it being exculpatory or anything of
17 that nature; would that --

18 A It's a remarkably passing reference in the
19 decision.

20 Q Yes. And so was that, was the reference in the
21 Court of Appeal decision -- and you've referred to
22 it a couple of times in your evidence and as well
23 we see that in the documents -- did that, did that
24 influence your thinking as to how, based on what
25 you read in the Court of Appeal decision, did that



1 cause you to think that maybe they didn't
2 understand it?

3 A Yes. Without question.

4 Q And to 000015.

5 "It is of significance that the Trial
6 Judge completely ignores this issue in
7 the charge to the jury. One can only
8 speculate that the Trial Judge simply
9 did not understand the significance of
10 the blood evidence."

11 And as a matter of fact there is, as you know Mr.
12 Asper, there is no mention in the charge to the
13 jury of any of the secretor issues; did that
14 influence your thinking as to whether the parties
15 or the jury understood the importance of the
16 secretor issue and the physical evidence?

17 A It struck us as very odd in light of the fact that
18 Justice Bence, during the trial evidence,
19 interrupted, I think it was on direct, Mr.
20 Caldwell and Mr. Paynter several times in order to
21 clarify the issue and to effectively correct the
22 impression that Mr. Caldwell, I think, was trying
23 to establish, namely that there was blood
24 containing A antigens from David Milgaard that had
25 gotten into the semen sample. Because Mr.



1 Caldwell needed an explanation as to how the
2 antigens got into the semen sample if David was a
3 non-secretor, and my recollection was Justice
4 Bence interrupted several times and kept saying
5 "There is no evidence of blood. There is no
6 evidence of blood".

7 It was odd, then, that where the
8 judge clearly realized that there was no evidence
9 of blood, and the effect of the evidence was
10 exculpatory, to not say it in his -- in the charge
11 to the jury, yes, and that's the point we tried to
12 make there.

13 Q And so if we can go ahead to the next page, and
14 again we've touched on this before, you state:

15 "The scientific evidence was presented
16 at his trial but it is submitted that it
17 was not understood. Perhaps it was too
18 new an issue for counsel and for the
19 Judge. The Trial Judge simply ignores
20 the issue in his charge to the jury and
21 more particularly does not point out
22 that on the evidence given at trial the
23 evidence exonerated David Milgaard."

24 And again, I think you probably already commented
25 on this issue, I take it the things you've told



1 us, the fact that it was not in the address to
2 the jury and your review of the transcript would
3 have influenced your thinking that people must
4 not have understood it?

5 A Yes, or appreciated its importance.

6 Q And, again, just down at the bottom:

7 "The Court of Appeal ... appeared to
8 believe that the evidence was a strong
9 factor in convicting David Milgaard.
10 There is no discussion from the Court of
11 Appeal as to how the evidence could
12 exonerate him."

13 And, again, would that, your conclusion there
14 about what the Court of Appeal -- the emphasis
15 they placed on that evidence; was that based on
16 your reading of the judgement?

17 A I might not have used that language in the
18 application but I think the Court of Appeal, if
19 you read the decision, I think they placed greater
20 weight on other issues.

21 Q Okay. If we can then just go to the next page.
22 So that's the final draft, then go to the next
23 page, which has the appendices. And, again, so
24 the Court of Appeal decision, the affidavit of
25 Deborah Hall which we have been through, the two



1 reports of Dr. Ferris we have been through, his
2 CV, and the trial transcript re: the blood; and
3 that would be the evidence regarding -- I think
4 that was in your original brief --

5 A Yes.

6 Q -- that went through Sergeant Paynter's
7 transcript?

8 A Yes.

9 Q So, again, once -- this would form the application
10 or the information that was put forward. Would
11 you agree, Mr. Asper, that this application did
12 not -- and you, and we'll go through the reasons
13 for it in a minute -- but did not include all of
14 the information that you had gathered or that the
15 Milgaards had gathered by this time that might
16 bear on the issue of whether he was properly
17 convicted, whether he was innocent, and whether
18 there was a miscarriage of justice?

19 A That's true.

20 Q And so we've identified some of the other
21 information earlier, the Ron Wilson interview, the
22 Nichol John interview, the Cadrain interviews, the
23 Peter Carlyle-Gordge interview of Mr. Caldwell;
24 was that something that you thought might be
25 helpful in looking at the case again?



1 A Oh, --

2 Q We didn't go --

3 A -- absolutely, it all would have been helpful.
4 I'm just, as I said, I'm getting -- I'm very --
5 I'm getting a little bit nervous about what we had
6 at what time --

7 Q Timing --

8 A -- and I'm not exactly sure of what we had in '88.
9 I'm pretty sure we had the documents you are just
10 referring to.

11 Q Yeah. So that the information gathered by Joyce
12 Milgaard and Peter Carlyle-Gordge; do you have any
13 concern that you -- and when I say "you" I want to
14 refer to your law firm, being you and Mr. Wolch
15 and the group that was putting forward the
16 application -- do you have any concerns or
17 nervousness as to whether or not you had
18 information from Joyce Milgaard or Peter
19 Carlyle-Gordge that they had gathered?

20 A What was the last part?

21 Q Yeah, do you have any nervousness or concern in
22 acknowledging that you and Mr. Wolch would have
23 had all of the material gathered by Joyce Milgaard
24 and Peter Carlyle-Gordge in their efforts prior to
25 December 28th, 1988?



1 A No, I don't think we had it all, because
2 Mr. Carlyle-Gordge actually wasn't working for us.
3 And I guess his work with Joyce was partly to help
4 Joyce, but as I said earlier in my evidence, I
5 recall he was writing a book and he had retained a
6 fair bit of his research and kept it with him and
7 had then, I think, gone to England for a period of
8 time, and we had to ask for a fair bit of his
9 research material after he had gone to England and
10 after things picked up pace. So I -- there was
11 clearly some material that we had, I just, I'm
12 nervous about drawing the line as to exactly what
13 we had when.

14 Q Okay. What we heard from Mr. Carlyle-Gordge was
15 that when he left in '83 to England I think he
16 provided some of his materials, I can't recall
17 whether he said all of his materials but certainly
18 -- and during the course of his work with
19 Mrs. Milgaard his evidence, I think, was that he
20 would provide her with the transcripts and the
21 tapes. And then I think we earlier went through
22 with you the letters, both you wrote a letter and
23 Mr. Wolch wrote a letter to Carlyle-Gordge, he
24 wrote back to each of you saying "I gave my files
25 to the *Fifth Estate*, get them from them", and I



1 think we saw the letters from the *Fifth Estate* to
2 you. We also looked at, yesterday, a reference in
3 the latter part of 1986, in one of your
4 memorandums, where you said that your -- you are
5 working with Joyce and Peter in putting together
6 the brief and going through everything, and I
7 thought at that time, or I took it from your
8 evidence that in the latter part of '86 you were
9 involved with Peter Carlyle-Gordge and getting his
10 insights. Do you have concerns that he would not
11 have given you, for example, the Cadrain
12 interviews?

13 A Well, again, I can't say what -- I -- look, I may
14 have had it all, I may have had everything from
15 Mr. Peter Carlyle-Gordge from the day we met, but
16 I also do recall other material coming in over
17 time --

18 Q Okay.

19 A -- and I can't remember and I can't be precise as
20 to who it came from or where it came from. Okay.

21 Q Now let's just talk about the Cadrain, Wilson,
22 John. You recall the letter from Peter
23 Carlyle-Gordge, the first letter to you, saying
24 "look, the key to this case are Cadrain, Wilson
25 and John and getting them to change their story";



1 do you have any concerns that Mr. Carlyle-Gordge
2 would not have given you his information on
3 Wilson, Cadrain and John in 1986 or thereabouts,
4 or prior to this application?

5 A I think we had it. But, you know, insofar as I
6 think the general question is concerned, I think
7 you can see from the material, such as it is, that
8 my preference would have been essentially to throw
9 the kitchen sink at the -- with the application,
10 and I -- and, you know, wiser people than I took a
11 different view on that.

12 Q And you had talked about hoping that, once you
13 filed the application, that the -- Justice would
14 go out and investigate and interview Wilson, John
15 and Cadrain I think; is that fair?

16 A Yes.

17 Q And, on that point, would the interview notes or
18 the transcript of the interview between
19 Mrs. Milgaard and Ron Wilson from 1980; would that
20 have been, number one, helpful to someone going to
21 talk to him?

22 A I would assume so, yes.

23 Q And, based on a reading of that, might that be
24 something that might pique the interest of someone
25 looking at the fact who at trial testified against



1 Mr. Milgaard but in the interview said "did I say
2 anything that incriminated him, I don't think I
3 saw blood", and some of the things we went through
4 that he seemed to be backing off a bit; again
5 would that be -- and I think you already told us
6 that that would be helpful information for someone
7 looking at the case against David Milgaard; is
8 that fair?

9 A Yes.

10 Q And so back when you are, when you say the kitchen
11 sink approach, are you saying that basically your
12 view would have been to take everything, like
13 "here's everything we've gathered, everything that
14 Peter Carlyle-Gordge has done, everything Joyce
15 Milgaard has done, all of the information, here
16 you go Justice, get at it"?

17 A Yes, and that crystalized or ripened the debate as
18 to what one has to actually file to trigger a
19 review under Section 617, an in -- even an
20 internal departmental review.

21 Q Now let's talk about this, sort of the two-stage
22 process, if we can call it that. And you've
23 talked a couple of times about sort of getting in
24 the door; did you contemplate or did Mr. Wolch
25 contemplate, or whoever the decision-makers were,



1 that once you got through this door, however you
2 do that, that then you would give the rest of the
3 information to Justice?

4 A Absolutely, yes.

5 Q And so I'm trying to understand; what would cause
6 you not to give it to them before you get through
7 the door, if that might help you get through the
8 door?

9 A That we were very concerned that anything that
10 looked like we were re-arguing the case of any
11 nature, even if it was -- looked to be exculpatory
12 or a changing of evidence but could also be
13 interpreted simply as essentially the same as what
14 was said at the trial, would result in a summary
15 dismissal. And I, you know, I, as I say, at the
16 time I really had no standing to dispute the views
17 of senior counsel in the firm.

18 Q And so, just again on this, let's talk about what
19 the understanding was, collectively, of your group
20 as to what would happen. Maybe have us walk
21 through -- let's go to December 28th, 1988, at
22 that point, and what you, David Asper, understood
23 the process to be and how you thought this would
24 unfold once they got this information, what they
25 would do with it -- when I say "they" what Federal



1 Justice would do with it -- and how the rest of
2 this information would get to the authorities?

3 A Well, here I go sounding Pollyannish, but this is
4 what I thought would happen. I thought that the
5 Department of Justice would receive our
6 information and agree to look into the case, they
7 would call us, we would sit down, have a meeting
8 with somebody who was in charge of the case who
9 would approach it with an open and impartial mind
10 and listen, on a preliminary basis, to what we had
11 to say both in terms of the, quote unquote, "new"
12 information that we were filing as well as to have
13 an understanding of our perspective on the case as
14 it was presented at trial.

15 As I say, I am sympathetic to
16 the view of the Department of Justice that they
17 would have to look at what we were submitting as
18 new in the context of what had happened at the
19 trial, both as they read the transcript and the
20 record and as we read the record, reasonable
21 people can have different views on the same
22 information.

23 I then -- we then thought, I
24 think, that the Department of Justice would engage
25 a process of discovery, and to gather everything



1 that had to do, every piece of paper that had to
2 do with the case, every record, every transcript,
3 every police report, every statement, and gather
4 it all from the various sources, Saskatoon Police
5 Department, the Saskatchewan Attorney General's
6 Department, and that they would become the
7 repository and the analyst of all of the
8 information; that the Department of Justice would
9 then conduct its investigation impartially and,
10 upon analysing all of the information it had
11 received through disclosure, consider whether the
12 information that we had submitted in connection
13 with anything else that it had uncovered as part
14 of the disclosure process could lead to the
15 discovery of a miscarriage of justice; that we
16 would be an active participant; that the
17 Saskatchewan Department of Justice would be an
18 active participant; that the Saskatoon Police
19 Department would be an active participant; and
20 that we would collaboratively, and even perhaps
21 with a tone of adversariness, if that's a word, --

22 Q It is now.

23 A -- consider the question, consider the question of
24 whether David's conviction was proper.

25 Q I --



1 A It sounds insane, but that's what I thought would
2 happen.

3 Q And just on the -- let's just go back a step to
4 sort of get in the door. So you had contemplated
5 that there was a threshold, in other words, to get
6 over before you had this collaborative effort; is
7 that right?

8 A Yes.

9 Q And you've used the word, I think, "to get through
10 the door", is that right, or maybe I used those.

11 A Yes.

12 Q And would the first step, to determine whether you
13 get through the door, would be to look at what you
14 put forward in your application?

15 A Yes.

16 Q And so what did you expect or contemplate might
17 happen if they looked at the two grounds you put
18 forward, being the Deborah Hall and Dr. Ferris,
19 what if they concluded that neither has merit for
20 whatever reason? They go through, they look at it
21 and they say "you know what, neither of these have
22 any merit", which in effect I think, Mr. Asper,
23 they ultimately did, --

24 A Yes.

25 Q -- but what did you expect to happen then?



1 A Well I would have expected, first of all, that
2 given the stakes and the ongoing incarceration of
3 a potentially wrongly convicted or an innocent
4 person, that there would have been some urgency by
5 the Department of Justice to get to a conclusion
6 one way or the other.

7 Q And so --

8 A It -- if the Department of Justice were to -- I
9 would have expected some consultation with the
10 applicant before reaching a conclusion, including
11 a negative conclusion.

12 Q And when you mean "consultation", I think you've
13 talked about this before, sitting down with you
14 and saying "lookit, here's what we think about
15 what you have provided, explain it to us", or
16 "here's our position", that type of thing?

17 A Yes, I -- yes.

18 Q And so, again, just -- and I'm going back to try
19 and get the understanding at the time this was
20 filed; would it be fair to say from your evidence
21 that until you get through the door, if I can call
22 it that -- or let me rephrase it this way. Did
23 you expect Federal Justice to go out and do this
24 investigation, to get the police records, the
25 prosecutor's records, and interview witnesses,



1 etcetera, before they let you through the door?

2 A No, I -- no. I think that our hope, I think our
3 expectation was that this information would open
4 the door, we would go and meet with the Department
5 of Justice, as I say, there would be a process
6 established, protocols, communication lines, and a
7 framework for what was going to happen next.

8 Q But, for example, let's just skip ahead, I think
9 you said -- you talked about gathering police
10 files, prosecutor files, interviewing witnesses,
11 and I think you've told us earlier that you
12 expected that they would go out and interview
13 Wilson, John, Cadrain, Melnyk, Lapchuk; is that
14 correct?

15 A Yes.

16 Q Is it your evidence, or was it your understanding,
17 that that would only happen after your application
18 got through the door, in other words past the
19 threshold, based on the two pieces of new
20 evidence?

21 A Yes.

22 Q And so that once, once you got through the door,
23 you then expected that they would sit down and say
24 "okay, we now better look at the rest of the
25 evidence, because if this new evidence is correct



1 we may have a problem, we may have a miscarriage
2 of justice"; is that what you are telling us?

3 A Yes.

4 Q And then, at that point, can you tell us then, as
5 far as the other information that you had gathered
6 regarding -- let's talk about Wilson, John,
7 Cadrain, primarily, and the interview with Mr.
8 Caldwell; when did you contemplate providing that
9 to Justice in this timeline or this process?

10 A I can't tell you exactly when, but I think our
11 position certainly would have been that when the,
12 call it the case conference meeting that we hoped
13 would occur occurred, which never did until much,
14 much later, I think that's the point where
15 disclosure, you start to talk about disclosure and
16 you start to talk about swapping documents and
17 whose got what.

18 Q Okay. And just getting back to the scenario where
19 I think if Justice' position was going to be that
20 the two new grounds did not have merit, the
21 Deborah Hall affidavit and Dr. Ferris, your
22 understanding or expectation was that they would
23 get back, I think you said, promptly; is that
24 right?

25 A Yes.



1 Q And allow you to regroup; would that be a fair way
2 to put it?

3 A Well that's -- that would be up to us.

4 Q But that --

5 A What would happen after that, who knows. I mean,
6 you know, the -- look, the stakes here, given
7 that, you know, we had been -- we had no financial
8 assistance, none, Legal Aid was not gonna support
9 the Milgaards and had said so many times, if
10 Justice had come back summarily and said "you're
11 out, we're rejecting it", you know, it is
12 conceivable that we would never have gotten to the
13 bottom of this case.

14 Q Just on the two grounds that you put forward,
15 would -- based on what you are telling us I think
16 you're saying that the initial grounds are pretty
17 important to get you through the door; is that
18 what --

19 A Sorry.

20 Q Okay?

21 A And what I was going to say, because in a perverse
22 way, again, the delay that resulted through the
23 process to some degree worked to our advantage,
24 because it allowed the whole media campaign and
25 all the other stuff that came out.



1 Q Just on the issue of timing, and I appreciate this
2 might be a difficult question to go back in
3 hindsight, but what was your expectation? Again,
4 you filed the end of 1988, did you have -- and
5 when I say "you" I mean you, Mr. Asper, Mr. Wolch,
6 or your group -- what was your expectation or
7 understanding as to how long this would take for
8 Justice to at least look at the threshold? And if
9 you are not able to answer, that's fine, but did
10 you have an expectation of months, a year, or what
11 were you -- what were you thinking?

12 A I couldn't put a specific timeline on it, but not
13 very long.

14 Q So you expected to hear back within months; is
15 that fair?

16 A Oh, yes, yes.

17 Q Now just back on the two grounds that you put
18 forward, and I think you've told us at the time
19 you certainly thought they were -- and today --
20 valid grounds to put forward, the Dr. Ferris
21 opinion; did you have a concern -- and when we
22 talked about the Dr. Ferris opinion you
23 acknowledged that the first part of the opinion
24 was the sample is of no validity, and the second
25 part is well if it were valid, which it isn't,



1 then it would exonerate. Did you have any
2 concerns that, if someone were taking the -- an
3 adversarial view or an opposite view, that they
4 could look at Dr. Ferris' opinion and say "lookit,
5 it doesn't say anything, he says it's of no
6 validity, it shouldn't have been used, it never
7 linked him at the trial, and plus we're not sure
8 if he's a secretor"; did you have the concerns
9 that someone looking at it with a critical eye, or
10 another expert, in other words "here, expert, take
11 this and be critical of it"; did you have that
12 concern that Dr. Ferris' opinion might not help
13 you as much as you hoped?

14 A I want to answer that by giving you an answer that
15 I think might explain a whole bunch of things.

16 Q Sure.

17 A We looked at Section 617 -- and I'll just be as
18 candid as I can be -- we looked at Section 617 as
19 a vehicle for equitable relief in its broadest
20 sense, and we, while we were trying to find some
21 legal basis to open the door, so to speak, we were
22 also pinning our hopes that there would be an
23 equitable approach from the Department of Justice,
24 not to take an adversarial position necessarily,
25 perhaps to test, perhaps to ask questions, but to



1 broadly say "okay, what's this about, what's this
2 really about" in a way that would give the
3 Department of Justice some comfort that the door
4 was not going to always be open to everybody 24
5 hours a day, if that makes any sense. I --

6 Q And I think, and again I'm asking this question
7 with the benefit of hindsight and with the benefit
8 of what happened after you filed the application,
9 but what followed is that Deborah Hall I think
10 added to what was in her affidavit and attributed
11 some words to Mr. Milgaard, although she said it
12 was still joking, that some might say, okay, well,
13 this is more damning of David's case than helpful.
14 Would you agree -- I'm not asking you to agree
15 with the characterization, but that someone could
16 easily reach that conclusion?

17 A Sure.

18 Q And secondly, with Dr. Ferris, someone -- some
19 could say lookit, the sample is of no validity, it
20 wasn't used to tie them, and oh, by the way, David
21 isn't a secretor, so that's of no value?

22 A Sure.

23 Q And so then the two prongs or the two points you
24 put forward in your application ultimately at some
25 point, based on other information that came about,



1 ended up, in the view of some, not being as good
2 as it was thought in December of '88; is that
3 fair?

4 A Absolutely, and I have to say, I mean, the scary
5 part about this is that deftly handled at a
6 political level with appropriate, I think,
7 communication strategy, we could have been knocked
8 out of the box and never had had a hope with
9 public opinion that later came into play.

10 Q Can you explain that?

11 A Yes. The manner with which the Department of
12 Justice handled the case and the manner with which
13 it communicated publicly and the manner in which
14 ultimately the minister communicated publicly gave
15 the Department of Justice no opportunity really to
16 say to the public that it had followed its
17 procedure, it had done it fairly, treated the
18 Milgaards fairly and there just wasn't any merit,
19 and if an appropriate communication strategy in my
20 view had been employed, we wouldn't have had a
21 chance, on being refused the application, we would
22 not have had sympathy, and the Department of
23 Justice could have said to Canada and to Canadians
24 and to the Milgaards you had your process and now
25 you've had another process and you just didn't



1 succeed.

