

Commission of Inquiry
Into the Wrongful
Conviction of David Milgaard
before
THE HONOURABLE MR. JUSTICE
EDWARD P. MacCALLUM

Transcript of Proceedings
and
Testimony before the Commission
sitting at the
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Volume 182

Inquiry Proceedings



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- BY MR. HODSON

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Transcript of Proceedings

(Reconvened at 9:03 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

MURRAY BROWN, continued:

BY MR. HODSON:

Q Good morning, Mr. Brown. If we could call up
234332 and go to page -- go to page 375, please.
We'll just pick up where we were yesterday, we
were talking about Saskatchewan Justice's position
to the Supreme Court on the Fisher rapes, and we
had walked through -- I think you said there was a
couple of distinctions. One, you were looking at
the failure to disclose the information that was
known at the time of trial, and I think you've
told us that basically analytically, that you had
to look at it two different ways; first, what was
the information known by the police and the Crown
at the time Mr. Milgaard went to trial about these
attacks, and I think you told us that there were
three unsolved attacks for which Mr. Fisher later
pled guilty, there was the (V9)---- attack that
was unsolved and the (V4)--- attack that was
unsolved, and we talked a bit about what, how that
might have affected the trial at the time, and I



1 think we went through that, and secondly, I think
2 you told us that after the trial, when more
3 information became known about Larry Fisher, sort
4 of a different analysis was in order. Is that a
09:04 5 fair summary of where we were yesterday?

6 A Yes, that's correct.

7 Q And then if we can just go to page 377, and this
8 is dealing with the first point about I think the
9 question of whether or not there was a failure or
09:04 10 a breach in not disclosing information with
11 respect to the unknown attacks, or the attacks
12 with the unknown perpetrator, and then you are
13 talking here about the similarities and
14 differences between, I think we're focusing here
09:05 15 on the three rapes, the (V1)-, (V2)----- rapes and
16 the (V3)-----, and you say:

17 "While there are some similarities there
18 are also some very major differences.
19 The two rapes and the attempted rape
09:05 20 occurred at night and not in the early
21 morning."

22 And let me just pause there. Can you tell us,
23 what was the significance of that in your view,
24 that the three, the (V1)-, (V2)----- and
09:05 25 (V3)----- were at night whereas the Miller



1 murder was in the morning?

2 A Well, if you are trying to come up with a
3 signature for the accused, or the person who has
4 committed these crimes, then you look at all of
09:05 5 the similarities, all of the dissimilarities. The
6 fact that the person may be roaming around at
7 night as opposed to the morning is a significant
8 difference in circumstances.

9 Q And so then in comparing the three, (V1)- -- I
09:06 10 think we're talking (V1)-, (V2)-----, (V3)-----,
11 comparing those three with the Miller murder in
12 your view, the time of day of the attack was
13 significant, or the difference I guess?

14 A It was one of the elements you look at in
09:06 15 determining whether you've got similar fact
16 pattern.

17 Q And then you go on to say:

18 "The three sexual assaults were rape
19 attacks and did not involve robbery or
09:06 20 serious physical injury to the victims.
21 Gail Miller was robbed, raped and
22 slashed and stabbed to death."

23 And can you elaborate on the significance of that
24 distinction?

09:06 25 A Well, the degree of violence in the Miller attack



1 is, in my view, a very significant difference. In
2 my experience that kind of violence is a signature
3 of some people who commit rape and not of others.

4 Q And so I take it the process of trying to look at
09:07 5 similarities, the objective there is to say based
6 on what happened in these other offences, is there
7 something with these offences that strongly
8 signals the person killed Gail Miller; in other
9 words, looking for something in those -- more than
09:07 10 a propensity I think was your language?

11 A That's right.

12 Q With the knowledge that we now know that Larry
13 Fisher did commit both those assaults and the
14 murder and rape, can you comment on the, not the
09:07 15 value, but the, I guess the inherent, maybe the
16 inherent subjectivity of similar crime analysis?

17 A Well, yes, it's subjective because it really does,
18 I suppose, depend on what significance you put on
19 the different factors involved. Nowadays I'm not
09:08 20 sure, after *Handy* and *Shearing*, that the rapes in
21 Saskatoon would be admissible as similar fact
22 evidence because the Supreme Court seems to have
23 gone back and raised the bar again and that
24 difference in violence would be something that
09:08 25 defence counsel would legitimately argue separates



1 those four crimes from the Gail Miller.

2 COMMISSIONER MacCALLUM: Excuse me, would
3 you spell the case, please, Handy, H-A-N-D-Y?

4 A It's H-A-N-D-Y and Shearing I believe is
09:08 5 S-H-E-A-R-I-N-G.

6 COMMISSIONER MacCALLUM: Thanks.

7 BY MR. HODSON:

8 Q Is it fair to say, Mr. Brown, that when you are
9 engaged in the process of looking at the
09:08 10 similarities between the rapes and the Gail Miller
11 murder, you are doing so with the perspective of a
12 prosecutor or a court official and trying to
13 determine how this information legally would come
14 into play in either David Milgaard's trial or
09:09 15 Larry Fisher's trial; in other words, what is the
16 legal significance of this information, how can it
17 be used and what does it tell me as a prosecutor.
18 Is that fair?

19 A Yes.

09:09 20 Q And so the analysis is not necessarily whether is
21 it the same person or do I think it is, but what
22 does this information give me by way of admissible
23 evidence in a legal proceeding. Is that fair?

24 A Yes.

09:09 25 Q Whereas a member of the public might look at this



1 and not view these offences and the similarities
2 to the Gail Miller murder in the same way. Would
3 you agree with that?

4 A A member of the public I suspect would use it
09:09 5 exactly the way the courts have said you are not
6 supposed to use it, and that is propensity
7 evidence, commits rapes, therefore did this.

8 Q Propensity being that he's a rapist, he was there,
9 there's some similarities, therefore, if it's not
09:10 10 David Milgaard, it must be him, that type of
11 thing?

12 A That's right.

13 Q And so is it your evidence, sir, then, that there
14 is a significant difference in how a prosecutor
09:10 15 looks at similarities of other offences than would
16 members of the public?

17 A Oh, absolutely, yes.

18 Q And I suppose if it had turned out that Mr. Fisher
19 had not been responsible for the Gail Miller
09:10 20 murder, then relying on the propensity argument
21 would have been, I guess, a dangerous thing?

22 A Absolutely.

23 Q I guess on the -- so on that hand, with the
24 knowledge, though, that he did commit the murder,
09:11 25 what does that tell us about the extent to which



1 similar fact evidence can be used to determine
2 these matters?

3 A Well, I mean, it tells you that sometimes that
4 guess is right, but, quite frankly, my view of
09:11 5 similar fact evidence is, for the most part, it's
6 a fast way to a wrongful conviction because it is
7 propensity evidence usually and nothing more.

8 Q And so again we talked about this yesterday, about
9 where we place the bar on these things, and am I
09:11 10 correct, sir, that the bar can fluctuate a bit
11 about the use upon which similar fact evidence can
12 be used in these cases? If you use it too
13 liberally, you may end up relying on propensity
14 rather than true signature and therefore
09:11 15 wrongfully convict somebody?

16 A That's right.

17 Q On the other --

18 A And my view was that the bar had to be set very
19 high before the Supreme Court decided *Arp*. I was
09:12 20 of that view after the Supreme Court decided *Arp*,
21 I thought they got it wrong, and they have come
22 around to say, well, we didn't mean to suggest the
23 bar was lowered in the *Handy* case.

24 Q Okay. So then if we can go on with -- you've
09:12 25 talked about that difference. If we can go to the



1 next page, you say here, and again we're talking
2 about I think the comparison between the (V1)-,
3 (V2)-----, (V3)----- incidents and the Gail
4 Miller rape -- pardon me, the Gail Miller rape and
09:12 5 murder:

6 "When the similarities are
7 looked at they don't amount to any kind
8 of special or unique pattern that gives
9 these crimes an identifying fingerprint
09:12 10 or unique characteristic that would set
11 them apart from other "stranger" rapes
12 and connect these sexual assaults in an
13 obvious way to the Miller murder.

14 The use of a weapon
09:13 15 occurring in two of the five incidents
16 to intimidate a victim is not uncommon
17 in stranger rapes. In our society,
18 knives are the weapons of choice for
19 this kind of crime.

09:13 20 The fact that all of these
21 women were attacked while walking alone
22 is hardly a unique or identifying fact
23 in a stranger rape situation. The fact
24 the woman is alone is the reason she is
09:13 25 chosen as a target. Very few rapists



1 attack groups of women.

2 The fact the attack occurs
3 in the dark is also common and that is
4 why when women are given advice on how
09:13 5 to protect themselves they are told to
6 avoid places that are not well lit.

7 The fact that in two of
8 these five events all or a sufficient
9 amount of clothing is removed to expose
09:13 10 the breasts and lower body and makes a
11 sexual assault possible is also hardly a
12 unique event. In this instance,
13 however, it should be noted that (V1)-
14 and (V2)----- were made to remove all of
09:13 15 their clothing. However, the condition
16 the Miller body was found in indicates
17 that she was not stripped of all of her
18 clothing. The (V3)----- incident ended
19 too soon to make it relevant to this
09:14 20 consideration. In this respect the
21 (V1)- and (V2)----- incident do not
22 resemble the Miller facts."

23 Can you just comment or elaborate on that?

24 A Well, again, if you are looking for similar fact
09:14 25 evidence, you are looking for what amounts to a



1 signature of the accused and you look at all of
2 the similarities and dissimilarities and see which
3 column sort of balances out at the top.

4 Q Okay. You also comment here, I think one of the
09:14 5 other similarities identified by counsel for Mr.
6 Milgaard was the bus line, you say:

7 "The fact that (V1)- (V2)----- and
8 (V9)----- lived close to the 20th Street
9 bus line is interesting but doesn't
09:14 10 amount to enough to be more than that.
11 It certainly doesn't come close to
12 suggesting that Gail Miller was killed
13 by the same person who attacked the
14 other three women. In attempting to
09:14 15 make that connection, it should be noted
16 that the (V1)- and (V2)----- incidents
17 occurred quite some distance away from
18 where Gail Miller was murdered."

19 And I suppose that's a case that it sounds like
09:15 20 both sides of the similar fact argument, if I can
21 put it that way, are arguing location. On the
22 one hand I think the Milgaard group is saying
23 look at location, that suggests they are similar.
24 On the other hand, the other argument is, well,
09:15 25 yeah, look at location, it shows that it's not



1 similar. Is that a fair way to put it?

2 A That's correct, yes.

3 Q And so not only do we have some disagreement about
4 whether the -- whether there are unique
09:15 5 characteristics of the crimes, some of those
6 characteristics are used by both sides of the
7 argument?

8 A Oh, absolutely, yes.

9 Q And you say:

09:15 10 "Consequently it is our
11 submission that given the lack of
12 telling similarities and the lack of any
13 factors creating an obvious pattern
14 ...",

09:15 15 you go on to say:

16 "... it is not surprising that Mr.
17 Caldwell did not consider disclosing
18 these to defence counsel. More
19 important, we submit, is that fact that
09:15 20 this lack of similarity and lack of
21 pattern would also have made such
22 information of little value to defence
23 counsel in preparing his defence of
24 David Milgaard."

09:15 25 Now we've heard from Mr. Caldwell at this



1 Commission that he was not aware of these other
2 offences, specifically he did not, I think his
3 evidence was that he did not see them as
4 connected and they were not disclosed, but that
09:16 5 he did not make a deliberate decision not to
6 disclose it, it didn't happen; were you aware of
7 that or did you have different information?

8 A No, my -- that's slightly misleading. My
9 understanding was that he never thought of them,
09:16 10 that they never came to mind, and it wasn't a
11 conscious decision not to disclose them.

12 Q And so in this argument are you addressing, then,
13 the suggestion that the failure by Mr. Caldwell to
14 disclose the (V1)-, (V2)-----, (V3)-----, and
09:16 15 let's include the (V9)---- and (V4)--- incidents
16 to Mr. Tallis prior to the time -- prior to the
17 trial, were you addressing that as an argument
18 that that constituted a miscarriage of justice?

19 A Yes, on the basis that even if he knew, that was
09:16 20 the case.

21 Q But just so that I'm clear here, on -- there was
22 evidence on the record, and I think you concede in
23 your argument, these five incidents were not
24 disclosed to Mr. Tallis. And so my question is
09:17 25 was this issue before the Supreme Court, namely,



1 did the failure of Mr. Caldwell to disclose those
2 five incidents to Mr. Tallis constitute a
3 miscarriage of justice?

4 A Yes, yes, that was part of the failure to disclose
09:17 5 argument.

6 Q And this argument you are putting forward is
7 addressing that issue?

8 A That's right.

9 Q You then go ahead to the next heading, *All of*
09:17 10 *Fisher's Crimes on Fresh Evidence*, and you say:

11 "The second argument advance
12 with respect to the Fisher material is
13 that since 1971 and Larry Fisher's
14 conviction for the four offences in
09:17 15 Saskatoon and two in Winnipeg, there has
16 existed fresh evidence of a similar fact
17 nature that points to Larry Fisher as
18 the guilty party. It is argued that the
19 known crimes of Larry Fisher have been
09:17 20 committed in such a way as to create an
21 obvious pattern of conduct that
22 identifies Larry Fisher as the person
23 who committed the Gail Miller murder."

24 And then:

09:18 25 "In our submission, when a



1 careful look is taken at the attacks on
2 (V1)-, (V2)-----, (V3)-----, (V9)----,
3 (V4)---, (V5)---, (V7)--- and (V8)--- it
4 becomes apparent that there in fact is
09:18 5 no such pattern or identifying criminal
6 fingerprint established by these
7 crimes."

8 And If I can just pause there, these would be the
9 incidents, then, if I can call them now the
09:18 10 Fisher rapes because -- actually, I'm sorry, I
11 shouldn't, (V9)---- and (V4)--- he was never
12 charged with -- but these would be the assaults
13 that were the six assaults that Mr. Fisher
14 essentially confessed to and pled guilty to in
09:18 15 1970-'71; correct?

16 A That's correct, yes.

17 Q And the two, the (V9)---- and the (V4)--- ones
18 which he was never charged with, but these would
19 all be incidents that occurred prior to the
09:19 20 conclusion of David Milgaard's criminal
21 proceedings; is that correct?

22 A Yes.

23 Q So the (V10) (V10)- matter is not included here
24 and I'm assuming from that, and please correct me
09:19 25 if I'm wrong, that this argument is addressed at



1 the following issue; that once the police and/or
2 Crown became aware of a number of things; number
3 one that the five, or that three of the five
4 incidents that occurred prior to Mr. Milgaard's
09:19 5 trial, that there was now a person who pled guilty
6 or had confessed to those crimes, number one;
7 number two, that there was a fourth incident in
8 Saskatoon, the (V5)-- (V5)--- rape, after David
9 Milgaard's trial for which Mr. Fisher pled guilty,
09:19 10 and two offences in Winnipeg that Mr. Fisher had
11 confessed to, and so that was the new information
12 that existed in 1970-1971, and the question is to
13 what extent, if any, did those facts give rise to
14 a miscarriage of justice; is that a fair way to
09:20 15 put it?

16 A Well, and the failure to disclose that to --

17 Q Yes.

18 A -- Justice Tallis, yes.

19 Q And so this argument is addressed at that very
09:20 20 issue, whether somehow the Crown and/or police
21 should have disclosed this information to Mr.
22 Tallis; is that fair?

23 A Yes.

24 Q That's the issue you are addressing?

09:20 25 A That was the issue.



1 Q And if we compare it to issue number one on
2 disclosure what we -- the one we just went
3 through -- what we now know on issue two is we now
4 know about Mr. Fisher; correct?

09:20 5 A Right.

6 Q And further assaults. And is it fair to say that
7 Saskatchewan Justice went through a similar
8 analysis and said, okay, now let's look at these
9 same offences with the information that was known
09:20 10 in 1970 and '71 and try and do the same analysis
11 to see whether it would have given rise to
12 something that would have assisted Mr. Milgaard?

13 A Yes.

14 Q Now you say here:

09:21 15 "We have not used the account
16 of these assaults set out in the summary
17 of Centurion Ministries Investigation
18 into the crimes of Larry Fisher. It is
19 clear when reading those summaries and
09:21 20 contrasting them with what the victim
21 actually had to say and what the police
22 reports disclosed, that the Centurion
23 Ministries summaries are not accurate."

24 And can you comment on that?

09:21 25 A Well my -- all I can say is that my recollection



1 was that the Centurion Ministries report included
2 some conclusions that they were drawing and not
3 just the facts as taken from the statements of the
4 witnesses or the police report.

09:21 5 Q And so I take it, in the course of your
6 comparisons, you relied upon what the witnesses
7 had said originally?

8 A Yes.

9 Q And scroll down. You then go through and say:
09:22 10 "Below is a chart setting out the
11 various aspects of Larry Fisher's
12 offences that the applicant suggests
13 form a pattern."

14 Let me just pause there. At the end of this
09:22 15 exercise, if you conclude that there is no
16 pattern, does that mean that it's not something
17 that ought to have been disclosed; is that --

18 A Well, again, the pattern and the number of
19 similarity points go to the issue of relevance.
09:22 20 If you have a lot of similarity and a very close
21 pattern, then it becomes relevant as potential
22 similar fact; if you don't have a substantial
23 degree of similarity and a lot of points where the
24 two meet, then it's not relevant.

09:22 25 Q Okay. And I think you made the remark, either in



1 the brief or in oral argument, that at one extreme
2 that might require you to disclose every rape that
3 occurred in Saskatoon; would that be --

4 A Well, that's right, every stranger rape.

09:23 5 Q And so here what you are saying is, I think, is
6 that no, there has to be some relevance or some
7 connection to the Gail Miller murder that would
8 take these rapes out of the general group and make
9 them relevant to David Milgaard's defence; is that
09:23 10 a fair way to put it?

11 A That's correct, yes.

12 Q And so here you go through and look at the
13 patterns, and you put "use of Knife", and you have
14 four of the incidents with a knife and five
09:23 15 without a knife, and I think you've got a
16 qualification. What is the importance of the
17 knife in looking at the similarities of these
18 assaults?

19 A Well, I mean, again it's an element of how Larry
09:24 20 Fisher committed rapes or didn't commit rapes. If
21 you can show a pattern where, for example, he
22 invariably used a knife, that's a strong, a strong
23 point of similarity; if you can't then it
24 substantially weakens it, if it's an occasional
09:24 25 thing, then the relevance of that information is



1 diminished.

2 Q And so are you saying that if Mr. Fisher used a
3 knife in only half of his assaults, then it
4 weakens the proposition that he committed Gail
09:24 5 Miller's rape and murder, because he always used a
6 knife; that's --

7 A Yes.

8 Q And the next is "took something" and "took
9 nothing", and you have (V1)-, (V2)-----, (V7)---
09:24 10 with clothing and money, and the others he took
11 nothing; why is that significant?

12 A Well, again, if he's not just raping women but
13 robbing them, that's of some consequence too, it's
14 part of the signature or lack of signature.

09:25 15 Q Now I think much was made, would you agree, in the
16 submissions by Centurion Ministries and counsel
17 for David Milgaard about the uniqueness of the,
18 particularly I think the (V1)- and the (V2)-----
19 rapes, about having the victim take off her coat
09:25 20 and then take off parts of her clothing and then
21 put her coat back on, and I think the suggestion
22 there was that that was similar or that might
23 explain what happened to Gail Miller; namely that
24 the perpetrator had her remove her coat, then
09:25 25 removed her clothing, raped her, and then she put



1 her coat back on, which explains why the stab
2 marks were through the coat and not the dress; and
3 you would have been aware of that suggestion?

4 A Yes.

09:25 5 Q And so can you comment here, you've got (V1)-,
6 (V2)----- under the "made woman undress", and then
7 the other four being "he removed or displaced
8 woman's clothes"; and what significance is that?

9 A Well I mean, again, it's just one more factor you
09:26 10 look at. On its own, it's not particularly
11 significant, but if you are trying to generate
12 patterns of similarity you look at everything.

13 Q Okay. Next page. You've got, for "time of
14 attack", now the (V4)--- and (V9)---- ones were
09:26 15 not -- is it correct to say, at that time, that
16 there was no, there was no conviction of Mr.
17 Fisher, in fact he denied both of those incidents;
18 is that correct?

19 A Umm, yes.

09:26 20 Q Whereas the other ones, I think the six referred
21 to here are matters where -- and we've got (V10)
22 (V10)- now included -- where he did confess, or
23 pled guilty to, or was convicted of; is that
24 correct?

09:26 25 A Yes.



1 Q So what about the "time of attack" being evening
2 versus morning?

3 A Well, again, it would suggest that what you have
4 got is somebody who is free to roam around in the
09:27 5 evening but isn't, for whatever reason, roaming
6 around in the morning, and if Gail Miller is
7 killed in the morning that's a piece of evidence
8 that suggests somebody other than the (V1-'s,
9 (V3)-----, etcetera, attacker.

09:27 10 Q Okay. Next, "made them lie on their coats", "did
11 not use coat", and you've identified three that he
12 did and six that were not; correct?

13 A Yes.

14 Q "Covered her face" and "didn't cover face"; what's
09:27 15 the significance of that?

16 A Umm, well I suspect the significance of that is
17 how careful he was inclined to be.

18 Q The last point is "infliction of extreme or lethal
19 violence on victim", and you have (V10) (V10)- on
09:27 20 the one side, and then the eight assaults on the
21 other; what was the significance of that in your
22 view?

23 A Well the infliction of an extreme degree of
24 violence is frequently something that separates
09:28 25 different kinds or different types of sexual



1 offenders, some add the violence, most don't.

2 Q And have you heard the term 'punishment rapist'
3 used? I think it was used in the Supreme Court in
4 Mr. Wolch's argument.

09:28 5 A Well there's, I mean there's certainly that kind
6 of sexual assault, and I mean that's the kind
7 where they add the violence as part of -- prior to
8 or as part of the sexual assault.

9 Q And, again, what, if anything, did your review of
09:28 10 these offences tell you about whether or not Mr.
11 Fisher was a punishment rapist?

12 A Well, certainly the ones that occurred around the
13 time of the Gail Miller murder didn't include that
14 degree of violence, the only one that did was the
09:28 15 (V10) (V10)- matter. And even under the Arp test,
16 very likely the (V10) (V10)- matter couldn't have
17 been admitted as fresh evidence because of the
18 time difference, it's was some ten years later.

19 COMMISSIONER MacCALLUM: Sir, in that
09:29 20 respect, do you make any distinction between the
21 evidence being introduced by the Crown or the
22 evidence in -- being introduced by the defence?

23 A Well, I suppose I'm looking at it from a
24 prosecutor's perspective, and even -- even with,
09:29 25 probably, the (V10) (V10)- one, I would see that



1 as being much more difficult for a defence counsel
2 to get in.

3 I think the essence of the
4 Supreme Court decision was that well no, they
09:29 5 disagreed with me on the similar-fact evidence,
6 there was something that could go to a jury, but
7 my view is it was with respect to the (V1)-,
8 (V2)-----, (V3)-----, (V5)---, (V8)---, (V7)---.

9 COMMISSIONER MacCALLUM: Right. Except, of
09:29 10 course, in this context we should be looking at
11 what might have been useful for the defence, not
12 for the prosecution?

13 A Oh no, I appreciate that, and that's what we were
14 looking at, but I tend to see that through the
09:30 15 eyes of someone who does prosecutions, --

16 COMMISSIONER MacCALLUM: Yes?

17 A -- and that's how I would assess them.

18 BY MR. HODSON:

19 Q Just on that point, I guess if we leave the (V10)
09:30 20 (V10)- out for just a moment, and I'll come back
21 to it, the other --

22 A Oh it, I think, is probably arguably admissible
23 for a different reason, and that would be the
24 comments he made to her.

09:30 25 Q Okay. And I'll come back to that. If we leave



1 the (V10)- assault aside for a moment, the rest of
2 these assaults occurred 1968 to 1971, and am I
3 correct that the focus then would be, when you are
4 going through this analysis for the court, is to
09:30 5 say in 1971, for example, if this information had
6 been provided -- number one, should this
7 information have been provided to David Milgaard's
8 counsel, and to determine that you have to say
9 could it have been relevant and used by him at the
09:30 10 trial; is that fair? Is that a fair way to put
11 it?

12 A Yes.

13 Q Yeah. And I'm not trying to change the words in
14 your brief --

09:31 15 A Well except, you know, I go back to the notion
16 that there were two kinds of disclosure that was
17 the problem; the stuff that was sort of available
18 at the time of trial, and the stuff that became
19 available after trial, and I think the argument
09:31 20 was it should have been disclosed to Justice
21 Tallis so he could consider what he would do with
22 it in terms of an appeal or something like that.

23 Q Right. I think, when you told us yesterday that
24 when you get into this miscarriage of justice and
09:31 25 the *Palmer* test, what you are forced to do is to



1 look at the information that was not provided to
2 the defence and say, okay, could it reasonably
3 affect, or could it have reasonably affected the
4 verdict?

09:31 5 A Yes.

6 Q In other words you are going back in time and
7 saying we know it wasn't disclosed, if it had
8 been, would it have made a difference?

9 A Yes.

09:31 10 Q And so, in so doing that, you go down this path
11 of, okay, what is the relevance of this. And I
12 appreciate your point is we're not talking about
13 whether it should or shouldn't have been disclosed
14 at the time, we're looking at, in 1992, whether or
09:32 15 not this information is significant enough to give
16 a remedy at that time; is that a fair way to put
17 it?

18 A Yes.

19 Q Yeah. And so that requires you to say, okay, in
09:32 20 1971, if Mr. Milgaard's counsel had this
21 information, might it have affected the verdict,
22 and then we get into the would it be admissible
23 and would it be, I guess, relevant to show that
24 there was another perpetrator, in other words to
09:32 25 allow him to run the defence and say "find a



1 reasonable doubt, jury, because Larry Fisher is
2 the perpetrator?"

3 A Yes. And I, in my view, probably the strongest
4 part of that argument is being able to show where
09:32 5 Larry Fisher lived as much as the fact that he was
6 connected to these rapes, because that neutralized
7 a piece of the evidence against David Milgaard,
8 and that was the -- I think it was her driver's
9 licence or --

09:33 10 Q The wallet.

11 A -- some piece of ID that was found out near the
12 Fisher residence.

13 Q Yeah. Now I guess, if we go ahead to the (V10)
14 (V10)- matter, that when you do the analysis of
09:33 15 the (V10) (V10)- matter you can't do that until
16 1980, and I guess the question then is if, after
17 the (V10) (V10)- matter, the question is could Mr.
18 Milgaard have used that assault as relevant
19 evidence in defence of a prosecution against him;
09:33 20 correct?

21 A Umm, yes. Well, parts of it, yes.

22 Q Or parts of it. And I think you were saying the
23 significance of that would have been the comments
24 that Mr. Fisher made to Ms. (V10)- in the assault
09:33 25 as opposed to the similarities of that attack?



1 A That's correct.

2 Q Scroll down.

3 COMMISSIONER MacCALLUM: Sorry, just a
4 second.

09:34 5 MR. HODSON: Yes.

6 COMMISSIONER MacCALLUM: I must confess to
7 having missed your last -- your testimony a
8 little while ago about the comments made.

9 A There was a comment, now I don't know exactly what
09:34 10 it was, but I recall that there were comments made
11 by Larry Fisher when he was attacking (V10)
12 (V10)-, something to the effect that he had done
13 this before or something, umm --

14 COMMISSIONER MacCALLUM: Yeah.

09:34 15 A -- that in my view were probably more significant,
16 and likely admissible in terms of the evidence, as
17 opposed to a rape that took place ten -- or a
18 sexual assault that took place ten years after the
19 Miller event.

09:34 20 MR. HODSON: And we do have that, Mr.
21 Commissioner, in one of the documents, it's in
22 the (V10)- proceedings, --

23 COMMISSIONER MacCALLUM: Uh-huh.

24 MR. HODSON: -- and there was that note. I
09:34 25 think there was also, there was a police



1 officer's notebook that has that, and I think
2 there was even a voir dire or some proceeding
3 related to that.

4 BY MR. HODSON:

09:35 5 Q But so if Mr. Milgaard wished, if Mr. Milgaard was
6 defending a charge, the charge after the (V10)
7 (V10)- incident, you are telling us that that
8 information or that evidence about what Mr. Fisher
9 said to (V10) (V10)-, in your view, would be
09:35 10 admissible and could be used by him to say he is
11 the person who killed Gail Miller, and here is a
12 confession or an admission that he made, although
13 he didn't refer to Gail Miller?

14 A If you add that to the four sexual assaults or six
09:35 15 sexual assaults that he pled guilty to, the fact
16 that he was living in the same place as Shorty
17 Cadrain, and then the (V10) (V10)- statement, I
18 think now you are coming close to having an
19 argument you could put to the jury that it should
09:35 20 raise a reasonable doubt. Coming close. It still
21 doesn't deal with the Wilson evidence, it still
22 doesn't deal with the Lapchuk and Melnyk evidence.

23 Q And what about the suggestion, though, that that
24 should be up to the jury to decide, whether or not
09:36 25 Fisher information displaces the incriminating



1 Milgaard evidence?

2 A Well that's, that's not the similar-fact evidence
3 test. First, you have to convince an appellate
4 court that it's something that's likely to raise,
09:36 5 or something that the jury is likely to consider
6 in looking at reasonable doubt. It's not enough
7 to say, well, you can throw it in, I mean you can
8 throw almost anything in for the defence.

9 Q If I can just scroll. You say here:

09:36 10 "The Crown concedes that
11 there are some similarities in all of
12 the sexual assaults committed by Larry
13 Fisher and those alleged to have been
14 committed by him and highlighted by the
09:36 15 Applicant's counsel during his
16 examination of Larry Fisher. The victim
17 was always walking alone. The attack
18 was sudden and unexpected by the victim.
19 The victim was dragged to a secluded
09:36 20 place. The victim was grabbed by behind
21 or the side."

22 Actually, sorry, if we can go to -- I should note
23 for the record in this version of the document
24 page 49 is missing. If we can call up 046227,
09:37 25 which is part of 046184, it's at page 49, Mr.



1 Commissioner, from another document. And we'll
2 just go through. You say:

3 "When looking at the pattern
4 established by the factors in the chart
09:37 5 and the similarities conceded above, it
6 is our submission that no pattern of
7 behaviour emerges to give Larry Fisher's
8 crime any unique criminal fingerprint
9 suitable for use as similar fact
09:37 10 evidence."

11 And are you saying that "for use as similar-fact
12 evidence" by the prosecution, or by the defence,
13 or both?

14 A Well, probably I was thinking in terms of the
09:37 15 defence, but likely applying a, probably a higher
16 standard than defence might have to meet.

17 But even conceding that,
18 again, you can put all of that evidence in and the
19 fewer similarities you have the easier it becomes
09:38 20 for Crown counsel to pick it apart and say "this
21 is nothing".

22 Q You say:

23 "On four occasions he used a knife. On
24 five occasions he did not use a knife.
09:38 25 On those four occasions when a knife was



1 used there was only one instance the
2 weapon was shown to be a paring knife.
3 In the (V8)--- instance, such a knife
4 was found at the scene. In the (V1)-
09:38 5 incident the weapon used was a long
6 bladed knife. In the (V2)----- and
7 (V10)- incidents while the victims felt
8 a knife their statements to the police
9 indicate they did not get a good look at
09:38 10 the same."

11 And then you go on to talk about, scroll down:

12 "With respect to him taking
13 something from his victims, again this
14 occurs in three instances but does not
09:38 15 occur in six incidents. On two of the
16 occasions in which something was taken
17 Larry Fisher appears to have taken
18 clothing in order prevent the victim
19 from rapidly dressing and either
09:39 20 following him or going for help before
21 he could escape. In none of the cases
22 where something was taken is there any
23 pattern of conduct that emerges as some
24 sort of peculiar trait of Larry Fisher.

09:39 25 On two occasions he made the



1 victim undress and on seven occasions he
2 attempted to or did succeed in removing
3 sufficient of his victims clothing
4 himself to commit the assault but did
09:39 5 not render the woman naked. Again,
6 there is nothing established by this
7 factor that would indicate any kind of
8 pattern that is unusual in these kinds
9 of sexual assaults."

09:39 10 Next page. If we can go back to the original
11 document now, page 50:

12 "With respect to the time of
13 the attack the sexual assaults we know
14 to have been committed by Larry Fisher
09:39 15 because he plead guilty to them all
16 occurred at night. The two assaults
17 that Larry Fisher has denied occurred in
18 the morning. In this instance if there
19 was any pattern it is one that suggests
09:39 20 Larry Fisher attacked women at night and
21 not during the morning hours.

