

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
Radisson Hotel at
Saskatoon, Saskatchewan

On Tuesday, June 6th, 2006

Volume 158

Inquiry Proceedings



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EUGENE WILLIAMS, CONTINUED

- BY MR. HODSON

32404



1 Transcript of Proceedings

2 (Reconvened at 9:04 a.m.)

3 COMMISSIONER MacCALLUM: Good morning.

4 ALL COUNSEL: Good morning.

09:04 5 EUGENE WILLIAMS, continued:

6 BY MR. HODSON:

7 Q Good morning, Mr. Williams.

8 A Morning.

9 Q If we could just call up 004868, and we'll just
09:04 10 carry on where we left off yesterday
11 chronologically. We had gone through this letter,
12 this was a letter from the minister to Mr. Wolch
13 requesting various information and I think you
14 told us that until this information, namely, the
09:04 15 trial record and the RCMP reports, until they were
16 received, that I think you told us you really
17 couldn't, although there were certain things you
18 could do, you really couldn't start your review of
19 the application; is that fair?

09:04 20 A Yes.

21 Q If we could then go to 33 --

22 COMMISSIONER MacCALLUM: Just a minute, the
23 screen is not on.

24 MR. HODSON: Maybe bring up 333291 while
09:05 25 they're looking at that.



1 COMMISSIONER MacCALLUM: You can go ahead.

2 MR. HODSON: Have you got it there?

3 COMMISSIONER MacCALLUM: Thanks.

4 BY MR. HODSON:

09:05 5 Q Just on this action request, maybe you could just
6 explain briefly, we see this on some of the
7 Federal Justice documents, is this an internal
8 process document?

9 A Yes, it's a control sheet from the ministerial
09:05 10 correspondence unit and that report, it's used to
11 track incoming and outgoing correspondence.

12 Q And this would be by the minister's office as
13 opposed to the Department of Justice; is that
14 right, or both?

09:06 15 A It's handled by the department on behalf of the
16 minister.

17 Q And so this would gather a control, so there would
18 be some formal system to know what went in and
19 what went out; is that fair?

09:06 20 A That's correct.

21 Q If we could go to the next page. So this is David
22 Milgaard, this is a letter from David Milgaard to
23 the minister, it is a week after the February
24 16th, 1989 letter from the minister to Mr. Wolch,
09:06 25 and just generally about the question of



1 correspondence with David Milgaard, would you as
2 counsel then, would you limit your correspondence
3 to Mr. Milgaard's counsel?

4 A Yes.

09:06 5 Q In other words, one's an applicant, has legal
6 counsel engaged, you as legal counsel would funnel
7 or deal all your communications through the
8 counsel; is that correct?

9 A That's correct.

09:07 10 Q And as far as your client, the Minister of
11 Justice, we see from time to time correspondence
12 directly back, but as well it appears that some
13 went through the Department of Justice as well?

14 A Yes. The departmental policy at the time was for
09:07 15 a response to be provided whenever someone wrote
16 to the Minister of Justice. In many instances the
17 response would be, if I might use the term pro
18 forma and wouldn't discuss any substantive aspects
19 of the application, but would simply refer those
09:07 20 types of issues, I understand that you have
21 counsel and that our officials will be dealing
22 with your counsel about the application.

23 Q Would there be a concern, wearing your hat as
24 legal counsel to the minister, in discussing
09:08 25 substantive matters relating to the application



1 with David Milgaard knowing that he has counsel?

2 A Correct.

3 Q And so do I understand your evidence to be that
4 although there might be a ProForma response saying
09:08 5 we received it, that the desire of the minister
6 and the Department of Justice was to have all
7 substantive communications with Mr. Milgaard's
8 counsel; is that correct?

9 A Yes.

09:08 10 Q And your assumption was that whatever you
11 communicated to Mr. Milgaard's counsel would in
12 turn be communicated to the client presumably, or
13 if it was not, that the lawyers would have a
14 reason not to do so?

09:08 15 A That's correct.

16 Q And is it also fair to say that communication with
17 Mr. Milgaard's counsel was, in your view,
18 communication with Mr. Milgaard?

19 A Yes.

09:08 20 Q So here, this is a letter I think a week after
21 your letter, or the minister's letter to Mr.
22 Wolch, and it says:

23 "My lawyer ... has said in most cases
24 many presentations are deemed frivolous
09:09 25 because many of them are. I would like



1 you to tell me if my case has past this
2 initial "stage"-evaluation."

3 And it appears that what David Milgaard is
4 talking about here from Mr. Wolch is the
09:09 5 preliminary screening; is that correct?

6 A That's correct.

7 Q And are you able to tell us whether or not this
8 preliminary screening, whether both the process
9 and the results might have been communicated by
09:09 10 you to Mr. Wolch by this time or by someone else
11 in the department?

12 A I would not have indicated to Mr. Wolch that, in
13 basic terms, that he has passed preliminary
14 screening, certainly not that directly. The
09:09 15 request for the additional materials, and by that
16 I am referring to trial transcripts and the
17 balance of the items identified on that letter of
18 February 16th, that is the signal that we're
19 moving on to the next phase of the investigation.

09:10 20 Q And let me take a step back. It appears from
21 David Milgaard's letter that Mr. Wolch is aware
22 that there is an initial stage evaluation in
23 applications, a screening, and that he's told his
24 client that, and my question is are you able to
09:10 25 tell us whether the source of Mr. Wolch's



1 information would be from you or from other
2 members of the Department of Justice?

3 A Yes, it would be from someone within the
4 department because the use of the term "stage" and
09:10 5 the way it's placed in quotation, "-evaluation",
6 signals or adopts some of the language that we had
7 used at that time.

8 Q And if we can go to the next page, Mr. Milgaard
9 says:

09:11 10 "It is important to me and my family to
11 know what sort of "input" we can have
12 into all of this. If you feel there is
13 a need for an investigation in the
14 interests of justice, what role can we
09:11 15 play (if any) in the direction of this?
16 We feel there should be a "sharing"
17 between yourself and us. Do you agree?"

18 As far as your response to this, maybe you could
19 just tell us, Mr. Williams, what would be, or
09:11 20 what was your position in response to this type
21 of request? Would it be consistent with what you
22 understood your role to be under Section 690?

23 A No, it would not. Two observations. Firstly,
24 where someone is represented by counsel, we deal
09:11 25 with counsel. We are of course mindful of the



1 applicant's request, but our dealings have to go
2 through the counsel because that's the way, that's
3 the way the code of ethics and the rules --

4 Q If Mr. Milgaard did not have legal counsel, then
09:12 5 you would deal with him directly; is that fair?

6 A That's fair.

7 Q And your second observation?

8 A The perception that there would be a "sharing", I
9 took that to mean that certainly they would
09:12 10 provide us with the materials, and to the extent
11 that we had things for them that required, shall
12 we say, clarification, we would certainly be in
13 touch with them, but that it would not be
14 collaborative in the sense that we would all sit
09:13 15 down and discuss the issue and jointly pursue
16 various lines of inquiry. That's not -- that's
17 just not how we did things.

18 Q And would that be something you would communicate
19 to Mr. Milgaard's counsel?

09:13 20 A That's hopefully -- my inclination is to say yes.
21 I'm just trying to think of how we would get that
22 message across and how we did get that message
23 across, but certainly the way we dealt with the
24 communications aspect, keeping in mind that we
09:13 25 were getting letters both from counsel and from



1 the client, my sense is, or my sense is although I
2 have no specific recall, that I would speak with
3 David Asper and say we're getting these things and
4 I would explain to him what our practice is, would
09:14 5 be.

6 Q It would appear from this letter, and we'll see it
7 from other letters, that David Milgaard may have
8 had a different understanding or expectation with
9 respect to the work that you were doing, your role
09:14 10 of the investigation. Would that be a fair
11 comment?

12 A Yes.

13 Q And that I think you've described for us that your
14 role was you were the lawyer acting on behalf of
09:14 15 the minister, the minister was your client, not
16 David Milgaard, and you were investigating what
17 David Milgaard's lawyer gave to you to test it and
18 advise the minister, I think that's in summary.

19 A That's correct.

09:14 20 Q And I think you've told us it was not to
21 investigate in the sense that Mr. Milgaard may be
22 suggesting here; is that fair?

23 A That's fair.

24 Q And again, would you have -- you've told us I
09:14 25 think that you believe you would have had some



1 discussions with Mr. Asper about that. Would you
2 have -- would you have left this issue of Mr.
3 Milgaard's understanding up to his lawyer to deal
4 with or his lawyers or did you feel any need to
09:15 5 take any further steps?

6 A I left it to his lawyer to communicate with him.
7 I think what would normally happen in a situation
8 like this is that we would draft a response either
9 for the minister or for one of the minister's
09:15 10 assistants and would have whatever message
11 communicated to Mr. Milgaard directly.

12 Q Do you have a recollection of Mr. Asper or Mr.
13 Wolch either stating to you or putting in a letter
14 a similar concern to you saying lookit, we believe
09:15 15 this process under 690 is that we collaborate and
16 that you go out and investigate whether there's an
17 injustice?

18 A I don't recall that as I speak now. It may well
19 be that there was such, but I have no recall of
09:16 20 that.

21 Q And if that had come up from the lawyers, in other
22 words, if the lawyers had said to you, Mr.
23 Williams, we would like to know how we can
24 collaborate and investigate whether there has been
09:16 25 an injustice here, how would you have responded to



1 that?

2 A I would simply tell them that, I would explain
3 that our role would be to make the necessary
4 inquiries and, yes, to the extent that we could,
09:16 5 we could keep them in the loop, that we would be
6 contacting them with respect to any matters of
7 clarification and giving them the opportunity to
8 fully complete their application and to make
9 whatever submissions that they felt appropriate.

09:16 10 Q And that as far as the investigation that Mr.
11 Milgaard talks about here about identifying the
12 grounds of the miscarriage of justice, is it your
13 evidence that that would be the responsibility of
14 his lawyers or Mr. Milgaard himself to do that and
09:17 15 present it to the minister for consideration?

16 A Yes.

17 Q Can we just talk generally about communication.
18 This is February of '89 and I appreciate that
19 we'll be covering a lot of documents and time
09:17 20 frame, but just generally speaking, let's talk
21 about from the time frame from the initial
22 application, December 28th, '88, let's go up until
23 February 28th, 1990 when the Larry Fisher
24 information comes up. Did you have -- can you
09:17 25 give us some idea of the frequency of your



1 communication with Mr. Asper and Mr. Wolch, just a
2 general sense?

3 A Between February, '89 and, let's say, May of '89,
4 there wasn't that much communication between us.
09:17 5 Things started -- there were more discussions
6 starting in the summer.

7 Q Sorry, on the February to May, '89, is that
8 because you were waiting for the materials?

9 A Yes.

09:18 10 Q So then after you received the materials in May,
11 there was more frequent discussion?

12 A Yes. I would get calls from David Asper basically
13 requesting a status or what's happening or is
14 there anything I can do to help, etcetera,
09:18 15 etcetera, and I would respond, you know, we're
16 still reviewing transcript or keeping him abreast
17 in a general way as to what steps we were taking.

18 Following the transcript review,
19 it became clear to me that we would have to speak
09:18 20 with Debbie Hall and so there was some contact
21 with him in an endeavour to assist in terms of
22 setting up that meeting, firstly needing the
23 address and then timing, timetable, so there were
24 discussions about that.

09:19 25 There were some general



1 discussions about --

2 COMMISSIONER MacCALLUM: Excuse me,
3 Mr. Esson, I wonder if you can do something about
4 that. I don't if that's the staff out there or
09:19 5 if it's our neighbours, but in either case, it's
6 too distracting. Try it again, please.

7 BY MR. HODSON:

8 Q Sorry. So you had contact with Mr. Asper for
9 information about Deborah Hall?

09:19 10 A

Yes.

11 Q Can you give us some sense, let's take May of '89,
12 or June of '89, thereabouts, through until
13 February of 1990 when the Fisher information --
14 and I'll go beyond that as well --

09:19 15 A

We would be in touch with each other, let's say,
16 every two weeks or so.

17 Q And usually by phone, and we'll go through some of
18 the correspondence.

19 A Yes, usually by phone.

09:19 20

COMMISSIONER MacCALLUM: This is you and
21 Asper?

22 A Correct.

23 BY MR. HODSON:

24 Q And did you have any discussions directly with Mr.
09:20 25 Wolch or was it primarily Mr. Asper?



1 A Periodically there would be some telephone
2 conversations with Mr. Wolch.

3 Q And so would it be usually the case that Mr. Asper
4 would call you or would you call him?

09:20 5 A Usually I received his calls, on occasion I would.
6 Sometimes I wasn't in and I would return his call.

7 Q And I think you said the general nature, he was
8 looking for a status report as to what it was that
9 you were doing?

09:20 10 A Yeah, yes.

11 Q And let's talk about -- is it fair to say that you
12 would have given him a status report as to what
13 you were doing and where things were at; is that
14 fair, that you would share with him?

09:20 15 A Yes.

16 Q You've told us that, really, you had two other --
17 two main roles for your client, namely the
18 investigation and assessment of the information?

19 A Yes.

09:20 20 Q And, secondly, advice to the Minister; correct?

21 A Correct.

22 Q Was it your practice, and did you share with Mr.
23 Asper, either of the -- any information with
24 respect to those two tasks you were doing for the
09:20 25 Minister?



1 A I did not.

2 Q And why not?

3 A My role was to provide that service to the
4 Minister of Justice only.

09:21 5 Q And so again, as far as your investigation and
6 assessment, was it your view, sir, that you were
7 doing that for the Minister as opposed to for Mr.
8 Milgaard, in a sense?

9 A Yes.

09:21 10 Q And did you, can you tell us, did you, in your
11 role as counsel to the Minister, did you feel that
12 you were constrained in what you could disclose to
13 Mr. Asper?

14 A Yes. Quite frankly, my service is as counsel to
09:21 15 the Minister, I owed the Minister a duty to
16 provide my legal assessment solely to the
17 Minister.

18 Q And am I right in, or what you are saying is, if
19 you would have shared that with Mr. Asper you
09:21 20 would have breached your duty to your client?

21 A In part. There -- periodically, and I recall
22 periodically we had discussions about the
23 significance of some of the information that had
24 been received, and by and large I listened as Mr.
09:22 25 Asper provided his take or his assessment of the



1 strength of some of the information that had been
2 submitted. He's an advocate, he was advocating on
3 behalf of his client, and he pointed out the
4 strength of the evidence that they had assembled
09:22 5 and urged me to adopt his take on it, that it
6 signaled that there should be some remedy, and
7 would I get on with it.

8 Q And would this be frequent, these discussions with
9 Mr. Asper?

09:22 10 A We would speak once every two months and it would
11 come up.

12 Q Yeah.

13 A Umm --

14 Q So for example on the Deborah Hall and Dr. Ferris,
09:23 15 those two grounds, he would buttress what was in
16 the written material saying "here's why I think
17 it's important"?

18 A Yes.

19 Q And, apart from your duty of confidentiality that
09:23 20 you told us about, did you have any other concerns
21 about sharing with Mr. Asper your assessment as
22 compared to what the Minister might do?

23 A Well, certainly, my assessment wouldn't rule the
24 day. The person who made the decision was the
09:23 25 Minister of Justice, my assessment might not be



1 accepted, and consequently it didn't make any
2 sense to me to give someone false hope in one way,
3 or negative hope, because ultimately it wasn't my
4 decision to make.

09:23 5 **Q** Let's take, for example, the Dr. Ferris ground,
6 and we'll see this a bit later, that I think you
7 came to the conclusion that the Dr. Ferris
8 information did not provide much, if any, support
9 for a ground for a miscarriage of justice; is that
09:24 10 a fair summary?

11 **A** Yes.

12 **Q** And what would have been your concerns in sharing
13 your view, your assessment, with Mr. Asper prior
14 to it going to the Minister?

09:24 15 **A** It would have been inappropriate.

16 **Q** And why would it be inappropriate?

17 **A** First, my role is to advise the Minister; second,
18 my advice may not always be accepted by the
19 Minister; consequently, it wasn't my
09:24 20 responsibility or it wasn't appropriate for me to
21 disclose to the applicant that type of
22 information.

23 **Q** Let's look at two scenarios, then. And on the
24 basis that your assessment, after reviewing
09:25 25 matters, is that the Dr. Ferris information does



1 not provide a basis to grant a remedy, and if you
2 would have advised Mr. Asper of that in advance of
3 it going to the Minister and the Minister ends up
4 rejecting the application, would you have had a
09:25 5 concern that your comments to Mr. Asper prior to
6 the decision might somehow be used against the
7 Minister?

8 A Certainly, it would signal that there was bias on
9 the part of the department. What would have
09:25 10 happened in those circumstances is that I would
11 have taken onto myself a role of decision-maker
12 when it's -- wasn't mine to make.

13 Q Okay. And I suppose the other, flip side, is that
14 if you, again with the same assessment that it was
09:25 15 not a ground for a miscarriage of justice and the
16 Minister had a different view, concluded it was
17 and granted a remedy or was prepared to grant a
18 remedy and yet you had signaled your assessment to
19 Mr. Asper, again I take it that there would be
09:26 20 some downside to that as well?

21 A Indeed, yes.

22 Q Did that, what you have described then, did that
23 make things difficult for you, Mr. Williams, in
24 discussing matters with Mr. Asper?

09:26 25 A It did. I listened a great deal.



1 Q And would it be fair to say that Mr. Asper, for
2 his client, was trying to find out whether or not
3 his application was being looked at favourably; is
4 that a fair way to put it?

09:26 5 A Yes.

6 Q And wanting to know if it was good enough and, if
7 not, they would maybe go get some more
8 information; would that be a fair --

9 A I assumed that that was one of the motivating
09:26 10 factors, yes.

11 Q And let's just talk, and again I'll deal with this
12 in more detail with specific instances, but let's
13 talk about -- we've talked about what
14 communications you would have with him about your
09:27 15 assessment, let's talk about documents and
16 information you gathered in the course of your
17 investigation, and I want to divide it into two
18 areas; one would be, the first would be, if I can
19 call it, the fruits of your investigation, in
09:27 20 other words when you go and interview Deborah Hall
21 and you get a transcript of that, or you interview
22 Dr. Ferris and you make a memorandum of that, and
23 I don't believe that that was initially shared
24 with counsel for Mr. Milgaard; is that right?

09:27 25 A That's correct.



1 Q And why was that?

2 A The -- there had been some sharing initially, and
3 I had an unhappy experience, and at that time I
4 decided that I would hold off sharing until such
09:28 5 time as we'd come closer to completion of all of
6 our materials and then give counsel an opportunity
7 to comment on what had been gathered.

8 Q And was the unhappy experience, was that the
9 release of the Ute Frank statement that ended up
09:28 10 in the newspaper in, I think, October of '89,
11 thereabouts?

12 A Yes.

13 Q And we'll deal with that, I'll go through that,
14 but that was the -- a point where you changed your
09:28 15 view of it, as to what you would share with Mr.
16 Asper; is that correct?

17 A Well it affected the timing of what we shared.

18 Q Okay. Now again, we'll get into this later, but I
19 think on the October 1, 1990 meeting with Mr.
09:28 20 Wolch and Mr. Asper, can you tell us whether the
21 fruits of your investigation, if I can call it
22 that, would have been shared at that point?

23 A Yes.

24 Q And so October '89, based on your experience on
09:28 25 the Ute Frank statement, you decide to defer



1 sharing of the information until a later stage; is
2 that right?

3 A Yes.

4 Q The second group of documents or information would
09:29 5 be that gathered by you from the prosecutor, Mr.
6 Caldwell, the prosecutor's file and the city
7 police file. And I think in the course of your
8 investigation you, from time to time, obtained
9 documents from the prosecutor's file and the
09:29 10 police file; is that correct?

11 A Yes, we did, and on some of those occasions, when
12 we were specifically requested by Mr. Asper to
13 obtain them for the purposes of furthering his
14 submissions, those were shared with him.

09:29 15 Q And so, if he had asked you to go get a specific
16 document from a file, you oblige?

17 A Yes.

18 Q And as far as -- do you have a recollection of
19 being asked by Mr. Asper or Mr. Wolch, after the
09:29 20 application was filed, to go and get a copy of the
21 Attorney General, the prosecutor's file, or the
22 city police investigation file, for their -- the
23 entire file for their review?

24 A No.

09:30 25 Q Did you have the power to compel production of the



1 prosecutor's file or the police file?

2 A No, I did not.

3 Q And how did you arrange to get access to the file?

4 A I asked for it and the authorities obliged.

09:30 5 Q And if, if Mr. Asper or Mr. Wolch would have asked

6 you to assist them in getting access for them to

7 the prosecutor's file and/or the police file to

8 assist them in conducting a further investigation

9 into finding other grounds, for example, can you

09:30 10 tell me what position you would have taken in that

11 respect?

12 A I would have supported their request.

13 Q And would you have asked them to make it directly

14 to those entities or would you have made the

09:30 15 request?

16 A I would, I guess initially I would have suggested

17 or signaled to them that they should approach them

18 directly, and if need be then I would certainly

19 lend my support to the request.

09:31 20 Q When you received the application on December 28,

21 1988, or that time after, did you take -- did you

22 believe or understand that they had completed

23 their investigation to identify the grounds?

24 A Yes.

09:31 25 Q And so again, as far as the need to get those



1 files to find further information, did, at some
2 point, you become aware that that might be a
3 concern of theirs?

09:31 4 A No. Based on the information contained in the
5 application it was clear that they, that the
6 Milgaards and/or counsel for the Milgaards, had
7 had access, at the very least, to the Court
8 exhibits, and had --

9 Q At least to what?

09:31 10 A To the Court exhibits --

11 Q Okay.

12 A -- that were filed at trial, and those were
13 certainly not easy to obtain, and it signaled to
14 me that -- well, I took some comfort from the fact
09:31 15 that two years had elapsed between their initial
16 contact with the department and the submission of
17 what appeared to be a, you know, a fairly
18 well-reasoned application, certainly by comparison
19 to several of the applications we receive, that
09:32 20 was well-documented and --

21 Q Do you recall --

22 A -- easy to read.

23 Q Yeah. Do you recall whether you assumed or formed
24 any view as to whether or not Mr. Asper or Mr.
09:32 25 Wolch had access, for example, to a prosecutor's



1 file and/or the police file?

2 A I certainly didn't. I didn't direct my attention
3 to it at that time. I knew that they had had
4 access to the Court files.

09:32 5 Q Did you see it as your role as the investigating
6 officer under Section 690 that, after an
7 application is received, for you to go out and get
8 a copy of the prosecutor's file and the entire
9 police investigation file and to provide it to
09:32 10 applicant's counsel?

11 A No, I didn't see it as my role.

12 Q And why not?

13 A By the time the application has come in it just
14 seemed to me that the issue had been joined in
09:33 15 this -- I use that term. The -- they had made
16 their application based on certain defects or
17 certain new information. That application came
18 from a consideration of the trial record and from
19 a distillation of -- and their analysis of all of
09:33 20 the things that could support a remedy under 690.
21 I assumed that they would have explored all of the
22 potential grounds and selected the ones that fit
23 within the criteria, therefore, to the extent that
24 the others were excluded I assumed that they were
09:34 25 not in issue.



1 Q And when you say you assumed they explored those
2 grounds, would that have been including, if Mr.
3 Milgaard's counsel felt necessary, accessing some
4 or all of the police or prosecutor's file; did you
09:34 5 assume that, if they felt that was necessary, they
6 would have done so?

7 A Yes.

8 Q If we can go to 333303. And this is Mr.
9 Milgaard's letter, this appears to be the draft
09:34 10 response, and I think -- if we can go to the next
11 page, next page, please.

12 A Umm --

13 Q Sorry, yeah, it looks as though this was drafted
14 by you; is that correct?

09:34 15 A Yes.

16 Q Now if we can just go back, I think the Minister's
17 letter is virtually identical except -- or the
18 executive assistant letter I'll show you in a
19 moment but let's use this document. So I take it
09:34 20 that once Mr. Milgaard's letter goes to the
21 Minister, since you are the lawyer from Justice
22 handling the file for the Minister, you would
23 draft a reply to be sent on behalf of the
24 Minister?

09:35 25 A Yes. I draw your attention to the last paragraph,



1 or the last two paragraphs, on that page.

2 Q Right, yeah, I will go through those.

3 A All right.

4 Q So the paragraph 2:

09:35 5 "As you may now be aware, the
6 Minister has replied to your counsel,
7 Mr. Wolch and has requested certain
8 information which, given the nature of
9 the case, is essential to the assessment
09:35 10 of this application."

11 Scroll down:

12 "Once this information is
13 received and reviewed, the officer
14 assigned to assess your application will
09:35 15 then be in a position to know what if
16 any further information will be
17 required. You and members of your
18 family should make submissions with the
19 assistance of your counsel. I trust the
09:35 20 above is satisfactory."

21 So that would have been your position back to
22 David Milgaard, essentially "use your legal
23 counsel to communicate with the Minister"?

24 A Yes.

09:35 25 Q And "whatever submissions you wish to make, take



1 it up with your counsel, and we'll consider them";
2 is that fair?

3 A Yes.

4 Q And then, just for the record, 213808. This is
09:36 5 the April 3rd, 1989 letter from the executive
6 assistant to Mr. Milgaard, and I think it tracks
7 at least the last two paragraphs, I think,
8 verbatim. So that would have been the letter sent
9 out by the Minister's assistant; is that correct?

09:36 10 A Yes.

11 Q I wonder if we can go to 333294, please, and go to
12 page 298 or 299. And this is an April 29th letter
13 from Mr. Milgaard back to the Minister, and it
14 says:

09:36 15 "My family and myself will
16 also be sending you a submission of our
17 own. It is expected to be completed at
18 the end of May."

19 And we talked a bit about this yesterday. Again,
09:37 20 this letter would have found its way to you, I
21 take it?

22 A Yes.

23 Q And so what was your, tell us, what was your
24 understanding, at this time, as far as what
09:37 25 additional -- as to whether or not the application



1 filed on behalf of Mr. Milgaard was complete or
2 not, in other words were you expecting more
3 information?

09:37 4 A I was. I was expecting it from two sources, first
5 from Mr. Wolch in response to the request for
6 additional information, and second, from the
7 Milgaard family based on this letter and based on
8 some conversations that I had with Mr. Wolch
9 and/or Mr. Asper.

09:37 10 Q And, again, if we could bring up 032905. This is
11 the May 8th, 1989 letter from Mr. Wolch back to
12 the Minister, and I'll just go to the next page
13 for a moment, I'll come back to the start here.
14 In this letter Mr. Wolch says:

09:38 15 "Finally, we would like to
16 thank you on behalf of Mr. Milgaard for
17 your letter inviting his submissions.
18 Mr. Milgaard and his mother have been
19 working consistently since the date of
09:38 20 conviction to establish that a
21 miscarriage of justice has occurred. In
22 addition to the materials which we have
23 presented to you, the Milgaard's are
24 planning on making a separate
09:38 25 presentation and once this is prepared



1 it will be forwarded to you in due
2 course."

3 And would that have been your understanding at
4 the time, then, that a -- in addition -- and in
09:38 5 this letter Mr. Wolch is providing the transcript
6 and the RCMP reports, so would it be your
7 expectation at this time that the application
8 made by David Milgaard was not yet complete?

9 A That's correct.

09:38 10 Q And you were expecting to receive further written
11 materials; is that correct?

12 A Yes.

13 Q And was that something that impacted your ability
14 to complete your investigation and advise the
09:39 15 Minister and formally re -- and allow the Minister
16 to formally respond to the application?

17 A Yes, in the following way. I could deal with the
18 grounds that had been advanced in the sense that I
19 could make the inquiries relating to those
09:39 20 grounds, but at that time, or until I had received
21 the submissions from the Milgaard family, I had no
22 way of knowing what additional grounds would be
23 raised and what additional work would be required
24 to complete the assessment.

09:39 25 Q And did you have any knowledge as to whether the,



1 and I'll call it the 'family presentation', and
2 when I say that I'm referring to that
3 supplementary material coming from David and/or
4 Joyce Milgaard; is that understood?

09:39 5 A Yes.

6 Q Did you have any understanding of whether or not
7 the family presentation would be further
8 submissions with respect to the grounds initially
9 raised in the December 28, '88 application or
09:40 10 whether it was, in fact, new grounds in support of
11 the application?

12 A I didn't know.

13 Q And was it your understanding that it would have
14 been an important part of the application, though,
09:40 15 the family presentation?

16 A Yes.

17 Q Let me put it this way; were you prepared to
18 proceed and have a decision made by the Minister
19 with this still pending?

09:40 20 A No, and particularly in circumstances in which
21 counsel for the applicant endorses it. The
22 Milgaards were planning on making a separate
23 presentation, ordinarily counsel make the
24 presentations but on occasion, if there's an
09:41 25 aspect of the case that they feel that the client



1 can best present, it's entirely within their
2 purview or within their sphere of influence to say
3 "eh, lookit, my client wants to say something and
4 I endorsed it and here it is", or "it's coming",
09:41 5 so we feel obliged to await its arrival.

6 Q And I don't want to jump ahead, but is it correct
7 that by the October '91 meeting, had at some point
8 the -- I don't believe you ever received the
9 family presentation; is that right?

09:41 10 A I don't believe so.

11 Q And, at some point, did you become satisfied that
12 it wasn't going to be provided or that you could
13 proceed without it?

14 A We had requested final submissions from Mr. Wolch
09:41 15 and, when we received them, we assumed that that
16 would be it.

17 Q And so you would have relied upon Mr. Wolch, then,
18 that if counsel felt that there was still more,
19 that the family presentation was to be part of
09:42 20 what you consider, that he would have told you at
21 that time?

22 A Yes.

23 Q Go back to the first page here. There -- and this
24 is the letter that includes the transcripts of the
09:42 25 evidence at trial, and I'm gonna show you some



1 documents later which I think suggest that the
2 preliminary hearing transcripts were not provided
3 at this time; is that right?