2 **Q** And so are you saying if they would have come out
3 and publicly stated Deborah Hall's affidavit
4 contains a significant omission, she confirms it
5 and Dr. Ferris is of no value for the following
6 reasons and publicly state that, say there's no
7 basis for the application, that things would have
8 changed; is that what you are telling us?

9 **A** I could have easily constructed a strategy on the
10 other side of the coin here that would have been
11 much more conclusive.

12 **Q** And if they had done that, and I think what you
13 are saying is to get the public opinion on their
14 side, that they followed their process, if they
15 would have done that, if they would have come out
16 in February of 1989 and said we've talked to
17 Deborah Hall, we've looked at Dr. Ferris, both are
18 wrong, there's nothing here, and publicly stated
19 that, what would your reaction have been?

20 **A** Umm, well, I don't think you can just sort of show
21 up in February of 1989. I think -- as I say,
22 there was a buildup of bad communication strategy
23 from the government side of things in my opinion
24 that led, that led to -- that led to the February,
25 '89 -- now, when was the --



1 Q Sorry, my question is -- I think you are saying
2 the feds, the Federal Justice could have done some
3 things, it could have got the public on their
4 side, and my question to you is, and I just picked
5 February, '89, let's say within four months after
6 you filed your application they had investigated,
7 talked to Deborah Hall, investigated Dr. Ferris
8 and they came out and publicly said we're
9 dismissing the application and, Canadians, the
10 reason is because here's what Deborah Hall said
11 when we interviewed her about what David Milgaard
12 said in the motel room, she confirms we think the
13 case against him, and Dr. Ferris is wrong for the
14 following reasons because we think David Milgaard
15 is really a secretor, and when you do that test
16 we're going to show that actually the evidence at
17 trial would have implicated him when it didn't and
18 put that on the front page, is that what you are
19 saying could have been done from a better
20 communication strategy?

21 A Yes.

22 Q And my question was what would you have done if
23 they would have done that? I mean, is that what
24 you are saying they should have done?

25 A No, I'm quite -- as it turned out, the miscues I



1 thought, I mean, worked in our favour, there's no
2 question, and as I say, it's perverse, but they
3 worked in our favour, both from a public relations
4 perspective as well as that the lapse of time is
5 what helped us garner and gather the new evidence,
6 the real new evidence, and ultimately the Larry
7 Fisher evidence. If Justice had employed a more
8 transparent and a more decisive communication
9 strategy, I don't think the Milgaards would have
10 ceased their efforts and we may have -- I can't
11 say what we would have done, I mean, that's total
12 speculation.

13 Q But would you have had concerns that the
14 authorities would be going public in making these
15 types of statements in response to your
16 application? Would you have --

17 A No, I think the rules had been established.
18 When -- you know, I mean, there is a political
19 component to this, there is -- and I think it's
20 one of the fundamental flaws with section 617, is
21 as soon as you involve the minister there's the
22 possibility of a political angle to this, and
23 where the applicant in this case, we had already
24 set the ground rules by making it public. The
25 minister, as a political animal, and the



1 department, which is responsible for the
2 reputation and the public's perception of the
3 administration of Justice, should, I think, have
4 gotten into the game. You can't look like -- you
5 can't have the Department of Justice look like the
6 evil empire which is what happened, it played
7 directly into our hand, and as I say, I think it
8 was just bad strategy by the Department of
9 Justice.

10 Q And so back to my question, are you saying that in
11 your view that would have been fair game, for
12 Federal Justice or the minister to go and publicly
13 state -- you know, I gave you an example of four
14 months after, but at some point after, and my
15 question was we've reviewed Deborah Hall's
16 affidavit, we've reviewed Dr. Ferris and here's
17 our views, in fact we think both of them actually
18 make the case stronger against David Milgaard?

19 A That would have been fair game for Justice to have
20 done, absolutely, and as I say, it would have been
21 fair game because the rules of the game, to the
22 extent that there were rules, had been defined as
23 soon as the Milgaard side made what was going on
24 public.

25 Q And when was that, when --



1 A Umm --

2 Q Was it before the application was filed?

3 A Oh, yes.

4 Q In fact, if we could call up 163061, this is a
5 letter of the same --

6 A I mean, I recall there is a letter or a memorandum
7 I think from Mr. Corbett urging the minister, and
8 I think it's between Corbett and Madigan, urging
9 the minister to do something.

10 Q Yeah, in April of 1990, and I'll -- that's when
11 we're dealing with the Fisher information and I'll
12 bring that up for you when we get to that part.

13 A All right.

14 Q This is a letter that you wrote to the CBC, Sandra
15 Bartlett, the same date that you filed the
16 application to the minister, and in fact the same
17 date that you sent a copy to the Minister of
18 Justice you sent a copy to the CBC; is that
19 correct?

20 A Yes.

21 Q And then again there's some comment about whether
22 the program is going to go, but you say:

23 "My instructions are to impose a seven
24 to ten day time limit for this decision
25 to be made."



1 And actually I should read the earlier.

2 "David's interest in having the Fifth
3 Estate air a story about his case is
4 obviously very keen. However, due to
5 the understandable exigencies of current
6 affairs programming, his experience to
7 date with the Fifth Estate has been
8 "on-again, off-again". Consequently, we
9 would very much appreciate a firm answer
10 as to whether the producers will go to
11 air with this story as soon as possible.

12 My instructions are to impose a
13 seven to ten day time limit for this
14 decision to be made. After this time
15 period has lapsed, we will be making
16 this story available to the media in
17 general. There may be some flexibility
18 in these time frames, but I think that
19 you can understand David's desire to get
20 a firm commitment one way or the other."

21 And do we read this letter as your giving the CBC
22 the first right to run with your story on the
23 application and if they don't respond in seven
24 days you are going to shop it elsewhere to other
25 media or give it to other media?



1 A Yes.

2 Q And so at this stage what was your, what was your
3 plan? How did you plan to use this? I mean, you
4 had filed that application that date. What was
5 your purpose in getting the media involved at this
6 time?

7 A I can't profess to -- I don't believe there was a
8 specific plan at this point other than to, let's
9 call it sow some seeds. We -- the CBC was way
10 ahead of every other media organization, they
11 had -- Sandra had researched this case and we had
12 no expectation that any media organization was
13 simply going to be fed what it was going to
14 report, to the extent that anybody does that
15 anyway, and that it was going to take a lot of
16 time for the media to get up to speed with what we
17 were doing, there was a ton of material, and we
18 were prepared to make it available to everybody,
19 and so if CBC wasn't going to run with it, then we
20 were going to, yes, make it available to others
21 and give them a chance to get up to speed to where
22 CBC was.

23 Q And what did you want the media to do with this
24 application, with these materials?

25 A Umm, I think we wanted to try and create an



1 environment, a positive environment, and I'll just
2 get to again, and I think I mentioned it before,
3 there was a way for the Department of Justice to
4 look like they were heroes and we I think thought
5 in a general way, and it's very difficult to go
6 back to this particular time period because we
7 weren't really into the battle at this point, I
8 mean, this was right -- this was the beginning.
9 We thought that we could create an environment
10 where the Department of Justice, as I say, would
11 look like heroes by coming to the aid of a wrongly
12 convicted, 17-year prisoner and helping him win
13 his freedom, and one of the ways to create that
14 environment was to have the media just do a very
15 general, factual story that this inmate had made
16 the application, there's a human interest story
17 about his mother and let's make it warm and fuzzy.

18 Q And I think later on we'll see, Mr. Asper, that
19 the media was deployed in a different way by the
20 Milgaards and by you later on in the process when
21 things --

22 A -- heated up.

23 Q Heated up, I was looking for some words there. At
24 this time things had heated up; is that fair?

25 A That's true.



1 Q And so this media was to get the story out there,
2 and are you telling us to assist Federal Justice
3 in their work?

4 A No, I mean, there was no specific assistance to
5 Federal Justice, but I think at this point we
6 wanted to, as I say, create a warm environment
7 where Justice could look, come off looking good.

8 Q What about -- was part of it to put some pressure
9 on them, that the media might be reporting about
10 this and that they might be contacted by the
11 media, what are you doing about this person,
12 things of that nature, or was that --

13 A No, no, because at this point we were really of
14 the view that we were going to work together.

15 MR. HODSON: Okay. This is probably a good
16 spot to break.

17 *(Adjourned at 10:30 a.m.)*

18 *(Reconvened at 10:47 a.m.)*

19 BY MR. HODSON:

20 Q Now turn to 219251, please. I now want to go
21 through the time period, Mr. Asper, to 1989
22 following the filing of the application, and this
23 is a letter from you to Mrs. Milgaard, who I think
24 now is in New Jersey, January 5, '89:

25 "Enclosed herewith, at long last, please



1 find the package which was sent to the
2 Minister of Justice on December 28,
3 1988."

4 Was there some impatience or some concern about
5 the time it took to get the package together? It
6 was about three years I think from when you first
7 started to when it was filed. Can you tell us
8 whether -- what if any concerns you may have had
9 or David or Joyce Milgaard may have had about
10 that?

11 A Oh, there was huge anxiety to get something filed,
12 yes, there had been anxiety -- when Milgaards
13 retained us I guess they had given us some period
14 of slack to get up to speed and then they wanted
15 something done.

16 Q And again, we talked a bit about this yesterday,
17 about the time frame, and I think through 1988, I
18 think we went through '86 and '87, the latter part
19 of '87, the early part of '88 you were aware from
20 the firm and then in September of '88 the Dr.
21 Ferris opinion came, so again, we may have already
22 covered all this, but again looking back, was
23 there anything that happened during that time
24 frame as far as sort of start to finish to get the
25 application in that you recall that may have



1 contributed to any delay or was this just how much
2 time it took to get the case together?

3 A I don't recall. It's just -- I look back at the
4 time, the lapse of time and I just don't -- it
5 seems like long periods of time, but I just don't
6 recall.

7 Q And I take it then at the time you filed, would it
8 be fair to describe David Milgaard and Joyce
9 Milgaard as being -- would anxious or impatient,
10 would those be proper descriptors?

11 A An understatement I would say.

12 Q And so they wanted something to happen now; is
13 that fair?

14 A Sure, yes.

15 Q And if we go back to March of 1986 when you first
16 met them, would that have been the same sentiment
17 expressed to you?

18 A No, I think, as I say, I think that yes, they were
19 anxious, but they were very, they understood that
20 it was going to take some time and they I think --
21 there was an anxiety level to have something done,
22 but I think they were quite willing to give us
23 some time to marshal an application.

24 Q If we can go to 182099, this is a memo January 16,
25 '89 from you to Hersh indicating that you spoke to



1 Sandra Bartlett and she's confirmed that the
2 Milgaard story will run March 28th. Do you recall
3 how that -- I don't think it did run that early
4 did it?

5 A No, and you'll see in subsequent documents, this
6 was a very difficult time because, as I say, the
7 Milgaards had really co-operated and invested a
8 lot of time, but emotional equity in this program
9 acting as much as a validator, a third party
10 validator for what they were trying to do as
11 anything else, and this is the first, and there
12 are subsequent correspondence here that I've seen
13 in the binder where there was a yanking back and
14 forth and it was very, very difficult, where one
15 date there would be an air date, then there
16 wouldn't be an air date, then there was an air
17 date, then there was editorial differences, and
18 some of it we told the family about, some of it we
19 didn't, and this is the beginning of -- I think
20 there was about a two week period where it was
21 on-again, off-again that was extremely difficult.

22 Q And when you say a validator, can you explain that
23 a bit further?

24 A If the CBC Fifth Estate, probably the most
25 highly-recognized investigative current affairs



1 journalism program in the country looks at your
2 case and says that you might have some, that there
3 might not just be validity, but you may be, you
4 are probably telling the truth in terms of David's
5 claim of innocence, then that is a powerful
6 emotional support for what you've been doing and
7 fighting for.

8 Q And so on the flip side, the failure to, or
9 decision not to proceed with the show, would that
10 have the opposite effect?

11 A It's a large blow, yes.

12 Q Okay. So are you telling us that the running of
13 this program, if it were to run, would have
14 positive influence on David and Joyce Milgaard,
15 but if it didn't run, or there was some doubts
16 about it running, it would have a negative impact?

17 A Yes.

18 Q And I think you told us yesterday, and when we
19 looked at one letter from David, that you
20 described a feeling of paranoia by your clients,
21 being David and Joyce Milgaard, and I think the
22 CBC was included, and the Fifth Estate, as one of
23 the parties that they thought might be part of
24 someone out to do harm to them; is that a fair way
25 to put it?



1 A Yes.

2 Q And so coupled with this, I think, anxiety or this
3 concern about getting the Fifth Estate to validate
4 their case, was there also some paranoia running
5 through this, that if they didn't run it, that
6 there might be nefarious reasons for not running?

7 A Yes.

8 Q If we can go to 213762, and this is a letter from
9 Mr. Wolch to Mr. Milgaard, February 10, '89, so
10 this would be, what, six weeks after you filed,
11 and there's a reference to a January 23rd letter
12 which I don't think I have, but in any event, call
13 out that paragraph, he says:

14 "You are concerned that we have an
15 overall game plan and that we have our
16 priorities. I fully agree, although I
17 do feel that it is impossible to have a
18 rigid game plan under the circumstances.
19 At this point in time the Department of
20 Justice is reviewing your matter. This
21 is number one. As well the Fifth Estate
22 will hopefully be airing a lengthy
23 program in the near future which will
24 undoubtedly attract a great deal of
25 attention. They apparently would like



1 very little publicity until their
2 program and one can fully understand
3 their reasoning. Once their program
4 airs undoubtedly there will be a great
5 deal of attention directed your way."

6 And I take it, or can I take it from that, Mr.
7 Asper, that Mr. Milgaard is talking about getting
8 further publicity and that Mr. Wolch is saying
9 lookit, hold off, the Fifth Estate doesn't want
10 anybody to beat them to the punch and hang on, or
11 am I reading that wrong?

12 A I'm not sure if he's referring to publicity
13 relating to the Fifth Estate program or to other
14 publicity, I don't know.

15 Q Actually, maybe let's just go down to the next
16 paragraph, this might assist:

17 "The issue that will obviously attract
18 attention is the question of an innocent
19 man being incarcerated for so many
20 years. The facts of your case, your
21 maintaining your innocence all these
22 years, and your time in jail will all be
23 of concern. Your championing social
24 Justice will be of interest but
25 initially will not be the major issue



1 nor should it be our initial concern.
2 Our initial efforts should in my opinion
3 be totally devoted to establishing your
4 innocence and your freedom. With that
5 done and your credibility ensured you
6 will be able to have a platform to
7 express your social Justice concerns."

8 So it may well be that it was his social Justice
9 concerns that he wanted publicized, that you and
10 Mr. Wolch were saying hold off on that, we've got
11 other items that have priority. Is that a fair
12 read of that?

13 A It could be, yes.

14 Q Do you have any recollection of those being issues
15 that you --

16 A As I said this morning, he was very interested in
17 publicizing his social Justice agenda, David was.

18 Q The next page, and just on that, and we'll see
19 this in a few later documents when the media
20 campaign, to use your words, heats up. It appears
21 that your objectives and David Milgaard's
22 objectives, as far as what should we put in the
23 media, did they clash from time to time?

24 A Yes.

25 Q And can you just elaborate on that a bit, and



1 we'll go through some of the documents, but just
2 generally?

3 A Well, I know we'll get into this. First of all,
4 once the, once we had invited the media into the
5 tent, so to speak, I began to work quite closely
6 with Joyce and David, but David in particular, on
7 what we called messaging, and it was very, very
8 important for what we were saying to be said in --
9 we had to determine, (a), what we were going to
10 say to the media, and (b), how we were going to
11 say it, and (c), how many times we were going to
12 say it. David would often reject our messaging
13 themes and most often Joyce, I don't know that
14 Joyce and I ever disagreed on messaging, David
15 often did, he wanted to pursue oftentimes issues
16 that we saw as being collateral to the main thrust
17 of what we were trying to do.

18 Secondly, we disagreed on, and
19 this is sort of a separate thought, but just on
20 presentation, on how we looked, and David had
21 trouble sometimes playing his role, he had to play
22 a role and he had to look like the role he was
23 playing, and sometimes he didn't care about that
24 because he was more concerned with messages that
25 weren't consistent with what we were trying to



1 accomplish.

2 **Q** So again, it appears in February of 1989 that that
3 might have been an issue at that time?

4 **A** Yes. It was an issue from the time I met him
5 frankly.

6 **Q** And then here Mr. Wolch says:

7 "The importance of responsible publicity
8 at this time is to ensure that your
9 ministerial review will have to satisfy
10 public scrutiny. From my understanding
11 the minister is swamped with
12 applications for review and while the
13 people doing the review are responsible
14 and intelligent individuals, the added
15 knowledge that the public is awaiting
16 their review may simply speed up the
17 process and ensure that the review is
18 thorough."

19 And do I take it from that that at this time one
20 of the factors in going to the media with your
21 case would be, as stated by Mr. Wolch, that
22 Federal Justice being aware of that it may speed
23 up the process and ensure that the review is
24 thorough because of potential public scrutiny?

25 **A** Yes.



1 Q Just back on your understanding of the 617, did
2 you understand that a lawyer from Justice would be
3 assigned to the file for review or what was your
4 understanding of how the Minister of Justice would
5 handle your application and what types of people
6 would be involved, did you have an understanding
7 before you filed?

8 A No, other than we, I believe, according to the
9 earlier correspondence, that we were led to
10 believe that Mr. Fainstein certainly was in charge
11 of the section of the department that dealt with
12 these applications, but yes, we assumed a lawyer
13 would be assigned to it.

14 Q And then the last paragraph, and I think this
15 touches on your earlier point:

16 "In all the times that we have had
17 communications either face to face or by
18 telephone, I have found you to be a
19 personable, intelligent and polite young
20 man. I think this is important that we
21 carry on presenting you in that manner
22 which is a truthful presentation to the
23 public. I realize there is much you
24 have accomplished even within the
25 penitentiary and much you wish to



1 accomplish, but subject to our
2 discussion it seems to me our prime
3 priority must be to establish your
4 innocence."

5 And I think that's what you told us a bit
6 earlier; is that correct?

7 A Yes.

8 Q If we can then go to --

9 A Since you raised the question just a question ago
10 about a lawyer being assigned to the case from
11 within the Department of Justice, and I don't want
12 to skip ahead here because I expect, Mr.
13 Commissioner, that you will get to the systemic
14 issues, but it really does point out one of the
15 current problems, or problems with the current
16 system is that the Minister, of course, is a
17 political person, a politician, a Member of
18 Parliament who has a duty to the electors of the
19 country that is a democratic duty that sometimes
20 may be distinct from the duties that are imposed
21 by statute, and there is by definition, therefore,
22 with the Minister acting in the capacity
23 contemplated under the current 690, an inherent
24 conflict -- a potential conflict of interest. And
25 when someone applies under Section 690 the



1 question is whether, is it a lawyer or is it a
2 political person who is applied to -- who is
3 assigned to the case, and you'll see that over the
4 course of the case ministerial and political
5 assistants start to get involved as the publicity
6 heats up, as we've said. But it raises the
7 question as to whether 690, which is a statutory
8 provision that calls on the Minister to act as the
9 Minister of Justice, creates a potential conflict
10 with the Minister acting as a Member of Parliament
11 and a politician. It's a serious systemic issue.

12 Q And we'll come back to that, Mr. Asper, a little
13 later on. The -- again, just on the expectation,
14 though, was it your understanding, and we saw
15 mention of Ron Fainstein and some other names, and
16 I think you said Mr. Wolch had discussions I think
17 with Mr. MacFarlane; was it your expectation that
18 a Justice lawyer would be looking after the file
19 and, although there may be other people involved,
20 that a lawyer would actually get the file to start
21 the review process, --

22 A I think that would --

23 Q -- as opposed to the Minister himself at the time?

24 A I think that would be fair to say, yes.

25 Q If we can go to 004868. And this is the reply



1 back from the Minister, at that time it was The
2 Honourable Doug Lewis, in response to your
3 application, and they get back to you saying --
4 thanking you for the application, and then -- I
5 think your application was to Joe Clark, being the
6 predecessor, this is Mr. Lewis:

7 "Would you please provide the following
8 materials, which are essential to the
9 assessment of this application:",
10 the transcripts, the factum, documents of the
11 police -- if you can go to the next page --
12 actually let, just go back to the first page, I'm
13 sorry

14 A I notice, I love the -- there is a subsequent
15 letter, I'm not sure if you're going to show it,
16 which points out that Mr. Lewis on February 16th,
17 1989, actually, in the first sentence of the
18 letter, agrees that David was wrongly convicted by
19 saying that he was wrongly convicted, "the
20 wrongful conviction of your client".

