

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
Bessborough Hotel at
Saskatoon, Saskatchewan

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Volume 173

Inquiry Proceedings



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Mr. David Frayer, Q.C. and Ms. Jennifer Cox, **for**
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Mr. Marshall Hopkins, Esq., **for** Justice Calvin Tallis
(Retired)
Mr. Donald J. Sorochan, Q.C., **for** David Asper
Mr. Kenneth R. McLeod, Esq., **for** Eugene Williams



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Transcript of Proceedings

(Reconvened at 1:03 p.m.)

COMMISSIONER MacCALLUM: Good afternoon.

ALL COUNSEL: Good afternoon.

MR. HODSON: Good afternoon,

Mr. Commissioner. Just a couple of introductory
comments.

First of all, to advise the
parties of your ruling granting Eugene Williams
standing before this Commission and if I could
introduce Ken McLeod who is here today as counsel
for Mr. Williams at the back. Welcome,
Mr. McLeod.

COMMISSIONER MacCALLUM: Mr. McLeod.

MR. HODSON: And there was no application
for funding and so that was not dealt with.

The second matter, just to
give a quick outline of where we're going in the
next five weeks, I've advised counsel of this, we
have David Asper here to finish his evidence, he
is to be examined by, finish up by Ms. Knox, by
Mr. Frayer and possibly Mr. McLeod and Mr.
Sorochan. We then have Murray Sawatsky to finish
his evidence who will be here this week and next
week followed by Murray Brown the week of



1 September 11th, Eugene Williams the week of
2 September 18th and the systemic witnesses the
3 week of September 25 and I am still trying to fit
4 in Mr. Fainstein, so that's generally where we
01:05 5 are going.

6 Secondly, I think after
7 Ms. Knox finishes with Mr. Asper, I may make a
8 few comments I think, and maybe I'll of leave it
9 until Mr. Knox is done before Mr. Frayer
01:05 10 proceeds.

11 COMMISSIONER MacCALLUM: Sure. How are you
12 doing, Mr. Asper?

13 MR. ASPER: I'm getting ready for football
14 this weekend, sir.

01:05 15 COMMISSIONER MacCALLUM: You have your
16 priorities straight.

17 DAVID ASPER, previously sworn:

18 BY MS. KNOX:

19 Q Sir, I trust we can hold on the football plays
01:05 20 until after I'm out of here.

21 A Sure.

22 Q Thank you. Mr. Asper, I had indicated at the
23 conclusion of the last day that you were here that
24 I had finished my cross-examination subject to two
01:05 25 issues. One was there was some of the transcripts



1 of the conversations that Mrs. Milgaard had
2 recorded that were late provided to us that I
3 hadn't had an opportunity to look at and as well
4 that I was attempting to get a copy of a
01:06 5 presentation that had been done at a conference in
6 Winnipeg and I indicated I would have those two
7 areas to perhaps address some questions, and I can
8 indicate to you that those are the only two areas
9 that I intend to touch on today and in fact I will
01:06 10 be very brief.

11 You recall when you were here
12 last day I asked you whether you remembered issues
13 to do with Father Murphy that dated back to Peter
14 Carlyle-Gordge's contact with him in 1983 and his
01:06 15 contact with Albert Cadrain around the time of the
16 investigation and trial. Do you remember my
17 questioning you that?

18 A I think so, yes.

19 Q The transcript page that refers to it, for the
01:06 20 benefit of the record, is page 28686 continuing
21 into 687, and at the bottom of the page my
22 question to you was:

23 "Q You recall though, I presume, that

24 Father Murphy became of some

10:18 25 significance in the case because, at a



1 certain point in time, Mrs. Milgaard
2 certainly put forth the view that Father
3 Murphy had been used by the police to
4 get Albert Cadrain to go in and give his
10:18 5 original statement?"

6 A Right.

7 Q And you indicated you didn't recall that?

8 A Right.

9 Q Sir, in the transcripts of conversations that we
01:07 10 were provided with, I'm going to direct your
11 attention to a brief portion of a conversation
12 between yourself and Paul Henderson. Again, Mr.
13 Commissioner, for the record, I'm going to be
14 referring the witness to a conversation that's on
01:07 15 tape 17 and the first page of that tape
16 transcription is 335929. That's not very helpful,
17 but I don't need that page, but, Mr. Commissioner,
18 and I point to the witness, what you can see is
19 that the tape indicates that it's a conversation
01:08 20 between Joyce and an unknown woman?

21 A Right.

22 Q You see that?

23 A Right.

24 Q And if we go to page 335933, which I think is page
01:08 25 5, we'll see a conversation between -- if we could



1 just go ahead about four pages, please, to 335933,
2 and at the top you will see that there's a new
3 conversation that begins, it indicates it's a
4 conversation between Joyce and Paul Henderson.

5 A Right.

6 Q Now, if we could go forward, this same
7 conversation continues for a lengthy period, if we
8 can go forward to 335952, and you'll see at the
9 middle of the page there's a notation between, by
01:08 10 the reporter that "Joyce leaves phone, Paul
11 continues conversation with David Asper"?

12 A Yes.

13 Q So it would appear that although it doesn't
14 indicate it at the beginning of the transcription
01:09 15 of this conversation, it was a three person
16 conversation, yourself, Mrs. Milgaard and Mr.
17 Henderson. Would you agree with me so far that's
18 what it appears to suggest?

19 A Yes.

01:09 20 Q Now, sir, if we could go forward, and then all of
21 the pages indicate, as it does down the side here,
22 that it's just you and Mr. Henderson in the
23 conversation through to page 335964, and if we
24 could bring out perhaps the top half of the page
01:09 25 to see if that helps with the print, and you see



1 it's you continuing discussions and you see the
2 part that starts here where you are indicating to
3 Paul Henderson that he should talk to Joyce about
4 the Cadrain -- and it's about the Cadrain initial
01:09 5 statement to the police, and you go on to say that
6 he was contacted immediately after he got back
7 from -- it says from Saskatoon, I presume it
8 should be to Saskatoon, with a priest and it was
9 the priest I think who put him in custody of the
01:10 10 police. Do you see you --

11 A I see that, yes.

12 Q -- telling that. And I don't know if this helps
13 you because it's very sketchy, but does this allow
14 you to conclude that certainly in 1991 or 1990 you
01:10 15 were having some discussions and putting forth the
16 possibility that Father Murphy had been used by
17 Saskatoon City Police to inveigle Albert Cadrain
18 to make that initial contact with the police?

19 A I'm not sure -- could you repeat that question?

01:10 20 Q Perhaps if I phrase it this way. During the
21 course of being --

22 A I mean, I clearly was talking about Father Murphy,
23 yes.

24 Q During the course of the inquiry evidence, and I
01:10 25 don't know if you've looked at Mrs. Milgaard's



1 evidence that she gave at this inquiry, but it has
2 been established that in the later days prior to
3 the Supreme Court of Canada reference the idea or
4 the suggestion that Father Murphy had been used by
01:11 5 Saskatoon City Police to basically con, and that's
6 an awful word to say in connection to a priest,
7 but you'll get my drift, but to con Albert Cadrain
8 into going in and setting David Milgaard up so
9 that he could get the reward money that was being
01:11 10 offered by the police and my question to you last
11 day was whether you remembered any discussion
12 about Father Murphy in that context, and I bring
13 this transcript to your attention to ask if it
14 assists you in refreshing your memory given that
01:11 15 last day you said you didn't recall anything about
16 Father Murphy vis-a-vis you.

17 A No, I can't say that it refreshes my memory, I'm
18 sorry.

19 Q So you wouldn't be aware then that through the
01:11 20 course of conversations between Mrs. Milgaard and
21 others, including a producer at *Front Page*
22 *Challenge*, that this was put forward as a factual
23 assertion, that in fact Saskatoon police had used
24 Father Murphy to set David Milgaard up?

01:11 25 A Well, I assume I would have been aware of it at



1 the time. I just don't recall it.

2 Q Okay. And I take it then -- no, there's no point
3 in asking the next question, I'll move on.

4 Sir, I had also asked you

01:12 5 about, and you had acknowledged, that you had
6 participated in a conference, a project in
7 Winnipeg in October as I understand it, 2005,
8 *Unlocking Innocence*?

9 A Yes.

01:12 10 Q And you were a panel member at a presentation that
11 was done with respect to the role of the media?

12 A Yes.

13 Q Okay. Now, sir, I have obtained the tape itself
14 and I viewed it on Thursday evening and I've asked
01:12 15 that we play the portion of that presentation,
16 that it was your presentation to the panel, and
17 after we've played it I have some brief questions
18 for you.

19 Mr. Commissioner, I might

01:12 20 indicate that the first part of this presentation
21 is not what I will be questioning Mr. Asper on,
22 it's what, the comments that come closer to the
23 end, but I didn't have time, because I had brief
24 time to use it, to be able to narrow down. It's
01:13 25 about a 10 minute presentation. If it's



1 agreeable, we'll play it in its entirety in
2 fairness to Mr. Asper. The staff have set it up.

3 COMMISSIONER MacCALLUM: Yes.

4 BY MS. KNOX:

01:13 5 Q The doc ID for this DVD, as it turns out, is
6 338632 and it has the conference title on it and
7 we were provided with, I reviewed two copies, *Lost*
8 *Lives: The Human Side of Wrongful Convictions*,
9 which is not the one that I'm asking to have a
01:13 10 portion played of, I'm asking to have *The Role of*
11 *Media*, a portion of that DVD played. If we could
12 play that now, please, starting with -- and again,
13 to preset, and, Mr. Asper, perhaps you can
14 confirm, this was a panel that consisted of four
01:13 15 persons, Dan Lett was the first speaker, of the
16 *Winnipeg Free Press*, Kirk Makin of the Toronto --
17 sorry, *The Globe and Mail* would have been the
18 second speaker, you were the third speaker on the
19 panel, followed by Bruce MacFarlane?

01:13 20 A I believe so, yes.

21 Q And we're just -- as I said, Mr. Commissioner, in
22 the interests of time, I want to play Mr. Asper's
23 presentation.

24 COMMISSIONER MacCALLUM: Very well.

25 (EXCERPT OF THE "UNLOCKING INNOCENCE" CONFERENCE



1 PLAYED)

2 MR. DAVID ASPER: I should begin by -- I
3 really want to congratulate the organizers of the
4 conference for putting this together and for all
01:14 5 of your interest in the subject of wrongful
6 convictions. It's very important. I would
7 remind you, though, that the time you spend in
8 these conferences is time that wrongly convicted
9 people remain in prison and so when you leave
01:14 10 here, please leave here with some sense of
11 urgency and dispatch to get those people out of
12 prison.

13 I'm appearing before you
14 wearing two hats I guess. I'm a media person,
01:14 15 but I'm also someone who, I guess, had one of the
16 earlier cases and more notorious cases in the
17 David Milgaard case as counsel.

18 I think it was very useful in
19 some of the submissions yesterday to have been
01:15 20 reminded, and remind all of us, that while we do
21 talk about the big picture, analytical and
22 systemic problems, at the root of this issue, as
23 I say, are human beings, people who have, in
24 effect, become a second victim of the process.

01:15 25 And we have to remember, when



1 we're talking about wrongful convictions as media
2 and as advocates, we're dealing with real people,
3 with real families, and all of whom have really
4 ruined lives. And while things are getting
01:15 5 better, there is no question about it, for most
6 of them they have really very little hope of
7 redress.

8 Now my specific experience,
9 as I say, was with the Milgaard case where, and I
01:15 10 will tell you how we resorted, in my view, to
11 extraordinary measures in order to meet an
12 extraordinary problem.

13 Without the media I can tell
14 you, I think without any reservation, David
01:15 15 Milgaard would be in prison today. Let me take a
16 few moments to trace the story for you and to try
17 to shed some light on why I think that.

18 The basic facts. January
19 31st, 1969, a woman named Gail Miller was
01:16 20 murdered in the City of Saskatoon, Saskatchewan.
21 Prior to that murder an individual had been
22 stalking and attacking women in the vicinity of
23 where Gail Miller had been murdered. In fact, in
24 December of 1968, the police had published in the
01:16 25 Saskatoon Star-Phoenix, a newspaper that my



1 company now owns, published in the newspaper a
2 warning to women in Saskatoon to watch out for
3 this person who was attacking women in the
4 neighbourhood of where Gail Miller was ultimately
01:16 5 killed. It wasn't a large piece of news in the
6 context of the newspaper that day but, as we look
7 back in time, that report could have had a
8 monumental effect on the future of David
9 Milgaard's life. It would appear that nobody
01:16 10 read it, and at trial defence counsel never took
11 the clipping and put to the police officers or
12 the witnesses a theory of an alternate
13 perpetrator, and the fact of that alternate
14 perpetrator was never brought to the attention of
01:17 15 the defence. That small, little news item from
16 December 1968, a little over a month before David
17 Milgaard's problems began, could have saved his
18 life or his time in prison. But it didn't
19 happen. So let me tell you how, over 23 years
01:17 20 following this terrible injustice, the media
21 truly helped set David free.

22 Now I came into the picture
23 in 1986, 17 years into David's life sentence.
24 His mother, Joyce, had retained our firm and the
01:17 25 first lead she provided was one that actually had



1 been developed by a radio journalist, somebody
2 who was being paid by a media outlet to be a news
3 reporter, not by Joyce Milgaard or not by anyone
4 else. His name was Chris O'Brien. And Joyce
01:18 5 Milgaard, of course, had not been able to
6 convince any lawyer or any public justice
7 official to look into the potential wrongful
8 conviction of her son. A media outlet decided to
9 do some digging. He discovered a witness, quite
01:18 10 by accident, who profoundly contradicted very
11 damaging evidence that had been used by the Crown
12 as a kind of coup de gras, final nail in the
13 coffin, in the case against Milgaard. And when
14 Joyce presented the work of this original
01:18 15 journalist, the original work of this journalist,
16 I then trotted off and got an affidavit, and so
17 began the seeds of the application that
18 ultimately set him free.

19 That work, in turn, had also
01:18 20 been augmented by a freelance journalist, a
21 fellow by the name of Peter Carlyle-Gordge, who I
22 think is here today, who had interviewed all the
23 trial witnesses and had taken the case apart
24 piece by piece by piece so that, when Joyce
01:18 25 Milgaard was able to walk into the office, we had



1 a very clear analysis of the absurdity of the
2 Crown's case as it had been presented. So, until
3 our law firm came into the picture, everybody
4 outside the journalism world had said 'no' to
01:19 5 Joyce Milgaard other than her family members and
6 two journalists, and when she came to our firm
7 and we decided to take on the case, we began with
8 the work of journalists.

9 And then what happened
01:19 10 between 1986 when Joyce came to us and 1992, when
11 David was ultimately freed by the Supreme Court,
12 provides an astonishing illustration of the value
13 of the media on the one hand and, in my
14 respectful opinion, the utter and complete
01:19 15 failure of our judicial system as it applied in
16 the Milgaard case. I will tell you, and I
17 confess right now I'm still mad about it, I'm
18 still mad about the cases that remain outstanding
19 and I'm still very impatient. I don't like
01:19 20 innocent people being in prison and I hope you
21 don't either.

22 Denied access, denied access
23 to all of her resources to provide a proper
24 investigator we turned to a much younger-looking
01:20 25 fellow sitting here on the panel here, Dan Lett.



1 He was much younger back in 1986. Now Dan was
2 able to convince his editors that there was merit
3 in devoting some resources to looking into what
4 this Milgaard thing was all about. And yes, did
01:20 5 we lobby him, yes, no question. And he began
6 writing about what we were up to, almost as a
7 human interest kind of story, a feature, and
8 slowly but surely Dan began to see what we were
9 talking about and the case became quite public in
01:20 10 Manitoba.

11 These stories that started to
12 appear in the Winnipeg Free Press sowed the seeds
13 for a strategy that we later had to kick into
14 high gear on a much broader level. We had to
01:20 15 make a deliberate decision to try to publicize
16 our efforts. There is some debate among the
17 legal community about what the proper role of a
18 lawyer is vis-a-vis the media, and I will never
19 ever apologize for my view that the zealous
01:21 20 representation of a client under these
21 circumstances, where one is seeking extraordinary
22 measures, that zealous representation knows no
23 bounds within the limits of the law, and that's
24 what we decided to do. And Dan started it on a
01:21 25 totally legitimate basis, he hadn't bought in, he



1 hadn't chosen sides, and began to publicize the
2 efforts.

3 We needed to get the word out
4 because we had no net to cast, we had no
01:21 5 resources, we had to tell the world that this
6 case was alive and that here we were, and 'here's
7 our phone number, if you have any information,
8 phone us.' It was our own little Crimestoppers
9 routine. And as we later learned over time and
01:21 10 as we interviewed witnesses, many of whom
11 recanted their testimony, they did so after
12 reflecting on the stories and reports that they
13 had been reading about the progress in the case,
14 and it took some time for some of these witnesses
01:22 15 to recant, and it took repetition of the stories
16 over and over and over again for them to start to
17 reconsider the evil that they had done at the
18 original Milgaard trial. It took a while for
19 their conscience to kick in, and the sustained
01:22 20 pressure that we tried to orchestrate through the
21 media was important.

22 Now Dan's reporting was
23 local. We needed to convert this case into a
24 national case. We were having nothing but
01:22 25 trouble with the federal Department of Justice.



1 Six years went by, five years went by before we
2 even got a hearing, four years went by before we
3 got any substantive replies, and so we decided to
4 make the case national and, to be honest with
01:22 5 you, we constructed a scenario.

6 We had a mother, aggrieved
7 and wounded, who had been crusading to fight for
8 her son. We had David Milgaard in prison, and
9 not doing very well in prison, and he'd been
01:23 10 there for 20 some odd years. We had me, the
11 young crusading lawyer, and we had created,
12 through the recantation of witnesses, a pretty
13 good whodunit. And then, through the efforts of
14 The Globe and Mail and the CBC, all on the back
01:23 15 of Dan Lett's initial reporting, we took the case
16 from a whodunit to a 'hedunit' and identified the
17 true perpetrator. And, even with that, the
18 Federal Minister of Justice would not re-open
19 David's case, would not give him another hearing.

01:23 20 And so we decided we were
21 going to resort to even further measures through
22 the media. And the media understood that the
23 case had become not one of should David Milgaard
24 have a new hearing, but is the justice system
01:23 25 wrong. And I don't apologize for what we did



1 because we turned the Milgaard case, through the
2 media, into a political fight, and it went all
3 the way to the top, to the Prime Minister's
4 office, and all through the way not a single
01:24 5 media story was wrong, not one.

6 There is a Commission of
7 Inquiry going on right now in Saskatoon that is
8 not only bearing out the media reporting, it is
9 making it look shallow compared to what we didn't
01:24 10 know, and in fact what the Supreme Court didn't
11 know and, in fact, what was withheld from us at
12 every single step along the way.

13 Now I will conclude -- I'm
14 getting a red-light camera and the Chief Ewatski
01:24 15 is going to take a picture and fine me if I don't
16 get off the stage here, but I want to conclude by
17 saying this. We heard Janet Reno saying last
18 night that sometimes the players in the system
19 have their feet in cement, and as an advocate in
01:24 20 my role as I was then, and as I believe today,
21 the media are critical, where those feet are
22 stuck in the cement, to take a jackhammer to it.
23 Oh, I know, we should be subtle, we should be
24 polite, we should be smooth, we should be smart
01:25 25 and use fancy words.



1 You know, I'm sorry, I come
2 back to where I began. There are people sitting
3 in jail who don't deserve to be there, and you
4 can't be polite about it, you can't waste time
01:25 5 about it, you can't be nice about it. As an
6 advocate the media needs to report it, and if the
7 system itself, if the prosecutors, if the police,
8 if the bar, if the judges, if nobody else is
9 going to shake the system, where else do you go?
01:25 10 And I have to say that, I reiterate that without
11 the media, I'm pretty sure that David Milgaard
12 would still be in prison today, and so I'm very
13 grateful to the media.

14 Thank you very much.

01:26 15 (End of Excerpt)

16 BY MS. KNOX:

17 Q Mr. Asper, am I correct in my understanding that,
18 or what I have been told, that this conference
19 material is being circulated to law schools
01:26 20 throughout Canada to be used as a teaching tool
21 for students in the study of law?

22 A I'm not sure what they are doing with it.

23 Q Okay. But your company, you indicated to us the
24 last day you were here, you were part of helping
01:26 25 get this conference on the go and funding it?



1 A Yes, we were a sponsor.

2 Q Okay. Sir, having sat and watched what you
3 presented at that conference -- and I believe it
4 was on October 21st, 2005, it was October 21st,
01:26 5 20th, 21st, or 22nd -- do you see why third
6 parties looking at it might take issue with the
7 accuracy of some of the strong assertions you made
8 to that audience?

9 A No.

01:26 10 Q You don't?

11 A No.

12 Q When you said to them 'All through the way ...',
13 referring to the campaign that you waged in the
14 media and politically to get David Milgaard freed
01:27 15 from his wrongful conviction, 'All through the way
16 not a single story was wrong', a single story put
17 forward by the media, was that true?

18 A I think, now, we can probably take issue with some
19 of them.

01:27 20 Q Sir --

21 A Because I think information has come to light,
22 now, that may, may contradict that.

23 Q Sir, I suggest to you that much information had
24 come to light before you did this presentation in
01:27 25 August 2000 -- or sorry -- October 2005, that many



1 media stories were wrong? The July 1990 story
2 about Mr. Caldwell not disclosing a critical first
3 statement of Ron Wilson to Mr. Tallis you knew to
4 be wrong?

01:27 5 A Well, I don't accept your interpretation of that
6 article, and you and I have discussed that. I
7 don't recall that specific article, but I don't
8 recall, I don't believe that it accurately
9 reflects what I said.

01:28 10 Q Mr. Asper, I played for you a transcript or a tape
11 of a conversation between yourself and
12 Mrs. Milgaard --

13 A Yes.

14 Q -- after she called you when she saw that story in
01:28 15 the paper and, as she said, it almost freaked her
16 out and she said to you "that's wrong, that's not
17 true, Mr. Tallis had the statement", and there was
18 a discussion that the Commissioner will ultimately
19 interpret. But, back then, you were told by
01:28 20 Mrs. Milgaard that Mr. Tallis had the statement
21 and that --

22 A And I told you under my, in my evidence, that I
23 believed I was referring to physically presenting
24 the statement to Mr. Wilson, a tactic at trial,
01:28 25 and I believe that it was conjunctive, it was



1 separate from the second part of the statement,
2 because if in fact the statement hadn't been
3 disclosed you would even agree that that would be
4 misconduct.

01:28 5 Q Mr. Asper, when we played that tape of your
6 conversation you were very clear in saying to her
7 that you -- it was your belief he didn't have the
8 statement. You talked about sometimes prosecutors
9 can give summaries, they can say to a lawyer that
01:29 10 'a witness was interviewed and this is a summary
11 of what he said', but you were very clear in your
12 conversation with her, were you not, that it was
13 your belief he didn't have the statement?

14 A Yes, and I think I was referring to the physical
01:29 15 statement.

16 Q Uh-huh. Sir, we've gone through, and have you had
17 an opportunity to review the testimony that
18 Mrs. Milgaard gave here, the cross-examine of
19 Mrs. Milgaard, --

01:29 20 A No.

21 Q -- and a review of the materials that was in her
22 possession from 1981 and your possession
23 presumably 1986 through to the Supreme Court of
24 Canada, including Ron Wilson's first statement?

01:29 25 A I haven't reviewed it.



1 Q I'm gonna suggest to you that the record shows
2 that, in a transcript of a telephone conversation
3 she did with Ron Wilson in January 1981, she was
4 referencing the statement to him telling him "no,
01:29 5 I have your statement here", there was
6 documentation that she'd gotten the statements off
7 Mr. Tallis' file through the offices of Gary
8 Young, there was reference in the transcript that
9 the preliminary inquiry that you had possession of
01:30 10 and presumably read where Mr. Caldwell told the
11 Court that he had disclosed Ron Wilson's initial
12 statement, all of that material was in your
13 possession, you may not have remembered it but it
14 was there, and I suggest to you that clearly the
01:30 15 story, as it was reported and as you were made
16 aware in July 1990, was wrong?

