

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
Sheraton Hotel at
Saskatoon, Saskatchewan

On Monday, September 11th, 2006

Volume 180

Inquiry Proceedings



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Mr. Hersh Wolch, Q.C.,	for Mr. David Milgaard
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Ms. Catherine Knox,	for Mr. T.D.R. (Bobs) Caldwell
Mr. Jay Watson, Esq.,	for Mr. Serge Kujawa
Mr. Rick Elson, Esq.,	for the Saskatoon Police Service
Mr. Chris Boychuk, Esq.,	for Mr. Eddie Karst
Mr. Bruce Gibson, Esq.,	for the RCMP
Ms. Jennifer Cox,	for Minister of Justice
	(Canada), The Hon. Vic Toews
Mr. Marshall Hopkins, Esq.,	for Justice Calvin Tallis
	(Retired)



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- BY MR. HODSON

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Transcript of Proceedings

(Reconvened at 1:03 p.m.)

COMMISSIONER MacCALLUM: Good afternoon.

ALL COUNSEL: Good afternoon.

MURRAY BROWN, continued:

BY MR. HODSON:

Q Good afternoon, Mr. Brown. If we could call up 010002, please, and this is an August 20th, 1991 memorandum from Mr. Williams, and just where we left off on Thursday, we were dealing right at the time of the second application and we had talked a bit about the second application. If we can go to the second page and there's a discussion here about observations and then as well a call to you and I just want to ask you about your recollection at the time, and this is Mr. Williams' reciting what his observations were I think about the first application and that:

"The applicant..."

Being Mr. Milgaard:

"...has mistakenly assumed that the similarities between the attack on Gail Miller and the Fisher assaults were not brought to the Minister's attention or considered during the first application.



1 This assumption is based on a mistaken
2 recollection of a conversation I had
3 with Mr. Wolch.

4 I had told Mr. Wolch that
01:08 5 the occurrence reports for the 1968
6 assaults in Saskatoon were not
7 available, and that the quality of the
8 photocopy of the 1970 assault in
9 Saskatoon was poor.

01:08 10 However, I had obtained a
11 sufficient information relating to the
12 October - November 1968 charges from
13 court documents and considered this
14 information during the assessment of the
01:08 15 first application. I had also obtained
16 and considered the occurrence reports
17 from the Winnipeg assaults."

18 Now, these are Mr. Williams' words. What's your
19 recollection of what -- I guess two questions,
01:08 20 number one, the extent to which the Fisher
21 assaults and the similarities was part of the
22 first application and I want to know what
23 Saskatchewan Justice's understanding was, and
24 secondly, about what documents may or may not
01:08 25 have been around at the time as far as those



1 assaults.

2 A Well, with respect to your last question first, I
3 recall that there was a problem with respect to
4 the files with the Saskatoon Police Service, they
01:09 5 had moved some of their files and these appeared
6 to have gone missing. They were, however, I think
7 reasonably certain at that time that if they
8 simply went box by box and went through their
9 files, somebody would eventually stumble on them.

01:09 10 With respect to the first
11 application, we were certainly aware that Sergeant
12 Pearson with the RCMP had investigated the Larry
13 Fisher matter, or at least that's what we
14 believed, so that whatever there was from his
01:09 15 investigation would have gone to the minister and
16 that would have included the salient facts I'm
17 sure.

18 Q And do you recall whether you had detailed
19 knowledge about whether or not he looked at the
01:10 20 similarities as some indicia of Mr. Fisher's
21 culpability?

22 A I don't know specifically whether he did because
23 we never saw, at that point, what he had done, but
24 that was the whole point of the Larry Fisher
01:10 25 evidence, was that it was similar fact evidence



1 that pointed at Larry Fisher as the perpetrator.

2 Q Maybe I can ask it this way, and again from
3 Saskatchewan Justice's perspective, did you view
4 the second application to the minister as being
01:10 5 different or putting forward a different ground
6 than had, to your understanding, been put forward
7 in the first application?

8 A It was my understanding that the Larry Fisher
9 material went forward in the first application as
01:10 10 well, yes.

11 Q And so is your answer then that although there may
12 have been a different emphasis on it, it was the
13 same type of application or ground that had been
14 considered in the first application?

01:11 15 A Well, I think with respect to the first
16 application, while the similar fact issue was
17 there, it was more of a here's this Larry Fisher
18 information that should have been disclosed;
19 absent that, there's some miscarriage. The second
01:11 20 application I think was little more directly
21 concerned with the issue of similar fact evidence.

22 Q Okay.

23 A So the same evidence, different emphasis.

24 Q Under *Action Taken*, Mr. Williams states that:

01:11 25 "Since the receipt of the



1 application I telephoned Murray Brown,
2 Director of Appeals, in the office of
3 the Attorney General of Saskatchewan. I
4 learned that a search is in progress for
01:11 5 the prosecution files relating to the
6 sexual assault charges in Saskatoon.
7 Mr. Brown said that he would send any
8 material that he locates."

9 And again, do you have a recollection of being
01:12 10 asked to undertake that activity?

11 A Well, I think just about everyone associated with
12 the administration of justice at that point was
13 looking for the Larry Fisher files and certainly
14 we wanted them to pass them on to the federal
01:12 15 government.

16 Q I'll show you a couple of documents later that I
17 believe confirm this, but would this have been the
18 first request made of Saskatchewan Justice to
19 locate -- I believe later documents suggest that
01:12 20 it is, but do you have a recollection of that?

21 A No. My recollection is that we went looking for
22 these earlier than August.

23 Q Would that be for your own purposes though or for
24 the Federal Minister?

01:12 25 A Well, probably both. We didn't have a particular



1 need to find them, but we thought the federal
2 government did.

3 Q Okay. And then under *Steps Proposed in Assessing*
4 *this Application*, the next page, Mr. Williams
01:13 5 writes:

6 "The Department should invite
7 submissions from the office of the
8 Attorney General of Saskatchewan in
9 relation to Mr. Milgaard's application."

01:13 10 And I'm going to now go to 114627 and this is a
11 fax cover sheet from Mr. Williams to you. The
12 cover page is August 29th, the next page is
13 August 20th, so I'm not sure if anything turns on
14 the date. I'll go by the date of the letter.
01:13 15 This is where it appears a copy of the second
16 application has been provided to you and talks
17 about:

18 "...a startling profile
19 showing the similarity of all of
01:13 20 Fisher's attacks and of that committed
21 against Gail Miller".

22 And:

23 "A second submission is that
24 the evidence of Larry Fisher's victims
01:14 25 would have been admissible in David



1 Milgaard's trial if the information had
2 been known."

3 Just on that second submission, was it your
4 understanding that that was something that was,
01:14 5 at least according to Saskatchewan Justice, part
6 of what was considered on the first application?

7 A Yes, that was, as far as we understood, I think
8 the emphasis that was put on the Fisher material
9 in the first application, that this was evidence
01:14 10 that could have been presented to raise a doubt at
11 the Milgaard trial.

12 Q And then Mr. Williams writes:

13 "I have been asked to examine
14 the issues that are raised in this
01:14 15 application. The applicant has
16 requested a new trial, or alternatively,
17 a reference to an appellate tribunal.
18 The grant of any of these remedies would
19 affect the office of the
01:14 20 Attorney-General of Saskatchewan.
21 Consequently, I am writing to invite you
22 to provide any submissions you may wish
23 to make in relation to the above-noted
24 topics."

01:14 25 And based at least on the documents that the



1 Commission had, it does not appear that this type
2 of invitation was made on the first application;
3 is that correct?

4 A That's correct, yes.

01:15 5 Q And do you know why that was the case, why there
6 was a request this time around? Do you have any
7 information about that?

8 A Well, by this point, frankly, I think everyone
9 understood that something had to be done publicly
01:15 10 and whatever was done publicly would end up
11 involving us.

12 Q And can you -- where did you get this
13 understanding from or on what sources did you
14 learn that something had to be done or was that
01:15 15 just the view of Saskatchewan Justice?

16 A Well, it was the view of Saskatchewan Justice, and
17 I understand in conversations with federal
18 officials, Ellen Gunn learned that that, they were
19 coming around to that view as well.

01:15 20 Q And can you give us some idea of when that would
21 have been in relation to the date of the second
22 application, which I think was August 14th, '91?

23 A Early summer.

24 Q And so before the second application?

01:15 25 A Shortly before, yeah.



1 Q And so can you tell us a bit more about what
2 information Saskatchewan Justice received from
3 federal officials?

4 A Well, they -- I mean, this was the period when
01:16 5 there was the intense media campaign after that
6 first application was rejected and it was
7 getting -- I think just reading between the lines,
8 they were beginning to feel some political heat in
9 Ottawa and the view was something needed to be
01:16 10 done publicly. They were thrashing around to try
11 and find out what that something might be. They
12 mentioned the Court of Appeal in there, or
13 mentioned the Court of Appeal. We pointed out to
14 them that that just wasn't a likely place to go.

01:16 15 Q And why was that?

16 A Well, there were too many of the judges that had a
17 connection to the case, principally, Justice Cal
18 Tallis who was sitting at the time. If he was
19 likely to give evidence, it would make it very,
01:17 20 very awkward for the other judges, but there were
21 also a number of others who have some connection
22 to either the Saskatoon Police Service or the
23 Saskatchewan Police Commission.

24 Q When you say the consensus was that something had
01:17 25 to be done public, would the fact that Minister



1 Campbell's decision of February 27th, the fact
2 that it was made public, was that not sufficient?

3 A No, because it -- that's a very summary sort of
4 thing, it doesn't explain how you got to that
01:17 5 particular point or what you consider and that was
6 what was needed.

7 Q And was the public up-rising, I think those were
8 your words, or the media campaign, can you tell
9 us, was it your observation that that was
01:17 10 primarily related to the alleged lack of follow-up
11 by the Federal Minister as to the reasons for her
12 decision and the work done by her department and
13 Mr. McIntyre's opinion?

14 A Well, it certainly came in that period between the
01:18 15 decision being made public and the next
16 application, and yes, I suspect the fact the
17 federal government would not release that
18 information had a considerable impact on the
19 situation.

01:18 20 Q And so sometime in the summer of 1991 I think you
21 are saying Saskatchewan Justice was made aware
22 that even before Mr. Milgaard made the second
23 application, that something public had to be done;
24 correct?

01:18 25 A That's right.



1 Q And by public, are we talking in a court process?

2 A I think at that point we had urged the federal
3 government to release the advice the minister had
4 been given, release the information that she, her
01:19 5 department had pulled together --

6 Q Why --

7 A -- so that --

8 Q Oh, sorry.

9 A -- so that people could see the basis for her
01:19 10 decision.

11 Q And I was going to ask why, maybe you've already
12 answered it, what was Saskatchewan Justice's
13 concern about the minister's failure to release
14 that information?

01:19 15 A Well, it made the cover-up and corruption campaign
16 or allegations that were coming from the Milgaard
17 group easy to make and if they were just left
18 lying there with no answer, that's what the public
19 was left with.

01:19 20 Q And again are you able to say, again based on your
21 personal involvement in this, whether the
22 disclosure of what was requested of them would
23 have made any difference in the eyes of the
24 public, and I'm not asking for your opinion on
01:19 25 what the public thinks, but just your, based on



1 your involvement, if that would have maybe quelled
2 what was in the media?

3 A It would have answered a good deal of what was in
4 the media. Whether it would have quelled the
01:20 5 public sentiment at that time, I don't know.

6 There is a point with these sorts of things where
7 you get so far behind the wave you can't catch it
8 any more no matter what you do.

9 Q And so was it Saskatchewan Justice's view then in
01:20 10 August of '91 when the second application was
11 filed that something was going to happen by way of
12 a remedy or a hearing as opposed to simply the
13 process that was followed on the first
14 application, being an internal review and a
01:20 15 decision?

16 A Yes.

17 Q And that information would have come from Federal
18 Justice officials to Saskatchewan Justice
19 officials, presumably in direct conversation or
01:20 20 telephone conversations?

21 A In telephone conversations that Ellen Gunn was
22 having with them.

23 Q And do you know who she was talking to with
24 Federal Justice?

01:20 25 A It may have been Corbett, it may have been



1 MacFarlane.

2 Q And what about Mr. Rutherford; does that --

3 A It, yeah, it could have been Doug Rutherford too.

4 I don't know. I know all of them were in that
01:21 5 sort of string of command that everything went
6 through.

7 Q And would Ms. Gunn share that information, then,
8 with you?

9 A Usually, yes.

01:21 10 Q And so were you, at this time, still fairly hands
11 on, from Saskatchewan Justice's perspective, in
12 monitoring this matter?

13 A Yes.

14 Q Just while we're on the first application, if we
01:21 15 can go to 114632, and this is the actual formal
16 application. And there's one assault that's
17 included here, the (V14)- (V14)- matter, and you
18 are familiar with that, are you, Mr. Brown?

19 A Yes.

01:22 20 Q And what did you learn about this allegation and
21 its inclusion as one of the Larry Fisher crimes in
22 the similar-fact application?

23 A Well, ultimately, wasn't she the one who actually
24 thought it might have been David Milgaard who did
01:22 25 it?



1 Q The evidence that we've heard, at least from
2 Sergeant Pearson, is that when he interviewed her
3 the statement that he gave to her was that she
4 believed David Milgaard had been the perpetrator.
01:22 5 I think Mrs. Milgaard has given us evidence where
6 she had a different view. But yes, this is the
7 individual where there certainly, at least in one
8 of her statements to the RCMP, she contends it was
9 Mr. Milgaard and not Mr. Fisher.

01:22 10 A I, actually, I didn't see the -- that matter as
11 being related to the Fisher thing very directly,
12 and I was a little surprised to see it there.

13 Q And --

14 A The other four are certainly good ones, but --

01:23 15 Q And I think the remainder listed are ones where
16 Mr. Fisher pled guilty to each of the remaining
17 ones?

18 A That's right, yeah.

19 Q And so, again, did the inclusion of the (V14)-
01:23 20 complaint influence Saskatchewan Justice's
21 thinking in any way in how it considered the
22 grounds put forward, at least as far as the
23 province's decision to re-open the investigation
24 in the death of Gail Miller?

01:23 25 A Not terribly. You know, I suppose it indicated



1 that they were willing to grasp at anything, but
2 when we looked at it we concentrated on b., c.,
3 d., and e. principally, but f. and g. as well.

4 Q If we can go to 026000. And, again, this is
01:23 5 August 21, 1991, a report in the media, the
6 headline is *Two Milgaard witnesses paid, lawyer*
7 *suggests*. And here it says:

8 "Federal investigators ...",
9 it's talking about -- this relates to the motel
01:24 10 incident:

11 "... looked into these allegations, and
12 in a February letter to Wolch signed by
13 Ms. Campbell, the Justice Minister said
14 Hall confirmed what Milgaard did and
01:24 15 said, but disagreed with the
16 interpretation placed on the words and
17 actions. She said the jury decided
18 which was the correct interpretation.

19 But Wolch's April 25 letter
20 ..."

21 and I referred that to you Thursday:

22 "... noted the jury never heard from
23 Hall or a second person (Ute Frank), and
24 'I would defy your prosecutor to stand
01:24 25 before a tribunal and advance the



1 position that the evidence of Frank, and
2 in particular Ms. Hall, does not bring
3 into doubt the evidence of the paid-for
4 criminals (Melnik and Labchuk).'

01:24 5 Wolch said it was important
6 to know what arrangements were
7 negotiated between the prosecutors and
8 Melnik and Labchuk, adding 'A member of
9 your department implied to us that they
01:25 10 were paid."

11 And I think the reference there, it's a letter to
12 Kim Campbell, so it's referring to the federal
13 department; can you tell us what knowledge or
14 information, if any, you have about this
01:25 15 allegation?

16 A There is nothing in Bobs Caldwell's file, or
17 anything that I have been able to discover since
18 the reference, to suggest that they were paid
19 anything by the Government of Saskatchewan.

01:25 20 Q If that allegation had been true would that be
21 something that would cause Saskatchewan Justice
22 concern?

23 A Yes, it would.

24 Q And why?

01:25 25 A Well, we're not in the habit of paying for



1 witnesses.

2 Q If this allegation were not true would it cause
3 Saskatchewan Justice concern?

4 A Well it, yes, it suggests that the evidence was
01:25 5 bought.

6 Q And implying that it was fabricated or false?

7 A That will be the implication, yes.

8 Q Now at this point, August of 1991 -- I think we
9 touched on this last week --

01:26 10 A But I should point out something else, that if any
11 kind of arrangement, whether it's an immunity or a
12 witness protection or any of that kind of thing is
13 made with the witness, there is an abundance of
14 correspondence on the file detailing that.

01:26 15 Q And so did you read this as being the implication
16 that there was something sinister about the
17 arrangement between -- as alleged here between the
18 Crown?

19 A Well, that's the allegation, yes.

01:26 20 Q Now -- now at this point, August of '91 -- and so
21 this is about eight months after Ms. Campbell's
22 letter -- what was your understanding of the
23 position with respect to the motel incident? And
24 let me just go a bit further. I think we talked
01:26 25 earlier about two alternate positions, one being



1 that Melnyk and Lapchuk lied and the incident
2 didn't happen; or second, that it did happen and
3 Ms. Hall had a different interpretation of the
4 actions and words, but that there was no real
01:27 5 dispute about the actions and words; do you recall
6 me going through that with you last week?

7 A Yes.

8 Q And did you think that that issue had been
9 resolved after Mr. Williams' examination of Ms.
01:27 10 Hall under oath and after the Minister's February
11 27th decision?

12 A Well, I thought it had been resolved, but
13 obviously, if the Milgaards weren't satisfied with
14 the decision, they weren't going to accept it as
01:27 15 resolved.

16 Q And so do you recall whether -- and maybe this
17 isn't a fair question because the record is so
18 expansive -- but do you recall, after the first
19 application, whether -- from Saskatchewan
01:27 20 Justice's perspective, what was being put forward
21 on behalf of David Milgaard with respect to the
22 motel room incident and the two, two alternate
23 positions, if I can put it that way?

24 A Well my impression was they were sticking to their
01:28 25 view that Hall's evidence, now Ute Frank's



1 evidence or statement indicated that in fact David
2 Milgaard wasn't guilty of anything, that this
3 didn't really happen.

