

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
Delta Bessborough Hotel at
Saskatoon, Saskatchewan

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Volume 179

Inquiry Proceedings



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(Retired)



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Transcript of Proceedings

(Reconvened at 9:01 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

DONALD MURRAY BROWN, continued:

BY MR. HODSON:

Q Morning, Mr. Brown. We left off yesterday going through just what information Saskatchewan Justice received, and I now want to turn to February 1990.

And we know from the record

that on February 26th, 1990, Mr. Wolch received a phone call from someone who identified himself, apparently, as Sidney Wilson and gave information about Larry Fisher, and you are familiar

generally, are you, with Sidney Wilson and the tip that raised the name Larry Fisher in February 1990?

A Yes.

Q And the evidence that we have heard is that, upon receiving this information, I believe it was Mr. Asper telephoned and wrote to Eugene Williams with this information, indicating that the Milgaard group had received information suggesting Larry Fisher was the perpetrator of Gail Miller's murder, and thereafter Mr. Williams engaged Rick



1 Pearson of the RCMP to investigate that matter.
2 Can you tell us, do you recall when and how you
3 personally would have become aware of the fact
4 that a new suspect was introduced into the federal
09:04 5 application? And I appreciate that we're going
6 back a number of years, but do you remember how
7 you became aware that this was a new ground?

8 A I recall that I learned about that through the
9 news media. We weren't provided with advance
09:04 10 information or anything like that.

11 Q Just to assist on that, and I'll take you through
12 these media articles in a moment, in May of
13 1990 -- in May of 1990 there was a newspaper
14 report that identified the fact that the RCMP was
09:05 15 investigating another suspect, and then in June of
16 1990 I think the CBC identified Larry Fisher by
17 name, and a number of media outlets did as well.
18 And so would that have been when and how you
19 became aware of the fact that part of David
09:05 20 Milgaard's application to the Federal Minister
21 included an allegation that Larry Fisher was the
22 perpetrator?

23 A Yes. That would have come out, my recollection
24 is, certainly before the first application was
09:05 25 decided, so 1990 would probably be correct.



1 Q And is it correct, sir, that according to your
2 recollection, then -- or do you have any knowledge
3 or recollection as to whether anybody from Federal
4 Justice would have contacted Saskatchewan Justice
09:05 5 to inform them that a new ground had been
6 advanced, and that was namely that there was
7 another alleged perpetrator?

8 A I don't recall talking to anyone from Justice with
9 respect to that. Ellen Gunn might have, the
09:06 10 deputy minister might have, but I don't recall
11 doing it myself. I was usually talking to Eugene
12 Williams.

13 Q Okay. If Saskatchewan Justice had been made
14 aware, let's say in March-April-May of 1990, if
09:06 15 Saskatchewan Justice had been informed by Federal
16 Justice that a new suspect was being investigated
17 is that something you think you personally would
18 have become aware of?

19 A At some point, yes, I -- if Ellen Gunn had been
09:06 20 told, I'm sure she would have passed that on to
21 me, there would be no reason for that to be kept
22 secret.

23 Q And can we take it from that that, at least based
24 on your best recollection, that Saskatchewan
09:06 25 Justice likely first became aware of this new



1 suspect being investigated through the media?

2 A That's -- that's how I became aware of it.

3 Q Okay.

4 A I suspect probably she did too.

09:06 5 Q Okay. And --

6 A Excuse me, this little speaker device isn't
7 working, and I'm having some trouble hearing you.

8 Q Okay, thanks.

9 A The sound is bouncing off everything.

09:07 10 Q Test! Is that better? I'm wondering if -- I
11 think they may need to replace the cable, Mr.
12 Commissioner. You can't hear me, Mr. Brown, very
13 well?

14 A Well, I can hear you, but I have to sort of strain
09:08 15 to do it because the sound is reverberating.

16 MR. JAY BOECHLER: I can turn it up a bit
17 more.

18 COMMISSIONER MacCALLUM: Would you like to
19 pass this one to him? I don't need that.

09:08 20 MR. HODSON: And then maybe at the break --

21 COMMISSIONER MacCALLUM: Sure, that would
22 be fine.

23 MR. HODSON: Try that. Is that better?

24 A That's better, yes.

09:09 25 MR. HODSON: Okay, thank you.



1 BY MR. HODSON:

2 Q So, just back on this investigation, I think what
3 we have seen in the record -- maybe we could call
4 up 001810 -- and this is a letter, it's dated
09:09 5 March 1990, I think we've identified it as being
6 March 1 of 1990. And this is the letter from Mr.
7 Williams to Sergeant Pearson confirming his
8 instructions to investigate the matter, and is
9 this a letter that you may have received in the
09:10 10 course of the reference case? I don't propose to
11 go through it in detail.

12 A We may have. I don't recall. If we had got that,
13 it would have been during the course of the
14 reference, not beforehand.

09:10 15 Q And is it fair to say that Saskatchewan Justice
16 had not been consulted, nor would it have been
17 involved in any way, in the engagement of the RCMP
18 by Federal Justice to investigate Larry Fisher as
19 the perpetrator of the Gail Miller murder?

09:10 20 A That's correct.

21 Q And I think you've told us that you would have
22 become aware of that engagement likely through the
23 media?

24 A Probably, yes.

09:10 25 Q We touched on this a bit yesterday, and I think



1 you've told us that from a constitutional
2 perspective, that Saskatchewan would not have had
3 concerns with the Federal Justice lawyers, as part
4 of the 690 process, engaging the RCMP to
09:11 5 investigate Larry Fisher as the perpetrator of
6 Gail Miller for their purposes; is that correct?

7 A That's correct, yes.

8 Q And I think you told us, then, that you would rely
9 upon that investigation to discharge your duty,
09:11 10 your provincial duties, as far as the
11 investigation into the death of Gail Miller?

12 A Yes.

13 Q And what was your understanding or what is your
14 understanding of the nature and extent of the RCMP
09:11 15 investigation conducted on the first application
16 into Larry Fisher?

17 A Well it was our understanding that they would do a
18 complete investigation of the Larry Fisher
19 allegation to determine whether there was any real
09:11 20 evidence connecting him to the Gail Miller murder.

21 Q And did you ever receive any information to
22 suggest that the investigation was anything other
23 than what you understood it to be?

24 A No.

09:11 25 Q And if we can just get that letter back up, just



1 so we're clear, did Saskatchewan Justice at any
2 point, then, become involved in directing Sergeant
3 Pearson or the RCMP in their police investigation
4 as part of the first application?

09:12 5 A No.

6 Q If we can go to 004815. This is March 15th, 1990,
7 this is a newspaper article in the *StarPhoenix*,
8 and I believe this is where the issue of the
9 bone-handled hunting knife was raised. And there
09:12 10 is a quote here, I think from Mr. Asper, it says:

11 "There's also the question of
12 a missing knife. A double-edged
13 bone-handled knife with a 7.6 centimetre
14 blade was found near Miller's body on
09:12 15 the day of the murder. But it
16 disappeared before the preliminary
17 hearing. A second knife was found in
18 the spring when the snow melted. It was
19 single-edged.

09:13 20 Asper said it would be
21 'helpful' if it could be shown that the
22 second knife presented by the Crown
23 wasn't the murder weapon."

24 And then it goes on to talk about it. And we've
09:13 25 heard a fair bit of evidence, this Commission,



1 about this bone-handled hunting knife; do you
2 recall this being an issue at the Supreme Court
3 reference or do you recall looking at this at
4 all?

09:13 5 A Well, certainly there was evidence that there was
6 a bone-handled hunting knife, and I believe it was
7 seen by the people in the car when they were
8 driving up to Saskatoon. I can't say that it
9 became a huge concern during the Supreme Court
09:13 10 reference. It seemed to me, at that point, that
11 there was already one too many knives to be
12 concerned with.

13 Q Okay. Let me just, if I might assist, inform you
14 a bit about some of the evidence relating to the
09:14 15 two knives; that there was evidence, I think from
16 Mr. Caldwell and from Ian Oliver, that in the
17 course of the Gail Miller investigation, I think a
18 number of weeks after the body was found or after
19 the murder, located in the back alley within -- I
09:14 20 can't recall -- a short distance from the body
21 they found a bone-handled hunting knife on the
22 bottom of the fence, I think with a compass in it.
23 It was retained by the police, I think the
24 evidence of Mr. Caldwell was that it was brought
09:14 25 to the preliminary hearing, it wasn't tendered as



1 an exhibit I don't believe. Mr. Tallis questioned
2 witnesses about that knife at the preliminary
3 hearing, it was not put forward by the Crown as
4 being the murder weapon or as an exhibit, and the
09:14 5 evidence we heard from Mr. Caldwell and Mr. -- I
6 believe, and Mr. Tallis, is that at trial it was
7 brought there, it wasn't tendered because the
8 Crown did not rely upon it, and Mr. Tallis, I
9 think, testified that he did not want to introduce
09:15 10 a second knife at the hearing, and so that's from
11 the Crown end.

12 And I think there, as well,
13 was evidence, certainly in statements of Ron
14 Wilson in 1990, I think he told Eugene Williams
09:15 15 that he recalled that David Milgaard had a
16 bone-handled hunting knife that, I think, differed
17 in description than the bone-handled hunting knife
18 found in the back alley. But, as I say, that's
19 just a quick summary.

09:15 20 Back to this article. Do you
21 recall considering an allegation that there was
22 somehow a miscarriage of justice or something
23 improper done by the police or Mr. Caldwell in how
24 they dealt with a knife found by the police in the
09:15 25 back alley, and in particular that it was, it says



1 here 'disappeared', but somehow it was disposed of
2 improperly or not provided to the defence?

3 A No, I don't recall us getting involved in any kind
4 of search for the knife, consideration of the
09:16 5 knife.

6 Q And if in fact, and it's not necessarily in this
7 article, but I think we see this later in other
8 documents, the suggestion that the Crown
9 deliberately disposed of this second bone-handled
09:16 10 hunting knife and didn't introduce it and that
11 this bone-handled hunting knife would have been
12 evidence favourable to David Milgaard at the
13 trial. If that allegation were true, that the
14 Crown had deliberately disposed of evidence that
09:16 15 might affect the verdict, would that be something
16 that might prompt the province to re-open the
17 investigation?

18 A Well, I mean, aside from the fact that I don't
19 know how putting more knives in David Milgaard's
09:17 20 hands is going to help him at trial. As I say, I
21 think there was already one too many for Justice
22 Tallis to deal with, but if there's some basis to
23 suggest that somebody is doing something nefarious
24 in getting rid of this knife, then that's a
09:17 25 concern to us, but there was no suggestion of



1 that.

2 **Q** And again, are you telling us that that was not
3 something that Saskatchewan Justice concluded at
4 any point, that there was -- that there was merit
09:17 5 to this ground or that this ground was even
6 advanced to you?

7 **A** Well, it certainly wasn't advanced to us. Again,
8 this would have been something we would have
9 discovered by reading the newspapers. At that
09:17 10 point, you know, again the federal government was
11 investigated, they would look at that and if they
12 determined there was anything to it, I'm sure they
13 would have done something about it.

14 **Q** Go to 015979, and this is a May 4 -- sorry, May
09:18 15 11th, 1990 news article, and I think this article
16 may be from the *Free Press* in Winnipeg and I think
17 the story was carried elsewhere, and the headline,
18 *RCMP reopen man's murder case*. It says:

19 "The RCMP are investigating a
09:18 20 suspect they believe may be responsible
21 for a murder that a Winnipeg man was
22 convicted of 21 years ago.

23 Winnipeg MP John Harvard told
24 the Commons justice committee yesterday
09:18 25 the investigation, which has been going



1 on for the last two months, involves a
2 man now serving time in a Saskatchewan
3 federal penitentiary for rape and
4 assault charges."

09:18 5 And then if we can just go up to the top, it
6 says:

7 "The real killer is serving time in jail
8 in Saskatchewan and (I've been told)
9 that the RCMP have interviewed this man
09:19 10 twice, Harvard said. "What we have here
11 is an investigation on two fronts, but
12 no concrete action has been taken and
13 meanwhile Milgaard remains in jail."

14 And John Harvard was a member of parliament at
09:19 15 the time who had raised this issue. Are you
16 familiar with John Harvard's general involvement
17 in this matter from reviewing the documents?

18 A Well, certainly Mr. Harvard was an opposition
19 member who was campaigning for David Milgaard. I
09:19 20 seem to recall that he may actually have written
21 the Minister of Justice for Saskatchewan as well.
22 I would know that because I would likely have been
23 the one that would prepare a draft response for
24 the consideration of the minister.

09:19 25 Q Okay. The evidence we've heard, I think primarily



1 from Mr. Asper, and as well from Sergeant Pearson
2 and a few others, is that the RCMP investigation
3 of Larry Fisher started I think in early March,
4 1990 and there was a desire by Sergeant Pearson to
09:20 5 keep that investigation both from Mr. Fisher and
6 out of the media and I think the evidence we've
7 heard is that in May, 1990 John Harvard raised the
8 question with Minister Kim Campbell, I think in a
9 parliamentary committee meeting, about this
09:20 10 investigation and it then became public, I think
11 that's generally the evidence, and so this is the
12 first story indicating that. Is it likely that
13 this would have been, either this story or
14 something that, a copy of this or followed this
09:20 15 story, that would have been how Saskatchewan
16 Justice first became aware that there was another
17 perpetrator being investigated?

18 A Very probably, yes. Again, they submitted nothing
19 to us in terms of a request or information.

09:21 20 Q And from Saskatchewan Justice's perspective to
21 learn then that, and I appreciate that it's done
22 in the context of the 690 application, but to
23 learn that the investigation into the death of
24 Gail Miller and another suspect is being
09:21 25 investigated by the RCMP, did that cause you



1 concern, to learn about it that way?

2 A I don't know that it caused us concern to learn
3 about it that way. My recollection is he was of
4 some considerable interest to us because I
09:21 5 gathered up the Larry Fisher files we could find
6 and we looked at those.

7 COMMISSIONER MacCALLUM: I'm sorry, Mr.
8 Brown, I wonder if you could keep your voice up,
9 please. Thanks.

09:21 10 A We gathered up the Larry Fisher files and looked
11 over those to see what we had on him and just
12 generally who he was and what his background was.

13 BY MR. HODSON:

14 Q Sorry, that's when you would have become aware of
09:22 15 that investigation?

16 A That's right, yes.

17 Q Yeah. But I guess, sorry, the question is, and
18 maybe you've already answered it too, given that
19 the responsibility to investigate the perpetrator
09:22 20 of the Gail Miller murder would be a matter for a
21 provincial police force and fall under provincial
22 power, did it cause Saskatchewan Justice any
23 concern to learn that that very matter was being
24 investigated as -- by the RCMP as part of the
09:22 25 federal review process?



1 A No, that didn't sort of get us terribly upset.
2 Again, these are allegations made in the course of
3 this review. We accepted that the federal
4 government had the authority and indeed the duty
09:22 5 to do the investigation and we were going to wait
6 until they were finished to see what they came up
7 with.

8 Q And would Saskatchewan Justice's position then be
9 to simply await their investigation and rely upon
09:23 10 Federal Justice and RCMP to do the investigation
11 that Saskatchewan Justice and Saskatoon City
12 Police would otherwise do if there was no 690
13 application?

14 A That's correct, yes.

09:23 15 Q If we can go to 004730, and this is a May 14th,
16 1990 article, I believe it's one that is included
17 in Saskatchewan Justice records, and this relates
18 to a Dr. Markesteyn. Are you familiar with who
19 Dr. Markesteyn is?

09:23 20 A Yes. He was -- was or had recently been the
21 medical examiner in Manitoba.

22 Q And this article talks about Dr. Ferris saying:

23 "...it is even stranger that,
24 although Justice Department was given
09:24 25 his report 16 months ago, none of the



1 investigators have ever contacted him.

2 "I don't think they really
3 have a reasonable excuse for not having
4 at least contacted me directly. I'm
09:24 5 surprised at that."

6 Asper said he requested
7 Markesteyn review the evidence because
8 it appears the Justice Department has
9 little interest in challenging Ferris'
09:24 10 findings."

11 And I'll show you some articles as we progress
12 chronologically where there is criticism leveled
13 in the media about the manner in which the
14 Federal Justice lawyers are reviewing the
09:24 15 application, and you would be generally aware of,
16 becoming aware of those criticisms during the
17 course of the first application?

18 A Yes, we were, and I believe Ellen Gunn was
19 basically staying in contact with some federal
09:24 20 officials with respect to our concern that this
21 seemed to be moving fairly slowly.

22 Q And so here, I'm wondering whether from
23 Saskatchewan Justice's perspective, you've told us
24 that you would have been aware of the Dr. Ferris
09:25 25 allegation and obviously, if that's true, that it



1 proves his innocence, that would provide the basis
2 at least for the province to re-open the
3 investigation; correct?

4 A If it were true, yes.

09:25 5 Q If it were true. And so from a -- from the
6 province's perspective, you have in the, I guess
7 the public domain, a report in the media back in
8 1989 that talks about Dr. Ferris' conclusions and
9 his opinion that it proves innocence and then
09:25 10 about a year later, or 10 months later, a
11 newspaper report that says, from Dr. Ferris that
12 says no one has even contacted him yet, and I want
13 to know from Saskatchewan Justice's perspective,
14 did -- what if any steps did you take or did you
09:26 15 have any concerns, when I say you I mean
16 Saskatchewan Justice, about -- or did you have any
17 concerns about the manner in which this review
18 process was being handled based upon what you read
19 in the media?

09:26 20 A Well, we were concerned it was moving fairly
21 slowly. In terms of specifics such as Dr. Ferris'
22 complaint about not being contacted, I think by
23 this time, certainly later, and sometime before
24 the first ministerial decision in February of '91,
09:26 25 we had been told by the federal government that



1 there didn't appear to be much to the Ferris
2 report. Again, they didn't get into a lot of
3 details on that, but we were assured that they had
4 looked at it, they had consulted on it and they
09:27 5 didn't think there was much there.

6 Q And we touched on this yesterday, I think you
7 testified that prior to Kim Campbell's February
8 27, 1991 decision, I think you told us that no one
9 from Federal Justice advised Saskatchewan Justice
09:27 10 as to what her decision was going to be; is that
11 correct?

12 A That's correct.

13 Q And so -- but what they did tell you is that with
14 respect to certain matters that were reported in
09:27 15 the media, basically that there's another side to
16 this story and here's generally what it is?

17 A Yes, that's right.

18 Q Just from a -- I suppose from Saskatchewan
19 Justice's perspective, would you agree that having
09:27 20 allegations in the public domain or in the media
21 about improper conduct in the investigation and/or
22 conduct of the trial of David Milgaard would be
23 matters that would affect the province and the
24 administration of criminal justice; is that fair?

09:28 25 A Yes.



1 Q And the public's perception of whether or not
2 Saskatchewan Justice and Saskatchewan police
3 forces acted properly; is that fair?

4 A That's correct, yes.

09:28 5 Q And I think you told us yesterday that you would
6 be -- or would you be relying to some extent on
7 the Federal Minister's review process to determine
8 whether or not the allegations had merit?

9 A Yes.

09:28 10 Q In other words, that in some respects, the
11 minister's decision on the first application would
12 have a direct impact on provincial interests;
13 would you agree with that?

14 A Yes, oh, yes.

09:28 15 Q And that if she concluded a remedy should be
16 granted because the Crown and/or the police
17 committed misconduct and therefore there was a
18 miscarriage of justice, that would have an impact
19 on a provincial interest; correct?

09:28 20 A Absolutely, yes.

21 Q And similarly, if she decided that there was no
22 miscarriage of justice, there was no misconduct or
23 wrongdoing by the Crown and police, that would
24 also have an impact on the province?

09:29 25 A Yes.



1 Q And in some respects it would be vindication or it
2 would be a determination that lookit, what's been
3 alleged against you has not been established to
4 the minister's satisfaction?

09:29 5 A Yes.

6 Q And so would Saskatchewan Justice then have, I
7 guess, an interest in the outcome of the
8 minister's review process and determination?

9 A Oh, absolutely, yes.

09:29 10 Q And in a sense, and I think we'll see this a bit
11 later in responding to the public, would there be
12 a public component of that; in other words, given
13 the attention this matter had, that the minister's
14 decision, at least the first decision was
09:29 15 ultimately used by Saskatchewan Justice to justify
16 why it wasn't taking steps? Is that fair?

17 A That's right, yes.

18 Q So in addition to -- given that interest in the
19 outcome, we've talked a bit about the substantive
09:30 20 allegations. Would the province also have an
21 interest or be affected by the process involved by
22 the minister; in other words, by the federal
23 department and the minister and whether the
24 process was seen by the public to be fair and
09:30 25 transparent?



1 A Well, yes, and that was one of the major concerns
2 we had, is the public's information on this was
3 coming entirely from the news media, allegations
4 of serious misconduct were not being challenged
09:30 5 publicly by the federal investigators who were
6 looking into them and ultimately all the federal
7 government ever did was release that letter of the
8 minister's which, while it certainly provides
9 answers, doesn't sort of assist the public in
09:31 10 understanding the process and arriving at those
11 answers.

12 Q And on that point, would it be important for the
13 province and for the provincial interest that
14 we've identified arising out of the minister's
09:31 15 decision to have the process not only to be fair,
16 but to be seen to be fair?

17 A Absolutely, yes.

18 Q And what would be the impact or the effect on the
19 provincial interest if the public did not perceive
09:31 20 or believe the process employed by the minister to
21 be fair?

22 A Well, they are left with the impression created by
23 the newspaper stories for two years, three years
24 indicating that David Milgaard was the subject of
09:31 25 a conspiracy to frame him up first and then cover



1 up the involvement of Larry Fisher.

2 Q If the process utilized by the Federal Department
3 of Justice and the Federal Minister was perceived
4 by the public not to be fair or proper or
09:32 5 transparent, did that impact on the province's
6 ability to publicly rely upon the minister's
7 decision as final resolution of the issues raised
8 as they affected the province?

9 A Well, I don't think it impacts on our ability to
09:32 10 rely on it. It's all we really have to rely on,
11 is that, since they wouldn't release that
12 information even to us, but what it does do is it
13 substantially weakens our position in replying to
14 the public. All we can do and say, well, look at
09:32 15 this letter or look at this release by the
16 minister of justice, they did everything.

17 Q And so prior to -- and we'll deal with this in the
18 media information after Kim Campbell's decision,
19 but prior to her decision of February 27, 1991,
09:33 20 and this is one, I think, example, and I'll go
21 through others, would you agree that there was
22 growing skepticism in the media, primarily from
23 those on behalf of David Milgaard, about the
24 process being utilized by the Federal Justice
09:33 25 Department in considering the application?



1 A Well, I think it's fair to say that -- and I think
2 news media people, whether they were supportive of
3 David Milgaard or not, could look at the fact that
4 this took a long time and say why, they could look
09:33 5 at the fact that a lot of these allegations didn't
6 appear to be getting responded to and one would
7 normally expect that if you were accusing senior
8 Justice Department officials of corruption or
9 misfeasance, that there would be some response.
09:34 10 The federal government was certainly playing by
11 the old rules in those days where you did your
12 job, you made the letter public and that was it,
13 there was no comment after that.

14 Q And I guess just back on the process, by the time
09:34 15 the minister's decision was announced in February,
16 1991, do you recall there being, even prior to the
17 decision, there being doubt and criticism being
18 expressed in the media regarding both the time
19 factor and the process utilized by Federal Justice
09:34 20 officials?

21 A Yes, yes.

22 Q And so in other words, there was, and again I'm
23 not asking you to interpret what the public was
24 thinking, but certainly the issue of the process
09:35 25 being employed by Federal Justice officials was an



1 issue that had been raised in the media in an
2 unfavourable sense; is that fair?

3 A Very much so, yes.

4 Q And just so that we're clear on this as far as the
09:35 5 province is concerned, would you agree that to the
6 extent to which Kim Campbell's decision of
7 February 27, 1991 was accepted by David Milgaard
8 and by the public generally, would that have been
9 helpful to the provincial interest?