17 A I don't -- I can't agree or disagree with you, I
18 can only give you my recollection.

19 Q Mr. Asper, I'm not gonna take you through the many
01:30 20 other stories, like stories about missing police
21 files and many other stories that have been
22 demonstrably shown at this Inquiry were wrong when
23 they were reported by the press, I take it you
24 take no responsibility, when you were doing this
01:30 25 presentation, to be sure that you were giving them



1 accurate information? You didn't go back and look
2 at the record of this Commission from January 2005
3 to your presentation, you didn't go back and look
4 at the file materials that were disclosed for
01:31 5 Supreme Court of Canada reference in 1992?

6 A No, I didn't.

7 Q You took no responsibility to show -- to know
8 that, when you made that statement, that in fact
9 it was an accurate statement?

01:31 10 A An inaccurate statement?

11 Q An accurate statement?

12 A I believe there was some research done in
13 connection with the speech. I can't recall.

14 Q Sir, do you accept today that it was a very wrong
01:31 15 statement, that this Inquiry has demonstrated a
16 number of times that the media, through your
17 efforts, through Mrs. Milgaard's efforts and
18 through the efforts of others, printed much wrong
19 information about my client and many others who
01:31 20 were involved in this process?

21 A I wouldn't agree with that, no.

22 Q You don't agree with that?

23 A No.

24 Q I see. And on what basis would you be able to say
01:31 25 that that's not an accurate statement, that in



1 fact a lot of misinformation, wrong accusation,
2 was put against good people who didn't deserve --

3 A No, you said "much".

4 Q Yeah.

01:31 5 A You said "much information", and I don't agree
6 there was much information that was wrong.

7 Q I see.

8 A There was some, but not much.

9 Q I see. And if I'm a law student two years from
01:32 10 now, and I'm looking at this tape, is there any
11 way that I could know that since David Asper made
12 that presentation in October of 2006 (sic) he has
13 had time to reflect on what was said and he knows,
14 now, that it's not right?

01:32 15 A That would be true.

16 Q Thank you. I have nothing further.

17 MR. HODSON: Next to examine, Mr.
18 Commissioner, is Mr. Frayer. And there have been
19 some discussions, I think between Mr. Frayer and
01:32 20 Mr. Sorochan, and I just want to -- I'm not sure
21 where this is going, but I think in light of
22 Chief Justice Laing's decision on judicial review
23 that related to your ruling about whether or not
24 Federal Justice witnesses could be questioned
01:32 25 about advice, Mr. Frayer has indicated that



1 neither your ruling nor Chief Justice Laing's
2 ruling affects, in any way, his examination of
3 Mr. Asper.

4 I understand from
01:32 5 Mr. Sorochan that he may have different views,
6 but that -- and I don't wish to speak for him,
7 I'm sure he'll correct me if I'm wrong -- that he
8 is content to have Mr. Frayer examine Mr. Asper
9 so that we can get the evidence done, but that he
01:33 10 wishes to reserve the right or to state that he
11 may make submissions at a later date regarding
12 the use of the evidence and submissions with
13 respect to what this Commission can and cannot
14 find with respect to, I think, the conduct of Mr.
01:33 15 Williams. Now it's my understanding that it is
16 not intended that this objection and/or this
17 issue will be addressed now, I understand that
18 Mr. Sorochan would like to get Mr. Asper's
19 evidence done.

01:33 20 This issue also affects Mr.
21 Williams, in fact perhaps more so than Mr. Asper.
22 Now Mr. Williams has counsel here, Mr. McLeod,
23 today. I've raised this with him briefly, and I
24 think Mr. McLeod and Mr. Frayer may have views,
01:33 25 as may other parties, about this, and so I think



1 this is an issue that will be addressed at some
2 future point, and if I understand Mr. Sorochan's
3 position correctly he did not want someone to
4 later complain that 'you didn't stand up and
01:34 5 object to every question', he wants something
6 noted on the record. And if I have not fairly
7 stated that, Mr. Sorochan, I'm sure you will
8 correct me. And if I may, Mr. Commissioner, on
9 this point, in addition to Mr. Frayer, Mr. McLeod
01:34 10 may wish to comment on it.

11 MR. SOROCHAN: Mr. Commissioner, I will be
12 very brief on this, because Mr. Asper has time
13 that's precious.

14 My position on behalf of Mr.
01:34 15 Asper is stated in -- is summarized in paragraphs
16 25 and 26 of the reasons for judgement of The
17 Honourable The Chief Justice Laing. And it is as
18 follows:

19 "... a provincial commission ...",
01:34 20 and I'm quoting here from paragraph 25:

21 "... A provincial commission of inquiry
22 cannot inquire into the conduct, or the
23 job performance of a federal employee
24 with respect to the employee's
01:35 25 activities on behalf of his or her



1 employer."

2 And I, where I take issue perhaps with Mr. Hodson
3 is that that applies to any type of inquiry, not
4 just an inquiry from the federal witnesses, and
01:35 5 that it certainly includes questioning of Mr.
6 Asper with respect to that area.

7 And then, in paragraph 26,
8 Chief Justice Laing says:

9 "The advice ...",
01:35 10 and this is, this has been the focus of Mr.
11 Hodson:

12 "The advice lawyers working on Mr.
13 Milgaard's application offered to each
14 other within the Department of Justice
01:35 15 or to their Minister, or why they did
16 certain things and did not do other
17 things while engaged in this activity,
18 as counsel for the applicant puts it, is
19 within the core area of operations of
01:35 20 the Department of Justice."

21 And this is the next part that I'd rely on:

22 "In addition such inquiries would be
23 inquiring into the federal employee's
24 performance of his duties, or conduct.
01:36 25 For both of the foregoing reasons, the



1 proposed inquiries would offend the
2 constitutional limitation on provincial
3 powers established in the Keable
4 decision."

01:36 5 Now the reason that I had, earlier in this
6 Inquiry, objected to the breadth of questioning
7 of Mr. Asper in that it touched upon these areas,
8 and I wanted to put it on the record that I still
9 maintain that it is not an appropriate area.

01:36 10 Mr. Frayer says that he has
11 legitimate reasons for the questions that he will
12 ask. Having had this discussion in courtrooms,
13 various coffee shops, and other places, for quite
14 some considerable period of time with various
01:36 15 counsel involved, it would take a long time to
16 try to sort out the justifications that there
17 might exist for various questionings, as to
18 whether or not there are other justifications for
19 the questions, and it may -- and so that's what
01:37 20 Mr. Hodson says, that the questioning can
21 continue, and that we'll sort it all out later.
22 Subject to there being an egregious stepping over
23 the line, that is what I have agreed should
24 happen.

01:37 25 COMMISSIONER MacCALLUM: Okay.



1 MR. FRAYER: Mr. Commissioner, if I might
2 make a brief response -- I'm not certain whether
3 Mr. McLeod has anything to add -- I think it's
4 been agreed, at least for present purposes, that
01:37 5 I'll continue with the examination of Mr. Asper
6 and that -- I'm not certain as to whether Mr.
7 McLeod will have any questions of him in any
8 event.

9 Just to make my observations
01:37 10 with respect to Mr. Sorochan's argument and the
11 observations of Mr. Hodson in interpreting the
12 judgement of Chief Justice Laing, factually
13 speaking what has occurred during the course of
14 this Inquiry to this date insofar as Federal
01:38 15 Government witnesses are concerned is that Mr.
16 Williams has testified for approximately two
17 weeks, and it was agreed that he would
18 voluntarily appear before this Inquiry and that
19 he would give narrative facts relating to his
01:38 20 involvement in the investigation of the 617/690
21 application. As I said, he's testified for two
22 weeks. It's my intention, and I indicated this
23 to Mr. Sorochan, I will endeavour to try to stay
24 within the bounds, dealing specifically with
01:38 25 issues like conduct, by staying away from issues



1 of that nature, and cross-examine Mr. Asper on
2 the factual background leading up to each of the
3 two applications on behalf of Mr. Milgaard.

4 So we're not here talking
01:39 5 about, I'm not here talking about a case where
6 we're looking at the conduct of the individuals
7 involved, and I will not be questioning him on
8 conduct. If I step to that line I would expect
9 that Mr. Sorochan would have some observations in
01:39 10 that regard. I've given him that undertaking, I
11 will endeavour to do so over the course of the
12 next day and a half. I hope to be able to finish
13 my cross-examination of Mr. Asper before the
14 close of this Inquiry tomorrow and may, indeed,
01:39 15 be quicker than that.

16 But, in any event, I fail to
17 see how the judgement applies to the issue of the
18 narrative of facts that Mr. Williams has given
19 and what I intend to cross-examine Mr. Asper on.
01:39 20 Thank you.

21 COMMISSIONER MacCALLUM: Well, Mr. McLeod,
22 did you have anything to say on that point?

23 MR. McLEOD: No, thank you, Mr.
24 Commissioner.

01:39 25 COMMISSIONER MacCALLUM: Okay.



1 MR. FRAYER: May I just take a brief --

2 COMMISSIONER MacCALLUM: You want a little
3 break?

4 MR. FRAYER: Yeah, just so that I can set
01:40 5 myself up.

6 COMMISSIONER MacCALLUM: Okay.

7 *(Adjourned at 1:40 p.m.)*

8 *(Reconvened at 1:58 p.m.)*

9 **BY MR. FRAYER:**

01:58 10 **Q** Mr. Asper, I'm David Frayer, appearing on behalf
11 of the Minister of Justice.

12 Just with respect to some
13 opening observations I'd make at the outset,
14 before we get into perhaps some of the factual
01:59 15 narrative leading up specifically to the first
16 application, and some questions relating to the
17 second application.

18 Safe to say that during the
19 course of the period of time between 1986 and 1992
01:59 20 when you were working on this on behalf of David
21 Milgaard, that at least to my knowledge there was
22 no contact between either of us in terms of
23 discussions about this or any sort of formal role
24 that I played in the process?

01:59 25 **A** That's --



1 Q Am I accurate in that?

2 A That's correct.

3 Q Most of the contact that you would have had, and
4 that of Mr. Wolch, would have been with officials
01:59 5 in Ottawa that included, amongst others, Mr.
6 Williams, who was the investigator, and people
7 like Mr. MacFarlane and Mr. Corbett and others?

8 A That's correct.

9 Q Mr. Rutherford and so on?

01:59 10 A Yes.

11 Q And it's evident, too, that, throughout this whole
12 process right up until today when we see the
13 excerpt from last year's conference, that you
14 remain a constant critic of the Department of
02:00 15 Justice, the role that Mr. Williams played, and
16 the ultimate decision that Minister Campbell made;
17 am I accurate?

18 A Yes.

19 Q And nothing has occurred to sort of lessen your
02:00 20 thoughts on the respective roles they played and
21 the decision that made?

22 A I'm gonna -- I may surprise you a little bit. I
23 think, as you're aware I'm going to school in the
24 fall and I'm studying wrongful convictions toward
02:00 25 the preparation of a thesis in an area that I



1 haven't yet decided on, and in the course of that
2 I've done a huge amount of reading and I have to
3 tell you that I think, as much as I have -- maybe
4 it's the impetuosity of youth at the time, and
02:00 5 maybe even now I hope, and as frustrated as I am
6 about the pace of change, I think that,
7 unfortunately, change, significant systemic
8 change, takes time in society.

9 You know, there is a proverb
02:01 10 that you have got to break eggs to make an
11 omelette, and I think that unfortunately along the
12 way to making change some things happened, and as
13 I've said I wish there were a whole bunch of
14 things differently done in the *Milgaard* case. I
02:01 15 will temper my criticism I think, now, of the
16 Department of Justice, recognizing that in order
17 to get to where I think we ought to be it just
18 takes some time and it maybe requires, as with the
19 common law, a period of some unfortunate
02:01 20 circumstances to create the wisdom and the
21 common-law experience in order to get to where I
22 think we need to be.

23 Q In specific criticisms that you made of people
24 during the course of the process, I won't go
02:02 25 through all of the references, but amongst the bad



1 guys named by you at the outset of your evidence,
2 that included two Department of Justice lawyers,
3 Eugene Williams, who was the investigator, and Mr.
4 Corbett, whom I think your views of is probably
02:02 5 tempered by the comment that was made to the media
6 that was published in *The Globe and Mail*; am I
7 accurate in that?

8 A Yes. And I think there was a subsequent curling
9 bonspiel that was held at the Department of
02:02 10 Justice kind of making fun of what Mr. Corbett had
11 done which I thought made light of the situation
12 even further.

13 Q Oh, I wasn't aware of that. You have better
14 informants than I have, Mr. Asper. In any event,
02:02 15 your characterization of -- in addition to bad
16 guys you characterized the Department of Justice
17 as, at least on one occasion, as 'the evil
18 empire'?

19 A Yes.

02:02 20 Q And there's been references to the three stooges
21 and things of that nature?

22 A I don't think I did.

23 Q Okay. There was some reference, in one of the
24 reports, to three stooges.

02:03 25 A I don't believe --



1 Q And I'm not doing that for the purpose of
2 embarrassing anybody, I'm just suggesting that you
3 had a pretty, I won't say bad view of the
4 Department of Justice, but it prompted you to make
02:03 5 aspersions against the Department and people in it
6 by using words that were less than charitable; am
7 I accurate in that?

8 A Yes.

9 Q And you've said that from time to time throughout
02:03 10 your evidence that you were fighting a war of
11 liberation, that liberty of the individual trumped
12 the reputation of the people involved in the
13 Milgaard process, the end justifies the means, and
14 today we heard about zealous representations knows
02:03 15 no bounds in cases like this?

16 A I said "within the bounds of the law".

17 Q I'm sorry?

18 A I said "except within the bounds of the law".

19 Q "Except within the bounds of the law?" Okay. And
02:04 20 you said to that conference, and although you've
21 tempered that throughout your evidence, that you
22 don't apologize for what was done?

23 A That's correct.

24 Q Because the ultimate result was what you were
02:04 25 seeking, and that was the exoneration of David



1 Milgaard, for which I'm certain everybody here
2 agrees you deserve considerable credit?

3 A That's correct.

4 Q Now my focus then, and some of the questions I
02:04 5 have of you, will be based sort of on that, on
6 that backdrop, and more importantly your
7 interaction with the Department of Justice
8 specifically leading up to the denial of the first
9 application. But, before going there, I'd like to
02:04 10 sort of go through some of the background.

11 And I know you've testified
12 with respect to your involvement in this when you
13 assumed responsibility for it in March of 1986,
14 and I think your evidence was that you were
02:04 15 part-way through your articles for call to the Law
16 Society Bar, the Bar Admission Course for call to
17 the Law Society of Manitoba as a barrister and
18 solicitor?

19 A Yes.

02:05 20 Q That you had changed firms and come over to the
21 Wolch, Pinx law firm?

22 A Yes.

23 Q And you were there articulated to whom?

24 A Sheldon Pinx I believe was my direct superior.

02:05 25 Q And you said that you got involved in this case



1 when Mr. Wolch or someone on his behalf dumped a
2 fair amount of materials in a board room or in a
3 room somewhere within the offices of Wolch, Pinx?

4 A In effect, yes.

02:05 5 Q And you were assigned that responsibility to start
6 preparing an application under then section 617 of
7 the Code?

8 A No, I wouldn't say that. I don't think we knew
9 where we were headed when the material first
02:06 10 arrived.

11 Q Okay. And with respect to that material, we've
12 heard, and you've been examined on this at length,
13 that -- and we've heard from Mrs. Milgaard that
14 she turned over every scrap of paper she had,
02:06 15 those were her words, and the first question that
16 I have with respect to that is do you recall -- I
17 know you've given testimony with respect to
18 generally what you received, but do you have any
19 more specific recollection of what it was she was
02:06 20 turning over to you? Did you review it, was it
21 catalogued, did you have someone assisting you?
22 Can you sort of answer those questions for me?

23 A I think we got the information -- we got a bulk of
24 information at the outset. I think we got more
02:06 25 information when Peter Carlyle-Gordge came back



1 from England at some point. I think there was --
2 it was staggered in some respects. No, I had no
3 one assisting me, and no, it was not well
4 organized, if at all.

02:06 5 Q Did you endeavour to try to organize it in some
6 form so that it was usable for your purposes?

7 A I tried, yes.

8 Q And do you recall what was in there? We've heard
9 reference to a portion, in fact, Ms. Knox examined
02:07 10 you on it today, a portion of the file of
11 Mr. Tallis that was in the possession of Mr. Young
12 and materials that were duplicated by her and
13 included in the information she gave you?

14 A I don't have a specific recollection of that being
02:07 15 in the material.

16 Q Was this to be your exclusive responsibility apart
17 from your bar admission duties; that is, the bar
18 admission course itself?

19 A No, not at all. I was expected to build a
02:07 20 practice.

21 Q Okay. And you started out with that in mind?

22 A Yes.

23 Q And during the course of your preparing -- well,
24 when you reviewed it and when the application was
02:08 25 subsequently made in late December of 1988, how



1 long did it take you on a review of those
2 materials that you had to make a determination
3 that there was something wrong with the process as
4 you saw it?

02:08 5 A I can't be specific about that, but I had read the
6 trial transcripts pretty early on and it didn't
7 make sense to me.

8 Q Okay. And the trial transcripts were part of the
9 materials that had been turned over to you by Mrs.
02:08 10 Milgaard?

11 A I say they must have been because that's how I
12 began.

13 Q Okay. And were you also aware at the time that
14 you started looking at this that there had been a
02:08 15 form of 617 application made by David Milgaard
16 himself?

17 A I actually saw that as I was scanning some of the
18 material that's before the Commission. No, I
19 don't think I was aware.

02:09 20 Q I would like to show you the first of the
21 documents if I could, Mr. Asper, and that's
22 333272, a letter dated January the 28th of 1986
23 directed to John Crosbie who was then the Minister
24 of Justice. If we can just bring that up. Can
02:09 25 you read that?



1 A Yes, thank you.

2 Q Now, this particular document appears to be the
3 first document that initiated this process of
4 contact with the minister and it appears to have
02:09 5 been done by David Milgaard directly from his
6 prison cell. Am I accurate in that?

7 A It looks to be, yes.

8 Q Okay. And when did you first see this particular
9 document; do you know?

02:09 10 A I don't recall specifically seeing it. As I say,
11 when I was scanning some of the documents to
12 prepare to come back, I don't know that I ever saw
13 that.

14 Q So it may be a document that, in fairness, never
02:10 15 went to you, although I notice at the bottom of
16 it, and I'm not sure what this means, it's got
17 Fifth Estate, CBC, and then it also has legal, if
18 you can see it there?

19 A Yeah. David kept a file, as did his mother, that
02:10 20 they called legal.

21 Q So that legal doesn't refer to a lawyer or
22 anything of that nature to your knowledge?

23 A Not to my knowledge, no.

24 Q And if we can move on then, you'll see the reply
02:10 25 from Mr. Crosbie's office and that is 333268, if



1 we can see that, please, and we can see, Mr.
2 Asper, that this is a response that David Milgaard
3 received directly from the Minister of Justice, or
4 on behalf of the Minister of Justice, and it's
02:10 5 signed by Henry S. Brown, executive assistant --

6 A Yes.

7 Q -- on page 2. And you'll note that, if I can go
8 back to page 1, please, if I can highlight the
9 third paragraph, please, it says:

02:11 10 "On receipt of an application for mercy,
11 the Minister of Justice has the power to
12 order a new trial or appeal proceeding.
13 In an appropriate case..."

14 And so on.

02:11 15 "These very special prerogatives are
16 granted only rarely, in the most
17 compelling circumstances which suggest
18 that there has been a miscarriage of
19 justice."

02:11 20 And the next paragraph, please.

21 "If you have not exhausted the court
22 process --"

23 Which I understand to be a condition precedent to
24 filing one of these applications? Am I accurate
02:11 25 in that, Mr. Asper?



1 A Yes.

2 Q You have to have exhausted all court processes?

3 A Right.

4 Q "-- you should do so."

02:11 5 Then it goes on:

6 "The following must be sent to the
7 minister: a brief fully detailing why
8 you say there was an injustice; copies
9 of transcripts of the preliminary
02:11 10 hearing and trial; copies of any
11 judgments and reasons for judgment that
12 were issued in your case; copies of any
13 written arguments filed by the Crown and
14 defence. On receipt of this material,
02:11 15 your application will be duly
16 considered."

17 And you'll notice that one of the people to whom
18 it's copied is S.R. Fainstein who was then, we're
19 told by Mr. Williams, in charge of reviews of
02:12 20 this nature?

21 A Right.

22 Q And you know Mr. Fainstein personally?

23 A Yes.

24 Q And Mr. Wolch knew him from their association with
02:12 25 Justice in Winnipeg?



1 A Yes.

2 Q Now, this particular document in response to the
3 letter -- this is dated March the 11th, 1986
4 acknowledging Mr. Milgaard's letter. When did you
02:12 5 see this letter?

6 A I must have seen it, but I don't have a specific
7 recollection of seeing it.

8 Q You'll agree with me that its contents are
9 somewhat informative, and the reason why I'm
02:12 10 asking this question is your evidence earlier on
11 was that you didn't have the faintest idea as to
12 what one of these applications involved. Am I
13 quoting you accurately?

14 A Yes.

02:12 15 Q Okay. And you'll agree with me that if you had
16 seen this, it does give you some small insight
17 into what the minister expects to receive on an
18 application?

19 A Yes.

02:13 20 Q Am I correct?

21 A Yes.

22 Q But you don't know when you saw it, you may have
23 seen it?

24 A Or if.

02:13 25 Q And --



1 A Or if.

2 Q Or if you saw it?

3 A I just, and I go back to -- well, I don't want to
4 speculate where you are going, but I go back to
02:13 5 what we actually submitted in our application, and
6 my recollection is that Mr. Wolch was speaking
7 directly with Mr. Fainstein about what one needed
8 to submit.

9 Q So when you say you didn't have the faintest idea,
02:13 10 Mr. Wolch may have had more than a faint idea as a
11 result of discussing this with Mr. Fainstein?

12 A Yes, and I think that's what gave rise to the form
13 of the application that we submitted.

14 Q You think that's as a result of his discussions
02:13 15 with him?

16 A Yes.

17 Q Okay. And just going back to that, what was your
18 relationship with Mr. Wolch on this application;
19 in other words, what did you see your
02:14 20 responsibilities as or what did he say your
21 responsibilities were and who was he contacting to
22 your knowledge and what sort of information was he
23 passing back to you in the early stages of this
24 proceeding?

02:14 25 A My role initially was to go through what Joyce had



1 brought us and to give him a sense of what was
2 there and an impression on the case itself. I
3 can't say the contact that Mr. Wolch was having
4 with the Department of Justice other than I knew
02:14 5 he was having various conversations. He then
6 advised that we would have to find something new
7 in terms of, something of evidentiary value that
8 was new and said see what you can find.

9 Q Were you ever aware at any stage with respect to
02:15 10 what Mr. Merchant, Tony Merchant had said about
11 what -- was there any correspondence or any
12 information that came to your attention that Mr.
13 Merchant had said was required on a 617
14 application? We know in the early '80s that Mrs.
02:15 15 Milgaard went to him for advice after Mr. Young.
16 Do you recall being told --

17 A No, I don't, I don't recall.

18 Q Okay. The next document is 333266 and this is a
19 document dated April the 2nd of 1986 and it's from
02:15 20 David Milgaard and he's there advising in the
21 first paragraph that:

22 "I am aware of how to proceed legally
23 and have a reputable solicitor, Mr.
24 Hersh Wolch presently retained."

