Commission of Inquiry

Into the Wrongful

Conviction of David Milgaard

before

THE HONOURABLE MR. JUSTICE

EDWARD P. MacCALLUM

****

<u>Transcript of Proceedings</u>

and

Testimony before the Commission

sitting at the

Sheraton Cavalier Hotel at

Saskatoon, Saskatchewan

****

On Tuesday, September 12th, 2006

Volume 181

<u>Inquiry Proceedings</u>

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Appearances:

Mr. Hersh Wolch, Q.C.,   **for** Mr. David Milgaard

Ms. Joanne McLean,   **for** Ms. Joyce Milgaard

Ms. Lana Krogan-Stevely,   **for** Government of Saskatchewan

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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1   ***Transcript of Proceedings***

2   *(Reconvened at 9:00 a.m.)*

3   COMMISSIONER MacCALLUM: Good morning.

4   ALL COUNSEL: Good morning.

5   **MURRAY BROWN, continued**:

6   **BY MR. HODSON**:

7   Q   Call up 002674, please. Yesterday when we

8   adjourned, Mr. Brown, we were just dealing with

9   the days or weeks leading up to the commencement

09:01 10   of the reference proceeding and some of the

11   preparations, and this is a letter by Mr. Neufeld

12   to Corrections Canada and it's to deal with

13   reviewing, I think, the Corrections files on David

14   Milgaard. Do you recall what the purpose was of

09:02 15   looking at Mr. Milgaard's, I think there was both

16   prison files and/or parole records, do you

17   remember how that issue came up?

18   A   Well, I think there were two things, as I recall.

19   First, we were looking for whatever admissions

09:02 20   there may be recorded in those files. And

21   probably, as well, one of the allegations he was

22   making was that he couldn't get parole because he

23   wouldn't admit he was guilty, and we were curious

24   about that.

09:02 25   Q   And what significance, if any, would that have,

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1   then, in the reference case?

2   A   It was just something that was going to be used

3   during his cross-examination. I -- it, frankly,

4   has no relevance in particular, we were mostly

09:02 5   interested in looking for any admissions that may

6   have been put into those files, because basically

7   everything you do in jail gets recorded.

8   Q   Now I had not shown you this but I think, in

9   October-November 1991, a book by Carl Karp and

09:03 10   Cecil Rosner was put out about the story of David

11   Milgaard, and it included a reference in there

12   about admissions that Ben Dozenko, a prison guard,

13   claimed David Milgaard made to him, and I believe

14   Mr. Dozenko was a witness at the Supreme Court; is

09:03 15   that correct?

16   A   Yes, I believe that's correct.

17   Q   And do you recall, generally, what his -- his

18   evidence was to the effect that Mr. Milgaard had

19   made an admission to him at some point, I think,

09:03 20   many years earlier?

21   A   Umm, yes, but as I recall he was the guard that

22   Mr. Milgaard walked away from when he was on an

23   escorted absence, and we were not able to find

24   anything recorded on the file that supported that

09:03 25   statement, and in our view that was of

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1   considerable significance because that kind of

2   admission would ordinarily have been recorded in

3   the files.

4   Q   And so is it correct to say that, at least

09:04   5   according to this letter, this enquiry, that one

6   of the issues would have been to follow up on what

7   had been reported in the media about Mr. Dozenko's

8   claim of an admission?

9   A   That, well that's -- yes, we were looking for any

09:04   10   suggestion there were admissions by David Milgaard

11   in those files.

12   Q   And I think, and I won't go through any of this

13   evidence in detail with you, but I think at the

14   reference case there was also evidence in

09:04   15   documentary form about other prison officials and

16   whether or not they were told by Mr. Dozenko about

17   this admission, whether there was anything on the

18   file, and this issue was canvassed fairly

19   thoroughly; was it not?

09:04   20   A   That's correct, yes.

21   Q   From the perspective of Saskatchewan Justice can

22   you tell us whether, if I can call it the Ben

23   Dozenko statement or his evidence that David

24   Milgaard confessed the crime to him, did

09:05   25   Saskatchewan Justice, once all of the facts came

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	1		out at the Supreme Court, did you put any weight
	2		on that piece of information?
	3	A	No.
	4	Q	And why not?
09:05	5	A	Well because, frankly, had that statement been
	6		made it just is inconceivable that it would not at
	7		some point have been entered into his records
	8		because, as I say, those reports are voluminous
	9		and they very carefully record your life in jail.
09:05	10	Q	And is it fair to say that you concluded that
	11		Mr. Dozenko was mistaken or wrong when he said
	12		that Mr. Milgaard confessed to the crime?
	13	A	Mistaken, wrong, whatever.
	14	Q	If we can go to 009789, please. And you'll recall
09:05	15		yesterday, I think it was December 20th, 1992 I
	16		showed you a letter where you wrote to Mr. Wolch
	17		and asked about the secretor status of David
	18		Milgaard, and whether or not he had been tested
	19		for secretor status, and whether he would be; do
09:06	20		you recall that letter I showed you yesterday, the
	21		request?
	22	A	Yes.
	23	Q	Actually, sorry, it was maybe December 24th. And
	24		this is the reply from Mr. Asper, and he says:
09:06	25		"This whole issue arose for

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1   us for the very first time when we

2   received from the Department of Justice

3   in Ottawa the opinions it solicited with

4   respect to this matter. The question of

09:06 5   whether David Milgaard is in fact a

6   non-secretor was never raised with us by

7   the Federal Department of Justice, and

8   it comes somewhat as a surprises given

9   the fact that in his Affidavit submitted

09:06 10   in support of the first application,

11   David undertook to take any tests

12   whatsoever in order to establish his

13   innocence. It is puzzling to say the

14   least that we were never apprised of any

09:06 15   real doubt as to David's status, and we

16   have always operated on the basis that

17   the test performed by the RCMP at the

18   time was accurate."

19   And then I'll read you the next paragraph and ask

09:07 20   you to comment on your notes here.

21   "If we are to have David

22   tested, we would appreciate knowing in

23   advance your position as to the two

24   possible results. For example, if David

09:07 25   is confirmed as a non-secretor, will it

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1   be your position that therefore he is

2   excluded as the perpetrator?

3   Conversely, if he is determined to be a

4   secretor, will it be your view that this

09:07   5   result would somehow be inculpatory?"

6   And then I think these are your notes on the side

7   of the letter, are they Mr. Brown, the

8   handwritten?

9 A   Umm, yes.

09:07 10 Q   And I wouldn't mind if you could just comment on

11   your reaction to this letter and/or tell us what,

12   if the notes reflect that, if you could maybe

13   decipher them for us?

14 A   Well, this isn't a terribly good copy, and --

09:07 15 Q   Maybe -- actually, if I can assist you, I think it

16   says here:

17   "your 2

18   experts have

19   told you

09:07 20   otherwise".

21 A   Okay.

22 Q   And so here, in the first paragraph the question

23   of whether he is:

24   "... a non-secretor was never raised

09:08 25   with us by the Federal Department of

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1   Justice ... comes ... as a surprise ..."

2   Your note is:

3   "your 2

4   experts have

09:08   5   told you

6   otherwise";

7   do you recall who that would have been or what

8   that would have been referring to?

9   A   Well, I would assume that would be their experts,

09:08   10   Ferris and Markesteyn.

11   Q   Right. And I think we heard evidence to that

12   effect from Dr. Ferris, Dr. Markesteyn, and

13   certainly I think it's in the Markesteyn and Merry

14   reports about -- raising questions about the

09:08   15   validity of the 1969 secretor test; was that your

16   understanding?

17   A   Yes.

18   Q   And so I take it that that note would have been

19   your reaction to this statement that the request

09:08   20   for a test comes as a surprise?

21   A   Likely, yes.

22   Q   And then here, on the questions posed, 'will it be

23   your position that he is excluded if he is a

24   non-secretor', and the answer is:

09:09   25   "no";

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 1              'if he is determined to be a secretor will it be

 2              your view that it would be inculpatory', and your

 3              answer:

 4                      "could be",

 5              or your note:

 6                      "could be".

 7              And, again, anything to elaborate on that?

 8      A       Well, if he is -- if he was a non-secretor, that's

 9              some evidence you can look at with respect to his

09:09 10        culpability, if he is a secretor that can be

11              looked at too.  At that point there was still some

12              question about how effective the original testing

13              of materials picked up at the scene was.

14      Q       Okay.  And then, as well, it refers to another

09:09 15        vic -- I'm not sure if this relates to another

16              subject matter; are you able to help us out with

17              that note on the bottom right?

18      A       I can't read it on this.

19      Q               "no evidence of ..."

09:09 20        Larry Fisher:

21                      "... blood group

22                      or secretor

23                      status?"

24      A       That is true, we didn't have that until the

09:10 25        reference actually began.  Now I --
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 1    Q      Okay.  If we can maybe go to the next page, there

 2           is a comment here as well, and this relates about

 3           the blood testing of the semen.  And Mr. Asper

 4           asks:

 5                    "Do you have any material relating to

 6                    any testing performed on the alleged

 7                    semen samples beyond the presumptive

 8                    test performed and as described by then

 9                    Staff Sergeant Paynter?"

10           And I think this relates back to '69, and I think

11           your comment is:

12                    "Not aware

13                    of any other

14                    tests - suggest

15                    Paynter's evidence

16                    suggests

17                    not";

18           and that would have been your comment at the

19           time?

20    A      That's correct.

21    Q      And, again, any general comments about -- I think

22           you told us, yesterday, a couple of things; one,

23           when you looked at the reports you thought that

24           the reports suggested Mr. Milgaard's secretor

25           status was in issue, and that's what prompted you
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1   to write the letter; you also mentioned that, and

2   I don't recall your exact words, but that you had

3   concerns that testing was not being done in a

4   timely fashion, is that a -- by Mr. Milgaard; is

09:11   5   that a fair way to put what you said yesterday?

6   A   Yes. We were being told oh yes, they were always

7   willing to do the testing, but for some reason it

8   just never got done.

9   Q   And did this reply to your request to have him

09:11   10   tested cause you any further concern in that

11   regard?

12   A   Well it's, it's a lot of smoke and dust kicked up,

13   and the answer at the end of the day is still

14   "will you or won't you", so there is no answer

09:11   15   there.

16   Q   If we can go to 156836. And this is a January

17   8th, 1992 letter from Mr. Asper to you and has a

18   copy of the statement of Launa Edwards, and I'll

19   go to the statement in a moment. Mr. Asper says

09:12   20   he:

21   "... was in Vancouver on January 6,

22   1992, and had the opportunity to

23   interview ...",

24   her, and I believe she was a former partner or

09:12   25   spouse of George Lapchuk; is that correct?

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1   A   That's correct, yes.

2   Q   And I think, yesterday, we had discussed this

3   motel room incident and I think you told us that,

4   at least going into the Supreme Court hearing and

09:12 5   after Kim Campbell's first decision, that the

6   motel room incident still had two arguments going;

7   one, that it didn't happen; and two, that if it

8   did happen, that being the incident, that it was a

9   joke; and that I think you told us that both were

09:12 10   still alive, is that correct?

11   A   Oh yes, yes.

12   Q   And that not with -- let me put it this way --

13   notwithstanding what Ms. Hall said to Mr. Williams

14   in her examination, which I think was November

09:13 15   1989, about what she observed and heard in the

16   room, from Saskatchewan Justice's perspective were

17   -- was David Milgaard and his counsel still

18   putting forward the argument that the incident

19   didn't happen?

09:13 20   A   Yes.

21   Q   And would that necessarily mean that Deborah

22   Hall's version of events to Mr. Williams, then,

23   about what was said and what she observed would

24   then be wrong or false?

09:13 25   A   Well it seems to discount it.

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1   Q   And here, if we can go to the page 156836, the

2   third page in, and I don't propose to spend much

3   time on this statement but the -- if you go to the

4   next page, just have you confirm. What she said

09:14   5   is that George Lapchuk:

6   "... made it clear in this conversation

7   that he'd lied in the trial and was

8   treating it like a joke. From what he

9   said and how he acted, it was apparent

09:14   10   to me that didn't care whether he'd lied

11   or told the truth."

12   And then scroll down.

13   "He said he was there in the motel and

14   that he'd lied and how him and Craig had

09:14   15   lied about what they'd seen and heard."

16   And, again, was that -- can you tell us, what was

17   your understanding of what Launa Edwards was

18   saying about the motel room incident, what did

19   you understand the import of her evidence to be?

09:14   20   A   I would take the import of that to be that she was

21   saying it didn't happen, that George and Craig

22   Melnyk made it all up.

23   Q   And her evidence is on the Supreme Court

24   reference, I believe she testified at the Court,

09:15   25   the Supreme Court to that effect?

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1   *A*   Well, she testified in Court and she apparently

2   testified in the Chief Justice's office, and we

3   weren't a party to what went on in the Chief

4   Justice's office.

09:15 5   *Q*   And was that relating to an issue that she had

6   raised or --

7   *A*   Yes, it was partially due to what she claimed to

8   be her terrible fear of George Lapchuk.

9   *Q*   And I believe there was also some follow-up

09:15 10   evidence from a Bobbie Stadnyk then who I think

11   was called to rebut what Ms. Edwards had said; is

12   that correct?

13   *A*   Yes.

14   *Q*   Is it fair to summarize it this way, that the

09:15 15   issue of whether or not the motel room incident

16   happened at all was an issue that was brought and

17   heard by the Supreme Court?

18   *A*   Oh, yes.

19   *Q*   009936, please, this is a letter from Mr. Asper to

09:16 20   you of January 8th, 1992, and I think this is the

21   first copy of the -- it's called forensic

22   dramatization of the evidence of Ron Wilson and

23   Nichol John, and I think there was at some point,

24   do you recall a request to have the video played

09:16 25   in the Supreme Court or what's your recollection

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1   of --

2   A   I believe there was a request to have it entered

3   into the record and we resisted that because it

4   was really just their opinion of what might have

09:16 5   happened, it wasn't any kind of real evidence of

6   what did happen.

7   Q   And do you recall if that video went in as part of

8   argument as opposed to an exhibit or do you

9   recall?

09:16 10 A   I don't recall it going in. It might have.

11   Q   Go to 115784. This is a letter from -- January

12   13, 1992 -- from Mr. Williams to you and it's got

13   copies of correspondence between David Milgaard

14   and Nichol John, between Joyce Milgaard and Nichol

09:17 15 John and I believe it is information that Mr.

16   Williams had gathered in the course of his

17   investigation of the first application. Can you

18   tell us, what was Mr. Williams' role in his

19   dealings with you after the Supreme Court

09:17 20 reference was called?

21   A   Well, for the most part we were dealing with Ron

22   Fainstein and Rob Frater, but Eugene Williams was

23   the one that had the originals of all the

24   documents and if we wanted something, he would

09:18 25 provide us with a copy of it.

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1	Q	And so it would be information, then, or his file
2		that you had seen previously and just not had
3		copied; is that correct?
4	A	Some of that. Yes, there were things that we
09:18 5		hadn't taken copies of. He was doing some of the
6		leg work in terms of obtaining records for us. He
7		wasn't sort of that heavily involved because of
8		course he still had the job of investigating other
9		690 applications at this point and he was busy
09:18 10		doing that.
11	Q	And what about Sergeant Pearson, do you recall,
12		did Sergeant Pearson play a similar role around
13		this time?
14	A	Well, not directly with me he didn't, I didn't
09:18 15		deal with Sergeant Pearson. Eric spoke to him,
16		Eric Neufeld spoke to him a couple of times, but I
17		don't know that Pearson would have been providing
18		us with information directly.
19	Q	And so it would be through Mr. Williams primarily?
09:19 20	A	It would. Since his activity on this file would
21		have been at the behest of the Federal Justice
22		people, the protocol at the time would have been
23		that whatever he was prepared to share with us
24		would have gone through the Justice officials
09:19 25		first.

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1 Q   And are you aware as to whether Mr. Beresh and Mr.

2   Wolch and Mr. Asper were also contacting Mr.

3   Williams for file information or information or

4   records, things like that?

09:19 5 A   Yes, they were.

6 Q   And so would he have been -- would it be fair to

7   characterize his involvement as a resource to the

8   parties on the reference?

9 A   Well, both he and Ron Fainstein were there to

09:19 10   assist the parties with whatever they needed.

11 Q   If we can go to 115797, and this is a letter

12   January 13, 1992 from Chief Justice Lamer, former

13   Chief Justice Lamer to Mr. Wolch, and before I get

14   into the letter, I think just let's clarify the

09:20 15   dates, I think November 28th the reference was

16   called by the federal government; correct?

17 A   That sounds correct, yeah.

18 Q   And I think yesterday, December 9th was when you

19   had the first meeting of counsel and the meeting

09:20 20   with the Chief Justice where I believe at that

21   meeting dates were set for the first set of

22   sittings on January 20th?

23 A   That's correct, yes.

24 Q   And I believe as well there was either a direction

09:20 25   or a request that the case books or the reference

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1   case be filed and witness lists provided I think

2   by December 20th; is that correct?

3   A   As soon as possible, yes, they wanted the

4   materials in as quickly as they could get them.

09:20 5   Q   And this is a letter January 13th and I think the

6   record reflects that the hearing started January

7   16th, is that correct, the formal -- with the

8   first witness I think the 21st of January?

9   A   Yes. My recollection is the meeting on the 16th

09:21 10   was, I think maybe we had a meeting first with the

11   Chief Justice and then with the court as a whole

12   with the idea being that we would sort of set out

13   the procedure then.

14   Q   Right, and then so the 21st of January I think is

09:21 15   when it ultimately began with the first witness;

16   does that sound right?

17   A   Yes.

18   Q   And so here Chief Justice Lamer indicates that the

19   meeting of December 9th:

09:21 20   "...we had set Thursday,

21   January 16th... for a first public

22   meeting to determine the dates we will

23   be hearing witnesses, in dealing with

24   this Reference. It was agreed in

09:21 25   December that we would target hearing

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1   witnesses during the week of January

2   20th, which I have set aside and kept

3   open for this Reference; and that we

4   would set other dates during our Winter

09:21 5   Term."

6   So I apologize, it was January 20th. And that

7   first paragraph, would that be -- was that your

8   understanding of what you were told I guess back

9   in December of 1991 of what was going to happen?

09:22 10   A   Yes.

11   Q   And then Mr. Lamer writes:

12   "Mr. Claude Alain, of our

13   Court staff, informs me that

14   Mr. Fainstein, of the Federal Department

09:22 15   of Justice, is having difficulty

16   obtaining from you the list of witnesses

17   you would like the Court to hear. It is

18   imperative that this information be

19   conveyed to Mr. Fainstein so that

09:22 20   subpoenas may be issued. It would be

21   unfortunate if we were to lose this week

22   of sittings.

23   While it is the Court's,

24   and only the Court's decision to call or

09:22 25   not to call witnesses, it was agreed

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1   during our meeting in early December

2   that we would let counsel of parties

3   granted status under s. 53(6) of the

4   *Supreme Court Act* indicate to the Court

09:22   5   which witnesses they feel should be

6   called."

7   And again, if you could maybe just elaborate on

8   that last sentence and your understanding of how

9   the calling of witnesses was to work, the role of

09:22 10   the parties and the time lines that were in

11   place?

12   A   Well, it was my understanding, and Eric Neufeld's

13   understanding, that we were to put together a

14   list, send it to Ron Fainstein, he would take that

09:23 15   up with the court and let us know whether the

16   court decided that witness should be subpoenaed or

17   not.

18   Q   And so just on the formalities of the calling of

19   the witness, that would be by a subpoena from the

09:23 20   court and it would be the court's decision;

21   correct?

22   A   Yes.

23   Q   And Mr. Fainstein's role was then to facilitate

24   that and to arrange to have the witness brought

09:23 25   before the court?

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1   A   That's right, yes.

2   Q   And am I correct then that from Saskatchewan

3   Justice's perspective, if you wanted to have a

4   witness testify, you would not go out and serve

09:23 5   the subpoena yourself and make the arrangements,

6   you would go through Mr. Fainstein and have him

7   arrange it with the court; is that correct?

8   A   That's correct, yes.

9   Q   And then as far as the witness list, what was your

09:23 10   understanding, again December, January up until

11   the date of this letter, as to who -- was there an

12   agreement that one side, if I can call it that,

13   would put forward their witnesses first or was it

14   a bit up in the air?

09:24 15 A   No, I think at that point it was still pretty much

16   up in the air. The meeting of the 16th of January

17   was intended to sort of firm up the procedure.

18 Q   At this date it appears that either Mr. Fainstein

19   or Mr. Lamer was expecting to get a witness list

09:24 20   from Mr. Wolch. Was that your expectation?

21 A   I think Mr. Fainstein was expecting to get witness

22   lists from both of us.

23 Q   Okay. And do you know at this point whether you

24   had provided a witness list?

09:24 25 A   I believe we had. I think we actually sent it in

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1   or phoned Ron Fainstein to give him the

2   information in December.

3   Q   And did you have any concerns -- or was there

4   discussion I guess between you and Mr. Wolch as to

09:24   5   whether you would be calling the same people or

6   whether one would be in response to the other?

7   Can you elaborate on how that was happening?

8   A   No, we hadn't had any discussion like that. We

9   didn't know precisely who Mr. Wolch and Mr. Asper

09:25   10   intended to call. We had sort of "if this person,

11   then that person" kind of list, and I believe we

12   passed that on to the federal government.

13   Q   Did the witnesses that Saskatchewan Justice would

14   ask to be called depend upon the witnesses that

09:25   15   Mr. Wolch called?

16   A   Yes.

17   Q   If we can go to 026526, and this is a note of a

18   telephone conversation between Mr. Fainstein and I

19   believe Eric Neufeld of January 13, '92. I simply

09:25   20   want to raise a point in here and ask if you can

21   tell us your recollection and knowledge of what

22   was happening at the time. It appears that Mr.

23   Fainstein was relating to Mr. Neufeld a call that

24   he had with Mr. Wolch, and:

09:26   25   "Doesn't feel next week could be

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1   utilized. Says Wilson won't cooperate -

2   fearing or concerned who will pay for

3   his lawyer. Feds don't seem to see why

4   they should. Doesn't know where to

09:26 5   begin."

6   And I think also some concerns about whether

7   David Milgaard was able to testify. What -- do

8   you have a recollection of receiving this

9   information and dealing with it?

09:26 10   A   Well, yeah, prior to the 16th we were told that

11   that -- I didn't recall the Wilson information,

12   but we were told that David Milgaard was having

13   problems which, if true, wouldn't have come as a

14   huge surprise because he was emotionally fragile

09:26 15   at that time.

16   Q   And so what, were you expecting that Mr. Milgaard

17   would be a witness at the Supreme Court reference?

18   A   We were expecting he would be the first witness.

19   Q   And why was that?

09:27 20   A   He was the one that was alleging he was wrongly

21   convicted. It seems to me appropriate you start

22   the process by him taking the stand and saying I'm

23   not guilty.

24   Q   And was that, to your understanding, was that what

09:27 25   the court expressed as well, the Supreme Court?

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1   A   I think -- I don't recall the Chief Justice

2   expressly saying that, but I have the impression

3   that it was his expectation that David Milgaard

4   was going to be there pretty quick.

09:27   5   Q   And I'll come back to this issue in a moment when

6   we deal with the January 16th proceedings. What

7   about the issue of Ron Wilson and his reluctance

8   to attend without a lawyer and without someone

9   paying for a lawyer, did you get involved in any

09:27   10   of those issues?

11   A   No.

12   Q   115835, this is a January 14th letter, I think

13   from your office to Mr. Dehm, about the

14   application for release of exhibits, and if we can

09:28   15   go to the next page, please, and it appears to be

16   a memo to send the following two pages to Fred

17   Dehm and request he proceed with the application

18   for release of the exhibits. And this would be

19   Gail Miller's clothing presumably?

09:28   20   A   That would be correct, yes.

21   Q   And the two pages that you are sending him, if we

22   can go to the next page, and we'll be hearing more

23   about this from other witnesses, but this relates

24   to information about the home office lab in

09:28   25   England, is that correct, the Central Research and

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1		Support Establishment?
2	A	Yes.
3	Q	And it talks about a new technique for DNA,
4		poly --
09:28 5	A	PCR.
6	Q	PCR, thank you. And it talks about the lab
7		facility, and then the next page it talks about a
8		fellow named Dr. Gill, his education and his work
9		in this area of DNA analysis, and then if we can
09:29 10		scroll down, it says:
11		"Fred: Dr. Peter Gill will be
12		supervising the testing at the forensic
13		Science's Central Research and Support
14		Establishment. This is in the
09:29 15		department of the Home Office."
16		And where would you have received this
17		information from?
18	A	That would have come from Ron Fainstein or Eugene
19		Williams.
09:29 20	Q	And so at this time who was -- who was making the
21		decisions as to where to send Gail Miller's
22		clothing for DNA testing and who to get to look at
23		it and what type of testing?
24	A	The federal officials as far as I know.
09:29 25	Q	And so it appears at this point that -- is it

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1 correct to say that you were arranging to get the

2 exhibits from the court to deliver to -- from the

3 Queen's Bench Court to deliver to the Supreme

4 Court and/or Federal Justice officials so they

09:30 5 could proceed with testing that they had arranged?

6 A Yes.

7 Q Were you involved in any of the dealings with the

8 home office or with Dr. Gill as to what type of

9 tests to perform?

09:30 10 A No.

11 Q If we can go to 002623, this is your January 14th,

12 1992 letter to Mr. Fainstein, the first paragraph

13 says that you will be ready to proceed the week of

14 January 20th as scheduled. Was there some

09:30 15 suggestion or concern that the hearings might not

16 proceed the week that had been scheduled?

17 A Well, there were the problems being raised with

18 respect to Mr. Milgaard's health and Mr. Wilson,

19 but I was simply concerned that they know that we

09:31 20 were ready to go.

21 Q And as far as the witness list, you say:

22 "It is difficult for us to formally

23 respond with the witness list proposed

24 by ourselves without receiving a witness

09:31 25 list from Mr. Wolch. We have some idea

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1   of the witnesses he has considered

2   calling, but nothing indicating what he

3   has decided. Generally our position is

4   that if the evidence of a witness is not

09:31 5   challenged or otherwise impugned and the

6   Court is prepared to accept it as given,

7   we see no need to have the witness

8   testify. This would of course be

9   subject to the wishes of the Court.

09:31 10   Until Mr. Wolch commits himself, we can

11   only put our position in a tentative

12   way."

13   Would that have reflected your views at the time

14   then?

09:31 15 A   Well, yes, our original conversation was

16   essentially these are the people that we think are

17   basic to this, but if Mr. Wolch and Mr. Asper call

18   this person, then we want to call these people.

19   For example, if they were calling Deborah Hall,

09:32 20   then we would want to call Craig Melnyk and Mr.

21   Lapchuk.

22 Q   And if they didn't call Deborah Hall then?

23 A   Then the issue of that motel room scene was not

24   before the court.

09:32 25 Q   Was it your view that, at least leading up and

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1   into the reference, that it was incumbent upon

2   counsel for David Milgaard to put forward whatever

3   evidence he felt established a miscarriage of

4   justice and that you would respond?

09:32 5   A   Their best case, yes, and we would respond to

6   that.

7   Q   And so here, I think you are saying:

8   "...our position so we will assume for

9   the sake of so indicating, that Mr.

09:32 10   Wolch may wish to have the following

11   witnesses called:"

12   And would this be your guess at the time, based

13   upon what you had reviewed and heard, as to who

14   you thought he would probably call?

09:33 15   A   That's correct, yes.

16   Q   And so at this point, I think some of these are

17   obvious, but Mr. Milgaard and Mr. Wilson and

18   Deborah Hall. John Patterson I think was a Larry

19   Fisher inmate?

09:33 20   A   Yes.

21   Q   And then Dennis Cadrain presumably relating to

22   Albert's condition?

23   A   Condition, yeah.

24   Q   And then Dr. Ferris and Markesteyn, did you expect

09:33 25   them to be called to deal with the secretor issue?

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 1    A      Well, and generally with respect to their reports,

 2           particularly Dr. Ferris.

 3    Q      You've got Professor Boyd listed here.  What was

 4           your thinking there as to why he might be called?

 5    A      His report was, in their view, of significance and

 6           we thought they may want to try and get that in as

 7           well.

 8    Q      And Mr. --

 9    A      Or at least get the thrust of it in if they

10           couldn't actually get the report in.

11    Q      And then Mr. Justice Tallis, what was your

12           thinking there as to why he would be called?

13    A      Well, at that point keep in mind I didn't know

14           what he was going to say, I was assuming that he

15           would provide support for whatever David Milgaard

16           said.

17    Q      Had you made efforts to try and talk to Mr. Tallis

18           and find out what he would say?

19    A      Well, I had, but he was very tight-lipped about

20           that.

21    Q      And is it fair to say that he wouldn't tell you

22           anything?

23    A      His view was the solicitor/client privilege waiver

24           that he had covered only talking with the federal

25           investigator and not talking with us.
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1   Q   And when did you first learn about what Mr. Tallis

2   was going to say or did say at the Supreme Court?

3   A   When he was on the stand saying it.

4   Q   Okay. So prior to his evidence, I think we have

09:34   5   on the record that Mr. Williams had interviewed

6   him I think a number of years prior, or perhaps it

7   wasn't --

8   A   Yeah, it was sometime prior to that.

9   Q   And were you aware that Mr. Wolch and/or Mr. Asper

09:35   10   had an opportunity to speak with him prior to

11   Mr. Tallis' evidence at the Supreme Court?

12   A   Well, I knew when they were at our offices in

13   Regina in December they went up to Justice Tallis'

14   office. Our preparation office was in the

09:35   15   basement of the Regina courthouse and Justice

16   Tallis' Court of Appeal office was on the second

17   floor and they went up to see him then, so I was

18   aware they had interviewed him.

19   Q   And so you and Mr. Neufeld though did not know

09:35   20   what Mr. Tallis was going to say until he said it

21   at the Supreme Court?

22   A   That's correct.

23   Q   And then Linda Fisher presumably for the

24   information she had previously provided; is that

09:35   25   correct?

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	1	A	That would be correct, yes.
	2	Q	Then the next page you say:
	3		"In that event we would suggest the
	4		following witnesses also be called:"
09:35	5		And Nichol Demyen, can you explain what you were
	6		thinking she would need to be called within
	7		response?
	8	A	Well, if you were going to call Ron Wilson's
	9		evidence, it seemed to me to get the full picture
09:36	10		you needed to call Nichol John and see whether
	11		there was -- or Nichol Demyen, to see whether
	12		there was anything she could add, take away from
	13		that.
	14	Q	And then as well the Cadrains, Celine, Marcel and
09:36	15		Kenneth and Estelle, who would be siblings and his
	16		mother, and as well Albert Cadrain, what was your
	17		thinking there as to having that evidence in?
	18	A	Well, if -- we knew that Albert Cadrain had mental
	19		illness problems, the issue was when did they
09:36	20		start manifesting themselves. Based on what I had
	21		read in the police file and the prosecution file,
	22		there wasn't any reason to believe that at the
	23		time he testified at the preliminary hearing or at
	24		the Court of Queen's Bench he was having those
09:37	25		kinds of problems and we wanted to be able to try

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 1            and pin that down as best we could.

 2      Q     And then what about Edward Karst, what was your

 3            thinking there as to why he would be called?

 4      A     He was the investigator who recorded the

09:37  5            statements of both John and Wilson I believe.

 6      Q     I think in the case of Ron Wilson, he took that

 7            statement, I think the evidence is Raymond Mackie

 8            took the statement of Nichol John?

 9      A     Oh, okay, yeah.

09:37 10      Q     Would it then be to deal with Mr. Wilson's

11            recantation and the suggestion that he had been

12            coerced?

13      A     Yes, it was the allegations that the police

14            mistreated him that he was to testify to.

09:37 15      Q     And Larry Fisher you would see being called at

16            your request to respond to what?

17      A     Well, I wasn't actually expecting Larry to sort of

18            be effusive about what he was doing at that time,

19            but I felt it was fair to give him the opportunity

09:38 20            to reply to the allegations that had been made.  I

21            don't suppose his character suffered a huge

22            beating given that he was in jail for six rapes,

23            but he did deserve the opportunity to reply to the

24            allegations being made against him.

09:38 25      Q     And then Ute Frank, Craig Melnyk and George
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1   Lapchuk, would it be fair to say they would be in

2   response to Deborah Hall?

3   A   Deborah Hall, yes.

4   Q   And actually if we go down here, I think there's a

09:38   5   comment here about each of them here:

6   "Edward Karst would be expected to

7   testify about the handling and

8   questioning of Ron Wilson and Nicole

9   John. George Lapchuk and Craig Melnyk

09:38 10   would testify as to their observations

11   of the motel re-enactment. We would

12   expect Larry Fisher to respond to the

13   allegation that he was the perpetrator

14   of the Miller murder."

09:39 15   And then Pat Alain is one I didn't ask you about.

16   In accordance with the material filed relating to

17   herself, would that relate to the response to the

18   Dr. Ferris, Dr. Markesteyn secretor issue?

19   A   I think it must because I don't believe at that

09:39 20   point she would have done the, looked at those

21   exhibits, so that would have to be what it was.

22   Q   Right. And you are talking about the later DNA

23   testing; is that right?

24   A   That's right, her attempt to do that.

09:39 25   Q   And if that assists you, I think February 17th was

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1   the date of her report, so this would be prior?