09:35 10 A Yes, it did answer some questions. It suggests
11 that the minister and her staff have fairly
12 thoroughly looked into the allegations that were
13 presented. I'm not sure, though, by that point
14 whether the train was too far past the station to
09:35 15 make any difference.

16 Q Okay. And so again, prior to Kim Campbell's
17 decision in February, 1991 to the extent that
18 there started to be media reports being critical
19 of the process being utilized, did that have a
09:36 20 concern to Saskatchewan Justice in that it might
21 end up affecting, maybe not the ability of
22 Saskatchewan Justice to rely on the minister's
23 decision, but for the public to accept
24 Saskatchewan Justice's reliance?

09:36 25 A We of course knew the process that the federal



1 government was engaged in, so we had confidence in
2 that. The problem was the public didn't know that
3 and that was the real concern, is the public's
4 confidence in the administration of justice in our
09:36 5 view was being shaken by the fact that allegations
6 were being made and no one was responding to them.

7 Q And allegations not only about the substance of
8 the case, but also allegations about the manner in
9 which Federal Justice officials were reviewing
09:37 10 them?

11 A Were dealing with them.

12 Q So both of those matters?

13 A Exactly.

14 Q If we can go to 004731. Again I'll just show you
09:37 15 a couple of other articles on this. I don't have
16 a date on this, Mr. Commissioner, I believe it is
17 May, 1990, it's a *StarPhoenix* report, it says:

18 "Joyce Milgaard says
19 information on who really killed Gail
09:37 20 Miller has been held by Saskatoon police
21 for a decade.

22 The mother of convicted
23 murderer David Milgaard says she talked
24 in March to a person who gave a
09:37 25 statement to the police in 1980, giving



1 the name of the man Joyce Milgaard
2 believes actually murdered Miller in
3 1969."

4 And this is an example of articles that start to
09:37 5 appear here saying that not only is the real
6 killer out there, but that police and then later
7 government officials knew about it and are
8 somehow covering up. You would have become aware
9 of those types of allegations?

09:38 10 A Yes.

11 Q And can you tell us what at this time, and again
12 this is May of 1990, what concerns if any did
13 Saskatchewan Justice have about these types of
14 matters being reported in the media?

09:38 15 A Well, again, I mean, they create a bad impression
16 of the administration of justice. We know that in
17 fact there is very little to most of what was
18 being said because we have spoken to the feds and
19 they have been doing some investigating, so we had
09:38 20 some comfort that the substance wasn't there, but
21 the impression being left by those articles was
22 there and it was not being answered.

23 Q And so again would Saskatchewan Justice have a
24 concern that Saskatchewan Justice, the Crown
09:38 25 and/or the police involved in the original



1 investigation would have had information about the
2 real killer for many years and weren't doing
3 anything with it?

4 A Let me put it this way, if we believed that was
09:39 5 true, we would certainly have concern with it.

6 Q And is this something that you would have
7 investigated, this allegation?

8 A Well, I suspect by then we would have known what
9 she was talking about, it was the Linda Fisher
09:39 10 statement.

11 Q And so you would have had some comfort that that
12 issue was being looked into by somebody; is that
13 fair?

14 A Yes.

09:39 15 Q And what about I guess from Saskatchewan Justice's
16 perspective, whether at this time you considered
17 going out to the public and saying lookit, this
18 isn't true, here's the other side of the story,
19 what precluded you from doing that?

09:39 20 A Well, first of all, there would certainly be an
21 understanding between governments that a
22 provincial government will not, or provincial
23 government officials will not comment on the work
24 of the federal government officials and vice
09:40 25 versa. I mean, it would just have been really,



1 really bad form in those days for us to start
2 commenting publicly about that information or
3 about these stories. The other problem of course
4 is that the information we had was coming in dribs
09:40 5 and drabs from telephone conversations we had with
6 federal officials. We weren't seeing
7 investigative reports or the, you know, interviews
8 or statements taken from witnesses.

9 Q And are you saying that in light of the fact that
09:40 10 the first application was pending and being
11 reviewed by the Federal Department of Justice,
12 that would preclude Saskatchewan Justice from
13 commenting on, publicly anyway, on matters being
14 raised related to that application?

09:40 15 A The deference we would give them would preclude
16 that, yes.

17 Q And so I guess two concerns you are telling us,
18 number one, you would not want to comment while
19 they are doing their investigation; correct?

09:41 20 A That's right.

21 Q And secondly, this information in the newspaper
22 was not provided directly to Saskatchewan Justice;
23 is that correct?

24 A Well, the information in the newspaper wasn't
09:41 25 provided to us and the information that the



1 federal government gathered in response to it
2 through their processes wasn't provided to us.

3 Q And so if, for example, this information, at least
4 in this article, and maybe a number of others, had
09:41 5 been provided directly to Saskatchewan Justice
6 saying lookit, we think the police have covered up
7 here, is that something that, again subject to
8 what's going on with the 690, you would have
9 investigated?

09:41 10 A Well, if there was no 690 process going on, yes,
11 that would have been a concern to us.

12 Q And what if anything did you make of the fact that
13 these allegations were made in the media and not
14 provided to Saskatchewan Justice?

09:42 15 A Well, you know, again, as I said yesterday, with
16 30 years' experience I've learned that if somebody
17 has something they think is genuine and is going
18 to be of assistance in getting their client's
19 cause moved forward, they will bring it directly
09:42 20 to us, you don't hold a press conference first and
21 then a few days after that send it in to us.
22 That's not the way it's done usually.

23 Q Go to 039010 -- and on that, would that cause you
24 to --

09:42 25 A It makes us very skeptical about the truthfulness



1 or accuracy of what's being claimed in the news
2 media.

3 Q Go to 039010, this is a May 15th, 1990 article,
4 and I think this is Dan Lett, this talks about
09:43 5 *Mother fears coverup by Saskatoon police,*
6 *Saskatoon police ignoring evidence, and again,*
7 *this is an article, amongst others, that*
8 *Saskatchewan Justice would have been, would have*
9 *received and reviewed at the time?*

09:43 10 A I would assume we -- yes. If it was in a
11 Saskatchewan paper, we would have certainly got
12 it.

13 Q And it says here, however -- actually, this is
14 from the *Winnipeg Free Press*, but I could be
09:43 15 mistaken. I believe this was from Saskatchewan
16 Justice records.

17 A Could be.

18 Q It says:

19 "However, Milgaard said she
09:43 20 fears the police department may be
21 trying to hide important information
22 from federal investigators.

23 "That's the worst part of
24 this, is that the person that I ended up
09:43 25 investigating in Saskatoon just this



1 year, had already been to the police and
2 told them they knew who the real killer
3 was..."

4 "And they (police) hadn't
09:43 5 done anything with it. They're hiding
6 something. Why?"

7 And again, I wouldn't mind your comment on this
8 type of information, and there's others in the
9 media that start around this time alleging that
09:44 10 the Saskatoon City Police had committed
11 misconduct and were covering up matters relating
12 to -- at this point the real killer wasn't
13 identified, but it was someone we're
14 investigating. The doc. ID on that is 039010.
09:44 15 And now would you agree that that -- let's put
16 aside the 690 process for a moment. A public
17 allegation that investigators in the Gail Miller
18 case covered up matters, would that be a matter
19 that Saskatchewan Justice would be concerned
09:44 20 about?

21 A Well --

22 Q If true?

23 A If true certainly, but early on in this process we
24 had had, or Ellen Gunn had had conversations with
09:44 25 the Saskatoon Police Service and they had assured



1 us and we were comfortable with the assurance that
2 they were going to co-operate fully with the
3 federal investigator.

4 Q And so would it be a case of saying, if this were
09:44 5 true, it would be something the federal
6 investigators would uncover?

7 A Yes. Well, and if there were problems with the
8 cooperation, I'm sure the federal investigators
9 would have brought them to our attention.

09:45 10 Q Would you be relying -- when I say "you", would
11 Saskatchewan Justice be relying upon the federal
12 minister and the Federal Justice department in
13 dealing with the Section 690 application, and to
14 the extent that these allegations were part of
09:45 15 that, to effectively resolve these allegations,
16 either verify them or say they are not verified?

17 A Yes.

18 Q In other words that was the decision-maker you
19 were looking to to resolve the allegations being
09:45 20 made that affected the provincial interest?

21 A That's correct.

22 Q If we could go to 004732. This is a May 16th,
23 1990 article, this is again talking about a yet at
24 this point unidentified suspect, and here this is
09:46 25 referring to -- if we can just scroll up a bit --



1 there's information about the police report
2 indicates officers canvassing the neighbourhood,
3 talking about the man who is now an inmate at the
4 bus stop. This is Larry Fisher, obviously,
09:46 5 although he's not named. And:

6 "Joyce Milgaard, David's
7 mother, said she learned of the police
8 report from Saskatoon Crown prosecutor
9 ... (Bobs) Caldwell. At the time, no
09:46 10 one realized the significance of the
11 interview. Asked Tuesday about latest
12 developments, Caldwell flatly refused
13 any comment whatsoever."

14 And then, if we can just scroll to the right-hand
09:46 15 side:

16 "Saskatoon Police Chief ...
17 Penkala - who was one of the senior
18 investigating officers in the 1969
19 murder - has refused comment on any
09:47 20 aspect of the case. And media relations
21 Officer Sgt. Dave Scott said: 'There's
22 going to be no comment on the case
23 itself.

24 'We just don't feel it's
09:47 25 prudent at this time because it's being



1 investigated by the Justice
2 Department.' "

3 And then goes on:

4 "... Milgaard said she fears the police
09:47 5 may be trying to hide important
6 information from federal investigators."

7 Just your comment, and you mentioned a, I think
8 briefly yesterday, about the fact that Mr.
9 Caldwell here is not commenting, and I think his
09:47 10 evidence to this Commission was that in light of
11 the federal investigation he didn't feel it was
12 appropriate, I think Mr. Penkala said the same
13 thing. I think you've told us, from Saskatchewan
14 Justice's perspective as well, you did not feel
09:47 15 it appropriate to publicly comment on matters
16 that were being considered by the federal
17 minister. And, what, can you tell us what, your
18 comment on what effect that may have had in the
19 eyes of the public looking at the administration
09:47 20 of criminal justice in Saskatchewan?

21 A Well the reason we moved away from that strict
22 policy of not commenting to any extent on matters
23 when there's an investigation or when they are
24 before the courts is that the "no comment" reply
09:48 25 simply engenders mistrust. If somebody is making



1 allegations of flagrant misconduct by the police
2 or the prosecution service, the public expects a
3 response, and "no comment" is as good as saying
4 "yeah, we might have done it."

09:48 5 **Q** And so was there a change, at least from
6 Saskatchewan Justice's policy on commenting, at
7 some point after this?

8 **A** Yes, very much so.

9 **Q** And is there some date or event that resulted in
09:48 10 that change or was it evolutionary?

11 **A** Well I think, actually, it had a lot to do with
12 the change in directors in prosecutions. Richard
13 Quinney's view was that keeping quiet simply fed
14 public suspicion. You don't go out, obviously,
09:49 15 when a matter is before the courts or before --
16 being investigated, and do anything that will
17 prejudice the case in terms of a fair trial for
18 the accused and prosecution's interest, and you
19 don't do anything that's going to prejudice a
09:49 20 police investigation, but there are all kinds of
21 things you can say that won't do that, and that
22 don't have the impact on the public of simply
23 saying "no comment".

24 **Q** And so are you telling us that based on your
09:49 25 observations, then, the fact that, at least at



1 this time in 1990, that Crown officials, police
2 officials, Saskatchewan Justice officials, and
3 indeed Federal Justice officials were not
4 commenting in response to the allegations in the
09:49 5 media, number one, may have contributed to public
6 skepticism about the administration of criminal
7 justice?

8 A Absolutely.

9 Q And can you -- yeah, that's fine, we'll leave
09:50 10 that, we'll come back to that point. Go to
11 002510.

12 And, just on that point, did
13 the fact that there was not a response to some of
14 the allegations, then, did that, in your view,
09:50 15 result in one side of the story being presented to
16 the public, --

17 A Oh, yes, --

18 Q -- at least at that time?

19 A -- absolutely. If you leave the playing field to
09:50 20 the people who are generating the publicity, then
21 it's their story that's getting told, and it's
22 their story that will likely affect public
23 opinion.

24 Q And is that something -- and we'll deal with this
09:50 25 in more detail, but when we get to the fall of



1 1991, is that something that contributed, in your
2 view, to the requirement to have this matter heard
3 by a court in a public forum?

4 A Oh, unquestionably, yes.

09:51 5 Q And that being the Supreme Court reference?

6 A That's right.

7 Q Here is a May 29th, 1990 memo to the file from
8 Eugene Williams relating to Dr. Markesteyn, and it
9 appears he talked to you about a report, and maybe
09:51 10 I can just give you a bit of background as to what
11 evidence the Commission has heard about this.

12 I think, in May of 1990, Dr.
13 Markesteyn was retained by, I believe, Mr. Asper,
14 on behalf of David Milgaard, to do a forensic
09:51 15 review. Mr. Williams testified that he contacted
16 Dr. Markesteyn because he became aware, I think in
17 the media, that he was looking at the matter and
18 wanted to ensure, at least according to Mr.
19 Williams, that certain issues were looked at, and
09:52 20 so I think this is discussions right before the
21 release of the report.

22 Do you have any recollection
23 of, number one, this discussion or why it would be
24 that Mr. Williams would be in touch with you about
09:52 25 this matter?



1 A No, I -- other than perhaps there had been some
2 news media speculation about another report, or
3 somebody else taking a look at it, and he was
4 simply keeping me informed as to what that was
09:52 5 about.

6 Q Do you have any recollection of Saskatchewan
7 Justice having any particular interest in Dr.
8 Markesteyn's report other than being informed of
9 it?

09:52 10 A Not -- well obviously, without putting too fine a
11 point on it, we had a bit more confidence in Peter
12 Markesteyn than we had in Rex Ferris at that
13 point.

14 Q Okay. And do you recall that being an issue
09:53 15 discussed with Mr. Williams?

16 A I may have given him my opinion with respect to
17 just sort of the general reputation of Peter
18 Markesteyn that I was aware of, and Rex Ferris,
19 that I was aware of.

09:53 20 Q And what would that have been?

21 A Well, at that stage of his career Dr. Ferris had
22 stopped working for, I think he worked at one time
23 with the Federal Government and at provincial
24 governments, he was now very much into the
09:53 25 consultant business and we had some concerns about



1 some of the work that he had done across Western
2 Canada at that point.

3 Peter Markesteyn had a good
4 reputation with Manitoba Justice people as someone
09:53 5 who called it as he saw it and gave, generally,
6 very reliable advice and information.

7 Q If we can go to 106948. And this is a June 1,
8 1990 letter to Mr. Asper from a Dr. Merry, and I
9 think this is the first point where we see the
09:54 10 issue of dog urine being introduced, and you
11 recall this being an issue in the media in 1990
12 and something you would have reviewed in your
13 preparations for the Supreme Court reference?

14 A Well it's certainly something we reviewed for the
09:54 15 Supreme Court reference, I recall that coming out
16 prior to the first application being dismissed,
17 but, after that, my only recollection is we
18 weren't terribly concerned with that opinion.

19 Q And why was that?

09:55 20 A Well, I expect it was because we would have
21 received something from, information from the
22 Federal Government that allayed whatever concerns
23 we may have had.

24 Q And so here, just for the record, this is the
09:55 25 initial report that says, from Dr. Merry:



1 "... I do not believe that the
2 possibility can be excluded that the
3 frozen yellowish substance found near
4 the body of the deceased was dog urine."

09:55 5 And then it goes on to talk about tests,
6 etcetera.

7 Then, if we can go to 333434,
8 this is a June 5, 1990 letter from Mr. Williams
9 to you with a copy of Dr. Markesteyn's report; do
09:55 10 you recall why he would have sent you this report
11 as compared to other, for example, other
12 information they had gathered?

13 A I'm not sure why he would have sent that, because
14 they certainly weren't very forthcoming with
09:56 15 respect to the materials they collected during the
16 investigation or even materials that were sent to
17 them as part of the reference. It may be that
18 that was sent to me because I had indicated that,
19 in my view, Peter Markesteyn was a fairly
09:56 20 reputable medical examiner.

21 Q And do you recall if -- let's just go to the
22 report, go to 333437. Would you have read the
23 report at the time and reviewed it then?

24 A Oh yes.

09:56 25 Q Do you recall any conclusions you reached at the



1 time about it?

2 A Well, my conclusion was that I didn't think it was
3 going to help David Milgaard's case very much.

4 Q And why was that?

09:56 5 A Well it -- it doesn't necessarily, my recollection
6 is it didn't follow what Rex Ferris said, it
7 disputed some of the points he makes.

8 Q If you can go to page 333444, this -- these are
9 the conclusions, and I think -- and I'm
09:57 10 summarizing a bit because we've heard a fair bit
11 of evidence about this -- Dr. Ferris' opinion had
12 been, I think initially he had concerns about the
13 frozen semen being contaminated and being of any
14 value, and then went on in his opinion to say
09:57 15 "but, if it is semen and it's not contaminated,
16 then it would tend to exonerate David Milgaard
17 assuming he's a non-secretor"; would that have
18 been the understanding of your --

19 A Yes.

09:57 20 Q -- your understanding, basically, of Dr. Ferris'
21 report? And I think what Dr. Markesteyn said is
22 that the frozen semen was of no value because it
23 was contaminated and, therefore, you could not
24 draw anything from it, and then says:

09:58 25 "I agree ... that the ...



1 evidence presented at the trial failed
2 to link David Milgaard with the semen
3 ..."

4 And then:

09:58 5 "If, to everyone's
6 satisfaction, it was established that
7 the origin of ...",
8 this:
9 "... was unadulterated, uncontaminated
09:58 10 human semen, then the presence of the
11 A-antigen in this specimen clearly, from
12 a serological point of view, could not
13 be Mr. Milgaard's."

14 Then it goes on to say:

09:58 15 "In my opinion, the
16 serological evidence presented at the
17 trial was on very shaky scientific
18 grounds to a degree that it may very
19 well have been erroneous."

09:58 20 This issue about -- so your understanding was
21 that -- did the Dr. Markesteyn report, when
22 Saskatchewan Justice received it in June 1990,
23 give you any reason to consider taking steps to
24 re-open the investigation into the death of Gail
09:58 25 Miller?



1 A No, that report went to the Federal Government,
2 they were looking at that already.

3 Q But, as far as when you reviewed it, I think you
4 told us you concluded that it did not help David
09:59 5 Milgaard's case; is that fair?

6 A Well, my recollection of the evidence at trial was
7 that Justice Tallis was able to deal with the
8 evidence with respect to whether David Milgaard
9 was implicated by the serological evidence found
09:59 10 at the scene, and I, again, my recollection is
11 that the view was that David Milgaard wasn't a
12 secretor and wasn't -- wasn't implicated by it. I
13 didn't think that this really advanced the cause
14 any.

09:59 15 Q Now, in this report, I think Dr. Markesteyn also
16 says that he cannot exclude the possibility that
17 the frozen sample, which was thought to be semen,
18 was in fact dog urine. Do you recall that being
19 part of his conclusion? If I could maybe just go
10:00 20 to 333442.

21 A Yeah, if I can see that report?

22 Q If we could just go call up that paragraph. And I
23 think goes on to say:

24 "The only way ...",

10:00 25 "The only way of excluding this semen



1 from being of non-human origin would
2 have been the morphology and/or ..."
3 other tests. And then I think it goes on to say
4 that he cannot determine whether that has been
10:00 5 done and I think his evidence was that what he
6 was saying is "lookit, I can't exclude the
7 possibility that what was thought to be semen
8 from the perpetrator may, in fact, be dog urine";
9 was that your general understanding of what he
10:01 10 was saying?

11 A Yes.

12 Q As opposed to saying it was dog urine, it was "it
13 could be dog urine, I can't exclude it"?

14 A Yeah, he said he couldn't exclude that
10:01 15 possibility.

16 Q Now if we can go to 004735. And this is, I think,
17 front page of the *StarPhoenix* June 6th, 1990, it
18 says:

19 "A key piece of evidence used
10:01 20 to convict David Milgaard of murder was
21 likely worthless, according to a new
22 forensic review.

23 Alleged semen found in the
24 snow at the scene four days after the
10:01 25 murder, which was linked to Milgaard,



1 could have been contaminated by dog
2 urine."

3 And then scroll down.

4 "The evidence doesn't
10:01 5 exclude it (as dog urine),' Markesteyn
6 said from Winnipeg. 'There are various
7 sources of yellow stains in a snowbank.'

8 David Asper, Milgaard's
9 lawyer, is more blunt about the report.

10 'It concludes that what
11 Penkala found in the snow could very
12 well be dog urine,' said Asper."

13 And then to the right-hand column, it talks about
14 Markesteyn:

10:02 15 "He does, however, support a
16 main conclusion of Dr. ... Ferris ...
17 whose 1988 report strongly questioned
18 the value of linking the semen sample to
19 Milgaard."

10:02 20 And I'll show you a few other articles -- well, I
21 won't show them all to you, but there's many
22 other articles at this time commenting on the
23 fact that what was presented at trial as being
24 David Milgaard's semen, and linking him to Gail
10:02 25 Miller, may have been, probably was, and later on



1 in fact was dog urine; and would you have been
2 aware of those types of reports in the media at
3 this time?

4 A Yes.

10:02 5 Q And would you agree that if that were true, if in
6 fact evidence presented at David Milgaard's trial
7 as being semen from David Milgaard found in the
8 snow near Gail Miller's body was in fact dog
9 urine, that that would be something that might
10:03 10 prompt Saskatchewan Justice to re-open the case?

11 A If we thought that was credible, yes.

12 Q That was credible. What about the public
13 perception of whether or not David Milgaard was
14 properly convicted? In light of this information,
10:03 15 if it were true, can you comment on that?

16 A Well, again, if it's -- when this is published, if
17 it's simply left lying there on the field, then
18 the public's view is going to be that, well, this
19 was dog urine.

10:03 20 Q And would you agree that if this were true, in
21 other words let's just put it in a general form
22 that if this allegation were true, that number one
23 it was dog urine, and number two it was used at
24 trial to link David Milgaard to Gail Miller's
10:04 25 murder, that if true that would be information



1 that would likely be sufficient to cause
2 Saskatchewan Justice to re-open the investigation
3 into the death of Gail Miller?

4 A Well, it would certainly cause us to re-open the
10:04 5 investigation with respect to the serological
6 evidence.

7 Q Once more information was obtained about this
8 allegation of the semen being dog urine what
9 conclusions did Saskatchewan Justice reach with
10:04 10 respect to the credibility and reliability of this
11 information as a basis to re-open the
12 investigation into the death of Gail Miller?

13 A Well, once we had all of the information, and
14 again, that would be after the reference was
10:04 15 called and all of their information was made
16 available to us, it became apparent to us that it
17 really wasn't a huge concern, the most anyone was
18 saying is "it might be", not that it was.

19 Q Now we have heard Sergeant Paynter from the
10:05 20 RCMP -- well, Mr. Paynter testify before this
21 Commission of Inquiry, he was the officer who
22 tested the semen back in 1969, and his evidence to
23 this Commission is, and he produced his notes,
24 that he did, in fact, test it and confirmed it was
10:05 25 human as opposed to canine. Was that something



1 you would have been aware of at the time?

2 A Umm, --

3 Q I don't believe his notes or his evidence was
4 before the reference, if that assists.

10:05 5 A I know the federal people, or I seem to recollect
6 the federal people telling us that they had spoken
7 to him and were satisfied that he did an
8 appropriate job in investigating this and was
9 satisfied it was human semen, but whether there
10:06 10 was any documents with respect to that I don't
11 recall.

12 Q Now, just on this issue about Dr. Markesteyn and
13 Dr. Ferris, I think you said that you had more
14 confidence in what Dr. Markesteyn had to say; is
10:06 15 that correct?

16 A That's correct, yes.

17 Q Do you recall considering this issue, either at
18 the time that these were in the media reports or
19 later during the Supreme Court reference, that I
10:06 20 believe Dr. Ferris' opinion, at least the opinion
21 that was relied upon in the application and the
22 opinion that was included in media reports most
23 often, was that the frozen semen tendered at David
24 Milgaard's trial exonerated and proved David
10:06 25 Milgaard's innocence because he was a non-secretor



1 and the frozen semen contained A antigens and,
2 therefore, could not have come from him; would
3 that have been your understanding, generally, of
4 his -- one of his conclusions?