02:15 25 He goes on near the bottom:



1 "I should be allowed to show a
2 demonstrable injustice when it's
3 possible to show it. It will eventually
4 get to you through a Ministerial
02:16 5 presentation."

6 So David Milgaard is replying to the Minister of
7 Justice. Are you aware of the fact that he's
8 doing that at the time?

9 A No, and I think you'll find there were several
02:16 10 instances that I've been referred to in this
11 proceeding where there's been correspondence that
12 I didn't know anything about.

13 Q Okay. This is one such letter, you recall never
14 having seen it before?

02:16 15 A No, I don't.

16 Q Okay. And the next item I would like to look at
17 is 162432. This appears to be when you are at,
18 after review, which started in March of 1986, that
19 you are writing Peter Carlyle-Gordge and you are
02:16 20 at that time identified as a graduate of law and
21 you say near the bottom of the first paragraph:

22 "I am trying to see Mr. Milgaard on a
23 weekly basis as he is now at Stony
24 Mountain Institution and hope that
02:17 25 within the next few weeks I will have a



1 firm grasp of the whole case."

2 So it appears that by June the 5th of 1986 you
3 are advising Mr. Peter Carlyle-Gordge that your
4 firm is acting and that you are still working on
02:17 5 getting a firm grasp of the case. So March to
6 June, at that point you can't say that you have
7 that firm grasp and you are suggesting that to
8 him at this stage?

9 A Yes, that's correct.

02:17 10 Q Okay. And then we know that following
11 considerably later after that, we have again --
12 well, we have a post application made in December
13 of 1988, we have a response from the then Minister
14 of Justice, Doug Lewis, that's 004868, you can
02:18 15 look at that, please, and what Mr. Lewis is
16 looking for, and this is after your application on
17 the first 617 application is filed, looking for
18 the entire transcripts of evidence and trial and
19 other items that they need. With respect to the
02:18 20 transcripts, your evidence is that you had those
21 in your possession, but they weren't forwarded on
22 on your first application in December of 1988; am
23 I accurate on that?

24 A That's correct.

02:18 25 Q And there's a request being made for that. And



1 then you see the next one is 182113 which is a
2 memorandum from Hersh Wolch to Heather and David.
3 That I assume is Heather Leonoff and yourself?

4 A Yes.

02:19 5 Q And it looks like in addition to attaching a copy
6 of this letter from the Minister of Justice, it's
7 Hersh Wolch saying that he wants to get things to
8 start moving; is that correct?

9 A Yes.

02:19 10 Q And what's his concern at that stage? Can you see
11 by looking at this as to what it is he's concerned
12 about?

13 A I can't say specifically. I think we were missing
14 some pages as I recall, we didn't have complete
02:19 15 information, and we had to track down bits and
16 pieces of it.

17 Q He's providing you information with respect to
18 Justice Tallis, Mr. Milgaard's lawyer. Did you
19 know that by that time?

02:20 20 A Yes.

21 Q And reference to Crown counsel named Fred Dehm,
22 and do you know what role he played? He was with
23 the AG of Saskatchewan.

24 A He may have helped us get the exhibits to Dr.
02:20 25 Ferris.



1 Q Okay. And the agent in Saskatoon is Audrey Brent
2 and Audrey Brent was the one that was assisting
3 you in that respect too?

4 A Correct.

02:20 5 Q This particular document appears to relate not
6 only to a response from the Minister of Justice
7 and Mr. Wolch's admonition to get this thing
8 moving, but it also has other issues attached to
9 it, including the identification of Mr. Tallis as
02:20 10 Mr. Milgaard's lawyer, the reference to Fred Dehm
11 and the agent being Audrey Brent?

12 A Correct.

13 Q Now if we can move on then, March 30th of 1989,
14 document 162408, and if we could just look at the
02:21 15 last paragraph, this is from yourself to Mr. Wolch
16 dated March 30th of 1989:

17 "Would you like me to draft a response
18 to that portion of the Minister's letter
19 or should we leave it until we provide
02:21 20 the Minister with all the documents that
21 he has requested (and that I have
22 ordered by letter dated March 30,
23 1989)?"

24 Do you know what it was that you had ordered by
02:21 25 letter? Do you have any recollection of that,



1 what that would be?

2 A I seem to recall that I asked the court in
3 Saskatoon to provide us with a variety of pages of
4 the transcript that we seemed to be missing,
02:21 5 that's what I may be referring to.

6 Q So what you are doing now is after filing the
7 application in late December of 1988, you are
8 marshalling some information that has been
9 requested that you don't as yet have and that's
02:21 10 missing from the documents that you have that you
11 are relying upon?

12 A Yes.

13 Q And we then have the memoranda from Mr. Wolch to
14 you dated April 3rd of 1989, 162407, and that
02:22 15 particular document is in reference to -- if we
16 could just bring that up, please:

17 "I feel we should draft a response
18 regarding Nicole John now. I don't
19 recall if it's in the unedited
02:22 20 presentation that we were going to send
21 or not, but I do think we should get it
22 ready so that we could either give them
23 everything at once or piecemeal if we
24 want to keep their interest up."

02:22 25 And do you know, this was sort of the piecemeal



1 strategy that was being employed at that time.

2 What is Mr. Wolch talking about in that

3 correspondence, that memo to you?

4 A Well, as I previously said, there was quite a

02:22 5 robust discussion about what we should file with

6 the original documents. I took the view that we

7 should be more fulsome in our discussion of the

8 facts, of the entirety of the case. I felt it was

9 important that bits and pieces that we said were

02:23 10 wrong ought to have been seen in the bigger

11 context of what I saw were the problems with the

12 case. Mr. Wolch took a different view and I

13 gather that he, in this memorandum, is now looking

14 for the detailed analysis of the Nichol John

02:23 15 evidence.

16 Q Right. But the idea of sort of the piecemeal

17 strategy, was that a strategy that was sort of --

18 I know you disagreed with that at the outset, but

19 it was ultimately agreed that you would keep the

02:23 20 application lean and provide information from time

21 to time when it either became available or was

22 requested; would I be accurate in that?

23 A Yes.

24 Q And this idea was so that you could keep the

02:23 25 Department of Justice interested in the



1 application?

2 A Yes.

3 Q By that time were you confident that they were
4 considering it at least, had you had any
02:24 5 indication by April of 1989?

6 A I think that we knew by then that we had opened
7 the door.

8 Q Do you know why you felt that way? Was there any
9 communication either to you or to Mr. Wolch about
02:24 10 that?

11 A There was a fair bit of informal communication,
12 certainly with Mr. Wolch and the senior members of
13 the department, and I can't be specific, but a
14 fair bit with Mr. Williams and I.

02:24 15 Q Now, was any of that, those discussions that were
16 taking place ever reduced to writing anywhere? Is
17 what we've seen sort of just a representative
18 sample of what the file likely contained?

19 A Mr. Frayer, I don't have my files, I don't know
02:24 20 what happened to them. I think at one point we
21 were keeping pretty good records, but I don't know
22 what happened to them.

23 Q Okay, thank you. Now, you said that sort of the,
24 there were no rules in place as such, but I
02:25 25 believe your evidence to be that when you started



1 this process on this application, that the rules
2 of conduct that applied were under the rules of
3 professional code of conduct and the rules of
4 ethics in journalism? You said there were no
02:25 5 rules for section 617 applications, but you said
6 that you were governed by the professional code of
7 conduct and that the journalists were governed by
8 the rules of ethics in journalism?

9 A Well, I may have said that, but there are rules
02:25 10 obviously under section 617 as to -- I mean,
11 there's a statutory provision.

12 Q Had you done any research in that respect, had you
13 looked at the Royal Prerogative of Mercy and made
14 some determinations as to what the law said about
02:26 15 them as to --

16 A Yes. I don't recall it, but we had done some
17 research to determine that that was the route that
18 we would take. There were a number of other
19 aspects that we considered as our alternatives.

02:26 20 Q Okay. You were in contact it seems with the
21 Buchan Derrick Ring law firm in Halifax, and
22 specifically Anne Derrick, and if I might just
23 bring up one document that you may recognize,
24 162392, please. It's not listed. If we can look
02:26 25 at this, Mr. Asper, this is dated October the 24th



1 of 1989. Now, we don't see the other side of
2 this, and that is the letter that you wrote to
3 Archie in August of, it appears, 1989. Can you
4 give us some background with respect to that
02:27 5 particular document and what it is that you are
6 looking for there? Do you recall? Have you seen
7 this letter before, obviously?

8 A I remember communicating with Ms. Derrick. I
9 think I met Professor Kaiser at a Federation of
02:27 10 Criminal Law Societies conference. We got to
11 talking because Ms. Derrick was at that point very
12 active in the Marshall inquiry and I was curious
13 as to their experience in 1982 through their own
14 reference process. I mean, I assume this is a
02:27 15 response to that.

16 Q Was this an attempt to get some assistance in what
17 you might next do in terms of the Milgaard
18 application? I mean, you had filed it already,
19 but is this one of the sources that you went to,
02:27 20 because it would appear from here that they
21 provided you with some information, Steven Aronson
22 and Douglas Rutherford, and evidence that was
23 given at the inquiry was sent to you to help you,
24 and can you recall in what context you were
02:28 25 looking for this information?



1 A I think I was trying to find out what to expect
2 through the process.

3 Q So this was one of the methods that you used to
4 find out whatever you could about the process
02:28 5 itself and what might assist you in furthering
6 David Milgaard's application?

7 A That's correct.

8 Q Okay. Is there any other information received
9 from them? I know there's a history of
02:28 10 correspondence which I won't go through, I was
11 curious to know what this related to, and there
12 was other correspondence back and forth because
13 you were both sort of working at common purposes,
14 they had David Marshall as their client, you had
02:28 15 David Milgaard as yours?

16 A Yes.

17 Q Okay. So this was sort of a legal camaraderie
18 that had some informational context to it too?

19 A Yes.

02:29 20 Q It helped you?

21 A Yes.

22 Q Thank you, that's fine with that document, thanks.
23 Now, the next place I would like to take you, Mr.
24 Asper, is the, just going back to this reference
02:29 25 to the code of professional conduct and your



1 earlier evidence in which, if I might take you to
2 that transcript, it's 25196 near the bottom, line
3 20, or line 16:

4 "There were no rules in the sense that
01:45 5 there was no proceeding, no formal
6 proceeding to which rules would attach,
7 i.e. rules of evidence. But, I mean, we
8 were very mindful all along of our rules
9 and conduct under the professional codes
01:45 10 of conduct, we hoped at all times that
11 the rules of ethics in journalism would
12 be applied by the media that were
13 ultimately invited into the case, and we
14 were bound by our conscience, what was
01:45 15 right and what was wrong."

16 Can you amplify in that, what you mean by that,
17 and in terms of we know that there's a code of
18 professional conduct which all lawyers must obey,
19 if I can put it in those terms, and that was
02:30 20 something that you were studying actually at that
21 time, weren't you, as part of the bar admission
22 course?

23 A Yes.

24 Q There was an ethics section --

02:30 25 A Oh, yes.



1 Q -- that involved the study of the code. And the
2 rules of ethics in journalism, and that's a little
3 less defined as I understand it, what were you
4 talking about at that time, what were the rules of
02:30 5 ethics, and journalism in a very general sense?

6 A Umm, I guess in a general sense it's actual
7 factual reporting, you know, we've talked about
8 this, headlines that fairly represent the story,
9 not using photographs for editorial purposes, that
02:31 10 sort of thing I would think is what I meant.

11 Q This is a fairly -- and in terms of the rules of
12 conduct of lawyers, as I understand it now, one of
13 their requirements is under the media provisions
14 of the code of professional conduct, is if you are
02:31 15 dealing with the media, you provide accurate
16 information and you expect that the media will
17 report it accurately, and I think your concession
18 is that at least in some cases it didn't appear to
19 be the case here from time to time?

02:31 20 A That's correct.

21 Q Okay. And just to go back to a couple of other
22 issues in terms of your preparation for the 617
23 application that was filed in the first instance,
24 you've given evidence with respect to the
02:31 25 preparation of the affidavit of Deborah Hall back



1 on November 23rd of 1986 and you've described how
2 that was prepared by you. Can you just sort of
3 elucidate on what process you went through with
4 that, because Deborah Hall wasn't physically in
02:32 5 the City of Winnipeg, so how was that affidavit
6 prepared again, if you can advise me?

7 A I believe I spoke to her over the telephone.

8 Q Right.

9 A Once or more than once obviously, I don't know.

02:32 10 Q Sure.

11 A She gave me the information, I wrote it up and
12 went to see her.

13 Q Okay. So that the affidavit, and I won't go to
14 it, but it's doc. ID 016600, is a document that
02:32 15 was prepared by you in your office based on a
16 conversation that you had with Deborah Hall, and
17 she was in Regina at the time; am I accurate on
18 that?

19 A I think so, yes.

02:32 20 Q And you prepared that affidavit in accordance with
21 information she gave you in affidavit form, took
22 it out to Regina and had her execute it there?

23 A Correct.

24 Q Okay. And that particular affidavit, was it
02:33 25 signed by her in the form in which you had



1 prepared it based on the conversation you had had
2 with her?

3 A Yes.

4 Q So it accurately reflected at that time her view
02:33 5 of the Milgaard proceeding?

6 A I would assume so, yes. She signed it.

7 Q She signed it, okay. They were her words put into
8 your words put in affidavit form, taken back and
9 sworn by her?

02:33 10 A That's correct.

11 Q And likewise with the preparation of David
12 Milgaard's affidavit which was done some two days
13 later on November the 25th of '86, that's doc. ID
14 301675, which I needn't see, that was prepared by
02:33 15 what method? What did you do?

16 A Pardon me?

17 Q What was the process in the preparation of David
18 Milgaard's?

19 A I don't specifically recall. He had a lot of
02:34 20 notes that he may have given me, I don't recall,
21 but he would have given me information, I would
22 have taken it back to the office, I would have put
23 it into the form of the affidavit and taken it
24 back to him.

02:34 25 Q Much in the same way as you did the Deborah Hall



1 one?

2 A Correct.

3 Q And can I ask you why it was that on the first
4 application David Milgaard's affidavit wasn't
02:34 5 filed along with the Deborah Hall affidavit and
6 the material relating to Dr. Ferris, why was it
7 not included in your first application?

8 A I believe the Deborah Hall affidavit was filed.

9 Q Yes, but I'm saying why wasn't his included.

02:34 10 A Oh, David's affidavit?

11 Q Yes.

12 A I can't answer that.

13 Q I mean, this was his application, I would have
14 thought that you might have -- some decision was
02:34 15 made that it wouldn't be filed with it? Were you
16 in favour of it and somebody else wasn't?

17 A I was give them everything.

18 COMMISSIONER MacCALLUM: I'm sorry?

19 A I was in favour of giving the Department of
02:35 20 Justice as much as we could.

21 BY MR. FRAYER:

22 Q And I think you've been asked this question
23 before, but I'll ask it again, you did become
24 aware of the fact that other lawyers had been
02:35 25 earlier involved in advising Joyce Milgaard and



1 David Milgaard on the 617 application, reference
2 to Gary Young and Tony Merchant, and I believe
3 your evidence was that you never spoke to either
4 of those two lawyers in advance of the preparation
02:35 5 of the application; am I accurate on that?

6 A I don't recall speaking with either of them.

7 Q You were aware of the fact that both of them had
8 earlier given advice though?

9 A I think, yes, at some point I must have become
02:35 10 aware. I just don't recall when.

11 Q Was a conscious decision made by somebody, either
12 yourself or someone else, not to contact them and
13 ask them what their thoughts were on the
14 application?

02:35 15 A I don't recall that.

16 Q Okay. And likewise with Cal Tallis, and we'll go
17 into this in greater detail, Mr. Tallis was never
18 approached by you until sometime after the first
19 application was filed?

02:36 20 A Mr. Wolch approached --

21 Q Mr. Wolch did?

22 A Right.

23 Q Okay. So -- but no explanation as to why that was
24 done after the fact as opposed to in advance of
02:36 25 it?



1 A I don't have an explanation for that.

2 Q Okay. Your evidence, too, was, if I've got it
3 correct, that between September of 1987 and May of
4 1988 you took a ten-month absence to go to the
02:36 5 family business, Global TV, I believe it was?

6 A That's correct.

7 Q And you were essentially away from anything to do
8 with Milgaard, to the Milgaard matter, during that
9 ten-month period?

02:36 10 A That's correct.

11 Q Okay. When you returned to the firm in May of
12 1988 do you know, do you have any recollection of
13 what stage the application was at, do you know
14 what had happened during the intervening ten
02:37 15 months while you were away?

16 A I don't recall.

17 Q Okay.

18 A I -- I don't recall.

19 Q Would it be safe to say that it hadn't moved very
02:37 20 far?

21 A Oh, that's -- yes, that was -- that was very
22 clearly my view, yes.

23 Q Okay.

24 A But I don't know what, specifically, had happened.

02:37 25 Q You don't know how far it hadn't moved?



1 A Right.

2 Q Okay. Now if I can take you to the next document,
3 Mr. Asper, is 337474. This is a document you
4 likely haven't seen before, and this is a document
02:37 5 of -- prepared by Eugene Williams, which is really
6 an outline of the chronology of events. It's
7 dated, as you can see, April the 23rd of 1992,
8 which is quite shortly after the Supreme Court
9 rendered its reasons.

02:37 10 A One week.

11 Q One week? Okay. And I'm going to take you
12 through this, and so bear with me, I don't believe
13 it's a document you've seen; am I accurate in
14 that?

02:38 15 A I actually did scan it --

16 Q Did you?

17 A -- as I was going through some of the documents to
18 prepare.

19 Q Okay. That's helpful. And Mr. Williams prepared
02:38 20 this and it's headed:

21 "The following is a chronology of events
22 concerning David Milgaard's application
23 under Section 690 of the *Criminal Code*."

24 And why I want to go through this with you is, in
02:38 25 my view, it's a good synopsis -- and you may



1 disagree with that -- it's a good synopsis of the
2 chronology of events from the filing of the first
3 application December the 28th of 1988 to the
4 decision of the Supreme Court on April the 17th
02:38 5 of 1992. And in going through this, sir, I want
6 to ensure that, if there's anyplace that you
7 disagree with me in terms of what's reflected in
8 this, I'd appreciate your comment on it?

9 A Well I'll just say, and I know you are going to go
02:39 10 through it, but I'll just say that I can't -- I
11 don't have a specific recollection of the timeline
12 itself, so I really can't comment on any specific
13 date and what Mr. Williams says happened on that
14 date.

02:39 15 Q Okay.

16 A But let's go through it.

17 Q And I think it's helpful to see just how the
18 process worked from the Justice side, according to
19 what Mr. Williams has prepared here, and what
02:39 20 effect new evidence coming to light had on the
21 progress of David Milgaard's application. So --

22 A Well the one thing, I have to say that the one
23 thing that interested me about this, and it ties
24 into a background paper I think done by Phillip
02:39 25 Rosen who's a policy analyst at the Department of



1 Justice -- I'm not sure if that document is in
2 evidence before the Commission -- but it relates
3 to, it says that Mr. Williams -- or that the unit,
4 the wrongful conviction unit, had seven lawyers
02:40 5 that were involved with wrongful, considering
6 wrongful cases, and this chronology that you are
7 showing me didn't relate to who was getting the
8 information, who was dealing with the information,
9 so I'm just assuming that this is Mr. Williams'
02:40 10 own dealings?

11 Q Yes.

12 A Okay.

13 Q Yeah, I am instructed that it is prepared by Mr.
14 Williams.

02:40 15 A Of his own activities?

16 Q Essentially his own. I mean, you'll see the
17 interaction between -- I mean the first is the
18 original application is filed and so on so --

19 A Right.

02:40 20 Q So if we can just go through this, I'll try get
21 through this --

22 A Okay.

23 Q -- in reasonable order, and ask you to -- and I
24 know, I appreciate your observation that it's
02:40 25 difficult to be certain about the chronology, and



1 I'm not -- it's not a test to see whether you can
2 remember when these specific events occurred, but
3 you will see that insofar as the first application
4 is concerned, that we know was filed on December
02:40 5 the 28th of 1988, he sets out the two bases for
6 relief. Then on February the 16th of 1989 --

7 A I would just -- but okay, but there again, and I
8 will comment there because I had opportunity to
9 read both -- or reread our application --

02:41 10 Q Yes.

11 A -- and Mr. Williams' evidence before the Inquiry.
12 And Mr. Williams noted, and the letter, our letter
13 contains what I think Mr. Williams referred to as
14 a 'tease' on the Nichol John evidence, and so the
02:41 15 application itself actually -- and I want to be
16 very clear on this -- was -- I might have written
17 it differently, but it certainly was clear that
18 there were other issues that were raised within
19 the application, and certainly Mr. Williams took
02:41 20 that to be the case. So I understand what's being
21 said here, because the document itself says
22 "here's two things", but actually in the body of
23 the letter it --

24 Q It sets out more?

02:41 25 A -- it sets out more.



1 Q Okay. But you'll agree that, I mean, that the
2 primary basis, the primary focus on the first
3 application was what Deborah Hall had said about
4 Melnyk and Lapchuk, and the Ferris evidence that
02:42 5 appeared to exonerate David Milgaard?

6 A Well if I had to pick the two, as of -- if I look
7 at the document itself, I think in the prayer for
8 relief it specifically only argues Dr. Ferris --

9 Q Yes.

02:42 10 A -- on page 3 of the application itself.

11 Q And February the 16th of 1989:

12 "The Minister requested ... to provide
13 ... trial and appellate record, the
14 forensic reports, ... waiver of
02:42 15 privilege ...",
16 and so on?

17 A Yes.

18 Q And then on April the 29th that waiver of
19 privilege was sent in response to the departmental
02:42 20 request. And then on May 8th, 1989:

21 "The trial and appellate record were
22 sent by counsel for Milgaard."

23 June 6th of '89:

24 "Departmental counsel requested access
02:42 25 to the trial exhibits in Milgaard case."



1 August 8th of '89:

2 "At the request of the Department,
3 Ms. P.M. Alain, Chief Scientist,
4 Serology, R.C.M.P. Forensic Laboratory
02:43 5 submitted her analysis of Dr. Ferris'
6 report."

7 You can't comment on that, other than that's an
8 after-the-fact -- that became -- you became aware
9 of that at some later stage considerably after?

02:43 10 A Well, I want to comment specific on that, --

11 Q Yeah?

12 A -- because Mr. Williams, in his evidence,
13 suggested that I had that in my possession and
14 that, with that knowledge, I went out and
02:43 15 continued to mislead the media. Mr. Williams is
16 badly mistaken on that.

17 Q Okay.

18 A That information may have come to us in the course
19 of the in-person meeting, but at no time that I
02:43 20 recall did Mr. Williams ever disclose that report
21 to us prior to that meeting.

22 Q And the in-person meeting you are talking about is
23 the one on October the 1st of 1990, the one that
24 was held in Ottawa?

02:43 25 A Umm, I guess if that's the date, yes.



1 Q Yes, okay.

2 A And it may not even have been at that meeting, it
3 may have been at the next meeting after the
4 rejection of the first application, I don't
02:44 5 specifically recall.

6 Q Yeah, there was a November -- to my recollection
7 from the facts there were two meetings; October
8 the 1st of 1990 and November the 11th of 1991?

9 A Right.

02:44 10 Q The second meeting was in advance of the Supreme
11 Court reference?

12 A Right.

13 Q The first one -- and I'm, we're gonna get to some
14 of the details of that, there is very little
02:44 15 record of it, it appears, but I'll ask you
16 questions relating to that at --

17 A Okay.

18 Q -- a later stage.

19 A Okay.

02:44 20 Q But, in any event, you've made your observation.
21 All that Mr. Williams is saying here, and of
22 course in this outline he says nothing with
23 respect to how -- the dissemination of the Alain
24 report?