2   A   Yes.

3   Q   A least according to the documents, that she

4   looked at that. If we can go to 115875. If I can

09:39 5   pause there, you did not have Mr. Caldwell or Mr.

6   Kujawa on your list, and I appreciate that maybe

7   your list is too strong a word, on -- in that

8   letter as possible witnesses, nor did you have

9   them down for Mr. Wolch. Can you tell me your

09:40 10   thinking at the time about where Mr. Caldwell

11   and/or Mr. Kujawa would fit in at the reference?

12   A   Well, at that point I believe Mr. Neufeld and I

13   were of the view that they likely wouldn't want to

14   get into that because based on our conversations

09:40 15   with Serge Kujawa and Bobs Caldwell, there really

16   wasn't any comfort for David Milgaard in calling

17   these people to give evidence about what they did

18   because there wouldn't be evidence coming from

19   them that would in any way assist in establishing

09:40 20   a cover-up or anything else.

21   Q   We talked a bit about this yesterday. Would it be

22   correct to characterize at least a couple of

23   issues that they might address that might affect a

24   miscarriage of justice, the first would be

09:40 25   disclosure in the trial setting or in the court

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1   setting; is that correct, one issue could be --

2   A   Oh, there were a number of allegations raised by

3   the Milgaard people that were directed at both Mr.

4   Caldwell and Mr. Kujawa that they could have dealt

09:41   5   with, but I didn't see our job as putting them on

6   the stand simply so they could respond to the

7   allegations that had gone before. It was my view

8   that it was Hersh Wolch and David Asper's job to

9   put up the witnesses that they thought would best

09:41   10 carry the day for their client and I did not see

11   Bobs Caldwell and Serge Kujawa being of any

12   assistance to them.

13   Q   And so just on that point, would you agree that at

14   least in the media there had been a number of

09:41   15 allegations against Mr. Caldwell and Kujawa of

16   breach of disclosure, frame and involved in

17   cover-up related to the handling of Mr. Fisher in

18   1971, those were issues that were live at the

19   time; is that fair, that they had been made?

09:42   20 A   Yes.

21   Q   And then as far as in the first application to the

22   minister, the issue of Larry Fisher was brought up

23   and dealt with in that, in her response, and I

24   think we've touched on that. As far as making

09:42   25 that an issue -- have you got a problem with that

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1   speaker?

2   A   The volume keeps going up and down.

3   Q   Okay. In the second application, the application

4   at least to the minister identified the similar

09:42 5   fact evidence and identified Mr. Fisher as the

6   perpetrator and I think also alluded to the fact

7   that information was not provided to Mr. Milgaard

8   in connection with that before his proceedings

9   were done. Your comment earlier that you would

09:43 10   have expected if that was to be an issue, in other

11   words, if the Supreme Court was going to respond

12   to the allegation that Mr. Caldwell and Mr. Kujawa

13   and others had deliberately taken steps to hide

14   the Fisher matter from the public and/or the

09:43 15   police and/or the Milgaards, that that was

16   something that was their responsibility to put

17   evidence forward?

18   A   Yes.

19   Q   Did you see it as your responsibility to put

09:43 20   forward evidence at the Supreme Court reference to

21   respond to allegations that had been made in the

22   public and in the media, but not put before the

23   Supreme Court?

24   A   No, no, we were limiting ourselves to what was

09:43 25   raised in court by the applicant.

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1   Q   And did you expect that this issue of frame and

2   cover-up then to be put before the Supreme Court?

3   A   No, because my view was those were inferences

4   being drawn from the facts that were largely

09:44 5   undisputed, the fact that Justice Tallis was not

6   told about the four Larry Fisher rapes in

7   Saskatoon, we knew that to be the case, we knew to

8   be the case the fact that the complainants weren't

9   notified that he pled guilty, we knew it to be the

09:44 10   case that he pled guilty in Regina on a direct

11   indictment, those were all established facts.

12   It's the inference of framing and covering up that

13   the applicants were drawing from that --

14   Q   And would that --

09:44 15   A   -- that was the subject of the media attention,

16   and we didn't expect them to raise that in the

17   Supreme Court because they weren't going to get

18   anywhere with it.

19   Q   Why not?

09:44 20   A   Because there was no evidence to support it, and

21   if they had raised that, both Bobs Caldwell and

22   Serge Kujawa would have been called to indicate

23   what they did and we knew the evidence they would

24   give wouldn't support that.

09:45 25   Q   Was there any reason that Mr. Wolch could not have

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1		called Mr. Kujawa as a witness and asked him to
2		explain why, in 1971, he did what he did with the
3		Larry Fisher file and the David Milgaard file and
4		asked the court to conclude, based on his
09:45 5		evidence, that he had deliberately covered up the
6		file?
7	A	No, I'm not aware of any reason he couldn't have
8		done that.
9	Q	And again, similarly to with Mr. Caldwell, was
09:45 10		that something that, again, could have been done
11		to -- at the Supreme Court?
12	A	Yes. In fact, I believe he was actually in Ottawa
13		at one point, waiting to be called to testify.
14	Q	And do you recall; what were the circumstances of
09:45 15		that?
16	A	Well, to be perfectly frank with you, I don't
17		recall the circumstances of that because it came
18		as a bit of a surprise to Eric Neufeld and I that
19		he was there. The Federal Government had brought
09:45 20		him in and we anticipate that, or I anticipated
21		that it must have been done at the request of Mr.
22		Wolch, because I don't think the Federal
23		Government themselves were actually proposing
24		witnesses and I don't believe we proposed him.
09:46 25	Q	And so Mr. Caldwell was not called? I think his

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1		evidence to this Commission was that he went to
2		Ottawa -- and I stand to be corrected on this -- I
3		think Mr. Pearson, or the request came from the
4		federal Justice Department to go to Ottawa?
09:46 5	A	Yes.
6	Q	And then he was advised, at some point, that his
7		evidence wasn't needed?
8	A	That's correct, yes.
9	Q	And so Saskatchewan Justice didn't ask him to go
09:46 10		there, didn't ask him to be a witness?
11	A	No, and we didn't meet with him in Ottawa either.
12	Q	And why did you not ask to have him called as a
13		witness?
14	A	Well, again, I was satisfied that Justice Tallis
09:46 15		had dealt with any issue with respect to access to
16		the prosecutor's file or disclosure of the
17		statements on -- that were from the witnesses.
18		There was no issue as to
19		whether Justice Tallis had been given the Larry
09:47 20		Fisher rape incidents, he wasn't -- and Mr. Wolch
21		and Mr. Asper did not raise the issue of, in their
22		proceedings before the Court, of the coverup.
23	Q	Were you surprised that, after the Supreme Court
24		reference, the issue of the frame and coverup
09:47 25		re-surfaced?

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1   A   No, not particularly. Again, they were at the

2   point where they needed to gain some traction to

3   get where they wanted, and it having worked so

4   marvelously well before the Supreme Court

09:47   5   reference, it didn't surprise me that it came up

6   again.

7   Q   Was it the view of Saskatchewan Justice that if

8   David Milgaard had an allegation, or his counsel

9   had an allegation that he had been framed and

09:47   10   there was a coverup involving Saskatchewan Justice

11   officials, that that issue should have been

12   forthcoming, or at least --

13   A   Well --

14   Q   -- presented to the Supreme Court?

09:48   15   A   Well, it certainly should have been presented,

16   they should have had Serge Kujawa and Bobs

17   Caldwell there to explain their conduct and so on.

18   But I'm, again, I'm not surprised they didn't,

19   because it wouldn't have helped, I don't think.

09:48   20   Q   And so is it your view that the reason they

21   weren't called is because there was no evidence of

22   a frame and coverup?

23   A   That's right, or to the extent -- to the extent

24   that there was anything you could work into that,

09:48   25   it was there, it was admitted. No one was arguing

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	1	that Justice Tallis wasn't given the four Larry
	2	Fisher rape convictions.
	3	Q This is a letter, 115875, a letter to Mr. Brown --
	4	or pardon me -- to you January 15th, 1992. If we
09:48	5	can go to the next page, it's a letter from Mr.
	6	Wolch to Chief Justice Lamer, I think responding
	7	to the witness list. And, again, we don't need to
	8	go through this in detail but it sets out sort of
	9	the groups of witnesses and, if we can go to the
09:49	10	next page, there is a discussion here about the
	11	DNA testing, and Mr. Wolch says:
	12	"Apparently Ottawa is aware of some
	13	testing techniques in England and
	14	Saskatchewan is aware of some testing
09:49	15	techniques in Texas. It is somewhat
	16	frustrating to us in that in his
	17	original application, Mr. Milgaard
	18	indicated that he would provide any
	19	samples requested of him, and in fact
09:49	20	that is consistent with his behaviour
	21	right back to the time of his arrest,
	22	and this is the first such request."
	23	It goes on to say that he will provide samples.
	24	This reference to, and I touched on this
09:50	25	yesterday about the testing techniques in Texas,

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1   I think you said that came from the RCMP; is that

2   right?

3   A   Well the RCMP via the Federal Government, I -- it

4   was the Federal Government people that we were

09:50 5   relying on with respect to the issue of where or

6   if this could be tested.

7   Q   And so, just to clarify that, are you telling us

8   that you did not go to Federal Justice and say

9   "lookit, send it to Texas"?

09:50 10 A   No, we didn't pick out any particular place.

11   Q   Next page. This relates to the issue of David

12   Milgaard testifying. Mr. Wolch says:

13   "It has always been our

14   intention to have David Milgaard

09:50 15   testify. The difficulty we are having

16   right now is with David's emotional

17   state."

18   And would that be -- was that your understanding

19   at the time, that -- was there ever a position

09:50 20 taken that Mr. Milgaard would not testify for

21   reasons unrelated to his emotional state?

22   A   Not that I am aware of, no.

23   Q   And then it goes on to talk about some issues that

24   Mr. Milgaard is having, and I'll refer to the

09:51 25 transcript of Court the next day that will

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1   elaborate on this. Umm, if you can scroll down

2   here, with Justice Tallis there is a couple of

3   comments here about his providing evidence. Mr.

4   Wolch says that:

09:51 5   "His Lordship was concerned that a

6   statement would be interpreted as

7   perhaps what he selected to put before

8   the Court, or if it was pursuant to an

9   interview as to what the interviewer

09:51 10   chose to select.

11   Accordingly, His Lordship

12   suggested, and we agreed that the

13   information his Lordship would put

14   before the Court should be in answer to

09:51 15   what the Court feels is important."

16   And then it goes on to talk about the waiver of

17   privilege. And it seems Mr. Brown, at least from

18   this letter, and we've heard evidence from

19   Mr. Tallis on this point as well, what is your

09:51 20 recollection of what -- were there issues or

21   concerns from Mr. Wolch or the Court about how --

22   number one, whether Mr. Tallis would testify; and

23   two, how he would testify, by statement, by

24   evidence; and three, who would question him. Do

09:52 25 you have a recollection of those issues?

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1   A   Well I believe, certainly prior to David Milgaard

2   testifying, it hadn't been fixed with certainty

3   that Justice Tallis would give evidence at the

4   reference. After David Milgaard testified, he

09:52 5   raised a number of issues concerning Justice

6   Tallis not following his instructions, not doing a

7   particularly good job, etcetera. At that point I

8   took the position, and the Court agreed, that

9   Justice Tallis had to be given the opportunity to

09:52 10   testify.

11   There were problems with

12   respect to getting him to discuss the matter with

13   anybody, he took a very narrow view of the waiver

14   of privilege that he had originally received from

09:53 15   David Milgaard, he said it applied only to the,

16   essentially the interview that Eugene Williams had

17   with him for the purpose of the 690. The Federal

18   Government took that same very narrow view,

19   because they never would give us a copy of that

09:53 20   interview, so consequently we were pressuring Mr.

21   Wolch to get David Milgaard to sign a waiver of

22   solicitor/client privilege so Justice Tallis could

23   testify.

24   I was of the view, I believe,

09:53 25   and may have expressed that at a meeting we had

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1   with the Chief Justice at some point, that

2   notwithstanding what David Milgaard may or may not

3   wish to do with respect to waiver, having accused

4   Justice Tallis of not following instructions and

09:54 5   given specific evidence with respect to his

6   communications with Justice Tallis, that amounts

7   to a waiver, and in -- Justice Tallis could come

8   and discuss those particular items.

9   Q   And I will be referring to your argument a bit

09:54 10   later, but just while we're on the subject, what

11   were the allegations that stand out in your mind

12   that were made against Mr. Tallis that warranted a

13   response?

14   A   Well, there was the one that he didn't allow David

09:54 15   Milgaard to testify when David Milgaard clearly

16   wanted to do so, and told him that; there was an

17   allegation that Justice Tallis hadn't done a very

18   thorough job of defending him, of checking into

19   the statements and the evidence against him; and I

09:54 20   believe there were, as well, some pieces of

21   information with respect to things like what they

22   did that morning that he did or didn't tell

23   Justice Tallis.

24   Q   And so prior to David Milgaard testifying then, as

09:55 25   far as Mr. Tallis being a witness, are you telling

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1   us that you weren't sure whether he'd be necessary

2   because you weren't sure what he would say?

3   A   Well, yes, we weren't sure that -- the Chief

4   Justice was reluctant to call Justice Tallis as a

09:55 5   witness and I think in his mind, if it wasn't

6   going to be absolutely necessary, that it wasn't

7   going to happen.

8   Q   Okay. And was it your understanding that that was

9   because of his position as a judge of the Court of

09:55 10   Appeal?

11 A   Yes.

12 Q   And that, once the decision was made to call Mr.

13   Tallis, do you have a recollection of there being

14   any issues about whether he would be treated

09:55 15   different than any other witness as far as how he

16   was questioned and who questioned him?

17 A   I don't recall that. My recollection is that,

18   once it was decided he was going to testify, it

19   was going to be viva voce evidence.

09:56 20 Q   I think that was Mr. Tallis' evidence here, he

21   said that someone had raised this issue about

22   doing it by questions only from the Court or by a

23   statement, and he said it was his clear view that,

24   if he was going to testify, he would be treated

09:56 25   like every other witness and questioned like every

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1   other witness; would that have been your

2   understanding?

3 A   That was my understanding, and I -- I don't recall

4   where the questioning him by written questions, or

09:56 5   something like that, came from. I don't recall

6   that.

7 Q   Just down at the bottom, Mr. Wolch writes about

8   other witnesses, and then on the next page he

9   says:

09:56 10   "We ... would not be interested in

11   calling Cadrain or Nicole John.",

12   and then goes on to say:

13   "The calling of these

14   witnesses may lead to the calling of

09:56 15   police witnesses as to the method of

16   taking statements. This of course would

17   not be our responsibility."

18   And I wouldn't mind your comment on that. Would

19   you -- whose responsibility did you view it to be

09:57 20   to put evidence before the Supreme Court about

21   police misconduct in the taking of witness'

22   statements?

23 A   They were making the allegation that the police

24   had misconducted themselves in talking to Nichol

09:57 25   John and Mr. Wilson and it was our view that if

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1   they want to raise that issue, if that's what they

2   think is going to help them, it's up to them to

3   call that evidence. Again, we were there to

4   respond to what they called, we weren't there to

09:57   5   sort of do clean-up on the press campaign that

6   they'd run.

7   Q   And so, on the issue of Ron Wilson, I think what

8   Mr. Wolch is saying, he would call Ron Wilson.

9   You've told us, therefore, you would call

09:57 10   Mr. Karst in response, because he took the

11   statement from Mr. Wilson; correct?

12   A   Yes.

13   Q   With respect to Cadrain and John, if you ended up

14   calling Cadrain and John, to the extent that there

09:58 15   was an issue -- let me back up. If Cadrain and

16   John came and said "yes, our statements are true,

17   what we said then and now", if the allegation was

18   going to be made that their statements before the

19   Supreme Court and their statements in '69 to the

09:58 20   police and evidence at trial was somehow false or

21   fabricated due to improper police conduct, it was

22   your view, then, that that evidence would have to

23   be put forward by Mr. Milgaard; is that correct?

24   A   Yes, they should put the witnesses on the stand,

09:58 25   and go over how the process was done.

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1   Q   The motel room incident, I think we've covered

2   that, and it appears here there is a new witness

3   about the motel room, and I think this is

4   referring to the Launa Edwards statement I showed

09:58   5   you earlier; is that correct?

6   A   Yes, I believe so.

7   Q   If we can scroll down on Larry Fisher, there is a

8   comment here about statements from the victims of

9   Larry Fisher and reports as opposed to having the

09:59   10   victims called, and it would appear your position

11   was that the victims ought not to be called before

12   the Supreme Court; is that correct?

13   A   Yes, that was right.

14   Q   If we can then go to 115881. This is a

09:59   15   continuation, and I think, are these your notes,

16   --

17   A   Yes, they are.

18   Q   -- Mr. Brown? And they appear to be attached to

19   the letter that I just showed you; are you able to

09:59   20   explain what the notes might relate to?

21   A   Well, I think they relate to the issue of delaying

22   the proceedings any. This had sort of been a long

23   time coming, the Supreme Court had set some time

24   aside, we were of the view that we should be

10:00   25   getting in there and getting at it as quickly as

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1   possible, and those notes reflect some of that.

2   Q   I'll just go through parts of them and see if this

3   will assist your recollection of what you maybe

4   said and did at the time. You say here:

10:00 5   "- We get full disclosure from Fed.

6   Justice officials on December 9 and 10 -

7   much of that material was information

8   which Mr. Wolch and Mr. Asper already

9   had.

10:00 10   - We immediately put our files at Mr.

11   Wolch and Mr. Asper's disposal and on

12   December 20 Mr. Asper visited our office

13   in Regina and requested certain

14   materials be photocopied for him.

10:00 15   - those copies were made sent to him on

16   the 21st of December."

17   And is that accurate?

18   A   Yes.

19   Q   And then scroll down. You say:

10:00 20   "- We have waited patiently since

21   December 9 for the proposed witness list

22   from Mr. Wolch and Mr. Asper in order to

23   determine who we would need to call

24   - Yesterday as we were checking into the

10:01 25   hotel here we received a faxed copy of

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1   the letter ...",

2   that's the one I have gone through with you. To

3   the next page, you say:

4   "- We note with interest that with the

10:01   5   exception of two people, Brett Morgan

6   and witness X - Mr. Wolch and Mr. Asper

7   have known of the existence of all of

8   the other witnesses they propose to call

9   and have known for some time what they

10:01   10   are likely or expected to say."

11   What was the concern you were expressing there?

12 A   Well I -- it sounds to me like the view was there

13   is no reason why they can't be ready to go ahead.

14 Q   Go down to the next page. So if you go to page

10:01   15   115884, this is with respect to the issue of Mr.

16   Wilson getting counsel, you say:

17   "- He is a witness - he doesn't get

18   counsel - at this stage not accused of

19   any crime

10:01   20   - What good can having a lawyer here do

21   him."

22   And then scroll down. Any:

23   "... advice he can give Mr. Wilson ...",

24   or:

10:02   25   "only advice he can give Mr. Wilson is

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1   tell the truth",

2   and would that have been your view about Mr.

3   Wilson's request to have a lawyer present?

4   A   Yes.

10:02 5   Q   What did you make of that, the fact that we saw

6   that in an earlier letter, that he wanted to have

7   his lawyer present in Court?

8   A   Well I wasn't sure what the purpose of that was,

9   the lawyer would have no status, Mr. Wilson's only

10:02 10   status was that he had been subpoenaed to testify.

11   Until things sort of went completely off the rails

12   and he needed advice on how to respond to the

13   Chief Justice's suggestion that he was in

14   contempt, he had no need of a lawyer.

10:02 15   Q   Then if we can scroll down:

16   "Re David Milgaard",

17   you say:

18   "- can appreciate he is nervous and

19   concerned and that he may have other

10:02 20   things on his mind

21   - however - he started this process by

22   alleging he has been wrongfully

23   convicted

24   - he's had almost 23 years to prepare

10:03 25   for testifying

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1		- He has been asking for this chance
2		since December of 1988
3		- he's known he'd get that chance since
4		late November of 1991
5		- and since December 9th of '91 he's
6		known pretty well when the hearing would
7		start
8		- if he isn't up to testifying now is
9		there any assurance he will ever be
10		ready or ever be focused on this
11		reference
12		- it seems to us that the first step in
13		this process is to hear from Mr.
14		Milgaard"
15		And would that have been your view on that, Mr.
16		Brown?
17	A	Yes.
18	Q	Okay. And, just on that, did you -- you say you
19		appreciate that he is nervous and concerned, and
20		you mentioned earlier you were aware of some
21		difficulties Mr. Milgaard was having; how did you
22		factor that into the equation?
23	A	Well, we knew that Mr. Milgaard had some
24		psychiatric problems, at some point in some
25		interviews he admitted some of that. The problem

10:03 (line 5)
10:03 (line 10)
10:03 (line 15)
10:03 (line 20)
10:04 (line 25)

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1   we had was that, if the prospect of testifying was

2   causing problems at that point in January,

3   wouldn't it be causing the same kind of problems

4   in March or February or whenever you called him?

10:04 5   He had no difficulty giving interviews to the news

6   media, he had no difficulty issuing statements to

7   the news media, it seemed to me that you bring him

8   to the -- to Ottawa, put him on the stand, and if

9   he can't testify, well, obviously you take him

10:04 10   off, but if he can, let's hear him.

11   Q   Did you have -- you made the comment about the

12   statements in the media; did you have doubts about

13   whether -- let me rephrase that. Did you have

14   concerns about the position being put forward that

10:05 15   he was not capable or had difficulty in testifying

16   in light of what you had read and heard in the

17   media?

18   A   Yes.

19   Q   And why?

10:05 20   A   Because he seemed to be able to deal with that

21   kind of stress without any kind of problem.

22   Q   And did you have concerns that maybe he was trying

23   or that this was an effort to avoid having him

24   testify --

10:05 25   A   Well I --

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	1	Q	-- before the Supreme Court?
	2	A	I was thinking it might be an effort by him to
	3		avoid testifying.
	4	Q	"Him" as distinct from who?
10:05	5	A	Well I -- I didn't think his counsel were involved
	6		in sort of trying to hide him from the Court.
	7	Q	And was it -- what was your view as to whether or
	8		not this reference could effectively be held
	9		without the evidence of David Milgaard?
10:05	10	A	Well, that it seemed to me that if you held this
	11		without David Milgaard coming in to say "I'm not
	12		guilty", that leaves a big hole in the whole
	13		process. He started this by saying "I was
	14		wrongfully convicted", well, come to Court and
10:06	15		tell us why.
	16	Q	If we can go to Mr. Justice Tallis -- and, again,
	17		these notes are appended to the January 15th, 1992
	18		letter, is it likely they would have been made
	19		around that time, presumably before the evidence
10:06	20		started, is that fair? Because it's --
	21	A	Umm, yes, it -- I would have -- I think I would
	22		have had those when we went into Court on January
	23		the 16th.
	24	Q	Okay. And so here:
10:06	25		"Mr. Tallis

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1		- why would this witness be called
2		unless or until Mr. Milgaard makes some
3		allegation that has to be answered
4		- a fair reading of the transcript does
5		not suggest any improper conduct by
6		defence counsel and until such time as
7		someone takes the stand and alleges it -
8		Mr. Justice Tallis has no reason to
9		testify"
10		And, again, would that have been your view then?
11	A	At that point the only thing I would have wanted
12		Justice Tallis to do is firm up what I thought was
13		obvious from reading the transcripts, and that is
14		that he had the statements of Wilson and John
15		before the preliminary hearing, that is all of the
16		statements, not just the inculpatory ones.
17	Q	And if we can go to the next page, and if we can
18		scroll down, talking about -- actually just,
19		sorry, scroll up:
20		"Re - further material to file",
21		and I think this, does this relate to the issue
22		of material continuing to being filed?
23	A	Yes.
24	Q	And what was the concern there?
25	A	Well I think the concern was that all of the

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1   materials that Mr. Wolch and Mr. Asper wanted

2   before the Court hadn't been put before the Court

3   and our view was, well, why not?

4   Q   And then it says:

10:08 5   "Re - secrecy -

6   - have grave concerns about secret

7   hearings or secret filing of materials

8   - Mr. Wolch's client and his mother have

9   themselves made such a cause celeb out

10:08 10   of this case it is now very difficult

11   and very undesirable to start operating

12   behind closed doors

13   - because their actions have called the

14   administration of justice into question

10:08 15   - this Court's inquiry should be fully

16   public"

17   Can you comment on why you made that comment and

18   what issue you may have been addressing?

19   A   Actually, obviously somebody had raised an issue

10:08 20   of secrecy, but just offhand I can't recall what

21   that was addressing. Perhaps it was David

22   Milgaard testifying.

23   Q   If I might assist, just from the record I think

24   what is on some of the documents, there was an

10:08 25   issue about Launa Edwards and protecting her

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1		identity, --
2	A	Oh.
3	Q	-- there was an issue about Mr. Patterson, and
4		there was an issue related to parole records of
10:09 5		both Mr. Milgaard and Fisher are issues which I
6		think, at least from the documents, appear to be
7		alive during the reference, and there may well
8		have been other issues as well, but does that
9		assist?
10:09 10	A	Well, to the extent that those issues were there,
11		certainly our view at the time -- I can recall
12		there being an issue with respect to, I believe it
13		was, Mr. Patterson and Edwards, and our view was
14		that these matters should be heard openly. We had
10:09 15		already had problems with people dealing with
16		these things behind closed doors, and this just
17		wasn't the place for that, and, indeed, one of the
18		reasons the reference was called was to make
19		things public.
10:09 20	Q	And was it the expectation of Saskatchewan Justice
21		that this reference would be not only public, but
22		that it would deal with all of the issues relating
23		to alleged miscarriages of justice that had been
24		made to this point?
10:10 25	A	Well, it would deal with whatever issues they

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10:10 1   chose to raise in the Supreme Court. Again, I

2   didn't take our position as being there to put up

3   all of these allegations and knock them down, we

4   weren't there to clean up.

10:10 5 Q Okay. But let -- let me phrase it this way; was

6   it the expectation that at the end of the Supreme

7   Court reference, regardless of the outcome,

8   Saskatchewan Justice could say to the public that

9   all -- or that Mr. Milgaard was given an

10:10 10   opportunity to put forward any and all allegations

11   relating to miscarriages of justice in a public

12   forum?

13 A Yes.

14 Q And was Saskatchewan Justice, in a sense, looking

10:10 15   for -- maybe 'closure' is the wrong word, maybe

16   it's the right word -- but some public forum that

17   would deal with all of the outstanding issues that

18   affected Saskatchewan and the administration of

19   criminal justice that had been raised in relation

10:11 20   to this case?

21 A Well, subject to the caveat that it was their job

22   to decide what issues they wanted to bring to the

23   Court. As I said, we weren't there to try and

24   clean up the public record with respect to

10:11 25   allegations.

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1   Q   Go to the next page. This is:

2   "Re: burden of proof

3   - cannot argue there has been a

4   miscarriage of justice unless he can

10:11 5   establish that the wrong person got

6   convicted - the only way he can do that

7   is show he is innocent",

8   and:

9   "- has to do more than raise reasonable

10:11 10   doubt about guilt",

11   and then:

12   "- this burden applies only at trial the

13   defendant presumed innocent

14   - if doubt exists Crown hasn't proven

15   guilt beyond reasonable doubt and

16   defendant acquitted because presumption

17   of innocence hasn't been displaced

18   - here defendant has been convicted -

19   ...",

20   act:

21   "... has found ...",

22   sorry?

23   A   'A court has found'.

24   Q   "... a court has found as fact he is

10:12 25   guilty - reasonable doubt no longer

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1		helps him".
2		And, again, would that have been your notes as to
3		the issue of burden at the outset of the
4		hearings?
10:12 5	A	Yes.
6	Q	And I'll go back to, I think there was submissions
7		made on this point to the Court in February when
8		they asked for submissions about the test; is that
9		correct?
10:12 10	A	Umm, --
11	Q	Or at some point?
12	A	I think it was the end of January, actually, yeah.
13	Q	It was the end of January, sorry, and at the end
14		of February --
10:12 15	A	And at the end of February they finally decided
16		what we were doing.
17	Q	And so I think the record shows, Mr. Brown, that
18		the Court asked you to formalize these
19		submissions, which you later did, and I'll maybe
10:12 20		ask you some questions when we get to that
21		document; is that fair?
22	A	Okay.
23	Q	009779, and go to the page 781. And this is a
24		letter from, it appears Mr. Meehan is the
10:13 25		executive legal officer of the Court, he is

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1		communicating on behalf of the Chief Justice,
2		accepts Mr. Wolch's suggestions in the letter and
3		the hearings commence with direct witnesses the
4		week of January 20th, and I take it that was the
10:13 5		Court's direction on dealing with witnesses?
6	A	Yes.
7	Q	267415. These, I -- are these Mr. Neufeld's
8		notes? No, I'm sorry, 267414. This is January
9		16th, '92 meeting, I think that's amongst counsel;
10:13 10		are these Mr. Neufeld's notes, do you know, --
11	A	Umm --
12	Q	-- or yours?
13	A	They are not mine. They might be Eric's, but they
14		don't, --
10:14 15	Q	Let me ask --
16	A	-- they don't actually look that much like his.
17	Q	Let me ask you a couple of questions about what's
18		noted in here. This is the day, January 16th,
19		that -- the next appearance was an appearance
10:14 20		before the Court at 10:00 a.m. on that day; do you
21		recall attending a meeting of counsel before
22		Court?
23	A	Yes.
24	Q	And there is one note here, if we can go to the
10:14 25		next page, a comment here:

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1   "Henderson tapes - not available -

2   before 1st witness".

3   Do you have a recollection of that issue coming

4   up, before Court, about finding the Henderson

10:14   5   tape? I think that's related to the Ron Wilson

6   interview.

7   A   We, yes, we wanted the Henderson tapes before

8   Wilson took the stand, and it was likely that he

9   was going to testify in that first week.

10:14 10   Q   And do you recall what you were advised about the

11   Henderson tapes and -- tape and/or tapes, and

12   where they were, and whether they could be

13   produced?

14   A   My recollection is that the tape was lost or

10:15 15   misplaced and that we were having some difficulty

16   getting ahold of Mr. Henderson.

17   Q   Go to 208523, please, and this is the transcript

18   of appeal proceedings before the Supreme Court,

19   January 16, 1992. If we can go to page 208526,

10:16 20   and I believe this would be the official

21   commencement of the reference proceedings; is that

22   correct?

23   A   It appears to be, yes.

24   Q   I just want to ask your comment on a couple of

10:16 25   matters raised. If we can go to page 528, and

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1   this is Chief Justice Lamer talking, he goes

2   through the Order-in-Council, he says:

3   "Pursuant to this, I had three meetings

4   with the lawyers; two in my chambers and

10:16   5   one in public. At the first meeting

6   where all counsel were present except

7   Mr. Fisher's counsel, a certain number

8   of decisions were made which I would

9   like to reiterate now so that they may

10:16   10   be endorsed by the Court. Some of those

11   decisions that were made have to be made

12   by the Court. It is not sufficient that

13   they be made by a Judge of the Court."

14   And then goes on, if we can just scroll down, it

10:16   15   talks about the second meeting:

16   "...Mr. Fisher's counsel was not there

17   because our second meeting was to

18   determine whether he would be granted

19   status, which he has. At that meeting

10:17   20   it was decided that (1) the attorneys

21   representing the Attorney General of

22   Canada would adopt a neutral position in

23   this reference;..."

24   And let me pause there. Would that -- would you

10:17   25   have been present then at the meetings in the

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1   chambers with Chief Justice Lamer then?

2   A   Yes.

3   Q   And I believe the record, there was one, at Mr.

4   Fisher's application for standing I believe an

10:17 5   agent appeared on your behalf; is that correct, on

6   that application, or were you present for that?

7   A   No, we had someone from Gowling and Henderson I

8   believe there.

9   Q   And so apart from that --

10:17 10   A   We weren't objecting to it, so --

11   Q   Apart from that occasion then, you would have been

12   present in meetings with Chief Justice Lamer and

13   all counsel?

14   A   The other two meetings, yes.

10:17 15   Q   Go to page 531, and I want to ask your views on a

16   couple of things because later on after the

17   reference we'll see reference made to Chief

18   Justice Lamer's opening remarks in correspondence

19   I think that the minister wrote and indeed counsel

10:18 20   for Mr. Milgaard wrote where he says:

21   "In this regard, it is to be

22   remembered -- and I reiterate this --

23   that this is not a trial; this is not a

24   rehearing of an appeal; nor is it a

10:18 25   Royal Commission of Inquiry into certain

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1   matters. It is a reference..."

2   And then the next page, commenting on:

3   "We have been asked by Cabinet to assist

4   them in exercising their power of mercy,

10:18   5   which is an administrative power. In

6   that way, while we are still a Court, we

7   are assisting in the exercise of an

8   administrative power. We are entitled

9   in that regard to do most of what

10:18   10   Cabinet itself could do."

11   And again, would that have been your

12   understanding then as to -- I mean, this is the

13   court indicating what their powers are, but did

14   you have any concerns about what, about whether

10:18   15   the Supreme Court might be limiting what they

16   were looking at in determining a miscarriage of

17   justice?

18 A   No. At one point during one of the meetings there

19   was some indication that they weren't, or that the

10:19   20   Chief Justice indicated they weren't interested in

21   dealing with how the Saskatoon police was set up

22   or how the Department of Justice was set up or

23   anything like that, they were interested in any

24   allegations that suggested David Milgaard had been

10:19   25   wrongly convicted.