10:07 5 A One of his conclusions, yes.

6 Q And that is, the premise of that is that what's
7 found in the snow near Gail Miller is semen from
8 the perpetrator; correct?

9 A That's the premise, yes.

10:07 10 Q Yes. And so now Dr. Markesteyn reports here that
11 what's found in the snow either may be dog urine,
12 or probably is, or could be, and the question for
13 you is did you consider -- I suppose one comment
14 might be "well, Dr. Markesteyn's report basically
10:07 15 takes away the premise of Dr. Ferris' opinion that
16 it proves David Milgaard's innocence"; would you
17 agree with that?

18 A If it's dog urine, yes, it doesn't help him at
19 all.

10:07 20 Q Okay. And so was that something that was
21 considered at the time, about how these two
22 reports mesh, and was there any consideration to
23 raising that issue, for example either in the
24 media, or with Dr. Markesteyn and Dr. Ferris?

10:07 25 A Well, certainly, we weren't considering raising it



1 with them, no.

2 Q And would there be any reason that -- and, again,
3 I appreciate you've already answered this -- but
4 to go out to the media and say "you know, Dr.
10:08 5 Markesteyn's report effectively undermines Dr.
6 Ferris' conclusion", and would the reason be you
7 didn't do that because of the matters under
8 review?

9 A That's -- yes, it simply wouldn't have been done
10:08 10 then.

11 Q And then 159853. This is a June 6th article of
12 Dan Lett, 1990, and here a comment where it says:

13 "Asper said after reading the
14 Markesteyn Report it seems entirely
10:08 15 likely that his client was convicted
16 partly on the basis of dog urine left in
17 the snow after the murder."

18 And if that, in fact, were true can you comment
19 on what effect this type of allegation has on the
10:09 20 province and the administration of criminal
21 justice?

22 A Well, if it were true, it would certainly suggest
23 that there was a gross error made by the
24 scientific people that examined the various things
10:09 25 sent in to the crime lab.



1 There is a substantial
2 difference between semen and dog urine, something
3 that, quite frankly, I can't imagine Bruce Paynter
4 would have missed. But, that notwithstanding,
10:09 5 yeah, if we thought that that was actually true
6 that is something that would cause a great deal of
7 concern. It wouldn't, at that point, have caused
8 us to re-open an investigation because the Federal
9 Government was dealing with this.

10:09 10 Q Right. But, again, from -- let me ask you this.
11 Do you recall, at a later point, Saskatchewan
12 Justice coming out in the media and responding to
13 this allegation?

14 A No. No, it -- to the extent that there was any
10:10 15 response it would have been done through the
16 Supreme Court process.

17 Q And we'll get to this later, but I think at the
18 Supreme Court reference, around that time David
19 Milgaard's secretor status was re-determined; is
10:10 20 that correct?

21 A That's right.

22 Q And Drs. Ferris, Markesteyn, and Merry did not
23 testify; is that correct?

24 A That's correct.

10:10 25 Q And was that because of the secretor test that



1 confirmed Mr. Milgaard was a secretor, or do you
2 recall?

3 A I think the view was their reports speak for
4 themselves, we now have evidence that David
10:10 5 Milgaard was a secretor, so that the premise of
6 the reports that the secretor status cleared him,
7 of course, is pretty much vacated at that point.

8 Q If we can go to 004783. This is a June 7th, 1990
9 article, the headline is *Milgaard witness says*
10:11 10 *police forced him to lie*, there as well were
11 following articles in the *StarPhoenix* and I think
12 in the *Leader-Post* related to this. I'll just go
13 through parts of this. It says:

14 "One of the chief Crown
10:11 15 witnesses in the trial of convicted
16 killer David Milgaard says threats and
17 manipulation by Saskatoon police led him
18 to lie in Court in 1969

19 In an interview from his home
10:11 20 in British Columbia, Ron Wilson said he
21 has lived in torment for lying and has
22 come forward to tell the truth about an
23 intensive police investigation into the
24 brutal slaying of Saskatoon nursing
10:11 25 assistant Gail Miller."



1 Then, quote:

2 "'I was manipulated. It was
3 like you're a puppet. Then you're
4 scared that if you don't do what they
5 wanted you to do, they would put you
6 away. They told me that they would find
7 some way to turn the tables on me.'"

8 And then just the middle columns:

9 "'They asked me questions
10 about everything - if I thought David
11 had done it, if I had done it, about
12 these knives that they showed me, if I
13 had ever seen them before. I was on
14 polygraph for over six hours.'

10:12 15 Eventually, Wilson said, if
16 he wouldn't agree with the police
17 interrogators, they claimed the
18 polygraph machine indicated he was
19 lying. Finally, he said, sheer fright
10:12 20 forced him to agree with anything the
21 police said."

22 Then he goes on to talk about his recantation.

23 The record reflects that the
24 statement that Mr. Wilson gave to Paul Henderson
10:12 25 was June 4th, 1990, I think this was an article



1 of June 7th, 1990, and I think Mr. Williams'
2 evidence is that that would have been -- I
3 believe his evidence was either he got the
4 statement right after or in conjunction with the
10:12 5 news reports. Do you recall how you became aware
6 of the Ron Wilson recantation?

7 A Well I, not specifically, but I expect it was
8 probably through the news media. The Milgaard
9 people weren't sending us their information and
10:13 10 the Federal Government generally wasn't sending it
11 to us.

12 Q Just on that point, did you expect the Milgaard
13 people to be sending you anything, --

14 A No.

10:13 15 Q -- in light of the fact they were dealing with
16 Federal Justice?

17 A No, no, they were dealing with Federal Justice,
18 and I didn't expect them to be sending stuff to
19 us.

10:13 20 Q And so do you recall, what would have been the
21 general reaction of Saskatchewan Justice, or your
22 reaction to this information that one of the
23 witnesses at the trial was recanting some of his
24 evidence and claiming that the police had forced
10:13 25 him to lie?



1 A Well, again, if that was true -- and keep in mind
2 there's some skepticism about what we were reading
3 in the news media by that point -- but if it was
4 true that would be a concern, yes.

10:13 5 Q And once more information was obtained about this
6 allegation what conclusions did Saskatchewan
7 Justice reach with respect to the credibility and
8 reliability of this information as a basis to
9 re-open the investigation into the death of Gail
10:14 10 Miller?

11 A Well, again, once -- once we had everything from
12 the Supreme Court reference, no, I -- we didn't
13 see any basis to use that to re-open any
14 investigation.

10:14 15 Q And when you say "use this" you are talking the
16 Ron Wilson recantation?

17 A Yes.

18 Q And why was that?

19 A Well, because essentially once the federal people
10:14 20 started talking to Mr. Wilson suddenly he can't
21 explain how the police manipulated him, how they
22 scared him, how they forced him to agree with what
23 they wanted, he just thinks they did.

24 Q So did you doubt the credibility of his
10:14 25 recantation at the time?



1 A Yes.

2 Q Based upon what?

3 A Well, the impression that the investigators had of
4 him, the fact that he simply couldn't explain how
10:15 5 all of this happened.

6 Q And again, you commented I think just a few
7 minutes ago that -- did Saskatchewan Justice have
8 skepticism about what was being put forward by
9 this time, skepticism about what was being
10:15 10 reported by way of allegations?

11 A Oh, absolutely. At this point a number of
12 reporters, and Dan Lett was certainly one of them,
13 had crossed over to the point of being a partisan,
14 he was clearly in the Milgaard camp working for
10:15 15 them, and whatever that does to your objectivity,
16 it certainly doesn't help it. The other thing is
17 when you looked at the news media reports, it's
18 clear that for the most part they were simply
19 taking what David Asper or Joyce Milgaard would
10:16 20 tell them and that was the story, there was no
21 evaluation of it at all.

22 Q Did you then put much weight on -- let me back
23 up -- by way of information that Saskatchewan
24 Justice had and was considering in its later
10:16 25 decision to re-open the investigation into the



1 death of Gail Miller, can you tell us what weight
2 you would have put on the allegations being
3 reported on in the media as you just commented,
4 the comments of Joyce Milgaard and David Asper?

10:16 5 A Well, generally the way we would read it is
6 there's something there, we don't know exactly
7 what it is, we don't know exactly how credible or
8 useful it may be, but obviously they've got
9 something and it needs to be looked at.

10:17 10 Q And then when you got to the Supreme Court
11 reference and learned more information, did
12 Saskatchewan Justice's views about -- what was the
13 use that Saskatchewan Justice, or weight
14 Saskatchewan Justice could put on what was being
10:17 15 reported in the media through the first
16 application?

17 A Well, once we saw what the federal investigation
18 revealed, it was fairly clear that most of the
19 media reporting in terms of the substance of what
10:17 20 was in there was more misleading than informative.
21 Now, you know, having said that, a lot of that had
22 to do with I think the Milgaard camp basically
23 giving them the story and the news media
24 publishing it.

10:17 25 Q If we can go to 052969, this is a typed version of



1 Ron Wilson's June 4th, 1990 statement, and
2 presumably in your work at the Supreme Court
3 reference you would have been familiar with this
4 statement, this is the recantation statement?

10:18 5 A Yes, there were a number of statements by Ron
6 Wilson and this is one of them.

7 Q Yeah. And can you tell us, prior to -- I'm trying
8 to identify when you would have received this and
9 there's an August 8th, 1991 letter that Mr. Wolch
10:18 10 wrote to Ellen Gunn that we'll deal with a bit
11 later that includes this as a copy. That was
12 right before the second application. Do you
13 recall if Saskatchewan Justice would have obtained
14 a copy of this recantation prior to -- prior to
10:18 15 the minister's first decision?

16 A I don't recall seeing one prior to the Supreme
17 Court reference actually.

18 Q Okay. Go to 004759, this is a story, *Sloppy probe*
19 *costs inmate '18 months'*, a June 7th article, just
10:19 20 at the bottom, Mr. Asper expressed concerns that:

21 "...no one in the federal government is
22 acting, even after learning that a key
23 witness said he lied at the trial."

24 And I think you've already commented on this,
10:19 25 that public -- or criticism or public concern



1 about the manner in which Federal Justice is
2 conducting the investigation and the time it's
3 taking would be a matter then that would be of
4 concern to the provincial interest?

10:19 5 A Yes.

6 Q 004760, again, this is a June 9th, 1990 article in
7 the *StarPhoenix* about Ron Wilson's recantation,
8 and the comment about Mr. Henderson who was
9 quoted:

10:20 10 "I was just sort of
11 parachuted into Ron Wilson's life Sunday
12 night," Henderson said in an interview
13 Friday.

14 "I talked to him Monday.
10:20 15 His recantation was evolutionary over
16 the course of the whole day."

17 I take it -- I believe this is an article that
18 would be from the government collections. Is
19 this something that someone from Saskatchewan
10:20 20 Justice would have likely read at the time or
21 reviewed?

22 A Very likely, yes.

23 Q And do you recall having any interest in following
24 up the circumstances of the recantation at this
10:20 25 time or was that something done later during the



1 reference?

2 A That was something done during the reference to
3 the extent possible.

4 Q If we can go to 009488, this is an article of I
10:21 5 think June 22nd or 23rd, there's not a date on
6 here, but it's an article that identifies Larry
7 Fisher by name, and we have on the record, I think
8 it was June 22nd, 1990, the CBC I think was the
9 first media outlet that reported Larry Fisher by
10:21 10 name as being the -- I think he was referred to
11 variously as the suspected killer, as the likely
12 killer, things of that nature. Would you have
13 become aware around this time of his name being
14 identified in the media as being the suspect or as
10:21 15 the perpetrator?

16 A Yes. As I said, prior to the first application
17 being rejected, we had Larry Fisher's identity and
18 we were gathering information with respect to him,
19 and my recollection is that, you know, it wasn't
10:22 20 just a few days before, it was some time before,
21 and that may have been when I had a conversation
22 with Bobs Caldwell about it.

23 Q Do you -- and what do you recall about your
24 discussions with Mr. Caldwell?

10:22 25 A Well, Mr. Caldwell's response, and I recall this



1 very clearly, is who is this Larry Fisher. He
2 seemed to be a surprise to him.

3 Q And do you recall what you would be contacting him
4 for or what the circumstances were of you raising
10:22 5 that with Mr. Caldwell?

6 A I was probably trying to discover whether he knew
7 anything about Larry Fisher, whether he had any
8 dealings with him, because the way the offices
9 were structured in those days, it's quite possible
10:22 10 Bobs Caldwell would never have heard of Larry
11 Fisher.

12 Q Did Saskatchewan Justice have any concerns with
13 Larry Fisher being identified by name in the media
14 as either the, a suspect or as the perpetrator or
10:23 15 as the real killer, things of that nature?

16 A Well, absent being able to charge somebody with an
17 offence like that, we don't particularly go around
18 naming folks as suspects or persons even of
19 interest. He's basically tried in the news media,
10:23 20 convicted and that's the end of that.

21 Q And so again, did Saskatchewan Justice have
22 concerns about that?

23 A Well, certainly we would have preferred if that
24 name had been kept confidential at that point
10:23 25 until there is some substantial reason to suspect



1 he may actually have been the person who did the
2 killing.

3 Q And I believe at least the early reports talked
4 about Larry Fisher as -- or the basis upon which
10:23 5 the reports were indicating that he either was or
6 likely the perpetrator was due to the similarities
7 between his known sexual assaults and the Gail
8 Miller murder. You would have become aware of
9 that, is that correct, of that being one of the
10:24 10 basis as to why it was alleged that he was the
11 perpetrator?

12 A I don't know that the early reports got down to
13 that kind of detail. I think they were simply
14 that this man had committed four rapes at around
10:24 15 that time, two or three of them in that vicinity,
16 lived in that area.

17 Q And the Linda Fisher information?

18 A And the Linda Fisher information, yeah.

19 Q Okay. So is it later on then when your
10:24 20 recollection is that the similar fact allegations
21 came to light?

22 A I think. I mean, they may have been made in the
23 materials that the Milgaards sent to Federal
24 Justice, but I don't recall the issue of the
10:24 25 similarity being played out in the news media.



1 Q If we could go to 039118, this is a June 26th,
2 1990 article, Dan Lett, the *Winnipeg Free Press*.
3 There was also I think a report in *The Globe and*
4 *Mail* and as well the *StarPhoenix* similar to this
10:25 5 issue, but this headline, *Milgaard witness says*
6 *detectives 'tortured' him*, and then goes on to
7 talk about Albert Cadrain and -- I have to find
8 the -- the first paragraph:

9 "The star witness from David
10:25 10 Milgaard's trial said he was
11 psychologically tortured by Saskatoon
12 police officers until he suffered a
13 mental breakdown and was committed to a
14 hospital psychiatric ward.

10:26 15 Albert Cadrain, in a
16 statement given to a private
17 investigator working for Milgaard's
18 family, said he was grilled
19 unrelentingly by Saskatoon police
10:26 20 officers Eddie Karst and Charlie Short
21 for weeks in the spring following the
22 1969 murder of nursing assistant Gail
23 Miller.

24 The result, Cadrain said
10:26 25 in his statement, was almost total



1 mental collapse."

2 Do you recall becoming aware of this allegation
3 in the media around this time, that Mr. Cadrain
4 was -- had given a statement?

10:26 5 A I do recall that, yes.

6 Q And do you recall what the reaction was of
7 Saskatchewan Justice at the time to the allegation
8 that one of the witnesses was tortured, I don't
9 know about the quotes around it, but
10:26 10 psychologically tortured?

11 A We didn't believe it.

12 Q And why not?

13 A Well, that's just not the way the Saskatoon police
14 were known to operate or any other police force in
10:27 15 the province, and second, Albert Cadrain presented
16 himself at the front desk of the police station,
17 they didn't have to go looking for him, he came in
18 and volunteered information.

19 Q And so once more information was obtained about
10:27 20 this allegation, what conclusions did Saskatchewan
21 Justice reach with respect to the credibility and
22 reliability of this information as a basis to
23 re-open the investigation into the death of Gail
24 Miller?

10:27 25 A Well, once we got the sort of full federal package



1 and there was information in there with respect to
2 Albert Cadrain actually having mental illness
3 problems, that sort of explained where some of
4 that came from, but it certainly wasn't the basis
10:27 5 upon which you would re-open any investigation.

6 Q And did you conclude that these allegations were
7 credible?

8 A No.

9 Q Can you comment on -- again, would this type of
10:28 10 information in the public domain have an adverse
11 effect on at least some of the public's perception
12 of the administration of criminal justice in the
13 province?

14 A Oh, I'm sure, yes.

10:28 15 Q And can you elaborate on that, what steps if any
16 Saskatchewan Justice could or did take to deal
17 with it?

18 A Again, I mean, if you have the public thinking
19 that Saskatoon Police Service is mentally
10:28 20 torturing witnesses in order to obtain
21 information, that's obviously not what they are
22 supposed to be doing, it obviously calls the whole
23 investigation into question, and that's sort of a
24 bad thing from our perspective. In terms of doing
10:28 25 anything about it, again, the federal government



1 was involved in this, they were looking into these
2 allegations, they would, in due course, report on
3 them, and so we were not going to deal with it.

4 Q Was Saskatchewan Justice then relying on the
10:29 5 Federal Minister in her decision on David
6 Milgaard's Section 690 application to deal with
7 this amongst other allegations that were being
8 made related to the administration of criminal
9 justice in Saskatchewan?

10:29 10 A Yes.

11 Q And presumably if she would have concluded that
12 there is merit in this allegation that he was in
13 fact psychologically tortured by police and
14 therefore his evidence is not credible, would that
10:29 15 have prompted Saskatchewan Justice to do
16 something?

17 A If she had concluded that, then yes, we would be
18 in a position where we would have to act on it.

19 Q And similarly, if she concluded that the
10:29 20 allegation did not have merit, would Saskatchewan
21 Justice then rely upon that decision to
22 effectively resolve this allegation in the minds
23 of Saskatchewan Justice?

24 A Yes.

10:29 25 MR. HODSON: I see it's 10:30, probably an



1 appropriate spot to break.

2 (Adjourned at 10:29 a.m.)

3 (Reconvened at 10:54 a.m.)

4 BY MR. HODSON:

10:54 5 Q Call up 052967, please, and this is a copy of
6 Mr. Cadrain's June 24th, 1990 statement, this is
7 the statement that refers to I think mental hell
8 and torture, or through hell and mental torture,
9 and this is a statement you presumably would have
10:55 10 become aware of through the course of the Supreme
11 Court reference; is that correct?

12 A Yes, at some point.

13 Q And is it likely that -- would it be at that point
14 that Saskatchewan Justice would have received a
10:55 15 copy of Mr. Cadrain's statement as opposed to
16 around the time that it was made?

17 A I -- yes. I think generally we received copies of
18 most of the material when the Supreme Court
19 reference was called, not before.

10:55 20 Q Go to 027179, please, and this is a newspaper
21 article of July 17th, 1990 from Dan Lett, the
22 headline is *Witness statement withheld, lawyers*
23 *say*, and it deals with the issue of whether or not
24 Mr. Caldwell provided a copy of Ron Wilson's
10:55 25 initial March 3rd, 1969 statement to Mr. Tallis,



1 and I will be going through this article and then
2 there were some memorandums within Saskatchewan
3 Justice. Do you recall looking into this issue as
4 a result of this article?

10:56 5 A Yes, I did.

6 Q And I'll just go through parts of it. The article
7 states:

8 "A statement given by a star
9 witness in the David Milgaard case that
10:56 10 could have discredited his entire
11 testimony appears to have been withheld
12 from defence counsel during the 1969
13 trial, two lawyers close to the case
14 have charged.

10:56 15 A statement given by Ron
16 Wilson to RCMP in Regina on March 3,
17 1969, denies any knowledge of the brutal
18 murder of nursing assistant Gail
19 Miller..."

10:56 20 And then if we can go to the middle column, it
21 says:

22 "The revelation of the first
23 statement has created serious concerns
24 about whether Cal Tallis, Milgaard's
10:56 25 lawyer in 1969 and now a Saskatchewan



1 Court of Appeal justice, was ever told
2 of its existence.

3 Tallis will not discuss
4 the case.

10:56 5 David Asper, Milgaard's
6 Winnipeg lawyer, noted Tallis made no
7 reference to the first statement in
8 questioning Wilson at either the
9 preliminary hearing or trial.

10:57 10 Asper said it is
11 inconceivable that Tallis, if he had
12 known of the original statement, would
13 have ignored it at the trial.

14 "It is painfully obvious
10:57 15 from the transcripts that Tallis did not
16 direct Wilson to the original
17 statement," Asper said. "It strikes me
18 that it would be serious misconduct for
19 the Crown not to provide that
10:57 20 information to the defence."

21 And then on the right-hand side at the top,
22 there's a reference to Ron Wilson's lawyer, Ken
23 Watson, it says:

24 "Watson said not only does
10:57 25 the first statement lend credibility to



1 his client's recent recant of his
2 testimony, it suggests a serious
3 omission in information given to
4 Tallis."

10:57 5 And then scroll down to the bottom:

6 "Wilson, in an interview from
7 his B.C. home, said he did not remember
8 giving the first statement, but firmly
9 believes Tallis could have broken him on
10:57 10 the stand if he had used it at the
11 trial."

12 And I've only touched on parts of the newspaper
13 article, Mr. Brown. Do you recall, what was your
14 take on Saskatchewan Justice, what was your
10:58 15 interpretation of what this article was alleging?

16 A Well, it's clearly alleging that Justice Tallis
17 did not receive any disclosure of statements of
18 the witnesses, or at least this witness, from the
19 Crown.

10:58 20 Q And let's focus on the Ron Wilson initial
21 statement, and we know on March 3rd, 1969, or you
22 later would have become aware that he initially
23 gave a statement to the RCMP that did not
24 implicate Mr. Milgaard. Do you agree with that?

10:58 25 A That's right, yes.



1 Q Yeah. And so was it your understanding then that
2 this was alleging that Mr. Caldwell did not
3 disclose that statement to Mr. Tallis?

4 A Yes.

10:58 5 Q And would that have been serious misconduct in
6 your view on his part if he had not disclosed that
7 initial statement?

8 A Probably not. There certainly wasn't a
9 requirement as we have now with *Stinchcombe* that
10:59 10 all relevant material be turned over. There were
11 provisions in the *Criminal Code* that permitted
12 defence counsel the opportunity to ask for witness
13 statements and there were prosecutors at that time
14 who did not provide witness statements absent a
10:59 15 request through the court process. Certainly we
16 always turned over the accused's statements, but
17 some prosecutors didn't provide witness
18 statements.

19 Q So in 1969, 1970, the practice at the time was
10:59 20 that statements may not necessarily be disclosed
21 or have to be disclosed of witnesses?

22 A That's right.

23 Q Now, this Commission has heard evidence from both
24 Mr. Caldwell and Mr. Tallis, and in fact I believe
10:59 25 have a letter on our record that indicates Ron



1 Wilson's first statement was sent to Mr. Tallis I
2 believe in September of 1969. Yeah, September of
3 1969. Is that something that you became aware of,
4 that the first statement had been provided?

11:00 5 A Yes.

6 Q Can you tell us what concerns Saskatchewan Justice
7 had when this article appeared suggesting that
8 there, that a witness statement had been withheld?

9 A Well, I think the first concern was that that
11:00 10 didn't sound much like Bobs Caldwell's dealings
11 with Cal Tallis. He very much respected Cal
12 Tallis and generally practiced, at least with the
13 lawyers he trusted and respected, and certainly
14 Cal Tallis was one of them, he generally practiced
11:01 15 an open file kind of prosecution activity, and
16 that was that they could come in and read the
17 file. They may not be able to take copies
18 necessarily, though they would likely get witness
19 statements because you use those for
11:01 20 cross-examining, but he could certainly come in
21 and look at the file.

