Commission of Inquiry

Into the Wrongful

Conviction of David Milgaard

before

THE HONOURABLE MR. JUSTICE

EDWARD P. MacCALLUM

****

Transcript of Proceedings

and

Testimony before the Commission

sitting at the

Sheraton Cavalier Hotel at

Saskatoon, Saskatchewan

****

On Monday, September 18th, 2006

Volume 184

Inquiry Proceedings

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Appearances:

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

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

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

Ms. Catherine Knox,   **for** Mr. T.D.R. (Bobs) Caldwell

Mr. Garrett Wilson, Q.C.,   **for** Mr. Serge Kujawa

Mr. Pat Loran, Esq.,   **for** the Saskatoon Police Service

Mr. Chris Boychuk, Esq.,   **for** Mr. Eddie Karst

Mr. Bruce Gibson, Esq.,   **for** the RCMP

Mr. David Frayer, Q.C. and Ms. Jennifer Cox,

                for Minister of Justice

                (Canada), The Hon. Vic Toews

Mr. Marshall Hopkins, Esq., **for** Justice Calvin Tallis

                (Retired)

Mr. Kenneth R. McLeod, Esq.,   **for** Eugene Williams

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1   ***Transcript of Proceedings***

2   *(Reconvened at 1:00 p.m.)*

3   COMMISSIONER MacCALLUM: Good afternoon.

4   ***MURRAY BROWN, continued***:

01:02   5   **BY MR. WOLCH**:

6   Q   Thank you. Mr. Brown, if a factually innocent

7   person was convicted of a crime, would that be a

8   miscarriage of justice?

9   A   A factually innocent person, yes.

01:02   10   Q   So in 1970 the conviction of David Milgaard was a

11   miscarriage of justice?

12   A   We didn't know that at that point, no.

13   Q   That wasn't my question.

14   A   Well, if you look at it that way, yes. We have to

01:03   15   deal with what we know, so in 1970 we didn't know

16   that.

17   Q   I didn't say that. You agree it was a miscarriage

18   of justice?

19   A   Ultimately, yes, that's correct, and it was shown

01:03   20   to be, whenever it was, in 1997.

21   Q   Mr. Brown, you say ultimately. It was always a

22   miscarriage of justice; was it not?

23   A   Yes, that's what I said, and it was ultimately

24   shown to be in 1997.

01:03   25   Q   I would like to touch on the Supreme Court

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1		decision again, 058828, and if we can go to 29,
2		please, and we dealt with this last time so I
3		don't intend to spend particularly much time with
4		it, but we dealt with the question posed to the
01:04 5		court; correct?
6	A	Yes.
7	Q	Okay. And the answer to (a) would be either yes
8		or no?
9	A	Yes.
01:04 10	Q	But in terms of (b), in terms of the remedy to be
11		recommended, the court set out some guidance for
12		how they would determine what remedy to recommend;
13		would that be fair?
14	A	Yes.
01:04 15	Q	And we'll skip (a), we know what it is, we'll go
16		to (b) and then to (c). Now, (a), (b) and (c) are
17		together, and if we can scroll to (c), (c) is much
18		akin to the test for fresh evidence; is it not?
19	A	Yes, it's a modified fresh evidence test.
01:05 20	Q	And if we scroll down, or to the next page rather,
21		sorry, now (d) is what should be done if they fail
22		to establish a miscarriage of justice as in (a),
23		(b) or (c)?
24	A	Yes.
01:05 25	Q	Right? Now, do you agree with me it seems to be

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1   saying that (a), (b) and (c) are miscarriage of

2   justices?

3 A Well, it seems to say that, but then when you read

4   (a), (b) and (c), it says would be.

01:05 5 Q But that was the question posed.

6 A Well, that's the way they worded that, yes.

7 Q Okay. So here is if you don't -- in effect, what

8   (d) is saying, if you don't find a miscarriage of

9   justice, if we don't find rather, you might

01:06 10   consider a conditional pardon, and was it your

11   evidence, and I don't want to misquote you, that

12   that paragraph is based on sympathy?

13 A Well, that's what I referred to as the sympathy

14   option simply because if you don't find a

01:06 15   miscarriage of justice or you don't find something

16   upon which to hang your hat, ordinarily there

17   wouldn't be a remedy, and certainly that would be

18   the minister's -- what the minister would do, but

19   the Supreme Court had a different view.

01:06 20 Q Well, rather than sympathy, what if the court was

21   left in a position that it felt the new evidence

22   didn't meet the fresh evidence test, and I'm

23   paraphrasing (c), didn't meet it, but caused them

24   to have concerns about the conviction, what do

01:07 25   they do?

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1   A   Well, presumably they could have said that if

2   that's what their concern was, but they didn't.

3   Q   But this was set up before they made any

4   determination.

01:07 5   A   Yes, I'm aware of that.

6   Q   They hadn't determined what they were going to

7   determine in the end.

8   A   Yes.

9   Q   So looking forward, they could very easily

01:07 10   envision a position, would they not, where the

11   applicant didn't meet the test but still caused

12   them concern as to the appropriateness of the

13   conviction and (d) would be the way to handle it?

14 A   Perhaps, yes.

01:07 15 Q   So (d) wouldn't be sympathy, it would just be a

16   matter of the fresh evidence test, which is quite

17   difficult, hasn't been met, but, you know, maybe

18   Fisher did it, maybe David is innocent, here is a

19   way to look at it if we're in that ballpark.

01:07 20   Nothing to do with sympathy at all.

21 A   Well, you can interpret it that way.

22 Q   Okay. And of course if the answer is no, that's

23   the end of it, to the first question, if the court

24   says no, don't do anything, we're done.

01:08 25 A   Well, presumably you don't get to (b).

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1   Q   Yeah. You don't even get to (d). Now --

2   COMMISSIONER MacCALLUM: Well, Mr. Wolch --

3   MR. WOLCH: Sorry.

4   COMMISSIONER MacCALLUM: -- sympathy, at

01:08   5   least in its abject title form, is used in the

6   second last line of (d).

7   MR. WOLCH: Yes, but that's sympathetic

8   consideration; that is, if you can't -- it

9   doesn't go to his personal circumstances, but

01:08 10   rather to the facts is what I'm suggesting. That

11   is --

12   COMMISSIONER MacCALLUM: I see.

13   MR. WOLCH: That is, if you are in that

14   legal quandary, I mean, sympathy, it's hard to

01:08 15   think what's sympathetic in the facts, but I'll

16   deal with that.

17   BY MR. WOLCH:

18   Q   Because the other line that causes some concern,

19   and I think you commented on it, if we go to 36:

01:09 20   "However, if a stay is not entered, a

21   new trial proceeds and a verdict of

22   guilty is returned, then we would

23   recommend that the Minister of Justice

24   consider granting a conditional pardon

01:09 25   to David Milgaard with respect to any

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1   sentence imposed."

2   And you interpret that as some form of sympathy?

3   A   Yes. If we had gone through the process of

4   running a new trial, got a conviction, the

01:09 5   sentence is automatic, I think that is a

6   sympathetic, and, frankly, an appropriately

7   sympathetic result.

8   Q   Unless it's not sympathetic at all.

9   A   At that point what would it be?

01:09 10   Q   Well, what if, for example, the court thought

11   there was real doubt about the guilt, real doubt,

12   even on further conviction, here is a way around

13   it because the court felt he was innocent.

14   A   Well, again, Mr. Wolch, you can read that in if

01:10 15   you want. I don't read it in, but --

16   Q   Well --

17   A   -- feel free.

18   Q   Let's examine it a little more. If David went to

19   another trial and was convicted, that would

01:10 20   conclusively say he robbed, raped and murdered

21   Gail Miller; correct?

22   A   Well, not on the basis of what you are saying.

23   Q   No, no, no, but in law it would?

24   A   Yeah, the question is concluded as far as the law

01:10 25   is concerned.

