

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 141

Inquiry Proceedings



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Mr. Donald J. Sorochan, Q.C., **for** David Asper



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Transcript of Proceedings

(Reconvened at 9:01 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

MR. SOROCHAN: Mr. Commissioner, I don't know if you were going to make any rulings on things from yesterday, but before My Friend Mr. Loran continues with his cross, I thought I should make a couple of comments.

Mr. Asper is being asked to comment on the evidence of others and normally I would be objecting to that, but it has been done so frequently in this Inquiry that it would seem to be a futile objection, but he's also been asked on a number of occasions is it your position this, is it your position that, and I wanted to make it clear that insofar as this Inquiry is concerned, Mr. Asper's position will be coming through his counsel, that is, me, and there are matters that relate to the evidence that I don't believe Mr. Asper is even aware of, and before the cross-examination continues, I thought I should advise you and counsel what one of them is, because this relates to the Saskatoon Police Department and Mr. Asper is being asked to



1 comment on various aspects of the Saskatoon
2 Police Department and what his position would be
3 and this is an area he may not be familiar with,
4 and it relates to the investigation at the
5 outset, and it will be the position that is being
6 advanced by counsel for Mr. Asper that there were
7 serious flaws in that investigation right from
8 day one, flaws that could have almost instantly
9 led to identifying the correct perpetrator and
10 exonerating David Milgaard and I'll just very
11 briefly, because I don't want to waste any time
12 for my client on the stand, but I'll tell you
13 what it is.

14 There was blood of Larry Fisher
15 found on the glove of Gail Miller and, as far as
16 I can see, this is a mystery to most of the
17 people in the room, they haven't twigged on this.
18 I've been looking at the case as if I was a
19 prosecutor right from the outset looking at
20 exhibits, etcetera, and I received assistance in
21 finding material --

22 MR. LORAN: Mr. Commission, --

23 MR. SOROCHAN: -- from Mr. Hodson.

24 MR. LORAN: -- I'm not sure this is the
25 appropriate place for counsel for Mr. Asper to be



1 making submissions in that he's received standing
2 and it would appear that these are submissions
3 which will be made in due course and I guess I
4 would object to an attempt to interrupt the
5 examination by making submissions.

6 COMMISSIONER MacCALLUM: Sorry, Mr. Loran,
7 I'll hear him out.

8 MR. LORAN: Thank you.

9 MR. SOROCHAN: I'll be very brief because I
10 know My Friend might, he should know about this
11 because I'm not sure he does. There was
12 testimony by a witness that I understand will
13 come but has not yet come, and yet the material
14 is in the CaseVault, and that is an RCMP lab
15 analyst by the name of A.E. Charland and her
16 testimony at the preliminary inquiry into the
17 Larry Fisher case starts at CaseVault number
18 315822. She says -- and the trial testimony of
19 Ann Charland starts at CaseVault reference 31296
20 (sic). In essence, what happened is that she
21 tested the gloves for the first time almost 30
22 years later. They were seized at the scene and
23 put away by the Saskatoon Police Department and
24 not examined by anyone until 30 years later.
25 Thirty years later it was found to have Larry



1 Fisher's blood and Gail Miller's blood on the
2 glove.

3 Now that, I understand last
4 week Mr. Rossmo caused some excitement in this
5 room when he testified to something he had been
6 told by a forensic scientist in the United
7 Kingdom. Now, whether that proves to be true or
8 not, it was an assertion that, right from the
9 outset, the technology that was available could
10 have cleared David Milgaard and implicated Larry
11 Fisher and the debate there was, well, he didn't,
12 Mr. Rossmo and that scientist did not know about
13 the blood on the glove, they were thinking they
14 were only going to have to do a serological
15 examination of other bodily fluids, but there was
16 blood on the glove, and that stayed in the
17 Saskatoon Police Department's custody for the
18 better part of 30 years and I think when
19 suggestions are being made about what Mr. Asper's
20 position is about the investigation of the
21 Saskatoon Police Department, he doesn't know
22 about it, I don't even know if My Friend knows
23 about it, but I can give, and I will give counsel
24 separately from here the full list of all of the
25 exhibits that show what was done by the Saskatoon



1 Police Department, how they, when they did the
2 autopsy, they checked for scrapings for flesh
3 underneath the arms -- or sorry, the fingernails
4 of the deceased, but she was wearing gloves and
5 nobody checked the gloves for 30 years.

6 Thank you.

7 MR. HODSON: If I may just address those
8 points. These issues will be dealt with with
9 future witnesses, certainly we'll be hearing some
10 witnesses on the DNA and as well as a review of
11 the forensics. I'm certainly aware of what Mr.
12 Sorochan talks about and have been since the
13 start of the Inquiry. I'm not so sure, and I'm
14 not disputing him that it was blood, I wasn't
15 clear whether it was blood and/or skin, but
16 certainly it was evidence put in at Mr. Fisher's
17 trial, so certainly when we get to that stage of
18 the Inquiry, which is right near the very end, we
19 will be hearing evidence about the physical
20 exhibits, the DNA, the testing, etcetera, so
21 again, it's matters that are part of the
22 Commission database that Mr. Sorochan talks about
23 and we will hear evidence on it.

24 COMMISSIONER MacCALLUM: Okay.

25 DAVID ALLAN ASPER, continued:



1 BY MR. LORAN:

2 Q Thank you. Mr. Commissioner, I had ended
3 yesterday, you had indicated that I should listen
4 to the tapes, and I've considerably reduced the
5 portion of the tapes that I would like to have
6 played. I've indicated to the technical staff
7 what portion I would like played and it's just a
8 portion of, a smaller portion of one of the three
9 passages we referred to.

10 COMMISSIONER MacCALLUM: Okay.

11 MR. LORAN: I guess we can proceed then.

12 It is a portion of tape 102. It's commencing on
13 page 336793.

14 **(EXCERPT OF TAPE 102 PLAYED)**

15 MRS. JOYCE MILGAARD: Maureen, I need my
16 little book with Len Sawatzky's number in it.

17 *(Joyce returns to conversation)*

18 MRS. JOYCE MILGAARD: So, umm --

19 MR. DAVID ASPER: I mean, I know exactly
20 who I would love to get to go and do this, but
21 they're two -- they're active police officers in
22 Winnipeg and I don't know if they'd do it.

23 MRS. JOYCE MILGAARD: Ha. They might love
24 it.

25 MR. DAVID ASPER: Yeah.



1 MRS. JOYCE MILGAARD: Love to turn -- now
2 the other one, David, is would like to maybe turn
3 out to be a hero.

4 MR. DAVID ASPER: Well --

5 MRS. JOYCE MILGAARD: (Laughs). Well --

6 MR. DAVID ASPER: These are the two
7 smoothest guys in the whole world.

8 MRS. JOYCE MILGAARD: Uh-huh.

9 MR. DAVID ASPER: They get blood from a
10 stone.

11 MRS. JOYCE MILGAARD: Uh-huh.

12 MR. DAVID ASPER: Umm, and I have seen how
13 they operate, and they can play the game, and
14 they're smart.

15 MRS. JOYCE MILGAARD: Uh-huh.

16 MR. DAVID ASPER: They're real smart.

17 MRS. JOYCE MILGAARD: Uh-huh.

18 MR. DAVID ASPER: And they can play the
19 game any way --

20 MRS. JOYCE MILGAARD: It has to be played?

21 MR. DAVID ASPER: -- it has to be played,
22 and if you tell them what you want, they'll get
23 it.

24 MRS. JOYCE MILGAARD: Uh-huh.

25 MR. DAVID ASPER: Even if what they're



1 getting is a lie, they'll get it.

2 MRS. JOYCE MILGAARD: Oh, well, we don't
3 want that.

4 MR. DAVID ASPER: Well listen, umm, we
5 don't know that it's a lie, first of all.

6 MRS. JOYCE MILGAARD: No, but I mean --

7 MR. DAVID ASPER: But, I mean, if you get
8 Cadrain saying "umm, of course I didn't say
9 anything, I was afraid that Fisher was gonna kill
10 me", --

11 MRS. JOYCE MILGAARD: Uh-huh.

12 MR. DAVID ASPER: -- we take that down and
13 we run with it, whether it's true or not,
14 because, you know, how are we to know whether
15 it's true or not.

16 MRS. JOYCE MILGAARD: Hmm, well I think the
17 only way, we've just got to be very truthful in
18 everything. His number is 985- --

19 MR. DAVID ASPER: Yeah.

20 MRS. JOYCE MILGAARD: -- 8100. I don't
21 think we make any --

22 MR. DAVID ASPER: 8100?

23 MRS. JOYCE MILGAARD: -- yeah -- make any
24 mileage for ourself by lying.

25 MR. DAVID ASPER: No, no, I'm saying --



1 MRS. JOYCE MILGAARD: Or taking lies.

2 MR. DAVID ASPER: No, no, I'm saying if we
3 get a statement from these people --

4 MRS. JOYCE MILGAARD: Uh-huh.

5 MR. DAVID ASPER: -- we don't know whether
6 they're telling the truth or not.

7 MRS. JOYCE MILGAARD: I realize that. But,
8 you know, anyhow --

9 MR. DAVID ASPER: I mean if they say, if
10 they give us a statement denying that there was
11 any impropriety, how do we know that that's the
12 truth?

13 MRS. JOYCE MILGAARD: I see what you are
14 saying. Well --

15 MR. DAVID ASPER: You know, so you know,
16 we're not sitting as judge on these statements.
17 So that, you know, whoever we send there, we say
18 -- we tell them up front --

19 MRS. JOYCE MILGAARD: Uh-huh.

20 MR. DAVID ASPER: -- what our theory is, I
21 mean we have to because they don't know anything
22 about the case.

23 **(EXCERPT OF TAPE 102 ENDED)**

24 BY MR. LORAN:

25 Q Thank you. Can we agree that in this conversation



1 you begin by suggesting that the interviewers will
2 be given the information they want to retrieve?

3 A No, I don't agree with that. I suggest, I tell
4 Mrs. Milgaard that the people I'm recommending are
5 people who are capable of getting whatever you
6 want them to get.

7 Q Yeah. I think your words were, "If you tell them
8 what they want, they'll get it."

9 A Right.

10 Q Okay. And you follow that up with, "Even if what
11 they're getting is a lie."

12 A Right.

13 Q And then you go on to say afterwards that it's not
14 your job to decide whether the witness is telling
15 the truth or not; is that fair?

16 A Well, can I see the transcript please? I can't
17 see it on the screen.

18 Q It's page 336794.

19 A I believe the import of what I'm saying is we
20 don't know if it's a lie or not, we don't know --
21 we're not in a position to judge.

22 Q You say, "Even if what they're getting is a lie,
23 they'll get it." And I agree that later on you
24 say --

25 A No, no, not later on, the next notation, "Well



1 listen, umm, we don't know that it's a lie, first
2 of all." It's the next thing I say.

3 Q Right.

4 A We don't know if it's a lie, right?

5 Q You'll agree then that that's the way you
6 approached this?

7 A Yes.

8 Q Okay. Does this passage and the two others
9 reflect the standard that you believe should be
10 applied when taking witness statements?

11 A Under the circumstances we were dealt with, yes.

12 MR. LORAN: Thank you. Those are all the
13 questions I have.

14 MS. KNOX: Mr. Commissioner, we're not
15 ignoring your ruling yesterday as to the order of
16 witnesses, I spoke with Mr. Pringle and, as he
17 was just coming in this morning, I offered that I
18 would continue because it was part of the way
19 that Mr. Loran, Mr. Boychuk and I had planned to
20 proceed in any event. So, if it's agreeable to
21 you, I will go next.

22 COMMISSIONER MacCALLUM: All right.
23 Please?

24 BY MS. KNOX:

25 Q Mr. Asper, just while I'm getting my materials



1 organized a little bit here, and I'm going to just
2 try to be as efficient as I can and as fast as I
3 can because I do know that you have a time
4 constraint, but one of the issues that had come up
5 during the cross-examination of Mr. Henderson was
6 that the audio tape that was done of his
7 interviews with, particularly I think we were
8 looking at Ron Wilson and the Cadraings, nobody
9 appeared to be able to locate them up until the
10 time that Mr. Henderson was here. Do you have any
11 knowledge as to what became of those tapes that he
12 did of the interviews he did with Dennis Cadrain,
13 Albert Cadrain, and Ron Wilson? I may be wrong on
14 one of them, but my memory is that we can't find
15 them, or --

16 A I don't have any knowledge.

17 Q Do you know, do you recall whether they were ever
18 turned over to you, whether you actually had
19 possession of them?

20 A I can't say.

21 Q Okay. Do you have any memory -- and I know you
22 are going to get mad at me about testing your
23 memory before this session is over -- but do you
24 have any memory, as you look back in time, of
25 actually being physically at a place where you



1 were listening to the interview, where you could
2 hear Mr. Henderson's voice and you could hear the
3 voice of the young man who gave the recanting or
4 clarifying statements, whichever word is
5 appropriate, when we include Dennis Cadrain?

6 A I can't say.

7 Q Okay. Now I indicated that I am going to try to
8 be concise, and I appreciate that there is a risk
9 in trying to be concise, that I'll upset your
10 counsel, because at some point in time it may
11 appear that I am trying to stop you from answering
12 a question, and I assure you that's not my
13 intention.

14 A I'm going to work on being concise too, I promise.

15 Q This may work for both of us then. And I want to,
16 I guess the second thing that I want to say before
17 I start, in the event it's difficult in these
18 situations, as you may appreciate, both in your
19 chair and in my position as I stand here, and all
20 other counsel, to ask some of the questions that
21 we need to ask to represent the interests of our
22 clients without causing, in some, an impression
23 that we're minimizing or not taking seriously the
24 very tragic thing that happened to David Milgaard
25 in that he was wrongful convicted of a criminal



1 offence that he was innocent of, and as a
2 consequence of that he spent 20 years in jail and
3 will, for the rest of his life, pay a price for
4 that in terms of the person who he is and will
5 become, so if we can be clear that I -- anything I
6 say in terms of framing my questions, I'm very
7 aware of that, my client is very aware of that.

8 As you know, I expect, he
9 extended an apology to your client, or your former
10 client and his family, and continues to have great
11 regret to know that he played a part in a young
12 man being wrongfully convicted. So if we can sort
13 of set that out as a parameter, and both have us
14 try to keep it in mind, if I start to annoy you on
15 that point it is on the record in various forms,
16 including immediately after the DNA results became
17 known in 1987 (sic) and I presume you are aware --
18 1997, I presume you are aware of that?

19 A Well, I'm actually not aware of all that Mr.
20 Caldwell may have said, but if he has said what
21 you said he said I say let's move on.

22 Q Okay. For the record, if I could have brought up
23 document number 332039, and just if I could have
24 the first paragraph of that brought up, please.
25 You will note, sir, in accordance with what I have



1 said or I've tried to summarize, there was a press
2 conference done by my client and Mr. Kujawa on the
3 21st of July, 1997, and the first thing that they
4 said in that public setting was the first and most
5 important statement they wanted to make -- and I
6 speak particularly for my client -- is that he
7 wanted to extend his sincerest apologies to Mr.
8 Milgaard, his family, and all others directly
9 affected by the failing of the system that
10 resulted in his wrongful conviction?

11 A I don't want to be -- sound picky, but you're very
12 familiar, Ms. Knox, with a different kind of
13 statement in which -- and I -- maybe it's
14 intended. I would have preferred, and I think the
15 family would have preferred, and I think it would
16 have diffused a whole lot of animosity, had Mr.
17 Caldwell and others not simply said in general
18 that there was failings of the system, because of
19 course there was failings of the system, but to
20 accept personal responsibility --

21 Q So maybe --

22 A -- for that failing. And if it appears, as I
23 said, great.

24 Q Okay.

25 A I'm glad.



1 Q Perhaps we could bring up paragraph 2, sir, and
2 that might address why it was framed in the way it
3 was. You are aware that, at that time, that Mr.
4 Caldwell was under investigation, there were
5 allegations of collusion, --

6 A Yeah.

7 Q -- criminal conspiracy, misconduct, and many other
8 horrendous allegations made against him in a civil
9 lawsuit launched?

10 A Right, I -- okay, I understand the context now.

11 Q And would that put your mind at ease as to the
12 different situation that caused the wording of an
13 apology, given the jeopardy that he was facing --

14 A Yes.

15 Q -- at that time?

16 A Yes.

17 Q With a strong and still-contended belief, as you
18 know from reviewing his evidence, that while he
19 made mistakes and regrets those mistakes, he
20 didn't intentionally do anything wrong?

21 A I understand that, yes.

22 Q Does that allow for the difference that you
23 identify in this particular situation?

24 A Yes.

25 Q Mr. Asper, I want to move away a little bit, and



1 at various points during your testimony you've
2 talked about recognizing mistakes that you've
3 made -- and again as he has to, we all have to
4 sometimes come to the plate and know that we've
5 made mistakes whether we meant to or not -- and
6 you've talked about things that you would do
7 differently if you had to engage in this process
8 again. And as I was reviewing my notes of your
9 transcript in preparation for the questions I
10 wanted to ask you, I had noted you made a mistake
11 -- made a statement in your, in response to Mr.
12 Hodson, wherein you said that if you had to do
13 this over again the first thing that you would do
14 would be write a letter to Mr. Caldwell?

15 A I think that's fair, yes.

16 Q Okay. May I suggest to you, since you've
17 identified yourself as a student of the subject of
18 wrongful convictions, that it might be prudent to,
19 as a counsel who, as you said yourself, was bound
20 by or attempting to be in compliance with the
21 Rules of Professional Conduct, that you needed to
22 go back or others like you would need to go back a
23 step further, and before contacting Mr. Caldwell
24 it might have saved a lot of time delays, a lot of
25 misunderstandings and, indeed, a lot of wrongful



1 accusations against parties who were players in
2 this system, if you had gone back even further
3 and, indeed, you had gone back and gotten the file
4 of Gary Young who was first counsel acting with
5 Mrs. Milgaard, and perhaps the file of Tony
6 Merchant?

7 A That probably would have been prudent as well,
8 yes, I would agree.

9 Q Okay. And, if you could just bear with me, I want
10 to ask if I could have brought up document 331926.
11 I'm gonna ask to have brought out the second
12 portion of this. And for your benefit, Mr. Asper,
13 this is a memo that was contained in the file of
14 Gary Young that was obtained by the Commission. I
15 don't know if you've seen this before?

16 A I may have been shown it during the proceedings, I
17 don't recall seeing it otherwise.

18 Q What I want to draw your attention to is a
19 notation that Mr. Young made in a memo on February
20 2nd, 1981 that he had had -- and what it -- in
21 summary what he is saying and what he testified to
22 is that he had a telephone discussion with Mr.
23 Caldwell, Mr. Caldwell told him that:

24 "... he gave copies of material
25 statements to Mr. Tallis - however he is



1 prepared to go over his file with me

2 -..." ,

3 "he" being Mr. Young as counsel for Mrs.

4 Milgaard:

5 "... but will not release copies ...",
6 of statements:

7 "... to Mrs. Milgaard."

8 So you will see that as early as first approach,
9 or first formal approach by another solicitor in
10 1981, Mr. Caldwell was indicating "come, look at
11 my file, I'll give you copies of statements, my
12 reservation being that I won't give copies to the
13 mother of Mr. Milgaard"?

14 A Right.

15 Q Now sir, just on that point, would you agree with
16 me certainly in those times, and perhaps even
17 today, it would be most unusual that a Crown
18 counsel would turn over, to the mother of somebody
19 either charged with or convicted of a crime,
20 witness statements?

21 A That's true.

22 Q So what he said there would be perfectly
23 appropriate and understandable in the
24 circumstances?

25 A Oh yes.



1 Q Okay. And had you had the benefit of that would
2 you agree with me that it would have prevented
3 many unfortunate occurrences in this file,
4 including the allegation that was made in July
5 1990 that Mr. Caldwell had failed to disclose
6 witness statements to Mr. Tallis at the time of
7 trial, this certainly would have triggered you to
8 go looking and make sure you were right?

9 A Well, we were correct, we just didn't know how
10 correct, when that unfortunate incident occurred.
11 The problem is that after, after the comment was
12 made in 1990, we did come to know what wasn't
13 disclosed.

14 Q Sir, the comment that was made in 1990, or the
15 story in the newspaper was that Mr. Caldwell
16 either had failed to disclose the first statement
17 of Ron Wilson --

18 A Right.

19 Q -- or, if he had disclosed it -- although the
20 weight of the belief appeared to be that he was
21 guilty of wrongdoing -- but certainly the
22 allegation that was made very publicly and
23 repeated in various news medias many times was
24 that he appeared to have withheld the first
25 statement of Ron Wilson, which would have meant



1 that David --

2 A Well, Ms. Knox, --

3 Q -- didn't get convicted?

4 A -- I've answered that and I've said to you that my
5 belief as to the genesis of that story, I accept
6 how it was played and I accept responsibility for
7 how it was played, my belief is that the story was
8 two separate statements that got conjoined.

9 Q Uh-huh?

10 A Two separate statements.

11 Q Okay. In the interests of time, then, perhaps
12 I'll move to -- and Mr. Commissioner, in light of
13 the objection from Mr. Sorochoan yesterday, I will
14 indicate that I have asked the staff to have
15 available for playing a portion of a taped
16 conversation that took place between Mr. Asper and
17 Mrs. Milgaard immediately after this story in the
18 -- accusing Mr. Caldwell of misconduct appeared in
19 the paper in July 1990. I have the excerpt of it,
20 I provided it to the staff, and I understand they
21 have it. And I've particularly asked to have this
22 played because, when Mr. Asper was being
23 questioned by Mr. Hodson in this regard, he made
24 the request that he'd like to hear the whole tape,
25 and I'm assuming that it would be helpful to you,



1 given that we're moving along into an area that I
2 intended to get to, if you can in fact hear the
3 conversation that you had with Mrs. Milgaard after
4 this story appeared in the paper?

5 A Sure.

6 Q Okay. If I could just have a moment to get it.
7 And Mr. Asper, for the record, the newspaper story
8 is -- has a document number 004752, if you need to
9 take a look at it to refresh your memory, if we
10 could have it brought up please? And this is the
11 story by Mr. Lett, and I won't go over it in
12 detail, but essentially the headline captures the
13 essence of the allegation made against my client,
14 but within the body of the story you are -- you
15 speak, and you specifically say that Mr. Tallis --
16 and I'm looking down the middle column here,
17 starting right here -- you specifically stated in
18 that newspaper story, according to the story, that
19 Mr. Tallis made no reference to the first
20 statement in questioning at either the preliminary
21 hearing or the trial. So you were stating, as a
22 fact, certain things to not exist within either
23 transcript; you will agree with that?

24 A Yes, and I believe I have testified that I was
25 using shorthand for a technique, cross-examination



1 technique, as opposed to -- and you can ask the
2 journalist, I don't know if the journalist
3 recorded that part of the conversation, but that's
4 my recollection.

5 Q Okay. Regardless, sir, of whether you were using
6 shorthand or not, you became aware that the
7 journalist took you to be saying, and he
8 represented you to be saying that you, with your
9 knowledge -- as you had said at various points in
10 time, you had memorized the transcripts, you knew
11 them inside out -- you, on the record, were put
12 forward as stating that it had not been raised at
13 either the preliminary inquiry or at the --

14 A Had not been what?

15 Q Had not been raised by Mr. Tallis at either the
16 preliminary inquiry or the trial?

17 A I'm not sure where you see that. I believe I said
18 he didn't put it to him.

19 Q Didn't -- well I --

20 A Didn't put the statement to him.

21 Q Okay. You and I --

22 A Didn't put the statement to him.

23 Q Okay. You and I --

24 A That's shorthand for, as I've described, a
25 criticism. What I was trying to do there -- and



1 I've heard Mr. Tallis' evidence and I understand,
2 now, why -- I believe I was referring to the
3 technique where you actually take the statement
4 and put it to him --

5 Q You mean --

6 A -- and he didn't do it. Take the piece of paper,
7 show it to him, and take him through it.

8 Q So you are talking about a distinction, when I say
9 "raised" as in the subject is brought up, what you
10 are meaning is that the physical paper wasn't
11 passed in front of him?

12 A Yes. Yes. I testified to that.

13 Q Okay. I apologize, I didn't understand that to be
14 what your testimony was when you were saying it
15 was an extraordinarily unfortunate conjoining of
16 statements.

17 A I think, if you ask the journalist, I think you
18 will find that that's what I was talking about.

19 Q Okay.

20 A And it was a trial tactic, and I understand why
21 Mr. Tallis didn't do it now, and I accept it. It
22 was a -- it's a valid reason. I just would have.
23 And I believe I was referring to a more aggressive
24 approach with Wilson.

25 Q I see. But you understand how it came out in



1 respect of my client?

2 A I, absolutely, and I've accepted responsibility
3 for that very wrong interpretation.

4 Q And do you have any appreciation of the
5 consequences, for him, of that very wrong
6 interpretation by your -- what you say a reporter
7 did of what you told him?

8 A Well, I've read about it, yes.

9 Q Okay. You've read about it in the transcript of
10 his evidence at this Inquiry?

11 A Yes I have.

12 Q Some 16 years later?

13 A Yes.

14 Q Okay. You can appreciate that, for 16 years, this
15 has been hanging out there as an allegation
16 against him?

17 A Okay, Ms. Knox, --

18 Q You say inadvertently made by you but,
19 nonetheless, one that he has had to live with in
20 the public record?

21 A Ms. Knox, I gotta tell ya, I understand that's
22 unfortunate, but you have to weight that against
23 23 years that a man spent in prison being beaten
24 and degraded, and so Mr. Caldwell's feelings I
25 know are important to him, but I put them in the



1 context of what my client suffered, and I'm sorry,
2 but my client's interests and my client's
3 suffering makes yours pale.

4 Q Sir, --

5 A And I'm sorry if your client suffered, I've said
6 that, but I'm putting it in the broader context
7 here.

8 Q Sir, do you have any memory of having a discussion
9 with Mrs. Milgaard the day after this story was in
10 the paper when she expressed to you that she was
11 upset, I think in fact the recording will show the
12 term she used was that she was freaked out when
13 she read it in the paper because she remembered
14 that in fact Mr. Tallis had the statement, and she
15 pointed you to parts of the preliminary inquiry
16 transcript and trial where it was clear to her, at
17 least, that he had knowledge of the statement and
18 he'd used it in the cross-examination of Mr.
19 Wilson?

20 A Right. We have seen the transcript.

21 Q Okay.

22 A I've seen the transcript.

23 Q I wonder if we could play that tape now, please,
24 at the portions we identified this morning?

25 **(Excerpt of Tape 30 played)**



1 MR. DAVID ASPER: Hi.

2 MRS. JOYCE MILGAARD: Hi.

3 MR. DAVID ASPER: Umm, a couple things.

4 MRS. JOYCE MILGAARD: Uh-huh.

5 MR. DAVID ASPER: Let me tell you about the
6 status of the case first.

7 MRS. JOYCE MILGAARD: Okay.

8 MR. DAVID ASPER: Umm, I've played
9 telephone tag with Watson over the past couple of
10 days. As you know, Hersh is in Edmonton.

11 MRS. JOYCE MILGAARD: Uh-huh, with Tallis.

12 MR. DAVID ASPER: Tallis didn't show.

13 MRS. JOYCE MILGAARD: Really.

14 MR. DAVID ASPER: But Williams is there.

15 MRS. JOYCE MILGAARD: Really.

16 MR. DAVID ASPER: And Williams has been
17 spending a lot of time with the Head Prosecutor
18 from Saskatchewan, who's also there.