02:44 25 A Right.



1 Q Okay?

2 A Right.

3 Q Then we have August the 29th of 1989, the:

4 "Affidavit of David Milgaard forwarded
02:44 5 by counsel for the applicant; also, ..."
6 at that time:

7 "... counsel ... sought information from
8 the Department."

9 And do you recall the circumstances under which
02:45 10 the David Milgaard affidavit was forwarded, why
11 at that stage?

12 A I don't know.

13 Q Then you wouldn't know anything about the next
14 issue, September the 8th of 1989, this is the --
02:45 15 this is the feasibility of conducting the DNA
16 analysis on the trial exhibits. And on October
17 the 2nd of 1989:

18 "Counsel for Milgaard wrote to ask for a
19 status report on the Departmental
02:45 20 review."

21 Now, according to the record, that appears to be
22 the first time that there had been communication
23 with respect to what's going on, so to speak, a
24 --

02:45 25 A I think --



1 Q -- formal --

2 A I think August 29th:

3 "Also ...",

4 where Mr. Williams says:

02:45 5 "... also, counsel for Milgaard sought
6 information from the Department." --

7 Q Ah, yes.

8 A -- may refer to what is going on, and there was
9 plenty of telephonic conversation.

02:45 10 Q Okay. Okay. October 11th of 1989:

11 "A status report was prepared and
12 forwarded to counsel for Milgaard, and
13 Mr. Wolch was told of his client's
14 desire to provide the Minister with a
02:46 15 family presentation as part of the
16 application."

17 Do you recall receiving that particular document
18 or seeing that document?

19 A Not specifically, no.

02:46 20 Q The status report?

21 A No.

22 Q Perhaps we could bring that up, if you could, it's
23 157023 is the number I have recorded for it now.
24 I hope I'm accurate in that respect. 157023. Now
02:46 25 this is the one from Mr. Williams, okay, this is



1 the status report.

2 "I am writing in reply to
3 your letter of October 2, 1989,
4 concerning David Milgaard's application
02:46 5 ...

6 For your information, I am
7 also enclosing the most recent
8 correspondence from Mr. Milgaard. In it
9 he re-iterates his intention to submit a
02:47 10 presentation as part of his application
11 to the Minister."

12 I believe that's the family presentation that we
13 will --

14 A This letter rings a bell, yes.

15 Q That --

16 A This letter rings a bell, yes.

17 Q "Armed with this information it
18 would be premature to conclude our
19 investigation at this time. Further, I
02:47 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 record is concluded, the Minister will
02:47 25 exercise his discretion. It would be



1 premature for me to speculate on the
2 timing of these events.

3 I would be happy to discuss
4 any further submissions you may wish to
02:47 5 make on your client's behalf when you
6 are in Ottawa at the end of November."

7 That particular meeting the end of November of
8 1989, I don't believe, ever took place?

9 A I --

02:47 10 Q To your recollection, there were only two
11 meetings?

12 A That's my recollection, yes.

13 Q This particular letter you recall having seen
14 before?

02:47 15 A I can't recall specific recollection, but it rings
16 a bell.

17 Q It rings a bell? Okay. And we'll go at a later
18 stage, too, to the family presentation. But
19 October 18th of 1989:

02:48 20 "Counsel for Milgaard advised that he
21 had uncovered new evidence relating to a
22 member of David Milgaard's jury.
23 Counsel undertook to pursue it and
24 advise the Department in due course."

02:48 25 That's the Fern --



1 A Mr. Cooney.

2 Q -- Fern Cooney information? Okay. And then we
3 see that November 6th to 8th of 1989 Mr. Williams
4 conducted a series of interviews of Deborah Hall,
02:48 5 Justice Tallis, Nichol John and Dr. Emson, and
6 then this is his observation:

7 "(A ... Departmental report was prepared
8 in November/December, 1989. It was not
9 pursued due to the events described
02:48 10 below.)"

11 And the next date recorded there is January the
12 10th of 1990, that's document 001140, if I could
13 have that please. 001140. Very difficult to
14 read. That's about as good as it gets? Okay.
02:49 15 We -- I don't think that will assist us very
16 much, Mr. Asper, in terms of the way it's
17 unreadable, illegible, whatever.

18 In any event, this letter of
19 January the 10th, 1990 is -- it says:

02:49 20 "Counsel for Mr. Milgaard wrote to the
21 Department. He advised that he would
22 like to develop the evidence further,
23 and to refine his submission, but lacked
24 financial resources to do so. He
02:49 25 enquired whether the Department could



1 provide those resources to enable him to
2 physically portray the Crown's theory of
3 the case."

4 My understanding that there were never any
02:49 5 financial resources?

6 A No.

7 Q No.

8 A We were denied by your department, as well as by
9 Legal Aid Manitoba and Saskatchewan.

02:50 10 Q Yeah. You likewise sought --

11 COMMISSIONER MacCALLUM: 226239.

12 MR. FRAYER: Okay, thank you.

13 MR. HODSON: A different version of it.

14 COMMISSIONER MacCALLUM: Different version
02:50 15 of what, 001140?

16 MR. FRAYER: 239? Okay.

17 MR. HODSON: What was the first doc. ID
18 that you had put up?

19 MR. FRAYER: I had 001140.

02:50 20 MR. HODSON: And this is just a better
21 version of that.

22 COMMISSIONER MacCALLUM: Okay.

23 BY MR. FRAYER:

24 Q This is a better version? Okay. And if we could
02:50 25 just go to page 2, yeah, it's prepared by Mr.



1 Wolch?

2 A Yes.

3 Q Okay. If we can just go back to page 1. Are you
4 familiar with this letter, Mr. Asper, do you have
02:50 5 any --

6 A I am, and I think you need to appreciate the
7 context.

8 In the discussions that we had
9 been having, the informal discussions that we had
02:51 10 been having, I think by this point we had a pretty
11 good sense that we were in trouble and that the
12 department had taken -- I will be charitable -- a
13 dim view of our application, and that we needed to
14 try to do more and sort of try to keep the
02:51 15 department on the hook, and this was part of what
16 we did.

17 Q And then January the 23rd of 1990:

18 "Counsel for Mr. Milgaard wrote to the
19 Department. He provided additional
02:51 20 information concerning the application
21 and sought funds to continue his own
22 investigation."

23 And then, of course, we have the disclosure of
24 the important new evidence that he makes
02:51 25 reference to, February the 28th of 1990, which is



1 the identification of Larry Fisher?

2 A Yes.

3 Q Insofar as the time, the observation that Mr.
4 Williams makes with respect to what occurs before
02:52 5 January the 10th of 1990, he said a preliminary
6 report was prepared, not pursued due to the events
7 described below. Would you agree that, if that
8 report was prepared by him but there was a
9 further, a further request to develop the evidence
02:52 10 further, that it made sense that he would stop at
11 that point and get whatever new evidence you could
12 develop further?

13 A Yes.

14 Q So it made sense that -- and this, of course, goes
02:52 15 to --

16 A Well it made, yes, it made sense from his
17 perspective. It didn't make sense from my
18 perspective because, as I'm sure we'll get into,
19 my expectation was that he was going to be doing
02:52 20 what we were doing.

21 Q Sure. But in the same --

22 A But I understand it makes sense from his
23 perspective, sure.

24 Q But in the same respect, if you had been asked --
02:52 25 if you had asked to have the opportunity to



1 develop the evidence further because you were of
2 the view that the Department of Justice was taking
3 a dim view, had Mr. Williams said "no, we're not
4 accepting anything further, I've got a
02:53 5 departmental report prepared, it's going to the
6 minister, he will make a determination at some
7 later stage", you would be critical of that too?

8 A Sure.

9 Q That --

02:53 10 A No, it was a good thing that he deferred the
11 report that was going up.

12 Q It appears so.

13 A It was a good thing, it was lucky, it was a good
14 thing.

02:53 15 Q Yeah. Okay. And then, of course, the information
16 relating to Larry Fisher comes forward, and we'll
17 go into that in some detail, specifically how it
18 involves Sergeant Pearson at a later stage of my
19 questions. But this information was given, and
02:53 20 he's put it in these terms:

21 "Counsel for Milgaard advised that he
22 had discovered important new evidence -
23 namely, Larry Fisher whom he identified
24 as the real killer."

02:53 25 Once again:



1 "... he sought money ... asked the
2 Government to pursue it."

3 And then a note:

4 "(The Department pursued this aspect of
02:54 5 the investigation. On March 1, 1990 the
6 R.C.M.P. were asked to investigate these
7 allegations; separately the Department
8 also requested the Saskatoon Police to
9 respond to written inquiries on March 1,
02:54 10 1990.)"

11 Now we all know that this is a very pivotal step
12 in the process, at least from your point of view,
13 and once again it's reasonable to assume that the
14 next steps would have to be taken by Mr. Williams
02:54 15 and Sergeant Pearson with respect to this
16 investigation, we know of the concurrent
17 investigation going on with Mrs. Milgaard and so
18 on, but -- and we'll go through this in some
19 detail, hopefully, later on.

02:54 20 March 15th of 1990:

21 "Counsel for Milgaard wrote to the
22 Department, providing further new
23 information. He advised that he was
24 "pleased" that the R.C.M.P. were
02:55 25 investigating the case and noted that he



1 felt that "there are many leads that
2 ought to be pursued" by the Government.
3 He provided an assurance that he would
4 assist the Department in its review."

02:55 5 And I believe you're the author of that; is that
6 accurate? I believe so.

7 A Yes, I think so.

8 Q I have document ID 050467, whether that -- yes,
9 this is the letter of March 15th of 1990 where you
02:55 10 provide information with respect to the background
11 of Mr. Fisher?

12 A Yes.

13 Q The offence dates and so on?

14 A Yes.

02:55 15 Q Okay. And then, if we can go on then, please.
16 March 18th of 1990, we can go back to the page
17 337476 of that synopsis, thank you. We have March
18 18th of 1990:

19 "Departmental Counsel ...",

02:56 20 A I have to tell you --

21 Q Yes?

22 A -- sorry, I hate to interrupt. I have to tell you
23 that:

24 "Counsel for Milgaard wrote to the
02:56 25 Department, providing further new



1 information."

2 has to qualify as a bit of an understatement

3 given what was in that letter.

4 Q Okay. Appreciating that this is a synopsis, of
02:56 5 course, that --

6 A I understand that. I understand that.

7 Q A chronology, a chronological synopsis, and it's
8 one person's word.

9 A Well --

02:56 10 Q I must tell you that Mr. Williams hasn't testified
11 with respect to this document.

12 A Okay.

13 Q I expect that Mr. Hodson will be going through it
14 with him at some later stage, but --

02:56 15 A Okay.

16 Q And I suppose, at that time, there can be an
17 opportunity to ask questions as to how he has sort
18 of summarized it in the way he's done it.

19 A Okay.

02:56 20 Q But bearing in mind that it's synoptic, that it's
21 a chronology, it's his interpretation.

22 A Well, "further new information" is three words,
23 "Fisher's criminal record" is three words, but I'm
24 not going to quibble.

02:57 25 Q Okay. Then it's late March of 1990:



1 "The Department sought 'final
2 submissions' from counsel for the
3 applicant."

4 April 2nd of 1990:

02:57 5 "'Final' submissions were forwarded by
6 counsel for Milgaard and were received
7 on April 10, 1990."

8 On April 17th of 1990:

9 "Sgt. Pearson sent his report that
02:57 10 outlined his investigations of Larry
11 Fisher."

12 We can look at that document of April the 2nd of
13 1990, I have it as 010045. This isn't very
14 readable either, but if we can go to page 2 to
02:57 15 see who's the author of this, and it is you Mr.
16 Asper?

17 A Yes.

18 Q Yeah. This is a -- go back to page 1, please --
19 this is your response to the request by Mr.
02:58 20 Williams for final submissions?

21 A Yes.

22 Q And then if we go back to 337476, or that page,
23 please. Thank you. It says:

24 "(In April, 1990 the Departmental report
02:58 25 to the Minister was once again prepared



1 in draft, but was abandoned due to the
2 events described below.)"

3 And here we have the events that follow your
4 retention of Dr. Markesteyn to get his report,
02:58 5 it's May 1st of 1990:

6 "Counsel for Milgaard retained the Chief
7 Medical Examiner for the Province of
8 Manitoba to conduct a second forensic
9 examination of certain important
02:58 10 evidence."

11 And now it's very clear again, once again, that
12 because of that fact the departmental report,
13 according to Mr. Williams' synopsis, was
14 abandoned. And, once again, it's clear that you
02:59 15 wouldn't have wanted him to provide that report
16 to the minister when you had further submissions
17 to make, in this case a report from Dr.
18 Markesteyn --

19 A That's correct.

02:59 20 Q -- that you expected would assist you on the
21 application? So --

22 A That's correct.

23 Q So the observation is accurate that Mr. Williams
24 couldn't proceed with the report because there was
02:59 25 new information that was forthcoming?



1 A Yes, I understand that was his position, yes.

2 Q Yeah. That was May 1st. May 15th of 1990:

3 "The Department provided information

4 ..." --

02:59 5 A I just want to be clear; you are asking me what
6 his position was?

7 Q Well I am saying that the observation he makes
8 about abandoning the departmental report at that
9 stage because of the receipt of information
03:00 10 relating to a report from the chief medical
11 examiner for the Province of Manitoba, it was a
12 sort of a logical action taken by him at that
13 stage because he would want to wait, at your
14 request essentially, for that additional report to
03:00 15 be prepared?

16 A Umm, I'm pretty sure that we were arguing at the
17 time that, having delivered the true -- what we
18 thought was the true perpetrator of the crime,
19 that nothing further need be done. Now I
03:00 20 understand why, in aid of the completeness of the
21 file, Mr. Williams did this, but our position at
22 the time was that enough was enough.

23 Q Yeah. Except that something further was being
24 done, and that was your attempting or seeking --
03:00 25 not attempting to, but seeking your report, an



1 expert report from Dr. Markesteyn. So it's
2 reasonable to assume that he would have held off
3 until that report came because --

4 A I don't believe -- no, I disagree. I think, in
03:00 5 our mind at the time, we had identified the true
6 killer. What did Mr. -- what did Dr. Markesteyn's
7 report -- now we had commissioned it, --

8 Q Yeah?

9 A -- but what could that possibly add?

03:01 10 Q Well, I suppose that's the question I'm asking.

11 A Well -- well --

12 Q What could that possibly add? If you say that you
13 are going to have a report prepared and Justice
14 says "well we'll await receipt of that report
03:01 15 before doing anything further with respect to a
16 departmental report to the minister", it would
17 make sense for them to wait? They thought it,
18 obviously would have thought it was important
19 enough, if you were seeking it, it was important
03:01 20 enough to wait for it; would you agree with that?

21 A No. Well our view all along was, as I said, the
22 department had taken a dim view of our application
23 and I suspect our -- what was in our mind at the
24 time was, in effect, that we would try to pile on
03:01 25 a little bit.



1 Q Okay.

2 A But that the Fisher evidence, in and of itself,
3 was sufficient to act under 690 or 617, whatever
4 it was.

03:02 5 Q It sort of goes from keep it lean to pile it on?

6 A Well, it just started coming.

7 Q Okay. In any event, May 15th of 1990:

8 "The Department ...",

9 meaning the Department of Justice:

03:02 10 "... provided information to the Chief
11 Medical Examiner to assist him in his
12 review."

13 May 17th:

14 "... sought and received an assurance
03:02 15 that it would receive a copy of Dr.
16 Markesteyn's forensic report."

17 And that was an assurance given by you, I
18 believe, wasn't it?

19 A I believe so, yes.

03:02 20 Q And June the 5th of 1990:

21 "Counsel for Milgaard forwarded the
22 report of the Chief Medical Examiner
23 dated June 4, 1990."

24 So there is an interchange between May 1st and
03:02 25 June 5th that results in the receipt of the



1 report by the Department of Justice, but surely
2 you are not suggesting at that stage that they
3 should ignore that report and just move on with
4 preparing the departmental report relying on the
03:03 5 evidence relating to Larry Fisher?

6 A Well I mean, Mr. Frayer, my view was that the
7 department should have acted on the first
8 application with the first information that we had
9 provided. My -- if -- and if I was then told that
03:03 10 that information had somehow changed or was
11 tainted by other information that the department
12 had obtained, the Fisher information that we had
13 submitted in and of itself should have caused this
14 case to be re-opened, was my view.

03:03 15 Q Yeah, that's, that's your argument, that was your
16 position?

17 A That's my opinion, yes. And so I found all of --
18 I found the argument that the decision was delayed
19 because we kept unraveling the case and kept
03:03 20 giving more information that unraveled the case
21 was a bit unfair to the person who was sitting in
22 prison.

23 Q Well, that may be the case, but in each instance
24 it would appear that, as you provided new
03:03 25 information, Justice stopped and moved into



1 investigating that new information or considering
2 that new information, in this case the Markesteyn
3 report, to the extent that we know that Mr.
4 Williams interviewed Dr. Markesteyn and came to
03:04 5 certain observations with respect to the contents
6 of that report which was being submitted in
7 support of the Ferris information?

8 A But the problem, the problem, Mr. Frayer, was that
9 our impression was, at every step of the way, was
03:04 10 that the department was not seeing our position
11 and was, in effect, rejecting our position. So
12 while it might be my opinion that the department
13 should have acted on the Fisher information in the
14 first application, it was our impression they
03:04 15 weren't, so we kept gettin' more.

16 Q Getting more? Okay. Because we do know that the
17 next thing that occurs is on June the 6th of 1990,
18 that you advised that you had identified another
19 witness that could assist in the application, and
03:04 20 that's Ron Wilson. So --

21 A Well by this time, just as the antecedent to this,
22 is that the -- we've got investigators. Centurion
23 Ministries had come on board and had agreed to
24 help us. So, yes, that -- and that led to the
03:05 25 next round of information.



1 Q Would you still take issue with the suggestion
2 that that's part of the reason why the Department
3 of Justice was delaying in preparing their final
4 report to the minister?

03:05 5 A I guess my issue, Mr. Frayer, is that I, obviously
6 wrongly, maybe naively, thought that this is what
7 the Department of Justice would do from the
8 outset, and as each piece fell away from the case,
9 I thought that those steps in and of themselves
03:05 10 could have justified intervention.

11 Q But the pieces falling away from the case, your
12 conclusion was that the department was taking a
13 dim view based on what information; do you know?
14 Was it something that was communicated to you?
03:06 15 Where does the dim view conclusion come from?

16 A Well, I can tell you, and I can't say specifically
17 because I don't have my files or the specific
18 recollection, I can just say that my recollection
19 in a general sense of all of my discussions with
03:06 20 Mr. Williams was that he was, he did not believe
21 that there was anything wrong with the Milgaard
22 conviction and he had prepped himself pretty
23 extensively to the point where we would have
24 discussions about individual factual -- and I
03:06 25 remember having these and I do recall him being



1 very quickly able to rebut everything that I was
2 saying and I just got -- maybe my impression was
3 wrong, but I just got the sense that he almost
4 treated us as though we were completely out to
03:07 5 lunch.

6 Q But you don't know where the dim view conclusion
7 comes from, that's just a --

8 A No, and we didn't -- other than sort of these
9 informal exchanges on, you know, individual little
03:07 10 pieces, we really had no sense, in a broad
11 perspective, of where the department was headed,
12 other than it just didn't smell good.

13 Q Okay. And then it goes on at the bottom of the
14 page:

03:07 15 "(The RCMP were asked to arrange for an
16 interview of this witness, and were also
17 asked to locate another witness that may
18 assist)."

19 And then on June 12th, 1990, and we'll get to
03:07 20 this letter in more detail at a later stage:

21 "Counsel for Milgaard wrote to the
22 Department, and sought additional facts
23 relating to the application. Counsel
24 also complained about the aggressive
03:08 25 questioning by the Department's counsel



1 when interviewing some witnesses."

2 That was your complaint about the conduct of the
3 interview of Deborah Hall and Linda Fisher?

4 A Well, it was her complaint that I was
03:08 5 communicating.

6 Q We'll get into that at a later stage, but in any
7 event, the next thing that occurs, June 18th of
8 1990:

9 "Departmental counsel went to Nakusp,
03:08 10 B.C. to interview Ronald Wilson. Mr.
11 Wilson via his counsel indicated that he
12 did not wish to be interviewed."

13 And I think part of that, and we'll get to that
14 at a later stage, Mr. Asper, was the suggestion
03:08 15 that witnesses had been mistreated by Mr.
16 Williams and that Mr. Watson wasn't enthusiastic
17 about his client being subjected to that? You
18 had --

19 A I'm not sure I --

03:08 20 Q You had a conversation with Mr. Watson about Mr.
21 Williams' treatment of other witnesses?

22 A I must have, I may have when we retained him, or
23 when we advised him that Wilson may need a lawyer,
24 yeah.

03:09 25 Q The likelihood is that you would be the source of



1 that though?

2 A I would think so, yes.

3 Q Okay. Because it's something that you had earlier
4 communicated to justice in a formal way?

03:09 5 A Right.

6 Q Then it's got June/July of 1990:

7 "Several witnesses, some of whom were
8 identified by counsel for Milgaard, were
9 approached by the Department. Two
03:09 10 retained counsel, and resisted being
11 interviewed. As Section 690 of the
12 *Criminal Code* lacks coercive powers to
13 examine witnesses, protracted
14 negotiations and discussions between the
03:09 15 Department and counsel for these
16 witnesses subsequently ensued."

17 That's his recitation of the difficulties he had
18 in setting up interviews of witnesses, one of
19 whom of course was Ron Wilson, who had been
03:09 20 interviewed and had recanted his testimony?

21 A Right.

22 Q And then there's July 5th of 19 --

23 A Well, but, Mr. Frayer, my recollection is that
24 prior to Mr. Williams going to Nakusp, or perhaps
03:10 25 it was Mr. Williams, somebody appeared at Wilson's



1 home unannounced and that spooked the process. I
2 don't think that's in this chronology.

3 Q No, it's not in the chronology, but we've heard
4 evidence with respect to what went on in terms of
03:10 5 the attendance at Nakusp.

6 A But that's not where in June, July, 1990, it says
7 two retained counsel and resisted being
8 interviewed. I'm not sure if Mr. Williams is
9 referring there to the unannounced visit to
03:10 10 Wilson's home.

11 Q Okay, yeah, and I'm not sure either. July 5th of
12 1990:

13 "Counsel for Milgaard wrote to the
14 Department and asked for our assistance
03:10 15 in obtaining Saskatoon Police Department
16 files concerning the person identified
17 as the real killer."

18 And then July he observes:

19 "...the Department sought,
03:11 20 unsuccessfully, to obtain all these
21 reports.)"

22 Do you take issue with that observation?

23 Although you don't know what they did, there's a
24 question as to whether any reports were available
03:11 25 at that time.



1 A I can't take issue with it, no.

2 MR. FRAYER: I'm wondering, Mr.

3 Commissioner, it's 10 after three. When do you
4 wish to take a break?

03:11 5 COMMISSIONER MacCALLUM: Well, we do go to
6 six o'clock, so do you wish to break?

7 MR. FRAYER: Yeah, perhaps if we could take
8 a break now.

9 COMMISSIONER MacCALLUM: All right.

03:11 10 (*Adjourned at 3:11 p.m.*)

11 (*Reconvened at 3:30 p.m.*)

12 BY MR. FRAYER:

13 Q I wonder if I might have transcript page 34736
14 brought up, please, just looking at -- if we can
03:32 15 bring up from line 15 downward, please. I just
16 thought, Mr. Asper, you said you've read Eugene
17 Williams' evidence that he's given to this point
18 and this is Eugene Williams testifying before this
19 inquiry on Thursday, the 22nd of June under
03:32 20 examination by Commission Counsel. It says, the
21 question -- maybe if we could just go up to the
22 question by Mr. Hodson:

23 "Q You said yesterday that you viewed at
24 one point that information or steps were
11:22 25 taken to make it very difficult on you



1 so that the easy thing to do would be
2 just to give up and give him a remedy,
3 or words to that effect?"