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1   Q   Okay. Now, he's convicted of murder, a horrible,

2   horrible murder; correct?

3   A   Uh-huh.

4   Q   He hasn't taken treatment, he's avoided it saying

01:10 5   I'm innocent, don't give me treatment; correct?

6   A   Uh-huh.

7   Q   He would be considered dangerous?

8   A   It was 23 -- by that time it would have been 23

9   years ago and he was 16 at the time. Things

01:11 10   change.

11   Q   But looking at the crime and lack of treatment,

12   one would not have a great deal of confidence in

13   that person at liberty?

14   A   Well, he -- yeah.

01:11 15   Q   He had escaped twice?

16   A   Yeah.

17   Q   You also have the Miller family that somehow the

18   killer, or there should be no conviction against

19   the killer. Wouldn't that cross somebody's mind?

01:11 20   A   Well, I have to say it didn't seem to disturb them

21   that much when we entered a stay.

22   Q   Only if they considered him innocent.

23   A   Well, did they?

24   Q   Well, we'll get to that. Furthermore, he would

01:11 25   have committed perjury in the Supreme Court;

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1		correct?
2	A	If you say so.
3	Q	If he was convicted later?
4	A	Yeah. Well, no, it doesn't necessarily follow.
01:12 5	Q	Well, he testified at the Supreme Court I didn't
6		do it. If he's convicted later of the crime,
7		isn't that tantamount to saying he perjured
8		himself?
9	A	Mr. Wolch, we got a conviction the first time
01:12 10		around and had he said he wasn't guilty, I expect
11		we would have still got the conviction. It
12		wouldn't make it perjury, it just means his
13		evidence wasn't believed.
14	Q	No, no, but would he not have perjured himself in
01:12 15		the Supreme Court?
16	A	Well, for the sake of argument, okay, yes.
17	Q	And then if he testified and was disbelieved in
18		his trial, he would have perjured himself again?
19	A	Fine.
01:12 20	Q	I'm trying to understand how you can think that
21		the Supreme Court was acting out of sympathy.
22	A	Because, Mr. Wolch, he was 16 years old when he
23		went into a federal penitentiary for that murder,
24		spent 22 years in hell basically and why wouldn't
01:13 25		they have some sympathy for him.

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1	Q	So you are saying that they would, on a verdict of
2		guilty in the future, recommend a conditional
3		pardon for somebody they thought committed the
4		crime of that seriousness?
01:13 5	A	Yes.
6	Q	Had lied to the court, wouldn't take treatment,
7		they would just say go?
8	A	That is exactly what they did.
9	Q	But I suggest that's consistent with thinking he
01:13 10		wasn't guilty.
11	A	Well, that may be your interpretation, Mr. Wolch.
12		I don't accept that.
13	Q	The court in a Supreme Court, not that all courts
14		aren't strong, was a particularly strong one; was
01:14 15		it not?
16	A	How do you mean? In terms of the people?
17	Q	You had the current -- you had the past chief
18		justice of the Supreme Court; correct?
19	A	That's right.
01:14 20	Q	You had the current chief justice of the Supreme
21		Court?
22	A	Yeah.
23	Q	You had --
24	A	You had a senior panel.
01:14 25	Q	Yeah, you had Justice Cory who has since had an

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1   inquiry into wrongful convictions?

2   A   Yes.

3   Q   In fact, Justice Lamer did too?

4   A   Uh-huh.

01:14   5   Q   Justice Sopinka unfortunately has passed away, but

6   an incredibly high reputation?

7   A   Uh-huh.

8   Q   And Justice Iacobucci who is respected by

9   everyone?

01:14   10   A   That's right.

11   Q   And you are saying that that court would, would

12   countenance no conviction or a pardon for somebody

13   they believed committed an horrific murder?

14   A   I'm saying they did, not that I believe they

01:14   15   would. That's what the judgment in my view said.

16   Q   You are saying based on that as opposed to based

17   on this guy could be innocent?

18   A   Well, you know, if they had thought he was

19   innocent, they could have said so, and they

01:15   20   didn't.

21   Q   Well, they recommended a murder conviction be

22   quashed.

23   A   On the basis that there was some evidence that a

24   jury should consider.

01:15   25   Q   Credible evidence which could affect the verdict?

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1	A	Yeah. If they had thought he was innocent, why
2		would they have sent it back for a new trial.
3	Q	I'm suggesting to you that if they thought
4		somebody was guilty, given that this is not an
01:15 5		appeal, we're not talking about legalities of an
6		appeal, given it wasn't an appeal, if they thought
7		somebody was guilty, there would never be a remedy
8		recommended?
9	A	Well, Mr. Wolch, you're right it's not an appeal,
01:15 10		it was a much broader proceeding than that, and
11		the remedies open to them were unlimited.
12	Q	No, they had one.
13	A	I --
14	Q	That was to give advice to the minister, and the
01:15 15		minister will not --
16	A	Well --
17	Q	-- give a remedy to somebody that the minister
18		believes is guilty?
19	A	Well, Mr. Wolch, if you want to testify to what
01:16 20		that was all about, you can certainly do that, but
21		I'm telling you what I think the decision said.
22	Q	I appreciate that.
23	A	And the decision did not say that they thought he
24		was innocent.
01:16 25	Q	Well, we'll deal with that. There was one thing

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1		which occurred in the Supreme Court which I'd like
2		to ask you about, and that is when Mr. Fisher
3		testified, it came to light that he had been
4		interviewed by Justice; do you recall that?
01:16 5	A	Well, --
6		COMMISSIONER MacCALLUM: Justice who?
7		MR. WOLCH: Oh, Mr. Williams.
8		COMMISSIONER MacCALLUM: Oh, okay.
9	A	The federal Department of Justice, I believe.
01:16 10		BY MR. WOLCH:
11	Q	I'll draw your attention to it but I just
12		thought --
13	A	I believe he was interviewed on behalf of Justice,
14		whether it was done by an RCMP officer or Eugene
01:16 15		Williams I don't recall, but I know somebody went
16		to the prison to see him.
17	Q	Okay. And I -- were you aware of the contents of
18		that interview before Mr. Fisher testified?
19	A	I -- if it was given to us I'm guessing we were,
01:17 20		yes. I don't --
21	Q	Okay. I don't think you were, but we'll talk
22		about that in a minute. You may have been. If we
23		can go to his evidence, I think it's 232244, and I
24		want it at page 409. At 409, please, thank you.
01:17 25		Now, just to set the stage, this is Mr. Fisher

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1   testifying, and the question is put -- because

2   I'll set the stage a little better and save

3   time -- Mr. Beresh had questioned him about his

4   giving a statement to Mr. Williams and the

01:17   5   question was put here:

6   "Q   And you also testified and were

7   questioned by Mr. Williams of Justice?

8   A   Yes, sir.

9   Q   And you put a ban on that, that

01:18   10   Milgaard's counsel could not see it?

11   A   That's right."

12   And if you just turn the page:

13   "Q   Why do you have a ban on it, ...",

14   and then Mr. Beresh says it's a sensitive area,

01:18   15   takes a position identical to the position with

16   Justice Tallis.

17   "There was an interview. There was an

18   undertaking and for the same reasons

19   that he refused to release the

01:18   20   undertaking, so do we."

21   That's a misstatement of fact, although I'm not

22   sure deliberate. Now I'm setting the stage for

23   you. That statement was a ban or a

24   confidentiality imposed, it would appear. Does

01:18   25   that help you at all, in seeing that, as to what

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1   your position might have been?

2   A   Well, again, I don't recall specifically. I know

3   we didn't get Justice Tallis' statement, I

4   thought -- my recollection is that there might

01:19 5   have been some others we didn't get because there

6   were -- they were given to Justice confidentially,

7   but I wasn't -- it doesn't strike me that Larry

8   Fisher's was one of them. I certainly knew that

9   he had taken a polygraph in jail.