4 A That's correct.

09:42 5 Q Just the trial. And I think that that's all that
6 the Minister had requested; is that right?

7 A I'm not certain. I think we may have requested
8 both trial and prelim.

9 Q Yeah. I think the letter says:

09:42 10 "The entire transcripts of evidence at
11 the trial",

12 is what Mr. Lewis' memo indicates -- or, sorry,
13 his letter.

14 A Then I, then I'm corrected.

09:43 15 COMMISSIONER MacCALLUM: Which one, the one
16 to David Milgaard?

17 MR. HODSON: Yes. In fact, if we can just
18 bring that up, that might assist. 004868.

19 004868, yeah:

09:43 20 "The entire transcripts of evidence at
21 the trial."

22 COMMISSIONER MacCALLUM: No, I meant the
23 one that Mr. Lewis wrote to David Milgaard
24 directly in response to his request, his first
09:43 25 request, I thought that was what you were



1 referring to?

2 MR. HODSON: Oh, I'm sorry. Okay. I can
3 go back to, just so we're clear, this is the
4 February '89 letter to Mr. Wolch that talks about
09:43 5 the evidence that was requested, and I think, Mr.
6 Commissioner, you were asking about -- if we can
7 go to 333268. Right. And it does mention
8 transcripts of the preliminary hearing and trial.

9 BY MR. HODSON:

09:44 10 Q So it appears that, at least back in '86, Mr.
11 Milgaard was told that you needed the transcripts
12 of the preliminary hearing and trial, in the
13 February '89 letter from Doug Lewis it appears
14 just the evidence -- the transcripts of the
09:44 15 evidence at trial?

16 A Yes.

17 Q And so, if we could go back to 032905, it looks as
18 though -- and the reason I raise it at this point
19 is because I think, later on, I'm going to show
09:44 20 you some documents where I think you went to Mr.
21 Caldwell to get copies of the preliminary hearing
22 transcripts?

23 A Yes.

24 Q Does that sound right?

09:45 25 A Yes.



1 Q And then, if we could go down, it looks as though,
2 in addition to what's provided, is the copy of the
3 Nichol John statement, or at least part of it.
4 And then, if we can go to the bottom paragraph,
09:45 5 you'll recall, Mr. Williams, in the initial
6 application there was, I think your words were, a
7 tease with respect to the Nichol John statement,
8 and you -- or the Minister wrote back to Mr. Wolch
9 and said "lookit, if you have something about
09:45 10 that, any information, give it to us"; correct?

11 A Yes.

12 Q And so here's the response:

13 "It is our position that the contents of
14 this statement ...",
09:45 15 which is Nichol John's:
16 "... are false because it is
17 inconsistent with the physical facts of
18 the case and cannot therefore reasonably
19 be true."

09:45 20 Next page. And then goes through an analysis of
21 other evidence that I think essentially says
22 primarily because the stabbing of Gail Miller,
23 she was stabbed through the coat but not her
24 dress, and I think the essence of the position is
09:46 25 this; that if Nichol John saw David Milgaard grab



1 Gail Miller, as she says in her statement, and
2 stab her or start stabbing her, that how did she
3 get her uniform dress off before she was stabbed.
4 And you recall that being -- is that a fair
09:46 5 characterization of this, at least, part of the
6 impossibility argument?

7 A Yes.

8 Q And so, again, can you tell us -- and then if we
9 can scroll down, and this is where it talks about
09:46 10 being -- no, no, go back up, please -- about being
11 stabbed through the coat but not the dress:

12 "In other words, in order for Nichol
13 John to have witnessed this event she
14 would also have had to have seen
09:46 15 Milgaard remove the coat, take the dress
16 down around the waist of the deceased,
17 replace the coat and then stab her.
18 These facts are neither related by the
19 witness nor does it seem possible given
09:47 20 the fact that the officers noticed no
21 sign of a struggle."

22 And then, if we scroll down:

23 "The physical impossibility
24 of Nichol John's statement will become
09:47 25 evident to you upon your review of the



1 trial transcripts."

2 Can you tell us to what extent did you look at
3 this position, that -- and, again, we talked
4 about this a bit yesterday -- the fact that the
09:47 5 statement wasn't adopted as evidence before the
6 Court at the trial; how, if at all, did this
7 submission in this letter factor into your
8 considerations?

9 A Although it was not submitted as a primary ground
09:48 10 it was just at -- it was set aside as an area of
11 interest, and for the --

12 COMMISSIONER MacCALLUM: Sorry, sir, I
13 can't hear you?

14 A I set it aside as an area of interest in the sense
09:48 15 that, once I read the trial transcript, I realized
16 that Nichol John did not adopt that portion of her
17 statement that implicated David Milgaard in the
18 stabbing, so if that's not evidence that went to
19 the jury and formed part of the body of evidence
09:48 20 that resulted in the conviction, then it couldn't
21 be viewed as something that could undo the
22 conviction because it wasn't part of it. But it
23 was an area of interest, it -- so --

24 BY MR. HODSON:

09:48 25 Q So do I, am I correct in understanding your



1 evidence that even if this was true, in other
2 words that it was not -- it was physically
3 impossible for her description -- and I think that
4 assumes that what she, that she witnessed David
09:49 5 Milgaard stab her through the, stab her through
6 the coat, and I think the fatal blows, while --
7 let me back up -- that she would have observed
8 David Milgaard grab Gail Miller, take her down the
9 alley and stab her through the back of the coat,
09:49 10 and knowing that the stab marks did not go through
11 the dress, unless Gail Miller had her dress down
12 before David Milgaard encountered her, --

13 A Yes.

14 Q -- it would not make sense. That was the
09:49 15 position, and I think it was, common sense would
16 dictate that she wouldn't have had her dress down
17 before he encountered her?

18 A Ordinarily, no.

19 Q Okay. And so is what you're saying is that even
09:49 20 though you accepted that as all being true, that
21 with respect to your investigation of the
22 application, your response would be not
23 necessarily "so what" but it wasn't evidence that
24 convicted him and, therefore, the fact that it
09:50 25 doesn't make sense or couldn't be true isn't



1 relevant to what you are looking at?

2 A That's correct.

3 Q Because you are looking at the conviction and it
4 wasn't part of the conviction, the fact that it
09:50 5 now can be demonstrated -- in fact, would it be
6 fair to say that at trial Mr. Tallis could have
7 also demonstrated it to be false if it had been
8 part of the evidence?

9 A Yes. It was, in my view, a non-issue, but it was
09:50 10 raised.

11 Q And when you say a matter of interest, would it be
12 correct to say that sort of the entirety of Nichol
13 John's evidence and non-evidence, if I can call it
14 that, was a matter of interest in that it was part
09:51 15 of the record and it was raised in the first
16 application and therefore something that you had
17 to at least pursue a bit further?

18 A Yes.

19 Q I'm done with that letter. So after you received
09:51 20 the transcripts, I take it you would have read
21 through the trial transcripts and the lab reports;
22 is that right?

23 A Yes.

24 Q And would it be correct to say that in doing so
09:51 25 you would, your primary focus would be to look at



1 the grounds raised in the application; namely,
2 Deborah Hall, the motel incident and Dr. Ferris,
3 the physical evidence, and perhaps as well the
4 Nichol John evidence, that would be your focus?

09:51 5 A Yes.

6 Q Do you have any recollection about anything coming
7 to your attention when you read through the
8 transcripts, anything stand out in your mind that
9 you thought was unusual, significant, just based
09:52 10 on your review of the transcript?

11 A The circumstances of the killing were very, very
12 puzzling. The aspect that we just discussed,
13 namely, the fact that the victim was stabbed
14 through the coat but not through the dress,
09:52 15 continues to be a puzzle, but I had to set that
16 aside and focus on the serological evidence of
17 Paynter and focus on the testimony of Melnyk and
18 Lapchuk. At trial their criminal records I think
19 were known and they were cross-examined
09:53 20 extensively on it and on the motives that they may
21 have had for testifying and I looked at that.
22 Once I had a grasp of the essential ingredients of
23 their evidence in relation to what they said that
24 might inculcate David Milgaard, then I took a
09:53 25 second look at Deborah Hall's affidavit and



1 started to compare and contrast the different
2 recollections of the same event. I then decided
3 to interview Miss Hall.

09:53 4 Q And then what about the physical evidence in the
5 Dr. Ferris report, again is that something that
6 you would have spent some time going through that
7 evidence?

8 A Yes, I looked at it. I'm not a serologist and as
9 a result we retained the assistance of a
09:54 10 serologist to provide us with an opinion on Dr.
11 Ferris' report.

12 Q And that serologist was Patricia Alain; is that
13 correct?

14 A Yes.

09:54 15 Q And was she at the time a member of the RCMP
16 forensic unit? Am I right?

17 A Yes, she was a -- I think she was the chief
18 serologist at headquarters in the RCMP.

19 Q The chief serologist?

09:54 20 A I believe so.

21 Q I have some documents that may assist on that.

22 A And in terms of what her position was at that
23 time, she was a serologist and she was qualified
24 in my view to provide the opinion, so we requested
09:54 25 it of her.



1 Q Let's just talk a bit about, again you would have
2 read the trial transcript, and I presume you would
3 have read Nichol John's evidence and the manner in
4 which her May 24th statement was put to her under
09:55 5 section 9(1) and 9(2) of the *Evidence Act*;
6 correct?

7 A Yes.

8 Q And I think it's clear from the record that the
9 jury heard what was in the statement, but with a
09:55 10 caution from the judge that it's not truth of the
11 contents, at least the unadopted parts?

12 A Yes.

13 Q And I think, is it correct to say, that in the
14 first application, even as it was amended, or the
09:55 15 first application, I don't believe that there was
16 a ground advanced that the fact that the jury, or
17 the fact that Nichol John's statement was heard by
18 the jury somehow gave rise to a miscarriage of
19 justice; is that fair?

09:55 20 A That's my recollection, yes.

21 Q And I don't think that was a specific ground
22 raised in any, at least any of the documents that
23 I saw as a ground, and I want to just explore that
24 for a bit. That was a matter that, and we've
09:55 25 heard considerable evidence on that, we heard from



1 Mr. Tallis who I think told us at trial that he
2 felt that his position was compromised by the
3 manner in which the trial judge held the inquiry
4 into the circumstances of the statement, and I
09:56 5 think Mr. Tallis said that he and Mr. Caldwell
6 both thought that it should be in the absence of
7 the jury where he could examine Nichol John about
8 the circumstances under which the statement was
9 given and as well perhaps call some of the police
09:56 10 officers about the treatment of Nichol John and
11 the circumstances, and I think what Mr. Tallis
12 told us is that he would do that in the absence of
13 the jury, but he may not do that in the presence
14 of the jury given what -- you know, for tactical
09:56 15 reasons, and I think when the matter went to the
16 Court of Appeal, the Court of Appeal said yes,
17 that should have happened, but it didn't,
18 Mr. Tallis still got a chance to examine Nichol
19 John and therefore there was no reversible error I
09:57 20 think would be -- would you be generally familiar
21 with what I just told you then?

22 A Yes.

23 Q And my question then, when we go to the Section
24 690 and to the substantial miscarriage of justice,
09:57 25 would it be correct to say that simply going back



1 to the minister and saying lookit, the jury heard
2 the Nichol John statement in these circumstances
3 and it was unfair, is it correct to say that the
4 answer would be, well, sorry, the Court of Appeal
09:57 5 and the Supreme Court didn't think so?

6 A Correct.

7 Q And you had your opportunity to address those
8 procedural concerns?

9 A Yes, that would be consistent with how ministers
09:57 10 at that time saw their role. It was to correct or
11 change the law as emanates from the Court of
12 Appeal or from the Supreme Court.

13 Q If the position had been something along the
14 following lines, that -- and what I've just told
09:58 15 you about the Nichol John statement, would it be
16 correct, Mr. Williams, based on your reading of
17 the transcript, that the Nichol John evidence
18 taken as a whole would have been viewed as damning
19 evidence against David Milgaard even though she
09:58 20 did not adopt certain parts of her statement, that
21 it might have been considered damning evidence?

22 A Yes.

23 Q And what Mr. Tallis told us, told this Inquiry, is
24 that the manner in which the judge questioned her
09:58 25 during the trial and the interaction between the



1 judge and Nichol John, and I think there was some
2 comments about, you know, stop crying, you
3 remembered before, Mr. Tallis' perception was
4 that, and I think that these are his words, that
09:58 5 the jury may well have thought that Nichol John
6 was trying to protect a friend, David Milgaard,
7 and was pretending not to remember to protect him,
8 and that the judge took that view and that that
9 might have been the impression left, that she did
09:59 10 not want to repeat the damning things because she
11 was trying to assist Mr. Milgaard. Would you have
12 been aware of that, whether that came from
13 Mr. Tallis, or one possible viewing of the
14 transcript and her evidence?

09:59 15 A That's one interpretation of it, yes.

16 Q Yeah. And so again, and I think what Mr. Tallis
17 told us, is that he felt that that evidence was,
18 even though she didn't adopt the statement, the
19 manner in which it came out was quite damning in a
09:59 20 couple of respects, one, he didn't get the
21 opportunity to cross-examine and challenge her on
22 the unadopted parts of the statements; in other
23 words, namely, how could you stab -- how could you
24 see him stab her through the coat and not the
09:59 25 dress, the fact that she said he used his right



1 hand when David is left-handed, why she would end
2 up going on a trip with him for three or four
3 days, and a number of things, and I think
4 rightfully so he couldn't cross-examine because
10:00 5 she didn't repeat them?

6 A Yes.

7 Q And secondly, he also said that the impact, or he
8 felt that the impact of Nichol John's evidence in
9 a whole may have assisted or perhaps gave a bit
10:00 10 more credibility to Ron Wilson's evidence in the
11 sense that if we take a situation where Nichol
12 John had given no evidence or nothing that said I
13 was in the car, I didn't see anything happen in
14 the alley, that the jury might say, okay, well,
10:00 15 how could she not see anything and Wilson now see
16 something, the fact that they have some
17 information, even though it's not adopted, might
18 somehow -- and again, I think we're all probably
19 speculating what might have influenced the jury,
10:00 20 but this is Mr. Tallis' perception -- that somehow
21 the Nichol John information helped the credibility
22 of Ron Wilson's evidence, and is that something
23 you could see as well? I'm not asking you to
24 agree, but --

10:00 25 A Yes.



1 Q Now to my question about 690. If the basis
2 brought forward was to lay that all out and say
3 lookit, this was a significant part of the
4 evidence that convicted David Milgaard for the
10:01 5 reasons that I've stated, and there's probably
6 more, and now the position is we have more
7 information about how Nichol John was interviewed
8 by Inspector Roberts and the polygraph, we have
9 some information about, from Ron Wilson about the
10:01 10 interaction between those two and that although
11 the Court of Appeal said the procedure was fair, I
12 as David Milgaard's counsel think that if I would
13 have had an opportunity to get Mr. Mackie, Mr.
14 Roberts, Ms. John in the absence of the jury and
10:01 15 here's some new information I didn't know, namely,
16 here's what Inspector Roberts did or didn't do
17 with her, here's some information from Ron Wilson,
18 might that be the type of information that might
19 give rise to a basis for remedy under 690, and
10:01 20 what I'm trying to get at is what would be -- and
21 again on this newness issue, would there be some
22 way to revive that issue by saying lookit, here's
23 some information I didn't know before about the
24 polygraph, things of that nature?

10:02 25 A I don't believe so. The questioning of the



1 witnesses, the Roberts' interview, Wilson's
2 interaction with the police, those were all issues
3 that were capable of exploration at trial. As
4 framed, there doesn't appear to be anything new
10:02 5 that signals that had that approach been taken
6 before the jury it would have resulted in a
7 different outcome, or it might have affected the
8 outcome to state it more accurately. At trial,
9 counsel, learned counsel makes strategic decisions
10:03 10 as to how they wish to attack the Crown's case and
11 sometimes embarking on one course of action
12 excludes a potential avenue of attack. If an
13 approach is taken for tactical reasons, it's not
14 for the minister to, number 1, second guess, or
10:03 15 two, if it fails, to provide another opportunity
16 to have a go at the Crown's case by way of a 690
17 review.

18 Q Okay. So let's just hold that thought for a
19 moment. If there are other grounds that fit
10:03 20 within this new and significant that might cause
21 you to consider a remedy, would I be correct in
22 saying that the minister would not get back into
23 the Nichol John issue because she would simply
24 send it back to the court and let the court sort
10:04 25 that out again? Maybe I didn't phrase that very



1 well.

2 A I'm not sure I understand.

3 Q Well, there was some suggestion or some comment
4 made, and I think it may have been by Mr. Asper,
10:04 5 that lookit, well, if we can get in the door with
6 a new ground, in other words, Deborah Hall and
7 Ferris, and at least qualify as new and
8 significant, then maybe we can get into some of

9 the other stuff that happened at trial that would
10:04 10 not on its own give us the right to a remedy, but
11 at least allow us to address it, and so what I'm
12 trying to get at is -- let me put two scenarios.

13 If the rest of the materials, the non-Nichol John
14 materials was not significant enough to give rise
10:04 15 to a remedy, then I take it the Nichol John issue
16 wouldn't be a factor?

17 A Correct.

18 Q If the new information was significant enough to
19 get a remedy, then I think what I'm trying to get
10:05 20 from you is that the minister wouldn't need to
21 sort out the Nichol John information because she
22 would be sending it back to the trial court or the
23 appeal court?

24 A That's correct.

10:05 25 Q At which point they would sort out again, and



1 obviously if there's a new trial, the manner in
2 which the Nichol John statement was used could be
3 re-addressed at that time?

4 A That's correct.

10:05 5 Q And so the scenario -- am I correct that there
6 wouldn't be a scenario where the minister or the
7 department would end up looking at these other
8 grounds and saying okay, we've got enough here,
9 now let's look at the rest of it to see if there's
10:05 10 more grounds?

11 A No. If there are grounds that support a remedy,
12 then you go with that. When it's back in court,
13 if it's by way of a fresh appeal, then counsel can
14 raise that on appeal. If it's by way of trial,
10:05 15 those issues would then be fully explored.

16 Q I just want to move ahead, I think you've told us
17 you would have, I think, reviewed the transcript
18 initially with a focus on Deborah Hall and Dr.
19 Ferris. I want to talk a bit about -- let's talk
10:06 20 first about Mr. Caldwell. What role did he play
21 in your investigation of the first application?

22 A Mr. Caldwell assisted me significantly. Firstly,
23 he helped to open some doors and by that --

24 COMMISSIONER MacCALLUM: I'm sorry, what
10:06 25 was that?



1 MR. HODSON: Open some doors.

2 A At the time the Section 690 process didn't have
3 any powers to compel production of material and at
4 that time I recognized that I needed to have some
10:06 5 access to the police files. Mr. Caldwell was a
6 well-respected prosecutor in this area, he was
7 also the prosecutor of the case, he made some
8 introductions that enabled me to access the police
9 file, access to some of the police investigators
10:07 10 as the case came along. I needed to understand
11 the theory of the Crown's case and he was the
12 prosecutor, so to the extent that I had questions,
13 he responded. To the extent that I requested and
14 needed information from the file, he provided it,
10:07 15 and he provided it on a timely basis. That was
16 his role. He asked -- I asked certain questions
17 of him, he responded, but he did not take part in
18 any of "my deliberations" and I did not share with
19 him any of my perceptions about the case. He was,
10:08 20 in some sense, like another witness, but he was a
21 fairly significant one because of his intimate
22 knowledge of the file.

23 BY MR. HODSON:

24 Q And would you have asked him what his thoughts or
10:08 25 views were on the grounds then?



1 A I don't recall doing so, no. I simply asked him
2 about, to provide certain information. He may
3 have expressed his views on it, but I certainly
4 didn't solicit his view about what he thought of
10:08 5 the applicant's grounds, no.

6 Q And as far as the Crown theory, we touched on this
7 a bit yesterday, why would it be important for you
8 to learn the Crown theory from him?

9 A Initially, I don't know if I had the closing
10:08 10 address, but I certainly had the opening address,
11 and sometimes when you make an opening address
12 it's kind of a hope for, you hope the evidence
13 will be as you've come to expect it, but sometimes
14 it doesn't come up that way or sometimes it gets
10:09 15 clarified by cross-examination so at the end of
16 the day your case has changed significantly, and
17 what was promised in the opening address, I didn't
18 see it established, particularly with the
19 serological, so at the end when all of the
10:09 20 evidence was in and he had to make his summation,
21 I wanted to find out what approach he had taken
22 with the jury to explain or to put into context
23 the information they had heard about the serology
24 or about the scientific evidence that was led at
10:10 25 trial, because that was really important in the



1 assessment of Dr. Ferris' report.

2 If at the end of the trial the
3 Crown's theory was that the serological evidence
4 linked David Milgaard to the crime, then Dr.
10:10 5 Ferris' report would have a significant basis. If
6 that was not the Crown's theory and if that's not
7 what the jury heard, then you would take a
8 slightly different approach, but I needed to have
9 a clear understanding of what the Crown's position
10:10 10 was with respect to that evidence.

11 Q And what did you come to understand the Crown's
12 theory being at the end of the case to the jury
13 about whether or not the semen found near Gail
14 Miller's body was linked to David Milgaard?

10:11 15 A It wasn't linked to him. They did not advance the
16 evidence on the basis. It neither inculpated nor
17 exculpated.

18 Q And so neutral?

19 A It was neutral.

10:11 20 Q And I think you told us that may have been a bit
21 different than what Mr. Caldwell had said in his
22 opening remark?

23 A Yes. I think he hoped that the evidence would
24 establish a tie to David Milgaard, but that was
10:11 25 his expectation.



1 Q Now, did you have any concerns, given that Mr.
2 Milgaard was applying to the minister saying I'm
3 wrongfully convicted, there has been a miscarriage
4 of justice on these grounds, did you have any
10:11 5 concerns about going to the prosecutor who
6 prosecuted Mr. Milgaard to get assistance?

7 A I had concern that my dealings with Mr. Caldwell
8 had to be at a certain level, and by that I mean
9 it was complicated because by this time Mr.
10:12 10 Caldwell was now a member of the Department of
11 Justice.

12 Q The Federal Department of Justice?

13 A The Federal Department of Justice, and in some
14 respects a colleague. That notwithstanding, he's
10:12 15 an officer of the court and I needed that
16 information and I wasn't asking Mr. Caldwell to
17 make the assessment for me, I was simply asking
18 Mr. Caldwell to open the doors to provide me with
19 the opportunity to get the information so that I
10:12 20 could make it.

21 Q And again, when you were getting this information,
22 did you ever consider doing this under oath and
23 examining Mr. Caldwell with his file and going
24 through and getting the information from him that
10:12 25 way?



1 A No, I -- Mr. Caldwell couldn't provide me with any
2 evidence. He led the evidence at trial, but it
3 wasn't his testimony that resulted in the
4 conviction of David Milgaard.

10:13 5 Q Was it your understanding in your dealings, with
6 respect to the applications, did you understand
7 this to be any allegation in the application to
8 the minister that Mr. Caldwell had somehow
9 committed any wrong with respect to the
10:13 10 prosecution of David Milgaard?

11 A No. My examination of the file and the
12 correspondence showed that as between counsel,
13 that is, Mr. Tallis and Mr. Caldwell, there
14 appeared to be a level of trust and respect and
10:13 15 sharing in terms of openness that for that time
16 was exceptional.

17 Q If one of the grounds of the application had been
18 that Mr. Caldwell had committed misconduct or had
19 been the perpetrator of a wrong that gave rise to
10:14 20 a miscarriage of justice, would your approach to
21 him to get this information been different?

22 A Yes.

23 Q And why and in what way?

24 A Because he then would have been a target or an
10:14 25 object or a ground and to the extent that his



1 behaviour would be under scrutiny, I would
2 certainly have to be much more circumspect in my
3 dealings with him. As it was, I tried to be
4 reasonably circumspect given my assessment and
10:14 5 knowing the sensitivity of this issue.

6 Q And let's talk about Mr. Tallis who was defence
7 counsel. Would your reasons for approaching him
8 be similar as your -- for different substantive
9 reasons, but would it be fair to say that you
10:14 10 would have to go to defence counsel to gather
11 certain facts as well?

12 A Yes.

13 Q And would that be, I don't want to get into
14 operations or management, but would it be fair to
10:14 15 say that in dealing with Section 690 applications,
16 it would not be unusual for the investigating
17 officer to talk to the prosecutor and defence
18 counsel?

19 A No. Quite frankly, in order to put the grounds
10:15 20 into some kind of perspective, you have to have a
21 solid understanding of what the trial issues were,
22 how the Crown was approaching it, how the defence
23 was approaching it so that you can better situate
24 the evidence and better situate and understand the
10:15 25 grounds that are now being advanced.



1 Q Now, and I touched on this, and I'll touch on it
2 again later, I think what the Dr. Ferris
3 information and the written materials, it was
4 suggested that Mr. Tallis didn't understand the
10:15 5 secretor issue basically, that was in the
6 material, that that's one of the reasons the jury
7 didn't understand it, is because Mr. Tallis didn't
8 understand it, or perhaps didn't understand it.

9 A He understood it.

10:15 10 Q Yeah, but that was a ground that was put forward?

11 A Yes.

12 Q And so would one of the reasons to talk to him be
13 to investigate that ground?

14 A Yes.

10:16 15 Q And so that if Mr. Tallis did understand the
16 issue, that would be a relevant consideration in
17 considering the submission that he didn't?

18 A Yes.

19 Q Now, again as far as contact with Mr. Tallis, and
10:16 20 we'll get into some of the details, would as well
21 you have contacted him to obtain general
22 information about the defence, talk a bit about
23 his, what other things you would want to get from
24 him, or what would be important?

10:16 25 A Certainly you would want to get a sense of what



1 the trial strategy was in terms of the defence and
2 the big question was given the circumstantial
3 nature of the case, given the fact that your
4 client didn't have a criminal record, what were
10:16 5 the considerations that prompted you to not put
6 your client on the stand.

7 Q And why would that be important to you?

8 A It would be important to get an appreciation of
9 counsel's take on the case and counsel's
10:17 10 assessment. It helps me to have a better
11 appreciation of the file so that I can, when I'm
12 receiving information, I have a flavour for it
13 that you can't get by simply reading the
14 transcript.

10:17 15 Q And would one of the issues about the fact that
16 David Milgaard did not testify, would that relate
17 to the motel room incident in the sense that there
18 was evidence led about this incident and since his
19 application was him saying it didn't happen, why
10:18 20 didn't he get on the stand and say it, would that
21 be one of the things you would raise or would you
22 think about?

23 A Yes. There was very -- there was no eye witness
24 evidence at trial, there was circumstantial
10:18 25 evidence, and the evidence of Melnyk and Lapchuk



1 was the closest thing to an admission that the
2 Crown had, and if the accused is there and this is
3 something that is attributed to him, silence is
4 important, and the reason why an approach to
10:18 5 lessening the impact of that evidence, why that
6 approach was taken, that's also significant in my
7 view in terms of getting a flavour for some of the
8 dynamics that were happening at the trial level.

9 Q Okay. If we can go to 332518, please, and this
10:19 10 is -- just go to the top part. This is a
11 handwritten note of Mr. Caldwell that we've been
12 through with him and it is May the 30th, 1989, a
13 phone call with you, it appears to be the first
14 contact, it's got:

10:19 15 "Prosecutor - H.Q. - Justice. Phd. &
16 asked Fay for copies of my two letters
17 to the Nat. Parole Bd."

18 Do you have a recollection of requesting that
19 from Mr. Caldwell?

10:19 20 A I have a recollection of asking him for
21 information concerning a summary of the case and
22 during the course of our conversation he mentioned
23 that he had produced a fairly concise summary and
24 it was contained in letters to the National Parole
10:19 25 Board. Until that conversation I had no way of



1 knowing that he had written the National Parole
2 Board, but he said I think I put it together in
3 this letter and I'll look for it and send it to
4 you.

10:20 5 Q And so you were calling him asking for a summary
6 of what the case or the Crown theory, or just what
7 were you after?

8 A That's -- a summary of the case and the Crown
9 theory, what was it that you were arguing or
10:20 10 putting, presenting to the jury.

11 Q And you needed this for what you told us earlier
12 is to look at how the grounds fit in and various
13 other matters?

14 A I was -- when you take a look at the transcript,
10:20 15 sometimes if you get a summary, it helps you to
16 zero in on various aspects of the evidence.

17 Q And so the prosecutor's summary of the case and
18 defence counsel's take on the case would be
19 informative to you then; is that --

10:20 20 A Yes.

21 Q And so the National Parole Board letters were
22 something that Mr. Caldwell brought up with you in
23 response to your request for a summary?

24 A Yes.

10:20 25 Q And then if we can go to 112320, and sorry to be



1 using other people's telephone notes, but this is
2 a way to put some dates on some things. I think
3 this is a message, May 31, '89 from you to Fred
4 Dehm. Are you familiar with the name Fred Dehm?

10:21 5 A Yes. I believe at the time he was the Crown
6 attorney for the area, or head of the prosecution
7 group.

8 Q Right. And so -- and we'll see his name come up
9 later. My understanding from looking at the
10:21 10 documents is that the prosecutor's file, Mr.
11 Caldwell's file, would have been in the possession
12 of the provincial Crown?

13 A Yes.

14 Q For which Mr. Dehm was the senior person?

10:21 15 A Yes, and my call to him was simply to request
16 access to it.

17 Q Right. And so it appears, from time to time, you
18 went to Mr. Dehm to get materials out of the
19 prosecutor's file, and on occasion you went to Mr.
10:21 20 Caldwell where he would then go and get access to
21 the file and retrieve information, so that both,
22 both sources were used from time to time; is that
23 correct?