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1   Q   And so -- and we touched on this yesterday, to the

2   extent that a police officer or the police service

3   did something wrong in gaining evidence against

4   David Milgaard, was it your view that that was an

10:19 5   issue that the Supreme Court was prepared to hear

6   about?

7   A   Yes.

8   Q   And then 208536, Mr. Lamer says, talks about --

9   or:

10:20 10   "This reference arises as a result of an

11   application for mercy Mr. Milgaard made

12   under section 690 of the Criminal Code.

13   In processing such an application, the

14   Minister of Justice is free to look at

10:20 15   anything she feels is germane. We are

16   beyond the adversarial process."

17   Was it your understanding that the Supreme Court

18   could look at whatever the Federal Minister of

19   Justice could look at in a Section 690

10:20 20   application?

21   A   Yes, that's correct.

22   Q   Actually, I apologize, that was Mr. Fainstein

23   speaking. If we can just go back to the earlier

24   page, I think this is Mr. Fainstein speaking. So

10:20 25   these are his opening remarks, but again, that

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1   would have been your understanding, then, of what

2   the court could do? Anything the Federal Minister

3   could look at, the Supreme Court could look at in

4   giving advice to the Federal Minister?

10:20   5   A   Yes.

6   Q   Again, 208537, and here's where Mr. Fainstein

7   states:

8   "...I believe that all

9   counsel here agree that you are not

10:21   10   constrained by the normal rules of

11   evidence or procedure and can entertain

12   and consider anything which common sense

13   and logic suggest is relevant. You are

14   thus as free as the Minister would be

10:21   15   when entertaining an application for

16   mercy.

17   This is not, however, as

18   your lordship has also pointed out, a

19   Royal Commission of Inquiry looking into

10:21   20   every aspect of the administration of

21   justice which can be touched on in this

22   case."

23   And I think that's what you talked to earlier,

24   about the, perhaps the, how the police service

10:21   25   operated or the Crown service operated would be

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1   one of those areas that you viewed as being out

2   of bounds?

3   A   Yes.

4   Q   If we can go to page 542, and here's where Mr.

10:22   5   Fainstein finishes up about getting subpoenas

6   issued and arranging the logistics and he says:

7   "...by the end of the day we

8   can have that list and begin the

9   process."

10:22 10   And Lamer states:

11   "I should inform you that it

12   is the view of the Court that not very

13   far into the process, rather at the

14   outset than anywhere else, if any, we

10:22 15   will want to hear from Mr. Milgaard.

16   There is a miscarriage of

17   justice only if Mr. Milgaard has been

18   convicted for a crime he did not commit.

19   He has never told a Court of law since

10:22 20   the beginning of the proceedings that he

21   did not commit the crime. It seems to

22   me that it is step one in what might be

23   a lengthy process, but would otherwise

24   be a very shortened process if the

10:22 25   answer goes the other way. So it is our

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1   feeling that, barring certain

2   impossibilities -- I don't know -- we

3   would want to hear him some time next

4   week."

10:23 5   And again, would that -- I think you talked

6   earlier that that would be your view and appears

7   to be the court's view as well, that Mr. Milgaard

8   should be either the first witness or very early

9   on?

10:23 10   A   That's correct, yes.

11   Q   Go to 208547, again this is still the January 16th

12   discussion, I think Mr. Wolch has raised the issue

13   about Mr. Wilson being difficult to get there

14   because his lawyer, no one is paying for his

10:23 15   lawyer, I think that's the sense of it, and Lamer

16   says:

17   "We intend to question Mr. Wilson

18   ourselves."

19   Mr. Wolch:

10:23 20   "I see."

21   And the court:

22   "We might turn him over to you if we see

23   fit. We will be doing that for most

24   witnesses.

10:23 25   Again, you must not fall back

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1   into the rut of the adversarial process.

2   It is our hearing and you are invited

3   here to attend and assist."

4   I wouldn't mind your comment in that regard.

10:24 5   What was your understanding at the time or going

6   into the hearing about who would be questioning

7   the witnesses?

8   *A*   Well, the week, during this meeting with the

9   court, the court made it very clear that they were

10:24 10   going to question the witnesses which sort of left

11   Eric Neufeld and I wondering, well, and we're here

12   because what. If they were going to question the

13   witnesses and the federal government people were

14   there as well, there didn't seem to be much of a

10:24 15   role left for us or even for Mr. Wolch and Mr.

16   Asper, but, frankly, that's the last we heard of

17   that. When the process started the following

18   week, David Milgaard took the stand and the next

19   thing the Chief Justice said was, to Mr. Wolch,

10:24 20   was "your witness", they didn't ask questions.

21   *Q*   And did that surprise you, that Mr. Wolch was

22   asked to lead Mr. Milgaard?

23   *A*   It did, yes. As I say, the Chief Justice made it

24   very clear that the court would examine the

10:25 25   witnesses and if they thought there was some

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1		particular need for us to get involved or muck in,
2		they would invite us to cross-examine.
3	Q	And then can you tell us, what was the practice
4		then put in place as to which of the three or four
10:25 5		counsel -- I take it the Federal Justice had
6		counsel present, I think they examined some of the
7		witnesses; is that correct?
8	A	Yes.
9	Q	But not very many?
10:25 10	A	No. I think sort of very early on the court
11		realized that having Mr. Fainstein or Mr. Frater
12		do examinations or cross-examinations would drag
13		the process out, so they limited their
14		participation and largely left it to Hersh Wolch,
10:26 15		David Asper, Eric Neufeld and I and Brian Beresh
16		when Mr. Fisher's interests were implicated.
17	Q	And so who and how did you know which of -- let's
18		talk about the two groups being Saskatchewan and
19		David Milgaard -- who would examine the witness
10:26 20		first and who would follow and how was that
21		determined?
22	A	Well, I suppose it roughly fell to be divided
23		between whose interest was being dealt with by
24		that witness. If the witness was advancing Mr.
10:26 25		Milgaard's case, then I think generally Mr. Wolch

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1   was invited to examine first and Mr. Neufeld to

2   cross-examine later.

3   Q   If we can go to page 208550, and this gets into a

4   fairly lengthy exchange on the record about Mr.

10:27 5   Milgaard's ability to attend the following week to

6   give evidence, and I'll just read you a couple of

7   parts and ask for your comment. I think Mr. Wolch

8   says:

9   "...I would like the Court to

10:27 10   hear the Milgaard that we know, not the

11   young man who in a depressive state has

12   lost all hope ---"

13   And the Chief:

14   "Do you have any medical

10:27 15   evidence? This is the kind of matter

16   that if we are to postpone Mr.

17   Milgaard's testimony before us, we might

18   have to postpone the whole thing because

19   we feel he should be heard at the

10:27 20   outset.

21   If you are making an

22   application that it be postponed, then I

23   think it should be supported. We have

24   already discussed it this morning, I

10:27 25   must say."

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1   And then goes on:

2   "We discussed it and we feel

3   that we would only be satisfied if there

4   was some medical evidence in persona for

10:27   5   us."

6   And then to go on at the bottom, the Chief says:

7   "If you say to us that we

8   shouldn't subpoena Mr. Milgaard next

9   week on the basis that he is not

10:27 10   medically fit to testify at his best

11   now, then I am saying to you that you

12   better get that medical evidence to us

13   before we get him here."

14   And I won't go through all the transcript here,

10:28 15   it speaks for itself. Can you give us your --

16   you would have been present during this?

17   A   Yes.

18   Q   Can you give us your sort of recollection and what

19   transpired and how it may have affected your view

10:28 20   of the proceedings?

21   A   Well, when asked to produce some medical evidence,

22   my recollection is that Mr. Wolch was not able to

23   do so because Dr. Yaren was out of the country and

24   had been for some time. I believe the court asked

10:28 25   that they contact Mr. Milgaard's case worker at

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1   the jail. The case worker indicated that Mr.

2   Milgaard was fine and was anxious to get on with

3   things and I think that didn't dispose the court

4   well to Mr. Wolch and Mr. Asper.

10:29 5   Q   And at the conclusion of this then, was it agreed

6   that Mr. Milgaard would be the first witness then?

7   A   Yes.

8   Q   And 208567 I think is where I think -- and the

9   transcript reflects what happened, I think there

10:29 10   was a break and some phone calls and Mr. Wolch

11   reports back to the court:

12   "The better news is --"

13   Actually, sorry, go back to the previous page.

14   After the court recessed, Mr. Wolch:

10:29 15   "I have bad news and good news. The bad

16   news is that in attempting to get ahold

17   of Dr. Yaren neither he nor his two

18   secretaries were there. But somebody in

19   the office mentioned that he had left

10:29 20   today out of the country and would be

21   back next week some time. It is not

22   verified, but he clearly was not

23   available.

24   The better news is that we

10:29 25   were able to contact David Milgaard

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1   himself. Mr. Asper spoke with him. For

2   reasons I won't get into, I didn't speak

3   to him. In any event, he spoke to David

4   and David feels he would be able to

10:30 5   testify next week."

6   And Chief Lamer says:

7   "He would be?"

8   Mr. Wolch:

9   "Able to testify next week. He is going

10:30 10   through a difficult time. To give you

11   some idea, he didn't quite appreciate we

12   were here; he heard it on the radio."

13   And then Lamer says:

14   "He can explain that to us."

10:30 15   So that would have been sort of the conclusion

16   there that reported back to the court that he can

17   attend?

18   *A*   Yes.

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

10:30 20   appropriate spot to break.

21   *(Adjourned at 10:30 a.m.)*

22   *(Reconvened at 10:49 a.m.)*

23   BY MR. HODSON:

24   *Q*   Call up 009092, please. And so January 16th, '92,

10:49 25   we went through the opening remarks of the court.

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1   This is a letter from Mr. Lamer to Mr. Fainstein

2   indicating that he has discussed with his

3   colleagues and that he's going to call Mr. Tallis.

4   It says:

10:49   5   "I will be inviting him to

6   send us his version of events as regards

7   the reason why Mr. Milgaard did not take

8   the stand, and as to whether he was in

9   possession, or knew of the existence, of

10:49   10   Wilson's first statement to the police

11   at the time of the trial. I imagine

12   that he will want to contact either Mr.

13   Milgaard or counsel for Mr. Milgaard, to

14   ascertain whether Mr. Milgaard is always

10:50   15   waiving his privilege, as we were

16   informed by his counsel.

17   The purpose of all of this

18   is to avoid having to call Mr. Justice

19   Tallis if it is not necessary. That

10:50   20   would be the case if, of course, his

21   version of events coincides with that

22   which will be given to us by Mr.

23   Milgaard."

24   And:

10:50   25   "Everyone will be given a

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1		copy of whatever he sends us."
2		Just a couple of questions. It appears at this
3		point that the court was looking at getting
4		evidence from Mr. Tallis in a different way than
5		having him called as a witness, at least at this
6		point?
7	A	Getting something from him, yes. I don't know
8		that they were actually planning to file anything.
9		My recollection is that if they were assured that
10		Justice Tallis' version of events didn't differ
11		from Mr. Milgaard's, there was no reason for him
12		to sort of be put on the record for anything.
13	Q	Can you help us out in identifying where the court
14		would have obtained the significance of this issue
15		about whether -- I guess the question is why would
16		the court be asking Mr. Tallis about whether or
17		not he knew of the existence of Wilson's first
18		statement, would that -- do you know where that
19		question would have arisen from, and I appreciate
20		it's Mr. Lamer's letter, not yours, but --
21	A	Well, certainly there had been much made in the
22		news media up to at least the first application
23		being dismissed that not all of the statements of
24		I believe Wilson and John had been provided to
25		Justice Tallis by the Crown.

Timestamps: 10:50 (line 5), 10:50 (line 10), 10:51 (line 15), 10:51 (line 20), 10:51 (line 25)

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1   Q   And I guess the reason I raise this, we did see, I

2   think in your evidence, I identify the article of

3   July 17th, 1990 of Mr. Lett that talks about the

4   issue of the first statement of Ron Wilson going

10:52 5   to Mr. Tallis, and you remember I went through

6   that with you, that article, because it prompted

7   Saskatchewan Justice to do their own review?

8   A   Yes.

9   Q   And so that was in the media. I don't believe,

10:52 10   and I stand to be corrected on this, that that was

11   an issue identified in the minister's February

12   27th, 1991 letter and it certainly wasn't an issue

13   put forward in the second application.

14   A   No, I think that's right. I think by then the

10:52 15   minister was satisfied that the evidence

16   disclosed, he had that statement.

17   Q   Do you recall in any of your dealings leading up

18   to I guess the dealings with the court prior to

19   January 17th, 1992, the date of this letter, the

10:52 20   issue of whether or not Mr. Tallis, or whether or

21   not Mr. Caldwell had disclosed Ron Wilson's first

22   statement to Mr. Tallis had been raised in these

23   discussions?

24   A   I don't recall it being raised as an issue.

10:53 25   Q   And again, do you have any -- can you be of any

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1		assistance in trying to ascertain where the court
2		might have obtained this issue from or what might
3		have prompted them to ask this question?
4	A	Well, the only basis I can see for that would be
5		the news media allegations that statements were
6		withheld from Justice Tallis.
7	Q	Okay. If you can go to 327858, and this is a CBC
8		radio news report of January 20th, 1992, so this
9		is I think the Monday morning before the
10		commencement of hearing evidence, and there's just
11		a couple of comments that you make here I want to
12		ask you about. Can you tell us generally at this
13		point, did you -- what was your view or
14		Saskatchewan Justice's view about the extent to
15		which you and Saskatchewan Justice officials would
16		comment in the media about this matter as we were
17		getting into the reference hearing?
18	A	Well, I think there was probably a difference of
19		view with respect to my position and the
20		department's position as sort of held by others.
21		My view was that we can be reasonably free to
22		comment providing the matter has already been
23		through -- if we're going to comment on evidence,
24		the evidence has to have been presented to the
25		court and the comment would be with respect to

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1   exactly what was said. With respect to this

2   particular interview, it was really a process,

3   discussion that they wanted to have, what are we

4   going to be doing, how is it going to be done and

10:55 5   my view was that -- and again, given that the no

6   comment had been so devastating to us in the past,

7   if we were able to co-operate with the news media

8   in providing information, we would do that.

9   Q   Would you agree that the Supreme Court reference

10:55 10   received a significant amount of attention in the

11   media?

12   A   Oh, yes, absolutely.

13   Q   And I won't go through much of it with you, but we

14   have on our record not only television and radio

10:55 15   reports, but as well as newspaper reports that

16   quote extensively from not only the evidence, but

17   comments by counsel for the parties throughout the

18   process, and you agree with that?

19   A   Yes.

10:55 20   Q   And so that, for example, Mr. Beresh on behalf of

21   Mr. Fisher, Mr. Wolch and Mr. Asper on behalf of

22   David Milgaard and Joyce Milgaard were, I believe

23   the record reflects, making regular comments in

24   the media, was that your understanding, through

10:56 25   the course of the reference proceedings?

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1   A   Well, Mr. Beresh was whenever Mr. Fisher's name

2   came up. Mrs. Milgaard was regularly in front of

3   the news media. Mr. Wolch and Mr. Asper were sort

4   of in the background when Joyce Milgaard was

10:56 5   talking to the news media, but I don't recall them

6   being sort of particularly prominent in that

7   respect. I think she was doing most of the

8   commenting.

9   Q   And did you have a concern then that Saskatchewan

10:56 10 Justice or your position then be in the media as

11   well? That's the point I was trying to get at.

12   A   Only to the extent that if someone asked a

13   question, I was prepared to answer it if I thought

14   it was appropriate for me to do that. I wasn't

10:57 15 prepared to speculate on what witnesses might say.

16   It was a matter of this is what the witness said.

17   Q   In light of the fact that the matter was before

18   the Supreme Court, you talked earlier about

19   concerns about getting both sides before the media

10:57 20 if the issue is being decided in the media, or

21   words to that effect; is that correct?

22   A   Yes.

23   Q   In this case with the matter before the Supreme

24   Court, did you have the same concern that all of

10:57 25 your issues or all of the Saskatchewan Justice

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1   points of view were also put in the media or were

2   you prepared to have them dealt with by the court?

3 A   Well, as I said, we weren't there to sort of clean

4   up what had gone before, we were there to respond

10:57 5   to whatever information the Milgaard people put

6   before the court. To the extent that there was

7   any comment to be made on that, the news media

8   people were not allowed to video tape the evidence

9   in the courtroom and because of that they liked to

10:58 10   have somebody say what witnesses had said, and if

11   they asked for that sort of thing, that's the kind

12   of comment I would give them.

13 Q   Okay. Here you are asked, and again this is

14   January 20th:

10:58 15   "Can you outline for us what the Crown

16   will argue?"

17   Your answer:

18   "Well, our position will be to make sure

19   that a full exposition of the facts is

10:58 20   placed before the Supreme Court."

21   And the announcer:

22   "As of now though your position is that

23   you want the original conviction upheld,

24   I take it?"

10:58 25   Your answer:

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1   "Well, the job that David Milgaard and

2   his council have is to convince the

3   court that there has been a miscarriage

4   of justice. In order to do that they

10:58 5   have to show that he is innocent,

6   because obviously if the right person

7   was convicted there has been no

8   miscarriage.

9   Our job will be to examine the proof

10:58 10   they bring in and check it closely to

11   make sure that it is reliable, and to

12   lead any evidence that indicates the

13   contrary."

14   And would that be an accurate summary of not only

10:59 15   what you said, but what your view was at the

16   time?

17   A   Well, that's a transcript of what was said, so I'm

18   assuming it's accurate, and yes, that was our view

19   at the time.

10:59 20   Q   And so as far as this, the question about whether

21   you want the original conviction upheld, was that

22   your job?

23   A   Yes, I suppose we were there to defend the process

24   and thoroughly examine or cross-examine on

10:59 25   anything suggesting that Mr. Milgaard was

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1   innocent.

2   Q   And what if the evidence suggested that -- to the

3   contrary?

4   A   Well, if there had been credible evidence

10:59 5   presented or evidence that we thought was credible

6   presented suggesting that he was innocent, then it

7   was always my position that we were free to then

8   tell the federal government that our position was

9   that there had to be some particular remedy given.

11:00 10   Q   And maybe I can put it this way, as an advocate

11   before the court, one scenario might be where your

12   client, the Attorney General, says my position is

13   X, go in and defend this position, namely, that

14   the conviction is valid, and I think you are

11:00 15   telling us, and I would like your comment on this,

16   but your position wasn't that rigid. Although you

17   are starting out saying that you are there to

18   defend the process and the conviction, but that if

19   in the course of the hearing you became of the

11:00 20   view that there had been a miscarriage of justice,

21   that your instructions or your position was such

22   that you could alter your course mid hearing; is

23   that a fair way to put it?

24   A   Yes, we could, and I should just point out that

11:00 25   there really was no discussion with the Attorney

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1   General with respect to what our position should

2   be or how we should approach this. The position

3   in Saskatchewan is pretty much a hands-off one.

4   Q   Okay. Perhaps on that point, the decision maker

11:01 5   for Saskatchewan Justice, is it fair to say this,

6   that if you believed that the original position

7   taken, namely, that the conviction was safe and

8   sound, you became of the view that that wasn't the

9   case, you were in a position to change your

11:01 10   position before the court on the matter?

11   A   Absolutely.

12   Q   Go to the next page, and there's a question here

13   about the Fisher information:

14   "Has that changed your case at all?"

11:01 15   "Why not? Can you be specific?"

16   You say:

17   "Well, the difficulty with the Fisher

18   matter Maureen is that quite frankly if

19   I were going to prosecute Mr. Fisher I

11:01 20   would have no evidence I could put

21   before the court.

22   The so called similar fact evidence is

23   so nebulous and so vague that it really

24   amounts to coincidence and nothing else.

11:02 25   And if I were prosecuting him a court

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1   would not allow me to bring that

2   evidence into trial, and I know his

3   council shares the view, that it's

4   questionable whether it would even be

11:02   5   allowable in his defence evidence in the

6   Milgaard trial.

7   So, that's got to be dealt with, and it

8   won't be dealt with this week. It will

9   probably be in March that we get to

11:02   10   that."

11   And so just on the similar fact evidence, that

12   would have been your view, and I think you told

13   us that the other day, that you did not think the

14   similar fact evidence would be admissible in a

11:02   15   prosecution against Mr. Fisher?

16   A   That's correct.

17   Q   And then you say here:

18   "And if I were prosecuting him a court

19   would not allow me to bring that

11:02   20   evidence into trial, and I know his

21   council shares the view, that it's

22   questionable whether it would even be

23   allowable in his defence evidence in the

24   Milgaard trial."

11:02   25   Are you referring to Mr. Beresh on behalf of Mr.

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	1		Fisher sharing your view or are you saying that
	2		Mr. Tallis shares your view?
	3	A	No, it would have been Brian Beresh.
	4	Q	So --
11:03	5	A	At that point I had never discussed the issue with
	6		Justice Tallis.
	7	Q	And so your reference to counsel sharing the view
	8		is not on the issue about whether the Fisher
	9		information would be available in the David
11:03	10		Milgaard trial, but rather whether it would be
	11		admissible in the Larry Fisher prosecution?
	12	A	Yes.
	13	Q	And then the next page, I think you are asked here
	14		about the motel room, you say:
11:03	15		"Well, there is one witness who has
	16		recanted. The other witnesses are
	17		pretty much holding steady to what they
	18		said at the trial.
	19		And you've got one more witness from the
11:03	20		so called motel room incident that's
	21		come forward and given a statement that
	22		indicates that she interpreted what
	23		happened a little different than what
	24		the other witnesses did.
11:03	25		But, in an essence her factual

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1   recounting of what occurred really is

2   very close to what the other witnesses

3   say, she just put a different

4   interpretation on it."

11:03   5   And would that be a reference to Deborah Hall?

6   A   Yes.

7   Q   If we can go to the next page, there's a comment

8   here about the DNA, you are saying that it's going

9   to the lab in England that invented the process

11:04 10   for DNA matching and they now believe they can

11   check to see whether they can do some comparisons

12   with that. And would that be information that you

13   received from Federal Justice officials?

14   A   Yes.

11:04 15   Q   Down at the bottom you are asked:

16   "During the course of this will the

17   conduct of the Saskatoon police be

18   investigated as well?"

19   You comment:

11:04 20   "I rather doubt it. The focus of this

21   inquiry is whether or not David Milgaard

22   is innocent. It's not a public inquiry

23   to determine whether the Administration

24   of Justice is good, bad or indifferent.

11:04 25   The focus is very narrow and it has to

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1   do with David Milgaard's status or

2   guilt, his innocence. And really the

3   conduct of the Saskatoon City Police

4   doesn't really come into that.

11:04   5   Our concern is whether there is evidence

6   that supports his conviction."

7   I'm wondering if you can just -- actually, let me

8   read one more comment and then I'll ask you to

9   elaborate. It says:

11:05   10   "Well, as the court noted the first time

11   we met, at some point there maybe some

12   consideration to some other form of

13   inquiry depending on the decision the

14   court makes. But, that's not something

11:05   15   that will come out of this case.

16   The Supreme Court will hear its

17   evidence, it will make its

18   recommendation to the Minister and she

19   will no doubt act on that in due course.

11:05   20   But, this isn't going to be a public

21   inquiry into the conduct of the

22   Saskatoon city police, or the

23   Saskatchewan Justice Department."

24   And I'm wondering, are you saying anything

11:05   25   different here than what you told us earlier

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1   about the extent to which the -- the extent to

2   which you understood the Supreme Court could

3   inquire into police and Crown misconduct in their

4   dealing with the David Milgaard case?

11:05 5   A   No, a general inquiry into the establishment and

6   processes of the Saskatoon police or Department of

7   Justice is a different matter altogether than an

8   inquiry into whether or not the police tortured a

9   witness to get a statement or whether or not they

11:06 10   coerced Wilson and John into providing the

11   statements they did. If you could establish that,

12   you would establish the statements are false, and

13   that would obviously be of considerable import.

14   Q   If we can go to 267287. And this is the court

11:06 15   order that was obtained, I think by your

16   department, if we can just -- on January 17th,

17   1992. This is a letter from the registrar, and

18   the order says that:

19   "'... the Registrar is authorized to

11:06 20   deliver the Court file and exhibits to

21   Sergeant Pearson for transmission to the

22   Supreme Court of Canada. They are to be

23   returned to the Local Registrar upon

24   completion of the proceedings in the

11:06 25   Supreme Court of Canada.'"

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        1   Now, to your knowledge, did the exhibits; were

        2   they returned to the Court of Queen's Bench or to

        3   the Local Registrar upon completion of the

        4   proceedings in the Supreme Court of Canada?

11:07 5   A   Umm, no, the clothing was retained by the Federal

        6   Government pursuant to an undertaking given by the

        7   Chief Justice that, in the event the technology

        8   becomes available to test the DNA, that testing

        9   would be done at some point.

11:07 10   Q   And I'm sorry, you said an undertaking 'by' the

    11   Chief Justice, or 'to'?

    12   A   Or to the Chief Justice.

    13   Q   To the Chief Justice?

    14   A   Sorry, from Ron Fainstein.

11:07 15   Q   And so at the conclusion of the proceedings, and

    16   I'll get to some documents a bit later, it was

    17   your understanding that there was an arrangement

    18   made that Federal Justice officials would continue

    19   to seek testing of the garments?

11:07 20   A   They -- they would, yes. You -- at that point, of

    21   course, we were of the view that there was just

    22   the one tiny speck of material that might be

    23   subject to analysis, and their concern was that

    24   until the PCR technology advanced, they didn't

11:08 25   want to attempt to do any testing and end up

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1   losing the entire sample for an inconclusive

2   result.

3 Q But once the Supreme Court proceedings were

4   concluded and the advice given to the minister,

11:08 5   what -- as far as further testing of Gail Miller's

6   clothing, would that not relate to, I guess,

7   matters affecting the administration of criminal

8   justice, namely finding out if someone else

9   committed the crime?

11:08 10 A Well, I -- I suppose it does, and we were relying

11   on the Federal Government to make those

12   arrangements and have that done at some point.

13 Q And so if the exhibits had been returned to the

14   Court of Queen's Bench at the conclusion of the

11:08 15   Supreme Court hearings, and no efforts were being

16   made by Federal Justice officials, are you able to

17   comment as to whether Saskatchewan Justice

18   officials would have pursued DNA testing of the

19   clothing after the Supreme Court reference

11:09 20   decision?

21 A Umm, yes, we would have sort of regularly checked

22   in with the RCMP to see where the technology was

23   and whether they were confident that those kind of

24   tests could be done and done productively.

11:09 25 Q And why would that be important for Saskatchewan

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1   Justice to do that testing?

2   A   Well, because we were anxious to have -- if there

3   was anything to be tested, we were anxious to have

4   that done, and settle the issue one way or

11:09   5   another.

6   Q   And would the testing of Gail Miller's clothing

7   for DNA and for elimination of a suspect, or to

8   match a suspect, would that be an important matter

9   in the investigation into the death of Gail

11:09 10   Miller?

11   A   Oh yes, yes.

12   Q   And just generally, we'll get into some of the

13   documents, once the Supreme Court reference was

14   concluded in April of 1992, for the five years

11:10 15   that followed, I think up until July 1997 when the

16   garments were actually tested in England, who was,

17   in your view, responsible for conducting the

18   tests, the DNA tests, determining what types of

19   tests should be done, who should do them, where

11:10 20   they should do them, and how they should be done?

21   A   Well, Ron Fainstein had undertaken to do that. He

22   had the exhibits, as far as I knew, and he would

23   be checking from time to time to see when it would

24   be possible to get that kind of work done.

11:10 25   Q   And as far as Saskatchewan Justice's position on

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1		that were you relying upon Federal Justice
2		officials, then, to do that?
3	A	Yes, particularly if it meant going to a lab
4		outside of Canada. As I mentioned before, we
11:11 5		don't have the money for that, so it would have to
6		be either the Federal Government or the RCMP that
7		arranged for that -- the money or the contacts,
8		frankly.
9	Q	If -- if the exhibits had been returned to the
11:11 10		Court in 1992 who would Saskatchewan -- and I
11		think you indicated Saskatchewan Justice would
12		look at whether technology was available and,
13		presumably, you would follow up on it if it was;
14		is that correct?
11:11 15	A	That's correct.
16	Q	And who would you go to, who would Saskatchewan
17		Justice utilize to inquire into whether or not DNA
18		testing was available, how would you go about
19		doing that?
11:11 20	A	I would deal directly with the Regina lab. It was
21		being set up, at that time, to do DNA testing. In
22		fact, they were in the process of putting up a
23		whole new building with facilities specifically to
24		do that, and I would have gone to a woman named
11:12 25		Jean Rooney, who was the head of serology there.

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1	Q	And that's at the Regina RCMP?
2	A	That's correct.
3	Q	Go to 003787. And this is a note, I'm not sure if
4		this is your note or Mr. Neufeld's note, can you
11:12 5		tell me?
6	A	It looks like mine.
7	Q	And we see a number of these in the documents, and
8		I'm not gonna go through all of your preparation
9		notes, but I just pulled out a couple for
11:12 10		examples. Is it fair to say that in your
11		approach, or Saskatchewan Justice's approach to
12		questioning the witnesses at the Supreme Court,
13		that at least a starting point would be the
14		previous statements that they had given, not only
11:12 15		back in 1969 and 1970, but as well to Mr.
16		Williams, in this case, and/or to people on behalf
17		of David Milgaard, so in other words what they had
18		said about the matter previously; is that fair?
19	A	Yes.
11:13 20	Q	And, here, there is a reference to, on Nichol
21		John, a letter from Bobs Caldwell to Mr. Williams
22		October '89:
23		"... in which he relates contents of
24		note he found on his file",
11:13 25		and the evidence we've heard from Mr. Caldwell on

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1		this, in fact I think we have the note before the
2		Commission, is that -- and I think his evidence
3		was that during the course of the preliminary
4		hearing he became aware that, in the witness
5		room, Ms. John was alleged to have made a comment
6		about "I don't know why he didn't kill me, I saw
7		him do it", or words to that effect?
8	A	Something like that, yes.
9	Q	You know what I am talking about?
10	A	Yes.
11	Q	Yes. And can you tell us, when and how did you
12		become aware of that, and what significance did it
13		have to Saskatchewan Justice's position?
14	A	Umm, that note was on the file when we went
15		through Bobs Caldwell's file, and it was, in our
16		view, evidence that corroborated her original
17		story.
18	Q	Corroborated Nichol John's original story?
19	A	The -- her story implicating David Milgaard.
20	Q	And if Mr. Caldwell had been called as a witness
21		before the Supreme Court would you have asked him
22		about this note on his file?
23	A	Oh yes.
24	Q	Did you consider -- I don't believe, and I stand
25		to be corrected, but I don't believe this note was

Timestamps: 11:13 (line 5), 11:13 (line 10), 11:13 (line 15), 11:14 (line 20), 11:14 (line 25)

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1   on the record before the Supreme Court; do you

2   recall?

3   A   I don't think so.

4   Q   And, again, would there be any reason why you

11:14 5   wouldn't put this forward or try to put this

6   forward as evidence to try to corroborate Nichol

7   John's --

8   A   Well the difficulty with trying to put that

9   forward is absent calling Bobs Caldwell, which we

11:14 10   weren't inclined to do if there was no direct

11   attack made on him, there really isn't a way to do

12   it. Nichol John couldn't have been asked about

13   it, no other witness could have been asked about

14   it.

11:15 15   Q   If we can then go to 003542. And these are your

16   notes, I think, related to Ron Wilson; is that

17   correct?

18   A   Yes.

19   Q   And it looks like, again, listing of all the

11:15 20   various statements that he made, the statement to

21   Paul Henderson, parts of Mr. Williams' interview

22   with him -- if we can scroll down -- the exchange

23   of letters between Wilson's lawyer and Mr.

24   Williams about not being interviewed. Did you

11:15 25   attach any significance to that, the fact that --

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1   or is this just a listing of what you had? And,

2   if I can assist, I think this related to Mr.

3   Williams' attempts to interview Ron Wilson after

4   he gave the recantation and the difficulties he

11:15 5   said he had --

6 A   Yes.

7 Q   -- in trying to arrange that.

8 A   Well, he was going to be testifying, so I don't

9   know that I attached a huge amount of significance

11:16 10   to that, he could be asked about that.

11 Q   And I guess the question was, though, did you, in

12   approaching Ron Wilson's recantation of June 4th,

13   1990, to what extent, if any, did you consider the

14   circumstances under which the recantation was

11:16 15   given and his conduct afterward, in particular

16   with respect to the request to be interviewed by

17   Mr. Williams; did that factor in your thinking?

18 A   Oh, yes, it did. I mean there were -- it was

19   suspicious, in our view, that we couldn't get the

11:16 20   Paul Henderson tape, we couldn't get much in the

21   way of elaboration on how that statement came

22   about, and that the problems with him talking to

23   Eugene Williams seemed to me to just further the

24   curiosity we had about how that recantation was

11:17 25   produced.

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1   Q   Had you experience in other matters in dealing

2   with witness recants, recantations?

3   A   Oh yes.

4   Q   And what was your -- just generally, did you have

11:17   5   sort of a set of concerns before you even got into

6   Mr. Wilson about Wilson -- or about witness

7   recants?