21 Q Oh, and what was this relating to?

22 A He states that David was wrongfully convicted in
23 the first --

24 COMMISSIONER MacCALLUM: Is that an
25 argument directed to me, sir?



1 A No, no.

2 BY MR. HODSON:

3 Q No, I --

4 A There is a subsequent letter that actually tries
5 to incorporate this as part of our case from one
6 of our supporters.

7 Q I suspect that Mr. Frayer may have a different
8 take on the matter, but in any event the question
9 here is, if we go back to 333268, if we could just
10 call that up, this was a letter I called up early
11 on, and this was the first letter back, this went
12 directly to Mr. Milgaard in his letter to John
13 Crosbie, and about what ought to be filed with the
14 application, and we went through this,
15 transcripts, etcetera.

16 If we can go back to 004868, the
17 -- I'm just wondering, the -- would you have been
18 aware of the requirement to file the transcripts
19 when you sent in the application or these other
20 materials?

21 A No, I think we would have assumed that it would,
22 at some point, have become relevant, although I --
23 although it struck us as extremely odd that the
24 applicant -- let's take this case and look at,
25 look at it from a perspective of David Milgaard



1 sitting in prison, having been denied Legal Aid,
2 and he says to the Minister of Justice "I'm
3 innocent" and gives the Minister of Justice an
4 application, and then he receives this letter.
5 Let's think about what capacity does David
6 Milgaard have to access the entire transcripts of
7 evidence of the trial, bearing in mind that we
8 actually wound up having to pay for them, and what
9 capacity would David Milgaard have had to do that?

10 And so we didn't know what we
11 had to file, we assumed we would ultimately have
12 to file, you know, this kind of material that's
13 referred to in the letter, but from a practical
14 perspective, if we hadn't been corresponding with
15 the Minister and we didn't have the capacity and
16 the means to do this and the Minister requires all
17 of this material to go forward, how does an
18 applicant ever proceed? And I just ask that
19 rhetorically.

20 Q And so, back at the time you filed your
21 application in December of '88, do you recall,
22 yourself, whether you were aware of the
23 requirements set out in Mr. Crosbie's -- actually,
24 not his letter but his assistant's letter back to
25 Mr. Milgaard in 1986, that you've got to file the



1 transcripts and the documents, etcetera?

2 A There -- I think we assumed we would have to, but
3 --

4 Q At a later date?

5 A -- at a later date, yes.

6 Q And now the transcripts, I think you would have
7 had most of the transcripts, we'll see a letter a
8 bit later where you actually get another copy, is
9 that right, from the court?

10 A Yes.

11 Q And the lab reports; would you have had all of
12 those, I think those are taken out of Dr. Ferris'
13 report. And if I can just back up, you'll recall
14 Dr. Ferris' report, at the outset, lists
15 everything that he bases his opinion on, and in
16 fact lists the transcripts of many, many
17 witnesses -- not all of them but many of them --
18 and then lists a number of lab reports --

19 A Yes.

20 Q -- that he relies upon, and --

21 A Yes.

22 Q -- so it may have been that that they were seeking
23 to get, that which Dr. Ferris had said he read in
24 reliance of his report; did you understand that to
25 be the case?



1 A Yes.

2 Q And then, if we can go to the next page, and the
3 Minister says:

4 "You mentioned in the first paragraph of
5 page 2 of your letter that you are 'in a
6 position to factually demonstrate the
7 errors' in the statement of Nichol John.
8 Certainly, any information and material
9 which you have in relation to that would
10 be of assistance in assessing the merits
11 of this application. As I understand
12 ...",

13 and let me just pause there, it goes on to a
14 different subject. So it looks as though the
15 Minister is saying, "lookit, you raise this issue
16 about Nichol John, anything you have would be
17 helpful, send it"; is that fair?

18 A Yes.

19 Q And so do you recall a discussion following that
20 as to whether -- sort of how to respond to that?

21 A Well as I say, and I don't recall specifically the
22 conversation, but -- and I, you know, to use the
23 colloquial terminology I was a kitchen sink guy, I
24 was always of the view that we should give Justice
25 everything.



1 Q Okay. And then he goes on to say:

2 "As I understand that you were not
3 counsel for Mr. Milgaard at the trial
4 and at the appeal, you should obtain a
5 waiver of solicitor-client privilege
6 from your client in relation to his
7 trial and appellate counsel in order to
8 facilitate the conduct of this
9 assessment."

10 Now this issue of waiver of privilege, had you
11 considered that prior to this time? I think the
12 evidence so far is that you would not have talked
13 to Mr. Tallis yet, but had you --

14 A I don't recall.

15 Q And, again, did you have any concerns about the
16 fact that they wanted David Milgaard to waive
17 solicitor/client privilege with Mr. Tallis?

18 A Umm, I seem to recall that we talked -- we sort of
19 expected it, but I don't recall when.

20 Q And did you have any concerns with this request
21 from the Federal Minister to get a waiver of the
22 privilege?

23 A I don't recall that.

24 Q Now at this time I think, when we went through the
25 affidavit of David Milgaard sworn in November of



1 1986 where he denies committing the crime, that
2 was not filed; correct?

3 A Right, correct.

4 Q And, again, I think you told us you didn't know
5 why that wasn't filed; is that correct?

6 A Correct.

7 Q Then if we can go to 333292. Actually, let me --
8 did you have any understanding about how many
9 applications the Minister received and how long
10 they normally took on these back at this time?

11 A No. No. But on, but just on the question of
12 number of applications that the Minister received,
13 and I guess looking back, it would have been
14 helpful, I think to everybody, if the people at
15 Justice -- because we didn't necessarily know what
16 David Milgaard was sending in in terms of
17 correspondence, and it looks now as though there
18 were actually two applications pending by the time
19 we filed our document in December of '88, I guess
20 it would have been helpful, and I'm not sure, and
21 I didn't see in any of the documents and I don't
22 recall, if somebody at Justice who was receiving
23 all of the material could have said "are we
24 blending these applications" and actually create a
25 unified process.



1 Q And, I'm sorry, you are talking about another
2 application filed by David?

3 A Yes. I -- well, David had been communicating with
4 the Minister, and I think there was an earlier
5 correspondence that they -- that Justice was of
6 the view that a 617 process was kind of underway
7 with David, already, by the time we had filed our
8 application.

9 Q I think the letters we went through indicated that
10 in light of his response, that he was going to
11 make an application, they opened up a file it
12 looks like. And then I think, the letters we went
13 through, David indicated that his lawyer, Hersh
14 Wolch, was working on an application and that he
15 was going to make some submissions.

16 A All right.

17 Q Perhaps if we can call up 333292. And, again,
18 this is David Milgaard's letter to the Minister,
19 and you'll see here he says, "I'm writing to you
20 in regard to my application for a review of my
21 case that was received by your office on December
22 28, 1988. My lawyer, a Mr. Hersh Wolch, has said
23 in most cases many presentations are deemed
24 frivolous because many of them are. I would like
25 you to tell me if my case has passed this initial



1 'stage' evaluation. It is also important to me
2 and my family to know what sort of 'input' we can
3 have into all of this. If you feel there is a
4 need for an investigation in the interests of
5 Justice, what role can we play (if any) in the
6 direction of this? We feel there should be a
7 'sharing' between yourself and us. Do you agree?

8 Please consider these three
9 questions of 'stage', 'input', and 'sharing'.
10 Please do this for us soon. Thank you." And
11 then, "Please send me a copy of this letter so I
12 can send it to my mother."

13 So, again, would you get copies
14 of these letters that David would send to the
15 Minister?

16 A Sometimes. Sometimes. I can't say all the time.

17 Q If we can then go to 182113, and this is a memo
18 from Mr. Wolch to you and presumably Heather
19 Leonoff, it talks about the letter from the
20 Minister requesting the information and he is
21 asking you to contact Saskatoon to get a lot of
22 the stuff, get the cooperation of the courts:

23 "The Chief Justice Tallis (?) was
24 Milgaard's lawyer and also a Crown
25 Counsel named Fred Dehm has been



1 somewhat cooperative ...",
2 and to sort of get moving soon. So this would be
3 the instructions to gather the information
4 requested by the Minister?

5 A Yes.

6 Q Go to 218743. And this is a letter from CBC to
7 you, it's received March 13th, sent March 8th,
8 1989, and we had earlier saw the memo that said
9 they were going to run the show March 28th. Here
10 they say:

11 "This is to let you know that the *fifth*
12 estate is unable to do a story on the
13 case of David Milgaard."

14 And they express regret, and they say:

15 "... we have concluded ...",
16 "Unfortunately, after spending
17 considerable effort and expense on the
18 matter, we have concluded that we cannot
19 get enough evidence to produce a
20 documentary that would support Mr.
21 Milgaard's claim. This does not mean
22 that we believe Mr. Milgaard to be
23 guilty; it is only that we cannot prove
24 his innocence.

25 And proof, fairly conclusive



1 proof, is what we have always needed
2 before we could commit ourselves to
3 putting the *Milgaard* case on the *fifth*
4 *estate*. There were a number of times
5 when we thought we had this proof, but
6 after further deliberations we decided
7 it wasn't strong enough."

8 Again, can you give us your comments about this
9 letter, this issue, Mr. Asper? We've touched on
10 this a bit earlier but what happened here?

11 A I don't know what happened from the CBC's side of
12 things, I really don't know what was going on
13 behind the scenes at CBC.

14 Q If we can go to the next page, there is a couple
15 comments here, and this --

16 A I know they referred to the Dr. Ferris, quote
17 unquote, "breakthrough", but there were -- to
18 hinge the entire documentary on the Dr. Ferris
19 report, or the results of Dr. Ferris, suggests
20 that, well, as was the case without it, there --
21 they didn't have a show, and I just didn't know
22 what they had done. But what they had done was, I
23 think, at odds with what the Milgaards thought
24 they had done.

25 Q And when you say -- there's some later documents,



1 maybe I'll just read this to you and ask some
2 questions about Dr. Ferris, it says:

3 "Then producer Gordon Stewart and
4 researcher Sandra Bartlett asked us to
5 look at the criticisms of Dr. James
6 Ferris about the handling of the
7 forensic evidence at the trial. We
8 examined this as best we could, did
9 further research, and then concluded
10 there are other experts around who can
11 challenge much of what Dr. Ferris has to
12 say. In other words, the story has been
13 reduced once again to an argument
14 between experts. This didn't meet our
15 requirements."

16 And there are some documents, one of which I'll
17 show you bit later, which suggest they went to an
18 expert, the CBC, and an expert that they had
19 retained refuted what Dr. Ferris had to say, or
20 basically said it doesn't prove anything; was
21 that your understanding of what happened?

22 A I can't recall, but I'll -- I accept that.

23 Q Well, no, I'm not --

24 A I just -- I don't know.

25 Q Let -- there is a document, I think it's David



1 Milgaard's letter -- and we'll get to it --
2 suggesting that an expert may have disagreed with
3 it, and I take it from this letter, now this is
4 only my inference from this letter, that they went
5 and got an expert that disagreed, and I'm
6 wondering if you have any further information?
7 I'm not asking you to agree with my inference.

8 A No, I don't, I don't actually recall much of this
9 at all.

10 Q And then he says:

11 "We then asked Sandra Bartlett to get in
12 touch with some of the key witnesses to
13 see if the testimony they gave in court
14 could now be shaken. Sandra talked to
15 the witness Wilson, but got nothing of
16 any use to us; and she tried hard but
17 failed to talk to Nicole John."

18 What information did you have about Sandra
19 Bartlett's discussions with Ron Wilson?

20 A I don't recall that, but this may be -- I referred
21 the other day to being concerned that Wilson had
22 gotten spooked, and this may be what I was
23 referring to but I honestly don't recall this
24 specifically.

25 Q And you said earlier that what the CBC was doing



1 was at odds with what the Milgaards thought they
2 were doing, I think; can you explain that?

3 A Well I think the Milgaards felt that the CBC had a
4 documentary that was favourable to their cause and
5 would establish, in the public's mind, that David
6 was either innocent or deserved a new hearing, and
7 clearly the CBC was not anywhere near that point.

8 Q And you talked earlier about this having a
9 negative impact; did this letter or this decision,
10 at this time, have a negative impact on David and
11 Joyce Milgaard?

12 A Absolutely.

13 Q If we can get to 182102. And, again, this is a
14 memo from you to Hersh March 13th, '89, and you
15 say:

16 "Somehow David got in touch directly
17 with Robin Taylor who is the executive
18 producer of the *Fifth Estate*. David was
19 advised that the *Fifth Estate* was not
20 proceeding with the story and that there
21 work is finished. I would think that we
22 would like to consider plan "B" and go
23 public with someone else. Joyce would
24 like to speak with both of us as well as
25 David via conference call early this



1 week to discuss the approach."

2 "Another good reason for setting up a
3 conference call is the letter we
4 received from the minister. Since we do
5 not have Legal Aid or any other kind of
6 retainer, we ought to be discussing who
7 will be incurring the costs of obtaining
8 transcripts, factums etc."

9 Again, we touched on the latter point. So it
10 appears, here, that once the *Fifth Estate* says
11 "no" you are looking at plan B and going with
12 someone else?

13 A Yes.

14 Q 162408. Sorry, 407 is the doc. ID, then go to
15 408. And here is your memo to Mr. Wolch about
16 Doug Lewis' letter asking you to send the
17 information on Nichol, and you recite in the first
18 paragraph about what the letter says:

19 "... any information and material which
20 we have in relation to this matter would
21 be of assistance in assessing the merits
22 ...",

23 and then you go on to say:

24 "The way that we can factually
25 demonstrate the errors in Nicole John's



1 statement is by relating what she said
2 to the physical evidence. For example,
3 she claims that she saw Milgaard grab
4 the woman and while struggling with her
5 take her into the alley.",

6 etcetera. And I think you then repeat that part
7 that was in your earlier brief; is that correct?

8 A Yes.

9 Q Sort of "here's how we can factually demonstrate
10 it". And then:

11 "... as I recall there were other
12 matters which made her statement
13 factually impossible.

14 Would you like me to draft a
15 response to that portion of the
16 Minister's letter or should we leave it
17 until we provide the Minister with all
18 of the documents that he has requested
19 ...",

20 and so anything to add to that, Mr. Asper, than
21 what's stated?

22 A No.

23 Q 213804. This is your letter to David Milgaard
24 about the waiver. You signed the waiver, you say:

25



1 "For some reason the Minister of Justice
2 has asked that we obtain a waiver of the
3 solicitor-client privilege between you
4 and your counsel at trial and at your
5 appeal. This is probably a formality
6 which will enable us to openly discuss
7 your instructions to counsel and your
8 counsel's advice at the time. There may
9 be other reasons of which I am unaware.
10 In any event, please sign where
11 indicated and return it to me as soon as
12 possible."

13 Did you have any concerns, at this time, about
14 David Milgaard waiving privilege?

15 A No.

16 Q 155490. Again, we'll just go through, March 30th,
17 '89, I think this is your letter, it's not a very
18 good copy, to Dr. Ferris. And you'll recall in
19 Doug Lewis', Minister Lewis' letter, he wanted all
20 the lab reports that Dr. Ferris relied upon, and
21 looks like you are asking Dr. Ferris to send them
22 back to you so you can send them to the Minister;
23 is that fair?

24 A Yes.

25 Q Go to the next page, I think that's what's



1 confirmed?

2 A Yes.

3 Q I gather that you are going to send them to the
4 Minister.

5 162407. Here's memo April 3,
6 1989 from Mr. Wolch to you about the Nichol John
7 matter, he says:

8 "I feel we should draft a response
9 regarding Nicole John now. I don't
10 recall if it's in the unedited
11 presentation that we were going to send
12 or not, but I do think we should get it
13 ready so that we could either give them
14 everything at once or piecemeal if we
15 want to keep their interest up."

16 The:

17 "... unedited presentation that we were
18 going to send ...",
19 would that have been your 1986-'87 brief that --
20 the lengthier brief?

21 A I'm not sure, but I would assume so, I think it
22 was -- that was the most comprehensive document
23 that we had developed at the time.

24 Q Yeah. And so can you tell us what may have been
25 discussed about:



1 "... giving them things piecemeal if we
2 want to keep their interest up."?

3 A I seem to recall Hersh's view, and it was shared
4 by several others, that it might take a bit of
5 warming up, I would call it, for the Department of
6 Justice to come around to see things our way, and
7 that in order to warm them up and develop a more
8 accepting attitude of our position, that the
9 information we had should be provided in
10 digestible pieces, and I believe that that's what
11 this memorandum refers to.

12 Q And is that, in fact, what happened?

13 A Well, in -- well what happened was we kept getting
14 new information, what happened wasn't so much that
15 we fed in digestible pieces what we had, what
16 happened was that over time we kept getting new
17 information and it kept getting fed, and so yes,
18 it did stretch over time.

19 Q Let's talk about not new information that you got
20 after the application, but information that you
21 had December 28th, 1988.

22 A Right.

23 Q Did you end up providing that to Federal Justice
24 on a piecemeal basis?

25 A I don't recall. I don't think so.



1 Q Okay. Well for example the Nichol John
2 information was not provided initially?

3 A Right.

4 Q And so here, and I think we'll see when it's sent
5 in -- and David Milgaard's affidavit; was that
6 held back for this reason stated in the
7 memorandum?

8 A Well I would attribute to Mr. Wolch some sort of
9 soothsaying ability, but no, I don't -- I don't
10 recall there being a deliberate holdback strategy
11 from the outset, I recall the strategy being don't
12 risk a summary dismissal.

13 Q And, by that, do you mean don't give them
14 everything and have it dismissed --

15 A Because we're re-arguing the trial.

16 Q Right. And what about, I -- just on this "to keep
17 their interest up", again, was that a view that
18 you might want to continue to give pieces of
19 information to Justice after you had filed so that
20 they would continue to be interested in the case?

21 A Yes. Call it wizened patience versus the
22 impetuosity of youth, I suppose, but I think
23 Hersh and others felt that, as I say, it may just,
24 it may take a little time, a little warm-up,
25 before -- given the magnitude of what we were



1 asking for, to get people onto our side.

2 Q If we can go to 163063. And this is a letter from
3 you to the *Winnipeg Free Press*, Dan Lett, and you
4 are sending copies of an article, I'm not sure
5 what that is, and maps of the scene of the murder.

6 "If I can be of further assistance,
7 please feel free to contact me."

8 I wasn't able to find in the documents, I mean
9 there's lots of newspaper articles as to what
10 this might have been, and I'm not sure if it
11 matters; but do you know what you might have sent
12 him?

13 A This would have been in the period when Dan was
14 getting himself familiarized with the case.

15 Q We see, later on, a number of articles from Dan
16 Lett; can you tell us, what was your relationship
17 with Dan Lett?

18 A He was a journalist who was employed by the
19 *Winnipeg Free Press*.

20 Q And did he come to take an interest in this
21 matter?

22 A Oh, hugely, yes.

23 Q And how did that come about?

24 A Umm, I don't recall if I -- I think Joyce had made
25 initial contact with him, and somehow I got



1 introduced to him and he took an interest, he took
2 an interest in the story.

3 Q And would he be one of the media people that you
4 would have shared a fair bit of information with
5 over the course of the next few years?

6 A Oh, yes, definitely. And, to its credit, the *Free*
7 *Press* accepted Dan's requests that he be given the
8 latitude and the financial resources to pursue the
9 case.

10 Q And so would he have been an investigative
11 journalist; --

12 A Yes.

13 Q -- is that how you would describe him?

14 A Yes.

15 Q And at this stage, April of 1989, were you looking
16 to get investigative journalists involved in the
17 case or --

18 A I don't -- I can't say that we were at this point.
19 Possibly, yes, possibly.

20 Q If we can go to 213808. This is the April 3rd
21 reply on behalf of Doug Lewis to David Milgaard,
22 and responding to the letter. It says:

23 "As you may now be aware, the Minister
24 has written to your counsel, Mr. Hersh.
25 ... Wolch, and has requested certain



1 information which, given the nature of
2 the case, is essential to the assessment
3 of this application.

4 Once this information is
5 received and reviewed, the official who
6 has been assigned to assess your
7 application will be in a position to
8 know if any further information will be
9 required. You and members of your
10 family should make submissions with the
11 assistance of your counsel."

12 So it appears, at this stage, that as far as
13 submissions in addition to what you and Mr. Wolch
14 put in, in other words from David or Joyce
15 Milgaard, the Minister is saying "lookit, put
16 them in through, through legal counsel"; is that
17 correct?