22 Q Now, if this suggestion in this article were true,
23 that the initial statement of Ron Wilson which did
24 not implicate Mr. Milgaard had not been provided
11:01 25 to defence, in light of the earlier media reports



1 about Ron Wilson's recantation and his comments in
2 this article that if that statement had been put
3 to him at trial he would have, he could have been
4 broken on the stand, tell me what concerns
11:01 5 Saskatchewan Justice had from, I guess, the
6 administration of criminal justice and what the
7 public might perceive about the conduct of
8 Saskatchewan Crown prosecutors?

9 A Well, certainly the whole article raises the issue
11:02 10 of impropriety by the prosecution of denying the
11 defence the opportunity to attack the witness and
12 break the witness down and that doesn't reflect
13 well on us for sure.

14 Q And if we can go to 327652, and I believe this a
11:02 15 memo of Curt Talbot, someone in the minister's
16 office, just at the bottom, this is August 1, 1990
17 and he says -- I'll show you a couple of memos
18 here. I believe you were asked to follow up on
19 this by Ellen Gunn eventually; is that correct?

11:03 20 A That's correct.

21 Q So here Mr. Talbot writes:

22 "Murray Brown has indicated to me that
23 the fact that Tallis does not refer to
24 the statement comes as no surprise. His
11:03 25 point is that defence counsel would not



1 bother raising such a statement as it is
2 very easy for the prosecution to get
3 around it. I am not sure about this. I
4 would assume that the credibility of
11:03 5 Wilson was an important part of the
6 Crown's case. There would not be any
7 downside to cross-examining Wilson on
8 the statement. In the context of a jury
9 trial anything could happen.

11:03 10 I would suggest that we first
11 determine if the Crown actually had the
12 statement in their possession
13 (presumably they did), and then
14 determine if it was in fact provided to
11:03 15 Tallis. If the statement was not
16 provided to Tallis and we determine that
17 not providing it amounts to "serious
18 misconduct for the Crown" in the words
19 of Milgaard's lawyer it seems to me that
11:03 20 the feds should be advised as such
21 information could play an important role
22 in their deliberations."

23 And it would appear, Mr. Brown, that at this
24 point Saskatchewan Justice is going to look into
11:03 25 the matter and if it concludes that something was



1 done wrong by the Crown prosecutor, that you
2 would be advising the Federal Justice officials.
3 Is that a correct read of this?

4 A Well, that's Curt Talbot's read on this. Just to
11:04 5 put it in context, Curt Talbot at that time was a
6 very junior lawyer, probably just barely out of
7 articles, he had no experience in criminal law and
8 that in my view reflects some assumptions on his
9 part that aren't necessarily true and are not
11:04 10 necessarily borne out by experience. We were --
11 he reported this to the deputy minister and the
12 deputy minister asked Ellen Gunn to look into it.
13 She referred it to me and I dealt with it
14 accordingly.

11:04 15 Q Okay. If we can go to 113514, just follow the
16 loop here, this is an August 7th, 1990 memo from
17 Mr. Talbot to -- on behalf of the deputy minister
18 Ellen Gunn:

19 "Would you be able to
11:05 20 determine whether or not the Crown had
21 the statement in their possession and if
22 so, whether it was disclosed to Tallis?

23 If the Crown possessed the
24 statement but did not disclose it I
11:05 25 would appreciate your comments on the



1 issue of whether or not this would
2 constitute serious misconduct in the
3 particular circumstances of this case.

4 And if you can go to the next page, just confirm
11:05 5 that it's the July 17th article that gives rise
6 to this inquiry; is that correct?

7 A I expect that was the case, yes.

8 Q And then 004750, Ellen Gunn is then asking you on
9 August 8th:

11:05 10 "Please look into this issue raised in
11 the attached newspaper clipping and in
12 Curt's memo and discuss with me."

13 And then 027176, and this would be your August
14 9th, 1990 memo to Ellen Gunn responding to this
11:06 15 issue?

16 A Yes.

17 Q I'll just go through parts of it. I think you
18 indicate that you reviewed the file and there are:

19 "...letters on the file
11:06 20 indicating Tallis got witness
21 statements. However none mentions
22 specifically the statements of Wilson,
23 John, or Cadrain as being the ones given
24 to Tallis."

11:06 25 I'm going to show you, when we're done with this



1 document, a letter which I think does confirm
2 that they were sent.

3 "On the other hand given that all the
4 other witness statements were given to
11:06 5 Tallis, it is highly unlikely Caldwell
6 withheld the statements of the Crown's
7 principle witnesses."

8 And then:

9 "Additionally, during cross-examination
11:06 10 of Wilson at the preliminary hearing, it
11 is obvious Tallis knew of all the
12 statements given to the police by
13 Wilson: the first verbal denial given
14 to Ken Walters here in Regina, the
11:06 15 written denial given to Insp. Riddell
16 (the one referred to in the Free Press
17 article); the second oral statement
18 given to Saskatoon City Police officers
19 while in custody..."

11:07 20 Etcetera, and then:

21 "At trial as well, it is obvious Tallis
22 knew of the police interviews and
23 statements given by Wilson in which he
24 denied any knowledge of these matters."

11:07 25 And then you attach portions of the preliminary



1 transcript, you say:

2 "All of these excerpts confirm that
3 Tallis was fully aware of the existence
4 of those statements and knew what was in
5 them. Indeed, given his intimate
6 knowledge of how many times Wilson was
7 visited at the --"

8 Provincial Correctional Centre,

9 "-- by police officers, it would appear
10 that Cal Tallis probably read the
11 prosecutor's file.

12 Finally, in speaking with
13 Caldwell about the matter, while he
14 cannot specifically recall giving the
15 statements to Tallis, it is his general
16 recollection that nothing was withheld
17 from Tallis including statements of
18 witnesses the Crown had no intention of
19 calling."

11:07 20 Would that be an accurate summary then of what
21 you concluded at the time?

22 A Yes.

23 Q And is it fair to read that you concluded that Mr.
24 Caldwell had in fact provided Ron Wilson's first
11:07 25 statement to Mr. Tallis?



1 A Yes.

2 Q If we could call up 007042, please, and this is an
3 August 15th, 1969 letter from Mr. Caldwell to
4 Mr. Tallis, and I think this is from Mr.

11:08 5 Caldwell's file, that enclosed are copies of the
6 following, and there is the March 3rd, 1969 Ron
7 Wilson statement, and would you have been aware of
8 that? I take it you reached the same conclusion
9 without seeing this letter?

11:08 10 A Yes. Probably we wouldn't have had that, the
11 prosecutor's file at that point, we would have had
12 the head office file in all of this.

13 Q We're done with that document. So on this issue,
14 it appears that you reported back to Ellen Gunn
11:08 15 that no, there was -- I guess, number one, there
16 was disclosure of Ron Wilson's statement to
17 Mr. Tallis, therefore, no need to look at the
18 second issue of whether the failure to disclose
19 was misconduct?

11:09 20 A That's right.

21 Q Is it fair to say that following your inquiry,
22 that no further steps were taken to deal with this
23 matter, at least at that time?

24 A That's correct, yes.

11:09 25 Q And what would be the reason that you would not go



1 to the media and say, to see if the statement was
2 in fact provided?

3 A Again, we were playing by the same rules that the
4 federal government played by, that the matter was
11:09 5 under investigation, you don't comment on it, and
6 as well we were deferring to the federal
7 government, it was their investigation. If they
8 wanted to deal with it publicly, that was their
9 business.

11:09 10 Q Did you have concerns that the public would be
11 left with inaccurate or incomplete information, at
12 least according to your review of Mr. Caldwell's
13 file?

14 A Yes. Well, until the Federal Minister ultimately
11:09 15 dealt with it, yes.

16 Q And did you have concerns that that would
17 adversely affect the administration of criminal
18 justice and perhaps the public's perception of the
19 job the Crown prosecutor did on the file?

11:10 20 A Yes.

21 Q And again, sorry to repeat this, but your --
22 Saskatchewan Justice would await and rely upon the
23 Federal Minister to resolve this issue not only
24 for your sake, but for the public's sake?

11:10 25 A Yes.



1 Q If we can go to 333486, it appears you wrote to
2 Mr. Williams August 9th, 1990 and passed on to him
3 your conclusions about this issue; is that
4 correct?

11:10 5 A Yes.

6 Q And that, what would be the purpose of that?

7 A Well, I would assume that they must have made some
8 request, because we weren't sort of routinely
9 forwarding information to them absent a request.

11:10 10 Q So do you think that, in light of the newspaper
11 article, some -- Mr. Williams or someone may have
12 asked you to inquire and find out whether the
13 allegation in the newspaper was true?

14 A Well, they might, though they would have all of
11:11 15 the material, at that point, that we had, or had
16 had access to it, certainly, at one point. They
17 would have the transcripts from the preliminary
18 and the trial.

19 Q Would it be a case of Saskatchewan Justice wanting
11:11 20 to ensure that the federal Justice Department had
21 your position, if I could call it, with respect to
22 this allegation?

23 A That's possible, yes, that's possible.

24 Q If we can then go to 004745, please. This is an
11:11 25 August 29th, 1990 article, the headline is



1 *Ex-prosecutor helping probe Milgaard case, it goes*
2 on to say:

3 "Federal investigators
4 examining the David Milgaard case have
11:11 5 enlisted the assistance of the Saskatoon
6 Crown attorney who handled the matter in
7 1969, and Milgaard's lawyers are crying
8 foul"

9 "The admission has prompted
11:12 10 Milgaard's lawyers, David Asper and
11 Hersh Wolch, to charge Williams with
12 conflict of interest and file a formal
13 complaint with federal Justice Minister
14 ..."

15 And then, scroll down:

16 "'If anybody asked me to
17 illustrate a conflict of interest, I
18 could use the example of Caldwell being
19 involved in the investigation of his own
20 case,' Asper said. 'He is certainly
21 biased. How could they involve him?'"

22 And on the right-hand side, right column:

23 "Asper said Caldwell has
24 exhibited extreme prejudice in relation
11:12 25 to the case, going as far as to



1 correspond with the National Parole
2 Board, sending them photographs of the
3 body and recommending that Milgaard
4 never be released."

11:12 5 Do you recall Saskatchewan Justice becoming aware
6 of this allegation, or this information, in this
7 media article?

8 A Yes.

9 Q And can you tell us, what was your reaction to it,
11:12 10 or your response?

11 A Well, politely put, I suppose we thought it rather
12 foolish. The extent to which Bobs Caldwell was
13 involved was he was providing information. Had
14 the Federal Government not gone to him for that
11:13 15 information, then of course the allegation would
16 have been "well, they are not trying, they are not
17 doing the job so apparently, one way or another,
18 there's corruption involved", or something like
19 that. This just, at this point it just seemed to
11:13 20 be more of the nonsense coming out of Milgaard
21 camp, this was, again, really a very foolish
22 characterization of what was going on.

23 Q And why do you say that?

24 A Because of course the federal representatives had
11:13 25 to talk to Bobs Caldwell, they had to get



1 information from his file, they had to discuss
2 allegations made against him. Of course they
3 would talk to him, and that, I cannot for a moment
4 believe that Mr. Asper would have thought
11:14 5 otherwise. My take on this was that this was part
6 of the public relations campaign, not particularly
7 genuine, but necessary to keep the matter in the
8 news media and the pressure on the Federal
9 Department of Justice.

11:14 10 Q And what effect, if any, did this allegation have
11 on Saskatchewan Justice and the administration of
12 criminal justice in Saskatchewan?

13 A Well this, quite frankly, is probably one of the
14 more transparent things that they were suggesting.
11:14 15 I don't recall anyone complaining that Bobs
16 Caldwell was involved in the investigation, in
17 fact I can recall a number of people, and mostly
18 lawyers, sort of suggesting that they thought the
19 complaint by Mr. Asper was rather silly.

11:15 20 Q And so did Saskatchewan Justice take any steps in
21 response to this allegation?

22 A No.

23 Q Go to 004702. This is December 1990, a December
24 3rd article, it talks about the process, so this
11:15 25 is a couple of months before the minister's



1 decision, and it says:

2 "- Convicted murderer David Milgaard's
3 application for a new trial is being
4 bogged down by infighting within the
11:15 5 federal Justice Department, the Winnipeg
6 Free Press reported today.

7 Some senior department
8 officials believe department lawyer
9 Eugene Williams has mishandled the
11:15 10 investigation into Milgaard's
11 application and are trying to rewrite
12 his report before giving it to Justice
13 Minister Kim Campbell, said the Free
14 Press, quoting unnamed sources."

11:16 15 And then on the right-hand side:

16 "'We were also very concerned
17 about the way our application had been
18 investigated . . . and that there was
19 very clearly a bias against our client,
11:16 20 but for reasons that he (Williams)
21 couldn't explain ..."

22 And then:

23 "Lawyers representing other
24 witnesses have said Williams told them
11:16 25 he was personally convinced Milgaard was



1 guilty."

2 And would this have been an article, I think this
3 is the *Leader-Post*, that Saskatchewan Justice
4 would have received and reviewed?

11:16 5 A Oh, we would have received that, yes.

6 Q And do you recall what reaction, if any,
7 Saskatchewan Justice would have had to this
8 information?

9 A Well we were certainly not aware of any conflict
11:16 10 within the Federal Government, nor were we aware
11 of Eugene Williams mishandling the investigation.
12 Again, it's more of the news media hype being
13 generated by the Milgaard people in order to
14 pressure the Federal Government.

11:16 15 Q Did you have concerns or did Saskatchewan Justice
16 have concerns, at this time or at a later time,
17 that an allegation of this nature, if believed by
18 the public, might undermine the public's view of
19 Kim Campbell's ultimate decision?

11:17 20 A Oh, we -- well, her ultimate decision and the
21 justice system in general, yes.

22 Q And so that would this type of allegation then, if
23 true, have an effect on the province in its
24 ability to rely upon, and have the public accept
11:17 25 their reliance upon, the minister's decision?



1 A Well ultimately, if we believed that was true or
2 it was shown to be true, it creates concerns about
3 the final product, yes.

4 Q And if it is not shown to be true, but is believed
11:17 5 by some members of the public to be true, what
6 effect does that have?

7 A Well, as I say, it diminishes respect for the
8 administration of justice generally. I don't --
9 I'm not sure the public necessarily puts a lot of
11:18 10 stock in the distinction between federal and
11 provincial authorities, the 'justice system' is
12 the justice system.

13 Q And so that, if the public believes the Federal
14 Justice Minister or her staff may have mishandled
11:18 15 the matter, that that might somehow transfer to
16 provincial Justice as well?

17 A It has a negative impact on the public's
18 perception of the whole operation.

19 Q If we can go to 004635. This is a fax, I think
11:18 20 it's -- you'll see at the top it's dated February
21 27th, 1991, I think at 1:39 in the afternoon.
22 There is a typo here, it's dated January 27th, but
23 it is -- if we can go to the next page -- it is
24 the February 27th, 1991 letter from Kim Campbell
11:19 25 to Mr. Wolch. This is her response to the first



1 application, and it would appear that Saskatchewan
2 Justice received it on February 27th, 1991 from
3 Mr. Williams?

4 A That's correct.

11:19 5 Q And presumably it would have been reviewed in
6 detail by you and other Saskatchewan Justice
7 officials?

8 A Yes.

9 Q I plan to go through parts of this. Was -- do you
11:19 10 recall whether there was anything that stood out
11 when you received the application, or the
12 decision, after having read it?

13 A I suppose the thing that stood out the most was
14 that after all this noise in the news media, after
11:20 15 all the fuss that had been made over this, it
16 comes down to very little substance.

17 Q And can you elaborate on that?

18 A Well the Federal Minister's officials, when they
19 investigated this, basically refute virtually
11:20 20 every suggestion made by the Milgaard people.

21 Q And when you say "suggestion made" are you
22 referring to in their application and/or in the
23 media?

24 A Well, in the, mostly in the media. I mean the
11:20 25 applications are relatively tame in the sense that



1 it purports to set out a position, it's not
2 calling people dishonest and so on, like -- as
3 they did in the news media later on.

4 Q And the second paragraph of her letter says:

11:20 5 "Upon receipt of your
6 application, departmental counsel
7 undertook a full review of the case.
8 Their advice following that review has
9 been provided to me, and I have
11:21 10 considered it along with the information
11 and submissions you provided the
12 Department."

13 And then it goes on, on the next page, just this
14 paragraph here the minister writes:

11:21 15 "During the investigation of
16 this matter, a number of comments were
17 made publicly which tended to suggest
18 that officials within the Department
19 were not impartial in their approach to
11:21 20 the application. That was simply not
21 the case. At all times I have had and
22 continue to have full confidence that
23 officials within this Department have
24 handled the inquiry fairly, objectively
11:21 25 and competently, and that their approach



1 to the examination of the case was at
2 all times wholly consistent with the
3 best traditions of the criminal justice
4 system in Canada. In view of the
11:21 5 allegations that were made, senior
6 officials concluded that, in the
7 particular circumstances of this case,
8 especially in view of the public
9 perceptions that could flow from these
11:22 10 unwarranted allegations, it would be
11 appropriate to seek the advice of
12 eminent counsel with considerable
13 experience in matters of criminal
14 litigation. The Honourable William R.
11:22 15 McIntyre, Q.C. who practices in
16 Vancouver, was retained for that
17 purpose. Mr. McIntyre has considerable
18 experience in criminal litigation as a
19 practitioner and as a former member of
11:22 20 the Supreme Court of British Columbia,
21 the Court of Appeal for British Columbia
22 and the Supreme Court of Canada. Mr.
23 McIntyre has reviewed the case in
24 detail, and has provided his advice to
11:22 25 me as well."



1 Now, prior to getting this letter, would you have
2 been aware of Mr. McIntyre's involvement in the
3 matter?

4 A I think we were aware that they were sending it
11:22 5 out to get an opinion from somebody else, because
6 they were concerned about the allegations of
7 incompetence and prejudice and bias and everything
8 else made against their investigators, yes.

9 Q And, at this time, were you familiar with Mr.
11:22 10 McIntyre?

11 A Oh yes.

12 Q And what did you know about him?

13 A Well, he was a retired Supreme Court Justice, he
14 had a very good reputation with the courts and
11:23 15 generally a good reputation as criminal law
16 counsel.

17 Q Did you have occasion, after receiving this letter
18 from Mr. Williams, to follow up with Mr. Williams
19 to find out more about what Mr. McIntyre had done
11:23 20 and what he concluded?

21 A Yes. In conversations I had after this decision
22 was made with Eugene Williams he basically went
23 through the process of what they did in terms of
24 providing materials to William McIntyre and what
11:23 25 he was asked to comment on.



1 Q Okay. And was that information important to
2 Saskatchewan Justice to find out what Mr. McIntyre
3 did and what he concluded?

4 A I was interested in knowing the extent of the
11:24 5 information provided to him and, sort of, the
6 scope of what he was asked to do. In particular,
7 I was curious as to whether, basically, he just
8 got everything and was asked for a broad opinion
9 on whether there was any substance to any of it.

11:24 10 Q And what were you told by Mr. Williams regarding,
11 number one, the information he was provided; two,
12 the scope of his review; and three, his
13 conclusions?

14 A Well, the specifics I'm not entirely sure of, but
11:24 15 I do recall that, at the end of that conversation,
16 I was satisfied that Justice McIntyre had been
17 given everything and had a full opportunity to
18 look at all of the information uncovered by the
19 federal investigation, as well as any allegations
11:24 20 made by the Milgaard people.

21 Q So was it your understanding, then, that he was
22 given the complete file that Federal Justice had
23 on the matter?

24 A That was my understanding, yes.

11:25 25 Q And, as far as what he was advised to look at or



1 asked to look at, what did Mr. Williams tell you
2 about the scope of Mr. McIntyre's review?

3 A It was -- it was basically wide open, "look at all
4 of this, tell us whether you think there's any
11:25 5 substance to any of it, whether you think the
6 minister should grant any particular remedy".

7 Q And did Mr. Williams share with you the legal
8 opinion provided by Mr. McIntyre to Kim Campbell?

9 A No, not at that point.

11:25 10 Q Did he at a later point?

11 A I believe, at a later point, I saw it, but that
12 would have been in connection with the reference.

13 Q You saw the physical document?

14 A I saw the document. I don't believe we were ever
11:25 15 given a copy of that, --

16 Q And did you have an opportunity --

17 A -- that I recall.

18 Q -- to review the opinion or parts of the opinion?

19 A I had an opportunity to look over the, basically,
11:26 20 the summary and the back page.

21 Q And, from that, did you learn what Mr. McIntyre's
22 opinion was to Kim Campbell?

23 A Well, my understanding was the opinion basically
24 was there was no basis established to believe
11:26 25 there was a miscarriage of justice, and that I



1 think he concluded the Larry Fisher information
2 was something that might have been useful to
3 counsel at trial.

4 Q But that his conclusion or his advice to the
11:26 5 minister was that there was no basis to grant a
6 remedy under Section 690?

7 A I believe that was his ultimate recommendation,
8 yes.

9 Q And, from Saskatchewan Justice's perspective, was
11:26 10 Mr. McIntyre's review and his conclusions
11 information that was important to Saskatchewan
12 Justice in your decisions as to whether or not to
13 re-open the investigation into the death of Gail
14 Miller?

11:26 15 A Well it, it provided some comfort in respect to
16 the notion that there was no basis to re-open. At
17 that point there wasn't really a positive decision
18 not to do it, there was a positive decision not to
19 do anything.

11:27 20 Q If Mr. McIntyre had provided an opinion to the
21 minister where, in his view, he thought a remedy
22 should be granted, and the minister, in her
23 decision, did not grant a remedy, would that
24 situation have influenced Saskatchewan Justice in
11:27 25 the steps it took following the --



1 A Well, given that I wasn't the one controlling the
2 steps, I can't say for sure, but it would
3 certainly have affected my opinion on the matter.

4 Q In what way?

11:27 5 A I had tremendous amount of respect for William
6 McIntyre, and if he indicated a remedy was
7 appropriate I would have taken -- given that a
8 considerable amount of weight.

9 Q And might that have prompted you to recommend to
11:27 10 others in your department that Saskatchewan
11 Justice maybe ought to take some steps to re-open
12 the investigation?

13 A Very likely, yes.

14 Q And is it fair to say that -- and I don't want
11:28 15 you, to put you in a position of comparing the
16 weight you put on Kim Campbell's letter and
17 Mr. McIntyre's opinion -- but would the opinion --
18 the review that Mr. McIntyre did and the opinion
19 that he reached had been given, at least in your
11:28 20 view, at least as much weight as the weight you
21 placed on the minister's ultimate decision?

22 A Umm, yes, I would think so, I would think so.

23 Q Or perhaps more weight?

24 A If there had been a disagreement, more weight,
11:28 25 yes.



1 Q If there had been a disagreement between
2 Mr. McIntyre and Ms. Campbell you would have put
3 more weight on Mr. McIntyre's opinion; is that
4 your evidence?

11:28 5 A Very probably, yes.

6 Q Let's talk about, again, just back to your
7 discussions with Mr. Williams. And this --

8 A If I can, --

9 Q Okay.

11:29 10 A -- if I can interrupt just a minute, Mr. Hodson?

11 Q Okay.

12 A I want to make something very clear. I was not
13 terribly concerned, and Justice officials in
14 Saskatchewan were not terribly concerned, about
11:29 15 the allegations of impropriety made against Eugene
16 Williams or any other federal official. We
17 considered that to be just part of the hype. The
18 problem is that when you're called incompetent and
19 stupid and corrupt often enough, it does begin to
11:29 20 affect the way you look at things, it does begin
21 to sort of set your mind up against the people who
22 are calling you those names. And our concerns,
23 you know, eventually becomes that, well, maybe
24 that influences the advice they are given -- they
11:29 25 are giving.



1 proprieties of the complaints?

2 A Yes, of the people who are bringing the material
3 to you, and the material they are bringing to you.

4 COMMISSIONER MacCALLUM: Okay.

11:31 5 BY MR. HODSON:

6 Q And who were you referring to as being the caller
7 and the callee in that exchange?

8 A Well the Milgaard camp, at that point, was
9 exercising some fairly excited rhetoric, if I can
11:31 10 put it that way, in the news media, calling people
11 incompetent and biased and things like that.