4 Q And so that if Melnyk, if the incident didn't
01:28 5 happen, in other words if there was no stabbing or
6 whatever with the pillow and no words spoken by
7 Mr. Milgaard to the effect that Melnyk and Lapchuk
8 attributed to him, that their evidence was
9 fabricated and paid for by the Crown; was that
01:28 10 your understanding of at least one of the ways
11 this allegation was put forward in the media?

12 A That's correct, yes.

13 Q And, once more information was obtained about this
14 allegation, what conclusions did Saskatchewan
01:28 15 Justice reach with respect to the credibility and
16 reliability of this information as a basis to
17 re-open the investigation into the death of Gail
18 Miller?

19 A Well, I'm not aware of where the suggestion that
01:29 20 the witnesses were paid for came from. We
21 certainly, as I say, we certainly couldn't find
22 anything to suggest that had happened so, as a
23 basis for re-opening the matter, it just didn't
24 rank.

01:29 25 Q If we can go to 220403. This is an August 22nd,



1 1991 *Globe and Mail* article, and there is a
2 comment here -- and I think, just if I can give a
3 bit of background, this is at the time, I think,
4 where issues are being raised in the media about
01:29 5 the manner in which Larry Fisher was dealt with by
6 Saskatchewan Justice or the Attorney General for
7 Saskatchewan in 1971, and in particular the direct
8 indictment and having the matter heard in Regina;
9 and do you recall that being an issue of some
01:30 10 comment in the media?

11 A Oh, that was part of the coverup conspiracy, move
12 it out of Regina -- or Saskatoon, do it quickly in
13 Regina.

14 Q And what was your understanding of the essentials
01:30 15 of that allegation?

16 A Well the allegation, I think, was that the police
17 and/or the prosecution realized that it had to
18 have been Larry Fisher who committed these -- the
19 Gail Miller murder and therefore, when he was
01:30 20 going to plead guilty to the four Saskatoon rapes,
21 it was shipped down to Regina, done quickly some
22 afternoon after all of the Milgaard matters were
23 done in the courts, and this was done as a means
24 of furthering the coverup, and the fact that the
01:30 25 victims weren't told about this was further



1 evidence of that.

2 Q And was it your understanding, then, that the
3 allegation involved knowledge on the part of the
4 conspirators, and I think one of which was Mr.
01:31 5 Kujawa and I think Mr. Caldwell, but -- sorry, are
6 you having trouble with that speaker?

7 A No, it's just a little loud, I'll --

8 Q Umm, was it your understanding of the allegation
9 that the alleged wrongdoers would have had
01:31 10 knowledge that David Milgaard was innocent and
11 Larry Fisher was guilty of the crime and took
12 steps, as you've stated, to cover up Mr. Fisher's
13 disposition in the courts for fear of bringing
14 attention to the matter in the public or through
01:31 15 to David Milgaard?

16 A That was the allegations being made, yes, that was
17 the nature of them.

18 Q And, if true, would this information provide a
19 basis for Saskatchewan Justice to re-open the
01:31 20 investigation into the death of Gail Miller?

21 A Well, if there had been any evidence of that we
22 certainly would have been concerned, yes.

23 Q And would that be, in your view, a miscarriage of
24 justice?

01:31 25 A Absolutely.



1 Q Did Saskatchewan Justice take any steps to follow
2 up on this information or allegation?

3 A We attempted to find out why it took as long as it
4 did to get the Larry Fisher matters dealt with. I
01:32 5 believe he was arrested in 19 -- October of 1970,
6 something like that, and --

7 Q Yes.

8 A -- shortly after that confessed to the sexual
9 assaults in Saskatoon, wanted to plead guilty to
01:32 10 them, and things just seemed to hang in the air
11 until I think late '71, December of '71, and we
12 tried to find out why that was but it's -- there
13 was nothing on the file other than the odd bit of
14 correspondence.

01:32 15 Q And did you reach any conclusions, then, as to
16 what; whether there was any merit to what was
17 being alleged?

18 A I didn't see any. In a conversation with Bobs
19 Caldwell he had very, very vague recollections of
01:33 20 any of this and, all things considered, that's
21 quite likely given that the structure of the Court
22 system or the prosecution system in Saskatoon at
23 that time was such that, if any prosecutor saw the
24 informations against Larry Fisher it would have
01:33 25 been, I think, Ben Wolff or one of the city



1 prosecutors, it wouldn't have been a provincial
2 prosecutor.

3 Q And --

4 A His only, Bobs Caldwell's only connection would
01:33 5 have been to reply to the request to send the
6 information down to Regina.

7 Q And what about the decision then, presumably by
8 members of Saskatchewan Justice at the time, to
9 proceed by direct indictment, to have the matters
01:33 10 heard in Regina, and the selection of the date of
11 the appearance; did you find any information that
12 would cause you to have suspicions or concerns
13 about that being part of a broader conspiracy?

14 A Well, no. If you are going to come into
01:34 15 Saskatchewan and plead guilty to a rape offence,
16 at that time you would pretty much have to have a
17 direct indictment, because otherwise you would
18 need a preliminary hearing to commit you, or at
19 least the initial arraignment process, preliminary
01:34 20 committal to the Queen's Bench. A direct
21 indictment takes it directly into the Queen's
22 Bench.

23 Q And if that direct indictment is consented to by
24 the accused, or requested by the accused, would a
01:34 25 prosecutor have difficulty with proceeding in that



1 fashion?

2 A No.

3 Q What about the having it heard in Regina as
4 opposed to Saskatoon; what information did you
01:34 5 find with respect to that allegation?

6 A The only thing I was able to discover was that,
7 obviously, that's where Serge Kujawa was, or the
8 head office of Justice was, that's where the
9 matter, the direct indictment, was going to be
01:35 10 obtained. That, and if Mr. Greenberg from
11 Winnipeg had to attend, it's a lot quicker to get
12 to Regina on the Trans-Canada than it is to go the
13 Yellowhead route up to Saskatoon.

14 Q Did you -- did you find anything then, in your
01:35 15 review of the matter, that would cause you any
16 concern about what happened back in 1971 with
17 respect to Mr. Fisher?

18 A The only, to be honest with you, the only thing
19 that caused me any concern is that the letters
01:35 20 from Mr. Greenberg, I think they originally went
21 to Darryl Heald, who was the Attorney General in
22 1970 prior to the election, weren't being
23 responded to. But, if you knew Serge Kujawa, that
24 kind of explained a lot of it.

01:36 25 Q And, excuse me, in what way; can you elaborate on



1 that?

2 A He was no good at paperwork. When I worked with
3 him on the *Colin Thatcher* case I very quickly
4 learned that, if you wanted a response to
01:36 5 anything, you went and talked to him. For
6 example, I'm still in waiting for him to comment
7 on the draft of the factum for that case, and
8 that's 21 years later. He just --

9 Q Would you like his counsel to address that today?

01:36 10 A He just, he did not deal with paperwork, and that
11 was a huge concern to the Attorney General at the
12 time.

13 Q If we can go to 00432 -- or sorry, just hang on
14 one sec' -- 004601. And just to put this in
01:37 15 context, this is August 24th, '91, so this is ten
16 days after the first application, and a *Globe and*
17 *Mail* article talking about:

18 "Serious questions are being
19 raised about the thoroughness of a
01:37 20 federal Justice Department investigation
21 into the trial and conviction of David
22 Edgar Milgaard."

23 "Secrecy shrouds the
24 reinvestigation, in which the original
01:37 25 prosecution played a role, and so far



1 the Justice Department has refused to
2 release the report's contents, even to
3 Mr. Milgaard's matters.

4 'I don't want to talk about
01:37 5 the Milgaard investigation to you or
6 anyone else, good-bye', William Corbett
7 told The Globe and Mail yesterday and
8 banged down the telephone. Mr. Corbett
9 is the senior Crown counsel who oversaw
01:37 10 the review."

11 Was this the type of information, then, in the
12 media that was causing Saskatchewan Justice
13 concerns?

14 A Well, the fact that the Federal Government
01:38 15 steadfastly refused to make anything public in
16 terms of what had gone to the minister and the
17 process, etcetera, was a concern because it
18 allowed for articles like this, which is perfectly
19 correct, I mean, that's exactly what was going on,
01:38 20 and it allows them to be then cast in a sinister
21 light.

22 Q And what about the effect on Saskatchewan Justice,
23 if any, of this type of media report?

24 A Well, as I say, I don't think the public
01:38 25 particularly separates one Justice Department from



1 the other, and the whole process, the whole
2 justice system, was getting a black eye out of
3 this.

4 Q Go to 004322. And this is a document from
01:38 5 Saskatchewan Justice, it's titled *Issues* at the
6 top, if we can go to the second page there is no
7 author noted nor is there a date, but I think, Mr.
8 Brown, you and I have had a chance to go through
9 this in advance of your evidence and I think,
01:39 10 based on your review, are you able to tell us who
11 you believe is the author of this report?

12 A Yes. I expect it was written by the Director of
13 Prosecutions at the time, Ellen Gunn.

14 Q And I'll go through parts of this with you and I
01:39 15 think, based on what's in the memo, it appears
16 certainly after the second application, and so
17 likely in the late August-early September 1991
18 time period; is that a fair estimate of when it
19 was prepared?

01:39 20 A Yes. She usually wasn't around in July so I'm
21 guessing it would have to be after that.

22 Q And I'll go through parts of this. Would this
23 have been, just at this time would you have been
24 -- I'm not sure what the right term is -- although
01:39 25 she was the director of public prosecutions would



1 you have been the Saskatchewan Justice lawyer that
2 was likely assuming most responsibility as far as
3 quarterbacking this matter, the David Milgaard
4 matter, from -- on behalf of Saskatchewan Justice?
01:40 5 Not exclusively, but --

6 A Well, yes, with the caveat that I'm not -- I
7 wasn't privy to every conversation that she had
8 with Justice lawyers and she didn't report all of
9 them to me.

01:40 10 Q Okay. But as far as -- would you agree that --
11 would you have been in the know as to what
12 Saskatchewan Justice was doing and thinking at the
13 time?

14 A Substantially, yes.

01:40 15 Q And so here it goes through, talks about received
16 an application for a new trial, and it's talking
17 about the first application. And then, here:

18 "The federal minister
19 reviewed all the materials collected in
01:40 20 this process and sent materials to Mr.
21 Justice McIntyre formerly of the Supreme
22 Court for an 'independent review'. A
23 letter was then sent to Mr. Milgaard
24 denying the application. We received a
01:40 25 copy. No other material gathered by the



1 federal department has been made public
2 in the process. The only material which
3 has become public has been the material
4 released by the Milgaard family and
01:41 5 their counsel. This has not been
6 countered in any way by the federal
7 Department of Justice and tends to lead
8 to the growing speculation that justice
9 was not done in this case."

01:41 10 And would you agree with what -- with that
11 comment?

12 A Yes.

13 Q And would that have been the view of Saskatchewan
14 Justice, then, at the time?

01:41 15 A I think that's correct, yes.

16 Q It goes on to say:

17 "The federal department has
18 declined to provide us with copies of
19 their materials either. They have made
01:41 20 certain statements about the parole
21 board and about the decisions which have
22 been made concerning Milgaard's release
23 - indicating that he has not been
24 released because he is dangerous, not
01:41 25 because he hasn't confessed. However we



1 have not been given access to any of
2 those files. They have also indicated
3 that they have located additional
4 witnesses who may be helpful at trial if
01:41 5 the matter goes back to trial, however
6 the witnesses do not want to be
7 identified at this time.

8 The secrecy surrounding this
9 matter and the continuing body of
01:42 10 material being publicized by the defence
11 is leading to a clear problem with
12 confidence by the public in the
13 administration of justice in this
14 province and in Canada."

01:42 15 And, again, would that have been the view of,
16 your view and Justice, Saskatchewan Justice's
17 view at the time?

18 A Yes.

19 Q It says:

01:42 20 "The question to be addressed
21 is whether the province ought to take a
22 position as to whether the case should
23 be referred to the Court of Appeal.
24 Without a full case file to review it is
01:42 25 difficult to conclude that the federal



1 minister's decision is right or wrong.

2 Without some sort of public accounting

3 or review is ...",

4 I presume that should be "it":

01:42 5 "... would appear than the outstanding

6 questions about the system will not

7 disappear."

8 And, again, would that have been the view of

9 Saskatchewan Justice at the time?

01:42 10 A Yes.

11 Q Okay. Was there some frustration on the part of

12 Saskatchewan Justice that you were not provided

13 with the case file?

14 A Well, there wasn't on my part. There was some

01:42 15 frustration, on our part, that the Federal

16 Government didn't seem to be doing anything to

17 counter the media campaign that the Milgaard camp

18 was very successfully operating and pushing the

19 federal department to the point where they were

01:43 20 going to have to do something.

21 Q The comment here, though, about:

22 "Without a full case file to review it

23 is difficult to conclude that the

24 federal minister's decision is right or

01:43 25 wrong." ;



1 can you elaborate on that statement?

2 A Umm, yeah. I -- I think that may put it a little
3 strongly. I don't think we had any doubts about
4 the minister's decision being correct because,
01:43 5 while we didn't have the file, there had been a
6 number of conversations leading up to her
7 decision, with federal officials, that gave us a
8 reasonably good sense of the information that she
9 had and that was likely going to her, although
01:43 10 again, we did not get to see what information,
11 exactly, went, nor the advice that went to her.

12 Q It says:

13 "Our initial view is that the
14 Federal Government should be encouraged
01:44 15 to make a public accounting of what led
16 them to the conclusions they reached.
17 Additionally, that we should receive a
18 full copy of their file to do our own
19 assessment."

01:44 20 And, again, would that be Saskatchewan Justice's
21 view at the time?

22 A Yes.

23 Q And what would be, when they talk, or when the
24 memo talks about:

01:44 25 "... a public accounting of what led



1 them to the conclusions they reached."; ;
2 would that be primarily the department, the
3 federal Department of Justice departmental report
4 and investigation and the William McIntyre
01:44 5 opinion; is that what we're talking about?

6 A Yes.

7 Q And:

8 "Additionally, that we should receive a
9 full copy of their file to do our own
01:44 10 assessment."

11 Can you tell us, what type of assessment would
12 Saskatchewan Justice be doing?

13 A Well, at that point I expect it was simply a
14 matter of looking at what they found and assuring
01:44 15 ourselves that they did, in fact, come to the
16 right conclusion on it.

17 Q Is it fair to say that at this time, whether it be
18 late August or September 1991, there was public
19 pressure on Saskatchewan Justice, in addition to
01:45 20 Federal Justice, to do something with respect to
21 the David Milgaard matter?

22 A Oh yes.

23 Q And is it fair to say that Saskatchewan Justice
24 was considering what it could do on its own,
01:45 25 notwithstanding that there was a second



1 application before the federal minister, at least
2 considering that?

3 A There was some thought to that, whether there
4 wasn't something we could release, something we
01:45 5 could say that would deal with some of this.

6 Q And then it says:

7 "A new application is
8 outstanding at this time. Based on the
9 limited information we currently have,
01:45 10 it would not appear that the actions of
11 Mr. Fisher would in law constitute
12 similar fact. However the fact that the
13 new application has been made obviously
14 gives the opportunity to do the 'right
01:45 15 thing' whatever that is."

16 Can you elaborate on that, please?

17 A Well I, from the last go-round, I think we took
18 the view that the evidence didn't -- wasn't strong
19 enough to amount to similar fact. As for 'do the
01:46 20 right thing', I don't know precisely what she's
21 referring to there, but my view was that, at that
22 point, the right thing to do would have been to
23 make the minister's information, the federal
24 investigation, the McIntyre report, public.

01:46 25 Q And, again, the -- is it possible that what -- I



1 mean I suppose one -- or let me run this by you.
2 The fact that the second application is made might
3 give the opportunity for whoever, whether it be
4 Federal Justice or Saskatchewan Justice, to take a
01:46 5 different approach in dealing with the
6 application; is that a possible reading of it?

7 A Could be, yes.

8 Q What about the similar fact? And we touched on
9 this last week, that would this have been your
01:47 10 view of the information you had, the limited
11 information:

12 "... it would not appear that the
13 actions of Mr. Fisher would in law
14 constitute similar fact?"

01:47 15 A That's right, yes.

16 Q And we, I think we talked about that on Thursday,
17 what you -- you went through the first -- or the
18 second application and made some observations
19 about whether or not you felt that the other
01:47 20 assaults could be similar-fact evidence in a
21 prosecution against Mr. Fisher; is that correct?

22 A Yes.

23 Q And then, now, the Saskatoon City Police files,
24 which I think came up at the end of August, it
01:47 25 says:



1 "A further outstanding
2 question involves the files of the
3 Saskatoon City Police. What action if
4 any should be taken to examine this? A
01:47 5 possibility would be a review done by
6 the Saskatchewan Police Commission at
7 the request of the department or of the
8 minister."

9 Do you recall that being an issue around this
01:47 10 time, like shortly after the second
11 application -- and I'll show you a couple of
12 media articles in a moment -- that the allegation
13 that the Saskatoon City Police had deliberately
14 destroyed files was in the media and being
01:48 15 reviewed by the police?

16 A Umm, yes, those allegations were out there,
17 together, I think, with statements by somebody
18 from the Milgaard team that they had seen the
19 statements and then they immediately disappeared
01:48 20 or something.

21 Q Can you tell us how that, how that allegation with
22 the Saskatoon City Police files fit into the
23 balance of the media campaign that was going on at
24 the time?

01:48 25 A Well the theme, the media, the theme of the media



1 campaign was coverup and conspiracy and, of
2 course, getting rid of those files would have been
3 part of that.

4 Q "Conclusion

01:48 5 1. Privately ask Federal Justice to
6 publicize their review.

7 2. Formally request copies of everything so
8 we can conduct our own review."

9 Do you know if either of those two were done
01:49 10 between Saskatchewan Justice and Federal Justice?

11 A I know we asked them if they would publicize their
12 review.

13 Q What did they tell you?

14 A My understanding is that they didn't think that
01:49 15 was likely.

16 Q Okay. And do you recall if any reasons were given
17 to Saskatchewan Justice, or who provided that
18 information?

19 A Ellen Gunn told me she'd spoken to somebody, and
01:49 20 that was their review -- their take on it.

21 Q Do you recall who it was with Federal Justice?

22 A No.

23 Q And then what about the -- so that was to
24 publicize it and the feds said "no". What about
01:49 25 the 'request copies of everything so Saskatchewan



1 Justice can review'; do you know if that request
2 was made?

3 A That I don't know.

4 Q And then:

01:49 5 "3. Absent agreement on above - recommend
6 that it go to the Court of Appeal for a
7 public airing.