19 MRS. JOYCE MILGAARD: Uh-huh.

20 MR. DAVID ASPER: And we can speculate all
21 we want, but I, I would think that those
22 conversations must be related to how do we
23 logistically, you know, deal with this case, not
24 whether it's gonna be re-opened, but we're gonna
25 re-open now, what do we do. Okay?



1 Umm, Williams also saw Fisher,
2 and he won't tell Hersh anything about their
3 meeting, but Hersh thinks he's going back.

4 MRS. JOYCE MILGAARD: Really.

5 MR. DAVID ASPER: Which I think is a good
6 sign.

7 MRS. JOYCE MILGAARD: Hmm.

8 MR. DAVID ASPER: Umm, next thing. When I
9 told Hersh about the statements --

10 MRS. JOYCE MILGAARD: Uh-huh?

11 MR. DAVID ASPER: -- he gasped. He said "I
12 shouldn't be surprised but I, it's just amazing".

13 MRS. JOYCE MILGAARD: Okay, yeah.

14 MR. DAVID ASPER: Like, yet another thing.

15 MRS. JOYCE MILGAARD: Uh-huh.

16 MR. DAVID ASPER: Okay.

17 MRS. JOYCE MILGAARD: The only problem is,
18 according to the testimony, I think Tallis knew
19 about these statements.

20 MR. DAVID ASPER: Yes, except he never put
21 them directly to him, he does -- there is a short
22 passage where he talks about "when you first
23 spoke with the police you told them nothing
24 happened".

25 MRS. JOYCE MILGAARD: But, no, there is a



1 part there where he talked about the statement to
2 Riddell.

3 MR. DAVID ASPER: Yeah?

4 MRS. JOYCE MILGAARD: I've got the, I've
5 got page numbers for you, and I'd like you to
6 look at what I give you, okay?

7 MR. DAVID ASPER: Okay.

8 MRS. JOYCE MILGAARD: Hold on. (Pause) now
9 it may be in my being naive in the matter that I
10 don't, you know, that I am not understanding it
11 the way I should so you, you read these
12 references.

13 MR. DAVID ASPER: This is, this is trial
14 transcript; right?

15 MRS. JOYCE MILGAARD: All right. Yeah,
16 this one is trial transcript.

17 MR. DAVID ASPER: Okay.

18 MRS. JOYCE MILGAARD: Page 320 -- page 291,
19 police visits in March, Riddell is mentioned;
20 page 292, "at the time Riddell was there there
21 was no suggestion you were a suspect in
22 connection with the case, I don't believe so,
23 there might have been, I'm not aware" --

24 MR. DAVID ASPER: Correct.

25 MRS. JOYCE MILGAARD: -- "but it was at



1 that time I gave the statement to him" --

2 MR. DAVID ASPER: Uh-huh.

3 MRS. JOYCE MILGAARD: -- he says. Okay?

4 MR. DAVID ASPER: Uh-huh.

5 MRS. JOYCE MILGAARD: Then on page 324 and
6 325 --

7 MR. DAVID ASPER: Uh-huh.

8 MRS. JOYCE MILGAARD: -- and 331 and 349,
9 on page 349, this is when the jury was out and
10 the Court said that they had no recollection of
11 any specific statement.

12 MR. DAVID ASPER: That's right.

13 MRS. JOYCE MILGAARD: Yeah. And then page
14 540.

15 MR. DAVID ASPER: This is what I am saying.
16 When you have -- you see, umm, I don't know that
17 Tallis necessarily has a copy of the actual
18 statement.

19 MRS. JOYCE MILGAARD: Uh-huh.

20 MR. DAVID ASPER: Umm, very often the Crown
21 will write a letter saying that "he made a
22 statement to, umm, on such and such a date to
23 such and such an officer" --

24 MRS. JOYCE MILGAARD: Uh-huh?

25 MR. DAVID ASPER: -- "and provided no



1 useful information", or something like that.

2 MRS. JOYCE MILGAARD: Right.

3 MR. DAVID ASPER: Because let me tell you,
4 and, and I don't think you will find a lawyer who
5 will disagree with me, that when you have in your
6 hand that statement, you put it to him word for
7 word, and you show him the statement --

8 MRS. JOYCE MILGAARD: Yeah, some --

9 MR. DAVID ASPER: -- and you show it to the
10 jury.

11 MRS. JOYCE MILGAARD: Uh-huh. Uh-huh. So
12 this is like, umm, the same thing as he did
13 almost with what he said on the prelim?

14 MR. DAVID ASPER: Yeah.

15 MRS. JOYCE MILGAARD: Yeah. Well, he
16 hasn't that -- he hasn't done that, but I know in
17 the --

18 MR. DAVID ASPER: It doesn't mean that he
19 has the statement.

20 MRS. JOYCE MILGAARD: Okay.

21 MR. DAVID ASPER: All it means is that he
22 knows, umm, that a statement may have been given,
23 umm, to Riddell.

24 MRS. JOYCE MILGAARD: Uh-huh.

25 MR. DAVID ASPER: Period.



1 MRS. JOYCE MILGAARD: But wouldn't, if he
2 knew that, wouldn't he get the statement?

3 MR. DAVID ASPER: Not necessarily. Not
4 necessarily. To this day, Joyce, I have trouble,
5 I mean in this era of the Charter and acute
6 awareness of procedural fairness --

7 MRS. JOYCE MILGAARD: Uh-huh.

8 MR. DAVID ASPER: -- I still have trouble
9 getting statements from the Crown.

10 MRS. JOYCE MILGAARD: Okay. Well, there
11 was something else in here that I --

12 MR. DAVID ASPER: And in addition, in
13 addition --

14 MRS. JOYCE MILGAARD: Uh-huh?

15 MR. DAVID ASPER: -- let me just -- I mean
16 it goes beyond simply taking him through the
17 statement word for word. When Wilson testifies
18 at the trial that the car gets stuck and he and
19 David get out of the car, --

20 MRS. JOYCE MILGAARD: Uh-huh?

21 MR. DAVID ASPER: -- well, that's
22 contradictory to his first statement.

23 MRS. JOYCE MILGAARD: Entirely.

24 MR. DAVID ASPER: And he was not
25 cross-examined on that, he was -- I mean when --



1 Tallis didn't get up and say "your evidence is
2 that the car got stuck and you two were apart, is
3 that right, right".

4 MRS. JOYCE MILGAARD: Uh-huh.

5 MR. DAVID ASPER: Umm, "do you recall
6 making this statement and do you recall in that
7 statement saying that you were never apart?"

8 MRS. JOYCE MILGAARD: Right.

9 MR. DAVID ASPER: I mean those, those are
10 the red flags that tell me that he doesn't have
11 the statement, that he may have a general idea
12 that one was given and that it was a -- a -- in
13 essence a denial of any involvement.

14 MRS. JOYCE MILGAARD: But are you saying,
15 then, that it's not -- well, I don't know.

16 MR. DAVID ASPER: Because it inhibits the
17 ability of the defence to make full answer in
18 defence --

19 MRS. JOYCE MILGAARD: Uh-huh.

20 MR. DAVID ASPER: -- when you don't know
21 the details, because what you get is the Crown
22 decides the value of the statement, and editing
23 the information in the statement in a summary.

24 MRS. JOYCE MILGAARD: Okay. Here it is,
25 the one that I had in the, in the prelim, page



1 540, it's in the prelim.

2 MR. DAVID ASPER: Okay.

3 MRS. JOYCE MILGAARD: Umm, it says "and who
4 was the first policeman to -- I take it you knew
5 nothing about the murder of the girl in Saskatoon
6 on January 31st until the policeman told you
7 about it, that's right, and who was the first" --

8 MR. DAVID ASPER: Is this
9 cross-examination?

10 MRS. JOYCE MILGAARD: This is prelim page
11 540, it doesn't, on the prelim it doesn't tell
12 you --

13 MR. DAVID ASPER: Well what does it say at
14 --

15 MRS. JOYCE MILGAARD: -- ahead what it is.

16 MR. DAVID ASPER: Does it -- okay, okay.

17 MRS. JOYCE MILGAARD: I think it's
18 examined, or I think it must be, because it's
19 Tallis.

20 MR. DAVID ASPER: Okay.

21 MRS. JOYCE MILGAARD: I think it's Tallis.

22 MR. DAVID ASPER: Okay. Whatever.

23 MRS. JOYCE MILGAARD: And "Ken Walters in
24 Regina and that would be on approximately what
25 date, sometimes in March, sometime in March and I



1 take it that during the trip up to Alberta there
2 was never any mention about the murder of a girl
3 in Saskatoon, no there wasn't, so that when you
4 told Mr. Riddell that all during this trip there
5 was never any mention about the murder of a girl
6 in Saskatoon, in fact I didn't even know about
7 this murder until the police told me today you
8 were telling him the truth, were you, yes", and
9 then "I take it Mr. Riddell was the type of
10 person who was friendly and courteous with you,
11 yes he was, he literally let you tell your own
12 story, yes, and you weren't cross-examined on
13 answers and so on by him, I was when -- every
14 once in a while, every once in a while, but to
15 the best of your ability at that time you told
16 him the truth didn't you, no I didn't, you didn't
17 tell him the truth, no, just part of the truth,
18 and the part that I have referred to here was the
19 truth, yes, but you didn't tell him the complete
20 truth you say and it was later on after you've
21 told us when you think, I think on May the 22nd,
22 that you made some reference implicating David".

23 MR. DAVID ASPER: Uh-huh.

24 MRS. JOYCE MILGAARD: And that's when he
25 goes on.



1 MR. DAVID ASPER: It doesn't, it doesn't
2 mean he's got the statement.

3 MRS. JOYCE MILGAARD: And then he says
4 here, "now" -- on page 541 -- "now when you had
5 this meeting or discussion with Mr. Riddell on
6 March the 3rd I take it that before you gave him
7 any statement you told him that there was nothing
8 to hide about what had happened on the trip and,
9 and you know, and you'd be straightforward with
10 him and to the best of the ability and the jacket
11 he was wearing and, umm, what, all the rest of
12 it", and then he goes into this stuff there.

13 MR. DAVID ASPER: Yeah. No, I -- listen,
14 as I say, umm, what could very well have happened
15 is that Tallis would -- or Caldwell would tell
16 Tallis that Wilson was interviewed and gave a
17 statement in which he describes nothing
18 happening, I --

19 MRS. JOYCE MILGAARD: It's interesting,
20 it's to the RCMP that his statement of innocence
21 is, and it's the Saskatoon one that --

22 MR. DAVID ASPER: Well, because the
23 Saskatoon Police have an interest.

24 MRS. JOYCE MILGAARD: Right.

25 MR. DAVID ASPER: The RCMP, you know, are



1 *probably doing --*

2 MRS. JOYCE MILGAARD: *Just a job.*

3 MR. DAVID ASPER: *-- just a job.*

4 MRS. JOYCE MILGAARD: *A statement, yeah.*

5 MR. DAVID ASPER: *Umm, I don't, I don't, I*
6 *don't think that any of that --*

7 MRS. JOYCE MILGAARD: *Okay. Well --*

8 MR. DAVID ASPER: *Umm, --*

9 MRS. JOYCE MILGAARD: *-- that's fine, but I*
10 *--*

11 MR. DAVID ASPER: *Because, because --*

12 MRS. JOYCE MILGAARD: *-- I dug them out*
13 *because I remembered that part of it, I*
14 *remembered --*

15 MR. DAVID ASPER: *Oh, yeah, oh --*

16 MRS. JOYCE MILGAARD: *-- in there about*
17 *Riddell and his statement.*

18 MR. DAVID ASPER: *Oh yeah, oh yeah.*

19 MRS. JOYCE MILGAARD: *So when I read that*
20 *in the paper yesterday I just about freaked right*
21 *out.*

22 MR. DAVID ASPER: *No, no, I -- no, no, I --*
23 *I don't think that any of that makes it any less*
24 *clean.*

25 MRS. JOYCE MILGAARD: *Okay.*



1 MR. DAVID ASPER: Because as I say, and
2 particularly at the trial, Joyce, at the
3 preliminary inquiry you can ask any questions
4 because there is no downside, I mean you know
5 he's going to get committed to stand trial.

6 MRS. JOYCE MILGAARD: Uh-huh.

7 MR. DAVID ASPER: But when you are at the
8 trial, in front of a jury, --

9 MRS. JOYCE MILGAARD: Uh-huh.

10 MR. DAVID ASPER: -- if Cadrain -- if
11 Tallis had the statement --

12 MRS. JOYCE MILGAARD: Uh-huh.

13 MR. DAVID ASPER: -- then there's some
14 serious questions about his --

15 MRS. JOYCE MILGAARD: That the --

16 MR. DAVID ASPER: -- conduct of the
17 defence.

18 MRS. JOYCE MILGAARD: Right.

19 MR. DAVID ASPER: If he didn't have the
20 statement, then there's very, very, very grave
21 problems with the prosecution, because a summary
22 of the statement does not suffice. And I mean,
23 look, Tallis is in there theoretically fighting
24 for Dave's life.

25 MRS. JOYCE MILGAARD: Uh-huh.



1 MR. DAVID ASPER: Everything is on the
2 line.

3 MRS. JOYCE MILGAARD: Uh-huh.

4 MR. DAVID ASPER: You are telling me that
5 he would not put the contra -- Wilson's
6 contradictions to him?

7 MRS. JOYCE MILGAARD: No.

8 MR. DAVID ASPER: Come on. Come on.

9 MRS. JOYCE MILGAARD: Okay.

10 MR. DAVID ASPER: His only hope is to
11 discredit Wilson.

12 MRS. JOYCE MILGAARD: What is -- what did
13 your litigation lawyer say?

14 MR. DAVID ASPER: He hasn't reported to me
15 yet.

16 MRS. JOYCE MILGAARD: Okay.

17 MR. DAVID ASPER: Umm, they're not ..."

18 **(Excerpt of Tape 30 ended)**

19 MS. KNOX: Thank you.

20 COMMISSIONER MacCALLUM: Could you identify
21 that to me, somehow, by reference?

22 MS. KNOX: Certainly, Mr. Commissioner. It
23 is transcript that's taken from tape 30, the
24 start number on the tape is 336059, the
25 conversation with respect to -- that we just



1 played begins, I believe, at about 33106-107 and
2 it goes through to page 336116, approximately,
3 but it's within the context of that tape which
4 is, as I said, tape 30, and the date on the front
5 of that tape and the transcription we have is
6 July 1990.

7 MR. HODSON: If I might just add, the tape
8 30, the doc. ID of that actual tape is 336991,
9 that's 336991, that's the actual tape, and the
10 doc. ID of the transcript, 336054.

11 BY MS. KNOX:

12 Q Mr. Asper, that conversation continues for some
13 period of time, and for all our sakes I didn't ask
14 the staff to play it, but I can indicate to you
15 that toward the conclusion of it, at about page --
16 at about -- not at about -- at page 336135 you
17 made the statement to Mrs. Milgaard in relation to
18 this, and a number of other matters that were the
19 subject of your continuing discussion, that the
20 truth -- and the words, if I have recorded them
21 properly, is that the truth is very, very bad.
22 And I took it, from that, that you were referring
23 to the truth about what the police and prosecution
24 had done in respect of the investigation and
25 prosecution of her son, and I presume that would



1 make sense as to what you were suggesting to her,
2 that when you found out the truth or you were
3 coming to learn the truth, that you believed it to
4 be very, very bad?

5 A Probably, but I don't recall the context of that.

6 Q No. And as I said, I would have played it for
7 you, but --

8 A No, I'm --

9 Q -- it's another 16 pages, and it would have gone
10 through a lot of extraneous information to get us
11 there, we can bring up the page for you if you
12 wish to see it. But essentially it's a
13 continuation of the theme of -- and I don't want
14 to lean on or to repeat words that you used -- but
15 that you were engaged in a battle, that there were
16 enemies here, and that people had done bad things?

17 A Yes.

18 Q And that was your strong belief?

19 A Yes.

20 Q Now, I'm going to ask to have brought up document
21 number 007042 before I move off this particular
22 area. Sir, could you indicate, if you could take
23 a minute to review the substance of this, you'll
24 note it's a letter dated August 15th, 1969?

25 A Yes.



1 Q Have you seen this before today?

2 A If I have, I don't recall.

3 Q Okay. I'm going to, for the record, advise you
4 this is a letter that was contained on Mr.
5 Caldwell's file, he directed it to Mr. Tallis on
6 August 15th as I said, and you will note that in
7 it he's providing him or confirming provision of
8 copies of certain statements, including number 2,
9 R.D. Wilson March 3rd, 1969, R.D. Wilson May 23
10 and May 24, 1969 put together as one statement?

11 A Yes. There's no question now, Ms. Knox, that
12 Mr. Tallis had copies of the statements.

13 Q Would you agree with me, sir, that when you
14 received the phone call that precipitated this
15 interview that you did with the press in 1990,
16 when you received a phone call from Mr. Watson who
17 was counsel for Mr. Wilson and he told you of
18 this, that you had options that were short of
19 running immediately to the press, and I'm going to
20 suggest to you one option was that you could have
21 been in touch with Mr. Tallis. Would you agree
22 that that was an option?

23 A I'm not following the question, sorry.

24 Q When you did this press story, the chronology of
25 events that we have seems to suggest that you got



1 a call from Ken Watson. Ken Watson told you he
2 opened a package of information that had been sent
3 to him by Federal Justice in preparation for
4 Eugene Williams' interview of Ron Wilson.

5 A Okay.

6 Q Are you remembering any of this?

7 A No.

8 Q Okay.

9 A Okay.

10 Q That when he opened the package and he started to
11 go through it, he found two statements of
12 Wilson's, one from March that was an exculpatory
13 statement and then the May statement or statements
14 combined that was inculpatory.

15 A Okay.

16 Q Is any of that coming back to you?

17 A No.

18 Q Okay. Assuming for the moment that the record is
19 correct --

20 A Yes, I accept the record.

21 Q -- let's assume that the record is correct and
22 that's essentially what transpired.

23 A Right.

24 Q You had a phone call, the guy saying to you look,
25 I just got a statement from Justice and my guy



1 says that, you know, he forgot giving this
2 statement, you know, if Tallis had put this to
3 him, if this was the truth, you know, David
4 Milgaard never would have been convicted.

5 A Right.

6 Q My question to you is did you at that time have
7 choices, other than the one which you took which
8 was to go to Dan Lett, choices being to talk to
9 Mr. Tallis?

10 A Well, again, I'm just not sure how, I don't know
11 if Dan Lett called me after talking to Watson, so
12 I'm not sure you can fairly say than I ran
13 straight to Dan Lett, but it happened, so --

14 Q And I don't mean to be disrespectful.

15 A But I don't think anything turns on it.

16 Q No. I didn't mean to be disrespectful in doing it
17 that way. I think the record shows that you went
18 to him, but I'm not 100 percent certain, and it
19 doesn't matter at the end of the day.

20 A I think -- but to your point, yes, of course there
21 were other options, there were other options at
22 every step of this whole process, in hindsight.

23 Q And would you agree with me whether Mr. Watson
24 went directly to Dan Lett or you were the one who
25 turned it over to Dan Lett, that unlike Dan Lett



1 you had a higher responsibility, you had a
2 professional responsibility as a member of the bar
3 with respect to what you did and in particular
4 what you did that got reported, whether correctly
5 or incorrectly, in this newspaper article that
6 impacted on both Mr. Tallis and Mr. Caldwell?

7 A Yes, which is why, as I say, I'm quite certain
8 that the import of the story got conjoined.

9 Q Sir, and the reason, one of the reasons why I
10 played the tape is because your testimony is that
11 the import of the story got joined, but would you
12 agree with me that when you listened to that
13 conversation that you and Mrs. Milgaard had
14 immediately following, that you appeared not to
15 want to hear of the possibility that there had
16 been a, the statement had been there, she's the
17 one who's saying to you but wait a minute, I think
18 it was there because, and in fact Mr. Tallis used
19 words in his cross-examination at the preliminary
20 inquiry where he said and the part, part,
21 referring to a physical object, that I refer you
22 to was actually part of the transcription, and yet
23 knowing the transcript inside out as you said,
24 having your memory refreshed by Mrs. Milgaard and
25 I presume still having physical possession of the



1 transcript, so after you got off the phone with
2 her you could have gone and looked at them;
3 couldn't you?

4 A Right.

5 Q Do you remember whether you actually went and
6 looked at them to see maybe I made a mistake, or
7 god, I hope I didn't make a mistake, or anything
8 of that nature crossing your mind?

9 A I don't recall any of that.

10 Q Okay. Did you make any phone call to Dan Lett to
11 say to him, like, I may have made a mistake here?

12 A I may have called him after the story was
13 published.

14 Q Okay. Do you have a memory of it?

15 A I don't have a memory of it, but I may have. You
16 can ask him.

17 Q To your knowledge, given that you were following
18 this event pretty closely, did anything appear in
19 any media, anywhere, including in Mr. Lett's
20 *Winnipeg Free Press*, to say whoops, we might have
21 overstated this?

22 A No.

23 Q So whether you talked to him about it or not, you
24 don't know, but if you did, nothing was done about
25 it?



1 A That's correct.

2 Q Did you, at any point in time, do you recall
3 having a passing thought or should you have a
4 passing thought that maybe, if I made this
5 wrongful accusation here, I should try and correct
6 the record?

7 A No.

8 Q Why?

9 A I didn't believe I had made the error.

10 Q Sir, is it that you didn't believe it or you
11 didn't want to believe it?

12 A I didn't believe I made the error.

13 Q Okay. Sir, one of the tasks that I've engaged in,
14 and I presume to some extent you may have engaged
15 in over the last number of days, is reviewing many
16 conversations that were recorded by Mrs. Milgaard,
17 and what's --

18 A To be honest, I've not had the time to do it.

19 Q And I haven't had time to finish them, so I'm not
20 fully up on them either, but what becomes
21 apparent, unfortunately, after Mrs. Milgaard's
22 conversation with you, and I can provide
23 references at a later point if they are needed, it
24 was just too overwhelming to get them all
25 organized, but what becomes apparent after the



1 conversation with you, I suggest to you, is Mrs.
2 Milgaard set aside her own reservations and she
3 started telling the press that Mr. Caldwell was
4 guilty of misconduct, that he had withheld the
5 statement. Did you have any appreciation that
6 that might be a consequence of your persuading her
7 out of her concern that a wrong had been
8 perpetrated in the media here?

9 A Ms. Knox, I can tell you that from the day I met
10 Mrs. Milgaard, she was of the view that some kind
11 of misconduct must have occurred that would have
12 led to her son's conviction.

13 Q But, sir --

14 A So if this encouraged that view or revived it,
15 it's possible.

16 Q Mr. Asper, as a master of language, may I suggest
17 to you, to say that it "revived it" understates
18 what happened here. What you took and identified
19 for her as your client was a specific act that you
20 imputed to my client that you described as
21 professional misconduct didn't you?

22 A I described it, my recollection, is that if it
23 occurred, it would be professional misconduct, and
24 I believe that's true.

25 Q Okay. But basically what you did, instead of sort



1 of maybe, what about, ifs, it must have happened,
2 you gave her, and she repeated many times, and she
3 will be cross-examined on that undoubtedly, but
4 she repeated many times that this was an
5 indication, a proof -- not an indication, but
6 proof that she was right all along and that people
7 had set out to wrongfully convict her son?

8 A Well, Ms. Knox, I take the telephone conversation
9 to be critical of the manner of cross-examination,
10 I take that conversation to be a discussion about
11 the way Wilson was cross-examined as much as it
12 was anything else.

13 Q Okay. Would you appreciate, if you can step back
14 a little bit from the fact that you were the
15 second person in the conversation, that third
16 parties looking at it might not draw from it what
17 you say you take from it?

18 A I can accept that, sure.

19 Q Mr. Asper, I'm going to move to another area, and
20 I apologize, I'll probably give you quite a
21 headache because you and I are going to be all
22 over the board with this unfortunately. I've
23 asked you, and I started by asking you whether
24 instead of starting with -- the first thing you
25 would do, being send a letter to Mr. Caldwell,



1 whether you would agree with me that it might have
2 been helpful, indeed not might have been, it would
3 have been extremely helpful to you as a lawyer,
4 vested with responsibility to carry some part of
5 this case, to have had Mr. Young's file because it
6 would have given you a perspective of the attitude
7 of the Crown independent of what you may have been
8 getting from Mrs. Milgaard which understandably
9 was that somebody had to have done something wrong
10 here because my son is not guilty and he's in jail
11 for murder?

12 A Yes.

13 Q Mr. Young would have given you a little bit of
14 separation from the emotion of a mother and
15 perhaps the paranoia that I believe she has self
16 ascribed in her circumstances?

17 A I think that's true, yes.

18 Q And had you gone a step further and gotten the
19 file of Mr. Merchant, whatever the issues may have
20 been with Mr. Merchant ultimately that have been
21 canvassed in a book and in this Inquiry and in
22 other places, it might as well have helped you get
23 some other information that wasn't coming from the
24 mouth of an emotionally distressed, understandably
25 emotionally distressed mom?



1 A Okay, I'm going to confine myself to the answer.
2 Yes.

3 Q Okay. Then if I could move you to another area,
4 and I'm trying to do a step through events
5 preceding your involvement, we had the Gary Young
6 file that was available, we had the Tony Merchant
7 file that was available, for what use if any it
8 may have provided, but as a prudent practice as a
9 solicitor taking over a new file to get a release
10 from the client and get the previous counsel's
11 file is usually quite, one of the first, second
12 things you do; would you agree?

13 A Yes.

14 Q Okay. Then intervening or coming along in this
15 package of events that were unfolding, we had the
16 arrival of Peter Carlyle-Gordge and you were aware
17 of his involvement in the file, the assistance
18 that he provided to Mrs. Milgaard?

19 A Yes.

20 Q Okay. And, sir, in reviewing the material that's
21 available to us, and I struggled with it a bit,
22 and I don't want to be unfair to you, I want to
23 first start by asking you what you remember, if
24 you remember anything of the material that you
25 personally received from Mr. Carlyle-Gordge or



1 from Mrs. Joyce Milgaard that had been generated
2 by Mr. Carlyle-Gordge and shared with her?

3 A Well, this is where I get confused as to what we
4 received and when. My recollection is that we
5 received some material initially in March of 1986
6 and then other material came at later points, I
7 think up to and including the reference, and I
8 just don't know, I don't recall what came when.

9 Q Okay.

10 A I think Mr. Carlyle-Gordge had gone to England
11 with all his material and I just don't recall.

12 Q Do you have a memory of receiving through your
13 office materials of Mr. Carlyle-Gordge's that had
14 been in the possession of the *Fifth Estate* in
15 Toronto, a Gordon Stewart?

16 A Yes, that rings a bell.

17 Q And I indicate to you that this correspondence in
18 the files that Mr. Stewart wrote in 1986, I think
19 around April, saying that, and this was in
20 response to a direction given by Mr.

21 Carlyle-Gordge from England, that because he was
22 away it would be easier to get his transcripts
23 from the *Fifth Estate* because he turned them over
24 to them?

25 A Sounds familiar.



1 Q And I can pull up documents if you want.

2 A I accept it. I did have dealings with the *Fifth*
3 *Estate*, so I accept that.

4 Q But essentially there's documentation in the file
5 to suggest that transcripts done by Mr.
6 Carlyle-Gordge were made available through the
7 *Fifth Estate*.