22 With respect to the use of
23 the coat, on three occasions he made his
24 victim lie on a coat and on six
09:40 25 occasions he did not. Again, it's



1 difficult to see what the pattern is
2 that connects these incident to the Gail
3 Miller assault. It is equally difficult
4 to see anything unique in Larry Fisher's
09:40 5 conduct in this regard."

6 And then you go on to talk about the coat and
7 then the infliction of violence. What did you
8 make of the fact, Mr. Brown, we've heard some
9 evidence about I guess the fourth Saskatoon
09:40 10 incident, the (V5)-- (V5)--- rape which occurred
11 in February 1970, three weeks after David
12 Milgaard's conviction. And sort of two questions
13 about that; the first one is that in Saskatoon
14 his -- the first three offences occur before Gail
09:40 15 Miller's murder and then no offences, at least
16 for which he was suspected or convicted, from the
17 time of Gail Miller's murder until David Milgaard
18 is convicted, and then the fourth assault. And I
19 think the suggestion was that while this was
09:40 20 going on, he did not commit offences, but as soon
21 as Mr. Milgaard was convicted he went out and
22 committed the fourth; any significance to that?

23 A Well, I mean, factually that appears to be the
24 case. I don't know that I necessarily attach any
09:41 25 significance to it.



1 Q And the second question related to that rape, and
2 I think this is in some of the analysis done by
3 others, that in that rape the victim -- in the
4 fourth rape the victim, I think, bit his finger or
09:41 5 tried to resist, and he may have hit her, but not
6 the same degree of violence that was found in the
7 Gail Miller murder. What was the significance of
8 -- I guess, if you look at the first three
9 incidents, there was not the degree of violence as
09:41 10 Gail Miller, the Gail Miller murder, and then the
11 rape that followed Gail Miller's murder being far
12 less violence?

13 A Well the significance is that, if the last woman
14 offered some provocation and he did not resort to
09:42 15 that degree of violence, it says something about
16 the way -- or as -- what he is prepared to do to
17 further these assaults, and apparently the use of
18 serious violence wasn't part of it.

19 Q And is it necessarily a fact, Mr. Brown, that a
09:42 20 rapist always commits the rapes the same way, the
21 same time, the same manner, same techniques?

22 A Umm, it -- no, it's not, not necessarily a fact,
23 but our experience would suggest that if you've
24 got people who commit a number of these kinds of
09:42 25 offences, they tend to have some pattern to their



1 offending. Now when I say "pattern" I -- it's not
2 that they do it identically, but there are times
3 of day when they are out roaming around looking
4 for trouble, there are types of people they choose
09:42 5 for these kinds of assaults or places where they
6 tend to feel comfortable doing them, so there is
7 some kind of a pattern that you could find in
8 these kinds of things.

9 Q If we can go to the next page, please, 51. You go
09:43 10 through a section here about stranger rapes, and
11 can you just -- and I think the essence of this is
12 that, if you compare the similarities of these
13 rapes with stranger rapes, that they are not much
14 different; is that a fair summary?

09:43 15 A Well I think my thesis before the Supreme Court
16 was that, if you looked at the similarities, they
17 basically broke into two things -- or three things
18 I suppose.

19 The first was the kinds of
09:43 20 things that are similar to almost any kind of
21 stranger rape, where they attacked their victims,
22 the victims are alone, things like that.

23 The second was when you look
24 at the so-called pattern that they said emerges
09:44 25 from Larry Fisher's activities the pattern, to the



1 extent there is anything, for example the use of
2 the knife four times didn't -- used it, five times
3 didn't, the pattern seems to suggest that Larry
4 Fisher isn't the one who committed these offences.

09:44 5 And the third would be a few
6 items where there was some similarity, but that it
7 really wasn't of any significance.

8 Q If we can go to page 384, please. Your
9 conclusion, then, is:

09:44 10 "... therefore, that when the
11 Larry Fisher incidents are looked at
12 closely the similarities found concern
13 factors, common to almost all incidents
14 where a woman is attacked and raped by
09:45 15 someone she doesn't know. The other
16 factors involved in his attack in which
17 the applicant alleges to be of interest
18 do not in fact present a similar pattern
19 of behaviour. On the basis of the type
09:45 20 of analysis used by the applicant, Mr.
21 Fisher could easily be suspected of
22 almost all of the 'stranger' sexual
23 assaults occurring in Saskatoon at the
24 time he lived this. In our submission,
09:45 25 the applicant has filed to demonstrate



1 any pattern of behaviour arising out of
2 Larry Fisher's known sexual assaults or
3 the two alleged to have been committed
4 by him but not proven against him that
5 is in any way unique or unusual and that
6 in any way identifies Larry Fisher as
7 the person likely to have committed the
8 attack, robbery, rape and murder of Gail
9 Miller."

09:45 10 And, again, I think that summarizes what you just
11 told us?

12 A Yes.

13 Q Now let's turn to (V4)---, Ms. (V4)---. You say
14 here:

09:45 15 "With respect to the evidence
16 of Ms. (V4)--- it is our submission her
17 identification of Larry Fisher as her
18 attacker is an almost text book case of
19 unreliable eye witness identification
09:45 20 evidence. She did not know Larry Fisher
21 prior to the assault and therefore could
22 not quickly recognize him as her
23 attacker. She admitted she did not get
24 a particularly good or long look at her
09:46 25 attacker because it was dark and she did



1 not see him for an extended period of
2 time. She has in the past picked out
3 several other men as resembling the
4 person who attacked her. Finally, it
09:46 5 would appear that her identification has
6 more to do with her being erroneously
7 told by a police officer who took her
8 statement that whoever attacked her went
9 on to kill Gail Miller. There is no
09:46 10 question but that if she believe that it
11 would have been a very chilling
12 revelation and one that would have stuck
13 in her mind all these years.
14 Consequently when she saw the newspaper
09:46 15 story indicating that Larry Fisher was
16 the one who attacked Gail Miller, it is
17 not surprising that she unconsciously
18 made the connection between his picture
19 in the paper and her attacker. Under
09:46 20 the circumstances, it is our submission
21 that her identification of Larry Fisher
22 as her attacker is most unreliable and
23 cannot provide the applicant with much
24 assistance."

09:46 25 And, again, would that be a fair summary of the



1 Saskatchewan Justice position on (V4)----

2 (V4)---?

3 A Yes. Eye witness identification of a stranger
4 assailant is tricky enough as it is when you are
09:47 5 trying to do it very shortly after the assault.
6 22 years later, I frankly have no faith in that
7 kind of eye witness identification.

8 Q Would you have prosecuted Mr. Fisher for the
9 assault of (V4)---- (V4)--- based on her
09:47 10 identification?

11 A No, no, not even close.

12 Q You go on to say:

13 "In addition to the identification
14 problem there is also the difficulty
09:47 15 posed by the fact that (V4)--- assault
16 occurred seven to eight blocks away from
17 where Gail Miller was attacked and
18 killed at about the same time. Even
19 considering that Gail Miller left her
09:47 20 residence sometime between 6:45 and
21 7:00, there would not have been time for
22 Larry Fisher to rape, rob and murder
23 Gail Miller then arrive over at Avenue H
24 in time to attack Ms. (V4)--- at 7:07
09:48 25 a.m. While there is a suggestion that



1 he had a car that morning there is
2 absolutely no evidence beyond
3 speculation to support that fact.
4 Indeed it now appears the statement
09:48 5 given by Linda Fisher to Ottawa Sun
6 Report Tim Naumetz suggests it is
7 unlikely that Larry Fisher would have
8 had a car on that occasion. Finally,
9 even if Larry Fisher had access to the
09:48 10 automobile in question, Mr. Diewald's
11 evidence was that the car was in the
12 alley about 7:00 and shortly after that.
13 Even with an automobile at his disposal
14 it would have been impossible for Larry
09:48 15 Fisher to have been in the alley at 7:00
16 and a few minutes after 7:00 and then be
17 at Avenue H on his way home on foot in
18 time to attack Ms. (V4)---."

19 Just a couple of questions there. I think in the
09:48 20 case reference there's an affidavit from
21 this reporter Mr. Naumetz and I think, and my
22 understanding is that in the course of the
23 Supreme Court hearings he interviewed Ms. Linda
24 Fisher, wrote a story and Mr. Beresh went and got
09:49 25 the reporter to swear an affidavit as to what



1 Linda Fisher had told him because Mr. Beresh
2 viewed that evidence to be relevant to Mr.
3 Fisher's position; is that correct?

4 A I believe that was correct. I think Mr. Naumetz
09:49 5 was one of the reporters covering the Supreme
6 Court matter.

7 Q What is your recollection about this suggestion
8 that Mr. Fisher had a car when he raped and killed
9 Gail Miller and then attacked Ms. (V4)---?

09:49 10 A Well, I think there might have been some evidence
11 that from time to time Mr. Fisher was able to
12 borrow his uncle's car if he needed to take his
13 wife and child, say, to the doctor or something
14 like that. Other than that, the only reference to
09:49 15 a car was there was some suggestion that Gail
16 Miller could not have been raped and murdered
17 where she was, she had to have been attacked and
18 killed somewhere else and then the body dumped in
19 that alley and that whoever did it would have to
09:50 20 have a car to do it, but there was, in my view, no
21 evidence beyond mere speculation to suggest any of
22 that and certainly there was no reason that anyone
23 knew of for him to have borrowed or used his uncle
24 's car that day.

09:50 25 Q What about the -- if in fact a car was used, or



1 your comment on this question about back to
2 comparing similar fact between the assaults, and
3 if Mr. Fisher had used a car in the assault and
4 murder of Gail Miller, would that have been a
09:50 5 similarity from other of his assaults, namely, the
6 use of a vehicle?

7 A Well, certainly he attacked the women when he was
8 on foot and I don't recall any of them having
9 anything in their statements with respect to a
09:51 10 car, but, I mean, if he's going to hide his face,
11 I'm guessing he's going to hide his car and
12 license plate number from them too, so it would be
13 parked some distance away.

14 Q And you comment in the next paragraph about the
09:51 15 level of violence in the assault on both (V4)---
16 and (V9)----, and can you comment on the
17 significance of that, that if Mr. Fisher had
18 committed both the Gail Miller rape and murder and
19 the (V4)--- assault, the significant difference in
09:51 20 the nature of the attack and the level of
21 violence?

22 A Well, again, I mean, here you have an attack that
23 is probably the least of, the least violent of all
24 of them and it certainly doesn't even come
09:51 25 anywhere close to comparing to the kind of attack



1 that Gail Miller suffered and it just, it's a
2 whole different kind of a crime.

3 Q In your view, if Ms. (V4)---'s identification of
4 Larry Fisher was sound and that Larry Fisher was
09:52 5 the person who assaulted her on the morning of
6 January 31, 1969, in your view would that have
7 provided Mr. Fisher with an alibi for the rape and
8 murder of Gail Miller?

9 A Well, if you could establish that Ms. (V4)---'s
09:52 10 identification was sound, Mr. Commissioner, you
11 may be back here doing another one of these
12 because certainly Larry Fisher would then have
13 some reason to complain, because it takes him away
14 from that area.

09:52 15 Q So I take it the answer is yes?

16 A Yes.

17 Q If we can then scroll down, it appears just again
18 following through your argument on the Fisher
19 information, you've looked at the similarities of
09:52 20 those offences and you now look at the evidence of
21 Linda Fisher, and can you just tell me
22 generally, what was your sense of the significance
23 and credibility of what Linda Fisher had to say at
24 the Supreme Court?

09:53 25 A Well, I mean, again, I suspect that Linda Fisher



1 was genuine in what she thought she saw, but Linda
2 Fisher had a drinking problem, it was 11 years
3 after the fact, she indicated that the knife found
4 and that I believe Dr. Emson indicated could have
09:53 5 been the murder weapon wasn't her paring knife.
6 Linda Fisher's evidence was interesting, but I
7 didn't think it was terribly helpful or terribly
8 credible or terribly reliable. I think she was
9 doing her best to tell the truth, but I don't
09:53 10 think her evidence was reliable.

11 Q You say that:

12 "First, whatever else Linda Fisher now
13 says, she is certain the murder weapon
14 wasn't her paring knife. Without that
09:53 15 there is nothing in what she says that
16 links Larry Fisher to the crime.
17 Second, his response to her accusation
18 that he killed Gail Miller is as
19 consistent with him being shocked she
09:54 20 would even think such a thing as it is
21 with him being guilty of the crime.
22 Third, her failure to bring this to
23 light until some ten years after the
24 trial is also troublesome. Based on the
09:54 25 affidavit of Tim Naumetz it is clear



1 that shortly after the murder she had
2 the opportunity to bring this to the
3 attention of the Saskatoon City Police
4 and did not do so. Living in Saskatoon
09:54 5 as she did during this time, she would
6 have to have known that David Milgaard
7 was convicted of that crime. Based on
8 her suggestion that she put her
9 husband's guilt to the Gail Miller crime
09:54 10 together after he plead guilty to the
11 various rapes in Saskatoon and Winnipeg,
12 she had all the information she needed
13 by 1971. Despite this, she did not go
14 to the police until almost ten years
09:54 15 later. In our submission that tells
16 against her credibility."

17 And can you elaborate on that last sentence?

18 A Well, if she had been genuinely concerned that her
19 husband, who had just pled guilty to four rapes,
09:55 20 or six rapes, was also the one responsible for a
21 murder, and a nasty murder at that, why wouldn't
22 she have gone to the police immediately. That she
23 would wait 10 years and just ignore that fact is
24 very curious.

09:55 25 Q Then you say:



1 "Finally, even taken at its face value,
2 her evidence does not link Larry Fisher
3 to the murder. Indeed much of it would
4 indicate he is not guilty of killing
09:55 5 Gail Miller. First, the evidence of his
6 reaction to her accusation is at the
7 very best ambiguous. It can just as
8 easily be interpreted as supporting his
9 innocence as it can be interpreted as
09:55 10 supporting his guilt. Second, she
11 indicates that the weapon known to have
12 been used to kill Gail Miller was not
13 her knife. Third, she indicated that
14 when she washed Larry Fisher's clothing
09:56 15 there was no blood on any of it. Given
16 the nature of the homicide involved,
17 some blood staining would have been
18 inevitable. Finally, in her evidence to
19 Tim Naumetz she indicates that when she
09:56 20 asked her husband about his possible
21 involvement with the Miller murder he
22 flatly denied the same."

23 Can you comment on, and we've heard this term
24 used again when Sergeant Pearson testified, about
09:56 25 evidence that links Larry Fisher to the murder,



1 and I think Mr. Pearson, as a police officer,
2 said it was evidence just as it's stated, it
3 would actually put Larry -- some evidence that
4 would put Larry Fisher either at the scene of the
09:56 5 crime, an admission, some piece of physical
6 evidence, as opposed to mere suspicion, and can
7 you comment on that point? What is a link,
8 what's necessary to link Larry Fisher to the
9 murder?

09:56 10 A Well, either something he says or some piece of
11 physical evidence that suggests he was there when
12 it happened. If, for example, there had been
13 blood on his clothing, that might have been a link
14 to the murder, or if he had made some kind of
09:57 15 incriminating remark to his wife that sort of
16 could reasonably be interpreted as a reference to
17 his being involved, that that would link him to
18 the murder.

19 Q If we look at the case against, that was presented
09:57 20 against David Milgaard, what would be -- what
21 would have constituted links between David
22 Milgaard and the murder?

23 A Well, again, some physical evidence that might
24 have connected him to that crime, and Cadrain said
09:57 25 that there was blood on his clothing, that he saw



1 that when he opened the coat up, you have John and
2 Wilson putting him in that location at the time,
3 and certainly John in her statements to the police
4 indicated she saw him attack the woman, the
09:58 5 evidence of the contact with the woman that may
6 well have been Gail Miller, those kinds of things
7 are what linked him to that murder.

8 Q And what about Mr. Wilson's evidence about
9 admissions from him?

09:58 10 A Well, yes, admissions count too.

11 Q And the motel room incident?

12 A And the motel room incident.

13 Q And so links would be then something to link Larry
14 Fisher to the murder of Gail Miller. Was it your
09:58 15 view then in 1992 that there did not exist
16 evidence that linked him to Gail Miller's murder?

17 A That's right.

18 Q And at that time were you of the view that there
19 was evidence that linked David Milgaard to the
09:59 20 murder?

21 A Yes.

22 Q And I may have asked you this earlier, but I
23 think, just on the similar fact evidence, I think
24 you told us that similar fact evidence would never
09:59 25 be sufficient to be the link between Larry Fisher



1 and the murder; is that correct?

2 A If all you were running was a murder trial based
3 on similar fact evidence, no, that would never be
4 sufficient.

09:59 5 Q This comment down at the bottom here, you comment
6 on Linda Fisher's evidence about Larry Fisher
7 being home the morning of the murder and you say:

8 "The single fact left unexplained is her
9 suggestion that Larry Fisher did not go
09:59 10 to work that morning. That fact
11 recollected to the police some eleven
12 years after the incident is alleged to
13 have taken place has to be contrasted
14 with Larry Fisher's statement to the
09:59 15 police four days after the murder. In
16 that statement he indicates to the
17 police officers that he in fact did go
18 to work that morning. It is reasonable
19 to assume that if Mr. Fisher whatever
10:00 20 his degree of intelligence, was going to
21 make up an alibi to take him out of the
22 neighbourhood at the time of the Gail
23 Miller murder, he would have been smart
24 enough to figure out that he couldn't
10:00 25 use an alibi that could be so easily



1 checked by the police. Mr. Fisher's
2 statement to the police is corroborated
3 by his evidence to this Court and to a
4 lesser extent by the statements of the
10:00 5 people who worked with him in the
6 reference case materials and who
7 indicate they do not recall his
8 unexplained absence from work. While we
9 concede the latter corroboration is of
10:00 10 very limited value, it is nonetheless
11 some corroboration for Larry Fisher's
12 story."

13 And would you agree, Mr. Brown, that in 1990 or
14 1992 when you go back and try and find evidence
10:00 15 that will link Larry Fisher to the murder, that
16 it's much more difficult to do 20 years later
17 than at the time of the offence?

18 A Oh, absolutely, yes.

19 Q And that if -- if, for example, Mr. Fisher's work
10:01 20 records had been obtained at any point that showed
21 he was not at work that morning, that might be
22 evidence that would assist in the case against Mr.
23 Fisher?

24 A That would be evidence of interest, particularly
10:01 25 put together with the statement to the police that



1 he had been at work that morning.

2 Q Scroll down, I won't spend much time on the
3 evidence of the jailhouse informants. Generally
4 can you comment on your submissions or your view
10:01 5 about the credibility or the significance of the
6 evidence of people who had served time with Larry
7 Fisher?

8 A Well, for a number of good reasons we don't tend
9 to rely on the evidence of those kinds of people
10:02 10 unless in every substantial detail it's
11 corroborated by somebody not in jail. You'll get
12 the strangest things coming out of inmates in
13 correctional facilities. Whether it arises out of
14 boredom or their natural desire to commit mischief
10:02 15 I don't know, but the stuff that comes out of
16 there is just something I wouldn't place any
17 reliance on, absent it being corroborated by,
18 again, in substantial detail, by something from
19 outside the corrections milieu.

10:02 20 Q Go to 234391, you refer here to the evidence of
21 Larry Fisher, you say:

22 "Finally, there is the evidence of Larry
23 Fisher himself. He absolutely denies
24 any involvement in the murder. Unlike
10:02 25 David Milgaard, who also made such a



1 statement in his evidence, Larry Fisher
2 was not shown to be obviously lying to
3 this court."

4 And can you elaborate on what you state there?

10:03 5 A Well, just what's there, Larry Fisher was not
6 shown to be lying, or obviously lying, and it
7 seems to me I used obviously advisedly. David
8 Milgaard was contradicted by other witnesses a
9 number of times.

10:03 10 Q And so are you saying that Larry Fisher's denial
11 of guilt was more credible than David Milgaard's
12 denial of guilt based upon the evidence that was
13 before the Supreme Court?

14 A Yes.

10:03 15 Q Go to 234393, here you summarize, you say:

16 "In our submission the Applicant has
17 failed to show that there is credible
18 new evidence to question or contradict
19 the evidence given at his trial. As
10:04 20 well, the Larry Fisher evidence does not
21 amount to credible evidence capable of
22 providing a properly instructed jury
23 with a basis to change its verdict nor
24 does it suggest that such a change in
10:04 25 verdict would be probable. As a result,



1 we submit there is no basis upon which a
2 new trial should be ordered."

3 And that would then summarize your position with
4 respect to whether or not the Larry Fisher
10:04 5 information would have affected the jury's
6 verdict; is that correct?

7 A Yes.

8 Q Then you go on to talk about, I think you dealt
9 with A, B and C in the Supreme Court

10:04 10 possibilities, here you talk about, saying that:

11 "There was no miscarriage of justice but
12 given the length of time David Milgaard
13 has served in prison, some form of
14 relief should be considered. In our
10:05 15 submission, prior to suggesting a
16 conditional pardon be granted David
17 Milgaard, notwithstanding there is no
18 miscarriage of justice, this court
19 should inform itself of the contents of
10:05 20 his parole file. Mr. Milgaard's
21 assertions that he is being kept in jail
22 solely because he will not admit his
23 guilt to this crime, are patently
24 false."

10:05 25 And can you comment on that, please, the



1 significance of that?

2 A Well, that issue, or the reason that's in there is
3 because you will recall that the last sort of test
4 or possibility they set out was that
10:05 5 notwithstanding they couldn't find the continuing
6 conviction would be a miscarriage, they may be
7 prepared to do something for him anyway, and I
8 wanted them to know that his failure to get parole
9 was not related to his refusal to admit he was
10:05 10 guilty, it was his refusal to agree that he would
11 comply with parole conditions.

12 Q And you go on to say:

13 "It is our submission that prior to
14 making any recommendation that would
10:06 15 result in the release of David Milgaard,
16 this court should take the opportunity
17 to fully appraise itself of the contents
18 of Mr. Milgaard's parole files. They
19 paint a fundamentally different picture
10:06 20 of the reasons for the Parole Board's
21 decisions than is painted by Mr.
22 Milgaard himself."

23 And then the next page you talk about simply
24 report to the minister that there is no
10:06 25 miscarriage of justice, leave the decision of



1 full release to the National Parole Board. Can
2 you explain why you are putting forward that
3 submission?

4 A Well, that was an option open to them, to just say
10:06 5 there is no miscarriage of justice, full stop.

6 Q And so what was your general view then about, and
7 you mentioned this earlier, about the fact that
8 Mr. Milgaard had been in jail for 22 or 23 years,
9 what was the -- was it your view that there ought
10:07 10 to be some way, regardless of the findings of the
11 miscarriage of justice, to get him out of jail?

12 A Well, no, I wouldn't say that it was my view there
13 ought to be, but it seemed to me when we got that
14 memorandum from the Supreme Court indicating what
10:07 15 they were going to look at, the inclusion of that
16 last test or last option clearly indicated that
17 that's the way they were thinking at that point.

18 Q Okay. So it was your sense that there was going
19 to be a remedy that --

10:07 20 A I wouldn't say I was certain there was, but when
21 they came out with the decision they did, it did
22 not surprise me.

23 COMMISSIONER MacCALLUM: Was this sense in
24 your perception shared by, or was this thinking
10:07 25 in your perception shared by both the minister's



1 office and by the Supreme Court, that he had done
2 enough time in any event and he should be out?

3 A Well, I don't know about the Federal Minister's
4 office, I would be inclined to think they weren't
10:08 5 of that view, but I recall discussing the Supreme
6 Court's options with, I believe it was Mr.
7 Fainstein, and I think he too shared the view that
8 there was likely something coming because of that.

9 COMMISSIONER MacCALLUM: Yes. And but for
10:08 10 that view, as I understand your evidence, the
11 second application wouldn't have succeeded on its
12 merits?

13 A That's correct, yes.

14 COMMISSIONER MacCALLUM: Okay.

10:08 15 BY MR. HODSON:

16 Q If we can go to 020952, I just want to have you
17 identify a document, and in the event that Mr.
18 Neufeld was the creator of this as opposed to you,
19 I'll just go through parts. This is an appendix
10:09 20 to the memorandum. The next page is a summary and
21 it goes through I think basically excerpts from
22 the evidence at the Supreme Court that sort of
23 tracks what's in your written brief, and is that a
24 correct description of it?

10:09 25 A Yes, I guess that's the case.



1 Q And if we can just go to the next page, for
2 example, it summarizes drug usage and then it has
3 the evidence of the various parties and where they
4 are in the Supreme Court transcript, and it
10:09 5 appears to be an appendix of all of the relevant
6 transcripts of evidence that goes with the written
7 argument that's filed; is that correct?

8 A That's correct.

9 Q Now go to 218223, and this is the argument filed
10:09 10 on behalf of David Milgaard. After the Supreme
11 Court reference handed down its decision, was
12 there a difference in views between Saskatchewan
13 Justice and Mr. Wolch and Mr. Asper about what
14 issues were before the Supreme Court and what
10:10 15 issues were decided by them in their decision?

16 A Well, ultimately that view surfaced, that I think
17 they took the view that they were not permitted to
18 call any evidence of misconduct by the police or
19 the Crown.

10:10 20 Q And did you have a different view about -- let me
21 put it this way. Was it your view that the issue
22 of police and Crown misconduct were dealt with by
23 the Supreme Court?

24 A Absolutely, they were not precluded from calling
10:10 25 any of that kind of evidence, and indeed some of



1 that kind of evidence was heard.

2 **Q** Okay. And I propose to go through parts of this
3 argument with you and get your response about, or
4 your comment about the extent to which
10:10 5 Saskatchewan Justice viewed what's in this brief
6 as being issues before the court. If we can go to
7 page 218227, and I'll try, I think try and track,
8 to the extent I can, what was in your submission,
9 and I believe, Mr. Brown, the briefs were
10:11 10 basically filed contemporaneously as opposed to
11 one side filing their brief, the other responding,
12 the written briefs were simply -- or do you
13 recall?

14 **A** Yeah, I think that was the case. I don't recall
10:11 15 sort of one side going first and the other sides
16 responding, I think we were simply asked to file
17 our arguments by a certain date.

18 **Q** And so on the trial, the first point is:

19 "In the Milgaard case, it is
10:11 20 submitted that the original trial was
21 severely flawed by the failure to
22 provide full disclosure."

23 And was that an issue that you felt was advanced
24 and argued before the Supreme Court in the
10:12 25 reference?



1 A Oh, yes, that was one of their particular issues.

2 Q Go to the next page:

3 "It is submitted that the
4 Milgaard case, like that involving
10:12 5 Donald Marshall, is an example of a
6 situation where lack of disclosure has
7 been an important contributing factor in
8 causing a miscarriage of justice.

9 Counsel for Milgaard
10:12 10 submits that the following relevant
11 information was withheld:"

12 Let me just pause there for a moment. Did you
13 view the, this argument, the word to be
14 "withheld" to be anything different than failure
10:12 15 to disclose?

16 A No, I consider them the same. I didn't sort of
17 put a sinister connotation to it.

18 Q As opposed to a deliberate withholding?

19 A Yes, of relevant information.

10:12 20 Q Now, as far as the evidence that was before the
21 Supreme Court on this issue of disclosure, I think
22 you told us there is a significant volume of
23 documents in the case on reference and we saw the
24 affidavit of Joyce Milgaard that had attached
10:13 25 copies of the correspondence between Mr. Caldwell



1 and Mr. Tallis; correct?

2 A Yes.

3 Q You had the evidence of Mr. Tallis --

4 A Yes.

10:13 5 Q -- on this issue, and I think you told us that Mr.
6 Caldwell was in Ottawa at the request of someone
7 else, but not called?

8 A That's correct.

9 Q And that your view was that you didn't need to
10:13 10 call him to give evidence to address any of the
11 allegations of non-disclosure; correct?

12 A Yes.

13 Q And the first argument, and I won't go through
14 these in too much detail, but these are the
10:13 15 grounds of where counsel alleged that there was no
16 disclosure. This is the Avenue N, or sort of the
17 evidence in the area, if I can put it that way.
18 Go to the next page, and this deals with the
19 argument that the police interviewed a number of
10:14 20 people around the time of the murder:

21 "None of the statements provided by
22 these people were disclosed to the
23 Defence."

24 So that would have been an issue then that had
10:14 25 been advanced to say there was a miscarriage of



1 justice because Mr. Caldwell didn't disclose
2 what's listed in this argument? It goes on for a
3 couple of pages.

4 A Yes, relying, as they were at that point, on the
10:14 5 *Stinchcombe* standard.

6 Q And the *Stinchcombe*, if you can comment on that,
7 and I guess -- go back to 218227. The *Stinchcombe*
8 decision was mentioned in 1992. What was your
9 view of that, as to whether the *Stinchcombe* -- did
10:14 10 you sense that they were seeking to apply the
11 *Stinchcombe* rule retroactively?

12 A Yes, they were trying to apply a case that
13 happened some 20 some years later retroactively to
14 the Gail Miller murder, and there's no question
10:15 15 that nowadays there's a lot more information
16 exchanged, and in fact many defence counsel will
17 tell you there's a lot more useless information
18 exchanged, because relevant and useful aren't
19 necessarily the same two things.

10:15 20 Q Go to 218231, and again this is just carrying on
21 with the grounds of non-disclosure, it says here:

22 "The Defence was not advised of the
23 witness, (V4)---- (V4)---."

24 "(V4)---'s evidence was crucial to the
10:15 25 evidence since it is a logical



1 assumption that whoever attacked Gail
2 Miller also attacked her."

3 And so I take it, Mr. Brown, that the issue of
4 whether or not the prosecutor should have
10:15 5 disclosed the (V4)--- information to defence
6 counsel as being a ground of a miscarriage of
7 justice was before the Supreme Court?

8 A Yes. That was the point of calling her.

9 Q And, similarly, the (V9) (V9)---- matter in number
10:16 10 4.

11 Scroll down to number:

12 "5. The Defence was not advised of the
13 evidence in the Crown's possession
14 concerning the rape of (V1)--- (V1)-
15 ...",

16 it goes on, next page:

17 "The defence was not given disclosure
18 concerning the attack on (V2)----- ...",

19 I think there is a mention of (V3)----- there.

10:16 20 Was it your view, sir, that the issue of whether
21 or not the Crown's failure to disclose
22 information relating to the (V1)-, (V2)-----, and
23 (V9)---- attack as a ground of a miscarriage of
24 justice was before the Supreme Court?

10:16 25 A Well, certainly the (V1)- one was, because it was



1 mentioned, I believe, in the police report. I
2 don't recall the other two being mentioned in that
3 police report, so it's unlikely that Mr. Caldwell
4 would have ever heard of them at that point, but
10:17 5 it was part of the pattern of sexual assaults that
6 should have been, at some point, disclosed.

7 Q And I guess my question is just on the issue of
8 whether or not it was your view that the Supreme
9 Court dealt with, in the reference, the issue as
10:17 10 to whether or not the Crown either committed this
11 --

12 A Oh, disclosure and failure to disclose at any
13 point from the time of the trial or before the
14 trial until after the Larry Fisher matters became
10:17 15 known was clearly before the Supreme Court, and it
16 was clearly part of Mr. Wolch's argument.

17 Q And so not only disclosure by Mr. Caldwell prior
18 to trial but, also, disclosure by the Crown, be it
19 Mr. Kujawa, Mr. Caldwell or the police
10:17 20 post-conviction, when the Larry Fisher information
21 became known in 1970 and '71, was an issue, in
22 your view, that was before the Supreme Court and
23 decided by them?

24 A Yes.

10:18 25 Q Scroll down. The issue of disclosure relating to



1 the bone-handled hunting knife turned over to
2 Constable Oliver, again, that would have been:

3 "The failure of the Crown to tender this
4 exhibit, or to make it available ...
10:18 5 deprived the Defence of the opportunity
6 to show the knife to Milgaard's
7 travelling companions ..."

8 In your view was that an issue, in other words
9 the Crown or police conduct with respect to this
10:18 10 second knife; was that an issue that was, in your
11 view, before the Supreme Court and decided by
12 them in the reference?

13 A Well it was certainly before the Supreme Court.
14 Umm, I, you know, I don't recall them mentioning
10:18 15 that specifically in the judgement, but the issue
16 of the disclosure of that information was before
17 them.