8   A   Well, from my experience up to that point,

9   witnesses recant for all kinds of reasons only one

11:17   10   of which is they didn't tell the truth the first

11   time around. And in fact, if my experience was

12   anything to go by, that usually wasn't the reason

13   they recanted, it had more to do with being

14   concerned about, you know, issues on the street

11:17   15   and things like that.

16   Q   And --

17   A   It's, I mean it's certainly something that you

18   have to be concerned about, because bottom line

19   is, with the people we deal with, they are

11:18   20   frequently just as happy to send a friend down as

21   they would be to support him, and it's only after

22   that they decide well maybe, maybe they shouldn't

23   have done that, or they have taken care of

24   whatever business on the street they wanted to

11:18   25   take care of with the accused out of the way.

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1   Q   You have a comment here about the:

2   "Statement of Paul Henderson that it

3   took over 1 day to get Wilson to

4   recant",

11:18 5   or "only one day". Can you tell us, you talked a

6   bit about getting the tape of Mr. Henderson's

7   interview with Mr. Wilson; did you have concerns

8   about -- and I'm talking about before Mr. Wilson

9   even testified at the Supreme Court -- concerns

11:18 10   about the manner in which the recantation was

11   obtained and the recantation itself?

12   A   Over the course of our preparation for the Supreme

13   Court I had been talking to police officers in

14   Regina who knew Wilson, John, Lapchuk, and Melnyk,

11:19 15   and as a matter of fact Launa Edwards, with

16   respect to what these folks were like, and one of

17   the concerns that was expressed to me was that

18   Wilson was easily led, and if it took a long time

19   to get the statement out of him, you want to hear

11:19 20   or you want to know exactly how that came about.

21   Q   Meaning what?

22   A   Meaning that, with a little pressure, he'd say

23   anything you wanted him to say.

24   Q   And was that a concern, then, you had going into

11:19 25   the Supreme Court, that that's maybe what happened

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1   with the recantation?

2   A   Well the other, I mean the other concern we had

3   with respect to Ron Wilson was that according to

4   the, again, the police officers that knew him

11:19 5   before he'd left Regina, was that he'd spent a

6   substantial part of his life drinking and doing

7   whatever kind of drugs came along. And to use the

8   expression one police officer used, "his mind was

9   just a sponge", there was -- they just didn't

11:20 10   think there was very much left of it.

11   Q   If we can go to 000255. And this is a document,

12   if we can just enlarge it at the top, and I think

13   we heard from either Mrs. Milgaard or Mr. Asper,

14   it's called *Evidence Used to Convict David*

11:20 15   *Milgaard*, and it was a fact sheet or a piece of

16   information that was, I believe, distributed by

17   David Milgaard's -- I'm not sure exactly who,

18   whether it was Mrs. Milgaard or a support group,

19   but it was -- anyway, it was information that was

11:21 20   in the public domain, and it appears to have; are

21   these your handwritten notes on it?

22   A   Look like it, yeah.

23   Q   And this would, I think, be from your files. Do

24   you have a recollection of what, of what this

11:21 25   related to, or was it something you had done in

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1   the course of your preparation for the Supreme

2   Court reference?

3 A Umm, yeah, I suspect that's probably the case. I

4   don't know that it really amounted to a whole lot

11:21 5   of anything since, if these witnesses were going

6   to be called, we could look at -- or hear their

7   evidence in Court and deal with it there.

8 Q If we can just look at a couple of these, I think

9   what they set forth is:

11:21 10   "Fact - Two witnesses testified that

11   David re-enacted the murder in a motel

12   room."

13   The:

14   "New evidence

11:21 15   police had statement from one woman in

16   that room that said nothing about a

17   re-enactment."

18   And then your note is:

19   "Ute Frank now says it happened".

11:22 20   And then:

21   "Fact - Another woman in the room has

22   signed a statement that says eleventh

23   hour witnesses lied ...",

24   and then you have got the word:

11:22 25   "Lie"

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1   there; would that be related to Deborah Hall?

2   A   Yes.

3   Q   And then:

4   "Fact - Two drops of semen found four

11:22 5   days after crime said to be Milgaard's."

6   "Fact - Dr. Ferris, a world renowned

7   scientist says it could not be

8   reasonably linked to Milgaard ...",

9   and you say:

11:22 10   "Not quite";

11   is that your notes?

12   A   That's correct.

13   Q   And the same with Dr. Markesteyn. And would that

14   be for the reasons you've already told us, the

15   concerns you had with those reports?

16   A   Yes.

17   Q   And then:

18   "Nichol John recanted eyewitness

19   statement that was factually impossible

11:22 20   on the stand."

21   I think that says:

22   "Lie

23   didn't recant

24   not factually

11:22 25   impossible";

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1   is that correct?

2   A   Yes.

3   Q   And then here with:

4   "Ron Wilson has recanted incriminating

11:22 5   lies ... Says he was coerced and

6   manipulated by police ...",

7   and I think you've got:

8   "Lie";

9   is that correct?

11:23 10   A   Yes.

11   Q   And the same with:

12   "Albert ... Cadrain ... totally

13   discredits his testimony and also shows

14   improper police procedures ...",

11:23 15   and you have got:

16   "- now supported by other Cadrains".

17   But would this have been something you would have

18   written perhaps after some of the evidence was

19   heard at the Supreme Court, or can you shed any

11:23 20   light on that?

21   A   Umm, no, I have no idea when we -- when I looked

22   at that or when I wrote the notes on that.

23   Q   If we can go to 000758. And I think this is a

24   list of files, it's a lengthy document, but it's

11:23 25   part of what was provided to us. Is this

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1		something that you or Mr. Neufeld would have
2		prepared, I think it's a list of -- or somebody at
3		your direction would have prepared?
4	A	I think it may be something the RCMP prepared.
11:24 5	Q	Let me go to 000763.
6	A	I don't recall that myself.
7	Q	Okay, you may be right on that, it may be
8		something that the RCMP prepared. And this is a
9		list of files and contents, and it refers to the
11:24 10		file folders that were in the various files and
11		how you had organized them for the reference; does
12		this look familiar at all?
13	A	We did not create inventories like that.
14	Q	And is it fair, I'm trying to find a -- an
11:24 15		efficient way, Mr. Brown, to determine from you
16		what information, by way of files and documents,
17		Saskatchewan Justice would have had, let's say at
18		the conclusion of the Supreme Court reference in
19		April of 1992, and is it fair to say that what you
11:24 20		turned over to the RCMP in the 1992 to '94
21		investigation would have been, in the course of
22		that, all of the files that Saskatchewan Justice
23		had at the time?
24	A	That I was aware of, yes.
11:25 25	Q	That you were aware of, and that to the extent

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1   that if they are on the Saskatchewan Justice

2   files, then that would be information that

3   Saskatchewan Justice had at the time it made its

4   decision not to re-open in April of 1992; is that

11:25   5   fair?

6   A   Yes.

7   Q   And just generally on that, again, this is at the

8   end of the reference, and we touched upon this a

9   bit earlier, you would have gathered basically

11:25   10   everything that had been exchanged between David

11   Milgaard's counsel and the Federal Justice on the

12   first application; is that correct?

13   A   That's correct, yes.

14   Q   And, generally, all of the information that David

11:25   15   Milgaard's counsel gave to the federal minister on

16   the first application; you would have had that?

17   A   Yes.

18   Q   You would have had either all or essentially all

19   of the federal Justice Department's investigation

11:26   20   of the information and witnesses and analysis done

21   by them?

22   A   Essentially, yes, you know, with the two notable

23   exceptions, we didn't have Justice Tallis'

24   statement and we did not get the report from

11:26   25   Justice McIntyre.

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1   Q   And then, if we go to the second application,

2   certainly everything that was filed on behalf of

3   David Milgaard with the federal minister on the

4   second application, you would have had that;

5   correct?

6   A   We had that, yes.

7   Q   And then everything that was filed at the Supreme

8   Court in the reference case, the 26 odd volumes,

9   you would have had that?

11:26 10   A   We would have had that, yes.

11   Q   And then as far as the media and information in

12   the media, is it fair to say that, to the extent

13   that Saskatchewan Justice files had media

14   clippings either that you obtained directly or

11:26 15   from other sources, that Saskatchewan Justice

16   would have a considerable volume of media

17   information about the David Milgaard matter in

18   April of 1992?

19   A   Yes.

11:27 20   Q   And that, in a general way, would you agree that

21   all of the information that had been accumulated

22   over the couple of years that Saskatchewan Justice

23   had would be information that, in some way or

24   another, was considered by Saskatchewan in their

11:27 25   decision not to re-open in April of 1992?

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 1    A     Yes.

 2    Q     If we can go to, I'm going to skip over, I am just

 3          going to try and go through chronologically what

 4          happens during the course of the reference.  I

 5          will leave the specific witnesses, and how you

 6          viewed them, until we get to the written argument

 7          that you filed with the Court.

 8                        But if we can go to 009796,

 9          this is a letter from Mr. Fainstein to all counsel

10          about the week of February 17th, and I think the

11          Court sat for a week or two and then broke; is

12          that right?

13    A     Yes.

14    Q     And so the first week or two I think it was Mr.

15          Milgaard, Mr. Wilson, Nichol John; is that

16          correct?

17    A     I think so, yes.

18    Q     And so, here, he's looking for the list of

19          witnesses that you feel should be called in that

20          week.

21                        And then if we can go to

22          156858.  And I think this is your letter of

23          January 29, '92 to Mr. Fainstein, and you talk

24          about:

25                        "With respect to additional materials to
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1   be filed, we would suggest that in light

2   of Mr. Milgaard's testimony, the

3   following should form part of the case

4   on reference:

11:29   5   1.   Statement(s) of Sharon Williams;

6   2.   Statement of Ron Stickel;

7   3.   Milgaard prison records indicating his

8   pre-charge history, particularly as

9   related to his stays at the Yorkton

10   Psychiatric Centre;

11   4.   Letters to Milgaard from the National

12   Parole Board clearly indicating the

13   reasons for his parole denial (which

14   have never, from the information we have

11:29   15   seen, included his refusal to admit

16   guilt);"

17   and:

18   "5.   Psychiatric reports of Dr. Minot and

19   Dr. Green ... with respect to ...

11:29   20   Milgaard."

21   Can you -- let's just go through these. Can you

22   comment on why you would want the statement of

23   Sharon Williams on the case on reference, and

24   what was it in Mr. Milgaard's testimony that

11:29   25   prompted that?

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1   A   Well, offhand, I don't remember what it was in his

2   testimony that would have prompted that. My

3   recollection of her statement was that she

4   indicated that he had been aggressive with her in

11:30 5   the past, and I suspect that's what we were

6   getting at, was putting that evidence before the

7   Court.

8   Q   But was it to rebut or respond to something Mr.

9   Milgaard had said in his evidence, or do you

11:30 10   recall?

11   A   I don't recall that specifically.

12   Q   And statement of Ron Stickel; do you recall how

13   that may have fit in?

14   A   To be honest with you, I don't even recall who Ron

11:30 15   Stickel is.

16   Q   I think Ron Stickel was a fellow who I think told

17   Mr. Pearson or -- that Mr. Milgaard had made some

18   admission to him back in -- in the late '60s about

19   being involved in a crime, and he put it in a time

11:30 20   frame by suggesting it was the time of a U.S.

21   federal election, that's how he associated it, and

22   I think when the RCMP checked into it that would

23   have made it 1968, and so I don't think it was

24   pursued by the RCMP. That's the information, at

11:31 25   least, in the documents; does that assist you in

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1   your recall at all?

2   A   Not really. I don't know that that would have

3   been of any assistance to us if that was the case.

4   Q   I'm not sure at what stage all that information

11:31   5   became known, but I think that's what's on the

6   record?

7   A   Well if, if there was a statement from a witness

8   indicating that David Milgaard had said something

9   inculpatory to him and it appeared to have some

11:31 10   credibility, yes we would have wanted that in, so

11   I'm assuming that's why Mr. Stickel's statement

12   was put in.

13   Q   And can you tell us, what would be the importance

14   of the prison records regarding his pre-charge

11:31 15   history and the stays at the Yorkton Psychiatric

16   Centre?

17   A   Well all of the psychiatric material was of some

18   consequence because when David took the stand he

19   made much of the fact that his psychiatric state

11:31 20   was not really much of a concern, it was a --

21   something that lots of people have, and it's not

22   much of a problem. I saw it as being something

23   different.

24   Q   And how would that have been relevant to the issue

11:32 25   of the miscarriage of justice or his guilt or

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1   innocence?

2   A   Well the issue of his psychiatric condition at the

3   time the offence was committed might have had some

4   impact on their decision.

11:32   5   Q   Would this be -- were you of the view, then, that

6   he had put -- had put his character in issue when

7   he testified as being not the type of person who

8   would have committed this crime?

9   A   No, he certainly would have done that, but he

11:32 10   was -- he was the one that raised the evidence of

11   this psychiatric condition very clearly.

12   Q   And so are you telling us this would be to respond

13   to that, to follow up and to see what was in

14   there?

11:33 15   A   Yes.

16   Q   And then, as well, the:

17   "Letters to Mr. Milgaard from the

18   National Parole Board clearly indicating

19   the reasons for his parole denial ..."?

11:33 20   A   Yes.

21   Q   And can you tell us how that (a) was relevant; and

22   (b) came out of Mr. Milgaard's testimony?

23   A   My recollection is that that comes out of his

24   testimony, and it -- the allegations that he made

11:33 25   beforehand was that the only reason he couldn't

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1   get parole was that he wouldn't admit he was

2   guilty and, again, while it doesn't go

3   specifically to the issue of guilt, it does go to

4   his credibility.

11:33 5 Q   And so what was your understanding of what was in

6   the parole records or the reasons that he was not

7   granted parole?

8 A   Well, essentially the problem that David was

9   having getting parole was he was very forthright

11:33 10   with the parole authorities and told them

11   repeatedly that he wasn't going to follow their

12   rules, he wasn't guilty and he wasn't going to

13   follow the rules that a parole board might put on

14   him, and I'm guessing that with that kind of sort

11:34 15   of statement on the record, they weren't

16   interested in giving him parole.

17 Q   And so your concern, in following this up, was to

18   challenge the credibility of his statement before

19   the Court that the reason he didn't get parole is

11:34 20   because he didn't admit guilt?

21 A   That's right.

22 Q   If we can scroll down, you say:

23   "On the matter of additional witnesses,

24   we are reluctant to make further

11:34 25   suggestions until such time as the Court

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1   has clearly delineated the test it will

2   be applying, the burden of proof and who

3   is to bear it. However, in light of Mr.

4   Milgaard's testimony, particularly the

11:34   5   startling first-time revelation of the

6   'heater fix/chicken soup' incident, we

7   would expect that the Court would wish

8   to hear from Mr. Justice Tallis."

9   And it goes on to talk about Nichol Demyen. Can

11:35   10   you just comment at this time, this is January

11   29th, about concerns you had about the test the

12   Court is applying to the burden of proof and who

13   is to bear it?

14   A   Well, at that point we didn't know who was

11:35   15   supposed to be proving what, who bore the onus of

16   establishing something, we were still sort of

17   waiting for the Court to settle that.

18   Their view was, well, in the

19   -- while they were considering that we should just

11:35   20   go ahead and call evidence. Well generally if

21   you're calling evidence, you're doing it towards a

22   purpose, and it was important, therefore, for us

23   to know what the purpose was, what were we

24   expected to do, what was Mr. Wolch/Mr. Asper

11:35   25   expected to do.

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1   Q   And can you comment on this testimony which you

2   describe as the startling first time revelation of

3   the "heater fix/chicken soup" innocent and how did

4   that figure into matters?

11:36 5   A   Well, that was an absolute alibi. If it had been

6   true, then David Milgaard could not have been

7   across the river at the time he said he was, or we

8   thought he was. He said he told Justice Tallis

9   this alibi and that Justice Tallis ignored it.

11:36 10   Q   And just -- I think we've had a chance to look at

11   this on a couple of occasions, I think this is the

12   part of his evidence where, at least at the

13   Supreme Court, he said that upon arrival in

14   Saskatoon, I think before they crossed the river,

11:36 15   they stopped at a gas station to get the heater

16   fixed and he bought chicken soup and I think he

17   said -- and I stand to be corrected on this point,

18   I think it was around seven o'clock or it was at a

19   time that was very important and that he had asked

11:37 20   Mr. Tallis to follow up and find this guy who

21   worked at the garage who could verify that he was

22   there. Was that -- and that Mr. Milgaard said the

23   reason he remembered it so well is because he got

24   chicken soup in a package, I think that was --

11:37 25   A   Out of a vending machine I believe.

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1	Q	Right. And that was -- so that's the incident
2		we're talking about?
3	A	Yes.
4	Q	Generally?
11:37 5	A	That was the incident, and it was of particular
6		concern to us because at one of the points where
7		there is a bridge crossing the river in Saskatoon
8		there used to be a garage at five corners. Now,
9		they indicated that they came into Saskatoon on a
11:38 10		bridge that let them off by Sears which of course
11		would be the Idylwyld bridge, it wouldn't be
12		anywhere near five corners, but if he was mistaken
13		about that and they came down Broadway, then it
14		would put them at a filling station that was close
11:38 15		to the bridge.
16	Q	Okay.
17	A	And that I know, as a matter of fact, it opened
18		early in the mornings to deal with the early
19		morning traffic.
11:38 20	Q	Now, do you recall, I know we saw some records,
21		and this may well have been at the time, I'm not
22		sure whether it was Sergeant Pearson on somebody,
23		it may have been Federal Justice, made inquiries
24		of the city clerk to find out which gas stations
11:38 25		were open in 1969, things of that nature. Was

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1		that -- did that involve you or was that something
2		that Federal Justice did?
3	A	That was something Federal Justice did. They told
4		us they were going to do it, but we knew they were
11:38 5		doing that.
6	Q	And do you recall whatever came of that, as to
7		whether -- whether a gas station was open that
8		morning that could have been where Mr. Milgaard
9		said he stopped?
11:39 10	A	Well, there certainly wasn't any gas station that
11		you could get to at the Idylwyld one before the
12		bridge, before crossing the river, and I don't
13		think inquiries -- my recollection is that
14		inquiries with the city clerk weren't helpful.
11:39 15	Q	I think there's a document, I don't have it handy
16		here, but we have seen a document indicating that,
17		I think that there were not, there would not have
18		been a service station open at that hour of the
19		morning, but I'll maybe check that over the lunch
11:39 20		hour and see if that might assist your memory, but
21		what -- you said this was significant information.
22		If it were true, then it might provide an alibi;
23		is that correct?
24	A	Oh, absolutely, yes.
11:39 25	Q	And what concern would Saskatchewan Justice have

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1		in that regard then?
2	A	Well, if it's true and it provides an alibi, then
3		it basically lifts Mr. Milgaard out of the whole
4		thing if they were there at around seven o'clock.
11:40 5	Q	Did you come to any conclusions as to whether or
6		not this piece of evidence was credible?
7	A	Yes. Frankly, when we left the courtroom, we were
8		pretty much of the view that it wasn't credible.
9		It was a substantial piece of evidence that would
11:40 10		have been very, very important and this was the
11		first time we had heard that, and my recollection
12		is it didn't -- it didn't include any, or wasn't
13		included in the materials that were submitted to
14		the minister.
11:40 15	Q	Was it a case that if this had been true, you
16		would have expected it to have come out much
17		earlier in a different format?
18	A	Yes.
19	Q	And I think Mr. Milgaard's evidence was as well
11:40 20		that he had told Mr. Tallis about this and that he
21		wanted him to check it and he never did and he was
22		concerned about that; is that fair?
23	A	Yes.
24	Q	And again, did you then learn from Mr. Tallis,
11:41 25		when he testified, his response to that?

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  1    A      Yes.

  2    Q      And which was what?

  3    A      That he received no such information from David

  4           Milgaard.

11:41  5    Q      And so in your letter here you seem to be

  6           suggesting that at least for the purposes of this

  7           allegation, Mr. Tallis needed to be called for

  8           that purpose; is that correct, and perhaps others?

  9    A      Yes.

11:41 10    Q      You say here:

 11                  "We would also expect --"

 12           Actually, let me just pause there on the chicken

 13           soup issue.  Was that an issue that once you

 14           learned more information about it, and in

11:41 15           particular what Mr. Tallis said and some of the

 16           other information that related to that, did that

 17           cause you to question Mr. Milgaard's credibility

 18           and what he said at the Supreme Court?

 19    A      Yes, yes.

11:41 20    Q      And did it influence your thinking with respect to

 21           the credibility of what he said about other

 22           matters?

 23    A      Yes, it did.

 24    Q      Including his denial that he killed Gail Miller?

11:42 25    A      Yes.
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1   Q   And did that cause you to doubt the credibility of

2   his denial because of this, and I'll get to some

3   of the other evidence, but let's just focus on

4   this heater fix/chicken soup incident, did his

11:42 5 evidence about that cause you to doubt the

6   credibility of his denial of killing Gail Miller?

7   A   Yes.

8   Q   You say here:

9   "We would also expect that the Court

11:42 10   would want to hear from Detectives

11   Short, Mackie & Karst..."

12   And let me pause there. Can you tell us what

13   would have prompted that comment, why did you

14   think the court would want to hear from them?

11:42 15 A   Well, by that time Ron Wilson and Nichol John

16   would have testified with respect to being dealt

17   with by the city police. Certainly -- I mean, Ron

18   Wilson kept saying that he was mistreated, but he

19   could never say how. Nichol John, as I

11:43 20   understand, was kind of vague about any of that

21   and it seemed to me that that was part of the

22   essence of their application, was how the two

23   witnesses who originally put David Milgaard into

24   it were treated by the police and they needed to

11:43 25   be heard from.

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	1	Q And I think the record shows that with respect to
	2	Cadrain, Wilson and John, that the three officers
	3	that had the primary dealings with them would have
	4	been Short, Mackie and Karst; is that your
11:43	5	understanding?
	6	A That's my recollection, yes.
	7	Q And so at this point, is it a case of you saying,
	8	and I appreciate your comment that this is after
	9	the court has heard from Wilson, Milgaard and
11:43	10	John, I don't know if Cadrain had been heard yet.
	11	A No, my recollection is he was towards the end.
	12	Q Yeah, I think that's right. So here was it a case
	13	of saying lookit, in light of what these people
	14	have said, we expect that these three police
11:44	15	officers should be called, or was it a case of you
	16	saying we would like them called? I mean, who --
	17	A Well, at this stage we were still operating under
	18	the rule that it was the court that decided who
	19	was going to be called and we would put forward
11:44	20	recommendations and our recommendation was they
	21	should be called.
	22	Q And then you comment about Albert Cadrain, it
	23	remains clear that he:
	24	"...has not changed his evidence,
11:44	25	there would appear to be no need to hear

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1   from him. Depending on the test and

2   burden of proof, we might want to

3   suggest..."

4   And then you list the family members and raise

11:44 5   the issue again about the test and the burden.

6   And again, the next paragraph, you raise the

7   issue about the fact that you did not yet have

8   access from Federal Justice to the results of the

9   interview of Mr. Justice Tallis conducted by Mr.

11:45 10   Williams, and I take it that was a concern you

11   still had and I think you told us you never did

12   get that; is that correct, before he testified?

13   A   That's correct, we never did get the statement.

14   Q   And here you say:

11:45 15   "Mr. Wolch has interviewed Mr. Justice

16   Tallis and therefore has the benefit of

17   knowing what he is likely to say.

18   Unfortunately he has been reluctant to

19   give us more than the most vague

11:45 20   suggestions of what his evidence could

21   be."

22   Are you referring to Mr. Wolch or Mr. Tallis

23   being reluctant to give us more?

24   A   Mr. Wolch.

11:45 25   Q   And:

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1   "This is notwithstanding the open access

2   he has had to the police and prosecution

3   files through ourselves. We are frankly

4   quite puzzled at his reluctance to

11:45 5   assist us, but assume he has good reason

6   to do so in his client's interests."

7 And can you elaborate on that, please?

8 A   Well, after the statement about the chicken

9   soup/heater fix, and the fact that it was given to

11:45 10   Justice Tallis but that he didn't act on it, my

11   suspicion was that there was a good deal more that

12   Justice Tallis could say about David Milgaard's

13   evidence that would conflict with what David had

14   said and, protecting his client's interests, Mr.

11:46 15   Wolch and Mr. Asper weren't prepared to give those

16   materials to us.

17 Q   And so had you asked them to tell you what

18   Mr. Tallis could say about his discussions with

19   Mr. Milgaard?

11:46 20 A   We had.

21 Q   And as well from Federal Justice you asked that?

22 A   We asked for the Eugene Williams/Tallis interview.

23 Q   Go to 019280, and this is the Supreme Court order

24   of January 30, 1992 -- go to the next page -- and

11:46 25   this is releasing the exhibits to the agents of

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1   the Attorney General for forensic testing, and I

2   believe that's the Attorney General of Canada; is

3   that correct. That's the way the application --

4   A   Yes, that's correct.

11:47 5   Q   And I take it you would have been aware and

6   involved in this process, then, as to getting the

7   exhibits from the court to Federal Justice

8   officials so that they could be tested, that was

9   something Saskatchewan Justice agreed to?

11:47 10 A   Well, we got the exhibits sent from Saskatchewan

11   to the Supreme Court and I believe the federal

12   government did the leg work in getting them out of

13   the Supreme Court.

14 Q   If we can go to 009810, please, and go to page

11:48 15   811, this is a letter of January 31 from Mr.

16   Fainstein to the court, and it appears here he's

17   saying:

18   "The next set of witnesses are former

19   police officers, who can speak, <u>inter</u>

11:48 20   <u>alia</u>, to the way in which statements

21   were obtained from Mr. Wilson and

22   Ms. John."

23   And I take it that would be Short, Mackie and

24   Karst?

11:48 25 A   Yes.

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1	Q	And then go down --
2	A	That's what we had suggested.
3	Q	Did you have any concern if other police officers
4		who had dealings with these three were called?
11:48 5	A	Did we have any concern with that?
6	Q	Yes.
7	A	No.
8	Q	Do you recall how Inspector Roberts came to be
9		identified as a witness? He did in fact testify.
11:48 10		He's not listed here.
11	A	Yeah. I don't know whether Mr. Wolch and Mr.
12		Asper suggested him or he came from the federal
13		government, but we didn't suggest him I don't
14		think.
11:49 15	Q	If we can scroll down to the bottom here, there's
16		an issue again, it says:
17		"There was considerable discussion on
18		the subject of potential testimony by
19		Mr. Justice Tallis."
11:49 20		So this is the end of January after the first
21		session. Do you recall there being issues
22		about -- I think from an earlier document we saw
23		that you wanted Mr. Tallis called as a witness?
24	A	Yes.
11:49 25	Q	Was there some opposition to that?

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1   A   Well, Mr. Wolch didn't seem to want Justice Tallis

2   to testify. He continued to assure us that his

3   client was prepared to waive privilege, but just

4   never seemed to get around to doing it.

11:49 5   Q   If we can go to the next page, it says:

6   "I understand Saskatchewan's

7   view to be that there should be an

8   unrestricted waiver, and that it should

9   have the opportunity to ask questions of

11:50 10   Justice Tallis.

11   As a result, then, there

12   is no agreement as to the manner or

13   timing of receiving evidence from

14   Mr. Justice Tallis. If the Court's

11:50 15   wishes about these matters were known, I

16   believe they could be speedily

17   resolved."

18   And so at this point I take it there was a

19   disagreement between Saskatchewan Justice and Mr.

11:50 20   Wolch about whether or not Mr. Tallis -- whether

21   or not privilege could be waived, the extent to

22   which it could be waived and whether he should be

23   a witness before the reference and the manner in

24   which he would be a witness; is that fair?

11:50 25   A   Yes. The Chief Justice of the Supreme Court

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1   hadn't resolved that at that point.

2 Q   If we can go to, just for the record, I'll

3   identify 009874, and go to the next page, this is

4   Mr. Wolch's response to Mr. Fainstein. I think he

11:51 5 puts forward his views about your requests on each

6   of those points about Sharon Williams, Ron

7   Stickel, the records, and then he says:

8   "I take exception to the references to

9   Justice Tallis as contained in your

11:51 10   letter to the court."

11   So the letter that I just read to you, I think

12   Mr. Wolch had concerns about that, but I take it

13   that it was not -- was the issue of the waiver

14   and Mr. Tallis being called then resolved by the

11:52 15 Supreme Court?

16 A   I believe we had a meeting with Chief Justice

17   Lamer in which he indicated that Justice Tallis

18   was to be called and that Mr. Wolch was to get a

19   waiver.

11:52 20 Q   Go to 020350, please, and go to the next page.

21   This is a February 5, 1992 fax from Mr. Williams

22   and I believe this is the test that shows Mr.

23   Milgaard to be a secretor. Do you recall getting

24   that information?

11:52 25 A   Yes.

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1   Q   And did that have an effect on the calling of Dr.

2   Ferris and Dr. Markesteyn then as witnesses before

3   the court?

4   A   Well, it seems to me it eliminated the need to put

11:53 5   them in to discuss the forensic evidence that went

6   in at trial. We now knew he was an A secretor, so

7   that issue kind of vanished.

8   Q   Now, did you consider putting forward that

9   evidence to say with this information this is now

11:53 10   inculpatory evidence or did you just leave it be?

11   A   We just left it.

12   Q   And why not, why did you not put it forward and

13   say here's evidence, evidence at trial that at

14   least on the view of Mr. Tallis was exculpatory is

11:53 15   now inculpatory because the test was done wrong?

16   A   Well, again, if Mr. Wolch and Mr. Asper had called

17   Peter Markesteyn or Rex Ferris, that would have

18   gone in, but as I said, we were not there doing

19   clean-up, we were there essentially dealing with

11:54 20   whatever evidence they were raising with respect

21   to the matters that were advancing their case,

22   that they thought were advancing their case.

23   MR. HODSON: Mr. Commissioner, the next

24   area I propose to go into are the submissions and

11:54 25   the test and I'm wondering if it's maybe an

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1   appropriate spot to break for lunch now and I'll

2   start at 1:30.

3   COMMISSIONER MacCALLUM: Yes.

4   *(Adjourned at 11:54 a.m.)*

01:32 5   *(Reconvened at 1:30 p.m.)*

6   BY MR. HODSON:

7 Q   Good afternoon. If we could have 021278 up,

8   please. And I believe, Mr. Brown, this is the

9   memorandum filed by the Attorney General of

01:33 10   Saskatchewan for Saskatchewan on the subject of

11   the tests to be convened by the Supreme Court? If

12   we could just go to page 021308, which is the last

13   page of that, February 5, 1992; do you recognize

14   this document?

01:33 15 A   Yes.

16 Q   And if we could just go back to page 021280. And

17   you've already told us a bit about the concerns, I

18   think, that you had during the reference, up until

19   this point, in trying to understand what it was

01:33 20   that -- or what the test was and what the role of

21   the parties were; is that fair?

22 A   That's correct, yes.

23 Q   And am I right that the Supreme Court asked for

24   parties to make submissions on this point?

01:34 25 A   Yes, they did.

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1	Q	There was a reference, and I don't think I need to
2		bring the document up, but there was a reference
3		at some point in the early part of the proceedings
4		where the Chief Justice, or Chief Justice Lamer,
01:34 5		indicated that they -- that the test was whether
6		there was still sufficient evidence to convict, or
7		something of that nature; do you recall that being
8		one of the earlier comments made about what the
9		test might be?
01:34 10	A	Yes. I think, at the end of perhaps the first
11		week of evidence, he suggested that the test would
12		be whether we could still prove he was guilty.
13	Q	And was that something expressed to counsel in
14		open Court, or in chambers, or do you remember how
01:34 15		that --
16	A	No, I believe it was in open Court.
17	Q	And did that cause you some concern?
18	A	Well, yes. 20 years down the line, trying
19		something like that was going to be difficult at
01:35 20		the best of times, but given that we had already
21		taken a week of the Court's time and we hadn't
22		been aware that that was where we were going, I
23		mean, that, frankly, hadn't crossed my mind as a
24		possible test, that caused a great deal of
01:35 25		concern, yes.

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1   Q   And when we talk here about 'tests', and I'll go

2   through parts of your argument here, is it correct

3   that what the Court was looking for or trying to

4   define was what would be the legal test or the

01:35 5   practical test applied by the Court in trying to

6   determine whether or not the continued conviction

7   of David Milgaard would constitute a miscarriage

8   of justice?

9   A   Yes, that's what they were wrestling with.

01:35 10   Q   And so the words "miscarriage of justice", and

11   what gives rise to that, would be the issue?

12   A   That would be my understanding, yes.

13   Q   And we've heard evidence from Mr. Williams about

14   what test he applied under Section 690 and the

01:36 15   types of things that they looked at. If I can

16   focus for a moment on Saskatchewan Justice and

17   what the test would be for Saskatchewan Justice to

18   re-open the investigation into the death of Gail

19   Miller, and I think you told us earlier in your

01:36 20   evidence that the initial threshold would be

21   fairly low for -- to cause you to at least start

22   to investigate matters, if someone came and said

23   "lookit, Mr. Milgaard's conviction is wrong, here

24   is why, check into these items", that the

01:36 25   threshold to investigate might be lower than a

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1   threshold to set aside a conviction; is that a

2   fair summary?

3   A   Oh, absolutely. I mean, it doesn't take much to

4   get a matter referred to the police for a further

01:36 5   investigation, to get us to agree that the

6   conviction be set aside is a whole different

7   issue.