01:19 10   Q   Okay. But the results of it; was that given to

11   you?

12   A   Well, we were told it was inconclusive.

13   Q   Okay. And the interview, you don't know if you

14   got it or not?

01:19 15   A   I don't recall that. If -- you'd have to look in

16   our file to see whether that materials was in

17   there.

18   Q   Okay. It --

19   A   Specifically, I don't recall.

01:19 20   Q   Okay. Perhaps I will be, try to be more fair to

21   you, and go a little farther. 412. You see the

22   Chief Justice addressing Mr. Beresh, I take it:

23   "LAMER, C.J.: But do you have an objection

24   to releasing it now?

01:20 25   MR. BERESH: Yes, that's the position I

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1   take. I take no different position than

2   ... my friend did."

3   Now, if I can pause there, at the hearing were

4   you of the view that the Court could order

01:20   5   production?

6   A   Yes, I don't see why they couldn't, or they could

7   at least require Mr. Beresh to waive it or get his

8   client to waive it.

9   Q   I'm thinking of this as from the systemic point of

01:20   10   view, that it was your view that they could order

11   anybody to produce something, that was your view?

12   A   Well, subject -- I mean the one sticking point for

13   them was the solicitor/client privilege

14   question, --

01:20   15   Q   Okay.

16   A   -- but subject to that, yes.

17   Q   Okay. Yeah. But with Mr. Fisher, there is no

18   solicitor/client, that's a witness talking to --

19   A   Yeah.

01:20   20   Q   -- to the investigator?

21   A   To the investigator, yeah.

22   Q   Yeah. But here Mr. Fainstein says:

23   "MR. FAINSTEIN: I would just like to

24   clarify the situation from my

01:21   25   perspective because it leaves us in a

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1   very, very awkward position.

2   There was an interview. I

3   think I can acknowledge that much

4   because it is the subject of discussion

01:21 5   now. It was at some time prior to the

6   reference. It was in connection with

7   the processing of the application for

8   mercy that was made.

9   We felt it would be very,

01:21 10   very important for us to have some

11   discussions directly with ... Fisher.

12   The interview took place when we pledged

13   that that material would be kept under

14   confidence. So we are caught in the

01:21 15   middle now. It was in connection with

16   the processing of the application for

17   mercy. It was before the Reference was

18   made and as long as counsel is refusing

19   to have it released, we are caught by

01:22 20   the undertaking."

21   Now, here's a key question from Justice Sopinka:

22   "SOPINKA, J.: Was that a document that the

23   Justice Minister would have considered

24   in the application for mercy?

01:22 25   MR. FAINSTEIN: I can't say if it came.

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1   directly to her attention or not.

2   SOPINKA, J.: But it wouldn't do anybody

3   any good if the Minister couldn't

4   consider it, would it?"

01:22   5   Mr. Fainstein says he wasn't involved in the

6   reference. Just turn the page. And he says:

7   "It was for the purpose of ultimately

8   giving advice to the Minister. As to

9   whether there was specific reference to

01:22 10   it in the advice she received, I can't

11   say."

12   So I pause there for a moment. So Mr. Fisher was

13   interviewed by Mr. Williams and in the Supreme

14   Court, we don't know if that went to Minister

01:22 15   Campbell for her assessment, we don't know if it

16   went to Justice McIntyre for his assessment;

17   correct?

18   A   Correct.

19   Q   We still don't know?

01:23 20   A   That's right.

21   Q   We don't know how that was represented to Justice

22   McIntyre?

23   A   No.

24   Q   We don't know whether it got to the Minister

01:23 25   Campbell?

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1   A   Well, Mr. Wolch, I'm already on record, I believe

2   with Ms. McLean, of saying that these materials

3   should have been released to David Milgaard,

4   before they go to the minister so that the

01:23 5   applicant has one last opportunity to review and

6   comment on them. I mean, if that were an

7   administrative law-type of process you would

8   certainly be required to do that and, you know, if

9   you are talking about somebody's freedom I don't

01:23 10   know why you wouldn't impose at least the same

11   standard that you'd use with administrative law.

12   Q   Okay. Well we'll just, for the record, I'll show

13   how it played out. Page 417, you have the current

14   Chief Justice saying:

15   "McLACHLIN, J.: But, Mr. Beresh, you do

16   face a different problem slightly and

17   because of your own making. It is

18   because you led evidence directed to

19   establishing that this witness had

20   voluntarily come forward with

21   everything, and so on and so forth."

22   I think you -- you see what the Court is getting

23   at, that he had raised it himself.

24   "McLACHLIN, J.: Now your friend is seeking

25   to challenge that position and you are

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1   saying "no" and it is within your power.

2   So, in a certain sense,

3   there is some sort of onus on you,

4   having led that cross-examination,

5   either to make a decision, it seems to

6   me, or to accept an adverse inference at

7   least as to openness."

8   So might you interpret that to mean the Court

9   didn't feel it had the power to order?

01:24 10   A   Well, that, they are certainly not exercising it

11   when I think they clearly could have.

12   Q   Well they are saying, in effect, "you could have

13   kept it a secret" --

14   A   Yup.

01:24 15   Q   -- "but you're going to get an adverse interest"?

16   A   For some particular reason they are giving the

17   authority to release it to Mr. Beresh when I think

18   they could have easily said "it's here".

19   Q   Okay. But had Mr. Beresh not raised, in examining

01:25 20   Fisher, that there was this interview, the entire

21   process would have ended without yourself or the

22   applicants even knowing that Fisher was

23   interviewed?

24   A   That's correct.

01:25 25   Q   Because, if you go to 419, you see Justice Cory

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1   saying:

2   "CORY, J.: Hasn't your position changed a

3   bit? Ordinarily, yes, this document was

4   given in confidence and was based upon

5   an undertaking by the Crown that it

6   would be treated in confidence. Things

7   have changed somewhat in that Mr. Fisher

8   has come forward and testified.

9   As part of his testimony,

10   reference, at least, was made to this

11   interview with Mr. Williams. In light

12   of that now, do you have any serious

13   difficulty with making that available?"

14   So that just sort of stresses the dilemma,

01:26 15   systemically at least, that we could be at this

16   stage of the process and an interview with a key

17   player would never be released unless Mr. Beresh

18   let it slip?

19   A   Mr. Wolch, we're at this stage of the process, and

01:26 20   have you ever seen the McIntyre opinion?

21   Q   No. I'd like to deal with a couple of individuals

22   who cropped up at the Supreme Court and ask you a

23   few questions about them. Commission Counsel

24   referred you to a man named Ronald Stickel; do you

01:27 25   recall who he would be?

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1   A   Umm, I had no recollection of him then, and I just

2   have the very vaguest recollection now.

3   Q   Well, if we can refer to 008578, this would be the

4   statement that he provided. It would appear to be

01:27 5   it was provided in 1991, towards the end of the

6   year, and he talks about the summer of 1970, a

7   restaurant, Smitty's -- sorry, sorry I'm messing

8   it up here -- a fellow known as Hoppy came into

9   the restaurant, he seemed quiet, never had any

01:27 10   friends, felt sorry for him, he was alone. If we

11   can go down farther:

12   "... I became aware that this person

13   called Hoppy was under suspicion for a

14   killing that took place but I didn't

01:28 15   know where and I wasn't too concerned

16   about it.

17   One day about five or six of

18   us guys were having coffee and for some

19   reason everyone except me and Hoppy got

01:28 20   up and went outside. We sat there for a

21   minute and then, knowing he was under

22   suspicion for the killing of a girl, I

23   said, 'Hoppy, why did you kill that

24   girl?' He reaction was to hang his

01:28 25   head, look at the table and say, 'Did

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1   she ever scratch my back.'

2   I could hardly believe what I

3   heard."