4 And Mr. Williams' response:

11:22 5 "A Well, what I said was that the
6 application by installments, coupled
7 with the media program, might have
8 persuaded someone to say, you know, just
9 let it go, because within a very short
11:23 10 period of time you had Larry Fisher, you
11 had Albert Cadrain, you had Dr.
12 Markesteyn, you had Ron Wilson, and not
13 having, not just having them, but there
14 were some fairly serious allegations.
11:23 15 You had the allegation that it was a
16 sloppy investigation, that we had been
17 sitting on our hands, that dog urine had
18 been used to link David Milgaard to the
19 offence, that the police had botched the
11:23 20 investigation and that they had coerced
21 witnesses. All of those allegations
22 were untrue, they were patently false,
23 but there was a succession of them and
24 we were not then ready to come public
11:24 25 with our findings because the -- because



1 the investigation had not been
2 concluded. One way to end it all would
3 have simply been to give up, send it to
4 the courts, send it somewhere, but give
11:24 5 a remedy. We chose not to do so."

6 Do you have any observations on Mr. Williams'
7 comment about this being an application by
8 installments, the influence of the media and all
9 these witnesses?

03:33 10 A Well, I think his comment that "all of these
11 allegations were untrue, they were patently false,
12 but there was a succession of them," it gives you
13 a beautiful window into the mind of Mr. Williams,
14 because all of the allegations in fact were not
03:34 15 false, and I happen to believe that it was Mr.
16 Williams' duty upon the initial application to
17 have taken all of the steps that we wound up
18 taking in order to get him the information that
19 wound up getting us the remedy we sought, or at
03:34 20 least some form of the remedy that we sought, so I
21 do take issue with Mr. Williams.

22 Q Certainly insofar as his view that this was an
23 application by installments, would you describe it
24 as that?

03:34 25 A Yes, that's the way it turned out, yes.



1 Q Okay, thank you. Now if we can just go back to
2 Mr. Williams' summary if we could, Mr. Asper, and
3 we were at the observation at the middle of page
4 337477 and that is July 12th of 1990:

03:34 5 "One of the witnesses --"

6 A I hope you are going to come back to that excerpt
7 in the transcript because, as I say --

8 Q What's that?

9 A I hope you are going to come back to that excerpt
03:35 10 in the transcript, because boy, does it ever give
11 a window into the mindset.

12 Q I hadn't intended to. I have your observation,
13 it's there, it's part of the record.

14 A Good.

03:35 15 Q And you disagreed with it.

16 A Good.

17 Q We have July 12th, 1990:

18 "One of the witnesses, the alleged
19 killer was interviewed by the Department
03:35 20 at the Regional Psychiatric Facility in
21 Saskatoon."

22 July 20th, 1990:

23 "Departmental counsel interviewed Ronald
24 Wilson."

03:35 25 August 1st to 5th, 1990:



1 "Further witnesses were interviewed by
2 the Department in British Columbia and
3 Saskatchewan."

4 August 9th, 1990:

03:35 5 "The Department continued negotiations
6 with counsel for one of the witnesses to
7 have that witness submit to a polygraph
8 examination. Counsel for the witness
9 agreed, but imposed several conditions."

03:35 10 The witness being talked about there of course is
11 Ron Wilson?

12 A Yes.

13 Q August of 1990:

14 "Departmental counsel researched several
03:36 15 issues that had to be addressed before a
16 final report could be prepared."

17 August 14th, 1990:

18 "Counsel for the witness Wilson
19 confirmed the conditions he was imposing
03:36 20 concerning the proposed polygraph
21 examination."

22 September 6th:

23 "The Department decided not to pursue
24 the polygraph examination in view of the
03:36 25 conditions imposed by the witnesses'



1 counsel. (They could not be met.)"

2 And so having failed in their attempt to meet the
3 conditions imposed by Mr. Watson, Mr. Asper, it
4 appears that in early September of 1990, final
03:36 5 submissions again were sought by the department
6 from you?

7 A Yes.

8 Q And September 10th of 1990, we have the final
9 written submissions received from counsel. If we
03:36 10 can just look at that, 004394, please. If I'm
11 correct in my recollection, this is co-authored by
12 you and Mr. Wolch? If we can go to the next page.

13 A Yes.

14 Q So Mr. Wolch has signed it as you have signed it.
03:37 15 Do you know, were you part of the preparation of
16 this letter or did you just sign it agreeing to
17 its contents or do you recall it?

18 A I don't recall how the letter came to be.

19 Q In any event, it appears to be and is indeed in
03:37 20 response to Mr. Williams seeking your final
21 submissions. If we can just look at it. If we
22 look at -- we'll get into this in more detail:

23 "2. Unsavoury Witnesses

24 Secondly, the evidence of Messrs. Melnyk
03:38 25 and Lapchuk has been rebutted by that of



1 Deborah Hall, who did not testify at the
2 trial and was never interviewed by the
3 police, as well as Ute Frank, who was in
4 fact interviewed and gave a statement
03:38 5 which could have been useful to
6 Milgaard, not the Crown."

7 So by this point, and we're now September 10th of
8 1990, you are still firmly of the view, that is,
9 you and Mr. Wolch, that the evidence of Deborah
03:38 10 Hall and that of Ute Frank rebuts the evidence of
11 Melnyk and Lapchuk?

12 A Yes.

13 Q There's nothing at that stage that's dispelled
14 that impression in your mind?

03:38 15 A Apparently not.

16 Q Okay. And if we can just go on to the next page:

17 "Thirdly, we have presented your
18 Department with the two reports of Dr.
19 Ferris and Dr. Markesteyn, which either
03:38 20 totally exonerates Mr. Milgaard, or
21 entirely discredits the forensic
22 evidence tendered at trial."

23 And then you go on to make reference to Larry
24 Fisher, and again, there's nothing to that point,
03:39 25 that's September 10th of 1990, that suggested to



1 you that the reports of Drs. Ferris and
2 Markesteyn didn't totally exonerate Mr. Milgaard,
3 you were still firmly of the view that --

4 A Apparently not.

03:39 5 Q -- both of what they were saying about it
6 exonerated him?

7 A Right.

8 Q Okay, thank you. If you might just go to the
9 bottom of this, I don't think there's anything
03:39 10 further, but -- I asked you this question earlier,
11 is this yours or is this Mr. Wolch's? It looks
12 like it may have been prepared by you. Am I
13 accurate in that or --

14 A The letter?

03:39 15 Q Yes.

16 A I don't recall.

17 Q You don't, okay. In any event, we can take that
18 off the screen then, thank you, and return to
19 337478. On October 1st of 1990, and once again
03:40 20 we'll go through the October 1st meeting, Mr.
21 Asper, to the best of your recollection of what
22 occurred, but we'll do that at a later stage, just
23 to confirm that:

24 "Hersh Wolch and David Asper, counsel
03:40 25 for Milgaard, had during the preceding



1 several months expressed an interest in
2 meeting personally with Departmental
3 officials involved in the review of the
4 case."

03:40 5 Now, he says the preceding several months. One
6 of your criticisms throughout your evidence was
7 the fact that there were never meetings held, and
8 I know what your expectations were in terms of
9 what justice would do, but do you have any
03:40 10 specific recollection in advance of this meeting,
11 other than the preceding several months, ever
12 asking for a meeting with Justice officials to
13 discuss this case?

14 A I don't have a specific recollection, but it was
03:40 15 something we had hoped would have happened early
16 on in the process.

17 Q And I may be wrong in this, and looking at the
18 correspondence, Mr. Asper, I'm not certain whether
19 I've been able to find any such request being made
03:41 20 in writing to the Justice officials.

21 A Well, as I say, unfortunately a lot of it was done
22 informally through telephonic conversations.

23 Q And much of it may have been done by Mr. Wolch
24 rather than yourself?

03:41 25 A Yes, although I'm quite certain that I discussed



1 it with Mr. Williams.

2 Q Okay.

3 "Officials agreed, and the meeting took
4 place on the 1st of October, 1990. The
03:41 5 purpose of the meeting was to permit
6 counsel with the opportunity to provide
7 their perspective of the case personally
8 and fully."

9 It seems to me that the only two records that
03:41 10 I've been able to find of what occurred at that
11 meeting is the excerpt from the book by Karp and
12 the letter that Mr. Wolch wrote on the 3rd of
13 October, 1990 to David Milgaard. While we'll go
14 into this meeting in some detail later on, do you
03:42 15 recall, like, notes taken by anybody that -- I
16 know that there's an observation by Mr. Wolch
17 that copious notes were taken by Justice
18 officials. Did you or Mr. Wolch make a record of
19 what was going on there during the course of a
03:42 20 fairly extensive day as I understand it?

21 A My recollection of it was that we were busy trying
22 to present our case and were occupied by, and I
23 was feeding Mr. Wolch pieces of paper and engaging
24 myself, but yes, I do recall one of the officials
03:42 25 sitting with a notebook taking notes.



1 Q Do you recall who that was?

2 A I don't.

3 Q But in any event, because of the nature of this
4 meeting, as I say, we can go into it at some later
03:42 5 stage during the course of your evidence, because
6 of the nature of this meeting there doesn't appear
7 to be at least any record that I've been able to
8 find, other than the two that I've -- one is
9 your -- one is the Karp and Rosner chapter on the
03:43 10 meeting with justice officials which has a number
11 of things attributed to you, I would expect that
12 you spoke to Karp and Rosner and gave them your
13 view of what went on at that meeting?

14 A I believe so. I don't recall it.

03:43 15 Q And the other of course is the reporting out to
16 David Milgaard by Mr. Wolch?

17 A Yes.

18 Q Now, we see the department, October 1st to 16th,
19 1990, we now have the departmental report to the
03:43 20 minister being prepared by Mr. Williams. October
21 17th of 1990 to November 5th of 1990 they reviewed
22 it. November 6th to 14th of 1990, the
23 departmental report and recommendations were
24 referred to the deputy minister. Discussions took
03:43 25 place concerning the prospect of retaining Mr.



1 McIntyre. November 14th, he was retained to
2 provide advice. November 14th to February 6th,
3 '90 and '91, he reviewed the case, provided
4 information and materials to Mr. McIntyre as and
03:44 5 when requested. Then advice received on February
6 7th. February 7th it went up to the minister for
7 consideration and on February 27th of 1991 the
8 letter came out.

9 Now, you weren't a party to
03:44 10 any of those proceedings so you can't observe or
11 make any comment with respect to what occurred
12 other than it would appear that this whole review,
13 despite the fact that there was some criticism of
14 delays by Justice leading up to the eventual
03:44 15 decision on the first application, that the
16 department acted with reasonable haste between
17 October and -- early October and February of '90,
18 '91. Would you agree with me?

19 A No.

03:45 20 Q Why would you disagree?

21 A As I said, my view was that we had submitted
22 sufficient information, and this is in isolation
23 of not knowing what the Department of Justice had
24 in its hands, that we had submitted information
03:45 25 long, a long time before February of 1991 that



1 would have justified re-opening the case, and in
2 particular the Fisher information.

3 Q And the information that you got, though, at that
4 meeting, inevitable to go back to the meeting of
03:45 5 October the 1st, there was considerable disclosure
6 given to you of what information justice had
7 gathered by that date. Am I correct in that?

8 A I think there was. I just -- I don't recall
9 exactly what it was.

03:45 10 Q You have no recollection of what it was that
11 justice turned over to you and there doesn't
12 appear to be any record as to where it's gone.
13 Mr. Wolch makes reference to a black binder that's
14 available, but --

03:46 15 A I don't have any recollection of them actually
16 giving us anything.

17 Q Okay. And then we have the recitation of what
18 went on from the second application. After the
19 minister's denial of the first application of
03:46 20 February the 27th of 1991, the next -- now, I know
21 there's an exchange between Mr. Wolch and the
22 minister Kim Campbell, I think in April of 1991,
23 but it's on August the 14th of 1991 that the
24 second application is made?

03:46 25 A Yes.



1 Q Any reason why it took that time to prepare that?
2 Do you recall what delays, if any, there might
3 have been in filing that second application?

4 A Yes. We didn't know what to do and we did a
03:46 5 little bit of research as to whether any remedy
6 lay, I believe, in the Federal Court, and we were
7 really at a loss as to what to do, and at some
8 point in that intervening time period we sat down
9 with the Fisher information and built the chart
03:47 10 that ultimately formed the basis for the second
11 application. This is the similar act allegation.

12 Q Right, okay. August 23rd of 1991:

13 "Counsel for Milgaard provided a
14 statement from another witness relating
03:47 15 to Larry Fisher."

16 Who was that; do you recall?

17 A I don't. That -- I don't, sorry. There were the
18 inmates -- people started coming forward. There
19 were inmates, there was Ms. (V4)---. I don't
03:47 20 recall specifically who that was.

21 Q And the (V14)- (V14)- information that formulated
22 part of that second application, we'll get to that
23 a little later on in the proceedings too, but when
24 did the (V14)- (V14)- information first come to
03:48 25 your attention; do you recall?



1 A I don't recall.

2 Q Her allegation formed part of that second
3 application?

4 A I honestly don't recall. I haven't even looked at
03:48 5 the second application.

6 Q Okay. We have the events of September the 6th of
7 1991:

8 "Prime Minister Mulroney promised Joyce
9 Milgaard that he would look into the
03:48 10 David Milgaard case."

11 And then September 11th of 1991:

12 "The Department received additional
13 materials from the Saskatoon Police
14 Force."

03:49 15 And then:

16 "The Department received submissions
17 from David Milgaard's counsel on the
18 similarity of the Fisher rapes to the
19 murder of Gail Miller."

03:49 20 And that was around that time period that that
21 was provided?

22 A Yes.

23 Q That synopsis. And then there's further
24 information with respect to Nichol John. If we
03:49 25 can go over on the next page, we have at 337480



1 the event of November the 11th of 1991 and that
2 says:

3 "Counsel for Milgaard met with..."

4 Rutherford, MacFarlane and Williams,

03:49 5 "...and were shown the videotape of

6 Ms. Demyen's hypnosis session."

7 Is that a summary of what went on there on that
8 day? It was more than that I understand.

9 A You know, I don't recall seeing the tape of the
03:50 10 hypnosis session. My recollection of that meeting
11 was the discussion about potential remedies.

12 Q Yeah, I thought that would be the case too. This
13 was a meeting that was held in preparation for the
14 Supreme Court reference.

03:50 15 A No, the department had --

16 Q The prospect of the Supreme Court reference as
17 being a --

18 A Right, and this was where the discussion began
19 about the potential conflict with a reference back
03:50 20 to the Saskatchewan Court of Appeal, given Justice
21 Tallis' position, and we got into a whole
22 discussion about potential remedies. That's my
23 recollection of the meeting.

24 Q And with respect to the events in the Supreme
03:50 25 Court, if I recall your evidence accurately, you



1 had very little, if any, recollection of what
2 occurred there?

3 A Other than getting -- other than seeing Mr.
4 Milgaard at the Ottawa city jail.

03:51 5 Q I would like to move on if I could, Mr. Asper --
6 that's fine, that can come off the screen, thank
7 you. I want to look at the Dr. Ferris chronology,
8 if I could call it that, and go through with you
9 the circumstances surrounding the preparation of
03:51 10 the Ferris report and events surrounding that, and
11 it's my understanding, and if we could have 182095
12 on the screen, please, 182095, just if we can make
13 that a little clearer. This is a memorandum to
14 file dated February the 26th, 1987 prepared by
03:51 15 yourself?

16 A Yes.

17 Q And we needn't go into the contents other than
18 this appears to be the first time that you came
19 into the information that there was a doctor by
03:52 20 the name of Ferris who could assist you in this
21 case?

22 A Yes.

23 Q And it appears that you made an attempt to contact
24 Dr. Ferris on the evening of February the 25th,
03:52 25 you were unsuccessful, and you left a message?



1 A I accept that.

2 Q I'm sorry?

3 A I accept that. I don't recall.

4 Q It's your memorandum, so I assume you did?

03:52 5 A Of course.

6 Q And then moving on to the next document, 162412,
7 this is one dated September the 15th of 1987, some
8 considerable time after the first one was
9 authored, and if we can go to paragraph 2 starting
03:52 10 with the words "we decided". This is, as I
11 understand, a letter co-authored by Joyce and
12 David Milgaard directed to you?

13 A Yes.

14 Q And this was one that was sent to you while I
03:53 15 believe you were out in the family business
16 working, it was during that 10 month hiatus that
17 you got this?

18 A That's correct.

19 Q And it says:

03:53 20 "We decided you might like to be
21 up-dated as to what has happened. It is
22 not too difficult. It can be put in one
23 word. Nothing. At least up until
24 yesterday when I visited Hersh and got
03:53 25 him to phone Ferris office re his letter



1 as well as to dictate the letters re the
2 exhibits to Saskatchewan."

3 And so this appears to be Joyce and David
4 Milgaard telling you that the Ferris information
03:53 5 appears to be moving slowly?

6 A Yes.

7 Q And my recollection of Mrs. Milgaard's evidence
8 was that she and Hersh had a discussion about sort
9 of moving the Ferris work on?

03:54 10 A Yes.

11 Q And during the intervening time between February
12 the 26th of 1987 when you recorded your
13 unsuccessful attempt to reach Dr. Ferris two days
14 earlier -- and I believe you left the firm in May
03:54 15 of '87; am I accurate?

16 A That sounds right.

17 Q During the course of that time, did you have
18 anything to do with Dr. Ferris, did you get a
19 response, did you, to your recollection, do
03:54 20 anything further before you actually left to go
21 back to the family business?

22 A I don't recall.

23 Q Were you largely responsible, at least at that
24 point, to marshall the Ferris material, to try to
03:54 25 get that expert report from him? Was that your



1 responsibility?

2 A Well, I assume that if I was calling him in
3 February, that I was trying to get him engaged in
4 the case, yes.

03:55 5 Q You called him as a result of information that
6 Mrs. Milgaard had?

7 A Right. She had read an article that cited Dr.
8 Ferris and she suggested that we contact him.

9 Q So we have the letter to you that we just referred
03:55 10 to that's on the screen dated September the 15th
11 of 1987. Then we have the next document that's
12 267870 and look at that. This is directed to the
13 Halyk law firm to Audrey Brent who you said was an
14 agent of yours, or from Audrey Brent, I'm sorry,
03:55 15 who was an agent of yours to assist you here in
16 Saskatchewan?

17 A Yes.

18 Q Okay. And January the 12th of 1988:

19 "In accordance with the order of
03:55 20 Mr. Justice Sirois, it would be
21 appreciated if the exhibits ordered
22 released for scientific testing be
23 forwarded to Dr. Ferris as soon as
24 possible and our account charged with
03:56 25 the appropriate cost for mailing.



1 Yours truly."

2 So it would look like by January the 12th of
3 1988, the order had been obtained for the release
4 of the exhibits and the request is being made by
03:56 5 Ms. Brent to have those forwarded on to Dr.
6 Ferris?

7 A Correct.

8 Q And the next item appears to be in response to
9 that request and that's 057361 and that's dated
03:56 10 January the 21st and it's directed to Dr. James
11 Ferris and certain exhibits are included in with
12 that correspondence?

13 A Correct.

14 Q So -- and it appears that there is some difficulty
03:56 15 with respect to the exhibits being obtained back
16 from Dr. Ferris, as I understand, and there's some
17 work done because the Department of Justice has --
18 or -- has asked for those exhibits?

19 A I --

03:57 20 Q Do you have any knowledge of that at all?

21 A No. I recall, I saw a document when I was
22 scanning through the documents relating to that,
23 but I don't recall that.

24 Q In any event it appears that, on July the 5th of
03:57 25 1989, that Dr. Ferris returns those to the Clerk



1 of the Court of Queen's Bench here in -- I'm
2 sorry -- in Saskatoon?

3 A January when?

4 Q This is -- I'm sorry, I should have shown, 069226.

03:57 5 A Yeah.

6 Q There is the exhibits, I would suggest, at long
7 last being returned. You weren't involved in any
8 way moving along Dr. Ferris' return of those
9 exhibits?

03:57 10 A I don't recall.

11 Q You don't recall?

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

13 Q Okay. If we can look at 218743. This is the
14 letter dated March the 8th of 1989, which we have
03:58 15 seen before, and it's directed to you, and it's
16 authored by Robin Taylor, Executive Producer at
17 CBC, the *Fifth Estate*?

18 A Yes.

19 Q And if I can look at, over at page 2 of that
03:58 20 letter, just where the words:

21 "Then producer Gordon Stewart and
22 researcher Sandra Bartlett asked us to
23 look at the criticisms of Dr. James
24 Ferris about the handling of the
03:58 25 forensic evidence at the trial. We



1 examined this as best we could, did
2 further research, and then concluded
3 there are other experts around who can
4 challenge much of what Dr. Ferris has to
03:58 5 say. In other words, the story had been
6 reduced once again to an argument
7 between experts."

8 Now this is the letter that comes back to you
9 saying that they don't, for various reasons,
03:59 10 don't want to do the show, but you are also
11 advised for the first time that there appears to
12 be some frailty with the evidence of Dr. Ferris;
13 had it ever been challenged to you, on any other
14 occasion, by anybody before this time?

03:59 15 A No.

16 Q Okay. And so you would agree with me that it
17 would appear, although they don't identify who the
18 experts are, that Dr. Ferris' opinion is subject
19 to challenge?

03:59 20 A Oh, I don't think we ever doubted that his opinion
21 would be subject to challenge, there -- I don't
22 think there's an expert in the world whose opinion
23 will not be subject to some challenge.

24 Q So --

03:59 25 A It's just what you prefer.



1 Q Yeah. Now I -- we know that there's
2 correspondence in which at your, at your request
3 you pass on, and it's the next document I was
4 going to show you, the concerns that David
03:59 5 Milgaard has about -- about the fact that the
6 *Fifth Estate* won't do his show. But did you, of
7 your own accord, ever make any inquiries to find
8 out, from the *Fifth Estate*, the basis upon which
9 they made that statement?

04:00 10 A I don't think so.

11 Q They, would they have given you that information
12 if you had asked, or do you know that?

13 A Umm, I don't know.

14 Q Okay.

04:00 15 A I don't know.

16 Q And certainly, insofar as the Department of
17 Justice is concerned, this particular piece of
18 correspondence wasn't directed to anybody there?

19 A No.

04:00 20 Q Okay. Okay. The next piece of correspondence is
21 163064, this is the one I was talking about that
22 -- and this is dated April the 19th of 1989, and
23 this was authored by you, and what you are doing
24 is passing on to Robin Taylor David Milgaard's
04:00 25 view of this. Do you recall this particular --



1 A No, not specifically.

2 Q Okay. And it says:

3 "At some point your people contacted

4 Mr. Wolch about Dr. Ferris' forensic

04:01 5 report. They claimed that they had

6 consulted someone in Toronto who

7 disputed Dr. Ferris' findings.

8 Mr. Wolch was asked to comment on this

9 and he referred your people directly to

04:01 10 Dr. Ferris."

11 Now was any inquiry ever made to determine

12 whether, in fact, Dr. Ferris was ever contacted

13 by anybody from the *Fifth Estate*?

14 A I think he was contacted later, but I don't recall

04:01 15 him being contacted -- I mean I think they -- my

16 recollection is the *Fifth Estate* ended up doing a

17 program, ultimately.

18 Q Okay. Well, in fairness to you, the next piece of

19 correspondence I'm going to show you is one that

04:01 20 you wrote Dr. Ferris -- or you wrote Dr. Ferris,

21 and that is 155495. This is dated May 3rd of

22 1989, it's -- we're -- you've written it --

23 A Yes.

24 Q -- to Dr. Ferris?

04:02 25 A Yes.