12 Q And you are referring to --

13 A They were referring to the Federal Justice
14 officials, in particular Eugene Williams, but
11:31 15 there were others as well.

16 Q And so if we can just go back to this letter,
17 then, so following Kim Campbell's decision I think
18 you told us you would have had a discussion with
19 Mr. Williams and you talked about Mr. McIntyre's
11:31 20 work; is that correct?

21 A That's correct.

22 Q And was that something that you initiated with
23 him, in other words you went to him and said
24 "lookit, tell me more about what Mr. McIntyre
11:32 25 did", or did he raise it with you, or do you



1 recall?

2 A I expect I raised it with him simply because I was
3 curious as to how extensive Justice McIntyre's
4 review had been.

11:32 5 Q And was that an important issue for Saskatchewan
6 Justice, to know the scope of Mr. McIntyre's
7 review?

8 A It was for me yes.

9 Q And you would have been one of the people involved
11:32 10 in the decision-making process for Saskatchewan
11 Justice on what to do, if anything, following
12 Ms. Campbell's decision?

13 A That's right, yes.

14 Q Did you also inquire of Mr. Williams about the
11:32 15 extent to which the federal Justice Department
16 conducted their investigation and what their
17 conclusions and opinions were to Minister
18 Campbell?

19 A I don't think we inquired at that point simply
11:32 20 because all of us in Saskatchewan would have been
21 satisfied by the conversations we'd been having
22 over the two or three years, that the Federal
23 Government investigation was very thorough, that
24 they ignored nothing, so we would have been
11:33 25 satisfied with that in February of 1991.



24 Q Did you inquire of Mr. Williams as to anything
11:34 25 else about what work he did, the scope of it, or

1 any of the conclusions that the federal department
2 reached?

3 A Umm, no. I think, as I say, we were reasonably
4 satisfied that they had been very thorough up to
11:34 5 the point of the advice to the minister, and
6 certainly that's something that became obvious
7 when we got boxes and boxes of paper from them
8 during the reference.

9 Q And so later, in the course of the Supreme Court
11:34 10 reference, did you receive -- did Saskatchewan
11 Justice receive the Federal Justice investigation
12 work product, or most of it?

13 A Most of it. There were, I believe, a few things
14 withheld. Justice Tallis's statement was withheld
11:34 15 because of solicitor/client privilege concerns,
16 and there may have been one or two other
17 statements that they didn't think were relevant.

18 Q And after getting that information did you reach
19 any conclusions, being Saskatchewan Justice, about
11:35 20 the thoroughness and the propriety of the
21 investigation conducted by the federal Justice
22 Department?

23 A I was satisfied, and certainly Eric Neufeld was
24 satisfied as well, that they had done a very
11:35 25 thorough job of investigating this matter.



1 Q If we can then go to 004638, please. And we have
2 been through this letter a number of times but you
3 would have been aware, then, of the issues that
4 the minister had looked at as set out in this
11:35 5 letter, that -- the allegations?

6 A Yes.

7 Q And, by this time, would you have been reasonably
8 familiar with these allegations based upon what
9 you had read in the media -- or Saskatchewan
11:36 10 Justice had read in the media?

11 A Well, we were familiar with what was in the media.
12 I wouldn't say there was nothing new in the
13 minister's response, there certainly was, but we
14 were also reasonably informed about what the
11:36 15 Federal Government investigators had found with
16 respect to many of these things.

17 Q If we can go to page 004645, please, and here is
18 the conclusion on the Ron Wilson. I take it -- I
19 won't go through these, but the first two grounds
11:36 20 were the Deborah Hall and the Dr. Ferris, and the
21 minister dismissed those allegations as set out in
22 the letter, and I think you've already commented
23 on that. Based on the information you had,
24 Saskatchewan Justice had, you did not find that
11:37 25 those grounds had merit for the purposes of the



1 province re-opening the investigation; is that
2 correct?

3 A That's correct.

4 Q And so here, on the Wilson recantation, she says:

11:37 5 "On the whole of the evidence
6 available to me, I can find no basis for
7 confidence in Mr. Wilson's allegations
8 that his statement incriminating
9 Milgaard was obtained by the
11:37 10 manipulation or coercion of police
11 investigators. The current retraction
12 by Mr. Wilson of much of his trial
13 evidence is unconvincing."

14 And did -- did the province then rely upon that
11:37 15 conclusion as far as disposing of Mr. Wilson's
16 recantation and his allegations about police
17 coercion?

18 A Well, that and information that we had, at that
19 point, received from federal officials, I can't
11:37 20 say who for sure, that when they attempted to get
21 Mr. Wilson to be more specific with respect to
22 what the police did to him he could not be
23 specific, he could not tell us how they mistreated
24 him or how they treated him or anything like that,
11:38 25 it's --



1 Q If you can scroll down, please, to this paragraph.
2 Number 4 relates to Larry Fisher, it says:

3 "Inquiries were also made
4 concerning the submission that one Larry
11:38 5 Earl Fisher was Gail Miller's assailant.
6 The observation of Linda Fisher, his
7 former wife, that her paring knife was
8 missing at the time of the murder was
9 fully investigated, in addition to other
11:38 10 assertions."

11 And again, you've touched on this earlier, did
12 you have any follow-up discussions with anybody
13 at Federal Justice to determine the nature and
14 extent of the investigation into the allegation
11:38 15 that Larry Fisher was the perpetrator?

16 A I don't recall having any such discussions, no.

17 Q Based upon what's stated in this letter, did you
18 believe that it was a complete investigation, and
19 did you rely upon that fact?

11:38 20 A At some point we were told that the RCMP was going
21 to investigate the allegation that Larry Fisher
22 committed the murder, and that's what we relied
23 on, yes.

24 Q And then the letter goes on to say that:

11:39 25 "Neither Ms. Fisher's suspicions, which



1 were conveyed to the police in 1980, nor
2 other well publicized assertions by her,
3 provide any evidence to link Larry
4 Fisher to Gail Miller's death. Ms.
11:39 5 Fisher noted that the photo of a knife
6 similar to the murder weapon indicated a
7 different handle type, colour and blade
8 from her missing knife. However serious
9 Mr. Fisher's criminal record may be, the
11:39 10 entire record at trial and in this
11 application reveals no evidence to
12 connect him with the killing of Gail
13 Miller. Although it was, as you have
14 conceded, quite coincidental that Mr.
11:39 15 Fisher resided at the Cadrain residence
16 during Mr. Milgaard's visit, no guilt or
17 suspicion of guilt can be attributed to
18 Fisher in the absence of some form of
19 evidence linking him to the crime."
11:39 20 And would Saskatchewan Justice then have relied
21 upon this conclusion, together with the other
22 information you learned about their investigation
23 and Mr. McIntyre's opinion, in deciding not to
24 re-open the investigation at the time, whether
11:40 25 it's a non-decision or not, but --



1 A Yes, oh yes.

2 Q Yeah. And I suppose, if the question is on
3 February 27, 1991 and the time period that
4 followed, the months that followed, why didn't
11:40 5 Saskatchewan Justice re-open the investigation
6 into the death of Gail Miller, investigate and
7 charge Larry Fisher for the murder?

8 A Well, we were of the view, as set out in the
9 minister's letter, that there was no evidence to
11:40 10 implicate him as the person who committed that
11 crime, and certainly no basis to charge him.

12 Q And did you rely then upon the minister's
13 conclusion and the background work that was done
14 that led to that conclusion in making the decision
11:41 15 not to re-open the investigation to determine
16 whether or not Larry Fisher had killed Gail
17 Miller?

18 A Yes.

19 Q Go to page 647, please. This is the conclusion,
11:41 20 it says:

21 "...I am satisfied that the verdict of
22 the jury was fair and justified
23 according to the law applicable at the
24 time, and continues to be so
11:41 25 notwithstanding the information and



1 submissions you have brought to my
2 attention."

3 I would like your comment on what was
4 Saskatchewan Justice's view in light of this
11:41 5 decision as far as the question -- did you
6 believe that this cleared Saskatchewan Justice
7 officials and the police who investigated the
8 matter of any wrongdoing or miscarriages as had
9 been alleged prior to this decision?

11:42 10 A Yes, that would be fair, yes.

11 Q And I had asked this earlier, I think you said
12 that when these allegations were being made about
13 Mr. Caldwell and about the conduct of the police,
14 that you deferred and waited for the minister to
11:42 15 render her decision to deal with those
16 allegations?

17 A Yes.

18 Q And so is it fair to say that in some respects Kim
19 Campbell's decision resolved at least, and maybe
11:42 20 temporarily, resolved the allegations that had
21 been made relating to provincial interests,
22 namely, the Crown prosecutor and the police
23 investigators?

24 A We thought it did, yes.

11:42 25 Q And did that later change?



1 A Well, when I say we thought it did, we thought it
2 did with respect to the public. That wasn't the
3 case. It certainly satisfied us that there was
4 nothing to suggest impropriety by them.

11:43 5 Q And then did you subsequently learn that the
6 minister's decision was not being accepted by at
7 least certain segments of the public?

8 A Well, certainly the Milgaard camp went on a media
9 campaign, and a very effective one, to build the
11:43 10 pressure up against the minister, the Federal
11 Minister to grant a remedy yet again prior to the
12 filing of the second application and that was
13 sufficiently strong, that it led to the point that
14 even the federal government agreed that something
11:43 15 had to be done and it had to be done publicly.

16 Q And was that criticism of the process or can you
17 elaborate, what was it that the -- what did you
18 understand to be the primary complaints about the
19 minister's decision and the process?

11:43 20 A Well, the complaint basically was that the process
21 had failed, that either through corruption or
22 error or whatever, it produced a bad result.

23 Q Was there concern expressed about the minister's
24 failure to provide the leg work or the background,
11:44 25 namely, the investigation done by the department



1 and Mr. McIntyre's opinion?

2 A We were certainly concerned that even at that
3 point they were still maintaining the kind of
4 secrecy they were. We would have anticipated that
11:44 5 at some point at least a justice official would
6 have been available to explain the process and
7 provide a considerable amount of background
8 information.

9 Q You are talking a Federal Justice official?

11:44 10 A Yes.

11 Q And would that be to -- and I'll show you some
12 articles and letters in a moment that talk about
13 concerns about the disclosure of what it was that
14 Mr. Williams and others did, the background leg
11:44 15 work and what Mr. McIntyre was provided and what
16 his opinion was, that there was some concern
17 expressed that the public and the Milgaards didn't
18 know what was done; is that correct?

19 A Well, the public didn't know. The Milgaards
11:45 20 certainly knew, they were told every time they
21 made an inquiry exactly where the process was and
22 what was happening. They would not have been
23 given, I don't expect, a copy of the advice that
24 went to the minister any more than we were, but
11:45 25 they certainly understood what the process was and



1 what investigations were underway and what those
2 investigations were producing.

3 Q I'll maybe go through some of these articles and
4 get you to comment, 025968 (sic). And you
11:45 5 commented that at some point, you said a public
6 airing was required. Why -- and you said even the
7 Federal Justice officials agreed; is that correct?

8 A Yes.

9 Q And why was a public airing required?

11:46 10 A Because the public's confidence I think in the
11 administration of justice had just been eroded to
12 the point by this media campaign that something
13 had to be done to restore it and a public airing
14 was the only way that you would do that.

11:46 15 Q And are you able to comment on what may have
16 contributed to, or what could have been done to
17 have prevented this public outcry or the loss of
18 confidence in the public?

19 A Yes, a more open response to allegations as they
11:46 20 were being made instead of letting them lie there
21 and the pressure build up, a more public response
22 to the release of the minister's opinion. If we
23 were doing that today and we were doing it in
24 Saskatchewan, I can tell you that prior to the
11:46 25 release of the minister's response, one of the



1 stops would be at the communications branch to get
2 a public relations campaign or a news media
3 campaign set up in advance so that the whole story
4 got out.

11:47 5 Q And when you say the whole story, are you
6 suggesting that sort of the open box, the
7 entirety, here's everything we did, the public can
8 look at it?

9 A Well, it wouldn't -- you wouldn't necessarily
11:47 10 disclose the files, but you would be disclosing a
11 substantial amount of information.

12 Q And what benefit would that have?

13 A Well, it basically shows the public what was done
14 to follow up these allegations in terms of
11:47 15 investigative work. Hopefully that would provide
16 them with the confidence that allegations were not
17 ignored, that the investigation was not slipshod,
18 that it was very thorough. Providing them, for
19 example, a copy of the statement or the relevant
11:48 20 portions of the statement of Deborah Hall would
21 clearly indicate that in fact what you are really
22 talking about is interpretation, she interpreted
23 it a different way than the other witnesses, it
24 wasn't that this didn't happen, and that I
11:48 25 think -- first of all, you are informing the



1 public, but second, you are answering the
2 allegation and that seems to me to be an important
3 aspect of what we do.

4 Q And again, I think you said the public airing came
11:48 5 at the Supreme Court reference about a year later?

6 A Yeah.

7 Q And you commented about what could have been done.
8 Can you comment on, at least from Saskatchewan
9 Justice's perspective in the latter part of 1991,
11:48 10 what effect did it have on the administration of
11 criminal justice that the province -- or that the
12 Federal Justice Department did not perhaps share
13 as much information as you thought they might
14 have?

11:48 15 A Well, it provided -- it simply provided the
16 Milgaard camp with the opportunity to set up and
17 operate an incredibly effective campaign to
18 pressure the Minister of Justice for Canada into
19 doing something more, and in this case calling a
11:49 20 reference.

21 Q And was it your observation, Mr. Brown, that if
22 they had not done that media campaign, that they
23 would not have obtained a public airing and a
24 reference?

11:49 25 A That's probably the case, yes. If the matter had



1 been allowed to die after February of 1991, there
2 wouldn't have been a reference I'm pretty sure.

3 Q This is an article of February 28th, 1991, if we
4 can just flip it over. So this is the day after
11:49 5 the decision, and I don't propose to go through a
6 lot of these, but you would have been aware, I
7 think you referred to it that a fairly significant
8 media campaign followed Kim Campbell's decision;
9 is that correct?

11:50 10 A That's correct.

11 Q And would you agree, if I can maybe summarize a
12 bit, the focus would be to, number one, dispute
13 her conclusions; correct?

14 A Yes.

11:50 15 Q And number two, to raise a number of issues that
16 called into question the process utilized by
17 Federal Justice officials, the fairness of the
18 process, the transparency, the accountability,
19 such that the credibility of her decision was
11:50 20 being called into question. Is that a fair way to
21 summarize it?

22 A That's correct.

23 Q In other words, public, don't accept, don't rely
24 upon her decision because the process is so flawed
11:50 25 and they won't tell us what they did, they won't



1 share with us what Mr. McIntyre had and what he
2 said, things of that nature, and I'll go through
3 some of those, but that's generally the flavour of
4 what was being put out there?

11:50 5 A Yes.

6 Q And did that have an adverse effect then, that
7 campaign, did that have an adverse effect on
8 Saskatchewan Justice and your ability to rely upon
9 the minister's decision in the eyes of the public?

11:51 10 A In the eyes of the public I think it did, yes.

11 Q And did you find then that the public was not as
12 readily and immediate to accept your reliance upon
13 Kim Campbell's decision in light of what was in
14 the media regarding it?

11:51 15 A Well, I don't know that they were questioning us
16 sort of directly, but certainly the whole
17 administration of justice was getting a black eye
18 out of this.

19 Q And so here in this article:

11:51 20 "Federal bungling of David
21 Milgaard's 22-year bid for freedom will
22 be publicly revealed in appeals to the
23 Federal Court of Canada and the
24 Saskatchewan Court of Appeal, his lawyer
11:51 25 promised..."



1 And then Mr. Asper:

2 "Either they ignored what we
3 presented or they just completely
4 misunderstood it," Asper said...

11:52 5 Although Campbell took the
6 extraordinary step of getting an outside
7 legal opinion, from former Supreme Court
8 of Canada Justice William McIntyre, any
9 hope she had of ending criticism of her
11:52 10 department's handling of the case faded
11 quickly."

12 And your comment on that, Mr. Brown, I think at
13 least in the minister's decision, it was lookit,
14 in order to quell the public criticisms against
11:52 15 my officials, I took the extraordinary step of
16 getting an opinion from Mr. McIntyre to add
17 credibility to my decision; would that be a fair
18 read of it?

19 A Yes.

11:52 20 Q And is it correct to say that at least what played
21 in the media following is that because she did not
22 disclose what was given to Mr. McIntyre and what
23 he provided back to her, at least in the eyes of
24 David Milgaard's supporters, that that resulted in
11:52 25 that opinion not adding to her credibility, but



1 perhaps detracting from the credibility of her
2 decision. Would that have been essentially the
3 allegation put forward?

4 A Well, that was the allegation being put forward,
11:52 5 yes.

6 Q So what was intended at least in the eyes of some,
7 that what had been intended as something to
8 bolster the credibility of her decision ended up
9 perhaps undermining it because what he did and
11:53 10 what he advised was not made public; is that fair?

11 A Yes.

12 Q And so here, if we can just go to the top part
13 here --

14 A Well, that said, I expect that had the Federal
11:53 15 Minister made public everything that was given to
16 Justice McIntyre, they would have found some other
17 way to be critical of it. At the end of the day
18 they didn't get what they wanted and their view
19 was, you know, that the campaign continues and
11:53 20 there would have been something else they would
21 have attached their sights to.

22 Q And here, Mr. Asper is referring:

23 "We will ask the judges to
24 order the department to disclose fully
11:53 25 everything that it has, all interviews,



1 all testimonies, all opinions and the
2 evaluation of all the evidence that we
3 provided.

4 "Justice has never
11:54 5 disclosed to us what they have."

6 And so that would have been -- this is the day
7 after the decision, but you would agree that that
8 would be a common theme in what followed in the
9 media, the Milgaard group saying lookit, you have
11:54 10 not given us what you did?

11 A Yes.

12 Q And did you have any views on that, Mr. Brown, as
13 to whether or not that's something that maybe
14 would have assisted or quelled some of the
11:54 15 concerns about Kim Campbell's decision as far as
16 the province is concerned?

17 A Well, I think the complaint has a certain
18 resonance with the public, that you've made this
19 decision, but you haven't told us why or how or
11:54 20 shown us what you based it on. That's something
21 that I think most members of the public can easily
22 understand and something that they would say they
23 would be sympathetic with.

24 Q And does there come a point where the failure to
11:55 25 disclose that type of information can lead to



1 speculation about, number one, trying to hide
2 something; would you agree with that?

3 A Oh, absolutely. Again, we run into that problem
4 with a lot of the things we do. If we allow
11:55 5 outrageous allegations to just lie there without
6 being answered, the no comment simply means that
7 the public is left with that and start thinking,
8 well, if they are not going to talk about it,
9 there must be something to it.

11:55 10 Q Okay. And then:

11 "Asper said the federal government is
12 trying use McIntyre to legitimize its
13 process by playing on his reputation and
14 expertise in criminal law. However, he
11:55 15 said it will not release the former
16 judge's opinion because it will reflect
17 how tainted and slanted evidence
18 presented to him was."

19 And let me just pause there. I think, and
11:55 20 correct me if I'm wrong, you told us that as far
21 as Saskatchewan Justice was concerned,
22 Mr. McIntyre's opinion did in fact legitimize the
23 process in your view and his opinions certainly
24 legitimized or gave you comfort that you could
11:56 25 rely more on Ms. Campbell's decision; is that



1 fair?

2 A Yes.

3 Q And it appears here that Mr. Asper is saying that
4 the Federal Minister is using Mr. McIntyre's
11:56 5 opinion for that purpose, but then won't disclose
6 it to the Milgaards and let them know what it was?

7 A Yes, and he's adding his view of why that is so.

8 Q And then I suppose the distinction here is, at
9 least maybe not at this point, but at some point,
11:56 10 Saskatchewan Justice had the benefit of knowing,
11 number one, what it was that Mr. McIntyre reviewed
12 and, number two, at least the essence of what his
13 opinion was to the minister?

14 A Yes.

11:56 15 Q If we can go to 025970, this is an article of
16 February 28th as well, and it talks about:

17 "The Justice Department -- isn't capable
18 of making an impartial decision..."

19 "Politics has everything to do with it
11:57 20 -- an independent investigator should
21 have looked at this case..."

22 And it goes on, I think that's John Harvard's
23 comments, and if we can scroll down to the right,
24 it says:

11:57 25 "Asper said ironically Campbell did just



1 what he wanted when she appointed
2 retired Supreme Court Justice William
3 McIntyre to review the case -- except
4 the defence had no opportunity to
11:57 5 present arguments or review the Crown's
6 case."

7 And again, you would have been aware of that? I
8 guess that's a different type of allegation in
9 that --

11:58 10 A Well, it's expanding.

11 Q Expanding it.

12 A It's not an opportunity to answer.

13 Q In other words, the complaint was that if you were
14 going to go and get an opinion from him, you
11:58 15 should have allowed us to at least participate in
16 that process?

17 A That's right.

18 Q And did you have any views on that?

19 A Well, that's not usually the way these kinds of
11:58 20 processes are done, certainly not the way an
21 investigation proceeds, you don't usually go to
22 the Defendant and ask them to participate in the
23 process.

24 MR. HODSON: I see it's 12 o'clock,
11:58 25 probably an appropriate spot to break.



(Adjourned at 11:58 a.m.)

(Reconvened at 1:30 p.m.)

BY MR. HODSON:

Q Good afternoon. If we could call up 026675. And this is a March 6th, 1991 letter, if we can just go to the second page, it's a letter from the minister, Gary Lane, prepared by Murray Brown, with a blind carbon copy to the Deputy Minister Brian Barrington-Foote. If you can go back to the front page, I don't think it turns on who this was sent to, but can you tell us; would this be a letter sent by the minister to a member of the public? We see a number of these in the documents.

A Yes. Generally, what would have happened is somebody has written in to the minister expressing some concerns, if the minister's office itself didn't feel comfortable in preparing the reply then they would send it on to the department. The department, the deputy minister sends it to the appropriate division, I was doing, I think, most of the letters with respect to David Milgaard's case, and this one would have come to me for reply.

Q And so, generally speaking, you would draft the



1 letter and, subject to any revision the minister
2 or the deputy might make the content, the
3 substantive content, would be from you?

4 A Yes.

01:32 5 Q And so here, this is March 6th, a week after Kim
6 Campbell's decision, and it says:

7 "The investigation in this case ...",
8 let me just back up. I could not find her letter
9 in to the minister, I'm not sure much turns on
01:32 10 it, but the first sentence says:

11 "Thank you for your recent
12 letter concerning the case of David
13 Milgaard."

14 It says:

01:32 15 "The investigation in this case was full
16 and painstakingly careful.",
17 and you're referring to the federal Justice
18 Department matter.

19 "Each suggestion that there was new
01:32 20 evidence was exhaustively examined.
21 This inquiry was very complete and
22 amounts to almost a complete
23 re-investigation of the crime. All
24 major witnesses and most minor ones were
01:33 25 re-interviewed by Royal Canadian Mounted



1 Police investigators and all of the
2 existing physical exhibits were
3 re-examined. The alleged new evidence
4 was also carefully checked. The
01:33 5 R.C.M.P. investigation supports the
6 conclusion of the Minister of Justice
7 that the original trial was fair and
8 reached the proper conclusion."

9 Could you tell me where, or on what would this
01:33 10 information have been based at the time?

11 A That would have come largely from the
12 conversations that we had had over the months with
13 the Justice officials and, of course, from Kim
14 Campbell's letter itself.

01:33 15 Q And can we conclude from this letter that this
16 would reflect the Saskatchewan Minister of
17 Justice's assessment of the situation at this
18 time?

19 A Yes.

01:33 20 Q If we can go to 165532. And this is a letter
21 March 12, 1991 from the Milgaard family to the
22 minister in response to her decision, and I just
23 want to touch on parts of this. I'm not sure if
24 this letter was ever provided directly to
01:34 25 Saskatchewan Justice; are you able to tell us by



1 looking at it, Mr. Brown? It may have been
2 provided as part of the reference.

3 A It may have come as part of the reference.

4 Q Yeah.

01:34 5 A I don't recall seeing their correspondence to the
6 minister before that.