4   Does that refresh your memory at all?

01:28 5   A   Not particularly, frankly, Hersh, no.

6   Q   Okay. What do you make of that?

7   A   I, to be perfectly honest with you, I have a lot

8   of trouble with people who come forward for the

9   first time 20 years after the fact remembering

01:29 10   specific things like this. It's just, I mean what

11   kind of faith can you put in it, it's there for

12   whatever it is but --

13   Q   Well, there's an initial problem in this, if we

14   scroll back to the beginning. See, he says

01:29 15   "during the summer of '70"; David would have been

16   in jail?

17   A   Yeah, he would have been in jail then, yes.

18   Q   Now I apologize if my number isn't the right

19   number, 247521, that's the page number if that can

01:29 20   be found. It might be 247398, could be the

21   starting page, thank you. Now Mr. Stickel was

22   investigated by Mr. Pearson, I take it:

23   "Called Mr. Ronald Stickel,

24   who said he was wrong about the dates he

01:30 25   provided me so far as his contact with

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1   "Hoppy". He said he got a wrist watch

2   just prior to leaving for Thompson,

3   Manitoba and scratched with 1968 on the

4   back of it. The watch was purchased on

01:31 5   05 Aug 1968. Ron said he then returned

6   from Houston, Texas early in Dec 68. He

7   said the American election was on during

8   1968 and Ron returned home to Canada

9   just a week or so prior to that

01:31 10   election. Stickel now believes that his

11   conversation with 'Hoppy' could not be

12   associated to anything of value to this

13   inquiry."

14   Now this paragraph, if the conversation took

01:31 15   place in '68 that's even before the murder?

16   A   Yeah.

17   Q   And Stickel is saying he doesn't think it is of

18   much merit, so it would appear his evidence was

19   basically useless?

01:31 20   A   Appears so.

21   Q   Now if we can turn to 009767, there's -- and turn

22   to the next page if we could, or to the last page,

23   whatever you want. This would be a letter from

24   yourself?

01:32 25   A   Yup.

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1   Q   If we could go back to the first page. And you're

2   writing to Mr. Fainstein as to:

3   "... additional materials to be filed,

4   we would suggest that in light of Mr.

01:32 5   Milgaard's testimony, the following

6   should form part of the case on

7   reference."

8   "2.   Statement of Ron Stickel;"?

9   A   Good question, Mr. Wolch. I have no idea why I

01:32 10   would have wanted that filed. The only thing I

11   can recall about him is that we didn't think there

12   was much there. It was the American election

13   thing that we thought sort of took it out of the

14   ballpark, so I don't know why I would want that

01:32 15   file.

16   Q   Well, if we can go to 009875, this will be two --

17   a letter written two days later. Look at

18   paragraph two is what I am interested in, it's a

19   letter to Mr. Fainstein:

01:33 20   "I fail to understand how Ron Stickel's

21   statement is of any use to the Court.

22   We would like to know if it is proposed

23   that he be called as a witness. If so

24   then we require an opportunity to check

01:33 25   out his background. We do not know

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1   right now if he is a clergyman or an

2   escapee from a mental home. We also

3   have no idea if he has a criminal record

4   and perhaps you might advise in that

01:33   5   regard. Why he would be called or his

6   statement tendered when his evidence

7   cannot be true is beyond me;"

8   A   That's a fair comment.

9   Q   But you would appear to have some concern about

01:33   10   what gets into the media but, of course,

11   Mr. Stickel did get into the media. 004506, I

12   believe. So here's an article in the *StarPhoenix*

13   in February, you'll see down there:

14   "A recent addition to the

01:34   15   Milgaard file at the Supreme Court is a

16   statement from Regina resident Ron

17   Stickel, taken late last year."

18   If we can just go up:

19   "In it, he says he knew Milgaard back in

01:34   20   1969 when he was under suspicion for the

21   murder ...",

22   etcetera, etcetera, etcetera:

23   "... which ... he took to be an

24   admission of guilt."

01:34   25   Did you put it -- or did you advise Mr. Fainstein

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1   to put it in the record so it would become public

2   knowledge and become publicly embarrassing?

3   A   No. No, we weren't doing that, Mr. Wolch.

4   Q   If we can turn to 232580 at 701, please. At 701,

01:35 5   please. This was your co-counsel, Mr. Neufeld,

6   questioning David Milgaard:

7   "Q   Do you know a person by the name of Ron

8   Stickle?

9   A   Ron Stickle.

10   Q   Did you ever meet him?

11   A   It doesn't ring a bell.

12   Q   Smitty's Pancake House?

13   A   It doesn't ring a bell.

14   Q   Do you remember a fellow at Smitty's

15   Pancake House questioning you about

16   whether you had done this crime or not?

17   A   No.

18   Q   A person who had suggested to you that

19   you did, and you said: "She scratched

20   my back." Do you remember that?

21   A   No."

22   Why would that be put to David when you knew it

23   to be totally unreliable?

24   A   Well, I suspect Mr. Neufeld was just checking to

01:36 25   see whether David had any recollection of any of

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1   that, and whether any of it was reliable.

2   Q   Well, the same would apply to the witness Dozenko,

3   would it not? He was actually called as a

4   witness.

01:36 5   A   In -- umm --

6   Q   As being unreliable?

7   A   He was the jail guard, wasn't he?

8   Q   The jail guard who came forward many, many years

9   later to say that David Milgaard had made some

01:36 10   sort of confession to him about ten years earlier,

11   one that he never recorded, one that he never

12   reported, David had escaped from him, and he had

13   had alcoholic problems since?

14 A   Yes.

01:37 15 Q   Totally unreliable?

16 A   Well, his statement was worth what it was worth.

17 Q   Well, the Supreme Court didn't even comment on it?

18 A   Well they didn't comment on very much of the

19   evidence, actually.

01:37 20 Q   No, but a confession might have been commented

21   upon if it --

22 A   Well, if they'd accepted it.

23 Q   As part of the case? No, but it was clearly

24   unbelievable, I'm just wondering why it was put

01:37 25   in?

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1   A   Well it, I wouldn't say it was clearly

2   unbelievable, at the end of the day you've got a

3   statement which ordinarily should be corroborated

4   by entries on the record. It wasn't. It's for

01:37 5   the Supreme Court and the judges to determine what

6   value if any they put on the statement, what value

7   if any they put on the fact he didn't record what

8   ordinarily would be recorded.

9   Q   But it would be more than not recorded, there was

01:37 10   no evidence he'd even told a person, not a single

11   person, over ten years not a person?

12   A   Yes.

13   Q   Yeah. I'm just wondering, like with Stickel and

14   Dozenko, why people so obviously unreliable would

01:38 15   be placed before the Court in this type of

16   hearing?

17   A   Well, you put -- I mean you characterize them as

18   'obviously unreliable', obviously we didn't. We

19   put their evidence before the Court in terms of

01:38 20   whatever it was worth and the Court could assess

21   it.

22   Now I -- with respect to the

23   Stickel stuff, I do recall that it seemed to me at

24   the time that it really wasn't worth much.

01:38 25   The Dozenko stuff, the man was

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1   certain that was the case, it was up to the

2   Supreme Court to determine what, if any, value

3   they placed on that evidence. It wasn't something

4   that I would personally discount as being useless.

01:39 5   Q   Okay. Another matter you touched upon would have

6   been the evidence of Ron Wilson. The Court did

7   place some -- some weight on his recantation; did

8   it not?

9   A   Well, there was, I mean there was that debate that

01:39 10   I had with. A short debate, albeit -- but a

11   debate with Justice Sopinka over whether, if he's

12   an incredible witness today in 1992, isn't that

13   evidence that he would have been an incredible

14   witness in 1970.