8 COMMISSIONER MacCALLUM: Do you have the
9 doc. ID?

10 MS. KNOX: I will pull it up for you, I
11 have it with me, Mr. Commissioner, I just have to
12 find the right file. Mr. Commissioner, if you
13 could bear with me, I'll get it for you, I do
14 have it physically with me, it's just that my
15 materials aren't as organized as I would like
16 them to be.

17 COMMISSIONER MacCALLUM: All right.

18 BY MS. KNOX:

19 Q Sir, in respect of that we have, through the
20 Commission, a number of transcriptions of
21 interviews that Mr. Carlyle-Gordge did with Albert
22 Cadrain, with Leonard Cadrain, Estelle Cadrain,
23 Father Murphy, Ray Mackie and Mr. Caldwell of
24 course, among others, and all of them appeared to
25 be part of the file materials that were either in



1 Mrs. Milgaard's possession or in the possession of
2 you, and by you I mean your firm. Do you have any
3 memory at this point in time of whether all of
4 those transcripts would have been received back
5 from Gordon Stewart at the *Fifth Estate* in 1986?

6 A No, I don't recall.

7 Q Okay.

8 A We must have -- I just -- no, I don't recall what
9 we got from them.

10 Q Okay. And, sir, additional to those transcripts,
11 Mr. Carlyle-Gordge had done a recording or he had
12 done a dictation of material that he was reading
13 on Mr. Caldwell's file. Do you remember receiving
14 that or reviewing that dictation?

15 A At some point, yes.

16 Q You don't know when you did that dictation?

17 A No.

18 Q Additionally, Mr. Carlyle-Gordge had been provided
19 with not the court transcription, but Mr.
20 Caldwell's transcription of his opening and
21 closing addresses to the jury and there's, you
22 know, there's certainly documentary evidence that
23 that was in your file. Do you recall reviewing
24 those in the early stages?

25 A Yes, I assume I must have in order to recreate for



1 myself the Crown's theory at the trial. I must
2 have had one of the two.

3 Q Mr. Commissioner, I'm going to refer just to, and
4 I will get all these documents together, but if we
5 could bring up document number 332045, and you'll
6 see that this is a letter directed to Mr. Caldwell
7 by Peter Carlyle-Gordge on February 22nd, 1980, it
8 doesn't have the date on it, I think it's 1983,
9 somebody can correct me on that, but in any event,
10 if you bring out -- have you see this before?
11 Let's start there.

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

13 Q Let's bring out the first paragraph so it's
14 readable. You'll see that this is a letter
15 expressing appreciation to Mr. Caldwell for having
16 spent time with Mr. Carlyle-Gordge the previous
17 weekend and we know from the evidence that he went
18 into the office on a weekend, he made his file
19 available to Mr. Carlyle-Gordge, he left him to go
20 through it at will and this letter indicates that
21 obviously he was unable to get all the work he
22 wanted to do complete and they are making cordial
23 arrangements for him to return to continue his
24 review of the file?

25 A Right.



1 Q Okay. And if we could go to page 2, please,
2 you'll see documented at the bottom of the file in
3 handwriting that the record will show, or has --
4 will show, and which I presume you'll accept, is
5 the handwriting of Mr. Caldwell, that on the 25th
6 of February, 1983 he sent his opening and closing
7 address to Mr. Carlyle-Gordge as he requested as
8 well as copies of the plans, or street areas I
9 think he's referring to by plans, where these
10 events occurred, or were believed to have
11 occurred, okay. So clearly that was in the
12 possession of you, or available to you I should
13 say, through the offices of Mr. Carlyle-Gordge
14 and/or Mrs. Milgaard when you became involved in
15 the file in 1986?

16 A Yes.

17 Q Do you have any memory of at what point in time
18 you would have reviewed this documentation?

19 A Well, as I say, at some point early on in the
20 process I came to Saskatoon with stopwatch and all
21 and tried to reenactment the Avenue O and the
22 Avenue N theories, so I assume I must have had
23 something, either the opening or the closing,
24 fairly early on.

25 Q But it was available to you, whether you read one



1 or both, certainly you think you had to read some
2 of it?

3 A I think so, yes.

4 Q In order to be over doing the walk-through that
5 you were attempting?

6 A Right.

7 Q Sir, without getting into a lot of detail of
8 everything that was involved in that, do you
9 recall indicating to Mrs. Milgaard in a
10 conversation with her, and if you want I can bring
11 up the tape to show you, but there was, and Mr.
12 Hodson put this to you last week, that you
13 indicated to her that you hadn't looked at the
14 closing address, you had only looked at the
15 opening address and in your view the closing
16 wasn't important?

17 A I don't recall that.

18 Q Okay.

19 COMMISSIONER MacCALLUM: You only looked at
20 which one?

21 A I don't recall that being put to me.

22 COMMISSIONER MacCALLUM: Ms. Knox, he only
23 looked at the opening was --

24 MS. KNOX: The opening was how I understood
25 it.



1 A I don't recall giving that evidence.

2 BY MS. KNOX:

3 Q Okay. If you'll bear with me.

4 A I would have thought I would have said the
5 reverse, or the inverse.

6 Q If we can go to transcript page number 27074,
7 actually if I could start on 27073.
8 Mr. Commissioner, this is transcript from April
9 19th, 2006, if we could bring it up from line 15.
10 These are questions that Mr. Hodson is asking you
11 and he's talking about a telephone transcription
12 of a conversation between you and Mrs. Milgaard,
13 which I can also give the document ID number for,
14 and he's saying to you that Mrs. Milgaard asked
15 you about Mr. Caldwell's closing, he thinks this
16 was around September of 1990 shortly after a *Fifth*
17 *Estate* documentary had been aired, and if we could
18 go to the next page, please, and you answer okay,
19 and Mr. Hodson's question, it looks like around
20 this time a discussion about Mr. Caldwell's
21 closing address and it looks like at that time you
22 indicated you don't have it, is that correct, and
23 your answer is it looks like that, yes. And then
24 at the next page he's quoting from the telephone
25 conversation or the telephone recording, you



1 saying it doesn't really matter what he said in
2 the closing, what matters is what he said in the
3 opening?

4 A I see that, yes.

5 Q Okay. Now, sir, to assist you in that, if we
6 could bring up the conversation transcripts, the
7 first would be at page 337127, and I believe the
8 beginning number of that document ID is 337105.
9 You see that what is recorded here is a
10 conversation between yourself and Mrs. Milgaard,
11 if we accept that the staff have got this right
12 when they did the transcription. Perhaps I
13 brought up the wrong one. Just bear with me a
14 moment, I didn't highlight this particular one.

15 My apologies, Mr. Commissioner,
16 the one that I needed in that regard is 33 -- the
17 pages I needed, it's from the same document, it's
18 337131, and again, I'm not taking you right back,
19 but you can see JM, DA is always used by the
20 transcription staff to indicate yourself and Mrs.
21 Milgaard, and if we could go further down the
22 page, please, starting right here, you'll see
23 after some lengthy discussion between yourself and
24 Mrs. Milgaard she asks the question:

25 "What about in his closing address."



1 And your response is:

2 "Well I don't have that."

3 And then your answer is, or her answer is:

4 "Well we did."

5 You indicate:

6 "All we've got are his rough notes."

7 She says:

8 "That wasn't his rough notes. That's
9 what he had in his file. That's what he
10 addressed from."

11 And your response:

12 "Are you sure. Because it..that... it
13 was on big paper, it was on a big
14 photocopy paper."

15 And Mrs. Milgaard, she says:

16 "Yeah and he even had his own notes
17 written in it."

18 And then you indicate:

19 "Yeah, I know."

20 If we go to the next page, please, and then
21 there's the reference to he told Peter that,
22 presumably referring to Mr. Carlyle-Gordge, who
23 he had given his own original notes and
24 transcription to, or a copy of his original
25 notes, and you see here you say:



1 "... well, it doesn't really matter what
2 he said in closing. What matters is
3 what he says in the opening. I mean he
4 may change his theory halfway through
5 the trial because of what he sees with
6 the evidence."

7 And Mrs. Milgaard says to you:

8 "Well there's lots in the closing too if
9 you wanna look at it."

10 A Yes, I see that.

11 Q Now, sir, are you aware now, and I don't know that
12 after that you went and actually read the closing
13 address, are you aware now of some significance in
14 terms of the opinions of individuals such as Dr.
15 Ferris is that in his closing address what Mr.
16 Caldwell said to the jury about the forensic
17 evidence, and in particular the secretor evidence,
18 was that it neither exculpated or inculpated Mr.
19 Milgaard?

20 A I'm aware of that, yes.

21 Q Sir, do you know now, and having gone through
22 these various documents with you, do you know now
23 whether you were aware of that then back before
24 the Supreme Court of Canada reference?

25 A Well, it appears I would be, yes.



1 Q Assuming for the moment that you were, can you
2 give us any reason or any explanation for why the
3 opening and closing -- the opening remarks and the
4 closing address done by Mr. Caldwell in particular
5 were not forwarded to Dr. Ferris, Dr. Markesteyn
6 when you were asking their opinion on the forensic
7 evidence at the trial?

8 A Well, it appears that I wasn't aware that the
9 rough notes was the actual closing.

10 Q Okay. Sir, in terms of the material that you had
11 in front of you, given that it was, you knew it to
12 be material from Mr. Caldwell's file, did it
13 matter that you didn't have a certainty of what it
14 was?

15 A I'm not sure I understand your question.

16 Q Did it matter -- it was clear on the face of it, I
17 suggest to you, that one document, one large
18 document that you refer to that was photocopied
19 was identified as his opening remarks?

20 A Right.

21 Q And it was also clear on the second of those
22 documents, and I can have them brought up if you
23 wish, in his handwriting that the second one was
24 his closing address?

25 A I assume that that's the case, but it looks to me



1 from this conversation that I wasn't, I didn't
2 understand that that was his actual closing.

3 Q Sir --

4 A That's what it looks like from this conversation.

5 Q Mrs. Milgaard obviously understood it?

6 A She was there. I wasn't at the trial.

7 Q No, no, Mrs. Milgaard was able to give you a
8 description of the document, including the fact
9 that it had on it --

10 A And she was able to describe that he read from it,
11 she would describe the document.

12 Q And she also described, didn't she, that it even
13 had his notes in handwriting on the typed text
14 that he had given to Mr. Carlyle-Gordge?

15 A That's correct.

16 Q It was his handwritten note?

17 A That's correct.

18 Q They're not passing me crib notes, they're giving
19 me document numbers that I said I would find for
20 the Commissioner, so I appreciate the assistance.

21 A I'm well accustomed to the team that I face and
22 have faced.

23 Q Sir, I will pull up the original of those
24 documents, I do have them here, the actual copies
25 here on my file, and we'll get to it but,



1 Mr. Commissioner, with the assistance of Mr.
2 Boychuk, if I could go back for a moment. I
3 referred Mr. Asper to a letter with respect to the
4 Carlyle-Gordge materials which we're still looking
5 at from Gordon Stewart. The document number is
6 218627, if we could have that brought up, please,
7 and it's a letter dated, as you can see, April
8 21st, 1986, no doubt who it's from. If we
9 could -- although it's not difficult to read it,
10 if we could bring the body of it up closer,
11 please. You see that Mr. Stewart forwarded
12 transcripts mostly of telephone conversations
13 between Mr. Carlyle-Gordge, a journalist, and
14 witnesses who gave evidence at the murder trial.
15 He indicated trial transcript being sent to you
16 separately by our researcher in Regina, Ms. Sandra
17 Bartlett, who will be contacting you should you
18 find grounds for a new trial.

19 A That's correct.

20 Q So does this confirm your sentence when I asked
21 you that you had in fact had correspondence from
22 Mr. Stewart of the *Fifth Estate*?

23 A Sure, yes.

24 Q If we could then bring up document number 162432.
25 Now, keeping in mind that that letter from



1 Mr. Stewart was April 21st, 1986, you'll note this
2 one is dated June 5th, 1986?

3 A Yes.

4 Q And it's directed to Mr. Peter Carlyle-Gordge in
5 England, and if we could bring up this part of it,
6 please. I'm bringing it up so that you can have
7 an opportunity to review it to refresh your memory
8 before I ask you the question that I intend to
9 ask.

10 A Right.

11 Q And perhaps if we could bring up the next
12 paragraph for you to look at as well, please.

13 A All right.

14 Q And if you wish to look at the next one, you
15 certainly can, for the fullness of the matter.

16 A All right.

17 Q Okay. Now, sir, if we could go back to the first
18 paragraph, please, the particular part that I
19 wanted to direct your attention to is you were,
20 you indicated to him that you were wading, you
21 were beginning to wade through trial transcript,
22 which the letter from Mr. Stewart indicated was
23 being forwarded to you, if you didn't have it
24 already, and I think you did, as well you were
25 reading transcripts that he had conducted with



1 several, of the interviews he conducted with
2 several key witnesses?

3 A That's correct.

4 Q This is 1986?

5 A Yup.

6 Q Okay, thank you. Now, with respect to the
7 transcripts that you were wading through, I have a
8 list of document numbers, if you want any one of
9 them brought up I will have them brought up for
10 you, but the transcripts that I have recorded as
11 Mr. Carlyle-Gordge's interviews is an interview
12 that he did with Mr. Leslie, and this has been
13 referred to previously, Mr. Leslie, Mr. Merchant,
14 Mrs. Milgaard and Nichol John?

15 A That's correct.

16 Q He was present at and recorded document number
17 048643, and do you have any memory now, and I know
18 you referred to it yesterday, of whether as part
19 of this review that you were doing in 1986, that
20 you gave Mr. Carlyle-Gordge indication of --
21 Nichol John's was one of the transcripts that you
22 looked at, and I should say to you that I think
23 what we're bringing up now when we bring up these
24 documents are versions done by the Commission, in
25 their original form they may have looked somewhat



1 different in typing style.

2 A Yes, I -- Ms. Knox, and I know you are going to
3 ask about all of them, and I don't recall exactly
4 if I got all of them, but in their original form I
5 recall seeing notes and transcripts, yes, in their
6 original form, --

7 Q Okay.

8 A -- so I don't recognize this document
9 specifically.

10 Q Okay. The document number, Mr. Commissioner, for
11 ease of reference in transcript, the transcription
12 for Albert Cadrain is 048447. And I'll accept
13 that you don't know if you saw it, but it is a
14 transcription of Mr. Carlyle-Gordge's interview,
15 and again that was referred to you yesterday; with
16 respect to other persons that he contacted,
17 Leonard Cadrain, there is a document number
18 325504; memory of that one at all?

19 A I don't recall Leonard Cadrain, no.

20 Q Okay. The next one, document number 048529, this
21 would be a conversation between Mr. Carlyle-Gordge
22 and Father Murphy?

23 A Don't recall that.

24 Q You recall though, I presume, that Father Murphy
25 became of some significance in the case because,



1 at a certain point in time, Mrs. Milgaard
2 certainly put forth the view that Father Murphy
3 had been used by the police to get Albert Cadrain
4 to go in and give his original statement?

5 A I don't recall that.

6 Q Okay. Then I -- I'll -- if the record indicates
7 that you have no memory of it?

8 A I have no memory of that one.

9 Q You don't have a memory of a newspaper story done
10 where it was said that Albert Cadrain came forward
11 to get the reward and there was various documents
12 that said that a priest was used by the police to
13 get him in?

14 A No I don't.

15 Q You don't remember discussions about whether a
16 police officer had set Father Murphy up and used
17 him to help them orchestrate a conspiracy,
18 collusion?

19 A No I don't.

20 Q Okay. Sir, there are other, the other Peter
21 Carlyle-Gordge witnesses -- or, sorry,
22 interviews -- Dennis Cadrain -- and I'm sorry, I
23 didn't copy down the document number on my sheet
24 that I have in front of me, I didn't do them
25 alphabetically in my files either -- but in any



1 event we've reviewed the Dennis Cadrain transcript
2 here at this Inquiry, and have you reviewed it in
3 your preparation for the giving of evidence at the
4 Inquiry?

5 A No.

6 Q Okay. You would not be aware then, at this point
7 in time, whether you knew it in the past, that in
8 his interview of Mr. Cadrain Peter Carlyle-Gordge
9 questioned him, as he did Albert Cadrain, about
10 the presence of Larry Fisher in their basement?

11 A I'm not aware of that.

12 Q Okay. But that -- and I don't want to provoke the
13 response that Mr. Boychuk provoked yesterday by
14 causing you to think I'm saying or I'm implying
15 that you should have known, somehow, that Larry
16 Fisher was the perpetrator because this
17 information was available, but if -- if you did,
18 in fact, review the file in its entirety, the
19 transcript, you may have read that, and as
20 Mr. Boychuk said yesterday, just not made a
21 connection, because there was no reason why you
22 should have I hasten to point out, but certainly
23 it was information that was available in the file?

24 A That's correct.

25 Q Okay. Sir, on that point, in the Peter



1 Carlyle-Gordge materials there were a series of
2 documents and correspondence that have been
3 identified at this Inquiry that show efforts being
4 made by Mr. Carlyle-Gordge after he did his review
5 of Mr. Caldwell's file, after he had contact with
6 Larry -- sorry -- with Dennis Cadrain, Albert
7 Cadrain, and I believe Estelle Cadrain as well he
8 questioned about Larry Fisher, about efforts made
9 by him to locate Linda Fisher?

10 A I recall that.

11 Q You are aware that there was a newspaper ad placed
12 by him asking anybody knowing her whereabouts to
13 be in touch with him?

14 A I believe I was shown that at the Inquiry, yes.

15 Q Yes. And, as well, that there were responses to
16 that information coming at -- identifying, in
17 fact, where she was found in 1990, that she was
18 living in Cando, Saskatchewan?

19 A Right.

20 Q When you received the file materials and when you
21 were reviewing the file, as you indicated to Mr.
22 Carlyle-Gordge in 1986, do you remember if that
23 was part of the material that you looked at but
24 obviously would have no significance for you back
25 in 1986?



1 A I can't recall specifically.

2 Q Are you -- sorry -- you indicated in response to a
3 question last week, or last day when you were here
4 I believe, that when you left your offices at
5 Wolch Pinx Tapper, that you left the entirety of
6 your file behind?

7 A Yes.

8 Q And there are various discussions in telephone
9 conversations that were recorded by Mrs. Milgaard
10 that you were working frantically to organize your
11 file, that you had a whole bunch of material, and
12 you were telling her at one point you were going
13 to have it so organized she'd be impressed with
14 you. Did you, in fact, organize the file to a
15 large degree?

16 A Before I left?

17 Q Well, before the Supreme Court of Canada
18 reference, and --

19 A Oh, no. What -- no. I mean the simple answer to
20 that is that we were caught in a whirlwind, it
21 came on us very quickly, and I don't believe we
22 were ever as well-organized as I would have
23 preferred.

24 Q But whatever you had access to, copies of, you
25 left in the office when you left?



1 A As far as I'm aware, yes.

2 Q Okay. No, and I'm not suggesting otherwise,
3 I'm --

4 A I don't have anything, I can assure you of that.

5 Q The only import of my question, in all the times
6 that you were running around with this and all the
7 hours that you were putting in on it, you were
8 working out of your office, you weren't working
9 out of your own home or anything?

10 A Oh, I was working on it every place I was, --

11 Q Okay.

12 A -- but I don't have any files anywhere.

13 Q Okay, but the files were kept in the office?

14 A In the end, yes.

15 Q In the end? Okay. Now, sir, I have asked you
16 about a number of transcripts that were done and
17 forwarded, apparently forwarded, at least some of
18 them, by the *Fifth Estate* to you because they were
19 transcripts of interviews done by Mr.
20 Carlyle-Gordge. In Gary Young's file, and in the
21 materials before this Commission, there is a
22 transcript of an interview that Mrs. Milgaard did
23 with Ron Wilson January 12th, 1981, and you have
24 been referred to that previously in your evidence,
25 and as I was going through my notes in preparation



1 for the cross-examination of you I wasn't clear so
2 I'm gonna ask, and if it's already been asked I
3 apologize: Do you remember whether or not you
4 actually physically reviewed that transcript of
5 the interview of Ron Wilson and Mrs. Milgaard back
6 in 1981 prior to preparation for the Inquiry, if I
7 could narrow it that way?

8 A I must have. I don't think I can specifically
9 recall it but I must have.

10 Q Okay. And, sir, also in the materials that have
11 been provided to us -- and we can bring it up --
12 document 155260, and this may have been referred
13 to you as well already, is a transcript of a
14 telephone conference call that took place on
15 January 22nd, 1981 between Mr. Milgaard from jail,
16 Mrs. Milgaard, Peter Carlyle-Gordge we know that
17 to be, and Mr. Young?

18 A I see the document.

19 Q Okay. Do you have any memory of --

20 A Well let me, if I may, have a quick look at it.
21 Could we get it enlarged?

22 Q Yes. Mr. Commissioner, --

23 A Thank you.

24 Q -- it may be of some assistance, if Mr. Asper is
25 willing to work a bit through his coffee break,



1 that we give him a copy. I do have a number of
2 questions in relation to this document and we
3 could do two things if it will help, have him look
4 at it and then I can direct him specifically to
5 the parts I want to go to, --

6 A I --

7 Q -- or it could be left for you on the screen
8 while -- I'm noticing --

9 A If we're taking a break I'll work through the
10 break.

11 Q It's about 28 minutes after by my clock.

12 COMMISSIONER MacCALLUM: That would be
13 fine. Can you give me the doc. ID, if you have
14 it, of the Joyce Milgaard/Wilson transcript,
15 *Fifth Estate*, January 19 -- sent from the *Fifth*
16 *Estate* January 1981 that you just referred to?

17 MS. KNOX: January 12th, 1981, 333953.

18 COMMISSIONER MacCALLUM: Thank you. Break,
19 15 minutes, thank you.

20 *(Adjourned at 10:26 a.m.)*

21 *(Reconvened at 10:44 a.m.)*

22 BY MS. KNOX:

23 Q Thank you, Mr. Commissioner, and thank you Mr.
24 Asper for taking time to look through the
25 document, I know it was lengthy and I didn't have



1 a hard copy for you.

2 As I -- for the record, there
3 are basically three parts of the document that I
4 want to refer you to, I don't think we need to
5 bring them up as I've made you aware of the points
6 that I wish to ask you about.

7 A That's correct.

8 Q And within that conference call, as it is
9 recorded, be -- with those four parties present,
10 there are three issues, as I started to say, that
11 I want to ask you about. One of them, of course
12 there was some brief discussion about the motel
13 room incident wherein Mr. Milgaard was asked about
14 it and he didn't deny that, in fact, the motel
15 incident happened, it was -- reference was made,
16 in fact it was his mother who stated he was on
17 drugs, the implication being whether he would
18 remember because he was on drugs at the time; do
19 you remember reading that in the document?

20 A Yes.

21 Q Okay. And in -- and I'm not going to belabour the
22 motel room re-enactment but I'll, because I'm on
23 that point right now, I'll deal with a couple
24 questions I do have about it. Do you have a
25 memory, now, whether you knew that, in 1981, the



1 information that was coming forward, albeit in a
2 somewhat indirect way at that point in time from
3 Mr. Milgaard, wasn't that the motel room incident
4 didn't happened but essentially it could have
5 happened, but if it did, he was on drugs.

6 A I can't say I recall specifically if I had that
7 information.

8 Q Okay. I'm going to ask a follow-up question. If
9 you had had that information of that very
10 conference call where David was a participant in
11 1981, a number of years before you became
12 involved, might that have put a note of caution
13 into how you viewed and conducted yourself, both
14 within the application itself and in the public
15 media, about whether or not, you know, the -- that
16 Melnyk and Lapchuk were out and out liars?

17 A Well I guess -- and we get into this debate about
18 semantics -- I guess my view, rightly or wrongly,
19 was that, irrespective of whether David said it
20 didn't happen or that it did happen but it was a
21 crude joke or not intended, I guess I look at that
22 as whether it was an admission or not.

23 Q Okay.

24 A And if I had felt that David had agreed that he
25 had made an admission, yes, I would have conducted



1 myself very differently.

2 Q Okay. If you had been aware that while he
3 couldn't make an admission, he couldn't say, as
4 was later said and in fact put in an affidavit
5 that it didn't happen either; might that have made
6 -- and I'm going to use the expression with no
7 intention of disrespect -- but slowed you down a
8 little bit, caused you to look deeper, maybe
9 research a little more before you took certain
10 stands with respect to that? I'm thinking,
11 frankly, of the Deborah Hall affidavit which was a
12 principal part of your first application and the
13 material that you brought forward on your
14 application; might it have introduced a little bit
15 of caution, as in, "eh, hold on a minute, we've
16 got to take a close look at this"?

17 A Well, again, I guess if I was of the view that
18 there was -- that what David was saying that, no
19 matter what happened, there was no admission, --

20 Q Uh-huh?

21 A -- I'm not sure that I would have slowed down.

22 Q Okay. And --

23 A I would have pursued with vigour the idea that
24 there was no admission.

25 Q And sir, with respect to that, are you aware that



1 documented within Mr. Caldwell's file, and
2 available had you written that letter that you
3 wish you had written, was a chronology of every
4 event giving rise to Melnyk and Lapchuk, Ute Frank
5 coming forward, statements being obtained from
6 them, and that kind of information, starting with
7 the very bald fact that the first the Crown heard
8 of them was on the evening of January 18th, 1970,
9 hours before they were about to start the trial?

10 A I think I became aware of that at the Supreme
11 Court, at the reference.

12 Q And, again, looking -- if you had gone looking you
13 would have been aware, as the documents show, that
14 Mr. Caldwell immediately contacted Mr. Tallis and
15 said, that very night, that "this just dropped
16 into my lap, I don't know if there's anything to
17 it, this guy, he said this to the police on the
18 way back from Regina this afternoon, I'm sending
19 police down to get statements, I'm not going to
20 say anything about it in my opening address out of
21 an abundance of caution, I don't know if I would
22 even be able to get this evidence in", but he very
23 prudently gave notice and then went through a
24 practice of getting statements, his file
25 documented that he had them in, interviewed them,



1 he disclosed the statements to Mr. Tallis, in fact
2 although Ute Frank wasn't called made her
3 available, as we know from Mr. Tallis and the
4 file, to be examined by him?

5 A Yes.

6 Q Might have made some difference if you'd had that
7 information, taken the prudent step of getting
8 access to his file?

9 A I'm not sure where it would have made a
10 difference.

11 Q Would you agree with me that it would have put the
12 context of what happened with Melnyk and Lapchuk
13 and the motel re-enactment evidence in a different
14 light than you anticipated was the situation? And
15 I, I'm, that's not a very good way to ask a
16 question.

17 A No, Ms. Knox, I always understood that these were
18 last-minute witnesses, and I don't know when we
19 became aware of it, we were aware that Mr.
20 Caldwell had informed Mr. Tallis and done exactly
21 as you said.

22 I think what we were taking
23 issue with was that there were other witnesses.
24 Now, with the information you've provided me, I
25 think that would have been very helpful to know



1 what other steps were taken, --

2 Q Uh-huh?

3 A -- there is no question about that.

4 Q Would it have been helpful to you, and might it
5 have slowed you down a bit, had you known -- which
6 you would have if you had accessed his file or
7 talked to him or Mr. Tallis -- that Deborah Hall
8 wasn't around on January 19th, 1970, that she was
9 -- and no disrespect to her, but it was the
10 generation of hippies and kids ran away from home
11 all the time -- the suggestion to the police that
12 first, at first instance was that she was in
13 Vancouver, she herself has said that she was
14 Vancouver, Toronto, I'm not sure exactly, but
15 certainly she was not in the Province of
16 Saskatchewan when this trial happened?