18 Q Go to 218234. It says:

19 "It is therefore submitted that lack of
10:18 20 disclosure caused a miscarriage of
21 justice. The Crown was allowed to
22 advance a theory that the Defence could
23 not effectively rebut. It is submitted
24 that this case provides another glaring
10:19 25 example of how important disclosure is



1 to ensuring that the right person is
2 found guilty of a crime."

3 And I take it you take no issue with that being
4 an issue that was before the Supreme Court?

10:19 5 A That's correct.

6 Q Go to the next page. It talks about *The Present*
7 *State of the Evidence* and it goes on to talk
8 about:

9 "... possible to re-examine the evidence
10:19 10 originally called, along with any
11 additional evidence, to determine if
12 there is any credible evidence that
13 establishes, or even points to
14 Milgaard's guilt."

10:19 15 "It is the position of David
16 Milgaard that highly coercive and
17 improper police tactics led to the
18 witnesses, Wilson, John and Cadrain,
19 eventually giving statements that
10:19 20 incriminated Milgaard. With the benefit
21 of hindsight, it is now possible to see
22 that the statements (including that of
23 John which was never adopted at trial)
24 described a set of impossible events."

10:20 25 And was the issue of police misconduct in their



1 treatment of witnesses in the David Milgaard
2 investigation, namely Wilson, John and Cadrain,
3 an issue before the Supreme Court and decided
4 upon by them, in your view?

10:20 5 A Yes, the issue was put before them.

6 Q Go to the next page. And, in fact, I think the
7 position here on Ron Wilson:

8 "It is submitted that his recantation
9 should be believed since his trial
10:20 10 evidence does not bear up after detailed
11 scrutiny. In 1969, he was a suspect
12 under pressure. There is no current
13 motive to admit to perjury and to be
14 publicly humiliated. His recantations
10:21 15 to Paul Henderson and Bobbie Stadnyk
16 were not made under pressure."

17 And, again, would the issue of whether Ron
18 Wilson's trial evidence was improperly obtained
19 by the police and/or Crown, was that an issue
10:21 20 that, in your view, was dealt with by the Supreme
21 Court?

22 A Yes, it was, it was raised and argued there.

23 Q If you go to page 218238. This is talking about
24 Nichol John and the issue of her statement to the
10:21 25 police that wasn't adopted, and the brief says:



1 "A more likely scenario was that she was
2 afraid to admit that she had lied to the
3 police.

4 This proposition is further
10:21 5 supported by:

6 i) The investigative summary retrieved from
7 the Crown's file which 'predicts' what
8 she would say, and demonstrates strong
9 determination to have the evidence
10:21 10 conform to a pre-existing theory ...

11 ii) The pressure imposed on her by her being
12 in custody and subjected to the highly
13 objectionable techniques of Inspector
14 Roberts;

10:22 15 iii) Her conversation with Wilson in which
16 it was decided to tell a story which
17 would satisfy the police."

18 And, again, would the allegation that Nichol
19 John; number one, gave false evidence to the
10:22 20 police because she was coerced into following the
21 Mackie summary or the script; two, that she was
22 pressured by her being put in police custody, be
23 issues that the Supreme Court dealt with in
24 considering whether or not there was a
10:22 25 miscarriage of justice?



1 A Well, yes, with the proviso that I don't know that
2 the allegation made in the Supreme Court was that
3 she was coerced into following the script. I
4 think the suggestion was that they were given
10:22 5 evidence during their, or given information during
6 their questioning by the police that, ultimately,
7 they used to fabricate stories when they felt
8 sufficiently pressured to come up with something.

9 Q Well was it your understanding that -- or what was
10:23 10 your understanding of whether or not the Mackie
11 summary and the allegation that the Mackie summary
12 was used by the police as a script to manipulate
13 and coerce witnesses to provide fabricated
14 evidence, and therefore there was a miscarriage of
10:23 15 justice, in your view was that issue presented to
16 the Court?

17 A Well, that was a statement that Mr. Wolch was
18 making, but he had no evidence whatsoever to
19 support it.

10:23 20 Q But was it an issue that was put forward to the
21 Court?

22 A It was.

23 Q It's raised in the argument and I'm asking you
24 whether, in your view, it was something that
10:23 25 was --



1 A It was, oh yes.

2 Q And so you are saying you didn't think there was
3 any evidence but it was something that was there;
4 is that correct?

10:23 5 A Yes, oh yes.

6 Q And, as well, this -- what was your understanding
7 of the extent to which the Court was asked to
8 consider Inspector Roberts' conduct in his
9 treatment of Nichol John and Ron Wilson as being
10:24 10 --

11 A Well, --

12 Q -- a ground of miscarriage of justice?

13 A -- again, the thrust of Mr. Wolch's
14 cross-examination of Inspector Roberts was an
10:24 15 attempt to show that, somehow, he had improperly
16 coerced or intimidated, or whatever term you want
17 to use, these witnesses into providing inculpatory
18 statements against David Milgaard.

19 Q And if the Court would have concluded that
10:24 20 Inspector Roberts had, or other police officers
21 had committed misconduct and manipulated witnesses
22 to give fabricated evidence -- I think you've told
23 us this -- but in your view that would have been a
24 miscarriage of justice?

10:24 25 A Yes.



1 Q Go to 218239. The issue of Albert Cadrain. The
2 argument states, I think, essentially that he was
3 also having mental problems -- let me back up.

4 "What has now become clear is that
10:25 5 Albert Cadrain was at the time of the
6 police investigation a simple youth who
7 has taken Grade VI three times. He was
8 also having mental problems. Those
9 mental problems continue today. As a
10:25 10 result, it is submitted that neither his
11 evidence at trial, nor the evidence that
12 was given on the Reference can be given
13 any weight by the Court."

14 And was it your view that the issue of whether
10:25 15 Albert Cadrain was mentally competent at the time
16 of trial was considered by the Supreme Court in
17 determining whether or not his evidence in some
18 way, and the giving of -- the getting and giving
19 of his evidence, constituted a miscarriage of
10:25 20 justice?

21 A Yes, that issue was raised.

22 Q And George Lapchuk, Craig Melnyk -- if we can go
23 to the next page -- it talks about the new
24 evidence. If we can go to page 218242, it says:

10:26 25 "It is therefore submitted



1 that when the motel room evidence is
2 examined in its entirety, the most that
3 can be said is that David Milgaard,
4 under the influence of drugs, made a
10:26 5 statement in a manner and in
6 circumstances consistent with sarcasm
7 and poor taste."

8 So I take it that the motel incident issues,
9 however many there were, were all before the
10:26 10 Supreme Court, as to whether anything related to
11 the obtaining of evidence or the presentation of
12 evidence relating to the motel room incident was
13 an issue considered by the Supreme Court?

14 A Yes.

10:26 15 Q 218243. It says:

16 "Justice Tallis",
17 it says:

18 "In this Reference, he
19 testified without the benefit of notes.
10:26 20 He was testifying as to conversations
21 that had taken place more than
22 twenty-two years before. In that time,
23 he has handled numerous other cases,
24 both as a lawyer and as a judge.

10:27 25 Justice Tallis was careful to



1 preface many of his remarks with the
2 statement that he was relying on his
3 best recollection. He was trying to
4 assist the Court to the best of his
10:27 5 ability, but without his file and his
6 original notes, it is difficult to be
7 assured that his memory was accurate."

8 Next page. And the comment that at all times Mr.
9 Tallis, his evidence was that David Milgaard had
10:27 10 maintained his innocence, and that, as well, that
11 he advised Milgaard against testifying at trial.
12 And then:

13 "Justice Tallis recalled that
14 Milgaard had admitted to having a knife
10:27 15 in the car on the day of the Miller
16 murder. He was clear that Milgaard had
17 at all times denied that it was a paring
18 knife. He believed that Milgaard had
19 admitted to having a knife which he
10:28 20 thought to be a small jackknife that was
21 to be used to break into buildings. It
22 is important to note that neither at the
23 preliminary inquiry nor at the trial did
24 Justice Tallis cross-examine any of the
25 Milgaard travelling companions as to



1 whether they had seen a knife of the
2 type described by David Milgaard. Such
3 a cross-examination might have been
4 relevant to establish that the knife
10:28 5 Milgaard had could not have made the
6 wounds found on Gail Miller. The
7 cross-examination concerning this knife
8 may have shown that no one saw Milgaard
9 take it when he allegedly left the car.
10:28 10 The fact that there is no reference to
11 this knife in any of the cross
12 examinations does cast some doubt on Mr.
13 Tallis' recollection that Milgaard told
14 him that he had a knife."

10:28 15 What was your view of what this submission was
16 saying or this position was saying?

17 A Well, essentially what he is trying, what he was
18 trying to do was suggest that Justice Tallis'
19 memory was not reliable --

10:28 20 Q Okay.

21 A -- and you can see that by looking at the fact he
22 didn't cross-examine with respect to the issue of
23 the small knife.

24 Q And did you take issue with that submission?

10:29 25 A I don't know whether we argued something at that



1 point. Certainly, we were of the view that
2 putting another knife in David Milgaard's hand
3 wasn't likely to be all that helpful.

4 Q I think Mr. Tallis' evidence before the Commission
10:29 5 was to the effect that he did not, I think for
6 similar reasons, did not want to ask other
7 witnesses to put a -- to confirm that Mr. Milgaard
8 had a knife, even though it was a knife different
9 than the murder weapon, I think was his evidence.
10:29 10 Was that -- do you recall that being an issue?

11 A Well, I mean there was -- there were a number of
12 issues with respect to knives. There was also the
13 bone-handled one and there was no examination with
14 respect to that. Well, and again, my -- my
10:30 15 thinking on that, and Eric Neufeld's thinking on
16 that, was there were too many knives around, you
17 didn't need to bring that fact up to the jury's
18 attention.

19 Q And I take it Mr. Tallis' evidence at the Supreme
10:30 20 Court that David told him he had a knife, in light
21 of what David Milgaard testified, was an issue, I
22 think, that you said you felt harmed Mr.
23 Milgaard's position; is that fair?

24 A Yes.

10:30 25 Q I see it's 10:30, Mr. Commissioner, probably



1 appropriate to break.

2 (Adjourned at 10:30 a.m.)

3 (Reconvened at 10:48 a.m.)

4 BY MR. HODSON:

10:48 5 Q Go back to 218223 and go to page 245. Just
6 following up, this is Mr. Wolch's written
7 argument, this talks about the compact and I
8 think, similar to the knife, indicates that:

9 "The cross-examination at trial of the
10:48 10 witnesses who testified they saw this
11 event was designed to show that this
12 event had never occurred. At no time
13 did Justice Tallis cross-examine the
14 witnesses in an attempt to establish
10:48 15 that Milgaard may have been throwing an
16 unrelated object from the window. If
17 Milgaard had in fact admitted to
18 throwing something from the car, this
19 would have been a logical line of
10:48 20 cross-examination. It is possible that
21 Justice Tallis is mistaken in his
22 recollection, given the passage of
23 time."

24 Again, would you have the same comment there as
10:48 25 you did with the knife issue, that this was



1 attempted to show that he maybe doesn't
2 recollect, Mr. Tallis does not recollect the
3 right facts on the compact?

4 A Yes.

10:49 5 Q And was the compact, just your comment on this,
6 we've talked generally about the contradictions,
7 but in the case of the compact or cosmetic bag, or
8 whatever term is used, would you agree the fact
9 that that was thrown out of the car after the
10:49 10 group left Saskatoon was incriminating or
11 suspicious?

12 A Suspicious, yes.

13 Q Suspicious. And I take it when -- one way to
14 eliminate the suspicion is to show that it didn't
10:49 15 happen; correct?

16 A Yes.

17 Q And I guess the suspicion would be that, I think,
18 Wilson and John said it wasn't in the car when
19 they left Regina, or some time, it was there, and
10:49 20 the fact that Mr. Milgaard threw it out without
21 explanation would be suspicious as well; is that
22 correct?

23 A That's correct, yes.

24 Q And the inference for the jury, presumably, would
10:50 25 have been that this was Gail Miller's compact --



1 A Yes.

2 Q -- or cosmetic?

3 A Yes.

4 Q Notwithstanding the fact that her purse was found
10:50 5 in the garbage can with items of make-up, and
6 whether it's a cosmetic bag or compact, but I
7 think it certainly suggested that if one looked at
8 her purse you could infer that it would not have
9 been her compact or cosmetic that was in Ron
10:50 10 Wilson's car; would you agree with that, that that
11 was certainly an argument that was made at the
12 time?

13 A Yes.

14 Q When we go to the Supreme Court reference, the
10:50 15 fact that Mr. Milgaard said that didn't happen and
16 the other witnesses are lying, and then to have
17 Mr. Tallis say, "well, he told me it happened and
18 he couldn't explain it", and if you accept Mr.
19 Tallis' evidence of that just your comment on does
10:50 20 that draw more attention to the compact, does it
21 make it more suspicious than if it had not been
22 denied?

23 A Well I -- I'm not sure, at the Supreme Court
24 level, we're talking about whether it's suspicious
10:51 25 or not. I think, at that point, it had developed



1 as an indicia of credibility. My recollection is
2 that Wilson said it happened, Justice Tallis said
3 that David Milgaard told him it had happened, and
4 now David Milgaard was saying it didn't happen.

10:51 5 At that point what you are really talking about, I
6 think, is it being used as an indicator of David
7 Milgaard's credibility. Certainly, at trial, it
8 was something that raised the suspicion that this
9 was something left over from the attack on Gail
10:51 10 Miller and David Milgaard wanted to get rid of it.

11 Q So let me put it a different way. I think you are
12 saying the compact itself was some incriminating
13 evidence, it worked against, it harmed David
14 Milgaard's interests?

10:52 15 A Yes.

16 Q The evidence about that. My question is, the fact
17 that he purported to deny it when his lawyer told
18 him it happened, did it increase the harm that the
19 compact incident caused David Milgaard at the
10:52 20 Supreme Court, in your view and in your
21 assessment?

22 A Well I think, if you take as a given the
23 conviction, at that point the use of the compact
24 isn't so much as an indicator of guilt as it -- or
10:52 25 it doesn't do him as much damage as an indicator



1 of guilt as it did as an indicator of lack of
2 credibility. To the extent that he's denying the
3 existence of this piece of evidence though, yes.
4 If you were looking at what evidence there is that
10:52 5 might suggest David Milgaard was guilty, ignore
6 the issue of the credibility of his statements,
7 then the fact that Justice Tallis and Wilson are
8 still maintaining the compact incident, yes.

9 Q And so that if Mr. Milgaard, at the Supreme Court,
10:53 10 had said either "lookit, I don't recall but I'll
11 accept what Mr. Tallis said", or "yes, I accept
12 that that happened, it wasn't Gail Miller's, I
13 don't know where it came from and I don't know why
14 I threw it out but I throw things out all the
10:53 15 time", so that gave an explanation; if you compare
16 that to what did happen I'm trying to get your
17 sense as to whether Mr. -- how would you have
18 viewed the credibility of Mr. Milgaard's case --

19 A Well it --

10:53 20 Q -- in those two scenarios?

21 A Well it -- yeah. Obviously, if his evidence isn't
22 conflicting with Justice Tallis or the other
23 witnesses, that makes him more credible.

24 Q And so his denial then, as compared to either "I
10:53 25 don't know, I accept Mr. Tallis" or "I did it but



1 I don't have a explanation", by denying it, in
2 your view, he harmed his position?

3 A He, yes, he damaged his own credibility.

4 Q If I can scroll down, the brief says:

10:54 5 "As stated earlier in these
6 materials, it would appear that Justice
7 Tallis was severely hampered in his
8 defence by the failure of the Crown to
9 make full disclosure. It can certainly
10:54 10 be inferred that if Justice Tallis had
11 all of the necessary information, the
12 approach to the Milgaard defence would
13 have been substantially different than
14 that taken in 1969."

10:54 15 And we saw, in your argument, the fact that I
16 think you are asking the Court to draw an
17 inference from the fact that the question wasn't
18 asked of Mr. Tallis on this issue; is that
19 correct?

10:54 20 A That's correct, yes.

21 Q And an adverse inference?

22 A Yes.

23 Q Okay.

24 A I mean our view was that it, while it may have
10:54 25 added an element to the offence, he still had to



1 deal with Wilson, John, Lapchuk, and Melnyk and
2 Cadrain.

3 Q But, again, I think the point you had made
4 earlier, I think, was that it's not clear that Mr.
10:55 5 Tallis -- or you are saying the Supreme Court did
6 not have evidence that Mr. Tallis could have and
7 would have done something at the trial if the
8 unsolved assaults had been disclosed to him?

9 A Yes, he was never asked that, "how would you have
10:55 10 played this at trial?"

11 Q And I think Mr. Wolch is asking the Court to infer
12 that he would have done something different, and
13 you are saying since Mr. Wolch didn't ask him that
14 question and he could have, draw the inference
10:55 15 that he couldn't have and wouldn't have done
16 anything; is that a fair --

17 A Well, that the notion that he would have done
18 things different isn't established, --

19 Q Right.

10:55 20 A -- and it's not obvious.

21 Q Go to the next page.

22 "It is submitted that the
23 case against Larry Fisher is extremely
24 strong, and in fact amounts to proof
10:56 25 beyond a reasonable doubt of his guilt.



1 In preparing a case against Larry
2 Fisher, it is submitted that expert
3 evidence could be called to establish
4 the following facts:

10:56 5 a) Gail Miller was the victim of a
6 punishment rapist; ...",
7 "Larry Fisher is a punishment rapist;"
8 "Punishment rapists are extremely rare;"
9 "Punishment rapists follow a pattern;"
10:56 10 "Gail Miller's murder and rape followed
11 Mr. Fisher's pattern."

12 I would like your comment on what was your view
13 of that submission, or your response?

14 A Well there certainly wasn't evidence upon which
10:56 15 Larry Fisher could be prosecuted and convicted
16 beyond a reasonable doubt. There wasn't even
17 evidence, in my view, that he could be charged.

18 The notion that you can call
19 an expert to explain what a punishment rapist is
10:56 20 and that -- and give the opinion that Larry Fisher
21 is the one, is a punishment rapist, I'm not so
22 sure about that. And, again, 'Larry Fisher's
23 pattern', at that point it was a pattern of one,
24 at the time of the Milgaard trial.

10:57 25 Q And, namely, being the Gail Miller?



1 A Yes. It was very different than the other sexual
2 assaults.

3 Q And so does that --

4 A And even after, all the way up until the (V10)
10:57 5 (V10)- matter came along, it was a very different
6 matter.

7 Q So how do you square, then, or are you saying you
8 can't square the notion that -- or the line of,
9 the line of prosecution that he's a punishment
10:57 10 rapist, therefore he raped and killed Gail Miller,
11 with the fact that the other rapes that he
12 committed are similar?

13 A Well I -- they are not similar, the only one that
14 has a degree of similarity is the (V10) (V10)-
10:58 15 one, if you are talking about in terms of a
16 punishment rapist.

17 Q So I'm putting aside (V10) (V10)-, we'll talk
18 about the '68 to '71 rapes, then. Are you saying
19 that it's your view that those assaults, that none
10:58 20 of the Fisher assaults -- putting aside Gail
21 Miller, so we're talking (V1)-, (V2)-----,
22 (V3)-----, (V5)---, (V8)--- and (V7)--- in
23 Winnipeg, let's leave (V4)--- and (V9)---- aside
24 -- that those six rapes for which Mr. Fisher pled
10:58 25 guilty; was it your view that any of those were --



1 that any of those identified Mr. Fisher as a
2 punishment rapist, or did you view those as
3 punishment rapes?

4 A No. My understanding of 'punishment rapist' is
10:58 5 that you have someone who not only commits the
6 rape, but they then use a degree of violence
7 that's designed to inflict physical suffering on
8 the victim that's above and beyond what's
9 necessary to commit the rape.

10:59 10 Q And so did you view the theory of punishment
11 rapist actually suggests if Mr. Fisher was -- or
12 let me ask you your comment. How did you see the
13 punishment rapist theory fitting in as far as the
14 value of the Larry Fisher assaults?

10:59 15 A Well if you look at all of them together, six
16 assaults plus the (V10) (V10)- matter, at that
17 point there's only one of those that could have
18 been considered a punishment rape, and that was
19 (V10) (V10)-. The others, in my view, were not.

10:59 20 Q And so, if you conclude that Gail Miller was
21 murdered by a punishment rapist, was that
22 something that you viewed as a possibility, or a
23 likelihood, or consistent with a punishment
24 rapist?

11:00 25 A Umm, poss -- well, you could make an argument



1 there. Umm, I think it's also consistent with the
2 fact that the woman resisted or she got a look at
3 him.

4 Q Okay. If you can go to 218252, Position on
11:00 5 (V4)---- (V4)---, I think here stated is that:

6 "An extremely important piece
7 of evidence implicating Larry Fisher in
8 the death of Gail Miller is the evidence
9 of (V4)---- (V4)---. Her attack takes
11:00 10 place shortly after the Miller murder,
11 about eight hundred yards away. It
12 defies logic to suggest that two
13 different people were responsible for
14 these crimes."

11:00 15 And then it goes on to talk about the railway
16 tracks and, I think, the theory that -- next page
17 -- Fisher may have visited the Pambrun home,
18 borrowed and returned a vehicle to Cliff Pambrun
19 or to Roy Pambrun, etcetera. And so you would
11:01 20 have been familiar with that theory advanced,
21 that Fisher committed the (V4)--- rape by using
22 Cliff Pambrun's car, taking it to his house, and
23 walking back on the tracks?

24 A That was the suggestion made, yes.

11:01 25 Q Go to page 218257, this is in the conclusion, I'll



1 get your comment about the test, the argument
2 states:

3 "The first test set out by
4 this Court states that a miscarriage of
11:02 5 justice will occur if the Court is
6 satisfied beyond a reasonable doubt that
7 Milgaard is innocent of the offence.
8 This test is a direct reversal of the
9 basic onus in criminal law which
11:02 10 requires that guilt be proved beyond a
11 reasonable doubt. A reasonable doubt is
12 defined as one based on the evidence and
13 not one which is fanciful or
14 speculative.

11:02 15 If the basic criminal law
16 propositions are applied to the first
17 test set out by the Court, then David
18 Milgaard will have met this test if the
19 Court has no reasonable evidence that
11:02 20 points to guilt. If there is some
21 credible evidence that points to guilt,
22 then the court cannot be satisfied that
23 Milgaard is innocent."

24 Let me just pause there. Would you agree with
11:02 25 that statement about the test in proving David



1 Milgaard is innocent beyond a reasonable doubt?

2 A Well, it does seem to turn things around a bit.

3 My understanding of that test was you take his

4 conviction as a given and if he can establish

11:02 5 beyond a reasonable doubt that he is in fact

6 innocent, he gets the full pardon.

7 Q And so that do you --

8 A It wasn't then a matter of us proving that there

9 was evidence that he was guilty beyond a

11:03 10 reasonable doubt.

11 Q And so that if the court has no reasonable

12 evidence that points to guilt, in your view would

13 that be in and of itself to prove beyond a

14 reasonable doubt that he's innocent?

11:03 15 A No, it would prove that perhaps the continuing

16 conviction was a miscarriage, but it didn't prove

17 innocence.

18 Q Go to the next page, it says:

19 "If the Court is not prepared to state

11:03 20 that Milgaard is innocent beyond a

21 reasonable doubt then it is submitted

22 that the Court can still find that

23 Milgaard is probably innocent of the

24 offence. This is a civil standard...

11:04 25 In considering the evidence as a whole,



1 it is submitted that it establishes that
2 there is no credible direct evidence of
3 Milgaard's guilt and there is a strong
4 circumstantial case against Fisher. In
5 such a situation it is submitted that it
6 is more probable than not that Milgaard
7 is innocent and to sustain a conviction
8 in such circumstances would result in a
9 miscarriage of justice."

11:04 10 And just your comment on that, do you agree with
11 how that's put forward or what was your view
12 about what Mr. Milgaard in your view was required
13 to put forward to meet part B of the Supreme
14 Court test and prove his innocence on a
11:04 15 preponderance of the evidence?

16 A Well, again, I think they were taking the same
17 approach to that as they took to the other test,
18 and that is we don't assume there's a conviction
19 outstanding, we'll simply say has the Crown proven
11:04 20 that there is probable -- or that he is guilty.

21 If we haven't proved he's probably guilty, then
22 he's entitled to a remedy, and it seems to me that
23 what they were trying to do was reverse the onus.

24 Q And then if we can scroll down, and this is the
11:05 25 reference to the part C test about:



1 "...new evidence which was reasonably
2 capable of belief..."

3 And:

4 "...could reasonably be expected to have
11:05 5 affected the verdict."

6 It says:

7 "...it is submitted that the evidence
8 concerning the (V1)-, (V2)-----,
9 (V9)----, and (V4)--- attacks meet this
11:05 10 test. It is submitted that the evidence
11 complies with the test for fresh
12 evidence... This evidence was not
13 disclosed to the Defence though it was
14 available to the Crown."

11:05 15 And again, that would have been one of the
16 arguments advanced then on part C of the test?

17 A Yes.

18 Q Page 218260, it says here:

19 "In conclusion the Applicant Milgaard
11:06 20 states that for the past twenty-two
21 years he has been proclaiming his
22 innocence. He had long maintained that
23 his conviction was obtained on
24 fabricated evidence. He asks the Court
11:06 25 to consider all of the evidence that is



1 now called on the Reference and to
2 confirm his innocence."

3 And again, just on the fabricated evidence, was
4 that your understanding of at least part of what
11:06 5 was being put forward?

6 A Oh, absolutely, yes.

7 Q If we can now go to 208379, and this is the
8 transcript of the oral submissions. I checked --
9 yesterday I asked you about whether there was oral
11:06 10 submissions on the test to be employed by the
11 court, I think you said you didn't recall, and I
12 think Mr. Wolch had advised me that he thought
13 there were oral submissions and I put that to you.
14 I'm now advised that he was mistaken, he was
11:07 15 thinking about the final submissions, so just
16 maybe let's clear this up on the record.
17 Certainly, and the transcript reflects this, final
18 submissions to the court, you made oral
19 submissions, as did all parties; correct?

11:07 20 A Oh, yes, yes.

21 Q As far as oral submissions to the Supreme Court on
22 the test to be employed by them, do you recall
23 whether you made oral submissions in addition to
24 the written submissions?

11:07 25 A I -- as I say, I don't recall doing that. If --



1 I'm prepared to take Mr. Wolch's view that there
2 weren't submissions made. I know there were
3 written submissions, but I don't really recall
4 whether there were --

11:07 5 Q Go to 208383, just a comment on a couple of
6 points. This is Mr. Fainstein, this is April 6th,
7 '92, on the DNA, he says:

8 "I would like to give you a
9 brief update on the matter of genetic
11:08 10 testing. When we had known samples of
11 bodily fluids from both Milgaard and
12 Fisher, I went back to our experts at
13 the RCMP's central forensic laboratory
14 to see if there was any avenue that we
11:08 15 could now pursue. It was decided to try
16 a test called "DQ alpha" which has
17 recently been accepted in American
18 courts."

19 And then goes on to say, unfortunately -- pardon
11:08 20 me:

21 "Though it is not as
22 discriminatory as other techniques which
23 are now under development, it would only
24 consume a small portion of the
11:08 25 evidentiary material, leaving enough for



1 better tests when they are validated.

2 Unfortunately, due to the age and

3 condition of the material from the crime

4 scene, we are not able to achieve

11:08 5 results with that test.

6 It is still possible that

7 other procedures which are not yet ready

8 for court use will, in time, help

9 resolve a case like this. We have at

11:08 10 least the comfort of knowing that we

11 have done everything we can for now."

12 And just on this issue of the DNA at this time,

13 would you have been involved, this is April 6,

14 '92, would you or anybody at Saskatchewan Justice

11:09 15 have been involved in, involved directly in the

16 review of exhibits, the testing for DNA samples

17 on the garments, the consideration of DNA

18 testing, as to who to send it to and how to do

19 it, and all of those matters relating to testing

11:09 20 for DNA from the Gail Miller exhibits?

21 A The only involvement we had with respect to the
22 testing of the exhibits for DNA was we were, we
23 continued to press the federal government to see
24 whether this could be done because, in our view,
11:09 25 if it could, it would certainly settle a lot of



1 issues, and we had obtained I think Fred Dehm, who
2 was a prosecutor in Regina at the time, obtained
3 the exhibits from the court in Saskatoon and had
4 them turned over to the police, but that was --
11:10 5 and we discussed the matter with the feds on a
6 number of occasions.

7 Q But as far as deciding who would look at the
8 garments, what they would look at, who they would
9 send it to and what tests would be conducted, was
11:10 10 that something you relied upon Federal Justice
11 officials?

12 A Yes.

13 Q And what was your understanding in April 6, '92,
14 what were you advised about, two things; number
11:10 15 one, what human tissue or what substances were
16 found on Gail Miller's clothing or in the exhibits
17 that would be capable of doing a DNA test, and
18 secondly, whether such a DNA test could be done at
19 that time?

11:10 20 A We were advised that when the garments were
21 examined, there was one tiny spot of potentially
22 analysable material on, I believe it was the
23 panties, but that it was a very, very tiny spot,
24 and until a better technique, specifically I think
11:11 25 PCR was developed, if analysis was done, it ran



1 the risk of using up the entire sample and
2 producing an inconclusive result.

3 Q And who -- do you recall who informed you of that?

4 A It was -- well, Ron Fainstein was the one that was
11:11 5 dealing with the RCMP with respect to that, so the
6 information would have come from him.

7 Q And what was your understanding of what tests had
8 been conducted or what had been reviewed as far as
9 the Gail Miller exhibits to identify analysable
11:11 10 substances?

11 A Well, my understanding was that the RCMP person,
12 Pat Alain, had examined all of the clothes to find
13 any biological material that might be analysed.

14 Q And who advised you of that?

11:11 15 A Again, that would have come from Ron Fainstein.

16 Q And so on April 6th, 1992, can you tell us, from
17 Saskatchewan Justice's perspective, what your
18 understanding was of what had happened on the DNA
19 and what was going to happen down the road?

11:12 20 A Well --

21 Q And who was going to do it?

22 A As I said, we were advised that the RCMP analyst
23 was only able to find a very tiny spot of material
24 and that in their view that wouldn't likely be
11:12 25 enough to provide an analysis using the current



1 techniques and that it ran the risk, if you
2 attempted it, of using up whatever sample there
3 was. There was, however, on the horizon this new
4 technique that could replicate even a tiny amount
11:12 5 so that there was more for testing, that that in a
6 few years perhaps would provide a better way to
7 proceed than the DQ alpha way and that's what --
8 when we left it, we were expecting the federal
9 government to keep track, Ron Fainstein or someone
11:13 10 in that office to keep track of the development of
11 the technology and to get the testing done when
12 the PCR technology permitted it.

13 Q And do you recall any discussions with Federal
14 Justice officials about having the exhibits turned
11:13 15 back to the Court of Queen's Bench pursuant to the
16 order?

17 A No.

18 Q Was Saskatchewan Justice in agreement with having
19 Federal Justice officials carry the ball in
11:13 20 getting further DNA testing done on Gail Miller's
21 garments?

22 A Yes.

23 Q And why was that?

24 A Well, if we were going to get it done sort of at
11:13 25 the cutting edge of the development of that



1 technology, at that point it was likely going to
2 have to go either to the United States or to the
3 United Kingdom. The federal people had the
4 contacts and, as important for us, they also had
11:14 5 the money to do that. We didn't have the contacts
6 or the money.

7 Q And post reference, once the reference was done,
8 is it fair to say that the DNA testing of Gail
9 Miller's clothing would have been an essential
11:14 10 investigative step for the province and/or police
11 to take in the investigation into the death of
12 Gail Miller?

13 A Yes.

14 Q In fact, is it fair to say that with respect to
11:14 15 Larry Fisher as a possible suspect, I think you've
16 told us that that would be the only evidence left
17 that you could pursue, barring some confession
18 from him or some evidence that had not been
19 obtained before; is that fair?

11:14 20 A Yes.

21 Q And I think you told us that -- or let me back up.
22 If the exhibits had been returned to the Court of
23 Queen's Bench at the conclusion of the Supreme
24 Court reference, I think you told us Saskatchewan
11:14 25 Justice would follow up to do DNA testing and



1 would rely upon the RCMP; correct?

2 A If those exhibits had been returned to us, yes, we
3 would have checked -- I would have checked with
4 the RCMP crime lab in Regina with respect to how
11:15 5 to store them and asked whoever was in charge of
6 serology at the time, I believe it was Jean
7 Rooney, to keep me apprised of the development of
8 the DNA science so that we can, at some
9 appropriate point, get these exhibits checked
11:15 10 for that kind of thing.