7 Q And so just a couple of points here. This letter,
8 I believe the evidence is that it was distributed
9 to the media, and in fact I will be showing you an
01:34 10 article later where parts of this are quoted from,
11 I believe, but I just want to get your comment on
12 a couple of the concerns, because I think this
13 letter outlines the concerns that David Milgaard,
14 his family and his lawyers, had with respect to
01:35 15 this issue we talked about before lunch, namely
16 whether the federal minister had adequately
17 explained to them how she arrived at her decision,
18 what she looked at, what she gave to Mr. McIntyre
19 and what he gave back, and those sorts of things.
01:35 20 And just a couple parts here. The second
21 paragraph says:

22 "After an intensive review of
23 the contents of your letter, we have
24 concluded that your decision is a
01:35 25 continuation of the gross miscarriage of



1 justice. It would seem that your
2 officials either ignored or profoundly
3 misunderstood not only the substance of
4 our application, but also the evidence
01:35 5 at trial. Having first consulted with
6 our counsel, we feel compelled to
7 particularize for you the many factors
8 outlined in your decision with which we
9 take strong objection."

01:35 10 And then here, as far as the department, and I
11 won't recite them, but they go through and they
12 say:

13 "These are objective examples
14 of the type of review conducted. The
01:36 15 fact that your officials conducted your
16 work in secrecy, and consistently
17 rejected our requests for disclosure,
18 makes it impossible to fully respond to
19 this point."

01:36 20 And the next page, at the bottom, I'll just read
21 you parts of this and ask you for your comment.
22 And at the bottom they say:

23 "With all due respect, the
24 suggestion by your officials that you
01:36 25 seek advice of outside counsel flows not



1 from their good intentions, but rather
2 because their conduct had been exposed
3 to public scrutiny. They had been
4 caught acting in a manner inconsistent
01:36 5 with their duty while pursuing an
6 application made under Section 690 of
7 The Criminal Code. We fully stand by
8 our assertion that your Department set
9 out from the very beginning to defeat
01:36 10 this application; initially in the hope
11 that by doing nothing, it would simply
12 lapse, and then latterly, as the
13 strength of the case grew exponentially,
14 by conducting itself in a way that would
01:37 15 ensure the result."

16 And then down to the third paragraph.

17 "We have no idea what
18 information was provided to Mr. Justice
19 McIntyre, nor are we aware of the
01:37 20 contents of his opinion."

21 And then:

22 "After our counsel met with your
23 officials in Ottawa on October 1, 1990,
24 it became abundantly clear that there
01:37 25 were very different views with respect



1 to the facts of the case. How one views
2 those facts will, in large measure, be
3 determinative of how one views the
4 application in its entirety."

01:37 5 And then it goes on to talk about having it
6 adjudicated by an independent body. And then
7 down, the next paragraph:

8 "Unfortunately, your process
9 has reverted to that which existed in a
01:37 10 bygone era. David Milgaard had his
11 application investigated, adjudicated
12 and concluded by all of the same people,
13 and always in our absence. The real
14 decision in this case was made when you
01:37 15 referred the case to Mr. Justice
16 McIntyre, and it is astonishing that you
17 believe otherwise. You referred this
18 case to a retired Judge for his opinion,
19 and you excluded counsel. We are
01:38 20 confident that there is no Court in this
21 country which would sanction this
22 practice, either under The Charter, or
23 by virtue of the rules of natural
24 justice."

01:38 25 And I think that's fine from the letter. Just --



1 and I believe this letter found its way, or at
2 least parts of it, in certain later media
3 reports. But do you understand from this letter,
4 Mr. Brown, the concerns expressed by David
01:38 5 Milgaard's group at the time with respect to
6 their seeking an explanation of how the decision
7 was arrived at, what was reviewed by the
8 department, and what was provided to Mr. McIntyre
9 and what his opinion was?

01:38 10 A Yes, I can certainly understand that.

11 Q And are you saying that you could understand why
12 David Milgaard would have a concern that he didn't
13 get that information after Kim Campbell's
14 decision?

01:38 15 A Well, I think it's fair to say that the days when
16 public officials could simply announce decisions
17 without bothering to make the effort to explain
18 how they came to those decisions, or even nowadays
19 giving somebody the opportunity, sort of a
01:39 20 last-ditch opportunity to comment on the material
21 that's been gathered, are gone, and they were
22 probably gone by that time too.

23 I can understand why the
24 Milgaards would be concerned that they were not
01:39 25 given the opportunity to see what the federal



1 minister made her decision on, or see the McIntyre
2 opinion, which she obviously placed a good deal of
3 weight on.

4 Q And would that be something that, again, could you
01:39 5 understand how that might result in at least the
6 David Milgaard group having further questions
7 about the minister's decision and perhaps some
8 reluctance to accept it --

9 A Yes.

01:40 10 Q -- as being valid?

11 A Yes.

12 Q And, again, would that be similar to what you
13 commented on earlier, your observations about what
14 members of the public might conclude as well, not
01:40 15 having had an opportunity to look behind the
16 minister's decision?

17 A Yes, that's correct.

18 Q 004681. And this is the March 13th, 1991 story in
19 the *StarPhoenix*, and this is where that letter I
01:40 20 just read to you is quoted from:

21 "In a letter of reply that
22 called the dismissal of Wilson's
23 evidence 'insulting' and the entire
24 departmental review biased and
01:40 25 unobjective ...",



1 and it goes to carry on. And I think the
2 evidence is that the letter I quoted from was
3 distributed widely to the media and may have
4 formed at least part of what the media thereafter
01:41 5 reported on. If we can just go down to the
6 bottom -- actually, sorry, no.

7 If we could go ahead to
8 026541. This is a March 13th, 1991 article, I
9 think this is in the *Winnipeg Sun*, this quote was
01:41 10 reported elsewhere as well. Would it be correct
11 to say that, after the minister's decision in
12 February of 1991, Saskatchewan Justice continued
13 to monitor and receive media reports about the
14 David Milgaard matter?

01:41 15 A Oh, we would have received media reports about it.
16 Again, there was a clipping service that provided
17 us with all of that on a regular basis.

18 Q And so here the heading, if we can just go back,
19 the headline here is *Milgaards declare war*
01:42 20 *Prisoner, family target Campbell in campaign*, and
21 it states here:

22 "Campbell set herself up as
23 judge and jury in the case, which is not
24 her role, Asper said.

01:42 25 'We never asked her to



1 declare his innocence. We've only asked
2 for a new trial,' he said.

3 'Her decision is an outrage.
4 Either she got bad advice and didn't
01:42 5 exercise due diligence, or she is an
6 active co-conspirator in this
7 injustice.'

8 In Vancouver, Campbell said
9 she worked hard to reach her decision,
01:42 10 and the Justice Department has 'no
11 vested interest, no bias.'"

12 Can you tell me what the reaction was by you
13 and/or Saskatchewan Justice at the time to this
14 allegation about either the minister got bad
01:42 15 advice or is an active co-conspirator?

16 A Well the more personal the attacks become, I
17 suspect the less credibility we see in any of
18 them, and the less we're inclined to take any of
19 it seriously. Clearly, the Milgaards were very
01:43 20 disappointed, I can certainly understand that, and
21 they had decided that the media campaign had to
22 continue, and there had to be another result
23 reached.

24 Q And any comment about what this type of report in
01:43 25 the media would do to Saskatchewan Justice and its



1 intentions to rely on the minister's decision?

2 A Well, again, any attacks on the decision, any
3 attacks on the federal Department of Justice,
4 ultimately reflect on the administration of
01:43 5 justice as a whole, and that's a concern to the
6 Government of Saskatchewan. At this point there
7 certainly wasn't any consideration of sort of
8 re-opening an investigation. We were satisfied
9 that, in fact, the Federal Minister had, as she
01:44 10 said, had her officials do a very thorough
11 reinvestigation, and there was no basis to
12 re-open.

13 Q Okay. And we've talked about this a bit. So
14 you -- is it fair to say that nothing in the media
01:44 15 criticizing the minister or her officials or the
16 role of Mr. -- of Mr. McIntyre caused Saskatchewan
17 Justice to have any doubts about the credibility
18 of her decision; is that correct?

19 A That's correct.

01:44 20 Q However, with respect to the province's ability to
21 convince members of the public that the matter had
22 been fairly and properly resolved, did what -- did
23 the criticism in the media present a challenge to
24 you in explaining, explaining Saskatchewan
01:44 25 Justice's reliance on the decision?



1 A Yes, I would say that's fair. It certainly makes
2 the job more difficult to try and convince people
3 who are writing the minister that, in fact, David
4 Milgaard had been given a fair hearing and simply
01:45 5 hadn't been able to establish his case that he
6 wasn't properly convicted.

7 Q Go to 004351. If we can go to the next page, this
8 is March 20, 1991 prepared by Murray Brown, just
9 go to the front page. Can you tell us what this
01:45 10 document would be?

11 A Umm, that appears to be a briefing note.

12 Q And so would this be for the Justice Minister
13 then?

14 A Yes.

01:45 15 Q And this would have been prepared by you on or
16 about that date?

17 A Umm, yes, subject to the fact it's reviewed by a
18 number of people and they may throw in a change or
19 two.

01:45 20 Q But would it represent the knowledge that
21 Saskatchewan Justice had at the time about the
22 matter?

23 A Yes.

24 Q And it talks here about, it says:

01:46 25 "The review conducted by both



1 the Federal Department of Justice
2 officials and Mr. McIntyre was very
3 thorough and complete and in result both
4 concluded there was no basis for a
01:46 5 reference to the Court of Appeal. My
6 officials co-operated fully with the
7 review."

8 And I'm wondering, at this point, Mr. Brown, what
9 information would Saskatchewan Justice have about
01:46 10 the conclusions reached by the Federal Department
11 of Justice officials in their review?

12 A Well, again -- what was the date on this?

13 Q March 20th, 1991.

14 A We had no sort of further information in terms of
01:46 15 specifics than we had when the minister released
16 her report. I may have talked to Eugene Williams
17 at this point and asked about the McIntyre
18 opinion, I don't know for sure, but that was the
19 only sort of inquiries that I made with respect to
01:47 20 how thorough things had been. My understanding to
21 that point was that the federal government had
22 done a very thorough job, had engaged the RCMP and
23 completely investigated all of the aspects of the
24 case.

01:47 25 Q And as far as the conclusion reached by the



1 Federal Justice Department officials, what
2 information did you have about that?

3 A Well, again, while these materials or these
4 allegations were being presented by the Milgaards,
01:47 5 from time to time we had conversations with
6 federal officials and they would tell us that they
7 had discovered this or they had discovered that,
8 there was never anything more formal than that.
9 Certainly no exchange of the file.

01:47 10 Q If we can just go to the next page here, there's a
11 passage here, it says:

12 "This matter was fully reviewed by the
13 Federal Minister of Justice. At the
14 conclusion of that review, the Federal
01:48 15 Minister had the former Supreme Court
16 Justice William McIntyre review the case
17 as well. Both the Minister's staff and
18 Mr. McIntyre concluded that the
19 conviction was properly obtained and
01:48 20 still valid. The "new evidence" put
21 forward was either illusory on closer
22 inspection or of little evidentiary
23 weight or inconclusive. In the opinion
24 of all parties who reviewed the matter
01:48 25 nothing new has come forward to justify



1 a re-hearing."

2 And can you tell us where that information would
3 have been obtained about, in particular:

4 "Both the Minister's staff and
01:48 5 Mr. McIntyre concluded that the
6 conviction was properly obtained and
7 still valid."

8 A That would have come from the federal government
9 people as well.

01:48 10 Q And so would that have been telephone discussions
11 then with --

12 A Yes, because we didn't get the McIntyre opinion
13 directly.

14 Q The document?

01:48 15 A Yeah.

16 Q And so by March 20th, 1991, then, are you telling
17 us that -- well, let me ask you. What information
18 about Mr. McIntyre's conclusions and the
19 minister's staff, the Federal Justice official's
01:49 20 conclusions, would that have been conveyed to
21 Saskatchewan Justice?

22 A In the form of those telephone conversations.
23 They knew that we were concerned with the public's
24 perception of the administration of justice and
01:49 25 because of that they tended to be, at least in my



1 experience, a little more forthcoming about what
2 they had discovered and a little more inclined to
3 keep us informed of what they were discovering
4 than they normally would, but even there they
01:49 5 exercise certain limits and those limits included
6 not sending us original materials.

7 Q And so again on the federal department report, I
8 think you are telling us they did not send you a
9 copy of their departmental report or their advice
01:50 10 to the minister or their conclusions?

11 A No, no.

12 Q Can you tell us to the best of your recollection
13 what they would have told you about what their
14 conclusions were and what their advice may have
01:50 15 been?

16 A Well, with respect to the conclusions, that would
17 have come from those conversations over the course
18 of time as they looked at each piece of new
19 evidence or new suggestion of impropriety or
01:50 20 whatever. Basically during the course of those
21 conversations, they made it clear that either the
22 new evidence didn't hold up or anything they may
23 have found, for example, with respect to the Larry
24 Fisher thing, in their view didn't amount to a
01:50 25 sufficient reason to re-open the conviction.



1 Q But would Mr. Williams or someone else with
2 Federal Justice have told Saskatchewan Justice
3 that the federal department review concluded that
4 the conviction was properly obtained and still
01:51 5 valid?

6 A Well, probably not, no, not -- because that, in
7 effect, would be advice to the minister, that
8 would have been something that we pulled out of
9 the minister's letter.

01:51 10 Q And is that something then that you would presume
11 that the minister followed the department's
12 advice?

13 A Oh, yes, yes. On something as complicated as
14 this, I have no doubt about that.

01:51 15 Q So we're done with that document. If we can just
16 pause here. Yesterday I talked about these
17 decision points and I think you told us that after
18 the minister's decision came out on February 27th,
19 1991, there wasn't a formal decision made by
01:51 20 Saskatchewan Justice not to re-open, but rather it
21 was a case where it simply wasn't re-opened, I
22 think you called it a non-decision; is that fair?

23 A Yes.

24 Q And can you just explain why no decision was made
01:52 25 at that time to re-open?



1 A Well, essentially we were taking the position that
2 if the Federal Minister's investigation turns up
3 something that suggests we need to further
4 investigate, we'll do that, but when the Federal
01:52 5 Minister reported that there was no basis to
6 re-open the conviction, as far as we were
7 concerned that was the end of that.

8 Q And if we can just generally try to outline what
9 information Saskatchewan Justice had, and I'm not
01:52 10 talking specifically on February 27, 1991, but
11 within, you know, weeks or a month after that when
12 the decision was digested, would you agree that at
13 least one group of information would be what
14 Saskatchewan Justice obtained from the media, the
01:52 15 information contained in the media report, some of
16 which I've shown you?

17 A Yes, I suppose with the caveat that I suspect at
18 that point we didn't believe a good deal of what
19 was being, what had been reported and what was
01:53 20 being reported.

21 Q I'm sorry, what was that?

22 A We didn't believe a good deal of what was reported
23 or was being reported currently.

24 Q And so although you had this information, what
01:53 25 weight if any then did you place on that in



1 deciding not to re-open the case?

2 A A decision not to do anything was largely based on
3 the Minister of Justice's report and what we had
4 learned from Justice officials with respect to the
01:53 5 various bits of information that had been
6 submitted as supporting a re-opening.

7 Q And would that include the information you
8 obtained about the RCMP investigation of Larry
9 Fisher?

01:53 10 A Yes.

11 Q And would it include the role that Mr. McIntyre
12 played in reviewing the matter and providing his
13 opinion to the minister?

14 A Yes.

01:54 15 Q Now, I suppose, we touched on this yesterday, the
16 practical effect, that if Saskatchewan Justice had
17 decided to re-open the investigation into Gail
18 Miller's death following Minister Campbell's
19 decision within weeks or months, I think you told
01:54 20 us yesterday there was no -- there was no reason
21 why you could not re-open the investigation, legal
22 reason?

23 A Oh, that's right, there's no legal reason why it
24 can't be re-opened, even when there's a 690
01:54 25 application involved.



1 Q But practically speaking, in light of what the
2 minister concluded, did that effectively
3 preclude --

4 A It gave us no reason to re-open an investigation.

01:55 5 Q If we can go to 026681, and this is a five page
6 letter from the Minister of Justice at that time
7 Gary Lane. It's prepared, at least the document
8 says prepared by you, Mr. Brown, and it talks
9 about the David Milgaard case, and I propose to go
01:55 10 through parts of it. Can you tell us, at this
11 time, I mean, this letter, as we see when we go
12 through, is fairly detailed and talks about
13 various matters. Was there a decision made at
14 some point by Saskatchewan Justice to be -- you
01:55 15 talked earlier about when Mr. Quinney became the
16 director and therefore you became more active in
17 putting information out in the media. Was there a
18 point where Saskatchewan Justice decided to be
19 quite detailed in its responses to inquiries from
01:56 20 the public on this matter?

21 A The minister wanted the responses to be fairly
22 detailed because he was of the view that if the
23 facts got out, that would allay concerns the
24 public may have with the administration of
01:56 25 justice.



1 Q Were there concerns, and again this is July, 1991,
2 were there concerns that the facts were not
3 getting out there; in other words, the other side
4 of the story, if I can put it that way?

01:56 5 A Yes.

6 Q And so this, the letter says:

7 "...I am satisfied that justice has been
8 done."

9 And then scroll down:

01:56 10 "Let me begin by explaining the process
11 of review involved in such a case."

12 And then it goes on to say about the involvement
13 of the police, but:

14 "Neither the Saskatoon City Police nor
01:56 15 my department played any major role in
16 the re-investigation of this case
17 conducted by the R.C.M.P. and Federal
18 Department of Justice officials."

19 And again, was there some reason that that -- was
01:57 20 that intended to address something that was in
21 the media or what was the purpose of that?

22 A It was very likely put in there to address a
23 concern that the writer had expressed with respect
24 to what we did.

01:57 25 Q Okay. If we can scroll down to the bottom, it



1 says:

2 "In this case something extra-ordinary
3 happened. Because Mr. Milgaard's lawyer
4 complained about the Department of
01:57 5 Justice review, everything, including
6 copies of the police and prosecution
7 file material, the original transcript
8 of the trial, the new evidence as
9 submitted by Mr. Milgaard's counsel and
01:57 10 the R.C.M.P. reports on the
11 re-investigation, were turned over to an
12 outside party for re-assessment. That
13 outside party was retired Supreme Court
14 of Canada Justice, the Honourable
01:57 15 William MacIntyre."

16 And where would you have obtained that
17 information as far as what was given to Mr.
18 McIntyre?

19 A That would have come from Eugene Williams.

01:58 20 Q And I think you told us earlier that was an
21 important fact for you when you inquired to find
22 out what it was that he had reviewed?

23 A Yes.

24 Q And it says:

01:58 25 "Mr. MacIntyre had a great deal of



1 experience as defence counsel when he
2 was practicing law and earned a very
3 good reputation for fair and sound
4 judgement as a judge. Mr. MacIntyre
01:58 5 took his time and reviewed everything.
6 In the end he was satisfied that the
7 review done by the Department of
8 Justice, Canada, had come to the correct
9 conclusion and that there was no reason
01:58 10 to order a review by the Saskatchewan
11 Court of Appeal. He was satisfied that
12 the original trial had reached a just
13 and fair conclusion concerning Mr.
14 Milgaard's guilt. And he was also
01:58 15 satisfied that the so called new
16 evidence was more illusory than real."

17 At this time -- do you think this letter was
18 before you had an opportunity to review parts of
19 Mr. McIntyre's opinion? This is July, '91.

01:58 20 A Oh, absolutely, yes.

21 Q It's before?

22 A Yes. I don't recall seeing any parts of his
23 opinion until after the reference began.

24 Q Okay. And so that would have been after November
01:59 25 28th, '91?



1 A Yeah, end of November.

2 Q Can you tell us the basis upon -- or where did you
3 obtain this information as I've read to you in
4 this paragraph?

01:59 5 A Well, it would either have come from the letter
6 that Kim Campbell sent out or from my
7 conversations with Eugene Williams, although I
8 don't know that I would have been told by Eugene
9 Williams exactly what Justice McIntyre concluded.
01:59 10 Eugene tended to be fairly discreet about that
11 sort of thing and while he would have told me that
12 everything was given to Justice McIntyre, I think
13 probably that conclusion comes from the minister's
14 letter.

01:59 15 Q Okay. Now, in the -- the minister's letter I
16 don't believe makes any reference to
17 Mr. McIntyre's opinion, it simply states that his
18 advice was sought, and so to the extent that this
19 letter contains -- or comments on what, I guess
02:00 20 what he reviewed and what -- in the end he was
21 satisfied that the review done by the Department
22 of Justice had come to the correct conclusion, if
23 it didn't come from Kim Campbell's letter, can you
24 tell us where Saskatchewan Justice would have
02:00 25 obtained that information?



1 A Well, it would have to have come then from someone
2 in Justice.

3 Q Federal Justice?

4 A Yes.

02:00 5 Q And in addition to communications between Mr.
6 Williams and you, were you aware that Ellen Gunn,
7 the director, may have had discussions with
8 Federal Justice officials?

9 A Oh, she was frequently involved in having
02:00 10 discussions with a number -- I think there was Mr.
11 Corbett and Mr. --

12 Q Mr. MacFarlane?

13 A Yeah, Mr. MacFarlane, Douglas Rutherford, they
14 were all involved in occasionally talking to her.

02:01 15 Q And is it possible that the information in this
16 letter may have, some of it may have been obtained
17 by Ms. Gunn from Federal Justice officials?

18 A It's possible, yes.

19 Q Is it fair to conclude that if the information
02:01 20 contained about Mr. McIntyre's opinion and work
21 was not in Kim Campbell's letter, that it was
22 obtained by Saskatchewan Justice from somebody at
23 Federal Justice?

24 A Yes, that would be correct.

02:01 25 Q And again if we can scroll down, it says here:



1 "You suggest as well, that new evidence
2 suggests Mr. Milgaard might be innocent.
3 The new evidence was all carefully
4 considered by both the Federal
02:01 5 Department of Justice officials and by
6 Mr. MacIntyre. Both reviews concluded
7 that the value of that new evidence was
8 minimal to non-existent and that even if
9 that information had been entered at Mr.
02:01 10 Milgaard's trial, it would not have
11 changed the verdict."

12 And again, would that information in that
13 paragraph have been obtained from someone with
14 Federal Justice to someone in Saskatchewan
02:02 15 Justice?

16 A Yes.

17 Q Next page, it says:

18 "The third proposed new evidence is a
19 suggestion that someone named Larry
02:02 20 Fisher might have committed the murder
21 because he lived in that area. On
22 careful investigation of this prospect,
23 the R.C.M.P. were able to find
24 absolutely no evidence connecting Mr.
02:02 25 Fisher to the murder. This aspect of



1 the new evidence has no basis in reality
2 at all."

02:02 3 And can you tell us, where would this information
4 have been obtained from or what was the basis of
5 that statement?

6 A Well, again, the only sources of information that
7 we had with respect to the review and what was
8 discovered during the investigation was either
9 conversations with federal officials or the
02:02 10 minister's letter.

11 Q And from that, Saskatchewan Justice would have
12 concluded that, as stated in this paragraph, that
13 Larry Fisher as a suspect was fully investigated?

14 A Yes.

02:03 15 Q Go to the next page, it says:

16 "You also asked how this case is being
17 handled. At this stage the matter is
18 closed. I have no authority to refer
19 the matter back to the courts. That
02:03 20 jurisdiction is given only to the
21 Minister of Justice for Canada."

22 And would that have been the minister's position
23 then at the time?

24 A Oh, yes.

02:03 25 Q Minister of Justice of Saskatchewan?



1 A Yes, that was the Minister of Justice for
2 Saskatchewan's position throughout the proceeding,
3 that it was a matter for the Federal Minister to
4 deal with.

02:03 5 Q And down at the bottom it says beyond that, about
6 going back for a second application, but:

7 "Beyond that there is no legal way to
8 set aside or ignore the verdict of the
9 trial court."

02:03 10 A That's correct, yes.