8 a) one would have to assume that the
9 possibility of the Court referring it
01:49 10 back for a new trial would be
11 reasonably high given all the
12 publicity this has received.

13 b) the chance of successfully running a
14 new trial after 20 years is
01:50 15 questionable."

16 Can you comment on those points, a) and b)?

17 A Well, as I said, referring it back to the
18 Saskatchewan Court of Appeal, in my view, really
19 wasn't a starter given the fact that Cal Tallis
01:50 20 was there, and if -- and now I think maybe by that
21 time even Gary Lane, who had been the Attorney
22 General when this happened or when the minister
23 was reviewing it. But I wouldn't necessarily
24 agree with the suggestion that there was a good
01:50 25 chance it would be referred back for a new trial



1 just because of the publicity it has received, I
2 would be inclined to the view that the Court of
3 Appeal at that time would have taken it on as a
4 fresh evidence matter, and said "give us what you
01:51 5 have got and we'll assess it on that basis".

6 Q And then what about the comment about:

7 "The chance of successfully
8 running a new trial after 20 years is
9 questionable."

01:51 10 Is that something -- did you share that view?

11 A Well, it certainly, the passage of 20 years,
12 doesn't make things any easier, but it didn't help
13 Mr. Fisher much did it.

14 Q If we can go to 000287, and I think this is one of
01:51 15 the, this is the August 29th, 1991 *Globe and Mail*
16 article, and I think we've heard evidence that it
17 was this media report that gave rise to the
18 Saskatoon police investigating their files. Is
19 this what you referred to earlier? I think
01:52 20 there's a comment here from Mr. Asper, or sorry,
21 from a source, and then later on a comment -- yes,
22 right here, a Saskatchewan police source.

23 A Yeah.

24 Q So you would have been familiar, this is
01:52 25 information the province would have received at



1 the time?

2 A Yes, we would know that.

3 Q And then 012120, I think this is a fax, August 30,
4 1991, from the police to Saskatchewan Justice with
01:52 5 54 pages, and I believe this is a copy of the
6 (V5)-- (V5)--- file?

7 A Yes.

8 Q And so it appears that on August 30, 1991 the
9 police had located that file and sent it to you;
01:52 10 is that correct?

11 A That appears to be the case, yes.

12 Q If we can go to 004592, this is an August 30, 1991
13 article, and this is where I think you referred to
14 earlier the comment about the files being there,
01:53 15 it says:

16 "This is unbelievable,"

17 Milgaard's lawyer, David Asper, said
18 from Winnipeg. "The files did exist
19 prior to Aug. 16."

01:53 20 Sometime between Aug. 16

21 and this past Tuesday, the files went
22 missing, Asper charged."

23 And do you recall that being something that was
24 brought to the attention of Saskatchewan Justice
01:53 25 at the time?



1 A Yes, that's right.

2 Q And I believe the record shows that the police,
3 the Saskatchewan Police Commission was then asked
4 to investigate this matter?

01:53 5 A That's correct.

6 Q And were you involved in that decision-making
7 process?

8 A No. I believe that was whoever was in charge of
9 policing at the time and -- I think John Baker and
01:53 10 the deputy minister were principally involved in
11 that.

12 Q If we can go to 012256 -- sorry, I don't have a --
13 oh, yes, this is September 1, 1991, so just going
14 chronologically here, and I think this is the
01:54 15 first news story that talks about (V4)----
16 (V4)---, and you are familiar with the (V4)----
17 (V4)--- information?

18 A Yes, I am.

19 Q And:

01:54 20 "A Metro woman who repelled a
21 rape attempt 22 years ago may be the key
22 to re-opening the 1969 sex slaying case
23 of a Saskatoon nurses' aide, says the
24 defence team for convict David
01:54 25 Milgaard."



1 And then scroll down, here:

2 "But the Metro woman was
3 jolted to see the Aug. 11 Sunday Star,
4 which featured pictures of Milgaard and
01:54 5 serial rapist Larry Fisher..."

6 And:

7 "When she saw the picture of
8 Mr. Fisher, she identified him as the
9 man who attacked her and not Mr.
01:55 10 Milgaard," Levy said."

11 And again, would this be information that you
12 would have, or Saskatchewan Justice would have
13 been aware of at the time?

14 A Ah, yes, we heard about her.

01:55 15 Q Did you learn about this through the newspaper or
16 do you know --

17 A I think it was through the newspaper. I don't
18 think anyone advised us of that.

19 Q Do you recall if Saskatchewan Justice was asked to
01:55 20 look into this, to the (V4)---- (V4)--- matter?

21 A No, I don't recall us being asked to look into it.

22 Q And then as well, if we can just scroll a bit to
23 the right:

24 "Joyce Milgaard said police
01:55 25 sources have told her that the file



1 about the attack on the Metro woman has
2 gone missing from police department
3 records."

4 And I think subsequently there was some evidence
01:55 5 that this information was on the Gail Miller
6 file. Again, would this information in the media
7 again be part of what you talked about earlier,
8 the media campaign, or as far as putting forward
9 information that would cause the public to have
01:56 10 some concerns about the administration of
11 justice?

12 A Oh, yes, yeah.

13 Q 010030, this is a letter from Mr. Williams to you
14 of September 5, 1991 and I think he's returning
01:56 15 the prelim transcripts on the (V10) (V10)- matter
16 and then copies of a letter from a witness who
17 provided a statement to David Asper, and I think
18 that was John Patterson who was one of the
19 inmates.

01:56 20 "In addition, I am providing
21 a copy of a statement of (V4)----
22 (V4)---."

23 And then the second statement resulting from the
24 Toronto Star article. Can you tell us why at
01:57 25 this point, what would be -- or why was Mr.



1 Williams sending you this information on the
2 second application; do you know?

3 A Well, again, I think at this point it wasn't if --
4 it was how there was going to be some kind of
01:57 5 public process to deal with this and we were
6 getting a good deal more information in a formal
7 sort of sense, documents from the Government of
8 Canada, than we had before.

9 Q Go to 004573, and this is a September 11th, 1991
01:58 10 article and the reference here:

11 "Milgaard's lawyers have
12 asked the Saskatchewan Attorney
13 General's Department to investigate
14 whether someone is tampering with files
01:58 15 and possibly obstructing justice."

16 And then goes on to talk about Dayday and the
17 Police Commission. Would that have been the case
18 then, that the missing police files was passed on
19 to the Attorney General of Saskatchewan and then
01:58 20 through, I think you said, the policing
21 department or minister, the Police Commission was
22 asked to look into the matter?

23 A Well, it was the Department of Justice, Attorney
24 General Department, one entity that dealt with
01:59 25 policing as well, and it's my understanding that



1 it was referred by the Attorney General to the
2 Saskatchewan Police Commission with a request that
3 they investigate it.

4 Q If we can go to 004574, and this is a September
01:59 5 14th, 1991 article in *The StarPhoenix*, and I have
6 trouble reading the first part, but there's a
7 reference here, I think it says:

8 "There's something sinister
9 about Saskatoon serial rapist Larry
01:59 10 Fisher's case being handled in Regina in
11 1970 --"

12 Or sorry:

13 "There's nothing sinister
14 about Saskatoon rapist Larry Fisher's
01:59 15 rape case being handled in Regina in
16 1971, says Justice Department spokesman
17 lawyer, Murray Brown.

18 Fisher wanted to plead
19 guilty in front of a Queen's Bench
02:00 20 judge, Brown said in an interview from
21 Regina.

22 "And at that time the only
23 way you could do that was to direct
24 indict him.

02:00 25 "It was arranged through



1 (former Saskatchewan director of
2 prosecutions) Serge Kujawa whose office
3 is here (Regina). And the direct
4 indictment has to come from the attorney
02:00 5 general, who is also here."

6 And then goes on to talk about the media. Sorry,
7 there's a better article. What would have
8 prompted you -- presumably you gave this
9 information to the news media at this time?

02:00 10 A Yes.

11 Q And was there -- was this part of an effort on
12 Saskatchewan Justice then to get, I suppose, your
13 version of events on the public record?

14 A Well, it might have been part of my effort to do
02:00 15 that. I think the view of the deputy minister and
16 the director of public prosecutions was that this
17 was still a federal government matter and we
18 weren't going to be commenting very much on it.

19 Q And what was your concern about what was in the
02:01 20 media regarding this direct indictment,
21 Regina/Saskatoon issue?

22 A Well, again, I mean, it was being used as part of
23 the evidence that there was a cover-up. The
24 matter from Saskatoon gets brought to Regina,
02:01 25 there's a direct indictment, not some sort of



1 trial process, it isn't handled sort of
2 immediately when the defence lawyer is asking for
3 it, and I think the other element of that was that
4 there was no report to victims.

02:01 5 Q And just on that last point, was that something,
6 are you able to comment on whether that -- did you
7 find that to be unusual in 1971, and I appreciate
8 you weren't practicing at that time?

9 A When I was prosecuting from about '76 to '82, '83,
02:02 10 we didn't routinely report anything to victims.
11 If they got any information, it would be from
12 either sitting in court during the rest of the
13 trial or the police would report it to them, but
14 we didn't, as a matter of routine, report that to
02:02 15 them, we reported usually to the police, although
16 that was, you know, inconsistent too.

17 Q And what caused the change in 1982?

18 A Nothing. The change actually didn't happen until
19 the '90s when the victims' rights movement and
02:02 20 witnesses became a -- the way witnesses were dealt
21 with and victims were dealt with became a concern.

22 Q If we can go to 004588. What about the -- I think
23 another part of the allegation relating to the
24 1971 disposition of Mr. Fisher's charges were the
02:02 25 fact that I think it was alleged that the media



1 did not, at least the print media did not report
2 on Mr. Fisher's charges in 1971. I don't think
3 there was an article in the *Leader-Post* or *The*
4 *StarPhoenix*. Did that surprise you or cause you
02:03 5 any concern?

6 A No. The news media was there if they had the
7 opportunity to send somebody to the courts, it
8 wasn't -- certainly the provincial courts were
9 better covered, the docket courts were better
02:03 10 covered. The trial courts, no, they weren't
11 particularly well covered by the news media at
12 that point, and that was still the case when I
13 started.

14 Q And so I think the evidence was that Mr. Fisher
02:03 15 was dealt with in Queen's Bench Court, I think on
16 an afternoon, and so that's something in your
17 experience then or based on what you knew, I guess
18 from what you knew about at that time period,
19 would there have been anything unusual or sinister
02:03 20 about that?

21 A No. Queen's Bench Court sat in the afternoons and
22 this, I should point out, that this would likely
23 go in under the Queen's Bench docket as kind of an
24 add-on, so that if there was somebody available,
02:04 25 it could be slipped into that court to be dealt



1 with. This wasn't something that went through the
2 normal process of having an indictment filed and
3 the transcript land in the court file and then go
4 through a setting of dates that usually happened
02:04 5 with ordinary cases.

6 Q And would the manner in which Mr. Fisher's charges
7 were dealt with in 1971 by Saskatchewan Justice
8 officials, would that be similar to how other
9 matters were dealt with around that time or later?

02:04 10 A Well, I don't know that the use of direct
11 indictments was all that frequent. On the other
12 hand, people coming in from out of province to
13 plead guilty to rapes wasn't very frequent either.

14 Q And then as far as -- let's go back to 1975 or
02:05 15 1976. If you had been asked as a prosecutor to
16 deal with, as Mr. Greenberg did in Winnipeg with
17 Mr. Fisher who was going to be in custody in
18 Prince Albert, again, how would you have dealt
19 with that situation?

02:05 20 A I would have dealt with -- well, I would ask him
21 first of all where he wanted to deal with it. If
22 defence counsel wants to deal with it in Prince
23 Albert where his client was, I would try and get
24 it dealt with there, but ordinarily if they are
02:05 25 writing me to deal with the matter, I'm likely



1 going to deal with it in a Regina court.

2 Q And what about going by direct indictment rather
3 than having the matter appear in provincial or
4 Magistrates' Court at the time?

02:05 5 A Well, that's -- a direct indictment would be the
6 sort of labour-saving way to do it, otherwise,
7 Larry Fisher has to be transported to a Provincial
8 Court, he has to make an appearance there, there
9 has to be a voluntary committal. The documents
02:06 10 then have to be prepared, they have to be brought
11 to the Queen's Bench and he then appears in the
12 Queen's Bench as a result of having been committed
13 to stand trial there. If you do it by direct
14 indictment, then you just pop the direct
02:06 15 indictment down onto the registrar's desk and the
16 matter is set for a hearing.

17 Q Go back to this article, there's a comment here,
18 this is September, it's either 13th or 15th, 1991,
19 and it's a comment about Justice Minister Kim
02:06 20 Campbell and says:

21 "However, Campbell said she
22 will consider making changes to the
23 current review process so it would be
24 more "open (and) transparent." She also
02:07 25 said she might release the independent



1 review of the Milgaard case the Justice
2 Department commissioned. It was written
3 by criminal lawyer William McIntyre, a
4 retired Supreme Court justice.

02:07 5 "I'm very confident (that
6 making its contents public) would simply
7 add to the credibility of the process,"
8 said Campbell."

9 Would you agree with that comment made by
02:07 10 Ms. Campbell?

11 A It would have helped, yes, but as I say, there's a
12 certain point with these publicity campaigns where
13 you are just so far behind the wave that you are
14 not going to catch up no matter what you do.

02:07 15 Q Again, 016091, this is a September 18th, 1991
16 article, Winnipeg *Free Press*, and it says:

17 "Federal Justice officials
18 are looking for ways to restore the
19 public's confidence in a legal review
02:08 20 process badly shaken by David Milgaard's
21 23 year fight for freedom, Justice
22 Minister Kim Campbell said yesterday.

23 And the minister hinted
24 the government will respond, possibly
02:08 25 within days, to a second request by



1 Milgaard for a new trial and may make
2 rulings and reports pertaining to the
3 case public.

4 Campbell admitted
02:08 5 departmental secrecy and a lack of
6 public scrutiny had fueled public
7 suspicion."

8 Would you agree with that comment?

9 A Oh, yes, absolutely.

02:08 10 Q And was this consistent with what Saskatchewan
11 Justice was hearing from Federal Justice as far as
12 their approach to the second application?

13 A Yes.

14 Q And then she said, I think this is similar to the
02:09 15 last article:

16 "But she added that if it
17 would help public understanding of the
18 Milgaard case and restore some level of
19 confidence in the system, she might be
02:09 20 willing to release a report relating to
21 the case.

22 "If there is sufficient
23 concern with the credibility of the
24 process, I might consider doing that,"
02:09 25 Campbell said.



1 "I am very confident that
2 it would simply add to the credibility
3 of the process."

4 And would it be fair to say that that would have
02:09 5 been the position advanced by Saskatchewan
6 Justice to Federal Justice, that she ought to do
7 just that for the reasons stated?

8 A Yes, that's correct.

9 Q 032537, there's a comment here, this is September
02:09 10 21, 1991, and I'll just read you this part to put
11 it in context where you are quoted, it says:

12 "However, investigators
13 either overlooked..."

14 They are talking about the first application and
02:10 15 Mr. Williams,

16 "...either overlooked or
17 ignored crucial documents during the
18 first review. In particular,
19 investigator Eugene Williams -- who
02:10 20 helped prepare the dossier -- failed to
21 obtain complete police and court files
22 on convicted serial rapist Larry
23 Fisher."

24 And then goes on to talk about that:

02:10 25 "But Saskatchewan Justice



1 Department appeals director Murray Brown
2 revealed this week that Mr. Williams
3 never sought any prosecution files on
4 Mr. Fisher.

02:10 5 "They didn't ask for our
6 files because Fisher wasn't really being
7 considered at that point," he said.

8 In an interview, Mr.
9 Williams conceded that he did not obtain
02:10 10 much data from Saskatoon City Police on
11 Mr. Fisher."

12 And would you confirm that, Mr. Brown, that on
13 the first application, the prosecution files
14 related to Mr. Fisher were not sought from
02:10 15 Saskatchewan Justice, or were they?

16 A I don't think they sought anything in relation to
17 the Larry Fisher files, police reports,
18 prosecution file or anything from us at that
19 point.

02:11 20 Q And I think there was a note here, it's in one of
21 the articles, that when this became an issue in
22 1991, August of 1991, Saskatchewan Justice located
23 all of its prosecution files related to Larry
24 Fisher; is that correct?

02:11 25 A Yes.



1 Q And so that would include the four Saskatoon
2 matters that Mr. Kujawa dealt with; correct?

3 A It contained some of the documentation. There
4 should have been police reports or at least
02:11 5 witness statements of some sort on the head office
6 file, the file that Serge had used to deal with
7 the matter before the Queen's Bench, but there was
8 none of that on that file either that I recall.

9 Q And so is that something you would expect to see
02:11 10 on the file?

11 A Well, I'm curious as to what he could say when he
12 spoke to sentence if he didn't have that.

13 Q I think there was some evidence, and it may have
14 been from him, that there was a letter from Deputy
02:12 15 Chief Corey to I think Ken MacKay that detailed
16 the four charges and some of the circumstances.
17 Do you recall that letter? Perhaps I can show it
18 to you later.

19 A Yeah, there could have been. I don't recall that.
02:12 20 I just know that I was concerned that there was no
21 particular materials on that file. Although,
22 having said that, when the Colin Thatcher matter
23 came up to be reviewed by the federal government,
24 our prosecution file was that thick and it
02:12 25 originally came over to us in a truck, but Serge,



1 who was the trial prosecutor, filed the materials
2 the way he usually filed the materials and that
3 was pretty much into the garbage.

4 Q So did you conclude anything sinister then about
02:12 5 what wasn't in the file?

6 A No, I just chalked it all up to Serge's usual
7 careful filing.

8 Q Can you tell us when -- I think the record shows
9 that November 28th, 1991 is when the
02:13 10 order-in-council, or whatever the correct legal
11 term is, the order was made to send the matter to
12 the Supreme Court; correct? That would be the
13 date?

14 A Yeah, I recall that.

02:13 15 Q Can you tell us generally what -- was Saskatchewan
16 Justice involved in discussions with Federal
17 Justice officials about what court to send it to
18 and what would be the terms of reference?