8   Q   And can you tell us then, obviously, these written

9   submissions would be the views of Saskatchewan

01:37 10   Justice on the issue of what constitutes a

11   miscarriage of justice; is that correct?

12 A   Yes.

13 Q   And how would that relate to the test that

14   Saskatchewan Justice would apply in deciding

01:37 15   whether or not to re-open the investigation into

16   the death of Gail Miller; would it be similar?

17 A   Well, no. Again, the threshold for getting some

18   reinvestigation going would be considerably lower

19   than the test for establishing there had been a

01:37 20   miscarriage of justice.

21 Q   Okay. Is it fair to say that, based upon the

22   position of Saskatchewan Justice, if the

23   miscarriage of justice had been demonstrated to

24   Saskatchewan Justice in accordance with what's

01:37 25   outlined in this brief, that that would be

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1   sufficient to re-open the investigation into the

2   death of Gail Miller?

3   A   Yes.

4   Q   If we can go to page 021281. And, again, it

01:38   5   appears -- and we've talked about this, I'll just

6   go over quickly -- that you've raised with the

7   Court here to know what, the test the Court will

8   be applying to the material in order for counsel

9   to know what is expected of them:

01:38   10   "... it is necessary for the Court to

11   clearly define the roles of the

12   parties.",

13   the burden of proof and who carries it:

14   "... and how the Court anticipates this

01:38   15   burden may be met."

16   Are you able to advise whether all of the other

17   parties shared the same concerns you did, or this

18   uncertainty about what was happening?

19   A   Well, certainly the Federal Government did. My

01:38   20   recollection is, of some discussions with Mr.

21   Wolch and Mr. Asper concerning that issue, again,

22   I mean they didn't know whether they were carrying

23   the burden, we were carrying the burden, what

24   burden it was. We were, at that point we had

01:39   25   simply called sort of three or four crucial

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1   witnesses, including David Milgaard, but past that

2   you kind of needed to know what the road map was.

3 Q If we can go to page 283. And here you set out

4   the question, and really this is the question that

01:39 5   you are being asked to address, what test should

6   the Court apply to answer that question about the

7   miscarriage of justice; correct?

8 A Yes.

9 Q If we could just scroll down a couple of items,

01:39 10   here it appears your argument deals with looking

11   at what the minister did on the first application

12   and how she approached that; can you tell us what,

13   generally, what was the significance of that?

14 A Well with respect -- given that they were being

01:39 15   asked to advise the minister with respect to what

16   she should do I suppose one of the things that

17   should be of interest to them is what test would

18   the minister ordinarily apply to these things.

19 Q If we can go to the next page, there is a

01:40 20   paragraph here -- no, sorry, this is gone.

21   Just for the record, Mr.

22   Commissioner, I think when this was copied, on the

23   back page of the typed version I think are Mr.

24   Brown's argument notes; does that sound right, Mr.

01:40 25   Brown?

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1	A	That could be, yes.
2	Q	And so if we can go to the next page -- or sorry,
3		yes, this is the right page. There is a paragraph
4		here about the *Palmer* test and fresh evidence and
01:40 5		I think, if we go down to this paragraph here, the
6		summary is:

> "It is ... apparent from her February
> 17, 1991 letter that the Minister was
> not about to grant a remedy unless she
> was convinced that the new evidence was
> both credible and of sufficient impact
> that it would have effected the verdict
> of the jury.",

14		which I think you refer back to the fresh
01:41 15		evidence test; --
16	A	Yes, --
17	Q	-- is that correct?
18	A	-- the *Palmer and Palmer* test.
19	Q	And can you just comment on that generally, as to
01:41 20		why you felt it was that should be the test?
21	A	Well absent -- you know, in addition to whatever
22		you might make of process concerns, it seems to me
23		that that was a good, or seemed to me that that
24		was a reasonable precedent to look at if you are
01:41 25		talking about there being new evidence or

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1   recantations or what have you, that would affect

2   the reliability of that verdict.

3 Q   And so you raised the point of process questions.

4   I think you, you referred the other day to the

01:41 5   bribed juror, for example, or problems with how

6   the trial was conducted?

7 A   Yes.

8 Q   And let's put those aside for the moment, and

9   would you agree that how you deal with

01:41 10   process-type questions might be different than how

11   you deal with sort of substantive fresh evidence

12   issues?

13 A   Fresh evidence issues, yes, that's right.

14 Q   And so let's just focus on, let's assume for the

01:42 15   moment that the process was fine as far as how the

16   trial was conducted and we're dealing with a

17   convicted person establishing a miscarriage of

18   justice, can you tell us the significance of the

19   information being new or fresh information?

01:42 20 A   Well the theory of the *Palmer* test is that if

21   there was information that counsel wasn't aware of

22   at the time of trial that is credible and that

23   might reasonably be expected to have an impact on

24   the jury, that should be heard by a Court.

01:42 25 Q   Can you comment on the significance of the

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1   finality of the criminal proceedings that resulted

2   in the conviction and how that relates to this

3   obligation or this suggestion that it has to be

4   new evidence?

01:43   5   A   Well, generally the rule in criminal cases is that

6   once the matter is through all the appellate

7   levels it's final, it can't, can't be re-opened by

8   simply re-arguing what's already been before the

9   Court. If you want to re-open something, you've

01:43   10   got to bring in something fresh, something new.

11   Q   Is that because the answer to those concerns is

12   that those arguments either were raised or could

13   have been raised, and they were not accepted by

14   the jury, nor by the reviewing Court?

01:43   15   A   Essentially, yes.

16   Q   And if you didn't have that threshold, what would

17   be the concern from Saskatchewan Justice's

18   perspective, if convictions could be challenged on

19   the basis of re-arguing what was before the Court?

01:43   20   A   Well the courts have typically taken the view that

21   there has to be a point at which there is some

22   finality, that the litigation ends. After the

23   appeals are all heard, that's the point where the

24   matter ends, subject to things like a 690

01:44   25   application or subject to there being fresh

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1   evidence that would compel a -- the order for a

2   new Court of Appeal hearings.

3 **Q**   What about -- I'm sorry. And what about the

4   contention that I think was made on occasion, in

01:44 5   both the proceedings and certainly in the media,

6   that in 1991, for example, or 1992, that "David

7   Milgaard could raise a reasonable doubt today if a

8   trial were held"; how do you respond to that, --

9 *A*   Well --

01:44 10 **Q**   -- and, therefore, there is a miscarriage of

11   justice?

12 *A*   Umm, no, that's -- that's simply not an adequate

13   standard. That doesn't meet the tests set out in

14   *Palmer* and it doesn't, from my perspective, meet

01:44 15   the test that the minister would use under 690.

16   Simply raising a reasonable

17   doubt, I mean you can argue that a different

18   lawyer arguing the trial a different way might

19   have raised a reasonable doubt, and, frankly, we

01:45 20   see those kinds of arguments put forward to the

21   Court of Appeal all the time, that the thing

22   wasn't argued properly and there should have been

23   a finding of reasonable doubt. But that's not the

24   test when you are trying to re-open a conviction

01:45 25   and, in my view, it shouldn't be.

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1 Q   021290. I'll get you to comment on -- again,

2   talking about the new evidence, I'm skipping

3   around a bit, but:

4   "Any new evidence must first be assessed

01:45 5   for credibility. If it is not credible,

6   it cannot be relied upon to overturn the

7   existing conviction. Hence the

8   conviction continues. If the evidence

9   is credible, the court must then apply

01:45 10   the second analytical step and determine

11   whether this evidence, if heard by a

12   jury, would necessarily result in a

13   different verdict."

14   And let me just pause there and talk about the

01:45 15   credibility issue, which is fairly

16   straightforward. Is that designed to prevent

17   frivolous allegations from allowing a conviction

18   to be set aside?

19 A   Well, I mean, the Supreme Court has said in a few

01:46 20   judgments that evidence that's not believed isn't

21   evidence, so if the court doesn't believe what a

22   witness is saying, it can't be used for any

23   purpose.

24 Q   And so in a post-conviction scenario then, are you

01:46 25   saying that there's an initial test of determining

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1   whether the evidence, as you say, is evidence, or

2   is credible before you even consider how it might

3   impact on the miscarriage of justice?

4   *A*   Oh, absolutely, that rule applies if a Court of

01:46 5   Appeal is applying the *Palmer* test. If they don't

6   believe the evidence, they are not going to rely

7   on it.

8   *Q*   And again that initial credibility test, in this

9   case it was something you asked the Supreme Court

01:47 10   to consider when they were giving their advice to

11   the minister about a miscarriage of justice;

12   correct?

13   *A*   That's correct.

14   *Q*   And would that be something then if a convicted

01:47 15   person came to Saskatchewan Justice and said

16   lookit, here's some new information, I'm

17   suggesting there's a miscarriage of justice, help

18   me go to the Federal Minister for a remedy, would

19   that be a similar thing then, would that be one of

01:47 20   the first things you would do as well then, assess

21   the credibility of the evidence?

22   *A*   Well, it has to have some sort of prima facie

23   credibility. I don't know that we would make a

24   final decision with respect to that until after we

01:47 25   had seen a police investigation or the product of

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1   a police investigation, but if something is

2   obviously not credible, then it's not going to be

3   referred to the police for reinvestigation.

4   Q   You then say here:

01:47   5   "If the evidence is credible..."

6   Then the second step is to,

7   "...determine whether this evidence, if

8   heard by a jury, would necessarily

9   result in a different verdict."

01:48 10   And I think that comes in part from the *Palmer*

11   test; is that correct, the fresh evidence test?

12   A   No, the *Palmer* wouldn't necessarily result, I

13   think puts it a little higher. The *Palmer* test

14   would be whether a jury could reasonably use it to

01:48 15   come to a different verdict.

16   Q   And so in this case are you saying that -- in this

17   case it's the Supreme Court, but in other cases of

18   alleged wrongful conviction, that someone has to

19   sit down and analyse the evidence to determine,

01:48 20   number one, that it's credible, and number two,

21   that if it had been heard by a jury, it would

22   necessarily result in a different verdict, that

23   would be the analysis?

24   A   That's what I've said there, although again I

01:48 25   think probably even there I put it a little high,

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1		because I think our position really was probably.
2	Q	Okay, so that it would probably affect. So that
3		requires the decision maker, if I can put it that
4		way, to look back at the record and say --
5	A	Look at all of the evidence.
6	Q	And what do I think the jury might have done with
7		this piece of evidence?
8	A	Yes.
9	Q	And I guess the difficulty there is in Canada we
10		don't know what and why the jury decided how they
11		did; correct?
12	A	Correct. Oh, yes.
13	Q	And so it requires the decision maker to try and
14		think what the jury would have done had they heard
15		it, whether they would have reached a different
16		verdict, then it would be I guess in some respects
17		speculation; would you agree with that?
18	A	Oh, yes, it is speculation, but essentially if the
19		court isn't going to do that, I don't know how you
20		fashion a workable test.
21	Q	How do you respond to the suggestion that at least
22		in this case, that -- and I think we're dealing
23		primarily with the Fisher evidence, that if
24		there's a debate over whether or not it would have
25		affected the jury's verdict, you may say it

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1   wouldn't have, someone else may say it will, that

2   why not just give Mr. Milgaard the opportunity to

3   let a new jury decide, how do you respond to that

4   suggestion, that rather than trying to guess what

01:50   5   a jury might have done, is it too easy to just say

6   okay, well, then everybody gets a remedy because

7   no one will figure out what a jury could have

8   done?

9   A   Well, essentially that's a non-test, it simply

01:50 10   says, well, do you have something new, yes, okay,

11   let's have a new trial. That's not an appropriate

12   test.

13   Q   So then when you look at the complete record and

14   to try and assess whether or not the jury might

01:50 15   have reached a different verdict, would that

16   include I guess a re-assessment of the strength of

17   the case against Mr. Milgaard?

18   A   Well, it necessarily involves looking at what

19   other evidence there was and saying, well, you

01:50 20   know, if there's powerful other evidence of guilt,

21   could this possibly overcome it, or probably

22   overcome it.

23   Q   And would it be fair to say that in looking at

24   this second analytical step and determining

01:51 25   whether the Fisher evidence, if heard by a jury,

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1   would necessarily result in a different verdict,

2   that that would necessarily involve a review and

3   assessment of the strength of the evidence against

4   Mr. Milgaard?

01:51 5   A   Yes.

6   Q   And so in other words, if the -- and let me give

7   you an example. If there was a case where there

8   was DNA evidence that linked a convicted person to

9   the crime and later on an application was brought

01:51 10   to have the conviction set aside on the basis that

11   there was another suspect that the jury didn't

12   hear about, in that process would you go back and

13   say okay, well, if the jury would have heard that

14   in light of the DNA evidence which is now -- or

01:51 15   still uncontroverted, it's unlikely, and so

16   therefore in that case where there's a solid piece

17   of evidence against the convicted person, it may

18   be more difficult to have this new evidence be

19   considered as possibly resulting in a different

01:52 20   verdict?

21   A   Yes.

22   Q   And whereas if the case against the accused was

23   maybe less certain and had some identified

24   problems later on where some of the, some of the

01:52 25   evidence that was used to convict may not be seen

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1		to be reliable, that might allow this new evidence
2		to be more significant in the second part of that
3		test; is that correct?
4	A	That would be correct, yes.
01:52 5	Q	And so in looking at the David Milgaard case in
6		this analysis, if in answering the question as
7		you've posed here, whether -- or as you stated
8		today, whether or not the Fisher evidence would,
9		if heard by the jury, would probably result in a
01:52 10		different verdict, if the assessment or the
11		conclusion of the decision maker was that the
12		evidence presented at trial against Mr. Milgaard
13		had not weakened in any way 20 years later; in
14		other words, that it was still the same evidence
01:53 15		the jury heard, in that scenario compared to a
16		scenario where 20 years later a number of pieces
17		of evidence that had been used to convict Mr.
18		Milgaard were undone or not reliable, would there
19		be a different result likely in those two
01:53 20		scenarios?
21	A	Possibly, yes. Again, I mean, it's speculation to
22		say there would have been, but suppose, for
23		example, Ron Wilson had delivered a credible
24		recantation, Deborah Hall had in fact been able to
01:53 25		destroy the credibility of Lapchuk and Melnyk,

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1   that would have left a very different case, and it

2   would seem to me that the significance then of the

3   so-called similar fact evidence would be greater.

4   Q   I guess that's the point I was trying to get at,

01:54 5   that depending upon what happens with the case

6   against Mr. Milgaard, the Larry Fisher evidence

7   could take on more significance in determining a

8   miscarriage of justice; is that fair?

9   A   That's correct, yes.

01:54 10   Q   If we can go to 021296, I want you to comment on

11   this statement about the role of the court, you

12   say:

13   "First, is there evidence to establish

14   that David Milgaard is innocent?

01:54 15   Obviously, if he is innocent, his

16   conviction in 1970 was and continues to

17   be a miscarriage of justice. It does

18   not follow however, that failure to

19   establish innocence means there has been

01:54 20   no miscarriage of justice. In our

21   submission, if credible evidence now

22   discloses that the conviction of the

23   Applicant is not safe to maintain, then

24   it's equally open to the Applicant to

01:54 25   argue that he has suffered a miscarriage

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1   of justice."

2   And is that the process issue that you are

3   referring to there, or can you maybe elaborate

4   on --

01:55 5   A   Well, no, my view of that would be that if he is

6   able to discredit a sufficient amount of the

7   cogent evidence from his trial, even if he doesn't

8   prove he's innocent, that still puts him in a

9   position to argue miscarriage of justice.

01:55 10   Q   And that's because the evidence that was used to

11   displace the presumption of innocence is now

12   shown --

13   A   Has become questionable.

14   Q   Has become questionable. So just on the -- we've

01:55 15   heard from some witnesses the difficulties that

16   may be presented to a convicted person in proving

17   his or her innocence. Is that something that -- I

18   mean, what are your views on that as to whether

19   that is a fair or appropriate requirement to place

01:55 20   on a convicted person?

21   A   Well, since at that point the Crown has had to

22   prove guilt beyond a reasonable doubt, it seems,

23   and you've gone through all of the appeal

24   processes, in my view it's not an undue burden to

01:56 25   require the accused to bring forward some cogent

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1   evidence that gives us reason to believe that that

2   verdict isn't safe any more. Now, how you do

3   that, there's a number of ways you can go after

4   that, but simply saying, you know, there should be

01:56   5   a reasonable doubt here or this can create a

6   reasonable doubt, in my view that test is too low.

7   Q   And would you agree that in some cases, due to the

8   circumstances of the offence, it may be such that

9   it's more difficult for a convicted person to

01:56   10   prove innocence than in another case?

11   A   Well, I mean, this is a good example, had that DNA

12   work not been done, David Milgaard would never

13   have been able to prove he was innocent, and

14   that's just because of the way the facts of the

01:57   15   case shake out.

16   Q   And so --

17   A   And, frankly, I don't know how you divide, or

18   define a system that's going to perform any

19   different unless you simply say that filing an

01:57   20   allegation by the accused that he's innocent, or

21   any new evidence, regardless of its credibility or

22   its substance, provides you with a basis to go

23   with a new trial order.

24   Q   Based upon what you -- based upon your knowledge

01:57   25   of this case, is it your view that the only piece

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1   of evidence or information that was capable of

2   establishing David Milgaard's innocence or proving

3   a miscarriage of justice was the DNA evidence?

4   A Yes. You know, again, if Ron Wilson had been a

01:57 5   credible recantation, that might have done

6   something, but he basically exploded in the

7   courtroom and it didn't turn out to be all that

8   useful.

9   Q And so are you saying that if the DNA evidence had

01:58 10   not been available, that due to, and I can't

11   recall your words, but due to the facts of this

12   case or how things happened, that it was not a

13   case that in your view could be re-opened, or

14   could establish a miscarriage of justice?

01:58 15   A Well, as things stood when the DNA evidence was

16   done, yes, I don't think David Milgaard could

17   establish a basis to prove he was innocent. I

18   mean, he had already got obviously the order for

19   the new trial, but if we're talking about proving

01:58 20   he's innocent, then no.

21   Q And how about proving a miscarriage of justice

22   then, is your answer the same, that absent the

23   DNA, based on what you know about the case, there

24   was not a basis there to establish a miscarriage

01:59 25   of justice?

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1   A   That's right, yes.

2   Q   And so back to my question about -- we're just

3   talking generally about the burden on a convicted

4   person. In some cases where there's not DNA and

01:59 5   in this case if the exhibits had been discarded,

6   for example, in the '70s or '80s as we've heard

7   evidence they almost were, then do you accept that

8   in some cases a convicted person may not have the

9   ability to prove innocence?

01:59 10   A   That's right.

11   Q   Due to the circumstances of the case?

12   A   That's right.

13   Q   If we can go to page 021300, the comment here

14   about burden of proof, it says:

01:59 15   "In our submission, based on the cases

16   previously cited, the burden of proof

17   must lie with the applicant to establish

18   that one of the above conditions exists.

19   The precedents mentioned make it clear

02:00 20   that the conviction is presumed to be

21   valid and there is no burden on the

22   Crown to re-prosecute the case at the

23   hearing of the Reference. The usual

24   presumption of regularity prevails.

02:00 25   Additionally, there is nothing in these

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1   cases to suggest that there is any onus

2   on the Crown to establish that it can

3   still put together a prosecution at this

4   point."

02:00 5   And just your comment on that, please?

6   A   Well, that arose out of the Chief Justice's

7   remarks at one point when he said they wanted to

8   know whether we could still prosecute the case.

9   In my view and in the view of the federal

02:00 10   government lawyer, that just wasn't the test.

11   Q   And you go on here to say:

12   "The mere passage of sufficient time

13   eventually makes almost every

14   prosecution case and certainly all

02:00 15   circumstantial ones impossible to

16   prosecute or reconstitute. Whatever

17   that interval of time may be in any

18   given case, it is reasonable to assume

19   we are likely to have passed it by in

02:00 20   this case."

21   And can you comment on that?

22   A   Well, just the erosion of witnesses' memories and

23   the disappearance of witnesses. Time is the

24   friend of the Defendant generally, it's not

02:01 25   usually the friend of the Crown.

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1   Q   And I think you go on to say that:

2   "Any such suggestion that the Crown has

3   the burden of showing it could now

4   prosecute the Applicant successfully,

02:01 5   assumes that people never forget, never

6   change and can always be found. It

7   assumes that credible people never

8   change to become incredible witnesses.

9   It assumes that the memories of the

02:01 10   witnesses never deteriorate or are never

11   affected by changes in lifestyle, age,

12   health or temperament. It assumes that

13   over time they are not influenced by

14   those around them or by publicity. It

02:01 15   ignores the weight of recollection of

16   events which are current in favour of

17   those which are dimmed by time and other

18   factors. It ignores the finality that

19   is essential to the proper

02:01 20   administration of justice and its

21   reputation and confidence in the minds

22   of the public."

23   And then goes on to say:

24   "Such a burden creates an impossible

02:02 25   task for the Crown and a ridiculously

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1   simple one for the Applicant."

2   Now, I appreciate you've touched on that, but

3   anything else to elaborate on what's stated

4   there?

02:02 5   *A*   Not much. Those pretty much sum up my view of the

6   notion that we should have to essentially prove we

7   can re-prosecute, reconvict.

8   *Q*   And just -- is what you are saying here, that if

9   you took 10 convictions, murder convictions from

02:02 10   20 years ago and try to re-prosecute them, is that

11   what you are getting at, that it would be

12   difficult to achieve the same results in each of

13   those cases as was obtained 20 years ago?

14   *A*   Yes.

02:02 15   *Q*   And that may have nothing to do with a miscarriage

16   of justice, but other factors?

17   *A*   It may have nothing to do with the quality of the

18   case at the time the conviction was obtained, or

19   any issue of miscarriage, it's just the passage of

02:02 20   time creates those problems.

21   *Q*   We'll deal with this issue a bit later when we get

22   into the decision not to proceed with the charge

23   against Mr. Milgaard, but are some of the matters

24   identified here, were these matters that

02:03 25   influenced your thinking in April of 1992 in the

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1　　　decision not to proceed with a further prosecution

2　　　of Mr. Milgaard?

3　A　They would have been on the periphery of that

4　　　decision. It was largely based on a consideration

02:03　5　　　of what the Supreme Court said and what we thought

6　　　was the public interest.

7　Q　Okay. And down at the bottom, your comment:

8　　　　　　　　　　"In our submission, it is hardly

9　　　　　　　　　　improper to require those who allege a

02:03　10　　　　　　　　miscarriage of justice has occurred, to

11　　　　　　　　　prove their allegations. Indeed, any

12　　　　　　　　　other process would be unreasonable and

13　　　　　　　　　unworkable."

14　　　And I think you've touched on that, and then as

02:03　15　　　far as the burden, you talk about it being a

16　　　balance of probabilities test:

17　　　　　　　　　　"Merely raising a doubt is no longer

18　　　　　　　　　appropriate at this point. Since the

19　　　　　　　　　conviction of the Applicant is a given

02:04　20　　　　　　　　at this stage, raising a reasonable

21　　　　　　　　　doubt does not help him. The reasonable

22　　　　　　　　　doubt standard is only appropriate when

23　　　　　　　　　applied in conjunction with the

24　　　　　　　　　presumption of innocence..."

02:04　25　　　And again I think you've touched on that, that

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1		that would be on the proof of innocence on the
2		balance of probabilities?
3	A	Yes.
4	Q	And then --
02:04 5	A	Well, proof of a miscarriage of justice. If, you
6		know, for example, you are alleging a jury has
7		been tampered with, then you need some evidence of
8		that that's substantial and credible and indicates
9		that that has probably occurred.
02:04 10	Q	And just comment on, and we had this made
11		reference to, the flood gates argument, that if, I
12		suppose if we look at what the bar is for a
13		convicted person to get a remedy, the -- if the
14		standard is too low, I think what your brief here
02:05 15		is saying, or your position is if the bar is too
16		low, then justice isn't served because there's no
17		finality and proper convictions may well be
18		improperly reviewed and set aside; is that fair?
19	A	Yes.
02:05 20	Q	And I suppose on the other hand, if the bar is too
21		high, you may have wrongfully convicted people who
22		can't get a remedy?
23	A	That's correct.
24	Q	And so is the challenge to put the bar in the
02:05 25		right spot?

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1   A   Essentially, yes.

2   Q   If we can go to page 021307, I think this was a

3   submission on procedure generally, and your

4   position here appears to be that:

02:05   5   "...all parties should be entitled to

6   submit such materials they consider

7   relevant to the issues. The ultimate

8   decision as to the weight and relevance

9   of the same should be left for argument

02:05   10   and ultimately the decision of this

11   Court."

12   And did that in fact happen?

13   A   Yes. Once things sort of got sorted out and we

14   had a better idea of where we were going, yes, as

02:06   15   far as I'm aware, all the evidence was put

16   forward, all of it was considered.

17   Q   If we can go to 020269 --

18   A   I should just add to that, though, that consistent

19   with the notion that the burden lay on the

02:06   20   applicant to bring forward evidence of misconduct

21   and then for us to challenge that evidence or test

22   it, so it wasn't up to us to bring forward

23   evidence that the conviction was proper, it was

24   for them to bring forward evidence it was

02:06   25   improper.

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1 **Q** Okay. And this is a, the submission filed on

2 behalf of David Milgaard as to the tests on the

3 reference, and if we can go to page 020279, the

4 position put forward on behalf of David Milgaard

02:07 5 is, or was:

6 "It is submitted that on this reference

7 the Minister of Justice has asked the

8 Supreme Court to sit as a trier of fact.

9 As such, a miscarriage of justice would

02:07 10 occur if the court had a reasonable

11 doubt as to the guilt of Milgaard."

12 And you've commented generally on this subject

13 earlier. Did you agree with this proposition?

14 **A** No, that wouldn't be the view that I would take of

02:07 15 what the minister's reference to the Supreme Court

16 represented.

17 **Q** And to 020282, and this is the concluding

18 paragraph of the brief filed by Mr. Wolch:

19 "The words "miscarriage of justice" do

02:08 20 not lend themselves to easy definition.

21 It is obviously a broad concept. It is

22 submitted that examples of miscarriages

23 would be situations where it is proved

24 on balance that the convicted person is

02:08 25 innocent; where it is proved on balance

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1		that the trial evidence was false or
2		fabricated; or where it is proved on
3		balance that another is responsible for
4		the crime."
5		And would you agree with that itemization of at
6		least some of the things that would constitute a
7		miscarriage of justice?
8	A	Yes.
9	Q	067230 -- I'll come back to the Supreme Court
10		decision when we get to, on the test when we come
11		to it chronologically. This is February 10th, '92
12		from Mr. Frater to Sergeant Pearson with subpoenas
13		for Mr. Karst, Mr. Mackie and Mr. Short, and were
14		you aware that these individuals were asked by the
15		court, or the court ordered that they appear and
16		subpoenas were issued for them?
17	A	Yes, I was aware of that.
18	Q	And again I think we touched on this in the
19		earlier documents. Do you know whether that came
20		from the court, from Mr. Wolch or from you or was
21		it some combination?
22	A	Well, the default is some combination, I suppose
23		that's the safe one. I don't know whether -- I
24		can't recall whether Mr. Wolch and Mr. Asper asked
25		for them to be called. I do know that after the

02:08 (line 5)
02:08 (line 10)
02:08 (line 15)
02:09 (line 20)
02:09 (line 25)

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1   evidence certainly of Wilson suggesting that

2   somehow the police had mistreated him, that we

3   thought it appropriate that they be brought to

4   testify as to what went on.

02:09   5   Q   Okay. If we can go to 116619, this is a February

6   14th, 1992 letter from Mr. Wolch to you and

7   enclosed is the first page of four pages which

8   appears to be a summary which was found in the

9   Miller file.

02:10   10   "I believe David Asper

11   provided a copy of this to Eric sometime

12   ago and asked if he could determine who

13   prepared this particular summary.

14   I am particularly

02:10   15   concerned in knowing if page 337

16   referring to the (V1)- attacker being an

17   "A" group secretor is available since we

18   could not find that page in searching

19   the file. What is more important to me

02:10   20   however, is knowing who prepared this

21   document. From an examination of same

22   it is clear it would have to be either

23   an extremely senior investigator or

24   perhaps even Bobs Caldwell.

02:10   25   Your assistance would be

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1   most appreciated."

2   If we can just go to the next page, just to

3   identify, this is what we have been referring to

4   as the Mackie summary which is the five page

02:10   5   document. Maybe I'll go to 006799, is a

6   different version of it. And this is a document,

7   Mr. Brown -- are you generally familiar with this

8   document?

9   A   Yes, I saw that document.

02:11 10   Q   And if we can go to the fifth page of that, this

11   is the summary part that has a number of

12   statements and the bottom the suggestion about

13   getting the polygraph. So you are familiar with

14   this document are you?

02:11 15   A   Yes.

16   Q   And this document was presented at the Supreme

17   Court reference and witnesses were questioned

18   about it I believe; is that correct?

19   A   I believe so, yes.

02:11 20   Q   Now, just -- it appears that Mr. Wolch asked you

21   to look into this. What's your recollection of

22   how this document came about during the course of

23   the Supreme Court reference and what did you find

24   out about it?

02:11 25   A   Well, my recollection is we, I didn't find out who

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1		authored it, but it -- that would have come off
2		Bobs Caldwell's file, I'm sure of that.
3	Q	And did you have any concerns, when you looked at
4		this document, that this document, assuming it's
02:12 5		prepared by a senior police investigator, did you
6		come to any conclusions as to whether this was
7		evidence of, fabrication of evidence, coercion of
8		witnesses, or I think it was suggested that it was
9		a script that the police used to cause witnesses
02:12 10		to give fabricated evidence?
11	A	No. That's a summary of the investigation to that
12		point with some indication of where they might
13		want to go after that. I don't consider that to
14		be anything sinister and I just don't see any
02:12 15		evidence of that being the case.
16	Q	And was this something then that was brought to
17		your attention and that you considered during the
18		course of the Supreme Court reference?
19	A	I believe it was put to perhaps Mr. Karst.
02:13 20	Q	Perhaps Mr. Roberts?
21	A	It might have been, although I would very much
22		doubt Art Roberts would have authored something
23		like that, I don't think he had that much
24		familiarity with the file.
02:13 25	Q	Again, but from the perspective of Saskatchewan

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1   Justice, is it your evidence then that this

2   document, which we've referred to as the Mackie

3   summary, did not cause you any concern that

4   something may have been done improper by either

02:13   5   the Saskatoon City Police or by Mr. Caldwell?

6   A   No. On large files it's not unusual to see

7   summaries prepared by an investigator.

8   Q   If we can go to 116610 and go to page 612, this is

9   a letter from Mr. Frater to the Supreme Court with

02:14   10   a list of witnesses, and there's a reference here

11   that:

12   "Charles Short and Raymond Mackie,

13   investigating police officers for whom

14   subpoenas were issued, are not on the

02:14   15   list. Mr. Short has been served with a

16   subpoena, but because he is experiencing

17   health problems, counsel have agreed

18   that he need not appear at this sitting.

19   Mr. Mackie is apparently vacationing in

02:14   20   Arizona and his exact whereabouts are at

21   present unknown."

22   And does this assist your memory at all as to

23   what happened with Mr. Short and Mr. Mackie? We

24   know they weren't witnesses, but do you know what

02:14   25   happened after this?

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1   A   It seems to me that after Mr. Karst and Mr.

2   Roberts were called, there wasn't much of an

3   appetite for calling Mr. Short or Mr. Mackie.

4   Certainly Mr. Mackie would have been back at some

02:14 5   point and Mr. Short was available. I think there

6   was some consideration of, between Federal Justice

7   officials and ourselves, about how we might get

8   his evidence from Saskatoon to Ottawa. The

9   Supreme Court at that time was set up to receive

02:15 10   video conferencing and we looked at that, but I'm

11   guessing at that point that Mr. Wolch and Mr.

12   Asper must have indicated they were no longer

13   interested in hearing from them.

14   Q   If we can go to 032522, and this is on the Mackie

02:15 15   summary, and the Mackie summary is that five page

16   document that I showed you, and this is a

17   newspaper report of February 18th, 1992, and I'll

18   read you a couple of things and ask for your

19   comment. It says *Police developed erroneous*

02:16 20   *theory, Milgaard lawyers say. Document shows*

21   *teenage witnesses pressed to flesh out*

22   *prosecution's script, Supreme Court told*, and then

23   the report talks about:

24   "David Milgaard's lawyers

02:16 25   have given the Supreme Court of Canada a

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1   mysterious document that they say proves

2   police and prosecutors developed an

3   erroneous theory about the 1969

4   sex-slaying of nurse's aid Gail Miller,

02:16 5   then pressed teenaged witnesses to flesh

6   out their script. The five judges

7   engaged in animated discussions and note

8   taking yesterday on the unsigned,

9   undated document from the files of the

02:16 10   Saskatchewan Justice Department. Chief

11   Justice Antonio Lamer described it as

12   very interesting.

13   Eddie Karst, a retired

14   Saskatoon police investigator who helped

02:16 15   put Mr. Milgaard behind bars, testified

16   that the documented theory appears to

17   have been developed when police had very

18   little incriminating evidence against

19   Mr. Milgaard."

02:16 20   And then I think if we can scroll down, the quote

21   here:

22   "I think the police theory is

23   set out in this document and that key

24   witnesses bought into the theory, David

02:17 25   Asper, one of Mr. Milgaard's lawyers

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1   told reporters outside the court.