1 Q "Firstly, I should advise that the *Fifth?*
2 *Estate* has decided to not proceed with
3 their story. However, a reporter ...",
4 and so on. Did you send a copy of the Robin
04:02 5 Taylor correspondence to Dr. Ferris?

6 A I don't know.

7 Q It doesn't appear to have accompanied this letter?

8 A Right.

9 Q Yeah. You think it would have been maybe a good
04:02 10 idea to have included that to Dr. Ferris so he
11 would be informed as to what was happening?

12 A I don't know that it was of any particular moment
13 at that time.

14 Q But there was doubts, obviously, raised about the
04:02 15 report that he had prepared?

16 A Well, as I say, I had -- there was no question in
17 our mind that, if you have an expert, someone can
18 go and create doubt about it. It's just a
19 question of the caliber of the expert, ultimately,
04:03 20 it becomes a matter of weight, as you well know.

21 Q But, in any event, that letter wasn't communicated
22 to Dr. Ferris, or at least it appears that?

23 A I'm sorry, I couldn't hear you?

24 Q The letter from Robin Taylor wasn't communicated
04:03 25 to Dr. Ferris?



1 A No. No. But as I say, I think *Fifth Estate*
2 ultimately did a program where they did talk to
3 Dr. Ferris, I believe that there was a documentary
4 or a full program done by the *Fifth Estate* is my
04:03 5 recollection.

6 Q And the last item that I want to refer you to is
7 182104, and that is -- this appears to be a
8 discussion or a memorandum with notes recorded
9 about -- from Hersh Wolch to you. This is the
04:04 10 urgent return of the exhibits held by Dr. Ferris?

11 A Yes.

12 Q Is that your writing on the right-hand side?

13 A Yes, it is.

14 Q Okay, where you've said "Done - July 4"?

04:04 15 A Yes, it is.

16 Q And then who you had contact with to arrange for
17 those exhibits to be returned?

18 A Yes.

19 Q Okay. And just one other reference, and that is
04:04 20 to a portion of your evidence that you gave
21 earlier on, on February the 25th, that's 25638.
22 And I take it, first of all, that -- I suppose you
23 have to be cautious how you answer this -- but the
24 *Fifth Estate* was considered to be, as you've said,
04:04 25 the most highly recognized investigative current



1 affairs show in the country?

2 A Yes.

3 Q Okay. Because you say, when you are asked the
4 question:

5 "Q And when you say a validator, can you
6 explain that a bit further?"

7 And your answer is:

8 "A If the CBC Fifth Estate, probably the
9 most highly-recognized investigative
10 current affairs journalism program in
11 the country looks at your case and says
12 that you might have some, that there
13 might not just be validity, but you may
14 be, you are probably telling the truth
15 in terms of David's claim of innocence,
16 then that is a powerful emotional
17 support for what you've been doing and
18 fighting for.

19 Q And so on the flip side, the failure to,
20 or decision not to proceed with the
21 show, would that have the opposite
22 effect?"

23 And your response:

24 "A It's a large blow, yes.

25 Q Okay. So are you telling us that the



1 running of this program, if it were to
2 run, would have positive influence on
3 David and Joyce Milgaard, but if it
4 didn't run, or there was some doubts
5 about it running, it would have a
6 negative impact?"

7 Your answer is:

8 "A Yes."

9 So this was, apparently had a profound effect on
04:06 10 people, specifically the Milgaards, because --

11 A Yes.

12 Q And that was the rejection based on, at least in
13 part, the fact that somebody else could contradict
14 the Ferris report?

04:06 15 A No, I wouldn't say that. I wouldn't say that at
16 all, Mr. Frayer. I think that it did have a very
17 negative effect. There were a lot of things at
18 play.

19 I think David had done a very
04:06 20 bad interview at the prison and was angry with
21 himself that he hadn't presented himself
22 particularly well. He hadn't slept, he had had
23 some problems I believe in the days leading up to
24 it, he had not formed a very good relationship
04:06 25 with Eric Mallings who was the host of the program



1 and I think the producer of this particular
2 segment, and I don't think it had anything to do,
3 frankly, with the Dr. Ferris issue, I think it had
4 to do more at a deeper psychological level, that
04:06 5 they were looking for validation of what they had
6 been saying for a long time, and I don't think it
7 had anything to do with any specific aspect of
8 what was going to be in the show.

9 Q Just a general reaction to the rejection of the
04:07 10 show?

11 A Yes. And as I say, some of the constituent parts,
12 I mean David was very angry with himself about the
13 interview.

14 Q Okay. If we move on, then, from consideration of
04:07 15 Ferris and the *Fifth Estate* to the, this parallel
16 family presentation that some questions and
17 comments have been made about. And I should say
18 at the outset, and Mrs. Milgaard testified that
19 with respect to this family presentation, that in
04:07 20 her view it was something to keep David Milgaard
21 busy while he was in prison, that was her view of
22 it at least?

23 A That's probably a fair view, yes.

24 Q Okay. But, with respect to that presentation, it
04:08 25 had, it's apparent, some effect on how quickly



1 Justice acted and --

2 A Well, I was going to say, it may have been
3 designed to keep David busy but it actually -- he
4 believed that that's what they were doing, and I
04:08 5 believe there is correspondence, that he was
6 sending letters, as you say, parallel to the
7 formal correspondence relating to this project
8 that we didn't quite know what it was.

9 Q Yeah, well we can go through those, it is my
04:08 10 intention to go through them briefly. And the
11 first of those is 213588, it's a letter dated
12 September the 15th of 1986, and it's in David
13 Milgaard's handwriting, and if I can just refer to
14 the first couple of pages of that. In other
04:09 15 words:

16 "Since my mother, Peter and
17 myself can apply ourselves to this a lot
18 I suggest we put a presentation together
19 ourselves and when you and David need us
04:09 20 to work on yours with you, we'll do so.
21 The benefit is two-products to consider.

22 The problem here for mom and
23 myself is that we may send Peter back
24 out on the road to see what more he can
04:09 25 dig up.



1 I think we can work around
2 this by getting his upstairs knowledge
3 from him about statements and tapes etc
4 in discussions as we plot the start of
04:09 5 the presentation. This way we can
6 follow up on things from his material
7 that are unresolved and have him
8 consider this and other areas (possibly
9 Thatcher) while mom and I work together
04:10 10 alone."

11 So this appears to be the first reference
12 anywhere to a family presentation being made in
13 conjunction with the application that you and Mr.
14 Wolch were working on?

04:10 15 A Yes.

16 Q Yeah. And again 301671, this one dated April 29th
17 of 1989, this is in response to correspondence
18 received from the Minister's office. In paragraph
19 2:

04:10 20 "My family and myself will
21 also be sending you a submission of our
22 own. It is expected to be completed at
23 the end of May."

24 And then, moving on, 032905. This is a letter
04:10 25 dated May 8th of 1989 to The Honourable Doug



1 Lewis prepared by Mr. Wolch, and on the page, the
2 second page of that letter, second-last
3 paragraph, last three lines, it says:

4 "Finally, we would like to

04:11 5 thank you on behalf of Mr. Milgaard for
6 your letter inviting his submissions.

7 Mr. Milgaard and his mother have been
8 working consistently since the date of
9 conviction to establish that a

04:11 10 miscarriage of justice has occurred. In

11 addition to the materials which we have
12 presented to you, the Milgaard's are

13 planning on making a separate

14 presentation and once this is prepared

04:11 15 it will be forwarded to you in due

16 course."

17 So from this idea that -- first given to Mr.

18 Wolch back in September of 1986 to, now, May 8th

19 of 1989, it would appear that the family

04:11 20 presentation is still being worked on, but in

21 addition to what Mrs. Milgaard said about why

22 they wanted David to do this to keep him busy,

23 Mr. Wolch is adding the authenticity to it by

24 saying to the Minister of Justice "this is

04:12 25 forthcoming"; am I accurate in that?



1 A I -- yes, that's correct. I have a feeling,
2 though, that by this time we were actually
3 considering, and we called it "the family
4 presentation" in order to keep that nomenclature
04:12 5 consistent with what David was expecting, I think
6 by that point we were considering some sort of a
7 video re-enactment.

8 Q Okay.

9 A And I think that's what --

04:12 10 Q A video re-enactment of the crime?

11 A Yes.

12 Q Okay.

13 A And that may be what this is referring to.

14 Q But you'll agree with me that still, by May 8th of
04:12 15 1989, it would be reasonable for the Minister of
16 Justice or his representative, in this case Mr.
17 Williams, to say "well, they have asked to provide
18 this to us, we should wait for it"?

19 A We could debate that, but I would understand why
04:12 20 the minister would take that view.

21 Q And then we have 130121. This is actually doc. ID
22 130118 at 121. Yes, thank you. And this is a
23 letter dated, I believe it's June 15th, June 15th
24 of 1989. This is, I believe, directed to the
04:13 25 Minister of Justice because it bears the stamp.



1 "I am just going to begin
2 going over stuff and my family and I
3 will be making a video too."

4 So this appears to be David's reinforcement of
04:13 5 the idea that a family presentation is
6 forthcoming, and now it's the video that you
7 think was something they worked towards
8 preparing?

9 A Yes.

04:13 10 Q Okay. And then 130125, September 10th of 1989, a
11 letter to the Executive Assistant to the Minister
12 of Justice directed to her by David. Now are
13 these, and I have been showing these to you, Mr.
14 Asper, are these ones that you've seen at some
04:14 15 stage or other; did you ever see these during the
16 course of the proceedings?

17 A Well, to be honest, there was such a blizzard of
18 paper I, you know, I look at it, I see the name
19 Janet Binks, I recall her responding, actually,
04:14 20 I'm not sure that I actually saw these letters, or
21 not, certainly I don't think I saw them
22 contemporaneous --

23 Q Well, these are initiated by David Milgaard, so --
24 and I don't notice any copies to you, just a copy
04:14 25 to the file, so there is a strong likelihood that



1 these are ones that you would have seen after the
2 fact, if at all?

3 A As I say, I just don't recall.

4 Q And if I move to page 3 --

04:15 5 A I'm just curious, and I'm, I know I'm not supposed
6 to ask the questions. As I read these and as I
7 scanned through them in the documents it just
8 seemed curious to me that the minister never, or
9 didn't write back, or maybe did write back and say
04:15 10 "you've got a lawyer, let me deal with your
11 lawyer", and I don't know if that letter was ever
12 written.

13 Q I don't know if it's there.

14 COMMISSIONER MacCALLUM: I think there was
15 such a letter at one time.

16 A I think there was.

17 COMMISSIONER MacCALLUM: Yes.

18 BY MR. FRAYER:

19 Q There was at least one very early on where there
04:15 20 was 'any application to be filed should be done
21 through your lawyer'?

22 A But these letters kept coming, I think, yes.

23 Q But the effect of these, of course coming from
24 David Milgaard, is it would have the same effect
04:15 25 on the minister, I would think, or the minister's



1 representative? You know, I can't testify to that
2 fact, but I would think they would simply because
3 he's consistently saying "you can expect this
4 family presentation", and Mr. Wolch at one stage
04:16 5 authenticated that by including that in the letter
6 he wrote?

7 A Yes, yes.

8 Q Okay.

9 A Yes.

04:16 10 Q And the -- and going to the last paragraph:

11 "Finally, please tell the
12 minister my presentation (my family one)
13 is coming along slowly and that this
14 part of the application will include a
04:16 15 video from us. Thank you for your
16 time."

17 So David Milgaard is reinforcing the idea that a
18 family presentation is still in the throes of
19 preparation, and that part of that will be a
04:16 20 video, it appears?

21 A Right.

22 Q Following that, 157023, October 11th of 1989, it's
23 a letter from Mr. Williams to Mr. Wolch, and I
24 think this reflects somewhat of the questions I
04:16 25 have been asking you, Mr. Asper, with respect to



1 the effect of the family presentation on David
2 Milgaard's entire application, the formal one
3 filed under 617 by you and Mr. Wolch, and the one
4 that he intends to file in support of that formal
04:17 5 application. And I think this is the first
6 reflection of this in the correspondence, here,
7 where Mr. Williams says in paragraph 2:

8 "For your information, I am
9 also enclosing the most recent
04:17 10 correspondence from Mr. Milgaard. In it
11 he re-iterates his intention to submit a
12 presentation as part of his application
13 to the Minister.

14 Armed with this information
04:17 15 it would be premature to conclude our
16 investigation at this time."

17 And then he goes on to say:

18 "Further, I can only advise in response
19 to your request for a status report,
04:17 20 that the matter is being pursued in a
21 practicable manner. Once the
22 investigation and report is concluded,
23 the Minister will exercise his
24 discretion. It would be premature for
04:17 25 me to speculate on the timing of these



1 events.",

2 and so on. Now this is Mr. Williams saying:

3 "Armed with this information

4 it would be premature to conclude our

04:18 5 investigation at this ...",

6 stage; do you disagree with the position he

7 takes? And I ask that in conjunction with

8 questions I had asked you earlier, if Mr.

9 Williams had said "no, we're not waiting for the

04:18 10 family presentation, let's get on with this",

11 that you or David, more specifically, might take

12 issue with it?

13 A David would have certainly taken issue with it. I

14 think we informally, again, made it obvious to --

04:18 15 and I can't say who -- that David was doing this

16 as his own little project, and that the department

17 needed to really focus on what we were giving

18 them.

19 Q Right.

04:18 20 A But I don't believe we ever put that in writing

21 because we were confronted with a couple of

22 factors. We were being fired fairly routinely,

23 and that was causing our own delay, our own

24 internal delay.

04:19 25 Q This was a frequent event?



1 A Yes.

2 Q Okay. And how long would you be sort of off the
3 case, so to speak, in any of those firings?

4 A Many times.

04:19 5 Q Many times?

6 A Yes.

7 Q And for what durations?

8 A Until I could get Mrs. Milgaard involved.

9 Q Okay. Now with respect to that, as you've
04:19 10 conceded, there doesn't appear to be any
11 correspondence with respect to the family
12 presentation, and keying in on the 617 application
13 that you prepared --

14 A Sorry, I should say, I should say -- and I want to
04:19 15 be fair to Mr. Williams -- I understand why he
16 would say that. I understand why he would not
17 want to risk the criticism of ignoring a
18 presentation that this letter, or that David's
19 letter claimed was coming.

04:19 20 Q And the presentation, the family presentation,
21 might be effective in compelling a different
22 result than the result you got perhaps?

23 A In the end --

24 Q It's possible?

04:20 25 A In the end I think it's fortunate for us that the



1 delay occurred, so I'll leave it at that.

2 Q Okay. And we have 333332, five 3's and a 2. And
3 this is a letter, again authored by David Milgaard
4 in his own handwriting, directed to Mr. Lewis
04:20 5 dated December 22nd of 1989. And he says:

6 "Since I got your letter
7 saying we can proceed with our family
8 presentation, I've completed quite a bit
9 of the written part of it. The video
04:20 10 segment of it is yet to be completed.
11 It will be in two parts. Part one is a
12 re-enactment according to the evidence
13 ...",

14 which you've testified to:

04:21 15 "... and part two is my family and
16 myself talking to you."

17 And then he had a question with respect to the
18 Ferris report. But here, as late as December
19 22nd of 1989, David Milgaard is advising the
04:21 20 minister that there is still -- there's this
21 family presentation that's going to be made. Do
22 you recall, and we've gone through this a little
23 bit, but whether you ever sort of discussed with
24 him or assisted him in how he might get to this?
04:21 25 He says:



1 "... I've completed quite a bit of the
2 written part of it. The video segment
3 ... is yet to be completed.",

4 and so on. Was there anything being done to
04:21 5 assist him in finishing the written work and
6 doing the video re-enactment, and so on, that you
7 can recall?

8 A Well, I'll give you two parts of the answer. The
9 first part is that I pleaded with him to stop
04:21 10 writing to the minister, period, "let us" -- and I
11 insisted that we have all of the formal
12 communication. I advised him that, if he wanted
13 to have some additional submission, that he should
14 prepare it, that we would review it, and that we
04:22 15 would submit it as part of the 617, the
16 application under 617. To that extent he had
17 been -- part of the strategy was to keep him busy
18 by writing, and he was writing, and he was writing
19 reams and reams and reams of pages of what he
04:22 20 wanted submitted, and he was getting frustrated
21 that nothing was happening with it, so we were
22 trying to manage him, and obviously not well.

23 Q Okay. But your recommendation was to sort of let
24 you do it?

04:22 25 A Yes.



1 Q That is you and Hersh do it rather than -- Mr.
2 Wolch do it rather than this.

3 A Yes.

4 Q But, in any event, it appears that as of December
04:22 5 the 22nd of 1989 he is not taking your advice in
6 that regard?

7 A Yes.

8 Q Okay. And then, if I can go to 333314, this is a
9 memorandum dated the 16th of October 1989. Now
04:23 10 this precedes the document I just referred you to,
11 but the last paragraph on page 2, this is a memo
12 from Mr. Williams to Bernard Hanssen, and he says:

13 "Further, Mr. Milgaard in his
14 September 15, 1989 letter has stated his
04:23 15 intention to make additional
16 representations in support of his
17 application. To date we have not
18 received these representations. In
19 these circumstances, it is difficult to
04:23 20 predict when the investigation will be
21 finished."

22 Mr. Williams is telling somebody within Justice
23 that at least part of the problem they are facing
24 at that stage, and that is the 16th of October of
04:24 25 1989, that this, these representations, haven't



1 come?

2 A Yes, that's true.

3 Q So that what was said to be something to keep
4 David Milgaard active and thinking may -- may have
04:24 5 resulted in delays in terms of the consideration
6 of his application just by virtue of the fact that
7 Justice didn't want to do anything until they'd
8 received the family presentation?

9 A Oh, that this correspondence caused delays, no
04:24 10 question, yes.

11 Q Okay. That's all the questions I have with
12 respect to the family presentation.

13 One other -- I just have a
14 binder I'd like to pick up, Mr. Commissioner, it's
04:24 15 on my desk.

16 COMMISSIONER MacCALLUM: Oh, yes, that's
17 fine.

18 BY MR. FRAYER:

19 Q Now, the next area I would like to canvass with
04:25 20 you, Mr. Asper, and hopefully I can get through
21 this in the next while, is the context with the
22 Department of Justice and, more specifically,
23 Sergeant Pearson after you communicated the
24 information that came from the confidential
04:25 25 informant with respect to the identification of



1 Larry Fisher as being the possible killer of Gail
2 Miller, and I know that part of your criticism
3 throughout the earlier part of your evidence was
4 that communications weren't taking place between
04:26 5 you and the Department of Justice and that you and
6 Mr. Williams had at one stage or the other during
7 the course of your dealings with each other really
8 fell out, if I can put it in those terms? In
9 other words, the hostility or the anger built at
04:26 10 least in you and that you were losing sort of
11 confidence in your relationship with Mr. Williams?

12 A Yeah, Mr. Williams was the focal point. My loss
13 of confidence was broader than that.

14 Q And with respect to that, do you know when that
04:26 15 falling out occurred, when you really felt at that
16 stage that you didn't want anything to do with,
17 anything further to do with Mr. Williams?

18 A I can't say specifically, but as I say, there was
19 a lot of, and it's unfortunate there's no record
04:27 20 of it, but there was a lot of informal
21 conversation, and I just got the sense early on
22 that we had no friend in Mr. Williams.

23 Q Could it have been a personality clash as opposed
24 to any other --

04:27 25 A No, I was -- I don't know when it occurred, this



1 may have been at the in-person meeting, I don't
2 have all the times and dates catalogued, I was
3 just really put off by what I perceived to be an
4 extremely intransigent attitude to the
04:27 5 possibility, even just the possibility that there
6 may have been a miscarriage of justice in the
7 Milgaard case.

8 Q And so part of your criticism I think too was that
9 communications were sometimes difficult,
04:28 10 communications in some instances weren't going on
11 at all between the two of you?

12 A Well, they weren't going on at all, and I have to
13 tell you, in looking at Mr. Williams' evidence
14 where he described -- I was quite amazed reading
04:28 15 his evidence where he described his approach where
16 he read our application, he saw some interesting
17 things I think is the words he used, he looked at
18 the possibility of some DNA testing that might
19 have been done, you know, and when I read that
04:28 20 part of his evidence I thought, well, why couldn't
21 we have had that conversation, you know, the day
22 after we filed our application, and so yes, there
23 were these communications, or lack of
24 communication. I don't know that it would have
04:28 25 changed attitudinally the difference between us,



1 but I think we could have talked more, and more
2 candidly at the beginning.

3 Q Okay. Now, things changed a little bit when,
4 after the information came to Mr. Williams'
04:29 5 attention with respect to the confidential
6 informant and Larry Fisher when Sergeant Pearson,
7 whom we've heard from already, became part of the
8 690 process?

9 A Yes.

04:29 10 Q And I think your evidence was that things changed
11 with respect to the relationship at least to the
12 extent that you had somebody you were talking to
13 at that point?

14 A Yes.

04:29 15 Q Okay. And it would be fair to say that over the
16 course of the period of time from the time the
17 information came into Mr. Williams' possession
18 until, say, the latter part of June of 1990, that
19 there were extensive telephone conversations
04:29 20 between yourself and Mr. Pearson, and I might say
21 while you haven't had this advantage I have of
22 going through and saying that between March 14th
23 of 1990, when Sergeant Pearson essentially started
24 assisting Mr. Williams, to near the end of June of
04:30 25 1990, there were some 11 telephone conversations,



1 some of some fair detail between yourself and
2 Sergeant Pearson?

3 A Yes.

4 Q And you understood Sergeant Pearson's role to be
04:30 5 assisting Mr. Williams in investigating the Larry
6 Fisher information?

7 A Yes.

8 Q And that he really was part of the 690 process,
9 albeit an RCMP investigator as opposed to a
04:30 10 Justice investigator?

11 A Yes.

12 Q Okay. So I would like to go through with you over
13 the course of the next short while the context
14 that you had with him during the time period that
04:30 15 I've made reference to, and this is following the
16 Fisher information. If I can go to -- the
17 document ID for Sergeant Pearson's notes is 056743
18 and I want to go to 056750, please, and if we can
19 just highlight paragraph 35. Now, there appears
04:31 20 to be some attempt to, on your behalf, to contact
21 Sergeant Pearson. Sergeant Pearson returns your
22 telephone call and at that time it says:

23 "Mr. Asper explained that he had been to
24 Saskatoon within the past couple of days
04:31 25 to see Joyce Milgaard, to tell her to



1 let the authorities investigate the new
2 evidence, and to share her information
3 with everyone. Asper was expressing
4 concern that Mrs. Milgaard has become
04:32 5 very mistrusting of everyone and has
6 become somewhat of an independent
7 investigator, and is reluctant to turn
8 information over to even her lawyers.
9 She is particularly mistrusting of the
04:32 10 Saskatoon City Police, and in fact
11 believes there is a cover-up conspiracy
12 by them regarding her son's murder
13 charge. Mr. Asper related to me that he
14 knows the file cold and could fill me in
04:32 15 on all the details if it became
16 necessary."

17 And Sergeant Pearson responded by saying:

18 "I indicated to Mr. Asper that my
19 involvement was very recent and not a
04:32 20 lot of investigation had been done on my
21 end, with anything other than the
22 information being provided by Linda
23 Fisher, and pursuing that angle of the
24 case. At this time I did not mention to
04:32 25 Mr. Asper that Federal Prosecutor



1 Williams was planning to come to North
2 Battleford for the purpose of conducting
3 an interview with Fisher."

4 So you have what appears to be the first
04:33 5 conversation, that I could find at least, in
6 Sergeant Pearson's notes where you are having
7 contact with him and you are explaining to him
8 the problems you are having with sort of
9 controlling Joyce Milgaard and her, if I can put
04:33 10 it, parallel investigation that she's doing while
11 the Fisher information is being pursued by the
12 authorities?