01:39 15   Q   Okay. Well maybe for --

16   A   Umm --

17   Q   Maybe, perhaps we could bring that up, I think

18   it's 233090. I think this is the comment that you

19   are making particular reference to, is where

01:40 20   Justice Sopinka says --

21   COMMISSIONER MacCALLUM: What is the doc.

22   ID, please?

23   MS. BOSWELL (Document Manager): It's

24   233078.

01:40 25   COMMISSIONER MacCALLUM: Thank you.

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1   MR. WOLCH: Thank you.

2   BY MR. WOLCH:

3   Q   Justice Sopinka says:

4   "SOPINKA, J.: That might go to the

5   weight, ...",

6   we're talking, of course, about Wilson:

7   "... but when you are applying this

8   *Palmer* test ...",

9   and the *Palmer* test, you would know that to be,

01:41 10   Mr. Brown?

11 A   Yes.

12 Q   Just for the record, perhaps?

13 A   It's the test set out in R v Palmer -- *Palmer and*

14   *Palmer*.

15 Q   "... it seems to me you can't be too

16   literal because the credible evidence,

17   the credible new evidence may be that a

18   principal witness is shown to be a

19   perjurer. That is the credible

20   evidence. It doesn't matter that you

21   don't accept the evidence that he has

22   now given, but he is shown to be a

23   perjurer and his credibility is very

24   material in deciding whether the jury

25   should have accepted it."

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1   That's the reference?

2   A   Yes, that's the reference.

3   Q   Okay. And Justice Sopinka is saying "look, if the

4   guy is a liar he didn't start just yesterday

01:41 5   necessarily, he could be a liar all along".

6   A   No, and I accept that if what you are talking

7   about is a year or two later, but this is 22 years

8   later and I'm not sure that his condition 22 years

9   later provides you with that kind of evidence,

01:42 10   because it seems to me it requires you make the

11   assumption that people don't change in 22 years,

12   or change much, and that's patently not true.

13   Q   No, but Wilson may have changed for the better.

14   He was a 16-year-old criminal, petty thief, back

01:42 15   then and he seems to be have been working and

16   rebuilt his life; why wouldn't it work the other

17   way?

18   A   Well, that's part of how he's changed, yeah.

19   Q   Okay.

01:42 20   COMMISSIONER MacCALLUM: Wilson was a

21   little older than that, wasn't he?

22   A   He was 17 I think.

23   MR. WOLCH: 17.

24   COMMISSIONER MacCALLUM: 17 or 18? 17?

01:42 25   A   17, I'm pretty sure.

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1   BY MR. WOLCH:

2   Q   Yes, I am too. Did I say 16?

3   A   16.

4   Q   It was 17. When Fisher testified the Court itself

01:43 5   asked him a number of questions -- I see you

6   smiling already -- but the Chief Justice asked

7   questions, I think Justice -- I think everybody

8   but Justice McLachlin, I think, but I don't recall

9   exactly. But what was your impression of the

01:43 10   questioning, what was it aimed to achieve, what

11   did you read into it?

12   A   Well, what it was aimed to achieve is a good

13   question, I -- the Supreme Court wanted to know

14   whether Larry Fisher had committed those offences.

01:43 15   Q   Right.

16   A   Umm, --

17   COMMISSIONER MacCALLUM: Which offences,

18   sir?

19   A   The -- or the Gail Miller murder.

01:43 20   COMMISSIONER MacCALLUM: All right.

21   A   Umm, and I'm guessing that's what they were aiming

22   at.

23   BY MR. WOLCH:

24   Q   Okay. Maybe we can just look at a few of the, I'm

01:44 25   not going to go through all of the questions, but

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1 a few of them. 144712, I think the doc. number is

2 144634. This is a sample of some of the questions

3 that are perhaps a little more interesting. You

4 have the Chief Justice:

5   "LAMER, C.J.: You know there is a broken

6   paring knife that was found on the scene

7   of the ---

8   THE WITNESS: Yes, sir. I read that in a

9   report.

10   LAMER, C.J.: Maybe somebody else took your

11   paring knife from your house?

12   THE WITNESS: I can't make any accusations

13   on where the paring knife went. If the

14   wife probably confronted me on it, I

15   probably left her right away, because I

16   didn't stick around long enough to argue

17   with her.

18   LAMER, C.J.: Mr. Fisher, the testimony that

19   you are giving here today cannot be used

20   against you in a subsequent proceeding.

21   Do you know that?

22   THE WITNESS: No, I didn't, sir.

23   LAMER, C.J.: It could be used, but in a very

24   limited way in that you could be charged

25   with perjury if you perjured

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1   yourself.

2   THE WITNESS: Yes, sir.

3   LAMER, C.J.: But it couldn't be used against

4   you if you were charged with murder, the

5   murder of Gail Miller.

6   You seem to have changed

7   quite a bit since the days when you were

8   doing these things."

9   That's a questionable comment, I don't know where

10   he would think that:

11   "You were obviously a very sick person.

12   THE WITNESS: Yes, sir.

13   LAMER, C.J.:   It's not as if you were

14   committing hold-ups or murdering people

15   for Murder Incorporated, or something.

16   It was something that had to do with

17   your illness.

18   THE WITNESS: Yes, sir.

19   LAMER, C.J.: I think we all understand that.

20   I think you understand it now.

21   THE WITNESS: Yes, sir.

22   LAMER, C.J.: Is it at all possible that the

23   paring knife that was found near Gail

24   Miller's body could have been yours?

25   THE WITNESS: I can't say, sir.

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1   LAMER, C.J.: But it's possible.

2   THE WITNESS: Anything is possible.

3   LAMER, C.J.: I know, but ---

4   THE WITNESS: I can't say whether it was the

5   knife that was in our house or not,

6   because I don't know."

7   Sort of a remarkable answer right there.

8   "LAMER, C.J.: I see. Is there any chance

9   that maybe you did encounter Gail Miller

10   and when you left her that she was

11   alive.

12   THE WITNESS: I had nothing to do with the

13   Gail Miller murder, sir.

14   LAMER, C.J.: Sure.

15   THE WITNESS: And I am here to prove my

16   innocence in that department.

17   LAMER, C.J.: I am putting the question to

18   you, so... fine.

19   SOPINKA, J.: Just to follow-up on the paring

20   knife. You told me that in Fort Garry

21   you got the knife out of the trailer

22   park.

23   THE WITNESS: Yes, sir.

24   SOPINKA, J.: You agreed with the Chief

25   Justice that you used a paring knife in

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1   Saskatoon. Where did you get that

2   paring knife?

3   THE WITNESS: Probably from the house, sir.

4   I used it at -- the one out of our

5   house. I'll admit that.

6   SOPINKA, J.: You told me earlier that you

7   wouldn't take a knife from your

8   house?

9   THE WITNESS: I usually did, if it was a

10   bread knife or something else. But I

11   did use a paring knife in there. And I

12   could have got it from Clifford's house

13   or our house.

14   IACOBUCCI, J.: Mr. Fisher, are you

15   left-handed or right-handed?

16   THE WITNESS: Right-handed, sir."

17   And it goes on and on. Does that tenor seem to

18   indicate that the Court really wasn't buying his

19   denial?

01:47 20   A   Well, I suppose you could put that interpretation

21   to it. They were -- I think they were very

22   curious about Larry Fisher, he -- when you looked

23   at Larry Fisher, you thought if ever there was a

24   guy that could have done it, that was the one.

01:48 25   Q   I would like to touch a bit on your written

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1   argument to the Supreme Court and I'm curious

2   about how and why you would put stock in the

3   evidence of Kenneth Cadrain, and if you look at

4   206846 -- 206801 is the doc. number -- and our

01:49 5   understanding is that Kenneth Cadrain was either

6   five or six or whatever, an exceptionally young

7   lad at the time, wasn't even spoken to by the

8   police?

9   A   There were a number of Cadrains, there was one

01:49 10   very young one. I -- was the little one Kenneth?