2   The police had two

3   points: They had the death of Gail

4   Miller and they had their own theory.

02:17   5   They had to connect the dots, Mr. Asper

6   said, adding that someone put the theory

7   to paper and police were then instructed

8   to round up the required witnesses.

9   "In my view, that's what

02:17   10   the document represents," he said. At

11   Mr. Milgaard's trial, the Crown alleged

12   that Mr. Milgaard and two "hippie"

13   companions, Nichol John and Ron Wilson,

14   arrived in Saskatoon early on the day of

02:17   15   the slaying."

16   And was that your -- was that your understanding

17   of how that document was being presented before

18   the court, as being a script that the police put

19   together and got the witnesses to follow?

02:15   20   A   Well that was the presentation that was being made

21   by I believe Mr. Wolch and, following that, by Mr.

22   Asper to the news media, but -- and the document

23   is there, it speaks for itself, it's not obviously

24   that, you have to do a lot of interpreting to get

02:18   25   to that particular point.

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1   Q   117000. Was it your view that the issue of

2   whether or not the Mackie summary was used by the

3   police improperly with the witnesses was issue

4   that was before the Supreme Court on the

02:18   5   reference?

6   A   Well, it was an issue that was raised. I would

7   rather disagree with Dave Roberts' assertion that

8   the Supreme Court found it immensely interesting,

9   I didn't get that impression.

02:18 10   Q   But was it a matter, I mean the document was

11   before the Court and witnesses were questioned

12   about it, was it --

13   A   I believe so, yes.

14   Q   This is a letter from you to Deputy Chief Montague

02:18 15   February 28th, '92, and you say you attach what

16   appears to be some sort of summary, and then you

17   say:

18   "Mr. Wolch, Milgaard's lawyer, has

19   attempted to cast this summary in a

02:19 20   sinister light. For our purposes, it is

21   important to know what this document is

22   and if possible, who prepared it. We

23   found this copy on the prosecutor's file

24   so it may assist you in identifying it

02:19 25   if Bobs Caldwell was asked if he

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1   recognizes it."

2   And then you go on to talk about the reference on

3   the page number. What was your purpose in

4   following up with the police on this document?

02:19   5   A   Well, my recollection is that Eddie Karst wasn't

6   able to say who authored it and wasn't entirely

7   clear on what it was, so I wanted to check with

8   the Saskatoon Police Service to see if anyone

9   there recognized it or knew exactly what it was.

02:19   10   Q   And were you --

11   A   I mean I suspected I knew what it was, but I

12   wanted to see whether they had anyone who could

13   state that "yes, in those days this was a fairly

14   routine process."

02:20   15   Q   And that's what you suspected it was?

16   A   Well, as I say, I have seen those before and

17   that's what they are, they are summaries of what

18   you've got to date and where it may direct you to

19   go in the future.

02:20   20   Q   If we can go to 020429. And this is the decision

21   of the Supreme Court of February 28th, '92 on the

22   test, and am I correct that there were no oral

23   submissions, just written arguments were filed?

24   A   I think that is the case.

02:20   25   Q   Mr. Wolch is telling me I'm wrong.

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1   A   Well --

2   Q   Not that I am going to let him --

3   A   Well, perhaps his memory is better than mine. I

4   don't recall whether there were oral arguments.

02:20 5   Certainly, we filed a written brief on that.

6   Q   Okay. I'll maybe check this evening.

7   A   The record should show, it would have been

8   transcribed, I would guess.

9   Q   In any event, the decision came out on February

02:21 10   28th from the Court. If we can go to 020431. And

11   we have been through these before, and the tests

12   are set out in their ultimate decision; did you

13   have any concerns about the manner in which the

14   Court set out the tests that they were going to

02:21 15   apply?

16   A   I don't recall being particularly concerned about

17   it.

18   Q   And just quickly, I mean the first test is that if

19   David Milgaard proved his innocence beyond a

02:21 20   reasonable doubt, that they would recommend a free

21   pardon, in other words that that would be a

22   miscarriage of justice?

23   A   Yes.

24   Q   And (b), that if he proved it only on a

02:21 25   preponderance of the evidence that he is innocent

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1   of the murder, then it would be open to apply to

2   re-open his application for leave to the Supreme

3   Court of Canada which presumably, if that had been

4   the case, the Supreme Court would have allowed him

02:22 5   to re-open his application for leave, grant leave,

6   grant the appeal, and set aside the conviction;

7   was that what was your understanding of what would

8   happen if he would have proven on a balance of

9   probabilities?

02:22 10   A   Yes.

11   Q   And then the next page, if we can get to (c), and:

12   "The continued ...",

13   this is:

14   "The continued conviction of David

02:22 15   Milgaard would constitute a miscarriage

16   of justice if there is new evidence put

17   before this Court which is relevant to

18   the issue of David Milgaard's guilt,

19   which is reasonably capable of belief,

02:22 20   and which, taken together with the

21   evidence adduced at trial, could

22   reasonably be expected to have affected

23   the verdict.",

24   and then if they answered that they would quash

02:22 25   the conviction and direct a new trial. And would

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1   that be essentially the test we talked about a

2   bit earlier this afternoon, about -- that was put

3   forward in your submissions, that credible new

4   evidence that would -- could reasonably be

02:23 5   expected to have affected the verdict?

6   A   Yes.

7   Q   And it's maybe stated a bit differently, but

8   that's what you were getting at, correct?

9   A   That's correct, yes.

02:23 10 Q   And then (d), if we can scroll down:

11   "If the ... record ... fails to

12   establish a miscarriage of justice ...

13   we might nonetheless consider advising

14   the Minister ... that granting of a

02:23 15   conditional pardon under ... 749(2) of

16   the Criminal Code may be warranted where

17   having regard to all the circumstances,

18   it is felt some sympathetic

19   consideration of David Milgaard's

02:23 20   current situation is in order."

21   What did you make of that, of (d) being in the

22   test?

23 A   Well I think, I think, frankly, it kind of tipped

24   the Court's hand in the sense that it indicated to

02:23 25   us that they viewed David Milgaard,

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1   notwithstanding his performance in Court, as a

2   sympathetic person, and that in their view it was

3   probably time he was out of jail.

4   Q And did you view (d) as being sort of the minimum

02:24 5   that would be granted, that even though this was

6   the test to be applied --

7   A Yes, yes.

8   Q If we can go to 010127. And you mentioned earlier

9   that you thought there was some discussion about

02:24 10   Joyce Milgaard being a witness and that the Court

11   either determined or concluded that she would not

12   be a witness; is that right?

13   A I believe that was the case, yes.

14   Q And, however, I think her affidavit was filed with

02:24 15   The Court; is that correct?

16   A Yes.

17   Q And if we can just go to page 010130, paragraph 9,

18   she states:

19   "I am advised by Mr. Wolch that this

02:25 20   Court is interested in determining what

21   disclosure was made available to Justice

22   Tallis at the time ...",

23   and then goes on to talk about her efforts. Was

24   that, do you agree with that statement, that the

02:25 25   Court was interested in determining what

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1   disclosure was made to Mr. Tallis at the time?

2 A   Yes.

3 Q   In order words, the disclosure in -- was

4   disclosure then an issue before the Supreme Court,

02:25 5 Crown disclosure?

6 A   Umm, the Wilson and John statements issue was

7   before the Court, yes.

8 Q   What about disclosure generally as a ground of

9   miscarriage of justice, or lack of disclosure?

02:25 10 A Well, with respect to what, you mean --

11 Q   Perhaps I'll leave that, I'll come back when I

12   deal with the written submissions. Certainly, in

13   the written submissions on behalf of Mr. Milgaard,

14   there was a reference to disclosure of the Avenue

02:25 15   N theory, the witnesses who were canvassed that

16   morning, the sexual assaults --

17 A   Oh.

18 Q   -- and just disclosure generally. Do you recall

19   that being --

02:26 20 A Well, I think when we were arguing the matter, or

21   when we were in the Supreme Court two issues of

22   disclosure were the statements of particularly

23   Wilson and John, and the issue of the disclosure

24   of the Larry Fisher rapes after the conviction,

02:26 25   those were the primary issues.

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1   The issue with respect to what

2   was in the police report and not disclosed, I

3   don't think that really was argued much in the

4   Supreme Court in the sense of sort of demanding

02:26 5   that this should have been disclosed and

6   ordinarily would have been disclosed.

7   Q   If we can go to page 010133. Again, this is

8   Mrs. Milgaard's affidavit, it says:

9   "Sometime ago I sought the assistance of

02:27 10   Centurion Ministries. I am advised that

11   Reverend McCloskey of Centurion

12   Ministries is prepared to testify.

13   Further, Paul Henderson, a Pulitzer

14   Prize winning author is also prepared to

02:27 15   testify. Centurion Ministries have

16   received no compensation from me in any

17   way nor is it ever contemplated that

18   they would. They are totally

19   independent of David Milgaard and the

02:27 20   Milgaard family."

21   Do you have any recollection as to why McCloskey

22   and Mr. Henderson were not called to testify?

23   A   Well with respect to Mr. Henderson, when we were

24   looking for the tape of the Wilson interview the

02:27 25   tape was missing and Mr. Henderson couldn't be

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1   located, he was on some investigation and, for

2   some reason, unavailable.

3   With respect to McCloskey, I

4   suspect -- I don't recall specifically why he

02:28 5   wasn't called, but I suspect it's because he

6   really didn't have direct evidence to give, or

7   certainly evidence that we couldn't get from

8   witnesses he interviewed or what have you.

9 **Q**   On the issue of -- did you object to either of

02:28 10   these being witnesses, being called?

11 *A*   I would likely have objected to McCloskey being

12   called simply because I -- my recollection is I

13   didn't think he had anything really to contribute

14   that couldn't be put forward directly through a

02:28 15   witness he interviewed or something like that.

16 **Q**   And so is your evidence that you don't think you

17   were asked but, if you had, you would have -- you

18   would have objected?

19 *A*   Well, that, that would have been our position with

02:28 20   respect to McCloskey.

21   With respect to Henderson, if

22   he'd been available we might well have wanted to

23   hear what he had to say, because certainly at that

24   point the Wilson matter was left in a mess and, if

02:29 25   that could be sorted out, it would have been

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1   helpful.

2   Q   And so Mr. Henderson might be a witness that

3   Saskatchewan Justice wished to hear from if he

4   were available?

02:29 5   A   With respect to the process of conducting the

6   Wilson interview, yes.

7   Q   And then, at the bottom, Mrs. Milgaard mentions

8   the report prepared by Professor Neil Boyd and Kim

9   Rossmo:

02:29 10   "They are also totally independent of

11   David Milgaard and ... were never

12   commissioned by the Milgaard family to

13   do their study.",

14   and indicates that they:

02:29 15   "... are prepared to testify."

16   And they weren't called, neither Professor Boyd

17   nor Mr. Rossmo, do you know what -- why they were

18   not called as witnesses, and did you take any

19   position with respect to their being witnesses?

02:29 20   A   Yes, we did. We took the view that their report

21   was largely one of opinion and inference and that

22   they didn't have direct, useful evidence to give

23   the Court.

24   Q   And so did you oppose them being called as

02:30 25   witnesses?

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1   *A*   I don't know that they were ever seriously put up

2   as potential witnesses, but we would have opposed

3   them, had that been suggested. It also makes

4   mention of their video tape, and I do recall that

02:30 5   we did oppose that going in.

6   *Q*   And for what reason?

7   *A*   Well again, I mean, that was their view of the

8   facts, their speculation, the inferences they drew

9   from the evidence or the portions of evidence that

02:30 10   they choose -- chose to look at.

11   *Q*   And I'm done with that document. If we can just

12   go to 338947, which is the outline, and go to page

13   950, please. And I just want to go through

14   quickly, and I think we've covered all of these,

02:31 15   the witnesses that were called and weren't called.

16   And I believe, Mr. Brown, I intend to go through

17   your written submissions to the Court, which I

18   think outline Saskatchewan Justice's views of the

19   significance of the evidence of the witnesses; is

02:31 20   that fair, that --

21   *A*   Yes.

22   *Q*   The witnesses that were not called, I think we've

23   talked about them, Mr. Mackie, Mr. Short. What

24   about Mr. Penkala, do you recall -- and any other

02:31 25   Saskatoon police officer, as to why he was not

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  1              called as a witness?

  2      A       My recollection with respect to Joe Penkala was

  3              that he was the ident officer on that case, he

  4              picked up a few things at the crime scene, there

02:32 5          was no need to prove continuity or anything like

  6              that, so there really wasn't a need to call him.

  7      Q       Okay.  And as far as Mr. Caldwell and Mr. Kujawa,

  8              I think we've touched on that, is there anything

  9              else you recall as to why -- I take it you would

02:32 10         have had no objection to having them testify?

  11     A       No.

  12     Q       And, again, for the next three --

  13     A       Well with respect to the issues of coverup, and so

  14              on, that were being alleged.

02:32 15    Q       You did not have an issue with them being

  16              questioned about that?

  17     A       Nope.

  18     Q       And similarly, I think you've told us this as

  19              well, Mr. Henderson and McCloskey and those

02:32 20         allegations, to the extent that they were -- I

  21              think you said as long as they had direct

  22              evidence, you were fine with them; is that right?

  23     A       I was fine with calling Paul Henderson because of

  24              the Ron Wilson situation.

02:32 25                                 James McCloskey, I just, I saw
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1		what was in the news media with respect to him, I
2		saw their report, I didn't see any point in
3		bringing him in because he really had nothing more
4		than speculation and inference to contribute, and
02:33 5		the Supreme Court was in a position to look at the
6		evidence and make their own decisions.
7	Q	If we can now go to 234332.
8	A	You -- I should add one other thing. We were
9		occasionally reminded and very much aware of the
02:33 10		fact that the Supreme Court considered us to be
11		taking a lot of their valuable time with this
12		inquiry, and I -- while they resolved themselves
13		to dealing with it, I don't know that they were
14		ever very happy with it.
02:33 15	Q	And -- and did that affect -- how did that affect
16		the proceeding?
17	A	Well, that it affected us in that if we didn't
18		think a witness was absolutely necessary, we
19		wouldn't call that person. If Mr. Wolch didn't
02:34 20		raise, or Mr. Asper didn't raise something, we
21		didn't bring that in. And as I -- as I've said
22		before, we weren't there to do clean up in any
23		event, we were there to respond to what was being
24		put before the Court.
02:34 25	Q	Okay. This document, although the front page is

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1   not a very -- maybe go to the next page -- is the

2   memorandum of argument, and I believe this would

3   have been filed I think around April 6th, 1992

4   following the conclusion of the evidence; is that

02:34   5   correct?

6   A   It's early April, yes.

7   Q   Early April. And would this, would this document

8   reflect Saskatchewan Justice's view of all of the

9   information that had come to its attention to that

02:34   10   point on the questions related to David Milgaard

11   and the miscarriage of justice? And I appreciate

12   that not everything is included in here, but would

13   this be a fair summary of the view of Saskatchewan

14   Justice at the time, based upon what had happened

02:35   15   at the Supreme Court reference on the issues dealt

16   with in it?

17   A   Yes, based on what went on at the Supreme Court

18   reference, yes.

19   Q   And I had asked you this question earlier, about

02:35   20   sort of your role as an advocate, and I think you

21   said that you were there in a way to defend the

22   conviction and be an adversary, but you were also

23   wearing a different hat in that if something came

24   to your attention, you would deal with it; right?

02:35   25   A   Yes.

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1   Q   And so I guess what I am trying to get at is this,

2   is this memorandum, in addition to being the

3   advocacy part as well, truly reflective, then, of

4   what Saskatchewan Justice thought about the

02:36 5   information and the evidence that it heard? I'm

6   not sure if I'm making my question clear.

7   A   Yes, I think that's fair. I don't -- I -- one of

8   the joys of working for the Crown is that you

9   don't have to be just an advocate, you can call

02:36 10 things pretty much the way you see them, and

11   that's what I did in that --

12   Q   Okay. And I guess that's what I am getting at, is

13   that you did not feel -- or did you feel

14   restricted in any way by the role you were asked

02:36 15 to take Saskatchewan Justice as an adversary in

16   the position you took in your final submissions?

17   A   Not at this point, no.

18   Q   And so can we take this submission as exactly what

19   you saw --

02:36 20 A   Yes.

21   Q   -- and what you --

22   A   Yes.

23   Q   -- what you -- and how you assessed the

24   information? I intend to go through parts of this

02:36 25 because it sets out, I think, Saskatchewan Justice

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1   and/or your view of the evidence. And go to the

2   first page, the first paragraph. And this would

3   be at a time when all the evidence is in, correct

4   Mr. Brown, so that the reference case is in,

02:37   5   you've heard from all the witnesses?

6   A   Yes, that's correct.

7   Q   And, just for the record, the DNA testing did not

8   result in anything that could be used by the Court

9   at that point; correct?

02:37   10   A   That's correct.

11   Q   And so you say here:

12   "Consequently, we submit that he has not

13   established there has been any

14   miscarriage of justice."

02:37   15   And would that have been, then, your view, that

16   based on everything that had been put on the

17   record and the evidence heard, that you did not

18   believe, at least in your assessment, that Mr.

19   Milgaard and his counsel had established a

02:37   20   miscarriage of justice?

21   A   That's correct.

22   Q   You then go through, and I won't go through any of

23   this, the summary of the trial evidence. But if

24   you can go to page 23433 -- 234332 -- I'm sorry,

02:38   25   234340, and you conclude your summary of the

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1   evidence at trial by saying:

2   "In our submission, the

3   evidence from the trial though largely

4   circumstantial and not without problems,

02:38 5   was, as found by the jury and the Court

6   of Appeal for Saskatchewan, sufficient

7   to establish the guilt of the accused.

8   If the jury accepted the evidence of

9   Wilson, John and Cadrain, David Milgaard

02:38 10   was in the vicinity when the murder was

11   committed, had the opportunity to commit

12   the crime and showed up with blood on

13   the front of his clothing after the

14   murder. If they further accepted the

02:38 15   evidence of Wilson with respect to the

16   statements made by Milgaard in the car

17   when they were stuck and in the bus

18   depot in Calgary, these statements

19   amount to confessions. Finally, if the

02:38 20   jury believed the evidence of Lapchuk

21   and Melnyk, Milgaard's performance in

22   the motel room amounts to another

23   confession and corroborates the ones he

24   made to Wilson. In our submission, the

02:38 25   evidence cited above provided an ample

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1   basis for the jury to convict."

2   And I think you've talked about that earlier on;

3   was that your assessment of the significant

4   evidence that the jury had before it to convict?

02:39 5 A   Yes.

6 Q   And you mention, on a couple of occasions, the

7   confessions; were those, in your view, significant

8   as far as the case that the jury heard?

9 A   I think they were very significant.

02:39 10 Q   You then go down and you review the evidence, and

11   you start off with the evidence of David Milgaard.

12   Can you tell us, generally, what was the

13   significance and importance of David Milgaard's

14   evidence at the Supreme Court hearing, in your

02:39 15   assessment, of his case that there had been a

16   miscarriage of justice?

17 A   Well, I mean obviously if the Supreme Court had

18   believed him when he said he didn't commit the

19   murder, that would have ended the matter. Pretty

02:39 20   quickly they would have -- they would have been

21   prepared to grant him the remedy he was looking

22   for and give him a pardon.

23   My impression of his

24   appearance in Court was that he likely didn't do

02:40 25   himself a lot of favours. His evidence was

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1   directly responsible for the calling of Cal Tallis

2   as a witness, and that was very damaging to David

3   Milgaard. Where there were any doubts with

4   respect to which one of them was credible, I don't

02:40 5   think there was much question about where that was

6   or how that was decided. He made remarks to his

7   lawyer that were problems for him and that needed

8   explaining, and he didn't explain them, he denied

9   most of them.

02:40 10   Q   And you make the comment here:

11   "In our submission, Mr.

12   Milgaard's evidence is not credible and

13   is both self-contradictory and

14   contradicted by other witnesses."

02:40 15   And then you go on to spend some time comparing

16   that. And by "self-contradictory", can you just

17   explain what you are getting at there?

18   A   Well, I understand or I recall that David Milgaard

19   indicated at one point that he had cooperated

02:41 20   completely with the police, and then when he was

21   being cross-examined he admitted that in fact he

22   was playing 'head games' with them, as he called

23   it, and justified that on the basis that everybody

24   did that in those days.

02:41 25   Q   Now, if I have this right, I'm just counting here,

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1   I think you go through that, I think, 11 instances

2   in the brief where you say that there were

3   contradictions between what Mr. Milgaard said and

4   what either other witnesses said or what he had

02:41 5   said on other occasions; is that correct?

6   A   Yes, that's --

7   Q   At least that's my count.

8   A   Yeah.

9   Q   Okay. And so here, the Notes to Counsel, and you

02:42 10   talk about the fact that in his evidence before

11   the Supreme Court he indicated repeatedly there

12   were notes he prepared for his trial counsel, and

13   he was asked about these notes, and Mr. Tallis --

14   or the notes that Mr. Milgaard has put forward as

02:42 15   being the notes, Mr. Tallis said they weren't the

16   ones that were produced to him. Just on that

17   point, why, would there be any significant, in and

18   of itself, about that contradiction, or was it

19   simply the fact that it was a contradiction?

02:42 20   A   It's, well, largely the fact that it was a

21   contradiction. I don't recall a lot in there that

22   sort of changed much of his testimony.

23   Q   And the next, if we can go to the next page, the

24   Knowledge of the case against him, and it says:

02:42 25   "Mr. Milgaard ... did not

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1   know the case against him until he went

2   to ...",

3   the prelim, and Mr.:

4   "... Tallis is absolutely clear that

02:43 5   David Milgaard knew the case to be

6   presented ..."

7   Again, would that be just a contradiction that

8   goes to credibility, or was there anything

9   significant about that contradiction that you

02:43 10   have got a problem --

11   A   No, that's a contradiction that goes to

12   credibility.

13   Q   "(c) Knives in the car on the way to

14   Saskatoon

02:43 15   Mr. Milgaard in his testimony

16   concerning the knives indicated ...

17   there were no knives ...",

18   "... that until they left Saskatoon,

19   there were no knives in the car, not on

02:43 20   the way to Saskatoon or in Saskatoon."

21   "Justice Tallis in his

22   testimony concerning the presence of

23   knives indicated that Mr. Milgaard did

24   tell him he had a knife with him at that

02:43 25   time though it was not a paring knife

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 1                    and not the knife found under the body

 2                    of Gail Miller."

 3          If we can go to the next page, you then talk

 4          about Nichol John's evidence about the knife, and

02:43 5     then here Mr. Wilson's evidence, I think this is

 6          his evidence at the reference that there was a

 7          bone-handled knife in the car on the way to

 8          Saskatoon.

 9                              And can you comment on that,

02:43 10    again, the contra -- I take it, with all these

11          contradictions, they were significant because

12          they affected David Milgaard's credibility in

13          your view; is that right?

14    A     Yes, that was, that was the point of them.

02:44 15   Q     And what about this issue of the knives, is there

16          anything significant about the fact that he told

17          the Supreme Court he didn't have a knife and Mr.

18          Tallis said that he acknowledged to him in '69

19          that he did have a knife?

02:44 20   A     Well, again, I mean it's an issue that relates to

21          his credibility.

22    Q     If we can then go on, again, I won't go through

23          all these; drug usage prior to or during the trip,

24          and it appears in the brief you've gone through

02:44 25    and compared what Mr. Milgaard said about drug use
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1   compared to what Mr. Tallis said he told him

2   earlier, is that correct, and what Ron Wilson had

3   said?

4   A   That's correct.

02:44   5   Q   Next, (d) Contact with the lady and asking for

6   directions, go to the next page, and I think this

7   relates to the age of the woman.

8   If we can just scroll down,

9   (e) would be:

02:45   10   "Fixing the car heater and getting

11   chicken soup.

12   David Milgaard at several

13   places in his testimony mentions that

14   the first thing they did when they

02:45   15   arrived in Saskatoon, was to stop at a

16   garage before a bridge to get the car

17   heater fixed and get chicken soup at

18   around 7:00 in the morning. He also

19   indicated that he told this to his

02:45   20   counsel at trail and requested that he

21   make inquiries to locate the garage

22   attendant and bring him to court to

23   verify this alibi."

24   And I think you mentioned earlier, if this in

02:45   25   fact had been true, that would have provided him

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 1              with an alibi; correct?

 2    A         That's correct.

 3    Q         Then:

 4                       "During these exchanges Mr. Milgaard was

 5                       eventually forced to admit that there is

 6                       no reference to this incident in any of

 7                       the sss statements he made to the

 8                       police, the notes he claimed were

 9                       prepared for his counsel prior to the

10                       preliminary hearing or in the materials

11                       he submitted in the Minister of Justice

12                       or his applications for the mercy of the

13                       Crown."

14              And why was that significant?

15    A         Well, because if that event happened, that put him

16              on the wrong side of the river at the time of the

17              murder and that clearly meant he could not

18              possibly have committed it, so that was a very

19              substantial, very important, singularly

20              significant piece of evidence, and to have it

21              omitted from the recounts of his evidence, or his

22              story, tells us of credibility.

23    Q         And then you go on to comment here that:

24                       "In their statements given to the

25                       police, their evidence given at trial,
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02:45 (line 5)
02:46 (line 10)
02:46 (line 15)
02:46 (line 20)
02:46 (line 25)

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1   their statements made since then and

2   their evidence before the court ...

3   neither Nicole John nor Ron Wilson ever

4   mention stopping at a garage to get the

02:47 5   car heater fixed or to have chicken

6   soup."

7   And the significance of that would be what?

8   A   Well, those are contradictions of David Milgaard.

9   Q   And then:

02:47 10   "Finally in this regard, Justice Tallis

11   specifically denied that he was ever

12   told by David Milgaard that they stopped

13   at a garage before a bridge, or that

14   they got the heater fixed or that they

02:47 15   had chicken soup there. He also

16   indicated that he was not instructed by

17   his client to locate the garage

18   attendant who could confirm this alibi."

19   Did you conclude, or was one of the

02:47 20   considerations that this may have been an alibi

21   fabricated by Mr. Milgaard to present to the

22   court?

23   A   At that point we were of the view that that was a

24   recent fabrication of his, something that sort of

02:47 25   popped up and he decided he would throw in.

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	1	Q	And what did that do to your assessment of his
	2		credibility?
	3	A	Well, obviously it suggests he's not a very
	4		credible witness when he testifies he did not kill
02:48	5		Gail Miller.
	6	Q	And I take it that that was a matter that you
	7		thought was important for the court to consider in
	8		assessing his evidence?
	9	A	Yes.
02:48	10	Q	Next, (f), *Becoming stuck and separating from Ron*
	11		*Wilson,* you say:
	12		"In his statement to the police on March
	13		3rd ... David Milgaard told the police
	14		he wasn't sure if he and the others
02:48	15		became separated... In his statement of
	16		the 18th of April ... he indicates that
	17		he only separated from John and Wilson
	18		when they got to Cadrain's house... In
	19		his testimony before the hearing he told
02:48	20		Mr. Neufeld that the only time they were
	21		stuck in Saskatoon was behind the
	22		Danchuk's house."
	23		And then if we can scroll down, you talk about
	24		Ron Wilson's testimony at the Supreme Court:
02:48	25		"...they got stuck almost immediately

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1   after they had spoken to the woman on

2   the street and asked for directions."

3   Next page, and then it goes on to describe Mr.

4   Wilson's evidence at the hearing about getting

02:48 5   stuck, it talks about Nichol John's evidence at

6   the Supreme Court, getting stuck in an alley and

7   the boys separated to get help.

8   And then you say:

9   "Finally in this regard, Mr. Justice

02:49 10   Tallis in his evidence indicated that

11   David had told him they had gotten stuck

12   not that long after seeing the lady on

13   the street. He indicated to his counsel

14   that at that point he and Wilson

02:49 15   separated for awhile though he was not

16   able to pin it down to any specific

17   amount of time."

18   So again, I take it that contradiction was a

19   concern about credibility?

02:49 20   *A*   Yes.

21   *Q*   Was getting stuck and Mr. Milgaard being away from

22   the car an important part of the evidence?

23   *A*   Well, it was in that there were certain aspects of

24   his testimony that Ron Wilson seemed to be able to

02:49 25   stick to and the getting stuck and them separating

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1   was part of it. Now, at that stage, quite

2   frankly, had he been the only one attesting to

3   that, I would have put no confidence in it at all,

4   but given what Justice Tallis said David Milgaard

02:50 5   told him and given Nichol John saying that in fact

6   they did get stuck, that seemed to me to be some

7   corroboration for at least part of what Ron Wilson

8   was saying.

9 Q And did you view, or how did you view Mr.

02:50 10   Milgaard's evidence at the Supreme Court where he

11   denied getting stuck and being away from the car,

12   being -- and I take it the evidence at trial was

13   that was the -- that put them in the location and

14   gave him the opportunity?

02:50 15 A That's right.

16 Q And what did you make of the fact that at the

17   Supreme Court he was denying that when Mr. Tallis

18   said he had told him that happened?

19 A Well, again, with Justice Tallis saying that David

02:50 20   Milgaard had in fact said that happened, it

21   corroborated what Wilson and John had said in

22   their statements to the police and at trial, that

23   they were stopped, that they were there, and that

24   in effect David Milgaard had the opportunity.

02:51 25 Q And if you accept Mr. Tallis' recollection of that

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1   as being accurate, I take it then there's one of

2   two, maybe more, explanations for Mr. Milgaard's

3   evidence, either he has forgotten or is mistaken;

4   correct?

02:51   5   A   Yes.

6   Q   Or he is deliberately lying about it or saying it

7   didn't happen?

8   A   Yes.

9   Q   And did you -- which of those two, or did you

02:51   10   reach a conclusion as to what you -- or how did

11   you assess his evidence on that issue?

12   A   Well, absent the chicken soup/heater fix story, I

13   might have been persuaded that he had forgotten

14   given the riggers of being in jail for 20 some

02:51   15   years and his mental health problems, but with the

16   heater fix/chicken soup story thrown in, which I

17   assessed as being just an out and out lie, it

18   coloured my, I suppose my view of the rest of what

19   Mr. Milgaard was saying and I considered this to

02:52   20   be a deliberate untruth.

21   Q   If we can scroll down, (g), *Failure to wear shoes*

22   *into the motel*, I won't go through it, but I think

23   there was a difference there about what Mr.

24   Milgaard told the Supreme Court and what

02:52   25   Mr. Tallis had been told back in '69; is that

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1   correct?

2   A   Yes.

3   Q   And again, the next page, *Changing clothes at*

4   *Cadrain's house* I won't go through, but again, I

02:52 5   take it you found there to be a contradiction

6   between what Mr. Tallis and others said happened

7   and what Mr. Milgaard told the Supreme Court?

8   A   That's correct.

9   Q   If we can go to the next page -- sorry, oh,

02:52 10   *Throwing out the cosmetic bag or compact*, it says

11   here:

12   "In his evidence before this Court,

13   David Milgaard indicated that he is

14   positive he never through anything like

02:53 15   a make up compact out the window of the

16   car as described by Wilson ... John and

17   Cadrain..."

18   And then:

19   "...he confirms that he never through

02:53 20   any compact or make up bag out the

21   window on the trip to Calgary.

22   In her evidence before this

23   Court Nicole John indicates that she

24   found the make up bag in the glove

02:53 25   compartment and that when she asked who

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1   it belonged to someone threw it out the

2   window."

3   And then:

4   "In his evidence Mr. Justice Tallis

02:53   5   indicated that he had questioned his

6   client about this incident and had been

7   told that what John and Wilson were

8   saying was true. David Milgaard told

9   his counsel that he did not know where

02:53   10   it came from or why he threw it out the

11   window, but that he did indeed throw it

12   out the window."

13   And again, your comment on this contradiction as

14   you call it?

02:53   15   A   Well, again, essentially there you have David

16   saying something didn't happen when all the other

17   witnesses, including his counsel, who discussed

18   the incident with him, was saying no, it did

19   happen.

02:54   20   Q   Now, did you have any views at the time as to

21   whether or not this makeup or compact, whether it

22   was Gail Miller's or --

23   A   I think, frankly, there was just evidence that

24   there was a makeup compact in the car and it was

02:54   25   thrown out and no one was able to attach that to

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1		Gail Miller.
2	Q	You had mentioned earlier that you were aware of
3		Mr. Milgaard speaking in the media prior to the
4		Supreme Court about various matters; is that
02:54 5		correct?
6	A	Yes.
7	Q	Making statements, and we have gone through some
8		of those and they are all on the record before the
9		Commission, but I think in early reports he may
02:54 10		have commented about some of these matters, the
11		compact, the motel room incident, about whether
12		they did or didn't happen. Do you recall
13		generally him making statements to that effect?
14	A	I don't recall him making a statement with respect
02:55 15		to the makeup compact. He may have gone over some
16		of that, but I rather -- my impression is that he
17		never got that detailed.
18	Q	I believe we've seen one, one story where he is,
19		by telephone, I think it's on the *Shirley Show*,
02:55 20		and I think it relates to the motel room incident
21		where he says it didn't happen. Do you recall --
22	A	I think he denied that, yes.
23	Q	And then I think in his affidavit filed in 1986 he
24		denied some of these things as well. Would you
02:55 25		have -- let's just talk about your approach to Mr.