17 A Right, it might have cast a different light on
18 this, yes.

19 Q I went through the materials with respect to
20 Deborah Hall, there's an interview transcript that
21 I don't know if you saw, it's done by Chris
22 O'Brien in 1981, there's your affidavit or the
23 affidavit that she signed before you in 1986; were
24 you aware, when you were dealing with her, that in
25 fact she hadn't even been in Saskatchewan when



1 this trial went ahead?

2 A I believe -- I don't think I was aware of that. I
3 think she told me that she wasn't aware of the
4 outcome of the trial.

5 Q Yeah, that's what appears to be the case in the
6 materials?

7 A I don't know, I don't recall her telling me where
8 she was during the trial.

9 Q Just dealing with her alone, if you had known that
10 in 1970, given the late arrival of this piece of
11 evidence into the hands of the Crown, or potential
12 evidence into the hands of the Crown, and from a
13 -- or the Crown and police point of view she
14 wasn't around to be found, would that have perhaps
15 ratcheted down your level of suspicion of conduct
16 a little bit?

17 A Well, to be honest, I think I probably would have
18 wondered why more effort wasn't made to find her,
19 --

20 Q Would you have --

21 A -- to be perfectly honest with what was in my mind
22 at the time.

23 Q Mr. Asper, in light of that comment I'm going to
24 ask you whether when you were, in 1986, judging
25 the actions of the people who were part of this



1 process in 1969-1970 -- and I'm thinking of
2 particularly the police and my client, Mr.
3 Caldwell -- did you ever stop for a minute and
4 think, okay, it's easy to jump on a flight right
5 now and go to Mexico, it's easy to do whatever,
6 but did you ever for a minute turn your mind back
7 to what the mobility, availability of the kinds of
8 services we had in 1986, and have even better
9 today, were in 1969?

10 A 'Mobility' in terms of what?

11 Q Like if, for example --

12 A People?

13 Q Well if, for example the police, you said you
14 would have wondered why they hadn't made a greater
15 effort to get her. Trial is starting tomorrow,
16 police officer goes to Regina, he gets a statement
17 and somebody says "I think she's in Vancouver",
18 got to find her, got to get her back here because
19 the jury is being, already being empanelled as
20 that information is being obtained, flights,
21 availabilities, address?

22 A Well certainly things would have been slightly
23 more primitive in 1969, but I wouldn't accept the
24 proposition that they were so primitive that an
25 effort couldn't -- that -- and I'm going back to



1 what I might have said in the hypothetical
2 circumstances that you and I are talking about
3 here -- that greater effort couldn't have been
4 made.

5 Q I'm not suggesting that I want you to accept that
6 they were so primitive it couldn't have been made,
7 I'm simply asking you, and I'm thinking back to
8 your own characterization of your duty of
9 professional conduct, --

10 A All right.

11 Q -- whether you stopped for a moment, different
12 from Mrs. Milgaard, different from everybody who
13 would have been civilian parties to this,
14 different from David Milgaard, and said, "yeah,
15 but I gotta look at this through the eyes of sober
16 second thought, professional judgement,
17 professional detachment", whatever the right word
18 is; did you ever -- and I'm asking this because
19 there is another area I'll come back to -- did you
20 ever, in 1986-'87 up through when you left the
21 file in 1992, ever sit down and think "all these
22 presumptions I'm making right now, is this the way
23 it was in 1969"?

24 A Yes, I think we did.

25 Q Okay. Sir, to get back in terms of the motel --



1 or of the, of the transcript that I had asked you
2 to look at of the January 22nd, 1981 conversation,
3 we've dealt with the motel room incident and I've
4 gotten off track a little bit.

5 The second area that I have
6 directed you to, or indicated that I wanted to ask
7 you about, were some statements made or some
8 comments made by Mr. Milgaard in that conference
9 call to Mr. Young and his mum and Peter
10 Carlyle-Gordge that he had some thoughts, or may
11 have had some thoughts, of snatching the purse of
12 the woman that he saw on the sidewalk -- and I
13 don't even want to go whether she was old, young,
14 or whatever -- but that he confessed -- and that's
15 the wrong word -- he told them that, back on that
16 morning in 1969, he/they were thinking that they
17 might roll someone to get some money?

18 A I saw that, yes.

19 Q Okay. Do you know whether you were aware of that
20 up to the point in time in 1986 when you drafted
21 an -- or helped Mr. Milgaard draft an -- the
22 affidavit that he filed in the Supreme Court of
23 Canada?

24 A I can't say when I would have known that.

25 Q Okay. Did you know it when you filed your



1 application on December 28th, 1988, with the
2 Deborah Harris (sic) and the Dr. Ferris material,
3 that David Milgaard had acknowledged having
4 thoughts of engaging in criminal misconduct that
5 morning when Gail Miller died?

6 A We may have.

7 Q Okay. And, sir, if you had that I -- and given
8 your answer I suspect that asking the next
9 question is probably pointless -- but do you know
10 whether it would have, or whether it did,
11 influence the way you approached the handling of
12 the information that you were receiving, the
13 drafting of your application, and in particular
14 the strategy that you developed when, eventually,
15 you decided that the gloves were off and this was
16 a war?

17 A I don't think it would have changed anything, no.

18 Q Okay. Sir, the third point, or the third issue I
19 want to raise with you with respect to that
20 transcript is the issue of Mr. Milgaard's
21 notebook. And you will recall that there is some,
22 still some question of what happened to the
23 original notebook, there's correspondence from Mr.
24 Tallis that says he returned it to him after the
25 trial, --



1 A Right.

2 Q -- there's indications that Mr. Tallis testified
3 in the Supreme Court of Canada that was, what was
4 purported to be Mr. Milgaard's notebook was not
5 what he had at the trial, and he has given that
6 evidence here. In this transcript Peter
7 Carlyle-Gordge said he had the notebook and he was
8 making reference in the transcript to right as --
9 it seemed to me at least, and I'm not sure if it
10 seemed to you -- as they were talking, he had
11 physical possession, he was talking about entries
12 in it, pages, and stuff like that; do you recall
13 whether you were aware of that?

14 A I was not aware of that. That notebook, I
15 recall -- and I don't know when -- seeing a
16 photocopy of handwritten notes where the coil, I
17 recall the spine or the coil was on the
18 photocopied pages. I don't know where I've saw --
19 I saw it.

20 Q Okay. Would it have been helpful to you to have
21 known that, in fact, Peter Carlyle-Gordge had had
22 it in 1981, and that perhaps would have allowed
23 you to go down a path where you might have been
24 able to recover it in 1986-'87-'88?

25 A I assume so, yes.



1 Q And I take it, since you didn't know it, obviously
2 you didn't make any efforts to try to recover the
3 original from him, and that you have no evidence
4 to suggest that Mrs. Milgaard or anybody attempted
5 to, or were able to, recover that original
6 notebook from Mr. Carlyle-Gordge?

7 A I think that's correct.

8 Q Sir, it has been said at various points in time,
9 when one goes back and reads the history of Mrs.
10 -- and it, I'll try to phrase this so that it
11 doesn't sound like a criticism, because I don't
12 intend it to be -- but through the history of her
13 dealings on this file Mrs. Milgaard expressed the
14 view, at various points in time, that the police,
15 Saskatoon Police Service, had interfered with her
16 ability to talk to the original trial witnesses?

17 A Yes.

18 Q And did you accept, in 1986 -- or with -- in the
19 instructions or in the discussions that you were
20 having with her in 1986 forward, did you accept
21 that her assessment of that fact, if I can
22 characterize it as a fact, was correct; that there
23 was a --

24 A I think I probably took it as information.

25 Q Okay. Sir, I wonder if we could bring up document



1 331953. Sir, and I, I'm gonna ask you, this is a
2 document, a letter from Gary Young's file?

3 A I think we have seen this, yes.

4 Q Yeah. You note, in that letter, there's some
5 indications from Mr. Young that he contacted the
6 police and asked them to basically assist them in
7 finding these witnesses, and then subsequent
8 correspondence in Mr. Young's file, which is
9 before the Commission and which he has testified
10 about, is that the report back was that these
11 witnesses didn't want to speak to Mrs. Milgaard,
12 in fact one of them became very angry and accused
13 -- and Nichol John, in fact, had a lawyer contact
14 them and accused them of giving out her address
15 even though she told them she didn't want it?

16 A That's correct.

17 Q Okay. And I, I know I'm probably annoying you by
18 going back to "if you had known this would it have
19 made a difference"; again, if you had taken the
20 step of getting Mr. Young's file, would it perhaps
21 have helped you in determining, or in hindsight,
22 whether or not you would have gone to war so
23 readily and so strongly, had you been aware that
24 --

25 A Well just remember, just remember, my "war", quote



1 unquote, I saw the -- was designed to achieve an
2 outcome vis-a-vis Federal Justice for -- with whom
3 we had sought a remedy.

4 Q Uh-huh.

5 A I can't say that knowing this information would --
6 yes, it probably would have had an effect, I can
7 -- I agree with that.

8 Q Uh-huh. And I'm not suggesting that you, or
9 asking you to say, "well I wouldn't have done what
10 I did"?

11 A It's just difficult to know, to go back into the
12 context of that time, given the outcome that we
13 were trying to achieve, what we would have done
14 with this information, what we would have done
15 differently. I just don't know.

16 Q Okay. Sir, in Mr. Young's file -- and I can pull
17 the exact document if anybody needs to see it --
18 there's some suggestion that in 1981 -- not some
19 suggestions -- documented that in 1981 he obtained
20 Mr. Tallis' file, that he provided Mrs. Milgaard
21 with an opportunity to go through, what we have
22 from his billing a record that she made 85 pages
23 of photocopies, and there is reference to Dennis
24 Cadrain's statement of March 1969 being on his
25 file. One of the parts of the formulation of the



1 theory of misconduct by police and Crown was the
2 mistaken belief that Albert Cadrain had been
3 coerced by police into giving the statement -- and
4 we won't, I promise you we won't go through the
5 details of that -- but do you recall whether, when
6 you took over the file, you were provided with a
7 copy of Dennis Cadrain's statement that had been
8 on Mr. Tallis' file in 19 --

9 A I don't believe I saw that.

10 Q Okay. Have you had an opportunity to look at the
11 statement that Dennis Cadrain gave to the police
12 that first time when Albert Cadrain attended
13 there?

14 A In 1969?

15 Q Yeah?

16 A I --

17 Q March '69.

18 A Not re -- I haven't looked at it recently.

19 Q If you had looked at the statement and seen, as
20 the statement documents, that Albert Cadrain
21 presented himself to the police station after
22 talking with Dennis and with his parents, and as
23 stating the belief that he had seen blood, might
24 that have been another piece of information that
25 might have not changed the plan, ultimately, but



1 caused you to step back and say "we gotta be, you
2 know, really sure of what happened here"?

3 A It would have changed things, certainly.

4 Q Okay. And that was information that was
5 availability, apparently, through Mr. Tallis' file
6 or through Mr. Young and had been apparently
7 reviewed by Mr. -- by Mrs. Milgaard, according to
8 the documentation in his file, but you have no
9 record that you were provided with it by her if
10 she had a copy of it?

11 A I don't have any recollection of that.

12 Q Okay. Okay. Sir, you've stated a number of times
13 during the course of your evidence, and I
14 appreciate that a number of times you've expressed
15 regret for actions that you took that, in
16 hindsight, turned out to be based on wrong
17 assumptions or wrong facts, you've expressed
18 regret for some difficulties that have been caused
19 to my client, also a number of times you've
20 indicated that the reason why you didn't go to
21 look for a copy of my client's file -- and in the
22 context of Mr. Wilson he asked you about going to
23 Mr. Kujawa -- was because you expected the federal
24 Department of Justice would do that?

25 A That's correct.



1 Q And I'm, I guess I need you to help me understand
2 what the thinking was beyond that. Your
3 indication is, or what I think I heard you say is
4 that you wanted the federal Department of Justice
5 to be the ones who were the distant third party
6 who did oversight of the police and Crown actions
7 and took the responsibility for getting the files
8 from the police and Crown; am I right in that?

9 A That's correct.

10 Q Am I correct in understanding that you were also
11 expressing a concern that, had you and other
12 colleagues of yours, in 1986 when you took over
13 the file, gone to look for either the police file
14 or the Crown file, you had a fear that somehow
15 they might corrupt their files -- and I use
16 "corrupt" in a small c sense -- but they might
17 alter, manage, remove things, you know, add things
18 to their file, that would cover up misconduct?

19 A Or not disclose.

20 Q Okay.

21 A Or just simply not disclose.

22 Q Yeah, or simply not disclose, okay. That's one I
23 hadn't factored in, and I appreciate that, that's
24 fair comment.

25 COMMISSIONER MacCALLUM: The question was



1 directed to what party not disclosing?

2 MS. KNOX: The -- well, in particular my
3 client, Mr. Caldwell.

4 COMMISSIONER MacCALLUM: I see.

5 BY MS. KNOX:

6 Q That, if you had asked for the Crown file, he
7 might not have given you everything that was on
8 it?

9 A Yes, or the police, or whoever else was involved
10 in it.

11 Q Mr. Asper, one of the reasons why I have a bit of
12 a struggle with that, and I ask if you can assist
13 me, is that in 1981 when Mr. Caldwell was
14 contacted by Gary Young, whether you obtained the
15 file or not, Mrs. Milgaard knew, when she was
16 instructing you, that he had been fully
17 co-operative with him, indeed Mr. Caldwell thinks
18 Mr. Young came in and looked at the file, Mr.
19 Young thinks he only had the offer but because he
20 got taken off the file he didn't actually go in
21 and look, but in any event, he extended an open
22 invitation come look at my file.

23 Peter Carlyle-Gordge documented,
24 and in a series of some of the correspondence I
25 referred to you this morning, very cordial



1 correspondence, that when he contacted Mr.
2 Caldwell in the guise of writing a book about
3 Western Canada murders and wanting to include this
4 one, that he received a very warm reception from
5 Mr. Caldwell. Do you recall --

6 A Yes.

7 Q -- that? And in your dealings with him did he
8 communicate that to you?

9 A Yes, I think so.

10 Q Not only did he receive a warm reception, Mr.
11 Caldwell accommodated him to the extent of going
12 to his office on weekends so he could look at the
13 file?

14 A Yes.

15 Q Gave him what appeared to be unfettered access,
16 allowed him to take a Dictaphone and dictate
17 anything he wanted from the police reports,
18 witness statements or whatever, there was no
19 attempt to circumscribe what he could take or use
20 except for a small detail regarding other alleged
21 criminal acts by Mr. Milgaard in Calgary?

22 A That's apparently the case, yes.

23 Q Okay. And then in 1988 when you were doing your
24 application, at the same time, the same day you
25 filed the application with the Federal Department



1 of Justice, December, 1988, you got a, you filed a
2 copy of it with the media, you sent it to CBC in
3 particular and it came to the attention of a
4 producer, Sandra Bartlett, who you had previous
5 contact with. Do you remember that?

6 A Right.

7 Q Do you remember getting a letter from Ms. Bartlett
8 almost immediately saying she had been in Mr.
9 Caldwell's office sometime previously working on a
10 television documentary, he was co-operating with
11 them, and in fact she had an opportunity to go
12 through his file?

13 A I think I remember that, yes.

14 Q I can get a document number if you wish.

15 A No, I accept that.

16 Q Okay. Now, would it be fair to say that up to the
17 point in time when you filed your application in
18 December of 1988, all of the indications,
19 independent indications, independent of your
20 suspicion, paranoia or whatever the right word is,
21 is that Mr. Caldwell was ready, willing and able
22 to extend courtesies to anybody who wanted to look
23 at the file, within the proper context of course,
24 Joe Blow citizen couldn't come in off the street
25 and look, but people with proper credentials



1 could, and proper reason for acces were given it?

2 A Yes.

3 Q And, sir, were you aware, even more than that,
4 that when Mr. Carlyle-Gordge came and saw him
5 himself in February and March of 1983, that he
6 provided him with information that would allow him
7 to make contact with Ray Mackie, one of the senior
8 officers on the file, Charlie Short, a senior
9 officer on the file, I think maybe Eddie Karst,
10 but he gave him a list of ways to get in touch
11 with the investigators?

12 A Right.

13 Q You were aware of that?

14 A I became aware, yes.

15 Q If you had read the transcript of the interview
16 that Mr. Caldwell and Mr. Carlyle-Gordge did, it
17 was in the interview.

18 A Right.

19 Q Okay. Not only that, were you aware that when Mr.
20 Carlyle-Gordge attempted to contact Ray Mackie, a
21 senior officer, Mr. Carlyle-Gordge interviewed him
22 and in the course of doing it Mr. Mackie
23 documented that he had reservations about talking
24 to him when he first called, that he called up Mr.
25 Caldwell and said should I be talking to this guy,



1 and Mr. Caldwell encouraged him to go right ahead?

2 A I'll accept that's the case. I don't recall that,
3 but I accept that.

4 Q We can provide the transcript number for you and
5 the evidence is before the Commission. So I
6 guess, Mr. Asper, of the parts that you recall and
7 the knowledge that you had, the information that's
8 available as a result of the inquiries done by
9 this Commission and the evidence that's been
10 presented here, have you found, this day or any
11 days that you've been sitting here and in the
12 months that you've had to think about this,
13 anything that gave validity to your concern that
14 Mr. Caldwell would somehow not give full access to
15 his file?

16 A I will tell you what the mindset was, and you've
17 asked for assistance in understanding I guess our
18 mindset.

19 Q Uh-huh.

20 A We were confronted with the possibility and came
21 to our own independent belief that there had been
22 a wrongful conviction, that David was wrongly
23 convicted, and somehow -- if that was true,
24 somehow that happened.

25 Q Uh-huh.



1 A And as I've said in my evidence, it can happen as
2 a result of innocent behaviour or it can happen
3 for degrees, as a result of degrees of more
4 nefarious behaviour, and our attitude, rightly or
5 wrongly at the time, was one of suspicion. We
6 sought a remedy. Mr. Caldwell couldn't provide us
7 with a remedy. He might, in hindsight, if we
8 look, he might have provided some assistance. Mr.
9 Karst couldn't provide us with a remedy, Mr.
10 Mackie couldn't provide us with a remedy, the only
11 place we could find a remedy was the Federal
12 Department of Justice, so notwithstanding looking
13 back that there may have been all this opportunity
14 for co-operation, coupled -- take the approach
15 that the co-operation may not be fulsome, coupled
16 with the remedy that was being sought from the
17 Federal Department of Justice, that's where we
18 went and that's how we proceeded.

19 Q And, Mr. Asper, I'm fully aware of where you went
20 and the way you proceeded. My question to you was
21 given that you were operating of a particular
22 mindset, for whatever reason, you were operating
23 from it, and whether it's right or wrong, I'm not
24 passing judgment --

25 A Right.



1 Q -- but that was your mindset at the time despite
2 the history of co-operation that Mr. Caldwell had
3 given, some of which you were aware of in terms of
4 allowing access to his file. My question to you
5 was whether you know of any evidence as a result
6 of the preparation that you've done for this
7 Inquiry or other work that you did that would give
8 any credence to your concern that Mr. Caldwell
9 might in some manner have engaged in a course of
10 conduct that would either have corrupted
11 information on the file, not disclosed information
12 on the file or in some manner or other engaged in
13 unprofessional, unethical conduct had he been
14 requested to give you access to his file?

15 A I'm -- I can't say where all of the -- we became
16 aware at some point of a whole bunch of statements
17 of canvassing the neighbourhood, we've talked
18 about it in this proceeding, the Merrimans and
19 George Jones and all the people walking on Avenue
20 N and P and O and all those ones.

21 Q Uh-huh.

22 A I don't know where they were.

23 Q Okay.

24 A They would have -- and Mr. Tallis I think has
25 testified that the Mackie theory document, I don't



1 know where that was.

2 Q Uh-huh.

3 A So I can't say that that existed and wasn't
4 disclosed and gives rise to unprofessional
5 conduct, I can't say that now.

6 Q Okay.

7 A I can tell you, had it been, you know, clearly --
8 I believe that information would clearly have
9 affected the outcome at the trial, it could have
10 prevented a wrongful conviction.

11 Q You've had an opportunity to review some of Mr.
12 Caldwell's evidence at this Inquiry, I know you
13 haven't been able to review all of it because of
14 time constraints, but have you gotten to the part
15 in his evidence where he agrees with you on that?

16 A Yes.

17 Q That had he to do it over, he now recognizes
18 significance to material, some that was on his
19 file, some that was on the police file and not
20 unfortunately given to him, and I say
21 unfortunately, he might not have done anything
22 with it anyway, but back in 1969 he thought that
23 he had disclosed everything that was relevant and
24 that he had no appreciation of the significance of
25 some pieces of information embedded in police



1 reports like the Merrimans, he had one part of it,
2 not the other, and (V4)---- (V4)---, for example,
3 if we could go with a bigger point of concern,
4 that he now recognizes he should have disclosed,
5 do you have anything to suggest, any evidence to
6 suggest that it was more than an honest mistake by
7 a man who failed to recognize the importance?

8 A No, I don't.

9 Q I'm going to refer you to a document, 157294. Mr.
10 Asper, this is a letter dated January 29th, 1992,
11 and when we get to the end of it you'll see it's a
12 list of materials that were provided by you to the
13 Department of Justice to be included in the
14 Supreme Court of Canada reference, and these were
15 materials that you received from the Crown, or
16 from Federal Justice as you were doing a review of
17 the original Crown file.

18 A Okay.

19 Q Were you aware that the documentation, much of the
20 documentation that you were given that forms the
21 subject of this letter, like the witness statement
22 of (V4)---- (V4)---, the witness statement of
23 (V11) (V11) (V11)--, the witness statement of (V9)
24 (V9)----, the witness statement of (V13)- (V13)--,
25 witness statement of (V6)--- (V11) (V6)-, were



1 pulled off the file after an inquiry was directed
2 about Larry Fisher by Mr. Caldwell himself and
3 forwarded to the Department of Justice?

4 A I don't think I was aware of that.

5 Q Okay. Sir, the evidence before this Inquiry is
6 that when Mr. Williams started doing the work, Mr.
7 Caldwell happened to have moved offices and he was
8 working in the Federal Department of Justice
9 office and as a consequence became a direct link
10 between the Department of Justice inquiry and the
11 old file, and the documentation indicates that
12 everything that was of issue, or everything that
13 could have been of issue was pulled off his file
14 by him, forwarded by him to the Department of
15 Justice completely without any apparent effort on
16 his part to do any of the things that you
17 suspected that he might do, he went over and got
18 his own file and he pulled everything off it, some
19 of which he had to say, and has to say,
20 regrettably, he wishes now he turned over to
21 Mr. Tallis or he recognized the importance of in
22 1969.

23 A Well, I think that's very laudable, I really do,
24 but I also believe that he should never have been
25 put in that position, like, you know, nor should



1 we have had to rely on his good offices.

2 Q Mr. --

3 A I mean, you've acknowledged it, it's a very
4 difficult thing for him to do potentially.

5 Q Mr. Asper, with respect, is it your view that any
6 time a professional, a member of the bar is
7 involved in a situation where there's potential,
8 some criticism that could arise of their conduct,
9 that they should be ostracized and treated like
10 somehow they are the bad guys as you did with him?

11 A I don't believe we did that, but I believe that we
12 were put in a position of having an innocent man
13 in prison and we were not receiving any assistance
14 to get him out and I have a duty to my client and
15 that's how I view it.

16 Q You say you don't believe you did that. Were you
17 party to the news story that appeared in the
18 Saskatoon paper with the headline that Mr.
19 Caldwell was in a conflict of interest because he
20 was being allowed access to his own file, and the
21 argument was, well, he could do things, bad
22 things, but even if he doesn't, there's a
23 perception that this is not right?

24 A Yes, yes, and I don't think that's Mr. Caldwell's
25 fault.



1 Q Sir, did you have any, at that stage in time,
2 other than the fact that you were engaged in a
3 war, did you have any reason to put forward in the
4 public media the suggestion that somehow, because
5 he was assisting in an investigation, some
6 wrongdoing could occur, obviously at his hand
7 because --

8 A As I said to Mr. Wilson, I am of the view, and I'm
9 not going to be shaken from my view, that one
10 should not be investigating ones self.

11 Q Okay. Then we'll leave that. I want to bring
12 up -- oh, before I bring up the next documents
13 that I want to ask you about, at various points in
14 time as I reviewed the taped conversations between
15 you and Mrs. Milgaard in preparation for the
16 Supreme Court of Canada hearing, you made
17 reference, or reference was made to you going to
18 Regina to look at files, and I take it by that you
19 were going to the provincial Crown prosecutor's
20 office to look at police files, prosecution files?

21 A Yes. I believe that was after the reference.

22 Q After the reference had been ordered or --

23 A Right.

24 Q -- recommended or whatever the right language is?

25 A Right.



1 Q But you did attend on a number of occasions. Do
2 you have any memory when you went to Regina to
3 look at the files of how the prosecution file was
4 presented to you to review, and I'm asking it in
5 that way because it's an important issue.

6 A I do not have any recollection of the meetings in
7 Regina.

8 Q Okay. I wonder if we could bring up document
9 number -- actually, what I'm going to do, if the
10 Commission will indulge me, is I'm going to pass a
11 series of file folders, I would like to have them
12 brought up on Elmo. This is a colour photocopy of
13 the file jacket that was the original file jacket
14 on Mr. Caldwell's closed file involving Mr.
15 Milgaard.

16 A Right.

17 Q And it had, and I'm going to say to you, the
18 record, or the evidence shows that there were six
19 file folders with very nice handwriting, not his
20 unfortunately, it was his secretary's of the day,
21 but they were numbered Milgaard number 1 through,
22 and we'll go through six in total, and then
23 there's some writing on them in a fountain pen in
24 a green ink that he liked to use that indicated
25 what he was including in each file.



1 A Right.

2 Q The first of them being the correspondence file
3 which, in its original form, is at the
4 Commission's office and you can, if you wish,
5 access it, a fairly thick file, probably two
6 inches thick, that had a lot of the correspondence
7 leading up to him, post trial, pegged with
8 original, as I said, lots of original red ink
9 markings, the green fountain pen ink markings. Do
10 you have any memory of seeing those original
11 documents when you went there?

12 A No.

13 Q If you note what he recorded on this file, that it
14 was his correspondence file?

15 A Yes.

16 Q The next one, if we could, number 2, please,
17 Milgaard number 2 with the nice handwriting and a
18 documentation by Mr. Caldwell, if you'll trust me,
19 as everybody else knows, that that's his ink and
20 his handwriting, that it was the opening address,
21 the trial notes, and he in brackets put (mine and
22 Ullrich's), Ullrich being the police officer who
23 was in court with him, and closing and charge?

24 A Yes.

25 Q The next one if we could, number 3, please, again,



1 same setup, main file, summary, autopsy report,
2 lab report, indictment, exhibit chart, photos.
3 You see the setup again that he organized his file
4 and the materials that would have been in it. If
5 you go back and look at the original, I just took
6 the file cover jackets off because it's too hard
7 for me to bring everything with me.

8 A Right.

9 Q And I could indicate I'm not totally anal, I made
10 colour photocopies because it was easier for him
11 to work with. The next one, please, number 4, has
12 a handwritten notation, witness statements (used)
13 by him?