11 Q And what would be your purpose, or Saskatchewan
12 Justice's purpose in getting the exhibits checked?

13 A Well, I mean, aside from the fact that there was
14 an undertaking to the Supreme Court to do that,
11:15 15 it's something -- DNA technology is a very
16 powerful tool and it gives you a result that's
17 pretty hard to argue with.

18 Q And so would that be to assist you in considering
19 whether to re-open the investigation into the
11:15 20 death of Gail Miller?

21 A Or to establish that in fact the right person had
22 been convicted, yes.

23 Q Okay. And in the circumstances, I think the
24 record reflects, and we certainly heard, and we'll
11:16 25 hear more evidence, that Federal Justice officials



1 pursued the DNA testing up until July of 1997 when
2 DNA results were obtained; is that correct?

3 A Yes.

4 Q And was Saskatchewan Justice then prepared to rely
11:16 5 upon Federal Justice to I guess control the
6 process of getting the Gail Miller exhibits
7 checked for DNA?

8 A Yes.

9 Q And what was your understanding, and again you may
11:16 10 have already answered this by way of the
11 undertaking, what was your understanding as to why
12 Federal Justice officials would be involved in
13 this matter after the conclusion of the Supreme
14 Court reference; in other words, why would they be
11:16 15 involved or interested in pursuing the testing of
16 these exhibits in light of the conclusion of the
17 reference case and the fact that the minister, in
18 April of 1992, concluded the 690 application by
19 granting a remedy?

11:17 20 A Well, part of it was the undertaking made to the
21 Chief Justice of the Supreme Court, but I think
22 part of it was that they were concerned that if
23 there was some testing that could be done on them,
24 it should be done, and that would provide whatever
11:17 25 certainty it could provide.



1 Q Just give me a moment here. Do you recall, Mr.
2 Brown, what was the position taken generally by
3 Larry Fisher in the proceedings as far as they
4 affected him, or where did you see --

11:18 5 A Yeah, Larry Fisher's view of the evidence against
6 him pretty much paralleled ours, that it did not
7 provide any kind of case, and as I recall, even
8 the Chief Justice wasn't able to sweat a
9 confession out of him.

11:19 10 Q And are you referring to -- that was Chief Justice
11 Lamer's questioning of him?

12 A Yes. *Mano a mano* I think it was.

13 Q If we can go to 208467, and this is from your oral
14 submissions to the court, I think this is after
11:19 15 Mr. Wolch has presented his argument, and you are
16 talking here, the memo is the Mackie summary, you
17 say:

18 "The memo that my learned
19 friend refers to and that he, indeed,
11:19 20 has produced in his new set of
21 materials, with the greatest of respect,
22 does not set itself up as some sort of
23 sinister masterplan to, in effect, frame
24 an innocent man. If you look at what
11:20 25 the police knew at that point from



1 having talked to Albert Cadrain, from
2 having talked to David Milgaard, from
3 having seen the scene and found the
4 articles around it, everything in there
11:20 5 is a perfectly reasonable statement of
6 either fact or inference that could be
7 drawn from the known facts."

8 And to the next page:

9 "Finally, you will note, my
11:20 10 lords and my lady, that that memorandum
11 ends with the police saying they want to
12 get at the truth. That is what Eddy
13 Karst said when he testified before you.
14 That is what Art Roberts said when he
11:20 15 testified before you.

16 I note that despite the
17 fact that we had found one other police,
18 Charles Short, and had him subpoenaed,
19 my learned friend did not press to have
11:20 20 him brought her in spite of his
21 condition or have him testify some other
22 way before this Court. He, in effect,
23 dropped that line of suggestion.

24 It is our submission that
11:20 25 at the end of the day there is nothing



1 to indicate that the police went out of
2 their way to frame David Milgaard or
3 even innocently pursued a false theory.
4 The only evidence they had, based on
11:20 5 what Mr. Cadrain had said, what Mr.
6 Milgaard had said, was that David
7 Milgaard was the most likely suspect."

8 And again, this would be your submission relating
9 to -- is it fair to conclude from that, Mr.
11:21 10 Brown, that this issue about framing David
11 Milgaard in reliance in part upon the Mackie
12 summary was an issue that was put before the
13 Supreme Court and addressed by you?

14 A Yes.

11:21 15 Q And if the court -- I think you maybe told us that
16 in your view, if that allegation were true, in
17 your view that would amount to miscarriage of
18 justice and be a basis to provide a remedy?

19 A Oh, if there was evidence to establish that they
11:21 20 had framed David Milgaard, absolutely.

21 Q And what significance, if any, do you place on the
22 fact that this argument was raised, and we've seen
23 it on a couple of occasions, but I don't believe
24 it was specifically dealt with in the written
11:21 25 decision of the Supreme Court.



1 A Well, there was a lot of evidence they didn't
2 specifically deal with in their written decision,
3 but the issue, that document was raised, the
4 suggestion was put to them by Mr. Wolch that this
11:22 5 amounted to some sort of script or a conspiracy to
6 frame David Milgaard and when they said they found
7 no evidence of police misconduct, in my view
8 that's an implicit rejection of that argument, or
9 the suggestion that that document has some sort of
11:22 10 sinister value.

11 Q And what about the comment, and we'll get to the
12 judgment, about no evidence or probative evidence
13 of Crown misconduct?

14 A Well, again, I mean, there was -- the allegation
11:22 15 being made was that the Crown had, number one,
16 sinisterly failed to disclose information to
17 Justice Tallis that he could have used at trial
18 and then sinisterly covered up after the Milgaard
19 conviction had been obtained and Larry Fisher was
11:22 20 known, and I take that suggestion again to be a
21 rejection of those arguments, they found no
22 evidence of that.

23 Q And I guess the question, though, that came up
24 later, was the one suggestion that the reason they
11:23 25 did -- the reason they said there was no probative



1 evidence of that is because they didn't -- number
2 one, they said the court directed the parties that
3 they wouldn't consider those issues, and two,
4 there was no evidence before the court on those
11:23 5 issues. Do you take issue with those suggestions?

6 A Well, first of all, I do not accept the suggestion
7 that the court prevented anyone from putting
8 evidence of that before it. Those were live
9 issues that went to the minister when she was
11:23 10 asked to do her job under 690, those were issues
11 that the Supreme Court was prepared to hear about.
12 They were not interested in listening to sort of
13 how police forces go about doing things generally,
14 they wanted evidence that was specific to this
11:23 15 case, and had there been evidence of those two
16 things, it could have been produced before the
17 Supreme Court. There was no attempt made by
18 anyone to stop them from doing that.

19 Q Okay. And I guess the second question then is was
11:24 20 there some evidence and were the allegations
21 before the court with respect to the Mackie
22 summary, the frame and cover-up and the 1970, '71
23 misconduct or alleged misconduct with respect to
24 the manner in which Mr. Karst obtained the
11:24 25 confessions from Fisher, that Mr. Caldwell, Mr.



1 Kujawa and others dealt with the Fisher and
2 Milgaard matters once they became aware of the
3 Fisher rapes?

4 A There was evidence before the court -- well, first
11:24 5 of all, with respect to the police misconduct
6 allegations, there was evidence before the court.
7 That's why Eddie Karst was called, that's why Art
8 Roberts was called, Mr. Wolch was waving the
9 Mackie summary around saying that this was
11:24 10 evidence of misconduct, so yes, that issue was
11 explored and evidence was called on it.

12 With respect to the issue of
13 Crown cover-up and failure to disclose, Mr. Wolch
14 raised those issues and we took no argument with
11:25 15 the fact that disclosure was not made with respect
16 to certain items. We dealt with that issue on the
17 basis of the fact that it didn't make any
18 difference, so it was raised. There was the
19 opportunity to hear from Mr. Caldwell and, if he
11:25 20 had wanted to, Mr. Kujawa, but there was no desire
21 on the part of Mr. Wolch and Mr. Asper to do that.

22 Q If we can go to 229673, please, go to the side
23 here, you can't see this very well, this is an
24 April 7th newspaper article, April 6th was the
11:26 25 argument, and it says:



1 "Murray Brown told reporters
2 the brutal sex-slaying of Gail Miller
3 more than 22 years ago would never have
4 come before the high court if not for
11:26 5 the political pressure on Justice
6 Minister Kim Campbell.

7 He said that pressure
8 forced the minister to send the case to
9 a five judge panel even though she was
11:26 10 convinced the original jury had
11 delivered the proper verdict -- life
12 imprisonment for Milgaard.

13 "I suggest the hearing
14 process arose because of questions
11:26 15 raised about the minister, the integrity
16 of members of her department and the way
17 the investigation was handled.

18 The suggestion that there
19 was impropriety have turned out to be
11:26 20 unfounded.

21 Over three years, they have
22 gone out and turned over every stone."
23 Let me just pause there. Can you -- do you take
24 issue with what's reported in that column, or at
11:26 25 least attributed to you?



1 A Oh, I think it was the pressure created by the
2 news media campaign, particularly the one between
3 the dismissal of the first application and the
4 filing of the second one, that did push the
11:27 5 minister into doing that.

6 Q And your comment that after the hearing process
7 over three years they've gone out and turned over
8 every stone, can you comment, and you touched on
9 this earlier, after the completion of the Supreme
11:27 10 Court reference did what you learned at the
11 reference, what you heard by way of evidence cause
12 you to have any concerns with the issues that had
13 earlier been raised about the integrity of members
14 of her department and the way the investigation
11:27 15 was handled?

16 A No, nothing.

17 Q Go to 008879. This is the April 14th, 1992
18 judgment of the Supreme Court. If we can go to
19 page 008885, please. Is it fair to say that this
11:28 20 Supreme Court judgment was a significant piece of
21 information, for lack of a better word, that
22 guided Saskatchewan Justice's conduct from this
23 point on, a matter that was relied upon?

24 A Oh, absolutely. If they had found that there was
11:28 25 significant evidence implicating Larry Fisher,



1 then that investigation would have to be opened.

2 If they had said that there was evidence of Crown
3 misconduct and police misconduct, an investigation
4 into that would had to have been set up as well.

11:28 5 Q You had mentioned earlier that Saskatchewan
6 Justice desired that the reference be as broad as
7 possible so that I think all issues relating to
8 the alleged miscarriages of justice that had been
9 in the media and that had been made against police
11:29 10 and Crown and others would be dealt with; correct?
11 You told us that, that was your desire?

12 A That they would have the opportunity to bring
13 forward any evidence they had to suggest there was
14 Crown misconduct, police misconduct, witnesses
11:29 15 lied, anything at all.

16 Q And at the end of the process, what you
17 participated in, were you satisfied that that
18 opportunity had been provided to David Milgaard to
19 put forward anything he alleged that related to a
11:29 20 miscarriage of justice in the handling of his
21 case?

22 A Yes.

23 Q And was Saskatchewan Justice relying on the
24 decision then from the Supreme Court, whatever it
11:29 25 might be, to guide it in its future actions



1 relating to the various allegations?

2 A Yes.

3 Q The court cites out the four tests, I won't go
4 through that, the first paragraph says:

11:30 5 "It is appropriate to begin by stating
6 that in our view David Milgaard had the
7 benefit of a fair trial in January 1970.
8 We have not been presented with any
9 probative evidence that the police acted
11:30 10 improperly in the investigation of the
11 robbery, sexual assault and murder of
12 Gail Miller or in their interviews with
13 any of the witnesses. Nor has evidence
14 been presented that there was inadequate
11:30 15 disclosure in accordance with the
16 practice prevailing at the time.
17 Milgaard was represented by able and
18 experienced counsel. No error in law or
19 procedure has been established. At the
11:30 20 conclusion of the first trial, there was
21 ample evidence upon which the jury,
22 which had been properly instructed,
23 could return a verdict of guilty."

24 If we can just go back to the previous page.

11:30 25 What was the significance of this first sentence,



1 about that in the view of the Supreme Court of
2 Canada, David Milgaard had the benefit of a fair
3 trial?

4 A Well, when you look at what follows in the
11:31 5 paragraph, they start with the conclusion that the
6 trial was fair and it was fair because there was
7 no evidence of police misconduct, no evidence of
8 failure to disclose in accordance with the
9 practice prevailing at the time, he was
11:31 10 represented by capable counsel, etcetera.
11 Basically what they are saying is that the
12 conviction was fair.

13 Q I want to deal with the second sentence:

14 "We have not been presented with any
11:31 15 probative evidence that the police acted
16 improperly in the investigation of the
17 robbery, sexual assault and murder of
18 Gail Miller or in their interviews with
19 any of the witnesses."

11:31 20 And you are aware that later some took the view
21 that this would -- we have not been presented
22 with any probative evidence because David
23 Milgaard's counsel was told by the court that
24 they could not call evidence.

11:31 25 A I'm aware that investigation was made, but with



1 the greatest of respect to Mr. Wolch's statements,
2 it's just not true.

3 Q So there seems to be two parts here, one about the
4 investigation, and two, in their interviews with
11:32 5 any of the witnesses, and again, you've touched on
6 this earlier, that -- and I think you told us, and
7 please correct me if I'm wrong, that the Supreme
8 Court did have evidence from Wilson, John, Cadrain
9 and David Milgaard about their interviews with the
11:32 10 police and from Inspector Roberts and Detective
11 Karst; is that correct?

12 A That's correct.

13 Q In addition to documentary evidence in the way of
14 police reports and other statements I take it?

11:32 15 A Yes.

16 Q And in your view, then, were the manner in which
17 the Saskatoon City Police interviewed Wilson,
18 John, Cadrain and Milgaard and investigated the
19 Gail Miller death matters of which there was
11:32 20 evidence before the Supreme Court and which they
21 were asked to consider in reaching this
22 conclusion?

23 A Yes, that's correct.

24 Q It says:

11:33 25 "Nor has evidence been presented that



1 there was inadequate disclosure in
2 accordance with the practice prevailing
3 at the time."

4 What was your understanding about this ruling
11:33 5 and, in particular, whether the court was
6 addressing disclosure in the trial setting and
7 disclosure in 1970 and '71 when the Larry Fisher
8 information came to light?

9 A Well, I took that to be a broad statement covering
11:33 10 everything, that it dealt with the issues of
11 disclosure of information at trial and disclosure
12 of the information after 1971.

13 Q Was the issue -- was the following issue, in your
14 view, before the court; namely, whether the police
11:33 15 and/or Crown should have disclosed to David
16 Milgaard's counsel the information they learned
17 starting in October, 1970 about Larry Fisher's
18 involvement in the Saskatoon rapes and the
19 Winnipeg rapes and his conviction in December of
11:34 20 1971, is it your view that that, the issue of
21 whether or not that should have been disclosed was
22 an issue that was considered by the Supreme Court
23 in deciding whether or not there was a miscarriage
24 of justice?

11:34 25 A Yes, that was one of the disclosure issues. The



1 other one was of course the trial information.

2 Q And did you take this statement, and the rest of
3 the judgment, I'll go through it with you, as
4 being the Supreme Court of Canada concluding that
11:34 5 there was no breach of any disclosure requirement
6 in 1970 and '71 by the Crown in not providing the
7 '70, '71 Larry Fisher information to David
8 Milgaard?

9 A Yes. If they had wanted to separate the trial
11:34 10 disclosure from the disclosure following the
11 Fisher convictions, they are perfectly capable of
12 doing that and they chose not to. I read that
13 then as meaning that they were satisfied with the
14 statement they made, that based on the practice
11:35 15 prevailing at the time, there was no error in the
16 disclosure.

17 Q And what if the Supreme Court had concluded that
18 there was, or that the Crown should have
19 disclosed, that in 1970 or 1971 the Crown should
11:35 20 have disclosed to Mr. Milgaard the information
21 that they became aware of relating to Larry
22 Fisher's confessions to the Saskatoon and Winnipeg
23 rapes; how would you have reacted to that
24 statement in the judgement?

11:35 25 A Well that would, that would have provided David



1 Milgaard with some argument that he was entitled
2 to some kind of remedy beyond simply being
3 released from custody, because at that point you
4 then have, if not error or misconduct, you at
11:35 5 least have error by the prosecutor.

6 Q And would that be a miscarriage of justice, then,
7 in your view; is that --

8 A Well, I -- I don't know. I suppose it depends on
9 what view you take of that. If the Supreme Court
11:36 10 had said that this was an error, that seems to me
11 to amount to a suggestion that there's been a
12 miscarriage, that this should have been provided
13 and it could have been useful.

14 Q And we'll talk about that a bit later. The -- and
11:36 15 I think you have taken the view that the Supreme
16 Court did not find that there had been a
17 miscarriage of justice but, rather, that if Mr.
18 Milgaard was not given an opportunity to have the
19 conviction set aside and have a new trial, there
11:36 20 would be a miscarriage of justice; is that
21 correct?

22 A Well, yes. The standards that -- for disclosure
23 had changed dramatically. I believe the year that
24 we're -- the 1991 I think, or 1992 when
11:37 25 *Stinchcombe* came out, I don't remember which, but



1 yes, there had just been sort of an earthquake
2 kind of change in the way that kind of thing was
3 handled, something that didn't exist back in
4 1960s, or even in the 1970s. When I started, I
11:37 5 frequently got into trouble with the RCMP for
6 letting people, defence counsel, read their
7 reports.

8 Q So then as far as the statement about, I guess
9 taking two things, one is this statement there has
11:37 10 been no evidence:

11 "Nor has evidence been presented that
12 there was inadequate disclosure in
13 accordance with the practice prevailing
14 at the time."

11:37 15 I take it there was evidence, and the record
16 reflects this, before the Court about Larry
17 Fisher's 1970 confessions to Detective Karst, I
18 think he was asked about that and Mr. Karst was;
19 correct?

11:37 20 A Yes.

21 Q And, as well, the follow-up, at least in the
22 evidentiary record, about his disposition in 1971;
23 that was before the Court, correct?

24 A Yes.

11:38 25 Q And as far as Mr. Caldwell's performance at the



1 trial then, or what -- Mr. Caldwell's performance
2 at the trial and through to the appeals -- I'm
3 sorry, let's start with the trial, his performance
4 at the trial; what was your understanding of what
11:38 5 the Court was saying here about his conduct as far
6 as disclosure was concerned?

7 A Well they were suggesting that he had not
8 improperly failed to disclose information to
9 Justice Tallis, that the practice prevailing at
11:38 10 the time was observed, at the very least, because
11 I believe the evidence was Justice Tallis knew
12 most of the statements of the witnesses.

13 Q Yeah. If the Supreme Court would have concluded
14 that, when Larry Fisher came to light in 1970,
11:39 15 that the police and/or Crown officials linked him
16 to the Gail Miller murder and took steps to
17 conceal that information or took steps
18 deliberately not to disclose it to David
19 Milgaard --

11:39 20 A It is unimaginable that they would not have
21 commented on that specifically.

22 Q And the fact that they did not comment on that
23 allegation, did you take that as being that that
24 was included in:

11:39 25 "Nor has evidence been presented that



1 there was inadequate disclosure in
2 accordance with the practice prevailing
3 at the time?"

4 A Yes.

11:39 5 Q So that -- so you took it to be -- maybe
6 'vindication' is the wrong word -- did you take
7 this judgement to be, based on your involvement in
8 the process, a conclusion by the Supreme Court of
9 Canada that the allegation that the police, in
11:40 10 October of 1970 and onward, became aware of Larry
11 Fisher, aware that he was the perpetrator of the
12 Gail Miller murder, and took steps to cover up
13 that information?

14 A I took that to mean that they found no such
11:40 15 support in the evidence for that kind of --

16 Q But did you take the judgement to be a
17 determination of that issue? In other words, in
18 the eyes -- you mentioned earlier that if there
19 had been in the judgement that there was police
11:40 20 misconduct, you would have done something with it;
21 correct?

22 A Yes. But let me point out that the way I read
23 that as saying. That judgement is basically
24 saying "Mr. Milgaard, you have not produced any
11:40 25 evidence of this", not that there isn't any



1 evidence or that it couldn't have happened, it's a
2 statement that "you have not met the burden of
3 proof on you to establish these allegations."

4 Q Okay. And I guess my question relates to this
11:41 5 fact; that there was some evidence before the
6 Court on some of these issues, and I suppose --
7 and we're going to get into this in later letters
8 -- I think Mr. Wolch took the position, after,
9 that the Court didn't deal with the frame and
11:41 10 coverup argument because we didn't put that
11 evidence forward, and I think your position was,
12 well, they did deal with it because (a) you did
13 put some evidence forward and the Court didn't buy
14 it; and (b) you didn't have any other evidence;
11:41 15 does that character --

16 A Well the frame and coverup comes after Larry
17 Fisher is discovered as the perpetrator of the
18 four Saskatoon rapes. Umm, the argument was made
19 that at that point the information should have
11:41 20 presented -- been presented to David Milgaard or
21 his counsel, and that that was part of the failure
22 to disclose. Now I don't know that they argued
23 specifically the frame and coverup, because they
24 had no evidence of that, their best argument was
11:42 25 that this was an error that should have -- and it



1 should have been disclosed.

2 **Q** And I guess I'm trying to understand, Mr. Brown,
3 that after the judgement, in your view, were there
4 still some remaining issues relating to Crown and
11:42 5 police misconduct that had previously been alleged
6 but were not decided by the Supreme Court in the
7 reference?

8 **A** Well there were all kinds of allegations that, if
9 you go back and look at their news media campaign
11:42 10 from the very beginning there were all kinds of
11 allegations that were still out there that weren't
12 addressed in the Supreme Court. And the reason
13 for that, I expect, is that they were in no
14 position to bring evidence with respect to them.

11:42 15 My position, and what I told
16 my minister at that point, was they were given a
17 full opportunity to bring all of their concerns
18 before the Court, they appeared to have taken
19 advantage of that, and after hearing all of their
11:43 20 evidence and looking at all of the material they
21 presented the Court was satisfied that there was
22 no failure, or no errors in disclosure as per the
23 practice at that time, no evidence presented with
24 respect to impropriety by the Saskatoon Police
11:43 25 Service in investigating it.



1 Q Is it fair to put it this way; to the extent that
2 there is evidence on the record before the Supreme
3 Court, and to the extent that the issues were
4 raised in either written or oral submissions
11:43 5 before the Court, is it fair to say that that
6 might be an indicator of what was and wasn't
7 decided by the Supreme Court on the issue of Crown
8 misconduct and police misconduct, in your view?

9 A Well, no, my -- my view would be that they put
11:44 10 everything they had before the Court one way or
11 another, --

12 Q Okay.

13 A -- either in written form or in evidence. The
14 Court, I'm satisfied -- I have no reason to
11:44 15 believe the Court didn't consider all of it --

16 Q Okay.

17 A -- and I have no reason to believe that they were
18 misstating their position when they said that they
19 find no support for these things.

11:44 20 Q I'll maybe revisit this when we get into some
21 later exchanges of letters that you have. The,
22 just again on this comment about the interviews
23 with witnesses and inadequate disclosure; to what
24 extent did you view these conclusions as dealing
11:44 25 with the allegations relating to the manner in



1 which the police and Crown dealt with the motel
2 room witnesses?

3 A Well I mean, again, there were allegations that
4 some of the evidence of persons talked to who were
11:45 5 at the motel room was not disclosed to Justice
6 Tallis. Again, the Supreme Court indicates that
7 disclosure with respect to anything relating to
8 the *Milgaard* case was appropriate for the time.

9 Q If we can go to the next page. I take it, as
11:45 10 well, the Court says:

11 "Milgaard was represented by able and
12 experienced counsel."

13 Was that an issue, in your view, that was being
14 presented to the Court, that Mr. Tallis'
11:45 15 representation of Mr. Milgaard may, in some way,
16 have been part of a miscarriage of justice?

17 A Well, I don't recall whether David Milgaard made
18 that allegation in the Supreme Court, but
19 certainly before the Supreme Court reference there
11:46 20 was a lot of media statements with respect to the
21 fact that he was a Legal Aid counsel and really
22 hadn't taken much interest in this case.

23 Q And what about the, in his evidence, the chicken
24 soup/heater fix issue?

11:46 25 A Well, yes, there was the suggestion by David



1 Milgaard that he had told Justice Tallis about
2 this and that Justice Tallis hadn't followed it
3 up.

4 Q And if that, in fact, had been true, then would
11:46 5 that be something that would give rise, in other
6 words if --

7 A Well, if the Supreme Court had accepted that story
8 and accepted the allegation that Justice Tallis
9 ignored it, yes, that's -- that would be something
11:46 10 that would be serious because, as I say, that,
11 that would be a silver-bullet alibi.

12 Q The next paragraph says:

13 "However, fresh evidence has
14 been presented to us. Ronald Wilson, a
11:47 15 key witness at the trial, has recanted
16 part of his testimony. Additional
17 evidence has been presented with respect
18 to the alleged motel room confession.
19 More importantly, there was evidence led
11:47 20 as to sexual assaults committed by Larry
21 Fisher which came to light in October
22 1970, when Fisher made a confession."

23 And let's talk, first, about the Ron Wilson
24 information as being fresh evidence; what did you
11:47 25 make of that statement in light of the contempt



1 proceedings?

2 A Well my view was that the issue that I had
3 discussed with Justice Sopinka, that since he's
4 incredible now can you look at him being or can
11:47 5 you consider him as being incredible 20 some years
6 earlier, I took that to mean that Justice
7 Sopinka's view may have had some weight when they
8 were looking at the decision --

9 Q So, in other words, --

11:48 10 A -- because --

11 Q Oh, sorry?

12 A -- because, if you simply take Ron Wilson's
13 evidence in the Supreme Court, it establishes
14 nothing.

11:48 15 Q And so did you take that as being the fact that a
16 person who gave pivotal evidence at the original
17 trial is now recanting, and even though his
18 recantation may not be credible, that fact alone
19 might be fresh evidence that might affect --

11:48 20 A Yes, I -- that seemed to be the view that Justice
21 Sopinka had.

22 Q And then, secondly:

23 "Additional evidence has been presented
24 with respect to the alleged motel room
11:48 25 confession."



1 And what was your understanding of that?

2 A Well I found that quite curious because, frankly,
3 we had pretty much resolved the fact that the
4 motel room incident happened, Deborah Hall says
11:48 5 she thought it was a joke, others said she
6 didn't --

7 Q Would that --

8 A -- or they didn't.

9 Q -- perhaps be the additional evidence, perhaps the
11:49 10 fact that some witnesses viewed it as a joke, --

11 A Yes.

12 Q -- as opposed --

13 A I suspect that was the case.

14 Q And then:

11:49 15 "More importantly, there was evidence
16 led as to sexual assaults committed by
17 Larry Fisher which came to light in
18 October 1970, when Fisher made a
19 confession."

11:49 20 Now I think much was made later about this
21 comment:

22 "... which came to light in October 1970
23 ..."

24 You recall that being referred to by Mr. Wolch in
11:49 25 the media and his correspondence with you about



1 signifying something, the fact that the Court was
2 saying it came to light and was known?

3 A Well, I mean, that's -- that's certainly not new.
4 I mean everyone knew it came to light in October
11:49 5 of '70 when Larry Fisher, I believe, was arrested
6 in Winnipeg. The fact that they put it in that
7 paragraph, I think that whole sentence suggests to
8 you what they found was really the significant
9 aspect of the application, and that is that the
11:50 10 Larry Fisher rapes, or those four rapes, suddenly
11 became attached to someone who lived at the same
12 place that David Milgaard was visiting.

13 Q And the Court says:

14 "In our view, this evidence,
11:50 15 together with other evidence we have
16 heard, constitutes credible evidence
17 that could reasonably be expected to
18 have affected the verdict of the jury
19 considering the guilt or innocence of
11:50 20 David Milgaard. Our conclusion in this
21 respect is not to be taken as a finding
22 of guilt against Fisher, nor indeed that
23 the evidence would justify charging him
24 with the murder of Gail Miller."

11:50 25 And your comment on that paragraph?



1 A Well, I obviously take a somewhat different view
2 of the significance of the evidence, I don't
3 believe it would reasonably be expected to have
4 affected the verdict.

11:51 5 But I go back to what I said
6 earlier. When the tests came down and the options
7 were set out, that last option seemed to me to
8 indicate that the Supreme Court would likely be
9 looking for some way to do something for David
11:51 10 Milgaard, and this was the hook they could use
11 and, really, the only hook they could use.

12 Q And this comment that, indeed, that evidence:

13 "Nor ... that the evidence would justify
14 charging him with the murder of Gail
11:51 15 Miller.";
16 any significance with that comment, in your view?

17 A Well, they got that part right.

18 Q If we can scroll down to the options, number one:

19 "As to the first, we are not
11:51 20 satisfied beyond a reasonable doubt that
21 David Milgaard is innocent of the murder
22 of Gail Miller."

23 Next page:

24 "As to the second, we are not
11:51 25 satisfied, on the basis of the judicial



1 record, the Reference case and the
2 further evidence heard on this
3 Reference, on a preponderance of all the
4 evidence, that David Milgaard is
11:52 5 innocent of that murder."

6 How did you interpret that ruling, what was your
7 view of that?

8 A Well, I mean, the first one basically says they
9 didn't believe what David Milgaard said because,
11:52 10 of course, if they had believed him they would
11 have found him innocent.

12 The second one says that not
13 only don't they believe him but, on the basis of
14 the rest of the evidence they heard, they are not
11:52 15 satisfied that he has established he was innocent.

16 Q Let me just back up. If the Court would have
17 believed David Milgaard when he said "I didn't
18 kill Gail Miller", in your view that would have
19 met the high burden of proof beyond a reasonable
11:52 20 doubt?

21 A Yes.

22 Q On the second test -- and so you're saying the
23 reason they didn't is because they didn't believe
24 him when he said he didn't kill Gail Miller?

11:52 25 A Yes.



1 Q And on the second test, that:

2 "... on a preponderance of all the
3 evidence ...",

4 I think that's also been characterized as 'more
11:52 5 likely than not' or 'probable'; is that a fair
6 way to --

7 A Yes, yeah.

8 Q And so that on the basis of all the evidence,
9 including David Milgaard's evidence, the Court did
11:53 10 not conclude that he was innocent?

11 A That he was probably innocent, yes.

12 Q Probably innocent. If the Court, in this
13 judgement, had concluded either that David
14 Milgaard had proved beyond a reasonable doubt that
11:53 15 he was innocent, or that he was probably innocent,
16 can you tell me what Saskatchewan Justice would
17 likely have done in that respect?

18 A Well that, if the Supreme Court says that somebody
19 at the very least has proved they are probably
11:53 20 innocent, that fires open the investigation like
21 that.

22 Q Into the death of Gail Miller?

23 A Into the death of Gail Miller. And it puts the
24 issue of the compensation claim, that we knew was
11:53 25 going to follow, clearly on the front burner.



1 Q And in 1997, when the DNA came out, I think the
2 Minister of Justice acknowledged a wrongful
3 conviction and indicated that compensation would
4 be negotiated. If the Supreme Court of Canada
11:54 5 would have concluded either that David Milgaard
6 had proven beyond a reasonable doubt that he was
7 innocent, or had established that he was probably
8 innocent, can you tell us whether Saskatchewan
9 Justice would have acknowledged a wrongful
11:54 10 conviction at that point and commenced
11 compensation discussions?

12 A Well, that would have been my advice to the
13 minister, and I'm assuming for the sake of that
14 argument that he would have followed that, yes.

11:54 15 Q And why would that have been your advice?

16 A Because in my view, if he can establish he's
17 probably innocent, we're at a point where proof
18 beyond a reasonable doubt would have been
19 impossible at trial.

11:54 20 Q And would that have been sufficient, in your view,
21 to establish a wrongful conviction on the --
22 against David Milgaard?

23 A In my view it would have, yes.

24 Q And would that have provided the basis for the
11:55 25 Government of Saskatchewan to negotiate



1 compensation to Mr. Milgaard for the wrongful
2 conviction?

3 A Yes.

4 Q In light of the fact that the Supreme Court of
5 Canada did not make either of those findings, what
6 significance did that have to Saskatchewan Justice
7 in considering the question of whether or not
8 David Milgaard had been wrongfully convicted, and
9 whether or not he was deserved of compensation?

10 A Well, the issue of compensation would only come up
11 if there was some indication that something wrong
12 had happened, if there was no finding that
13 something wrong had happened then there wasn't
14 going to be -- there wasn't likely going to be
15 discussions about compensation, and it -- for my
16 part, I certainly wouldn't have been recommending
17 that the government enter into those kinds of
18 discussions.

19 Q And when you talk about "wrong", if the Court said
20 that he is innocent, I take it would that
21 constitute a wrong?