13 A That's correct.

14 Q Okay. And so, and if I can move on then to
04:33 15 paragraph 52 of -- if I can just give you -- the
16 page number is 755, and there appears to be a
17 record of conversations that took place on the
18 19th and 20th of March with Sergeant Pearson and
19 there's a call to you to assure you and Mrs.
04:34 20 Milgaard that the new information presented to the
21 Justice Department was in fact being pursued. And
22 then it goes on, after placing a telephone call to
23 you it says:

24 "Telephone call placed to Asper, further
04:34 25 discussion to ensure that Mrs. Milgaard



1 was made aware of developments to date.

2 I also advised Asper that I wished him

3 to have Mrs. Milgaard cooperate with us

4 and permit the authorities to follow up

04:34 5 on the Fisher information, as opposed to

6 Mrs. Milgaard making inquiries on her

7 own."

8 Now, can I say, ask you at this point, were you

9 satisfied with the types of responses that you

04:34 10 were getting from Sergeant Pearson with respect

11 to how the Fisher investigation was going?

12 A I think so, yes.

13 Q And it would appear that at least during one of

14 these conversations he communicated to you exactly

04:34 15 where the status of the Fisher investigation was

16 at least?

17 A Yes.

18 Q And then he goes on:

19 "Whilst talking to Asper, he stated he

04:35 20 had received a call from Linda Fisher,

21 he thought this past Saturday,

22 indicating that she was going to the

23 Prince Albert Penitentiary with Larry

24 Fisher's mother..."

04:35 25 And so on. And then over on the next page,



1 paragraph 56:

2 "I asked Mr. Asper if he or Mrs.

3 Milgaard had possession of a statement

4 given to the City Police, indicating

04:35 5 that Larry had been interviewed, and had

6 indicated he had taken the 6:30 a.m. bus

7 on the morning of the Miller murder.

8 Mr. Asper said he had no such statement

9 but indicated that this information was

04:35 10 the result of a verbal conversation

11 between the Saskatoon City Police

12 investigator and Larry Fisher, sometime

13 shortly after the murder."

14 So you were in possession of information that you

04:35 15 were communicating to Sergeant Pearson,

16 information specifically relating to the

17 statement that Larry Fisher had given at the bus

18 stop when being interviewed by Saskatoon

19 police --

04:36 20 A Correct.

21 Q -- a short while later?

22 A Correct.

23 Q And then if I can go to 056761, and this is

24 paragraph 86:

04:36 25 "David Asper called from Winnipeg,



1 wanting to know what we had come up with
2 so far."

3 This is on the 28th of March, 1990.

4 "All I could really tell him was that
04:36 5 new information was being pursued. I
6 did indicate that contact had been made
7 with the Saskatoon City Police, Larry's
8 former boss, and that Mr. Williams had
9 been in Saskatoon."

04:36 10 So you are getting further information from
11 Sergeant Pearson?

12 A Yes.

13 Q That gives you some idea as to how that
14 investigation is progressing?

04:36 15 A Yes.

16 Q And then on page 056763, paragraph 102, the 20th
17 of April of 1990:

18 "A call from Mr. Asper, I returned his
19 call..."

04:37 20 Not in, left a message. And then at paragraph
21 106:

22 "Asper called me, wanting to know what
23 was happening. All I could tell him was
24 that I had contacted Fisher and that
04:37 25 ongoing inquiries were being made.



1 Asper wanted to know what Fisher had to
2 say, however I told him I had no more to
3 tell him at this time. Asper said he
4 was relieved that contact had been made
04:37 5 with Fisher because Mrs. Milgaard was
6 coming home early from England and it is
7 suspected that she is going to press
8 ahead about the inaction of the Federal
9 Justice Department on their Section 690
04:37 10 application and Asper stated he felt
11 better knowing that Fisher may cooperate
12 with us. I advised Mr. Asper that
13 unnecessary publicity would possibly
14 hamper the police investigation and that
04:38 15 there is a certain danger in having
16 Fisher's name become subject of a press
17 release, and this will have no positive
18 effect on our inquiries. I explained to
19 Mr. Asper that my role at this point is
04:38 20 to find the truth and to gather
21 evidence, not become embroiled in a
22 press release, which in my opinion would
23 serve no one's interest at this time."
24 Do you recall having that conversation with
04:38 25 Sergeant Pearson and the concerns that he



1 expressed about how media attention might detract
2 from the investigation?

3 A Yes.

4 Q And that was, in essence, as I gather, a caution
04:38 5 to do whatever you could to control the media so
6 that he could carry on with his investigation?

7 A Yes, this was actually, I recall this, was a
8 very -- I do recall this because I felt it was a
9 turning point, that Sergeant Pearson was kind of
04:38 10 getting to the meat of the matter and it was quite
11 a serious conversation.

12 Q So that you are getting information and you know
13 how things are progressing at that stage through
14 Sergeant Pearson?

04:39 15 A Yes.

16 Q And page 056765, paragraph 109:

17 "I talked to Mr. Asper, who called me
18 twice today. He stated that Alex Barker
19 called him during the weekend to report
04:39 20 he had information on the Milgaard
21 case."

22 And he goes on:

23 "Barker is well known to police and
24 continually calls with information based
04:39 25 on suspicion and usually no facts. I



1 explained to Asper that Barker had no
2 credibility with the RCMP or the
3 Saskatoon City Police. However, I will
4 contact Barker to ensure I will get any
04:39 5 info he may have, and try to have him
6 discontinue with his publicity, as he
7 has the potential to harm the
8 investigation. Asper indicates Barker
9 was in contact with Albert Cadrain, who
04:40 10 was a witness at the Milgaard trial."

11 So there again you are sharing information with
12 Sergeant Pearson that you at least on its face
13 thought might be useful for investigation, you
14 were advised as to what Sergeant Pearson's
04:40 15 thoughts were of the person who communicated that
16 information and, despite that, Sergeant Pearson
17 undertook to contact him, so you are getting
18 results, you are getting --

19 A Oh, I think this is indicative of a very cordial
04:40 20 and ongoing relationship that I had with Sergeant
21 Pearson. He called me, I called will, we talked.

22 Q You would give him information, he would give you
23 what he thought about the information source?

24 A And I had no illusion that he was giving me
04:40 25 everything, but it was something.



1 Q Now if I can move to 056767, I won't go through
2 all of this with you, Mr. Asper, but perhaps try
3 to get to the highlights of it. Paragraph 129,
4 there's a considerable number of pages that
04:41 5 include information that you communicated to
6 Sergeant Pearson, all of which occurred on the 4th
7 of May of 1990, and you talk about problems with
8 penitentiary staff and so on, and at paragraph 130
9 you go through a fairly comprehensive discussion
04:41 10 around some points that you raise with Sergeant
11 Pearson, and without going through them in any
12 great detail, it would appear that from this
13 report, that what you advise him of goes from
14 056768 to 771 and you are having what would appear
04:42 15 to be a fairly substantial discussion with him,
16 more communicating information that you think is
17 useful to him than him communicating to you, but
18 he appears amenable, and if you look at this,
19 would you agree that -- I'm not asking you to go
04:42 20 through each and every detail here, but it would
21 appear that he's accurately recorded the essence
22 of what you were saying to him? It's all in point
23 form I appreciate.

24 A It looks like it, and this must be the
04:42 25 conversation, but I think there was more than one



1 where we talked in general about the circumstances
2 of the case as a whole and this may be one of
3 them.

4 Q And this is one of these cases in which you've
04:42 5 communicated a fair amount of information to him?

6 A It looks like it, yeah.

7 Q Okay. And at 056772, paragraph 134 and following,
8 there's a fairly extensive conversation again,
9 this time on the 10th of May of 1990, he says:

04:43 10 "I returned a telephone call to Mr.
11 Asper, he expressed concern that Joyce
12 Milgaard has released information to the
13 press that the RCMP are investigating a
14 suspect who is currently doing time in a
04:43 15 Saskatchewan Penitentiary."

16 It goes on about the contact of Mr. Harvard and
17 so on, and then it goes on:

18 "Mr. Asper also indicated that Joyce
19 Milgaard had been in contact with Star
04:43 20 Phoenix reporter Cam Fuller and that
21 Fuller will soon be releasing a story on
22 the details provided him by Mrs.
23 Milgaard."

24 Then Sergeant Pearson says:

04:44 25 "My position is neutral."



1 That's his comment about himself.

2 "I explained to Asper that the potential
3 exists that Fisher will eventually
4 refuse to cooperate if he is unfairly
04:44 5 suspected, accused, or made subject of
6 press releases and stories. My
7 inquiries will continue as planned.
8 Regardless of the publicity or the
9 subtle influence Joyce Milgaard may try
04:44 10 to exercise, although I certainly have
11 compassion for this lady who obviously
12 believes her son is wrongly convicted.
13 My efforts, so far as they relate to
14 Larry Fisher, are concerned with
04:44 15 concentrating on determining the facts
16 and the truth, whatever they may be."

17 In this particular instance when you are talking
18 about sort of the, what's going to occur with
19 respect to John Harvard and the House of Commons
04:44 20 and the *StarPhoenix* reporter Cam Fuller, is this
21 a point, this is now the 10th of May, where you
22 are becoming dissatisfied with the pace at which
23 the investigation is going, so is this sort of an
24 indication that you are going to start ramping up
04:45 25 the media again?



1 A I can't say that specifically.

2 Q It would appear that --

3 A I think that -- my recollection is that

4 Mr. Harvard was Mrs. Milgaard's member of

04:45 5 parliament and that he had either contacted her or

6 she had contacted him in a general sense and he

7 then got a question, he got on the list of

8 questioners for Question Period for the Liberals

9 and I think this just sort of exploded.

04:45 10 Q So that was something that really wasn't ramped up

11 by anybody to get media attention, it was actually

12 done by Joyce Milgaard to get somebody influential

13 to raise her son's case in the House of Commons

14 and question the minister?

04:46 15 A Well, looking at what Sergeant Pearson records

16 here, and I don't recall it specifically, but it

17 looks to me like Harvard was supposed to raise the

18 issue of delay, but not specifically refer to

19 Fisher, and I think, if I recall the video tape of

04:46 20 Question Period that day, he got himself all wound

21 up and basically let the whole thing go.

22 Q Exactly, okay. And were you apprised at any time,

23 apart from the one reference I've given you with

24 respect to how the investigation relating to Larry

04:46 25 Fisher was going, did you become impatient with



1 how that was progressing?

2 A Well, I was impatient to the extent that it was
3 our view that you didn't need -- I mean, it would
4 be nice if you had an admission from Fisher, but
04:46 5 that you didn't need it, and we didn't have a duty
6 or an obligation to prove that Fisher had
7 committed the crime and we were very firmly of the
8 view, upon the submission of the first wave of
9 Fisher information, that we had more than exceeded
04:47 10 the threshold that we needed to get relief under
11 617, so yes, we were getting impatient.

12 Q Okay. And last, there is a call relating to that,
13 and your inquiry about Fisher, 056781, this is the
14 last of the calls to which I'm going to refer you,
04:47 15 this is paragraph 176, that's the 20th of June of
16 1990:

17 "I returned a call to David Asper who
18 was enquiring about our progress with
19 Fisher. I explained to him what has
04:47 20 taken place to date and that a meeting
21 has been set up with Fisher and a new
22 lawyer next week. We also talked about
23 the Justice Department lawyer being in
24 B.C. making inquiries. Asper also
04:47 25 stated he has insufficient funds to



1 continue the investigation with their
2 American investigators, however they
3 wish to continue this investigation."

4 Now, with respect to the difficulties you were
04:47 5 having in sort of funding the investigation, it's
6 clear that Sergeant Pearson, who was at that time
7 a 15 year member of the RCMP and working in the
8 general investigation section, was probably the
9 most skilled investigator that you had working on
04:48 10 your behalf to the extent that he was out trying
11 to find whatever evidence he could about Larry
12 Fisher?

13 A I would agree with that.

14 Q Would you agree with that?

04:48 15 A I would agree with that, but I'm going to give you
16 some context though.

17 Q Okay.

18 A I want -- this case unfolded at the same time that
19 the Marshall Inquiry Commission reported, and not
04:48 20 that it was dispositive in our thinking, but, you
21 know, when you referred to the earlier
22 correspondence with Anne Derrick and Archie
23 Kaiser, I was very careful to find out, or I tried
24 to find out exactly what happened with Marshall to
04:48 25 try to predict what was going to happen in our



1 case. As much as I respected Sergeant Pearson,
2 and you are correct, he's a 15 year investigator,
3 we had to bear in mind the possibility, as was the
4 case in the Marshall case, that senior
04:49 5 investigators were brought in from the RCMP and
6 missed it and it wasn't until Sergeant Wheaton and
7 his partner took over in a second investigation
8 that they actually got to the bottom of it, so I
9 did respect him, but I'm just giving you a flavour
04:49 10 of the context of how we were viewing this.

11 Q Sure. But it's very clear that you were sort of
12 in, over the course of that time, in constant
13 communication, or periodic communication of some
14 substance over the course of that three month
04:49 15 period?

16 A It was a refreshing period in the whole course of
17 the investigation, there's no question.

18 Q But bearing in mind, although you are probably
19 reluctant to concede this, that it was the, it was
04:49 20 Eugene Williams, Mr. Williams who sought out
21 assistance in Saskatoon to assist in the
22 investigation of your Larry Fisher information and
23 it formed part of the investigation that was being
24 done generally?

04:50 25 A Oh, I give him credit for that. My issue with Mr.



1 Williams is that, you know, I go back to the way
2 the original application was received and how it
3 was investigated and our expectations. I give him
4 credit for bringing Sergeant Pearson in of course.
04:50 5 I just think it should have happened a lot
6 earlier.

7 Q It couldn't have happened any earlier insofar as
8 Larry Fisher is concerned because you agree with
9 me that Justice and the RCMP acted very
04:50 10 expeditiously in investigating the information
11 that you got with respect to Larry Fisher. I can
12 go through the chronology with you, but --

13 A No, I understand, but I guess my problem is, and
14 maybe I'm just completely unrealistic as to what I
04:50 15 expected, but if the reaction of the department to
16 our application had been to get hold of all of the
17 original prosecution and police files relating to
18 this case, if Mr. Williams and his conviction
19 review group had contacted the Attorney General of
04:51 20 Saskatchewan and said we've got this
21 investigation, and I'm sure you are going to get
22 to the conflict of interest issue with Mr.
23 Caldwell, but if they had gone to the Attorney
24 General and said get us all the information and
04:51 25 assigned it to senior people with senior, you



1 know, years of investigative experience, it's
2 conceivable that what we had found in the files
3 ultimately might have been discovered at that
4 time, at the outset of the process, and that's my
04:51 5 quarrel. I give him credit for what happened
6 here. I don't like the conclusion they reached.
7 I just think that all of this should have happened
8 at a different time.

9 Q You don't like the conclusion that was reached
04:51 10 ultimately, but with respect to Sergeant Pearson,
11 the conclusion he came to you don't necessarily
12 have to disagree with, though, in terms of what he
13 concluded in terms of the possibility that Larry
14 Fisher had committed the offence?

04:52 15 A I think he --

16 Q He talked about suspicion?

17 A Right.

18 Q Couldn't take him any further past that.

19 A Well, there's two parts to that though, Mr.
04:52 20 Frayer, one is -- yes, personally I think it went
21 further, but more importantly, again, as I say, I
22 didn't think that we had to prove beyond a
23 reasonable doubt that Larry Fisher committed the
24 crime and we were absolutely convinced that the
04:52 25 identification of Fisher smashed through any



1 threshold that was left remaining on the 617
2 application simply by the raising of an
3 alternative perpetrator irrespective of similar
4 fact.

04:52 5 MR. FRAYER: Thank you. And I'm wondering,
6 Mr. Commissioner, it's 10 to five, and I must
7 admit, I'm starting to flag a bit. If I can --
8 if we can take a break, 10 minute break and see
9 how we do?

04:53 10 COMMISSIONER MacCALLUM: Oh, sure.

11 (*Adjourned at 4:53 p.m.*)

12 (*Reconvened at 5:10 p.m.*)

13 A I guess, Mr. Frayer, before you begin, and Mr.
14 Commissioner, I want to thank you and counsel for
05:10 15 going into overtime for me, I appreciate it.

16 COMMISSIONER MacCALLUM: You are welcome,
17 sir. Continue, Mr. Frayer.

18 BY MR. FRAYER:

19 Q Now I want to deal with the meeting of October the
05:10 20 1st of 1990, the first of two meetings that you
21 held with Justice officials, and as I said earlier
22 in my questions of you it appears -- or comments
23 to you, it appears that there's only really two
24 records of what transpired at that meeting, one of
05:10 25 which is found in the Karp and Rosner book and the



1 other which is found in a memorandum that Mr.
2 Wolch prepared, or a letter that Mr. Wolch
3 prepared and sent to David Milgaard. Now do we
4 have, I'm sorry, *When Justice Fails*? Do we have
05:11 5 it? I don't have a doc. ID for it, I'm sorry, I
6 have an excerpt from it but it's not -- thank you.
7 331550? And I would like to go to page 232,
8 please. The excerpt I have is entitled *When*
9 *Justice Fails*.

05:12 10 MR. HODSON: Yeah, that's the Karp and
11 Rosner one?

12 MR. FRAYER: Yes.

13 MR. HODSON: Yeah, *When Justice Fails*.

14 MR. FRAYER: Thank you. Sorry, no, it
05:12 15 doesn't appear to be.

16 COMMISSIONER MacCALLUM: What page number
17 did you have?

18 MR. FRAYER: Well, I had 232 and 233 but
19 I've got different text, it looks like.

05:12 20 A Well there were two editions of the book,
21 actually.

22 MR. FRAYER: Okay. I may have the wrong
23 edition, I may have the earlier edition. I just
24 have an excerpt that someone gave me and --

05:13 25 MR. HODSON: Do you want to put it up on --



1 MR. FRAYER: I don't have it identified.

2 MR. HODSON: Just a 'sec. Do we have a
3 different version? No?

4 BY MR. FRAYER:

05:13 5 Q I must have the different edition of the book, the
6 excerpt from it.

7 A I'd be happy to look at the hard copy and then
8 give it back to you. (Witness reading)

9 COMMISSIONER MacCALLUM: You can read what
05:15 10 you are concerned about into the record.

11 MR. FRAYER: Yes. Perhaps I could go to
12 the other document that I intended for that
13 purpose, and meantime if we can find it I can, or
14 I can make reference to it by reading it in, Mr.
05:15 15 Commissioner?

16 COMMISSIONER MacCALLUM: Yes.

17 MR. FRAYER: Thank you. Maybe I'll do that
18 to save everybody the time and effort. I'll
19 proceed as the Commissioner suggested by just
05:16 20 making reference to --

21 MR. HODSON: I think we've got it working
22 here. Do you have the document? Do you?

23 MR. FRAYER: Yes. Okay. I guess the
24 highlighting doesn't --

25 BY MR. FRAYER:



1 Q If we can just move over to 233, we'll avoid the
2 kibitzing and so on. Well, maybe I can refer to
3 that just by page 233:

4 "The kibitzing came to an end
05:16 5 when Wolch and Asper began their formal
6 meeting with the departmental officials.
7 Present were Eugene Williams, Bill
8 Corbett, and Bruce MacFarlane, the
9 assistant deputy minister. Undeterred
05:17 10 by the sombre looks that greeted them
11 when they walked through the door, Asper
12 introduced himself ...",
13 and so on.

14 "Williams was deadpan, and didn't say a
05:17 15 work. Corbett, meanwhile, who had spent
16 the last few months trading verbal barbs
17 with Asper through the media, pushed the
18 items away. Asper's blood pressure
19 started to rise. The fight was on."

20 Now insofar as the description of what goes on,
21 as colourful as it is Mr. Asper, these are your
22 words to Karp and Rosner; in other words you are
23 describing to them, you know, what went on in
24 that meeting?

05:17 25 A Yes.



1 Q Okay. And the quote is attributed to you:

2 "'Very early on in the
3 conversation we got to a very intense
4 level, and kept it at an intense level
05:17 5 for about five straight hours,' Asper
6 said."

7 Now can you just go back and assist us in this
8 respect. You know, what -- the meeting that was
9 conducted was conducted over pretty well the
05:18 10 entire day, as I understand?

11 A I guess so.

12 Q And you had produced to you certain information
13 that the Department of Justice had gathered as
14 part of the investigative process, and it was in a
05:18 15 form where you and Mr. Wolch were permitted an
16 opportunity to review it, is that accurate or not
17 accurate?

18 A I think that's accurate.

19 Q Okay.

05:18 20 A I don't have much recollection of the specifics of
21 the meeting.

22 Q No, no. But you were there for a considerable
23 time and it's my understanding that you got an
24 opportunity, that is you and Mr. Wolch by
05:18 25 yourselves, to go through the documents before the



1 next at-face meeting took place to discuss their
2 contents?

3 A That sounds -- that sounds like what happened.

4 Q Okay. So now we're at the part, at 241, 331679,
05:19 5 Mr. Commissioner.

6 "Every major aspect of the
7 case was canvassed, with the Justice
8 officials raising their concerns and
9 offering their interpretations. It
05:19 10 became instantly clear to Milgaard's
11 lawyers that the Justice officials were
12 inclined to discount any evidence that
13 favoured their client. They were quick
14 to see interpretations that discredited
05:19 15 the application and upheld the original
16 verdict. It was, as Wolch would later
17 indicate, a kind of inherent bias that
18 some prosecutors have - a firm belief in
19 everyone's guilt unless the facts of
05:19 20 innocence are clearly demonstrated in
21 irrefutable terms.

22 'They started out believing
23 in guilt very strongly, because to admit
24 to innocence is to admit what would be
05:19 25 the greatest legal mistake in Canadian



1 history,' Wolch said. 'Once they'd
2 taken that mindset, as they got more
3 information, the inclination was: No,
4 it can't be right, or let's pooh-pooh
05:20 5 it. They built themselves a trench and
6 never really dug themselves out.'

7 The first argument to erupt
8 centred on Deborah Hall's affidavit.
9 The department took the position that
05:20 10 she actually corroborated Lapchuk and
11 Melnyk's description of how Milgaard
12 acted in the Park Lane Motel. At one
13 point, a department official said the
14 issue would come down to semantics.
05:20 15 Asper was livid. 'I sprung out of my
16 chair,' Asper recalls, 'and said "My
17 friend, we are not talking about an
18 issue of semantics, we are talking about
19 a huge physical difference in what you
05:20 20 say she says and in what she, in fact,
21 says."'

22 Is that an accurate description of your reaction
23 to what you were told about the Deborah Hall
24 affidavit?

05:20 25 A I don't specifically recall it, but yes, I accept



1 that that's what happened.

2 Q Okay. I couldn't portray it in the same manner as
3 I'm sure you did, but in any event, this is
4 information that was given to you -- given to Karp
05:20 5 and Rosner by you or Mr. Wolch or both of you?

6 A Yes.

7 Q Okay. And the Deborah Hall affidavit that's made
8 reference to in there, is that an affidavit that
9 was in the possession of the Justice officials
05:21 10 that was turned over to you for your review?

11 A I would assume so, yes.

12 Q Okay, and so you for the first time, or had you
13 been aware earlier of the existence of the
14 affidavit; were you seeing it for the first time?

05:21 15 A Well, we submitted the affidavit. I think what
16 we're referring to there is the interview by Mr.
17 Williams of Ms. Hall.

18 Q Yes, okay. The interview conducted by Mr.
19 Williams that was in transcript form, I assume?

05:21 20 A Right, right.

21 Q Thank you. Mr.:

22 "MacFarlane ...",

23 now Professor MacFarlane:

24 "... tried to calm down the atmosphere,
05:21 25 but Wolch picked up where his partner



1 had left off. When Milgaard's lawyers
2 had both finished, the Justice officials
3 did not respond. They took careful
4 notes.