14 A Yes.

15 Q Which contained statements of witnesses obviously,
16 logically, who testified at the trial?

17 A Right.

18 Q The next one, please, number 5, his notation,
19 witness statements (not used)?

20 A Right.

21 Q Mr. Asper, would it surprise you to know that
22 within that file, pegged very neatly in numbered
23 ordered as they were received from the police,
24 were all of the witness statements that, exactly
25 as it said, weren't used, including (V4)----



1 (V4)---, (V9) (V9)----, (V11) (V11)--, all of the
2 ones that in retrospect it would have been
3 important to disclose, but he kept them on his
4 file?

5 A I wasn't aware of that, but I accept that that's
6 the case.

7 Q Apparently on his file, when Mr. Carlyle-Gordge
8 looked at it, and certainly on his file when
9 Sandra Bartlett looked at it because what he wrote
10 to tell you was that on his file she saw
11 statements about other women who were being
12 assaulted in that area, so he gave it to not
13 anyone who came again, I should paraphrase myself,
14 persons with a legitimate interest to look in
15 1988?

16 A Are these the files, and I know I'm not supposed
17 to ask you questions. I don't know if these are
18 the files that Carlyle-Gordge actually saw.

19 Q Yes.

20 A I don't know.

21 Q The evidence from Mr. Caldwell is that these were
22 the files as he concluded his file and the order
23 he organized them in, that they were all provided
24 to Mr. Carlyle-Gordge. He doesn't have a strong
25 memory of Ms. Bartlett being there, but certainly



1 her letter indicated she saw them and certainly
2 saw some of the things in this file, including the
3 statements that became the subject of interest.

4 A Can I ask another question, did Mr. Young see them
5 too?

6 Q Perhaps you should ask the Commissioner.

7 A I'm just curious. I don't know if it's the same
8 file that Mr. Young would have received.

9 Q Mr. Young, and in fairness, sir, the memo on Mr.
10 Young's file indicates that Mr. Caldwell extended
11 an invitation to him to go look at his file.

12 A Right.

13 Q He extended an offer to give him copies of
14 statements.

15 A Okay.

16 Q Mr. Young's memory is that he doesn't remember
17 going over to look at the file because it was
18 within a fairly short time after that that he was
19 discharged and Mr. Merchant took over.

20 A I see.

21 Q If I'm summarizing the evidence correctly.

22 A Okay.

23 Q Mr. Caldwell's memory was he thought Mr. Young had
24 actually gone over, but whether he did or he
25 didn't, these are the only files that were there



1 and this is what, according to Mr. Caldwell's
2 evidence, and the record would seem to be, were
3 being made available to those to whom he deemed it
4 appropriate to give access.

5 A Right.

6 Q Okay. The next file jacket, please, file number
7 6, extra copies of statements, police file (not
8 used), referring to portions of police material
9 that he received that hadn't been used as part of
10 the evidence he led at trial, okay?

11 A Right.

12 Q So you see that he kept in a fairly organized
13 fashion the material that was provided to him by
14 the police and disseminated out of that, in
15 closing his file, that which he used and that
16 which he didn't use?

17 A Right.

18 Q Now, as I said, all of the documentation as he
19 organized it sits in the Commission's office
20 because I requested and they obtained the original
21 materials and I've had an opportunity, repeatedly
22 unfortunately, to go through it, but does it jog
23 any memory with you as you look at these file
24 folders of whether, when you went to Regina after
25 the Supreme Court of Canada reference was



1 initiated, that you saw the files in this
2 condition or, as has been suggested, they might
3 have been disassembled and put into different
4 categories by the Crowns who were working on them
5 in preparation for the Supreme Court of Canada
6 reference?

7 A I honestly don't recall seeing them in this
8 condition. I'll tell you that it looks like
9 there's a yellow sticky on the file.

10 Q I think that might be our --

11 A I think that might be mine, that looks like my
12 writing.

13 Q You talk about new facts. I'm going to --

14 A I don't know if I actually labelled those for the
15 court or -- I mean, I'm looking at them as you
16 flipped them through and I'm thinking, oh, where
17 is she going with this one.

18 Q I wasn't going there, trust me. Mr. Asper, if it
19 will, and if Mr. Hodson is in agreement, I will
20 say to you only that --

21 A I don't recall seeing the actual files.

22 Q -- the originals are in the possession of the
23 Commission.

24 A All right.

25 Q They were in intact in the order that they were



1 returned to the police, or to the Crown after the
2 Supreme Court of Canada reference and all other
3 matters. Whether or not they are in the exact
4 order they were in at the time Mr. Caldwell
5 concluded his file, it will never be able to be
6 established, but certainly they are there, and if
7 you want to look at them, I invite you to do so.

8 A I don't.

9 Q But I'm staying out of that.

10 A I don't. Thank you, but no.

11 Q Whether that's your sticky or not, I don't want to
12 know. Sir, and I bring these to your attention
13 for a couple of reasons, and eventually I'll get
14 where I'm going with this, but assuming for the
15 moment that when Mr. Carlyle-Gordge went in, when
16 Sandra Bartlett went in, all of this information,
17 as I've suggested to you, was made available to
18 them, you've expressed at some point some
19 discouragement that you could have done things
20 faster and better if you had taken different
21 steps. May I suggest to you that if you had gone
22 in and looked at this file, you would have gotten
23 a really organized review of how the case was put
24 together, how it was presented and what was not
25 presented by Mr. Caldwell?



1 A I think that's very fair, yes.

2 Q Thank you. And, Mr. Commissioner, each of these
3 file folders actually now has a document number
4 assigned to it, I neglected to have them moved up
5 the screen. Would it be helpful to have those?

6 COMMISSIONER MacCALLUM: Yes, it would.

7 MS. KNOX: For the record, the Milgaard
8 number 1 file has a document ID number on the
9 cover 331789. File number 2 has a document
10 number on the cover of 007081. Document number 3
11 doesn't have a number on it, I guess I neglected
12 to put one on.

13 MS. BOSWELL: 009371.

14 MS. KNOX: Thank you. 009371. The
15 document number for file cover number 4 I don't
16 have.

17 MS. BOSWELL: 331786.

18 MS. KNOX: 331786. For file number 5, the
19 document cover number?

20 MS. BOSWELL: 331788.

21 MS. KNOX: 331788. And document cover
22 number 6?

23 MS. BOSWELL: 331791.

24 MS. KNOX: 331791. Thank you for saving me
25 on that.



1 COMMISSIONER MacCALLUM: Thank you.

2 BY MS. KNOX:

3 Q Mr. Asper, I'm just going to go back to something
4 that we were talking about earlier, and I was
5 asking you about the documents that had been sent
6 to Peter Carlyle-Gordge by Mr. Caldwell in
7 February I think it was, he made a note on that
8 letter, remember, he was sending him the opening
9 address and closing address?

10 A Right.

11 Q I wonder if we could bring up document 007084.
12 You'll note that it has a cover page with
13 handwritten notes, opening, and if we could go to
14 the next page, please, it starts with a
15 typewritten text with handwritten additions. It
16 goes, Mr. Commissioner, for the record, from
17 007084 to 007126 as I've got it in my file, but
18 does this look like what you remember having that
19 was the photocopy with handwriting and stuff like
20 that when you were discussing this in your
21 conversation with Mrs. Milgaard?

22 A Yes, it looks familiar.

23 Q And the next one, if we could bring up document
24 007311, it has the handwritten notation at the top
25 that it is his closing address?



1 A Yes.

2 Q It goes through from 311 to 345 for the record,
3 and it's interspersed in places with some
4 handwritten notes, but essentially starts out very
5 formally as:

6 "Ladies and gentlemen of the jury, I am
7 sure my learned friend and His Lordship
8 would wish to join me in thanking you
9 for your patient attention..."

10 Sounds like the boilerplate for the start of what
11 it says it is, a closing address doesn't it?

12 A Yes.

13 Q I see you looking through some papers. If you
14 wish to --

15 A No, I asked for a copy of it just to refresh my
16 memory and I'm just looking at the same document.

17 Q So it is the same document?

18 A Yes.

19 Q So when you talked about, in your conversation
20 about, and we talked about whether you had the
21 closing address, clearly, while you didn't have
22 the transcript version, you had, and I haven't
23 compared this word for word by any means, but
24 substantially the body of what he was intending to
25 say and presumably did say to the jury in his



1 closing?

2 A That appears to be the case, yes.

3 Q Mr. Asper, I'm just going to, on the subject of
4 what was contained in his files, I'm just going to
5 bring up a couple of documents and ask you if you
6 remember seeing them. The first one I would like
7 to have brought up is 007014. These -- in its
8 original form it's handwritten in Mr. Caldwell's
9 blue ink, so they have more of a presence in their
10 original form, but nonetheless, in photocopy form
11 you'll see that this is dated September 9th, 1969.
12 It goes through various witnesses, some that he
13 needs to recall, remaining witnesses and whether
14 they would be required or there could be
15 agreements between him and Mr. Tallis it would
16 appear to be, and then a notation at number 3 that
17 there were certain witnesses, Mrs. Wilson and Art
18 Roberts, that Mr. Tallis wants and notations about
19 statements he wants, the Danchuks' statements?

20 A Yes.

21 Q Then if we could go to --

22 A This is for the preliminary inquiry I think?

23 Q Yeah, it is for preliminary, the September date
24 will show you that.

25 A Right, okay.



1 Q And there's no magic to these forms, I'm just
2 bringing up some to show you what was on his file,
3 and I will, after I show you this next one, ask if
4 you remember seeing it when you went to Regina.

5 The next one is 007016, a
6 document on his file that has a heading "possible
7 witnesses which tend to show prisoner innocent,"
8 and this is a document he was preparing in
9 response to a request from Mr. Tallis to review
10 the file about possible statements that could
11 assist the defence?

12 A Right.

13 Q Do you have any memory of having seen this
14 previously?

15 A No.

16 Q Okay.

17 A I must have, but I don't remember seeing it.

18 Q And the next one, 007073, again because it leads
19 nicely into the question I want to put to you with
20 respect to these three pages, a notation made
21 during the trial, and I bring it up because it
22 contrasts with your earlier observation properly
23 that I was referring you to a document from
24 prelim. This is a document during the course of
25 the trial and what we know is that it's notes that



1 Mr. Caldwell made at a meeting that he had with
2 Mr. Tallis on the Saturday about various issues
3 that were outstanding in terms of the conduct of
4 the trial and how the trial would go forward?

5 A Okay.

6 Q And I had had -- do you have any memory of having
7 seen this before?

8 A I must have seen it, I don't remember seeing it,
9 though.

10 Q I in looking at these -- and very briefly, I know
11 I'm giving you snapshot looks of what, as you say,
12 you must have seen before, but you don't remember
13 -- do you agree with me that what they do and what
14 they illustrate is contained within those six file
15 folders that I just showed you were lots of pieces
16 of information that might have been of some
17 assistance to you in your assessment of how the
18 Crown conducted themselves with respect to
19 disclosure, discussions, attitude indeed, toward
20 how this prosecution proceeded, and demonstrate, I
21 would suggest to you, a fair level of cooperation
22 in how this case was presented?

23 A Well I'll agree with the first part of your
24 question, certainly, yes.

25 Q Okay.



1 COMMISSIONER MacCALLUM: Which part was
2 that?

3 A That the file -- that we had, if we had had the
4 files and the information it may have affected, I
5 think, our approach. Is that fair, Ms. Knox, I --

6 BY MS. KNOX:

7 Q Uh-huh.

8 A Yes.

9 COMMISSIONER MacCALLUM: Thank you.

10 BY MS. KNOX:

11 Q Thank you, Mr. Commissioner. Sometimes I ask the
12 questions but I'm not sure that I wait for the
13 answer.

14 A I have to say, you know, I would be remiss in not
15 including the federal Department of Justice in my
16 answer as well, that it would have assisted in
17 their approach as well.

18 Q And I'll leave Mr. Frayer to speak to that.

19 A I --

20 Q I speak only to what Mr. Caldwell could have
21 offered you if you had done what you now say you
22 wish you had done, written him a letter?

23 A But that could have affected everything.

24 Q Uh-huh. Sir, on that point, since you bring me
25 here -- I wasn't sure that I was going here -- and



1 at various points throughout the course of your
2 evidence you talk about what the federal
3 Department of Justice could have done and you
4 ascribe to the federal Department of Justice --
5 and trust me, I'm leaving that area entirely for
6 Mr. Frayer -- you describe certain things that you
7 did, particularly some of what I would
8 characterize as the fairly nasty things against
9 certain individuals, in retrospect you sort of say
10 "well, if the federal Department of Justice had
11 done what we thought they'd do when we sent this
12 application in on December 28, 1988, none of this
13 would have happened", and I guess where -- and
14 maybe I touched on this already -- where I have
15 some difficulty in understanding what it is that
16 you are attempting to say when you make those
17 comments is that, on the very day that you were
18 sending your application to the federal Department
19 of Justice, you sent it to the media?

20 A Well, but I think if you look at the character and
21 tone -- first of all, the case had been reported
22 on up to that point, the information that was
23 reported by the media at the time, and our
24 position at the time, was very neutral and factual
25 versus where it became. It was purely



1 information.

2 Q My only issue with respect to that, though, is
3 that you're indicating on the one hand that you
4 were looking to the federal Department of Justice
5 to be the good guys, --

6 A Right.

7 Q -- but what you did from -- with the federal
8 Department of Justice -- to an extent from the
9 very day you framed your application, did you not,
10 and you put it in the hands of the media -- is you
11 started to cut the legs from under them?

12 A I wouldn't agree with that. I can understand some
13 people would see it that way but I don't agree
14 with that.

15 Q Would you go so far as to say that it created the
16 potential that the media, or your actions, could
17 cut the legs from under them? Because your
18 evidence was a number of times, as I reviewed it
19 last night, that when you put something in the
20 hands of the media you lose control?

21 A It's true. It cuts both ways, because on the
22 other hand the media were able to develop
23 information for us, ultimately, that they may not
24 have been interested in doing unless we had had
25 them involved.



1 Q But my question to you was --

2 A But, yes, it cuts both ways.

3 Q -- that potentially, by doing what you did at that
4 very early stage, you set a scenario in place that
5 may have caused some of the difficulties that
6 evolved with the Federal Government -- and I'll go
7 a step further -- may have developed with my
8 client, as an example, --

9 A I have no doubt about --

10 Q -- because they weren't given the courtesy and
11 respect of being able to answer the allegations,
12 accusations that were being made against them,
13 they woke up in the morning and read it in the
14 paper?

15 A That's true.

16 Q They woke up in the morning and sometimes, in the
17 case of my client, called downstairs to his wife
18 to find out if it was safe to go downstairs or
19 whether his house was being inundated again, his
20 street blocked by media?

21 A Well okay, but Ms. Knox, I'm sorry, and I
22 appreciate that your client may have had
23 difficulty; my client couldn't go downstairs and
24 speak to his wife because he was locked up in jail
25 for 23 years, so I guess we come at it from a



1 different perspective.

2 Q But, Mr. Asper, would you agree that one of the
3 consequences of the approach that happened was
4 that it may, in fact, have taken much longer for
5 the whole review process to take place because
6 everybody got put on the defensive?

7 A I don't -- I wouldn't agree that -- I wouldn't
8 agree with you that that was the case from the day
9 we filed the application. I would agree with you,
10 looking back, that, yes, that did become a
11 problem --

12 Q Okay.

13 A -- at some point.

14 Q And, sir, would it -- if I could have brought up a
15 document 001543, please. This is a newspaper
16 story that we've looked at before in the context
17 of an accusation being made about Albert Cadrain,
18 but I want to refer you to the part right here,
19 I'm -- that starts:

20 "The Crown prosecutor was T.D.R.

21 Caldwell ...",

22 and if we could bring out these two paragraphs,
23 please. Sorry, I'm all over the screen here.

24 Okay. If you could just take a minute to read
25 that part, please.



1 A (Witness reading) Yes, I'm familiar with it.

2 Q And you note the date is October 20th, 1989, the
3 media is ratcheting off the rhetoric, Mr. Caldwell
4 is contacted and he said:

5 "The Minister of Justice is
6 in the process of preparing a review of
7 the case, and in light of that, it would
8 be improper for me to comment on it
9 whatsoever.'" "

10 Sir, I suggest to you that that was appropriate
11 for Mr. Caldwell to take that stance when he was
12 contacted by the media in 1989, given the role he
13 was in and the review that was going on, and ask
14 whether you take any disagreement with his
15 assessment of his professional and ethical duty?

16 A I don't take any issue with it, no.

17 Q Sir, there was some testimony that I wasn't
18 present for from Mr. Boyd, or Dr. Boyd I believe
19 he is now, that he contacted Mr. Caldwell and Mr.
20 Caldwell refused to talk to him. Would you not
21 agree that the position that he took in 1989, that
22 it wasn't proper for him to become engaged in a
23 public debate because it was under ministerial
24 review, still remained the proper and ethical
25 course of conduct for him to take?



1 A In terms of not speaking with Dr. Boyd?

2 Q Not getting involved in the debate about what was
3 going on with persons outside the officials
4 properly charged with the responsibility to
5 investigate and conduct the review, Dr. Boyd not
6 being one of them?

7 A By speaking to the media? I assume you are
8 referring by speaking to the media?

9 Q Uh-huh.

10 A I agree, yes.

11 Q Now I'm not going to go into a lot of detail about
12 Doctor Boyd -- as I said, I wasn't here for his
13 evidence, I have some sense of it because my
14 colleague briefed me -- but am I not correct in
15 recalling that when Dr. Boyd came to this case the
16 first time he appeared on the scene he was met at
17 the airport in Winnipeg by Mrs. Milgaard and it
18 was reported in the press that he was now working
19 on the file?

20 A It's possible.

21 Q Okay. If that were the case, and that were known
22 to Mr. Caldwell when Mr. Boyd contacted him, do
23 you reconsider whether it might have been
24 appropriate for him to be cautious and to, in
25 fact, take the position he did as he did in



1 1989 --

2 A Yes.

3 Q -- in --

4 A Yes. Absolutely.

5 Q I'm getting there, honest.

6 COMMISSIONER MacCALLUM: It was appropriate
7 for who to be cautious, Boyd or Caldwell?

8 MS. KNOX: I'm sorry, Mr. Commissioner, I
9 didn't hear your question?

10 COMMISSIONER MacCALLUM: It was appropriate
11 for who to be cautious, Boyd or Caldwell?

12 A Mr. Caldwell.

13 MS. KNOX: Mr. Caldwell to be cautious and
14 to decline to become engaged in debate with Mr.
15 Boyd.

16 COMMISSIONER MacCALLUM: Uh-huh.

17 BY MS. KNOX:

18 Q Sir, if I can globalise a question -- and if I
19 misstate anything, it will be unintentional, but
20 I'm looking at saving some time -- sometime after
21 this article in 1989 where Mr. Caldwell said, very
22 professionally, "there is a review going on by the
23 Minister of Justice, it's not proper for me to
24 comment", the level of rhetoric --

25 A Vitriol?



1 Q -- vitriol -- thank you, that's a very good
2 word -- the vitriol that was being extended in the
3 media towards him, his department, his conduct,
4 increased exponentially up to that article in July
5 of 1990 where he is accused of misconduct on the
6 front pages of the paper; where not too long after
7 that he is accused of paying witnesses for their
8 testimony, referring to Melnyk and Lapchuk; where
9 it's asserted that a substance that he had
10 introduced in evidence at trial as semen was
11 probably dog urine when he knew in fact that there
12 were human pubic hairs in that substance and it
13 couldn't be dog urine -- as examples of what he
14 would have been thinking at the time -- does it
15 cause you pause to think that it's no wonder that
16 he had a, perhaps a -- you might have to help me
17 with another word, but a skeptic -- a reluctance
18 to fully embrace the concept that was being put
19 forward that David Milgaard had been wrongfully
20 convicted?

21 A I completely sympathize with his view.

22 Q Thank you. Sir, do you think that maybe being
23 repeatedly the -- and I'm using "victim" with a
24 small v, no way comparable to how David Milgaard
25 was a victim -- but being repeatedly the victim of



1 unwarranted attacks, to know that stuff that's
2 being put out there is wrong, would perhaps cause
3 him to continue to be faithful in his belief, that
4 I suggest to you was an honestly-held belief, that
5 in 1969 and 1970 the police had arrested the right
6 guy and he prosecuted the right guy?

7 A I can understand how that would have -- how that
8 would be the view, yes.

9 Q And if that had been approached in a different
10 way, where somebody had come in a -- I'm -- I was
11 going to use the word "sensible" and I won't
12 because that sounds like my mother -- in a more --

13 A No, I'd agree "sensible", because I think that's
14 the right word.

15 Q Had he been approached in a more appropriate,
16 non-warlike way, not been ambushed in the media
17 like he was ambushed in the media with what he
18 knew to be untruths, that his participation and
19 his assistance in this matter might have continued
20 to be as it was with Mr. Young, with Mr.
21 Carlyle-Gordge, with the media who came, that he
22 put forth an honestly-held belief that he had done
23 the right thing?

24 A I completely agree. I think our line of
25 separation is only as to how that should have



1 occurred, should it have been via the federal
2 Department of Justice or should it have been done
3 directly, but I agree that either one would have
4 been more sensible than what happened.

5 Q Okay. Thank you for using my word. Sir, I --
6 you'll recall that yesterday there was a point in
7 time when I stood and raised a concern about a
8 paraphrasing that was done by Mr. Wolch as to
9 certain information that would have been in the
10 possession of Mr. Caldwell about Larry Fisher?

11 A Right.

12 Q And I objected because I was asserting, whether
13 you were listening to me or not, that there was a
14 very limited contact recorded and remembered by
15 him with respect to the file, and in that regard I
16 want to bring up a letter dated March 17th, 1971,
17 and I have to apologize to the staff, I have my
18 version of it that came from the original file
19 that we had for Mr. Caldwell and it doesn't have
20 the number on it. But it's a March 17th, 1971
21 letter to Mr. Ken MacKay authored -- pardon me --
22 yes, authored by Deputy Chief Corey, if anybody
23 can assist us with the number I'd much appreciate
24 it, I didn't realize I had taken an original from
25 my old file pre-Inquiry.



1 MR. HODSON: 110590?

2 MS. KNOX: 110590?

3 MR. HODSON: 010718.

4 BY MS. KNOX:

5 Q Thank you for assisting me with that. Every now
6 and then, if you see me with a strange look on my
7 face, it's because I've touched the screen with a
8 pen and I'm gonna be in trouble with the staff
9 because I break it. A March 17th, '71 letter from
10 the Saskatoon Police Service to Mr. MacKay?

11 A Yes.

12 Q Have you had an opportunity, in the course of your
13 preparation or during the time that you were
14 preparing for the Supreme Court of Canada
15 reference, to look at this letter?

16 A I think the latter, yes.

17 Q Okay. And you will see, if I could direct your
18 attention to this part, that Deputy Chief Corey
19 was indicating that he was contacted by Mr.
20 Caldwell on March 16th, 1971, and requested to
21 forward a summary of a fax relating to offences of
22 rape allegedly committed by the above-named, the
23 above-named being Larry Fisher?

24 A Right.

25 Q Who was in custody in Manitoba?



1 A Right.

2 Q In your review of the testimony that Mr. Caldwell
3 gave at the, at this Inquiry, did you review the
4 -- his evidence with respect to this aspect of the
5 allegations of misconduct that were made against
6 him?

7 A I don't think I did.

8 Q Okay. If I can summarize for you -- and others
9 may correct me if I don't get this exactly
10 right -- it was his evidence before this
11 Commission of Inquiry that he had no involvement
12 whatsoever in the investigation or prosecution of
13 the Larry Fisher matter, the only documentary
14 evidence found which triggered a memory for he --
15 him, that he had long forgotten of a non-event of
16 his professional practice in 1971, is this letter
17 that caused him to remember receiving a phone call
18 from Mr. MacKay asking about this character Fisher
19 who was in jail in Manitoba; he checked he says
20 the Crown files, prosecution files, and there were
21 none, there was nothing whatsoever in respect of
22 Larry Fisher; that the practice of the day was
23 that police did investigations and police held
24 files until they were ready to charge and have the
25 matter brought forward for prosecution, in most



1 instances, there being an occasional opinion file,
2 but this wouldn't have been one of them?

3 A Right.

4 Q That, as a consequence of finding nothing in the
5 Crown office, he simply made a phone call to
6 Deputy Chief Corey, he said "we have nothing here,
7 could you determine if you have anything", and
8 effectively said, "if you do, send it on to
9 Mr. MacKay", end of story, only involvement that
10 he had?

11 A That's what it looks to be.

12 Q Yeah.

13 A Yes.

14 Q And you're aware, of course, that there was much
15 suggestion made about him, to his great dismay
16 knowing that this is the only knowledge that he --
17 oh, and I should add there was one reference to
18 Larry Fisher in a police report done by Detective
19 McCorriston in the David Milgaard file that he
20 made no connection to. This is two years later,
21 the day -- the reference in the Milgaard file was
22 in January or early February '69, this is a call
23 two years later about something totally unrelated?

24 A No, but this is a year after the trial, though,
25 isn't it?



1 Q Yes.

2 A Yes, okay.

3 Q But Larry Fisher played no part in the trial?

4 A Yes, right.

5 Q So he might have read a police report in
6 1969-'70 --

7 A Right.

8 Q -- where there were, you know, 200, 300 people in
9 the neighbourhood canvassed?

10 A Right.

11 Q Made no attachment to it, and I presume that you
12 can understand that?

13 A I'm well aware of the problem.

14 Q Yes, perhaps further than most of us, given the
15 amount of time we have had to look back on your
16 actions that aren't so quite dated in time. But
17 essentially, if I can get myself back to where I
18 was going here, in the course of the disclosure of
19 the Larry Fisher connection, the possibility that
20 he was the real killer because he was the rapist,
21 and apart from anything that you and others may
22 have said in the media and to the police and
23 others about the fact that my client was complicit
24 in covering up who the real killer was and
25 knowingly let an innocent man either, number 1, be



1 convicted in the first place, or if he didn't know
2 it then he let him stay in jail once he found it
3 out, but do you have any evidence to suggest
4 there's any truth --

5 A Or let a real killer stay on the street --

6 Q Yeah.

7 A -- was the third part.

8 Q Yeah. Do you have any evidence that would suggest
9 anything, objectively, to sustain that allegation
10 that was made against him so many times?

11 A I think the whole thing from the beginning was
12 circumstantial.

13 Q Sir, and I want to take you -- and I'll, this will
14 be my last question before lunch, I see that you
15 are getting uncomfortable from sitting, but -- and
16 I will finish shortly after lunch -- but the point
17 that you make is that the third point being that
18 if they had done that, what was being suggested
19 that he and others had done, they would have left
20 a real killer on the street; when you were mulling
21 over your information, you were formulating your
22 strategies, you were looking for the bad guys, did
23 you ever for a moment step back from the rhetoric
24 and the emotion that you brought to this at a
25 certain point in time -- as is evident from any of



1 the tapes that I have listened to that this was a
2 very emotionally-engaged file for you -- but did
3 you ever step back for a moment and say to
4 yourself, "okay, I don't know this man, what I do
5 know is that he has been a prosecutor for a long
6 time", if you'd looked at his background you would
7 have seen a career of public service in his
8 prosecutorial service, involvement in his
9 community, involvement in his church, a husband
10 and a family man, and did you ever for a minute
11 say to yourself "how is it possible that a decent
12 man could do this, let an innocent guy go to jail,
13 let a real killer walk, but more importantly how
14 could he put his head on his pillow every night as
15 a husband and father and a member of a community
16 that he was integral to, knowing that when he woke
17 up in the morning, that real killer could have
18 killed somebody while he slept. Ever think about
19 that?