24 A That's correct. In addition, my search took me to
10:22 25 Regina, and to Murray Brown.



1 Q Was that, do you remember when that was, was that
2 on the first application?

3 A I think it was on the first application at a later
4 time.

10:22 5 Q Okay. Now, here, this looks to be getting access
6 to the exhibits at the courthouse. And, again,
7 would that have been something that you would have
8 gone to Fred Dehm, to the provincial Crown, to try
9 and get access to the Court exhibits?

10:22 10 A Yes.

11 Q And I think this is where it's discovered that Dr.
12 Ferris still had them; do you remember that
13 happening?

14 A Yes.

10:22 15 Q Did that cause you any concern?

16 A I was surprised. Dr. Ferris' letter was, and
17 report was dated September of '88, this was May of
18 '89. I would like to see them back. I wasn't
19 concerned about, you know, him doing something
10:23 20 wrong with them, I just needed to get them back,
21 it would result in a delay.

22 Q Right. And so what -- if we could maybe go to
23 001557. And I'll show you another letter in a
24 moment, but this is, I think this is Mr. Dehm's
10:23 25 notes about certain exhibits, semen and blood.



1 Would it be fair to assume from this that you're
2 now pursuing to see what exhibits might be
3 available to do some forensic testing or DNA
4 testing?

5 A Yes.

6 COMMISSIONER MacCALLUM: Was it Bahm or
7 Dehm?

8 MR. HODSON: Dehm, D-E-H-M, Dehm is the
9 correct pronunciation, Dehm.

10:24 10 COMMISSIONER MacCALLUM: Okay.

11 BY MR. HODSON:

12 Q And if we can go to 001555. This is your letter
13 to Mr. Dehm June the 6th, 1989, and I think this
14 is where you raise:

10:24 15 "I understand that a number
16 of trial exhibits are being stored at
17 the Court House ... To better assess Mr.
18 Milgaard's application, it would be
19 helpful ...",

20 to get:

21 "... some of the exhibits ...",
22 the diagram, photos, envelopes, vials, etcetera.
23 And at this time -- and you say some have been
24 sent to Dr. Ferris, next page, and:

10:24 25 "I am not certain if Dr.



1 Ferris' unsuccessful attempts to obtain
2 DNA related only to his examination of
3 'clothing including the panties and
4 panty girdle of the victim' or included
10:25 5 some of the exhibits mentioned above.

6 ... describe the conditions ... stored."

7 So you would have gone to Fred Dehm as a resource
8 to say "tell me what's happening with the
9 exhibits, what condition are they in", and I
10:25 10 think you used Mr. Dehm to contact Mr. Wolch to
11 contact Dr. Ferris to get the exhibits back; is
12 that fair?

13 A Yes.

14 Q Just back on Mr. Caldwell's file, did you ever
10:25 15 request an entire copy of the prosecutor's file?

16 A No, I didn't.

17 Q Would there be a reason, or what would guide you
18 as to what information you would get from the
19 prosecutor's file?

10:25 20 A The nature of the issues I'm looking at, one of
21 the things, I did come to Saskatoon on several
22 occasions and I did have access to the file and I
23 reviewed it. On a homicide file, it -- it -- they
24 can vary in terms of volume, and I knew that I was
10:26 25 coming to Saskatoon at some point in time, and



1 when I was here I examined it, and from it I made
2 certain selections, and they were happy -- they
3 were kind enough to photocopy what I required.

4 Q And, when you reviewed the file, did you review it
10:26 5 to find out whether there was information there
6 that might assist you in your investigation of the
7 grounds advanced by Mr. Milgaard?

8 A Yes. I also reviewed it and got a certain sense
9 of how the case went.

10:26 10 Q Would you have reviewed the file with a view to
11 trying to identify whether anything other than
12 what grounds were raised in the application by Mr.
13 Milgaard might give rise, or give information to
14 pursue new grounds of a miscarriage of justice, or
10:26 15 reflect on Mr. Caldwell's performance?

16 A I was alive to that issue and I looked at the
17 material with that in mind.

18 Q And so that if something did jump out at you that
19 might suggest to you the basis of a miscarriage of
10:27 20 justice, that's something you would have done
21 something with, is that correct?

22 A Yes.

23 Q And do you recall anything of that nature in your
24 review of the file?

10:27 25 A No.



1 Q Were you aware, in the course of your
2 investigation and in particular your dealings,
3 that at an earlier point Mr. Caldwell had made his
4 file available to a fellow named Peter
10:27 5 Carlyle-Gordge; does that --

6 A The name is familiar, and I was advised that
7 certain journalists had requested, and had
8 obtained, access to Mr. Caldwell's file.

9 Q Were you aware, middle of 1989, whether or not Mr.
10:27 10 Asper or Mr. Wolch had either made a request to
11 have access to the file or had had access to the
12 file directly?

13 A I wasn't aware. I wasn't aware of any access or
14 any request for access by either Mr. Wolch or Mr.
10:28 15 Asper.

16 Q And I believe as well, and we'll see this a bit
17 later, that you did have access to the Saskatoon
18 City Police file; is that correct?

19 A That's correct.

10:28 20 Q And, again, would you have gone through the entire
21 file or can you give us some idea of what you
22 would have done with that file?

23 A Sometimes the material that reaches the Crown
24 doesn't represent the entirety of the
10:28 25 investigative efforts that the police make in



1 relation to a particular case, and it -- it is
2 sometimes very useful to see what else the police
3 uncovered that wasn't provided, or wasn't -- or
4 didn't find its way into the prosecution brief, so
10:29 5 I took a look at that.

6 Q And, again, do you have any recollection of
7 anything -- let me just back up. In reviewing the
8 police file would it be fair to say that your
9 primary focus would be to look for information
10:29 10 relating to the grounds raised?

11 A Yes.

12 Q And, apart from that, do you recall anything
13 coming to mind, in looking at the police file,
14 that caused you to think there might be other
10:29 15 grounds that might give rise to a miscarriage of
16 justice?

17 A No. I became aware that the initial police theory
18 had nothing to do with David Milgaard and that the
19 initial police theory related to they were looking
10:29 20 for a serial rapist.

21 Q And that's something you would have viewed on the
22 file on one of your initial reviews?

23 A Yes.

24 Q And would that have been 1989, or are you able to
10:30 25 tell us when, would that have been when



1 Mr. Pearson became involved?

2 A No. I'm not sure, to be honest. It was certainly
3 before the conclusion of the first application,
4 but the exact date, I'm not certain.

10:30 5 Q Okay. We'll go through and I'll show you some
6 other documents that might assist your recall.

7 A Okay.

8 Q But at some point, looking at the police files,
9 before the conclusion of the first application you
10:30 10 became aware that the initial theory of the police
11 did not involve David Milgaard as a suspect but,
12 rather, a person who had committed some earlier
13 rapes?

14 A Yes.

10:30 15 Q And, again, would that -- what signal, if any,
16 would that give to you?

17 A Well one of the, one of the reasons for wrongful
18 conviction that has appeared in a number of
19 publications and articles on the subject is what's
10:31 20 referred to as tunnel vision by the police, they
21 fix their attention on one individual and they
22 ignore evidence exculpatory and they ignore other
23 possibilities. When I look at a police file I'm
24 certainly alive to that, and what occurred in this
10:31 25 particular case was quite the opposite, David



1 Milgaard was entirely off the radar until Albert
2 Cadrain came to talk to the police in Saskatoon.

3 Q And so, based on your review of the police file,
4 your understanding was they were focused on the
10:31 5 rapist theory, perhaps, amongst others?

6 A Yeah. There were two or three theories that were
7 out there and were discussed in the material I
8 saw, and I -- that's -- that's what occurred to
9 me.

10:32 10 Q And so, again, that would be -- you'd be alive to
11 that issue, as to whether or not the police
12 initially identified David Milgaard as a suspect
13 and pursued that. What about, we've also heard
14 some suggestion that once Albert Cadrain did come
10:32 15 into the police station with that information,
16 that the suggestion has been made that perhaps the
17 police had tunnel vision with respect to David
18 Milgaard after that point?

19 A I really can't comment on that, I -- in my
10:32 20 conversations with Albert Cadrain he indicated
21 that he wasn't believed initially and he was quite
22 carefully questioned.

23 Q Okay.

24 A And those are my words, not his, he was far more
10:32 25 colourful in his language to me.



1 Q We have had the pleasure of hearing some of his
2 interviews, Mr. Williams. This is probably an
3 appropriate spot to break for the morning.

4 (Adjourned at 10:33 a.m.)

10:57 5 (Reconvened at 10:57 a.m.)

6 BY MR. HODSON:

7 Q Mr. Williams, before the break we were talking
8 about the Saskatoon City Police file, and I think
9 you, on occasion, went to take a look at it. Do
10:57 10 you recall being asked by Mr. Wolch or Mr. Asper
11 to either arrange for them to have similar access
12 as you to the file?

13 A No, I wasn't.

14 Q And, if you had, was that something that you would
10:57 15 have undertaken to try to facilitate if asked?

16 A Yes.

17 Q And, based on your dealings with the city police,
18 is that something that you think may have been
19 looked upon favourably? I'm not asking you to
10:57 20 speak on their behalf but, based on your dealings
21 with them, is that something you think you would
22 have been able to achieve is an opportunity for
23 them to review the police file?

24 A Yes. In my dealings with them I received full
10:57 25 cooperation, or I received cooperation.



1 Q If we can go to 333294. Here is a letter --
2 that's June 15th, 1989, is that, yes, that is --
3 that's June 15th, 1989 from David Milgaard, again
4 to the Minister, and they talk here about a video
10:58 5 and it appears that the video is being put
6 forward, or a proposed video was part of the
7 family presentation; was that your understanding
8 that a video was going to be provided as well?

9 A Yes.

10:58 10 Q A re-enactment or something of that nature?

11 A Yes.

12 Q And that would be different, a different ground or
13 different information, than what was in the
14 original application; is that right?

10:58 15 A I --

16 Q Presumably it didn't refer to Deborah Hall, the
17 hotel incident, or the secretor issue; is that
18 fair?

19 A Yes.

10:59 20 Q If we can go to the next page. And here Mr.
21 Milgaard:

22 "Anyway what do you think so far - has
23 your man done anything yet - I know that
24 may sound impatient but it has been
10:59 25 awhile hasn't it? I honestly wish you



1 well sir, I'm just tired of this place."

2 And again, we talked about this before, you said

3 that you would have your dealings with Mr. Asper.

4 Did you have concerns when -- presumably the

10:59 5 Minister would have given this letter to you, is

6 that right, or you would have seen a copy of it?

7 A Yes.

8 Q Did you have concerns about what Mr. Milgaard was

9 saying in this letter, in other words expressing

10:59 10 concern that he didn't know anything was

11 happening?

12 A At the time I wasn't overly concerned. I wasn't

13 aware of the level of communication between the

14 applicant and his counsel, it just seemed to me

11:00 15 that there was some anxiety for a quick decision,

16 or for a decision.

17 "... what do you think so far ...",

18 I guess it should have raised some, some alarm

19 bells, but --

11:00 20 Q And why do you say that?

21 A Well:

22 "... has your man done anything yet

23 ...",

24 by then I would have had the trial transcripts

11:00 25 for approximately a month and, having reviewed



1 the application, probably would have had a fair
2 bit of the reading done.

3 Q And would you have communicated, generally, what
4 you were doing to Mr. Asper do you think?

11:01 5 A Yes, say "look, we're still reviewing the
6 transcripts", it would be no more than that
7 because that's -- capsulizes what I was then
8 doing.

9 Q And we'll see some letters later on from Mr.
11:01 10 Milgaard, as the file progresses, expressing
11 similar concerns about "no one tells me what is
12 going on, nothing's happening, why aren't you
13 telling me what's going on", and I'm summarizing;
14 do you recall letters of that nature being sent to
11:01 15 Mr. Milgaard from the Minister from time to time?

16 A Yes.

17 Q And I think you've told us your lines of
18 communication would be with Mr. Asper, and I take
19 it that, is it fair to say that you felt that you
11:01 20 were doing things and communicating what you were
21 doing to Mr. Asper?

22 A Yes.

23 Q And, again, at some point did you have concerns
24 that Mr. Milgaard, based on his letters to the
11:01 25 Minister, may not either know or appreciate what



1 it was you were doing and what was being
2 communicated to his lawyer?

3 A It certainly occurred to us that that may have --
4 that that was the case.

11:02 5 Q And, again, do you recall whether you took; would
6 you take steps to advise Mr. Asper, Mr. Wolch,
7 would you --

8 A No, I mean that's the relationship between counsel
9 and the client, it's not for me to intervene. But
11:02 10 I would simply relay to them, "lookit, we're doing
11 what we can so, you know, please convey that to
12 your client", but that's as far as we could go.

13 Q And I think a bit later on we'll see that not only
14 did Mr. Milgaard express these concerns in letters
11:02 15 to the Minister, he started to comment publicly
16 through the media, as did his mother, as did Mr.
17 Asper, of a similar nature, is that fair, that --

18 A Yes.

19 Q And what was your -- did you take issue with what
11:03 20 Mr. Milgaard was portraying or Mrs. Milgaard was
21 portraying about the steps, if any, that you had
22 taken?

23 A Well I knew what I was doing, I was fully aware of
24 the effort that was going into it, however when
11:03 25 the press contacted us we would simply say



1 "lookit, we're in the midst of a review", having
2 done this, that, and the other, and leave it at
3 that.

4 In terms of specifically
5 discussing the case in the press, certainly
6 weren't authorized to do that, and would certainly
7 be, well, not frowned upon, but we couldn't do it.

11:03 8 Q And so -- and let me take it, for example, where
9 the media has a report that attributes it to Mr.
11:03 10 Asper or Mr. Milgaard or Mrs. Milgaard saying
11 "lookit, it's taken X number of months, we don't
12 know what's happening"; are you telling us that
13 you would be constrained in saying to the media
14 "lookit, I've read the transcripts, I've retained
11:04 15 Pat Alain, I've arranged to interview Deborah
16 Hall", etcetera, etcetera?

17 A I wouldn't go into those details, we'd simply say
18 "lookit, we're reviewing the request, part of that
19 review would include a review of the trial and
11:04 20 appellate record, and we're investigating the
21 grounds that have been advanced", and that's as
22 much as we could go in without going into detail.
23 Because for example if I mentioned Pat Alain, next
24 thing, a reporter would be on her doorstep.

11:04 25 Q Okay.



1 A And with respect to Ms. Alain, she is a public
2 servant and public servants are expected to field
3 those types of things, but in the event that I
4 were to discuss elements of the case with a
11:04 5 private citizen I certainly wouldn't want to visit
6 on that citizen a horde of reporters trying to get
7 an update --

8 Q And --

9 A -- or a discussion of their particular involvement
11:05 10 in the file.

11 Q For the work that you were doing, sir, on the
12 file, did you see any need for the public to be
13 made aware, through the media, of the work that
14 you were doing?

11:05 15 A As time went on we certainly found that to be a
16 desirable goal, to communicate, but we were
17 somewhat constrained in what we could say.

18 Q And was that a reaction to what was in the media
19 about you and the work you were doing?

11:05 20 A In part, and it also had to do with the provisions
21 of the *Privacy Act* which govern our activity.

22 Q All right. But apart, apart from the fact that
23 concerns were raised on behalf of David Milgaard
24 in the media about not only the progress of your
11:05 25 work but the type of work, etcetera; apart from



1 that would there be any reason for you, in the
2 course of doing the investigation for the
3 Minister, to want that to be made public in the
4 public domain, "here's what I am doing, here's why
11:06 5 we're doing it", and keep the public informed
6 throughout?

7 A Well it's a desirable goal, and while we would
8 trying to articulate in a general way what we were
9 doing, the story lines that were coming out
11:06 10 certainly didn't reflect the information we
11 provided to certain reporters.

12 Q Would there be any benefit for you in, for
13 example, August of 1989 after you get Patricia
14 Alain's report, to issue a press release that says
11:06 15 "serologist raises doubts about Ferris report",
16 etcetera; would there be any desire, reason, that
17 you would want to do that?

18 A My Minister would be very unhappy with me if I
19 were to presume to disclose information destined
11:06 20 for her eyes before she had had a chance to review
21 it and make a decision on the application. It's
22 certainly premature, and it's certainly
23 presumptuous, it's certainly not my role to
24 perform that function.

11:07 25 Q And for example in the Deborah Hall examination,



1 after your interview of her, again, would you have
2 seen any reason to issue a press release saying
3 "here's what Deborah Hall now says, what happened
4 in the motel room and what was said"?

11:07 5 A The decision on the application is that of the
6 Minister of Justice. My role is to gather the
7 information, indicate and analyse some of that
8 information, provide advice, and sit back and
9 await the decision of the Minister. It is not to
11:07 10 publicly discuss individual aspects of the
11 investigation in the media.

12 It's similar to that of, in some
13 respects, the police. The police are conducting
14 an investigation into an offence, their role is
11:07 15 not -- or their efforts would certainly be
16 hampered if each of the investigative steps was
17 accompanied by a full media barrage. For one
18 thing, it would certainly inform whether or not
19 anyone charged could get a fair trial in that
11:08 20 community or in any community, it's just not the
21 way we do things.

22 Q And the fact -- and I'll deal with this in more
23 detail later -- the fact that you did not think it
24 appropriate to be making public information that
11:08 25 you gathered, would it be fair to say that as your



1 investigation progressed information would appear
2 in the media attributed to either Mr. Asper or
3 Mrs. Milgaard or David Milgaard or Mr. Wolch where
4 you had information that differed significantly
11:08 5 than what was being portrayed in the media --

6 A Yes.

7 Q -- in relation to either a ground of the
8 application or the case?

9 A Yes.

11:08 10 Q And in those circumstances are you telling us
11 that, for the constraints you've mentioned, you
12 not only felt it not appropriate but felt that you
13 were unable to go to the media and say "lookit,
14 this is wrong and here is why"?

11:09 15 A That's correct.

16 Q Okay.

17 A For example the Minister's first letter of
18 February 27th, 1991, before some of the personal
19 information in that could be released, it required
11:09 20 an application to the Privacy Commissioner and
21 justification under one of the provisions of the
22 *Privacy Act* to permit the release of that
23 information. It would be doubly embarrassing for
24 the department, given that the Minister of Justice
11:09 25 is also the Minister responsible for the *Privacy*



1 Act, and to have her officials violating the act
2 that she is responsible for would indeed be, at
3 very best, embarrassing.

4 Q And so I think you are saying there were some
11:10 5 legal constraints as well as policy constraints,
6 if I can call it that, would preclude you from
7 arguing the case in the media; is that a fair way
8 to put it?

9 A Yes.

11:10 10 Q And so I take it for the most part, then, that you
11 would decline to do so?

12 A Yes.

13 Q And --

14 A Until the case was -- until a decision was taken
11:10 15 there was no comment, as far as I am aware, in
16 relation to the materials gathered and the
17 findings.

18 Q And then in your view, then, did you take issue
19 from time to time -- and I'll show you some
11:10 20 specifics as we go through -- with the accuracy of
21 the information that was being portrayed in the
22 media?

23 A Yes.

24 Q And did that fact cause you any concern, the fact
11:10 25 that, if I can call it, one side of the events,



1 and not the opposing side or a different view,
2 being presented; did that cause you concerns that
3 the public was being informed about the case that
4 you were investigating without hearing your side
11:11 5 of it or what you had discovered in your
6 investigation?

7 A Yes, it -- the public's view was being shaped by a
8 series of articles that didn't fully reflect the
9 facts as I knew them, and I was unable to correct
11:11 10 that perception without violating, violating the
11 law as I understood it.

12 Q And did that become more of an issue after the
13 first application was rejected in the sense that
14 there may have been, in the public domain, a
11:11 15 different view of the relevant facts and grounds
16 than what you had uncovered in your investigation?

17 A Yes.

18 Q And so maybe a different -- I'll come back to that
19 later when we get to that part. If we can go to
11:12 20 333496. This is the letter back from Mr. Caldwell
21 to you obtaining copies of the two letters to the
22 parole board, and I think you told us that this
23 you were getting because Mr. Caldwell told you
24 they provided a good summary of the Crown theory;
25 is that right?



1 A A synopsis of the case, and I hoped to get, from
2 that, the Crown theory, yes.

3 Q And then if we can go to 006840. I think this is
4 the June 14th letter where Mr. Caldwell says:

11:12 5 "While the facts are set out
6 at length and in detail in the judgement
7 of Chief Justice Culliton mentioned
8 above, I will set them out briefly here
9 for your information."

11:13 10 And it then goes on for a few pages, you can go
11 to the next page. And, again, would that be
12 something, again, that -- tell us, what
13 significance or what weight or what did you use
14 this document for in your work?

11:13 15 A It just helps put the -- it helps to crystalize 13
16 or 1,400 pages of transcript. It just gives me an
17 idea, a short summary in advance of a more
18 detailed look at it, what the prosecutor viewed as
19 the significant facts --

11:13 20 Q Now the --

21 A -- leading --

22 Q I'm sorry.

23 A -- leading to the conviction.

24 Q Now there's mention here, in the synopsis, about
11:13 25 -- and, again, I think Mr. Caldwell puts this



1 forward as the facts -- that it talks about Nichol
2 John's -- yeah, Nichol -- let me back up. It
3 talks about:

4 "Milgaard then confronted Miss Miller,
11:14 5 grabbed her, grabbed at her purse, and
6 pulled a knife on her, taking her down
7 an adjacent alley ... Nichol John
8 observed this episode, and ran away,
9 ..."

11:14 10 And I think what we heard from Mr. Caldwell
11 before the Inquiry that that would have been
12 information taken from her statement, but that
13 did not get adopted before the Court, and again
14 I'm -- did you put any significance on this
11:14 15 recitation here?

16 A No. Other than, you know, it was a narrative, and
17 the facts at trial is the evidence of the
18 witnesses subject to examination and
19 cross-examination. This is his perception of it,
11:14 20 and at the time it was useful, but I didn't rely
21 on that as supporting one version or another
22 version of the facts because, by then, I had the
23 trial transcript.

24 Q If we can go to the next page. Again, appreciate
11:14 25 this letter was to the parole board, it also talks



1 about -- Mr. Caldwell expresses some comments
2 about:

3 "In preparing this case, I
4 had the privilege of reading Milgaard's
11:15 5 entire psychiatric history, which, as it
6 happened, was very well documented since
7 his early youth. He had been in
8 constant trouble since kindergarten
9 days, and the file even contains
11:15 10 predictions by social workers who had
11 examined Milgaard, that he would one day
12 kill somebody."

13 Did you recall whether you would have put --
14 given any consideration to this information?

11:15 15 A No. That letter was drafted or for the parole
16 board, not for us, that had nothing to do with
17 what I was about.

18 Q And if we can go to 006833, I think this, just for
19 the record, is the second letter to the Parole
11:16 20 Board that he sent along to you; is that right?

21 A Yes.

22 Q And then if we can go to 332495, your letter to
23 Mr. Caldwell June 26, 1989:

24 "Thank you for your recent letter and
11:16 25 the enclosed letters addressed to the



1 National Parole Board. The earlier of
2 the two letters is a concise synopsis of
3 the facts of this matter, and discloses
4 what was the Crown's theory of the
5 case."

11:16

6 And again, I think you told us that's what you
7 were relying upon that document for?

8 A Yes.

9 Q Go to 001554, and this is June 29th, '89, this is
10 a letter from Mr. Dehm to you referring to a
11 telephone conversation and sending the witness
12 statement form of Ute Frank and exhibit number 4,
13 book of photographs, and it appears that you would
14 have asked for that from Mr. Dehm; is that
15 correct?

11:17

16 A Yes.

17 Q The photographs, do you know what you would have
18 requested those for?

19 A The photographs, as I recall, was -- I believe
20 they represented some of the exhibits tendered at
21 trial just to assist me in understanding the scene
22 itself. You can try and visualize the scene from
23 reading the transcripts, but the picture certainly
24 is the better.

11:17

11:17 25 Q Would the issue of -- would these photographs have



1 assisted in your review of the issue of
2 contamination raised in Dr. Ferris' report,
3 contamination of the scene?

4 A Yes. It was significant because it showed the
11:17 5 body, it showed the condition of the snow around
6 the body. It also showed, or it provided, as I
7 recall, there was some shots of the roadway and
8 some shots of places in which certain items were
9 recovered.

11:18 10 Q Now let's talk about the statement of Ute Frank,
11 and we know that Ute Frank was in the motel room
12 during the motel room incident and had given a
13 statement to the police but was not called at the
14 trial. Do you recall the circumstances about how
11:18 15 you became aware that she had given a statement
16 and what prompted you to get the statement?

17 A I believe that Ute Frank's name was mentioned by
18 one of the witnesses, either Lapchuk or Melnyk, as
19 being one of the persons present when they say
11:18 20 that David Milgaard reenacted something on the
21 bed. She didn't appear as a witness at trial and
22 I think I questioned Mr. Caldwell as to why not
23 and learned that there had been a statement. I
24 believe I learned also that he had provided a copy
11:19 25 of the statement to Mr. Tallis and I requested a



1 copy of the statement to see the extent to which
2 it would -- I wanted to see whether or not it
3 confirmed what Lapchuk and Melnyk said or
4 detracted from it. It was part -- I mean, she was
11:19 5 a witness to the event that was one of the grounds
6 for the application.

7 Q So reading the transcript you see the evidence of
8 Melnyk and Lapchuk, I think both of whom indicate,
9 or one of them anyway, that also in the room was
11:19 10 Ute Frank and Deborah Hall; correct?

11 A Yes.

12 Q And so you've got the affidavit of Deborah Hall
13 that also says Ute Frank was in the room. Would
14 one of the reasons you go to Mr. Caldwell is to
11:20 15 say how come Ute Frank wasn't called and give me
16 the background so that I can figure out where Ute
17 Frank fits into the ground raised with respect to
18 Deborah Hall; is that a fair summary?

19 A Yes.

11:20 20 Q And so then you got the statements and would it be
21 fair to say that this would be as part of your
22 investigation of the Deborah Hall ground?

23 A Yes.

24 Q And if we can go to 277583, this is a copy of the
11:20 25 statement, it's one page, we've been through it on



1 a number of occasions, I think she says here:

2 "I was quite stoned & I sometimes wasn't
3 aware of what was going on around me. I
4 also was hallucinating quite a bit. I
11:21 5 recall asking hopy if he killed that
6 nurse they were talking about and he
7 just looked at me and smiled oddly."

8 Again, do you have a recollection about, when you
9 got the statement, about what significance if any
11:21 10 you drew from just the statement?

11 A It appeared to be neutral, it didn't -- it was
12 clear on the basis of that statement that there
13 was some discussion about the killing in
14 Saskatoon. The statement, however, neither
11:21 15 confirmed in any way Melnyk and Lapchuk's
16 testimony, nor did it seem to contradict what
17 Deborah Hall had said, it just seemed to discuss
18 another incident that took place that evening.
19 There's no mention in it about pillows or
11:22 20 anything, it's just -- it may have been a
21 continuation, it may have been totally unrelated,
22 but it had to do with the subject of the killing
23 of the nurse in Saskatoon.

24 Q Do you recall asking Mr. Caldwell why he didn't
11:22 25 call her as a witness at trial?



1 A I may have, I probably did, but I believe that,
2 you know, based on her statement, it doesn't
3 really assist.

4 Q What Mr. Caldwell told the Inquiry is that when he
11:22 5 interviewed Ute Frank she became quite upset and I
6 think ran out and I think was a bit incoherent and
7 that that was his reason for not calling her. Do
8 you recall anything of that nature being -- Mr.
9 Caldwell telling you that?

11:22 10 A Now that you've brought it to my attention, yes.

11 Q And so, and I'll get to Mr. Tallis later, I think
12 you brought, you inquired -- I think Mr. Caldwell
13 also said that he gave the statement of Ms. Frank
14 to Mr. Tallis?

11:23 15 A Yes. In my discussion with Mr. Tallis, he
16 indicated to me that he had interviewed Ms. Frank
17 and based on the information he expected that she
18 could provide, he didn't feel that calling her
19 would assist his client.

11:23 20 Q And we'll deal with that in a bit more detail
21 later, but would it be correct to say that in
22 investigating the ground brought forward, that
23 Deborah Hall says Melnyk and Lapchuk lied about
24 what they witnessed in the motel room, that to the
11:23 25 extent that Ute Frank, what she observed in the



1 motel room would be relevant to your consideration
2 of the Deborah Hall versus Melnyk/Lapchuk as
3 opposed to who was lying and who was telling the
4 truth; is that fair?

11:23 5 A Yes, that's fair.

6 Q So getting the statement would be one of the early
7 steps in going down that path?

8 A Yes.

9 Q Now if we can just turn our attention to Dr.
11:23 10 Ferris' report. I think if we call up 112334 and
11 go to page 335, go to the next page, please, and
12 this is a report from Patricia Alain to you dated
13 August 8th, 1989; is that correct?

14 A It is.

11:25 15 Q And she talks about:

16 "After reviewing the transcripts,
17 comments of Dr. Ferris, --"

18 Etcetera. Are you able to tell us when you would
19 have engaged her? Presumably prior to August 8th
11:25 20 of '89.

21 A Yes. I'm not certain of the precise date, sir. I
22 imagine probably within a month or two months
23 previous to that.

24 Q Okay.

11:25 25 A And the likelihood is I would have contacted Barry



1 Gaudette who was the head of the lab and would
2 have asked him, would have funneled the request
3 through Barry Gaudette.

4 Q And Barry Gaudette was -- what was his position at
11:25 5 the time?

6 A I think he was -- he was the head of the lab, the
7 administrator. I'm not certain what his title
8 was, but --

9 Q That was the RCMP lab?

11:26 10 A That's the RCMP lab in Ottawa. Whether I required
11 assistance with respect to DNA or serology or any
12 of those types of services, as the chief
13 administrator that request was funneled through
14 him, or channeled through him.

11:26 15 Q And he would have then identified Patricia Alain
16 as the appropriate person to provide you with the
17 advice; is that right?

18 A Yes.

19 Q And it says:

11:26 20 "After reviewing the transcripts,
21 comments of Dr. Ferris, the submissions
22 by Mr. Wolch and S/Sgt. Paynter's lab
23 reports, I make the following comments."