11   Q   That's right.

12   A   I mean, I don't recall.

13   Q   No, he would have been the very young one.

14   A   Okay.

01:49 15   Q   Okay. So you put into your argument:

16   "Kenneth Cadrain in his statement at

17   Reference Case..."

18   Etcetera,

19   "...indicates David Milgaard changed his

01:49 20   pants and then went out the back door.

21   At page 4 ... of that statement he

22   indicates that when David Milgaard went

23   out the back door he had something in

24   his hand but when he came back in he had

01:50 25   nothing."

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1   Now, I'm just curious about using the evidence of

2   this young man who would only have been five or

3   six remembering back 20 odd years later, that

4   evidence would be patently unreliable wouldn't

01:50 5   it?

6   A   It is what it is. As for unreliable, I believe

7   the evidence was that David Milgaard changed his

8   pants at that house.

9   Q   Whether Kenneth Cadrain had any memory of

01:50 10   something relatively innocuous when he was five or

11   six years old --

12 A   It's there for what it's worth, Mr. Wolch.

13 Q   Well, no, but I've always been under the

14   impression that Crown counsel will monitor

01:50 15   evidence in the sense if it's of no probative

16   value and could only mislead, they won't put it

17   in.

18 A   Well, no, I wouldn't say that this evidence could

19   only mislead, it's there for whatever value it

01:51 20   has. There's no evidence that he was lying.

21   There was evidence that in fact David Milgaard

22   changed his pants there and I believe there was

23   evidence that they didn't, couldn't find the pants

24   that he changed from.

01:51 25 Q   Okay. But it doesn't make the evidence of a five

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1		year old of any weight.
2	A	Well, that's your argument.
3	Q	All right. If you go to 837, the statement of --
4		sorry, here -- in light of the statement of
01:51 5		Estelle Cadrain, the statement of Kenneth Cadrain,
6		Marcel Cadrain, these three people all indicate
7		that Albert Cadrain's psychiatric problems began
8		quite a while after his testimony in the Milgaard
9		matter. Now, you are relying on Kenneth Cadrain
01:52 10		to talk about Albert Cadrain's psychiatric
11		problems when Kenneth was five, six or seven?
12	A	It's in his statement, Mr. Wolch, it's there. In
13		this particular instance it seems two other people
14		backed it up.
01:52 15	Q	Just scroll down here. This is with respect to
16		Albert Cadrain's current testimony that Milgaard
17		threw the blood stained pants out, support for
18		that is found in two sources, first in the
19		statement of Kenneth Cadrain there's a reference
01:52 20		to the fact that David Milgaard went out the back
21		door of the house with something in his hand and
22		when he came back he had nothing, so once again
23		Kenneth Cadrain is being relied on in your
24		argument?
01:52 25	A	It's there for what it's worth, Mr. Wolch. It

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1   fits with what Albert Cadrain said.

2   Q   No, I guess what I'm saying, when you look at

3   Kenneth Cadrain, Ronald Stickel and Ben Dozenko,

4   you are looking at evidence of really no merit no

01:53 5   matter how you look at it.

6   A   Well, I wouldn't agree necessarily with that.

7   Q   Now, in your argument, and I'm not going to go

8   through it, anybody can read it, but you did deal

9   with Larry Fisher. I would like to bring your

01:53 10 attention to a couple of points at 814. Sorry,

11   perhaps you could go to 805 just for the record's

12   sake. That's where you start your analysis of

13   Larry Fisher, that your first paragraph is:

14   "Finally, there is the evidence of Larry

01:54 15   Fisher himself. He absolutely denies

16   any involvement in the murder. Unlike

17   David Milgaard, who also made such a

18   statement in his evidence, Larry Fisher

19   was not shown to be obviously lying to

01:54 20   this court."

21   So you are -- that's how you preface your

22   argument. Now if we can go to 814:

23   "With respect to the use of the coat, on

24   three occasions he made his victim lie

01:54 25   on a coat and on six occasions he did

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01:55   1   not. Again, it's difficult to see what

2   the pattern is that connects these

3   incident to the Gail Miller assault. It

4   is equally difficult to see anything

01:55   5   unique in Larry Fisher's conduct in this

6   regard."

7   Now, you saw nothing unique about having three

8   victims lie on a coat. That would not be a

9   unique thing to you?

01:55 10   A   When six of them didn't?

11   Q   Well --

12   A   Six of them didn't is the unique thing.

13   Q   That's where you see the uniqueness, is in what

14   didn't happen?

01:55 15   A   Well, if you are looking for commonalities, the

16   fact that six of them didn't lie on a coat would

17   be more common than the fact that three of them

18   did.

19   Q   One was (V4)---, one was (V8)-- (V8)--- who was

01:55 20   stopped in the middle, but having said that, you

21   do have Gail Miller's coat being rather unusually

22   on her body?

23   A   Yes.

24   Q   Don't the two sort of go together?

01:55 25   A   Well, I don't think you can necessarily find a

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1   common pattern from that, Mr. Wolch. You

2   obviously argued a different view.

3 Q   Okay. If we can go to 812, you say here:

4   "Finally, counsel made much of the fact

01:56 5   that in the instances where Larry Fisher

6   succeeded in raping his victims he

7   always took..."

8   Off I take it,

9   "...always took or had them take off

01:56 10   their bras. The implication arising

11   from this is that somehow Larry Fisher's

12   breast fetish distinguishes his attack

13   from other incidents of "stranger" rape.

14   In our society it is unusual to find

01:56 15   sexual attacks on a female victim where

16   exposure or fondling of the breasts has

17   not occurred. In North American society

18   breast fetishism and breast manipulation

19   is a substantial part of heterosexual

01:56 20   eroticism. It is not surprising

21   therefore that some attack on a women's

22   breast is a regular feature of sexual

23   assaults committed against women on this

24   continent."

01:56 25   Do you still stand by that paragraph?

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	1	A	Yes.
	2	Q	You say taking off the bras, including somebody in
	3		40 below, is not a unique feature?
	4	A	No. No, as a said, breast manipulation is
01:57	5		something that's very common in a rape.
	6	Q	And if you go to 808 you say:
	7		"We submit therefore that Linda Fisher's
	8		evidence is of no value to the Applicant
	9		in attempting to tie her former husband
01:57	10		to the Gail Miller murder. If anything,
	11		it tends to suggest he was not
	12		involved."
	13		Are you serious about that?
	14	A	Well, I would have to see what I was talking about
01:57	15		there, Mr. Wolch.
	16	Q	Okay, that's fair. If we can just go back a bit.
	17		You have to go back one more page then. I think
	18		we have to go back some more then.
	19	A	Didn't you go back too much?
01:58	20	Q	I don't think so, unless they went the wrong way.
	21		I think we've got it here. One more page and we
	22		have it. Evidence of Linda Fisher.
	23	A	Right.
	24	Q	"...whatever else Linda Fisher now
01:58	25		says, she is certain the murder weapon

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1   wasn't her paring knife. Without that

2   there is nothing in what she says that

3   links Larry Fisher to the crime. ...his

4   response to her accusation that he

01:58 5   killed Gail Miller is as consistent with

6   him being shocked she would even think

7   such thing as it is with him being

8   guilty of the crime. ...her failure to

9   bring this to light until some ten years

01:58 10   after the trial is also troublesome.

11   Based on the affidavit of ... Naumetz,

12   it is clear that shortly after the

13   murder she had the opportunity to bring

14   this to the attention of the ... police

01:59 15   and did not do so. Living in Saskatoon

16   as she did during this time, she would

17   have to have known that David Milgaard

18   was convicted of that crime. Based on

19   her suggestion that she put her

01:59 20   husband's guilt to the Gail Miller crime

21   together after he pled guilty to the

22   various rapes in Saskatoon and Winnipeg,

23   she had all the information she needed

24   by 1971. ...she did not go to the

01:59 25   police until almost ten years later. In

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1   our submission that tells against her

2   credibility."