22 A Well, yeah, if you're innocent and spend 22 years
23 in jail that's a good definition of "wrong".

24 Q So the "wrong" -- so your last answer, though, the
25 fact that the Court said "we don't find you



1 probably innocent", you said you would not
2 acknowledge a wrongful conviction and not look at
3 compensation because there was no wrong. And just
4 so that we're clear, you are not looking at -- you
11:56 5 were not limiting that to wrong conduct by the
6 part of the Crown or police but, rather, wrong in
7 the result?

8 A Well, no. If the Court had come to the conclusion
9 that looking at the evidence that exists, even now
11:56 10 for example with respect to the Wilson and Deborah
11 Hall thing, and said, you know, "even though we
12 don't find the police have done anything wrong,
13 David Milgaard is probably innocent", then we --
14 my advice to the minister would be that we
11:56 15 acknowledge the fact he was wrongly convicted and
16 we have to deal with it by way of compensation.

17 Q Right. And so the wrong is the fact that an
18 innocent person was --

19 A That he was convicted, --

11:57 20 Q Yes.

21 A -- yes, when he shouldn't have been.

22 Q This is probably an appropriate spot to break for
23 lunch.

24 *(Adjourned at 11:57 a.m.)*

01:31 25 *(Reconvened at 1:31 p.m.)*



1 BY MR. HODSON:

2 Q If you could call up the Supreme Court judgment,
3 008879, and go to page 887. Just before lunch we
4 finished dealing with that paragraph about
01:31 5 probable innocence. Next it says:

6 "Third, we are satisfied that there has
7 been new evidence placed before us which
8 is reasonably capable of belief and
9 which taken together with the evidence
01:31 10 adduced at trial could reasonably be
11 expected to have affected the verdict.
12 We will therefore be advising the
13 minister to quash the conviction and to
14 direct a new trial under s. 690(a) of
01:32 15 the *Criminal Code*. In light of this
16 decision, it would be inappropriate to
17 discuss the evidence in detail or to
18 comment upon the credibility of the
19 witnesses."

01:32 20 And the last point, I take it, Mr. Brown, was
21 that if this matter was going to go to a new
22 trial, that the court's comments on their
23 evidence might be prejudicial to a subsequent
24 trial, or how did you take that?

01:32 25 A Well, I mean, just generally when an appellate



1 court orders a new trial, it doesn't comment on
2 the evidence any more than is absolutely necessary
3 to substantiate their decision.

4 Q And then if we can scroll down, the court says:

01:32 5 "Nonetheless we will set out in brief
6 the basis for our recommendation to the
7 minister..."

8 And then it says:

9 "Without being exhaustive it will
01:32 10 suffice to observe that there is some
11 evidence which if accepted by a jury
12 could implicate Milgaard in the murder
13 of Gail Miller."

14 What was your reaction, or the significance of
01:33 15 this statement?

16 A Well, it was simply that they thought there was
17 still a sufficient case left, that it could point
18 to -- that a jury could accept that it proved
19 David Milgaard was guilty.

01:33 20 Q And did you read anything into the fact that this
21 was included in the judgment?

22 A Well, other than it sort of stands alongside with
23 the notion that he hasn't demonstrated that he was
24 innocent, no.

01:33 25 Q And then next it goes on to talk about the facts.



1 Did you take this recitation as being the court's
2 finding of the facts, or the skeleton facts?

3 A Yes.

4 Q And in particular they talk about the vehicle, or
01:34 5 sorry:

6 "The evidence of Nichol John and the
7 final version of the recantation of
8 Ronald Wilson indicates that in
9 Saskatoon, sometime before 7:00 a.m. on
01:34 10 that morning they stopped a woman
11 walking by their car to ask for
12 directions. Shortly after that, the car
13 became stuck, Wilson and Milgaard got
14 out of the car and walked away in
01:34 15 different directions to seek
16 assistance."

17 Now, on that point about getting stuck and
18 leaving the car, I think the evidence of Nichol
19 John, Ron Wilson and Mr. Justice Tallis was that
01:34 20 that's what had happened; correct?

21 A Yes, that remained as part of I think what was
22 legitimately left of the evidence we had from the
23 trial.

24 Q However, David Milgaard had testified that they
01:34 25 didn't get stuck and he didn't leave the car. Did



1 you read this conclusion or this statement in the
2 Supreme Court as dealing with that issue and
3 deciding against Mr. Milgaard on that factual
4 point?

01:35 5 A Well, yeah, I think it was another piece of
6 evidence to suggest that the Supreme Court wasn't
7 especially impressed by David's credibility.

8 Q Next page, the comment here:

9 "Without enumerating them fully, or
01:35 10 commenting on which should prevail, it
11 will suffice to observe that there were
12 a number of differences in the testimony
13 given by Milgaard and Justice Tallis on
14 this reference."

01:35 15 And I think you've told us that that was a
16 significant part of Saskatchewan Justice's
17 submission?

18 A Yes.

19 Q And then it goes on to recite what Mr. Tallis
01:35 20 testified and I think we've gone through that.

21 If we could go to the next
22 page, go down here:

23 "In addition there is the evidence of
24 the motel room incident which could be
01:36 25 taken as an admission of murder by



1 Milgaard, or as a joke made in very poor
2 taste, or as mere drug-induced
3 rambling."

4 And what's not in there is a suggestion that it
01:36 5 didn't happen.

6 A No. That's right, yes.

7 Q And so was it your understanding that the Supreme
8 Court had concluded that the motel room incident
9 did happen, and when I'm talking about incident,
01:36 10 that David Milgaard did in some form stab a pillow
11 and utter words confessing or admitting to killing
12 Gail Miller?

13 A Yes.

14 Q And the question was was it an admission of the
01:36 15 murder, a joke or a mere drug-induced rambling?

16 A That's right. How you characterized it was the
17 issue left.

18 Q The court says:

19 "While there is some evidence which
01:37 20 implicates Milgaard in the murder of
21 Gail Miller, the fresh evidence
22 presented to us, particularly as to the
23 locations and the pattern of the sexual
24 assaults committed by Fisher, could well
01:37 25 affect a jury's assessment of the guilt



1 or innocence of Milgaard. The continued
2 conviction of Milgaard would amount to a
3 miscarriage of justice if an opportunity
4 was not provided for a jury to consider
01:37 5 the fresh evidence."

6 Can you comment on the significance of the
7 language used by the court in describing the
8 miscarriage of justice?

9 A Well, I think they are making it clear that
01:37 10 consistent with their earlier view that there had
11 been no demonstration of police misconduct, Crown
12 misconduct, impropriety at the trial, there was no
13 miscarriage of justice then, but his continued
14 conviction at this point, without the opportunity
01:37 15 to present the Fisher evidence, would continue, or
16 would be a miscarriage.

17 Q And did you read this paragraph, and as part of
18 the whole judgment, as a statement by the Supreme
19 Court that there had not been a miscarriage of
01:38 20 justice established, there was not a miscarriage
21 of justice to that point?

22 A Yes, that's what the language suggests very
23 clearly.

24 Q Go to the next page, it says -- it talks about
01:38 25 setting aside the trial, or pardon me, setting



1 aside the conviction and directing a new trial:

2 "It would be open to the Attorney

3 General of Saskatchewan under the

4 *Criminal Code* to enter a stay if that

01:38 5 course were deemed appropriate in light

6 of all the circumstances."

7 What if anything did you make of that statement?

8 A Well, the Supreme Court does not direct Attorneys

9 General how to exercise their discretion usually.

01:38 10 However, it's always open to them via this sort of

11 a method to indicate where they think that

12 discretion should be exercised or how they think

13 it should be exercised, and I read that as being a

14 very broad hint to the Attorney General of

01:39 15 Saskatchewan that he should have stayed the

16 prosecution.

17 Q And on the basis that you found it unusual that

18 this type of comment would be made in the

19 judgment?

01:39 20 A Well, it is unusual. As I say, they don't usually

21 direct a minister of justice how to exercise

22 discretion.

23 Q I take it that if they had not made this comment,

24 it would be open to the Attorney General to enter

01:39 25 a stay if that course were deemed appropriate; in



1 other words, you didn't need the court to tell you
2 that to have that discretion?

3 A That's correct.

4 Q And is it your evidence then that this was a
01:39 5 message from the court to the Attorney General?

6 A Yes, that's my view.

7 Q And then:

8 "However, if a stay is not entered, a
9 new trial proceeds and a verdict of
01:40 10 guilty is returned, then we would
11 recommend that the Minister of Justice
12 consider granting a conditional pardon
13 to David Milgaard with respect to any
14 sentence imposed."

01:40 15 And what was the significance of that provision,
16 statement?

17 A Well, I think that's their fall-back position if
18 we didn't get the hint, ran a trial and got him
19 convicted, as might well have happened had he been
01:40 20 tried in Saskatoon, the Federal Minister was to
21 nullify the proceedings.

22 Q Okay. If we can go to 153889, this is an April
23 14th, 1992 memo to the deputy minister from public
24 prosecutions. If you can go to page 893, I think
01:40 25 page 5, Murray Brown, director of appeals, that



1 would have been --

2 A It would have been me, yeah.

3 Q Can you just walk through what -- actually, let's
4 go back to the first page and I'll go through
01:41 5 parts of this. At the bottom on *Milgaard's*
6 *Innocence*, it says:

7 "In their original statement
8 of the tests to be considered, the Court
9 indicated that it was open to David
01:41 10 Milgaard to establish a miscarriage of
11 justice if he could prove either beyond
12 a reasonable doubt or on a balance of
13 probabilities that he was innocent. The
14 Court specifically notes in its decision
01:41 15 that he has failed to do this. This
16 failure comes despite the fact that he
17 was allowed to the most incredible
18 latitude in calling "evidence" that no
19 trial court would every admit.

01:41 20 It should be noted here in
21 answer to any suggestion that Milgaard
22 needs a new trial to establish his
23 innocence, that he has now had three
24 opportunities to establish that
01:41 25 innocence: Once at trial, once in the



1 Court of Appeal and now in an
2 extraordinary proceeding before the
3 Supreme Court. On each occasion he has
4 failed to do so. In effect, he's failed
01:41 5 on three attempts to prove he is
6 innocent including, the chance to do so
7 using the Larry Fisher and Ron Wilson
8 fresh evidence. The justice system has
9 given Milgaard three chances to prove he
01:42 10 is innocent. If he wants another
11 opportunity, it should be left to him to
12 sue for wrongful imprisonment."

13 And would this have been your -- I take it this
14 document would have been your analysis of the
01:42 15 Supreme Court decision and what it meant to
16 Saskatchewan Justice?

17 A Yes, I would think so.

18 Q If we can just go back, sorry, to the first page,
19 on *Police Conduct*:

01:42 20 "The Court has held that
21 there was no evidence to suggest that
22 the police had acted improperly in
23 either their investigation or their
24 treatment of witnesses. This should put
01:42 25 to rest the spurious allegations that



1 the police coerced witnesses into lying.

2 There was simply no credible evidence to

3 even suggest that happened."

4 And again if, and I think you commented on this

01:42 5 earlier, if the court had concluded that there

6 was some misconduct, would that have prompted

7 Saskatchewan Justice to do something?

8 A Yes, absolutely.

9 Q And the fact that the court said there was no

01:43 10 evidence to suggest that the police had acted

11 improperly, did that, for Saskatchewan Justice's

12 purposes, put to rest those allegations that had

13 been made publicly and through the media and to

14 you?

01:43 15 A Yes.

16 Q Scroll down, *Conduct of The Crown*:

17 "The Court notes specifically

18 that Milgaard has had the benefit of a

19 fair trial and that there was ample

01:43 20 evidence the jury could rely on to

21 convict. It also notes that the

22 allegations that the Crown did not

23 properly disclose information in its

24 possession to the defence have not been

01:43 25 substantiated.



1 The Court notes that the
2 new evidence of Larry Fisher's
3 confessions made in October of 1970 is
4 relevant fresh evidence. However, the
01:43 5 Court does not say that the Crown made
6 any error in failing to revive the issue
7 of Milgaard's guilt after Larry Fisher
8 confessed to his sexual assaults. This
9 failure is of significance because this
01:43 10 was one of the major arguments put
11 forward by the Applicant."

12 Can you just comment on that last part, please?

13 A Well, certainly that was a huge part of the second
14 application they made, and indeed part of the
01:44 15 first one as well, that given that nobody was
16 informed of these Larry Fisher offences, it was an
17 error, if not a conspiracy, by the Government of
18 Saskatchewan officials to hide this from Mr.
19 Milgaard.

01:44 20 Q And did you view the Supreme Court judgment as
21 deciding in favour of the government on that
22 issue?

23 A Yes.

24 Q Go to the next page. This is, again, dealing with
01:44 25 David Milgaard's innocence. It says:



1 "In this regard there is also
2 one other point of note. If Milgaard's
3 evidence before the Court was accepted,
4 they would have been compelled to
01:44 5 declare he was innocent. The essence of
6 Milgaard's evidence was that he did not
7 kill Gail Miller. The fact they did not
8 find him innocent means they didn't
9 believe him when he said he didn't do
01:44 10 it. While that may seem like a small
11 point, in the public relations war that
12 will follow over the issue of
13 compensation, it'll be worth remembering
14 that the Supreme Court did not believe
01:45 15 David Milgaard's claim that he did not
16 kill Gail Miller's."

17 And what was the significance of that comment?

18 A Well we were anticipating that, given the way the
19 Supreme Court decision turned out, the Milgaard
01:45 20 camp were not going to be very happy with the
21 result. They weren't just after getting David
22 Milgaard out of jail, they were after
23 compensation, and this would make a compensation
24 claim impossible to pursue, given that the Supreme
01:45 25 Court didn't believe David, the Supreme Court



1 thought there was ample evidence to convict,
2 etcetera.

3 Q And so is it your view that the Supreme Court
4 judgement itself presented a roadblock to David
01:45 5 Milgaard advancing a claim for compensation for
6 wrongful conviction?

7 A Yes.

8 Q And that's because in order to get compensation,
9 he must establish wrongful conviction, which
01:46 10 requires probable innocence?

11 A Well, --

12 Q Proof?

13 A -- he has to establishing wrongful conviction, and
14 the Supreme Court decision said he wasn't
01:46 15 wrongfully convicted.

16 Q And I think I put this question to Mrs. Milgaard,
17 that on David Milgaard's position as far as
18 advancing a claim for wrongful conviction and
19 compensation, that his position in that regard was
01:46 20 better before the Supreme Court decision than
21 after; would you agree with that?

22 A Yes.

23 Q In addition to the compensation I think
24 Mrs. Milgaard, and perhaps others, identified
01:46 25 another important -- an issue that was important



1 to them, and that was clearing David Milgaard's
2 name, in other words the -- whether it's an
3 exoneration or declaration of innocence. Did you
4 understand that to be a concern, either standing
01:47 5 alone, or related to the compensation issue?

6 A Well, yes, they usually put the two together.

7 Q And as far as the, Mr. Milgaard's quest to get a
8 declaration of innocence or an exoneration, what
9 was your view as to what the Supreme Court
01:47 10 judgement did to that effort?

11 A Well, it basically creates the same problem. It
12 didn't say that it found he was wrongly convicted,
13 it didn't say that it thought he was innocent, and
14 the suggestion to us that we stay the proceedings
01:47 15 pretty much blocks his avenue towards sort of any
16 kind of exoneration, even the kind that might have
17 arisen from a not-guilty verdict.

18 Q You had talked earlier about the media campaign
19 and the effect it had on giving rise to the
01:48 20 Supreme Court reference. What was your
21 observation or your view as to what the Supreme
22 Court decision would do to efforts to get David
23 Milgaard's case and these issues in the media with
24 the view of getting public pressure on political
01:48 25 decision-makers to give favourable results?



1 A Well I -- this decision, it seems to me, pretty
2 much takes the steam out of their process. It
3 would have been very, very difficult for them, at
4 that point, to generate any kind of -- any kind of
01:48 5 traction for a media campaign to push the Minister
6 into something.

7 Q Why?

8 A Because you now have five judges in the Supreme
9 Court of Canada basically saying that most of the
01:49 10 allegations they made in their previous campaigns
11 have turned out to be unfounded, they do not find
12 David Milgaard to be innocent, they don't find him
13 to be probably innocent, there is still evidence
14 upon which he could have been, and could be,
01:49 15 convicted, and his conviction was fair, there was
16 no evidence of misconduct demonstrated to the
17 Court, and it would be very difficult for them, in
18 the face of that, to be able to produce the kind
19 of media campaign that they'd been able to
01:49 20 generate before.

21 Q And what about the fact that Larry Fisher
22 participated and testified in the Supreme Court
23 reference?

24 A Well, I'm not sure the fact that Larry Fisher
01:50 25 testified was all that significant, it was the



1 findings of the Supreme Court that were
2 significant.

3 Q Maybe I put that -- the fact that the Court had
4 the opportunity to hear Larry Fisher --

01:50 5 A Oh.

6 Q -- and then made it, made the decision it did in
7 light of hearing from Larry Fisher, and in hearing
8 the arguments about the similarity of the rapes,
9 etcetera?

01:50 10 A That's a nicety that's a little subtle, I think,
11 for the news media and the public.

12 Q As far as Miscarriage of Justice:

13 "In its advice to the

14 Minister, the Court notes that there has
01:50 15 been no miscarriage of justice up to
16 this point. Their concern in this
17 regard is expressed by saying that a
18 miscarriage will arise only if the
19 conviction stands without Milgaard being
01:50 20 given the opportunity to use this new
21 evidence in his defence. Obviously, if
22 the Federal Minister orders a new trial,
23 the old conviction is set aside and the
24 chance of a miscarriage occurring is
01:50 25 avoided. While that may seem like a



1 lawyer's slight of lip, that is exactly
2 the effect the Court seems to have
3 intended."

4 Any comment on that?

01:51 5 A Umm, no, I -- the Supreme Court, I think, chose
6 their words there fairly carefully, intending to
7 suggest that if the matter is dealt with by
8 staying it, then there will be no miscarriage of
9 justice if he's released and the matter stayed.

01:51 10 Q And then, as far as a New Trial:

11 "The Court's decision is in
12 effect, advice to both Ministers of
13 Justice involved in this matter. In
14 particular, it is apparent the Court is
01:51 15 of the view that we should stay to
16 matter and not run a second trial. Just
17 in case we missed that message or
18 ignored it, the Court goes on to
19 indicate that even if we do run a new
01:51 20 trial and get a conviction, the Federal
21 Minister should grant a pardon. Such
22 action by the Federal Minister of
23 Justice would effectively make the new
24 trial process a pointless waste of
01:52 25 scarce resources."



1 And on that point, what about the effect a new
2 trial process might have on David Milgaard, in
3 other words the opportunity to be found not
4 guilty, if that were the result?

01:52 5 A Well, except that the opportunity comes with the
6 opportunity to be found guilty as well. And as I
7 said, certainly based on the readings that we were
8 getting from Saskatoon, it's by no means clear, if
9 a trial had been held in this city, that he would
01:52 10 have been acquitted.

11 Q When you say "by readings in Saskatoon" what are
12 you referring to?

13 A The letters that we were getting from the people
14 in Saskatoon and what the political people were
01:52 15 coming back with from their constituents.

16 Q So if, if there had been a new trial, I suppose we
17 don't know what would have happened, either guilty
18 or not guilty, one of the two. You became aware
19 of Mr. Milgaard's desire to have a trial to be
01:53 20 found not guilty; correct?

21 A Yes.

22 Q And, if we explore that a bit, that would not be
23 -- or that -- would that be the equivalent of the
24 Supreme Court of Canada saying "you're innocent"
01:53 25 or "you're probably innocent"; would that be an



1 exoneration?

2 A Well, no. I mean, strictly speaking, our trials
3 do not result in a statement that 'you are
4 innocent', they result in a statement that 'the
01:53 5 Crown has not proved its allegations beyond a
6 reasonable doubt'.

7 Q But if David Milgaard had an opportunity to have
8 another trial and was found not guilty, would that
9 put him in a better position as far as the state
01:54 10 -- as far as his status? Let me back up. Would
11 it undo the original conviction or undo the effect
12 of it?

13 A Well, I'm not entirely sure about that. 20 some
14 years after the fact, you should be able to
01:54 15 generate some kind of doubt. I don't, you know, I
16 don't really think, at that stage, having him
17 acquitted would have changed the public's view of
18 the situation. It may have, it may have given him
19 some comfort, and I don't deny that, but I don't
01:54 20 think it would have changed the public's view of
21 the situation much.

22 Q When you say:

23 "Additionally, there are a
24 strong practical and moral arguments to
01:54 25 be made favouring a stay. Twenty-three



1 years after the fact, the chance of
2 being able to mount a successful
3 prosecution in this or any other case is
4 virtually non-existent. Memories fade
01:55 5 or are lost and previously good evidence
6 becomes so vague as to be meaningless.
7 Additionally, given the pre-trial
8 publicity this case has received, the
9 chance of picking an impartial jury is
01:55 10 pretty slim."

11 Can you comment on that?

12 A Well, at that point we felt it would certainly be
13 difficult to come up with a jury that hadn't heard
14 of the case, perhaps that has more to do with our
01:55 15 view that the universe spins around the things
16 that we're involved with.

17 As it turned out, when they
18 went to do the Larry Fisher prosecution in
19 Yorkton, they had no trouble whatsoever finding 12
01:55 20 juries (sic) who had never heard of the matter.

21 Q You go on to say:

22 "Morally, it would be
23 difficult to justify a new trial.
24 First, he has already served 23 years in
01:56 25 prison. Most of the people convicted of



1 murder since 1970, have served their
2 sentences and been released. Second, if
3 the offence were committed today, a 16
4 year old would be tried in youth court
01:56 5 and the maximum sentence available would
6 be 3 years. In this province the chance
7 of raising him to adult court even for
8 this type of offence would be slim. And
9 finally, since the Supreme Court has
01:56 10 just indicated that our best possible
11 outcome of a new trial should be
12 nullified by the Federal Minister, how
13 can we justify putting David Milgaard or
14 the witnesses through a trial process
01:56 15 again."

16 And anything to add to that?

17 A No. It seems to me that those were the public, or
18 the public interest reasons why you wouldn't run a
19 new trial, and quite frankly I expect that they
01:56 20 would have been things we would have had to
21 consider even if the Supreme Court hadn't said
22 that we should enter a stay. It just, at that
23 point, --

24 Q So --

01:56 25 A -- I mean aside from providing an opportunity for



1 David Milgaard to enter a defence there just
2 didn't seem to be, in my view, a compelling case
3 for running a new trial against him.

4 Q And what about that point of allowing David
01:57 5 Milgaard an opportunity to mount the defence,
6 would --

7 A Well that would be the only reason you would run a
8 new trial. And quite frankly, after the process
9 in the Supreme Court of Canada, to bring all of
01:57 10 those witnesses back and put them through all of
11 that process again, umm, no, I just -- I didn't
12 see the point of that, even if it was what David
13 Milgaard wanted.

14 Q And what about the notion of simply having a new
01:57 15 trial, and not presenting evidence, and having him
16 acquitted that way?

17 A And we would do that why?

18 Q Well, no, I'm asking you. I mean I think that
19 was, in other words, to give Mr. Milgaard the
01:57 20 opportunity of being found not guilty?

21 A He had that opportunity and he couldn't prove he
22 was innocent, he couldn't make a case for the
23 Supreme Court to suggest that they even thought he
24 was wrongly convicted.

01:58 25 Q So did that finding, then, was that -- the Supreme



1 Court finding on that point; was that something
2 that influenced your thinking in deciding to stay
3 the charge?

4 A It was our view that David Milgaard had been given
01:58 5 every opportunity to establish that he somehow
6 wasn't guilty of this offence, and he hadn't been
7 able to do that, in fact all he had succeeded in
8 doing was re-establishing that he likely was
9 guilty.

01:58 10 Q I'm scared to venture into the next area, Mr.
11 Brown.

12 "There is nothing left to
13 inquire into and therefore, no need to
14 hold such an inquiry. The Supreme Court
01:58 15 has covered everything very thoroughly.
16 As well, the result of the Court's
17 inquiry is set out in the decision.
18 They found no misconduct or impropriety
19 of any kind. Again, absent some
01:59 20 evidence that there is something that
21 needs looking into, an inquiry isn't
22 justified."

23 Comment on that?

24 A Well, again, my view then, my view now, was they
01:59 25 had every opportunity to present whatever evidence



1 they had to suggest that there had been misconduct
2 by the police, misconduct by the Crown,
3 incompetence by his defence counsel, some error
4 made at trial, etcetera, and they had not been
01:59 5 able to establish that. What would we inquire
6 into? What further would we inquire into, other
7 than say something like the systemic operations of
8 the Saskatoon police, their training and stuff
9 like that? Well, what would be the point of that
01:59 10 when we were dealing with something that happened
11 over 20 years ago.

12 Q Compensation. You say:

13 "In my view, the next battle
14 we face is the claim for compensation.
01:59 15 We know that Mr. Wolch and Mr. Asper
16 have a contingency fee agreement with
17 David Milgaard that entitles them to a
18 portion of any compensation. We also
19 know that the Milgaards were talking
02:00 20 about this during the hearing before the
21 Supreme Court."

22 What were you referring to there?

23 A Umm, I don't actually recall the, what they were
24 talking about before the Supreme Court, but I know
02:00 25 in discussions with Ron Fainstein, and I think



1 David Asper and Hersh Wolch in the room, the issue
2 of a contingency fee agreement came out, and that
3 may actually have been when they were talking
4 about how people were going to be compensated for
02:00 5 being involved in this.

6 Q In the Supreme Court reference?

7 A So I -- so we knew there was an issue of
8 compensation that they wanted to pursue.

9 Q And did you view the Supreme Court decision as
02:00 10 being a fairly effective answer to a compensation
11 claim?

12 A I think, yes, I think it was meant to be,
13 actually.

14 Q You say:

02:01 15 "Given Milgaard's failure to
16 establish even probable innocence there
17 is no reason to pay compensation for
18 wrongful conviction. No one has
19 established wrongful conviction. The
02:01 20 Donald Marshall precedent clearly does
21 not apply because Marshall was found to
22 be innocent by the Court that reviewed
23 his case at the request of the Federal
24 Minister. Indeed, the Supreme Court
02:01 25 notes that there was ample evidence to



1 establish that Milgaard was guilty and
2 that there is no evidence that anyone
3 has behaved in any improper fashion.
4 The Supreme Court has attempted to word
02:01 5 its decision to leave no basis for any
6 claim for compensation."

7 Is that the point you were referring to earlier?

8 A Yes.

9 Q And was that because they didn't find a
02:01 10 miscarriage of justice?

11 A Yes.

12 Q You go on to say:

13 "... if the decision is that no
14 compensation will be offered or paid, we
02:02 15 had better be prepared to vigorously and
16 publicly counter such a campaign. If we
17 do fail to do so and we'll end up losing
18 the public relations fight and be forced
19 to pay compensation of some amount. If
02:02 20 the decision is to resist any payment of
21 compensation, some thought has to be
22 given to how we are going to wage this
23 resistance campaign."

24 A Well, the issue of compensation wasn't for me to
02:02 25 decide, so I basically left that to the people



1 that were going to look at it. Ultimately --

2 Q Would that be -- sorry -- a political decision?

3 A Well it would be a political decision, plus it
4 would likely be a decision that was dealt with in
02:02 5 consultation with the civil is law division of the
6 department, and that's ultimately what happened.

7 Q So here, on the public campaign side, what was
8 your view, or what were you referring to here
9 about "vigorously and publicly countering a
02:03 10 campaign"?

11 A Well, I anticipated that you would get the same
12 kind of response to the disappointment from the
13 Supreme Court that we saw come from the
14 disappointment when the minister rejected their
02:03 15 first application, and that is that there was
16 going to be some kind of campaign from the
17 Milgaards with respect to attempting to use
18 political pressure to push the Attorney General of
19 Saskatchewan into offering some kind of
02:03 20 compensation, an inquiry, something like that, and
21 it was my view that if we didn't want to get
22 pushed into the same kind of problem that the
23 federal minister did, we'd better be ready to
24 answer any claims that were made.

02:03 25 Q And did you then attempt to do so?



1 A The Government of Saskatchewan took that advice,
2 yes.

3 Q And I'll have a chance to go through some of the
4 media articles and some of the letters. Is it
02:04 5 fair to say that there was a conscious decision,
6 then, by the Government of Saskatchewan, once the
7 Supreme Court decision came out, to be fairly
8 vocal in the media, to respond to what was being
9 said about the Supreme Court decision and said
02:04 10 about the administration of criminal justice?

11 A Well, that's ultimately what the minister did. I
12 prepared that, prepared a briefing note, and
13 somebody else took it and discussed it with the
14 minister, I don't recall spending much more than a
02:04 15 few minutes with him.

16 Q But you did, certainly we'll see from some of the
17 articles, you, I believe, took a fairly vocal
18 position on it; is that --

19 A Well, something else happened in the department
02:04 20 about that time, and that was we were basically
21 told that we were free to respond to allegations
22 by various parties in the news media. Prior to
23 that, the department's position had basically been
24 we didn't comment on these things in the news
02:05 25 media, that general policy changed and now we did.



1 Q Under Stay of Proceedings you say:

2 "The Supreme Court

3 effectively recommends we stay the

4 matter. Mr. Wolch has apparently

02:05 5 insisted that this be an unconditional

6 stay.

7 There is in law only one kind

8 of stay of prosecution the Minister or

9 his prosecutors can issue. There are no

02:05 10 conditions we can attach to it. The

11 effect of the stay in this case is to

12 temporarily put the prosecution on hold

13 subject to our lifting the stay and

14 recommencing the prosecution. If the

02:05 15 prosecution is not recommenced within

16 one year of the stay being entered, we

17 lose the right to recommence proceedings

18 on that charge and the prosecution is

19 permanently at an end.

02:05 20 With respect to Mr. Wolch's

21 demand, he is really demanding the

22 Minister stay proceedings and at the

23 same time issue a statement saying David

24 Milgaard is innocent. Obviously, Mr.

02:06 25 Wolch wants the Minister to set himself



1 up for the big claim for compensation.
2 Just as obviously, since Milgaard has
3 now had three chances to prove his
4 innocence before twelve jurors, three
02:06 5 Court of Appeal judges and five Supreme
6 Court judges and hasn't convinced even
7 one of these twenty people he is
8 innocent, there doesn't seem to be any
9 reason for the Minister to make the
02:06 10 proclamation Mr. Wolch wants."

11 And, again, that would have been your thinking at
12 the time?

13 A Yes.

14 Q And so, on the stay, I take it that Mr. Wolch was
02:06 15 asking that the stay be entered with some
16 acknowledgment of innocence; in other words not an
17 equivocal stay?

18 A That's right, yes.

19 Q And what were the reasons, then, other than -- I
02:06 20 take it the reasons are stated in this paragraph
21 as to why you wouldn't do that?

22 A Well, I mean, the minister could have said,
23 collateral with the stay being entered, that he
24 was of the view David Milgaard was innocent, or he
02:07 25 could have said that the government accepts that



1 he was innocent, but that wasn't our position.
2 Our position was the Supreme Court had indicated
3 the trial had been fair, it didn't find him
4 innocent, didn't find he was probably innocent,
02:07 5 felt that there was still evidence upon which he
6 could be successfully prosecuted, and it was not
7 the Government of Saskatchewan's view that David
8 Milgaard had, in any way, established he was
9 innocent.

02:07 10 Q Go down to Further Investigation. You write:

11 "There may be concerns raised
12 by the press with respect to further
13 investigations of Larry Fisher for the
14 murder or some of the original trial
02:07 15 witnesses for perjury.

16 In this regard we are open to
17 looking at any new evidence that may
18 come to light in the future, but as of
19 today there are no further
02:07 20 investigations planned or under way.
21 There is no evidence to corroborate that
22 Ron Wilson perjured himself at the
23 original trial and therefore no chance
24 of a perjury prosecution. The Court
02:08 25 indicated that it would deal with him



1 for contempt of Court for his
2 performance before them and therefore,
3 there is no reason for us to become
4 involved in dealing with Ron Wilson.
02:08 5 With respect to Larry Fisher, the Court
6 indicated there was no basis to charge
7 him, and to say the least, that is an
8 understatement."

9 Do I take it from this, these two paragraphs, Mr.
02:08 10 Brown, that the Saskatchewan Justice had
11 concluded, on April 14, 1992 after the Supreme
12 Court reference decision came out, that it would
13 not be re-opening the investigation into the
14 death of Gail Miller?

02:08 15 A That's correct, yes.