11 Q And then the next page you say, or the letter
12 says, pardon me:

13 "I hope this rather long reply will
14 answer your concerns. I have taken the
02:04 15 liberty of dealing with the matter in
16 some detail in the hope of demonstrating
17 to you that Mr. Milgaard has been
18 treated fairly in spite of what you may
19 have read or heard in the news media. I
02:04 20 regret that a good deal of the coverage
21 given this matter by the news media has
22 focused more on being sensational than
23 on being accurate and complete. Much of
24 what appeared in the newspapers and on
02:04 25 television were accounts that were



1 inaccurate or incomplete, stating only
2 one view of the issue. It is my hope
3 that this letter will correct some of
4 the misinformation broadcast about this
02:04 5 case."

6 And would that paragraph reflect the views of
7 Saskatchewan Justice at that time, and the
8 minister?

9 A Yes, oh, yes.

02:04 10 Q And is there anything that you can elaborate on
11 with respect to what's being referred to there
12 that you haven't already told us?

13 A Well, I think it's fair to say that once we had
14 heard what the federal government had discovered
02:05 15 in terms of its investigations and all of that, we
16 were reasonably convinced that most of this had
17 been, albeit a well run news media campaign,
18 that's really what it was, was it was all flash
19 and no substance.

02:05 20 Q If we can go to 333573, this is July 26th, '91,
21 and it's a file memorandum of Eugene Williams
22 referring to a telephone conversation with you on
23 July 25, 1991:

24 "...to ascertain whether
02:05 25 there is any truth to a report --"



1 Mr. Williams had received,

2 "-- that the Government of Saskatchewan
3 was poised to begin an inquiry relating
4 to the conviction of David Milgaard.

02:06 5 Mr. Brown stated that no
6 inquiry had been ordered and to his
7 knowledge none was contemplated."

8 Do you have a recollection of what might have
9 prompted this or what this was about?

02:06 10 A I seem to recall that at some point when Mr. Wolch
11 and Mr. Asper were looking for some support for a
12 new application, they had dropped some hints that
13 perhaps the Government of Saskatchewan was
14 interested in supporting that. I know the deputy
02:06 15 minister had inquired about that and then Eugene
16 Williams had inquired about that as well.

17 Q If we can go to 010080, please, and this is a
18 letter dated August 8, 1991 from Mr. Wolch to the
19 Department of Justice, Saskatchewan, to Ellen
02:07 20 Gunn, and she was the director of public
21 prosecutions at the time; correct?

22 A Yes, that's correct.

23 Q And the letter says:

24 "It was only recently brought to my
02:07 25 attention that the Attorney-General for



1 Saskatchewan was not involved in our
2 application to the Minister of Justice
3 for Canada, with the exception of
4 receiving a copy of the Minister's
02:07 5 reply."

6 And I think just putting aside Mr. Wolch's
7 statement about when he became aware of it, would
8 you agree that that statement is correct, that
9 you were not involved in the application to the
02:07 10 Minister of Justice, Canada?

11 A Well, we weren't involved to the extent that our
12 advice was sought, we were involved to the extent
13 that our co-operation was occasionally sought and,
14 as I say, because of the impact this was having in
02:07 15 the news media, we were kept informed as to where
16 the federal government was.

17 Q In looking at the documents in the Commission
18 database, Mr. Brown, it appears that this letter
19 is the first letter from anyone on behalf of David
02:08 20 Milgaard to Saskatchewan Justice in relation to
21 the matter. Would -- are you able to verify that?

22 A As far as I know it is, yes.

23 Q And so this would have been the first written
24 contact from representatives of David Milgaard?

02:08 25 A That's right.



1 Q And do you recall, again I think your involvement
2 was 198 -- I think early 1989, do you recall if
3 there was any phone calls from Mr. Wolch or Mr.
4 Asper to Saskatchewan Justice prior to this
02:08 5 letter?

6 A I didn't get any, no.

7 Q And were you made aware of any?

8 A No.

9 Q And in this letter they provide, the letter
02:08 10 provides a list of information and, for example,
11 the affidavit of Deborah Hall, the report of Dr.
12 Ferris -- the statements mentioned aren't dated,
13 but I think those are the statements obtained in
14 June of 1990 -- the Markesteyn report, Linda
02:09 15 Fisher's statement. Would this have been the
16 first occasion that, other than the Markesteyn
17 report which I showed you earlier, do you think
18 this is when Saskatchewan Justice would have first
19 received this information?

02:09 20 A I would think so, yes. As I say, they hadn't
21 communicated with us before and the federal
22 government, with the exception of the Markesteyn
23 report, I don't believe sent us any of the other
24 information.

02:09 25 Q And as well, as far as other information provided



1 to Saskatchewan Justice, is the minister's
2 decision which you had, it says our reply to the
3 Minister of Justice, and I'll show you that in a
4 moment, number 11 is a summary of the Centurion
02:09 5 Ministries investigation into the crimes of Larry
6 Fisher, and I believe that was the genesis of the
7 second application, the similar fact comparison;
8 is that correct? I think that's what was
9 attached, or some of it?

02:10 10 A That's what was sent in as their second
11 application, yes.

12 Q And then as well various press clippings and the
13 video tape of the *Fifth Estate* program. And so it
14 would appear as part of the information that Mr.
02:10 15 Wolch provided you on August 8th, 1991 included
16 reports, media reports; is that fair?

17 A Yes, that's right.

18 Q Go to the next page, it goes on to talk I think a
19 bit about the:

02:10 20 "...pattern of offences which
21 makes Gail Miller indistinguishable from
22 the other victims. We believe we have a
23 strong case against Larry Fisher. The
24 similar facts are startling in
02:10 25 similarity, and as well we have comments



1 made to a prison inmate and to one of
2 the victims which could be referring to
3 the Gail Miller murder, and as well of
4 course, we have the Statement from Linda
02:11 5 Fisher."

6 And then it goes on, if we can just scroll down,
7 it says:

8 "The reason for this hasty
9 letter is that the matters that have
02:11 10 arisen since the Minister's decision
11 are, I believe, going to receive a
12 considerable amount of publicity in the
13 extremely near future. It is my
14 understanding that at least one major
02:11 15 news outlet and perhaps others are going
16 to be publishing the Larry Fisher
17 evidence and urging a reopening of the
18 case. In addition to that, the position
19 of the victim's family will be receiving
02:11 20 media attention. And furthermore, the
21 shocking fact that a number of Larry
22 Fisher's victims did not even know he
23 had been arrested until we brought it to
24 their attention has caused considerable
02:11 25 reaction among various women's groups.



It is our intention if

Now, would you have received this -- would this letter have been provided to you by Ms. Gunn?

Q Okay. And we'll go to that in a moment. Would you have been, at this time, this is a couple of months before the Supreme Court reference, but would you have been the Saskatchewan Justice lawyer that would have been overseeing this matter? I appreciate that Ms. Gunn was the director at the time, but would you have been the hands-on lawyer dealing with this matter at the

1 time?

2 A Yes, at this point.

3 Q Can you tell us what -- what was your reaction to
4 this letter and what did you do with it?

02:12 5 A With respect to the notion that we were going to
6 take a position and involve ourselves in it, first
7 of all, that's very seldom done if the matter is
8 being addressed by the federal government people,
9 it's just not considered polite for us to be
02:13 10 giving them unsolicited advice. If something came
11 to our attention that we thought was important for
12 them to know and that, for example, we thought
13 provided the opportunity for a reference to the
14 courts, we might provide that advice, but it would
02:13 15 be done discreetly and it certainly wouldn't be
16 communicated to the public via a news conference
17 or a press release, and given the fact that in
18 this instance, in particular, you could count on
19 anything you sent out to Mr. Wolch or Mr. Asper
02:13 20 ending up in the news media, it wouldn't have been
21 communicated to them either.

22 Q And so what would the concern there be?

23 A Well, the concern was that if we're going to give
24 advice to the Federal Department of Justice, it is
02:14 25 advice that they can follow it, they can ignore



1 it, but it is done in a discreet fashion and we
2 certainly didn't want to become part of any
3 publicity campaign that the Milgaard camp was
4 running.

02:14 5 Q And what did you take from this letter as to what
6 they were seeking, what was it that you understood
7 Mr. Wolch was seeking from Saskatchewan Justice
8 with this letter?

9 A I think he was seeking our endorsement that the
02:14 10 minister had to review this and -- at the very
11 least review it, and hopefully our endorsement
12 that some kind of remedy should be granted.

13 Q Now, we talked yesterday about cases where
14 Saskatchewan Justice would, prior to a 690
02:14 15 application, take information from a convicted
16 person and investigate the matter in certain
17 circumstances. You recall that evidence?

18 A Yes.

19 Q And did you perceive, is that what you thought Mr.
02:15 20 Wolch was asking you to do?

21 A No. My perception of this is he was asking us to
22 get on his band wagon.

23 Q Now, I'm not sure if it's mentioned in this
24 letter, but certainly there is, I think, six days
02:15 25 later, on August 14th, a second application was



1 filed to the Federal Minister. Is that something
2 that you would have been aware of at the time,
3 that a second application was either pending or in
4 the works and would that have influenced your
02:15 5 response?

6 A Umm, I think we had an understanding, at that
7 point, that there was likely going to be another
8 application that would centre on whatchamacallit,
9 Centurion Ministries' investigation of the Fisher
02:15 10 matter. They thought they had a much better
11 picture of the Larry Fisher case than they had
12 originally and it warranted a second application.

13 Q Can we just go to the handwriting on the
14 right-hand side. Are you able to tell us what
02:15 15 that says and explain?

16 A Umm, well, it --

17 COMMISSIONER MacCALLUM: Can we blow it up
18 a little more?

19 BY MR. HODSON:

02:16 20 Q Sure. Maybe you could just read it for us so we
21 have it on the record?

22 A "No ev.

23 Larry Fisher

24 did this

02:16 25 - 2 big fact different



1 - others not dead

2 - others raped

3 - also similar

4 fact ..."

02:16 5 Q "Same as"?

6 A "... same as

7 every rape w

8 knife used

9 as weapon".

02:16 10 Q And is that something -- when would you have made
11 that note; do you recall?

12 A Umm, they are on the original, so I'm guessing I
13 was making those notes as I was reading it.

14 Q And so is that something you would have observed
02:16 15 after reviewing the -- if we could just go back to
16 the first page -- the summary from the Centurion
17 Ministries?

18 A Yes.

19 Q And I think that had --

02:16 20 A Yes.

21 Q And so can you tell us, what was your reaction or
22 your observations with respect to the contention
23 that the Fisher, the other Fisher sexual assaults
24 for which he had been convicted were similar to
02:17 25 the Gail Miller rape and murder?



1 A What were my thoughts on that?

2 Q Yes?

3 A They weren't that similar.

4 Q And why do you say that?

02:17 5 A Well, as I note in that marginal note, the level
6 of violence was very, very different, and
7 certainly at one time that would have been a
8 consideration that any judge would have to deal
9 with in looking at admitting the similar-fact
02:17 10 evidence. A case called *Arp*, which was either out
11 of the Supreme Court just about then or shortly
12 after that, I think, substantially lowered the
13 threshold for similar-fact evidence, even though
14 they say they didn't intend that. They have
02:18 15 restored it again and, in my view, that difference
16 in the level of violence would play a significant
17 role in the decision a judge would have to make
18 when looking at whether this really is
19 similar-fact evidence.

02:18 20 Q And so we've heard -- you are talking about
21 similar-fact evidence in a prosecution against
22 Larry Fisher; correct?

23 A Yes.

24 Q And would the contention here be, from the
02:18 25 Milgaards, that "we can establish that Larry



1 Fisher is the perpetrator, the minister in her
2 first decision said there was nothing to link
3 Larry Fisher to Gail Miller's murder, now with
4 similar-fact evidence we can establish or it can
02:18 5 be established that he is the perpetrator because
6 of the similarities between his other offences and
7 the Gail Miller rape and murder"?

8 A That, that was certainly the contention, and that
9 was the basis of the, as I understood it, their
02:18 10 second application that was going forward.

11 Q Okay.

12 COMMISSIONER MacCALLUM: Mr. Brown, for the
13 purposes of the benefit of the reporters, you
14 referred to the Arp case, A-R-P?

02:19 15 A A-R-P, yes.

16 BY MR. HODSON:

17 Q The -- and so again, when you looked at the Fisher
18 rapes or the information in the Centurion
19 Ministries' investigation and the particulars,
02:19 20 your conclusion was that they were not similar; is
21 that correct?

22 A That's correct.

23 Q And was that --

24 A Not sufficiently similar.

02:19 25 Q Not sufficiently similar? And would that be with



1 your eye as a prosecutor, as to whether or not
2 they could get evidence of those previous assaults
3 into a Court in a prosecution against Larry
4 Fisher?

02:19 5 A That, yes, that was based on my experience as a
6 prosecutor attempting to use similar-fact
7 evidence, when I thought we had everything but the
8 guy's credit card number in all of the things, and
9 that in both cases the courts were of the view
02:20 10 that it wasn't similar enough.

11 Q And can you tell us, in the absence of other
12 evidence to link Larry Fisher to Gail Miller, what
13 was your view as to whether or not a charge could
14 be laid against Larry Fisher based on similar-fact
02:20 15 evidence alone?

16 A On the basis -- when I got this material I read, I
17 read the Dennis Cadrain statement because I wasn't
18 familiar with that and I read the Centurion
19 Ministries investigation because I wasn't familiar
02:20 20 with that either. Based on what I read in the
21 Centurion Ministries investigation I didn't think
22 there was a similar fact case to be made out, and
23 certainly nothing upon which you could charge.
24 Even if, even if you accept all of those facts as
02:20 25 absolutely correct, there would be nothing there



1 upon which the police could swear an information
2 on reasonable grounds to believe, and nothing upon
3 which we could reasonably expect to get a
4 prosecution.

02:21 5 COMMISSIONER MacCALLUM: Now, Mr. Brown,
6 perhaps it might be helpful for you to explain
7 the Court's reluctance to admit similar-fact
8 evidence. It's because of its highly prejudicial
9 nature; right?

02:21 10 A It's highly-prejudicial evidence that essentially
11 addresses the subject of propensity, did it
12 before, probably did it now. Before the courts
13 are prepared to admit that, that prejudice has to
14 be overcome by a great deal of probative value
02:21 15 that shows no, no, this isn't propensity, this is
16 actual evidence by identification, it identifies
17 the person who has committed these crimes.

18 MR. HODSON: And --

19 COMMISSIONER MacCALLUM: Thanks.

02:21 20 MR. HODSON: Oh, sorry?

21 COMMISSIONER MacCALLUM: No, thanks.

22 BY MR. HODSON:

23 Q Okay. And we have seen in some reports that he's
24 a serial rapist, he is in the neighbourhood, as a
02:21 25 prosecutor, then, does that lead to the basis to



1 lay a charge, that he is the type of person to
2 commit these offences?

3 A No, absolutely not.

4 Q And so --

02:22 5 A It may make him of interest to investigators but
6 it certainly doesn't provide you with a basis to
7 prosecute.

8 Q And again, just to follow up on the Commissioner's
9 question then, you talked about beyond propensity.
02:22 10 Is it akin to a signature, in other words that
11 there is something with the other offences that is
12 so unique and so similar to the charge under
13 question that tends to suggest that it's the same
14 person?

02:22 15 A Yes, and 'signature' is what the courts
16 occasionally use, that it is so similar that there
17 is that signature of the accused.

18 Q And your comment, I think in the marginal note,
19 was that the two big differences are, one, the
02:22 20 others aren't dead; and two, the same as any other
21 rape committed with a weapon; can you just
22 elaborate on those two points?

23 A Well in almost any stranger rape there is likely
24 going to be a weapon used because you need to get
02:23 25 control of the person and, of course, you don't



1 want the person to see your face. So, frankly,
2 the fact that he used a knife to commit these
3 offences, that is not unique, it's nothing like
4 the kind of signature the Supreme Court would talk
02:23 5 about. And the fact that he didn't let the women
6 see his face is, again, that's not a signature,
7 that's kind of normal behaviour in those kinds of
8 cases. Now, you know, there aren't a lot of those
9 kinds of cases, fortunately, but when you have a
02:23 10 stranger rape that's frequently what happens.

11 Q And can you comment on the significance, at least
12 in looking at this similar-fact analysis, of the
13 fact that Mr. Fisher lived in the basement of the
14 Cadrain house at the time?

02:23 15 A I would consider that coincidence.

16 Q Would it be significant that he lived in the area
17 of where the murder occurred?

18 A Well, again, that's coincidence too. He didn't
19 live in the area where two of the rapes were.

02:24 20 Q And then what about the level of violence; what
21 was your observation about the differences there?

22 A The level of violence far exceeded anything that
23 occurred in the other sexual assaults. Those
24 women were not stabbed, they were not slashed,
02:24 25 they were not left bleeding and dying in the place



1 where they were raped.

2 Q And, with the knowledge that we now have of Mr.
3 Fisher's conviction for Gail Miller's rape and
4 murder, does that fact cause your view to change
02:24 5 about the similarities or lack of similarities
6 between the earlier -- or the rapes, if I can call
7 it that, and the Gail Miller murder?

8 A No, it doesn't, because at the end of the day the
9 similarities still aren't there. If you wanted to
02:25 10 look at a similarity type of thing I suppose the
11 (V10) (V10)- case is far more similar in that the
12 level of violence is at least the same, but that
13 also happened ten years later, so you're way out
14 of the time frame for the consideration of
02:25 15 similar-fact evidence. And it happened after
16 something very significant in Larry Fisher's life
17 had occurred, and that is he had been in prison
18 for ten years.

19 Q And so again, when you looked at the similar-fact
02:25 20 issue, is it fair to say that you looked at it as
21 a prosecutor and whether or not you would be able
22 to prosecute Mr. Fisher for those charges, in
23 other words whether it was sufficient evidence
24 that would allow a charge to be laid and/or a
02:25 25 prosecution?



1 A Yes.

2 Q If you then take a look at it from Mr. Milgaard's
3 perspective, which is as evidence of a reasonable
4 doubt or of a defence -- and I appreciate that the
02:26 5 trial proceedings are concluded and so maybe
6 reasonable doubt isn't on the table any more --
7 but as far as a defence for Mr. Milgaard if he
8 were to be given another trial, what -- did you
9 consider that at all, as to whether -- how this
02:26 10 Larry Fisher similar-fact evidence might affect
11 either a miscarriage of justice or David
12 Milgaard's claim of wrongful conviction?

13 A Well my view was yes, they could raise that
14 information, but in the face of the fact that not
02:26 15 only did the two motel room witnesses stand up,
16 but you now had another witness indicating the
17 very same activity took place, it wasn't likely
18 going to count for very much.

19 Q And if we just pursue that a bit further, what --
02:27 20 and I don't want to get into too much of a
21 detailed discussion of the law at the time, but
22 would you agree that at least in 1991 -- or let me
23 ask you this for your comment; as to whether you
24 understood there to be a lower threshold for David
02:27 25 Milgaard to put forward Larry Fisher's propensity



1 to rape, his previous convictions, and his
2 location as a defence in a prosecution against Mr.
3 Milgaard, compared to the prosecution tendering it
4 at his trial? Do you follow?

02:27 5 A Yes. My understanding is that generally, with
6 respect to the law of evidence, there is a set of
7 rules that apply to everybody but they are much
8 more strictly enforced against the Crown when it's
9 entering evidence than they are against the
02:27 10 defence when it's attempting to get evidence in.
11 And this is one instance where, while the Crown
12 wouldn't have been able to call that evidence to
13 prove Larry Fisher was guilty, his defence would
14 likely have been able to call it to attempt to
02:28 15 raise a reasonable doubt.

16 Q And, on that point, what was your -- did you
17 consider that -- when you looked at these similar,
18 looked at these other offences and the allegation
19 of similarity, what were your observations or
02:28 20 thoughts about how that might affect David
21 Milgaard's defence and his ability to raise it if
22 he were given another trial, or if he had been
23 able to raise it at his original trial?

24 A Well my view, frankly, was that it wouldn't have
02:28 25 made any difference. Certainly, at the original



1 trial, you have the statement from Nichol John,
2 and delivered in the sort of emotional and
3 powerful way it was; you have the evidence of
4 Lapchuk and Melnyk, which was basically
02:29 5 undisputed; if he got a new trial, he would still
6 be faced with the evidence of Melnyk and Lapchuk,
7 and there's little evidence that's as powerful as
8 the words out of the accused's own mouth.

9 Q And so again, in 1991, are you telling us that, in
02:29 10 addition to saying "here is another suspect" with
11 some evidence that might raise a doubt, that you
12 felt Mr. Milgaard had to remove something about
13 the case against him, in other words attack a
14 piece of evidence that convicted him?

02:29 15 A In my view, he had to do more than show he might
16 be able to raise a reasonable doubt at this point,
17 I mean, just with the passage of time, he might be
18 able to raise a reasonable doubt. There had to be
19 some basis beyond that in order to set the thing
02:30 20 aside, and probable innocence was as good a test
21 as I could think of.

22 Q And what about the suggestion that he did not have
23 an opportunity to raise this at his original trial
24 for whatever reason?

02:30 25 A That, that is -- as I said before, process is an



1 issue, but, again, before you set a verdict aside,
2 before you put everybody through the trouble and
3 expense of a new trial, I would have to be
4 convinced that it may produce a different result,
02:30 5 and not just 'might', like possible, but there's
6 some substantial chance it will produce a
7 different result.

8 Q And I guess with what we know today, Mr. Brown, in
9 saying that with the knowledge that Mr. Fisher
02:30 10 killed Gail Miller -- and I appreciate you didn't
11 have that knowledge at the time -- to look at the
12 question of that that could not have assisted Mr.
13 Milgaard in his defence at the trial; does that --
14 I wouldn't mind your comment on that?

02:31 15 A Well my view, when that DNA evidence became
16 available, was that that was a whole new ball
17 game, it changed things completely, and that
18 whatever the old evidence was, it was now
19 something that we couldn't rely on, we couldn't
02:31 20 consider or shouldn't consider. It didn't,
21 however, change my view of the similar-fact
22 evidence or its likelihood of changing the verdict
23 in 1991-'92-'93.

24 Q If, in 1991, the DNA evidence had been presented
02:31 25 together with the similar fact, would that have



1 changed your view?

2 A The DNA evidence alone would have compelled me to
3 tell the Supreme Court that they had to grant a
4 remedy.

02:32 5 Q Yeah.

6 A And the remedy, or the advice that they would give
7 was that there should be either a new trial or a
8 pardon for David Milgaard.

9 Q I see it's 2:30, it may be time for a break, Mr.
02:32 10 Commissioner.

11 COMMISSIONER MacCALLUM: Yes.

12 *(Adjourned at 2:32 p.m.)*

13 *(Reconvened at 2:56 p.m.)*

14 BY MR. HODSON:

02:56 15 Q Call up 010080, please. Just before the break,
16 Mr. Brown, we were talking about the Larry Fisher
17 similar-fact evidence and how it might have been
18 used at David Milgaard's original trial and might
19 have been used if Mr. Milgaard had another trial
02:57 20 in 1991, that's what we were discussing.

21 A Yes.

22 Q And I think you shared your views that you had
23 doubts about that. In 1991, when you are looking
24 at the Larry Fisher information and the sexual
02:57 25 assaults, you mentioned earlier that the 1997 DNA



1 information, I think your words were, changed --
2 changed everything, or words to that effect; is
3 that correct?

4 A That's right, yes.

02:57 5 Q And so in 1991, when you and others at
6 Saskatchewan Justice are looking at that, and I
7 guess it goes without saying you did not know for
8 certain who killed Gail Miller, did you, at that
9 time?

02:57 10 A With certainty, no.

11 Q And so, in looking at whether or not Mr. Fisher
12 was or was not the killer, can you just explain
13 for us what you -- what analysis you would go
14 through, or what information you would look to, to
02:58 15 consider that question?