3   Finally, on face value, her evidence does not

4   link Fisher to the murder. It would indicate he

01:59 5   was not guilty of killing Gail Miller. His

6   reaction is at the very best ambiguous. It could

7   be just as easily interpreted as supporting his

8   innocence. She indicates that the weapon known

9   to have been used to kill Gail Miller was not her

01:59 10   knife, that when she washed Larry Fisher's

11   clothing there was no blood. And I am

12   paraphrasing, for the record. If we can go

13   further, in our submission, therefore, when

14   examined, her evidence is not capable of

02:00 15   supporting a conclusion.

16   "The single fact left unexplained is her

17   suggestion that Larry Fisher did not go

18   to work that morning. The fact

19   recollected to the police some eleven

02:00 20   years after the incident is alleged to

21   have taken place has to be contrasted

22   with Fisher's statement to the police

23   four days after the murder. In that

24   statement he indicates to the police

02:00 25   officers that he in fact did go to work.

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1		It is reasonable to assume that if Mr.
2		Fisher whatever his degree of
3		intelligence, was going to make up an
4		alibi to take him out of the neighbour
02:00 5		at the time of the murder, he would have
6		been smart enough to figure out that he
7		couldn't use an alibi that could be
8		easily checked. Mr. Fisher's statement
9		to the police is corroborated by his
02:00 10		evidence to this Court and to a lesser
11		extent by the statements of the people
12		that worked with him in the reference
13		case materials and who indicate they do
14		not recall his unexplained absence from
02:00 15		work. While we concede the latter
16		corroboration is of very limited value,
17		it is nonetheless some corroboration
18		..."
19		And it goes on to say that her evidence is of no
02:00 20		value. Do you feel that you looked at her
21		evidence objectively?
22	A	Yes.
23	Q	And found her to, if anything, to be supporting
24		her husband's claim of innocence?
02:01 25	A	Well, she did say it wasn't her knife, she did say

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    1   there was no blood on his clothing. That seems to

    2   me to have supported the claim that he wasn't

    3   guilty. I mean, you read the parts of the

    4   submission that pretty much answer the question

02:01   5   you asked. You may disagree, but that's your

    6   argument.

    7   Q   No, no, I'm asking you what you thought and what

    8   you --

    9   A   Well, it's right there.

02:01 10   Q   Okay. Then finally at 804, here's your

  11   submission, the *Answer to the questions posed by*

  12   *the Minister:*

  13   "...the Applicant has failed to prove

  14   beyond any burden of proof that he is

02:02 15   innocent."

  16   Therefore, no free pardon. That would be the (a)

  17   test?

  18   A   Yes.

  19   Q   Next paragraph would be the (b) test, there's no

02:02 20   basis -- sorry, no.

  21   A   No, I think I put the two tests together --

  22   Q   (a) and (b) together?

  23   A   -- in the first paragraph.

  24   Q   Okay, you are right. So the first paragraph,

02:02 25   that's (a) and (b)?

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 1    A      Right.

 2    Q      Okay.  Now, the next paragraph deals with (c):

 3              "Additionally, in our submission, the

 4              Applicant has failed to show that there

02:02  5              is credible new evidence to question or

 6              contradict the evidence given at his

 7              trial.  As well, the Larry Fisher

 8              evidence does not amount to credible

 9              evidence capable of providing a properly

02:02 10              instructed jury with a basis to change

11              its verdict nor does it suggest that

12              such a change in verdict would be

13              probable.  As a result, we submit there

14              is no basis upon which a new trial

02:02 15              should be ordered."

16           Okay.  So you are saying the probability of a

17           different verdict isn't there, so don't send it

18           back, and a court rejected that position;

19           correct?

02:03 20    A      Yes, they set the test a little lower.

21    Q      They applied the test that they had set?

22    A      Well, they applied a different -- I said probable,

23           they said reasonable expectation, which is

24           probably a little less.  It's more like the

02:03 25           *Palmer*.
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1   Q   The Palmer test, okay. Now, your position was:

2   "In our submission, that leaves only two

3   possibilities open to the court. The

4   first is that the Court answer the

02:03   5   Minister's question by noting there was

6   no miscarriage of justice in this case

7   but given the length of time David

8   Milgaard has served in prison, some form

9   of relief should be considered."

02:03 10   Okay. So you are saying there's only two

11   possibilities, one is no miscarriage and given

12   some sort of relief, and then you go on to say:

13   "In our submission, prior to suggesting

14   a conditional pardon be granted ...

02:04 15   notwithstanding there was no miscarriage

16   of justice, this court should inform

17   itself of the contents of his parole

18   file. Mr. Milgaard's assertions that he

19   is being kept in jail solely because he

02:04 20   will not admit his guilt of this crime,

21   are patently false. His parole record

22   and prison files clearly indicate that

23   the Parole Board has substantial

24   concerns about his psychiatric stability

02:04 25   and his ability to function outside the

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1   institution... It is our submission

2   that prior to making any recommendation

3   that results in the release of David

4   Milgaard, this court should take the

02:04 5   opportunity to fully appraise itself of

6   the contents of ... parole files. They

7   paint a fundamentally different picture

8   for the reasons for the Parole Board's

9   decisions than is painted by Mr.

02:04 10   Milgaard himself."

11   Then you say:

12   "Finally, the second alternative left to

13   the court in our submission is to simply

14   report to the Minister that there was no

02:04 15   miscarriage of justice. In our

16   submission, this is the appropriate

17   response. It would leave the decision

18   on full release of Mr. Milgaard to the

19   National Parole Board..."

02:05 20   Who,

21   "...are in a better position to assess

22   his ... condition ... and to assess and

23   monitor the danger... They are also in

24   a better position to ... monitor the

02:05 25   eventual ... release ..."

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1   And assess whether he will:

2   "...continue to pose any danger to

3   society."

4   So it would appear when you were writing this,

02:05 5   you recognize that one of the possibilities is to

6   tell the minister there was no miscarriage of

7   justice and that's what you wanted the court to

8   do?

9   *A*   That was our submission.

02:05 10   *Q*   And they didn't accept that?

11   *A*   No.

12   *Q*   Okay. I would like to turn now -- just give me a

13   second -- to the time after the Supreme Court

14   rendered its decision. Now, everybody reacted to

02:06 15   the decision in various ways and I would like to

16   deal fairly quickly with Mr. Fisher's reaction.

17   Was it your understanding that under no

18   circumstances would the court point a finger of

19   guilt at Larry Fisher?

02:06 20   *A*   No. I suspect if they had thought he was guilty,

21   they would have -- they may not have said Larry

22   Fisher is guilty, but they would have certainly

23   said there is a substantial case against him.

24   *Q*   Well, if they said there was credible evidence

02:06 25   that Fisher did it --

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1	*A*	No, they said there was evidence that could be put
2		in that the jury could consider.
3	Q	That was credible?
4	*A*	Yes, that might reasonably be expected to affect
02:06 5		the verdict.
6	Q	Yeah.
7	*A*	But then their verdict is beyond a reasonable
8		doubt.
9	Q	Doesn't that mean that they thought there was some
02:06 10		substance in the --
11	*A*	They thought there was some evidence. They also
12		said that there wasn't enough to charge him.
13	Q	Is that what they said?
14	*A*	Well, I thought that's what they said.
02:07 15	Q	They said we're not suggesting. I don't remember
16		them saying that.
17		COMMISSIONER MacCALLUM: Let alone charge
18		Larry Fisher, something like that.
19		BY MR. WOLCH:
02:07 20	Q	I'll try and find the exact quote, but -- if
21		somebody gets it faster than me, I would
22		appreciate it. Yes, on -- if I can get -- well,
23		document 058828 at 32, they say:
24		"In our view, this evidence, together
02:08 25		with other evidence we have heard,

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1   constitutes credible evidence that could

2   reasonably be expected to have affected

3   the verdict of the jury..."