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1		Milgaard at the Supreme Court. You talked about
2		contradictions between what he said and what
3		others had said, sort of external contradictions,
4		and as well internal contradictions, in other
02:55 5		words, what he had said on previous occasions;
6		correct?
7	A	Yes.
8	Q	And if he had -- if there had been inconsistencies
9		with what Mr. Milgaard told the Supreme Court
02:56 10		versus what he had said in the media prior to
11		that, would those have been matters that you would
12		have used at the Supreme Court hearing to
13		challenge him?
14	A	Well, I believe Mr. Neufeld was ready to do that,
02:56 15		but it also got to the point where there was so
16		much that he already had that there didn't seem to
17		be any point in simply chasing after this
18		endlessly.
19	Q	In other words, if there had been public
02:56 20		statements made by Mr. Milgaard in the media in
21		the years prior to the Supreme Court reference,
22		would those have been matters then that Mr.
23		Neufeld or you would have or could have utilized
24		in examining Mr. Milgaard if he departed from what
02:56 25		he had said publicly?

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1   A   Oh, yes. Well, to the extent that you can affix

2   responsibility to anyone for what's quoted in the

3   newspaper.

4   Q   I'm thinking more of a television interview or one

02:57 5   that has his -- that has him speaking.

6   A   Well, if we have a transcript of that, yes. I

7   don't know that we had a lot of transcript of

8   interviews.

9   Q   Okay. But it appears that you and Mr. Neufeld

02:57 10   were alive to checking what Mr. Milgaard had to

11   say to the Supreme Court versus what he had said

12   elsewhere?

13   A   Oh, yes. When we went in, Mr. Neufeld had a

14   fairly extensive pile of materials indicating what

02:57 15   David Milgaard had said on different occasions

16   with respect to each aspect of the case that he

17   could have put to him.

18   Q   Okay. A couple more items here before we break,

19   the *Motel room re-enactment*, and it says:

02:57 20   "David Milgaard in his testimony to Mr.

21   Wolch ... denies the motel room incident

22   ever happened; that he never did the

23   action ascribed to him and that he never

24   said the words ascribed to him."

02:58 25   And I had asked you this earlier, and it appears

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1		that at the Supreme Court that was the position,
2		at least one of the positions advanced by Mr.
3		Milgaard, is that the motel room incident didn't
4		happen and therefore, at a minimum, Mr. Melnyk
5		and Lapchuk had fabricated their evidence;
6		correct?
7	A	That's correct, yes.
8	Q	And that necessarily Deborah Hall and Ute Frank,
9		parts of their evidence would also have to be
10		wrong?
11	A	They would have to be false too.
12	Q	And you go through the evidence of Lapchuk and
13		Melnyk, and the next page, Deborah Hall and her
14		evidence, and then as well Robert Harris, and I
15		think he was a fellow that provided an affidavit
16		late in the proceedings and he said that he was in
17		the room, confirmed generally that the incident
18		happened, but viewed it much like Deborah Hall, as
19		a joke; is that correct?
20	A	I believe that was correct, yes.
21	Q	So how did you -- what was your assessment of this
22		contradiction then, the fact that he was saying it
23		didn't happen and others were saying it did
24		happen?
25	A	Well, again, I mean, you are at the point where

02:58 (line 5)
02:58 (line 10)
02:58 (line 15)
02:58 (line 20)
02:59 (line 25)

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1   there are so many of these contradictions that, I

2   mean, aside from just the chicken soup/heater

3   thing, you start to think that maybe he's

4   deliberately lying just to clean everything he can

02:59 5   off the record and paint himself in as innocent a

6   position as he can. I can accept that he wouldn't

7   recall some of it, perhaps some of the minor

8   details, but the evidence of Lapchuk and Melnyk

9   was pretty damaging at trial and for him to have

02:59 10 simply brushed that incident out of his mind,

11 that's just not reasonable, and in our view he was

12 lying, he was deliberately choosing not to

13 remember these things or not to tell the Supreme

14 Court about them.

03:00 15 Q   And then if we can scroll down, the last one is

16   the *Failure to testify*, and I think here the

17   contradiction you point out is between what Mr.

18   Milgaard said at the Supreme Court about his

19   desire to testify and Mr. Tallis' recollection of

03:00 20   the discussion; is that -- I think Mr. Milgaard

21   said he wanted to testify and Mr. Tallis told him

22   he couldn't, or that it wouldn't help his chances?

23 A   Well, my understanding was that he told Justice

24   Tallis he wanted to testify, Justice Tallis

03:00 25   wouldn't call him. Justice Tallis' story was that

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1   he advised him that he didn't think it would

2   assist him to testify, but that it was always open

3   to him to make the decision and he made that

4   clear.

03:00   5   MR. HODSON: This is probably an

6   appropriate spot to break.

7   (Adjourned at 3:00 p.m.)

8   (Reconvened at 3:19 p.m.)

9   BY MR. HODSON:

03:19   10   Q   Go back to 234332, please, is the doc. ID, and go

11   to page 351. So I went through the contradictions

12   in your brief, and if we can just call out that

13   paragraph, you say:

14   "In our submission David Milgaard's

03:19   15   evidence is not credible. The above

16   analysis indicates that he lied about

17   the notes appended to his affidavit and

18   in particular what they are, when they

19   were created and who they were given to.

03:19   20   He lied about how much he knew of the

21   case against him... He lied about not

22   possessing any knife prior to them

23   purchasing one at Rosetown. He lied

24   about not using drugs... He lied with

03:19   25   respect to his description of the

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1   lady..."

2   Lied about getting the car heater fixed and

3   having chicken soup -- scroll down. He lied when

4   he indicated to the court they did not get stuck

03:20   5   and that he and Ron Wilson did not separate. And

6   if we can go --

7   "...lied to the Court when he indicated

8   that the incident involving throwing a

9   compact or makeup bag out of the car did

03:20   10   not happen. He lied to the Court..."

11   About the motel room incident, and:

12   "Finally, he lied to the Court when he

13   indicated that his lawyer did not

14   communicate with him very frequently

03:20   15   about the case and did not spend much

16   time with him discussing it.

17   Consequently it is our

18   submission that David Milgaard's denial

19   of guilt is not credible and should not

03:20   20   be accepted. In the final analysis very

21   little of what Mr. Milgaard told this

22   Court about the major issues in this

23   case is true. Under the circumstances

24   there is no reason to believe his denial

03:20   25   of guilt is anymore credible than the

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1   rest of his evidence."

2   And again, would that have been one of the

3   significant parts of Saskatchewan Justice's

4   submission?

03:21   5   A   Well, yes, it certainly answers the one test that

6   the Supreme Court had set out and that is that

7   basically if he proved beyond a reasonable doubt

8   he was innocent, he would get a free pardon.

9   Q   Or on a balance of probabilities, or preponderance

03:21   10   of --

11   A   Well, the preponderance of evidence one I suppose

12   was theoretically still open, but if he was able

13   to sort of knock down some of the other evidence,

14   but practically speaking, if they don't believe

03:21   15   him when he says he's not guilty, that I think

16   puts you into the C and D, that is, the *Palmer and*

17   *Palmer* test or something else in terms of a

18   remedy.

19   Q   And so I take it your assessment was not only what

03:22   20   Mr. Milgaard said, but how it came out at court,

21   in your view affected his credibility?

22   A   Yes. He wasn't a particularly credible looking

23   witness.

24   Q   Now, what -- your comment at the time, now, in

03:22   25   1992 at the time you are dealing with this matter,

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1   I mean, obviously you don't have the DNA evidence

2   and I take it your views on his guilt would be

3   what, what was your thinking going in in

4   approaching Mr. Milgaard's evidence and the

03:22 5   credibility of his evidence, was it as a guilty

6   person?

7 A   Well, yes, my view at that point was that he was

8   likely guilty.

9 Q   Based upon what?

03:22 10 A   Based upon all of the evidence and based upon the

11   fact that I simply didn't believe his denial.

12 Q   And would you agree that if you look at Mr.

13   Milgaard's evidence with either the belief,

14   whether it's a certainty or not, but the view that

03:23 15   he's guilty compared to looking at it with the

16   knowledge that he's innocent, that you might look

17   at his evidence and his contradictions in a

18   different way?

19 A   Well, if I know he's innocent, then the

03:23 20   contradictions -- I think -- I still think he's

21   lying, I don't think they are a result of faulty

22   memory necessarily, but obviously with the DNA, I

23   am of the view that he didn't commit the murder.

24 Q   And so as far as these contradictions at the

03:23 25   Supreme Court at the time in 1992, I think you

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1   said it was your view that he was deliberately

2   lying to the court about these matters for -- and

3   trying to --

4   A   Well, based on particularly the chicken

03:23 5   soup/heater fix thing, that was where I landed,

6   yes.

7   Q   And what are your thoughts now in light of the DNA

8   evidence and, as you mentioned, now knowing that

9   Mr. Milgaard is innocent, about that piece of

03:24 10   evidence?

11   A   Well, I still think he lied about that, I still

12   think he was trying to make up an alibi at the

13   Supreme Court.

14   Q   And so does it come down to perhaps a different

03:24 15   view now of his motive for what you viewed to be a

16   lie in 1992, you believed he was lying to try and

17   prevent the exposure that he was guilty, or to

18   come up with a basis to show he was innocent?

19   A   Well, I mean, at the point of the Supreme Court

03:24 20   reference, I would suspect he was lying to make

21   himself look better and to make his application

22   look better. Now, to be perfectly honest with

23   you, I don't care why he lied, as far as I'm

24   concerned the evidence shows he wasn't guilty, so

03:25 25   it's not my concern.

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1 Q And are you able to put, as far as the

2 significance of the evidence, I'm just looking for

3 how you assessed the evidence you heard, was Mr.

4 Milgaard's evidence and your assessment of his

03:25 5 credibility the most important or one of the most

6 important pieces of evidence that influenced your

7 assessment of the evidence of a miscarriage of

8 justice?

9 A It was part of it. I wouldn't say it was the most

03:25 10 important. I think the fact that Ron Wilson's

11 recantation became incredible was important. I

12 think that the evidence suggesting that Mr.

13 Lapchuk and Mr. Melnyk had lied virtually blew up

14 was important, their evidence held up. In fact,

03:26 15 it was strengthened by the evidence of Deborah

16 Hall and Ute Frank.

17 Q And what did that, just on those two points, apart

18 from the evidence, did the fact that allegations

19 put forward -- did the fact that allegations that

03:26 20 were put forward in your view not being proven

21 have some significance?

22 A Well, I mean, obviously if the suggestion made by

23 Deborah Hall that they lied and it didn't happen

24 was correct, that substantially has an impact on

03:26 25 what's left of the case. If Ron Wilson had

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1   provided a credible recantation, that would

2   substantially impact what was left of the case.

3   Q   Would your assessment of the Milgaard case, if I

4   can call it that, the case for miscarriage of

03:26 5   justice, based on your observations of Ron Wilson,

6   would they have been better off if he had not

7   recanted and not testified at all? In other

8   words, did his recantation and his evidence at the

9   Supreme Court actually put Mr. Milgaard's position

03:27 10   or his case, in your view, in a worse position?

11   A   I think the performance Ron Wilson turned in put

12   it in a worse position than if he hadn't been

13   there.

14   Q   And why?

03:27 15   A   Well, because here -- it showed them to be relying

16   as a major part of their submissions to the

17   minister on somebody who was utterly incredible,

18   who couldn't seem to stick to the same story for

19   more than two seconds, and I think that had a very

03:27 20   damaging effect on sort of the tone of the hearing

21   or that sort of thing from then on.

22   Q   In your assessment on the credibility of the case,

23   did the credibility, or in your view the lack of

24   credibility of the Wilson information, affect your

03:28 25   view of the credibility of other parts of the

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1		case?
2	A	Well, you start off with David Milgaard, he gives
3		a performance that is going to be suspect, then
4		you have Ron Wilson putting in a performance that
03:28 5		is just bordering on the absurd and utterly
6		incredible, that's not a good way to start any
7		presentation of any case, and I think that that
8		probably did have an effect of colouring the
9		reception that, or affecting the reception that
03:28 10		the rest of the evidence got.
11	Q	And are you talking about your view and/or the
12		court's view of that?
13	A	Both.
14	Q	Both. And so let's just talk about -- and I'll go
03:28 15		in more detail, but when you get to the assessment
16		of the credibility of the case as it relates to
17		Larry Fisher, in other words, David Milgaard's
18		case that the Larry Fisher information in whatever
19		form gives rise to a miscarriage of justice, did
03:29 20		your assessment of the credibility of Mr.
21		Milgaard's evidence and Mr. Wilson's evidence, and
22		I think you referred to the motel room incident
23		not panning out as they had hoped, did that
24		influence or colour or prejudice your assessment
03:29 25		of the credibility of the Fisher information? Are

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1   you able to elaborate or comment on that?

2   A   Well, with the Fisher information, except perhaps

3   for what Linda Fisher said, I don't know that

4   there was an issue of credibility. Well, (V4)----

03:29 5   (V4)---, there may have been an issue with

6   reliability there, but in terms of the six rapes,

7   I don't think there was any issue of credibility

8   there. We acknowledged those happened.

9   Q   Let me put it a different way, not so much about

03:29 10   the facts that were there, but when you went to

11   look at, after, as you say, after dealing with Mr.

12   Milgaard's evidence and your concerns, Mr.

13   Wilson's evidence, the motel room incident, then

14   in looking at the Larry Fisher information and

03:30 15   saying okay, do I think this might have had an

16   effect on the jury or do I think that there's a

17   miscarriage of justice, when you are talking

18   globally about saying lookit, do I think

19   ultimately there has been a miscarriage of

03:30 20   justice, did what happened with Mr. Milgaard's

21   evidence, Mr. Wilson's evidence and the motel room

22   incident, did that prejudice your overall take

23   when you got to the final question on the Fisher

24   evidence?

03:30 25   A   I think when you start -- when we started applying

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1   that modified *Palmer* test and looking at the sort

2   of substantial weight to be given the Fisher

3   evidence, together with the other evidence at

4   trial -- let me put it this way. I can't say it

03:30   5   didn't prejudice the view we took of the weight

6   that the Larry Fisher evidence should be given.

7   Q   And I think you mentioned earlier when I went

8   through the test about looking at credible

9   evidence and then asking yourself would this

03:31   10   evidence have affected the verdict of the jury,

11   and I think you said -- maybe you didn't use the

12   words, but that it was the subject of approach; in

13   other words, not necessarily a gut feel, but it

14   was to take a look at it and to come to some

03:31   15   judgment based on a whole bunch of factors?

16   A   Well, it is very subjective and that's why I say,

17   I can't say that that didn't have an impact on how

18   I felt, or how I assessed the weight or the

19   importance of the Fisher evidence.

03:31   20   Q   Put it this way, would you agree that it would

21   have been better off, at least from your -- it

22   would have been better off from David Milgaard's

23   perspective that when Saskatchewan Justice was

24   assessing the credibility of the Larry Fisher

03:31   25   information and the credibility of the allegation

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1   that that gave rise to a miscarriage of justice,

2   that there had not been other allegations that in

3   your view turned out to be not credible?

4   A Well, yes. If you don't have that kind of

03:32 5   background, I think you probably are inclined to

6   see the rest of the evidence as more important or

7   slightly more important. As I say, I can't say

8   that I was prejudiced, but I can't say I wasn't.

9   I'm still of the view that the Larry Fisher

03:32 10 evidence really didn't amount to all that much.

11 Q In the 1992 assessment as to how it would have fit

12   into establishing a miscarriage of justice?

13 A That's correct.

14 Q Just on the point of Mr. Milgaard's evidence, can

03:32 15 you tell me what would have been your approach at

16   the hearing or your reaction if he simply

17   testified as follows: "I do not have a reliable

18   memory, I accept what my defence counsel

19   Mr. Tallis says I told him as being true," period?

03:33 20 A Well, that certainly has a huge impact on his

21   credibility, yes.

22 Q In what way?

23 A Well, he's not denying things that are relatively

24   easy to prove through other witnesses.

03:33 25 Q And had that been --

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1   A   And he's providing the reason why he doesn't

2   remember all this, his memory is bad.

3   Q   And let me add one further thing, "and I remember

4   not killing Gail Miller"?

03:33   5   A   Well, that -- if he makes that claim and there is

6   no reason to doubt his credibility that show up

7   from his testimony, it certainly adds to the

8   assessment of his evidence. Whether it would have

9   taken it over the top and done him any good I

03:33 10   don't know, but it certainly puts him in a

11   position where there's nothing detracting from it.

12   Q   And it appears that the many pages that I just

13   went through about the contradictions would not

14   have been part of the arguments put forward by

03:33 15   Saskatchewan Justice?

16   A   That's right.

17   Q   Let's move on to Ron Wilson. It says:

18   "In our submission nothing

19   Mr. Wilson has said in his re-cantation

03:34 20   can be accepted unless there is

21   corroboration for what he says found in

22   the evidence of others or in previous

23   testimony of his from the trial. That

24   he lied to this Court is undeniable. He

03:34 25   admitted to having a bias or interest in

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1   this proceeding, to being on the

2   'Milgaard team' and wanting to help the

3   team in whatever fashion he could."

4   "It is also obvious from his performance

03:34 5   in Court that he came here prepared to

6   fully resist any suggestion from

7   'prosecution' counsel and prepared to

8   agree with any suggestion put to him by

9   the Milgaard team lawyer."

03:34 10   And you say:

11   "The reason for this performance and

12   what motivated it we can only guess."

13   Can you elaborate?

14   A   Well what his -- what was motivating him, after

03:34 15   all these years, to behave like that wasn't

16   obvious. I mean, he was claiming that he was

17   concerned about the fact that he had lied

18   originally, but again, I mean at that stage his

19   credibility was difficult to accept.

03:35 20   Q   We have had an opportunity to hear Mr. Wilson at

21   the Commission, we've also gone through his

22   Supreme Court evidence in some detail, and I don't

23   propose to go through any of it; but can you

24   comment on, at least from Saskatchewan Justice's

03:35 25   perspective, a couple things when we look at his

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1		evidence and his citing for contempt and then his
2		changed evidence when he came back. And I think
3		essentially what he did -- and please correct me
4		if I'm wrong, I just want to lay out in quick
03:35 5		format -- he was examined initially by I think
6		Mr. Neufeld and testified about his recantation,
7		talked about what the police did, but in the
8		course of that evidence to the Supreme Court he
9		said a couple things; one, that David Milgaard had
03:36 10		a knife on the trip to Saskatoon, a bone-handled
11		hunting knife; and two, that their vehicle had got
12		stuck and that David Milgaard had left the
13		vehicle, not anywhere near the funeral home, but
14		two pieces of evidence that, in his recanted
03:36 15		version of events post-Paul Henderson, his
16		recanted version contradicted Mr. Milgaard; is
17		that generally a correct summary --
18	A	Umm, yes, --
19	Q	-- amongst other things?
03:36 20	A	-- he, my recollection is that he kept to those
21		two issues.
22	Q	And so he recanted, he said "the compact didn't
23		happen and David Milgaard didn't make any
24		admissions to me", but I think after he had given
03:36 25		the statement to Mr. Henderson in 1990, when he

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1		was interviewed by Mr. Williams under oath, he --
2		I think it was under oath -- I think that's when
3		he said "no, no, there is two other things", the
4		knife he raised, and then getting stuck and David
5		leaving the car, and that those were two items
6		that Ron Wilson contradicted David Milgaard's
7		evidence; correct?
8	A	I believe that's correct, yes.
9	Q	And then, when he was questioned by Mr. Wolch, he
10		ended up saying that David didn't have a knife and
11		they didn't get stuck; is that correct? I mean
12		amongst other things, I'm -- and it was at that
13		point that Mr. -- or that Chief Justice Lamer had
14		concerns with contempt; is that how you remember
15		it?
16	A	Umm, it's -- I would have to look at the evidence
17		specifically, but yes, it was when he kept going
18		back on some of the things he told the other
19		counsel that the issue of the contempt and the
20		lying arose.
21	Q	Let me put it this way, and maybe without getting
22		into specifics, he was questioned first by
23		Mr. Neufeld and gave a version of events; correct?
24	A	I believe so, yes.
25	Q	He was then questioned by Mr. Wolch and gave a

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1   different version of events on some items?

2   A   Yes.

3   Q   And it was at that point that he was cited for

4   contempt, he came back later with his lawyer, and

03:38   5   essentially I think his explanation was, as you've

6   referred to here, in part that "I said some things

7   to Mr. Wolch that weren't true because I thought"

8   -- and I don't want, I want to be careful here and

9   not paraphrase this wrong -- but he ended up

03:38 10   saying "some of the things I told Mr. Wolch

11   weren't true", and he gave his reasons as to why

12   he agreed with Mr. Wolch; is that correct?

13   A   I believe that's the case, yes.

14   Q   And that's the reference in your brief to being on

03:38 15   the Milgaard team and wanting to help them out,

16   and I think the transcript reflects that the two

17   items that were -- at least two of the items of

18   significance were the knife and getting stuck and

19   leaving the car, which -- and let me just try this

03:38 20   again. Initially, to Mr. Neufeld, he suggests

21   there was a knife, "yes, we got stuck and David

22   left the car", to Mr. Wolch he said "no knife, we

23   didn't get stuck and David didn't leave the car",

24   and then when he came back after the contempt he

03:39 25   said, "yeah, what I told Mr. Neufeld is true and

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1 what I told Mr. Wolch is not true", and then gave

2 his reasons why he lied to Mr. Wolch; is that a

3 general --

4 A That sounds right, yes.

03:39 5 Q Okay. Can you tell us what, putting aside the --

6 his actual evidence on the substance of the

7 matters I take it is one thing, the fact that you

8 are saying his evidence wasn't credible because he

9 changed it a couple of times, can you comment on

03:39 10 your assessment of not only Ron Wilson but of the

11 -- let's talk first about Ron Wilson, about the

12 reasons that he gave for changing his evidence at

13 the Supreme Court as far as being on a team, and

14 things of that nature; can you tell me what your

03:39 15 reaction was to that or how did that affect your

16 assessment?

17 A Well, I don't know that that had a huge amount to

18 do with his -- with my assessment on his

19 credibility. I was more concerned with what he

03:40 20 said and the fact that he seemed to be so

21 incredibly easy to lead and so incredibly easy to

22 turn around when he gave evidence.

23 Q And after Mr. Wilson gave his evidence at the

24 Supreme Court, at least up until the point when he

03:40 25 was cited for contempt, do you recall; did you

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1		make further efforts to try and get the tape of
2		Mr. Henderson's earlier interview of Mr. Wilson?
3	A	I think that was left with Mr. Wolch and Mr. Asper
4		to attempt to get that.
03:40 5	Q	After Mr. Wilson's evidence at the Supreme Court
6		did you have any further concerns about the
7		circumstances of the initial recantation on June
8		4th, 1990?
9	A	Oh, it -- it gave particular significance to the
03:41 10		notion that it took about a day to get the
11		statement out of him. That suggested to me that
12		he was probably harassed into giving some kind of
13		statement.
14	Q	And why do you say that?
03:41 15	A	Well, if he was prepared to make a clean breast of
16		everything it wouldn't have taken a day of
17		following him around to try and get that
18		information or to get that information out of him,
19		but if he was reluctant to talk to anybody or say
03:41 20		anything you might have to follow him around and
21		pressure him.
22	Q	And what about the notion -- and I think it's
23		dealt with a bit in the brief -- that Mr. Wilson
24		appeared to recant certain facts which were
03:41 25		corroborated by other witnesses? And I think the

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1   example that Mr. Sawatsky used was the compact or

2   cosmetic case, that he said "that definitely

3   didn't happen", he lied about that --

4   A   Yes.

03:42 5   Q   -- when, in fact, Mr. Tallis said "David Milgaard

6   told me that happened"; can you tell me how that

7   figured in your assessment of his evidence?

8   A   Well I, again, if he is recanting things, saying

9   things didn't happen when other witnesses are

03:42 10   clear they did, and in particular Justice Tallis

11   relying on what David Milgaard told him happened,

12   it suggests that in fact he is part of David's

13   team and doing what he can to be of assistance to

14   him and that his testimony is highly suspect.

03:42 15   Q   And, just on that point, did you come to the

16   conclusion that his recantation, or at least parts

17   of it, may have been fabricated with a view to

18   helping David Milgaard?

19   A   Yes.

03:42 20   Q   Did that cause you, in -- or in looking at other

21   grounds did Mr. Wilson -- did that point prejudice

22   your view when you looked at other grounds? In

23   other words that, if you concluded that Mr. Wilson

24   was giving a fabricated recantation, in your view

03:43 25   to help Mr. Milgaard, when you went to look at

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1   other grounds and other evidence did the Wilson

2   situation prejudice your view; are you able to

3   tell us?

4   A   Well in terms of looking at other parts of the

03:43 5   evidence not related to him, no, it wouldn't. But

6   again, it comes down to the issue of, when you're

7   looking at how much weight you are going to give

8   other aspects of the case, applying that

9   *Palmer*-type test, the fact that a substantial

03:43 10   portion of the case that they had advanced as

11   showing that David Milgaard was innocent has blown

12   up and been shown to be unreliable, it -- I'm sure

13   it does have a, some kind of effect.

14   Q   When you're looking at the Larry Fisher

03:43 15   information, back when we --

16   A   Yeah.

17   Q   -- talked about this test as to whether it might

18   have affected the jury and you go back, I think

19   you then, you then go back and you look at the

03:44 20   evidence at trial. When you went back and looked

21   at the trial evidence of Ron Wilson, and I think

22   the key parts of his incriminating evidence were

23   the admission that Mr. Milgaard made when he got

24   back in the car, "I got her", the confession or

03:44 25   the admission in Calgary, Mr. Wilson saying he

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1   observed a maroon-handled paring knife, and that

2   he observed blood on him, and I suppose the fifth

3   thing is the compact; after Mr. Wilson's

4   performance at the Supreme Court did you, when you

03:44   5   went back and looked at and tried to assess the

6   evidence, did you conclude that -- or what did you

7   conclude about his, the credibility of his trial

8   evidence?

9   A   Well, that's, I think I got into a debate with one

03:44   10   of the Supreme Court judges over whether, if he

11   was incredible now, he would have been incredible

12   then. And my view then was, and is now, that his

13   lack of credibility now, 22 years after the fact,

14   isn't something that you can necessarily apply

03:45   15   backwards to his trial evidence.

16   I took the trial evidence as

17   the given, and looked at his recantation, and my

18   view was the recantation wasn't credible.

19   Q   And did you default, then, to the trial?

03:45   20   A   The trial evidence stood.

21   Q   And if there had been no -- I'm not sure if I'm

22   going to ask this right -- but if he had, back at

23   this time in 1992 when you're looking at this,

24   were you of the view that if he truly had lied at

03:45   25   trial on certain parts of his evidence, that he

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1   would have been able to do a better job recanting,

2   a more credible job; that if he truly had lied at

3   trial, that 20 years later you would expect that

4   he would be more credible on the recantation?

03:46 5   A   Yes.

6   Q   And the fact that he wasn't, did that cause you to

7   view his original trial evidence, and in

8   particular the incriminating parts, as being more

9   trustworthy than it otherwise would have if he

03:46 10   hadn't tried to recant?

11   A   Well, I don't know that I looked at it that way.

12   I, as I say, I took his trial evidence as the

13   given, it was before the jury, they had the

14   opportunity to assess it. The issue then was do

03:46 15   you wipe all of that out because of his

16   recantation now, and the answer is my view was no

17   you don't, his recantation and his evidence at

18   this point was just not credible except where

19   somebody else was saying the same thing.

03:46 20   Q   Just go down to the bottom of this page. And I

21   think this is the argument and there is in the

22   oral argument, I think, an exchange with you and

23   Justice Sopinka about this issue, but here you

24   say:

03:47 25   "We anticipate the applicant

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1   will argue that because Ron Wilson

2   cannot be believed now it logically

3   follows that he could not be believed 22

4   years ago when he testified at trial.

03:47   5   In our submission there is in fact no

6   logic to this assumption. To come to

7   this conclusion one would have to assume

8   that people never change and in our

9   submission that is neither a reasonable

03:47 10   nor logical assumption."

11   And down at the bottom:

12   "Mr. Wilson recounts twelve intervening

13   years of very heavy drug and alcohol

14   abuse. He quite readily admits that

03:47 15   this conduct has effected his memory and

16   as he admitted, the fog rolls in to

17   shroud his recollection of the past."

18   And just comment on that? And I think what, I

19   think the position put forward by Mr. Wolch to

03:47 20   the Court was that "Mr. Wilson is not credible

21   today, 1992, therefore he wasn't credible in

22   1970, and if you don't believe his evidence today

23   you shouldn't rely on his evidence in 1970", and

24   I think that's what you took issue with; is that

03:48 25   correct?

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1   A   That's correct, yes.

2   Q   And can you just elaborate on why, why you

3   disagree or why you don't think that would be the

4   basis for a miscarriage of justice?

03:48 5 A   Well, as I put in the oral argument, people change

6   over the course of 22 years. This isn't an

7   instance, which I believe you said it was Justice

8   Sopinka raised, that, well, what if it's a year

9   later or two years later. That's a very different

03:48 10   matter. If it's -- if the change in story is

11   contemporaneous with the original statement and

12   you can show that the new statement is, or that

13   the witness isn't credible, then that calls the

14   whole process into doubt. But unless you can show

03:48 15   that, 22 years ago, Ron Wilson was a drug and

16   alcohol-addled individual who had no real ability

17   to recall what had happened or what hadn't

18   happened, or any ability to resist strong

19   cross-examination, then it just doesn't follow

03:49 20   that, because he's not credible now after years of

21   drug and alcohol abuse, that he wouldn't have been

22   credible 22 years ago before that drug and alcohol

23   abuse.

24   Q   And what would be the significance of the fact

03:49 25   that in 1970 Mr. Wilson would have been subjected

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1   to examination at a preliminary hearing and a

2   trial?

3   A   Well if, quite frankly, in my view if he had been

4   in the condition when he was 16 that he was 22

03:49 5   years later when he was testifying in the Supreme

6   Court, he would have totally crumbled under

7   cross-examination, because he -- in the Supreme

8   Court, if you read the transcript of his evidence,

9   he just didn't seem to be able to hold onto the

03:49 10   same evidence for very long.

11   Q   And, if we can scroll down here, I think this is

12   your comment here:

13   "It is clear that in dealing with

14   questions of Mr. Neufeld, Mr. Wilson was

03:50 15   simply resisting almost everything

16   suggested to him. When Mr. Wolch

17   examined him he simply agreed with

18   everything. There was no thought

19   involved in his testimony and only a

03:50 20   diminished understanding of what was

21   happening."

22   And then on the contempt:

23   "... Mr. Wilson indicated that he was

24   confused when he gave answers to Mr.

03:50 25   Wolch that totally contradicted what he

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1   had said earlier. However, its

2   difficult to understand what Mr. Wilson

3   was confused about. He was asked point

4   blank in effect whether or not the car

03:50 5   had ever got stuck and they had ever

6   separated. His indication to Mr. Wolch

7   was that this incident did not happen."

8   And onwards. So is your point, here, that the

9   questions were pretty simple and that --

03:50 10   A   He wasn't -- it wasn't as though there was a long

11   spread between the time he was examined by Neufeld

12   and the time he was cross-examined by Mr. Wolch

13   but, notwithstanding that, he couldn't stick to

14   the story.

03:51 15   Q   If we can go to the next page, I think here you

16   say the applicant -- or that:

17   "... Mr. Wilson's current evidence can

18   be used to set aside his testimony given

19   at trial or to impeach it in any

03:51 20   fashion, his recantation must be shown

21   to be credible."

22   And I think that's the position you took, that

23   his recantation is credible, --

24   A   That's right.

03:51 25   Q   -- therefore his trial evidence can't be impugned?

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1   A   Attacked by it.

2   Q   Scroll down to Nichol John. I think you say here

3   that -- acknowledge that:

4   "... a ... difficult witness to assess."

03:51 5   What was your, in 1992 at the Supreme Court she

6   did not repeat or adopt the, or recollect that

7   part of her 1969 statement where she said she

8   witnessed David grab, grab a woman and stab her.

9   What did you make of her evidence and where did

03:52 10   it fit in in your assessment of the alleged

11   allegation of a miscarriage of justice?

12   A   Well her evidence, it seemed to me, was pretty

13   much a wash either way. She didn't significantly

14   change her testimony, she still didn't remember,

03:52 15   she was still, I believe, of the view that the

16   police hadn't mistreated her, but she couldn't

17   provide any explanation for why she couldn't

18   remember any of this or that, and I -- it seems to

19   me, as well, she may have had a few more little

03:52 20   pieces of evidence that she added to it with

21   respect to things she saw. I think there was

22   some, something about seeing somebody in an alley

23   wrestling with a woman, but she couldn't see the

24   face.

03:53 25   Q   And so, as far as looking in 1992 at -- was there

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1   anything that came out of Nichol John's evidence

2   at the Supreme Court reference that caused you to

3   consider or to doubt the evidence that was put

4   forward in 1970?

03:53 5   A   No.

6   Q   And in looking at this we talked a couple days ago

7   or last week about the fact that her May 24th

8   statement was read to her in the presence of the

9   jury for the purposes of challenging her

03:53 10   credibility, and you had some concerns about that.

11   That was an issue that was raised with the Court

12   of Appeal and leave to the Supreme Court was

13   denied. When you looked at that in 1992, was that

14   something that you addressed your mind to, whether

03:54 15   or not the Court of Appeal had got it right or

16   not?