24 Are you able to tell us what -- presumably
11:26 25 transcripts are the trial transcripts; is that



1 right?

2 A Yes.

3 Q And do you recall, what would you have sent
4 Patricia Alain in order for her to prepare this
11:26 5 review?

6 A The examination-in-chief and cross-examination of
7 Staff Sergeant Paynter.

8 Q And what about Dr. Emson, some of the other
9 witnesses, do you recall if that would have been
11:27 10 sent?

11 A Certainly to the extent that they were required,
12 yes, the pathologist's report, the testimony of
13 the pathologist.

14 Q And again, would you have gone through the record
11:27 15 to identify what you felt Patricia Alain would
16 need then?

17 A Yes, and she would also amplify and she says look,
18 I need this as well. For example, it seemed to me
19 that the evidence of the ident, in terms of what
11:27 20 was picked up and where it was picked up, was also
21 transmitted to her because she needed to get the
22 evidence from the time of retrieval to the time of
23 its assessment or investigation.

24 Q And so that may have been Mr. Penkala or Mr.
11:27 25 Kleiv's evidence I believe, I think touched on



1 that?

2 A Yes. You may call this confabulation, but that
3 would have been the types of evidence that I would
4 send to her because she needed to get the full
11:28 5 picture and those were the individuals involved in
6 the collection, retrieval and examination of the
7 evidence.

8 Q And then as well, comments of Dr. Ferris,
9 presumably that would be his report; is that
11:28 10 correct?

11 A Yes.

12 Q The submissions by Mr. Wolch, that would be his
13 application?

14 A Yes.

11:28 15 Q And Staff Sergeant Paynter's lab reports, those
16 would be the lab reports that Mr. Wolch sent you
17 on May 8th, '89; is that correct?

18 A Yes.

19 Q Now, what was it that you asked Patricia Alain to
11:28 20 do, what were her instructions?

21 A Well, we had this report and I would simply say
22 lookit, please review the report and provide me
23 with your comments with respect to the issues
24 raised, simple like that.

11:28 25 Q And prior to getting her report, did you have --



1 tell us what type of understanding you had of the
2 issues raised in Dr. Ferris' report?

3 A Dr. Ferris -- the thrust of the submission with
4 respect to Dr. Ferris' report was this, David
11:29 5 Milgaard, on the basis of Sergeant Paynter's
6 findings, was a non-secretor, the sample tested
7 out as showing that it was donated by a secretor.
8 The Crown's initial theory that despite the fact
9 that Milgaard was a non-secretor, you could -- he
11:29 10 could still have been the donor because there was
11 perhaps blood in it, in that sample; thus, that
12 would link him as the donor to the sample, that
13 would link him to the offence. Dr. Ferris simply
14 said lookit, the amount of blood in there was
11:30 15 insufficient to provide enough antigens given the
16 colour; therefore, whoever donated that had to
17 have been a secretor. Since David Milgaard was
18 not a secretor, David Milgaard could not have
19 donated it and since the Crown's theory was that
11:30 20 the donor was also the killer, that excluded David
21 Milgaard.

22 Q Okay. Now, can you tell us then what was your
23 understanding of what Patricia Alain reported in
24 this report?

11:30 25 A Well, Patricia Alain, and I must confess, I



1 haven't read the report in detail in quite some
2 time.

3 Q Perhaps we can do it this way. In this report I
4 think there were some further discussions in
11:31 5 reports, maybe let's start off with you telling us
6 what was your understanding of the upshot of
7 whatever review you had done with respect to Dr.
8 Ferris' report and then we'll come back to this
9 specific report.

11:31 10 A Okay. I start from the basis that Dr. Ferris'
11 report was advanced to signal that the trial judge
12 and jury didn't understand the impact of the
13 forensic evidence led at trial in relation to the
14 serology, that had they properly understood it,
11:31 15 there would have been no doubt of its impact and
16 that there would have been an acquittal, that was
17 one aspect of Dr. Ferris' report.

18 The other aspect was a criticism
19 of the forensic evidence in the sense that he said
11:32 20 lookit, it should not have been tendered in the
21 first place because there was evidence of
22 contamination, but notwithstanding that, assuming
23 that these facts were made out at trial, then it
24 had to exclude him.

11:32 25 Based on what I subsequently



1 learned and the reviews by Ms. Alain and a review
2 of the transcript, what emerged was that no
3 conclusions could be drawn about the secretor
4 status of the donor because of the prospect of
11:32 5 contamination and that prospect was so high that
6 the evidence neither inculpated nor exculpated
7 David Milgaard, it was evidence that was put
8 before the jury, but its probative value in terms
9 of linking him to the scene or excluding him was
11:33 10 nil and Patricia Alain essentially said that, and
11 to the extent that she said that, she pointed out
12 that Dr. Ferris' conclusion that forensic evidence
13 exculpated David Milgaard was based on an
14 incorrect assumption or appreciation of the facts
11:33 15 that were led at trial.

16 Q And that would be, number 1, contamination?

17 A Yes.

18 Q And, number 2, that David Milgaard is a
19 non-secretor?

11:33 20 A Yes, and she, I think she also commented on the
21 testing methodology that was used to determine
22 David Milgaard's status.

23 Q And so is the bottom line, that based on Patricia
24 Alain's report, tell me, what was your conclusion
11:34 25 reached with respect to the significance of Dr.



1 Ferris' report with respect to the application
2 under Section 690?

3 A It had -- Dr. Ferris' report, conclusion that it
4 exculpated David Milgaard was based on an
11:34 5 incorrect factual assumption and therefore it had
6 little if any value in terms of determining, or in
7 terms of having an impact on the Section 690
8 application.

9 Q And then let's just go back, you talk about the
11:34 10 Crown theory, I think what Dr. Ferris also said,
11 that it could not, the semen was not linked or
12 could not link David Milgaard to the crime and I
13 think it was put forward as well, not only the
14 position was it proves David Milgaard's innocence,
11:34 15 but I think later on or at some point there was
16 also a corollary argument that it at least knocks
17 out the semen as being linked to David Milgaard.
18 Can you tell us how you dealt with that and, in
19 particular, your understanding of the Crown theory
11:35 20 at the end of the case?

21 A At the end of the case the Crown didn't advance
22 the argument that the semen was linked to David
23 Milgaard, that's how I understood their position
24 to be.

11:35 25 Q And so if we focus simply on that part of Ferris'



1 opinion that says the semen can't be linked to
2 David Milgaard because it's contaminated, would
3 that be new and significant information that was
4 not before the jury that would be a ground capable
11:35 5 of giving rise to a remedy under Section 690?

6 A No, it wasn't new and significant because in the
7 questioning of Staff Sergeant Paynter I think that
8 the trial judge elicited from Staff Sergeant
9 Paynter that the prospect of contamination was
11:35 10 such that very little if anything could be made of
11 it.

12 Q So I think --

13 A So that was squarely before the jury at the time
14 of trial.

11:36 15 Q And I think the primary focus, at least in the
16 written materials of Dr. Ferris' opinion, is that
17 it proves David Milgaard is innocent, and I think
18 again you've told us that you concluded that was
19 just wrong?

11:36 20 A Yes. I didn't conclude that, the evidence just
21 established that.

22 Q Yeah. Your conclusion, that based on the
23 evidence, that Dr. Ferris' opinion was based on
24 incorrect assumptions and therefore of little or
11:36 25 no value?



1 A Yes, and I should add that that followed my
2 discussions with Dr. Ferris when I put to him
3 certain assumptions of fact.

4 Q And so I think that was in June of '90 that you
11:36 5 talked to him?

6 A Yes.

7 Q And did he agree with your assessment at that
8 time?

9 A Yes.

11:36 10 Q Is it fair to say that prior to talking to Dr.
11 Ferris, based on the advice you got from Patricia
12 Alain, that you reached the conclusion without
13 talking to him; is that fair?

14 A Yes.

11:37 15 Q Did you -- is there a reason you didn't go back to
16 Dr. Ferris before June of 1990? In other words,
17 once Patricia Alain gave you this report, is it
18 fair to say that after you digested this, that you
19 would have reached the conclusion that the Dr.
11:37 20 Ferris report is of little or no value as a ground
21 under Section 690; is that fair?

22 A Yes.

23 Q And you did so without having talked to Dr.
24 Ferris; correct?

11:37 25 A Yes.



1 Q And did you see a need -- in light of what
2 Patricia Alain told you, did you see a need to go
3 to Dr. Ferris before you sort of reached your
4 conclusion?

11:37 5 A No, I didn't.

6 Q And why not?

7 A It's consistent with my role in that I would
8 report up to the minister and materials collected
9 would form the basis of a report and then she
11:38 10 would, the minister would decide. That did
11 change, it did change and that change occurred as
12 a result of another development and that was the
13 publication of Dr. Markesteyn's report.

14 Q And we'll get to that a bit later, but I think
11:38 15 when that became public, that prompted you to go
16 and talk to Dr. Markesteyn, Dr. Ferris and Dr.
17 Merry?

18 A Yes.

19 Q But as I understand your evidence, that you did
11:38 20 not feel it necessary, in light of what Patricia
21 Alain told you and in light of your review of Dr.
22 Ferris' report, to talk to Dr. Ferris before you
23 had reached your conclusion with respect to the
24 merits of his evidence?

11:38 25 A Correct, but in light of what was publicly



1 disseminated around Dr. Markesteyn's report which
2 essentially said, I think the conclusion was that
3 the material was not of human origin, and that was
4 widely disseminated, I thought in fairness to Dr.
11:39 5 Ferris I should bring that to his attention and
6 have him comment on it and also put to him certain
7 other aspects as well.

8 Q Okay. And is it correct to say that in the
9 October 1, 1990 meeting, your conclusions with
11:39 10 respect to Dr. Ferris' report, would that have
11 been shared with counsel for David Milgaard?

12 A My conclusions wouldn't have been, but Patricia
13 Alain's report I think was there.

14 Q So the information provided -- this memorandum
11:39 15 would have been provided to them; is that right?

16 A Yes, I believe so.

17 Q So we'll just go through parts of this, and I
18 think again we've been through this, I think
19 actually we've been through this memo before so I
11:40 20 won't go through all of it in detail, but
21 certainly one of the issues identified is
22 contamination due to a bacterial soil or another
23 environmental source, and I think what the
24 evidence we've heard from, and seen from other
11:40 25 witnesses is that certain leafy vegetables or



1 leather, there's certain things that could mimic
2 "A" antigens and if the sample was contaminated
3 and showed of having "A" antigens, it would have
4 been as a result of something other than the
11:40 5 donor; is that right?

6 A Yes.

7 Q And then as well there's a discussion here about
8 the secretor test and what was your -- was it your
9 understanding that the test performed in 1969 to
11:40 10 determine that David Milgaard was a secretor or
11 not, that that test was not reliable?

12 A Yes, that was my understanding.

13 Q Did you -- what were your thoughts on a couple of
14 matters, about, number 1, well, why didn't they
11:41 15 confirm his secretor test? I think Dr. Ferris --
16 I don't think in Dr. Ferris' report, there's no
17 mention about the reliability of the secretor
18 test, he assumes, and I think Dr. Ferris' evidence
19 is that he would have raised that with I think
11:41 20 either Mr. Asper or Mr. Wolch. Did you, when you
21 learned of this information from Patricia Alain,
22 say why didn't they confirm his secretor test?
23 A It may have crossed my mind, but in the overall
24 scheme of things, David Milgaard's secretor status
11:41 25 was a non-issue at trial in that on the basis of



1 the evidence before the court, let's take the
2 evidence at its highest and assume that he's a
3 non-secretor, whether in the light of the
4 contamination that's present, since it neither
11:42 5 inculpated nor exculpated him, it could have very
6 little bearing on the outcome of the verdict, and
7 yes, in hindsight it would have been preferable
8 and it certainly would have been -- it would have
9 closed off this avenue to have had or insisted
11:42 10 that a new test be conducted on David Milgaard to
11 determine his secretor status, but I believe that
12 didn't happen until after the results of the
13 first, and --

14 Q Just on that point, is it correct to say that if
11:42 15 in 1989 you had done a secretor test and confirmed
16 that David Milgaard was a non-secretor, would it
17 have changed your view of the value of Dr. Ferris'
18 report?

19 A No.

11:42 20 Q If it would have shown, as was shown later, that
21 he was a secretor, would that have had any impact
22 on your --

23 A No, because once you introduce contamination, it's
24 contaminated, so even if he didn't do it, it would
11:43 25 still show up as an "A". If he did do it, it



1 would show up as an "A". I think the strongest
2 case would have been if the secretor test showed
3 he was a non-secretor, it still wouldn't have had
4 an impact because of the fact of contamination
11:43 5 either way.

6 Q What about the submission that was made, and I'm
7 not sure if it was made in the materials or that I
8 heard from Mr. Asper at this Inquiry, maybe a
9 combination of the two, that if it had no
11:43 10 probative value, it was still before the jury and
11 the jury must have been confused by it and the
12 jury must have thought that the semen was linked
13 to David Milgaard because otherwise why would that
14 be in his evidence, and did you hear an argument
11:44 15 of that nature being made at some point or did you
16 consider that as a position?

17 A I heard a submission like it. In my view it's
18 speculative, it's Monday morning quarterbacking.
19 At the time that the evidence went in, there was
11:44 20 an expectation that it would be probative. It
21 turned out not to be.

22 Q We heard from Mr. -- sorry to interrupt. We heard
23 from Mr. Tallis that he wanted the evidence in
24 because I think he thought it was exculpatory up
11:44 25 until Chief Justice Bence asked a question about



1 the identity of the donor being a secretor or
2 non-secretor?

3 A Yes.

4 Q And I think from Mr. Tallis' point of view, he
5 wanted it in his evidence?

11:44

6 A It certainly would have been -- it was a good
7 basis upon which to launch a defence, it couldn't
8 be my guy because the science excludes him.

9 Q And was it your understanding then that the
10 contamination or the prospect of contamination
11 precluded either side from relying upon the
12 sample?

11:45

13 A Yes.

14 Q And the fact that the jury may or may not have
15 been confused by this is a matter that was before
16 the court and not a new matter; is that fair?

11:45

17 A Correct. The trial judge instructed the jury.
18 I'm not certain, I don't believe it was mentioned
19 in the charge.

11:45

20 Q I think you are right on that, there's nothing in
21 the charge. Both counsel referred to it in their
22 closing address, but it was not in the charge to
23 the jury.

24 Now, and I think is it correct
25 to say that whether it was this report of August

11:45



1 8th, '89 or at some point shortly after that, is
2 that when you would have reached your conclusion
3 or your thinking that, lookit, this ground does
4 not have -- based on your information -- does not
11:46 5 have any merit or much merit?

6 A That's correct.

7 Q And you may have touched on this in a more general
8 way, but did you consider advising Mr. Asper of
9 this?

11:46 10 A I didn't consider advising him of it. This is
11 material that I was duty-bound to bring to the
12 attention of the Minister. Mr. Asper, Mr. Wolch,
13 they had made their inquiries, they had made their
14 assessment of the file and they had brought this
11:46 15 forward as their ground. My job was to make the
16 necessary inquiries and provide a report to the
17 Minister. It would be inappropriate for me to
18 pre-judge how the Minister would receive this
19 information.

11:47 20 Q Did you at some point -- and, again, prior to the
21 October 1, 1990 meeting where I think this report
22 was shared with them -- did you at any point
23 observe or come to the conclusion that either Mr.
24 Asper or Mr. Wolch may have been aware of some
11:47 25 problems or defects in Dr. Ferris' conclusions,



1 and based on your discussions with them or
2 anything --

3 A Yeah.

4 Q -- did you come to realize that they maybe knew,
11:47 5 the same way you knew, that there were problems
6 with the Ferris report?

7 A Well, there was some signal that the Ferris report
8 may not be as strong as it needed to be, because
9 in June of 1990 Dr. Markesteyn was engaged to
11:47 10 provide an opinion on the same subject and, I
11 mean, how many experts is enough. If Dr. Ferris
12 was right then why would you need Dr. Markesteyn.
13 Dr. Markesteyn's evidence was, I think, submitted
14 to shore it up.

11:48 15 Q Now I think what Mr. Asper said is that -- and
16 we'll see some newspaper articles a few months
17 later, in fact even a few years later, where he
18 continues to publicly state that the Dr. Ferris
19 report proves innocence, and that I think his
11:48 20 evidence was that if -- it would have been nice,
21 once you reached your conclusion, to let him know
22 so that they could maybe focus elsewhere, or words
23 to that effect; and then how do you respond to
24 that suggestion?

11:48 25 A Between 1986 and 1988 the applicants had an



1 opportunity to canvass the material and to provide
2 to the Minister what they saw were the grounds to
3 support the application for that.

4 Q The contamination issue, is it fair to say that
5 that was in Dr. Ferris' report?

6 A The contamination issue was in Dr. Ferris' report,
7 the contamination issue was squarely before -- in
8 the trial transcript, it's counsel's duty to read
9 it, it's my duty to read it, to understand it, and
10 to get the necessary help to get the Minister to
11 understand it accurately. This isn't, you know,
12 "if you miss on this tell me so I can go find
13 something else". No. At -- when you make that
14 application the assumption is you've done your
15 research, you've identified the things that are
16 wrong, and you bring it to the Minister's
17 attention for consideration and a decision. This
18 isn't -- it's not a game of ping-pong, it's you
19 make your submission, you put your best foot
20 forward, if you need our help to bolster the, any
21 of the information around it, and you ask,
22 certainly we'll provide it. If there is something
23 that comes up that you haven't thought about we
24 may come back to you and say "well have you
25 thought about this, what about this", umm --



1 Q Would a concern -- and again, you touched on this
2 more generally earlier -- but if you would have
3 gone to Mr. Asper and said "lookit, Dr. Ferris'
4 opinion is of no value", were you concerned that
11:50 5 you might later be met with an argument that you
6 had prejudged or were biased?

7 A Correct. It's not my -- that's not my call.

8 Q So is the bottom line that, to the extent that
9 there may have been problems with the expert
11:50 10 engaged by David Milgaard's counsel, in your view
11 it was their responsibility to determine the
12 credibility of that evidence and identify if there
13 were any problems with it?

14 A Yes.

11:50 15 Q And that to the extent that you determined
16 credibility and identified problems with it, you
17 did so for your client, the Minister of Justice?

18 A That's correct.

19 Q Is that a fair summary?

11:50 20 A Yes.

21 Q If we can go to 010056, please. This is a letter
22 from -- the Minister, Doug Lewis, from David
23 Asper, and I can't recall, just as far as
24 communications directly to the Minister rather
11:51 25 than to you, was that anything unusual or was



1 there anything inappropriate, in your view, about
2 that?

3 A No.

4 Q And you didn't view that as being Mr. Asper going
11:51 5 over your head to the Minister? Did it matter who
6 he addressed it to?

7 A From my vantage point, it didn't. Certainly, when
8 letters went to the Minister, my take on it was
9 that this was an opportunity to highlight, to
11:51 10 bring it to the Minister's attention, the fact
11 that there is this ongoing matter, and possibly
12 the Minister's office may make some inquiries of
13 us to find out where it is, and to move us along.

14 Q So might the -- did you perceive it as an attempt,
11:52 15 perhaps, to try and put some pressure on you in
16 your dealing with the matter?

17 A Yes, but that's -- that -- that's within the
18 rules.

19 Q So you didn't take any objection to the fact that
11:52 20 this letter went to the Minister?

21 A No.

22 Q And it talks -- if we can scroll down -- and it
23 talks about the May 8th letter. Actually, if I
24 could just get the first two paragraphs, please.
11:52 25 The May 8th, '89 letter would be the letter that



1 sent in the trial transcripts and the lab reports,
2 it says further to that letter and:

3 "... discussions between Mr. Asper of
4 our office and Mr. Williams of your
11:52 5 office, we enclose herewith the
6 Affidavit of David Milgaard with
7 Exhibits appended thereto."

8 Now that affidavit was sworn in November of 1986;
9 are you aware or do you recall the circumstances,
11:53 10 or why it was sent in August of '89 and not with
11 the first application, or how that came about?

12 A No, I'm not aware of the circumstances. Maybe it
13 was oversight that I -- maybe it was a part of the
14 family's submission, I don't know.

11:53 15 Q Would it -- would there be a situation where you
16 might go back to Mr. Asper and say "lookit, we
17 didn't get any evidence from David Milgaard saying
18 he didn't do it, we need that"?

19 A No.

11:53 20 Q Yeah.

21 A I wouldn't say that, no.

22 Q And so is it your evidence that the sending-in of
23 the affidavit of David Milgaard is a matter that
24 Mr. Asper, the fact that it wasn't sent in
11:53 25 initially and was sent in at this time would be



1 his affairs as opposed to anything that you would
2 have said or done or asked for?

3 A Correct.

4 Q And then he says:

11:54 5 "It has also come to our
6 attention that there may have been
7 reports of an individual harassing or
8 accosting nurses in the vicinity where
9 Gail Miller was murdered in the days or
11:54 10 weeks preceding the murder. Our
11 information comes from Ms. Sandra
12 Bartlett who is a researcher for C.B.C.
13 in Regina. She indicated that she had
14 reviewed the file of Mr. Caldwell who of
11:54 15 course was the prosecutor in this case.
16 Ms. Bartlett advises that she saw in the
17 file either newspaper clippings or
18 police incident reports showing that
19 various other nurses had been accosted.
11:54 20 Indeed, our information is that another
21 nurse had actually been accosted by a
22 knife-wielding person but that the
23 attack was interrupted when the nurses
24 boyfriend arrive on the scene. The
11:54 25 assailant apparently fled without



1 further incident."

2 Prior to this letter were you aware of any
3 information of this nature, do you recall, was
4 this new information that you got?

11:54 5 A I was aware that there were some, that there had
6 been some inquiries on the file or there was some
7 information about other things on the file, but --

8 Q Which file, the prosecutor's file?

9 A Either the -- yes, I believe so.

11:55 10 Q And if we can just scroll down, next paragraph:

11 "We have attempted to locate
12 this information by reviewing the
13 Saskatoon Star - Phoenix in the time
14 period including the weeks preceding the
11:55 15 murder of Gail Miller. Unfortunately,
16 we are either missing the items as
17 reported or they may not have been
18 reported at all. In any event, we would
19 very much appreciate your making
11:55 20 enquiries as to information that the
21 prosecutor might have had involving
22 attacks or related incidents involving
23 nurses."

24 And, again, did you understand that to be a
11:55 25 request by Mr. Asper to you to go look at Mr.



1 Caldwell's file for this information?

2 A Yes, or to cause an inquiry to be made.

3 Q And, again, did you have any difficulty with this
4 type of request?

11:55 5 A No, I believe I acquiesced, and I think I asked --

6 Q Yeah, there's some correspondence I'll take you to
7 --

8 A Yeah.

9 Q -- where you did ask Mr. Caldwell.

11:56 10 A Yeah.

11 Q But, again, this type of inquiry, as far as your
12 role as investigator, you had no difficulty in
13 following up on this?

14 A Yup.

11:56 15 Q And this would be a new ground, a new issue, is
16 that fair?

17 A Potentially, yes, it's another aspect of it, but
18 the applicant is entitled to raise it, so --

19 Q And you hadn't, I take it at this point you were
11:56 20 quite prepared to go take a look for it as opposed
21 to saying "well you go get the file, you go talk
22 to Mr. Caldwell, and you get your information"?

23 A I was prepared to look for it.

24 Q And then the next paragraph:

11:56 25 "Finally, Mr. Asper and Mr.



1 Williams were recently discussing the
2 statement provided to the police by
3 Ms. Ute Frank. This is a statement
4 given by a witness who was never called
11:56 5 at the trial but which refutes evidence
6 given at trial to the effect that
7 Milgaard re-enacted the killing some
8 months afterward in a motel room in
9 Regina. One would think that this
11:57 10 statement combined with the Affidavit of
11 Deborah Hall that was filed with our
12 original application would tend to
13 seriously draw into question the
14 veracity ...",

11:57 15 and don't go to the next page, I'll just read the
16 end of the sentence:

17 "... of the evidence that was given at
18 trial."

19 And can you tell me, what was your reaction to
11:57 20 this statement about the Ute Frank statement and
21 the comments made by Mr. Asper?

22 A That was his argument. That was not my take on
23 Ute Frank's statement. The suggestion that it
24 refutes the trial evidence that Milgaard
11:57 25 re-enacted the killing, I thought, was a



1 submission, it's an advocate's submission, but it
2 ignored the fact that it -- that Ute Frank's
3 statement did not directly address the comments of
4 Melnyk and Lapchuk, it did not even seem to
11:58 5 address the same incident or, if it did, it
6 addressed another aspect of it.

7 Q Now we had saw -- we saw earlier correspondence
8 where you asked Mr. Dehm to send you Ute Frank's
9 statement. Do you recall, it appears that you and
11:58 10 Mr. Asper would have discussed Ute Frank's
11 statement, and let me tell you this as far as what
12 the record before the inquiry is; that later you
13 send a copy of the Ute Frank statement to Mr.
14 Asper. I think the evidence we heard from Joyce
11:58 15 Milgaard is that she would have had the Ute Frank
16 statement that she got from Mr. Tallis' file in
17 1981 and she likely would have given it to Mr.
18 Asper, but I think Mr. Asper may not have been
19 aware, I think based on his evidence, that he had
11:58 20 it at the time. So, with that background, would
21 you have discussed, would you have told him
22 "here's what the statement says", or are you able
23 to remember what -- or how that came about?

24 A Yes. I don't recall the details of the discussion
11:59 25 but, you know, we would have talked about it.



1 Q And so, since you got the statement from Fred
2 Dehm, is it something you would have introduced
3 with him saying "I've now got the statement of
4 her, here's what it says"?

11:59 5 A Yeah.

6 Q And shared that with him?

7 A Yes.

8 Q And was that your understanding of what prompted
9 this letter to the Minister saying "now the
11:59 10 statement of Ute Frank corroborates Deborah Hall's
11 affidavit"?

12 A Yes.

13 Q And you took issue with that; is that fair?

14 A Well, I didn't agree with it, but I wasn't going
11:59 15 to refute it publicly.

16 Q And then the next page, please. It says here:

17 "Aside from that issue, however, we were
18 unaware of the existence of the
19 statement of Ms. Frank and would
11:59 20 appreciate your forwarding it along with
21 any other information that you may have
22 in respect of this case at your earliest
23 convenience."

24 Now I think that the Ute Frank statement you did
12:00 25 send; correct?



1 A Yes.

2 Q What about this comment here:

3 "... appreciate your forwarding it along
4 with any other information that you may
5 have in respect of this case at your
6 earliest convenience."

7 How did you understand that request and what, if
8 anything, did you do to respond to it?

9 A I, my take on that was information from the police
10 file that we may have had relating to the issues
11 he had raised, and that's -- I believe I may have
12 sent some of that material to him. I certainly
13 did not send Pat Alain's report.

14 Q Did you view it, I mean as far as forwarding on
15 any other information, would it be fair to say
16 that in the course of the investigation that you
17 did for the Minister, that you would have gathered
18 information in respect of the case for the
19 purposes of giving advice to her?

12:01 20 A Yes, and that information should be sent to her
21 first.

22 Q Did --

23 A Now to the extent that someone has made a request
24 of certain items on the file so that they can
12:01 25 bolster their submissions or develop new



1 submissions, I have no trouble sending that along
2 to them, and that was done.

3 Q So the line -- let's just talk about that, "if
4 there was something specific and you find this on
12:01 5 the file, send it to me", at this time you were
6 prepared to do that?

7 A Yes.

8 Q As far as the blanket thing, let's go to the other
9 extreme, saying "lookit, can you look at
12:01 10 absolutely everything out there in the Crown and
11 police file and tell me whether there's anything
12 in there that might tend to show a miscarriage of
13 justice", how would you -- and I'm not sure if
14 that's what Mr. Asper is intending here but let's
12:01 15 assume for the moment he is?

16 A Well I would say that's way too wide a request.
17 If I've encountered something on the file that
18 tends to show a miscarriage of justice I'll send
19 it to you and say "lookit, this is what I found,
12:02 20 what do you want to make of that, do you want to
21 develop some additional submissions in relation to
22 that", but send along:

23 "... any other information you may have
24 in respect of this case ...",

12:02 25 wow, that's huge, and I would have to make an



1 assessment of what I am -- what was permissible
2 to be shared and what was not.

3 Q Did you view it as your task or your duty, in what
4 you were doing under Section 690, to either
12:02 5 identify information or gather information and
6 consider whether or not it might be information
7 that Mr. Milgaard and his counsel could use to
8 assist their case?

9 A Yes.

12:02 10 Q And so, to the extent that you found information
11 that would be relevant to one of their grounds,
12 that's the type of information you would
13 ultimately share; is that correct?

14 A Of course.

12:02 15 Q What about with respect to new grounds; did you
16 believe that it was part of your duty, as the
17 investigating officer for the Minister, to go out
18 and canvass the Crown file and the police file to
19 try and identify what might be new grounds and to
12:03 20 provide that information to Mr. Milgaard or his
21 counsel?

22 A No. If, during the course of the examination of
23 the file in relation to the grounds that had been
24 advanced, you discover something else, then you
12:03 25 don't ignore it, you provide it and you develop



1 it.

2 Q And you mentioned this earlier, when you were
3 going through this did you presume or assume that
4 Mr. Wolch and/or Mr. Asper had already done that
12:03 5 type of review prior to filing the application?

6 A Yes. I knew that some time had elapsed between
7 the initial contact with the department, the
8 identification of Mr. Wolch by Mr. Milgaard as
9 counsel, and receipt. My assumption was, given
12:03 10 the nature of the application, the way it was
11 framed, that they had done their research and this
12 is the product of it.

13 Q That's an appropriate spot to break for lunch.

14 (Adjourned at 12:04 p.m.)

01:31 15 (Reconvened at 1:31 p.m.)