16 Q And for the reasons stated in this memo, and for
17 what you have, I think you alluded to some of them
18 earlier?

19 A Yes.

02:09 20 Q Now it's my understanding that if we can go to
21 0203 -- that's the wrong one -- sorry, 00442 --
22 sorry, 004442. And it's my understanding that,
23 just the mechanics of the charge and the
24 indictment, that after the Supreme Court rendered
02:09 25 its advice to the federal minister the federal



1 minister directed that the conviction be set
2 aside, which was done in Court of Queen's Bench,
3 and then you filed a new indictment because the
4 charging provision had changed since 1969, filed a
02:09 5 new indictment, then entered a stay of proceedings
6 --

7 A Yes.

8 Q -- simultaneously; is that correct?

9 A Yes, that's correct.

02:09 10 Q And can you just explain, why was that necessary
11 to go through, to actually file another indictment
12 and stay it?

13 A We thought that out of an abundance of caution, if
14 you were going to put the proceeding back before
02:10 15 the Court, it should be with respect to the proper
16 current charge number.

17 Q So, just so that I have this right, if the
18 conviction -- if the order setting aside the
19 conviction were made, then the original indictment
02:10 20 would be alive again; is that correct?

21 A Well that's, yes, that's, strictly speaking,
22 correct. But the original -- but that indictment
23 now charged an offence that no longer existed.

24 Q Right. And so then that was why a new indictment
02:10 25 was filed --



1 A Yes.

2 Q -- and then a stay entered? This, I think, is a
3 briefing note that you prepared. If we can go to
4 page -- the third page, would this be your
02:10 5 briefing note April 15th, 1992?

6 A Yes.

7 Q I think this duplicates some of the earlier memo
8 we went through. If we can go to the next page.
9 And presumably these would be for the Minister to
02:11 10 utilize, the briefing note?

11 A Yes.

12 Q And:

13 "After consulting with my
14 officials we have decided not to run a
02:11 15 new trial for several reasons. Instead
16 we have decided to enter a stay.

17 First, we accept the guidance
18 provided by the Supreme Court. Given
19 the time Mr. Milgaard has already served
02:11 20 and the fact that the Court has
21 indicated that even if he is convicted
22 again he should be pardoned, there is no
23 public interest to be served in running
24 this case again.

02:11 25 Further, in practical terms,



1 running a case with evidence that is
2 twenty three years old, would be
3 difficult. We would only attempt such a
4 prosecution in the most compelling of
02:11 5 cases and where there is something to be
6 gained by the effort. Here, when we
7 assess the public interest factors we
8 look at with respect to other
9 prosecutions, there is no reason to
02:12 10 undertake a new trial."

11 And would this decision, I think you told us
12 earlier the stay of the proceedings would be made
13 by the Director of Public Prosecutions?

14 A Yes.

02:12 15 Q And, at this time, was it Mr. Quinney who was the
16 director?

17 A That's correct.

18 Q And so would it have effectively been his decision
19 with your advice?

02:12 20 A Yes.

21 Q As opposed to the minister's decision?

22 A Yes.

23 Q Next page. Under Further Investigation it's
24 written:

02:12 25 "At this point we have no



1 plans to direct further investigations
2 into anything surrounding this case.

3 The Supreme Court has
4 indicated that there is no evidence of
02:12 5 wrong doing on the part of any police or
6 prosecution agency in this province.
7 Additionally, the Supreme Court has now
8 conducted an exhaustive inquiry and
9 there seems little left to inquire into.

02:12 10 In the future, should any
11 further information come forward bearing
12 on the guilt or innocence of any person
13 with respect to the murder of Gail
14 Miller, we will have that information
02:13 15 investigated. However, at this point
16 there is nothing left to investigate."

17 And, again, that -- these would have been your
18 words at the time?

19 A Yes.

02:13 20 Q On that investigation, is it fair to say that the
21 only significant area to further investigate would
22 have been this DNA testing we talked about
23 earlier?

24 A That was the only thing left, that I could see,
02:13 25 that needed further action.



1 Q And then on the Compensation you say:

2 "We in turn will want to
3 assess any claim against the background
4 of the past practice in this country and
02:13 5 the decision of the Supreme Court in
6 this case which in effect says that Mr.
7 Milgaard was not wrongfully convicted."

8 And 'the past practice in the country' was what
9 as far as compensating and wrongful conviction?

02:13 10 A Well we, with respect to the compensation issue,
11 there was an agreement between the Federal and
12 Provincial Governments with respect to
13 cost-sharing and with respect, I believe, to the
14 bases that we would be agreeing to pay
02:14 15 compensation, and that required that there be some
16 finding of a wrongful conviction.

17 COMMISSIONER MacCALLUM: Is this a
18 Federal-Provincial agreement or a
19 Federal-Saskatchewan agreement?

02:14 20 A A Federal-Provincial one.

21 BY MR. HODSON:

22 Q And was it your view that those criteria had not
23 been met by David Milgaard?

24 A Yes, yes.

02:14 25 Q Go to 020392, and this is a formal press release



1 or news release; is that correct?

2 A Ah, yes.

3 Q And this is where Minister Mitchell announces the
4 stay. If we can go to the next page, the quote
02:15 5 here says:

6 "The bottom line is that there was
7 nothing that was brought before the
8 Supreme Court which convince even one
9 justice that Mr. Milgaard is either
02:15 10 innocent or a victim of a miscarriage of
11 justice. Anyone who would suggest
12 otherwise has no understanding of what
13 the Supreme Court said."

14 And was there any significance to that language
02:15 15 being used by the minister in the press release?

16 A Well, I didn't write the press release and,
17 Candace, cover your ears, please, the
18 communications people sometimes get a little
19 carried away with their language and this -- the
02:16 20 minister wouldn't have written this, this would
21 have been written by somebody who -- it seems to
22 me at that point they had communications staff
23 attached to executive council and it would have
24 been written there. Now, I suspect if you look at
02:16 25 the language throughout the thing, you can see



1 where it has been lifted from, or parallels some
2 of the language in the briefing note, but as I
3 say, I didn't write that, so I don't know what
4 they were referring to.

02:16 5 **Q** If we can go to 328328, and this is an April 16th,
6 1992 CBC interview with Mr. Wolch, and we won't go
7 through all of these media articles, we've already
8 reviewed many of them, but would you have become
9 aware that following the Supreme Court decision
02:17 10 and the government's decision to stay the charges,
11 there was a fair bit of comment in the media by
12 Mr. Wolch and Mr. Asper and Mrs. Milgaard about
13 not only what the Supreme Court decision meant,
14 but about the government's decision and what it
02:17 15 was doing?

16 **A** Oh, yes, yes, as we anticipated there would be.

17 **Q** And here Mr. Wolch is asked:

18 "...what is your reaction to what you
19 heard this morning?"

02:17 20 And this is referring to Mr. Mitchell's press
21 conference. He says:

22 "Well it went a little beyond what we
23 expected. We assumed there'd be a stay
24 of proceedings, there is no case."

02:18 25 Question:



1 "How did it go beyond what you were
2 expecting?"

3 Answer:

4 "Well we knew there would be not the
02:18 5 clear cut vindication we wanted.
6 We knew there would be some equivocation
7 and whatever else and that's what
8 happened."

9 Reporter:

02:18 10 "Your client seems to be left in a state
11 of limbo. I mean his guilt or innocence
12 is still up in the air or is that how
13 you perceive it?"

14 Mr. Wolch:

02:18 15 "Not really, he is innocent. I mean he
16 will have...he has of now no conviction,
17 so he is innocent. He is no more in law
18 guilty of the crime than you or I.

19 Of course, there is a cloud
02:18 20 left to some degree. But, the part that
21 disappoints us in what was said was the
22 prematurity of some of it that is, to
23 say there will be no inquiry when we
24 haven't even asked directly for an
02:18 25 inquiry nor have we given the reasons



1 for an inquiry. It's somewhat
2 disconcerting. To say there is no
3 compensation when we haven't even asked
4 them for compensation is disconcerting
02:18 5 because it's a qualified judicial
6 decision. You normally hear both
7 sides."

8 And just your comment on two things, Mr. Wolch's
9 comment about -- just scroll up -- about how he
02:19 10 characterized Mr. Milgaard's guilt or innocence
11 at the time, do you take any issue with that?

12 A No. Once the conviction is set aside, the
13 presumption of innocence arises. Once the
14 indictment was -- well, and since there was no new
02:19 15 trial setting that aside, it continues, he is
16 presumed to be innocent.

17 Q Then the question, if you scroll down:

18 "But, how are you going to get
19 compensation? How are you going to get
02:19 20 an inquiry if Saskatchewan is so opposed
21 to it?"

22 Answer:

23 "Well, we are going to show them what
24 the judgement said at the Supreme Court.

02:19 25 It appears that perhaps and I



1 don't fault the minister, I mean, he
2 obviously is going by advice and it
3 appears that the advisors, if it isn't
4 Serge Kujawa is somebody who reads like
02:19 5 him and they've missed the decision.

6 What I'm trying to say and in
7 part is the decision does not exonerate,
8 the decision says that the miscarriage
9 of justice came to light in 1970. It's
02:20 10 in Black and White and why it's being
11 not read is beyond me."

12 And your comment on that?

13 A Well, my comment on that is that we didn't get the
14 same secret decoder wheel with our copy of the
02:20 15 Supreme Court decision that Mr. Wolch and the
16 Milgaard camp got. We took a literal reading of
17 the decision and based on that literal meaning
18 there was no suggestion that there was a
19 miscarriage of justice. It says it would be a
02:20 20 miscarriage of justice.

21 Q Now, the suggestion here that Mr. Kujawa is
22 involved, I think at this time he was a sitting
23 MLA, was he, with the government?

24 A With the government, yes.

02:20 25 Q And was he in any way involved in the decision



1 making of the director of public prosecutions?

2 A No, not with us. What contact he may have had
3 with Robert Mitchell, who was the Attorney
4 General, I don't know, but as far as I'm aware,
02:20 5 there wasn't any.

6 Q And did you go to him to seek his assistance in
7 interpreting the Supreme Court decision?

8 A No.

9 Q And would you agree -- certainly the record
02:21 10 reflects that in the days that followed, that Mr.
11 Kujawa seemed to be one of the targets of Mr.
12 Wolch and Mr. Asper in the media as far as
13 criticism?

14 A Well, I think they understood from previous
02:21 15 experience that if you poked him, he might react,
16 so they were, I expect, hoping to get something
17 juicy by way of a reaction from him that would
18 play well in the press.

19 Q It carries on, the reporter says:
02:21 20 "You are referring to the fact that you
21 believe the police should have known...
22 did know about Larry Fisher's crimes
23 after he confessed to them and they
24 should have reinvestigated the case even
02:21 25 after the conviction?"



1 Mr. Wolch:

2 "Well sure, it came to light then the
3 Supreme Court said it came to light and
4 it implies that there was a cover up
02:22 5 from 1970 on. It's right in the wording
6 and why that is not being read is beyond
7 me but. I'm sure the Crown didn't bring
8 that to the Minister's attention.

9 That's what we were going to show him."

02:22 10 And I would like your comment on the suggestion
11 that the Supreme Court judgment implies that
12 there was a cover-up from 1970 on.

13 A That is nonsense, that is fantasy. As I said, if
14 they were able to produce any evidence of that,
02:22 15 why didn't they do that in the Supreme Court, and
16 that's certainly not what the Supreme Court says
17 in its judgment.

18 Q If you can go to 328357, and this is a media
19 report, it says Al Thada, I'm not sure if that's
02:22 20 the correct spelling, but the Saskatoon City
21 Police, and there's a few other public comments
22 here, where he says:

23 "He remains the chief suspect in this
24 investigation. He was convicted of it
02:23 25 once. The Police Department will not be



1 reinvestigating the Gail Miller Murder."

2 And then scroll down, Justice Bayda:

3 "...doesn't know when Justice Officials
4 will make their decision on the Miller
02:23 5 Murder file. He says police are
6 satisfied there will be no inquiry into
7 the Milgaard affair. He says that
8 clears police of any wrongdoing during
9 the murder investigation in 1969."

02:23 10 Do you recall whether you would have had any
11 discussions with the Saskatoon City Police around
12 this time or whether -- would they take their cue
13 from you, from Saskatchewan Justice as far as the
14 re-opening?

02:23 15 A I would assume so. I certainly didn't have any
16 discussions with them around that time. I can't
17 say whether they may have talked to Richard
18 Quinney or, for that matter, to Robert Mitchell
19 directly because he was an MLA from Saskatoon.

02:24 20 Q But as far as the decision to re-open, I think you
21 said Saskatchewan Justice concluded that there was
22 no basis to re-open the investigation into the
23 death of Gail Miller?

24 A That's correct.

02:24 25 Q And if you had thought so, presumably you would



1 have asked the Saskatoon City Police to
2 investigate?

3 A Yes.

4 Q And as far as their decision whether to
02:24 5 investigate or not, that's something they could
6 have done without your direction?

7 A Oh, yes.

8 Q And was it your understanding that they did not
9 open, re-open the investigation either?

02:24 10 A That's my understanding, yes.

11 Q Go to 160314, a comment here, it's in an April
12 18th article, it makes reference to a comment by
13 Anne Derrick, it says:

14 "If a new trial proceeded..."

02:25 15 And this is referring to against David Milgaard,
16 "...one would presume he would have been
17 acquitted and if he'd been acquitted,
18 he'd be entitled to compensation."

19 And do you agree with that comment?

02:25 20 A No. Well, I don't agree with, first of all, the
21 presumption that he would have been acquitted. I
22 don't know how Anne Derrick would come to that
23 given that she really had nothing to do with this
24 matter, and the notion that if he was acquitted he
02:25 25 would be entitled to compensation, people who are



1 acquitted aren't usually entitled to compensation.

2 Q And so the fact that if there had been a second
3 trial and Mr. Milgaard had been acquitted, that
4 that would not have, in the eyes of Saskatchewan
02:25 5 Justice, given rise to an entitlement to a claim
6 for compensation?

7 A Well, you know, subject to whatever advice the
8 civil law group would have given the minister, in
9 my view it wasn't obvious that simply getting
02:25 10 acquitted at this point in light of what the
11 Supreme Court said would have entitled him to
12 compensation.

13 Q Go to 160313, this is an April 18th, 1992
14 StarPhoenix article, it says:

02:26 15 "Murray Brown, director of
16 public prosecutions in Saskatchewan,
17 doesn't think Wolch can assume anything
18 was left out from the Supreme Court's
19 findings.

02:26 20 "Hersh Wolch had every
21 opportunity to enter whatever
22 information he wanted. If there was
23 nothing before the court it was Mr.
24 Wolch's fault."

02:26 25 At the justice minister's



1 request, Brown's department will
2 determine whether there is evidence to
3 charge Fisher with Miller's murder,
4 though this is unlikely, according to
02:26 5 Brown.

6 All the information in
7 respect to that is already known. How
8 do you go out and find something else?
9 Do you go out and knock on every door in
02:26 10 Saskatoon?"

11 Do you know what prompted this? Just scroll over
12 to the left. Was there some suggestion in the
13 media that things were left out of the Supreme
14 Court findings or do you know what prompted this?

02:27 15 A Well, I suspect this probably arises out of
16 something that would have come from the Milgaards
17 with respect to there needing to be further
18 investigation of Larry Fisher because he was
19 obviously the one that was guilty, etcetera,
02:27 20 etcetera. I don't recall sort of any other source
21 of concern about that at the time.

22 Q Go to 026935, please, and this is a fairly lengthy
23 letter from Mr. Wolch to The Honourable Bob
24 Mitchell, April 20, 1992, and you are familiar
02:27 25 with this letter?



1 A Yes, I am.

2 Q And is it fair to say that you would have been
3 involved in reviewing this for the minister and
4 preparing a response on his behalf?

02:28 5 A Preparing a draft response for him, yes.

6 Q And Mr. Wolch writes:

7 "The Supreme Court of Canada ruled on
8 April 14, 1992 that there had been a
9 miscarriage of justice in the conviction
02:28 10 of David Milgaard inasmuch as there was
11 fresh evidence put before the Court
12 which is reasonably capable of belief,
13 and which taken together with the
14 evidence adduced at the trial, could
02:28 15 reasonably have been expected to have
16 affected the verdict."

17 Did you agree with that?

18 A That's a misrepresentation of what's said in that
19 judgment.

02:28 20 Q And why is that?

21 A Because they hadn't said there had been a
22 miscarriage of justice. It said his continued
23 conviction would be a miscarriage of justice.

24 Q It says:

02:28 25 "On Thursday, April 16, 1992, your



1 decision was announced not to proceed to
2 trial. While we certainly agree with
3 your decision, we found it somewhat
4 troublesome that reasons were provided
02:28 5 that witnesses were either deceased or
6 had problems with memory. In our view,
7 there was no material witness who is
8 deceased, and since all of the key
9 witnesses were very young at the time,
02:29 10 they are all capable of giving evidence.
11 Regarding Nichol John, who you mentioned
12 in the conference, it should be noted
13 that her so-called memory problem
14 occurred right from the outset, and it
02:29 15 has not been the passage of time which
16 affected her, but rather the fact that
17 she never did see anything in the first
18 place.

19 In any event, it is not the
02:29 20 purpose of this letter to debate those
21 reasons, but to express further concern
22 that you announced that there would be
23 no inquiry and no compensation from the
24 Saskatchewan Government. We had not at
02:29 25 that time provided you with any of the



1 reasons, and we would respectfully
2 suggest that your decision was
3 premature, and we would ask that you
4 consider what follows. It is our view
02:29 5 that you could not have had the contents
6 of the Supreme Court decision properly
7 placed before you, and there is
8 considerable evidence that you would not
9 have been privy to."

02:29 10 And just your response to the fact that the
11 minister said no to compensation and no to an
12 inquiry before it appears to have been asked for.

13 A Well, I mean, again, we knew those demands were
14 clearly going to be coming. I raised that with
02:30 15 the minister in the briefing note and they went to
16 the point of saying, well, there isn't going to be
17 that.

18 Q Okay.

19 A And I will also point out that attached to the
02:30 20 briefing note that went over was a copy of the
21 judgment, so the minister had that, he could read
22 it for himself.

23 Q Scroll down, Mr. Wolch says:

24 "It should firstly be considered that
02:30 25 compensation is not a matter of



1 necessarily attaching blame. It is
2 possible for an innocent man to be
3 wrongly convicted even though everyone
4 has acted properly. It is hard to
02:30 5 imagine why compensation should not be
6 afforded in those circumstances, and why
7 one must look at blame before doing what
8 is right."

9 Do you agree with that observation?

02:30 10 A Yes, that's -- you could do that, although I think
11 traditionally in law compensation follows some
12 sort of finding of wrongdoing.

13 Q If it were the fact that an innocent man were
14 convicted, would that be a sufficient wrong?

02:31 15 A Yes. Oh, yes.

16 Q Yeah.

17 A I mean, at that point you've got the opportunity
18 then to make some kind of ex gratia payment and
19 you've got a reason for doing it.

02:31 20 Q Yeah, I think, and as I read this, I think what
21 Mr. Wolch was saying, that it's possible that an
22 innocent person can be convicted and it be a
23 wrongful conviction even though no person or
24 institution can be blamed for that or have acted
02:31 25 improperly?



1 A Oh, yes, I think that's true.

2 Q And that in that situation, the innocent person
3 who is wrongfully convicted would still have a
4 basis for a claim for compensation?

02:31 5 A Yes.

6 Q In other words, you don't need to show that either
7 the Crown or the police or somebody did something
8 wrong?

9 A Yes.

02:32 10 Q The simple fact that an innocent person is
11 convicted is sufficient; would you agree with
12 that?

13 A Yes, I would agree with that.

14 Q Then he writes:

02:32 15 "Unfortunately, in David Milgaard's
16 case, there is prima facie evidence of
17 blameworthiness, and it is found in the
18 judgment of the Supreme Court at page 5:
19 "More importantly, there was evidence
02:32 20 led as to the sexual assaults committed
21 by Larry Fisher which came to light in
22 October 1970, when Fisher made a
23 confession."

24 What is your response to the suggestion that that
02:32 25 is prima facie evidence of blameworthiness?



1 A Well, he seems to be suggesting that the
2 blameworthy conduct is ours, not his client's or
3 anything.

4 Q He then goes on to say that:

02:32 5 "The Supreme Court has offered the
6 opinion that the Fisher evidence could
7 reasonably affect the verdict of a jury.
8 The Fisher evidence would have come
9 under the heading of fresh evidence in
02:33 10 1970, and could have been presented to
11 the Saskatchewan Court of Appeal. It
12 must be remembered that in October of
13 1970, David Milgaard's appeal was still
14 pending before the Saskatchewan Court of
02:33 15 Appeal. He was deprived of the
16 opportunity to present this very
17 probative and cogent evidence."

18 Was it your view that this issue had been
19 determined, considered and determined by the
02:33 20 Supreme Court of Canada?

21 A Yes. They concluded that there was no evidence
22 that the Crown had misconducted itself or that
23 disclosure was in any respect out of line with
24 what was done in that particular time.

02:33 25 Q And then if we can scroll down, I think as far as



1 blameworthiness, it talks about:

2 "There are three main "players"... The
3 role of each must be examined..."

4 The first one is Detective Ed Karst, and here:

02:33 5 "Why were the Fisher admissions withheld
6 from the Saskatoon investigators, and
7 from the very victims themselves?"

8 Was this issue canvassed by Mr. Wolch to
9 Mr. Karst at the Supreme Court, his dealings with
02:34 10 Larry Fisher in Winnipeg?

11 A Well, certainly the fact that Mr. Karst traveled
12 to Winnipeg and interviewed Larry Fisher was
13 raised in the Supreme Court. I don't know whether
14 the issue of why the victims themselves weren't
02:34 15 told was raised with them or not, I don't recall.

16 Q But the obtaining of the confessions from Larry
17 Fisher by Detective Karst, do you recall that
18 being evidence before the Supreme Court?

19 A Yes, there was evidence that he had traveled to
02:34 20 Winnipeg to interview him.

21 Q Next page, Mr. Caldwell, it talks about Mr.
22 Caldwell, indicating that, talking about the
23 March, 1971 dealings with the Fisher charges, and
24 it says here:

02:35 25 "The Milgaard/Miller file clearly



1 demonstrates that Mr. Caldwell had to
2 have made the connection. There is no
3 evidence that he disclosed the
4 information to David Milgaard's
02:35 5 counsel."

6 And then down, Serge Kujawa:

7 "He would have been totally conversant
8 with the files, and has since so
9 indicated in interviews."

02:35 10 And I don't propose to go through them, but I
11 think I can summarize it by, I think that the
12 letter suggests that Mr. Karst, Mr. Caldwell and
13 Mr. Kujawa had committed misconduct and were
14 blameworthy in the conviction of David Milgaard.
02:35 15 Was that your understanding of at least this part
16 put forward in the letter?

17 A Those were the allegations being made again, yes.

18 Q And in your view, were those allegations all
19 considered by the Supreme Court?

02:35 20 A They were -- well, considered to the extent that
21 they had the opportunity to raise them. Certainly
22 Serge Kujawa wasn't called, Bobs Caldwell wasn't
23 called. Had they had any evidence or concern that
24 they could have presented through the courts about
02:36 25 misconduct by these two people, they basically



1 didn't bother doing it.

2 Q And what did you make of the fact that within days
3 of the Supreme Court judgment, that the
4 allegations against Mr. Caldwell and Mr. Kujawa
02:36 5 were made to the minister?

6 A Well, I mean, bottom line is they were going back
7 to the old tactics they used after the first
8 application, let's slander people, let's make
9 outrageous allegations for which we have no basis
02:36 10 in fact and see if we can can't generate some kind
11 of publicity.

12 Q And had you expected the allegations with respect
13 to Mr. Caldwell and Mr. Kujawa to be presented to
14 the Supreme Court?

02:36 15 A Well, we had rather expected they probably would
16 want to call that and, I mean, on its face it does
17 permit the asking of the question, why did it take
18 so long to produce, to push this matter through
19 the Court of Queen's Bench in Saskatchewan, can
02:37 20 you explain that. Now, to jump from that to
21 providing your own sinister explanation is
22 nonsense in my view, but there was at least a
23 basis for them to want to ask it.

24 Q Go to 117592, this is a letter of the same date to
02:37 25 the Federal Minister Kim Campbell. Do you know if



1 you became aware of this letter, Mr. Brown? I'll
2 maybe just go through parts of it. I'm not sure
3 if you were or not.

4 A Well, I was aware that they were also going to the
02:38 5 Federal Minister asking for an inquiry too, which
6 after having called her corrupt and stupid and a
7 few other things I thought would be an interesting
8 task to try and persuade her to be favourable to
9 them.

02:38 10 Q And he writes here:

11 "Following the Supreme Court opinion,
12 while you moved expeditiously,
13 Saskatchewan appeared to have delayed in
14 making a decision, and when they did,
02:38 15 they appear to have decided issues that
16 were premature. In other words, they
17 turned down a request for an inquiry and
18 for compensation before those requests
19 were even made. Accordingly, I have
02:38 20 written to the Attorney-General for
21 Saskatchewan setting out the reasons why
22 there should be an inquiry and
23 compensation to follow. For expedience
24 sake, I am enclosing a copy of my letter
02:38 25 to the Attorney-General, along with the



1 enclosures. There is clearly an
2 overlap, and while The Federal Inquiries
3 Act allows for the Governor-in-Council
4 to cause an inquiry, at the same time an
02:38 5 inquiry could be launched provincially."

6 And it goes on to talk about cost sharing:

7 "Accordingly, our request is before the
8 Provincial Government, and at the same
9 time we are bringing it to your
02:39 10 attention. Clearly the matter does not
11 call for two inquiries. What we are
12 doing is providing the Attorney-General
13 for Saskatchewan with an opportunity to
14 review the material and perhaps consult
02:39 15 with your officials so that needless
16 duplication will not arise."

17 And the next page --

18 COMMISSIONER MacCALLUM: What was the date
19 on that, I'm sorry?

02:39 20 MR. HODSON: It's April 20th, 1992. It's
21 the same date as the letter to Mr. Mitchell.

22 COMMISSIONER MacCALLUM: Oh.

23 BY MR. HODSON:

24 Q

"There is overlap in connection with
02:39 25 the 690 application. You will note the



1 chart of Larry Fisher attacks. When we
2 brought our first application, I am
3 satisfied that the information you were
4 provided with regard to Larry Fisher
02:39 5 fell far short of what is contained in
6 the chart. Larry Fisher was
7 interviewed, and was not questioned
8 about the other attacks and the
9 similarity of pattern. We did not know
02:39 10 of Larry Fisher's difficulty with the
11 polygraph until a few days before he
12 testified in the Supreme Court, and I
13 wonder if you were aware that he was the
14 same blood type as the attacker of Gail
02:40 15 Miller.

16 There are very serious
17 questions as to what information was
18 provided to you -- particularly in the
19 first application -- in order for you to
02:40 20 make a decision."

21 It goes on to talk about that and parole. Scroll
22 down to the bottom, and then here:

23 "As I indicated at the outset of the
24 letter, there does appear to be
02:40 25 considerable overlap Provincially and



1 Federally, and we feel that the
2 Provincial Government should be looked
3 to first in this matter. Obviously any
4 initiative from the Federal Government
02:40 5 would be greatly appreciated."

6 I think you said, had you become aware, then,
7 that David Milgaard's counsel was seeking help
8 from the federal government to either prompt the
9 province to have an inquiry or to have a joint
02:40 10 look into the matters?

11 A We knew he was going to the Federal Minister. My
12 recollection was to request that the federal
13 government order an inquiry.

14 Q Okay. Go to 077808, it's an April 21, 1992
02:41 15 newspaper article, *StarPhoenix*, quoting Mr. Asper:

16 "Mr. Asper on Monday said outstanding
17 questions relating to Fisher, which need
18 to be addressed by an inquiry, include:
19 - Who had the information about Fisher?
02:41 20 - Was it disclosed? If not, why?
21 - Was there a duty for whoever had the
22 information to disclose it to Milgaard's
23 lawyer?
24 - Was there a decision made to withhold
02:41 25 the evidence from Milgaard's lawyer and,



1 if so, by whom?

2 - What steps were taken, if any, to
3 insure the information didn't come to
4 light?

02:41 5 - Have there been ongoing efforts to
6 cover up the facts concerning when the
7 information came to light?"

8 In your view, sir, based on your involvement at
9 the Supreme Court reference, were those questions
02:42 10 questions that were before the Supreme Court in
11 the reference case and considered by them?

12 A Well, certainly the issue of was it disclosed and
13 was there a duty to disclose it were issues that
14 were before the Supreme Court. I don't know that
02:42 15 they ever got into the notion of whether there was
16 a decision to withhold it or what have you. As I
17 say, they didn't pursue that issue in the Supreme
18 Court.

19 Q And is it -- was it an issue that they could have
02:42 20 pursued then if they chose to?

21 A If they had been able to demonstrate that David
22 Milgaard had been the object of some kind of
23 misconduct by prosecutors trying to cover up the
24 fact that they knew he had been wrongly convicted,
02:42 25 absolutely, and that would have been something the



1 Supreme Court would have been very happy to hear
2 about.

3 Q If we can go to 227974, this is a *Globe and Mail*
4 article of April 22nd, 1992, *Saskatchewan accused*
02:43 5 *of coverup*. And I take it, is this something that
6 you would have become aware of?

7 A Yes.

8 Q And it says:

9 "Saskatchewan's New

02:43 10 Democratic government is afraid to hold
11 a public inquiry into the David Milgaard
12 case because it threatens to expose a
13 decades old coverup and might embarrass
14 high profile government members, Mr.
02:43 15 Milgaard's lawyers and the province's
16 Conservative opposition have charged."

17 Scroll down:

18 "Mr. Milgaard's lawyers have
19 released new information yesterday that
02:44 20 they say points to a possible coverup by
21 police and prosecutors who helped
22 convict Mr. Milgaard of the murder of
23 Saskatchewan nurse's assistant Gail
24 Miller in 1969.

02:44 25 "We're alleging the facts



1 indicate there was a coverup," said
2 Hersh Wolch.

3 Mr. Kujawa is --"

4 COMMISSIONER MacCALLUM: Excuse me, just a
02:44 5 second. Could I have that blown up? I don't
6 know whether I'm losing my sight or --

7 A I think it's just very faint.

8 MR. HODSON: Yeah.

9 COMMISSIONER MacCALLUM: Okay, thanks.

02:44 10 BY MR. HODSON:

11 Q What was your reaction to these allegations, Mr.
12 Brown?

13 A Well, I mean, quite frankly, our view of the whole
14 thing at this point, and by "our" I'm suggesting
02:44 15 public prosecutions as well as myself, was that
16 they had been given every opportunity to make the
17 case in the Supreme Court of Canada, had failed to
18 do so, chosen not to do so in some instances, and
19 we were anticipating that there would be a lot of
02:45 20 hysterical rhetoric coming from the Milgaard camp.
21 We anticipated there would be another
22 corruption/cover-up series of allegations and they
23 were doing exactly what we anticipated they would
24 do and, in the process, I might add, losing
02:45 25 credibility every day.



1 Q In what way?

2 A Well, when you start off by saying the Supreme
3 Court said this when in black and white they
4 clearly did not, you don't start yourself off on a
02:45 5 very good foot, and then to start making
6 allegations of corruption and cover-up when they
7 haven't got any evidence to present on that when
8 they had the opportunity to present evidence on it
9 and they couldn't present anything, or wouldn't
02:45 10 present anything, it was just getting to be, as we
11 said, another one of the campaigns. It worked
12 very effectively between the time of the first
13 application being dismissed and the second one
14 being filed and they were again trying it in
02:46 15 Saskatchewan.

16 Q And what -- you said it, on credibility, what did
17 it do to your assessment or Saskatchewan Justice's
18 assessment --

19 A Well --

02:46 20 Q -- of their credibility?

21 A -- the more, the more they did this, the less
22 credible they became. If they had evidence of
23 anything, then they should have simply sent it in
24 to the minister and said "here's our evidence that
02:46 25 supports the fact that your officials deliberately



1 covered this up", they didn't have that and it
2 wasn't until they actually got to that silly
3 Breckenridge stunt that they began producing some
4 -- or they produced what they thought was evidence
02:46 5 or what they pretended was evidence.

6 Q And we will get to that this afternoon. If we can
7 just go over to the second column, it says:

8 "But Mr. Mitchell would not
9 budge, claiming Mr. Milgaard had a
02:47 10 chance to raise all issues - including
11 the conduct of police and prosecutors -
12 at the Supreme Court. Mr. Milgaard's
13 lawyers, though, contend it was agreed
14 before the Supreme Court began hearing
02:47 15 the case that questions of police and
16 Crown conduct would not be entered as
17 evidence."