17   A   Well, yes, I -- I looked at that, but I looked at

18   it or looked at it in terms of its place in the

19   whole scheme of things. I think the Court of

03:54 20   Appeal got that wrong. Did it have an impact, I

21   really don't think so, not in light of what Melnyk

22   and Lapchuk later said.

23   Q   So again, though, but in looking in 1992 did you

24   revisit the issue that the Court of Appeal had

03:54 25   dealt with in looking at Nichol John's evidence,

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1   or was that something that had been decided and,

2   therefore, not open for you to consider?

3   A   I don't recall us actually revisiting that in

4   Court or as part of the reference. When we were

03:55 5   looking at the Nichol John evidence we were

6   basically trying to come up with any, any

7   recollection she may have of what happened and

8   whether she had -- whether she could contribute to

9   the notion that the police had mistreated the two

03:55 10   of them.

11   Q   Go to the next page to, sorry, page 357. I think

12   you conclude here:

13   "... at the very least Nicole John's

14   evidence at trial is corroborated by

03:56 15   evidence currently before the this

16   Court."

17   And that relates to the fact that they were

18   driving around the neighbourhood in question, and

19   stopped to talk to a woman to get directions,

03:56 20   shortly after that the car became stuck, changed

21   clothes, and the make-up bag. So am I correct

22   that, if you completely ignore that part of the

23   statement, the May 24th statement that she did

24   not adopt in Court, and say that with all of the

03:56 25   hypnosis and everything that was done in '90 --

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1   '89, '90, '91 and '92, that it didn't really

2   change anything, are you saying that when you

3   boil it down to her actual evidence before the

4   Court it was incriminating in the sense that it

03:56   5   put him in the neighbourhood, had Mr. Milgaard

6   leaving the car, and corroborated the make-up

7   bag?

8   A   Yes.

9   Q   Now, next, to Albert Cadrain. What was the -- we

03:56   10   haven't spent much time with him. He testified at

11   the Supreme Court and, as well, I think he was the

12   only Cadrain family member who testified; is that

13   right?

14   A   I believe so, yes.

03:57   15   Q   And if you can just go to the next page, to the

16   bottom, and I think Dennis Cadrain's statement was

17   filed. And you say here:

18   "In the final analysis

19   nothing Albert Cadrain has said now or

03:57   20   that has occurred since his testimony at

21   the Milgaard trial has in any way

22   impeached or contradicted his original

23   evidence."

24   And I think you told us earlier that the real

03:57   25   issue with him is whether or not -- I think you

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1   said that it was clear that in 1992 he had some

2   mental illness issues, the question was did he

3   have those in 1969-'70, and did they affect his

4   evidence; is that correct?

03:57   5   A   That's correct, yes.

6   Q   And I take it you had earlier said you may want to

7   call family members to give evidence about his

8   mental state in 1969-'70, I think Celine, the

9   brother and the mother, were -- did you view those

03:57   10   people as being favourable in the sense that they

11   would say that Albert Cadrain did not have mental

12   issues at the time of the trial?

13   A   Well I, my recollection was that their evidence

14   would have been that he was not having problems

03:58   15   like that at the time, and that what he said would

16   be reliable and that his perception wasn't being

17   distorted or affected by whatever problems he may

18   have had later.

19   Q   And do you recall how it was that Mr. Cadrain came

03:58   20   to testify? I think he was at the tail end; do

21   you know who called him or asked that he testify?

22   A   I don't recall that. I suspect, since we had

23   heard from all of the other sort of incident

24   witnesses that were there, he was brought in to

03:58   25   sort of complete the process, and my recollection

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1   of his testimony was that he came in, testified in

2   a very straightforward fashion, didn't change his

3   evidence much, and left.

4   Q   If we can go to the next page, motel room

03:59 5   incident, again I think you say:

6   "In our submission nothing credible has

7   arisen to contradict that statement or

8   their recollections of the principle

9   events."

03:59 10   And then you go down to discuss this, you say:

11   "Debra Hall's evidence we submit does

12   not contradict this. The theory that

13   the performance was a joke was put to

14   the jury and obviously considered by

03:59 15   them."

16   And then you go on to ask us the evidence of

17   Launa Edward and conclude that:

18   "... for whatever reason, lied in her

19   evidence before this Court."

03:59 20   And her evidence, I think you told us, was to

21   this argument that the incident didn't happen?

22   A   That's correct.

23   Q   And again, was your view that if Deborah Hall and

24   Ute Frank had been called as witnesses at the

04:00 25   trial in addition to Mr. Melnyk and Lapchuk, did

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1   you view that that would have any effect on the

2   jury?

3   A Well, it would largely corroborate what Lapchuk

4   and Melnyk said happened. I suppose it would

04:00 5   then, though, give defence counsel the opportunity

6   to put in the joke theory through Deborah Hall,

7   but that's all.

8   Q I think Mr. Tallis' evidence before this

9   Commission is that he did not want Deborah Hall

04:00 10   and Ute Frank to be witnesses at trial because of

11   what he learned from Ute Frank?

12 A Well in that respect he had already, before the

13   Court, two too many witnesses with respect to what

14   happened in that motel room, he didn't need more

04:00 15   to deal with.

16 Q And as a prosecutor, if those witnesses had been

17   available or if you would have known that they

18   would give evidence as they did at the Supreme

19   Court, would they be witnesses that you would

04:01 20   consider calling?

21 A Well, Ute Frank was a little curious even back

22   then, I don't know whether -- whether, as a

23   prosecutor, I would have called her. Deborah

24   Hall, quite probably, yes.

04:01 25 Q If we can go to the next page, Forensic Evidence,

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1   you say that:

2   "Since the trial there has

3   been one change in the forensic evidence

4   and one qualification ...",

04:01   5   "... the change is that David

6   Milgaard's secretor status is now known

7   to be positive; that he is a secretor

8   ...",

9   and:

04:01   10   "Second, there is now

11   stronger evidence ...",

12   about contamination. And so basically that's,

13   would that be removing it from the mix?

14   A   It pretty much does, I believe.

04:02   15   Q   Go to the next page. Now you take some time in

16   your argument to deal with, you've got Reference

17   Case Materials, these would be the documents filed

18   and dealing with the Boyd report, and was there

19   any particular reason you were responding to the

04:02   20   Boyd report in your materials?

21   A   Umm, it was before the Court.

22   Q   And you indicate, here, that -- and we've heard

23   from Professor Boyd and gone through his report --

24   he says:

04:02   25   "The first argument he raises is that

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1   there was no opportunity for David

2   Milgaard to have committed the crime

3   because of the timing involved. This

4   argument was put to the jury as part of

04:02   5   the theory of the defence and was

6   obviously rejected."

7   And you go on to say that his argument is based

8   on four principal assumptions:

9   "First, he assumes that Gail Miller left

04:03 10   the house at 7 a.m. In our submission

11   that is not likely since she had to be

12   to work at 7:30."

13   You go on:

14   "Also, other evidence ... suggests that

04:03 15   she usually left ...",

16   at:

17   "... 6:45 or so."

18   And then:

19   "Finally, even the applicant finds it no

04:03 20   longer convenient to subscribe to this

21   assumption. In his latest argument, the

22   applicant suggests Gail Miller must have

23   left earlier than 7:00 or Larry Fisher

24   would not have had time to assault, rob,

04:03 25   rape and kill Gail Miller and then be at

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	1		Avenue H at 7:07 to attack Ms. (V4)---
	2		even if he had a car and drove between
	3		those two locations."
	4		Can you comment on that point?
04:03	5	A	Well, once (V4)---- (V4)--- showed up and
	6		indicated that she was convinced that Larry Fisher
	7		had molested her shortly after 7:00, for Larry
	8		Fisher to have been involved in the Gail Miller
	9		assault you had to move Gail Miller's time of
04:03	10		departure back substantially, which we always
	11		thought was likely the case anyway, we didn't
	12		think she was leaving at 7:00.
	13	Q	So do I have this right, that forget (V4)----
	14		(V4---'s evidence for a moment -- she came up in
04:04	15		August of '91 I think -- so that the time factor,
	16		are you suggesting that in Professor Boyd's
	17		analysis the closer you could get Gail Miller's
	18		murder to 7:00 as being when David Milgaard, or
	19		close to the time he was at the Trav-a-leer Motel,
04:04	20		that it would be in David's best interest to have
	21		Gail Miller's murder as late as possible?
	22	A	That's correct, yes.
	23	Q	Because then, the later it was, the more likely he
	24		could then say he was at the Trav-a-leer Motel?
04:04	25	A	Well, and the less time he would have to make that

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1   trip.

2   Q   Right. And so now what you are saying, that in

3   light of the (V4)--- information, that in order to

4   say Larry Fisher killed Gail Miller and assaulted

04:04 5   (V4)---- (V4)--- Gail Miller's murder had to be

6   moved back closer to 6:45 or thereabouts to allow

7   Mr. Fisher to both kill Gail Miller and get to

8   (V4)---; is that what you are saying?

9   A   That was their theory, yes.

04:05 10 Q   And so this is, are you saying that Professor

11   Boyd's assumption is contradicted by the (V4)---

12   evidence then, or the (V4)--- assertion?

13   A   That was my view, yes. Well it would -- if -- if

14   you accepted the (V4)--- assertion that it was

04:05 15   Larry Fisher that assaulted her, then that pushed

16   back Professor Boyd's 7:00 hypothesis, and that

17   was the view that Mr. Wolch and Mr. Asper were

18   advancing. It wasn't our view. My view was that

19   (V4)---- (V4)--- was mistaken about her

04:05 20   identification.

21   Q   Then you talk about:

22   "The second assumption ... is that Gail

23   Miller would not have used the Avenue N

24   and 20th Street bus stop."

04:06 25   Just generally, we spent some time on this, what

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1   was the significance, if any, of this -- I think

2   the allegation was that Gail Miller would not

3   have been on Avenue N, therefore, it could not

4   have been her who they stopped for directions,

04:06 5   etcetera, that if she was on Avenue O, then that

6   sort of disproves the Crown's theory of the case.

7   A   Well, going on the basis of the statements that

8   they got stuck in that alleyway beside the funeral

9   home, that would have put them on Avenue N. That

04:06 10   would have meant she would have to come out of her

11   building which I think faced onto Avenue O, go to

12   the end of the block, cut over to Avenue N and

13   then go to the bus stop on Avenue N going past the

14   funeral home. I think their view was likely that

04:07 15   she was more likely to go down Avenue O directly

16   from sort of the front door out onto Avenue O and

17   then straight down past the church and to the bus

18   stop there. That's what that was about.

19   Q   Go to the next page, I think on the time thing you

04:07 20   conclude here:

21   "If Gail Miller was grabbed sometime

22   after 6:45 but sometime before the last

23   pre-7:00 a.m. bus, the car could still

24   be in the alley entrance when Mr.

04:07 25   Diewald opened the church and be there

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1   again when he went back to his home a

2   few minutes later. The Milgaard party

3   could then leave for the motel, get

4   their map and be back into the area

04:07   5   stuck behind the Danchuk's at 7:30 to

6   7:40. Using those time references,

7   there was an opportunity for David

8   Milgaard to have attacked and killed

9   Gail Miller."

04:08 10   And that would have been your response then to

11   Professor Boyd's suggestion that it was not

12   possible for him to have been involved?

13   A   Yes.

14   Q   And I think the end posts, if I can call it that,

04:08 15   were the known times, or the more certain times,

16   the time that Gail Miller heft her house, 6:45,

17   and the time that the Milgaard vehicle was at the

18   Danchuks, which I think was 7:30 to 7:40?

19   A   Yes.

04:08 20   Q   Go to the next page, you raise an issue about:

21   "Professor Boyd also raises a number of

22   other concerns.

23   He indicates that since no

24   blood was seen on David Milgaard's

04:08 25   clothes by the Danchuk's, there couldn't

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1   have been blood there. It should be

2   noted, however, that Albert Cadrain said

3   that when David Milgaard opened his coat

4   he saw the blood. The position that

04:08   5   Cadrain said he saw the blood on the

6   pants and shirt, would have been covered

7   when the coat was closed."

8   And again, would this be in response to the

9   suggestion that because the Danchuks and

04:09 10   Rasmussens didn't see blood, that Cadrain was

11   therefore lying?

12   A   Yes, or mistaken.

13   Q   I'm sorry?

14   A   The suggestion by Professor Boyd that the blood

04:09 15   couldn't have been there and that Cadrain was

16   either mistaken or lying.

17   Q   Then the next page, you say here:

18   "Professor Boyd also indicates that Ron

19   Wilson's recantation is credible. With

04:09 20   the greatest respect, this court is in a

21   better position than Professor Boyd to

22   consider whether or not that is so."

23   And then I take it that's referring to what we've

24   already touched on, the evidence that Mr. Wilson

04:09 25   gave at the Supreme Court?

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1   A   Yes.

2   Q   And then lastly:

3   "Finally, Professor Boyd indicates that

4   in his view, Larry Fisher is likely

04:10 5   responsible for the murder. With the

6   greatest respect, his reasoning here is

7   highly speculative and his conclusions

8   have very little basis in fact."

9   And can you elaborate on that?

04:10 10   A   Well, the previous paragraphs indicate why I

11   thought his factual assumptions were wrong and the

12   inference therefore, inferences that he was

13   therefore drawing from them would be wrong too.

14   Q   Now, Professor Boyd I think has said that was his

04:10 15   view and he now has been confirmed to be right in

16   light of the DNA evidence and the conviction.

17   What was your concern, with his process as opposed

18   to his result, or --

19   A   Well, no, I mean, the problem with the Boyd report

04:10 20   was he selects a view of the evidence most

21   favourable to the position he wants to arrive at

22   which was it couldn't have been David Milgaard, it

23   had to be Larry Fisher, and then reasons from

24   there. You take the evidence as it is and deal

04:11 25   with it as it is as opposed to taking the best

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1   view you can and trying to argue your way past

2   that.

3   Q   Go to page 368, there's a heading here, *Theories*

4   *of the Applicant that Police Fabricated Evidence*.

04:11 5   Was it your view that that was an issue that was

6   advanced before the Supreme Court by counsel for

7   David Milgaard?

8   A   Well, that -- that was my understanding of what

9   they made of that summary document, that this was

04:11 10   in fact a script that they would use to get the

11   witnesses to put David Milgaard into it.

12   Q   And you say here:

13   "In order to account for the evidence of

14   Albert Cadrain, Ron Wilson and Nicole

04:12 15   John given at trial and at the

16   reference, the applicant puts forward

17   the proposition that the police made up

18   these stories and then somehow

19   manipulated or coerced these three

04:12 20   persons into giving this evidence at

21   trial. In our submission, this theory

22   is not borne out by the evidence."

23   So would this be the response to the Mackie

24   summary and evidence from these witnesses about

04:12 25   how the police treated them?

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1   A   Yes.

2   Q   Go to the next page, you talk -- sorry, just go

3   back. You then discuss the evidence of the

4   witnesses, and I think Ron Wilson was the only one

04:12 5   who said he was manipulated or coerced by the

6   police, and then down at the bottom you say:

7   "...but when pressed, can't say how this

8   manipulation or coercion occurred. He

9   admits the police treated him well, did

04:13 10   not threaten him or scare him, did not

11   tell him to lie or force him to do so."

12   And I take it, was that -- can you tell us the

13   significance of the evidence of Wilson, John,

14   Cadrain about their treatment by the police in

04:13 15   trying to assess whether the police coerced and

16   manipulated them?

17   A   Well, again, I mean, the allegation was made that

18   the police coerced the witnesses, fed them this

19   evidence and got them to testify against David

04:13 20   Milgaard. Well, if you are making those

21   allegations, one would expect you could point to

22   some evidence of that having happened and Ron

23   Wilson, who was the principal author of the

24   coercion allegations, couldn't say how that

04:13 25   happened, he had no idea how the police coerced

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1   him. Well, you know, that does sort of weaken

2   your allegations of coercion.

3   Nichol John's view was she had

4   been treated well and Albert Cadrain, well, of

04:14   5   course Albert went into the police himself and his

6   claim was that they didn't believe him and

7   harassed him a bit over that.

8   Q   If we can go to the next page, there's a comment

9   here about it, you say:

04:14   10   "During the reference case hearing much

11   was made of an unidentified memo that

12   was found on the prosecutor's file..."

13   And I take it that's the Mackie summary; correct?

14   A   Yes.

04:14   15   Q   "With the greatest respect to the

16   Applicant's submission to the contrary,

17   this memo does not support the

18   conclusion that the police forced or

19   manipulated the witnesses into lying.

04:14   20   The material contained therein is

21   equally consistent with the police using

22   what they knew to come up with some

23   theories that might assist in providing

24   other leads to pursue in questioning

04:14   25   these or perhaps other witnesses. This

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1   is a normal process in police

2   investigations. Additionally, some of

3   the information contained in that

4   document was already known to the

04:14 5   police."

6   You go on:

7   "The guess about purse snatching was a

8   reasonable one given the fact that Gail

9   Miller's purse was taken and left in a

04:15 10 trash can near the scene of the murder."

11 And go on to discuss that.

12 "In our submission, there is no evidence

13 to support the theory propounded by the

14 applicant that this document is the

04:15 15 sinister recipe to be followed when

16 forcing Ron Wilson and Nicole John to

17 create evidence against David Milgaard.

18   What this note doesn't

19 contain is just as interesting as what

04:15 20 it does. If this is the recipe for the

21 story the police are going to force the

22 witnesses to adopt, it is a pretty thin

23 recipe. The alleged stories contained

24 therein contain little or no detail and

04:15 25 are hardly complete. Additionally, if

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1   this is what the police are going to

2   force the witnesses to agree to it seems

3   to leave out an awful lot of the facts

4   that were later given to by Nicole John

5   and Ron Wilson in their statements and

6   evidence. There is no mention of the

7   break in at Aylesbury, the knives in the

8   car, the "stupid bitch" remark, Nicole

9   John being hysterical when Ron Wilson

10   got back to the car, the confession by

11   David Milgaard with respect to "having

12   fixed her" when he got back into the

13   car, the incident involving the makeup

14   bag, the confessions at the bus station

15   in Calgary or the conversation between

16   Nicole John and Ron Wilson in Calgary.

17   There was also nothing in there with

18   respect to Nicole John witnessing any of

19   the events involved in the attack on

20   Gail Miller.

21   If the police were going to

22   invent a story for these witnesses it is

23   reasonable to assume they would have

24   invented a better one to explain the

25   curious condition of the clothes with

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1   the knife wounds through the coat but

2   not through the dress. This was

3   something that begged for an

4   explanation. If they were going to

04:16 5   invent a story to feed to the witnesses,

6   it's reasonable to assume that the

7   confessions made by David Milgaard would

8   have been a good deal more specific and

9   would not have included the suggestion

04:16 10   that he thought she would be alright.

11   If they were going to invent a story to

12   give to the witnesses why would they

13   invent the story of them getting stuck

14   during the course of making a U turn, a

04:16 15   story which doesn't seem to fit with

16   much of the other evidence?

17   And finally, if the police

18   made up the story and coerced Nicole

19   John and Ron Wilson into adopting it,

04:17 20   they must have also been successful in

21   coercing David Milgaard into adopting

22   this story too. David Milgaard also

23   admitted discussing doing breaking and

24   enters and purse snatching to raise

04:17 25   money for their trip, driving around

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1   that particular neighbourhood in

2   Saskatoon, meeting a woman on the street

3   to ask for directions, getting stuck,

4   leaving the car with Ron Wilson, the two

04:17   5   of them separating for an indeterminate

6   period of time, him changing clothes at

7   the Cadrain house and, him throwing the

8   makeup purse or compact out of the

9   window on the way to Rosetown."

04:17   10   Again, that's a lengthy submission, but does that

11   summarize your views about whether or not the

12   Mackie summary was part of some fabrication or

13   misconduct by the police?

14   A   Yes.

04:17   15   Q   Just on that latter point about, if I can just

16   scroll back up, are you saying that because what

17   it was alleged Wilson and John were scripted to

18   say from the Mackie summary happened to be

19   evidence that Mr. Milgaard also told his counsel

04:18   20   Mr. Tallis, that if the script was used to coerce

21   Wilson and John, then it must have been used to

22   coerce Milgaard to say the same things to his

23   counsel, is that the essence of what you are

24   saying?

04:18   25   A   That's right, yes.

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1   Q   Or the other way around, that since some of what

2   was in Wilson and John's statement was

3   corroborated by Mr. Milgaard through Mr. Tallis,

4   that that would suggest it was not?

04:18 5   A   Well, it leads to that. If that was a script,

6   then David Milgaard must have been part of the

7   play. Since he wasn't, and since he did not give

8   that information to the police, he gave it to his

9   lawyer, it would tend to suggest that that was not

04:18 10   a script.

11   Q   If we can go to page 374 and deal now with the

12   Larry Fisher submissions, go to the next page, I

13   think you characterize these two arguments.

14   "First, he..."

04:19 15   And I think you are referring to Mr. Wolch,

16   "...suggests that if defence counsel at

17   trial knew about the three sexual

18   assaults occurring in that area and that

19   Larry Fisher ultimately pled guilty to,

04:19 20   the one occurring in January involving

21   Ms. (V9)---- and the incident occurring

22   the same day at Avenue H., it would have

23   made a big difference to the trial

24   outcome. The second aspect of this

04:19 25   argument is that the evidence available

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1		since 1971 clearly shows that Larry
2		Fisher is guilty."
3		And if I've got that right, you broke it down
4		into two parts, the first one would be is at the
5		time of trial what was known by the police was
6		three unsolved rapes, the (V9)---- complaint and
7		the (V4)--- incident, it wasn't known at that
8		time that Mr. Fisher was the perpetrator;
9		correct, and you're saying okay, is there
10		anything there with respect to that, and the
11		second aspect is that since 1971 it's known that
12		Larry Fisher is guilty, sort of a second issue,
13		with the knowledge that came later, was there
14		some miscarriage of justice; is that correct?
15	A	That's correct, yes.
16	Q	And just so that we're clear, the (V9) (V9)----
17		assault was one that occurred I think a week or so
18		earlier that had I think been near Avenue Q and it
19		was I think an attempted assault or an encounter
20		for which no one was ever arrested or charged, but
21		it was alleged I think by Mr. Milgaard or by his
22		counsel that she would have been assaulted by Mr.
23		Fisher or may have been; is that why that's
24		included in there?
25	A	I -- well, I'm not sure that it's necessarily

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1   Larry Fisher that was responsible for that. I

2   think the issue was that if that information had

3   been available to Justice Tallis, he could have

4   used it to try and indicate that no, no, there was

04:21   5   somebody else on the loose in that area when David

6   Milgaard wasn't in Saskatoon that was committing

7   these assaults.

8   Q   So when we go into the failure to disclose,

9   prejudicial to the defence at trial, what we're

04:21   10   talking about is the various assaults committed by

11   an unknown perpetrator?

12   A   That's right.

13   Q   And you say:

14   "...it is clear these were not disclosed

04:21   15   to Mr. Justice Tallis. However, in our

16   submission that doesn't mean much by

17   itself. The applicant has to show how

18   failure to disclose that information

19   hindered Justice Tallis in defending

04:21   20   David Milgaard or how it would have

21   assisted him in that task."

22   And then you go on to talk about the affidavit of

23   Disbery, you say:

24   "With the greatest respect ... the

04:22   25   affidavit is largely meaningless since

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1   it doesn't say how such information

2   could be used..."

3   And then you say here:

4   "It is interesting to note in this

04:22 5   regard that despite the fact he had

6   ample opportunity to do so, counsel for

7   the applicant failed to ask Justice

8   Tallis how he would have made use of

9   such information to defend David

04:22 10   Milgaard. We suggest that it is a very

11   telling omission and makes it very

12   difficult for the applicant to credibly

13   argue that failure to disclose this

14   information had any significant impact

04:22 15   on his defence."

16   And can you just comment on that suggestion?

17 A   Well, Mr. Wolch and Mr. Asper had the opportunity

18   to interview Justice Tallis in December of 1991.

19   They likely knew what he had to say or could say

04:23 20   when examining him in the Supreme Court. When I

21   examined Justice Tallis in the Supreme Court, I

22   had no idea what he was going to say because I

23   hadn't seen the federal information and Mr. Wolch

24   and Mr. Asper had not provided me with any

04:23 25   information with respect to what he could say, so

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1   all I could do is go by sort of the significant

2   aspects of the case against David Milgaard and try

3   and find out what in particular was said about

4   those things, and, quite frankly, had I remembered

04:23 5   to ask him what use he might have made of that

6   information, I would have asked him, but I didn't

7   remember to do that.

8 Q   And so what was the significance to you that the

9   question was not asked and that he did not have an

04:23 10   opportunity to answer, the use that would be made?

11 A   Well, given the fact that they were placing a

12   great deal of weight on the fact that he could

13   have used this information, my suspicion was that

14   he told them he couldn't do much with it or it

04:24 15   wouldn't have been that helpful.

16 Q   And why do you --

17 A   That was my suspicion at the time.

18 Q   And why do you say that or why do you have that

19   suspicion?

04:24 20 A   Well, if the answer had been positive and helpful

21   to the Milgaards, Mr. Wolch would have brought it

22   out.

23 Q   And can you tell us what would have been the

24   significance and relevance of Mr. Tallis' evidence

04:24 25   before the Supreme Court as to what use he could

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1   have made if these five assaults had been

2   disclosed to him?

3   A   Well, it goes to the issue of the continued

4   conviction being a miscarriage of justice.

04:24   5   Q   Okay. Let me back up. I think at this time, at

6   the time of Mr. Milgaard's trial, there would be

7   five unsolved crimes; correct, and so --

8   A   Well, you are including (V4)--- and (V9)----?

9   Q   (V9)----, yes.

04:25   10 A   Were there -- okay, sorry.

11 Q   Sorry, there was the three -- the three -- two

12   assaults and one attempted assault that Mr. Fisher

13   was convicted of at a later date.

14 A   Yes.

04:25   15 Q   So those three, you've got the (V9)---- and

16   (V4)--- assaults for which no one has been

17   convicted now?

18 A   That's correct, yes.

19 Q   Those are the five assaults, and I think the

04:25   20   question is has there been a miscarriage of

21   justice if those were not disclosed -- I think the

22   argument was made was those were not disclosed to

23   Mr. Tallis and, if they had, they would have had a

24   significant effect on the jury.

04:25   25 A   Yes.

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1   **Q**   And therefore there's a miscarriage of justice.

2   *A*   That's correct.

3   **Q**   And your view was, well, there's no evidence from

4   Mr. Tallis as to what he would have done with that

04:25 5   and how he would have put that evidence before the

6   court and whether in his view it might have

7   affected the case he put forward; is that correct?

8   *A*   Yes.

9   **Q**   And the fact that I think you are telling us that

04:26 10   counsel for Mr. Milgaard had an opportunity to

11   interview Mr. Tallis where you didn't, that you

12   assumed that, in your view, that evidence was

13   important, that by not asking the question you

14   assumed that the answer would not have been

04:26 15   favourable to David Milgaard's position; is that

16   right?

17   *A*   That's correct.

18   **Q**   Then go to the (V4)--- attack, you say:

19   "...it is very unlikely defence counsel

04:26 20   would want to bring this out during the

21   course of the murder trial."

22   And again, are you speculating about what use

23   would have been made because there was no

24   evidence on that?

04:26 25   *A*   Well, the difficulty -- well, (V4)---- (V4)---,

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1   I'm not sure that anyone could have brought that

2   evidence out given that she wasn't able to

3   identify anybody at that particular time, but

4   David Milgaard was in a car, he's already accused

04:27 5   of one sexual assault against a woman, now you've

6   got another sexual assault and you are going to

7   bring that evidence in. When you don't have

8   someone else to clearly point to, I don't think

9   you need more misconduct in a case like that,

04:27 10   unless you can clearly show somebody else is

11   responsible.

12   Q   And was it your view that the perpetrator of the

13   *(V4)--- assault* was someone different than the

14   person who had killed Gail Miller due to the

04:27 15   timing and the circumstances?

16   A   Yes.

17   Q   Go to the next page, down at the bottom, these are

18   the *(V1)- (V2)----- and the (V3)------ attacks*, so

19   these are the three, two rapes and one attempted

04:28 20   rape in the two or three months prior to Gail

21   Miller's murder. You say:

22   "...it is of importance to note that at

23   the time of David Milgaard's trial, the

24   police did not know who committed these

04:28 25   attacks or that they were committed by

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1   the same person. In our submission,

2   it's not surprising that Crown

3   prosecutor, Bobs Caldwell did not see

4   the relevance of these attacks to the

04:28   5   Milgaard murder.

6   First, these were sexual

7   assaults, not murders and not purse

8   snatching. At that time the police did

9   not know they were committed by the same

04:28   10   person or that the culprit lived in the

11   neighbourhood where Gail Miller was

12   murdered. What they did know was that

13   two of these attacks were committed

14   eight to eleven blocks away from where

04:28   15   Gail Miller was murdered and were two to

16   three months earlier. The third attack

17   was on the other side of town two months

18   earlier. In our submission, the

19   applicant's suggestion that these events

04:28   20   should obviously have been disclosed to

21   Justice Tallis amounts to little more

22   than saying that every unsolved sexual

23   assault by someone who was a stranger to

24   the victim should have been disclosed to

04:28   25   Justice Tallis in preparation for this

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1   case. Once again, the Applicant failed

2   to ask the most important question in

3   this regard of Justice Tallis. He

4   failed to ask how this knowledge would

04:29   5   have assisted in defending David

6   Milgaard. Again we submit, that is a

7   telling omission. There is no obvious

8   connection between these two to three

9   month old rapes and what was clearly a

04:29   10   rape, robbery and murder. Given the

11   lack of relevance or connection these

12   unsolved crimes had to the Miller

13   murder, it's questionable whether this

14   information could even have been

04:29   15   admissible at trial."

16   Can you just comment on that last remark, about

17   admissibility at trial? What was your view,

18   again in 1992, as to whether or not in 1970 these

19   other assaults would have been admissible at

04:29   20   David Milgaard's trial?

21   A   Well, absent having any idea who committed them,

22   or being able to demonstrate some connection to

23   the Gail Miller event, it becomes difficult to

24   show even the degree of relevance necessary for

04:30   25   defence counsel to admit that evidence in my view.

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1   Q   And I think you told us earlier that the standard

2   for defence counsel is lower than prosecution in

3   putting in similar fact evidence?

4   A   Oh, absolutely, and, I mean, yeah, there's no

04:30   5   suggestion that the Crown could have obtained that

6   kind of evidence or put it in at a trial.

7   Q   And so you are saying you are not sure if it would

8   have been admissible?

9   A   Well, I mean, again, I go back to the notion that

04:30   10   even defence evidence has to have some relevance

11   and until you know who's committed these and can

12   somehow connect it to this case, for example, if

13   they had known it was Larry Fisher and he's living

14   in the same building as Shorty Cadrain, then you

04:30   15   have a bit of relevance you could bring that in,

16   but, I mean, what distinguishes these from any

17   other stranger rape that might have happened in

18   that area around that time and that Larry Fisher

19   wasn't convicted of.

04:31   20   Q   And would you have, putting on your prosecutor hat

21   for a moment, what was your view as to whether

22   putting the evidence in of the unsolved rapes,

23   given the other evidence on the record against Mr.

24   Milgaard, whether that would have been favourable

04:31   25   or not to his position?

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1   A   I don't think it would have affected the jury's

2   consideration of the case one bit. At that point

3   you had Ron Wilson's evidence, the incident with

4   Nichol John -- or the evidence of Nichol John and

04:31 5   the way that went in, plus you had the words out

6   of David Milgaard's own mouth as reported by

7   Lapchuk and Melnyk.

8   Q   And so again, I wouldn't mind your views or

9   comments on whether in light of that evidence and

04:32 10   the fact that Mr. Milgaard did not testify for

11   reasons that we've heard, in your view, as a

12   prosecutor, would evidence of unsolved rapes in

13   the months prior suggesting that that was the

14   person who committed the Gail Miller rape, would

04:32 15   that necessarily be favourable to Mr. Milgaard's

16   position or could you see circumstances where it

17   might be favourable to the Crown?

18   A   Well, I don't know how it would be favourable to

19   the Crown, but it doesn't --

04:32 20   Q   Sorry, unfavourable to Mr. Milgaard is how I maybe

21   should have put it.

22   A   Well, unless you can put Mr. Milgaard in Saskatoon

23   at the time these events happened, I don't know

24   how it would be unfavourable to him. All it -- I

04:33 25   suppose, you know, it throws up a little dust, but

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1   at the end of the day he had to confront the

2   evidence that positively tied him to the event.

3   Q And I guess --

4   A And that was the problem.

04:33 5   Q And given the fact that he did not testify and did

6   not, at least in a direct way, confront the motel

7   room evidence and the Ron Wilson evidence, did

8   that -- what I'm wondering, your view as to

9   whether that maybe made it difficult to put

04:33 10   forward an alternate perpetrator theory?

11 A Well, my view from my years of experience is that

12   any time the Defendant doesn't testify and say I

13   didn't do it, it becomes difficult to put forward

14   any defence, and certainly if he's going to say,

04:33 15   well, it had to have been somebody else, I suspect

16   the jury is going to want to hear him first say,

17   well, it wasn't me.

18   MR. HODSON: I see it's 4:30,

19 Mr. Commissioner.

04:34 20   (Adjourned at 4:34 p.m.)

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