18 A Yes.

19 Q 162409, this is a memorandum from Heather,
20 presumably Heather Leonoff, April 10, 1989 to you,
21 it says:

22 "David, I am not going to be looking
23 after this Milgaard thing, so I hope
24 that you are.

25 Seriously, you and I and Hersh



1 should talk about doing something on
2 this, but as I see it right now it is a
3 bunch of collection of information which
4 I hope you know where most of it is or
5 if it is available to us."

6 Can you tell us what this would have been about?
7 A No. I looked at it and I have no idea what it's
8 about.

9 Q Okay. Presumably the David is you; is that --

10 A Yes.

11 Q And you have no recollection of dealing with it?

12 A No, I don't.

13 Q 155493, April 11th, 1989, Dr. Ferris is sending
14 you back the exhibits which you asked, and then he
15 says at the bottom:

16 "I did hear from the CBC that they were
17 interested in doing a program on the
18 Milgaard case but I suspect that with
19 the recent CBC strike, their plans have
20 been somewhat derailed."

21 And so I take it from this that the CBC might
22 have contacted Dr. Ferris earlier on?

23 A Yes.

24 Q 163064, this is the letter I referred to earlier
25 about the Toronto, or the experts on Dr. Ferris'



1 report, and this is a letter by you to the Fifth
2 Estate and you say:

3 "Nonetheless, he --
4 Being David Milgaard,

5 "-- contacted my recently and dictated
6 the following letter and asked that I
7 forward it to you.

8 "Since our last telephone conversation I
9 have been very puzzled about the quality
10 of your investigation into my case. At
11 some point your people contacted Mr.
12 Wolch about Dr. Ferris' forensic report.
13 They claimed that they had consulted
14 someone in Toronto who disputed Dr.
15 Ferris' findings. Mr. Wolch was asked
16 to comment on this and he referred your
17 people directly to Dr. Ferris."

18 As far as I know, no one ever
19 spoke with him."

20 Let me pause there. Again, do you have any
21 recollection of learning that the CBC had had a,
22 someone in Toronto look at Dr. Ferris' report and
23 dispute his findings?

24 A I have some recollection, yes, that that occurred.

25 Q And it would appear that Mr. Wolch, are you aware



1 of any discussions Mr. Wolch may have had with the
2 CBC in --

3 A No, not specifically.

4 Q 301671, and this is David Milgaard's April 29th,
5 '89 letter back to the minister in response to the
6 letter about send your submissions through your
7 lawyers, and he says here:

8 "My family and myself --"

9 Sorry:

10 "All the information you have requested
11 will arrive your office shortly. I've
12 enclosed the waiver of solicitor-client
13 privilege too with this letter.

14 My family and myself will also
15 be sending you a submission of our own.
16 It is expected to be completed at the
17 end of May.

18 Please proceed with everything
19 as best you can ..."

20 From this letter it would appear that, as you
21 mentioned earlier, that there was a bit of a
22 parallel, or two parallel applications, although
23 maybe funneled through your office, and that
24 David Milgaard was going to file, and/or Joyce
25 Milgaard file a family presentation; is that



1 right?

2 A Yes.

3 Q And you would have been aware of that at the time,
4 that that was communicated to the Minister of
5 Justice, that in addition to what you filed, being
6 the lawyers, David and Joyce Milgaard were going
7 to file something?

8 A I can't say that I was completely -- I can't say
9 that I was aware that this commun -- that this was
10 being said to the Department of Justice, to the
11 minister. I think -- I was certainly aware
12 personally because the family was telling me that
13 they wanted a presentation to be made.

14 Q So at the time after you had filed the written
15 application, one of the, if I can call it, pending
16 matters would be to get the family submission to
17 the Minister of Justice; is that fair?

18 A Well, to be honest, I didn't ever really
19 understand what the family submission was.

20 Q Did you understand that the Minister of Justice
21 would not respond to your application until that
22 presentation was filed?

23 A No.

24 Q Did you understand -- let me rephrase it, and I
25 think we'll see that in some of the letters, but



1 did you understand that the federal Minister of
2 Justice, in order to respond to the written
3 application you filed December 28, 1988, was
4 waiting for, or may have been waiting for this
5 presentation from the family before they responded
6 to your application?

7 A No.

8 Q If we can go to 225007, and this is a letter from
9 Sandra Bartlett who I think was, was it the Fifth
10 Estate researcher, is that right, that was her --
11 she wasn't the producer?

12 A Among other things, yes, that was her role.

13 Q And she's writing directly to David about the
14 decision not to run the story, and again this is
15 May 1, '89, she says:

16 "I cannot really tell you what happened
17 except to say that it was decided that
18 editorially that was not enough. The
19 producers decided that a stronger case
20 for innocence or doubt of guilt was
21 needed."

22 And then it goes on, scroll down a bit further:

23 "Recently, I spoke with David Asper, and
24 he tells me that the Justice Department
25 application has passed the first hurdle



1 and officials there will be taking a
2 detailed look at the legal material."

3 Pause there. Do you know what that would be
4 relating to? Did you tell her that or would you
5 have told her something like that?

6 A I would have told her that, and by that time I
7 think that we were aware that the Department of
8 Justice was in fact looking into our application
9 and was, and had not summarily dismissed it.

10 Q Now, we're going through the documents here, Mr.
11 Asper, I don't have any notes from the file of
12 either your conversations, or telephone
13 conversations or Mr. Wolch's conversations with
14 members of Federal Justice. Do you recall or
15 would you be able to tell us whether, after the
16 application was filed, whether either you or Mr.
17 Wolch would have had communication by telephone
18 with Mr. Fainstein, Mr. Williams, Mr. MacFarlane,
19 Mr. Corbett; for example, someone at Federal
20 Justice?

21 A Yes, I'm pretty sure there was correspondence,
22 communication.

23 Q And so is it possible, again we're going through
24 the documents, this is -- we're now into April of
25 '89. For example, in January or February did



1 someone phone up and say we've got your
2 application, here's what we're doing, or things of
3 that nature, was there some communication?

4 A I think there was, yes. Yes, I'm pretty sure
5 there was.

6 Q And would that have been with you or Mr. Wolch?

7 A Mr. Wolch.

8 Q And do you know who from Justice it was and what
9 they said?

10 A No.

11 Q And so is it fair to say from your evidence that
12 you did, in addition to the letters we're going
13 through, people from Justice phoned Mr. Wolch and
14 talked to him about something related to the
15 application?

16 A Well, let's be careful here. I don't think
17 anybody -- I don't recall people from Justice
18 calling Mr. Wolch, I think it was the other way
19 around.

20 Q Oh, I'm sorry, that there were phone calls, it may
21 have been that Mr. Wolch had phoned them?

22 A Yes.

23 Q Okay. So there would have been I think -- let me
24 put it this way. You are saying yes, you are
25 aware that Mr. Wolch would have had telephone



1 communication with someone at Justice, Federal
2 Justice in relation to the application in the
3 early part of 1989, but that you believed that Mr.
4 Wolch initiated the contact, and are you able to
5 -- is that correct?

6 A Yes.

7 Q And are you able to tell us what the nature of
8 those discussions would have been?

9 A What's going on would be the nature of the
10 conversation, what's going on.

11 Q And what would the other side of the phone be
12 saying?

13 A Probably something to the effect of we're looking
14 into it.

15 Q And is that going by memory or is that something
16 that -- I mean, do you have a recollection of --

17 A I don't have a specific recollection of a specific
18 phone conversation, but I do recall that there
19 were a number of telephone calls.

20 Q And let's just talk generally, if we can go
21 through the time period December 28, 1988, let's
22 take the calendar year 1989. We've got documents,
23 some documents that reflect communications back
24 and forth. Is it fair to say in addition to that
25 there would be either in-person meetings or



1 telephone discussions between Mr. Wolch and
2 members of Federal Justice from time to time?

3 A I don't believe there were any in-person meetings
4 until we, I believe it was 1990, met in Ottawa.
5 There would have been a number of telephone
6 conversations that we would have considered
7 inadequate from our perspective in terms of
8 telling us what's going on and that would -- and
9 then there was, you know, the record of
10 correspondence.

11 Q And those telephone conversations, were you
12 involved in any of those or was that Mr. Wolch's
13 area?

14 A I don't think I was involved, I think Mr. Wolch
15 had the primary contact.

16 Q If we can then go to 032928, this is not a very
17 good copy, but this is Mr. Wolch's letter to the
18 minister of May 2, 1989, and you'll see this is
19 responding to the February 16, '89 letter
20 requesting the documents which are sent in, and
21 then:

22 "With respect to the matter of the
23 Statement of Nicole John, we are also
24 enclosing a photocopy of a statement
25 given by this witness on May 24, 1969.



1 We were only able to locate ten pages of
2 the handwritten statement and we are
3 unaware of where the rest of it might
4 be. In any event, the portion of the
5 statement dealing with this witness
6 stating that she saw Milgaard commit the
7 crime is contained within the enclosure
8 beginning at the bottom of page 3."

9 And then the next page --

10 A It's interesting, isn't it, how quickly the Nichol
11 John statement grabbed the attention of the
12 Department of Justice.

13 Q In what sense are you saying that?

14 A Well, for a statement that wasn't evidence at
15 the -- for the incriminating part that wasn't
16 evidence at the trial, they zeroed in on, I think
17 very, very quickly, the part where she says that
18 she saw David commit the murder, and I think
19 you're starting to see it manifest itself right
20 there.

21 COMMISSIONER MacCALLUM: Didn't you draw
22 that to their attention when you submitted the
23 application?

24 A Oh, yes. Oh, yes.

25 BY MR. HODSON:



1 Q I was just going to say, I think when, and in the
2 sequence of correspondence when we went through
3 it, it looked as though your first application
4 said we haven't filed anything about Nichol
5 John --

6 A Right.

7 Q -- but we can demonstrate, they wrote back and
8 said, well, if they can, send it in.

9 A Right.

10 Q And would that not be where this letter is going?

11 A Well, I think you have to read this letter in the
12 context of everything that comes after it that we
13 now know.

14 Q And we'll get into that in some detail, but was it
15 your impression that the Nichol John statement
16 became significant to Federal Justice in their
17 review?

18 A Yes, Federal Justice became fixated on whether
19 Nichol saw David commit the murder.

20 Q And was that an important fact as far as your
21 application? Sorry, let me back up. As far as
22 putting forward your application to say that there
23 was a miscarriage of Justice and that David was
24 innocent, would you dispute the fact that what
25 Nichol John, even though she didn't adopt it at



1 trial, but what Nichol John would state at that
2 time, in 1989, would that not be of some
3 importance to the issue?

4 A Yes, that's why I had argued that we should have
5 addressed it.

6 Q For example, if she would have said, oh, I can now
7 explain, I never saw anything and here's why I
8 lied, that would be helpful to you; correct?

9 A Yes.

10 Q And if on the flip side she said, well, no, I
11 really did see it and here's why I didn't repeat
12 it at trial, that would be of assistance in
13 assessing your application; is that fair?

14 A Yes.

15 Q And so are you -- and I appreciate your comments
16 about them being fixated on it, but did you
17 contemplate that they would not look at all at
18 Nichol John's statement?

19 A No, no, no, I'm not saying that at all. That was
20 the reason why I had argued at the time of the
21 filing of the application that we deal with that
22 issue head on, because I knew that just as a
23 matter of human nature, notwithstanding what the
24 rulings were under 9(2), that you've got this
25 piece of information out there that doesn't look



1 very good for David Milgaard and you better deal
2 with it.

3 Q And so are you telling us that you didn't think it
4 was inappropriate for Federal Justice to deal with
5 the Nichol John statement; is that fair?

6 A I'm sorry?

7 Q Did you think it would have been inappropriate for
8 Federal Justice to deal with the Nichol John
9 statement, to go back and look at it and say,
10 okay, Nichol John, tell us today what you can
11 about the statement and your evidence?

12 A No, I think it's totally appropriate.

13 Q And so again just back on this, again I won't read
14 through this, I think, Mr. Asper, this is the
15 similar type of argument that came from your
16 earlier briefs about the impossibility of Nichol
17 John's statement, and then the letter says:

18 "Finally, we would like to thank you on
19 behalf of Mr. Milgaard for your
20 letter --"

21 A Sorry, Mr. Hodson, let me -- let me just -- and
22 I'm sorry if I --

23 Q No, that's fine.

24 A -- interrupt your train of thought. Let me just
25 make something clear I guess, because I am



critical of the Department of Justice and there's no question about that. There's nothing that the Department of Justice did in terms of its attention to the witnesses from the original trial. Now, we can debate, and I -- I think some of the efforts with Nichol John were a bit crazy, but in terms of wanting to find out what she really had to say today, in terms of going to interview Ron Wilson, in terms of all the things they did, I don't take issue with that. The issue that I guess we take is that it was not done in what we think was, what we thought was a neutral and impartial way and in a timely manner.

Q Okay.

A Okay. So --

Q No, I appreciate that. So again, on the Nichol John issue, I think your words were they became fixated on her and what you are telling us is no, they should have gone and talked to her and found out things, and you may take issues with when they did it and --

A And what they did.

Q And what they did?

A Right.

Q But you expected them to go there?



1 A Absolutely, and I've said this, we hoped that from
2 the outset we would sit down and get all the
3 information out on the table from everybody, from
4 every source.

5 Q Now, just back on this last paragraph, Mr. Wolch
6 says:

7 "Finally, we would like to thank you on
8 behalf of Mr. Milgaard for your letter
9 inviting his submissions. Mr. Milgaard
10 and his mother have been working
11 consistently since the date of
12 conviction to establish that a
13 miscarriage of Justice has occurred. In
14 addition to the materials which we have
15 presented to you, the Milgaard's are
16 planning on making a separate
17 presentation and once this is prepared,
18 it will be forwarded to you in due
19 course."

20 So it looks like here at this time Mr. Wolch is
21 saying there is another piece of written material
22 that's going to be part of our application and
23 we'll send it to you when we're done; is that a
24 fair read of that?

25 A Umm, yes. I think there's a bit of client



1 management in that paragraph. This was something
2 that the family had been insisting on and I think
3 we said okay, we just wanted to have on the record
4 "okay".

5 Q Now -- and I guess, Mr. Asper, and I'll show you
6 some of the documents later, but in the to'ing and
7 fro'ing between your office and Federal Justice
8 later about let's get a decision, when can we
9 expect it, Federal Justice writes back saying,
10 well, we're still waiting for your family
11 presentation, until you file it we don't have all
12 your materials, how can we consider your
13 application if it's not complete. Do you recall
14 that being an issue from their side, being Federal
15 Justice?

16 A Yes.

17 Q And was that one of the reasons for perhaps a
18 delay in the proceedings?

19 A It's a position taken by the Department of
20 Justice. The fact is this may have been a piece
21 of information that was just simply left dangling
22 and not resolved by us.

23 Q If we can go to 155495, please --

24 A I mean, I don't want to become an advocate here,
25 but some of it is farcical that, you know, an



1 application can't be decided because they are
2 waiting for a family presentation, but can't find
3 a connection of Larry Fisher to the crime, but
4 that's --

5 COMMISSIONER MacCALLUM: Well, you
6 are becoming --

7 A That's an editorial comment.

8 COMMISSIONER MacCALLUM: Let's go to lunch.

9 *(Adjourned at 11:50 a.m.)*

10 *(Reconvened at 1:35 p.m.)*

11 BY MR. HODSON:

12 Q If we could call up 155495, we're in May of '89
13 and we'll just carry on through, Mr. Asper, here
14 with some of the key documents and dates. Here's
15 a letter from you to Dr. Ferris and you'll see
16 here that you are advising:

17 "... the Fifth Estate has decided to not
18 proceed with your story. However, a
19 reporter from the Winnipeg Free Press as
20 well as a local CBC news reporter are
21 currently investigating the situation.
22 We have provided both reporters with
23 your name and address etc."

24 And that would be Dan Lett, wouldn't it, the *Free*
25 *Press* reporter?



1 A I think so, yes.

2 Q And so at this time, May, '89, would you be trying
3 to get Dr. Ferris' opinion out in the public
4 domain to assist Mr. Milgaard's efforts?

5 A Well, I can't say. I think by this point we had
6 probably provided copies of the application to a
7 number of different people in the media, some of
8 whom may have asked specifically for Dr. Ferris'
9 contacts.

10 Q And then as well you tell him:

11 "Insofar as the application to The
12 Minister of Justice is concerned, we are
13 just sending the transcripts and
14 forensic reports to the Minister. We
15 are quite encouraged by the fact that he
16 has requested the transcripts because,
17 as you may know, most of these sorts of
18 applications are dismissed summarily.
19 It looks very much as though your work
20 has inspired the interest of the
21 Department of Justice. We will keep you
22 up to date as these matters develop."

23 A Yes.

24 Q And again --

25 A Now, sorry, I should go back to the first



1 paragraph.

2 Q Yes.

3 A The -- I think what happened here was that a
4 producer, or I think a producer who was associated
5 with CBC had a brother who worked at another part
6 of CBC who worked alongside of somebody who used
7 to work at the *Free Press* and that's how what the
8 Fifth Estate had been doing I think got to local
9 CBC and the *Free Press*. Now, we had also already
10 spoken with them I believe about what we were
11 doing, but I think it emanated from somebody who
12 was really working, who was related to somebody
13 working on the Fifth Estate.

14 Q And was that Morris Karp and Carl Karp?

15 A Yes.

16 Q And so -- sorry, I'm going to have to have you go
17 through this one more time. So that -- where did
18 Morris Karp and Carl Karp fit in?

19 A Morris Karp was a producer at the Fifth Estate. I
20 don't know that he was a producer at the Fifth
21 Estate at that time, he may have been on a
22 different current affairs program.

23 Q And Carl Karp, where was he at the time?

24 A Carl was part of the local CBC news, I think he
25 was the executive producer of the local CBC news



1 in Winnipeg and he worked with, I believe at this
2 time, a fellow named Cecil Rosner who used to work
3 as a print journalist at the *Winnipeg Free Press*,
4 but was now, but was at that time working at CBC,
5 and I think that Cecil may have talked to the *Free*
6 *Press*.

7 Q And so Carl Karp and Cecil Rosner, they in fact
8 authored a book I think the following year, or a
9 year or two later; is that correct?

10 A Yes.

11 Q Called *The Milgaard Story*?

12 A Yes.

13 Q Now, just back on this paragraph, you say:

14 "... most of these sorts of applications
15 are dismissed summarily."

16 What information did you have in that regard?

17 A I don't recall.

18 Q Did you have any statistics or information from
19 Federal Justice about how many applications they
20 had or how many were dismissed, things of nature;
21 do you remember?

22 A I seem to recall we did have some information to
23 that effect, but I don't recall it now.

24 Q And again as far as this, about the minister
25 requesting transcripts and forensic reports, did



1 you take that as an encouraging sign?

2 A Yes.

3 Q If we can go to 153486, and this is a letter May
4 10th, '89 from Mr. Wolch to Mr. Justice Tallis as
5 he then was, and I've asked you about contact with
6 Mr. Tallis before. This appears to be, from the
7 documents, the first contact made by you or Mr.
8 Wolch to Mr. Tallis. Would you agree with that or
9 are you able to comment on that?

10 A I honestly don't recall, so if this is the first,
11 then I accept that.

12 Q Yeah, no, and in fairness, it doesn't refer to any
13 earlier conversations.

14 A That's why I accept that this is the first
15 contact.

16 Q And if we can go to the next page, what the letter
17 states is:

18 "The Minister's representatives have
19 made a number of requests to us in
20 return to enable them to further their
21 investigation. One of their requests
22 was that David waive privilege in
23 regards to interviews he had with his
24 counsel at trial.

25 David expresses no concern in



1 this regard and is prepared to do so,
2 but I thought it best to bring you up to
3 date. Perhaps I might telephone you in
4 a week or so to discuss this matter
5 further. I did not think it would be
6 fair or appropriate to telephone you
7 without warning and without some time to
8 reflect on a matter which is now so
9 old."

10 So it appears this letter is a bit of a heads up
11 that David has waived privilege with Federal
12 Justice so they might be calling you; is that a
13 fair reading of this?

14 A Yes.

15 Q If we can then go to 163025, this is a letter May
16 18, 1989 from you to Dan Lett, and the first
17 paragraph talks about a conversation and then you
18 enclose consents duly executed by David Milgaard
19 authorizing Dan Lett to speak with Stan Yaren,
20 Dr. Raymond Denson (ph) with respect to David's
21 psychiatric history, and then you say:

22 "Also, I am enclosing an article
23 provided to me by David which apparently
24 describes his particular disorder."

25 And can you shed any light on this, Mr. Asper?



1 It looks as though you're -- and accompanying the
2 letter is a release from David Milgaard to allow
3 Dan Lett to look at his psychiatric history.
4 What gave rise to this?