19 A We were. We told them that it was our view that
02:13 20 the Saskatchewan Court of Appeal was really out of
21 the question because there were now two people
22 that had some involvement with that case on the
23 court. We were also consulted with respect to the
24 questions. I seem to recall that at first glance
02:14 25 the federal government was sort of looking at a



1 very narrow question that related largely to the
2 Larry Fisher similar fact evidence thing, but we
3 thought it should be as wide as possible so that
4 if there was anything in the way of evidence of a
02:14 5 miscarriage of justice, the Supreme Court could
6 review it.

7 Q Is it fair to say that Saskatchewan Justice
8 advocated for a reference at least to a court?

9 A Yes. Well, some kind of public process when it
02:14 10 became sort of clear that the federal government
11 was fixed on a court process, then we thought yes,
12 it had to go to the Supreme Court, not to the
13 Court of Appeal.

14 Q And you had talked, you've talked on a number of
02:14 15 occasions about the media campaign that I think
16 you said was more prominent after Ms. Campbell's
17 February 27th, 1991 letter. Was it your view that
18 it was the media campaign that prompted and
19 resulted in there being a reference to the Supreme
02:15 20 Court?

21 A I think that's fair, yes.

22 Q And it was the reference case itself which then
23 resulted in David Milgaard's conviction being set
24 aside and him being released from prison; correct?

02:15 25 A That's correct.



1 Q And so is it fair to connect the media campaign
2 then to his release from prison?

3 A Well, I don't think you can ignore it, that's for
4 sure.

02:15 5 Q And it has been suggested by some that but for the
6 media campaign, at least in 1992, he would not
7 have had his conviction set aside and been
8 released from prison. Would you agree with that
9 assertion?

02:15 10 A Well, but for that 1991 part of the media
11 campaign, there would never have been another
12 reference, or there never would have been a
13 reference, and absent that reference, the
14 conviction wouldn't have been touched, yes.

02:15 15 Q Now, the next document I want to refer to, and
16 before you comment on it, Mr. Brown, Ms. Cox I
17 think wants to speak to it, it's 016098 is the
18 document, if we can have it brought up, and before
19 I ask Ms. Cox to speak to it, Mr. Commissioner,
02:16 20 this is one of -- I think there's a couple of
21 documents that came to the Commission from
22 Saskatchewan Justice and there's an August -- or
23 pardon me, an April 14th letter from Mr. Frayer
24 and Ms. Cox to the Commission indicating that, I
02:16 25 think words to the effect that it was probably



1 inappropriately, or was inappropriately disclosed
2 to Saskatchewan Justice, but that since we had it,
3 I think what the letter says, we can use it, but
4 it doesn't mean that it somehow gets into
02:16 5 privilege on other matters. My purpose in
6 presenting this document to Mr. Brown and as a
7 related one is simply to ask him where he got it,
8 whether he read it and whether he can comment on
9 the information in there, whether it's information
02:17 10 that the province had and whether anything in the
11 memorandum is something that he has knowledge of,
12 I do not propose to get into anything other than
13 what Saskatchewan Justice knew and did with the
14 information in it, and so I think I've alerted
02:17 15 this to Ms. Cox and she may wish to address that.

16 If I may just, Ms. Cox, for
17 the record, the other document is 010007, maybe we
18 can just put that on the screen, and my purpose is
19 the same for this document, if you want to just
02:17 20 put that up.

21 MS. COX: Mr. Commissioner, the reason that
22 I would like to speak to these documents is that
23 my client considers these to be within the
24 constitutional parameters as suggested in Mr.
02:17 25 Justice Laing's decision. I don't propose to



1 object to any questions or the documents
2 themselves being utilized by you today; however,
3 I would like to reserve the right to make further
4 submissions on the weight to be given to either
02:18 5 the documents or the evidence that the witness
6 may give in relation to those documents.

7 COMMISSIONER MacCALLUM: Well, if you are
8 taking the position that there are constitutional
9 reasons I shouldn't be looking at them, weight
02:18 10 would seem to me not to be a factor I take into
11 account, I just shouldn't look at them.

12 MS. COX: Well --

13 COMMISSIONER MacCALLUM: You can't waive
14 the constitutional prerogative can you?

02:18 15 MS. COX: No, I think the position I'm
16 taking is that Mr. Brown may be free to speak to
17 them in any way he may -- I mean, I'm not here on
18 behalf of Mr. Brown, and my client can't object
19 to what Mr. Brown has to say about these
02:18 20 documents, I'm simply suggesting that there may
21 be a weight issue when it comes to commenting on
22 documents that I say, or my client says are
23 beyond the purview of the inquiry.

24 COMMISSIONER MacCALLUM: Well, weight is
02:19 25 putting it mildly if that's the case, but



1 certainly Mr. Brown, in my view, is -- or may be
2 asked to comment upon any advice that he
3 received, or any information he received to be
4 more precise about it, which bore on the question
02:19 5 of whether or not the Milgaard case should be
6 re-opened, so if this was something that he
7 received in the form of information, it may be
8 put to him and he may comment upon it, but you of
9 course are free, Ms. Cox, to make any further
02:19 10 representation you wish as you may deem
11 advisable.

12 MS. COX: Thank you.

13 BY MR. HODSON:

14 Q Thank you. If we can go back to 016098, and this
02:19 15 is an October 2, 1991 memorandum from I think
16 Douglas Rutherford to the federal deputy minister,
17 it's a document that the Commission received, I
18 think it was contained in Saskatchewan Justice
19 files, and I believe would have been obtained
02:20 20 around, I can't say for certain, from the files I
21 can't indicate when it was received, but it
22 appears to be around the time of the reference.
23 Are you able to shed any light as to the
24 circumstances under which the Saskatchewan Justice
02:20 25 received this document?



1 A Umm, well I can tell you that, when we were
2 getting documents related to the reference, we did
3 get some that appeared to be internal
4 correspondence between officials in the Department
02:20 5 of Justice, and they struck me as documents that
6 we wouldn't ordinarily be given, so I gave,
7 apparently, most of them back to either
8 Mr. Frater, Mr. Fainstein, or Eugene Williams.
9 These would have been two that I missed. I don't
02:20 10 know why I would keep them in particular but,
11 yeah, I guess I missed those.

12 Q So when you say they are ones that you would
13 normally not be given, was that based on your view
14 of what you would disclose in Saskatchewan Justice
02:21 15 files, or on what basis did --

16 A No, if they'd been Saskatchewan Justice files we
17 would have been prepared to disclose them, but the
18 Federal Government was much more circumspect about
19 what they were prepared to let out.

02:21 20 Q What I am wondering, though, is how did you, in
21 your own mind, conclude that it was a document
22 that you shouldn't have been given?

23 A Well the --

24 Q Was that a supposition, did you assume that, or
02:21 25 were you told that?



1 A No, I assumed that, and that was later -- when I
2 gave them back, I believe that was confirmed.

3 Q And so who gave them to you; do you remember?

4 A They would either have come through Ron
02:21 5 Fainstein's office or through Eugene Williams,
6 although I think by that point we were dealing
7 with Mr. Fainstein, getting materials from him.

8 Q And so, so that I have this correct, this would
9 have been in the course of preparations for the
02:22 10 reference case, or would it have been before?

11 A No, it would have been preparations for the
12 reference case, because there really wasn't very
13 much coming from the Federal Government at that
14 point and, certainly, there wouldn't have been
02:22 15 anything like this.

16 Q So after November 28th, 1991 and before January
17 17th, 1992, in that time frame --

18 A Yes.

19 Q -- likely?

02:22 20 A Yes. I recall giving a file of documents back,
21 maybe half a dozen or so, in January of '92, so
22 that we would have been down in Ottawa to do that.

23 Q And so these would have been documents they gave
24 to you in Ottawa, or were they, --

02:22 25 A Umm --



1 Q -- did they send them to you in Regina?

2 A I think we took a whole stack of materials home in
3 December of '91 when we first went down to Ottawa
4 to talk to them about this.

02:22 5 Q And would they be copies, then, or originals of
6 the files?

7 A I'm guessing copies.

8 Q And so then you think this document would have
9 been in that group that you got a copy and took
02:23 10 back to Regina; is that correct?

11 A Yes.

12 Q And then, in the course of reviewing it, you
13 concluded that you thought it was something that
14 --

02:23 15 A Likely got shuffled into the file without anyone
16 putting any thought into it.

17 Q And why did you -- what caused you to think that
18 these were documents that should not have been
19 provided to you?

02:23 20 A Well simply because that's the kind, the very kind
21 of material they weren't releasing to us, was what
22 happened with the William McIntyre opinion.

23 Q And so that was based on what had been stated
24 earlier, that they would not disclose that
02:23 25 information to you?



1 A That's correct.

2 Q And so, when you took it back or sent it back, are
3 you able to comment on whether or not that was
4 their position or did you just simply send them
02:24 5 back?

6 A No, I took them back when we went down there in
7 January. I may have discussed that with somebody
8 from Ottawa prior to that, but the other documents
9 were things like memos asking Eugene Williams
02:24 10 where he was in terms of this investigation, stuff
11 that really wasn't of any help to anybody.

12 Q Okay. And what about, you commented on Thursday
13 that you received a copy of the William McIntyre
14 opinion and had an opportunity to review part of
02:24 15 it; is that correct?

16 A I -- yeah, I saw the McIntyre opinion, and I saw
17 the conclusions on the last page. That was about
18 all I read of it.

19 Q And where -- who gave that to you, and where were
02:24 20 you, and what were the circumstances?

21 A Umm, it was either in Fainstein's office or Eugene
22 Williams' office that I would have seen that,
23 those were the only offices that we sort of
24 regularly squatted in.

02:25 25 Q And would this, again, be in the December



1 '91/January '92 time frame?

2 A December or January, yes, I'm not sure which.

3 Q So after the reference is ordered and before it
4 formally started with evidence?

02:25 5 A Yes, that would be correct.

6 Q And was -- do you recall, if we could just deal
7 with the McIntyre opinion, was it -- how was it
8 provided to you?

9 A I was simply shown something, like, it was handed
02:25 10 to me.

11 Q Do you remember who handed it to you?

12 A No. It was either Eugene Williams or Ron
13 Fainstein, I'm sure.

14 Q And do you recall what the discussion was, or what
02:25 15 -- why they were showing it to you or giving it to
16 you?

17 A No, I don't recall. Umm, perhaps it was because
18 there had been a fuss made about it earlier, that
19 it should have been released, --

02:25 20 Q And --

21 A -- and I was shown a copy.

22 Q And you were given an opportunity by them to read
23 at least the conclusions?

24 A Yes.

02:26 25 Q And can you -- what is your recollection, then, of



1 the information you obtained, then, about the
2 McIntyre opinion?

3 A Well, essentially his view was that there wasn't a
4 particular -- a strong case for re-opening, and I
02:26 5 -- my impression is that I just, when I read that,
6 it seemed to me that the minister had accepted
7 that advice and her letter of February of '91
8 pretty much reflected what McIntyre had said.

9 Q And again, though, was what you read then, and
02:26 10 what you were shown of the McIntyre opinion and
11 what you read, then would that have been
12 information that Saskatchewan Justice would have
13 received relevant at least to the issue of whether
14 or not the investigation into Gail Miller's death
02:27 15 should be re-opened? And I'm talking, and maybe
16 in fairness, at a later date, maybe in April of
17 1992, you told us on Wednesday that that was
18 really the key date about whether or not to
19 re-open the investigation?

02:27 20 A Yes.

21 Q And what, would what you read in Mr. McIntyre's
22 opinion be part of the information that was
23 considered by Saskatchewan Justice when it made
24 its decision in April of 1992?

02:27 25 A Well it would be part of it, I suppose, but,



1 really, we were relying on the Supreme Court
2 decision and what had gone on in the Supreme
3 Court. But, yes, Justice McIntyre's decision was
4 part of what we would have considered.

02:27 5 Q If the conclusion that you read had recommended a
6 remedy and said there had been a miscarriage of
7 justice, and that's what you would have read,
8 would that have prompted Saskatchewan Justice to
9 consider re-opening the investigation?

02:28 10 A That would have made it a very different ball
11 game. If Justice McIntyre's opinion had said that
12 "there has been a miscarriage and it should be
13 re-opened", yes, I would have been quite surprised
14 and a little upset that that information hadn't
02:28 15 been provided to us.

16 Q Now this memorandum, October 2, 1991, talks about
17 further consultations, it appears, in -- in
18 September-October 1991, which is obviously after
19 the first application was dealt with. Were you
02:28 20 aware of Mr. McIntyre being involved on the second
21 application?

22 A No, I wasn't, that was news to me.

23 Q Go to the next page. There is a comment here
24 where it says:

02:29 25 "William McIntyre has



1 concluded, following a review of all the
2 material, that there is still no
3 reasonable basis to conclude that a
4 miscarriage of justice may have
02:29 5 occurred. He points to the substantial
6 body of evidence on which the conviction
7 is supportable and concludes that the
8 Fisher series of attacks on other women
9 doesn't undermine it."

02:29 10 It goes on to talk about:

11 "... there is no real link between
12 Fisher and Gail Miller's murder."

13 "In this regard, Mr. McIntyre
14 distinguishes between raising some doubt
02:29 15 as to a persons guilt, and a reasonable
16 basis for concluding that justice has
17 miscarried."

18 Can you tell us whether, again October-November
19 of 1991, were you made aware by anybody from
02:29 20 Federal Justice about their views on the legal
21 merits of the second application; in other words,
22 whether there was a reasonable basis to conclude
23 that a miscarriage of justice may have occurred
24 based on the materials filed in the second
02:30 25 application?



1 A No, their view, at least that we were getting, was
2 that they saw no basis to conclude there was a
3 miscarriage of justice, but they were also of the
4 view that the minister simply could not deal with
02:30 5 it the way she had before.

6 Q And this is information that Saskatchewan Justice
7 would have then received from Federal Justice
8 officials?

9 A Yes.

02:30 10 Q And so that, if I have this correct, that if the
11 application had been dealt with on the merits of
12 what was in the application as opposed to the
13 public issues, if I can put it that way, that the
14 application would have been dismissed?

02:30 15 A I expect that would have been the case, yes.

16 Q And then the comment here that:

17 "... there is such a public
18 mis-conception about the case that the
19 public confidence in the proper
02:31 20 administration of criminal justice may
21 require some public airing of the
22 issues. In short, the Minister's
23 conclusion that no miscarriage of
24 justice had occurred could not be
02:31 25 expected to overcome a rising, media



1 fed, public doubt about Milgaard's
2 guilt. Some judicial forum should be
3 selected in which to air and dispose of
4 the issues raised by Milgaard's
02:31 5 counsel."

6 And two questions there. Number one, would that
7 be similar to the view Saskatchewan Justice held
8 around this time?

9 A Yes, it was.

02:31 10 Q And --

11 A In fact I suspect they came to that view because
12 of our urging. They were not initially disposed
13 to some public process.

14 Q And why do you say that?

02:31 15 A Well, when the original ap -- or the second
16 application came in, while we were talking about
17 that, it took a while to convince them that was
18 the way it had to go. You'll note that the
19 Order-in-Council didn't come down until the end of
02:31 20 November and the application was filed, I think,
21 early August.

22 Q And so did Saskatchewan Justice then have dis -- a
23 number of discussions with Federal Justice
24 officials along the lines you've discussed then?

02:32 25 A Yes.



1 Q And are you able to tell us whether, at least --
2 or did you come to understand, then, that Federal
3 Justice shared Saskatchewan Justice's view at some
4 point?

02:32 5 A They, yes, at some point they became concerned
6 that the -- they were concerned that the
7 administration of justice was taking a bit of a
8 beating. They had in the back of their minds, I
9 think, the notion that some kind of public airing
02:32 10 might be appropriate, but it -- my impression was
11 it just seemed to be so foreign a notion to them
12 that they didn't want to get into it but,
13 eventually, they were pushed to that.

14 Q In what way, "such foreign a notion"?

02:32 15 A Well, the notion that you would sort of publicly
16 air what went on during one of these
17 investigations, you would publicly air the kind of
18 advice that was given to the minister, that
19 just -- that was not something that seemed to be
02:33 20 easy for them to accept.

21 Q And, if we can scroll down, there is a mention
22 here about the role of the Saskatchewan Attorney
23 General; and is that something, then, that would
24 have been discussed between Federal Justice and
02:33 25 Saskatchewan Justice in relation to this



1 reference, or Court case, or case?

2 A I, yes, I expect it was discussed with Ellen Gunn.
3 It certainly wasn't discussed with me.

4 Q And if we can go to the next page, it says:

02:33 5 "It was agreed that following
6 discussion with you, the next step
7 should probably be some detailed
8 discussion with Saskatchewan officials."

9 I think you've told us that that did happen?

02:33 10 A Yes.

11 Q If we can go to 010007. And I believe this is a
12 memorandum from Bruce MacFarlane dated October 3,
13 1991. And is it fair to say you -- I had asked
14 you some questions about how you came across or
02:34 15 received 016098, the last memorandum; would you
16 have the same answer for this memorandum?

17 A Yes.

18 Q And it talks here about, if a remedy is granted,
19 conferring with the Province of Saskatchewan:

02:34 20 "... what are their views on the
21 granting of a remedy; what type of
22 Reference would they prefer -- sub (b)
23 or sub (c); do they have a prosecutable
24 case should a new trial be directed;
02:34 25 what are their views on the



1 establishment of some form of Commission
2 to review the case rather than a
3 Reference to the Court of Appeal?"

4 And, again, I take it that these would have been
5 matters, then, that would have been discussed at
6 some point between officials, or do you know?

7 A Well, I don't, I mean I don't know what a sub (b)
8 or sub (c) reference is or what's the difference
9 between them. I expect there was some discussion
10 with Ellen Gunn, perhaps the deputy minister as
11 well, it wasn't at my level. I was, at that
12 point, I was still just one of the lower orders.

13 Q If the -- I think the sub (b) and (c) reference
14 was either sending it to the Court of Appeal where
15 Mr. Milgaard would be an appellant or (c), I think
16 I've got this right, would be a reference to a
17 Court for advice, so those two distinctions; do
18 you recall considering that or discussing that
19 with anybody?

20 A No, no.

21 Q And do you recall being asked to look at or
22 comment on whether or not there would be a
23 prosecutable case should a new trial be directed
24 around this time?

25 A No. We hadn't been given the Federal Government's



1 investigation at that point so I, all I would have
2 is whatever was on our file.