05:22 5 The government investigators
6 also intimated that they didn't put too
7 much stock in Ron Wilson's story, as
8 they believed he had something to gain
9 by recanting his original testimony.

05:22 10 They suspected ..." --

11 COMMISSIONER MacCALLUM: Excuse me, I just
12 want to be sure I have this straight. When they
13 say 'Deborah Hall's affidavit', that's not the
14 case, they are actually -- the reference was
05:22 15 actually being made to a transcription of
16 Williams' interview of Hall?

17 A Well I think we were arguing about both of them.
18 I think they, well they obviously had the
19 affidavit because we had submitted it with our
05:22 20 application, and then subsequent to that Mr.
21 Williams went and interviewed Ms. Hall where she
22 gave her different account, and this is where the
23 two collided, I believe. I think that is what
24 this is referring to.

05:22 25 COMMISSIONER MacCALLUM: Well, but somebody



1 is suggesting that Hall's affidavit, presumably
2 that would be the one that you prepared, --

3 A Yes.

4 COMMISSIONER MacCALLUM: -- actually
05:22 5 corroborated Melnyk and Lapchuk?

6 A Right.

7 COMMISSIONER MacCALLUM: Well, surely not.
8 What corroborated Melnyk and Lapchuk, if
9 anything, was what she told Williams later on?

05:23 10 A Well, it's possible that they took the position
11 that the affidavit itself corroborated, that it --

12 COMMISSIONER MacCALLUM: Well, it's
13 possible. But it's also possible, is it not,
14 that they simply mixed it up?

05:23 15 A I guess, but --

16 COMMISSIONER MacCALLUM: Well you would
17 know, you were there, sir?

18 A I don't know. I can't recall.

19 COMMISSIONER MacCALLUM: You can't
05:23 20 remember?

21 A I can't recall.

22 COMMISSIONER MacCALLUM: Okay.

23 A I can't recall.

24 BY MR. FRAYER:

05:23 25 Q My question earlier on, Mr. Commissioner, related



1 specifically to whether he saw, for the first
2 time, the interview conducted -- or the transcript
3 of the interview conducted by Mr. Williams, and
4 that's --

05:23 5 A Maybe we didn't. You know, as I read that, maybe,
6 Mr. Commissioner, you are right, maybe this was a
7 debate just on the affidavit, I just don't recall,
8 I'm sorry.

9 Q But you have no independent recollection now --
05:23 10 and this isn't meant in the critical sense -- of
11 what was in the materials that was being provided
12 to you by the Department of Justice for your
13 review at that meeting?

14 A No, I don't.

05:24 15 Q You don't?

16 A No.

17 Q Okay. There is a possibility, perhaps a strong
18 possibility, that amongst the material that you
19 had to review was the Eugene Williams interview of
05:24 20 Deborah Hall?

21 A I would think so, yes.

22 Q Okay. And the contents of that particular
23 interview, when -- when looked -- when you looked
24 at Deborah Hall's affidavit that she gave you,
05:24 25 would likely have resulted in the conclusion that



1 there was something wrong with the original
2 affidavit; would I be accurate in that?

3 A Yes.

4 Q To the extent that there was a grave omission from
05:24 5 it?

6 A Well that was the -- yes, exactly. I'm getting
7 leery, though, of committing to whether we
8 actually saw the transcript now. I don't know.

9 Q Okay. And then it was over --

05:24 10 A I'm sorry, I just don't know.

11 Q No, I appreciate that. 242, I was over on the:

12 "They suspected Wilson may have feared
13 Milgaard, once released, would come
14 after him for providing the damning
05:25 15 testimony at the trial. As for the
16 forensic evidence, they were also
17 sceptical, arguing that the forensic
18 testimony didn't play a large role at
19 the trial, so that any new
05:25 20 interpretation of what it meant wasn't
21 very important."

22 What was your reaction to that observation?

23 A I can't tell you specifically. I don't recall it.
24 I could guess but, I think, so could you.

05:25 25 Q Okay.



1 "Asper and Wolch countered with a
2 summary showing the many pages of trial
3 transcripts devoted to the forensic
4 evidence, and the emphasis the Crown had
05:25 5 placed on it during his opening and
6 closing addresses."

7 Then there was Mr. Wolch's incredulity with
8 respect to how the Supreme Court might decide it.
9 Then:

05:25 10 "The meeting ended abruptly
11 at 5:00 ... Williams and Corbett left,
12 leaving MacFarlane - another former
13 Winnipegger and acquaintance of Wolch's -
14 to chat with Milgaard's lawyers for a
05:26 15 few minutes. MacFarlane indicated that
16 Williams would be working on the report
17 over the Thanksgiving Day weekend. The
18 Minister would likely see it within a
19 couple of weeks, and a very speedy
05:26 20 decision would follow."

21 That was a meeting held in October the 1st of
22 1991 and -- sorry, 1990, and the decision came
23 down a few months later.

24 Now the only other item I'd
05:26 25 like to show you with respect to that meeting is



1 162374. This is a letter from Mr. Wolch to David
2 Milgaard reporting on the outcome of the meeting,
3 it's dated October 3rd of 1990. So it says, if I
4 can just go through this letter with you, it
05:26 5 says:

6 "Further to my previous
7 correspondence advising you of our
8 attendance in Ottawa, I am pleased to
9 report to you fully as to what
05:27 10 transpired.

11 David and I attended upon
12 Bruce MacFarlane, Assistant Deputy
13 Attorney-General, William Corbett,
14 Director of Prosecutions, and Eugene
05:27 15 Williams, for a lengthy meeting. Prior
16 to the meeting we were provided with a
17 number of reports contained in a thick
18 black binder, most of which we had seen
19 before. We will certainly make
05:27 20 available to you the binder, and in
21 particular those portions that were new
22 to us. After studying the material and
23 certain preliminary discussions lasting
24 over 2 hours, we then had a concentrated
05:27 25 four hour meeting without break."



1 So there is Mr. Wolch's summary of not only a
2 summary of what was received by you, but the
3 duration of the meetings that were held to
4 discuss its contents, and it's abundantly clear
05:27 5 there that there was a thick black binder, and we
6 don't know where that's gone; --

7 A Yes.

8 Q -- am I accurate in that?

9 A Yes.

05:27 10 Q And Mr. Wolch also says:

11 "... and particularly those portions
12 that were new to us."

13 And what would be new to you would, amongst other
14 things I would think, be the -- possibly the
05:28 15 interview of Deborah Hall by Eugene Williams?

16 A Possibly, yes.

17 Q Could be part of that.

18 "Mr. MacFarlane explained
19 that he wished to meet with us because
05:28 20 he felt that when one gets a submission
21 on paper you sometimes miss the flavour
22 and many questions are not readily
23 answered. He felt that we could provide
24 him with that flavour. We indicated
05:28 25 that we welcomed the chance to address



1 any area of the case that might cause
2 the reviewers to have any negative
3 thoughts. Also, we wanted to be certain
4 he was being properly briefed by Mr.
05:28 5 Williams."

6 And was that part of the rationale behind that
7 meeting was to test whether Mr. Williams was
8 properly briefing Mr. MacFarlane in preparation
9 for the minister?

05:28 10 A Yes.

11 Q Okay.

12 "There was a lengthy
13 discussion regarding Mr. Wilson. From
14 there we branched off to a discussion on
05:29 15 how it would have been physically
16 impossible for you to have committed the
17 crime based on the accepted evidence
18 ...",

19 and then it goes on near the bottom -- sorry,
05:29 20 bottom of that paragraph.

21 "The forensic evidence was reviewed at
22 great length and the evidence of Deborah
23 Hall, Melnyk and Labchuk was considered.
24 The situation regarding Larry Fisher was
05:29 25 examined fully."



1 So it appears that part of the discussion you had
2 was a discussion with respect to the forensic
3 evidence and the information that Justice had to
4 essentially contradict what Dr. Ferris had said
05:29 5 in his report?

6 A I can't say that we had that information.

7 Q But it would appear that --

8 A It makes sense to me that --

9 Q -- yeah, but Justice would be pointing out to you,
05:29 10 I would think, sort of the frailties of your
11 submission, at least two of the frailties that
12 they would argue, Deborah Hall's affidavit and Dr.
13 Ferris' report?

14 A Yeah, it would make sense.

05:29 15 Q Yeah, okay.

16 A Umm --

17 Q And then:

18 "Given the length of the discussion I
19 clearly cannot possibly do it justice in
05:30 20 this letter, but on a positive note I
21 would indicate that it is remarkable how
22 many factors in your favour come up in a
23 discussion of that nature.

24 It was obvious in talking to
05:30 25 the Justice officials that the points we



1 were making were significant and they
2 took copious notes."

3 And then there was a discussion as to what test
4 would be applied should they go to an appropriate
05:30 5 Court, and Mr. Wolch's prophetic finding that,
6 based on his personal opinion, that it should go
7 to the Supreme Court directly?

8 A Yes.

9 Q And then on the next page:

05:30 10 "All in all we brought 'life' to our
11 written submissions. We did have
12 certain facts brought to our attention.
13 It is clear that Deborah Hall in her
14 examination by Mr. Williams in some ways
05:30 15 corroborated Melnyk and Labchuk. But in
16 reading her evidence thoroughly, it
17 became obvious that she was not wavering
18 and she was very clear that there was no
19 re-enactment and that your comments, if
05:31 20 made, were sarcastic at best."

21 Do you agree with what Mr. Wolch has put in that
22 letter?

23 A Sure, yes.

24 Q Okay. It's a -- Mr. Wolch talks it in some ways
05:31 25 corroborated Melnyk and Lapchuk, that's I suppose



1 a concession that some of what Deborah Hall said
2 did change, or did -- it didn't --

3 A No, I think what Mr. Wolch was referring to, I
4 suspect, is that they -- she corroborated that
05:31 5 something happened, --

6 Q Yeah?

7 A -- that there was some motion, but -- you know, if
8 you want to debate that again I'm happy to do it,
9 but --

05:31 10 Q And near the end:

11 "I believe that everything
12 that can be done has been done to this
13 point, with the possible exception of
14 the recent suggestion that we may have
05:32 15 more evidence regarding Fisher. Any
16 direction from you would be
17 appreciated."

18 So, there, Mr. Wolch is seeking instructions from
19 Mr. Milgaard as to where to go next; would that
05:32 20 be accurate? Maybe not 'instructions' but
21 'directions' on where he'd like to see the things
22 go?

23 A I would characterize it as a client management
24 invitation.

05:32 25 Q Right. Okay.



1 A Participate in what was going on.

2 Q And that was the intention behind this
3 correspondence, to keep your client up to date
4 with the most recent discussions?

05:32 5 A Yes.

6 Q It's a page and a half, I'd be accurate in saying
7 that it isn't a reflection of everything that was
8 discussed, it isn't a reflection of all of what
9 went on there, it's Mr. Wolch's summary of what he
05:32 10 thought were the salient parts of the -- of that
11 particular meeting?

12 A That's correct.

13 Q Am I accurate?

14 A Well, I can't say that, I -- I -- I just can't
05:33 15 say.

16 Q Yeah?

17 A Umm --

18 Q But it's fair to say --

19 A Sorry, it's clearly an effort to appease David
05:33 20 Milgaard, and to have him feel as though he's
21 informed.

22 Q Informed? Okay. And the Karp and Rosner excerpts
23 that we've gone to, while you don't have much of a
24 recollection of what occurred at that meeting and
05:33 25 what documents were, you were seeing for the first



1 time, is it sort of an accurate reflection of your
2 view of how things went?

3 A I'm -- I'm reading it again almost from first
4 impression. I don't recall.

05:33 5 COMMISSIONER MacCALLUM: That's Karp and
6 Rosner?

7 A Yes.

8 BY MR. FRAYER:

9 Q So it may have some exaggerations to it too, or is
05:33 10 it an accurate reporting of --

11 A Well, I recall it was a very heated meeting, I
12 just don't recall the details. And I recall
13 bringing Grey Cup stuff to them, Blue Bomber
14 stuff, --

05:34 15 Q That's there. I can see that. Thank you.

16 A -- and we also brought Mr. Fainstein food.

17 Q I have just a couple of questions, as you
18 suggested I might, with respect to the
19 Caldwell-Williams conflict.

05:34 20 A Yes.

21 MR. SOROCHAN: If I could just -- Mr.
22 Commissioner, both of the documents referred to
23 the witness in relation to this meeting make
24 reference to the Department of Justice officials
05:34 25 making copious notes about the meeting, Mr. Asper



1 is asked to recall things, and without those
2 notes being shown to him. I'd ask Commission
3 Counsel where those notes are, and I guess the
4 answer is nobody knows or maybe it's privileged,
05:34 5 but this illustrates the difficulty I have had
6 with Mr. Asper being questioned about this area
7 when the Department of Justice is not prepared to
8 produce all of the documents, including documents
9 which the record seems to indicate were copiously
05:35 10 taken at the time.

11 MR. HODSON: I might just add my
12 understanding, Mr. Commissioner -- and we haven't
13 got to this point for Mr. Williams -- I do not
14 have any notes. I've asked for this, I do not
05:35 15 have any notes or documents that shed any light
16 on what was provided at the meeting. I
17 understand, and again it's only my understanding
18 based on my interview with Mr. Williams, that
19 there is at least one communication between Mr.
05:35 20 Williams and other lawyers and/or somebody over
21 which privilege is claimed, it's reporting on the
22 meeting, and in the course of the report it sets
23 out what happened at the meeting. I've asked for
24 that, I'm told it's a privileged document, I
05:35 25 suspect they will say it's unconstitutional as



1 well, so I don't have it. I'm not giving up yet
2 on getting it.

3 COMMISSIONER MacCALLUM: Okay.

4 MR. HODSON: And I might add that the fact
05:36 5 that this line of inquiry has taken with this
6 witness confirms for me the relevance of that
7 document to this Commission for that purpose.

8 COMMISSIONER MacCALLUM: So it would
9 appear.

05:36 10 MR. FRAYER: Okay, thank you, Mr.
11 Commissioner. I have no response to either
12 submission, so I'll proceed, if I might.

13 BY MR. FRAYER:

14 Q Just with respect to -- and I'll just touch on
05:36 15 this briefly because this has been canvassed very
16 ably in great detail by Ms. Knox -- but I wanted
17 to just sort of deal with a couple of items
18 relating to the allegation of a conflict of
19 interest between Mr. Caldwell and Mr. Williams.
05:36 20 And the first of those documents to which I am
21 going to refer you is 010056, and this is a letter
22 authored by you dated August the 29th of 1989, and
23 if we could look at the third paragraph of that
24 letter, the last line of it, perhaps this whole
05:37 25 paragraph:



1 "We have attempted to locate
2 this information by reviewing the
3 Saskatoon Star - Phoenix in the time
4 period including the weeks preceding the
05:37 5 murder of Gail Miller. Unfortunately,
6 we are either missing the items as
7 reported or they may not have been
8 reported at all. In any event, we would
9 very much appreciate your making
05:37 10 enquiries as to the information that the
11 prosecutor might have had involving
12 attacks or related incidents involving
13 nurses."

14 And the reason I point that out is that I suppose
05:37 15 the interpretation -- you can tell us what you
16 meant by it -- is that there was a direct
17 recommendation made that Mr. Caldwell be
18 contacted for that information; in other words a
19 request made by you, through the Minister of
05:37 20 Justice, to have that information obtained?

21 A Oh, Mr. Frayer, I don't think there's any question
22 that Mr. Caldwell -- that it was argued that Mr.
23 Caldwell should be contacted. Our view, however,
24 was that he should be contacted and treated as a
05:37 25 witness, not as a co-collaborator in the



1 investigation.

2 Q But, in any event, there is a specific request for
3 information to be obtained from the prosecutor
4 directly, and information --

05:38 5 A Well, no, no, it says:

6 "... we would very much appreciate your
7 making enquiries as to information that
8 the prosecutor might have had involving
9 attacks ...",

05:38 10 that information could have come through a
11 request to the Attorney General to sequester the
12 files and provide them to the Department of
13 Justice, and Mr. Caldwell would then be asked as
14 a witness, as were our witnesses, what his
05:38 15 recollection might have been.

16 Q That was what, that was what you intended by that.
17 The impression that could be left from it is
18 that -- an invitation to talk to the prosecutor
19 directly to get the information that you are
05:38 20 looking for?

21 A Well I think, my recollection is that we were, we
22 were pretty clear that we thought that Mr.
23 Caldwell should be treated as a witness.

24 Q And you say that, with respect -- and that, again,
05:39 25 is, if I can just go to one other piece of



1 correspondence, that's reiterated again in
2 document 157828, which is a letter dated August
3 23rd, 1991 prepared by yourself directed to
4 Minister Campbell, which at page 2 or at 157829:

05:39 5 "Finally, I would draw to
6 your attention my letter to the then
7 Minister of Justice and Attorney-General
8 for Canada, The Honourable Doug Lewis,
9 dated August 29, 1989 ...",

05:39 10 you send a copy:

11 "... in which we requested that
12 enquiries be made as to information that
13 the original prosecutor might have had
14 involving attacks or related incidents
05:39 15 involving nurses. Perhaps this request
16 was too specific and, under the
17 circumstances, it would be appropriate
18 to broaden the request that enquiries be
19 made relating to any victims of indecent
05:40 20 assault ...",

21 and so on. Once again, it appears to be a
22 reiteration of the same request, and in this case
23 it's more specific in terms of referring to the
24 original prosecutor, what the original prosecutor
05:40 25 might have?



1 A Well I guess I would say that, if that had been
2 the intention, the wording would have been that
3 inquiries be made of the prosecutor as to what he
4 might have had involving attacks.

05:40 5 Q Okay. The interpretation could be that you go to
6 the original prosecutor to get that information?

7 A Well, okay, but with all respect, it was our view,
8 and it just seemed logical to us, that the
9 original prosecutor in the trial would not be part
05:40 10 of the investigative team into his own
11 prosecution.

12 Q Okay. And from the other side, you know, having
13 read through the evidence of Mr. Williams as
14 you've indicated, that in response to questions
05:41 15 asked him by Commission Counsel, he outlined
16 exactly what the relationship was between he and
17 Mr. Caldwell?

18 A I didn't see that part, I'm sorry.

19 Q You haven't read it?

05:41 20 A No.

21 Q Okay. Well, if I can bring it up on the screen
22 then, 32451 is an excerpt from Mr. Hodson's
23 examination of Mr. Williams on Tuesday, June the
24 6th, and Mr. Hodson says, middle part of the
05:41 25 question:



1 "-- let's talk first about Mr. Caldwell.
2 What role did he play in your
3 investigation of the first application?

4 A Mr. Caldwell assisted me
10:06 5 significantly. Firstly, he helped to
6 open some doors and by that --

7 COMMISSIONER MacCALLUM: I'm sorry, what
8 was that?

9 MR. HODSON: Open some doors.

10:06 10 A At the time the Section 690 process
11 didn't have any powers to compel
12 production of material and at that
13 time I recognized that I needed to
14 have some access to the police files.
10:06 15 Mr. Caldwell was a well-respected
16 prosecutor in this area, he was also
17 the prosecutor of the case, he made
18 some introductions that enabled me to
19 access the police file, access to some
10:07 20 of the police investigators as the
21 case came along. I needed to
22 understand the theory of the Crown's
23 case and he was the prosecutor, so to
24 the extent that I had questions, he
10:07 25 responded. To the extent that I



1 requested and needed information from
2 the file, he provided it, and he
3 provided it on a timely basis. That
4 was his role. He asked -- I asked
5 certain questions of him, he
6 responded, but he did not take part in
7 any of "my deliberations" and I did
8 not share with him any of my
9 perceptions about the case. He was,
10 in some sense, like another witness,
11 but he was a fairly significant one
12 because of his intimate knowledge of
13 the file.

14 Q And would you have asked him what his
15 thoughts or views were on the grounds
16 then?

17 A I don't recall doing so, no. I simply
18 asked him about, to provide certain
19 information. He may have expressed
20 his views on it, but I certainly
21 didn't solicit his view about what he
22 thought of the applicant's grounds,
23 no.

24 Q And as far as the Crown theory, we
25 touched on this a bit yesterday, why



1 would it be important for you to learn
2 the Crown theory from him?"

3 And then he goes on to answer that question in
4 some detail, and then on page 32455, line 17 --
05:43 5 just before that, sorry, he was employed with the
6 Federal Department of Justice:

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

17 On the basis of what Mr. Williams has said about
18 his relationship with Mr. Caldwell, it would
19 appear that the allegation that eventually made
05:44 20 its way into the newspaper didn't have any
21 foundation. Would you agree with me given Mr.
22 Williams' interpretation of his relationship with
23 Mr. Caldwell?

24 A Not at all.

05:44 25 Q Okay. And why is that?



1 A On two levels, on the perception level and on the
2 actual reality level of the question of conflict
3 of interest. For Mr. Williams to treat Mr.
4 Caldwell as anything other than the way he treated
05:44 5 other witnesses in this case, given that Mr.
6 Caldwell had a vested interest in preserving the
7 conviction and given that Mr. Caldwell had written
8 to the Parole Board and displayed extreme bias in
9 favour of upholding the conviction, there was an
05:45 10 actual conflict of interest for Mr. Williams to
11 expect Mr. Caldwell to all of a sudden say, well,
12 maybe I made a mistake, or at least consider the
13 possibility that maybe he had made a mistake, and
14 it's unreasonable of Mr. Williams, in my opinion,
05:45 15 to put Mr. Caldwell in that position, and it
16 creates not just the actual conflict of interest,
17 it creates the perception of a conflict of
18 interest, and, Mr. Frayer, it's not a novel
19 concept that conflicts arise when people are asked
05:45 20 de facto to investigate themselves. I'm guessing
21 that the Province of Saskatchewan may have a
22 problem, may have had a problem if I was named
23 commissioner of this inquiry.

24 Q Given that what Mr. Williams has said about the
05:45 25 role that Mr. Caldwell played, it doesn't appear,



1 at least according to Mr. Williams, that there was
2 opinions sought from Mr. Caldwell about the merit
3 of the application itself.

4 A There's a letter, Mr. Frayer, that I don't have, I
05:46 5 was just looking for it. There's a letter that
6 Mr. Caldwell sends to Mr. Williams enclosing the
7 chapter of Peter Carlyle-Gordge's book in which he
8 makes reference to the chapter and quips to Mr.
9 Williams, "I wonder if these people are looking at
05:46 10 the same trial as you and I." A very informal
11 kind of quip that I read as kind of mocking those
12 of us who were making the application to the
13 Department of Justice, and that's a letter from
14 Caldwell to Williams enclosing Peter
05:46 15 Carlyle-Gordge's -- the chapter on Joyce Milgaard.

16 Q Or mocking Peter Carlyle-Gordge for inaccuracies
17 in the information he was providing?

18 A Either way it's an opinion.

19 Q Because we know from cross-examination of Peter
05:47 20 Carlyle-Gordge, while he described certain factual
21 errors in there as being technical only, they were
22 more than technical, they were factual errors of
23 some significance, and he said the reason why he
24 maintained that they were technical errors only
05:47 25 was because he was being pressed by his publisher



1 to get the book out, so the press isn't infallible
2 either.

3 A Oh, I know that. I just think it shows a level of
4 familiarity by Mr. Caldwell toward Mr. Williams
05:47 5 that showed that they thought they were on the
6 same team and they are not, that's not the way --
7 as I understood it, that's not the way the system
8 was supposed to work.

9 MR. FRAYER: It's about quarter to,
05:47 10 Mr. Commissioner. I'm finished with that
11 particular area until nine tomorrow morning.

12 COMMISSIONER MacCALLUM: Yes.

13 MR. FRAYER: Thank you.

14 (*Adjourned at 5:48 p.m.*)
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OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:

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of our shorthand notes taken herein to the best of my
knowledge, skill, and ability.

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Official Queen's Bench Court Reporter

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Official Queen's Bench Court Reporter



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