16 BY MR. HODSON:

17 Q If we could call up 301675, please, and this is
18 the affidavit of David Milgaard sworn November 25,
19 1986 that was filed I think with the August 29th
01:31 20 letter. Just talk a bit about this, and I think
21 you told us before lunch that this was not
22 something you ask for nor require; is that fair?

23 A That's correct.

24 Q And I think, Mr. Williams, that in the course of
01:32 25 your investigation, you did not question David



1 Milgaard either on this affidavit or otherwise; is
2 that correct?

3 A That's correct.

4 Q And did you consider whether or not you would
01:32 5 examine or question him or interview him?

6 A Yes, there was some consideration to it, or to
7 moving towards that step. One of the factors that
8 we took into account was that Mr. Milgaard did not
9 testify at trial and the grounds that were
01:32 10 advanced were -- one impacted upon him indirectly
11 and that was the reenactment, but the decision was
12 taken to hold off on that until such time as we
13 had dealt with Deborah Hall. In the final result,
14 I did not interview Mr. Milgaard.

01:33 15 Q And was that in part influenced by what Deborah
16 Hall and ultimately Ute Frank told you about the
17 motel room incident?

18 A Yes, and the other information collected.

19 Q And so am I correct in concluding that in light of
01:33 20 what all the other members or participants in the
21 motel room incident, in light of what they said
22 happened, you determined not, it not necessary to
23 ask Mr. Milgaard about that?

24 A Yes, in light of what they said and the
01:33 25 conversations with counsel.



1 Q With Mr. Tallis?

2 A Yes.

3 Q And can you tell us, what was that that
4 Mr. Tallis -- are you talking about the Ute Frank
01:33 5 interview and that?

6 A Uh-huh.

7 Q We'll get to that maybe in the chronology. If we
8 could -- what about any other matters other than
9 the motel room incident, did you think it
01:33 10 warranted an interview of Mr. Milgaard to find out
11 about his recollection of events?

12 A I thought about it, but in the end decided not to
13 pursue it.

14 Q And if we can go to page 679 of this affidavit,
01:34 15 please -- actually, go to 677, page 2, and again
16 this is what's in the information that you were
17 provided, the fact that Mr. Milgaard says here
18 that he had been denied parole repeatedly and in
19 part because of his assertion of his innocence,
01:34 20 was that a factor at all that you considered in
21 your work?

22 A No.

23 Q If we could go to 301697, and in paragraph 15 Mr.
24 Milgaard attaches a narrative of his trip saying
01:35 25 this is what I wrote out and gave to my lawyer



1 around the time, this is my best recollection. Do
2 you recall whether you would have put any reliance
3 on that piece of evidence?

4 A By and large, the information -- no, I didn't put
01:35 5 much reliance on it. The information reaching us,
6 whether directly from Mr. Milgaard or via his
7 counsel, was that his recall wasn't that great and
8 his emotional state and psychological condition
9 was not that strong, those were some influencers
01:35 10 in the decision not to pursue it.

11 Q Just so that I have this clear, that in 1990,
12 then, '89, '90, your information was that Mr.
13 Milgaard's emotional state and recall were not
14 great; is that fair?

01:35 15 A Yes.

16 Q And did you in fact interview Mr. Tallis and get
17 Mr. Tallis' recollection of what David Milgaard
18 told him back in 1969, 1970?

19 A Yes, but particularly in relation to the evidence
01:36 20 coming from Melnyk and Lapchuk about the
21 reenactment as I recall, about the cosmetic case
22 that was found. I wouldn't have been surprised if
23 defence counsel had said to the client, lookit,
24 the Crown is going to introduce this evidence
01:36 25 about the cosmetic case, what have you got to tell



1 me about that, and there would be a response from
2 the client either denying or not. I was
3 interested in getting his recollections of the
4 types of responses he had gotten had he asked
01:36 5 those questions. I firstly wanted to find out if
6 he had questioned his client about it and, if so,
7 whether or not there was anything from his client
8 that either affirmed or not the evidence of the
9 Crown witnesses on those points.

01:37 10 Q Were you then looking to Mr. -- let me back up.
11 Are you telling us that you indirectly sourced Mr.
12 Milgaard's recollection of events by asking his
13 defence counsel to tell you what Mr. Milgaard told
14 his defence counsel back in 1970?

01:37 15 A On a limited number of points, yes.

16 Q On the points that you were interested in?

17 A Yes.

18 Q So, in effect, you got, assuming Mr. Tallis'
19 recollection to you was reliable, you were getting
01:37 20 Mr. Milgaard's version of events from '69, '70;
21 correct?

22 A Correct.

23 Q And is it fair to say that that, you felt, might
24 have been more reliable than the 1990 recollection
01:37 25 of Mr. Milgaard given his emotional state at the



1 time?

2 A Yes.

3 Q And just back on -- you talked about the compact
4 or the cosmetic case, that was something that you
5 would go to Mr. Tallis and say lookit, did you
6 bring this -- presumably defence counsel, you
7 would have presumed, would have brought up the
8 significant parts of evidence that was being put
9 against Mr. Milgaard and find out what his lawyer
10 learned at the time?

11 A Yes, or what his client had said to him at the
12 time, yes.

13 Q Or, I'm sorry, what the client said. Now, if we
14 can go to the next page, there's a couple here in
15 the affidavit where Mr. Milgaard says he denies
16 throwing a woman's compact out of the car in
17 between Saskatoon and Rosetown or anywhere else
18 and that he denies ever reenacting the crime in a
19 hotel room in Regina in May, 1969 or anywhere else
20 at any other time. Based on your interviews with
21 the people who were in the motel room and your
22 discussions with Mr. Tallis and your interview of
23 Nichol John, did you come to a different
24 conclusion with respect to these two facts?

25 A There was evidence to support the contention that



1 he threw a woman's compact out of the car and that
2 even Deborah Hall, although she would not
3 characterize what she saw as a reenactment, her
4 description of David Milgaard's actions
01:39 5 corresponded with the descriptions provided by
6 Melnyk and Lapchuk at trial.

7 Q To what extent, if any, did you, having -- I think
8 saying reached conclusions to the effect that
9 doubted the veracity of paragraph 18 and 19; is
01:39 10 that fair?

11 A Yes.

12 Q Did the fact that Mr. Milgaard or his counsel
13 provided to you an affidavit where he swore to
14 these two facts and you, based on other evidence,
01:39 15 concluded they were arguably contradicted by other
16 facts, or however you characterized it, wrong or
17 perhaps wrong; is that --

18 A It was his perception there was some information
19 from other sources that tended to contradict the
01:40 20 accuracy of it.

21 Q Did that fact cause you to doubt anything else
22 that Mr. Milgaard had said in his affidavit or put
23 forward on his behalf?

24 A I didn't jump to the conclusion that because I
01:40 25 disagreed with that particular, or those two, that



1 the rest was necessarily wrong, each one was
2 examined individually, but I looked at it.

3 Q And so it was a factor?

4 A It's a factor.

01:40 5 Q If we can go to 002479, please, and this is a file
6 memo September 6, 1989 regarding Barry Gaudette,
7 and I think you told us Barry Gaudette was the
8 head of the forensic unit, is that right, or in a
9 senior position?

01:41 10 A Yes.

11 Q And you say:

12 "Today I spoke with Barry Gaudette
13 concerning the performance of D.N.A.
14 Testing on certain exhibits tendered at
01:41 15 Mr. Milgaard's trial. Mr. Gaudette
16 advised me that he had reviewed the
17 material sent over to Pat Alain, and was
18 of the view that the current technology
19 would not enable him to test the
01:41 20 material.

21 He believes however, that
22 technology will be developed within two
23 years that could test the existing
24 material for the presence of D.N.A."

01:41 25 And that would be an accurate recording of what



1 he told you?

2 A Yes.

3 Q And Barry Gaudette would have been -- Pat Alain
4 would have reported to Barry Gaudette; is that
01:41 5 right?

6 A Yes.

7 Q And so the information that he has that was sent
8 over to Pat Alain would be what you described to
9 us earlier; is that likely the case?

01:41 10 A I'm sorry, I didn't hear correctly.

11 Q The question was as far as what Mr. Gaudette
12 looked at from you in order to make this
13 determination on DNA, would it have been the same
14 information that you had earlier given to Patricia
01:42 15 Alain?

16 A Yes.

17 Q So in other words, the transcripts of some of the
18 evidence and Dr. Ferris' report?

19 A It would have been that and I believe it was
01:42 20 the -- we had received some vials of material.

21 Q Vials?

22 A Yes. I believe we had a couple of test tubes.

23 Q Yes.

24 A Which had a dried --

01:42 25 Q I think maybe this will assist you. I think back



1 in 1969 the two frozen materials found near the
2 scene were sent to the RCMP lab, they were
3 labelled. One vial they tested and found semen
4 and that's the substance upon which they conducted
01:42 5 the test for the "A" antigens. The other
6 substance, they did not find anything of that
7 nature, and so I think those vials had been kept.
8 So those would have been sent to you in, prior to
9 this memorandum?

01:43 10 A Yes.

11 Q And I believe we've heard some evidence that the
12 material in there had dried up to a powder or had
13 basically disintegrated; is that right?

14 A My recall, yes, it was just, yes, a residue at the
01:43 15 bottom of the vial or test tube.

16 Q Do you recall whether you would have obtained at
17 this time any of the garments or clothing worn by
18 Gail Miller that were exhibits at the trial?

19 A No, I didn't.

01:43 20 Q And so the vials would have been sent to Mr.
21 Gaudette and do you know whether or not the --

22 A I believe -- go ahead.

23 Q No, that's fine. I'm wondering whether -- we saw
24 in Dr. Ferris' report mention of the fact that he
01:43 25 had examined certain parts of the clothing to try



1 and identify DNA, a material to do a DNA test and
2 concluded that he could not. Do you know if that
3 was information that had been provided to Mr.
4 Gaudette and may have formed part of this
01:44 5 conclusion?

6 A I suspect so, and I say that because I believe
7 there was reference in one of the letters or
8 reporting letters between Dr. Ferris and Mr. Wolch
9 which indicated that they had attempted DNA and
01:44 10 that that attempt had been unsuccessful to the
11 extent that I believe that that reporting letter
12 was part of the materials that went to Ms. Alain
13 and I surmise that she may have informed Barry
14 Gaudette of that information, but that's --

01:44 15 Q Okay. If we can go to 000062 which is a page in
16 000002, the application, please, and I think this
17 is -- this is part of the Dr. Ferris report
18 relating to the secretor issue and this is part of
19 the application, I think you said this was sent to
01:45 20 Patricia Alain, and I think this is the only
21 written reference from Dr. Ferris about his DNA
22 testing. Is that something you think would have
23 been provided to Mr. Gaudette?

24 A Certainly that information would have been
01:45 25 provided.



1 Q Any information?

2 A Yup.

3 Q Did you consider having Mr. Gaudette, or getting
4 the actual garments of clothing and providing
01:45 5 those to Mr. Gaudette for him to physically
6 review, do you recall any discussion with him
7 about that?

8 A No, I don't.

9 Q And would you have been relying upon this advice
01:45 10 from Mr. Gaudette? I take it he was the expert in
11 this area?

12 A No, he wasn't. He was involved in it, but I
13 believe the expert was Dr. Ron Fourney, and
14 Fourney reported to Gaudette as did Patricia
01:46 15 Alain, and so that between Alain and Fourney they
16 would advise Gaudette, who spoke on behalf of the
17 lab, to me.

18 Q And if any of these scientific people would have
19 got back to you and said "I think we'd like to
01:46 20 look at the clothing", I presume you would have
21 taken steps to get the clothing?

22 A Yes.

23 Q So you would have relied on the scientific people
24 to advise you as to whether or not DNA testing
01:46 25 could be done at that time?



1 A Yes.

2 Q And if we can go back to 002479. And this would
3 be what you received back, and then what you
4 relied upon to conclude that DNA testing wasn't
01:46 5 available at the time; is that fair?

6 A That's fair. The explanation that I received was
7 that the condition of the samples was such that
8 the prospect of getting sufficient DNA to conduct
9 the testing that was reliable at that time -- and
01:47 10 I will just use the acronym RFLP because I've
11 forgotten the scientific name that accompanies it,
12 but that was the prevailing test -- and it could
13 not, or the science had not developed to the point
14 whereby they could get meaningful results from 10
01:47 15 or 15-year-old samples that had disintegrated and
16 had not been stored in optimum conditions.
17 Subsequently, I was then told that there was
18 another methodology being developed, it was called
19 DQ Alpha, and perhaps within a year or two that
01:47 20 might yield some results, plus I was advised that
21 the Brits were working on yet another advance in
22 DNA testing but it wasn't yet ready, so --

23 Q Was that the PCR?

24 A It's PCR basis mitochondrial DNA.

01:48 25 Q And so, if I can summarize it, based on the advice



1 that you had that due to the age of the samples
2 and how they were maintained, at least on the
3 clothing, DNA could not -- the current technology,
4 according to your advisors, would not give rise to
01:48 5 a suitable DNA test, but that efforts were being
6 made in the scientific areas that might give rise
7 to a test in the future?

8 A Correct.

9 Q And would the vials be different than the clothing
01:48 10 in that the vials would be presumably pure semen
11 or semen as opposed to -- stored in a test tube as
12 opposed to something found on the clothing, would
13 that be why you would have got the vials to have
14 them look at?

01:48 15 A Yes.

16 Q Go to 332493, please. And sorry, I've got this a
17 bit out of order, this is August 17th, '89, this
18 is a couple weeks before your memo to Barry
19 Gaudette or Gaudette, and this is a memo from -- a
01:49 20 memo of Bobs Caldwell and it says:

21 "Message EX Fred Dehm - says exhibits
22 order obtained by Hersh Wolch - exhibits
23 had not been but now have been",

24 I think returns:

01:49 25 "Wonders re having exhibits released for



1 examination again, this time for us".

2 And I take it, then, that, prior to Barry
3 Gaudette's memorandum you were considering
4 getting the exhibits from the Court for further
01:49 5 examination?

6 A Yes.

7 Q And you would have gone to Fred Dehm as your
8 contact person at the provincial Crown to
9 facilitate that?

01:49 10 A Yes.

11 Q And then:

12 "Victims",
13 scroll down please:

14 "Victims underpants sent to Farris re
01:50 15 DNA testing/matchup: As M's semen,
16 etcetera, on garment.

17 He could not get any material
18 to make the assessment."

19 Now that may well be something between Mr. -- is
01:50 20 that something you would have discussed with Mr.
21 Caldwell; do you know?

22 A Umm, probably, because that's, that's information
23 that comes from, from a portion of Dr. Ferris'
24 report. It doesn't specify the undergarments, but
01:50 25 I, I'm not sure if it specifies the undergarments,



1 but that's something we probably talked about
2 between myself and Mr. Caldwell.

3 Q What Dr. Ferris received is the panties, the
4 girdle, the dress, some other clothing. The
01:50 5 testing he performed was on the panties, and
6 perhaps the girdle, but not the dress. Do you
7 have any recollection; does that assist your
8 memory at all?

9 A It does. I certainly did see the underwear and
01:50 10 noted where portions of the underwear had been cut
11 or removed to facilitate testing.

12 Q And that would have been when you examined the
13 exhibits at the courthouse or --

14 A I examined them, yes.

01:51 15 Q But was that at the courthouse in Saskatoon, do
16 you know, or was that maybe in Ottawa?

17 A I am certain I saw them in Ottawa, I may have seen
18 them previously, but I'm just not certain.

19 Q Yeah. And if we can scroll down, Mr. Caldwell
01:51 20 writes, and I believe this is a note of a
21 conversation with you:

22 "They're trying to set up a straw man -
23 if they knock it down, they expect to
24 spring him.

01:51 25 Big factual assumption is M. a



1 non-secretor."

2 And, again, do you recall whether that might have
3 been something you discussed with Mr. Caldwell
4 around that time? And I appreciate those are his
01:51 5 words, but does that sound like something you
6 might have said to him? Now, in fairness, this
7 may be his own commentary after, and I appreciate
8 this isn't your document?

9 A Yeah. It's possible we discussed that:

01:52 10 "Big factual assumption is M is a
11 non-secretor."

12 It's quite possible we talked about the basis for
13 the -- or one of the grounds. Whether that's Mr.
14 Caldwell's conclusions or not, I'm not certain.

01:52 15 Q Okay. If we can go to 332492. And again, this is
16 a -- the same date as your memorandum of Barry
17 Gaudette, and a discussion again with Mr.
18 Caldwell, these are his notes, and it appears:

19 "Tell Fred",

01:52 20 "keep exhibits",

21 that this may have been a follow-up call to say
22 "we're not gonna test the exhibits"; is that
23 correct?

24 A Yes.

01:52 25 Q And it says it wouldn't be useful, and referring



1 to:

2 "Gaudette

3 Testing",

4 says:

01:53 5 "says it wouldn't be useful ... now to
6 test, as technology can't handle
7 something 20 years old & already tested.
8 Won't be any exhibit release application
9 in near future."

10 And that's, that would have been something you
11 advised Mr. Caldwell?

12 A Yes.

13 Q If we can go to 002480. And, again, this is Barry
14 Gaudet's letter to you September the 8th, '89
01:53 15 about the issue, it talks about the conversation
16 of September 6th, and says:

17 "On the basis of information I was given
18 concerning the age, history and previous
19 examination results of the stains in
01:53 20 this case, it appears unlikely that
21 there would be sufficient sample for
22 conventional DNA Typing (RFLP
23 analysis)."

24 And would the:

01:53 25 "... previous examination results of the



1 stains in this case ...";

2 would that be Dr. Ferris' review?

3 A Yes.

4 Q And then down at the bottom, paragraph 4:

01:54 5 "Much more research work is required
6 before this new technology can be
7 applied to casework. It presently
8 appears that it will be available in
9 about two year's time."

01:54 10 So that would have been something you would have
11 relied upon?

12 A Yes.

13 Q And then the next page:

14 "Since any attempt to apply conventional
01:54 15 DNA analysis methodologies at the
16 present time would likely preclude any
17 subsequent analysis attempts, I feel it
18 would be best to delay any request for
19 DNA analysis in the *Milgaard* case until
01:54 20 such time as the new technology is
21 available."

22 And we -- I take it that what he's saying is
23 "lookit, if you test it now and it doesn't work,
24 you may preclude a later test"?

01:54 25 A You would use up the existing sample.



1 Q And I think what Dr. Ferris' conclusion was, that
2 there was some remaining substance or material on
3 the panties, he had tried a test, it didn't work
4 or he couldn't get any material, and there was
01:54 5 some remaining piece left but that it was not
6 significant, in other words there wasn't much
7 material left or believed to be left at that time;
8 was that your understanding based on what Dr.
9 Ferris had done?

01:55 10 A Yes.

11 Q Now we know in 1997, when testing was done in
12 England, that on Gail Miller's dress -- and I
13 hesitate the use the word 'significant' -- but
14 more than what was on the panties was found, sperm
01:55 15 and semen, on her dress that was used for the
16 testing, and that seemed to be a bit of a
17 revelation to them at the time. Do you have any
18 recollection about -- or what was your
19 understanding back at this time, in 1989, about
01:55 20 whether or not Dr. Ferris had examined the dress
21 and whether or not Dr. Ferris had concluded there
22 was no semen on the dress, or semen or sperm on
23 the dress, suitable for testing for DNA?

24 A I have no recollection of a discussion with Dr.
01:56 25 Ferris, or with anyone, concerning alternate



1 sources of material for DNA testing. I think the
2 focus had been on the, on the undergarments. I
3 believe there had also been an examination of the
4 dress by Pat Alain at the Supreme Court, but at
01:56 5 that time I was not in a position -- I didn't
6 know, --

7 Q Okay. So --

8 A -- so I just relied on those who knew what to look
9 for in relation to identifying the materials for
01:56 10 scientific testing.

11 Q Right. But let's focus at this time, August of
12 1989 or September of 1989, I'm trying to
13 understand whether you assumed, based on what Dr.
14 Ferris had done, whether the only remaining Gail
01:56 15 Miller clothing that might give rise to a suitable
16 DNA testing substance would be the panties; is
17 that --

18 A That's correct.

19 Q And so you believe that that was the only piece of
01:57 20 clothing left that might give rise to a DNA test?

21 A Yes.

22 Q And then later on -- and we'll get to that --
23 around the Supreme Court there were further
24 efforts by some to do some DNA testing; is that
25 right?



1 A That's right.

2 Q If we can go to 333306. Here's a letter September
3 10th, 1989 from Janet Binks, she was the Executive
4 Assistant to the Minister, and you'll recall
01:57 5 earlier that Ms. Janet Binks had responded to one
6 of Mr. Milgaard's letters on behalf of the
7 Minister?

8 A Correct.

9 Q And so this is September 10th, 1989. If we can
01:58 10 scroll down, and he's talking about getting --
11 applying through Asper and Wolch to get bail, and
12 he says, "I plan to do this as soon as Mr. Lewis
13 picks a chief investigator to continue with the
14 investigation into my wrongful conviction. Will
01:58 15 you please tell the Minister this?"

16 And whether the word "chief
17 investigator" is the right term, that would have
18 been -- you were the investigator, were you not?

19 A I was.

01:58 20 Q And when would, to your recollection, Mr. Asper or
21 Mr. Wolch been made aware that you were the,
22 whether it's chief investigator or whatever you
23 want to call it, the investigator on behalf of the
24 Minister?

01:58 25 A I think, at the very least, by July or August of



1 that year. There is, I believe we referred to
2 correspondence which may have been in July or
3 August between either Mr. Wolch or Mr. Asper and
4 me in my capacity as investigator.

01:58 5 Q Do you recall having any concern -- again, I asked
6 you a similar question earlier -- that in
7 September of '89 Mr. Asper -- or Mr. Milgaard is
8 writing directly to the Minister saying "as soon
9 as you appoint an investigator", when in fact the
01:59 10 Minister has appointed an investigator and that
11 has been communicated to Mr. Milgaard's counsel?

12 A It's a matter of communication between counsel and
13 client, it's -- you know, I may have been a bit
14 surprised, but it may be that he's just forgotten.
01:59 15 I -- I didn't -- I wasn't overly concerned about
16 their relationship, I was more concerned about
17 doing the investigation and following through on
18 the grounds that had been advanced.

19 Q Did you at this time, or at some later time,
01:59 20 become concerned that the actual applicant, Mr.
21 Milgaard, was writing to your superior, your
22 client the Minister, saying that based on the
23 information he appeared to have, Mr. Milgaard,
24 that the Minister and his staff weren't doing
02:00 25 anything, when in fact you felt you were, and you



1 were communicating that to his lawyer? Do you
2 understand --

3 A Yes.

4 Q -- the nature of my question?

02:00 5 A Yes. I was -- I was aware of it. My take on it
6 at the time was that it was convenient for the
7 client to write to the Minister, that way the
8 complaint wouldn't appear to be coming from
9 counsel, but it would be coming from the client.

02:00 10 Q And so did you have some concerns that this might
11 be an attempt by Mr. Milgaard and his counsel to
12 get a message through to the Minister; "hurry up"?

13 A That's, that's just part of the territory, that --
14 you know, that happens, but it wasn't of any
02:01 15 particular concern to me.

16 Q What about -- and we'll see this later on in some
17 of David Milgaard's letters and, indeed, I think
18 in some newspaper articles quoting David Milgaard
19 and his mother -- about their belief or their
02:01 20 sense that for many months nothing had been done
21 by you and nothing had been communicated by you to
22 the Milgaard group; do you recall hearing or
23 reading those complaints about what you were doing
24 or not doing?

02:01 25 A Yes.



1 Q And did you become concerned that what you were
2 communicating, or you believed you were
3 communicating through to Mr. Asper, may not have
4 been reaching Mrs. Milgaard and David Milgaard?

02:01 5 A My recollection some 15 or 16 years later is that,
6 in conversations either with Mr. Asper or with Mr.
7 Wolch I may have indicated, "lookit, we are
8 examining the application, let your client know
9 that, we're also at this time waiting for the
02:02 10 submissions from your client and nothing is going
11 to happen by way of a decision until the
12 application is completed and we have had a chance
13 to take a look at all of the materials that you
14 have submitted, so if you're asking for a
02:02 15 day-by-day as to what we're doing and what we've
16 got I'm not able to give you that, but I can tell
17 you that we're actively pursuing the grounds and
18 when we're in a position to let you know more we
19 will".

02:02 20 Q We don't see, for example, a letter back from the
21 Minister's office saying, "lookit, we're waiting
22 for your family presentation, which you told to
23 give us; two, our lawyer has been in touch with
24 your lawyer, talk to your lawyer and you'll get an
02:02 25 answer ", instead it is "thank you for your



1 letter" basically, and was there a reason; are you
2 able to shed any light on that?

3 A I can't at this moment. I could only surmise
4 that, in light of the fact that we'd been dealing
02:03 5 with counsel, the preferred route was to continue
6 just to have one point of contact in relation to
7 the application and that is with counsel.

8 Q And would it also be correct to say that there
9 might be some understanding on your part, or
02:03 10 others' part, that a person who is in jail who
11 claims to be wrongfully convicted and who has
12 sought relief might be anxious to find out what's
13 happening; is that a fair way to put it?

14 A That's a fair way, yes.

02:03 15 Q And that it might be expected that the, contrary
16 to the lawyers, the convicted person may have
17 different concerns than the lawyers about what's
18 happening and the timeliness, etcetera?

19 A Yes.

02:03 20 Q If we can go to the next page. And, again, we've
21 touched on this similar subject:

22 "Will you also please ask the
23 Minister to have his chief investigator
24 meet with my mother, myself and David
02:04 25 Asper? Such a meeting will see us



1 looking at what has been done so far on
2 the facts we gave the Minister. It
3 probably will also open more of a
4 direction where one is needed which is
02:04 5 the continuing investigation of this
6 whole affair and how it happened."

7 And I think, from what you've told us, that this
8 wasn't exactly what you viewed your role as
9 being; is that right?

02:04 10 A That's correct.

11 Q And would it appear that your understanding of
12 your role and what you were supposed to do under
13 Section 690 was quite a bit different than what
14 David Milgaard, at least in this letter and
02:04 15 previous letters we've looked at, what he may have
16 understood you were doing or supposed to do?

17 A Yes. The underlying assumption, or what I gleaned
18 from this, is that he perceives that I'm working
19 at his behest or at the behest of the applicant.
02:05 20 That's partly right in the sense that we make
21 inquiries on the basis of the grounds advanced by
22 the applicant, however, the object of those
23 inquiries is to collect the evidence for the
24 decision of the Minister of Justice.

02:05 25 Q And again, to the extent that you may have



1 concluded that David Milgaard may have had a
2 different understanding of your role versus what
3 you felt your role was, was that something you
4 left to his counsel to deal with between his
02:05 5 counsel and him?

6 A Yes.

7 Q And then if we can go to the next page, please, he
8 says:

9 "Finally, please tell the
02:05 10 Minister my presentation (my family one)
11 is coming along slowly and that this
12 part of the application will include a
13 video from us. Thank you for your
14 time."

02:05 15 So, again, there appears to be another mention
16 about the family presentation and a video that --
17 and I think you've answered that, that you were
18 waiting for that, and until his counsel said "our
19 submissions are final" I think you told us the
02:06 20 application, in your view, wasn't complete; is
21 that right?

22 A That's right.

23 Q If I can go to 333309. This is a handwritten note
24 September 26, '89, with Eileen O'Donnell, who I
02:06 25 think is a reporter with the Global station in



1 Winnipeg, if I'm not mistaken. Is this your
2 handwriting?

3 A It is.

02:06 4 Q And is it a note of a telephone call from the
5 media?

6 A Yes.

7 Q And I think this may have been the first contact,
8 I'm not sure if anything turns on that, but is
9 that --

02:06 10 A It's --

11 Q Around this time?

12 A It's one of those contacts, yes.

13 Q And, here, you:

14 "told her I couldn't comment on the
02:06 15 progress of the investigation",

16 and:

17 "... may wish to check with Asper to see
18 whether all the submissions have been
19 sent",

02:07 20 and:

21 "... that he would be the person to
22 check with to determine when a final
23 decision has been made."

24 And that would have been your position?

02:07 25 A Yes. It's the application made by counsel, it



1 would be inappropriate for us to announce it to
2 the press before the applicant had had the benefit
3 of a response.

02:07 4 Q So if we just go through this, number one you
5 weren't prepared to comment on the progress, and I
6 think that -- of the investigation, and you've
7 told us why; correct?

8 A Yes.

02:07 9 Q "... told her that she may wish to check
10 with Asper to see whether all the
11 submissions had been ...",

12 met, or:

13 "... had been sent",

14 and was that something to say "lookit, go talk to
02:07 15 him and ask him whether they filed everything",
16 because your view at that time was they had
17 not --

18 A That's correct.

19 Q -- because of the family presentation?

02:07 20 A Yes.

21 Q And so were you being pressed to say "why haven't
22 you done anything", yet you're waiting for the
23 submissions to come in, but you can't say it?

24 A Yes.

02:07 25 Q So you are saying go talk to Mr. Asper and maybe



1 he'll tell you what you can't say?

2 A I -- that's right.

3 Q Did Mr. Asper end up saying what you hoped he
4 would say?

02:08 5 A I don't recall what he said, and certainly I would
6 be very surprised if he said what I hoped he would
7 say.

8 Q To the media, that is?

9 A To the media.

02:08 10 Q And then, lastly, that the final decision, that's
11 not something you would announce to the media, you
12 would provide it to Mr. Asper and he could inform
13 the media?

14 A Yes.

02:08 15 Q Next page. And you'll recall the August 29th, '89
16 letter from Mr. Asper I showed you this morning
17 that said Sandra Bartlett saw either newspaper
18 clippings or incident reports about a nurse being
19 assaulted prior to the murder; remember that
02:08 20 letter?

21 A Yes.

22 Q And he had asked you to check with the
23 prosecutor's file or check with the prosecutor to
24 find out, to get what it was that Sandra Bartlett
02:08 25 saw on his file, is that fair?