18 And your comment on that suggestion?

19 A Well there were comments early on that I suppose,
02:47 20 if you sort of squint your eyes and look at them
21 sideways, you could understand as being
22 suggestions that we couldn't look at police
23 misconduct and Crown misconduct. But, if they
24 really believed that, why were they questioning
02:47 25 Eddie Karst, why were they questioning Art



1 Roberts, what was the document that Hersh Wolch
2 was waving around, what was the significance of
3 that? The issue of police misconduct, of Crown
4 misconduct, was very much available to them in the
02:47 5 Supreme Court of Canada and they could have called
6 any evidence they wanted on that.

7 Q If we can scroll to the right-hand side, it says:

8 "Mr. Milgaard and his lawyers
9 allege that what the Supreme Court now
02:48 10 considers to be evidence relating to Mr.
11 Fisher was concealed by the police and
12 the Crown in Saskatchewan until after
13 all Mr. Milgaard's appeals were
14 exhausted in early 1971 and there was no
02:48 15 hope of... exoneration.

16 'We are deeply concerned that
17 the man who was most instrumental in
18 prosecuting David ... [Mr. Kujawa] ...
19 is the same man who now stands as an
02:48 20 elected representative in the provincial
21 government,' Mr. Wolch said."

22 So on the first part, again, was this issue here
23 about the concealing by the police and the Crown
24 of the Fisher evidence. In your view, was that
02:48 25 something that had been dealt with by the Supreme



1 Court of Canada?

2 A Well I mean, again, to the extent that it was part
3 of the disclosure argument it was before the
4 Supreme Court. The notion that it was
02:49 5 deliberately hidden, I don't know that that was
6 necessarily put to the Supreme Court of Canada,
7 though, as I said, if they'd wanted to do that
8 they certainly could have.

9 Q 160397. This is an April 22nd, 1992 article. It
02:49 10 says:

11 "Former Saskatchewan chief
12 prosecutor Serge Kujawa was either
13 incompetent or dishonest when he failed
14 to disclose key evidence that may have
02:49 15 kept David from a 1970 murder
16 conviction, Milgaard's lawyers say.

17 Hersh Wolch said even though
18 Saskatchewan Attorney General Bob
19 Mitchell has turned down the Milgaard
02:49 20 family's request for a full inquiry into
21 the Crown's handling of the case, the
22 public will demand to know why the
23 evidence was suppressed."

24 "Wolch said he fears Mitchell
02:50 25 is trying to protect Kujawa, now a



1 member of the Saskatchewan NDP
2 government."

3 Your comments to that? What was the response to
4 those allegations?

02:50 5 A Well again, I mean, where is your evidence of
6 anything? It's more of the slander and smear
7 campaign that they used so effectively after the
8 first application was turned down, they were just
9 turning up the rhetoric, and certainly Dan Lett
02:50 10 and Dave Roberts were still very much part of the
11 Milgaard team, at that point, when it came to
12 providing media coverage.

13 Q Go over to the right-hand side. It says:

14 "Wolch said Kujawa failed to
02:50 15 disclose the Fisher evidence to
16 Milgaard's lawyers either because he was
17 incompetent or because he was trying to
18 save his office from embarrassment over
19 a wrongful conviction."

02:50 20 And I think you've maybe covered this before, but
21 is that an issue that either was or could have
22 been put before the Supreme Court on reference?

23 A Yes, yes, if there was any evidence of Crown
24 misconduct it could have been put before the
02:51 25 Supreme Court.



1 Q This might be an appropriate spot to break.

2 (Adjourned at 2:51 p.m.)

3 (Reconvened at 3:13 p.m.)

4 BY MR. HODSON:

03:13 5 Q If we could get 164797. Following the Supreme
6 Court reference decision, Mr. Brown, was there
7 somewhat of a public relations battle about the
8 interpretation of the Supreme Court decision, in
9 other words that the government was putting
03:13 10 forward what it viewed as the significance of the
11 decision, and Mr. Wolch was putting forward a
12 different view in the media and in the public?

13 A Umm, well yes, he had an interpretation that he
14 was putting forward, one that would support the
03:13 15 call for an inquiry and compensation, and we were
16 putting forward our view of what we thought it
17 said.

18 Q Here is the minister's reply to Mr. Wolch's letter
19 of April 20th, and I think if we go to the last
03:14 20 page -- actually, we don't have that. Is it fair
21 to say that the substance of this would have been
22 drafted by you, Mr. Brown?

23 A Yes, I expect that's probably true.

24 Q And just, it's got a date of April 22 on the front
03:14 25 page, if we go to the second page it looks like



1 it's actually April 30th that it was actually sent
2 out. I'm not sure if anything turns on the date,
3 but this would have been the minister's response
4 to Mr. Wolch's letter, is that correct?

03:14 5 A Yes.

6 Q If we can go back to the first page, we touched on
7 some of this when I went through Mr. Wolch's
8 letter, but the first item is:

9 "... let me correct your mistaken
03:14 10 impression concerning the decision of
11 the Supreme Court of Canada in this
12 case. You indicate the Court found that
13 your client suffered a miscarriage of
14 justice. Clearly Mr. Wolch, a fair and
03:15 15 careful reading of the judgement does
16 not support that statement."

17 And then it goes on to quote:

18 "... 'The continued conviction of
19 Milgaard would amount to a miscarriage
03:15 20 of justice if an opportunity was not
21 provided ...",

22 etcetera. You say:

23 "Since the Federal Minister and I have
24 followed the advice of the Supreme
03:15 25 Court, no miscarriage of justice has



1 occurred. While you may not like this
2 position, your quarrel is obviously with
3 the Supreme Court since it is they who
4 found there had been no miscarriage to
03:15 5 this point."

6 Can you comment on, did you view some of the
7 allegations or complaints being with the Court
8 decision as opposed to your interpretation of it?

9 A Well, no, the suggestion Mr. Wolch was making was
03:15 10 that it said there was a miscarriage of justice,
11 and that clearly was what it did not say.

12 Q If we can scroll down.

13 "Second, I note in your
14 letter, that you are happy with our
03:16 15 decision not to proceed with a new
16 trial. Based on your press statements
17 and those of your partner and your
18 client, you would like me to go further
19 and declare your client innocent. With
03:16 20 the greatest of respect, I do not see
21 why or how I can ignore the findings of
22 the Supreme Court. Your client
23 testified before that Court that he did
24 not kill Gail Miller. Had the Court
03:16 25 believed his evidence, it would have



1 been compelled to declare him innocent.
2 Apparently, the Court did not believe
3 him because they specifically said that
4 they did not find he was innocent using
03:16 5 either the high criminal standard of
6 proof beyond a reasonable doubt or the
7 much lower civil standard of proof of
8 balance of probabilities."

9 Again, I think you've touched on the significance
03:16 10 of that. Would that be the reason, then, that
11 the minister would not give the declaration of
12 innocence requested?

13 A Yes.

14 Q Next page. You say:

03:17 15 "After hearing your client
16 testify, after hearing what little
17 evidence there was left from the
18 original trial witnesses and after
19 hearing your new evidence, if you could
03:17 20 not convince even one judge of that
21 Court that your client was innocent, how
22 can you expect me to, in effect,
23 overturn the Courts finding and
24 pronounce your client innocent? Your
03:17 25 request Mr. Wolch, is totally



1 unreasonable."

2 And was that your view of his request to the
3 minister to have him declared innocent, --

4 A Umm, --

03:17 5 Q -- that it would be overturning the Supreme
6 Court's ruling on that issue?

7 A Well, it would be ignoring it, I -- the language,
8 quite frankly, doesn't sound all that familiar to
9 me and I'm wondering if perhaps the reason you've
03:17 10 got a different date on the front of the letter
11 and a different date on the second page is that
12 somebody in the minister's office may have decided
13 to punch up the language or change something,
14 because these documents are produced in a word
03:18 15 processor --

16 Q Yes?

17 A -- and whatever date is entered at the top is
18 going to pop up automatically on the header on the
19 second page.

03:18 20 Q I'm -- and I -- if I can, let me just show you
21 something that may assist you. When I looked at
22 this, if we can go back to page 1, because I too
23 had some confusion about this letter, and this is
24 an exhibit in an affidavit sworn by Bob Mitchell
03:18 25 in a proceeding, a defamation proceeding. There



1 is also -- and, in that, it indicates that the
2 letter was sent out April 30th.

3 As well, let me just find it
4 here, if we can go to 334791. This is a fax from
03:19 5 you to Ron Fainstein of May 8th, 1992. It says:

6 "Ron - this just went out to H.W. this
7 afternoon."

8 Then, if we can go to the next page, it says:

9 "I have reviewed and considered the
03:19 10 issues raised in your letter of April 20
11 ... and the material ...".

12 And then go to the next page. And so it's a
13 two-page letter of May 8th, and I'm not sure if
14 that assists you, Mr. Brown? It may be that the
03:19 15 May 8th letter is the one you drafted and the
16 earlier one is some, is a letter someone else
17 drafted; are you able to --

18 A Umm, that's possible. By this point I think we
19 had the new, refined process for minister's
03:19 20 letters that saw just about everybody in the
21 department read them and correct them and add to
22 them in some form or other. I would provide a
23 draft and it would then go to communications, it
24 would then go through the deputy minister's
03:20 25 office, it would then go through an executive



1 assistant at the minister's office, the minister
2 would then see it, and if he accepted it then he
3 could sign it then, if he didn't then it could be
4 sent back for changes.

03:20 5 Q Okay. So if we can go back to 164798 or 797, and
6 is it fair to say that although this appears to be
7 the minister's letter, what you are saying is that
8 you may well not have been the drafter of much of
9 the substance; is that fair?

03:20 10 A Umm, yes, I suspect that might be --

11 Q Okay.

12 A -- because I don't -- the language, I'm not --
13 it's not doing, not coming to mind --

14 Q Okay.

03:20 15 A -- the way some of the other letters have.

16 Q If we can go, I'll just ask you a couple of
17 questions about 164800. It says here:

18 "Before leaving this aspect
19 of your letter, I again note, there is
03:21 20 not one fact you have raised in this
21 regard that was not before the Supreme
22 Court. There is not one argument you
23 have put to me that you did not put to
24 the Supreme Court either in the
03:21 25 materials that were filed as part of the



1 reference or in the evidence you called
2 or in the argument you presented.

3 Notwithstanding your doubtless very able
4 efforts in this regard, the Supreme
03:21 5 Court still concluded the Crown had done
6 nothing wrong in failing to bring the
7 Fisher matters to defence counsel's
8 attention. Given that, Mr. Wolch, there
9 is nothing I can see requiring the
03:21 10 ordering of any other kind of inquiry
11 into Crown counsel's conduct."

12 And again is that something, whether you drafted
13 it or not, would have reflected your views at the
14 time?

03:21 15 A Yes, it reflects the views.

16 Q Next page, 801. Here it says:

17 "Fifth, you have stated
18 several times that the Supreme Court did
19 not inquire into the conduct of the
03:22 20 police and that the subject wasn't
21 raised during the Court's inquiry. That
22 statement is misleading. With respect,
23 I would remind you that going into the
24 inquiry in the Supreme Court and during
03:22 25 that inquiry, you and Mr. Asper



03:22

03:22

03:22

03:23

03:23

1 repeatedly assured the news media that
2 you were going to show there had been
3 police misconduct involved in procuring
4 the evidence of Ron Wilson and Nicole
5 John. Towards that end, you requested
6 subpoenas be issued for 4 police
7 officers. Two of those officers
8 testified, including Detective Eddie
9 Karst. After hearing from those two
10 officers and getting nowhere in trying
11 to prove your misconduct theory, you
12 chose not to pursue having the other two
13 testify. My assertions in this regard
14 are supported by the materials filed
15 with the Court, the transcripts of the
16 hearing and the findings of the Supreme
17 Court that there was no evidence the
18 police had misconducted themselves
19 during the investigation. Given that
20 police misconduct was one of central
21 features of your case and that you
22 required the calling of evidence with
23 respect to the investigative process, it
24 is misleading for you to now claim this
25 avenue of inquiry was never explored.



1 That claim simply is not true."

2 And, again, would that have reflected your view
3 of that issue?

4 A Yes.

03:23 5 Q Next page, comment here:

6 "Again in this regard, it
7 seems I have to remind of what the
8 Supreme Court said in its decision. You
9 presented this information to them and
03:23 10 they concluded that the facts did not
11 disclose any impropriety on the part of
12 the Saskatoon City Police. While you
13 may not like that finding, that is what
14 the Court said after being apprised of
03:24 15 all the facts you mention in your
16 letter.

17 Eighth, you indicate that the
18 reason for there being no inquiry is to
19 protect Mr. Kujawa, a sitting member of
03:24 20 the Saskatchewan Legislature. That
21 allegation is nonsense and would seem to
22 suggest the level of desperation you
23 have reached in order keep your claim
24 for compensation alive. As you must be
03:24 25 aware by now, Mr. Kujawa is quite



1 capable of taking care of himself."

2 And would that have been your thinking at the
3 time or your position at the time?

4 A Well, to be honest with you, I don't ever recall
03:24 5 addressing the issue of Serge Kujawa as being
6 connected, and --

7 Q Okay.

8 A -- it may be that this was part of what was added
9 after I had sent the draft.

03:24 10 Q Okay. If we can go to 004450. This is a May 5,
11 1992 letter from you to access to information and
12 privacy coordinator, and it appears that there was
13 a request from Mr. Asper, I think from the letter,
14 to have access to prosecution files. And you say:

03:25 15 "At the time he was free to take
16 whatever copies he wished and there is
17 no reason now to restrict his client's
18 access to those same materials on your
19 file. This letter will serve as your
03:25 20 authority to release those materials to
21 Mr. Milgaard."

22 Can you comment on what this related to?

23 A Well, it's obviously something off Federal
24 Government files. It would be -- or they, the
03:25 25 documents that he was requesting would be



1 provincial government documents created here and
2 sent to the Federal Government or something that
3 was copied off one of our files, because the only
4 time that a federal access to information and
03:26 5 privacy coordinator would contact the provincial
6 government is to determine whether we were
7 prepared to allow access to documents that the
8 federal classification people would consider as
9 'protected', that is communications between the
03:26 10 federal and provincial officials or materials
11 received from the provincial officials. So I'm
12 assuming that, at some point, Mr. Asper wanted
13 access or information, documents, what have you,
14 off the files that the federal Justice Department
03:26 15 had put together on this and the documents he was
16 particularly asking for were ones that would have
17 originated with Saskatchewan.

18 Q If we can go to 338943. And this is an article
19 from *The Lawyers Weekly* May 8, 1992 referring to
03:27 20 comments made by Mr. Wolch about various matters,
21 and I believe you then followed it up to -- with a
22 letter to *The Lawyers Weekly* magazine; is that
23 correct?

24 A Yes.

03:27 25 Q And, generally, what were the concerns you had



1 with the comments?

2 A Well, he was misstating what went on in the
3 Supreme Court and what the result of their
4 decision was, and I, as part of the process that
03:27 5 we looked at and decided upon, we were going to
6 challenge that kind of thing whenever it appeared.

7 Q And so, if we can go to the next page, I'd ask you
8 to comment on some parts here:

9 "Mr. Wolch called the Supreme
03:28 10 Court review a 'very, very difficult'
11 experience. The burden of proof wasn't
12 established until half-way through the
13 hearing, and since there was no set
14 procedure, the rules were made (and
03:28 15 changed) as the hearing went along."

16 Do you agree with that?

17 A Well, certainly there's truth to that, certainly
18 we didn't know what the burden of proof was and
19 who carried it until I think it was the end of
03:28 20 February when the Supreme Court provided us with
21 the test it was looking at. And I think the
22 reference to the rules changing had to do with
23 being advised on the 16th that the Court was going
24 to question all the witnesses and then being told
03:28 25 on the 20th or 21st, when we started, that David



1 Milgaard was his witness and he was expected to
2 examine him.

3 Q Right. And I think Mr. Wolch refers to that,
4 about the hearing, that:

03:29 5 "... he was given to understand that the
6 Court itself would be leading the
7 witness.

8 'Then at the hearing [Chief
9 Justice Antonio Lamer] said 'You go
03:29 10 ahead and lead.'"

11 And I think that's consistent with what you were
12 saying?

13 A Yes.

14 Q And:

03:29 15 "The rules of evidence were
16 also bent out of shape. 'The stuff that
17 was let in was absolutely remarkable,'
18 Mr. Wolch said. 'Put in whatever you
19 want' was virtually it."

20 And:

21 "Above all, there was a very
22 strong pressure from the court to get to
23 the point quickly. 'You always felt
24 like you were imposing, that you had to
03:29 25 move faster', Mr. Wolch said. 'You had



1 to get it done. That was a feeling that
2 bothered me a fair bit.'

3 Now I'll go to your letter in a moment that has
4 comment on that, Mr. Brown. Maybe I'll just
03:29 5 touch on a couple of the points that you dealt
6 with.

7 "Mr. Wolch said he also felt
8 constrained in his examination of Mr.
9 Milgaard's former defence counsel,
03:29 10 Calvin Tallis, now a highly-respected
11 member of the Saskatchewan Court of
12 Appeal.

13 'Anything I said about the
14 defence of Justice Tallis I was going to
03:30 15 get killed', by the court, he said.
16 Even innocuous questioning prompted
17 remarks from the court to move along.

18 '[Mr. Justice Tallis] was not
19 a witness to attack in front of that
03:30 20 court. That was the impression I had.'

21 Mr. Wolch noted that Mr.
22 Justice Tallis was testifying from
23 memory about a 23-year-old file. 'I
24 think he would be the first to agree
25 that there was too much made of what he



1 said because of who he is.

2 'An ordinary witness, after
3 23 years, would be questioned a lot
4 more.

03:30 5 Asked by a member of the
6 audience to assess Mr. Justice Tallis's
7 defence of Mr. Milgaard, Mr. Wolch
8 replied 'my personal feeling, and
9 reading, is that in his own mind he
03:30 10 thought that David was guilty and relied
11 on his [legal] skills [to defend him] as
12 oh testified to digging. That's my
13 personal view. It could be very unfair.

14 Mr. Wolch cited
03:30 15 inconsistencies between Mr. Justice
16 Tallis's testimony at the Supreme Court
17 and his cross-examination at the
18 Milgaard trying as the basis for his
19 opinion.

03:30 20 He said he was also
21 bewildered by Mr. Justice Tallis's
22 testimony that he was unaware that there
23 had been a series of rapes in Saskatoon
24 at the time of the murder, a fact that
03:31 25 was highly publicized.



1 'He may have an answer for
2 all this and he was never asked about
3 that. But those are difficult questions
4 that maybe a [public] inquiry could find
03:31 5 out about,' Mr. Wolch said. 'I could be
6 very unfair to him ... but those
7 problems definitely bother me deeply.'"

8 And again, if we can just go to 020383, and this
9 is your letter to the editor of *The Lawyers*
03:31 10 *Weekly* responding to that article; is that
11 correct?

12 A That's correct, yes.

13 Q And I'll show you when we're done with the letter,
14 that was in fact published I think in May, May
03:31 15 22nd, 1992; is that correct?

16 A Umm, --

17 Q I'll show you that.

18 A Yeah, it could be.

19 Q It was published?

03:31 20 A I don't, actually, I don't know whether it was
21 published or not.

22 Q Okay. I'll show you a document that confirms
23 that. And I'll go through parts of this with you,
24 but what was it that -- I mean you mentioned the
03:32 25 fact that you thought it was not your view of what



1 happened at the Supreme Court, but was there
2 something in what he had said or in the article
3 that prompted you to write?

4 A Well, just that here you had a very sort of
03:32 5 visible account of Mr. Wolch's view of what went
6 on in the Supreme Court of Canada, in our view it
7 contained inaccuracies and, as part of the fact
8 that we wanted to answer public allegations that
9 we thought were inaccurate, we were gonna do that.
03:32 10 I believe it was Richard Quinney that told me to
11 prepare the response.

12 Q And what about the comments regarding Mr. Justice
13 Tallis; did those concern you?

14 A Well they did to the extent that I don't know that
03:33 15 a fair reading of the transcript or a fair
16 observation of what was going on when Justice
17 Tallis was testifying would support that Mr. Wolch
18 wasn't permitted to question him as fully or as
19 thoroughly as he wanted to. The opportunity was
03:33 20 there. I mean certainly, when he says that he had
21 to be careful or when he implies that he had to be
22 very careful about the way he attacked Justice
23 Tallis' testimony, that was certainly correct.
24 But, at the end of the day, the real damage from
03:33 25 Justice Tallis' testimony was the fact it



1 contradicted David Milgaard and he really didn't
2 attack that much at all. I mean he may well
3 disagree with the way Justice Tallis presented the
4 defence, you know, I suspect that if you had ten
03:33 5 lawyers take a look at that and -- ten defence
6 lawyers take a look at that each one would come up
7 with a different view of how they would go about
8 doing it, and fair enough, if he wants to suggest
9 that there was a different strategy that would
03:34 10 have been pursued, fine. But the real problem was
11 that Justice Tallis had a devastating impact on
12 David Milgaard's credibility.

13 Q Your letter here, and I think this is reproduced
14 in the article, you say:

03:34 15 "First, my recollection of
16 the proceedings was that the Court was
17 indeed anxious that the matter proceed
18 in an expeditious fashion. Their
19 concern however, was that time not be
03:34 20 wasted. At all times we were assured
21 that we would have whatever time was
22 reasonably necessary for this inquiry.
23 While I cannot speak for how Mr. Wolch
24 felt, there was no reason that I could
03:34 25 see for feeling rushed. Indeed, we



1 didn't even use all the time that was
2 set aside for the hearings."

3 And is that an accurate statement?

4 A Yes.

03:34 5 Q Scroll down.

6 "Second, it's also true the
7 Court allowed great leeway in leading
8 evidence. They did so to insure that
9 every scrap of evidence or information,
03:35 10 real and imagined, that was thought to
11 be helpful to Mr. Milgaard would be
12 heard by the Court. Given the function
13 they were performing in this type of
14 extra-ordinary hearing, that openness
03:35 15 was to be desired. It's now curious
16 that Mr. Wolch, who took the most
17 advantage of that leeway, should
18 complain about the Court allowing him
19 such freedom."

03:35 20 Again, is that an accurate expression of your
21 view?

22 A Of my view, yes.

23 Q Scroll down, please:

24 "It's also annoying that Mr. Wolch
03:35 25 should feel free to take some rather



1 cheap shots at Mr. Justice Tallis. The
2 fact the evidence Justice Tallis gave
3 had a devastating impact is hardly the
4 fault of the witness and does not
03:35 5 justify this kind of attack. Even young
6 counsel know that if there's going to be
7 bad news coming down the line, you do
8 your best to lessen its impact during
9 examination of your own witnesses or
03:36 10 client. Mr. Wolch certainly knew there
11 was bad news coming."

12 And can you elaborate on that?

13 A Well, at that point Eugene Williams and Hersch
14 Wolch and David Asper were the only three that had
03:36 15 interviewed Justice Tallis with respect to this
16 particular matter and I expect that Mr. Wolch and
17 Mr. Asper knew what Justice Tallis was going to
18 say about the various aspects of what David
19 Milgaard told him, and if they knew that, and of
03:36 20 course they would have, I suspect, canvassed what
21 their client was going to say, they would have
22 known that there were going to be some substantial
23 conflicts and tried to do something to sort of
24 deal with that during the examination of David
03:36 25 Milgaard in chief.



1 Q And then if you can scroll down, you say:

2 "Before, David Milgaard testified, Mr.

3 Wolch knew his client had waived

4 privilege to allow his trial counsel to

03:37 5 be interviewed by the federal Justice

6 department investigator. He knew what

7 Justice Tallis had said. He knew what

8 his client was now saying conflicted in

9 dramatic ways with what Justice Tallis

03:37 10 had told the investigator. Mr. Wolch

11 also knew that Saskatchewan Justice

12 lawyers were taking the position that

13 Justice Tallis should be a witness. In

14 this regard also, he knew what David

03:37 15 Milgaard was going to say and should

16 have known his evidence would give my

17 partner, Mr. Neufeld, and I the legal

18 basis to insist Justice Tallis be called

19 to give evidence. What's more, counsel

03:37 20 with Mr. Wolch's experience should have

21 known, that given what his client

22 intended to say, the Supreme Court would

23 insist that Justice Tallis be given to

24 opportunity to comment on David

03:37 25 Milgaard's allegations of impropriety."



1 And what were you referring to there as the
2 allegations of impropriety?

3 A Well, the fact that he wanted to testify and
4 wasn't allowed to, that he gave Justice Tallis the
03:38 5 alibi information and Justice Tallis refused to
6 follow it up, the fact that Justice Tallis didn't
7 spend enough time trying to prepare a defence,
8 things like that.

9 Q And if we can go to the next page, your concluding
03:38 10 paragraph:

11 "While I can appreciate that Mr. Wolch
12 isn't happy with the result from the
13 Supreme Court, I'm disappointed that
14 counsel of his stature finds it
03:38 15 necessary to vent that displeasure by
16 disparaging the activities of others.
17 Mr. Wolch was given all the time and
18 leeway he needed to call whatever
19 evidence he wanted. If some evidence
03:38 20 was omitted or other evidence left
21 unchallenged, the fault lies much closer
22 to home than Mr. Wolch seems prepared to
23 allow."

24 And can you elaborate on that?

03:38 25 A Well, as I've said several times, it's my view



1 that while the court did not want us wasting their
2 time, they were not saying that we could not
3 present evidence we thought relevant to the issue
4 of a miscarriage of justice and Mr. Wolch was not
03:39 5 constrained, in my view, from doing that.

6 Q Go to 02 -- just for the record, we don't need to
7 call it up, but 334803, Mr. Commissioner, includes
8 a copy of the printed article.

9 COMMISSIONER MacCALLUM: What was that
03:39 10 number?

11 MR. HODSON: 334803.

12 BY MR. HODSON:

13 Q If we can go to 026996, and I'm just going to go
14 through a couple of letters here, Mr. Brown, there
03:39 15 are many I think on the file from 1992 onward to
16 1996, letters written to various people who wrote
17 in presumably to the Minister of Justice asking,
18 or commenting on the David Milgaard matter; is
19 that fair?

03:40 20 A Ah, yes.

21 Q And I'll show you when we get to the back page
22 that this was prepared by you. You indicate:

23 "...I indicated that no police officers
24 were called. In fact, that was not
03:40 25 correct, retired police officers, Eddie



1 Karst and Art Roberts, were called and
2 did give evidence at Mr. Wolch's
3 request. Further, two other police
4 officers were under subpoena but Mr.
03:40 5 Wolch decided not to call them to the
6 stand to give evidence. Similarly, Mr.
7 Wolch could have called both Mr.
8 Caldwell, the trial prosecutor, and Mr.
9 Kujawa, the appeal prosecutor, if he had
03:40 10 wanted them. Indeed, Mr. Caldwell was
11 flown to Ottawa to be ready to testify
12 at Mr. Wolch's request. It was Mr.
13 Wolch who decided not to call Mr.
14 Caldwell or Mr. Kujawa."

03:40 15 And is that an accurate statement?

16 A Yes.

17 Q And then down at the bottom:

18 "With respect to the allegations of
19 police misconduct, that argument was put
03:41 20 to the Supreme Court and they have
21 rejected it as baseless. There has been
22 no evidence whatsoever produced to
23 suggest police misconduct. The same
24 applies to the allegations of
03:41 25 prosecution misconduct. That theory was



1 put to the Supreme Court and the Court
2 rejected it."

3 Again, the next page, and again it appears that
4 this letter may have been in response to a letter
03:41 5 from the public seeking an inquiry; is that
6 correct?

7 A It looks that way, or supporting the notion there
8 should be an inquiry.

9 Q Then 026986, this is a letter to the same lady. I
03:41 10 don't have the letter she wrote back, but it
11 appears that a further follow-up letter was
12 written, and this is a bit of a different subject
13 matter. It says:

14 "You will note from the
03:42 15 Supreme Court's decision that they
16 considered the matter of disclosure by
17 the Crown. The court notes that proper
18 disclosure was made in accordance with
19 the law of the day. The latter phrase
03:42 20 is the key to understanding the
21 judgment. The Larry Fisher evidence
22 would not have been admissible in 1970.
23 Even if Mr. Milgaard's lawyer had known
24 about Larry Fisher's conduct, that
03:42 25 evidence would not have been considered



1 sufficiently relevant to be admissible
2 at Mr. Milgaard's trial. This lack of
3 relevance at law is also the reason
4 Crown counsel did not have to disclose
03:42 5 it to defence counsel at that time. It
6 was because of this the Supreme Court
7 was able to say that the Crown disclosed
8 all that was required by law in 1970.

9 The law since then has
03:42 10 changed. First, the Fisher evidence is
11 now considered to be sufficiently
12 relevant to be admissible if, and only
13 if, it's being used by the defence. It
14 still would not be admissible if the
03:42 15 Crown wanted to use it to prosecute
16 Larry Fisher for Ms. Miller's murder."

17 And --

18 A Just if I can interrupt?

19 Q Yeah.

03:43 20 A I can tell you that that first paragraph is not
21 what I would have written. It's been reworked I
22 think by somebody.

23 Q Okay.

24 A I don't think I would have ever suggested that it
03:43 25 wasn't admissible by the defence. There certainly



1 was an argument against it, but it could have
2 been, and the notion that lack of relevance was
3 the reason it didn't have to be disclosed, no,
4 that -- I'm pretty sure I wouldn't have put that
03:43 5 in. I may have -- what I suspect has happened is
6 somebody has taken the second paragraph which
7 would have dealt with the *Stinchcombe* decision and
8 the issue of disclosure of relevant evidence and
9 tried to work some of that into that first
03:43 10 paragraph.

11 Q If we can go to 334872, I now want to deal with
12 the Michael Breckenridge allegations, and you have
13 some familiarity with that, Mr. Brown?

14 A I do.

03:44 15 Q And I'll go through some of the documents. Do you
16 recall how you first became aware of, and just for
17 your benefit, we've had an opportunity and have
18 read into the record all of the press conference
19 statements, witness interviews and so much of that
03:44 20 information is already on the record. What's your
21 recollection -- maybe just generally walk through
22 how you became aware of it and what happened.

23 A I became aware of it through the news media. I
24 believe we obtained one of those news monitoring
03:44 25 agency transcripts of the press conference and I



1 read that. I think I also -- in fact, I know I
2 also saw some of the press conference, so, you
3 know, that's how I became aware of that going on.

4 Q And so this would have been -- I think the date of
03:45 5 the press conference was September 19, 1992, so
6 about five months after the Supreme Court
7 decision. Can you tell us, in early or mid
8 September, 1992, before the Breckenridge
9 information became public, what was your sense of
03:45 10 what was happening in the media, and again, I'm
11 just looking for your observation about what the
12 status was of the media reports on the David
13 Milgaard matter.

14 A Well, aside from Dan Lett and -- who was with the
03:45 15 Winnipeg *Free Press* I think, and Dave Roberts with
16 the *Globe and Mail*, the news media just wasn't
17 paying a whole lot of attention to the things that
18 were coming from the Milgaard camp. It seemed
19 like their campaign this time wasn't working as
03:46 20 they had hoped.

21 Q If I can call -- this document, 334872, is a
22 letter of September 18th, 1992 from Bruce
23 MacFarlane to you attaching a copy of the letter
24 dated the 16th of September, 1992 together with an
03:46 25 attachment headed statement:



1 "I understand that Mr. Milgaard and some
2 of his supporters will be holding a
3 rally in Winnipeg tomorrow. I also
4 understand that this letter, or its
03:46 5 contents, may be made public at the
6 rally."

7 And then if we can go to the next page -- sorry,
8 117785, and it looks like this is a copy of a fax
9 you are sending to the minister's office, and go
03:46 10 to page 787, this is the September 16th, 1992
11 letter from Mr. Wolch to Kim Campbell that talks
12 about the statement, and it appears that, and let
13 me ask you, on September 18th, 1992, that Bruce
14 MacFarlane would have sent to you a copy of the
03:47 15 letter Kim Campbell, the minister's office,
16 received with a copy of the statement; does that
17 sound right?

18 A That's -- yes, that's right.

19 Q And then so this would be I think the day before
03:47 20 the press conference. Does that sound right?

21 A Well, according to the dates, that's correct, yes.
22 I don't have any recollection of that
23 specifically, but that's the 16th and if they
24 didn't have their press conference until the 18th
03:47 25 or 19th, then obviously it was sent out early.