16 A Well at that point we had a conviction, which is
17 proof beyond a reasonable doubt, not to an
18 absolute certainty but proof beyond a reasonable
19 doubt; we had, at that point, no reason to believe
02:58 20 that that conviction was erroneous; what you had
21 was some evidence of other crimes in that area,
22 and that particular area in Saskatoon at that time
23 was an area where there was a substantial amount
24 of crime. Indeed, when you begin reading the
02:58 25 police report, within the first few pages there



1 are a number of names that the police recite, and
2 for those in my business and certainly for people
3 who are familiar with who's been prosecuted over
4 the years in Saskatoon, it's kind of a who's who
02:59 5 of people who have committed serious sexual
6 assaults, murders, that sort of thing. So the
7 fact that it was in that area, you had four rapes
8 in that area at that time, that's coincidence,
9 it's not -- it's not really very good direct or
02:59 10 circumstantial evidence that anyone but David
11 Milgaard was responsible for this.

12 Q If you had looked at that same question on March
13 1, 1969, the day before David Milgaard became a
14 suspect in the Gail Miller investigation, and just
02:59 15 looked at the -- and at that time you'd only have
16 the three previous rapes, and I think we've heard
17 from some police officers and others suggesting
18 that that would be information that might tend to
19 show Larry Fisher to be a person of interest or a
03:00 20 suspect; would you agree with that?

21 A Yeah, oh absolutely, I have no quarrel with the
22 notion that that would make him someone they'd
23 want to talk to, assuming they knew who it was.

24 Q And then in 1991 then, when you look at that, I'm
03:00 25 trying -- did -- can you tell us what effect it



1 would have on your thinking when you look at Larry
2 Fisher as a possible suspect, the fact that David
3 Milgaard had been convicted for the offence?

4 A Well it -- it certainly makes Larry Fisher a lot
03:00 5 less interesting as a suspect.

6 Q Yeah. And so that if, in 1991, you had looked at
7 the similar-fact evidence, and there had never
8 been a conviction for Gail Miller's murder, would
9 you have looked at the Larry Fisher information
03:00 10 any differently than you did?

11 A No, it would still only make him a person of
12 interest.

13 Q And am I correct in your earlier evidence that I
14 think you told us that similar-fact evidence alone
03:01 15 would never be sufficient, in your view, to lay a
16 charge and/or obtain a conviction?

17 A That's right.

18 Q In this letter from Mr. Wolch he includes his
19 reply to the Minister of Justice under item 10 and
03:01 20 that is, I believe, is an April 25, 1991 letter,
21 and that was 212782, and this was Mr. Wolch's
22 reply. I had earlier showed you the family's
23 letter back, Mr. Brown, and I believe this is the
24 letter that Mr. Wolch would have provided with the
03:01 25 August 8th letter, and I just plan on going



1 through parts of it; do you have any recollection
2 of having reviewed this?

3 A Not specifically, although I likely would have,
4 yes.

03:02 5 Q And this was the reply he sent to the minister
6 expressing concerns about the process and the
7 decision, and he included this as information that
8 he provided to Saskatchewan Justice, and just ask
9 for your comments about whether -- to what extent,
03:02 10 if any, Saskatchewan Justice considered this
11 information. And here he expresses a concern that
12 their:

13 "... application must go for review to a
14 'Crown prosecutor' who will eventually
03:02 15 make recommendation to yourself."

16 Was that a concern to Saskatchewan Justice at
17 all, this -- we talked earlier about the process
18 objections that were raised, the fact that the
19 Milgaard group or Mr. Wolch was questioning the
03:02 20 fact that Eugene Williams was the person who
21 reviewed it and he was a Crown prosecutor, as
22 suggested in this letter?

23 A Well, I mean, Mr. Williams is a federal
24 prosecutor. I would suggest that that's a little
03:03 25 different than being a Crown prosecutor.



1 Certainly, those of us in the
2 provincial services take the view that the feds
3 have it easy when it comes to prosecuting, it's
4 mostly drugs, and that's a certificate and a cop
03:03 5 and you walk away.

6 Umm, somebody has to do the
7 work, who are you going to get to do it?

8 Q And I think the concern was not that he was a
9 federal versus provincial prosecutor but that he,
03:03 10 as a person who prosecuted crimes, had a certain
11 mindset. I think that was --

12 A Well, Mr. Wolch may be of that opinion. I don't
13 agree with what he said in the previous paragraph.
14 We don't assume that all witnesses for the accused
03:03 15 are untruthful and we don't assume that the
16 accused is guilty.

17 Q And so as far as you were concerned, or
18 Saskatchewan Justice were concerned, the fact that
19 the first application was investigated by Mr.
03:04 20 Williams did not cause you any concern?

21 A No, it did not.

22 Q If we can go to the next page. And Mr. Wolch had
23 expressed to the minister, and again to you in his
24 August 8th letter, this concern about:

03:04 25 "We have no idea what material was sent



1 to Justice McIntyre, nor do we know what
2 he said in response. For example, was
3 he provided with credibility findings as
4 to Wilson or did he make his own? If
03:04 5 our position was argued in front of him,
6 who presented our position and what did
7 he say? What material was furnished to
8 Justice McIntyre?"

9 And I think, later in the letter, he follows up
03:04 10 with this. But would you agree, then, that at
11 least Mr. Wolch's concern about the fact that
12 Mr. McIntyre's involvement was not disclosed to
13 the Milgaards was a concern to them?

14 A Umm, yes, that -- that's a legitimate concern in
03:05 15 my view. Justice McIntyre's opinion, well it
16 certainly had a good deal to do with how I felt
17 about or what I thought of the matter, and I
18 suspect that, since the minister asked for it, it
19 played a significant role in her decision as well.

03:05 20 Q If we can scroll down, there is a comment here --
21 and keep in mind this is a letter from Mr. Wolch
22 to the minister -- and it's talking about the
23 Deborah Hall and Ute Frank evidence and about
24 Melnyk and Lapchuk. It says:

03:05 25 "More important, even to this day we do



1 not know what arrangement was made for
2 them to secure their evidence. A member
3 of your Department implied to us that
4 they were paid."

03:05 5 And I will show you, a bit later, a couple of
6 newspaper articles where this is repeated. Do
7 you recall seeing this allegation or becoming
8 aware of the allegation that the Crown, 'the
9 Crown' being the Saskatchewan Crown, paid Melnyk
03:06 10 and Lapchuk to give their testimony?

11 A I recall that I did ask Bobs Caldwell about that
12 at one point and his response was he knew nothing
13 of that.

14 Q Did this allegation cause Saskatchewan Justice any
03:06 15 concern?

16 A Well generally speaking we don't pay witnesses for
17 evidence, and there would be no particular reason
18 in this case why we would, as far as I can see.
19 If it was true and, you know, not just the media
03:06 20 hype coming from the Milgaard camp, it would if we
21 took it seriously.

22 Q If we could go to page 212786, this is the
23 concluding part of the letter, Mr. Wolch asks the
24 Minister to:

03:06 25 "Provide us with access to the material



1 that formed the basis of your decision.
2 That is, the entire investigation
3 including police reports, witness
4 statements and opinion evidence."

03:07 5 And:

6 "2. Provide us with the information that
7 went to Justice McIntyre and his
8 response."

9 And do you have any comment as so whether or not
03:07 10 -- and, again, this was in a letter that they
11 provided to you August 8th, 1991; any thoughts or
12 observations about that request to the federal
13 minister?

14 A Well other than frankly, at that point, we would
03:07 15 have liked to have seen that material too. I can
16 certainly understand why, after being turned down,
17 they would like to know on what basis they were
18 turned down.

19 Q And I think we will see in a later document that
03:07 20 Saskatchewan Justice felt similar to Mr. Wolch on
21 this point?

22 A Yes, that's correct, we would want to see that
23 too.

24 Q If we can go to 004623. Just go through,
03:08 25 chronologically, a few media reports leading up



1 to -- I think August 14th, '91 was the date of the
2 second application. We have heard evidence from
3 Mr. Asper and Mrs. Milgaard, as well we've had an
4 opportunity to review some news reports and media
03:08 5 articles that, around the time of the second
6 application, there was, in conjunction with the
7 application, an effort to publicize in the media
8 the second application and the similar-fact
9 evidence, and as well, I'll show you some articles
03:08 10 that talk about allegations of a frame and
11 coverup. Do you recall being -- becoming aware of
12 those allegations in the media around that time?

13 A Yes. It was, I think, between the first
14 application and sort of the second application,
03:08 15 the end of the first application, commencement of
16 the second, that basically things got nasty.
17 There were allegations of the police not just
18 misconducting, but actually framing the wrong
19 person and then covering up, there was allegations
03:09 20 that the minister had been corrupt and her
21 officials. It got ugly at that point.

22 Q And did Saskatchewan Justice -- tell us what, if
23 anything, did Saskatchewan Justice do with respect
24 to those allegations?

03:09 25 A Well, quite frankly, we just didn't believe any of



1 that, --

2 Q And why?

3 A -- that this was more of the Milgaard camp's
4 public relations campaign. Having been

03:09 5 disappointed, they were now angry and inclined to
6 pursue this further and notch it up a few degrees
7 in terms of the heat.

8 Q And so did you -- let me back up and I'll go
9 through some of these. If -- if those allegations
03:09 10 were true and the police framed David Milgaard and
11 covered up that framing, would that be something
12 that would cause Saskatchewan Justice to re-open
13 the investigation into the death of Gail Miller?

14 A If there had been any evidence of that whatsoever,
03:10 15 yes, but there wasn't.

16 Q And so this I think is August 11th, 1991,
17 *Saskatoon cops cover sex offender's tracks, probe*
18 *says*, and then if we can go to -- actually, sorry,
19 let me just back up. This is -- yeah, this is an
03:10 20 August 11th article and it says:

21 "Saskatoon police covered up
22 the 1970 conviction of a serial rapist
23 whose crimes were identical to the
24 murder for which David Milgaard was
03:11 25 convicted, for fear it would prompt a



1 review for wrongful conviction, a new
2 investigation has charged."

3 And then it goes on to talk -- just scroll down.
4 Did you become aware at this time of Centurion
03:11 5 Ministries and James McCloskey, who they were?

6 A Well, Centurion Ministries, I think by then we had
7 the letter from Hersh Wolch giving us the
8 Centurion Ministries brief, so I knew who that
9 was. I don't know that I knew who Jim McCloskey
03:11 10 was specifically.

11 Q And here's the comment:

12 "I have no doubt that Larry
13 Fisher is the killer of Gail Miller,"
14 said Rev. Jim McCloskey..."

03:11 15 And then if we can go to the next page of this,
16 which is actually a different -- 004624, which is
17 a new doc. ID, but it's a continuation, and
18 you'll see that's continued from the earlier
19 story, and so this is August 11th and it says:

03:12 20 "Earlier, Centurion
21 Ministries investigations revealed that
22 key witnesses in the case against
23 Milgaard had been coerced into
24 testifying and were fed false evidence
03:12 25 to solidify the case against him.



1 McCloskey said the results
2 of this recent investigation have been
3 given to the office of the Saskatchewan
4 Attorney General for consideration of a
03:12 5 new trial."

6 Now, if we assume that what he's referring to is
7 the August 8th, 1991 letter from Mr. Wolch, would
8 you agree with --

9 A It has to be. That was all there ever was.

03:12 10 Q Yeah. And was that -- was it your understanding
11 that that information was given to you for
12 consideration of a new trial?

13 A No, no, it was, my understanding was we were being
14 asked to get on board and support their second
03:12 15 application.

16 Q So then if --

17 A At that point you couldn't -- the conviction
18 stood, there was no second trial.

19 Q And then to 004625, which I think is a
03:13 20 continuation of this article, the comment here:

21 "It appears obvious Saskatoon
22 police kept the Fisher conviction under
23 wraps because they were concerned the
24 publicity would call into question the
03:13 25 validity of the Milgaard conviction.



1 "Why did the Saskatoon police
2 not publicize the conviction of this
3 west side rapist?" Henderson said.

4 "Because if they did, then they would
03:13 5 probably have to review their conviction
6 of David Milgaard."

7 "It looks like a
8 deliberate cover up of (Fisher's) arrest
9 and conviction."

03:13 10 Can you tell us what -- did Saskatchewan Justice
11 consider responding to these allegations in the
12 media?

13 A No. It was my understanding at that point that
14 there was going to be some kind of process coming
03:14 15 out of the federal government and we felt it best
16 to leave that and we would deal with it later.

17 Q Go to 032096 and if we can just -- this is a
18 *Sunday Star*, the *Toronto Star*, August 11th, 1991.
19 If we can go to the next page, just get your
03:14 20 comment here, we dealt with this issue earlier.
21 So this would be August 11th, 1991 and the caption
22 here is *Semen presented at Milgaard's trial was*
23 *really dog urine*, and then:

24 "What was presented in court
03:14 25 as possibly Milgaard's semen near the



1 crime scene was actually dog urine,
2 concluded Dr. Peter Markesteyn, chief
3 medical examiner of Manitoba in a June,
4 1990, statement."

03:15 5 Do you recall whether this -- let me ask you this
6 question. If that in fact were true, I think
7 you've already told us that that would be
8 something that might prompt Saskatchewan Justice
9 to re-open the case?

03:15 10 A It would cause us concern, yes.

11 Q And what about the -- I had shown you earlier
12 articles and Dr. Markesteyn's report about the
13 possibility of dog urine. In this report it says
14 that it was dog urine.

03:15 15 A Well, it's fully evolved here to being a positive
16 finding, yes.

17 Q And again, is this something that Saskatchewan
18 Justice would respond to or did you consider
19 responding to or the same answer as before, that
03:15 20 it was --

21 A No, the same as before, there was something going
22 to happen.

23 COMMISSIONER MacCALLUM: Whose article was
24 that, Mr. Hodson?

03:15 25 MR. HODSON: This is the *Toronto Star*,



1 Peter Edwards.

2 BY MR. HODSON:

3 Q And again, if we could call up 160026. This is an
4 August 11th, '91 -- if you can just rotate it to
03:16 5 the left, please. Winnipeg Free Press article,
6 again there's a comment here about:

7 "...the results of this recent
8 investigation have been given to the
9 office of the Saskatchewan Attorney
03:16 10 General for consideration of a new
11 trial."

12 I think we see this comment in a number of papers
13 at the time. Do you recall whether Saskatchewan
14 Justice or the Attorney General took any steps to
03:16 15 deal with that and, if not, why not?

16 A The same answer as before, we anticipated there
17 would be some kind of process, public process in
18 which these things would be dealt with in due
19 course.

03:17 20 Q Go to 026001, this is I think around the same
21 date, August -- I don't see a date on there, it's
22 around August 11th or 12th, and it would appear
23 that you were contacted for comment and the
24 Saskatoon police:

03:17 25 "...said they will not



1 comment on the Milgaard case, nor on
2 allegations they covered up the Fisher
3 conviction."

4 "Murray Brown, director of
03:17 5 appeals for the Saskatchewan Attorney
6 General, said his department would not
7 become involved in the Milgaard case
8 unless asked by the Federal Justice
9 Department.

03:17 10 Brown said despite
11 comments by Milgaard's lawyers,
12 Saskatchewan does not have the
13 jurisdiction to hear appeals for new
14 trials based on fresh evidence.

03:18 15 David Asper, Milgaard's
16 lawyer, said he believes a case can be
17 made to approach the Saskatchewan Court
18 of Appeal directly."

19 And do you recall the circumstances under which
03:18 20 this matter came about in the media?

21 A Well, I suspect it's in response to a call from a
22 journalist probably trying to follow up on
23 McCloskey's remarks.

24 Q If we can go to 027207, this is an August 16th,
03:18 25 1991 memo from the deputy minister to the



1 minister, I'll go through parts of this. August
2 14th I think was the date of the letter to, the
3 date of the letter Mr. Wolch wrote to Minister
4 Campbell, I'm not sure if it was received on the
03:18 5 16th or thereabouts, and it talks here about:

6 "...come up with what they
7 claim is more new evidence in the form
8 of so called proof that one Larry Fisher
9 is the one guilty of Gail Miller's
03:19 10 murder. My officials have not seen the
11 full report on these allegations, they
12 have been provided with a summary.
13 Based on this summary, they inform me
14 there does not appear to be much of an
03:19 15 argument there. We could not charge Mr.
16 Fisher with murder on the basis of this
17 evidence and it does not detract from
18 the Crown's case against David
19 Milgaard."

03:19 20 And would that have been information that you
21 would have provided to the deputy minister and
22 the minister?

23 A Probably. It would be unlikely that
24 Barrington-Foote would have, the deputy minister
03:19 25 would have written his own memo on something like



1 this, he would have either got one from Ellen Gunn
2 or from me.

3 Q Would this have been your view at the time then as
4 far as the --

03:19 5 A Yes.

6 Q About charging Larry Fisher?

7 A Yes.

8 Q And then it goes on to say:

9 "At any rate, the proper

03:20 10 course is to refer this material to the
11 Federal Minister of Justice and have her
12 review it in the same fashion as she did
13 the last submission. While Mr. Asper
14 claims he will be bringing an
03:20 15 application to admit fresh evidence to
16 the Court of Appeal for Saskatchewan in
17 the near future, we are of the view
18 that, absent a reference from the
19 Minister of Justice under s. 690 of the
03:20 20 Code, there is no jurisdiction in the
21 Court of Appeal to deal with this matter
22 again."

23 I think that confirms what you've told us?

24 A That's right.

03:20 25 Q And then at the bottom it says:



1 "Recently Mr. Wolch dropped off a
2 package of information at the office of
3 the Director of Public Prosecutions. He
4 then, apparently, promptly told the
03:20 5 media he'd done so. Mr. Wolch spoke
6 with Mr. Brown of that office and was
7 carefully informed then that we
8 considered his package of materials as
9 being for information purposes only and
03:20 10 that we would not get involved in
11 publicly or privately supporting his
12 position. He was told that our view was
13 that this was a matter for the Federal
14 Minister of Justice and that we would
03:21 15 not be providing her with our opinion
16 unless asked. I am now informed that
17 Mr. Asper has announced to the Winnipeg
18 media that he expects we will want to
19 support their position once we have seen
03:21 20 this new material. To date, we have not
21 been given anything more than a brief
22 summary of the latest new evidence and
23 therefore, we have no position to
24 advocate at this time."

03:21 25 And would that be, is that an accurate statement



1 of what happened?

2 A To the best of my recollection, yes.

3 Q If we can go to 151817, this is an August 16th,
4 1991 letter from you to Mr. Connelly, the Regina
03:21 5 regional Crown prosecutor; is that correct?

6 A That's correct.

7 Q And I think the record shows that it wasn't until
8 after August 20th that Mr. Williams sent you a
9 copy of the second application and this appears to
03:22 10 be a memo where you are gathering the Larry Fisher
11 prosecution files; is that correct?

12 A Yes. I was aware that -- or there was an
13 allegation that Larry Fisher had been prosecuted
14 in Regina for something other than the original
03:22 15 four rapes that he pled guilty to and I wanted to
16 gather up any files we had relating to Larry
17 Fisher.

18 Q And you say here:

19 "In order that we may assess
03:22 20 for ourselves the strength of this
21 alleged connection we would like to
22 collect all the files on Larry Fisher
23 within our system."

24 And what would you be wanting to assess for
03:22 25 yourselves, the strength of this connection?



1 A Well, at this point I suspect it was to assure us,
2 ourselves that we didn't have a case against Larry
3 Fisher and that there really was no basis to
4 suspect that he was the one who committed the
03:23 5 Miller murder.

6 Q 151818 --

7 COMMISSIONER MacCALLUM: What was the last
8 doc. ID, sorry?

9 MR. HODSON: 155817.

03:23 10 COMMISSIONER MacCALLUM: Thanks.

11 BY MR. HODSON:

12 Q And if you had concluded that there was a case
13 against Larry Fisher, what would you have done?

14 A Well, if we had determined there was a case to be
03:23 15 made against Larry Fisher for the murder of Gail
16 Miller, then we would have advised the Federal
17 Minister that that was our view and provided her
18 officials with everything that we based that on.

19 Q Here's a second memo, the same date, to the North
03:23 20 Battleford office, and I believe this is
21 requesting the (V10) (V10)- file and that would be
22 for the same purpose?

23 A That's correct.

24 Q 010028, this is a letter of August 16th, 1991 to
03:24 25 the public prosecutions in Manitoba, and it



1 appears that you are requesting the prosecution
2 files for Mr. Fisher's convictions in Fort Garry;
3 is that correct?

4 A That's correct, yes.

03:24 5 Q And you say:

6 "While at first glance this
7 similar fact allegation doesn't seem to
8 have a lot of merit, we are nonetheless
9 very concerned that it be carefully and
03:24 10 thoroughly assessed."

11 And the comment about at first glance, would that
12 have been what you alluded to earlier when you
13 went through the summary from Centurion
14 Ministries?

03:24 15 A Yes, that's right. Well, that and -- I mean, the
16 Centurion Ministries didn't raise Larry Fisher for
17 the first time, he was part of the other
18 application as well.

19 Q If we can go to 004626, and this is an article
03:25 20 from the *StarPhoenix* on August 16th, 1991,
21 *Milgaard framed* is the headline:

22 "Saskatoon City Police framed
23 David Milgaard for the murder of Gail
24 Miller in 1969, alleges the head of a
03:25 25 U.S. group which investigates suspected



1 cases of wrongful conviction.

2 City police Sgt. Dave

3 Scott denied the charge Thursday and
4 refused to comment further.

03:25 5 Jim McCloskey, founder of
6 the New-Jersey based Centurion
7 Ministries, says the Saskatoon police
8 department coerced testimony from
9 witnesses..."

03:25 10 I'm not sure if I can read that,
11 "...to substantiate a case against
12 Milgaard. The department needed a
13 scapegoat because the murder followed a
14 series of brutal rapes in the city and
03:25 15 they had no suspects, he said."

16 So again, this would have been the types of
17 articles that were out at this time alleging
18 frame?

19 A Yes, that's correct.

03:26 20 Q And can you tell us, at the time did Saskatchewan
21 Justice, what credibility or reliability did you
22 place on these allegations at the time they were
23 made in the media?

24 A None.

03:26 25 Q And why was that?



1 A There's no evidence indicating that any of that
2 has any basis other than speculation. If they had
3 been able to bring forward one ounce of evidence
4 that the Saskatoon police had framed anybody or
03:26 5 that there had been any kind of cover-up, we would
6 have been concerned, we would have looked into it,
7 and all this was was speculation and excited
8 publicity over this whole thing.

9 Q Go to 333576, this is Mr. Williams' memo to file
03:27 10 about a conversation with you:

11 "...learned that Lawrence
12 Greenberg, a Winnipeg lawyer who has
13 since been disbarred, represented Larry
14 Fisher..."

03:27 15 And then it goes on to talk about the files, and
16 can you tell us, what would be the purpose of
17 your discussions with Mr. Williams at this time?

18 A It seems to me he wanted to know why four charges
19 of rape from Saskatoon would be heard in Regina,
03:27 20 what that was all about.

21 Q And were gathering information for him then on
22 those matters?

23 A To the extent we could. My understanding was that
24 Mr. Greenberg wasn't entirely sure why he went to
03:27 25 Regina as opposed to Saskatoon, but there were



1 reasons that I could find that were I think the
2 explanation for why it was done in Regina.

3 Q And what were those?

4 A Well, I mean, in terms of Mr. Greenberg, it's a
03:28 5 lot easier for him to come down the TransCanada
6 Highway to Regina than to spend 10 or 11 hours
7 going up to Saskatoon when you are traveling from
8 Winnipeg, but in terms of us, if we're going to
9 get a direct indictment and the man is going to
03:28 10 plead guilty, it's easier for us to do it here
11 than to get the direct indictment, ship it up to
12 Saskatoon and make arrangements there.

13 Q When you say here, are you meaning Regina?

14 A Or in Regina, yes.

03:28 15 MR. HODSON: I see it's 3:30,
16 Mr. Commissioner, probably appropriate to
17 adjourn.

18 COMMISSIONER MacCALLUM: Yes.

19 (Adjourned at 3:28 p.m.)
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OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR, CRR,
CBC, Official Queen's Bench Court Reporters for the
Province of Saskatchewan, hereby certify that the
foregoing pages contain a true and correct transcription
of our shorthand notes taken herein to the best of my
knowledge, skill, and ability.

_____, CSR

Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR, CRR, CBC

Donald G. Meyer, RPR, CSR, CRR, CBC

Official Queen's Bench Court Reporter



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