3 Q And, if we can scroll down, there is a discussion
4 here about *Confer with Hersh Wolch*. Are you able
02:35 5 to tell us, based upon your involvement or
6 Saskatchewan Justice's involvement in the fall of
7 1991 about the setting up the reference and the
8 terms of reference, what involvement Mr. Wolch and
9 Mr. Asper had in the process?

02:36 10 A I don't know, no.

11 Q Go to the next page. There is a comment here
12 about files, it says:

13 "... a file in the possession of the
14 prosecution office in Regina contains
02:36 15 police reports that may interest Hersh
16 Wolch. To what extent is Saskatchewan
17 able or prepared to turn this material
18 directly over to Hersh Wolch? What is
19 the view of the police on this?"

02:36 20 And I believe that's referring to, I don't know
21 what it's referring to, but let's assume it
22 refers to the prosecution files of Larry Fisher;
23 were you prepared to turn those over to Mr. Wolch
24 if requested?

02:37 25 A Yes.



1 Q And, to the extent that Saskatchewan Justice had
2 any police reports at this time, were you prepared
3 to turn those over to Mr. Wolch?

4 A Yes.

02:37 5 Q Do you know if you had been asked for those by
6 either Mr. Wolch or Mr. Williams or anybody at
7 Federal Justice?

8 A I'm not aware of anyone -- well, yeah, the -- Mr.
9 Williams would have asked for whatever we had. I
02:37 10 don't recall getting a request from Mr. Asper or
11 Mr. Wolch at that time, I think the first request
12 for information we got from them was after the
13 reference was called.

14 Q If we could go to 010024. This is an October 4,
02:37 15 1991 letter to you from the Director of Winnipeg
16 Prosecutions, Bruce Miller, and this relates to
17 the Fisher files in Fort Garry. And you had, I
18 think I showed you earlier, a letter where you
19 wrote to them requesting copies of their
02:38 20 prosecution files or their -- yes, for the
21 prosecution files for Mr. Fisher. They wrote back
22 that, saying that the prosecution files aren't in
23 existence, and that they were in touch with the
24 Winnipeg Police Department and the Fort Garry
02:38 25 Police Department, and it says that these



1 documents were held for seven years and then
2 destroyed. Did you have any concern with that
3 response, both as to the prosecution files and the
4 police files having been destroyed, did that
02:38 5 concern you?

6 A Umm, no, it didn't particularly concern me. Each
7 province has a different regime for dealing with
8 its files. Police forces generally don't keep
9 things indefinitely, they destroy files on a
02:38 10 routine basis.

11 Q 004537. This is an October 17th, '91 article, I
12 believe, and I stand to be corrected, I think this
13 is the first reference to the completion of the
14 Boyd/Rossmo report, and it was completed in
02:39 15 October. It talks about:

16 "Neil Boyd, professor of
17 criminology ... that 'based on the best
18 available evidence, it would appear that
19 David Milgaard did not murder Gail
02:39 20 Miller.'"

21 Did you become aware, at some point, of the
22 Boyd/Rossmo report or the report by these people?

23 A Umm, yes. I don't know whether that was through
24 the news media or once the reference began, but
02:39 25 yes, we became aware of that.



1 Q And I think there was a video prepared by
2 Mr. Rossmo at some point as well; is that correct?

3 A Umm, I believe there -- yes, I think they created
4 that.

02:39 5 Q And what is your recollection, then, of the
6 Boyd/Rossmo report, if I can call it that; where
7 did that fit in as far as Saskatchewan Justice and
8 information it received on the matter?

9 A Well, when we ultimately looked at it, basically
02:40 10 it comes down to "well that's their take on the
11 evidence, that's their opinion", we didn't share
12 it, and ultimately the Supreme Court didn't share
13 it.

14 Q Did you have any concerns about the manner in
02:40 15 which they went about their work?

16 A Well I -- there were certainly portions of it that
17 I thought were pretty light on real evidence and
18 heavy on speculation.

19 Q If we can scroll down, there is a reference here
02:40 20 to it being -- scroll down a bit further, an:

21 "'... independent voice that concludes
22 on the totality of the evidence that
23 David Milgaard is suffering from a
24 miscarriage of justice,' ..."

02:40 25 Did the Saskatchewan Justice view the Boyd/Rossmo



1 report as an independent report?

2 A I suppose we viewed them as independent, yes.

3 Q It's a quarter to 3:00, perhaps an appropriate
4 spot to break, Mr. Commissioner?

02:41 5 COMMISSIONER MacCALLUM: Okay.

6 (Adjourned at 2:41 p.m.)

7 (Reconvened at 3:02 p.m.)

8 BY MR. HODSON:

9 Q If we can call up 160129, please. A couple of
03:03 10 articles here, I'm wondering if they might refresh
11 your memory. They talk about -- so this would be
12 about three weeks before the decision -- and a
13 comment about Mr. Wolch and Mr. Asper meeting with
14 federal officials. Do you know if -- do you
03:03 15 recall being in any meetings with federal
16 officials and either Mr. Wolch or Mr. Asper in the
17 month or so leading up to the reference being
18 announced?

19 A I certainly wasn't. I don't recall anyone from
03:03 20 Saskatchewan being involved in that.

21 Q And 160125. And I think this is one that talks
22 about a Remembrance Day meeting in Ottawa, and I
23 think we've heard some other evidence, perhaps
24 from Mr. Asper, on that, that there was a meeting
03:04 25 about discussions. And is it your recollection,



1 then, that that -- that Saskatchewan Justice would
2 not have been in attendance at that meeting?

3 A That's my recollection, yes.

4 Q Go to 004320. This is a document I think from
03:04 5 Federal Justice, and I'm not sure if we'll hear
6 from Mr. Williams on this document or not but I
7 think it's there, it's a set of draft questions.
8 And I will get to the actual order in a moment,
9 and this is a draft question that talks about
03:04 10 whether or not -- or refers to the Nichol John
11 evidence and then, as well, I think there's one
12 later on about the Larry Fisher evidence. Do you
13 have a recollection of being given draft terms of
14 reference, or you had mentioned earlier that the
03:05 15 initial questions were fairly narrow?

16 A I don't recall specifically getting drafts, I may
17 have seen them, I don't recall it. I do recall
18 that there were discussions between myself and
19 Ellen Gunn with respect to the issue of broad
03:05 20 questions, narrow questions, focused issues or
21 just something more general.

22 Q And I believe there is a document, it's discussed
23 in here but there may be another one as well, that
24 focused on two questions, two possible questions;
03:05 25 one is advice to the federal minister about how to



1 deal with Nichol John's evidence and her memory
2 issues from '91; and secondly, what to do with the
3 Larry Fisher information, as being two questions
4 to be put to the Court; do you have a recollection
03:05 5 of that being --

6 A I -- yes.

7 Q -- advanced at least as a possibility?

8 A That's what I am referring to when I say they were
9 sort of issue-focused questions that were very
03:06 10 narrow and we thought should be -- it should be a
11 much broader reference.

12 Q And would that have been something, then, that
13 Saskatchewan Justice communicated to Federal
14 Justice?

03:06 15 A Yes, we gave them that information.

16 Q 004353. This is a fax from Mr. MacFarlane to you
17 with a copy of the Privy Council order on the next
18 page. Just maybe go to the next page. And can
19 you tell us, apart from discussions that you may
03:06 20 have had or Saskatchewan Justice may have had with
21 Federal Justice officials, did you or Saskatchewan
22 Justice take any other role in the formal drafting
23 of this order?

24 A I certainly didn't, umm, I don't recall Ellen Gunn
03:07 25 being involved in specifically drafting that



1 document.

2 Q And as far as sending the matter to the Supreme
3 Court, and you've touched on this earlier, was
4 that something you had discussions with federal
03:07 5 officials about?

6 A Yes. We knew, before the order came out, that it
7 was going to be referred to the Supreme Court of
8 Canada.

9 Q And apart from the Saskatchewan Court of Appeal do
03:07 10 you recall any discussions or considering whether
11 it could be sent to another provincial Court of
12 Appeal?

13 A There were some discussions with respect to that
14 but nobody could see sort of how you would get a
03:07 15 case from Saskatchewan, say, into the Manitoba or
16 Ontario Court of Appeal, or for that matter, that
17 they would likely be inclined to want to take that
18 on.

19 Q And is it correct to say that, from a legal
03:07 20 standpoint, there wasn't a mechanism to get a
21 reference case?

22 A That's my understanding, what -- what was
23 eventually decided.

24 Q And then one of the preambles in the order is
03:08 25 that:



1 "Whereas there exists
2 widespread concern whether there was a
3 miscarriage of justice in the conviction
4 of David Milgaard and it is in the
03:08 5 public interest that the matter be
6 inquired into;",

7 was that a sentiment that Saskatchewan Justice
8 shared?

9 A Absolutely, yes.

03:08 10 Q Go to the next page. And the two reference
11 questions, the second one is the remedial action,
12 but the first one is considering:

13 "... the judicial record, the Reference
14 Case that will be filed before this
03:08 15 Court, and such further or other
16 evidence as the Court, in its
17 discretion, may receive and consider,
18 does the continued conviction of David
19 Milgaard in Saskatoon, Saskatchewan for
03:08 20 the murder of Gail Miller, in the
21 opinion of the Court, constitute a
22 miscarriage of justice?"

23 And, again from the perspective of Saskatchewan
24 Justice, was that as broad as you could get or a
03:09 25 broad enough question for the Court?



1 A Yes. Essentially, we wanted the issue of the
2 continued conviction and the miscarriage of
3 justice put together, so that it could be as broad
4 as possible.

03:09 5 Q You mentioned, last week, that at some point
6 Saskatchewan Justice was advised by Federal
7 Justice that you would have to, Saskatchewan
8 Justice would have to participate in the
9 reference; is that correct?

03:09 10 A Yes.

11 Q Was that before or after this order was made; do
12 you recall?

13 A I believe Ellen Gunn said I was it before the
14 order was actually published.

03:09 15 Q And meaning that you would be involved on behalf
16 of --

17 A I would be involved, yes.

18 Q And when and how did you learn about the role that
19 Saskatchewan Justice would have to play in the
03:09 20 reference?

21 A Well, ultimately that didn't sort of settle down
22 entirely until the end of February and after we
23 had been to the Supreme Court several times, it
24 wasn't until then that the Court actually decided
03:10 25 what we were expected to do. But earlier on in



1 December or in November when this came out, it was
2 essentially that we were going to be advocating
3 the case against David Milgaard, and Mr. Wolch/Mr.
4 Asper would be advocating the case for him.

03:10 5 Q With respect to whether or not a miscarriage of
6 justice had occurred or the continued conviction
7 would constitute a miscarriage of justice?

8 A That's right, yes.

9 Q And so you were -- you were told then that you
03:10 10 would be the adversary of Mr. Milgaard before the
11 Supreme Court?

12 A Essentially, yeah.

13 Q And who told you that?

14 A That would have been Ellen Gunn.

03:10 15 Q But who told -- who told Saskatchewan Justice?

16 A Oh, Federal Justice I believe decided to follow
17 the precedent of the Steven Truscott hearing
18 before the Supreme Court some 20 odd years earlier
19 and I believe in that hearing in Ontario, the
03:11 20 Ontario Department of Justice had argued the
21 contrary case.

22 Q Did you have, and when I say you I mean
23 Saskatchewan Justice, and if there's a difference
24 between your view and Saskatchewan Justice, please
03:11 25 tell me, did you have a concern about the Attorney



1 General for Saskatchewan being placed in an
2 adversarial position with Mr. Milgaard given the
3 Attorney General's involvement in the original
4 prosecution?

03:11 5 A Well, I had a concern about the Attorney General
6 of Saskatchewan being involved in the Supreme
7 Court at all simply because we were part of what
8 was being investigated. There had been
9 allegations by the Milgaards that there had been
03:12 10 cover-up and essentially corruption within the
11 Department of Justice in Saskatchewan and it
12 seemed to me that the more appropriate way to go
13 after that was via somebody independent inquiring
14 into it and not us being involved in the hearings,
03:12 15 but I was overruled on that.

16 Q By the feds or internal, by --

17 A Internally.

18 Q Internally. So your concern was that you didn't
19 think Saskatchewan Justice should be involved at
03:12 20 all, but ultimately the decision was made to
21 accept the invitation to attend?

22 A Yes.

23 Q Did you have concerns about the position it would
24 put the Saskatchewan Attorney General in in the
03:12 25 eyes of the public given what had gone on before,



1 or had preceded this?

2 A Well, yes, I mean, that was my concern, is that
3 there had been allegations of misconduct by people
4 who had been with Saskatchewan Justice and now you
03:13 5 have Saskatchewan Justice essentially going to
6 court to argue their case and say no, no, there
7 was no problem there. It should have been -- in
8 my view it should have been a more neutral kind of
9 matter.

03:13 10 Q And then what did you -- and I appreciate your
11 comment about what happened at the end of
12 February, and I'll go through that in some detail
13 with you, but going into the reference case then,
14 can you describe for us, what was your
03:13 15 understanding then of the role that Saskatchewan
16 Justice was playing vis-a-vis David Milgaard, was
17 it a true adversary?

18 A Well, my view, and certainly Eric Neufeld's view
19 at the time that we were first preparing to go to
03:13 20 the Supreme Court, was that in all likelihood Mr.
21 Wolch and Mr. Asper would put up the evidence they
22 had of, that they thought provided Mr. Milgaard
23 with some avenue for recourse and we would be
24 there essentially to test it with
03:14 25 cross-examination.



1 Q And did you consider a situation where you and/or
2 Mr. Neufeld might become convinced that there was
3 evidence of a miscarriage of justice and how you
4 would deal with that given the role you were asked
03:14 5 to take?

6 A Well, actually, Ellen Gunn and I discussed that
7 issue shortly before she was appointed to the
8 bench and her advice, and I agreed with it
9 completely, was that if at some point we became
03:14 10 convinced that there should be an order for a new
11 trial, that we should inform the federal officials
12 immediately of that.

13 Q And are you -- if you became -- what would cause
14 you to be of that view then, can you give us some
03:15 15 idea?

16 A Well, I mean, suppose Ron Wilson had taken the
17 stand and been an extremely credible witness when
18 he recanted what he had said and been able to
19 specifically say, well, the police did this, this,
03:15 20 this and this to scare me into giving a statement,
21 if he had done that, that would have caused some
22 concern.

23 Q And so notwithstanding the fact that you were
24 asked to be the adversary or the -- the adversary
03:15 25 to argue the other side of the miscarriage of



1 justice, did you believe then that you had some
2 discretion, or that if you concluded there was a
3 miscarriage of justice, you were free to take that
4 position?

03:15 5 A Yes. Well, I don't know that the federal
6 government ever saw it that way, but that's the
7 view that I thought we had to take. I spoke to
8 Ellen Gunn about it and she agreed that that was
9 what we should be doing.

03:15 10 Q And why do you say you are not sure if that's the
11 view Federal Justice --

12 A Well, I think the federal government thought we
13 were there more in a sort of traditional advocacy
14 role, and that is that we would advocate one side.

03:16 15 Q Is it fair to say that in your role as being a
16 participant in the Supreme Court reference,
17 namely, as you said, to be asked to participate,
18 the Attorney General would also have another, I
19 guess another obligation as the Attorney General
03:16 20 for Saskatchewan; in other words, that as a
21 litigant, if you became aware of information that
22 suggested to you or to the Attorney General that
23 there was a miscarriage of justice, that
24 notwithstanding the role you had in court, you
03:16 25 might have other responsibilities? Is that a fair



1 way to put it?

2 A Yes, yes.

3 Q And so is it also fair to characterize, and let's
4 talk about Saskatchewan Justice or the Attorney
03:16 5 General before the Supreme Court, is it fair to
6 say that in the course of that reference
7 proceeding, Saskatchewan Justice, through you and
8 Mr. Neufeld and others, received a significant
9 amount of information relevant to the issue of
03:17 10 re-opening the investigation into the death of
11 Gail Miller?

12 A Yes.

13 Q And, namely, the significant volumes of
14 documentary evidence that was filed in the case on
03:17 15 reference?

16 A That's right.

17 Q Other information that came to Saskatchewan
18 Justice in the course of your preparations, I
19 think primarily from Federal Justice officials; is
03:17 20 that correct?

21 A Yes.

22 Q Saskatoon police files, the prosecutor file?

23 A I had certainly the prosecutor file before that.

24 Q Okay.

03:17 25 A The police file, we would likely -- to the extent



1 we had materials off that, we would have got that
2 from the reference.

3 Q And as well you had an opportunity to hear the
4 evidence of a number of witnesses before the
03:17 5 Supreme Court and to examine I think most of them;
6 is that correct?

7 A That's correct.

8 Q And so is it correct to say that as counsel
9 participating in the reference case, as counsel
03:18 10 for the Attorney General of Saskatchewan, you also
11 had the dual role of being the recipients of
12 information on behalf of Saskatchewan Justice that
13 might be relevant to the re-opening of Gail
14 Miller's -- the investigation of Gail Miller's
03:18 15 death?

16 A Yes.

17 Q And so if in the course of the Supreme Court
18 reference you became aware of information that
19 separate and apart from any Supreme Court
03:18 20 reference or Section 690 proceeding would have
21 been the type of information that the Attorney
22 General for Saskatchewan would otherwise act upon,
23 then you felt that you were free to do so?

24 A Yes.

03:18 25 Q And would you also agree that by participating in



1 the Supreme Court reference, Saskatchewan Justice,
2 or the Attorney General was put in the position of
3 receiving a significant volume of information?

4 A Oh, yes.

03:18 5 Q That related to the issue of the investigation
6 into Gail Miller's death?

7 A Yes.

8 Q If we can just go back to this term "miscarriage
9 of justice". Can you give us some examples of
03:19 10 what -- what was your understanding of this term
11 "miscarriage of justice" and what might, at least
12 from Saskatchewan Justice's perspective, what are
13 the types of things that David Milgaard could
14 prove or put forward that would, in your view,
03:19 15 constitute a miscarriage of justice?

16 A Well, I suppose there's two things, there's the
17 process issue, if he could have shown that some
18 aspect of the process involved in investigating or
19 trying him had been flawed or there had been some
03:19 20 serious misconduct by somebody, that would be one
21 issue. If he was able to demonstrate that
22 specifically -- for example, there was an
23 allegation that Ron Wilson and Nichol John were
24 coerced by police into giving the statements they
03:20 25 did. If they had been able to demonstrate that,



1 that would certainly have been an issue that would
2 result in a miscarriage of justice.