20 A I think that, when we considered that, we were of
21 a view that the magnitude of the wrong was so,
22 potentially so huge that those involved, if there
23 was some misdeed, may be more concerned with their
24 own self-interest than the interest of the system
25 at large.



1 Q Could you --

2 A That would have been our thinking, I think, at the
3 time.

4 Q Could you ever have rationalized that a
5 self-interest to -- because effectively what they
6 would be doing would be protecting their
7 reputations --

8 A Right.

9 Q -- would be big enough that it would overwhelm the
10 fear in the pit of their stomach every night, when
11 they went to bed, that they'd left a real killer
12 on the streets of Saskatoon?

13 A I think that assumes that they would have had that
14 feeling, and at the time, I'm not sure. As I say,
15 I think we were probably of the view that
16 protecting themselves won over everything else.

17 Q Won over their personal, their families, their
18 communities, their professional responsibilities?

19 A Yes.

20 Q Did you have any basis for having that thought
21 other than that it was a thought?

22 A Yes, we did have a basis. We had a client who had
23 been prison for a long time, and we were of a view
24 that that just doesn't happen, it just doesn't
25 magically happen that the wrong person goes to



1 jail.

2 Q And I take it, then, that that view has been
3 tempered by time and experience, because you've
4 testified at this Inquiry that you now realize
5 that good people can all do their jobs properly,
6 or in their -- to the best of their ability, and
7 with an honest belief that they're doing the right
8 thing, and bad things like wrongful convictions
9 can still sometimes happen?

10 A Ms. Knox, absolutely, good people can do their
11 jobs and make mistakes.

12 Q Okay. This would be an appropriate place to break
13 for lunch, Mr. Commissioner.

14 COMMISSIONER MacCALLUM: Okay.

15 (Adjourned at 11:58 a.m.)

16 (Reconvened at 1:31 p.m.)

17 BY MS. KNOX:

18 Q Thank you, sir. Mr. Asper, I just want to go back
19 to a couple of, hopefully not more than a couple
20 of things that I referenced this morning, and
21 closer to the end of the day where I didn't have a
22 document ID number, but you recall I was asking
23 you about the fact that Mr. Caldwell declined to
24 speak to Mr. Boyd and suggested I had a memory of
25 a press conference at the airport in Winnipeg?



1 A Right.

2 Q If I could bring up document ID 004633, please.
3 You'll see that this is a headline in the Winnipeg
4 *Free Press*, I think on July 10th, 1991, and it
5 shows Mrs. Milgaard greeting Professor Boyd at the
6 airport that ran in the local media, this is a
7 Winnipeg *Free Press* version, but would it make
8 sense to you that if Mr. Caldwell, already feeling
9 a little -- no, a lot under attack, might conclude
10 that to accept the invitation that came from
11 Mr. Boyd some weeks later might be equally
12 inappropriate as it was to talk in 1989 when he
13 took the position the matter was under review?

14 A Well, yes, and I thought about that a little bit.
15 I understand Mr. Caldwell's view. I guess -- I
16 guess I look back at it, it may not be fair, but I
17 guess I just sort of wonder if Mr. Caldwell felt
18 that something erroneous was being said why he
19 didn't say something to us, but I understand why
20 he wouldn't.

21 Q Okay. May I suggest to you that Mr. Kujawa
22 attempted to do that and he got crucified and that
23 might have been a factor that would have
24 influenced Mr. Caldwell?

25 A I'm not even necessarily saying publicly, but I



1 understand, having seen that, or seen other
2 examples of it, why one might not.

3 Q And just to pick up on that, when you say not
4 publicly, you are aware, of course, that Mr.
5 Caldwell was available, willing and indeed made
6 himself available as necessary to Mr. Williams of
7 the Federal Justice Department to Sergeant
8 Pearson, I believe, when he came involved, and
9 ultimately to every other person in an official
10 capacity who sought his assistance in exploring
11 what had happened?

12 A Yes, I understand that's the case.

13 Q So it wasn't that he didn't choose to speak about
14 it, he chose to speak about it in a professional
15 forum, if I can use small "p" professional to
16 represent --

17 A I'm not going to debate that. Yes, I'll agree
18 with you.

19 Q Sir, this morning, and I'm going back a bit, but
20 trust me, there's a whole bunch of stuff over on
21 that table now which means I'm finished with it,
22 but there are some issues or some points as I went
23 through my notes that I need to go back, and I'll
24 be very brief I hope, to clarify, but I was asking
25 you whether you have had the opportunity to look



1 at the materials contained in the six volumes of
2 files that were how Mr. Caldwell housed his file,
3 and I phrase that in concert with your expressed
4 concern that if you had gone to Justice, or you
5 and your associates had gone to Justice looking
6 for the file, you had a fear that he might somehow
7 do something that would be not proper and you
8 wouldn't get a true picture?

9 A He or others, yes.

10 Q He or others, okay. I wonder if we could bring up
11 document 00938 -- sorry, 009374 is the document
12 ID. Sir, what is on the screen is, as you
13 probably recognize by now, a page with Mr.
14 Caldwell's handwriting on it. This is a group of
15 materials, or group of reports that come out of
16 his file number 3 as he labelled it, if I'm
17 remembering his labelling correctly.

18 A Right.

19 Q And it is a gathering, or for closing his file
20 purposes he put all of the lab reports into a
21 complete collection and kept them on his file, and
22 I wonder if we could go to page 009386 of that
23 series of pages of lab reports. Sir, this
24 grouping on his file of lab reports goes on for
25 some period of time and this is kind of in the



1 middle of it, if I could characterize it that way?

2 A Right.

3 Q And you'll note that this is a lab report that
4 contains the names (V2) (V2)- (V2)----- and
5 (V1)--- (V1)-?

6 A Right.

7 Q And we don't have the benefit of having a colour
8 copy of it which is how it existed in his original
9 file and how the Commission has seen it during his
10 evidence, but if you look at this in his original
11 file, this long line that comes down through it is
12 done in his fountain pen ink, the green fountain
13 pen ink, there is a notation made by him to omit
14 this particular report, and there's a note made on
15 it up here that it is a different file, and if you
16 are not remembering, the file number assigned to
17 it, 286-69, is a different file than the David
18 Milgaard/Gail Miller file?

19 A I accept that.

20 Q Sir, one of the pieces of, or one of the many
21 allegations made against him that followed on your
22 suspicion or your concern in the early stages,
23 that if you went to him you might not get a true
24 picture, but in fact this document was on his file
25 when it was taken or reviewed by the Department of



1 Justice in preparation for the 690 review and
2 ultimately for Supreme Court of Canada, and you
3 can see it clearly relates to two of the women who
4 were victims of Larry Fisher?

5 A That's correct.

6 Q Sir, I suggest to you that the fact that Mr.
7 Caldwell, number 1, identified it as a different
8 file not connected to the Milgaard prosecution,
9 and number 2 -- and identified it that way at the
10 time, and number 2, and perhaps more importantly,
11 that he kept it on his file for all to see, Mr.
12 Young, if he had come to look at it, Peter
13 Carlyle-Gordge, Sandra Bartlett, you, if you had
14 come to look at it, anybody who wanted to come to
15 look at it, would be another factor that, had you
16 gone about this the way you now wish you had,
17 would have been some, given some weight to putting
18 to rest your concerns about misconduct on his
19 part?

20 A I think that's true, yes.

21 Q You know, why would he keep the very thing that
22 was going to be evidence that he could have had
23 knowledge and that he should have -- that he
24 should have made the connection where he says he
25 didn't or might have made the connection?



1 A That's true.

2 Q And on that point as well, is it not true that you
3 became aware very early in your dealings with this
4 file that the very exhibits that ended up being
5 the materials that were able to be used in 1996,
6 1997 to exonerate David Milgaard were available to
7 you because Mr. Caldwell had made a direction to
8 the registrar of the court and a note was put on
9 those exhibits that they were not to be destroyed
10 except by express direction from him?

11 A Yes, I think I was the first of our -- I was
12 certainly the first lawyer after our firm was
13 retained to inspect those exhibits. I don't
14 recall seeing the note, but I became aware later
15 that Mr. Caldwell had in fact preserved them.

16 Q And, sir, and I didn't bring it with me, but
17 you'll recall that you used Audrey Brent as the
18 agent for your firm here?

19 A Yes. Ultimately, yes.

20 Q And perhaps you don't have a memory of it, but
21 there's a story that appeared in the media where
22 Ms. Brent is quoted, as to her amazement when she
23 went in she found this sitting on top of this pile
24 of exhibits in a grocery cart I believe.

25 A Found the note?



1 Q The note was sitting on top of the exhibits when
2 she went in on direction from your firm as your
3 agent to get the exhibits released.

4 A Right. Well, I had been there before Ms. Brent
5 became involved. I just don't recall seeing the
6 note. I may have.

7 Q Okay. But that she's -- and as I said, I didn't
8 bring the article.

9 A I don't dispute the note was there.

10 Q But again, if you became aware of that, that the
11 man that you were suspicious of and who you
12 weren't comfortable trusting to give you basic
13 information, including access to the Crown file,
14 was in fact the man who was preserving the
15 exhibits, should that have, if you were thinking
16 logically, and I'm going to borrow a term from
17 Peter Carlyle-Gordge, if you had been using
18 rigorous logic, that that too would be another
19 indication, just as this lab report is, still in
20 his file, that this guy doesn't sound like he's
21 done anything wrong, because if he is, he's not
22 going a very good job of trying to cover it up?

23 A Well, yes, I would agree with that.

24 Q Sir, I asked you this morning, and I didn't have a
25 document number, about the fact that as he was



1 under siege in terms of his actions and his
2 integrity, a media report was done or a further
3 attack on his present day integrity was done when
4 it was alleged that he was in a conflict of
5 interest because he was getting access to his
6 file?

7 A Right.

8 Q I want to bring up document 332361. If you can
9 flip it a little bit, please. You'll see this is
10 an article that appeared in the *StarPhoenix* in his
11 home city on the 30th of August, 1990 and
12 essentially quotes in part yourself and Mr. Asper,
13 but the headline makes it very clear that in
14 another time frame, additional to what's been
15 alleged about him in 1969, 1970, '71, '72, in 1990
16 further allegations of improper conduct are being
17 made about him?

18 A That's correct.

19 Q And I don't think I need to ask the question, I
20 think you are agreeing with me, that in hindsight
21 looking at that, you could see why that would keep
22 him silent and cause him to be skeptical of the
23 claim being made by Mr. Milgaard because, after
24 all, while innocence is not a right word, he's the
25 man who hadn't done any of the things he was being



1 accused of, in his mind?

2 A In his mind, yes.

3 Q Yes.

4 A Okay.

5 Q I also made reference to an allegation that was
6 made against him in the public media and I didn't
7 have the document ID, if we could bring up 332331.
8 This, you'll see, and you've been referred to this
9 before I believe in the course of your evidence,
10 and you'll be happy to know that you are not the
11 spokesperson here, that your principal, Mr. Wolch,
12 but again, this is an article that appeared, as
13 you can see, August 21st, 1991 in the *Saskatoon*
14 *StarPhoenix* that makes some pretty serious
15 accusations against Mr. Caldwell?

16 A I'm just --

17 Q Please, take your time.

18 A (*Witness reading*) Well, okay, I see it.

19 Q See why he might be upset by that?

20 A Oh, I can see why Mr. Caldwell might be upset,
21 sure.

22 Q Uh-huh. Sir, and again if you'll be patient with
23 me, I'm sort of going back in terms of some stuff
24 I did this morning. At one point in time I asked
25 you whether at any point between 1986, when you



1 became involved in the file, and 1992 when you
2 left the office to go on to another aspect of your
3 life, whether you had turned your mind back to the
4 way things were in 1969, 1970, and you were
5 talking about air traffic and mobility and things
6 like that in that respect and you indicated that
7 you believed that you had to an extent?

8 A Well, I mean, yes, to a large extent, because we
9 thought that things were a lot closer in terms of
10 the relationship among police officers, the police
11 department was smaller, communities were smaller,
12 the crimes that Fisher was committing we assumed
13 would have seemed larger given the size of this
14 community, yes, we certainly put our mind back to
15 1969.

16 Q Okay.

17 A As much as we could I guess.

18 Q Okay. I want to take you back to the, out of the
19 mobility of people and with respect to practices
20 and rules that govern the practice of law,
21 particularly criminal law at that time, and did
22 you make any attempt, and particularly in light of
23 the allegation that was reported as made by you in
24 July, 1990 that Mr. Caldwell had engaged in
25 misconduct by withholding statements from



1 Mr. Tallis. Did you make any attempt before you
2 took that position publicly to go back and look at
3 what the rules were or the law was respecting
4 disclosure at that point in time?

5 A Well, I'm not going to give you a free pass on the
6 interpretation because my recollection of that
7 incident is that I was being critical of Tallis on
8 his cross-examination and suggesting that if he
9 didn't have the statements, if he didn't, then it
10 would be misconduct on the Crown. If your
11 question is if Mr. Tallis didn't have the
12 statements did I consider, under the rules of the
13 time, as to whether that would have been
14 misconduct by the Crown attorney, is that --

15 Q We can go there, that works for me.

16 A Because I just -- I'm sorry, I just can't accept,
17 because that's not my recollection --

18 Q Okay.

19 A -- of how that quote came about. As I've said
20 over and over again, I accept for how it came out,
21 I accept that.

22 Q And, Mr. --

23 A And in terms of, I believe you are referring to
24 Boucher standard of disclosure, I don't recall it
25 and can't recite it at this moment, but I'm pretty



1 sure we would have been looking at the standards
2 for the time.

3 Q And if I paraphrased inappropriately what your
4 evidence is, I apologize for that. You and I have
5 I think a slightly -- I have a different view of
6 how you interrupt it, but that's not for us to
7 decide, that's for the Commissioner to decide.

8 A Right.

9 Q I want to -- and this may be a quick reference,
10 I'm not going to ask you to give me the cite for
11 Boucher, I want to have brought up document
12 009289, please, a letter dated June 10th, 1969 to
13 Mr. Caldwell from Mr. Tallis.

14 A Yes.

15 Q And I want to direct your attention to the second
16 paragraph of that letter if I may, and the second
17 sentence more importantly is where I want to ask
18 you a question.

19 A Yes.

20 Q Okay. Perhaps paraphrasing the law as it was set
21 out in Boucher, you recognize -- first off, have
22 you ever seen this letter before? I know you
23 hadn't gotten Mr. Tallis' file or Mr. Caldwell's
24 file up until December of 1991, but had you seen
25 it at any point in time prior to that?



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

2 Q Okay. Would you agree with me that the statement
3 of law as put forward by Mr. Tallis at that point
4 in time appears fairly definitive, that there
5 wouldn't have been an automatic entitlement to
6 physical receipt of statements; in fact, I don't
7 think we were even using words like disclosure
8 back then, although we may have been, I wasn't old
9 enough to be, but that in fact the standard or the
10 practice of the day for many was that counsel were
11 given opportunities to read and review, Mr. Tallis
12 had a very good working relationship, as he
13 attested to, as did Mr. Caldwell and others, and
14 was freely given materials, including witness
15 statements and so forth, but there was no --

16 A It wasn't certainly as we know it today, that's
17 for sure. Yes.

18 Q And I don't want to go down the road of debating
19 that issue with you again, but I'm going to ask
20 one more question with bated breath. If -- if --
21 just possibly if you had been thinking in terms of
22 the requirements on the Crown, or the duty on the
23 Crown at that time in the context of how
24 Mr. Tallis outlined it in that letter that I just
25 showed you, which he sent to Mr. Caldwell in



1 respect of this file, might that, might that have
2 in any way introduced a note of caution to your
3 interpretation of what the implications were of
4 whether or not Mr. Tallis had physical custody of
5 the statement, it being a non-issue of course
6 because indeed we know he did have it?

7 A I suppose it might have.

8 Q Okay. Every time a file goes that way it's a good
9 thing, and everybody in the room will groan when I
10 say this, but I just want to take one quick walk
11 back to the motel reenactment.

12 A Great.

13 Q This morning when I was asking you about it I
14 think I paraphrased or summarized by saying that
15 it was my recollection that a letter had been sent
16 to Mr. Tallis subsequent to a phone call made to
17 him on the Sunday night, January 19th, when Mr.
18 Caldwell first became aware?

19 A Right.

20 Q As did the police first become aware of the
21 existence of these people?

22 A Right.

23 Q I want to bring up document 007070. You'll see
24 this is in fact a letter that I thought I had,
25 that I knew to have existed and which I obtained



1 over the lunch hour, but if you want to -- if we
2 could bring it up in paragraphs closer for you to
3 do a quit scan of it.

4 A Okay.

5 Q Would you agree with me that essentially it
6 confirms what I summarized for you, that this was
7 how Lapchuk, Melnyk, Ute Frank came to their
8 attention and the course of action that was
9 engaged in as a consequence of it?

10 A Right.

11 Q Now, again going back to a question I've asked you
12 a number of times, would you agree with me that
13 had you looked at the Crown file, as you wish now
14 that you had, and seen this, that that would have
15 had some influence on the side of being less
16 aggrieved or less vitriolic towards Mr. Caldwell
17 in terms of his action?

18 A I'm not sure I -- it may. I'm just not -- I don't
19 recall being, that this issue was anything that
20 drove me particularly more than anything else.

21 Q Sir --

22 A Other than the characterization. I don't think
23 the disclosure issue here was an issue.

24 Q And perhaps, sir, I'm placing an emphasis on a
25 piece of the process of events that unfolded



1 different than you did, but I'm premising the
2 importance of this issue on the fact that it was
3 the affidavit of Deborah Hall with respect to this
4 incident that was the second peg of your
5 re-opening application in December, 1988, and it
6 may be that I'm giving it more importance in the
7 greater scheme of things than you attributed to it
8 and, if that's case, then I apologize again, the
9 Commissioner will make that determination, if it's
10 necessary to be made, as to whether or not I'm
11 overemphasizing.

12 A Well, I mean, look, to be clear, as I said from
13 the outset, we needed something new, that was new.
14 As the case wore on, I think it's very clear that
15 the role of the Deborah Hall statement diminished
16 quite dramatically.

17 Q I won't go there. Mr. Asper, in your -- I
18 referred you this morning to the content of the
19 original prosecution file and I have passed to the
20 staff three documents that I want to ask you to
21 look at because there's a single point in respect
22 of them, and if we could start with the (V4)---
23 (V4)--- statement that was contained in Mr.
24 Caldwell's file which he sent to the Department of
25 Justice. Again, this is a colour photocopy taken



1 from the original which is in the possession of
2 the Commission, it has a document ID number
3 006404, again for the record, and I draw to your
4 attention, because in Mr. Caldwell's file it had
5 written in red ink a comment, "Indecent assault
6 not connected." The evidence before the
7 Commission is this was an assessment or a
8 preliminary assessment done with respect to this
9 incident by a police officer, we're not sure
10 exactly who, but certainly a member of the
11 Saskatoon Police Service before it was sent to
12 him, and he has suggested that it may have been a
13 factor in his not making a connection. If you had
14 reviewed the file and been aware that of these
15 particular statements, and there were others, (V9)
16 (V9)---- and the other three have the same kind of
17 a notation, would that have given you some pause
18 with respect to the expectation that you would
19 have had on Mr. Caldwell as to how he fit this
20 into the big picture given what little information
21 he had about, the fact that he had no information
22 about Larry Fisher?

23 A I find it, I just find it odd that files of this
24 potential importance were in Mr. Caldwell's file
25 and marked not connected, I can't explain that.



1 Q Okay. Sir, as part of an explanation, would it,
2 you consider the fact that there's still a debate
3 to this day as to Larry -- and I believe Dr. Boyd
4 visited here in my absence this week as to whether
5 the person who killed Gail Miller could have
6 perpetrated the assault on (V4)---- (V4)--- as she
7 describes it, just in terms of location and time
8 line?

9 A There may be debate. I was taking one side of it.

10 Q And, Mr. Asper, I have to say to you that my
11 memory tells me, as I had a brief humorous comment
12 that was exchanged between Mr. Wolch and I with
13 respect to this, but somewhere in the Federal
14 Government file there is a memo that says that in
15 discussions with you, and the merits, or the
16 suggestion that the same perpetrator had killed
17 Gail Miller and indecently assaulted (V4)----
18 (V4)---, you had conceded that the one person
19 couldn't have done it because the time lines were
20 too tight?

21 A Well, I think that's referring to a conversation
22 that I had with Inspector Sawatzky, --

23 Q Okay.

24 A -- and I had a fairly free-ranging discussion with
25 Inspector Sawatzky about time lines, and if you



1 move one time this way or that way it's not
2 possible.

3 Q Okay. Sir, given that you, with your view of the
4 file, were prepared to acknowledge that slight
5 variations in time would make it impossible, does
6 that make it so astonishing that Mr. Caldwell --
7 that and other factors -- didn't make a
8 connection?

9 A I have to say certainly, at the time, the fact
10 that there was another sexual assault within
11 blocks of the Miller murder was something that we
12 thought would have been important.

13 Q Okay. I'm going to go completely away from my
14 files for a minute because there is a question
15 that's kind of been niggling at me, and I've
16 raised it with several, including Mr. Hodson, as
17 we go along. But throughout the course of the
18 representations that have been made in respect of
19 your view -- and by "your view" I mean the
20 collective counsel representing Mr. Asper in this
21 application from 1986 forward --

22 A Milgaard.

23 Q Sorry.

24 A I'm Asper.

25 Q I'm sorry. I'm very tired, I didn't sleep a lot



1 last night, you will be -- you kept me up -- Mr.
2 Milgaard, but --

3 A I gave you something to read in the *National Post*,
4 so --

5 Q I haven't looked at the *National Post*, I have been
6 looking at this stuff, but --

7 A I've got a subscription for you.

8 Q Thank you again. You are just taking me off
9 track. But at various points of time in the
10 course of various pronouncements that were made in
11 the media, the various salvos that were blown in
12 the war that had begun to happen around this whole
13 inquiry into the merits, or lack thereof, of Mr.
14 Milgaard's conviction, reference has been made by
15 many people to the fact that the Saskatoon Police
16 Service and Mr. Caldwell should have realized that
17 they were dealing with a serial rapist. And I
18 don't know, I can't bring to mind -- and there are
19 many things about this, unfortunately, I can
20 readily bring to mind -- I can't bring to mind any
21 time when I heard or read that you had said it;
22 but were you aware that one of the assertions as
23 to the lack of *bona fides* of the Saskatoon Police
24 Service and the prosecution in bringing these
25 charges and prosecuting Mr. Milgaard was that they



1 had to be aware, that the statements were strong,
2 they had to have known that they had a serial
3 rapist, they covered it up was one allegation, if
4 they didn't, you know, if they didn't know they
5 should have known, they were professionals, but
6 generally the language of the serial rapist was --
7 is part of the explanation being offered for why,
8 in the mind of their detractors, these policeman
9 and this prosecutor should have known and made a
10 connection to Larry Fisher; do you remember those
11 kinds of --

12 A Oh, I certainly recall the use of the word or the
13 phrase 'serial rapist'.

14 Q Uh-huh.

15 A I think some witnesses have testified, either here
16 or at the Supreme Court, I -- you know, the words,
17 or the phrase 'serial rapist' wasn't known at the
18 time in '69, in 1969 it was called something else,
19 if anything.

20 Q Uh-huh?

21 A But, yes, we took the view -- and I to have say
22 this. You have to wonder why, with all of the
23 Fisher activity going on, in the context of the
24 Gail Miller murder, you know, it's not crazy to
25 wonder why somebody didn't -- it didn't twig.



1 Q Uh-huh. Sir, I want to take you back and ask you
2 again if you consider that, in the context of
3 1969, that offences of violence against women,
4 sexual offences in particular, were, according
5 to -- certainly according to the literature and
6 many women who were victims of assaults or who
7 were advocates of victims of assaults in those
8 days, weren't taken as seriously as they are in
9 the current age, and as they have been for the
10 last 20 plus years; would you --

11 A I --

12 Q Were you aware of that when you were doing a
13 review of what the Saskatoon Police should have
14 known, what the Saskatoon Police Service should
15 have done?

16 A Oh, I don't think I would be prepared to say that
17 the Saskatoon Police weren't taking these crimes
18 seriously.

19 Q Okay. And --

20 A I think, I think it is fair to say we were in a
21 much more paternalistic world.

22 Q Okay. And I apologize to the Saskatoon Police
23 Service, because you're right, that's a wrong use
24 of language. What I should have said is that the
25 investigative style was somewhat different, and



1 'paternalistic' is a good word I think, to
2 describe what was often done with respect to the
3 offences?

4 A But, Ms. Knox, I have to say I think my view would
5 be that it would be the na -- in the nature of
6 that paternalism to want to protect the women.

7 Q Uh-huh. Okay. And what do you base your view of
8 that kind of paternalism on? Have you
9 canvassed --

10 A Well, because the women are weak and need
11 protection was the attitude.

12 Q That's an attitude in some places, there's no
13 doubt. But, sir, --

14 A Well in 1969 it was in a lot of places.

15 Q Sir, did you canvass or have you canvassed with
16 policing authorities outside the parameters of
17 Saskatoon, outside of Saskatchewan, about what the
18 policies and practices were of police departments
19 around investigation of complaints of rape,
20 indecent assault, in those days?

21 A I don't think so. We may have when Rossmo and
22 Boyd got involved, but not until then, I wouldn't
23 think.

24 Q Did you canvass or attempt to determine what the
25 practices or policies were around notification to



1 victims when cases were either closed because they
2 were unsolved and the police felt they had no
3 place to go, or when they were concluded by way of
4 guilty plea, as an example like happened in Larry
5 Fisher?

6 A I don't recall if we did or not.

7 Q Okay. Are you since aware that there's evidence
8 before this Inquiry, and likely perhaps will be
9 more evidence, that there was no policy within the
10 Saskatoon Police Service that required
11 notification?

12 A I don't -- I accept that that's evidence. I'm not
13 aware of that evidence but I accept that it's
14 before the Inquiry.

15 Q Okay. I -- and are you aware that -- and I'm
16 trying to remember long back, this has been a long
17 process -- or, no, I won't ask you if you are
18 aware -- but the summary of what you're telling
19 me, I take it, is that you didn't check it out,
20 you presumed that the normal course of events for
21 a policing authority would be to give notice to
22 women like the women in the Larry Fisher files?

23 A I don't know that we presumed that there -- well,
24 I guess that's the implication, we were surprised.

25 Q And you went further than being surprised, because



1 that notification wasn't given you made -- you,
2 and I say "you" in a collective sense, your
3 group -- made a conclusion and drew a conclusion
4 and made public assertions that the failure to
5 notify had sinister overtones as opposed to an
6 unfortunate paternalistic policy as might -- it
7 might be described?

8 A That was an interpretation we were offering, yes.

9 Q But to bring an end to this point that I am
10 belabouring, perhaps unnecessarily, it was a
11 viewpoint that wasn't based on any factual
12 information that you obtained or any evidence of
13 policy or practice of the day, it was an
14 assumption made in 1986 forward about what would
15 have happened or should have happened in 1980 --
16 in 1969, and an assumption made, because it didn't
17 happen, that meant that something wrong was done
18 here -- being done here?