5 A Well, clearly Dan Lett -- over the course of
6 representing David Milgaard, and I can't tell you
7 specifically where we ran into it, but others ran
8 into the suggestion that there was some -- there
9 was a phantom psychiatric report which predicted,
10 or came close to predicting behaviour that David
11 would kill and commit deviant sexual crimes and we
12 could never find this. We obviously -- it doesn't
13 exist obviously, but it just seemed to be, just
14 kept -- just seemed to surface.

15 Q When you say -- by whom, parole people, reporters?

16 A The reporters kept hearing about it, and this is
17 sort of an early indication of it, and so David
18 was prepared to disclose his background.

19 Q And so what was the purpose behind that then, or
20 was there one?

21 A Dan Lett may have just wanted to know whether
22 David was -- I believe they call it antisocial
23 personality disorder type. In those days it was a
24 psychopath who was trying to manipulate people.

25 Q And so did you have any concerns, or did David



1 Milgaard have concerns that what would be
2 considered obviously very private mental health
3 issues and concerns would be disclosed to the
4 media and ostensibly to the public?

5 A No, he did not.

6 Q And did you have any concerns about that?

7 A No, I didn't, in terms of what may be disclosed.
8 I suppose I probably had a concern that it was a
9 side issue.

10 Q Okay. A side issue in what respect, a side issue
11 to what?

12 A Well, we didn't particularly want to make David's
13 mental health the issue here, the issue was his
14 innocence.

15 Q And then just down at the bottom --

16 A I believe this also coincided, if I'm not
17 mistaken, with -- Dr. Yaren, I seem to -- I think
18 that David had been misdiagnosed for many years in
19 the prison system and I believe that Dr. Yaren at
20 Stony Mountain Penitentiary began to spend a lot
21 of time with David and came to the conclusion that
22 what he suffered from was manic depression and
23 began to treat him and put him on a regime that
24 probably stabilized him for the longest period of
25 time, to the extent he was taking his medication,



1 in his prison history.

2 Q Sorry, this paragraph may assist you, you write:

3 "As I indicated to you over the
4 telephone, I am not really surprised
5 that you came to hear about negative
6 psychiatric reports about David. They
7 have plagued David throughout this
8 entire ordeal and in some cases reports
9 have been relied on which never existed.
10 This is obviously very frustrating and I
11 am starting to believe that psychiatric
12 reports are becoming a convenient
13 cop-out, for not dealing with the
14 underlying issue which is that David was
15 wrongly convicted. While it may be true
16 that David suffers from some psychiatric
17 disorder, one wonders how he could be
18 otherwise having spent nearly two-thirds
19 of his life in prison."

20 And again, would that capture one of the
21 objectives in giving the information to Mr. Lett,
22 one of the reasons for giving it to him, to deal
23 with the --

24 A Yes, yes.

25 Q -- negative psychiatric reports?



1 A Yes, yes.

2 Q And then scroll down, "The reinforcement for my
3 belief that psychiatric reports are rapidly
4 becoming an excuse for inaction is in the
5 consistently inconsistent stories that we have got
6 from the *Fifth Estate*. I can appreciate that you
7 spoke with Eric Malling and heard of his concern
8 about this psychiatric report in which it is
9 alleged that David is psychopathic. You should be
10 aware, however, that this issue was never raised
11 with us, rather the reporters, producers and
12 researchers voiced concerns about the question of
13 exculpatory evidence. In fact most recently a
14 ...",
15 I'm not sure what that word is?

16 A "Researcher" I think.

17 Q "... researcher ...", thank you, "... for the show
18 wrote to David and indicated that the response for
19 the discontinuance of the project was that the
20 editorial board felt that they did not have enough
21 to be able to advocate David's innocence, this
22 apparently because Nichol John continues to refuse
23 to discuss the matter. It is curious that all of
24 a sudden a psychiatric report and not evidentiary
25 issues is the problem."



1 So, again, I think that may be

2 --

3 A Yes. If you go back, and I seem to recall that
4 even at the earliest stages of the investigation,
5 the investigating officers were referring to some
6 kind of report that made them think that David was
7 capable of committing this crime, and that went
8 back to 1969.

9 Q If we can go to 333294. So here's a letter of, I
10 think it's January 15, or June 15th, 1989, I
11 think, and it's to the Minister, and again just
12 again refers to:

13 "... my family and I will be making a
14 video too."

15 And so was that part of the family presentation
16 that, in addition to a written submission, that a
17 video was being planned?

18 A Yes.

19 Q And then the next page. And, again, I think we
20 see here where David writes that:

21 "I know that may sound impatient but it
22 has been awhile hasn't it?"

23 So, again, this would be another example of, at
24 least from Mr. Milgaard's end, wanting things to
25 happen sooner than they were happening; is that



1 fair?

2 A Well it shows, and I think it was the case if I'm
3 not mistaken, we didn't know what was going on, we
4 just didn't know, and it was very difficult for
5 us, as counsel, to respond to David and his
6 mother.

7 Q When you say you didn't know can you elaborate a
8 bit, what didn't you know, what were you hoping to
9 know that you didn't know?

10 A Well, as I say, the Department had requested
11 information from us, we had provided the
12 information, we -- and, you know, again it goes
13 back to our expectations. We had thought that
14 there would be, in effect, a case conference and
15 an open dialogue and an exchange of particulars,
16 and we were kind of waiting and waiting and we
17 weren't hearing anything as to what, specifically,
18 the Department was doing with the information that
19 we had provided them, and as counsel, the
20 Milgaards were very anxious, we were getting a
21 little bit anxious, and I think that this letter
22 reflects that.

23 Q If we can go to 166262. And I've shown you this
24 letter before, this is your June 23rd, 1989
25 letter, we went through it, it's just in the



1 sequence. So it would appear at this time, in
2 June, that -- is it fair to conclude take either
3 you or Mr. Wolch would have had some indication
4 that Mr. Eugene Williams was involved in the file,
5 you refer to him here?

6 A Yes, of course.

7 Q And is it fair to assume that one of you would
8 have had a conversation or a discussion with him
9 and learned that he would be contacting Deborah
10 Hall?

11 A Umm, we would have -- there would have been a
12 conversation with someone, perhaps Mr. Fainstein,
13 perhaps Mr. Williams, and the wording of the
14 letter says "it may be", not "will be", so I
15 wouldn't commit myself to being confident, at this
16 point, that Mr. Williams would be contacting her.

17 Q Is it fair to say that, based on this letter, you
18 would have had some idea that he might call, might
19 be contacting her?

20 A It was certainly our hope, yes.

21 Q And would that have come from a conversation with
22 him, do you think, or --

23 A Umm, the only thing I can assume from this letter
24 that would be certain is that Mr. Williams was
25 assigned to the file.



1 Q Okay. And again, we went through the contents
2 here, I don't think we need to go through again.

3 If we can go to 001554. And
4 this is a letter, you probably haven't seen this
5 other than maybe recently, it's a letter from the
6 Crown prosecutor, Mr. Dehm, to Mr. Williams June
7 29, 1989, it's around the time of your letter to
8 Ms. Hall, and it just sends Mr. Williams a copy of
9 Ute Frank's statement. And I think at this time,
10 Mr. Asper, you would not have had Ute Frank's
11 statement; is that correct?

12 A I don't think so.

13 Q And I'll show you some documents later where it's
14 sent to you, later chronologically. And, again,
15 would you -- do you recall having any discussions
16 with Mr. Williams about Ute Frank and her
17 statement around this time?

18 A I must have, because there is a snarkey letter
19 that comes back at me I think in August.

20 Q Yeah, and I'll go through those, but I guess --
21 and I'll go through the letters with you, but I'm
22 just wondering if -- well, let's leave it until we
23 go through those letters and maybe you can shed
24 some light on that.

25 Would Mr. Williams have told you



1 that he was getting Ute Frank's statement?

2 A I don't recall. It's possible that I may have
3 asked him or suggested to him that he get the
4 statement on the basis that it was corroborative
5 of Deborah Hall, it's possible.

6 Q And then 182104. Had you made any efforts to find
7 Ute Hall (sic) and to get her version of the
8 events?

9 A No.

10 Q Did you consider it, after you got Deborah Hall's
11 affidavit, to check with sort of the other person
12 who was in the room who hadn't testified?

13 A No.

14 Q This is a memo June 30, 1989 from Hersh to you
15 indicating that basically Dr. Ferris has still got
16 the exhibits and has had them for some time, and
17 the court order I think said they were supposed to
18 be back in a month, and it looks as though you
19 would have followed up and had them returned; is
20 that correct?

21 A Yes.

22 Q Let's go to 025909, please. And this is an
23 article August 5, 1989 in the *Saturday Free Press*,
24 which is the *Winnipeg Free Press* I believe, Dan
25 Lett. And I think, Mr. Asper, based on my review



1 or our review of the Commission records, that this
2 is likely the first story in the newspaper from --
3 when -- after you became involved. There might
4 have been some prior ones, but this looks to be
5 the first story, and it comes August 5, 1989 and
6 it appears to be a front-page story; am I correct
7 in assuming that from how we see it?

8 A Yes.

9 Q And let's just go through it, I've got a few
10 questions. Here Mr. Lett -- it says:

11 "Milgaard and Winnipeg lawyer
12 David Asper have spent the past two
13 years trying to persuade the Federal
14 Government to reopen his case. All
15 other avenues of appeal have been
16 exhausted, Milgaard said."

17 Would this article, would you -- how did this
18 article come about; did you go to him to try and
19 get something in the paper -- when I say "you"
20 meaning you, Milgaards, Mr. Wolch -- or was it
21 something that he was pushing; are you able to
22 elaborate on that?

23 A My recollection is that either David or Joyce had
24 contacted Dan and gotten to know him and, when we
25 filed our application, he was one of the people to



1 whom the applications was distributed for his
2 reference and potential follow-up.

3 Q And so, again, is this the type of article or
4 media piece that you were hoping for back when you
5 talked earlier about --

6 A Warm and fuzzy.

7 Q -- warm and fuzzy?

8 A Yes.

9 Q If we can go to the next page, you are quoted
10 here, he says:

11 "The more I read, the more I
12 think the evidence the police presented
13 just can't be true," Asper said. 'The
14 Crown's theory is preposterous.'"

15 And so, again, this would be August of '89, so
16 about seven, eight months after you would have
17 filed the first application. What would be your
18 strategy, if I can call it that, at this point as
19 far as what you are putting forward in the media?
20 You talked before about where the media fit in in
21 your efforts to perhaps influence Federal Justice
22 or influence public opinion; can you tell us, at
23 this time, what strategy were you operating
24 under?

25 A None.



1 Q So this was reactive to what Dan Lett asked you
2 then?

3 A Yes.

4 Q If we can then just go to the right-hand column,
5 it says:

6 "In an attempt to further
7 analyse the forensic evidence presented
8 at the trial, Asper he sought the
9 services of Dr. James Ferris, a noted
10 Canadian forensic pathologist."

11 And then the headline, or what's the correct term
12 for a headline within a column, is there a --

13 A Umm --

14 Q Mini-headline, or I'm sure there is something
15 better than that?

16 A I can't remember what the newspaper slang is for
17 that.

18 Q And, anyway, a headline *Proves innocence* and:

19 "According to Ferris's
20 report, in which he re-examined
21 extensively the trial transcripts and
22 physical evidence, the semen sample was
23 incorrectly analysed by RCMP
24 pathologists and in fact proves
25 Milgaard's innocence."



1 And then takes out of the report:

2 "'On the basis of the evidence that I
3 have examined, I have no reasonable
4 doubt that the serological evidence
5 presented at the trial failed to link
6 David Milgaard with the offence,' the
7 report stated, 'and in fact, could be
8 reasonably considered to exclude him
9 from being the perpetrator of the
10 murder.'" Ferris also ...",

11 actually, let me just pause there. Now when we
12 asked Dr. Ferris at this Inquiry about this part
13 he said that it was, I think his words were,
14 "misleading", and in particular -- if we can just
15 scroll up -- the headline *Proves innocence* was
16 not accurate, and I think he expressed some
17 concern that the media would take the back half
18 of his opinion without the front half. And I
19 wouldn't mind your comment, Mr. Asper, because
20 we'll see, as we go through some later media
21 reports, this -- there are many reports in the
22 media that are similar, that say "Dr. Ferris'
23 report proves David Milgaard is innocent and
24 exonerates him", yet Dr. Ferris has told us and I
25 think you've told us that his opinion that's



1 relied upon doesn't really state that?

2 A Let me answer in this way. Any time, and in our
3 case it was certainly the case, that you involve
4 the media, there are major, major risks. There
5 are risks to the applicant, there are risks to the
6 system, potentially, and there are risks for
7 readers and, to some degree, to journalists,
8 because the system is very imperfect.

9 Q What system?

10 A The media system, --

11 Q Okay.

12 A -- this -- the way information goes in and comes
13 out, goes into the media world and then comes out
14 as a commodity for the consumer.

15 The journalist Dan Lett, I don't
16 believe, would have written that headline, an
17 editor would have written that headline.

18 And what the story actually says
19 is, in the quotation, is that the evidence failed
20 to link David with the offence, part 1; and part
21 2, might be or could be reasonably interpreted to
22 exclude him. So it actually does summarize, the
23 story does say what Dr. Ferris concluded.

24 Q I think what Dr. Ferris' concern was that the
25 earlier part of his opinion that said "the frozen



1 semen is of no value in assessing anything" was
2 missing. That was his concern, in other words,
3 that you shouldn't rely on the frozen semen at
4 all?

5 A I wouldn't be surprised about that, and I would
6 sympathize with his concern about the headline.

7 And generally speaking, and I
8 believe if you refer to the *Canadian Press Media*
9 *Style Guide*, you will find, because it's a
10 principle that we utilize in our organization and
11 I believe it's a principle that is found in the *CP*
12 *Style Guide* -- that headlines can't be used for
13 either editorial effect or -- sorry -- and must
14 fairly reflect the substance of the story.

15 Q So at this time, Mr. Asper, was it your view that
16 it would not be correct to state that Dr. Ferris'
17 report proves David's innocence?

18 A I think that's fair. And one of the risks, again,
19 we faced -- and I, I'm sure I will be challenged
20 on -- is you, you know, we had no control once the
21 message -- once we invited the media in we had
22 very little control over what came out.

23 Of course we're responsible for
24 our quotes and what we said to the media, but
25 there's an inherent problem there as well, and



1 we'll see it in some of the newspaper reports
2 where, if you say two things, two things can,
3 through the process of editing, become a
4 conjunctive one and not fairly represent the two
5 things that you actually said.

6 Q We talked earlier, I think the very first day,
7 about the distinctions between putting forward
8 evidence in a courtroom setting versus putting
9 evidence forward in a media setting, and would
10 this be an example where, in the media setting,
11 there are different rules about matters than would
12 be in a courtroom setting?

13 A There are, absolutely, yes. Absolutely, there are
14 different rules.

15 Q And so again, just stepping back, would this
16 article and the headline and what's contained, I
17 take it, would be a favourable article to David
18 Milgaard?

19 A Yes.

20 Q In the sense that someone would be writing that,
21 based on an expert report, that the expert report
22 proves his innocence?

23 A Yes.

24 Q And that Dr. Ferris is an expert and as a result
25 of this report, if one were to read that, to read



1 that headline and article, one might conclude that
2 Dr. Ferris' work does prove his innocence; is that
3 a fair reading of that?

4 A Yes.

5 Q And I think, would you agree Mr. Asper, that over
6 the next number of months and even a couple of
7 years, that this -- this is repeated, this
8 assertion that Dr. Ferris' report proves his
9 innocence or exonerates him gets repeated time and
10 again in the media?

11 A Well, and not only does it get repeated, but
12 again, I'm not sure whether this story would have
13 been picked up, but if it were picked up on the
14 wire service through Canadian Press this
15 particular story, let alone how it then gets
16 repeated or referred to, but this particular story
17 would start popping up all over Canada --

18 Q Let's just talk --

19 A -- in all kinds of different media sources.

20 Q Let's just talk about what -- a couple of groups
21 and how they might react to something like this.
22 And I can tell you, and I'll go through some of
23 the later media articles where this type of thing
24 is repeated, but to the public would one reading
25 from the public be, if they read this, to say "oh,



1 okay, the Minister has got a report that
2 exonerates him, proves his innocence, why don't
3 they let him out, they should be doing something";
4 is that a fair -- and that might be one intended
5 purpose in having this story out there, that the
6 public might think there's some evidence that
7 proves his innocence?

8 A Umm, yes, the public could. I don't know that the
9 public -- I think the public is skeptical of the
10 media, I suspect the public thinks maybe that the
11 Minister has something that's of interest that may
12 show he's innocent. But the public, in my opinion
13 up to this point, would have a lot of confidence
14 in the Minister and the public generally respects
15 authority, which is why I said sort of at this
16 point early on in the process, I think, that the
17 Department of Justice could have handled this --
18 and this is adverse to the Milgaard interest by
19 the way -- could have handled this in a very
20 different way.

21 Q If the suggestion or argument or assertion is
22 repeated enough times in the media and in
23 different media by different people would, at some
24 point, the public say "okay, well there must be
25 some evidence there, why isn't somebody --"



1 A That's how politicians get elected.

2 Q But is that something where the intended purpose
3 might be for the public to say "hang on a minute
4 here, this report proves his innocence, why isn't
5 somebody doing something about it"?

6 A Yes, that could be the effect.

7 Q And wasn't that the effect on David Milgaard? You
8 told us earlier that that's what he thought about
9 Dr. Ferris' report is that it proved his
10 innocence?

11 A That's what David thought?

12 Q Yes?

13 A Yes.

14 Q And so again, just go back to the public, would
15 that be one of the purposes, then, in getting this
16 type of story out there in this way, to get the
17 public on side and to perhaps get some influence
18 on the authorities?

19 A No. My purpose would -- well, I guess it could
20 have the, yes, I guess it could have the effect on
21 the public. I always was of the view that asking
22 the public to conclude innocence was too much of a
23 stretch, so I --

24 Q Well let's put it this way; that a piece of
25 evidence excludes him and, therefore, should



1 acquit him as opposed to prove his innocence?

2 A Yes.

3 Q Now let's talk about Federal Justice, who -- I
4 take it, Mr. Asper, you would assume that the
5 Federal Justice officials would be reading, or
6 that somebody would be clipping these reports and
7 giving them to the decision-makers in Justice?

8 A Yes.

9 Q And so if, at this point, they get something like
10 this what did you think their reaction might be?
11 And again if we go back, earlier I had mentioned
12 that I think -- and we'll see some documents --
13 that at some point Justice looked at Dr. Ferris'
14 report and said "it proves nothing", and for a
15 number of different reasons?

16 A Right.

17 Q And I think, prior to this time, the documents
18 suggest that that might have been their
19 conclusion, and I'm not sure -- and, again, we'll
20 hear from Mr. Williams whether that had been
21 communicated to you. What type of reaction do you
22 think this type of story might have had on Federal
23 Justice and was that part of your thinking in
24 going to the media with this type of information?

25 A I'm not sure that we actually controlled or had



1 any influence over when this story was gonna run,
2 so I want to be careful about that, because there
3 is a distinction between things that we tried to
4 orchestrate deliberately versus stories like this.

5 But the effect on Justice, I'm
6 sure, would not have been very positive. I'm sure
7 the people, the folks in Ottawa, were not very
8 happy about this.

9 Q And why do you say that? What would cause you to
10 believe that?

11 A Well because I'm -- their view could well have
12 been, at the time, that the report inaccurately
13 portrays the doctor -- what Dr. Ferris concluded.

14 Q And would there be a concern, I think -- I think
15 you said earlier that there is a risk when you go
16 into the media domain to argue your case; did you
17 have any concerns about putting Federal Justice in
18 the position of having to enter the media tent, if
19 I can call it that, or entering that type of forum
20 to either defend their position or put forward
21 their position, as opposed to the legal arena, if
22 I can call it that?

23 A It's very difficult for me to reconstruct what
24 would have been in my mind specifically around
25 this report. It probably, though, was "talk to



1 us", it probably was one way of trying to get
2 their attention.

3 Q Did you ever have a concern -- and we'll deal with
4 this in more detail later but let's start with
5 right now -- a concern that what you were doing in
6 the media arena, and the pressures and things you
7 were doing there to put pressure on Federal
8 Justice and what you were saying through the media
9 arena, might undermine what you were trying to do
10 in the legal arena?

11 A Not at this stage.

12 Q At some stage did you?

13 A Umm, yes, I would say at the very -- there were
14 some very sensitive periods of time dealing with
15 the Larry Fisher issues, that I was quite
16 concerned, but we had -- and whatever risks
17 existed and whatever concerns we had were our own
18 fault because we had set the train on the track,
19 so to speak -- but I was very concerned around
20 that time, and I think Sergeant Pearson and I
21 commiserated a little bit about that.