1 Q Yeah. I think, if I may assist, I think from the
2 record it appears that on September 16th, 1992 the
3 letter was written to Kim Campbell that had a copy
4 of the Breckenridge statement, it wasn't
03:48 5 identified, the name wasn't identified at the
6 time, it was sort of an unnamed statement, and
7 then on September 19th was the press conference,
8 and I think in the intervening time we've heard
9 some evidence from Sergeant Pearson about some
03:48 10 investigations he did at the time checking into
11 some of this. So anyway, does that sound right,
12 do you have any recollection of that?

13 A Well, again, my recollection was that we got it
14 from the news media and that may be because I
03:48 15 watched the press conference itself and it made
16 more of an impression than this, but, you know, I
17 accept --

18 Q In fairness, Mr. Brown, the press conference had
19 more information in it than I think what was in
03:48 20 the statement and this letter, so maybe I'll just
21 walk through parts of this. Would you have been
22 made aware of the fact that Mr. Wolch had written
23 to Kim Campbell with the Breckenridge statement
24 asking for a federal inquiry?

03:49 25 A Yes, I accept what the document shows there, yes.



1 Q And here, he says that:

2 "Briefly this evidence

3 consists of a witness who was a former
4 employee of the Saskatchewan Attorney
03:49 5 General's Department who has come
6 forward with information concerning
7 activities in the Department shortly
8 after David Milgaard's conviction.

9 Enclosed please find a photocopy of the
03:49 10 statement which the witness has provided
11 to a private investigator in
12 Saskatchewan.

13 It is clear from this
14 statement that some information came to
03:49 15 the attention of this witness which
16 suggested that there was a mistake made
17 in the Milgaard case. This witness
18 brought this information to Mr. Kujawa's
19 attention, and was told to mind his own
03:49 20 business if he valued his job. The
21 witness also indicated that by virtue of
22 the filing which was required in his
23 position, he became aware that meetings
24 were held where both the Milgaard and
03:49 25 Fisher files were considered together.



1 These meetings were behind closed doors
2 and involved senior attorneys in the
3 Attorney General's office.

4 Mrs. Milgaard, along with
03:50 5 the investigator in question, met with
6 this witness to follow up on the
7 information contained in the statement.
8 The witness described an incident which
9 involved his refiling the Milgaard and
03:50 10 Fisher files, which were requested for a
11 meeting which was attended by
12 Mr. Romanow, attorneys in the Attorney
13 General's office, and police officials."

14 And then goes on to talk about the court ruling.
03:50 15 The following -- sorry:

16 "Accordingly, we know the evidence of
17 Larry Fisher was suppressed. The
18 following, however, has not yet been
19 established:"

03:50 20 And then goes on to talk about the questions, and
21 the next page:

22 "Mr. Mitchell has not seen fit to order
23 an inquiry into the Milgaard matter, nor
24 does he seem inclined to do so. In
03:50 25 light of the evidence linking the



1 present Premier of the Province of
2 Saskatchewan to the Milgaard case, we
3 would suggest that it would be
4 impossible for the Milgaard family to
03:50 5 obtain any form of impartial inquiry in
6 the Province of Saskatchewan. A full
7 and proper inquiry into this matter is
8 absolutely essential to deal with this
9 new evidence and with other issues which
03:51 10 need to be addressed.

11 Accordingly, we are now
12 formally requesting that you order an
13 inquiry into the entire matter of the
14 arrest, conviction and continued
03:51 15 incarceration of David Milgaard... The
16 issue of compensation should also be
17 placed before this inquiry."

18 Do you recall, and just for the record, the next
19 page of this letter is the statement, and you'll
03:51 20 see at the bottom, I think the bottom right is
21 Mr. Breckenridge's signature. Is this your
22 writing, the middle part?

23 A I think so, yes.

24 Q So Breckenridge and Buckholz, it looks like you
03:51 25 are trying to identify --



1 A We were trying to identify who it was, yes.

2 Q So did you become aware, and I'm not sure if it
3 matters on September 18th or not, but did you
4 become aware of Mr. Wolch's request to Kim
03:51 5 Campbell to hold a federal inquiry and the nature
6 of the allegations being made that supported that
7 request for an inquiry?

8 A Yes.

9 Q And what was your reaction to that?

03:52 10 A Well, frankly, my reaction to the entire
11 Breckenridge stunt was that it was so outrageously
12 dishonest and malicious that we shouldn't even
13 reply to it. However, other persons in the
14 department, particularly I believe the deputy
03:52 15 minister and the minister, determined that the
16 matter had to be referred to the RCMP for an
17 investigation.

18 Q And why do you say it was so dishonest and
19 malicious?

03:52 20 A Because anyone with a half an ounce of sense
21 wouldn't believe that statement, would be very
22 concerned about verifying the accuracy of it. To
23 suggest that the Attorney General and the deputy
24 and the director of prosecutions got together to
03:52 25 conspire to suppress evidence is just nonsense and



1 to release that without any real amount of
2 checking and to discover a few days later that in
3 fact Michael Breckenridge didn't even work in the
4 department at that time, it clearly went beyond
03:53 5 being careless to being malicious and it suggested
6 a level of desperation that I didn't think had
7 existed at that point. The other thing that made
8 it truly appalling is that this time they couldn't
9 even excuse their behaviour by saying that this
03:53 10 was aimed at a desperate attempt to get David
11 Milgaard out of jail. David Milgaard was out of
12 jail and this was all about grubbing for money.

13 Q And what about the fact that the request was made
14 to the Federal Minister?

03:53 15 A Well, they obviously knew that if they slandered
16 officials in the provincial government,
17 particularly the premier, that they weren't likely
18 to get much sympathy out of us.

19 Q Can we just go to the next page of this statement,
03:54 20 and I take it, Mr. Brown, did you have an
21 opportunity to review the statement and consider
22 what was in the statement and to determine whether
23 it had credibility?

24 A Yes, I looked at the statement and listened to
03:54 25 what was said at the press conference, and it was



1 just -- it was outrageous. The notion that some
2 file clerk would be in on what was going on in the
3 office of the Attorney General or the Deputy
4 Attorney General, the fact that they would so
03:54 5 blithely slander these people by suggesting that
6 they were involved in some kind of cover-up was,
7 in my view, just outrageous and showed a degree of
8 malice that I didn't think was there at that
9 point.

03:55 10 Q When you say you watched the press conference, was
11 that a televised press conference or a news clip
12 or do you recall?

13 A I don't recall whether it was a televised one or
14 just a news clip that I saw, but I saw -- it
03:55 15 was -- what I recall is Joyce Milgaard making, or
16 putting the news out there and Mr. Wolch sitting
17 beside her.

18 Q And do you recall at what point you discovered,
19 number one, that it was Michael Breckenridge who
03:55 20 they had been relying on who had made the
21 statement, and number two, that he didn't work
22 there at the time that he was alleged to have
23 worked there? How did that come about?

24 A Umm, my recollection is that there were people
03:55 25 still in the department at that time who were



1 familiar with who was there and who wasn't there
2 in the beginning of the '70s and they thought that
3 kind of thing sounded like Michael Breckenridge
4 because he had a bit of a reputation for being a
03:56 5 little off the wall and when the records were
6 checked, it was clear Michael Breckenridge didn't
7 start until considerably after this point.

8 Q And what information did you find out about
9 Mr. Breckenridge and his reputation?

03:56 10 A Well, certainly Richard Quinney had known Michael
11 Breckenridge and he knew him to be somebody who
12 was -- well, he marched, let's say he marched to
13 the beat of a drum that he was the only one that
14 could hear. The last anyone in the department
03:56 15 heard from Michael Breckenridge, he was off to go
16 racing for Jesus.

17 Q If we could go through a couple of documents,
18 219290, and this is a news release of September
19 18th, 1992 that's talking about -- this is Friday,
03:57 20 September 18th, which is the day I think you got
21 the letter from Bruce MacFarlane, and then it
22 talks about a news conference being held on
23 Saturday, September 19th:

24 "Copies of a letter to the
03:57 25 Minister of Justice containing new



1 evidence that supports an application
2 under The Federal Inquiries Act will be
3 released.

4 David with other members
03:57 5 of the Milgaard family and Hersh Wolch
6 will be in attendance. David and Mrs.
7 Milgaard will be available for
8 background shots etc should they be
9 required by request from 10 o'clock
03:57 10 until 12.30. Mr. Wolch will be
11 available after the press conference for
12 any questions."

13 Do you recall being made aware in advance of the
14 press conference that this was going to happen?

03:58 15 A I don't recall seeing that.

16 Q And sorry to belabour the point, but is it your
17 recollection that you became aware that there was
18 going to be a press conference when you watched a
19 clip of it on the news?

03:58 20 A Well, no, I think the communication from the
21 Federal Department of Justice people indicated
22 there was going to be some kind of news event, but
23 I didn't -- we didn't get a copy of that, and I
24 would have seen whatever it was I saw of the news
03:58 25 conference the day it was held I expect from



1 watching the news.

2 Q And 047110 --

3 A I should, however, say that I have seen a
4 transcript of that conference because that was
03:58 5 prepared for us at some point.

6 Q Right, and I'll show you that in a moment.

7 047110, this is a memo of Officer Egan of the RCMP
8 to file and it appears, maybe I can just summarize
9 it, it appears, Mr. Brown, that when the federal
03:59 10 government, Federal Justice Department received
11 the letter from Mr. Wolch on September 18th with
12 the statement from Mr. Breckenridge, they
13 investigated it for a while, for at least a number
14 of days, and engaged Sergeant Pearson to go
03:59 15 interview some people and at some later point it
16 appears from the documents that it was agreed that
17 it was really a provincial matter because it
18 related to a criminal investigation. Do you
19 recall that generally being the case?

03:59 20 A Yes.

21 Q And so here, it says Sergeant Pearson, it talks
22 about Pearson and Williams discussing this
23 matter -- just scroll up -- so this is Friday,
24 this is before the press conference:

03:59 25 "There is an indication that



1 a further employee in Sask Justice,
2 believed to be Mike Breckenridge, may
3 have some knowledge.

4 Sgt. Pearson has been
04:00 5 tasked to locate the people involved and
6 have them interviewed."

7 And these are people named Dave Wollbaum, and it
8 says:

9 "Sgt. Pearson will be
04:00 10 contacting Mr. Murray Brown directly to
11 obtain any relevant information which
12 may assist his investigation. There has
13 also been a reference that Mr. Bill
14 Logan, who worked at Justice at the
04:00 15 time, may have some information to lend.
16 Mr. Quinney is aware of the
17 investigational steps being made."

18 So it appears that on the Friday, September 18th,
19 1992, that upon receipt of the letter, Federal
04:00 20 Justice lawyers and Sergeant Pearson began to
21 investigate these allegations and notified the
22 province; is that a fair summary?

23 A They may have notified Richard Quinney, that
24 appears to be what he's suggesting there. I
04:00 25 wasn't told that.



1 Q Okay. If we can go to 004068, it appears that Mr.
2 Williams faxed you a copy of the transcript from
3 the press conference on what would appear to be
4 the Sunday, September 20th, 1992. Do you recall
04:01 5 getting a copy of the transcript?

6 A I certainly recall reading a copy, so presumably I
7 got it from somewhere. We generally had an agency
8 that, or the government had an agency that
9 provided transcripts of various kinds of news
04:01 10 media events.

11 Q And what was your -- if we can just maybe go to
12 the next page. What was your reaction after
13 reading through the transcript?

14 A Well, again, it just struck me that the whole
04:01 15 thing was so sleazy and so corrupt that they
16 really had reached a new low. As I said, I was
17 prepared to forgive the nonsense that went on
18 before on the basis that David Milgaard was in
19 jail and getting him out, getting his freedom was
04:02 20 a strong source of motivation, but David Milgaard
21 was out now, this wasn't about getting him out,
22 and, frankly, it wasn't about clearing him, it was
23 about getting a compensation package from the
24 Government of Saskatchewan, and apparently they
04:02 25 were willing to do anything or say anything to get



1 that.

2 **Q** Did this Breckenridge incident, if I can call it
3 that, did that change the way that you dealt with
4 the matter from that point on?

04:02 5 **A** From that point on, had they marched in with the
6 Pope and a stack of affidavits indicating
7 misconduct, I wouldn't have believed a single word
8 of it.

9 **Q** And why is that?

04:03 10 **A** Because, as I say, at this point in became clear
11 that they were prepared to do or say anything that
12 would get them closer to the compensation package
13 they were after and the truth wasn't something
14 they were going to be worried about.

04:03 15 **Q** If we can go to page 004071, some comments here,
16 this is Mrs. Milgaard talking about the, her
17 discussions with Mr. Breckenridge, although she
18 doesn't name him at the meeting. It says:

19 "He said we would never receive an
04:03 20 impartial hearing with the Saskatchewan
21 government. He told of delivering the
22 Milgaard and Fisher files together, to
23 Serge Kujawa. He told of meetings
24 behind closed doors with Roy Romanow,
04:04 25 Kujawa and other senior police and Crown



1 officials with the Milgaard and Fisher
2 files."

3 Just on that, you had mentioned this earlier, was
4 that something that happened, that the Minister
04:04 5 of Justice, senior police and Crown officials
6 would meet on prosecution files?

7 A No. In my experience with the Department of
8 Justice, which starts in 1975, neither the deputy
9 minister nor the minister in that case -- and the
04:04 10 deputy was Ken Lysyk, the minister was Roy
11 Romanow -- ever involved themselves in criminal
12 law matters, they just -- it wasn't something they
13 were interested in. They believed they had
14 competent officials running the public prosecution
04:04 15 service and when I joined, that would have been
16 Eugene Ewaschuk who is now a judge in the Ontario
17 courts, followed by Del Perras who is now a judge
18 in Alberta, and it just, they did not get
19 involved, Roy Romanow had a conscious policy of
04:05 20 not getting involved, and on two occasions when
21 some other cabinet ministers even called the
22 director of public prosecutions to make inquiries,
23 he came down hard on them, and at one point when
24 one of those people made a second call, he took
04:05 25 that to the premier because it was his view that



1 politics had absolutely no place in the criminal
2 prosecutions division.

3 Q Now, at the time these allegations were made,
4 Mr. Romanow was the premier; correct?

04:05 5 A That's correct.

6 Q And what did you make of the fact, if any, that
7 the allegations being made in the Breckenridge
8 incident were directed at the then premier?

9 A Well, I mean, if you are trying to create
04:06 10 attraction for your demands for an inquiry or
11 compensation, alleging corruption and cover-up by
12 the premier would be about as good as it gets.

13 Q The comment here, it says:

14 "The Supreme Court said the Larry Fisher
04:06 15 evidence that the police had in 1970 was
16 credible evidence which could affect the
17 verdict of the jury. Justice Tallis
18 said they never ever told him about
19 Larry Fisher. Somebody suppressed that
04:06 20 evidence and there has been no inquiry
21 into it to see just how this happened.
22 This new evidence says that these people
23 had the files together. Since there was
24 no disclosure we can only assume a
04:06 25 decision was made to suppress it. Pure



1 and simply put, a coverup."

2 And just your comment on that, and in particular
3 the comment about what the Supreme Court had
4 said.

04:06 5 A Well, fact one, the Supreme Court said that the
6 evidence of Larry Fisher might affect the jury.
7 Fact two, it wasn't provided to Justice Tallis.
8 Then you get the malicious supposition that
9 obviously that means the evidence had to have been
04:07 10 deliberately suppressed for an evil reason and, in
11 my view, those two facts don't necessarily lead a
12 reasonable person to come to the conclusion that
13 it had to have been suppressed.

14 Q The bottom of the page, the question is asked of
04:07 15 Mr. Wolch:

16 "What is the significance of the letters
17 you have from - legally."

18 And I think this is referring to Breckenridge.

19 Top of the next page. No, next page. Mr. Wolch:

04:07 20 "It's simply more evidence of what we
21 know to be a fact. Ah, ah um I take a
22 bit of a different view than Joyce I
23 think the letter simply adds one extra
24 feature of evidence that the coverup was
04:07 25 established a long time ago and this is



1 just one more piece in the puzzle that's
2 all it is."

3 And this comment about the cover-up being
4 established a long time ago, your comment on that
04:08 5 in light of what you understood the Supreme Court
6 to be saying?

7 A Well, the Supreme Court didn't find that to be the
8 case. Had they found that the Department of
9 Justice officials had covered up anything, I have
04:08 10 no doubt they would have not said that they didn't
11 find any evidence of improper conduct, or that the
12 disclosure was proper according to the processes
13 in place of the day.

14 Q And scroll down, Mrs. Milgaard says:
04:08 15 "What we're saying is we have
16 information that says Roy Romanow and
17 this we have said in the letter to the
18 Minister of Justice - that he was in
19 these meetings. Now I'm not about to
04:08 20 judge his evidence. I met with him and
21 I thought that he was credible. Ah I
22 met with him ... and private
23 investigators. We made sure that he was
24 employed where he said he was at that
04:08 25 time, and that the people he mentioned



1 were also employed and that he in fact
2 did the things that he said he did, but
3 he's the one that has come forward and
4 said that Roy Romanow was in these
04:09 5 meetings behind closed doors."

6 What was your -- did you ever -- can you tell us,
7 what steps did you take to check this issue about
8 whether he was employed where he said he was at
9 the time; namely, Mr. Breckenridge?

04:09 10 A Well, we got -- we went looking for the records
11 from the human resources office. There are files
12 on everybody that has been employed for years and
13 years and years and those files contain the dates
14 of commencement and the dates of termination and
04:09 15 one quick look made it clear that Michael
16 Breckenridge wasn't there when he said he was.

17 Q Go to page 004075. Now I think Mr. Breckenridge's
18 first letter to Mr. Wolch is dated March 21st,
19 '92 -- if I'm not mistaken I think it was March,
04:09 20 yeah, March '92 -- so before the conclusion of the
21 Supreme Court reference. So there is a question
22 here from a reporter:

23 "Did you ask him why he didn't come
24 forward?"

04:10 25 Mr. Wolch:



1 "... just on that question, it wouldn't
2 have been relevant to the Supreme Court.
3 It simply wasn't relevant."

4 "I'm not saying it affected him, but it
04:10 5 wouldn't even have been admissible."

6 And if Mr. Breckenridge's allegations were true,
7 would that have been admissible evidence at the
8 Supreme Court reference?

9 A Well, never mind if they were true, if Mr. Wolch
04:10 10 thought for a moment they might stand up under any
11 kind of scrutiny they would have been brought
12 forward and they would have been something the
13 Supreme Court would have been willing to hear
14 because that is direct evidence of Crown
04:10 15 misconduct.

16 Q And so is the answer to that is that, yes,
17 Mr. Breckenridge's evidence would have been
18 relevant and admissible as far as the scope of
19 what the Supreme Court was looking at?

04:10 20 A Yes.

21 Q Go to 334858, please. This is a letter, I think
22 from Mr. Williams to you dated September 21, 1992,
23 that has attached the statements of David Wollbaum
24 and Patricia Styles. And do you -- maybe just go
04:11 25 to the next page -- do you have a recollection of



1 that, at least for a while, that Mr. Williams and
2 Mr. Pearson were investigating this matter?

3 A They were, yes. Well, I -- Rick Pearson, Sergeant
4 Rick Pearson was investigating it, yes.

04:11 5 Q So what was your -- after the press conference
6 what happened? Just tell us, from your
7 perspective, what did you do and how did we end up
8 with the RCMP investigation?

9 A Well I know that to the extent that Justice
04:11 10 officials investigated anything, we checked the
11 records to determine when he was employed there,
12 and in fact he wasn't employed there when he said.
13 We knew the RCMP, that Rick Pearson was in fact
14 doing some checking as well, and we left it at
04:12 15 that point. The next thing I heard was that the
16 RCMP were going to do a full-blown investigation
17 of the whole thing, the whole case.

18 Q And was that a decision made by the Premier, do
19 you believe, or by his --

04:12 20 A Well, I know it came as a surprise to me and it
21 came as a surprise to Richard Quinney, so I'm
22 guessing it probably came out of the deputy
23 minister's office and perhaps Bob Mitchell's
24 office. Again, I can't imagine that Roy Romanow
04:12 25 would have been involved in making that decision,



1 he would have left it to his minister.

2 Q And so, again, the view of you and Mr. Quinney was
3 that nothing further should be done with this? I
4 think your words earlier were there shouldn't even
04:13 5 be a response.

6 A It was almost immediately discredited in the press
7 when it was published, or the fact that he wasn't
8 even employed in the department at the time became
9 publicly known, and it was our view that that's as
04:13 10 much of a reply as this deserved.

11 Q If we can go to 117965, please. And, again, I
12 think -- are these Mr. Quinney's notes of --

13 A Umm, yes, it looks like Richard Quinney's writing.

14 Q And I don't know that we need to go through them.

04:14 15 It would appear that there were some discussions
16 between the province and the Federal Justice
17 departments about who should be doing the
18 follow-up, the federal Justice Department I think
19 received the information, and it appears from
04:14 20 these notes the question became, well, if it's a
21 criminal investigation, the allegations are that
22 the Premier and Mr. Kujawa and Mr. Lysyk and
23 others committed criminal conduct, that that's a
24 matter for the province to investigate; is that
04:14 25 correct?



1 A Yes.

2 Q And I think what Mr. Sawatsky told us was that the
3 RCMP were then asked to investigate these
4 investigations and report to the Alberta Deputy
04:14 5 Minister and the Alberta -- or Calgary --

6 A Chief Crown.

7 Q -- Chief Crown? Go to 279577. This is an
8 editorial or an opinion piece in the *StarPhoenix*
9 September 23, 1992. I think you commented that
04:15 10 the allegations, at least your view, was in the
11 media -- and maybe you better tell me your words
12 again; what was your reaction to how the media
13 dealt with these allegations?

14 A Well, again, obviously they were reported. It was
04:15 15 sensational news to have someone allege that the
16 Premier was involved in a coverup. And it was my
17 view that, once it was made public that in fact
18 Mr. Breckenridge didn't even work in the
19 department when he said he did, that should
04:15 20 largely allay people's fears about, you know, what
21 was in that news media article.

22 Q And this piece says -- talks about the -- it says:
23 "David Milgaard and his
24 supporters are making serious
04:16 25 allegations about suppressed evidence



1 and a coverup involving Premier Roy
2 Romanow and MLA Serge Kujawa in a bid to
3 get a public inquiry in the handling of
4 Milgaard's prosecution for murder.

04:16 5 But the latest announcement
6 by the Milgaard camp leaves the public
7 wondering about just how long this saga
8 will drag on.

9 The latest reason for
04:16 10 Milgaard and his mother Joyce Milgaard
11 demanding a public inquiry are the
12 recollections of a former Justice
13 Department employee. They say the
14 former employee saw then justice
04:16 15 minister Romanow and senior prosecutor
16 attend meetings where Milgaard's file
17 was reviewed along with that of serial
18 rapist Larry Fisher.

19 If that's the evidence they
04:16 20 have about the alleged coverup, they
21 should release the informant's name. If
22 revealing the person's identity is not
23 practical for whatever reason, the
24 public is owed a full explanation as to
04:16 25 why



1 The Milgaards have so far
2 relied heavily on the media to carry the
3 ball for them and it appears they are
4 taking the same route this time around.

04:17 5 Nobody - not provincial or
6 federal officials, police forces or the
7 media - can do what's presumably being
8 asked of them by the Milgaards without
9 having enough information to go on.

04:17 10 Innuendos and allegations
11 against two senior government officials,
12 without even a name to back up the
13 claims, aren't a beginning. They are a
14 dead end."

04:17 15 And just your comment on that piece?

16 A Well I -- again with -- I think by this point the
17 news media was not prepared to unquestionably
18 accept anything that Joyce Milgaard put out, they
19 were very skeptical of what she was saying, and on
04:17 20 its face the statement by Michael Breckenridge was
21 incredible, nobody with half an ounce of sense
22 could accept that.

23 Q In we can go to 061702, sorry, 061701. And this
24 is the October 30, 1992 letter from Brent Cotter,
04:18 25 who was the Deputy Minister of Justice and Deputy



1 Attorney General, to Mr. Wolch, and this is the
2 letter that's advising that his letter of
3 September 16th to the federal minister was
4 referred to the Minister of Justice for
04:18 5 Saskatchewan, and that the matter has been
6 referred to the RCMP for consideration. And I
7 think it's your evidence, sir, that after the --
8 the day or two around the Breckenridge press
9 conference, after that, you did not have much to
04:19 10 do with the decision to have the RCMP investigate;
11 is that correct?

12 A Yes, that's correct.

13 Q If we can go to 154281. This is an October 30th,
14 1992 letter or fax from Mr. Williams to you, and
04:19 15 go to the next page, it says:

16 "Our view re the R.C.M.P. request".
17 And at this time I think we've heard evidence
18 from Sergeant Pearson the inclusion of the (V14)-
19 (V14)- assault in the second application to the
04:19 20 federal minister prompted the RCMP to investigate
21 the (V14)- assault as a ground of that
22 application, and I think in his investigation
23 Sergeant Pearson interviewed Ms. (V14)-, who
24 indicated that -- at least according to Sergeant
04:20 25 Pearson -- that she was not saying that Larry



1 Fisher assaulted her, that she thought David
2 Milgaard had. And you're aware of that, of the
3 (V14)- assault and that issue?

4 A Yes.

04:20 5 Q And I think Sergeant Pearson then after, even
6 after the matter went to the Supreme Court
7 reference, found himself dealing with Ms. (V14)-
8 and this issue of trying to identify who had raped
9 her?

04:20 10 A That's correct, yeah.

11 Q And so this memo appears to be, again, October of
12 1992, a number of months after the conclusion of
13 the reference, and I think this relates to an
14 issue about whether or not Sergeant Pearson, the
04:20 15 RCMP, could use the blood provided by David
16 Milgaard and Larry Fisher in the Section 690
17 process, correct, for further DNA testing in
18 relation to Ms. (V14)-?

19 A That's correct.

04:21 20 Q And I believe the federal position here is that:
21 "Our minister's role is conditioned on
22 the existence of a section 690
23 application; there not being one at the
24 moment, we must be careful to ensure
04:21 25 that she does not overstep her



1 responsibilities."

2 And:

3 "The second point concerns
4 future charges arising out of this
04:21 5 issue. It is of fundamental importance
6 to remember that the entire question
7 whether there is sufficient evidence to
8 implicate Milgaard in the (V14)-
9 controversy falls exclusively to the
04:21 10 Attorney General of Saskatchewan. We
11 have no role whatsoever. Accordingly,
12 advice on the lawfulness of seizures and
13 the development of the case falls to the
14 Province of Saskatchewan ..."

04:21 15 And then it goes on to say about the blood
16 samples are being held by the RCMP, the
17 lawfulness, etcetera, is something that
18 Saskatchewan should deal with; is that correct?

19 A Yes.

04:21 20 Q And:

21 "... the blood samples ... presently
22 being held by the R.C.M.P. ..."
23 are in fact, I believe, the same blood samples
24 that ended up going to England in 1997 for the
04:22 25 DNA testing; is that correct?



1 A I would think so, yes.

2 Q And I'm just wondering if -- next page, just go to
3 the next page, it says:

4 "Having said this, it is

04:22 5 important to remember that we cannot
6 provide the advice to the R.C.M.P. on
7 these issues. It must come from
8 Saskatchewan. On this basis, I agree
9 with the recommendation that you have
04:22 10 set out in the last three lines of your
11 memorandum."

12 And I'm just wondering why there would be a
13 distinction between the handling of the (V14)-
14 DNA and accessing the blood of David Milgaard and
04:22 15 Larry Fisher provided in the 690 proceedings, and
16 the DNA testing of Gail Miller's clothing?

17 A Well, actually, I was just sitting here thinking
18 the very same thing. The Federal Government
19 seemed to be taking two different views.
04:23 20 Certainly, Ron Fainstein's view was that they
21 legitimately held the samples and the clothing for
22 the purpose of doing the DNA. Perhaps their view
23 was that that was still connected to the 690
24 process, albeit the minister had already provided
04:23 25 her advice, whereas this was something that was



1 right outside that process, this was a whole
2 different offence.

04:23 3 Q And I guess as far as the -- if you put it down to
4 this basic issue, that getting the -- getting the
5 blood that was provided in the reference case to
6 enable the RCMP to do a DNA test to try and
7 identify or eliminate who was involved in the
8 assault of (V14)- (V14)-, compared to getting the
9 blood used in the Section 690 proceedings of
04:24 10 Milgaard and Fisher to use to do a DNA test to
11 determine -- from Gail Miller's clothing to
12 determine who did or did not commit that crime,
13 I'm just wondering if there is a distinct -- I --
14 what the distinction there as to why one would be
04:24 15 dealt with differently than the other?

16 A Well, as I say, the only thing I can think of is
17 that the Federal Government, having committed
18 itself to the comparison or to the testing of the
19 clothing and so on, and the DNA work there, and
04:24 20 that arising out of the 690 process, perhaps they
21 saw themselves as being in a slightly different
22 position in that regard than they were with
23 respect to using those exhibits to investigate a
24 case that had nothing to do with the David
04:24 25 Milgaard accusations.



1 Q If we can go to 004436, please, 004436. And,
2 again, go to page 37. And this is the letter that
3 Mr. Sawatsky wrote to Mr. Quinney about getting
4 files for the RCMP investigation, and if you can
04:25 5 go to page 36 it talks about providing access:

6 "... to both the Milgaard and Fisher
7 files as per your request.

8 As Murray Brown handled this
9 matter in the Supreme Court I would
04:25 10 normally appoint him to assist however,
11 he will be on holiday after the end of
12 the year. Anyone else should be able to
13 assist - just call before you come."

14 Were you involved in putting together the
04:26 15 documents to provide to the RCMP for their
16 Flicker investigation, or was that someone else
17 in your department?

18 A Umm, I can recall going through some boxes to see
19 whether there was what appeared to be all of the
04:26 20 materials that Eric Neufeld and I had generated
21 there. But, no, umm, it seems to me that they
22 came while I was away on vacation so I wouldn't
23 have been the one that put that together.

24 Q If we can go to 061373. And this is a September
04:26 25 9th, 1993 letter to Inspector Sawatsky from you,



1 it says:

2 "Enclosed is another portion
3 of the Department's file in this matter.
4 It would appear this is the missing head
04:27 5 office file put together before and
6 after the appeal. Until now it has been
7 languishing in the correspondence files.
8 Why it was there I have no idea. I
9 personally disclaim any knowledge of it
04:27 10 as the file contains material I have
11 never seen before.

12 Would you please pass this on
13 to your investigators for their
14 consideration."

04:27 15 And I think this head office file was identified
16 by -- maybe I can just call up the document --
17 061389. And I think that what's included in
18 that, and I think the evidence that we've heard
19 from Mr. Sawatsky and perhaps some other
04:27 20 witnesses, is that the RCMP in 1969, in their
21 contract policing, provided reports to the
22 Attorney General's office -- or to their
23 superiors, which in turn were provided to the
24 Attorney General's office, and that that may have
04:28 25 been the source of or the reason as to why the



1 Attorney General of Saskatchewan had some of the
2 RCMP reports. And do you have any -- do you have
3 a recollection of where these files were and how
4 they came -- how they were discovered?

04:28 5 A Well certainly at that time, and even when I
6 started reviewing materials in head office in the
7 early '80s, if the RCMP took a breath pursuant to
8 the provincial policing contract some paper would
9 come flying over to us reporting what they'd done.
04:28 10 One of the things that I did was try and get them
11 to cut down on some of that because we simply
12 didn't need to know the detail that we were
13 getting.

14 How those files ended up in
04:28 15 the correspondence files, I don't know, I mean
16 obviously somebody has misfiled them.

17 Q And prior to you -- and do you recall how they
18 came to your attention in 1993?

19 A I suspect somebody was reviewing or looking for
04:29 20 something in the correspondence files to see
21 whether there were any letters or anything that
22 were missed, and they discovered that, because the
23 correspondence files are exactly that, they are
24 letters of -- or copies of letters that were sent
04:29 25 out, they weren't copies of letters received or of



1 police reports received, so they would stand out
2 if you were just even sort of quickly going
3 through those files.

4 Q And so they were not where they should have been;
04:29 5 is that a fair way to put it?

6 A Yes, that's correct. Ordinarily, they would have
7 been filed under the subject of the inquiry.

8 Q I see it's 4:30, Mr. Commissioner. I expect to be
9 a short while tomorrow morning, maybe half an
04:29 10 hour, 45 minutes, and I expect that, based on my
11 discussions with counsel, we should have no
12 difficulty finishing Mr. Brown tomorrow, but --

13 COMMISSIONER MacCALLUM: Okay.

14 (Adjourned at 4:30 p.m.)
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