19 A Or could, yes.

20 Q Okay.

21 A Yes.

22 Q Mr. Asper, at various points in times, I'm not
23 sure if you said it in your evidence this past
24 while or whether it is something that I have read
25 and that I am reflecting on because I read it as



1 opposed to heard you say it, but I have a
2 recollection that you have indicated, either in
3 this forum or in other forums, that as soon as you
4 read the transcript of the evidence given by
5 Albert Cadrain at Mr. Milgaard's preliminary
6 inquiry and at his trial you knew something wasn't
7 right here; do you remember saying that?

8 A No.

9 Q Okay. Was it your view or do you remember if it
10 was your view, after you read his evidence of the
11 preliminary inquiry and trial, that there was
12 something wrong with this guy?

13 A I don't recall.

14 Q Okay.

15 A I haven't read that evidence in a long, long time.

16 Q Okay. I won't bore you with the detail, but I
17 want you to know that Mr. Wolch didn't share your
18 opinion. According to an interview he did with
19 the RCMP, document number 023046 at page 023059,
20 he made -- he offered to Inspector Sawatzky to
21 show Albert Cadrain on tape, he -- and I'm quoting
22 from the document without needing to bring it up
23 -- oh, sorry, we have it up. He says here:

24 "We could show him to you on tape. It
25 would appear that he had mental problems



1 early on. Going through the trial, you
2 don't have any sense of him being
3 mentally ill."

4 And on that point, with respect to Mr. Cadrain
5 and his mental health status at the time of
6 trial, were you aware, in fact, that there were
7 no indications made to the police or the Crown,
8 according to the evidence before this Commission,
9 that Albert was experiencing any mental health
10 problems at that time?

11 A I think that's what the evidence is, yes.

12 Q Yeah. And you were aware that when Peter
13 Carlyle-Gordge interviewed Dennis Cadrain in 1983,
14 and Dennis was very helpful to him, Dennis made no
15 allegation, at that time, that his brother was
16 exhibiting any signs of mental illness.

17 A I'm sorry, was that in '83?

18 Q '83, I believe, was the Carlyle-Gordge. Yeah,
19 '83, I can --

20 A Well I'm not sure that -- I'll accept it. At some
21 point, though, I think we found out that Cadrain
22 was in a psychiatric institution in '73.

23 Q Yes, and I'm --

24 A In '73 though.

25 Q I'm going there, yes. But in terms of, I'm



1 talking about the knowledge base that persons
2 who's conduct you were calling into question
3 had, --

4 A I --

5 Q -- I'm asking you whether you had any indications,
6 early in this process, to indicate there was
7 evidence known to police or Crown that Albert
8 Cadrain had some mental health problems at some
9 point?

10 A No, not until 1990 or -- sorry, no, we never --
11 no, there was no indication that anybody had that
12 knowledge.

13 Q Do you -- so I take it that you would be prepared
14 to accept that Mr. Caldwell, as he has testified,
15 had no idea that there was anything wrong, in fact
16 didn't become aware some couple of years after the
17 trial that Albert Cadrain was admitted to a
18 psychiatric hospital and received treatment, and
19 didn't become aware of the information about him
20 and his comments that Dennis has reported, about
21 seeing Mr. Milgaard's face on a snake or some
22 object or something like that, until well after
23 this review had started?

24 A I accept that, sure.

25 Q Okay. Mr. Commissioner, for -- and for the



1 benefit of Mr. Asper, with reference to the Peter
2 Carlyle-Gordge interview of Dennis Cadrain, the
3 document number, I don't have the first couple of
4 pages, I believe it starts at 325634.

5 MR. HODSON: Correct.

6 COMMISSIONER MacCALLUM: Yes.

7 BY MS. KNOX:

8 Q And while I'm back in that document, if I could go
9 back to something I had asked you about this
10 morning and you said you weren't sure if you had
11 read it, if we could go to page 325644 of that
12 document. And I'd asked you this morning if you
13 could -- if you remembered reading the transcript,
14 if it was one sent to you when you first started
15 the file in '86, and if you remembered -- if you'd
16 read it you would have noted the reference to
17 Larry Fisher, you said you didn't remember it, but
18 you see that it was, in fact, canvassed by Mr.
19 Carlyle-Gordge in that interview? The question
20 starts here:

21 "Did you know a Larry Fisher?"

22 And this is the Dennis Cadrain.

23 A Right.

24 Q Okay. So he canvassed it with Dennis, he
25 canvassed it with Albert?



1 A Right.

2 Q In that, I'm confusing myself, I think it was
3 1983. Now, sir, that -- and, sir, I'll move off,
4 and that document can go. Reference has been
5 made, in the examination of you by others, to the
6 document that's called, now, the Mackie document,
7 which was that summary that showed up --

8 A Right.

9 Q -- in around the time that you were in preparation
10 for Supreme Court of Canada. And if I -- I could
11 have brought up a version of it, please, 008920 is
12 the number I have in front of me, I could work
13 with a different version -- I'm sorry, 920. I
14 have a different version with document number
15 006799. If we could use 006799, that's the one I
16 think that we've all been working with.

17 MS. CHERYL ELLERMAN: (Assistant Document
18 Manager) Could you repeat the number?

19 MS. KNOX: 006799.

20 BY MS. KNOX:

21 Q Okay. Same document, the other one had a cover
22 sheet from Murray Brown to Chief Montague with a
23 letter attached that you -- in any event just
24 going back to your evidence, and in particular to
25 some of the material I read in your conversations



1 with Mrs. Milgaard, that you started going to
2 Regina to look at the Crown file in December, I
3 think, of -- just in advance of the Supreme Court
4 of Canada reference. When you went to Regina do
5 you remember seeing this document in what was
6 provided to you as the prosecution file?

7 A I don't think I recall seeing it, or at least
8 twiggling to it, until we were in Ottawa.

9 Q Okay. You are aware, as you've reviewed Mr.
10 Caldwell's evidence, that it is his evidence that
11 this was not in his original prosecution file when
12 it was in the offices over here, when it was
13 examined by him at Mr. Williams' request, and
14 prior to it being sent to him in Regina; that this
15 was not a document that was part of his file?

16 A Right.

17 Q And do you know, when you became aware of it, what
18 the source of it was that got it into your hands?

19 A I believe it was through the federal Department of
20 Justice.

21 Q Okay. Are you -- do you have a -- and I'm going
22 to be pushing your memory for sure now -- but do
23 you remember whether there was anything given to
24 you, either of a document ID or a cover letter or
25 a memo or anything, that would have documented the



1 source of this document as it was being passed on
2 to you?

3 A I'm sorry, I can't recall.

4 Q Okay. Sir, this may have been canvassed with
5 you -- and I'm, and I apologize if, to you and to
6 the Commissioner and other counsel if I'm going
7 over something that you've already covered, but
8 because of time constraints I didn't have time to
9 go back and read all of your transcript -- but one
10 of the criticisms, if I could use that word, that
11 you made at various points in time, as did others,
12 of Mr. Caldwell and his conduct of the trial, in
13 particular as it relates to Nichol John, was that
14 he got to examine Nichol John in front of the jury
15 about a statement that, ultimately, she didn't
16 adopt?

17 A Right.

18 Q Okay. Now you had read the transcript of the
19 trial as -- and I believe, well, I know you read
20 the transcript of the preliminary inquiry, but do
21 you recall that when that issue became live within
22 the conduct of the trial, that Mr. Tallis and Mr.
23 Caldwell asked to have the jury removed before
24 they brought it -- it became an issue?

25 A I'll accept that.



1 Q Okay.

2 A I don't recall.

3 Q Okay. And that both of them took the position,
4 before Justice Bence, that this was an examination
5 that should have been done in the absence of the
6 jury?

7 A I'll accept that.

8 Q Okay. There's much evidence on it in addition --

9 A I don't recall. It's in the transcripts and I'll
10 accept your evidence on it.

11 COMMISSIONER MacCALLUM: May I just ask you
12 to make a distinction between the examination
13 under 9(2) and the one under 9(1) after the
14 declaration of hostility, where the statement was
15 actually read point by point, --

16 MS. KNOX: Okay.

17 COMMISSIONER MacCALLUM: -- and I don't
18 think Caldwell and Tallis asked that that
19 particular examination be done in the absence of
20 the jury?

21 MS. KNOX: And you are correct in that, I
22 was summarizing inappropriately, but that just in
23 terms of -- if I can wrap my mind around it,
24 because I just did a scribble note to myself --
25 but in the preliminary stages of the application



1 there was an agreement that the jury should be
2 out of the room, and that would be with respect
3 to the -- I'm confusing myself, even, on the
4 sections -- but as to whether or not she should
5 be declared adverse, that there was an
6 application to have her --

7 COMMISSIONER MacCALLUM: Yeah, that was
8 under 9(2), which was the new section at that
9 time.

10 MS. KNOX: Right.

11 BY MS. KNOX:

12 Q Do you have any memory of reading that, or sort of
13 directing your mind to how the ruling of Justice
14 Bence might have impacted on the way that
15 application unfolded from the perspective of Mr.
16 Caldwell, and I should say from the perspective of
17 Mr. Tallis as well?

18 A I'm not sure. Well, I'm not sure I understand
19 your question. I'm not sure what you are asking
20 me. Are you asking did they -- did the statement
21 have an effect on the jury?

22 Q No, I'm asking you whether you gave any
23 consideration to the constraints that Mr. Caldwell
24 was operating on in the course of that part of the
25 trial --



1 A No.

2 Q -- when you made your --

3 A No.

4 Q -- assertions about wrongdoing on his part?

5 A I don't think so.

6 Q Okay. And I'll leave it at that. Mr. Asper, when
7 you engaged the services -- and I think I may have
8 touched on this this morning, I just want to bring
9 sort of a summary question or a question to get a
10 summary of what your position was, as I'm not sure
11 that I got a clear answer this morning -- but when
12 you engaged the services of Dr. Ferris -- or not
13 you -- or Dr. Markesteyn -- and Dr. Markesteyn to
14 do a review of the serological evidence, and in
15 Dr. Markesteyn's case the whole of the evidence,
16 did you sit down and do any sort of a detailed
17 review of what it was necessary for you to provide
18 to these experts to be sure that any opinion they
19 rendered would rest on the fundamental necessity
20 for any expert opinion, but a solid foundation, a
21 solid factual foundation?

22 A I'm sure there was conversation with the doctors.
23 I don't recall it specifically.

24 COMMISSIONER MacCALLUM: I -- Ms. Knox, as
25 I recall this witness' earlier testimony, he did



1 not engage Markesteyn, he came to them as a
2 matter of interest, and also that he said that he
3 didn't have a chance to, or he didn't have time
4 to examine the larger picture of the forensic
5 evidence and its effect on the trial; am I right?

6 A I think that's what Dr. Markesteyn said, yes.

7 COMMISSIONER MacCALLUM: Yeah, uh-huh.

8 MS. KNOX: Mr. Commissioner, I'm going to
9 ask your indulgence in spite of time constraints,
10 and ask if we could bring up some documents in
11 relation to that, because I'm not quite clear, I
12 only made notes on the documents.

13 COMMISSIONER MacCALLUM: Uh-huh.

14 BY MS. KNOX:

15 Q If we could bring up document 155505. And, sir,
16 you will recognize this, I'm sure, as you are the
17 author of it. This is your letter to Dr.
18 Markesteyn on March 1st, 1990?

19 A Yes.

20 Q And as I look at it, and I'm looking at it for the
21 first time in a long time, there is no indication
22 --

23 A Well I think the last sentence, Ms. Knox, thanks
24 for your concern in the matter, --

25 Q Yeah, that's okay.



1 A -- might suggest that he contacted us. I don't
2 know, I'm not gonna stand on it, I never --

3 Q Okay. And trust me, I don't have anything that I
4 am going to pull out of the hat and say to you
5 "well, I know that that's not true", I'm looking
6 for the first time at these documents in a long
7 time, I made note of the numbers last night.

8 If we could also bring up
9 document 155507, please. This is a May 15th
10 letter, and directed to Dr. Markesteyn from you,
11 indicating that subsequent to your May 1st letter
12 that we just looked at there was a telephone
13 conversation between you and you requested that he
14 offer an opinion on the overall evidence in --
15 that might or might not support the theory of the
16 Crown in the *Milgaard* case?

17 A Right.

18 Q Okay. Now I, appreciating how difficult it is to
19 try to remember, I'm not wanting to suggest to you
20 that you were wrong in your belief that Dr.
21 Markesteyn approached you; would it be fair to say
22 that, once Dr. Markesteyn was involved in the
23 process, that you opted to use his services for
24 some more extensive work, if -- as indicated in
25 this May 15th letter?



1 A Yes.

2 Q Okay. And I guess it is in the context of that,
3 then, that I would ask you whether you gave any
4 consideration to the importance of giving him a
5 solid, accurate, factual background to the inquiry
6 that you asked him to conduct, because of course
7 the weight and value of his opinion would only be
8 as good as the legs that he based it on?

9 A Yes, I think we would have thought of that.

10 Q Okay. Sir, I have taken the liberty of going
11 through, on this point, some of the transcript
12 from the preliminary inquiry, and I don't want to
13 take you to much in the preliminary inquiry, but I
14 am -- I refer you to the transcript of evidence of
15 Victor Sam Molchanko, the document number is
16 108916. And what is on this, sir, the cover page
17 is a notice sent out to witnesses by Mr.
18 Caldwell's assistant providing them with their
19 transcript to review prior to the trial, and a
20 request to bring it back, and then the next page,
21 at 108917, this is the start of Victor Molchanko's
22 evidence.

23 A Yes.

24 Q If we could go to 108930. In Mr. Molchanko's
25 evidence there's some reference to vials at line



1 61, I believe -- yes, two vials, he talks about
2 some vials that he received as part of the
3 exhibits turned over to him; do you see that?

4 A Yes.

5 Q And if we could go to page 108950 of that
6 transcript, in a re-examination by Mr. Caldwell --
7 if we could bring out that part -- it was
8 Mr. Molchanko's evidence that he found seven hairs
9 in one of those vials?

10 A Yes.

11 Q Okay. And now if we could go to the transcript of
12 his evidence at the trial, which has -- was on
13 January 28th, 1970, and the first page of the
14 document indicates 211936.

15 COMMISSIONER MacCALLUM: Is this a new doc.
16 ID?

17 MS. KNOX: Yes, 211936 would be the trial
18 evidence --

19 COMMISSIONER MacCALLUM: Okay.

20 MS. KNOX: -- of Corporal Molchanko.

21 BY MS. KNOX:

22 Q And, sir, I'm not going to go through the bulk of
23 it, but before I direct your attention to a
24 specific part of it do you remember, when you were
25 reviewing the file or the trial transcripts, that



1 there was a period during the course of
2 Mr. Molchanko's evidence when the -- there was a
3 request that the jury be removed and an argument
4 was engaged in, by Mr. Tallis in particular, that
5 the evidence about the presence of the pubic hair
6 should not be admitted in front of the jury?

7 A No.

8 Q Okay. Direct you to 211955. And I won't go back
9 further, but basically this is the conclusion of a
10 submission being done, that Mr. Caldwell is
11 notifying the Court that there is a matter that
12 Mr. Tallis wishes to go into in the absence of the
13 jury, the jury is excused?

14 A Yes.

15 Q Do you see that?

16 A Yes.

17 Q If we go to the next page, from page 211956
18 through to 211966 the -- there is a motion or an
19 application, in the absence of the jury, about
20 whether or not the evidence should be admitted?

21 A Yes.

22 Q But -- and without taking the time to go through
23 every page of it, unless you wish to do so, Mr.
24 Asper, do you remember, with the transcript in
25 front of you, reading this excerpt from the trial



1 back in '86, '87 and back when you were preparing
2 to deal with Dr. Markesteyn?

3 A I don't recall reading this.

4 Q If you wish an opportunity to read it, it
5 certainly can be provided to you, but I will
6 summarize it by saying that it was an argument by
7 Mr. Justice -- or sorry, Justice Tallis, or
8 Mr. Tallis as he then was, that the evidence
9 shouldn't be admitted, but clearly over the pages
10 and over the course of the argument evidence,
11 strong evidence was put forward as to the presence
12 of pubic, human pubic hairs in that sample?

13 A I'll accept that.

14 Q Okay. Now, sir, when Dr. Markesteyn was
15 interviewed by Dr. Boyd for purposes of the report
16 that he did reviewing the Milgaard question, you
17 are familiar with the report, and you are aware,
18 of course, that it was Dr. Markesteyn's position
19 that had he known about that presence of the hair
20 in the sample, that he would not have come to the
21 conclusion and we would not have had the resulting
22 furore that what was out there was really probably
23 dog urine, not human semen?

24 A I'll accept that.

25 Q Okay. Sir, I don't know from reviewing the record



1 exactly what material was in the possession of Dr.
2 Markesteyn as sent to him by you, but --

3 A Well, I did see a reference in the letter that you
4 showed me asking him if he had received all the
5 identification evidence.

6 Q Right.

7 A So I don't know.

8 Q And I don't know the answer, there appears to be a
9 conflict here, he's saying if I had it, I wouldn't
10 have made the conclusions and wouldn't have made
11 the public statements that I made, and I truly am
12 not meaning to be unfair to you here, I don't know
13 what in fact was sent to him.

14 A Right.

15 Q But my question to you is a very, I suppose, a
16 simple question. To the best of your ability,
17 looking back on it now, would you, for any reason,
18 would you have had any reason not to give him that
19 fairly critical piece of evidence?

20 A No.

21 Q If I could just have a moment. And, Mr. Asper,
22 again I'm not meaning to impugn any criticism of
23 you, I'm just simply working with a large amount
24 of material and trying to find out why certain
25 things happened, but in reviewing the taped



1 conversations that Mrs. Milgaard has provided to
2 the Commission, if I could refer to tape 1 -- I
3 think it's 102, the first page being 336785, this
4 is a tape, if you could bring up this part here,
5 that references May 17th, and I don't know the
6 significance of these dates, whether they were
7 talking about conversations all on one day, but
8 this is the cover of the tape, if you can see
9 that?

10 A Uh-huh.

11 Q And then if we could go, just scroll down a bit,
12 please, if we could go to the next page, please.
13 You'll see, as you look at this -- and have you
14 seen this transcription before do you recall?

15 A I have not had time to look at any of these
16 transcriptions.

17 Q And I appreciate that. If I could do a quick
18 summary for you, and if you want to look at the
19 entirety of the pages that I'm going to summarize,
20 or essentially what, there's a discussion between
21 yourself and Mrs. Milgaard about Dr. Markesteyn's
22 report that continues through pages 336792, and at
23 page 336797, if we could go to 336797, and you'll
24 have to bear with me while I find it, I only have
25 a note, I didn't mark it, there is -- Mrs.



1 Milgaard asks you -- if we could bring up this
2 page, please. You'll see that the discussion is
3 about some of Dr. Markesteyn's findings, and if we
4 could go on to the next page, please, there's some
5 discussion about materials that would have been
6 provided, or could have been provided to him. If
7 we could go to the next page, please, and the next
8 page, please. Maybe I'm not finding the spot and
9 I apologize, Mr. Commissioner.

10 MR. HODSON: I think those -- those are all
11 the same pages. Do you want the next page?

12 BY MS. KNOX:

13 Q Please. Mr. Asper, what I recorded, and obviously
14 not very well, was that at page 336797 Mrs.
15 Milgaard questioned you as to whether Dr.
16 Markesteyn had the preliminary inquiry
17 transcripts?

18 A Right, that appeared on the page.

19 Q Oh, it did, and sorry, I missed it.

20 A Yes.

21 Q And your response to her was that he hadn't asked?

22 A Right.

23 Q And I guess, given that you were sending him
24 material to found an opinion for you, if I may ask
25 you without appearing to be in any way critical,



1 why, in that particular circumstance, you wouldn't
2 have automatically sent him the preliminary
3 inquiry material.

4 A I may have sent him the trial evidence.

5 Q Okay.

6 A I don't know.

7 Q Okay. But you do see that there is that
8 reference -- yes, I'm sorry, I did have a copy of
9 it made, that the question is what about, does Dr.
10 Markesteyn have access to the prelim. It's right
11 here, I apologize. And then there's that
12 discussion that occurs as between you and Mrs.
13 Milgaard.

14 A Okay, but if you look at the second part there:
15 "I said to him "if you want it I've got
16 a whole", I mean I got all this, this is
17 the prelim right here, and I'm -- I got
18 a list..."

19 Etcetera, so I think it looks like I offered it
20 to him.

21 Q Yes, okay. My question to you, and I wanted to
22 bring it up just because I wanted to make sure
23 that the record was fully clear, I'm not trying to
24 misrepresent here, that's why I was searching for
25 it, but my question to you still is given the



1 request that you made of him in your May 12, May
2 14th letter, why you wouldn't have automatically
3 sent it to him.

4 A As I say, the only thing I can think of is I had
5 already provided him with the trial transcript.

6 Q Okay. Whether you can see it or not, my file is
7 getting smaller.

8 A You keep saying that.

9 Q It is, it truly is. I have three files left, and
10 none of them are black. Two files, thank you.
11 I'm being monitored by both you and Ms. McLean.

12 Sir, at various points in time,
13 and I apologize, I didn't bring the references for
14 you, but at various points in time in telephone
15 discussions that you have with Mrs. Milgaard, as
16 I've been able to get through a number of them,
17 not all of them, there's reference that is being
18 made often to a fact sheet and she's asking you to
19 prepare a fact sheet with key points with respect
20 to David's circumstance and the allegations
21 regarding his wrongful conviction and continuing
22 imprisonment, and I tried in my various databases
23 to find a document that I could bring to you and
24 say is this the fact sheet that you prepared, and
25 I haven't been able to narrow it down because



1 there are many -- not many, that's stretching it,
2 but there are more than one version of assertions,
3 facts, myths and things like that, and I wonder if
4 you could, without the benefit of me providing a
5 document to us, give us any guidance as to what if
6 anything you ultimately prepared that would be
7 labelled as a fact sheet in this case?

8 A When you -- it's interesting, when you use the
9 word fact sheet, I believe that's a phrase that
10 David Milgaard actually insisted, or created and
11 insisted on creating.

12 Q Uh-huh.

13 A It was, you know, it would be a piece of paper
14 that he could have that would say this is why I
15 didn't do it.

16 Q Okay.

17 A I don't recall ever actually producing that until
18 the Supreme Court when we produced the chart of
19 the Fisher victims.

20 Q Okay.

21 A That's my -- there may have been other documents
22 along the way that summarized things up to a
23 certain point, but I don't recall anything called
24 a fact sheet.

25 Q I'm wondering --



1 A It may have been, but I don't recall it.

2 Q Okay. I'm just going to direct your attention to
3 a couple of documents, not because I believe them
4 to be fact sheets, but because they might match
5 what would have been fact sheets, and I simply
6 want to know from you if you, to your best memory,
7 had any input into creating them, because the ones
8 that I will refer you to have some references to,
9 or contain allegations against Mr. Caldwell and
10 I'm trying to stay restricted to what affects him.

11 A Okay.

12 Q If we could bring up 048350. Now, this is a five
13 page document that has --

14 A Is this the original, is this the actual document?

15 Q This is a document that's in our database that
16 contains various allegations. I can bring up
17 parts of it for you to take -- and it's clearly
18 around the time of or after the Supreme Court of
19 Canada reference because it refers to Mr. Beresh,
20 but I'm wondering if this is something that you
21 were, you authored or were party to authoring to
22 your best memory?

23 A No, I don't recall this at all. It's certainly
24 not my font.

25 Q Okay. If you would, if I could go to --



1 MR. SOROCHAN: Mr. Commissioner, these
2 documents show a source in the Commission's
3 database, so I trust that My Friend is not
4 ignoring that when she's putting documents to the
5 witness. I mean, it specifically says where they
6 came from.

7 MS. KNOX: Mr. Commissioner, I appreciate
8 Mr. Sorochan's identification of that and say
9 only that for those of us who have been working
10 in the file for approximately two years now,
11 we've made copies of various documents and as I
12 was going through materials I had set aside for
13 Mr. Asper, unfortunately I didn't describe to
14 them the source. If Mr. Sorochan is able to tell
15 me what the source is on this one, I would be
16 happy for the assistance. I'm not meaning to be
17 disingenuous or to prolong time, but as with most
18 of us, I expect our hard copies don't always have
19 attribution of where they originated from.

20 MR. SOROCHAN: Somebody named Ethel.

21 BY MS. KNOX:

22 Q Okay. Then if it's written by somebody named
23 Ethel, Mr. Asper, can I narrow down the question
24 and say did you ever work with Ethel on putting
25 together this kind of a document?



1 A No. I was many things in a past life, but I was
2 never an Ethel.

3 Q And you have no memory of working with an Ethel?

4 A No.

5 MR. HODSON: This came from the RCMP file.

6 COMMISSIONER MacCALLUM: Okay, thanks.

7 BY MS. KNOX:

8 Q Thank you. Sir, there was some suggestion that a
9 fact sheet was prepared to be used, and if anybody
10 can help me in terms of this I would be grateful
11 for the help, there was some suggestion, or some
12 of the discussion that you had with Mrs. Milgaard
13 was about doing a fact sheet that would be
14 available for public circulation, in particular,
15 with respect to a John Howard offer to be of
16 assistance to the efforts to have Mr. Milgaard's
17 conviction overturned, and I couldn't find one
18 that was particularly given to them, but I wonder
19 if you have any memory of whether you would have
20 created or participated in creating one for those
21 purposes?

22 A Well, it's conceivable that, there was a group
23 called the Milgaard Support Group that may have
24 created -- and I may have participated in creating
25 a document that they used to inform each other of



1 what was in the case, but I don't recall a
2 specific piece of paper. I mean, there may have
3 even been something on a free David Milgaard
4 poster that could qualify as what you say is a
5 fact sheet.

6 **Q** Okay. There will be some issues with respect to
7 it and I'm anticipating some questions for others,
8 but it would be helpful, since we only have you
9 this one time, that I know the answers now. And,
10 sir, just a couple of other points, one of them is
11 short, you in your testimony over the last while,
12 and I don't remember exactly when, made reference
13 to the fact that there was a lot of information in
14 the file that Mr. Caldwell should have disclosed
15 and had he disclosed it, it might have had an
16 impact on conviction. Do you recall making
17 reference to the roommates of Gail Miller who
18 testified that she always went down Avenue O to go
19 to the bus?

20 **A** Yes.

21 **Q** I wonder if we could bring up document 009334, and
22 I want to direct your attention to the part that's
23 underlined, if we could bring that out down to
24 here. And, sir, it's a little bit hard to read
25 because of the underlining, I have the original,



1 or a coloured copy of the original from Mr.
2 Caldwell's file, and starting with the reference
3 to Simon Doell, what this reads is that they give
4 his former address as Avenue R, indicate that he
5 has now moved, indicate that he moved out previous
6 to the murder and that he stated that on occasions
7 when he had been riding the bus and Miss Miller
8 got on the bus, she always got on on the corner of
9 Avenue N and 20th Street directly across from the
10 funeral home.