22 Q And so that, I think, was May-June of 1990 when
23 Mr. Fisher's name was publicized; at that point
24 you had some concerns that what was happening in
25 the media might undermine what you were doing in



1 the legal arena?

2 A Yes.

3 Q If we can call up -- now just on this Dan Lett
4 article, would -- and I think you said this was
5 very favourable?

6 A Yes.

7 Q And so I take it you wouldn't call up Mr. Lett and
8 say "you know, on the Ferris report, the first
9 part says the sample is of no validity and it
10 really doesn't prove his innocence, you might have
11 overstated it"? I'm not saying you should have
12 but --

13 A I may have, actually, I may have. We were quite
14 candid with the journalists. That doesn't mean
15 that they would change anything in what they
16 write.

17 Q Do you recall telling Dan Lett that the Dr. Ferris
18 -- I mean you've told us here that the Dr. Ferris
19 report, I think you said, was -- the value of it
20 was that it showed that it didn't, the semen
21 didn't link David Milgaard because it was of no
22 value, but the part of his opinion that says it
23 exonerates David, I think you said, really wasn't
24 of much value because it was dependant upon the
25 sample being valid; would you have given that



1 information to Dan Lett, would you have told him
2 that?

3 A No, that's not what I said.

4 Q I'm sorry?

5 A What I said was the report is in two parts, either
6 the sample is no evidence, it's not evidence; --

7 Q Yes?

8 A -- or, if it is evidence, it excludes David.

9 Q Okay.

10 A That's what the report says.

11 Q Okay. Now you --

12 A From an advocate's perspective, when the
13 prosecution attempts to use that to inculcate
14 David, then I will use that as a sword.

15 Q And, I'm sorry, I didn't mean to misstate what you
16 had told us. Thanks for correcting that.

17 A Okay.

18 Q Would you have communicated to Dan Lett what you
19 just told me about your interpretation of Dr.
20 Ferris' report?

21 A Yes.

22 Q And to other media, as well, when you were
23 discussing the Dr. Ferris report?

24 A I would assume so, yes. I don't recall
25 specifically, but yes.



1 Q If we can then go to 002477. And this is an
2 internal memorandum from Patricia Alain to Eugene
3 Williams August 8, 1989. Now you may have
4 received this as part of the reference in 1992,
5 but I'm presuming you didn't see it prior to that.
6 Let me just go through parts of this. This is her
7 report to Eugene Williams that basically says --
8 comments upon the Dr. Ferris report, and actually
9 if we can go to the next page, sort of questioning
10 the assumption of -- that David is a non-secretor,
11 and then down at the bottom suggesting that maybe
12 a further test should be done. I'm summarizing
13 that a bit but, again, it looks as though, around
14 the time of Dan Lett's article, Eugene Williams
15 has gone to a scientist and had, internally, the
16 Dr. Ferris report reviewed; would you have been
17 aware of that or would Eugene Williams have shared
18 any of that with you, do you recall?

19 A I don't believe so, no.

20 Q If we can go to 010056. This is a letter August
21 29th, 1989 to the Minister, and this letter is
22 from you, and do you know at this point why you'd
23 be writing directly to the Minister as opposed to
24 Mr. Williams? Did anything turn on that?

25 A Umm, it may be that we were not having much luck



1 with Mr. Williams and decided to write directly to
2 the Minister.

3 Q Are you able --

4 A We just weren't hearing anything, there were long
5 periods of time where there was silence.

6 Q I take it, I think from your evidence to date --
7 and we'll go through it in a bit more detail --
8 that you had -- that your relationship with Eugene
9 Williams, are you telling us, was not a good one?

10 A No.

11 Q Is that fair? And are you --

12 A I mean it didn't start, there was no relationship,
13 I think, is the real -- is the correct answer.

14 Q Are you able to tell us at what point, or was
15 there a point in time where you concluded that the
16 relationship was bad and irreparable, or there was
17 something that happened that caused you to say
18 "lookit, we have trouble with this individual"?

19 A I think we probably suspected it pretty much all
20 along because he was just, he was -- his approach
21 was always very standoffish, curt -- you know, I'm
22 sure he'll characterize it as professional -- and
23 skeptical, all of which completely manifested
24 itself when Mr. Wolch and I went and met with the
25 Justice officials in Ottawa where we realized we



1 were pretty much in an adversarial process.

2 Q Now, that meeting, I think you said, was in
3 October, November. Was that of 1991, was that --

4 A I believe so, yes.

5 Q So that would have been after the first
6 application was rejected, the second application
7 was filed and shortly before it was sent to the
8 Supreme Court, or was it --

9 A I think it was before the first application was
10 rejected.

11 Q There may have been, and we'll see it in the
12 chronology, I think in October or November of
13 1990 --

14 A '90.

15 Q -- there may have been a meeting before --

16 A Yes.

17 Q -- Kim Campbell's letters.

18 A 1990, yes.

19 Q So this was before --

20 A Yes, and I've seen the document where we report to
21 David on that meeting.

22 Q Yes, I think it's October, November of '90, 1990.

23 A Yes, yes.

24 Q So that would be your first in-person meeting with
25 Mr. Williams; is that correct?



1 A Yes.

2 Q And at that point you are telling us that you --
3 maybe tell us again, what was it at that meeting
4 that caused you to have concerns about Mr.
5 Williams?

6 A Because Mr. Williams challenged and doubted
7 everything that we talked about.

8 Q Now, if we can go back --

9 A And, you know, and I guess it's fair to -- sorry
10 to interrupt, but I guess it's fair to do that in
11 the context of a collaborative discussion, but
12 just the physical layout of the room and the body
13 language and Mr. Williams' demeanour was very
14 adversarial.

15 Q Prior to that, and I appreciate that you had many
16 dealings with Justice over a time frame, but if we
17 go back to 1988 when you file and into 1989, was
18 there some point where you, where things maybe got
19 off on the wrong foot and started to go sideways
20 or are you able to shed any light on that? You
21 mentioned that he was curt and skeptical. What
22 was it in 1989 or in your initial dealings that
23 caused you to reach that conclusion?

24 A I guess -- and this is very subjective of course,
25 but I guess I just would have hoped that the



1 person assigned to the case would have engaged us
2 a little bit in what, what we, on our perspectives
3 and our views of the case as opposed to these, you
4 know, two-line letters that go back and forth
5 between us.

6 Q And so is it a case not what was said by him or
7 how he said it, but what wasn't said; is that what
8 you are saying?

9 A Partly, partly, and in whatever conversations we
10 had it was just, it was always very, very abrupt I
11 thought.

12 Q Okay. So at some point in 1989, is it fair to say
13 that you started to have concerns about Eugene
14 Williams and the manner in which he was handling
15 the file on behalf of the Minister of Justice?

16 A Yes.

17 Q And is it fair to say that those concerns, those
18 concerns grew over time?

19 A Yes. I believe that in the meeting -- ultimately
20 the meeting that culminated, I believe that it
21 sort of erupted in the meeting between Mr.
22 Williams and I, and Mr. MacFarlane had to calm
23 things down.

24 Q We'll deal with that when we get to that part of
25 the chronology. So again back to this letter, at



1 this point is it possible, August 29th, 1989, that
2 your relationship with Mr. Williams is such that
3 you are writing to the minister instead of Mr.
4 Williams; is that a possible explanation?

5 A Yes. I suspect this was as much a tactic to try
6 to yank the political side of the office and alert
7 them to our matter.

8 Q And did you think that Mr. Williams would
9 appreciate you writing to his minister as opposed
10 to him, was that part of your purpose in sending
11 it to the minister?

12 A I was not particularly thinking about Mr.
13 Williams' feelings at this point.

14 Q Yeah, no, and I didn't mean to say feelings. Was
15 it -- well, let me put it this way. Were you
16 trying to send a message to Mr. Williams by
17 sending this letter to the minister?

18 A Yes, probably.

19 Q Okay. And so here you send the affidavit, or it
20 looks like there has been discussions between you
21 and Mr. Williams. Would you have had any notes,
22 or other than what we have of what you and Mr.
23 Williams would have discussed, was it your habit
24 to write notes of the calls or memos to the file?

25 A Probably, yes.



1 Q And do you know where those might be, would those
2 have been left on the file when you left?

3 A I left everything when I departed the firm.

4 Q So here you are enclosing the affidavit of David
5 Milgaard, and this is August 29th, 1989. Two
6 questions, why had you not sent the affidavit
7 earlier and what caused you to send the affidavit
8 to the minister on this date?

9 A I don't know why we didn't send it earlier. I
10 believed that this was a response to Mr. Williams'
11 comment that David hadn't testified at the trial.

12 Q And so he was looking -- would you have advised
13 him by phone that David had sworn this affidavit?

14 A Probably, yes.

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

16 "It has also come to our attention that
17 there may have been reports of an
18 individual harassing or accosting nurses
19 in the vicinity where Gail Miller was
20 murdered in the days or weeks preceding
21 the murder. Our information comes from
22 Ms. Sandra Bartlett who is a researcher
23 for C.B.C. in Regina. She indicated
24 that she had reviewed the file of Mr.
25 Caldwell who of course was the



1 prosecutor in this case. Ms. Bartlett
2 advises that she saw in the file either
3 newspaper clippings or police incident
4 reports showing that various other
5 nurses had been accosted. Indeed, our
6 information is that another nurse had
7 actually been accosted by a
8 knife-welding --"

9 I think that should be wielding,

10 "-- person but that the attack was
11 interrupted when the nurses boyfriend
12 arrive on the scene. The assailant
13 apparently fled without further
14 incident."

15 Can you tell us, what was it that Ms. Bartlett
16 told you; do you remember?

17 A No, I don't recall, and this troubled me last
18 night because this may suggest that Mr.
19 Carlyle-Gordge's material relating to Fisher in
20 Mr. Caldwell's file may have come later.

21 Q Yeah, I think --

22 A Because Ms. Bartlett had obviously seen it and
23 called me and told me about it.

24 Q I think, if I may assist, based on some of the
25 evidence that we've heard, I think there was a



1 reference, the first part is that Ms. Bartlett saw
2 something, according to this, on the file of Mr.
3 Caldwell, either a newspaper clipping or a police
4 incident report, and then you say:

5 "Indeed, our information is that another
6 nurse had actually been accosted ..."

7 And the nurse's boyfriend arrived on the scene.

8 A But I think our information would -- I think that
9 would relate to what Ms. Bartlett was telling me.

10 Q I'm wondering if I can call up -- in Mr.
11 Carlyle-Gordge's notes of his review of Mr.
12 Caldwell's file there is a record of his reviewing
13 a police report of Audrey Boutin, and if I can
14 call up 009232, and this was a police report that
15 was on Mr. Caldwell's file, and it's actually
16 Audrey Odnokon was her previous name, and talks
17 about an incident, a man in an alley, started to
18 come towards her, on one occasion her boyfriend
19 was with her, the man came out, walked past her,
20 etcetera, and then in fact Mr. Carlyle-Gordge, if
21 we can call up 173869, we went through this with
22 him, he actually telephoned Audrey Boutin, who was
23 Audrey Odnokon, and got this statement about this
24 incident. Is that what -- again, if we can go
25 back to 010056, is that possibly the information



1 you were referring to in this letter?

2 A Quite possibly, yes.

3 Q Are you able to tell us from memory or anything
4 else whether it might have been something else or
5 whether --

6 A No, I can't. I don't have any other recollection
7 of that.

8 Q And then you go on to say, if you can scroll down:
9 "We have attempted to locate this
10 information by reviewing the Saskatoon
11 Star-Phoenix in the time period
12 including the weeks preceding the murder
13 of Gail Miller. Unfortunately, we are
14 either missing the items as reported or
15 they may not have been reported at all.
16 In any event, we would very much
17 appreciate your making enquiries as to
18 information that the prosecutor might
19 have had involving attacks or related
20 incidents involving nurses."

21 And again, Mr. Asper, I think yesterday we looked
22 at a couple of those newspaper articles from
23 around the time. Do you recall whether you would
24 have connected those newspaper clippings? I
25 think one was February 4, '69, right after the



1 murder, the other was December 12, '68. Now,
2 they didn't mention nurses, but --

3 A I'm really starting to doubt myself now about when
4 I actually got those clippings, but -- I looked at
5 this last night and I've got my copy of the
6 clippings with me in Toronto and I'm going to --
7 there are dates I believe written in on the top of
8 each document which should give me a clue as to
9 when I received them.

10 Q So, sorry, where did these clippings come from,
11 these would be --

12 A These are clippings, these are just photocopies of
13 a stack of clippings relating to the case.

14 Q And would those have been photocopied from your
15 legal file when you left?

16 A Yes, yes.

17 Q So they would be copies of what we would have in
18 our database from your files?

19 A Oh, yes, yes.

20 Q Okay. Perhaps that's something that we can follow
21 up on and maybe have a look at those to see if
22 they assist --

23 A Sure.

24 Q -- on the date. If we can then scroll down, you
25 say:



1 "Finally, Mr. Asper and Mr. Williams
2 were recently discussing the statement
3 provided to the police by Ms. Ute Frank.
4 This is a statement given by a witness
5 who was never called at the trial but
6 which refutes evidence given at trial to
7 the effect that Milgaard re-enacted the
8 killing some months afterward in a motel
9 room in Regina. One would think that
10 this statement combined with the
11 Affidavit of Deborah Hall that was filed
12 with our original application would tend
13 to seriously draw into question the
14 veracity of the evidence that was given
15 at trial. Aside from that issue,
16 however, we were unaware of the
17 existence of the statement of Ms. Frank
18 and would appreciate your forwarding it
19 along with any other information that
20 you may have in respect of this case at
21 your earliest convenience."

22 So would you have had a discussion with Mr.
23 Williams about the Ute Frank statement and
24 perhaps the Deborah Hall affidavit?

25 A I must have, yes.



1 Q Do you have any recollection of that? Would that
2 have been a discussion or an argument do you know?

3 A I don't recall.

4 Q Just go ahead, 163065 --

5 A It looks as though I must know what was in the --
6 or have an idea of what was in the statement.

7 Q Actually, why don't we skip ahead, if we call up
8 157019, and this is Mr. Williams' reply where he
9 encloses a copy of Ute Frank's statement, and he
10 says:

11 "Had you the benefit of reading it
12 before you wrote the Minister on August
13 29, 1989, you may have avoided
14 improperly characterizing its contents
15 in the last paragraph of page 1 of your
16 letter."

17 And so again, can you tell us, at this point, Mr.
18 Asper, were -- what was your relationship like
19 with Mr. Williams?

20 A Deteriorating.

21 Q And was there an issue then over the Ute Frank
22 statement and the discussion?

23 A Obviously, yes.

24 Q If we can go back to 163065, and here's a letter
25 to Southam News Service, Steve Bindman sending a



1 copy of the application and Dan Lett's article in
2 the *Free Press*. What would be your reason in
3 sending the application to Southam News Service?

4 A I believe that Steve had contacted Joyce and I had
5 obviously spoken with him over the telephone and
6 he was curious, I believe he was the -- he had the
7 Justice beat, the Supreme Court beat for Southam
8 News Service and he and I must have conversed over
9 the telephone and I sent this letter.

10 Q And again, would this be to try and get -- at this
11 stage would you be trying to get Southam News
12 Service to pick up the news story similar to what
13 Mr. Lett had reported on?

14 A Yes.

15 Q And would that be the reason that you would send
16 Mr. Lett's newspaper article, which was the August
17 5, 1989 article?

18 A Yes. I think the hope would probably have been
19 that Mr. Bindman, who is now with the Department
20 of Justice, to talk to Mr. Lett and just so that
21 they as journalists could discuss the background.

22 Q Was there some point, Mr. Asper, in your -- in
23 this matter where you decided or your group
24 decided to rely on the media more heavily than you
25 had initially; in other words, change your



1 strategy with respect to what role the media would
2 play in your efforts?

3 A Yes.

4 Q And when -- are you able to tell us, was there a
5 defining moment when that happened or was it a
6 gradual process? Can you give us some idea as to
7 when it changed and what caused it to change?

8 A I would have to say that, as I think I said on the
9 first day of my evidence, there was a slow
10 escalation, this was a buildup of what I would
11 call hostilities, we were clearly into the buildup
12 at this point. I don't know when, and nor could
13 we control sort of, as though it's a tap, when a
14 lot of media would occur because we were, as I
15 say, sowing seeds and providing information to a
16 lot of journalists and a lot of news services, but
17 clearly this was very much in the buildup to
18 hostilities.

19 Q So at this point are you able to tell us,
20 September 6, 1989, would you be starting down the
21 path of saying okay, we have got to get more media
22 involved and let's start to get this story out
23 there to put pressure on the Department of Justice
24 and to get the public on our side?

25 A And to try to tease out new and other witnesses.



1 Q I'm sorry, and that was the other purpose, to
2 get -- and so would this, would that be starting
3 at this point, September of 1989?

4 A I can't pinpoint it exactly, but this is probably
5 around the time. I should also say that what
6 started to concern us was that, as I say, we were
7 in this adversarial process in the dark, and in
8 the dark, so part of this wasn't just to put
9 pressure on the Department of Justice for
10 pressure's sake, it was to try to shine some light
11 on what was happening.

12 Q Was your decision to change your strategy with the
13 media and use them in a more aggressive way, if I
14 can put it that way, was that prompted by or as a
15 result of the reaction that you were getting from
16 Federal Justice?

17 A In part, yes.

18 Q And so can we look at it and say at the point you
19 started to more aggressively go to the media to
20 put pressure on Federal Justice, amongst other
21 things, would that be related to the response you
22 perceived you were getting from Federal Justice?

23 A Yes. I was extremely concerned and, as I say, I
24 can't pinpoint this, but I was very concerned
25 that, in effect, Justice was not working with us,



1 or collaboratively with us, and Justice
2 represented the instrumentality of the state and
3 we needed some ballast, we needed something else
4 on our side.

5 Q And so was it a reaction though on your part as to
6 what you perceived you were getting from Federal
7 Justice?

8 A Yes.

9 Q And so again from a timing perspective, is it fair
10 to say that once the media, the media strategy
11 started to escalate, would that be a fair
12 indicator that that might also be at the time when
13 things started to deteriorate as far as your
14 relationship with Federal Justice?

15 A Well --

16 Q Was there a cause --

17 A To be precise, I don't think there ever was a
18 relationship that could deteriorate, but -- and I
19 would -- yes, I mean, in principle, yes, your
20 characterization is correct.

21 Q And again, it may not have been an exact date, but
22 are you telling us that your decision to ramp up
23 the media exposure and to do the things that
24 you've talked about, and we'll talk a bit more
25 about that, that was in part a result of what you



1 perceived to be your relationship with Federal
2 Justice and what you thought they were doing and
3 not doing with your application?

4 A Yes.

5 Q Is that a fair way to put it?

6 A Correct.

7 Q If we can go to 225037, and here, this is a letter
8 from Sandra Bartlett to David Milgaard about
9 writing a book, so September 7, 1989, and again
10 we'll see that in the documents later on as well,
11 Mr. Asper, that there were, and in fact there were
12 a couple of books published and some movies. Can
13 you tell us -- and again we'll deal with this
14 chronologically, but just generally this appears
15 to be the first document that starts talking about
16 a book. How did that come about and what role, if
17 any, did that play, being the publishing of books
18 and movies, what role did that play in your
19 efforts to re-open the investigation?

20 A Well, initially I found it to be quite a
21 distraction because it, you know, the Milgaards
22 needed advice on literary rights and things that I
23 knew nothing about and there was also the matter
24 of who the family -- if a book was to be written
25 or a documentary produced or a movie produced, who



1 the family preferred over others in order to do
2 that work. I found it a distraction. Having said
3 that, expansive, more expansive investigative work
4 and the telling of the story and the humanizing of
5 the story was certainly an asset in our effort.

6 Q And so is it fair to characterize the publishing
7 of books and the TV documentaries and the movies,
8 would they be considered as media the same way
9 newspaper stories and news stories would be, just
10 a different type?

11 A Yes, but bearing in mind the film and the
12 documentary came after David was released, after
13 the Supreme Court.

14 Q Okay.

15 A I believe there was only one book, the Carl
16 Karp/Cecil Rosner book, that was completed and
17 published during the --

18 Q The re-opening?

19 A During the re-opening phase.

20 Q And it's my understanding that that was their
21 doing as opposed to your doing, I mean, that
22 wasn't the Milgaards' --

23 A Right.

24 Q In fact, I read somewhere that it was --

25 A They didn't like it.



1 Q I'm sorry?

2 A They did not want that done.

3 Q The Milgaards?

4 A Right.

5 Q And why not?

6 A They were not -- Karp and Rosner were not the
7 authors of choice.

8 COMMISSIONER MacCALLUM: This letter was to
9 whom, Bartlett to --

10 MR. HODSON: This is to David Milgaard I
11 believe.

12 COMMISSIONER MacCALLUM: Oh.

13 BY MR. HODSON:

14 Q Yeah. She says I spoke to David Asper, so I think
15 this is directly to David?

16 A Yes.

17 Q Yeah. If we can then go to 163066, this is
18 September 18, '89 to CTV National News to Tassie
19 Notar. Did I pronounce that right?