3 Q Okay. Any other examples?

4 A Well, you know, the Deborah Hall thing, if in fact
03:20 5 the motel room incident didn't happen, I think
6 that would certainly amount to evidence that there
7 had been a miscarriage of justice because, in my
8 view, that was very powerful evidence.

9 Q And so when you talked about process and the
03:20 10 miscarriage of justice, do I have that right, that
11 quite separate and apart from establishing
12 innocence, that there could be circumstances where
13 the process that resulted in the conviction could
14 be flawed that would give rise to a miscarriage of
03:20 15 justice notwithstanding the fact that Mr. Milgaard
16 may not be able to establish his innocence?

17 A Yes. If, for example, you could show that some of
18 the jurors were bribed or improperly influenced,
19 that's certainly a basis upon which you would want
03:21 20 to redo the proceedings.

21 Q And so --

22 A Although let me just add one thing, redo the
23 proceedings in this case subject to consideration
24 of the fact that David Milgaard had already spent
03:21 25 22 years in jail which is more than most people



1 spent in jail for that kind of crime.

2 **Q** And so how would that be a factor then?

3 **A** Well, you don't just look at whether there's
4 evidence upon which you can prosecute, you look at
03:21 5 whether it's in the public interest to do so, and
6 whether it's in the public interest to prosecute
7 David Milgaard again and potentially get him
8 sentenced to another life sentence, I think that
9 has to be weighed in the balance, particularly
03:21 10 when you look at the fact that in 1989, if he had
11 committed that offence then, he would have been a
12 young offender and got, what, three years in jail.

13 **Q** Okay. So again, you gave an example as well of
14 police misconduct I think in how they treated
03:22 15 Wilson and John in getting their evidence, and you
16 said that could be --

17 **A** Yes, if Mr. Wilson's allegations, or if he had
18 been able to substantiate his allegations that the
19 police had mistreated him or the suggestion that
03:22 20 Mr. Cadrain had made, or somebody made on his
21 behalf that he was tortured, if those had been
22 shown to be true, that of course is pretty serious
23 misconduct.

24 **Q** What about the allegation that had been made in
03:22 25 August of 1991 of a frame and a cover-up, is that



1 the type of thing in your view --

2 A Well, yes, if you can come up with any kind of
3 information to suggest that justice officials
4 immediately recognized in October or November of
03:22 5 1970 that Larry Fisher had to have been the one
6 guilty of this crime and covered it up, that too
7 is something that merits careful attention.

8 Q In your view, sir, the allegations that had been
9 made up to November, 1991 relating to the case,
03:23 10 whether it be in the media, to Saskatchewan
11 Justice, I'm thinking of the August 8th letter, or
12 to Federal Justice, was it your view that all of
13 those allegations were fair game in this
14 reference; in other words, that would be or could
03:23 15 be considered by the court as constituting a
16 miscarriage of justice?

17 A The wording in the reference "continued
18 conviction" didn't happen by accident. We wanted
19 that term in there because we wanted to look at
03:23 20 not just what happened up to the point where he
21 was convicted, but everything that had happened
22 since, including the issue of whether there had
23 been some kind of conspiracy to cover up his, the
24 fact that we knew he was innocent.

03:24 25 Q And so that would be the 1970, '71 Larry Fisher



1 matter?

2 A Yes.

3 Q And was it your understanding then that this
4 wording was intended to have that issue addressed
03:24 5 by the Supreme Court?

6 A Yes. My recollection is that we were concerned
7 that if it simply said the conviction of, --

8 Q Yes.

9 A -- that that would sort of take you up to the end
03:24 10 of, what was it, January of 1970 when he was
11 convicted and stop it there, and we thought that
12 given that they had raised the issue of Larry
13 Fisher and the Linda Fisher statement and all of
14 that, that that had to be part of the reference.

03:24 15 Q And what about Crown misconduct, Crown prosecutor
16 misconduct, is that something that would, in your
17 view, could constitute or would constitute a
18 miscarriage of justice?

19 A Absolutely, yes.

03:24 20 Q So the issue of Crown disclosure in the course of
21 the trial, would that be something that would or
22 could constitute a miscarriage of justice?

23 A Yes.

24 Q And disclosure after the trial and, in particular,
03:25 25 the October, 1970, 1971 time period, was that a



1 matter that in your view was intended to be and
2 included in this wording?

3 A Everything that had been alleged to have been
4 improper was included in that, and of course one
03:25 5 of their allegations was that as soon as we became
6 aware of Larry Fisher, the justice officials
7 should have made the connection, or did make the
8 connection and then attempted to cover up on it,
9 so yes, it was all there.

03:25 10 Q And was it the desire of Saskatchewan Justice then
11 to have all of the allegations in the media and
12 made directly to Federal Justice and Saskatchewan
13 Justice part of this reference case?

14 A Yes. There wouldn't have been any point in having
03:26 15 a reference if all of these things weren't dealt
16 with.

17 Q And why is that?

18 A Well, what would be the point of going through the
19 process in the Supreme Court if only half the
03:26 20 allegations were dealt with and half were left
21 outstanding for the Milgaards to argue that, well,
22 you didn't deal with this or you haven't dealt
23 with that.

24 Q Did you become aware, after the Supreme Court
03:26 25 released its decision on April 14, 1992, of



1 suggestions made on behalf of David Milgaard, that
2 the Supreme Court reference was limited and was
3 not broad enough to cover a number of allegations,
4 in particular, police misconduct and Crown
03:26 5 misconduct?

6 A Yes.

7 Q And what is your response to those allegations?

8 A If there had been evidence of that, there was no
9 reason it couldn't have been presented to the
03:26 10 court, none whatsoever.

11 Q You talked about process and miscarriage of
12 justice. By this time would you have been aware
13 of I guess the allegation that -- let's talk about
14 the Larry Fisher information, the October, 1970
03:27 15 confession and the subsequent dealings. Had you
16 looked at the question of whether or not there had
17 been any, or had considered whether or not there
18 had been any breach by the Crown, and let me refer
19 to the Crown broadly, not by any individual, but
03:27 20 by the Attorney General of Saskatchewan with
21 respect to the non-disclosure of that Larry Fisher
22 information to David Milgaard's counsel before the
23 conclusion of his proceedings which I think ended
24 up in January of 1971 when the Supreme Court
03:27 25 dismissed his leave application?



1 A Well, we did. The difficulty with the notion that
2 those should have immediately been disclosed is
3 first of all somebody has to be aware that this
4 somehow connects to the Milgaard case and, second,
03:28 5 you have to be of the view that it has some impact
6 or potential impact or some use, and our view was
7 that nobody would reasonably connect the Larry
8 Fisher case to the David Milgaard case,
9 particularly in light of the fact that certainly
03:28 10 in 1971 you still had Ron Wilson's evidence as it
11 was, you had Nichol John's statement to the police
12 as it was, you had the Melnyk and Lapchuk evidence
13 as it was and no reason to believe that they had
14 lied when they reported what they did, so it would
03:28 15 be difficult to sort of see the nebulous Larry
16 Fisher evidence as being of a sufficient substance
17 as to call into question the Milgaard conviction.

18 Q And so that if someone had made the connection
19 prior to the -- I'm going to talk about the
03:29 20 conclusion of David Milgaard's proceedings and I'm
21 referring to when the Supreme Court I think
22 disposed of it, I believe it was January of 1971
23 if I'm not mistaken, but if someone with the
24 Attorney General's office or indeed the police had
03:29 25 made the connection between the Fisher rapes and



1 the Gail Miller murder, some connection that said
2 maybe Larry Fisher is involved in that, and that
3 was known but not disclosed, can you comment on
4 whether that would have been viewed by
03:29 5 Saskatchewan Justice as a miscarriage of justice?

6 A Given the nature of the evidence in both the
7 Milgaard trial and the Fisher evidence, I don't
8 think we would have viewed that as a potential
9 miscarriage of justice. Now, having said that,
03:30 10 certainly today, following *Stinchcombe* and *Egger*
11 and a few other decisions out of the Supreme
12 Court, I think we would have had an obligation to
13 turn that evidence over simply because it's
14 relevant, you don't bother weighing whether it's
03:30 15 useful or might be of some assistance, you simply
16 turn it over and let defence counsel make of it
17 what they will.

18 Q And just to draw a finer point, if at the time,
19 back in October of 1970 or thereabouts the Crown
03:30 20 had become aware, or pardon me, had connected
21 Larry Fisher and his rapes in some way to the Gail
22 Miller murder, are you telling us that based upon
23 the law at the time regarding disclosure, there
24 may not have been an obligation to disclose that
03:31 25 to Mr. Milgaard's counsel?



1 A I think under *Boucher*, if we had thought that it
2 was of sufficient import that it might be useful
3 to the defence, you would disclose it, or you
4 would have an obligation to disclose it, because
03:31 5 of course as a prosecutor, you disclose evidence
6 that is likely to show somebody is innocent.

7 Q So again in looking back at this, and we're
8 talking in 1991, I think you told us that you
9 concluded that no one had made the connection
03:31 10 between the Fisher rapes, or Larry Fisher and Gail
11 Miller; is that correct?

12 A That's correct, yes.

13 Q So I just went through the examples of if you had
14 concluded that someone had made the connection,
03:31 15 what you would have viewed as a miscarriage of
16 justice, or potentially, the fact that you
17 concluded no one had made the connection, was the
18 fact that the information existed, and at least
19 according to Mr. Tallis he didn't know about it,
03:32 20 can you comment on whether and how you considered
21 whether that might give rise to a miscarriage of
22 justice?

23 A Well, at that stage, if you are looking at setting
24 aside a conviction, you want more than just
03:32 25 evidence that might be relevant, you want evidence



1 that is likely to tip the balance in my view.

2 **Q** Now --

3 **A** And our assessment of that evidence was that it
4 wasn't likely to tip the balance.

03:32 5 **Q** When you talk about tipping the balance, would
6 there be -- are you talking about -- let me put a
7 couple --

8 **A** Probable innocence.

9 **Q** Okay. So that, number one, tipping the balance
03:32 10 and that the information relating to the Larry
11 Fisher crimes would be of sufficiency (sic) to tip
12 the balance and say that David Milgaard is
13 probably innocent?

14 **A** Yes.

03:33 15 **Q** And did that then require you, or when you looked
16 at it, to find something in the case against David
17 Milgaard that you could undo? In other words, if
18 the case against --

19 **A** Well, that certainly makes it easier to see the
03:33 20 balance tipping, but I don't know that you
21 necessarily have to undo everything, anything in
22 particular, but suppose you had had, for the sake
23 of argument, the Ron Wilson and Nichol John
24 evidence basically withdrawn -- well, the problem
03:33 25 there is of course if that evidence is withdrawn,



1 then you don't need the Fisher evidence, you've
2 got enough right there, but --

3 Q Let me put it to you this way. If the evidence in
4 1991 had been the exact same as the jury heard it
03:33 5 in 1970 and you are looking at the new Fisher
6 information --

7 A Well, no, and that's the way we considered it.
8 Given what was heard in 1970 at David Milgaard's
9 trial, you now have the evidence of the Larry
03:34 10 Fisher rapes, would it have been appropriate to
11 disclose that or would it have been necessary to
12 disclose that to Justice Tallis, and our view was
13 no, it wasn't of sufficient probative value that
14 it would have done him any good.

03:34 15 Q And is that because your view was that the jury
16 would have reached the same conclusion even if
17 they would have heard the evidence?

18 A Yes.

19 Q What about the suggestion that Mr. Milgaard was
03:34 20 deprived the opportunity to put that information
21 before the jury, or at least before the Court of
22 Appeal on a fresh evidence application?

23 A I mean, yes, that's an argument that comes up on
24 every fresh evidence application, is that I didn't
03:34 25 get the opportunity to raise this, but even on



1 fresh evidence applications, it's my experience
2 you've got to go a little further than simply
3 saying, well, this might raise a reasonable doubt.
4 All kinds of things might raise a reasonable
03:35 5 doubt. I mean, I know the wording in the Supreme
6 Court decision is a little different than that,
7 but practically speaking, if you are going to an
8 appellate court with fresh evidence, it has to be
9 something that has some real substance to it, and
03:35 10 our view was Larry Fisher's evidence didn't have
11 any substance to it, particularly when you looked
12 at the other evidence.

13 Q And was it your view and understanding then that
14 these issues we've just, you and I have just
03:35 15 canvassed about the extent to which Larry Fisher's
16 apprehension in 1970 and the manner in which the
17 Attorney General dealt with, and the Saskatoon
18 police dealt with Larry Fisher and his charges in
19 1970 and '71, was it your view and understanding
03:35 20 that all of those issues, or any issues that arose
21 out of that would be dealt with by the Supreme
22 Court in the reference?

23 A Yes.

24 Q If we can go to 228948, and this is just a
03:36 25 newspaper article that talks about the scope of



1 this, and this is an article by Dan Lett, and at
2 least the comment here is that, and this is after
3 the reference is ordered, that the reference would
4 allow the court to, number one:

03:36 5 "Examine claims by Centurion

6 Ministries, a non-profit American

7 organization that specializes in

8 attempting to free convicted people,

9 that serial rapist Larry Fisher is a

03:36 10 more likely suspect."

11 Again, was that something that you viewed as
12 being appropriately within the scope of the terms
13 of reference?

14 A Well, the evidence that Centurion Ministries may
03:37 15 have come up with would be. Their opinions are of
16 no real interest.

17 Q So let's talk about evidence. Certainly if
18 evidence existed to support the allegation, that
19 that evidence in your view would have been
03:37 20 relevant to what the Supreme Court was looking at
21 in the reference case?

22 A Yes.

23 Q And in particular the allegation that David
24 Milgaard was framed and police and Saskatchewan
03:37 25 Justice officials took deliberate steps to cover



1 it up, again, subject to your qualification that
2 there be evidence, that evidence of that would
3 have been, in your view, properly before the
4 Supreme Court in the reference case?

03:37 5 A Absolutely.

6 Q The article talks about the missing Saskatoon
7 police files and we've heard a fair bit of
8 evidence about that, and was that something that
9 you felt would be appropriate evidence before the
03:37 10 Supreme Court in light of the terms of reference?

11 A Well, if it was being introduced to support the
12 cover-up aspect, yes. If it was being introduced
13 simply as a matter of looking at how the Saskatoon
14 Police Service did business on a day to day, I
03:38 15 don't know that that was all that relevant.

16 Q Was there a distinction then, and we'll see this a
17 bit later in one interview, between this idea that
18 the reference -- would you agree that the Supreme
19 Court reference was broad enough to inquire into
03:38 20 police, certain police misconduct or alleged
21 police misconduct in how they dealt with witnesses
22 in the David Milgaard matter?

23 A Yes. I don't think the Supreme Court -- well, the
24 Supreme Court wasn't happy to see us at the best
03:38 25 of times, they --



1 Q Why do you say that?

2 A Well, they were not very happy with the federal
3 government suddenly thrusting this into their
4 calendar. I think the Chief Justice made it
03:38 5 fairly clear that he thought the federal
6 government had mishandled the whole process and
7 this was why the Supreme Court was being asked to
8 bail them out, but that notwithstanding, they were
9 prepared to hear whatever evidence there was of,
03:39 10 to support any claim of miscarriage of justice
11 subject to the notion that they were not
12 especially interested in going over how the
13 Saskatchewan Justice department was set up or how
14 the Saskatoon police were set up or how we
03:39 15 operated in those days.

16 Q And so just on that point, systemic issues about
17 how the police investigate crimes would be
18 something that maybe would be outside the scope?

19 A No, they were interested in how they investigated
03:39 20 this specific crime.

21 Q Okay. Your comments about the court's reaction to
22 becoming involved in this matter, can you --
23 what's the source of that information, how did you
24 become aware of the court's displeasure?

03:39 25 A We had a meeting early on with the Chief Justice



1 and the Chief Justice made a couple of comments,
2 as I recall, that indicated that he wasn't happy
3 this was in the Supreme Court and he thought the
4 reason it was there was the Federal Minister
03:40 5 needed to be bailed out.

6 Q If we can go to 077760. And this is a November
7 30, 1991 article, *Province to play 'major role' in*
8 *Milgaard review*, and this quotes Mr. Wolch saying:

9 "You can't just walk in (to
03:40 10 the Supreme Court), have a love-in and
11 say 'we all agree David is innocent',"
12 Wolch told the *StarPhoenix* Friday.

13 Somebody will have to say:
14 'No, David is guilty.'

03:40 15 'And that will undoubtedly
16 have to be Saskatchewan.'

17 The provincial department
18 will play a 'major role' in the review,
19 agrees Murray Brown, the department's
03:41 20 director of appeals.

21 'It's pretty much up to the
22 chief justice (of the Supreme Court) and
23 his colleagues how they want to handle
24 it,' Brown said in an interview Friday.

25 Because Saskatchewan had



1 jurisdiction for the original trial, 'I
2 would assume we would continue to have
3 some major role in the matter, but
4 beyond that I can't even tell you what
03:41 5 role that is going to be,' ..."

6 And, again, that -- this is November 30th; would
7 that be an accurate statement at the time?

8 A Yes, that was correct.

9 Q And it appears, here, that certainly Mr. Wolch is
03:41 10 expressing a public view that he anticipates
11 Saskatchewan will be an adversary in the Court; is
12 that a fair comment? I mean, did you come to know
13 that he took that view?

14 A Well I suspect, at that point, we thought that's
03:41 15 probably what we were going to be doing too.

16 Q Did you have any concern expressed to you by
17 counsel for David Milgaard about the role
18 Saskatchewan Justice was being asked to play in
19 the Supreme Court reference?

03:41 20 A I don't recall anything like that.

21 Q There is also a comment here, if we can just
22 scroll over, the issue of bail came up, and there
23 is a number of articles here, I don't propose to
24 go through any of them, but can you tell us; do
03:42 25 you recall this issue of bail coming up at this



1 time? And I can show you some later articles, if
2 you want, but I think you commented on this issue?

3 A Yes, there was some issue of bail pending the
4 appeal, but it was my view that, on the basis of a
03:42 5 reference, there really wasn't a statutory
6 provision allowing for bail.

7 Q And I think that's reflected in the later
8 articles, you comment that there is no legal basis
9 for anybody, that bail is statutory and there is
03:42 10 no basis for any Court to grant bail to David
11 Milgaard pending the review; is that correct?

12 A That's correct.

13 Q And did that become an issue in the public as well
14 as to why, I think there was some articles where
03:42 15 Mr. Milgaard's counsel indicated that he is
16 seeking bail, and that you were asked to comment;
17 do you recall that?