11 A Yes.

12 Q And I bring this to your attention because you are
13 correct that there was various pieces of
14 information about Miss Miller walking down on
15 Avenue O to go to her bus stop that were not made
16 part of the record at trial, but would you accept
17 from me that this piece of information that would
18 have corroborated the Crown theory that she went
19 on Avenue N was not introduced at trial either,
20 that it wasn't just keeping out what might have
21 helped the defence and not putting in, and I
22 suggest to you that --

23 A Ms. Knox, I mean, this is a single statement. Mr.
24 Caldwell, or certainly the police, or both, were
25 aware of dozens and dozens of different statements



1 from people in the neighbourhood who contradicted
2 the Avenue N theory and you've got at least two
3 witnesses specifically who directly contradict the
4 Avenue N theory, one of the witnesses staring at
5 the point, who would have had to have been as much
6 a witness as Nichol John to the murder right
7 across the street, so I have to tell you when I
8 see this and how I place it in the context of the
9 larger trial, is a very unfortunate thing that
10 took over, which is this becomes more believable
11 and corroborative than the weighted evidence that
12 contradicts the theory.

13 Q Okay. Mr. Asper, I'm not sure if I didn't state
14 my question very well or you misunderstood my
15 question, but the preface to the question is this
16 was not evidence that was used at the trial --

17 A Right.

18 Q -- even though it would have had some evidentiary
19 weight to support the theory of the Crown.

20 A Okay, but I'm suggesting that there was a mountain
21 of evidence that contradicted the Crown.

22 Q Could I be allowed to finish my question?

23 A Right.

24 Q And I put it to you with the intent of saying to
25 you that as Mr. Caldwell has said many times, that



1 had he to do it over again, there are things that
2 he would have recognized and used differently, but
3 to suggest that this may simply be an illustration
4 of where the -- there were so many people
5 interviewed, there were so many things going on,
6 that it was simply a thing that got missed through
7 no malfeasance or no improper motive, but it was
8 just a matter of managing a large amount of
9 information and perhaps not having done 100
10 percent coverage of all of it, but certainly had
11 he been looking with an ulterior motive, this was
12 a piece of evidence that he could have used to the
13 benefit of the Crown isn't it?

14 A I think that's fair.

15 Q And that's my only point.

16 A Yes, okay.

17 Q But just to say to you that it wasn't all about
18 the one, there was the other side of the equation
19 too?

20 A Okay, all right. I mean, I suppose I could debate
21 with you, Ms. Knox, that when you've got all the
22 roommates saying something different you might
23 choose not to use that, but let's accept that yes,
24 it could have been corroborative of the Avenue N
25 theory.



1 Q And, Mr. Asper, on that point, again, and you
2 remind me of something that I didn't bring
3 documentation on, but you said that you were
4 familiar with the transcript from the preliminary
5 inquiry?

6 A At one point, yes.

7 Q At one point. And you were aware that one of the
8 roommates, Adeline Nyczai, did testify?

9 A Yes.

10 Q You are aware that she testified at trial?

11 A Yes.

12 Q Do you remember her in response, I believe, to
13 questions in cross-examination by Mr. Tallis,
14 informing him that roommates that she had had, one
15 was living in Whitehorse, one to whom you prefer,
16 another was living I think in B.C. or something
17 like that, but by the time the trial came around
18 these young women were no longer available?

19 A Well, okay, they weren't in Saskatoon, right. I
20 don't recall that, but based on what you've told
21 me, they were apparently not in Saskatoon.

22 Q I'm not going to ask you if you think that might
23 have been a reason why they did not call them,
24 because I don't want to engage in a debate with
25 you.



1 A Well, you're talking about a man's liberty here,
2 so -- but okay.

3 Q Sir, I have one other file left and unfortunately
4 it might take us a little bit of time because it's
5 the issue of the allegations that were made about
6 Mr. Caldwell and the missing knife. You are
7 familiar with those allegations?

8 A I'll do my best.

9 Q Okay. Do you recall, and I'll -- if you want
10 reference to documents, I will take you to
11 documents, but I'll try to be as concise as I can
12 in attempting to --

13 A I have to tell you I've seen all the documents and
14 they've been put to me several times.

15 Q Okay.

16 A I still can't, and I have not gone on my own to
17 look back at the information, I still don't get
18 what the issue is, I can't figure out what the
19 issue was.

20 Q And, sir, with great respect, I can say to you
21 that Mr. Caldwell perhaps is in the same position
22 you are in because he doesn't know what the issue
23 was, but in a public forum many times, including
24 in a book written by Mrs. Milgaard, he has been
25 accused of getting rid of evidence. You are aware



1 of that?

2 A Yes, I think I am.

3 Q And would you appreciate that from my client's
4 point of view, that that would be a concern,
5 particularly since it's not true?

6 A Sure.

7 Q Okay. Sir, do you recall what input you had into
8 discussions or what instructions you received with
9 respect to the existence of or the disposition of
10 the knife that was found on the stringer of a
11 fence near where Gail Miller was killed?

12 A I have to -- I think I've said this already, my
13 only recollection was that there was some
14 evidence, perhaps by Dr. Emson or somebody, that
15 the knife wounds could have been inflicted with a
16 double-edged knife, that a knife, another knife
17 had been found and went missing from a police
18 officer's locker or something, I think that was at
19 the preliminary inquiry.

20 Q Okay. Sir, the transcript of the preliminary
21 inquiry, and in particular the evidence of Thor
22 Kleiv, and I'm going to take you to, I'm just
23 going to identify it --

24 A Sorry, but let me just, I guess I should also say,
25 that's information that has been put to me and, as



1 I say, I'll do my best, but I really don't --

2 Q And, Mr. Asper, if you'll bear with me, it's not
3 about me wanting to test your memory on this one
4 so much as to attempt to question a course of
5 actions that you took that I will ultimately
6 suggest to you flies in the face of the
7 evidentiary record that you have available to you.

8 A I don't recall accusing Mr. Caldwell of disposing
9 of evidence.

10 Q Okay.

11 A And certainly -- we may have raised the question
12 as to what happened to it, but I don't recall
13 doing that.

14 Q You were referred yesterday to a letter that you
15 sent to Mrs. Milgaard on September 9th, 1992, the
16 document number was 162466, and it had attached to
17 it a draft news release?

18 A Right.

19 Q And you identified that you didn't know that,
20 whether that release had ever gotten used?

21 A Right.

22 Q And if we could go to page 3 of that release,
23 please, again, it would be 162468, and I don't
24 have these allegations in order when they started
25 to come, but just because this is specifically



1 apparently authored by you, I bring it to your
2 attention. And do you remember where you got the
3 information that you put in that draft for Mrs.
4 Milgaard?

5 A No.

6 Q Mr. Asper, what you say there is that a second
7 knife found at the scene, which may have played an
8 important role and which mysteriously went missing
9 at the time of the trial, was in fact released
10 during the trial by Mr. T.D.R. Caldwell?

11 A Right.

12 Q Do you agree with me that whether this got
13 released or not, that when you were writing it, it
14 was making some relatively serious allegations
15 about the conduct of the prosecutor?

16 A In a draft internal document, yes.

17 Q Yes, in a draft internal document.

18 A Yes, yes.

19 Q And that you go on to say it was a knife that was
20 seized at the crime scene. Now, would it be fair
21 to expect that when you were doing a draft
22 internal document and given that you were bound by
23 a code of professional conduct, that you would
24 have wanted to, or you should have wanted to be
25 sure that what you put in it was in fact an



1 accurate reflection of the evidence that you were
2 referring to?

3 A I would assume so, yes.

4 Q I don't expect you to review it because it's long,
5 but you recall, or do you recall that the exhibit
6 officer on this trial was a gentleman by the name
7 of Thor Kleiv?

8 A Right.

9 Q That he was called at the preliminary inquiry?

10 A Right.

11 Q That he introduced all of the exhibits and during
12 the course of his evidence -- I have to go back to
13 a page, I hope everybody will bear with me -- in
14 the course of his evidence it was offered or it
15 was decided that he would be recalled if there
16 were further questions to be asked of him because
17 he put in some fairly substantial evidence for
18 both Mr. Caldwell and Mr. Tallis to follow. Do
19 you remember that? I'm holding it up so you can
20 see it.

21 A I accept what you say.

22 Q Sir, I want to direct your attention to that
23 transcript at page 108272. Actually, if you could
24 go back to 271 so we can place this.

25 COMMISSIONER MacCALLUM: Is that our



1 transcript?

2 BY MS. KNOX:

3 Q That is Commission transcript, yes. And if we
4 could start bringing out here, and I'm not going
5 to take you back through the examination of Mr.
6 Kleiv on recall by Mr. Tallis, but you'll see that
7 there is a re-examination of him by Mr. Caldwell?

8 A Right.

9 Q And if we could go to the next page starting at
10 question 13, there is a question put to him, you
11 told my learned friend about this hunting type
12 knife found on the stringer of the fence near
13 where the scene of the body was, and he answered
14 that's right. And then there's some discussion
15 about where exactly it was located, and if we
16 could go to the next page, we go to question 18,
17 he's asked whether it was he who actually
18 discovered the knife and he indicated that it
19 wasn't. And then if we could continue down, and
20 we know from other evidence and from the police
21 file that it was a Constable Oliver who found it
22 about a month after the murder. If we continue
23 down to question 21 and in re-exam the
24 identification officer is asked, in answer to a
25 question from my learned friend, you said at that



1 time -- that time being I believe when it was
2 recovered -- it was possible it could have been
3 connected with this crime, referring to the
4 hunting-type knife, and the answer given by Mr.
5 Kleiv at that point in time as the knife was
6 ceased and turned over is that, was yes, and then
7 the next question, please, the question is, now,
8 have you established any connection -- and if we
9 could go to the next page, please -- any positive
10 connection of the knife with the crime to your
11 knowledge, and the answer given by the
12 identification officer at that time was that no,
13 they hadn't established any connection between the
14 crime, the death of Gail Miller and this knife
15 that was found a month or so after, and it's about
16 four weeks after.

17 A Right.

18 Q And then if we could go, for fullness of the
19 record, if could go to 108277, this is a re-cross
20 by Mr. Tallis, and at that time he questions the
21 answer to Mr. Caldwell effectively, that he didn't
22 rule out the possibility and he said he didn't, he
23 didn't rule it out and when he was asked if he,
24 being Mr. Kleiv, had ruled it out, and asked if he
25 still had ruled it out today, he answered no.



1 Now if we could go to page
2 108279, and if we go to the next page, please. If
3 we could go to the bottom of the page, and perhaps
4 this part as well, you will see that when Mr.
5 Kleiv is recalled there's further examination by
6 Mr. Tallis about the knife in question. And if we
7 go to the next page, please, if you've finished
8 reading that?

9 A Yes.

10 Q And it is in this question that Mr. Tallis
11 established that the hunting knife in question had
12 been received from Constable Oliver on February
13 28th, 1969; do you see that?

14 A Uh-huh.

15 Q All right.

16 A Yes.

17 Q Now, sir, I next want to direct you to a portion
18 of testimony of Lieutenant Penkala at the trial,
19 and if we could go to page 177176 you will see
20 that this is the commencement of the trial
21 transcript of Mr. Penkala, --

22 A Right.

23 Q -- or Lieutenant Penkala as he then was. I just
24 have to find my spot about the knife. If we could
25 go to 177214. And Mr. Asper, unless you wish to



1 do so I'm gonna summarize, I don't wish to go
2 through all of it, I'm going to summarize for you
3 what Lieutenant Penkala's evidence was about the
4 area where they found the knife. And essentially
5 what Lieutenant Penkala testified, that on -- at
6 the point in time, the January 31st when Gail
7 Miller's body was found, there was an examination
8 of the area surrounding the body, and that there
9 was no indication of any traffic between her body
10 and the area of the fence where, a month later,
11 Constable Oliver found the knife. And they go on,
12 they talk about photographs, they talk about no
13 indentations in the snow, and, indeed, part of his
14 evidence is that, at the point in time when she
15 died, there was snow piled up over that stringer
16 on the fence to quite some depth, way beyond where
17 the knife was found. And this would have been
18 information, I take it, that you had available to
19 you, whether or not you remembered it, but that
20 you had reviewed in your preliminary preparation
21 for the conduct of this trial?

22 A Yes.

23 Q Or not the conduct of the trial, for the
24 application --

25 A The application.



1 Q -- and, ultimately, the review?

2 A Yes.

3 Q Now, sir, while I appreciate that the document
4 that we referred -- I referred to you earlier is a
5 draft press release, would you be able to advise
6 how it was, when the subject of that second knife
7 came into question and ill motive was being
8 imputed to my client, you didn't take the time to
9 go back and review the transcripts that you still
10 had possession of to see whether there was any
11 merit to that allegation that was being made?

12 A Well, Ms. Knox, I didn't have possession, I was
13 not at the law firm at the time, I wasn't
14 Mrs. Milgaard's lawyer at the time, I --

15 Q Sir --

16 A You know, I had just left, and I can't tell you
17 the circumstances around how that document was
18 created because I don't remember.

19 Q Okay. Sir, in September 1992, when you did this
20 draft press release, had you wanted to could you
21 have walked yourself over to the offices of Wolch
22 Pinx Tapper and looked to be sure that what you
23 were drafting out for her as a script of
24 wrongdoing was borne out by the evidentiary record
25 that you had had possession of?



1 A I believe that I was in Australia most of
2 September 1992.

3 Q Sir, if I could refer to 162465, please, there is
4 a fax cover sheet that accompanies the letter that
5 you sent with the draft press release. If we
6 could just go to the next page, to the letter,
7 that is your signature; isn't it?

8 A Yes.

9 Q So, if you were in Australia, you wouldn't have
10 been able to sign a letter on September 9th in
11 Winnipeg?

12 A I must have been in Winnipeg.

13 Q Yeah. And if we look at the fax number -- and I'm
14 not trying to be smart here, I'm trying to make
15 sure the record is accurate -- but if we go back
16 to the fax cover sheet the indication with respect
17 to the transmission of this is that it was
18 transmitted on the date that you appear to have
19 prepared it, September 9th, 1992, and it was
20 transmitted from CanWest Global in Winnipeg?

21 A Right.

22 Q Okay. So while I appreciate that having to
23 review, you indicate you spent a lot of time in
24 Australia or you spent some time in Australia
25 around this time, would this suggest to you, in



1 fact, that when you did this you were in Winnipeg?

2 A Oh sure.

3 Q And --

4 A Yes, I don't dispute that. And I would also say
5 it's a bit disingenuous to say "walk across the
6 street and go and look at the file". I was doing
7 a draft, and as I say, I don't remember the
8 circumstances. I was not working at the firm any
9 more and I was working, I had a job, and I was
10 obviously doing this as an add-on to everything
11 else that I was doing trying to help them.

12 Q Number one, I apologize if using the expression
13 "walk across the street" appears disingenuous, I
14 don't know Winnipeg and I have a tendency to use
15 going off on my own --

16 A And it's not a question of geography, it's not a
17 question of physically walking across the street,
18 I believe -- I mean, I just don't know the
19 circumstances of how this document got created.

20 Q Okay. You are aware, though, that this and other
21 information -- and I'm not suggesting it was
22 because of this document -- but this document, or
23 these thoughts that are set out in this document
24 in form for a draft press release, ultimately
25 became part of what is a book that is in circles,



1 available for purchase within -- throughout the
2 world, I suppose?

3 A I would strongly, strongly doubt that this draft
4 --

5 Q And I --

6 A -- is the source or the genesis of any public
7 statement that was made in connection with the
8 contents of that draft.

9 Q Okay, and I agree with you, I'm not suggesting
10 that it is --

11 A I'm also calling for the ouster and toppling of
12 the Saskatchewan Government in the document.

13 Q Okay. Sir, can we go to 332 -- Mr. Commissioner,
14 I'm noting the time, this might be an appropriate
15 time to break. I'm going to be to be another few
16 minute on this and I --

17 COMMISSIONER MacCALLUM: Well we do quit at
18 3:30 today.

19 MS. KNOX: I can continue with the witness?

20 A I'm fine.

21 COMMISSIONER MacCALLUM: Are the reporters
22 okay to continue? Anybody else have to stop?
23 Okay. Go ahead then.

24 BY MS. KNOX:

25 Q Okay. If I could have brought up document 332404.



1 Do you recognize the picture?

2 A Good-lookin' guy. I was a smoker then, boy do I
3 want a smoke now.

4 COMMISSIONER MacCALLUM: 332404?

5 BY MS. KNOX:

6 Q 332404. I've never been a smoker, but you might
7 make me tempted at this moment too.

8 If we could go to page 2 of the
9 document, please, 332405. And, Mr. Asper, I'm
10 putting them to you in this order not because I
11 was meaning to set you up or anything, and I hope
12 you don't get that feeling, but because I'm
13 getting very tired of my documents and my file on
14 this one, because it's so large, aren't very well
15 organized. I want to direct your attention to a
16 passage in a newspaper article that was done on an
17 occasion when, as the article indicates, you and
18 Mrs. Milgaard were in Saskatoon going over
19 transcripts and exhibits. And you see as early as
20 the date of this article, which was March 15th,
21 1990, and well in advance of your press release,
22 allegations were being made about the missing
23 knife?

24 A Okay. I -- well, okay. I don't think that
25 there's an allegation, I think it's a factual



1 statement, the knife went missing.

2 Q Sir, are you aware that the --

3 A I believe it did, actually, for a period of time.

4 Q Okay. Are you aware that the evidence before this
5 Commission of Inquiry is that the knife was
6 available for trial, it was brought to the
7 courthouse by Constable Oliver, who was prepared
8 to give evidence about it, that after some
9 discussion between Mr. Tallis and Mr. Caldwell Mr.
10 Tallis indicated that he didn't want to hear from
11 Constable Oliver and he didn't want the knife
12 introduced into evidence?

13 A If that is -- if that's the case, then -- then --
14 then we were wrong here, but at the time I think
15 we were of the view or of the belief, and that
16 there was some -- my recollection is that the
17 knife went missing from a locker or something to
18 that effect.

19 Q Okay. Mr. Asper, I'm going to say to you or ask
20 you a couple of questions that go back to -- and
21 I'm almost finished -- go back to where I was
22 earlier this morning, and it's with the concept of
23 if you had to do this over differently. Would you
24 agree with me that had you talked to Mr. Tallis,
25 gotten Mr. Caldwell's file and maybe talked to Mr.



1 Caldwell, that what was knit -- and I'm using
2 "knit" like my mother would use knit -- out of
3 pieces of information into whole cloth that cast a
4 very negative spin on my client could have been
5 avoided, and he could have been avoided -- and he
6 could have avoided that other allegation following
7 him that is now contained, as I said, in a book *A*
8 *Mother's Story* that will continue to be published
9 alleging wrongdoing by him? The book we have in
10 our database, it's a document number -- and we
11 don't need to bring it up -- page 269317 at, I
12 believe, page 369.

13 A I think that -- like there is no question if I
14 could do it over again, I still -- I still -- I
15 don't know, I have to say I'm a little torn,
16 because I do think that the dispassionate neutral
17 party should be the one to do the investigation,
18 and that being the federal Department of Justice.

19 But I will tell you this. I
20 really wonder what would have happened -- and I
21 want you to consider the possibility of an even
22 greater doomsday scenario, frankly -- if we had
23 Mr. Caldwell's file and the federal Department of
24 Justice was still not granting us relief. In
25 other words, if we knew all that Mr. Caldwell had



1 in the file in terms of the witness statements and
2 some of the police statements, and we still
3 weren't getting action from the federal Department
4 of Justice, I have to be very candid with you, it
5 could have been worse.

6 Q Sir, I haven't gotten instructions from my client
7 on this point because you raise it now, but my
8 expectation is that he would say that he would
9 rather subject a review of his conduct to the good
10 offices of the office of the federal Department of
11 Justice than have it subjected, as it was, to
12 allegations and --

13 A Oh, no, I don't think --

14 Q -- vitriolic in the public media.

15 A I don't think, no, I don't think it would have
16 been that at all. Really, I don't think that
17 would have been that at all. I think the whole
18 character of the assault, if you will, vis-a-vis
19 the federal Department of Justice, would have been
20 on the basis of the hard evidence that was in Mr.
21 Caldwell's file. I don't think it would have -- I
22 think Mr. Caldwell would have been out of it,
23 frankly.

24 Q Okay. Mr. Asper, there was one area that I had
25 wanted to review in preparation for the



1 cross-examination for you -- of you, and it was
2 with respect to a conference that took place in
3 Winnipeg last year that you were a speaker at.
4 And I, for the record, I would indicate that I
5 know that you have given your consent to that
6 information being made available to me for my
7 review?

8 A That's correct.

9 Q Perhaps you are aware, as I just became aware
10 yesterday or the day before, that there is still
11 some issue of whether it can be released?

12 A I'm not aware of that.

13 Q Some -- I just became aware of it, and you can
14 speak to Mr. Hodson about it perhaps, I just got a
15 briefing briefly --

16 A What information is it?

17 Q A presentation that I understand was done, or
18 presentations that were done at this conference?

19 A I don't believe I submitted one.

20 Q No, no, of an oral --

21 A I know I had written notes and I gave a speech --
22 oh, you are looking for a tape of the speech?

23 Q I'm looking for -- yes.

24 A Okay.

25 Q Okay. Subject to my being able to get that, and I



1 make the point because I know that I don't have it
2 has nothing to do with you, it's about some
3 technical issues about --

4 A I think I own the video rights.

5 Q *(Laughs)*

6 A I'm not kidding you.

7 Q I really seriously invite you to talk to Mr.
8 Hodson.

9 A Okay. I will speak with him.

10 Q Okay.

11 A I think I can fix that.

12 Q I wish -- and, if you can do that, I will end your
13 day by saying that subject to my having an
14 opportunity to review that and the last binder of
15 the transcriptions of Ms. Milgaard's various
16 conversations with you, I can indicate that I
17 won't have any further questions, and, indeed,
18 once I look at that I may not. But may I end by
19 asking you a final question.

20 You indicated yesterday -- I
21 believe it was yesterday, it might have been the
22 day before -- that sometimes when conduct comes
23 under review -- and in this particular case, of
24 course, we're talking about the conduct of
25 officials within the criminal justice system, be



1 they police, prosecutors, sometimes judiciary and
2 others -- that there is a syndrome that comes over
3 in these kinds of cases, and I think you were
4 averting to it and at various times you've used
5 the label "tunnel vision" becoming a real problem
6 in these kinds of investigations, and I'm going to
7 ask you whether you have ever, in your times that
8 you've looked back on how you conducted yourself
9 from 1986 forward, how Mr. Wolch and others
10 advised you to conduct yourself or how they
11 conducted themselves, whether you have ever
12 thought that the shoe could go on the other foot
13 too, and sometimes those of you who embrace the
14 cause of those you believe to have been wrongfully
15 convicted can be equally guilty of tunnel vision?

16 A It's an interesting philosophical question. Is it
17 tunnel vision if you're correct? And I don't
18 know, I -- but the syndrome might be spreadable
19 across the spectrum of the interests in a wrongful
20 conviction case. The question is, is it tunnel
21 vision if you're correct, whether you're the
22 police officer in the original investigation, or
23 the prosecutor, or someone trying to free a
24 wrongly convicted. I don't know.

25 Q And Mr. Asper, I don't know the answer, but maybe



1 next day when we come here, outside the confines
2 of this room, you and I can debate it?

3 A Look forward to it.

4 Q Thank you.

5 MR. HODSON: I think, just on the point of
6 the tape, I had been asked to obtain a copy of, I
7 think, the tape recording of Mr. Asper's
8 presentation at the Unlocking Innocence
9 Conference --

10 A Do you know who organized that is Mr. MacFarlane,
11 don't you, --

12 MR. HODSON: Uh-huh.

13 A -- from the former federal Department of Justice.

14 MR. HODSON: -- yeah, I'm getting there --
15 and we had made efforts to get the tape directly
16 from the conference due to the request. We were
17 told we needed a subpoena, I raised it with Mr.
18 Sorochan and Mr. Asper and they kindly agreed to
19 consent, and they -- and assist us in getting it,
20 because Mr. Asper indicates he has no objection
21 to it. Apparently that was not good enough for
22 them and they still require a subpoena. That
23 requires us to issue a subpoena registered in
24 Manitoba. We became aware of that this week, so
25 I will talk to Mr. Sorochan and/or Mr. Asper, and



1 see if Mr. Asper's influences can get it without
2 a subpoena. I'm not sure what the contents are
3 or what it's needed for, We were --

4 COMMISSIONER MacCALLUM: Well maybe the
5 people who want to see it should go and get the
6 subpoena?

7 MR. HODSON: I think the subpoena has to
8 come from you initially. I --

9 COMMISSIONER MacCALLUM: They can ask
10 Queen's Bench.

11 A Mr. Commissioner, I'll -- I was -- I was on the
12 organizing committee for that conference, I --
13 maybe I'll speak with Mr. Hodson and we can try
14 and do this without an order, --

15 MR. HODSON: Sure.

16 A -- if that's easier?

17 COMMISSIONER MacCALLUM: Well, it certainly
18 would be, sure. Thank you.

19 MR. HODSON: Sorry. And I think next is
20 Mr. Frayer. In light of the time, I'm not sure
21 if it's wise to --

22 COMMISSIONER MacCALLUM: Mr. Frayer, we're
23 in your hands?

24 MR. FRAYER: My Lord, given the time and
25 the time that Mr. Asper has been on the stand,



1 I'll make very little inroad into my
2 cross-examination in about 15 minutes.

3 COMMISSIONER MacCALLUM: All right. So
4 obviously, Mr. Asper, you will be needed again at
5 some future time; do we know when that might be?

6 A Mr. Commissioner, this is getting to be a very
7 serious problem. I have undertaken to speak with
8 Mr. Hodson and try to find something that works.

9 MRS. JOYCE MILGAARD: No Fridays.

10 MR. HODSON: Your former client has asked
11 that you not pick a Friday.

12 A Well, as I say, I'm going to speak with Mr.
13 Hodson. I'm moving into an extremely difficult
14 business cycle.

15 COMMISSIONER MacCALLUM: Mr. Sorochan, you
16 should be asked, first of all as counsel, to
17 speak to this.

18 MR. HODSON: I have -- what I can indicate
19 is I've provided to Mr. Sorochan the list of
20 remaining dates, and the dates that I can't. I
21 mean I'm committed next week to Mr. Henderson,
22 there is a couple dates in June, notwithstanding
23 Mrs. Milgaard's comments I did indicate to Mr.
24 Sorochan that if a Friday makes it work, that I
25 will look at that, depends on the week. So I



1 will do anything I can to accommodate Mr. Asper's
2 schedule within the dates that we have, and I
3 guess I will wait to hear from Mr. Asper and
4 Mr. Sorochan, and work with them.

5 MR. SOROCHAN: What we said last time is
6 we -- that Mr. Asper wasn't available this week,
7 and we had hoped that we would be concluded,
8 because -- I don't know if I said it on the
9 record or just to Mr. Hodson -- the meetings that
10 had to be re-arranged had people coming from all
11 over the world, so it's not an easy matter to try
12 to, with the responsibilities that Mr. Asper has,
13 to find dates, and Mr. Hodson and I worked
14 through it, and I guess that's what we'll have to
15 do.

16 COMMISSIONER MacCALLUM: So we don't know?
17 That's --

18 MR. SOROCHAN: Well, that's --

19 COMMISSIONER MacCALLUM: All right. His,
20 the resumption of his cross-examination is
21 adjourned sine die, then, on the usual
22 understandings about communication with other
23 counsel.

24 MR. HODSON: And we have Paul Henderson
25 here Monday, Monday at 1:00.



(Adjourned at 3:15 p.m.)

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OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATES:

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Official Queen's Bench Court Reporter



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