20 A Yes.

21 Q Producer. Is that someone who you knew or came to
22 know?

23 A I think I met her maybe once.

24 Q Yeah. And so again you send the original
25 application and as well a copy of Dan Lett's



1 Winnipeg Free Press article. Would this be the
2 same purpose in this letter as to sending the
3 information to Southam News?

4 A Yes, and again, I think that Mrs. Milgaard had met
5 Ms. Notar at this point.

6 Q And 157021, this is a letter of October 2, 1989
7 from Mr. Wolch to Mr. Williams:

8 "As you might be aware, Mr. Asper and
9 myself have been representing David
10 Milgaard for over three years.
11 Virtually from the outset of our
12 involvement, there have been a number of
13 reporters from the media who have
14 expressed interest in this case. We
15 have been able to keep them at bay for a
16 considerable period of time but lately
17 it appears that the interest in the
18 media is expanding."

19 Let me just pause there. Would that -- what was
20 your take of the media, Mr. Asper, at this point,
21 were there reporters there expressing interest in
22 the case and were you keeping them at bay or were
23 you seeking to get them to publish your story?

24 A By this point I think we had been fairly careful
25 about -- I mean, notwithstanding that we were



1 getting the information out to various reporters,
2 the information relating to the application, I
3 think we were still being pretty careful about --

4 Q Careful in what way, what were you --

5 A About rhetoric, about turning the heat up, so to
6 speak.

7 Q And let me just pause. So you were careful in not
8 wanting the media to --

9 A We didn't want to start a firestorm, and the issue
10 with the media is once you get one -- the story
11 was contained very much to Winnipeg at this point,
12 it was a very local, very local story, and at some
13 point, and you can see here based on the previous
14 correspondence that we're starting to communicate
15 with people outside of Winnipeg, but we still had,
16 I think, to the extent that you can control these
17 things, managed it as a very local story.

18 Q When you mentioned control the rhetoric, what do
19 you mean by rhetoric, what were you controlling?

20 A Well, I see I used the word preposterous in the
21 Dan Lett article, but I think the record is pretty
22 clear, as things wound on the language got more
23 colourful and more damning and that plays well in
24 the media, that's what they want.

25 Q And so just again back to this point, at this



1 stage are you saying that, October 2, 1989, you
2 were holding back a little bit from the media in
3 that you were not giving them, (a), as much
4 information as you later did, and (b), maybe not
5 as -- maybe a little less colourful at this point?

6 A Yes.

7 Q And so then the next paragraph is:

8 "In order that we might properly respond
9 to their questions (if at all) and for
10 the edification of our client, we would
11 very much appreciate your advising as to
12 the status of the application. In
13 particular, we would be very interested
14 to know whether you might have any rough
15 idea as to when a decision might be
16 made."

17 Now, in reading that, in asking Mr. Williams,
18 saying lookit, in order so we can decide how we
19 respond to the media, or if we respond, can you
20 tell us what's happening, was that an attempt to
21 him to say lookit, give us an answer or we're
22 going to go to the media? Now, this is Mr.
23 Wolch --

24 A I see Mr. Wolch wrote the letter. That may have
25 been the way he would say it, yes, that may be the



1 way Mr. Wolch would have intended Mr. Williams to
2 read that, yes.

3 Q And at your time, what was your thinking as far as
4 what should be communicated to Mr. Williams about,
5 at this stage, with the media there and how they
6 might be deployed depending on when the decision
7 comes?

8 A I was probably ready to pull the trigger much
9 faster than Mr. Wolch at this point.

10 Q And so is this letter to be construed as a
11 warning? Maybe that's the wrong word, maybe it's
12 the right word, but saying lookit, unless you tell
13 us something is going on, we have this media out
14 there and we may turn to them. Is that a fair
15 read of this or of your position at the time?

16 A Yes. It may well be, yes.

17 Q And then:

18 "Finally, and further to Mr. Asper's
19 earlier letter, we would appreciate
20 receiving copies of any documentation
21 that you have received from the original
22 prosecution file so that we might
23 respond to same if the need arises."

24 And I think the earlier letter referred to is the
25 one I think to get a copy of Ute Frank's



1 statement. Do you recall discussions with Mr.
2 Williams about getting copies of the prosecution
3 file or what was on the prosecution file?

4 A There certainly were those discussions at some
5 point. I don't know if it would have been at this
6 point.

7 Q And do you remember getting any, anything from Mr.
8 Williams from on the prosecution file?

9 A I don't recall getting anything from the
10 Department of Justice until we had the case
11 re-opened. Now, that may be wrong, but that's my
12 recollection.

13 Q I think there's the statement of Ute Frank.

14 A Right.

15 Q Which I showed you earlier.

16 A Right.

17 Q But apart from that, do you have a memory of
18 getting parts of the prosecution file from Mr.
19 Williams?

20 A No, I don't.

21 Q Do you recall him getting back to you and saying I
22 won't give it to you and here's why or some
23 explanation?

24 A No. Mr. Williams tended to use silence as his
25 answer.



1 MR. HODSON: This might be an appropriate
2 spot to break.

3 (Adjourned at 2:44 p.m.)

4 (Reconvened at 3:06 p.m.)

5 BY MR. HODSON:

6 Q If we could just go back to 163066. And this was
7 the letter to CTV National News, and I think it's
8 the same wording of the letter you sent to Southam
9 News as well, that talked about sending the
10 original application, the Dan Lett article, but it
11 also says:

12 "There has been some correspondence
13 subsequent to the filing of the
14 application and I am providing you with
15 this as well."

16 Would that be correspondence with Federal Justice
17 that you would be sending or do you know what
18 that would have referred to?

19 A I don't know, it could have, I don't recall.

20 Q What else might it be if it wasn't correspondence
21 with Justice; do you know?

22 A I don't know. It could have -- I don't know.

23 Q Okay. Go to 156668, please. This is a letter
24 October 2, 1989 to Mr. Carlyle-Gordge, and you're
25 sort of bringing him up to date on the



1 application, and here you talk about Dr. Ferris'
2 report. And it says:

3 "Basically, he concludes that the
4 evidence tendered at trial excludes
5 David is the perpetrator of the crime."

6 And was that, was that what you had thought that
7 the Ferris report did at that time, or I thought
8 you maybe said something a little different,
9 earlier, about your view of the value of the
10 Ferris opinion?

11 A I don't want to dodge it because there is a fine
12 line. The evidence at the trial, if you call it
13 evidence, excluded David.

14 Q Okay.

15 A Now that's a, that's a fine point, and I don't
16 know if I was that smart, or whether I was just
17 simply saying half of what Dr. Ferris said.

18 Q Okay. So back at the trial, and I think this is
19 what we heard from Mr. Tallis based on the
20 evidence, that the frozen semen, assuming it came
21 from the perpetrator, excluded David Milgaard?

22 A Yes.

23 Q And so here though, as far as the opinion of Dr.
24 Ferris, that his opinion -- let me back up. What
25 I thought you had said earlier about just looking



1 at Dr. Ferris' opinion, the value was number one
2 because he said, "you shouldn't rely on the
3 sample, it's contaminated", and then "therefore it
4 can't be used to link David to the crime"?

5 A Yes.

6 Q "Secondly, if you were to use it, it would exclude
7 him"?

8 A Yes.

9 Q Now we're --

10 A And the Crown used it.

11 Q Pardon me?

12 A And the Crown used it --

13 Q Yes.

14 A -- is the fine point on this language. I don't
15 know if I was that smart.

16 Q I think what we heard from Mr. Tallis was that he
17 used it and that he said "I did not want to
18 challenge the integrity of the sample, although I
19 could have, because it was favourable", so he
20 didn't raise any concerns. I think he also said
21 he thought that the judge would likely have let it
22 in.

23 So, again, were you concerned
24 that the Ferris opinion, by saying "you can't rely
25 on the sample", might actually undermine the



1 position that was put forward at trial, namely
2 that this exonerated David Milgaard?

3 A No, because -- no. In fact, I would argue that if
4 the Ferris, if we were going to use the Ferris
5 report as a sword, and if Dr. Ferris concludes
6 that the sample has no integrity, I -- and I'm
7 reconstructing here and it may never have
8 happened -- but my view certainly would be, have
9 been that it would have been a miscarriage of
10 Justice for the Crown to try to use something that
11 had no integrity to implicate somebody.

12 Q Okay. And I think what --

13 A But I don't think that was in our mind at the
14 time.

15 Q And again, just on this point, what Mr. Tallis
16 told us is that he relied upon the frozen semen to
17 exculpate his client?

18 A Yes.

19 Q And so maybe you are going at it -- your view was
20 that this frozen semen was used by the Crown to
21 convict, and Mr. Tallis at the time said no, he
22 thought it was being used by him to acquit?

23 A Yes.

24 Q And so there maybe is a different premise there.
25 In fact, I think what Mr. Tallis told us is to the



1 effect that Dr. Ferris' opinion would not have
2 helped him at trial because it would have
3 undermined the validity of the frozen semen that
4 he was using, through the evidence of Mr. Paynter,
5 to exonerate or exculpate Mr. Milgaard, and so
6 that's the question; did you ever consider that
7 Dr. Ferris' opinion might hurt the position put
8 forward at trial because what it does is it
9 questions the integrity of the very evidence that
10 Mr. Milgaard's trial counsel relied upon to
11 exculpate?

12 A I think you have to remember, Mr. Hodson, that we
13 are not, we were not in a trial at this point, we
14 were seeking extraordinary equitable relief.

15 Q Okay. So, again, I think as far as the -- and
16 we'll come back to that, I think the Ferris matter
17 gets some attention a bit later on. You then talk
18 about the:

19 "... Affidavit evidence of Deborah Hall
20 has kept the Department of Justice
21 apparently busy investigating for the
22 past nine months or so. In addition, I
23 recently discovered that the Department
24 of Justice was in possession of a
25 statement given by Ute Frank regarding



1 the alleged re-enactment of the crime in
2 a motel room in Regina. That statement
3 describes the scene in the motel room
4 and make no reference whatsoever to any
5 sort of re-enactment by David. The
6 Department of Justice claims that this
7 evidence was made available to the
8 defence at the time and I am still
9 waiting for Mr. Justice Tallis to
10 respond on that issue."

11 Did you contact Mr. Tallis, or did Mr. Wolch, on
12 the issue of Ute Frank, or do you know what this
13 is referring to?

14 A No, I don't.

15 Q And I don't, I don't recall seeing any letter.
16 Now it may be one of two things, it could be
17 simply a question "did you get Ute Frank's
18 statement", or I suppose it could be "can you tell
19 us what you knew or did about Ute Frank"; do you
20 know if either of those happened?

21 A I don't recall.

22 Q And then you go on to say:

23 "Also, the media has started to pay some
24 attention to the case. I was able to
25 persuade the Canwest Broadcasting



1 Stations (Winnipeg, Regina, Saskatoon
2 and Vancouver) to get involved. They
3 began with a general story describing
4 the fact that Dave was claiming that he
5 was wrongly convicted and was making
6 application to the Minister of Justice
7 to have the case re-opened. Shortly
8 after that story aired the Winnipeg *Free*
9 *Press* published a story which I'm
10 enclosing for your reference."

11 Just let me pause there. I think that was the
12 August 5, '89 statement, so presumably there
13 would have been a news story that ran prior to
14 that, is that a fair read of that?

15 A Looks like it, yes.

16 Q And --

17 A I suspect that would have been during the period
18 where I was away from the firm.

19 Q Okay. And then:

20 "The Canwest group ...",
21 and working with the CanWest group that ran the
22 stories?

23 A Pardon me?

24 Q And when you were away you were actually working
25 with the --



1 A Yes, yes, yes, I was absolutely trying to get our
2 stations to have the scoop, and I will point out
3 that we had it and gave it away.

4 Q Okay. It says:

5 "The Canwest group of stations then
6 aired a story telling of how David had
7 finally won a limited right to parole
8 and how he will be receiving six
9 escorted day passes over the next six
10 months. Sometime in the next couple of
11 weeks all of the Canwest stations
12 including Calgary and possibly Toronto
13 will be airing an 18 to 25 minute piece
14 on the story in the context of one of
15 their half hour public affairs programs
16 entitled 'Eyes West'. It would also
17 appear that the Southam group of papers
18 is interested in doing a story and
19 lately the CTV National News has caught
20 wind of what is happening."

21 And, again, I think the latter two, we saw
22 letters from you to Southam and CTV. Would this
23 18 to 25-minute piece on *Eyes West*, was that the
24 equivalent type of show of the *Fifth Estate*,
25 then, but on a different network?



1 A No, Mr. Hodson, we're a private broadcaster and we
2 would have had a substantially different approach
3 than the *Fifth Estate*. This would have been
4 probably a human interest. The *Eyes West* was a
5 program that we were producing as part of CRTC
6 local programming and regional programming
7 requirements under our licence, it was a, I guess
8 it was a current affairs program but it was more a
9 human interest 'what's happening across Western
10 Canada' kind of program.

11 Q And was it intended to get the public on-side with
12 David Milgaard's efforts to re-open his case?

13 A No, I -- it would be, it would have been the kind
14 of program that would not fall into, certainly,
15 anything close to advocacy.

16 Q And from this paragraph and the letter to Mr.
17 Carlyle-Gordge, does this assist you in trying to
18 identify the time frame when things started, when
19 you started to cause things to heat up in the
20 media or to be more aggressive in the media?

21 A Umm, no, I think all I'm describing here is kind
22 of the, as I keep saying, the warm and fuzzy
23 phase.

24 Q Okay, so yeah, that's maybe my question.

25 A You have to understand, Mr. Hodson, that -- and



1 Mr. Commissioner, that this -- as I say, when we
2 invited the media to pay attention to what we were
3 doing and it was a local story, it was fine, and
4 it was quite controllable. As soon as the
5 national media got hold of it this thing exploded
6 and the intensity of it, compared to what you are
7 seeing here, was incomparable.

8 Q And I'm just trying to identify, Mr. Asper, you've
9 told --

10 A This is a very calm period of time, let me tell
11 you.

12 Q Okay, no, and that's helpful. I'm trying to
13 identify at what stage the manner in which the
14 media was dealt with by you, when it changed
15 significantly, and I think you said at some point
16 there was a change?

17 A I --

18 Q And at this point we're not there yet; is that
19 fair?

20 A I think we're getting closer to it, --

21 Q We're getting close?

22 A -- but not now, yes.

23 Q And then you say:

24 "Curiously enough, the Department of
25 Justice has been utterly mute to the



1 extent that it has not responded to any
2 of my correspondence and in particular
3 my request that they disclose all of the
4 information that they have received from
5 prosecution in Saskatchewan."

6 We saw Mr. Wolch's letter of October 2, 1989, the
7 same date, making the request and referring to an
8 earlier letter -- which I don't think we have, I
9 wasn't able to find, and I could be mistaken on
10 that -- an earlier letter from you, but it
11 appears from this that you had made efforts to
12 try and get copies of the prosecution file, is
13 that right, or information, at least, that Mr.
14 Williams had received from the prosecutor?

15 A Yes.

16 Q And you say:

17 "As I am sure you can imagine, the
18 waiting game is driving everybody crazy,
19 especially David."

20 And then:

21 "A couple of weeks ago, Sandra Bartlette
22 wrote to David and asked that he give
23 Sandra permission to write a book on the
24 case. David has declined to grant this
25 permission for two reasons. First, he



1 feels an unwaivering loyalty to you and
2 would very much prefer that if a book is
3 written that it be written by you.
4 Secondly, there are lingering suspicions
5 about Sandra arising out of the whole
6 *fifth estate* incident. Both David and
7 Joyce feel very uncomfortable dealing
8 with Sandra because they simply cannot
9 predict her approach or sympathies."

10 And, again, I think you've told us about the
11 whole *Fifth Estate* thing; do you have anything to
12 add to that?

13 A No.

14 Q And then if we can go to 157023. And this is a
15 letter responding to Mr. Wolch's October 2 letter
16 and he says:

17 "For your information, I am enclosing
18 the most recent correspondence from Mr.
19 Milgaard. In it he reiterates his
20 intention to submit a presentation as
21 part of his application to the
22 Minister."

23 And then:

24 "Armed with this information it would be
25 premature to conclude our investigation



1 at this time. Further, I can only
2 advise in response to your request for a
3 status report, that the matter is being
4 pursued in a practicable manner. Once
5 the investigation and report is
6 concluded, the Minister will exercise
7 his discretion. It would be premature
8 for me to speculate on the timing of
9 these events."

10 And then it says he would be happy to discuss any
11 further submissions when Mr. Wolch is in Ottawa.
12 And, again, a couple of points here. One, Mr.
13 Williams is saying in this letter that until
14 Justice, Federal Justice gets David Milgaard or
15 the family presentation, it would be premature to
16 conclude their investigation. And again, we
17 touched on this earlier, can you tell us what
18 your response was to that or your --

19 A My response at the time probably would have been
20 frustration; my response today is thank goodness.

21 Q And why do you say that?

22 A I suspect we would have been thrown out and
23 everything that is about to happen chronologically
24 may not have happened.

25 Q And that would be the Larry Fisher information in



1 February of '90?

2 A Yes.

3 Q So, but just back at this time, did you have --
4 did you take issue with the fact that Federal
5 Justice was saying "lookit, until you complete
6 your submissions, namely this written
7 submission/video presentation from the Milgaard
8 family, we can't finish our work"; did you take
9 issue with that position?

10 A No, I -- sorry. I was frustrated, frankly, with
11 David, because David was the one pushing it and
12 David had kept writing the letters, and we were
13 trying to tell him to stop, and this is what it
14 resulted in.

15 COMMISSIONER MacCALLUM: What date is that
16 letter, please?

17 MR. HODSON: It's October 11th, if you can
18 just scroll up, October 11th, '89.

19 COMMISSIONER MacCALLUM: Thanks.

20 BY MR. HODSON:

21 Q Now do you know if Mr. Wolch met with Eugene
22 Williams as contemplated in this letter?

23 A I don't know. I don't recall. I don't think he
24 did.

25 Q Now I want to call up a document, 333314. And



1 this is a memorandum, I think from Eugene Williams
2 to Bernard Hanssen, and I think Bernard Hanssen
3 was -- had some role in the Federal Minister's
4 office at the time, and this would have been an
5 internal report about the status of matters of
6 October 16, 1989. Now I don't believe you would
7 have seen this memo before, other than maybe
8 recently if we would have given it to you, but it
9 sets out where Mr. Williams was coming from at the
10 time, at least according to this memo. And in
11 fairness, we haven't heard from Mr. Williams yet,
12 but I just want to go through a couple of points
13 in here and get your reaction or your comment.
14 He, in reporting to his, and I'm not sure if it's
15 a superior but to someone else in Justice, he
16 talks about the application but then he says:

17 "The application which raises two
18 issues, was not completed until May 1989
19 when the Department received the
20 transcript of evidence and other
21 materials required for its assessment."

22 A What's the date on this document?

23 Q It's October 16th, 1989.

24 A Okay.

25 Q And so from their perspective -- and, again, we'll



1 hear from Mr. Williams -- but according to this
2 memo they seemed to be taking the position that
3 the application wasn't filed, so to speak, or at
4 least complete until May 1989 when the transcripts
5 and documents came in. And I think, earlier, we
6 saw your memorandum and some of your notes that --
7 where you took the view that lookit, when they
8 asked for the transcripts, you thought that that
9 may have been a sign that you had crossed the
10 initial threshold, and so I'm just wondering what
11 -- whether you have any comment on what position
12 Mr. Williams seems to be taking that "lookit,
13 until May 1989, your application wasn't complete";
14 did they ever tell you that?

15 A I -- no. It bothers me that -- that -- it bothers
16 me.

17 Q Now you talked about earlier, and I'll come back
18 to that, about the cost for Mr. Milgaard to get
19 the transcripts, and is that what bothers you
20 about this, or is there something else?

21 A Yes. It bothers me that somebody who is in prison
22 applies to the Justice Minister and says "I'm
23 innocent", and the attitude seems to be "well
24 you've already got 17 years in or you've already
25 got so many years in, what's another few months",



1 and that bothers me.