1 A Yes.

2 Q So here:

3 "T.D.R. Bobs Caldwell and I spoke; he
4 agreed to examine the file to see if
02:09 5 there are any news or police reports
6 with respect to assaults on young
7 women",
8 and that would be a proper, a fair, or an
9 accurate recording of what you would have asked
02:09 10 him to do?

11 A Yes.

12 Q And then if we can go to 332490. It says, again
13 the same date, this is his note of the same call:

14 "Received communication from Wolch's
02:09 15 office that I had - news clippings on my
16 file or ...",

17 I'm not sure what that is:

18 "... police reports re other attacks on
19 nurses/women by knife-wielding
02:09 20 assailant. Gene Williams want me to go
21 through file & see if this is so."

22 And so, again, I think that's consistent with
23 what your request was?

24 A Yes.

02:10 25 Q Did you trust Mr. Caldwell to go through his file



1 and look for what it was that Mr. Asper said was
2 on there?

3 A I'm not certain if -- I made the request. In
4 light of his earlier responses to my requests I
02:10 5 didn't feel a need to press him, I asked him, and
6 I expected that I would get it in a timely
7 fashion.

8 Q And when Mr. Asper -- and maybe we'll just bring
9 up 010056. Actually, just, we've gone through
02:10 10 this before, it talks about the incident --

11 A Yes.

12 Q -- and says:

13 "... we would very much appreciate your
14 making enquiries as to information that
02:10 15 the prosecutor might have had involving
16 attacks or related incidents involving
17 nurses."

18 Did you understand that to be a request of you to
19 actually go and ask Mr. Caldwell about this
02:11 20 information and to have him review his file to
21 respond to Mr. Asper's request?

22 A I understood it to be a request to cause a search
23 of the file to be made for that information. Mr.
24 Asper didn't specify how it would be done, but my
02:11 25 understanding was that they were looking for that



1 information from the file.

2 Q And did you view Mr. Caldwell as the most
3 appropriate person to look through his
4 prosecutor's file to find out if that was in
02:11 5 there?

6 A Certainly, he would be the one most familiar with
7 it.

8 Q And did you have any concerns that Mr. Caldwell
9 would not do what was asked of him?

02:11 10 A None at all.

11 Q I think, later, Mr. Asper expressed concerns that
12 it would be -- or that it was inappropriate, in
13 light of their application, to have the prosecutor
14 doing this type of work for you; did you have any
02:11 15 concerns then, or now, about having Mr. Caldwell
16 do this task?

17 A No, I didn't, and I'll tell you why. Mr.
18 Caldwell, although he was the prosecutor, he was a
19 prosecutor for the provincial attorneys general
02:12 20 and he was a prosecutor for the federal attorneys
21 general, and with that office comes a
22 responsibility, and that responsibility, it's not
23 to be partisan, that responsibility is to assist
24 the Minister of Justice, and that was his current
02:12 25 capacity. And I felt no, no hesitation whatsoever



1 in making that request of him, I'd observed that
2 he had extended or opened up his file to others
3 who were not in the department.

4 Q The fact that this request for information was as
02:13 5 a result of a reporter seeing something on Mr.
6 Caldwell's file, did you have a concern in going
7 back to Mr. Caldwell to look for what the reporter
8 saw in his file when he showed it to her?

9 A I did not. I did not.

02:13 10 Q If we can go to 157019, October 2, 1989, and you
11 recall in the August 29th, 1989 letter that I just
12 showed you, that Mr. Asper wrote to the minister
13 Doug Lewis and that was the reference to the Ute
14 Frank statement, and I think you told us you
02:13 15 disagreed with the interpretation Mr. Asper placed
16 on the effect of Ute Frank's statement; is that
17 correct?

18 A I did, yes.

19 Q And so here you are sending him a copy of Ute
02:13 20 Frank's statement. Did you -- had he asked for a
21 copy of it, do you recall, or were you sending it
22 to him because of his characterization in the
23 letter to the minister?

24 A I was sending it to him -- I think he asked for a
02:14 25 copy, but it wasn't merely because of the



1 characterization in the letter to the minister, he
2 was widely quoted in a number of news articles as
3 indicating that here's yet another statement from
4 a Crown witness that was withheld that showed that
02:14 5 trial witnesses had lied.

6 Q And, okay, I'm going to show you some newspaper
7 reports after he gets the statement. Do you have
8 a recollection of prior to you giving him the
9 statement, that he may have made some comments in
02:14 10 the media suggesting that there was -- similar to
11 the comments he made in the letter to the
12 minister?

13 A I believe so, but I may be mistaken on the timing.

14 Q So -- and was it your understanding that Mr. Asper
02:14 15 did not have a copy of the Ute Frank statement?

16 A Yes, otherwise I wouldn't have sent it to him.

17 Q And it said:

18 "Had you the benefit of reading it
19 before you wrote the Minister on August
02:15 20 29, 1989, you may have avoided
21 improperly characterizing its contents
22 in the last paragraph of page 1 of your
23 letter."

24 Did you have any discussions with Mr. Asper about
02:15 25 this subject in addition to what's in the letter?



1 A I don't recall. We may have, but --

2 Q If we can go to 157021, please, this is a letter
3 from Mr. Wolch to you October 2, 1989. I think
4 you told us your primary contact would have been
02:15 5 with Mr. Asper throughout most of '89; is that
6 right?

7 A Yes.

8 Q And was there any rhyme or reason as to when Mr.
9 Wolch would write, were there any particular
02:16 10 subject matters or times when you would deal with
11 him rather than Mr. Asper or was it one or the
12 other and whoever happened to call or write?

13 A I think the latter, one or the other.

14 Q And here, this is October 2, he says:

02:16 15 "As you might be aware, Mr. Asper and
16 myself have been representing David
17 Milgaard for over three years.
18 Virtually from the outset of our
19 involvement, there have been a number of
02:16 20 reporters from the media who have
21 expressed interest in this case. We
22 have been able to keep them at bay for a
23 considerable period of time but lately
24 it appears that the interest in the
02:16 25 media is expanding.



1 In order that we might properly
2 respond to their questions (if at all)
3 and for the edification of our client,
4 we would very much appreciate your
02:16 5 advising as to the status of the
6 application. In particular, we would be
7 very interested to know whether you
8 might have any rough idea as to when a
9 decision might be made."

02:16 10 And if I could just pause there. You recall
11 getting this letter do you?

12 A Yes.

13 Q And what was your understanding of the message
14 that was being put here, or what was it that you
02:17 15 understood being said here?

16 A Tell me where you are in terms of completing this
17 application and when we can expect your job to be
18 completed and the minister's decision provided to
19 us.

02:17 20 Q And what about the media, the fact that the media
21 were calling?

22 A The fact that the media were calling, I suspect
23 the media tends to feed or to be influenced by
24 itself and to the extent that there were certain
02:17 25 articles, then maybe the news, the radio or the TV



1 might want to follow up and they might come and
2 say, well, where are you with this application and
3 when do you expect to finish.

4 Q I think, and I stand to be corrected on this, I
02:17 5 think Mr. Asper's evidence, that even though this
6 was Mr. Wolch's letter, that the reference to the
7 media, I'm not sure if it was this letter or
8 another letter, but the reference to the media was
9 a message that if it doesn't go soon, the media
02:18 10 may put more pressure out there; in other words,
11 the mention of the media was done for a reason to
12 signal to you that the media may gear up. Did you
13 perceive it as such and did it influence anything
14 you did?

02:18 15 A If I perceived it as such, it couldn't influence
16 the speed with which I completed it, because by
17 then I had not yet spoken with Deborah Hall.

18 Q And so at this time what was left, the interview
19 of Deborah Hall?

02:18 20 A And the receipt of the submission from the
21 Milgaard family.

22 Q Okay. Now, we know that Deborah Hall was
23 interviewed in November of 1989. Was there any
24 reason -- I mean, as far as the timing of that,
02:18 25 that it was done in November rather than -- did



1 you do the Ferris stuff first or can you give us
2 any idea why Deborah Hall was in November and not
3 sooner or later?

02:19

4 A It may have just coincided with a variety of
5 different responsibilities I had.

02:19

6 Q I think I've seen from the file that you, I think
7 you called it a western swing, you interviewed
8 Deborah Hall, Nichol John, Dr. Emson and
9 Mr. Tallis all on the same trip; is that right, in
10 November?

11 A That's correct.

02:19

12 Q And would one factor be that the Deborah Hall
13 interview or examination was going to be done in
14 conjunction with some other matters for
15 efficiency; is that fair?

02:19

16 A Yes. The other thing to keep in mind was that
17 there were other responsibilities that I had in
18 addition to working on the Milgaard file, so you
19 would want to be efficient, but you would also
20 have to line up your interviews in relation to
21 other work responsibilities as well.

02:20

22 Q Then if we can carry on, the letter says:
23 "Finally, and further to Mr. Asper's
24 earlier letter --"

25 And I believe that's the August 29th letter



1 asking for the prosecutor's file to be checked
2 for the nurse assaults,

3 "-- we would appreciate receiving copies
4 of any documentation that you have
02:20 5 received from the original prosecution
6 file so that we might respond to same if
7 the need arises."

8 And was it your understanding that that request
9 related to Mr. Asper's request to check Mr.
02:20 10 Caldwell's file for the nurse knife-wielding
11 assailant?

12 A Yes.

13 Q And there's also a reference here about being in
14 Ottawa and pleased to meet. Do you know if you
02:20 15 ever did meet with Mr. Wolch around that time?

16 A We may have briefly.

17 Q If we can go to 333311, this is a letter October
18 2, 1981 to Inspector Drake of the Kelowna
19 detachment of the RCMP, and basically you are
02:21 20 seeking his assistance in locating Nichol John for
21 the purposes of arranging an interview by her with
22 you; is that correct?

23 A That's correct.

24 Q And would that be the route that you would go, is
02:21 25 to get the assistance of the RCMP as opposed to



1 you calling directly?

2 A Yes.

3 Q And was there something about Nichol John that
4 differed from, for example, Deborah Hall, I think
5 with Deborah Hall you contacted Mr. Asper. Were
6 you concerned that Nichol John might not want to
7 talk to you?

8 A My experience has been that people do not respond
9 positively to a voice on the other end of the line
10 of whom they know very little, that we had more
11 success in a face-to-face encounter, or we had
12 more success if the RCMP could visit someone,
13 explain the nature of the visit, the purpose and
14 to introduce the fact that I would be calling
15 them, so that when the call came, they would know
16 that it was coming from someone with an official
17 capacity and would have some idea as to the
18 reasons why I was calling.

19 Q Okay. If we can go to the next page, you say
20 here:

21 "An essential part of our investigation
22 in the merits of this application is the
23 interview of Nichol John."

24 And would that be accurate?

25 A That's what I said to him, yes.



1 Q And so that the interview of Nichol John would be
2 an essential part of your investigation; would you
3 agree with that characterization?

4 A At that time that's how I felt, yes.

02:22 5 Q And then if we can go to 333313, Drake writes back
6 on October 6, 1989, and says that Sergeant
7 Tidsbury had located her.

8 "When speaking with Nicol John, she very
9 reluctantly provided her address and
02:23 10 phone number and wished Sergeant
11 Tidsbury to advise you she does not wish
12 to be contacted anymore concerning this
13 matter. She advised Sergeant Tidsbury
14 she was harassed by various people,
02:23 15 predominantly people associated with the
16 accused, for years and does not wish to
17 discuss the case with anyone in the
18 future."

19 And I take it that would be accurate, Mr.
02:23 20 Williams, that Nichol John was reluctant and
21 didn't want to meet with you; is that fair?

22 A That's fair.

23 Q And at this time you did not have the power to
24 compel her did you?

02:23 25 A I did not.



1 Q She could have said I refuse to talk to you and
2 there's nothing legally you could have done to
3 force her to talk to you; is that fair?

4 A That's correct.

02:23 5 Q If we can go to 157023, and we're going
6 chronologically, this is October 11th, 1989, it's
7 a letter from you to Mr. Wolch, and you recall his
8 October 2 letter was the one I just showed you
9 saying give us the status and the media are
02:24 10 pressing, and you write back:

11 "For your information, I am also
12 enclosing the most recent correspondence
13 from Mr. Milgaard. In it he reiterates
14 his intention to submit a presentation
02:24 15 as part of his application to the
16 Minister.

17 Armed with this information it
18 would be premature to conclude our
19 investigation at this time. Further, I
02:24 20 can only advise in response to your
21 request for a status report, that the
22 matter is being pursued in a practicable
23 manner. Once the investigation and
24 report is concluded, the Minister will
02:24 25 exercise his discretion. It would be



1 premature for me to speculate on the
2 timing of these events."

3 Again, I think you've told us earlier that the
4 family presentation was a matter that was holding
02:25 5 up completion of your investigation, or was a
6 consideration?

7 A I didn't feel that we could complete the
8 investigation without having received the family
9 submission, particularly -- this is October 11th?

02:25 10 Q Yes.

11 A I could finish the work in relation to Deborah
12 Hall and Nichol John, but to me it seemed
13 pointless to do that before the family had sent in
14 whatever submissions they had to make because it
02:25 15 would only mean re-opening the case afterwards.

16 Q Were you concerned that the family presentation
17 may raise matters that you would need to canvass
18 with Deborah Hall and Nichol John?

19 A That was also a possibility. I had no way of
02:26 20 knowing what points would be raised in the family
21 presentation.

22 Q Was that a factor, the family presentation, was
23 that a factor that may have affected the timing of
24 your interview of Deborah Hall?

02:26 25 A I couldn't say so. It may have had some impact,



1 but I don't think it was the moving consideration.

2 Q And you ultimately did your string of interviews,
3 examinations with Deborah Hall, Nichol John,
4 Mr. Tallis and Dr. Emson prior to getting the
02:26 5 family presentation; is that right?

6 A Yes.

7 Q Go to 333316, please, and this is a -- go to the
8 next page -- October 15th, 1989 CTV National News,
9 and I believe this would have been a service that
02:27 10 would track matters in the media for the federal
11 government; is that right?

12 A It's a service that we use to obtain transcripts
13 of media reports and in this particular case it
14 was a CTV National News item that covered David
02:27 15 Milgaard's application.

16 Q And so this would be something where you would
17 become aware of a news report and you would make a
18 request to get the transcript; is that right?

19 A Yes.

02:27 20 Q And so here, if we can go to the next page, and I
21 think this is, if I'm not mistaken, it might be
22 Pamela Wallin is doing this story, they quote
23 David Milgaard, and then they talk here about the
24 conviction was based --

02:28 25 "It was based partly on testimony from



1 his two travelling companions, even
2 though their stories conflicted. And
3 key to his conviction was a small sample
4 of semen found by the police in the snow
02:28 5 four days after the murder."

6 Based on your examination of the transcripts and
7 your review of the scientific reports and
8 whatever else you looked at, did you agree with
9 this, that key to David Milgaard's conviction was
02:28 10 a small sample of semen found by the police in
11 the snow four days after the murder?

12 A I did not agree with that.

13 Q And for the reasons I think you stated earlier
14 based on your, I think what you told us, based
02:28 15 upon what, the closing arguments to the jury?

16 A The closing arguments and the testimony of
17 Sergeant Paynter when questioned by Justice Bence.

18 Q And then if we scroll down, by this time you would
19 have reviewed Dr. Ferris' report and concluded
02:29 20 that, I think you said it would be of little or no
21 value in considering the matter; is that fair?

22 A Yes. It was based on an assumption of fact that
23 did not exist at trial.

24 Q And here he would be saying:

02:29 25 "I would not have found him guilty."



1 "If I was to look at it purely
2 analytically, as a forensic scientist I
3 think I would probably have said there
4 is not enough evidence to convict."

02:29 5 And then to the next page, as well Dr. Ferris
6 goes on to talk about the timing, his alibi, the
7 reliability of witnesses and other matters that I
8 think he acknowledged were unrelated to his
9 forensic area of expertise. Let me just pause
02:29 10 there. Tell me, or tell us how this type of
11 information in the media at this time, what
12 effect if any did it have on the work that you
13 were doing?

14 A There are two aspects to it. Firstly, the
02:30 15 misstatements of fact create an impression in the
16 public that isn't supported by the record, but at
17 the time there's very little we can do to correct
18 it. A reporter can call up and I say lookit, I
19 don't agree with that assessment, you may wish to
02:30 20 take a look at the transcript, have you read the
21 trial transcripts, and the reporter says I don't
22 have time for that, there's not much you can do
23 about that aspect, but more importantly, this is a
24 national news broadcast, it's Canada wide.
02:30 25 Responsible civil servants recognize that such an



1 item could lead to questions of the minister in
2 the House of Commons and it would be, we would be
3 tasked to prepare briefing notes so that the
4 minister could accurately and adequately respond
02:31 5 to these types of, to the anticipated questions
6 which flow from the various news and media
7 reports, so when there was coverage we had to
8 ensure that the minister was properly briefed on
9 all aspects of the file so that the minister could
02:31 10 respond to questions in the house and elsewhere in
11 the various scrums.

12 Q So did -- are you telling us that -- let's just
13 talk about this story in particular, but would
14 this, the fact that this story is published in the
02:31 15 media, would that require you, Eugene Williams, to
16 spend a part of your time on the file preparing
17 information either for the minister or for someone
18 else to advise the minister to respond to the
19 story?

02:32 20 A Yes.

21 Q And can you give us some idea of what, what are we
22 talking, an hour, a day?

23 A A briefing note like that, depending on -- at
24 least two and a half hours.

02:32 25 Q So half a day?



1 A Possibly, yes.

2 Q And so would that be half a day that you would
3 otherwise spend possibly on your investigation of
4 the application?

02:32 5 A Yes.

6 Q And so I think we'll see as we go through the
7 chronology more and more media stories come up.
8 Did you have to spend more and more of your time
9 preparing briefing notes for the minister to
02:32 10 respond to what was in the media?

11 A I did.

12 Q Did that delay your work in investigating the
13 application?

14 A It did.

02:32 15 Q If we can go down to -- and the other part you
16 talked about is the concern that the public, I
17 think what you said is the public would be
18 misinformed about, and maybe that's too strong a
19 word, but the public would get a report on the
02:33 20 facts that you, based on your review of the
21 record, would be inaccurate, and you felt that
22 there was -- I'm sorry, I think you said there's
23 not much done because you thought reporters may
24 not take the time to read the transcripts to get
02:33 25 the answer, they were looking for you to give a



1 quick quote on the other side; is that fair?

2 A That's fair.

3 Q And in the absence of a quote from you saying this
4 information is wrong, one side would get in the
02:33 5 media; is that what you are saying?

6 A That's what I'm saying, I'm saying lookit, I'm not
7 certain that the analysis or the summary of the
8 facts contained in that is correct, you may wish
9 to take a look at the testimony of so and so
02:33 10 from -- on this point, because I didn't understand
11 the evidence to be that way, but that would not --
12 I rarely saw situations in which reporters
13 corrected misstatements of fact even when it had
14 been drawn specifically to their attention.

02:34 15 Q On this file?

16 A On this file, and the one that stands out vividly
17 in my mind is one, is a report from Macleans that
18 essentially said that certain events took place in
19 Regina when in fact they took place in Saskatoon,
02:34 20 and I spoke with an editor and I said lookit,
21 that's wrong, and I was told it's too late to
22 correct it before deadline and the story went out
23 as it was, so --

24 Q So again, are you telling us that, number 1, you
02:34 25 couldn't respond and say, for example, the



1 information you have is wrong, Dr. Ferris' report
2 really doesn't add any value, you couldn't say
3 that for reasons you've told us about; correct?

4 A Correct.

02:35 5 Q What you might be able to do is say, reporter,
6 please read Dr. Ferris' report, please read
7 Sergeant Paynter's evidence, please read this,
8 this and this and then you'll have an idea of
9 what, how the information that has been reported
02:35 10 from the other side might be wrong, and your
11 experience, I think you are saying, is that they
12 wouldn't do that; therefore, you didn't attempt
13 it?

14 A That's correct.

02:35 15 Q If we can just scroll down to the bottom, the
16 reporter here says:

17 "And now a new witness has come forward,
18 with an affidavit contradicting original
19 testimony. This only adds to Mrs.

02:35 20 Milgaard's concern that the original
21 case was not handled properly."

22 And I think that would be the Deborah Hall
23 affidavit, and then down, the reporter:

24 "It's been almost a year now and the

02:36 25 Justice Department is still studying the



1 case."

2 Can you tell us, this would have been October 15,
3 1989. How long had you been studying the case?

02:36 4 A Well, technically they are correct in that the
5 application arrived on December 28 or it was dated
6 December 28th. The transcripts came, oh, about,
7 shortly after the first week in May, so between
8 May and October of '89 I was examining the file,
9 but to say that we've been actively looking at it
02:36 10 for four or five months, that doesn't make good
11 copy. If, on the other hand, you've had it for a
12 year and you've done nothing, that makes better
13 copy.

14 Q If we could scroll down just to ask you, and I
02:37 15 meant to ask you this earlier when we were talking
16 about the test here, but this reporter raises the
17 question:

18 "So a key question still remains: Was
19 there, or is there now, any reasonable
02:37 20 doubt about the evidence that convicted
21 David Milgaard."

22 Would it be sufficient in a Section 690
23 application to say the following, in the context
24 of David Milgaard's application, that lookit, if
02:37 25 we had a trial today in 1989, we don't think he



1 would be convicted, we think we could raise a
2 reasonable doubt today, is that enough to say --
3 a basis to get a remedy?

4 A Not in my view.

02:37 5 Q And why not?

6 A Reasonable doubt is the standard that the Crown
7 must establish for a conviction. Once a
8 conviction has been achieved and the file has been
9 reviewed by the Court of Appeal and the Supreme
02:37 10 Court of Canada, reasonable doubt does not enter
11 into it. The statement signals a misapprehension
12 of the role that 690 plays and a misapprehension
13 of the test or the hurdle that an applicant has to
14 overcome. Reasonable doubt is what you create for
02:38 15 trial, but the trial is over. What you now need
16 is some basis to conclude that what happened at
17 trial was wrong, was so wrong that it might have
18 affected the verdict. You've had your chance to
19 establish reasonable doubt at trial. This method,
02:38 20 this, call it a safety net, isn't designed to give
21 you an opportunity to re-argue what was argued at
22 trial.

23 Q And so would it be correct to say that what the
24 Section 690 hurdle is, is I think you told us the
02:39 25 evidence that would show a miscarriage of justice



1 at trial and that the remedy would be to go back
2 to trial at which point you could raise reasonable
3 doubt because the court and not the minister would
4 be dealing with the issue of reasonable doubt?

02:39 5 A Yes.

6 Q And so the bald statement that lookit, if I were
7 tried today, you couldn't convict me today, absent
8 some evidence of a miscarriage of justice with
9 respect to the original trial, is not enough to
02:39 10 get a remedy; is that fair?

11 A That's fair.

12 Q And that was a notion that came up, I think, from
13 time to time in the media and as well I think in
14 submissions from, and on behalf of David Milgaard,
02:39 15 that lookit, you couldn't convict me today, I
16 could raise a reasonable doubt today, and I think
17 your evidence is that that would be a
18 misapprehension of your view of how Section 690
19 operated; is that right?

02:40 20 A Yes. The media and most folks are aware of the
21 reasonable doubt standard because it's, in terms
22 of the reporting of criminal justice issues, much
23 of that reporting focuses on a trial and focusing
24 on either guilt or acquittals where the Crown must
02:40 25 establish the guilt of the accused beyond a



1 reasonable doubt and that phrase is front and
2 centre in a lot of people's minds because it's
3 often reported in the context of trial matters.
4 In the context of 690 it's, in our view,
02:40 5 inappropriate to import that standard which is
6 suitable for a trial, or in the trial context, to
7 a 690 application.

8 Q And would it be correct to say that it might not
9 be unusual to find, in the cases of many convicted
02:41 10 persons, that if you retried them 15 or 20 years
11 later, that for a whole host of reasons, unrelated
12 to a miscarriage of justice, they may be acquitted
13 on a subsequent trial?

14 A Correct.

02:41 15 Q If we can go to 333314, please. Now, this memo is
16 October 16, 1989. My understanding is that
17 Bernard Hanssen -- maybe tell me, who was Bernard
18 Hanssen?

19 A At the time Bernard Hanssen was a member of the
02:41 20 minister's staff.

21 Q Minister of Justice?

22 A Minister of Justice's staff.

23 Q And this is the day following the October 15th,
24 1989 CTV National News story. Am I right in
02:41 25 assuming that this would be a briefing note that



1 you prepared for the minister as a result of what
2 was reported on the CTV National News?

3 A This is part of a briefing package, yes.

4 Q Or part of a briefing package?

02:42 5 A Yes.

6 Q And again, I appreciate, and I know Mr. Frayer,
7 that some, there might be some privilege over some
8 media reports or information, but if I'm stepping
9 over the line, please advise, but this is a
02:42 10 document that we've been provided. In addition to
11 what you gave to Bernard Hanssen, would other
12 people contribute information into the media
13 briefing package?

14 A Yes.

02:42 15 Q But this would be your product to inform the
16 minister about what was happening at this time?

17 A Yes.

18 Q And this would be the report that you told us
19 would take sometimes a half day or thereabouts?

02:42 20 A It would take some time, yes, sometimes a couple
21 of hours. It depends.

22 Q If we can scroll down, you say here:

23 "The applicant also alleges that had the
24 jury properly understood the forensic
02:43 25 evidence introduced at Mr. Milgaard's



1 trial, the jurors would have acquitted
2 him. The general consensus at trial was
3 that Gail Miller's assailant sexually
4 assaulted and murdered her. Laboratory
02:43 5 tests of frozen sperm recovered at the
6 scene indicated that the sperm's donor
7 had type "A" blood. The analyst also
8 testified that the sperm contained "A"
9 antigens. Further tests revealed that
02:43 10 the sperm tested "positive for blood",
11 however, the analyst could not determine
12 if there was blood because he exhausted
13 his sample before the tests could be
14 performed. David Milgaard's blood type
02:43 15 is "A".

16 Antigens are a component of
17 blood which are secreted in the body's
18 fluids by a large section of the
19 population. Tests performed in 1969 on
02:43 20 a saliva sample from David Milgaard, did
21 not disclose the existence of antigens
22 in David Milgaard's saliva. The
23 applicant submits that the sperm sample
24 was not contaminated by blood.

02:43 25 Therefore, the donor of the sperm was a



1 secretor of "A" antigens. Because
2 Milgaard is not a secretor of "A"
3 antigens, he could not have been the
4 person responsible for the sexual
02:44 5 assault and murder of Gail Miller."

6 So that would be basically a summary of the
7 position put forward in the application?

8 A Yes.

9 Q And then here:

02:44 10 "To date the investigation
11 has included an examination of the trial
12 and appellate record, and an analysis of
13 the forensic reports submitted by the
14 applicant. The forensic analysis
02:44 15 performed to date reveal that there are
16 grave omissions in the submission of the
17 applicant which undermine the
18 conclusions he has reached."

19 And, again, can you elaborate on that other than
02:45 20 what you have already told us; is there anything
21 in addition?

22 A No. We were, at that time, referring to the
23 forensic reports of Dr. Ferris.

24 Q Right. So the 'grave omissions' would be the
02:45 25 contamination and the fact that David Milgaard's



1 secretor status were not a proper assumption?

2 A Yes, and the fact that the conclusion that Dr.
3 Ferris reached, which was so widely publicized,
4 did not take into account the impact of
02:45 5 contamination on the result.

6 Q And I think, as well, you also told us that it
7 assumed that the evidence was put in by the Crown
8 as a link, or the position, I think you said, put
9 to the jury --

02:45 10 A Yes.

11 Q -- was this was a link to David Milgaard when, in
12 your view, it was not?

13 A That's correct.

14 Q And then you say:

02:45 15 "We have just located a
16 witness at trial, who may have seen
17 Milgaard begin his assault on the
18 victim. As soon as arrangements can be
19 made to interview this witness, the
02:45 20 interviews will be conducted. We also
21 intend to interview Debra Hall, but
22 would prefer to do so once we have
23 completed arrangements with the witness
24 at trial. We intend to complete the
02:46 25 interviews before finalizing our



1 assessment of this application. Both
2 interviews would be in Western Canada
3 and could be completed
4 contemporaneously."

02:46 5 Then, scroll down:

6 "Further, Mr. Milgaard in his
7 September 15, 1989 letter has stated his
8 intention to make additional
9 representations in support of his
02:46 10 application. To date we have not
11 received these representations. In
12 these circumstances, it is difficult to
13 predict when the investigation will be
14 finished."

02:46 15 Now this would be an accurate report, then, of
16 what you provided to the Minister's office?

17 A Yes.

18 Q And so I take it that if the Minister -- this
19 would be your client, correct, you are telling
02:46 20 your client what you have done?

21 A "This is what I have done, this is what I propose
22 to do", and they were entitled to that in some
23 greater detail.

24 Q And so that if the client -- if your client, the
02:46 25 Minister, decided to publicly say "lookit, there



1 are grave omissions in the Dr. Ferris report",
2 he -- I think it was Minister Lewis at the time --
3 he could have done so if he chose, but that would
4 be his prerogative?

02:47 5 A That would have been his call, but you note I did
6 not get into a great deal of details in terms of
7 what those omissions were, just to give them a
8 flavour for what it is that we were doing.

9 Q And the briefing notes, is it fair to say, would
02:47 10 generally respond to the subject matters raised in
11 the media articles?

12 A Yes.

13 Q Whatever background you required?

14 A Yes. This is much more detailed than you can get
02:47 15 in let's say a Question Period report, but this
16 was what was required at the time, and I provided
17 it.

18 Q And so I think Mr. Asper said that one of the
19 reasons that they went to the media was to put
02:47 20 pressure, I think, on the Minister to get a
21 decision more favourable and to get it done
22 quicker. Is it your evidence that by going to the
23 media, to the extent that those on behalf of David
24 Milgaard instigated reports in the media, that in
02:48 25 doing so, that it may have actually slowed down



1 the work you were doing?