18 A I recall that there were some articles. I, at
19 this stage, I don't recall that being a major kind
03:43 20 of issue that --

21 Q Okay.

22 A -- arose at that time.

23 Q If we can go to 042956. This is a December 5,
24 1991 memo -- if we can go to page 958 -- prepared
03:43 25 by Murray Brown. And I think this, if we can just



1 go back to the first page, it's dealing with I
2 think Mr. Kujawa's involvement in 1971 and the
3 role the Premier may have had. And if we can move
4 down a bit and go through parts of this, it
03:43 5 appears that this memo would be your sort of
6 summary of what you concluded at the time about
7 Mr. Kujawa and Mr. Romanow's involvement back in
8 '71; is that correct?

9 A That's correct, yes. At that point Serge Kujawa,
03:44 10 of course, was a Member of the Legislature, the
11 NDP had just been elected to government, and Roy
12 Romanow, the Attorney General during the 1970s,
13 was now the Premier, so there were some concerns
14 that the Attorney General, Bob Mitchell, had with
03:44 15 respect to what roles either of them may have had
16 in this matter.

17 Q And is it fair to say that, based on your review
18 of the file and the knowledge you had, you would
19 have put together this summary of what you
03:44 20 believed their involvement was?

21 A Yes.

22 Q And scroll down. Go to the next page. There is a
23 comment here, it talks a bit about the history,
24 but then it says:

03:44 25 "None of the existing 'new evidence' was



1 known until 1988."

2 Is it fair to infer that that relates to the
3 first application to the federal minister under
4 section 690?

03:45 5 A Yes.

6 Q And then, if we can just scroll down, there is a
7 comment here that says -- I think it relates to
8 whether or not the department had given the
9 federal minister advice. You say:

03:45 10 "First, they have not ask for any advice
11 with respect to the first application
12 decided in February of this year. This
13 summer when the second application was
14 launched, there was an invitation
03:45 15 extended to us to comment on what we
16 thought about it. At that time Mr. Lane
17 decided not to become involved and later
18 Mr. Schmidt chose the same course of
19 action."

03:45 20 And those both would have been ministers under
21 the previous government; is that correct?

22 A That's correct, yes.

23 Q "Since then we have been asked for our
24 thoughts on the prospect of a reference
03:45 25 to the Supreme Court. It was our view,



1 given the extent of the publicity
2 generated by this case, that a reference
3 to the Supreme Court was appropriate.
4 That is the extent of the advice given
03:45 5 to date. Murray Brown of our Department
6 is going to Ottawa next week to discuss
7 the process to be followed and may at
8 that time be asked for his advice on
9 procedural matters relating to the
03:46 10 hearing in the Supreme Court."

11 Is that accurate?

12 A Yes.

13 Q And then we'll go on, I won't read all this, but
14 this deals, question d) related to the
03:46 15 department's role in the prosecution of Larry
16 Fisher. So it goes to give a bit of a history.
17 Then, on the next page, you talk about:

18 "... Winnipeg lawyer, Lawrence
19 Greenberg, contacted the Attorney
03:46 20 General expressing that wish and the
21 letter was sent to Mr. Kujawa to deal
22 with. At this point the matter was
23 delayed for some time for reasons that
24 are not clear from what there is on the
03:46 25 file. I suspect what happened is that



1 it simply sat on Mr. Kujawa's desk
2 because, with thirteen years of
3 incarceration facing him, Mr. Fisher was
4 not going anywhere very quickly.
03:46 5 Eventually, a direct indictment signed
6 by the acting Attorney General Allan
7 Blakeney was obtained by Mr. Kujawa. A
8 direct indictment was needed because at
9 that time, the only Court that could
03:46 10 deal with a rape trial or guilty plea
11 was the Court of Queen's Bench. If no
12 direct indictment was used it meant that
13 at the very least, Mr. Fisher would have
14 to be taken before a Provincial Court to
03:47 15 consent to his committal to the Queen's
16 Bench Court for the guilty plea. For
17 the sake of expedience, a direct
18 indictment was used to get Mr. Fisher to
19 the Queen's Bench Court for his guilty
03:47 20 plea. The matter was handled in a
21 Regina court because Mr. Kujawa's office
22 had been the only office of this
23 department that had handled anything to
24 do with this matter. The Saskatoon
03:47 25 prosecutor's office had never been



1 involved. Given that Mr. Kujawa's
2 office had dealt with this matter
3 throughout, that the direct indictment
4 had to come from here and that
03:47 5 Mr. Greenberg found it more convenient
6 to come to Regina than to go to
7 Saskatoon, the matter was handled here."

8 And would that be an accurate summary, then, of
9 what you learned from the file and your review at
03:47 10 the time?

11 A From the file, from talking to Mr. Kujawa. I
12 don't know that I talked to Lawrence Greenberg,
13 but I got the information that he found it more
14 convenient to come to Regina than Saskatoon from
03:47 15 somebody who did talk to him. I know, I'm
16 confident I didn't talk to Lawrence Greenberg, but
17 I'm also confident that he was the one that
18 suggested it was more convenient. Umm --

19 Q And was that someone in Saskatchewan Justice,
03:48 20 then, that had talked to him do you think?

21 A I'm thinking that it was probably Serge that would
22 have told me that, but I don't know for sure,
23 because according to the file it was ultimately
24 Ken MacKay who sort of set the process up and then
03:48 25 Serge went in and spoke to the matter.



1 Q There was a mention in one of -- in a police
2 report somewhere, and I think it was an RCMP
3 report, of Mr. Greenberg's desire and family in
4 Regina. Do you have any recollection of that
03:48 5 information, that he had family in Regina, and
6 that might have been a reason?

7 A No, I -- my only recollection is that it was more
8 convenient for him to come to Regina, and my
9 thinking at the time was that it was a lot quicker
03:48 10 to come from Winnipeg via the Trans-Canada Highway
11 to Regina than it was to go up to Saskatoon.

12 Q There was also a reference I think in some
13 reports and I think we've also heard evidence that
14 in 1971 there was an election, and Mr. Wilson is
03:49 15 not here to correct me but I think it may have
16 been in June of 1971, and the government changed
17 from the Liberals to the NDP, and Mr. Heald was
18 the Attorney General, followed by Mr. Romanow, and
19 I think there was a document in June of '71 where
03:49 20 Mr. Kujawa was seeking the direct indictment from
21 Mr. Heald, and then five months later followed up
22 with Mr. Romanow, and eventually had Mr. Blakeney
23 sign it. Do you have any recollection of looking
24 at whether or not the election and the change in
03:49 25 government was a factor in that delay that you



1 referred to in your memo?

2 A I don't know that I looked at that, but I can tell
3 you, from experience, that it certainly would be.
4 Basically, a month before the election and at
03:49 5 least six weeks after are pretty much dead times
6 for government. For the period before the
7 election, of course, everybody is out campaigning,
8 and for the period after the election you've got
9 about two weeks when the government is in the
03:50 10 process of changing, and then another four weeks
11 while new ministers sort of get settled in their
12 office, so it -- I can certainly understand that
13 delay period.

14 Q And based on your experience, then, would getting
03:50 15 an Attorney General to sign a direct indictment in
16 the month prior to an election or in that time
17 after the election be a problem?

18 A Yes.

19 Q 009084. This is a letter from the RCMP to Ms.
03:50 20 Gunn about the files and Sergeant Pearson, and do
21 you recall, I think Sergeant Pearson -- and let me
22 ask you this. Sergeant Pearson, as you know, was
23 involved in investigating Larry Fisher on the
24 first 690 application, you are aware of that I
03:51 25 think you told us, correct?



1 A Yes.

2 Q And he generated a significant file of his
3 investigation; was that something that was
4 provided to Saskatchewan Justice for the Supreme
03:51 5 Court reference?

6 A At some point we got it, yes.

7 Q And so is it fair to say that in December
8 1991/January 1992, and indeed perhaps even into
9 February and March of 1992, that Saskatchewan
03:51 10 Justice received information relating to the RCMP
11 investigation, Federal Justice investigation, the
12 Federal Justice investigation of the first
13 application?

14 A Yes.

03:51 15 Q 004312. This is a letter from Bruce MacFarlane to
16 Ellen Gunn December 6th, '91 -- if we can go to
17 the next page -- and this refers to a meeting
18 December 9th, '91 in Ottawa, I think with Mr.
19 MacFarlane and others, is that correct, --

03:52 20 A Yes.

21 Q -- to talk about the procedures? And I think, by
22 this time, had you been -- I was going to say --
23 'appointed' or 'anoointed' counsel for Saskatchewan
24 Justice to deal with these matters?

03:52 25 A That's correct, yes.



1 Q And so did you, in fact, attend the meeting and
2 deal with this matter as requested by Mr.
3 MacFarlane?

4 A Yes, I did.

03:52 5 Q Go to the next page. And I'll show you some notes
6 in a moment here, but maybe just generally, would
7 this be the agenda or the list of issues, then,
8 that were discussed at the meeting that followed
9 in Ottawa?

03:53 10 A It looks like it, yes.

11 Q And I think, from the documents, it looks like
12 there was a meeting -- maybe go to 010085 -- a
13 meeting with some of the counsel, and these are
14 your notes of the meeting; are they?

03:53 15 A Yes, they are.

16 Q And:

17 "Milgaard briefing meeting",

18 so it would be:

19 "Wolch Asper MacFarlane Neufeld"

03:53 20 is Eric Neufeld; is that correct?

21 A That's correct, yes.

22 Q And Mr. Neufeld was a lawyer employed by
23 Saskatchewan Justice who assisted you as counsel
24 on the reference case; is that correct?

03:53 25 A Yes.



1 Q And then it's got:

2 "Rob Fratter",

3 who I believe is a Justice, Federal Justice

4 lawyer; is that correct?

03:53 5 A Yup.

6 Q And:

7 "Murray",

8 who is you. Do you know what this comment here

9 is:

10 "Fratter or Freighter",

11 that's maybe a pronunciation --

12 A I didn't know how to spell his name so I just

13 wrote it phonetically.

14 Q Spell it? We'll just go through parts of this.

03:54 15 Do you have a recollection, generally, of this
16 meeting?

17 A Umm, yes.

18 Q Is there anything that, I'll go through parts of

19 the notes, is there anything that stand out in

03:54 20 your mind about what transpired at the initial
21 meeting?

22 A Well, to be honest with you, I -- the only thing

23 that sort of stands out is I still came away from

24 that a little unsure exactly what we were going to

03:54 25 be doing.



1 Q "You" being Saskatchewan Justice or "you" being
2 everybody?

3 A Well, "you" being everybody, were we going to look
4 at the whole box or were we going to look at just
03:54 5 the materials that Mr. Milgaard put forward, and
6 how was that going to be done, I -- I mean we
7 didn't have that settled at that point.

8 Q And I think the order from the Federal Government
9 talked about the record and the reference case to
03:55 10 be filed, and was that the nature of the
11 discussion, "what do you put in this reference
12 case?", in other words "what do you file with the
13 court?"

14 A Yeah, I think there was some of that, although my
03:55 15 recollection is that most of that discussion
16 occurred later.

17 Q If we can go to 010089, a comment here:

18 "What is Fisher's blood type and
19 secretor status

03:55 20 - samples were A

21 - DM is A non secretor?"

22 Is that an issue that you recall being raised at
23 this meeting of counsel?

24 A I, yes, I think so. We certainly weren't aware of
03:55 25 what David Milgaard's secretor status was at that



1 point.

2 Q Did -- and --

3 A Or Larry Fisher's, for that matter.

4 Q And did you -- were you aware of what the evidence
03:56 5 was at his original trial in 1970 about his
6 secretor status?

7 A Yes.

8 Q Did you have concerns that that may not be
9 accurate?

03:56 10 A Well, it appeared on the record of the trial to
11 have been confusing and I thought it was
12 appropriate that we look at that again.

13 Q 010091. There's a comment here:

14 "- what disclosure will we get from
03:56 15 Wolch

16 - what disclosure will we provide".

17 What is your recollection of what was discussed
18 and agreed upon amongst counsel as far as
19 disclosure?

03:56 20 A Well my understanding was that there was going to
21 be mutual disclosure, we would give them
22 everything, they would give us everything.

23 Q And who do you refer to when you say "they"?

24 A Mr. Wolch, Mr. Asper.

03:56 25 Q And was that agreed to by them?



1 A I believe it was, yes.

2 Q And did Saskatchewan Justice provide everything it
3 had?

4 A Yes, they were invited to come down at Christmas
03:57 5 and, or just before Christmas that year and have
6 open-box disclosure of our file.

7 Q Now I don't want to do this out of sequence, and
8 I'll come back to this later, I think in September
9 of 1993 did you become aware of an RCMP file that
03:57 10 had not been provided at the time; do you recall
11 that? The -- I think it was the 1993 head office
12 file that had some 1969 RCMP reports.

13 A I don't recall that. Umm, no, I don't recall that
14 specifically.

03:57 15 Q Okay. I'll come back to that and show you a
16 letter when we do it in chronological order. So
17 as far as what Saskatchewan Justice had, was it
18 your prosecution file and -- related to Larry
19 Fisher and David Milgaard that was provided?

03:58 20 A Umm, yes.

21 Q And what did you get, then, in the way of
22 disclosure from Mr. Wolch and Mr. Asper?

23 A Very little. They were not terribly forthcoming.
24 Defence counsel are always willing to be
03:58 25 forthcoming but they never actually get around to



1 doing it.

2 Q And did you have some experiences where that was
3 the case?

4 A Oh yes.

03:58 5 Q And can you give us some examples?

6 A Well we never did discover what the secretor
7 status was until the Chief Justice made a point of
8 demanding that people be tested, we never got a
9 waiver of privilege on Cal Tallis until the Chief
03:58 10 Justice demanded that that be done, we never did
11 see the interview with -- or get the interview
12 tapes with Ron Wilson.

13 Q Is that with Paul Henderson?

14 A With Paul Henderson, and in fact, as I recall we
03:59 15 could never even get ahold of Paul Henderson.

16 Q And so what about Federal Justice, did they
17 provide you with -- what was the discussion with
18 them as far as disclosure?

19 A Umm, they were prepared to disclose everything but
03:59 20 one or two statements. There was Justice Tallis'
21 statement that they felt was covered by privilege
22 and that, until that was waived, they couldn't
23 give that out, and then even after it was waived
24 they were of the view that, given the conditions
03:59 25 that it was taken under, it couldn't be given to



1 us, so we never did get to see the statement given
2 by Justice Tallis, and I believe there may have
3 been one or two other statements that they assured
4 us were of little consequence that we didn't get.

03:59 5 Q So --

6 A And we did not get as well, except for what came
7 out inadvertently, the advice given to the
8 minister, or the McIntyre report, ultimately.

9 Q Look at 004314. Just back to the list of issues,
04:00 10 do you recall what the discussions were at this
11 initial meeting of December 9th about who would
12 call the witnesses and what witnesses could be
13 called?

14 A Well I think it, I mean the Court was obviously
04:00 15 going to call the witnesses, but I think the issue
16 there really was who's going to suggest what
17 witnesses be called, and what's the process for
18 putting forward names, and what's the process for
19 actually recommending to the Court that the
04:00 20 witnesses be called.

21 Q And what, ultimately, was the procedure used by
22 the Supreme Court for the calling of witnesses?

23 A Well, it was, my recollection is that it was
24 pretty much left up to Mr. Fainstein to make those
04:01 25 arrangements. If he could -- if he was satisfied



1 that a witness was appropriate, then they would
2 issue a subpoena and off it would go, the parties
3 themselves were the ones who suggested names.

4 Q Are you aware of any witness being requested by
04:01 5 any party that was not called by the Court?

6 A No. Well, at one point Mrs. Milgaard wanted to
7 testify or file an affidavit, and ultimately the
8 Court wasn't really that interested in having her
9 testify because it was their view that she wasn't
04:01 10 going to be able to give any evidence with respect
11 to how the crime was investigated or what had
12 happened afterwards in the Justice departments.

13 Q Apart from that are you aware of any witness that
14 counsel for David Milgaard wished to call before
04:02 15 the Supreme Court where that was rejected by the
16 Court?

17 A No.

18 Q If we can talk for a moment about contents of the
19 reference case, and I believe that's referred to
04:02 20 the volumes of documents that ended up being filed
21 before the Court, of which there were 26?

22 A 25, 26, something like that, yes.

23 Q What was the procedure that was ultimately
24 utilized by the Supreme Court for the filing of
04:02 25 documents before the Court?



1 A Well, again, they relied pretty much on Ron
2 Fainstein with the Federal Government and, in the
3 end, it basically came down to if you could get it
4 on a shovel and shovel it in, it went in.

04:02 5 Q And so are you aware of whether any documentary
6 evidence sought by any of the parties, of a
7 significant nature, was rejected?

8 A No.

9 Q I think I -- there are some documents where I
04:03 10 think, between counsel for Mr. Fisher and Mr.
11 Milgaard, there may have been some disputes about
12 prison records and some prison informants, or
13 there may have been some issue taken about what
14 could get in; do you recall being involved in
04:03 15 that?

16 A Well there -- I -- there was a lot of information
17 off both David Milgaard and Larry Fisher's
18 Corrections Canada files and parole files that
19 wasn't all that relevant or useful to anything
04:03 20 that we could see, and the Federal Government was
21 a little reluctant to get that in. They were also
22 -- the Supreme Court was also, I think, somewhat
23 reluctant to get some of that material before the
24 Court, because there were huge breaches of privacy
04:03 25 involved in much of that evidence or that



1 information.

2 Q If we can go to 010085, please -- or I'm sorry,
3 yeah, go to 010092. These are your notes, I just
4 want to show you the same date, are you able to
04:04 5 identify these as Mr. Neufeld, Eric Neufeld's
6 notes?

7 A I think those are Eric Neufeld's notes, yes.

8 Q They are coupled with yours. If we can go to
9 010093, just a comment here on the issue of
04:04 10 disclosure, these are his notes but I'll ask for
11 your comment; it says:

12 "Mutual disclosure

13 - feds, unless conditions imposed on how

14 ...",

04:04 15 I'm not sure what that says:

16 "... or Priv. Act will give everything",

17 and then:

18 "- everyone appears committed to

19 disclosure on both sides".

04:05 20 Would that have been your understanding of what
21 was agreed amongst counsel for the Milgaard's,
22 counsel for Federal Justice, and Saskatchewan
23 Justice?