2 Q You --

3 A And the idea that you could file something in
4 December, file our application in December, and
5 not have the application completed until the
6 transcripts are filed, and therefore not acted on
7 until that occurs, --

8 Q Yeah, and --

9 A -- is bureaucracy in the extreme.

10 Q And in fairness, Mr. Asper, we haven't heard from
11 Mr. Williams yet, and I will certainly be asking
12 him what steps were taken before the transcripts
13 were received, and so I just -- I'm trying to get
14 --

15 A But that's what this looks like, and that's my
16 impression.

17 Q If we go to the next page Mr. Williams writes,
18 here:

19 "To date the investigation has included
20 an examination of the trial and
21 appellate record, and an analysis of the
22 forensic reports submitted by the
23 applicant. The forensic analysis
24 performed to date reveal that there are
25 grave omissions in the submission of the



1 applicant which undermine the
2 conclusions he has reached."

3 And I think this is dealing with Dr. Ferris'
4 report. Did you -- do you recall hearing back
5 from Mr. Williams, or any response saying
6 "lookit, we don't think Dr. Ferris' opinion has
7 any value", or expressing concerns about it?

8 A No.

9 Q If we can scroll down to the bottom of the page
10 and, again, I think this is consistent with the
11 letter we saw earlier:

12 "Further, Mr. Milgaard in his September
13 15, 1989 letter has stated his intention
14 to make additional representations in
15 support of his application. To date we
16 have not received these representations.
17 In these circumstances, it is difficult
18 to predict when the investigation will
19 be finished."

20 So again, and I think we touched on this earlier
21 with the letter, that it appeared that at this
22 time Justice was saying "until we get that
23 submission from Mr. Milgaard we can't, we can't
24 finish our work", and I think you told us that
25 that was -- you understood that and you were



1 frustrated with David Milgaard; is that --

2 A A little bit, yes.

3 Q A little bit? If we can go to 01005 --

4 A Well, before you go, I mean --

5 Q I'm sorry?

6 A -- I can't let you leave that document, if I may,
7 with the paragraph above where Mr. Williams is --

8 Q Oh, I'm sorry --

9 A -- focusing on Nichol John, already, at that
10 point.

11 Q I'm sorry, just -- oh, the paragraph. Yeah, I had
12 intended to deal with her in November with the
13 transcript, but we can read -- we can deal about
14 this here. It says:

15 "We have just located a witness at
16 trial, who may have seen Milgaard begin
17 his assault on the victim. As soon as
18 arrangements can be made to interview
19 this witness, the interviews will be
20 conducted.",

21 and then it goes on to talk about conducting
22 Deborah Hall. And this is October 16, 1989, and
23 there are other documents where Mr. Williams has
24 located Nichol John, and in fact he interviews
25 her on November 7, 1989, and I'll get to that



1 when --

2 A Right.

3 Q -- we get to November. But did you -- were you
4 aware that he was going to interview, and did
5 interview, Nichol John?

6 A No, not until later, obviously.

7 Q And are you able to give us a sense of how much
8 later; are we talking months?

9 A I don't think, I don't think we knew about what
10 the Department of Justice had done with Nichol
11 John until we got to the Supreme Court, to the
12 briefings before the Supreme Court, now possibly
13 in the meeting that we had in Ottawa prior to the
14 reference being made, but it was quite some time
15 later I think.

16 Q Go to 010054.

17 A And don't, and I want to make clear, I don't fault
18 Mr. Williams for zeroing in on Nichol John. As I
19 said, Commissioner, it's human nature to go to
20 what she -- her statement.

21 Q Okay. And this is an October 18th, '89 letter to
22 Mr. Williams. You say:

23 "As you might be aware, a story aired on
24 the CTV National News on Sunday, October
25 15, 1989, which described the effort of



1 David Milgaard to have his case
2 re-opened. During the afternoon on
3 Monday, October 16, 1989, apparently in
4 response to the CTV News, Mr. Asper
5 received a telephone call from a
6 Mr. Fernley Cooney."

7 Now this letter is from Mr. Wolch, I should have
8 pointed out. It says:

9 "Mr. Cooney identified himself as a
10 member of the jury at the Milgaard
11 trial, and said that he wanted to
12 discuss the case. Mr. Asper, perhaps
13 being overly cautious, given that the
14 *Criminal Code* was not amended until
15 1972, immediately advised Mr. Cooney
16 that it may be improper, indeed illegal,
17 for him to disclose anything regarding
18 the private functioning of that jury.
19 Cooney quickly interjected that he did
20 not want to talk about the jury
21 deliberation, or anything of that
22 nature. Rather, he indicated that he
23 had not been fit to serve as a juror due
24 to a psychiatric problem. Furthermore,
25 he claimed that he had tried to



1 disqualify himself four days before the
2 trial but was told that he was required
3 to provide 10 days notice in writing.
4 Consequently, Mr. Cooney claims that he
5 was required to serve as a juror and
6 felt that he had no other choice.

7 Mr. Cooney advised that he had
8 been a psychiatric patient at University
9 Hospital in Saskatoon as well as at the
10 hospital in North Battleford. He
11 claimed that he has suffered a complete
12 mental break-down and that this had
13 affected his ability to cope with his
14 duties as a juror.

15 We are taking steps to make
16 further inquiries into this matter and
17 as more information becomes available,
18 we will advise you in due course."

19 Now would that accurately describe what happened,
20 that letter?

21 A Yes.

22 Q And what do you recall of Mr. Cooney calling you;
23 anything in addition to what's stated in the
24 letter?

25 A No.



1 Q And what, what, what did you do with this
2 information?

3 A We gave it to Mr. Williams, we passed it along to
4 the Department of Justice, and, I assume, believed
5 it would become part of what was becoming the rich
6 pageant of the cast of characters in this case.

7 Q If we could go to 159886. This is the same date,
8 October 18, 1989, an article by Dan Lett in the
9 *Winnipeg Free Press*, and talks about Fernley
10 Cooney, and if we can go to the right-hand side,
11 quotes you as saying:

12 "I don't think he got a fair
13 trial.' David Asper, Milgaard's
14 Winnipeg lawyer, said he was shocked
15 when he first learned of Cooney's
16 revelations.

17 Asper said although the
18 confession doesn't alter the facts of
19 the case, it is another example of how
20 irregular the trial and police
21 investigation were.

22 'If it's true, if all of this
23 is true, then it lends support to our
24 position that there may have been some
25 irregularities at the trial,' Asper



1 said. 'I think it supports our position
2 that this case should be re-opened.' "

3 "Asper also said that if
4 Cooney's condition had been made public
5 during the trial, he would have been
6 excused from duty and perhaps a mistrial
7 granted.

8 This is just the latest of a
9 series of bizarre disclosures
10 surrounding the trial and police
11 investigation of the *Milgaard* case,
12 Asper said."

13 Do you know how -- or did you provide the
14 information from Fernley Cooney, and his name, to
15 Dan Lett?

16 A I may have. I'm not sure. I don't recall.

17 Q Do you know if Mr. Cooney would have contacted Dan
18 Lett directly and given him this information?

19 A It's possible.

20 Q Do you think it more likely that you would have
21 phoned Mr. Lett with this information?

22 A Or Mrs. Milgaard. It -- I can't say how Dan got
23 that, I mean I may have, I may have talked to him
24 about it.

25 Q And would this type of information -- just go back



1 to the main article -- would this information,
2 would this be something you want in the public
3 domain to -- for some reason?

4 A Yes.

5 Q And what was that?

6 A Umm, this helps, this actually helps more than a
7 claim of innocence, more than asking the public to
8 conclude that David was innocent. This is the
9 kind of thing that helps the public wonder whether
10 there should be a new hearing, as opposed to
11 asking the public to conclude something far more
12 radical, i.e. that David was innocent.

13 Q And what did you mean -- and, again, I take it
14 *Bizarre disclosures*, that headline, would you have
15 the same comment about the last headline in Mr.
16 Lett's article that proves innocence; someone
17 would have --

18 A I don't know what that's referring to.

19 Q And it attributes to you:

20 "This is just the latest of a
21 series of bizarre disclosures
22 surrounding the trial and police
23 investigation of the *Milgaard* case,
24 Asper said."

25 What were the 'series of bizarre disclosures'



1 that you were referring to?

2 A I don't know. I don't know what he is referring
3 to.

4 Q And so, again back on the main page, so *'Unfit*
5 *juror convicted murderer and Guilt haunts juror*
6 *for 20 years;* would those be, I guess, headlines
7 or things that would be helpful to your cause,
8 saying to the public "something is wrong with this
9 case"?

10 A Yes, absolutely.

11 COMMISSIONER MacCALLUM: Just a minute. I
12 seem to have missed something. Does that mean
13 the unfit juror was a convicted murderer or the
14 unfit juror helped to convict a murderer?

15 BY MR. HODSON:

16 Q Actually, if I can go back --

17 A It's that an unfit juror convicted.

18 Q I think what it says here:

19 "A member of the jury that convicted
20 David Milgaard ... says he was not
21 mentally fit at the time of the trial
22 and should not have been on the panel."

23 A So that he was unfit, and convicted -- and helped
24 to convict David.

25 MR. HODSON: Actually, and it goes on --



1 COMMISSIONER MacCALLUM: "Convicted
2 murderer" it says.

3 A Yeah, it's not good language.

4 BY MR. HODSON:

5 Q And it says:

6 "As well, Fernley Cooney says he felt
7 Milgaard, who is serving time in Stony
8 Mountain Institution, was innocent, but
9 caved in to his peers because of his
10 weakened mental health."

11 And let me just go on to the next -- is that
12 something that he told you in the interview, or
13 is that something he told Mr. Lett, do you know?
14 Did Mr. Cooney tell you this?

15 A I can't recall.

16 Q If we can then go to 165287, this is a letter from
17 you to Mr. Cooney, October 20, 1989, which would
18 be two days after the article, you say:

19 "On behalf of the Milgaard family, I
20 would like to express our profound
21 gratitude for the courage you showed by
22 coming forward and discussing your role
23 in the Milgaard trial. It is
24 unfortunate that some members of the
25 media have tried to take advantage of



1 your situation and as I indicated to you
2 over the telephone, you should have no
3 concern whatsoever in telling people to
4 leave you alone. I can understand that
5 this whole matter may be quite stressful
6 for you and all I can really suggest is
7 that you put it behind you and carry on
8 with your life. You have done a great
9 service and you should be proud for what
10 you have done."

11 Did Mr. Cooney express some concern with you
12 about the fact that the media had contacted him?

13 A Oh, I think they showed up at his front door.

14 Q And how would they -- do you know how they found
15 out about him and where he lived and what he had
16 to say?

17 A I think this was, probably was after the *Free*
18 *Press* article.

19 Q Okay, let's just go back. He would have phoned
20 you and said here's who I am, here's where I live,
21 here's what I have to say?

22 A Right.

23 Q Do you know how that information would have got
24 out to the media?

25 A No.



1 Q Would it have been from you to Mr. Lett?

2 A No. I have a feeling that -- again, part of the
3 game that starts when you start to play with the
4 media is the trading of favours and the trading of
5 scoops and trying to manage who is going to get
6 information when and on what basis. This may have
7 been, the giving of this information to Dan Lett
8 may have been part of the, part of that, although
9 I'm not sure what we would have been trading at
10 the time, and once Mr. Cooney's name was out in
11 the press, I suspect the press, or the media just
12 found him.

13 Q And so let's go back to Mr. Lett. Are you telling
14 us that it was likely you who would have given Mr.
15 Lett the scoop and given Mr. Cooney's name or --

16 A Or Mrs. Milgaard, yeah, one of us.

17 Q And so one of the two of you would have given it;
18 is that your evidence?

19 A I think so, yes.

20 Q And then once Mr. Lett put it out there in the
21 public domain, other media would have picked up on
22 it?

23 A Potentially, yes.

24 Q And your letter to Mr. Cooney, is it right to read
25 this that he was not happy with the media exposure



1 he got?

2 A I don't think he was happy, I think he was very
3 unnerved by it, because to show -- and my
4 recollection was, and to show you what a hair
5 trigger it was starting to become, I think they,
6 my recollection is they really descended on him
7 and -- now, to someone not experienced, if you
8 have two cameras and microphones, that can feel
9 fairly aggressive.

10 Q Did you tell Mr. Cooney that you would be giving
11 his name and information to the media or that your
12 client Mrs. Milgaard would be?

13 A I think we -- I think he agreed to speak with Dan
14 Lett, yes.

15 Q Okay. So, sorry, let me back up. Dan Lett in his
16 article quotes him.

17 A Right.

18 Q But did you get -- did you talk to Mr. Cooney and
19 get his agreement for you to give his name and
20 information to Dan Lett in the first place?

21 A Yes. Assuming that he got to us directly, and I'm
22 not clear on that either, he may have come to us
23 through Dan Lett.

24 Q Okay. We'll have a chance to have Mr. Lett tell
25 us about that.



1 A Right.

2 Q Go to 153499, and this is your letter to
3 Mr. Tallis of October 18th, '89, you say:

4 "David has asked us to communicate with
5 you in an effort to obtain your files
6 ... if you still have them."

7 So it looks as though October 18, 1989 would have
8 been the first request from the file, at least
9 after you were involved; is that a fair reading
10 of that?

11 A Yes.

12 Q Then 163068, this is a letter to Mr. Dan Lett
13 October 18, 1989, and a letter that David Milgaard
14 sent to the Parole Board, so it appears that you
15 are sending information as well about David
16 Milgaard's parole efforts; is that correct?

17 A Yes. I'm not sure what that was about, but --

18 Q If we can then go to 220222, and we'll have to
19 turn this around a bit. This is an October 22,
20 1989 newspaper article, the headline is,
21 "Statement sparks new look at murder trial,
22 conviction."

23 "A police statement from a witness who
24 directly refuted damning testimony given
25 at the 1969 murder trial of David



1 Milgaard has been released by the
2 Federal Justice Department 20 years
3 after he was convicted.

4 Milgaard's lawyer, David Asper,
5 said the statement indicates there were
6 irregularities in the trial and police
7 investigation. It may even prove that
8 two witnesses were lying to protect
9 themselves against criminal charges laid
10 just two weeks before the trial, he
11 added.

12 "All of this confirms that
13 we're on the right track, that we have
14 some serious concerns about the
15 investigation and trial," Asper said.

16 It also raises serious
17 questions about whether two witnesses
18 who gave damning evidence at the trial
19 were lying."

20 And then it goes on to talk -- now, this is the
21 Ute Frank statement that Mr. Williams had sent to
22 you on October 2nd, 1989. Would you have
23 provided that statement and this information to
24 Dan Lett for this story?

25 A I would think so, yes.



1 Q And let's just go back to the headline again and
2 turn that around and call that up. What was
3 your -- when you got the Ute Frank statement, what
4 significance did you place on that?

5 A I assume -- I would assume that we would have
6 looked at it as corroborative of Deborah Hall.

7 Q On the basis of what's in the statement?

8 A Yes.

9 Q And so again when -- just on this first paragraph,
10 it says:

11 "... has been released by the Federal
12 Justice Department 20 years after he was
13 convicted."

14 Were you aware at this time that Mr. Tallis had
15 the statement?

16 A I don't know.

17 Q Had received the statement in 1970?

18 A I don't know. I doubt it.

19 Q And so again reading that first paragraph, is your
20 read of that that David Milgaard never had it
21 until it was released 20 years later, is that a
22 fair reading of that, or is that -- I appreciate
23 these aren't your words.

24 A That could very well be the implication, yes.

25 Q And then you say:



1 "The statement indicates there were
2 irregularities in the trial and police
3 investigation."

4 Can you tell us how Ute Frank's statement
5 indicated there were irregularities in the trial
6 and police investigation?

7 A I'm not sure I would have said that. I'm not sure
8 I said that. I probably would have referred to it
9 as corroborative of Deborah Hall, evidence that
10 was not called at the trial, that contradicted the
11 evidence of Melnyk and Lapchuk.

12 Q Okay. If we can go back to the left-hand side of
13 the column, and here you say:

14 "Asper said the statement was taken by
15 Saskatoon police in January 1970 from
16 Ute Frank, an acquaintance of Milgaard,
17 who was one of several people in the
18 hotel room in May, 1969."

19 And then if we can go over to the right-hand
20 side, flip it around again, and then talking
21 about Melnyk and Lapchuk with the heading, "Both
22 Charged":

23 "Both men came forward with the evidence
24 just two weeks before the trial -- after
25 they were arrested and charged with



1 various offences, including fraud and
2 armed robbery.

3 Milgaard denied the event ever
4 took place, but it wasn't until 1986
5 that Asper said he was able to secure an
6 affidavit from Deborah Hall ..."

7 It says Milgaard denied the event ever took
8 place. Would that -- Mr. Milgaard didn't testify
9 at trial. Do you know where -- did you give that
10 information to Mr. Lett? Do you know where he
11 would have got that?

12 A I would assume so, although Mr. Lett was also
13 speaking with David directly.

14 Q Okay. And it says:

15 "Hall swore that Milgaard did not
16 re-enact the murder, but even though
17 police knew she was in the room, she was
18 never interviewed, Asper said. Asper
19 said Hall's affidavit had no
20 corroboration until earlier this month,
21 when the Justice Department released Ute
22 Frank's statement, taken at the time as
23 those of Lapchuk and Melnyk."

24 Scroll down further:

25 "Asper said either of the statements



1 from the two women, if used at the
2 trial, could have successfully refuted
3 Lapchuk's and Melnyk's testimony, which
4 was considered very powerful and
5 persuasive.

6 Asper said he's puzzled why the
7 police would take the statement and is
8 unsure about whether Milgaard's counsel
9 even knew the statement existed."

10 And again, had you talked to Mr. Tallis about
11 that at that point?

12 A I don't believe so.

13 Q And you now know and have read Mr. Tallis'
14 evidence about what he knew about Deborah Hall and
15 Ute Frank and the statement?

16 A Yes.

17 Q And if you would have had that information at the
18 time, would you have dealt with Ute Frank's
19 statement in a different way?

20 A I'm not sure. I'm not sure.

21 Q Well, Mr. Tallis said that if you would --

22 A I heard his evidence that Ms. Frank was someone he
23 didn't want to call and as a result of what she
24 said he didn't want to find Ms. Hall, he didn't
25 want to find Ms. Hall.



1 Q I think he also said Ute Frank's version of events
2 corroborated Melnyk and Lapchuk.

3 A One version. Not her statement.

4 Q No, the version that she gave to him.

5 A Well, that's the second version.

6 Q Okay.

7 A So I'm not sure how I would have dealt with it.

8 Q Okay.

9 A I mean, it started -- it would have started to, I
10 suspect, give us a sense that nobody was
11 believable or that nobody was reliable because
12 everybody was giving multiple versions of stories
13 of the same event and we saw that with Deborah
14 Hall, although we didn't know it at the time.

15 Q But I guess the point here, that:

16 "... either of the statements from the
17 two women, if used at the trial, could
18 have successfully refuted Lapchuk's and
19 Melnyk's testimony ..."

20 And I think what Mr. Tallis has said is that
21 Deborah Hall and Ute Frank would have effectively
22 corroborated Melnyk and Lapchuk and been damaging
23 to David's case and he wouldn't have called
24 either of them and was glad they weren't called
25 by the Crown, that was Mr. Tallis' evidence



1 before the Commission, and I'm trying to --

2 A I'm not sure how he would know what Deborah Hall
3 would have said.

4 Q Well, I think his evidence was that based upon
5 what Ute Frank described in the room and what
6 Melnyk and Lapchuk described in the room and the
7 fact that Mr. Milgaard told him I can't deny that
8 that happened --

9 A Right.

10 Q -- I was there and can't deny it, I think he
11 concluded that whatever Deborah Hall had to say
12 would not be good, and when I put to him at this
13 Commission what she testified to at the Supreme
14 Court of Canada and her description of the
15 incident, he said had I known that, if I found
16 her, I wouldn't have called her, so that was sort
17 of his position on it, so -- and I'm just
18 wondering how that, if you would have had that
19 knowledge back in, the knowledge that Mr. Tallis
20 had at the time you were talking to Mr. Lett about
21 the Ute Frank statement, would that have maybe
22 caused you to deal with her statement a bit
23 differently?

24 A Probably, yes.

25 Q And in what way?



1 A We probably wouldn't have been attempting to use
2 her to corroborate Deborah Hall.

3 MR. HODSON: Okay. Mr. Commissioner, I'm
4 moving on to a different area and I think we're
5 10 minutes from four. I'm wondering if we can
6 maybe break now. Mr. Asper is going to be back
7 in April and we'll pick up at that time. We're
8 here next Monday with Ken MacKay as the witness.

9 COMMISSIONER MacCALLUM: Thank you.

10 *(Adjourned at 3:48 p.m.)*



OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
Official Queen's Bench Court Reporters for the Province of
Saskatchewan, hereby certify that the foregoing pages
contain a true and correct transcription of our shorthand
notes taken herein to the best of my knowledge, skill, and
ability.

_____, CSR

Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR

Donald G. Meyer, RPR, CSR

Official Queen's Bench Court Reporter



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