2 A It did. It, in essence, it lengthened my day.

3 Q Is it fair to say that, had there not been the
4 volume of media reports and hence the work you did
02:48 5 with the media briefings, you would have got your
6 investigation done sooner?

7 A I think it's fair to say that. I couldn't
8 quantify just what impact it might have had, but
9 there is an opportunity cost to preparing this
02:48 10 note to Bernard Hanssen, and the cost of doing
11 this is not doing something else on the file.

12 Q Okay. If we can go to 010054. The -- this is a
13 letter from Mr. Wolch to you of October 18, 1989
14 identifying that a juror at David Milgaard's trial
02:49 15 contacted Mr. Asper after the CTV News program and
16 claimed that he tried to disqualify himself four
17 days before the trial but was told that he was
18 required to provide ten days notice. And,
19 actually, I should just go back up:

02:49 20 "... he wanted to discuss the case. Mr.
21 Asper, perhaps being overly cautious,
22 given that the Criminal Code was not
23 amended until 1972, immediately advised
24 Mr. Cooney that it may be improper,
02:49 25 indeed illegal, for him to disclose



1 anything regarding the private
2 functioning of that jury.",
3 and then went on to talk about his psychiatric
4 problems. So I think this letter was giving you
02:50 5 the heads-up that, "lookit, we -- a juror has
6 called us and a juror said that he was not able
7 to sit as a juror"; is that correct?

8 A Yes.

9 Q And what, if any, steps did you take to deal with
02:50 10 this information?

11 A Well, I took a look at it, it said he didn't want
12 to talk about jury deliberations or anything of
13 that nature. I could not approach the jury --

14 Q What was the --

02:50 15 A -- or a former juror, so --

16 Q And why could you not?

17 A There is a provision in the *Code* that signals that
18 one should not do that, it's an offence; but,
19 secondly, that the claim is one that you just
02:51 20 couldn't substantiate without running afoul of
21 another set of laws.

22 Q And so are you telling us that in order to follow
23 up, or that following up with Mr. Cooney would put
24 you in the position of violating the *Criminal*
02:51 25 *Code*?



1 A Yes. Yes. Mr. Cooney's psychiatric condition
2 could only be relevant if he took the position
3 that that psychiatric condition informed the jury
4 deliberations or informed his role as a juror,
02:51 5 which is to gather or listen to the evidence and
6 deliberate and come to a decision.

7 Q Now if we could call up 159886. This is an
8 article of Dan Lett the same date in the Winnipeg
9 *Free Press* about Mr. Cooney, and I think it's fair
02:52 10 to say that he actually does get into and report
11 on information from Mr. Cooney in the jury
12 deliberations, says:

13 "As well, Fernley Cooney says
14 he felt Milgaard, who is serving time in
02:52 15 Stony Mountain Institution, was
16 innocent, but caved in to his peers
17 because of his weakened mental health."
18 Go back to the full page, I'll just read you a
19 few more and then ask you a question:

02:52 20 "Cooney said even though he
21 had a history of mental illness and was
22 on medication, he understood all the
23 evidence presented during the trial and
24 along with five other jurors, originally
02:52 25 felt Milgaard was innocent.



1 However, the jurors who felt
2 Milgaard was guilty pressured the
3 others, Cooney said, until he was the
4 only juror supporting an innocent
02:52 5 verdict."

6 Let me pause there. Would that type of
7 information, in your view, for you to go and
8 gather that information would put you in the
9 position of violating the *Criminal Code*; is that
02:52 10 correct?

11 A It deals specifically with the deliberations of a
12 jury, yes.

13 Q And so is it fair to say the reason you did not
14 follow up with this type of information, because
02:53 15 you did not wish to violate the *Criminal Code*?

16 A Yes. But, you know, if I read the story in its
17 entire context, he may be, in quotes, "a weakened
18 mental condition", that doesn't signal that he is
19 unable to perform the functions of a juror. He,
02:53 20 along with five others, initially, according to
21 the article they may have taken a straw poll at
22 the end of the evidence and he, along with others,
23 said "I don't think he's guilty". Well, that's
24 fine.

02:53 25 The jury system is one in which



1 12 people, after deliberation, come to a consensus
2 one way or the other, or if not there is a hung
3 jury, but that's part and parcel of how juries
4 work.

02:53 5 Q If we did then go back to the main page, the
6 comment here:

7 "Asper said although the
8 confession doesn't alter the facts of
9 the case, it is another example of how
02:54 10 irregular the trial and police
11 investigation were.

12 'If it's true, if all of this
13 is true, then it lends support to our
14 position that there may have been some
02:54 15 irregularities at the trial,' Asper
16 said. 'I think it supports our position
17 that this case should be reopened.'"

18 "This is just the latest of a
19 series of bizarre disclosures
02:54 20 surrounding the trial and police
21 investigation of the Milgaard case,
22 Asper said."

23 I wouldn't mind your comments on that. What was
24 your -- does that accord with what you believed
02:54 25 was being put forward to you as the grounds for a



1 remedy under Section 690?

2 A No. If -- I'm not certain what he means by
3 "bizarre disclosures", because until that time we
4 had Deborah Hall's affidavit, we had Ute Frank's
02:55 5 statement, which received some characterization,
6 and we had Dr. Ferris' report, which is a
7 scientific -- or which is evidence scientifically
8 based. I wasn't aware of a great deal of, quote,
9 "bizarre disclosures".

02:55 10 There was, of course, the --
11 there was, of course, the disclosures relating to
12 other sexual assaults, but by then we hadn't
13 really collected that much information about
14 it, --

02:55 15 Q Okay.

16 A -- so I'm not certain what Mr. Asper had in mind
17 when he talked about bizarre disclosures.

18 Q Let's just go down to the full page, please.

19 There is also a mention here, and this just
02:55 20 predates your interview of Nichol John, he says:

21 "Asper noted that at the
22 trial, one witness who gave police an
23 eyewitness account of the crime
24 contradicted her earlier statement while
02:56 25 testifying. The witness had been jailed



1 without charge and claimed later that
2 police pressured her into making the
3 statement."

02:56 4 Again, was that part of what you understood to be
5 a ground with respect to the Nichol John
6 statement, that the police had pressured her into
7 making the statement?

8 A No.

9 Q If we can go to 220 --

02:56 10 A Because --

11 Q Oh, sorry?

12 A -- if I may just add, the thrust of the, the
13 thrust of the submissions up until then was that
14 Nichol John's statement couldn't factually be
02:56 15 true, and it focused on the fact that the victim
16 had been stabbed through the coat and not through
17 the dress.

18 Q Can you tell us, as an investigator, presumably
19 you would have read this article at or around the
02:57 20 time it came out?

21 A Yes.

22 Q To the extent that, in the media, Mr. Asper may be
23 putting forward a position or an argument that is
24 different or not included in what's in the written
02:57 25 application, how did you deal with that or --



1 A You took a deep breath and you hoped that the
2 story would die in one day because you couldn't
3 respond to it publicly in the same fashion.

4 Q Would you, would you take this and say "okay, this
02:57 5 must now be part of the application", so what you
6 read in the media, or did you restrict your focus
7 to what was submitted to you as part of the
8 application?

9 A Well it certainly added some, it certainly added
02:57 10 some importance to speaking with Nichol John,
11 because here's an aspect that doesn't deal with
12 something that didn't happen at trial, but this is
13 in relation to police pressure into making the
14 statement. To the extent that Ms. John adopted,
02:58 15 in her testimony, certain aspects of the
16 statement, that was in evidence, and that's
17 something that we -- we needed to look at.

18 Q So that are you telling us that if, in fact, the
19 police had pressured Nichol John into making the
02:58 20 original statement, and the one that she did not
21 adopt all of, that might be something you would
22 consider?

23 A Yes.

24 Q Now I think you're telling us that that was not in
02:58 25 the application material?



1 A Not the original one, no.

2 Q No. And so, having read this in the article,
3 would then that, I think you said, inform you that
4 you might raise it with Nichol John?

02:58 5 A Yes.

6 Q That's probably an appropriate spot to break.

7 (Adjourned at 2:58 p.m.)

8 (Reconvened at 3:21 p.m.)

9 BY MR. HODSON:

03:21 10 Q Calm up 220222, please. And this is an October
11 22nd, 1989 article of Dan Lett in the Winnipeg
12 *Free Press*, and if we could just turn it around so
13 we can take a look at it. No, this way so I can
14 see this part, please.

03:21 15 And I'll go through this. Just
16 to give you a bit of background, Mr. Williams,
17 this is an article that talks about the Ute Frank
18 statement that you had sent to Mr. Asper, and I
19 think you're familiar with this article and the
03:21 20 timing of this article; is that right?

21 A I am.

22 Q And we'll just go through parts of it, and it
23 says:

24 "A police statement from a
03:21 25 witness who directly refuted damning



1 testimony given at the 1969 murder trial
2 of David Milgaard has been released by
3 the federal Justice Department 20 years
4 after he was convicted."

03:22 5 And then:

6 "Milgaard's lawyer, David
7 Milgaard, said the statement indicates
8 there were irregularities in the trial
9 and police investigation. It may even
03:22 10 prove that two witnesses were lying to
11 protect themselves against criminal
12 charges laid just two weeks before the
13 trial, he added."

14 I'd like you to comment on not only the -- your
03:22 15 views about what is stated here, the contents,
16 but as well the inclusion of Ute Frank's
17 statement in the media. Can you tell me whether
18 you had concerns at the time and, if so, what
19 those concerns were?

03:22 20 A My concern was that information that had been
21 collected and shared for the purposes of a 690
22 application was being used to -- for a different
23 purpose and was being characterized in a way that
24 prevented me from responding. The signal that, or
03:23 25 the suggestion by the reporter that the statement



1 directly refuted damning testimony given at the
2 trial, I took the Ute Frank statement to mean that
3 it could only refer to the testimony of Messrs.
4 Melnyk and Lapchuk. To the extent that the
03:23 5 statement was silent about, or didn't comment
6 directly or adversely about what Melnyk and
7 Lapchuk reported that they had seen, I couldn't
8 conclude that the statement was refutation just by
9 looking at it. There was no specific reference in
03:24 10 the statement, as I recall, to either Mr. Melnyk's
11 testimony or to Mr. Lapchuk's testimony or to the
12 event that they testified about. Consequently, I
13 was perplexed about what aspect of the statement
14 was being held out as a refutation of the trial
03:24 15 evidence of Mr. Melnyk and Mr. Lapchuk.

16 Q Why would you care about what the media or the
17 public learns; was that a concern for you?

18 A It's a concern because there -- it's just another,
19 call it a brick in a mounting series of statements
03:24 20 or misstatements about the state of the 690
21 application. When all of this information, which
22 isn't correct, is out there, it puts undue
23 pressure on the Minister, "lookit, Minister, if
24 there's all this why haven't you acted, why do you
03:25 25 have to wait". There is a mounting body of



1 evidence, at least portrayed by the press, that
2 signals that this person shouldn't be where he is
3 and, to me, that was inappropriate.

4 Q Let me ask you this. If Mr. Milgaard's
03:25 5 application to you under Section 690 contained
6 everything that you read in the press, and
7 everything in the press was true, would that have
8 provided a number of different bases for relief?

9 A Yes. I have handled applications in which there
03:25 10 was a turnaround time of less than three months,
11 and it was a successful outcome.

12 Q And so are you saying that if, for example, Ute
13 Frank's statement did in fact refute the evidence
14 of Melnyk and Lapchuk, and it was true, then would
03:26 15 that be a basis that would provide or could
16 provide a remedy under Section 690?

17 A It -- Ute Frank's evidence, coupled with Deborah
18 Hall's, might, or could, provide a basis.

19 Q So if what Mr. Lett writes here is in fact true, I
03:26 20 mean if the public reads this and says, okay, well
21 Ute Frank has refuted the damning testimony of
22 Melnyk and Lapchuk, Melnyk and Lapchuk had
23 criminal charges, if that's true then why hasn't
24 the Minister --

03:26 25 A Acted.



1 Q -- reop -- acted?

2 A Yes. And you've got to take that in conjunction
3 with what was already in the public concerning
4 Deborah Hall and concerning Dr. Ferris.

03:26 5 Q And so your concern, is it fair to say your
6 concern is that the public, if, in your view get
7 misinformed about the facts, and in particular
8 about the grounds for the application, it puts
9 undue pressure on the Minister in that what the
03:27 10 Minister is looking at is a record far different
11 than what the public is looking at?

12 A Correct.

13 Q And I think you have said the difficulty you have
14 is that you are unable to, or were unable to try
03:27 15 and correct the record in the public domain for
16 the reasons you stated?

17 A Yes.

18 Q What about the comment here that the statement had
19 been released by federal Justice Department 20
03:27 20 years after he was convicted; did you have
21 concerns about what inference or what may have
22 been drawn by the public from that?

23 A The -- one of the inferences is that the
24 department had held onto the statement for 20
03:27 25 years before releasing it. In reality, I think we



1 requested it towards the end of June, and turned
2 it over in October.

3 Q Now the evidence of Mr. Tallis is that, at the
4 time of David Milgaard's trial, he had the
03:27 5 statement; would you have been aware of that?

6 A I was aware of that from my conversations with Mr.
7 Caldwell.

8 Q And so, again, would the concern there be that the
9 public might perceive, by reading this, that your
03:28 10 department or the government held back the
11 statement for 20 years, and that it was only now
12 coming to light that there was this irrefutable
13 evidence?

14 A Yes. This is only partly correct. The Justice
03:28 15 Department did release the statement to Mr. Wolch
16 and Mr. Asper 20 years after Mr. Milgaard was
17 convicted. What it doesn't say is that trial
18 counsel had a copy of the statement at the time of
19 trial and, in fact, trial counsel interviewed the
03:28 20 witness at trial. The impression that the story
21 gives is that this is something that's brand new,
22 it only surfaces after conviction, and -- when
23 that, in fact, was not the case.

24 Q So, again, would this be similar to the substance
03:29 25 of what is said, that the public may have an



1 incorrect view about the fairness of the process?

2 A Yes. You can't attack what's said because we did
3 give it up, but it's the omissions that is not
4 stated there that colours the public's perception.

03:29 5 Q And, again, would there be -- and I appreciate
6 we've touched on your constraints earlier, but
7 would you have considered phoning Mr. Lett and
8 saying "lookit, here's the rest of the
9 information, publish that please"?

03:29 10 A No.

11 Q And why not?

12 A That would involve a release of personal
13 information which I wasn't entitled to do.

14 Q But would that draw you into trying the case in
03:30 15 the media?

16 A Yes.

17 Q And was that something that you intended to avoid?

18 A At all costs.

19 Q And, here, the statement that Milgaard's lawyer
03:30 20 said the statement indicates there were
21 irregularities in the trial and police
22 investigation, and again with the Ute Frank
23 statement, I think, would it be fair to say that
24 that was not a ground put forward in the
03:30 25 application? There wasn't an application that



1 said "Ute Frank's statement proves irregularities
2 in the trial and police investigation, therefore,
3 find a miscarriage of justice"?

4 A I didn't know what to make of that statement.

03:30 5 This is the reporter talking? Now let me look at
6 this again.

7 Q I think Milgaard's lawyer --

8 A These are words attributed to Mr. Asper.

9 Q Yes.

03:30 10 A I didn't know what he was referring to.

11 Q And then, as well, the suggestion here that:

12 "It may even prove that two witnesses
13 ...",

14 and I'm assuming that that's Melnyk and Lapchuk:

03:31 15 "... were lying to protect themselves
16 against criminal charges laid just two
17 weeks before the trial, he added."

18 And I think that's the suggestion that Melnyk and
19 Lapchuk, when they testified at David Milgaard's
03:31 20 trial, had previous or outstanding criminal
21 charges, and was that something you were aware
22 of, Mr. Asper contending that, "lookit, they lied
23 because they were trying to make a deal"?

24 A Yes.

03:31 25 Q And if we can go over to, back to the main page,



1 please, and I think the article continues there,
2 and it says:

3 "The statement, released last
4 week, contradicts testimony from two men
03:31 5 who say they saw Milgaard reenact the
6 murder in a Regina hotel room."

7 And I think you told us that you do not agree
8 with that statement; is that fair?

9 A That's correct.

03:32 10 Q And then, if we could go back to the full page,
11 and I want to get -- spin it, put it upside down
12 to show me the right-hand column, please. It
13 says:

14 "Asper said" --
03:32 15 actually, sorry, let me just find -- sorry, I'll
16 have to get you to go back there. It says:

17 "Asper said the statement was
18 taken by Saskatoon police in Jan. 1970
19 from Ute Frank, an acquaintance of
03:32 20 Milgaard, who was one of several people
21 in the hotel room in May, 1969."

22 Did you have a concern, at this time, that Ute
23 Frank's name, and the statement which Mr. Asper
24 had received from you, would be put into the
03:33 25 public domain through the media?



1 A Yes.

2 Q And can you elaborate on what your concern was?

3 A Well, at the time, I had obtained that information
4 as a result of the good offices of the provincial
03:33 5 attorneys general office. Submitting it to the
6 applicant was done for the purpose of enabling the
7 applicant to advance its application to the
8 Minister. I can sell, or I can obtain, or that
9 was one of the bases upon which I obtained
03:33 10 information, and it was sometimes obtained under
11 certain embargoes that I would restrict its
12 dissemination and it would not be used for
13 purposes unconnected with the work. By
14 disseminating it to Mr. Asper I felt -- I was
03:34 15 disappointed in myself for not getting a, for not
16 getting some kind of undertaking to control its
17 further dissemination, number one; and two, I ran
18 the risk of violating some of the personal -- some
19 of the *Freedom of Information Act* or privacy acts
03:34 20 of the various provinces. It's just this is
21 someone's statement that was taken for a
22 particular purpose and it wasn't taken for the
23 purposes of publication.

24 Q If you would have known that Mr. Asper would have
03:34 25 sent the Ute Frank statement to the media would



1 you have given it to him?

2 A I wouldn't have given it to him unless I had some
3 kind of undertaking concerning its further
4 dissemination. If, for example, you take the
03:34 5 statement and you are interviewing another witness
6 and you want to put the statement to that witness,
7 fine, but not to be submitted to your favourite
8 reporter.

9 Q Did you -- was it your understanding that, in
03:35 10 giving the statement to legal counsel for Mr.
11 Milgaard, that -- are you saying implicit in that
12 was that he would use it only for the purposes of
13 the application?

14 A Yes, I was hoping that he would use it for the
03:35 15 purposes of the application, and I suspect the
16 argument may be made that by giving it to the
17 press that's consistent use with purposes of the
18 application, but I felt that giving it to him
19 would enable him to bolster whatever submissions
03:35 20 he wanted to make to the Minister.

21 Q Did this dissemination of the Ute Frank statement
22 to the media by Mr. Asper, did it cause you to
23 change your practices and what information you
24 provided to Mr. Asper and Mr. Wolch after this
03:36 25 date?



1 A Yes, it caused me to adjust the timing for the
2 delivery of any of that information.

3 Q And can you explain that, please?

4 A Well the effect of this statement, and its
03:36 5 characterization, is that we were unable to
6 respond to it publicly. Notwithstanding that, it
7 put the Minister in an unfortunate position, so to
8 lessen the incidences or the incidents of being
9 placed in this kind of position we decided to hold
03:36 10 off until such time as we've completed our work
11 and then we can provide the fruits of the
12 investigation in a more controlled setting with
13 the necessary precautions against further
14 dissemination.

03:37 15 Q And that would be the October 1, 1990 meeting; is
16 that correct?

17 A Yes.

18 Q And so are you telling us that, as a result of
19 this incident with the Ute Frank statement, rather
03:37 20 than providing to Mr. Asper or Mr. Wolch the
21 fruits of your investigation from time to time,
22 you took the step of withholding it or holding
23 back until October 1 because of what was done with
24 the statement you provided?

03:37 25 A Or getting embargoes in relation to further



1 dissemination, yes.

2 Q Did you ever hear from Ute Frank or have concerns
3 expressed by her that she read about herself in
4 the newspaper? I believe that was her evidence
03:37 5 before the Commission, he had some concern that it
6 --

7 A I didn't hear about Ute Frank directly. She --
8 she didn't say that to me, she may well have had
9 that. But I did interview her, I think, in
03:38 10 relation to the second application.

11 Q And if we can then go back to the main page, and I
12 want to get this, right-hand side please. It
13 says:

14 "Asper said Hall's affidavit
03:38 15 had no corroboration until earlier this
16 month, when the Justice Department
17 released Ute Frank's statement, taken at
18 the same time as those from Lapchuk and
19 Melnyk."

03:38 20 And it goes on:

21 "Frank made no mention in her
22 statement of Milgaard re-enacting the
23 murder."

24 And it goes on to give a quote. Did you agree
03:38 25 with this characterization that the Deborah Hall



1 affidavit -- or pardon me -- that the Ute Frank
2 statement corroborated Deborah Hall's affidavit?

3 A No, I didn't.

4 Q And then he says:

03:39 5 "Asper said either of the
6 statements from the two women, if used
7 at the trial, could have successfully
8 refuted Lapchuk's and Melnyk's
9 testimony, which was considered very
03:39 10 powerful and persuasive.

11 Asper said he's puzzled why the
12 police would take the statement and is
13 unsure about whether Milgaard's counsel
14 even knew the statement existed."

03:39 15 And I think, on the latter point, you told us
16 that you knew, at this time, that Mr. Tallis had
17 a copy of that, or had been provided?

18 A Yes.

19 Q Did that concern you, that in this article there
03:39 20 would be a suggestion that a statement had not
21 been provided by the Crown prosecutor to defence
22 counsel?

23 A At the time I wasn't concerned because I was
24 aware, based on conversations with Mr. Caldwell,
03:39 25 that he had in fact provided that statement to Mr.



1 Tallis.

2 Q But were you concerned that the public was being
3 told a different story possibly?

4 A Yes, but I guess I'm resigned to the fact that by
03:40 5 then I'd been in the prosecutions game for about
6 ten years and recognized that the publication of
7 criminal justice issues is rarely accurate and
8 I'm, I had just become resigned to it.

9 Q And, again, were you concerned, though, in that
03:40 10 the legal counsel that you were dealing with on
11 this application was making statements in the
12 media that you felt were wrong and yet you felt
13 unable to respond to?

14 A Correct.

03:40 15 Q And, again, I mean you've, I think you've touched
16 on it earlier, that that -- is it fair to say
17 that, as the media attention grew, that this
18 became more and more of an issue?

19 A Yes. If you take a look at the last paragraph, it
03:40 20 really:

21 "So far, there has been no
22 comment from Justice Department
23 investigators about whether the new
24 evidence will warrant re-opening the
03:41 25 case, he added."



1 Well, that's absolutely true. It's not the role
2 of the investigators to presume to relay to the
3 public what the Minister is authorized to do.

03:40 4 Q Do you recall whether you ever went to Mr. Asper
5 and expressed your concerns about this article or
6 about his use of the Ute Frank statement?

7 A It may have come up in conversation. I believe I
8 may have mentioned it, but I have no specific
9 recall.

03:41 10 Q Did there come a point in your dealings with Mr.
11 Asper where things maybe were not as cordial as
12 they once were or that perhaps there wasn't the
13 same level of trust that you had in him?

14 A Well, certainly I had to be much more careful in
03:41 15 what I said and what information I shared because
16 I was never certain that it would be relayed as
17 accurately as I would hope it would be. He is
18 entitled to his view and I could not prevent that.
19 What I could, however, influence is the frequency
03:42 20 with which we were exposed to views which we
21 couldn't respond to publicly. There would be a
22 time and based upon these experiences, I knew that
23 I had to be careful.

24 Q And so but for these concerns that you had in your
03:42 25 dealings with Mr. Asper, are you saying that the



1 information that was shared at the October 1, 1990
2 meeting might have been shared earlier?

3 A Some of it would have been, yes.

4 Q 002473, please, again this is an October 23, '89
03:42 5 memo to file, it looks like another conversation
6 with Pat Alain -- scroll down -- and again I think
7 this just touches on similar matters to what was
8 talked about before; is that right? Would this
9 just be a follow-up discussion or can you shed any
03:43 10 light on this?

11 A I think it's a follow-up, a clarification of what
12 she may have written earlier, and it focused
13 primarily on causes of contamination.

14 Q And that's here:

03:43 15 "She also pointed out that certain
16 substances can mimic the A antigens."

17 And that would be the concern, that the "A"
18 antigens may have been in the semen due to
19 contamination as opposed to coming from the
03:43 20 donor?

21 A Yes.

22 Q 002475, this is an October 23, '89 memorandum to
23 file, same date, and this deals with, you inquired
24 of her -- just scroll down a bit, please -- the
03:44 25 steps required to take a non-contaminated saliva



1 sample, and she goes through the process, and I
2 think this is how you take a test of saliva to
3 test for the secretor status; is that right?

4 A That's right.

03:44 5 Q And were you getting this information to evaluate
6 the validity of the secretor test done in 1969 or
7 were you getting this with a view to having the
8 secretor test done for David Milgaard?

9 A Looking back on it, I believe initially I wanted
03:44 10 to get that information to evaluate what had been
11 done previously, but I recognize at the time that
12 it may also be useful if a decision were taken to
13 request a secretor test from David Milgaard what
14 the necessary steps would have to be.

03:45 15 Q So it may have been both?

16 A It may have been both.

17 Q Go to 016105, and this is an October 23, '89 memo
18 to file of a conversation with Mr. Caldwell, and
19 you say:

03:45 20 "... asked him to photocopy the
21 testimony of Nichol John, Ron Wilson and
22 Shorty Cadrain and any other file
23 materials he had identified."

24 And it appears that you had maybe planned to go
03:46 25 look at the file and postponed the trip and asked



1 him to go get these. I'm assuming these are
2 preliminary hearing transcripts; is that right?

3 A That's right.

4 Q And I think the "any other file material" he had
03:46 5 identified, I'll show you a letter in a moment, I
6 think this relates to the earlier request that
7 emanated from Mr. Asper to review the file for the
8 nurse knife-wielding assailant; correct?

9 A Yes.

03:46 10 Q And then Mr. Caldwell mentioned that Mr. Emson had
11 performed certain tests:

12 "These tests indicate that the knife
13 wounds were consistent with penetration
14 from a paring knife."

03:46 15 And then talks about Dr. Ferris' report. And I
16 take it you were going to see Harry Emson as
17 well?

18 A Yes.

19 Q And what was the purpose of that?

03:46 20 A I wanted to get, I wanted to clarify some
21 questions in my mind about the knives and which
22 knife caused the wounds.

23 Q And was that based on what may have come out
24 from --

03:47 25 A The trial transcripts.



1 Q Or the trial transcripts?

2 A Yes.

3 Q If we can go to 027172, this is a memorandum
4 October 23, 1989, a memo to file from Ellen Gunn
03:47 5 who was at the time Executive Director, Public
6 Prosecutions. Do you recall dealing with Ellen
7 Gunn?

8 A Yes, I do.

9 Q And the first paragraph indicates she telephoned
03:47 10 you with respect to the Milgaard case:

11 "Mr. Williams indicated that he was
12 working on the review of the Milgaard
13 matter and when I asked for the status
14 indicated that it was still under
03:47 15 review. He then offered to have a
16 discussion off the record with me with
17 respect to it. When I agreed he
18 indicated that he would have to call me
19 back. I then received a call from Mr.
03:48 20 Corbett who apparently is Mr. Williams'
21 superior."

22 Now, would that be accurate?

23 A Yes.

24 Q And let's just talk for a moment about the role of
03:48 25 the Attorney General, Saskatchewan, or public



1 prosecutions or Government of Saskatchewan,
2 however you want to characterize it. Would it be
3 correct to say that up until this point in your
4 work under Section 690, you would not involve the
03:48 5 Attorney General of Saskatchewan office other than
6 I think you contacted Mr. Dehm and Mr. Caldwell to
7 get access to the file?

8 A I had asked them and they had agreed to provide
9 certain information, but I had not kept them
03:48 10 apprised of what we were doing or what the results
11 of our inquiries had been.

12 Q And why was that?

13 A Because it's -- why? Because I work for the
14 Minister of Justice federally and at that stage we
03:48 15 had not -- we hadn't come to any -- we hadn't
16 completed the investigation and consistent with, I
17 guess, my practice at the time, I reported to the
18 Minister of Justice, I reported up within the
19 Department of Justice. I was quite -- I had not
03:49 20 met Ellen Gunn when I received the call. Her
21 voice, a female voice was at the other end of the
22 line, identified herself as Ellen Gunn and I knew
23 generally that Ellen Gunn was a senior officer in
24 the department, or I think it's DPP, public
03:49 25 prosecutions. I was reluctant to provide the type



1 of information that she wished, so I told her it
2 was still under review. She pressed for more
3 details and I parried that request and went to
4 talk to my boss, Mr. Corbett, who new Ellen Gunn
03:50 5 and who could determine whether the voice on the
6 phone identifying herself as Ellen Gunn was Ellen
7 Gunn.

8 Q So were you reluctant to talk to Ms. Gunn; is that
9 fair?

03:50 10 A Yes.

11 Q And let's just talk about -- putting aside Ms.
12 Gunn, but let's just talk about the Government of
13 Saskatchewan. Would it be correct to say that in
14 your role in investigating the 690 application,
03:50 15 the Attorney General's office of Saskatchewan
16 would not play a role in that?

17 A It would not play a direct role, no. I have --
18 there's a time frame involving the Attorney
19 General's office and typically that would come
03:50 20 when, at the conclusion of the investigation. If
21 it looked as if grounds existed for remedy, we
22 would give them a heads up and we would say
23 lookit, this is what we've found, we would like to
24 have your comments on it, but until such -- until
03:51 25 we had reached that moment, generally our job was



1 to do it, ask the questions, gather the
2 information, make the assessment. Yes, we would
3 involve the A.G.'s office to the extent we need
4 clarification to the extent that we needed
03:51 5 information for the assessment, but we would not
6 be making it in consult with them. For one
7 reason, they were the prosecuting agency and while
8 they would have valuable information for us in
9 terms of understanding the case that was put
03:51 10 before the jury, our practice was not to involve
11 them.