24 A Yes.

04:05 25 Q If we can go to 010097. Sorry, this isn't very



1 legible, but down at the bottom it says here:

2 "- want - Department report, McIntyre
3 opinion, internal memos",
4 Police officers':

04:05 5 "Notebooks of interviews.",
6 and then another reference here. Do you recall
7 if there was a discussion at the December 10th --
8 or pardon me -- December 9th, '91 meeting about
9 requests being made to I guess it would be Mr.
04:05 10 MacFarlane and Mr. Frater about the McIntyre
11 opinion, the departmental report, and the
12 internal memos?

13 A Yeah. I thought we would throw that in just to
14 see whether, given it had gone this far, they
04:06 15 might be more forthcoming but, as I say, the only
16 sort of internal memos we got were the ones that
17 were sort of mistakenly filed to us.

18 Q If we can go to 029808, and I believe this is an
19 order of the Court, if we can go to the next page,
04:06 20 December 10, 1991. And I think there is a record
21 that on December 9th -- and please tell me if this
22 is correct -- that after the meeting amongst
23 counsel, that you all went over and met with Chief
24 Justice Lamer at the Supreme Court, is that right,
04:06 25 or was it the next morning?



1 A No, I believe it was that day.

2 Q And did that give rise to this order adding the
3 Attorney General of Canada and Saskatchewan and
4 David Milgaard as formal parties?

04:06 5 A Yes.

6 Q And you talked earlier about what the Chief
7 Justice said to you; was that at this meeting
8 then?

9 A I, yeah, I believe it was the first time we met
04:07 10 with him.

11 Q Do you recall anything else at that meeting
12 regarding the scope of the reference, things of
13 that nature?

14 A Umm, well he indicated he wanted it, my
04:07 15 recollection is he indicated he wanted it focused
16 on the miscarriage of justice issues, that they
17 weren't particularly interested in learning how my
18 department or the Saskatoon Police Department
19 operated, it was to look at were there reasons,
04:07 20 specific reasons relative to David Milgaard's
21 investigation and case, conviction, that they
22 should know about.

23 Q Go to 159104 and go to the next page. This is a
24 notice of motion brought by counsel for Larry
04:08 25 Fisher for intervenor status, and I believe that



1 Saskatchewan Justice either -- I think consented
2 to that application; is that correct?

3 A I believe so, yes.

4 Q And, again, anything to elaborate on that as to
04:08 5 your position about Mr. Fisher's involvement
6 before the Supreme Court?

7 A Well, just that Mr. Fisher obviously had an ox
8 that was going to be gored in this process, so he
9 had a reason to be represented by counsel.

04:08 10 Q If we could go to 115605. This is a December
11 17th, '91 memorandum to Fred Dehm, Saskatoon
12 prosecutor's office -- if we can go to the next
13 page -- about getting the Gail Miller trial
14 exhibits, and that Sergeant Pearson was going to
04:09 15 have them picked up when they become available.
16 Can you tell us what prompted this?

17 A Well, --

18 Q It's December 17th.

19 A -- yeah. I would assume, at that point, there was
04:09 20 some issue with respect to having a forensic
21 examination of the exhibits, and we were basically
22 going for all the clothing and I think the, that
23 broken knife.

24 Q And so this would be to get the exhibits for the
04:09 25 Supreme Court hearing and testing; is that --



1 A For the Federal Government, yes.

2 Q If we can go to 156827, please. This is your
3 December 20th, 1991 letter to Mr. Wolch; is that
4 correct?

04:10 5 A Yes.

6 Q And further to your assurance to us of full
7 disclosure, can you tell us what you are referring
8 to there?

9 A During the meeting with the Chief Justice there
04:10 10 was an assurance by both parties that there would
11 be full disclosure of what they had.

12 Q And was this at the December 9th, '91 meeting?

13 A Yes.

14 Q You ask here for copies of:

04:10 15 "a) any statements from witnesses or
16 potential witnesses that you have not
17 already sent to the Federal Government;
18 and that you will rely on or may rely on
19 in your presentation before the Supreme
04:10 20 Court."

21 And again, was there something there that you
22 were seeking specifically or was this a general
23 request?

24 A It was a general request.

04:10 25 Q Now, did you -- when did you become aware that



1 there were taped interviews of a number of
2 witnesses from 1981; in particular, Ron Wilson,
3 Nichol John, Albert Cadrain and George Lapchuk,
4 '81 to '83, that there were --

04:11 5 A Well, when that was written, we were looking at
6 particularly the activities of Paul Henderson and
7 some of the investigators, perhaps even David
8 Asper's work. We certainly weren't aware that
9 Mrs. Milgaard was making recordings of all sorts
04:11 10 of things.

11 Q And I believe the record indicates that those, at
12 least the 1981 to '83 interviews, the transcripts
13 were not part of the Supreme Court reference?

14 A That's correct.

04:11 15 Q And when did you become aware of their existence?

16 A Well, during this proceeding.

17 Q And again, is that something that would have been
18 assistance to you, interviews of Ron Wilson and
19 Nichol John from 1981?

04:11 20 A Yes, it would have assisted in assessing Mr.
21 Wilson's testimony.

22 Q I believe as well that there was an interview of
23 Ron Wilson conducted by Kim Rossmo and Neil Boyd
24 in October of 1991 as part of their work. Do you
04:12 25 recall, and I don't believe, I stand to be



1 corrected on that, I don't believe that transcript
2 made it part of the Supreme Court reference case.
3 Do you recall becoming aware of that, of that
4 transcript?

04:12 5 A I don't know whether I was aware of the
6 transcript. I certainly knew they had interviewed
7 him and I knew the results of that interview, so I
8 may have seen something.

9 Q Would that be from their report, their written
04:12 10 report?

11 A That could be, yes.

12 Q You as well ask here:

13 "b) copies of any tape recorded
14 interviews or transcripts of such
04:12 15 interviews and in particular any such
16 tape recordings or transcripts of such
17 tape recorded interviews conducted by
18 Paul Henderson."

19 And you mentioned a bit earlier the, I think it
04:13 20 was the Ron Wilson interview. Is that what you
21 were referring to?

22 A Yes.

23 Q And why did you want that tape?

24 A Well, we wanted to know how the recantation came
04:13 25 about. For years he had resisted that.



1 Q And did you have any specific concerns about what
2 happened on that day?

3 A Just wanted to hear the interview.

4 Q And if we can scroll down -- and did you ever get
04:13 5 that tape?

6 A Ah, no, that was the one that was, I think
7 ultimately went missing and Mr. Henderson couldn't
8 provide.

9 Q It says:

04:13 10 "Additionally, I should
11 inform you that we are going to make an
12 application to get exhibits out of the
13 Court of Queen's Bench in Saskatoon so
14 that they may be subjected to D.N.A.
04:13 15 testing at a laboratory in Houston,
16 Texas. Apparently the technology has
17 advanced to the point where old samples
18 of human tissue may be compared so long
19 as the D.N.A. content has not
04:14 20 degenerated or been contaminated beyond
21 the point of recovery."

22 And then go on to talk about that. Can you tell
23 us, this lab in Houston, Texas, had you had
24 discussions with them or was this with the
04:14 25 Federal Justice or where did this come from?



1 A No, that came from Ron Fainstein with Federal
2 Justice, they were the ones that were suggesting
3 that the lab in Houston, Texas -- at least it's my
4 understanding that they had received that
04:14 5 information from the RCMP and were relying on that
6 to suggest the lab in Houston was the place to
7 attempt a DNA analysis.

8 Q And 002663, this is a letter of the same date from
9 you to Mr. Williams; correct?

04:14 10 A Yes.

11 Q And you are talking about DNA examination, and it
12 appears you would have had some conversations on
13 these topics either with Mr. Williams and/or Mr.
14 Fainstein presumably?

04:15 15 A Yes.

16 Q And the letter confirms the position of
17 Saskatchewan Justice:

18 "In our view every effort
19 should be made to analyze the D.N.A.
04:15 20 content of all human tissue samples
21 found at the scene or on the clothing of
22 the victim. It seems to us that we at
23 least owe that effort to Mr. Milgaard.
24 If such testing can be done on
04:15 25 degenerated and probably contaminated



1 samples and still produce reliable
2 results such information would be
3 useful."

04:15 4 And so that would have been your position at the
5 time?

6 A Yes.

7 Q If -- let's just go back to December, 1991. If
8 there had not been a Section 690 application or a
9 reference to the court and Saskatchewan Justice
04:15 10 was simply asked to follow up and investigate or
11 check Gail Miller's clothing to see whether or not
12 there was human tissue samples on her clothing
13 that would assist in a DNA test, first of all, is
14 that something that Saskatchewan Justice would
04:16 15 have considered doing?

16 A Yes. We have done that on a couple of cases.

17 Q And so let's take the case, even after Minister
18 Campbell's decision dismissing the application, if
19 there had been no second application to the
04:16 20 minister and a request had been made by Mr.
21 Milgaard to have the clothing checked for DNA
22 purposes, is that something Saskatchewan Justice
23 would have considered or would have done?

24 A Yes, subject to we would have asked the RCMP if
04:16 25 they were capable of doing it.



1 Q That was my next question. If you were going --
2 so assuming there was a way to do it, is it
3 something that you would have been inclined to do?

4 A Yes.

04:16 5 Q And can you tell us what steps Saskatchewan
6 Justice would normally take then to investigate
7 DNA at this time?

8 A Well, at that point it was a relatively new
9 investigative process in Canada, there was fairly
04:17 10 limited capacity, and our access to getting that
11 kind of work done would have been strictly through
12 the RCMP because I didn't have any kind of budget,
13 or public prosecutions didn't have any kind of
14 budget that would allow us to engage labs from
04:17 15 outside the country.

16 Q So would you then go to the RCMP to find out, (a),
17 whether they could do it, and (b), if not, whether
18 they knew a lab outside of Canada that could do
19 the test?

04:17 20 A Well, they had the connections with the FBI and
21 with the forensic service in the UK and if they
22 couldn't do it, they could make a recommendation
23 that it go outside and then we would have to
24 wrestle over who is going to pay and how we're
04:17 25 going to pay for it.



1 Q And would Saskatchewan Justice then rely upon the
2 expertise of the RCMP and whoever they contacted
3 to do the proper testing?

4 A Absolutely, yes.

04:17 5 Q And so there wasn't a provincial testing agency or
6 anything of that sort that Saskatchewan Justice
7 could or would go to; is that correct?

8 A No, there was no agency then that could do DNA
9 work. There are now at the University of
04:18 10 Saskatchewan and University of Regina, but they
11 don't do forensic work.

12 Q And in the scenario I gave you, if you became
13 aware that there was a lab in Houston or in
14 England that could do DNA testing back in the
04:18 15 scenario where there's no Section 690 application
16 but Mr. Milgaard's counsel simply comes to
17 Saskatchewan Justice with the request, would it
18 have been your practice to go directly to these
19 out-of-country labs or was it your practice to go
04:18 20 through the RCMP?

21 A No, we would go through the RCMP.

22 Q Now, there's also a comment here about Nichol John
23 and some hypnosis, and we've had a chance to look
24 at some evidence about hypnosis she underwent in
04:18 25 late '91 and '92, I think Dr. Lee Pulos, Dr. Orne,



1 Dr. Campbell Perry. Do you recall generally that
2 information and generally that happening at the
3 time?

4 A Yes.

04:19 5 Q What was your understanding of what Federal
6 Justice was seeking to do with respect to Nichol
7 John and enlisting these, the hypnotists and the,
8 and I think there was a psychiatrist or
9 psychiatric help?

04:19 10 A Back in the early '90s there was a view that you
11 could revive memories that people had sort of
12 pushed out of their minds because they were
13 traumatic and we were thinking, well, maybe
14 hypnosis might be able to do that with her.

04:19 15 Q And you talk here about:
16 "...we should make one last effort to
17 see if we cannot get expert psychiatric
18 help to revive her memory. As you
19 noted, it may be that the events in
04:19 20 question were too long ago and have been
21 buried for so long they cannot be
22 brought back at this time. However, one
23 last attempt should be made. I am
24 convinced she saw the murder and can
04:20 25 identify the person who committed it.



1 As such her evidence, if its available,
2 is potentially very powerful."

3 And that would have been your belief at the time?

4 A Yes.

04:20 5 Q And on what was that based?

6 A Well, it was based on the information that the
7 feds had gathered during the course of the
8 interview for the original application -- or the
9 interviews during the original application based
04:20 10 on what we had seen to that point, and I believe
11 at that point there was a video tape that was
12 rather interesting.

13 Q We have had occasion to -- was that the one with
14 Dr. Orne in Philadelphia, the hypnosis?

04:20 15 A I think so. It's the one where she becomes very
16 excited at one point.

17 Q Right, and I think the Commission has viewed that
18 video tape. There was also a report of a
19 Dr. Fleming I think as well. Do you recall that
04:21 20 name, and a Campbell Perry?

21 A Yeah. I think Dr. Fleming was the forensic
22 scientist from Penetanguishene, the psychiatrist?

23 Q Yes.

24 A Who provided an expert opinion to the Supreme
04:21 25 Court.



1 Q So at this time, the thought -- was that a view
2 shared by Federal Justice officials that you
3 talked to, that Nichol John had witnessed the
4 murder?

04:21 5 A I don't know that they necessarily held that view
6 that way. I think they were of the view that she
7 couldn't remember and they needed to do something
8 to see whether there was any chance of reviving
9 that memory. I mean, the other possibility is
04:21 10 that, memory revived, she would say I didn't see
11 anything.

12 Q Go to 002664, this is a December 20th letter from
13 you to the chief of police and it appears that you
14 are asking the chief to provide the investigating
04:22 15 officers' notebooks covering the Milgaard
16 investigation:

17 "In particular we are
18 interested in references covering all
19 dealings with Albert Cadrain, Nicole
04:22 20 John, Ron Wilson, David Milgaard and
21 Larry Fisher."

22 And again, was that prompted from your December
23 9th meeting or can you give us some background as
24 to how this came about?

04:22 25 A Yes. Very likely I expect probably the federal



1 government investigators wanted to see that
2 information.

3 Q Go to 002671, or 672, please. The doc. ID is 671.
4 And this is a December 24th, 1991 letter from you
04:23 5 to Mr. Wolch. You say:

6 "After reading the scientific
7 reports you filed with the Minister of
8 Justice and consulting with R.C.M.P.
9 crime lab personnel, it would appear
04:23 10 that Mr. Milgaard's status as a non
11 secretor is not established. I am
12 informed that the test used to determine
13 that characteristic in 1969 has
14 subsequently proven to be unreliable.
04:23 15 This confirms information given the
16 federal Department of Justice by Colin
17 Terry of the University of Manitoba and
18 the statement to that effect in the
19 report of Dr. Markesteyn.

04:23 20 I would like to know
21 therefore, whether you have made any
22 recent effort to have Mr. Milgaard's
23 blood tested to determine his secretor
24 status. If you have, would you please
04:24 25 advise us as to the results of such



1 tests? If you have not, do you intend
2 to do so?"

3 And can you elaborate on what prompted this and
4 what you were looking for?

04:24 5 A Well, the blood type and secretor status of the
6 person involved in the death of Gail Miller was of
7 some interest because of the materials found at
8 the crime scene and we wanted to know whether
9 David Milgaard was an A secretor.

04:24 10 Q And --

11 A We wanted to know the same of Larry Fisher as
12 well.

13 Q And was there something in the reports, and I
14 think that should be Dr. Merry and Markesteyn,
04:24 15 that caused you to doubt whether or not David
16 Milgaard was a non-secretor or not?

17 A Well, yeah, I think based on something that the
18 Federal Department of Justice had in their files
19 from the RCMP indicated to us that David Milgaard
04:25 20 really should be tested to determine whether he is
21 or isn't, because the science 20 years ago wasn't
22 reliable.

23 Q Was it your understanding at this time that -- or
24 did you believe that one of the areas that Mr.
04:25 25 Milgaard would be calling evidence at the Supreme



1 Court reference would be Dr. Ferris and Dr.
2 Markesteyn and possibly Dr. Merry to give evidence
3 similar to the reports they had filed with the
4 Federal Minister on the first application?

04:25 5 A We expected that, yes.

6 Q In other words, that Dr. Ferris would testify that
7 the forensic evidence proves David Milgaard's
8 innocence?

9 A Yes.

04:25 10 Q And was that one of the reasons then that you were
11 seeking to get his secretor status?

12 A Yes.

13 Q And can you -- I've got some other documents here,
14 but maybe, can you by memory tell us what happened
04:25 15 with that request and how the testing came about?

16 A Umm, well, my recollection is that we didn't get a
17 response on that until after the Chief Justice
18 made it clear that he wanted that testing done.

19 Q If we can go to 002694, it's a letter from Mr.
04:26 20 Beresh, December 27th, 1991, about access to
21 documents, and I take it that once Mr. Fisher was
22 added as a party, he was provided with access to
23 Saskatchewan Justice files in a similar fashion to
24 Mr. Milgaard and perhaps the Federal Justice?

04:26 25 A Yes.



1 Q I think there was some evidence that -- did Mr.
2 Asper and Mr. Wolch come and visit your office
3 then in December to review files, do you recall
4 that happening?

04:27 5 A Ah, yes, they did. I believe it was shortly
6 before Christmas they came to Regina and spent a
7 day or so going through the documents in our
8 office.

9 Q And did you provide copies to them of the
04:27 10 documents?

11 A They marked some documents that they wanted copies
12 of and those were copied and sent off the next
13 week.

14 Q 009082, this is a letter from Inspector Quinn on
04:27 15 the notebooks, just indicating that all of the
16 notebooks had been provided to the Federal
17 Department of Justice and the Saskatchewan Police
18 Commission and it appears here that not all of the
19 notebooks were still in existence in 1991; is that
04:27 20 correct?

21 A Yes.

22 Q And did that surprise you based on your previous
23 experience in dealing with officers and notebooks?

24 A No, it really didn't, because my previous
04:28 25 experience would have indicated that it was sort



1 of haphazard, very often whether the police
2 department had the notebooks of the officers
3 involved or whether they didn't, and the same with
4 the RCMP, they may or may not have investigators'
04:28 5 notebooks.

6 MR. HODSON: I see it's 4:30. Probably an
7 appropriate spot to break, Mr. Commissioner.

8 (Adjourned at 4:28 p.m.)
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