12 Q Okay. And would it be correct to say that if the
13 minister was going to grant a remedy and send the
14 matter back to trial, the Attorney General of
03:52 15 Saskatchewan would need to know that because they
16 would be the ones prosecuting?

17 A Correct.

18 Q Or if they were sending it back to the Court of
19 Appeal to have the appeal reheard, it would be the
03:52 20 Attorney General of Saskatchewan that would have
21 to deal with that?

22 A Correct.

23 Q And so am I correct that it would be, if that was
24 the direction that the Federal Minister was going
03:52 25 to go, it would be a heads-up call that lookit,



1 this is where this is going, you should be aware
2 that what you thought was a finished file is now
3 going back to the courts and you will have to
4 assume your responsibility as the prosecuting
03:52 5 agency?

6 A Correct. It wouldn't make sense to take them by
7 surprise.

8 Q But are you telling us that you wouldn't consult
9 them and say what do you think about these grounds
03:52 10 and what do you think about a remedy?

11 A No, not generally.

12 Q If we can scroll down here, and I appreciate, I
13 think this is not your memo, I think the remainder
14 of this is the discussion that Ms. Gunn has with
03:53 15 Mr. Corbett. You've had a chance to review this
16 memorandum in the last few days. Would you agree
17 with that, that the remainder of this memo talks
18 about or relates to a discussion with Mr. Corbett
19 as opposed to you?

03:53 20 A Correct, because I did not return the call to Ms.
21 Gunn.

22 Q And I want to ask you about a couple of things
23 that it appears Ms. Gunn wrote down about what Mr.
24 Corbett said to her according to her note. As
03:53 25 Mr. -- do you recall whether you would have talked



1 to Mr. Corbett or what you discussed with him at
2 the time?

3 A I alerted Mr. Corbett to the fact that I had
4 received a call from a woman identifying herself
03:53 5 as Ellen Gunn, that Ms. Gunn had sought the status
6 report from me and I was not comfortable providing
7 such a report to her, and he says, "well, I know
8 her, let me deal with it".

9 Q And what -- would it be -- what information would
03:54 10 Mr. Corbett have about the work that you had done
11 to that date, are you able to shed any light on
12 that?

13 A I was -- I copied him on several of my memos to
14 file and periodically I would brief him verbally
03:54 15 about the steps I had taken, the steps I was about
16 to take and the results that I had obtained.

17 Q And so on October 23, 1989 he would have been
18 aware of the work that you had done on the
19 secretor issue?

03:54 20 A Yes.

21 Q And as well I think at this point you were in the
22 process of arranging interviews of Nichol John,
23 Mr. Tallis, Deborah Hall?

24 A Yes. He would have -- his approval was required
03:54 25 before I could expense the funds to take the trip.



1 Q Okay. And he says here:

2 "They indicate the more publicity the
3 matter gets the longer the review is
4 likely to take."

03:55 5 And I think that's what you told us this
6 afternoon; is that right?

7 A Yes.

8 Q And so you would agree with that, that -- I mean,
9 I'm not asking you to testify as to what Mr.
03:55 10 Corbett may have said to Ms. Gunn, but I would
11 like your comment on whether you agreed with what
12 has been attributed to your superior Mr. Corbett,
13 okay?

14 A To the extent that I can I will.

03:55 15 Q Yes. So I think this is something that you say
16 that was your view at the time, that the more
17 publicity the matter gets, the longer the review
18 is likely to take?

19 A Yes.

03:55 20 Q And then here:

21 "Off the record and on a confidential
22 basis they indicate that they are not
23 satisfied based on those two pieces of
24 evidence that the case is likely to be
03:55 25 reopened."



1 Let me just pause there. And I think they talk
2 about the new affidavit and Dr. Ferris. At this
3 stage was that something that you had concluded?

4 A I wouldn't have gone that far with respect to
03:56 5 Ms. Hall's because I hadn't spoken to her yet.

6 Q As far as Dr. Ferris' evidence, is that -- or that
7 report, is it fair to say at this time --

8 A Yeah.

9 Q -- that this piece of evidence you did not view as
03:56 10 being the type that would provide grounds for a
11 remedy under Section 690?

12 A Correct, in relation to Dr. Ferris.

13 Q And then:

14 "The tests they follow is that the
03:56 15 defence must show that the accused is
16 probably innocent at this stage. They
17 do not see themselves as one other level
18 of appeal court and so the onus has
19 clearly shifted to the accused."

03:56 20 Again, this comment that's attributed to Mr.
21 Corbett about the tests showing probably innocent
22 at this stage, was that the test that you were
23 applying?

24 A No. I think that overstates the test in that it
03:56 25 places too high a burden on the accused or on the



1 applicant.

2 Q And it says:

3 "They intend to interview defence
4 counsel (Mr. Justice Tallis) and
03:57 5 potentially some other witnesses. They
6 also intend to review the Crown file and
7 potentially speak with the Crown
8 prosecutor. Bobs Caldwell, who now
9 works for the Department of Justice, has
03:57 10 already reviewed the Crown file in
11 Saskatoon and has provided them with
12 some information."

13 And again, would that be an accurate --

14 A Some of it is accurate in the sense that we had
03:57 15 intended then to interview Mr. Tallis, then
16 Mr. Justice Tallis, and some other witnesses.
17 There had been some review of the Crown file and I
18 had been in contact with Mr. Caldwell.

19 Q And then she writes:

03:57 20 "I have asked to be notified whenever
21 any decision is taken. Accordingly, we
22 will be copied with any letters which go
23 to defence counsel on this file."

24 And presumably that would be the letter advising
03:58 25 of the decision; is that your understanding?



1 A Yes.

2 Q And that's something I think you told us, that you
3 would notify the provincial Attorney General when
4 a decision was made by the minister?

03:58 5 A Yes.

6 Q Go to 157030, and this is your letter to
7 Mr. Tallis, Mr. Justice Tallis at the time, and it
8 appears you had a telephone conversation of
9 October 19, go back to the full page, please, and
03:58 10 you send a waiver and it says:

11 "As you are aware, Mr. Milgaard has
12 applied to the Minister of Justice
13 pursuant to section 690 of the Criminal
14 Code... He has raised certain issues
03:58 15 concerning the forensic evidence entered
16 at trial. I would like to discuss the
17 defence's position in relation to that
18 evidence, and related matters.

19 Further to our discussion I
03:59 20 spoke with Mr. Hersh Wolch, counsel to
21 Mr. Milgaard to advise him of my
22 intention to discuss this matter with
23 you and to obtain his views on our
24 proposed meeting. He advised me that he
03:59 25 had no objection to our meeting to



1 discuss the Milgaard case."

2 And again, I take it then that that would
3 accurately reflect what you were planning at the
4 time?

03:59 5 A Correct.

6 Q And you wanted to talk to Mr. Tallis about, at
7 least one matter was the defence's position in
8 relation to the secretor issue?

9 A Yes.

03:59 10 Q Had you -- did you become aware that Mr. Tallis
11 had not yet talked to Mr. Wolch or Mr. Asper at
12 this time?

13 A I'm not certain whether it came up. I hadn't -- I
14 had assumed that they had been in some contact.

03:59 15 Q Had you considered going back to Mr. Wolch or Mr.
16 Asper and saying lookit, in your application you
17 said that defence counsel likely didn't know about
18 this secretor issue or scientific evidence, or may
19 not have known about it, what's the information
04:00 20 you've got from Mr. Tallis on this point; in other
21 words, why don't you get the information from
22 previous counsel?

23 A I didn't do that. Certainly that was an option
24 that was available to me. I felt that by speaking
04:00 25 directly to Mr. Tallis I could get his assessment



1 of, and his position with respect to the forensic
2 evidence.

3 Q And in addition to getting a waiver of
4 solicitor/client privilege from David Milgaard, it
04:00 5 appears that you also contacted Mr. Wolch to get
6 his approval or okay for you to go meet with
7 Mr. Tallis; is that correct?

8 A That's correct. I didn't want to take him by
9 surprise. In relation to the, to Ms. Hall, he
04:01 10 knew that I intended to speak with her and I
11 advised him also in relation to Mr. Justice
12 Tallis.

13 Q Go to 333323, please, October 23, '89 memo about a
14 call to Ms. Hall, and it appears that you had
04:01 15 maybe planned on doing these interviews at the end
16 of October and they got postponed; is that right?

17 A That's correct.

18 Q Can you tell us your recollection of your
19 discussions with Deborah Hall prior to the actual
04:02 20 examination?

21 A Well, once I had obtained her phone number, most
22 of the conversation --

23 Q Sorry, who did you get the phone number from?

24 A I believe I obtained them from Mr. Wolch's office.

04:02 25 Q From David Asper or his office?



1 A From the office. I'm not certain if David Asper
2 provided it to me, but --

3 Q Someone there?

4 A Someone there. Most of our calls were
04:02 5 administrative in nature basically to set up time,
6 date and place and arrangements and to provide her
7 with a brief description of what she might
8 anticipate how it was going to happen and where it
9 was going to take place and who was going to be
04:02 10 present.

11 Q And I think as we will see, that you got a court
12 reporter for that interview; is that right?

13 A That's correct.

14 Q And why did you do that?

04:03 15 A I felt -- Deborah Hall had not testified at trial.
16 The material reaching the Minister of Justice was
17 in the form of an affidavit and I felt that it
18 would be appropriate in those circumstances that
19 if I questioned her, that it be accurately
04:03 20 recorded and hopefully under oath, and --

21 Q And would you have advised Ms. Hall in your
22 telephone calls leading up to the meeting that
23 that was the plan?

24 A I hoped I would have. I have no specific recall
04:03 25 of having done so.



1 Q Again, would that have been your practice at the
2 time? Would there be any reason that you wouldn't
3 tell her?

4 A There's no reason I wouldn't tell her.

04:03 5 Q And again, are you able to tell us what generally
6 you would have told her what the purpose of your
7 interview or examination was?

8 A Yes. I told her that she had been identified to
9 us as a witness who had new information concerning
04:04 10 the testimony of Messrs. Melnyk and Lapchuk, that
11 we had received a copy of her affidavit and that
12 we wished to question her about certain aspects of
13 it to clarify some of the points she had raised.

14 Q And did you detect any concern or apprehension on
04:04 15 her part in your telephone discussions about her
16 meeting with you and being questioned?

17 A No.

18 Q If we can go to 112392A, please, this is an
19 October 25, 1989 letter from Mr. Caldwell to you,
04:05 20 and it's a letter that responds to a number of
21 requests including the August 28th, '89 letter
22 that asked for the information on the nurse,
23 assault on the nurse and as well some other
24 information, and you are generally familiar with
04:05 25 this letter are you?



1 A Yes.

2 Q And Mr. Caldwell says here:

3 "I have had copied, and enclosed,
4 herewith, the following items, some of
04:06 5 which you have requested, and others
6 which I thought would be helpful in your
7 review of the case:"

8 And point A:

9 "Material Relating to, and Following the
04:06 10 Preliminary Inquiry:"

11 And provides some reporting letters and
12 background information. And I take it this would
13 be information that Mr. Caldwell thought you
14 might find informative from his file as opposed
04:06 15 to you requesting these specific pieces?

16 A Yes.

17 Q And then the next page, transcript of the prelim
18 for Nichol John, Dale Wilson and Albert Cadrain,
19 and I think earlier you had requested that; is
04:06 20 that correct?

21 A Yes.

22 Q And I think you told us you didn't have the entire
23 prelim transcript from the May 8th materials;
24 right?

04:06 25 A That's correct. My memory was refreshed by your



1 reference to the requests made of Mr. Wolch in
2 February, we had not asked for the preliminary
3 inquiry transcript.

04:07 4 Q If we can scroll down, and then material relating
5 to trial, there's a memo here that Mr. Caldwell
6 had prepared back in 1970 setting out the
7 chronology relating to these witnesses, and we
8 don't need to bring that document up, but it was
9 his memo at the time about when he became aware of
04:07 10 Melnyk, Lapchuk, what he did on the interviews,
11 when he gave the statements to Mr. Tallis, and
12 that's something that you would have been familiar
13 with at the time; is that right?

14 A That's right.

04:07 15 Q His opening address which -- is that something you
16 would have already had do you think, or is that --

17 A It -- I may have had it as part of the trial
18 record, but maybe not. I'm not certain right now.

04:07 19 Q I think in the, and I'll check this maybe
20 overnight, I think in the original application
21 materials of the Dr. Ferris information there may
22 have been, certainly there was excerpts of
23 evidence, there may well have been of the opening
24 address, I'll maybe check that and we can come
04:08 25 back to that tomorrow.



1 A Okay.

2 Q But would that have been part of the trial
3 transcript that you received do you remember?

4 A It might have been. Quite often openings are
04:08 5 included. A lot depends on what the issues are on
6 appeal.

7 Q I think the evidence we've heard in this case, the
8 trial transcript did not have the, it had the
9 charge to the jury, but not the closing addresses
04:08 10 of counsel, and I'm not sure about the opening
11 address. Did they have the opening address?
12 Maybe Ms. Knox can clarify that.

13 MS. KNOX: Approximately the first 50 pages
14 of the trial transcript are Mr. Caldwell's
04:08 15 opening address, it's there in what appears to be
16 its entirety from -- I think it's page 1 to page
17 50.

18 MR. HODSON: And the closing address was
19 not?

04:08 20 MS. KNOX: Was not.

21 BY MR. HODSON:

22 Q Okay, thank you very much for that. I think
23 that's the record, Mr. Williams, that the trial
24 transcript had the opening address, but did not
04:09 25 have the closing addresses of counsel.



1 A Okay.

2 Q Does that sound right to you? Are you able to --

3 A It sounds right to me.

4 Q So the opening address, and then if we can go to
04:09 5 the next page, some miscellaneous material, the
6 index of statements taken, again would that be
7 something that Mr. Caldwell would have decided
8 might be of assistance to you or did you request
9 that do you know?

04:09 10 A I'm not certain as we speak.

11 Q And then he goes on to talk about the disclosure,
12 and I think you may have already looked at his
13 file at this point, but again, information about
14 what statements were given to counsel and as well
04:09 15 the statement of David Milgaard given to the
16 police, again, would that be something that you
17 might look at to inform yourself?

18 A Yes.

19 Q And then to the next page, the statement of Ute
04:10 20 Frank, which I think you already got from Fred
21 Dehm, and then we get D:

"Other Attacks on Nurses or Other Women
by Knife-Wielding Assailants."

24 And I think that was what was requested by you as
04:10 25 a result of the August 29th letter; correct?



1 A Yes.

2 Q And he says:

3 "On September 26th, you advised me by
4 telephone that Mr. Wolch had suggested
04:10 5 that on the Provincial file there were
6 either news clippings or police reports
7 to the above effect, and asked me to
8 check and see if this is so.

9 There were no news clippings of
04:10 10 this description on the file."

11 And just scroll down a bit:

12 "I enclose a report dated February 4th,
13 1969, by Detective Sergeant R. Mackie,
14 which in the final paragraph deals with
04:10 15 an apparently unrelated sexual assault."

16 And we've now identified that report and it
17 relates to (V2)---- (V2)-----, the second victim
18 of Larry Fisher, the second assault, which at the
19 time the police were investigating. Again, do
04:10 20 you recall, when you received this letter,
21 whether that information had any significance to
22 you? Do you have any recollection of that?

23 A It was in response to Mr. Wolch's request. I
24 didn't attach any particular significance to it at
04:12 25 that time.



1 Q And then he also encloses copies of statements
2 number 38, and lists them, and just for the record
3 I can indicate, if I can read my writing, I think
4 the statements are (V11)--, (V9)----, (V4)---,
04:12 5 (V12)-- and (V6)-, in that order, and other than
6 the (V4)--- statement, number 40, the other four
7 would be statements of women who claim they were
8 assaulted or allege they were assaulted in and
9 around, in the weeks or months prior, maybe even
04:12 10 after Gail Miller's murder, that were on Mr.
11 Caldwell's file. And they were, they were lesser
12 assaults than the rape file, rape charges that Mr.
13 Fisher was convicted of, and none of these
14 suggested, or none of them were connected to Mr.
04:13 15 Fisher, if I can put it that way, of those four.
16 And again, with that background, do you recall
17 whether that -- you put any significance on that?

18 A Not at the time. I -- that was provided in
19 response to the request from Mr. Wolch.

04:13 20 Q Okay. And then, as well, the (V4)---- (V4)---
21 statement, you are familiar with who (V4)----
22 (V4)--- is, and you're now familiar with her
23 information and statement?

24 A Yes.

04:13 25 Q At the time when you received this information



1 from Mr. Caldwell did you put any significance
2 on -- do you recall putting any significance on
3 that information?

04:13 4 A No, I did not. And it was another example, as I
5 recall Ms. (V4)--- was assaulted at roughly the
6 same time a few blocks away by someone that
7 didn't, that didn't match the description of Mr.
8 Milgaard.

04:14 9 Q Now the information that you gathered in this
10 letter, would this information have been provided
11 to Mr. Wolch and Mr. Asper at the October 1, 1990
12 meeting?

13 A Yes.

04:14 14 Q And would the reason it was not provided to them
15 prior would be because of the publication of the
16 information relating to Ute Frank?

17 A That would have been a factor. I may have given
18 it to him earlier and, if I did, it would have
19 been with an embargo. But certainly, by October
04:14 20 1, that material would have been made available.

21 Q So your evidence is that, certainly at the October
22 1, 1990 meeting, you would have shared that
23 information with them, possibly earlier. Are you
24 saying that because you have a memory of that or
04:14 25 --



1 A I'm saying that I don't have a specific memory of
2 it, but in light of the fact that it had been
3 requested and it had been requested in relation to
4 making submissions about the application, my sense
04:15 5 is that I probably would have given it to him in
6 advance.

7 Q Now --

8 A But I'm not sure.

9 Q Now the request was made August 29th, before the
04:15 10 Ute Frank incident in the newspaper, --

11 A Yeah.

12 Q -- the information came to you after?

13 A Yes, I know.

14 Q And so would the Ute Frank, the publication of the
04:15 15 Ute Frank statement that we referred to earlier,
16 would that have influenced your decision about
17 providing this information to Mr. Asper?

18 A Yes.

19 Q If we can go to 112393. This is an October 31,
04:15 20 1989 letter, again from Mr. Caldwell, it appears
21 that there was a telephone conversation and some
22 follow-up information getting the autopsy report,
23 Ron Wilson's statement, and the statements of
24 Henry -- or Albert Henry Cadrain; is that correct?

04:16 25 A Yes.



1 Q And do you recall why -- what would have prompted
2 you to get, let's just talk about the Wilson and
3 Cadrain statements. What did that -- what line of
4 inquiry did that relate to?

04:16 5 A I don't know --

6 Q Is it --

7 A -- or I don't remember. There was something
8 there, otherwise I wouldn't have bothered him for
9 it, but --

04:16 10 Q Let me, is it possible, let me see if this
11 refreshes your memory. You had earlier asked for
12 the preliminary hearing transcripts of Cadrain,
13 Wilson, and John?

14 A Yes.

04:16 15 Q And this is right prior to your interview of
16 Nichol John; is it possible that you wanted the
17 statements of her travelling companions and the
18 prelim evidence for your interview with Nichol
19 John?

04:16 20 A Viewed in that context, that seems ultimately a
21 reasonable thing to do, yes.

22 Q And so that you're saying that sounds likely, you
23 don't recall specifically, but that would be
24 logical?

04:17 25 A Yes.



1 Q And then there is a note here, Mr. Caldwell says,
2 "I also located a note of mine in the provincial
3 prosecutor's file indicating that Nichol John at
4 some stage of the proceedings said that "she saw
04:17 5 it, and doesn't know why he didn't kill her".

6 This statement was heard by witnesses M. Marcoux,
7 and A. Cadrain and Mrs. Miller. From this, I
8 infer that this statement was made at the time of
9 either the preliminary inquiry or the trial
04:17 10 herein, since those would be the only times when
11 those three individuals would be assembled in one
12 location."

13 Do you have a recollection of
14 getting this information from Mr. Caldwell?

04:17 15 A I do.

16 Q And can you tell us to what extent, if any, that
17 information, what role that may have played in
18 your examination, investigation?

19 A It was information, it was not -- Ms. John did
04:17 20 not, she didn't say that in her statements to the
21 police, she didn't say it when she testified at
22 trial, it was some information, she didn't repeat
23 it when I spoke with her.

24 Q Would it be any more -- 'damning' is maybe the
04:18 25 wrong word -- would it be any more cogent or



1 damning than what was in her May 24th, '69
2 statement saying she witnessed the murder?

3 A No.

4 Q Would it be fair to say that it would be much like
04:18 5 the unadopted part of her statements, she may have
6 said it but it wasn't evidence at trial?

7 A It was even less than that. Like with her
8 statement there is a signature at the bottom of
9 the page, this is a word attributed to her which
04:18 10 she neither adopted or affirmed in any fashion.

11 Q If we can scroll down, Mr. Caldwell also sent you
12 a copy of a book written -- or pardon me -- yeah,
13 "a book entitled *Winnipeg 8 - The Ice-cold*
14 *Hothouse*, which has a story by Peter
04:18 15 Carlyle-Gordge concerning the mother of the
16 accused and her efforts on his behalf."

17 If we can just go to 112395. Is
18 this article, do you remember reading this or
19 putting any significance on this information?

04:19 20 A I read it. As we speak today I don't recall its
21 contents without a further review.

22 Q Okay. And, again, and I think it is a story, it
23 was printed in 1982, about, primarily about Joyce
24 Milgaard. There's some reference to some of the
04:19 25 facts of the case, and I think Mr. Caldwell took



1 issue with some of them, but, again, do you have a
2 recollection, today, whether this figured in any
3 way in any of the investigation that you did?

4 A I have no recollection. It may have been used for
04:19 5 background information or it may have been used to
6 assist my inquiries of Ms. John, --

7 Q Okay.

8 A -- but I -- there was -- nothing about it stands
9 out, many years later, that signaled I relied on
04:20 10 any one particular area of it.

11 Q Okay. If we can go to 332413. And this is a
12 letter from you to Mr. Caldwell October 31, 1989
13 thanking him for the information he provided, and:

14 "In addition, I wish to thank
04:20 15 you for the many helpful suggestions you
16 have provided during these many weeks
17 and the introductions to the key
18 witnesses, which has made my task that
19 much easier."

04:20 20 Can you tell me what that may be referring to,
21 the "helpful suggestions provided"?

22 A Mr. Caldwell answered many of my questions and he
23 would say, for example, "if you want to find out
24 about this you should speak to this person". He
04:21 25 knew the players in the judicial system around



1 Saskatoon, and Bobs Caldwell knew virtually
2 everyone, so if I needed some certain things he
3 says "well the way to do it is to get -- speak to
4 Mr. Dehm" or talk to somebody else. I believe, at
04:21 5 the time, I also talked to some of the police
6 officers involved in the file, --

7 Q Okay.

8 A -- and he identified them, and at some point he
9 arranged for me -- or set up arrangements where I
04:21 10 could talk to them.

11 Q If we can go to 333324, please. And this is an
12 October 31, '89 memo that talks about arrangements
13 to meet with Mr. Tallis, and I think you met with
14 him, I think on November 6th, 1989 in Regina; is
04:22 15 that correct?

16 A Yes.

17 Q Now the only file memorandum that I think we have,
18 I think later in February of 1990 Mr. MacFarlane
19 wrote to Mr. Tallis with a list of questions and
04:22 20 then you had a follow-up interview with him for
21 which there was a memorandum, does that sound
22 correct?

23 A Yes.

24 Q And I think the meeting in November 6, or around
04:22 25 that time, of 1989, I don't believe -- and I could



1 be wrong on this -- that there was a file
2 memorandum prepared on that interview; does that
3 accord with your recollection?

04:22 4 A Yes. It was, as I recall, a very brief -- despite
5 the fact that we had a waiver of solicitor/client
6 privilege Justice Tallis was somewhat reluctant
7 and circumspect to get into a detailed discussion
8 of the file.

04:22 9 Q Can you tell us what your recollection is of your
10 meeting with Mr. Tallis, the November '89 meeting?

11 A At that time, 4:00, and I believe it was at the
12 Court facilities in Regina, we spoke briefly about
13 forensic evidence and what his understanding of it
14 was, and we spoke also about the decision not to
04:23 15 put his client, Mr. Milgaard, on the stand. There
16 were some other questions that I put, and he
17 deferred responding to them because he wasn't
18 comfortable and wished to get some further
19 instructions, and I believe part of the discomfort
04:23 20 was due to the fact that he had not had an
21 opportunity to review some of the file material
22 and wished an opportunity to see it and he felt, I
23 believe he felt that his research would be focused
24 if he had a list of questions.

04:24 25 Q Okay. And I think, subsequently, you did provide



1 him with a list of questions, and then you talked
2 to him again on the phone, I think?

3 A Yes.

4 Q Let's talk about the first meeting, the November
04:24 5 '89 meeting, about the secretor issue. What do
6 you recall him telling you about his understanding
7 of the forensic evidence at trial?

8 A My recollection is that he certainly understood
9 the secretor issue very, very well, that part of
04:24 10 his defence was based on the finding by Staff
11 Sergeant Paynter that David Milgaard was not a
12 secretor, and that the argument that he had hoped
13 to present would proceed on the basis that there
14 was evidence that the donor was a secretor; the
04:25 15 argument that the Crown wanted to advance that,
16 although David Milgaard was not a secretor, his
17 blood contributed the A antigens; that he was
18 prepared to put evidence in that there wasn't
19 sufficient blood in the sample to account, or to
04:25 20 signal that it was from an A donor, and
21 consequently the only way that those A antigens
22 could have gotten in there is if they had come
23 from a secretor, since David Milgaard was not a
24 secretor that evidence would establish sufficient
04:25 25 doubt and secure his release.



1 Q And, now, Mr. Tallis testified in detail before
2 this Commission about the submissions, and similar
3 to what you said. Did you, did you go away from
4 your meeting with him with the conclusion that, I
04:26 5 think you said that he clearly understood the
6 secretor issue; is that right?

7 A Yes.

8 Q And, as well, that the argument or the fairest
9 position, if I can call it that, put forward in
04:26 10 the Milgaard application had been, in fact,
11 advanced by Mr. Tallis at trial?

12 A Yes, or he wanted to advance it at trial.

13 Q And do you recall him telling you what, what it
14 was that maybe --

04:26 15 A Frustrated that?

16 Q Yes?

17 A Yeah. It was the questioning of Justice Bence.

18 Q And I believe I highlighted, or we saw that here,
19 and I think, after the evidence went in, I think
04:26 20 Mr. Tallis said the evidence went in fine, that he
21 thought it was exculpatory, and then Chief Justice
22 Bence asked Sergeant Paynter the question to the
23 effect "can you tell us whether the semen came
24 from an A secretor or not", and he says "no, I
04:27 25 cannot tell", that would be the question that Mr.



1 Tallis felt undermined the defence that he had
2 tried to build; is that right?

3 A Yes.

4 Q And that, is it fair to say what Mr. Tallis told
04:27 5 you, that he felt that was sort of the best
6 evidence he had on that issue?

7 A Yes. But, I mean, his description of it certainly
8 signaled to me that he was alive to the issue and
9 to the significance of the various factors.

04:27 10 Q And I think, as well, that the reason that Staff
11 Sergeant Paynter said he couldn't tell whether it
12 came from a secretor or not, because he could not
13 rule out contamination?

14 A Correct.

04:27 15 Q Right. So after your meeting with Mr. Tallis in
16 November of 1989, did the information that he
17 provided you further support the conclusion that
18 you had already reached, that Dr. Ferris' opinion
19 did not provide the basis for a Section 690
04:27 20 remedy?

21 A Yes, to the extent Dr. Ferris' opinion was based
22 on the assertion that those at trial didn't
23 understand the evidence it was clear to me that
24 the evidence was understood.

04:28 25 Q Did you ask Mr. Tallis whether he had shared his,



1 what he told you about his defence strategy on the
2 secretor issue, with Mr. Asper or Mr. Wolch?

3 A I didn't ask.

4 Q And what about; did you talk to him about Ute
04:28 5 Frank and the motel room incident?

6 A I did.

7 Q And what do you recall him telling you about that?

8 A He told me that Ute Frank had been brought to
9 Saskatoon, that he interviewed her, that as a
04:28 10 result of his interview with her he felt that his
11 client's case would not be advanced by calling her
12 to the stand and it would be detrimental to the
13 interests of his client to put her on the stand,
14 and thus, with the benefit of her statement and
04:28 15 with the benefit of having interviewed her, he
16 felt that it would be better if she were not to be
17 called.

18 Q And did he go further and tell you what it was
19 that she told him she observed in the motel room
04:29 20 and, in particular, the words and conduct of David
21 Milgaard?

22 A He may have, but I don't recall it at this time.

23 Q Did you form the impression that, if she would
24 have been called as a witness, that she would have
04:29 25 been -- corroborated Mr. Melnyk and Mr. Lapchuk's



1 evidence?

2 A That is the strong impression that he gave and, as
3 I recall, he basically said Melnyk and Lapchuk
4 were -- had criminal records and Ute Frank was
04:29 5 not, she didn't have the deficits that the other
6 two Crown witnesses had, and if he had called her
7 and put her up it would bolster their evidence,
8 based on what he had learned from his discussion
9 with her.

04:29 10 Q I see it's 4:30, this might be an appropriate spot
11 to break.

12 (Adjourned at 4:30 p.m.)
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OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATES:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR,
Official Queen's Bench Court Reporters for the Province of
Saskatchewan, hereby certify that the foregoing pages
contain a true and correct transcription of our shorthand
notes taken herein to the best of our knowledge, skill,
and ability.

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