4   That is, I emphasize could reasonably be expected

02:08 5   to affect the verdict.

6   "Our conclusion in this respect is not

7   to be taken as a finding of guilt

8   against Fisher, nor indeed that the

9   evidence would justify charging him with

02:08 10   the murder of Gail Miller."

11   They are not commenting on it, they are saying

12   it's -- we're not saying yes or no, and that is

13   consistent with what they said from the very

14   beginning; is it not? If we go into the evidence

02:08 15   now --

16   A   Now you've lost me. What's your question?

17   Q   That the court was never going to make a finding

18   of guilt against Larry Fisher.

19   A   Oh, and if what you want me to say is that they

02:08 20   were not going to say Larry Fisher is guilty, of

21   course they weren't, there would have to be a

22   trial to establish that.

23   Q   So no matter what they found or believed, they

24   weren't going to say that?

02:09 25   A   Well, they wouldn't say it, yes, but then why

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1		would they then add the additional not to be taken
2		as a finding or that it was, would even justify
3		charging him.
4	Q	Because reading the judgment, some people might
02:09 5		read it to suggest that Fisher should be charged
6		and they don't want to have a role in that
7		because --
8	A	Well --
9	Q	-- if the Supreme Court says this guy should be
02:09 10		charged with murder, can he ever get a fair trial.
11	A	Well, again, Mr. Wolch, that's I guess a matter
12		that you and I are going to have to disagree on.
13		I don't interpret their judgment as basically
14		restricting themselves that way.
02:09 15	Q	Well, take a look at --
16	A	They properly qualified the evidence as not being
17		sufficient to charge him.
18	Q	Not being sufficient or that their decision should
19		not be interpreted?
02:10 20	A	Nor indeed that the evidence would justify
21		charging him with the Miller, the Gail Miller
22		murder.
23	Q	In other words, don't make anything out of this
24		finding regarding Fisher?
02:10 25	A	Well --

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1	Q	Look at page, if we could, 232030, and this is
2		Justice Lamer speaking to Mr. Beresh. I'm sorry,
3		perhaps I should have the document --
4	A	The next paragraph down I think.
02:10 5		MS. McLEAN: 231940.
6		MR. WOLCH: 232?
7		MS. McLEAN: 231940.
8		BY MR. WOLCH:
9	Q	940.
02:10 10	A	It starts at nine, doesn't it, or eight?
11	Q	Yeah.
12	A	"Whatever we say, I don't think we are
13		going to be saying "Oh, we think it is
14		Mr. Fisher."
02:10 15	Q	Yeah.
16		"You are here on a very special status.
17		I think I made it clear at the time I
18		granted you status. It is just in case
19		that somebody starts pointing fingers at
02:10 20		your client that you should have an
21		opportunity under the rules of fairness
22		to respond to that.
23		Whatever we say, I don't
24		think we are going to be saying "Oh, we
02:11 25		think it is Mr. Fisher." We are not

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1		asked that. We are just going to answer
2		the question that was put to us, and
3		that is all."
4	A	And they didn't say it was Mr. Fisher.
5	Q	I know, but --
6	A	They said there was some credible evidence the
7		jury could consider that might reasonably be
8		expected to affect the verdict.
9	Q	But I'm saying that based on this, it was pretty
10		clear they were never going to say it.
11	A	That -- Mr. Wolch, I've given you that the Supreme
12		Court of Canada is not going to say someone else
13		is guilty when there has to be another trial to
14		find that out. They don't do that.
15	Q	Well, if I can also take you to 233068.
16		COMMISSIONER MacCALLUM: Is that a doc. ID,
17		Mr. Wolch?
18		MR. WOLCH: I'm sorry, the same one I was
19		at earlier, that's 233007. I'm not sure why the
20		A is there following it. This is an argument,
21		the Chief Justice again:
22		"Why don't we keep that for reply
23		because, I don't know, we have read the
24		material, of course, but I don't know to
25		what extent Mr. Fisher has an interest

02:11 (line 5)
02:11 (line 10)
02:11 (line 15)
02:12 (line 20)
02:12 (line 25)

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1   in our answer."

2   You see that? That's the same theme, I'm

3   suggesting, that Fisher was only there for one

4   purpose, is the evidence credible or not, but

02:12 5   there would never be a finding that Larry Fisher

6   did it or a direction to go charge him under any

7   circumstance. Would you not agree?

8   A   Well, Mr. Wolch, I've already said the Supreme

9   Court is not going to say Larry Fisher is guilty.

02:12 10   Q   Okay. But I want to set the stage where now the

11   judgment has been rendered, David is free --

12   A   Uh-huh.

13   Q   -- the conviction is -- the minister has quashed

14   the conviction; correct?

02:13 15   A   Right.

16   Q   That's the point in time, it's the point of time

17   when he's presumed innocent.

18   A   Right.

19   Q   I want to deal with first of all, deal with

02:13 20   Fisher's reaction, 229387. Here we have *Fisher*

21   *most pleased with Milgaard decision. Supreme*

22   *Court avoided pointing finger at rapist.* Given

23   their findings of similar act, it's hard to

24   understand that, but here, here's what is said:

02:13 25   "I'm very pleased with it because I

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1   think it is in essence a judicial

2   exoneration of Larry Fisher,"...

3   Mr. Beresh said.

4   "Fisher was most pleased with the

02:14 5   outcome," he said, adding the

6   42-year-old inmate just wants to get on

7   with his life."

8   Now, did you look at this as a judicial

9   exoneration?

02:14 10   A   Mr. Wolch, Brian Beresh was his defence lawyer.

11   What was he going to say, thank God he dodged this

12   bullet?

13   Q   Now I would like to turn to the government's

14   reaction, and if I can go back to 208531 first --

02:15 15   208531 -- this is doc. ID 208523.

16   COMMISSIONER MacCALLUM: Yes, please say

17   that to begin with, would you, Mr. Wolch?

18   MR. WOLCH: Unfortunately,

19   Mr. Commissioner, there's some points where I

02:15 20   messed up my cross-referencing.

21   COMMISSIONER MacCALLUM: Okay, thanks.

22   BY MR. WOLCH:

23   Q   This is the Chief Justice, again:

24   "The right to cross-examine

02:15 25   witnesses will be determined on an ad

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1   hoc basis as matters develop. We will

2   hear you on an ad hoc basis whenever you

3   feel you should be allowed to put

4   questions. In this regard, it is to be

02:15   5   remembered -- and I reiterate this --

6   that this is not a trial; this is not a

7   rehearing of an appeal; nor is it a

8   Royal Commission of Inquiry into certain

9   matters. It is a reference that is

02:16   10   governed by very few sections in the

11   Supreme Court Act and a couple of

12   sections in our Rules of Court."

13   COMMISSIONER MacCALLUM: You're speaking

14   about Fisher's right to --

02:16   15   MR. WOLCH: No, that's the inquiry --

16   A   At the very opening.

17   MR. WOLCH: The very opening, this is

18   setting the rules at the very beginning.

19   COMMISSIONER MacCALLUM: Well, he just

02:16   20   finished talking about Mr. Fisher, is there a

21   feeling that Mr. Fisher is in a somewhat

22   different situation here, right to cross-examine

23   and so on?

24   MR. WOLCH: Right.

02:16   25   COMMISSIONER MacCALLUM: So he's not

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1   talking specifically about Fisher?

2   MR. WOLCH: No, he's not.

3   COMMISSIONER MacCALLUM: Okay.

4   BY MR. WOLCH:

02:16 5   Q   No. If you could just turn the page:

6   "At our meeting this morning,

7   we agreed, and I should announce to you,

8   that we do not think that the rules of

9   the Criminal Code apply whatsoever here.

02:16 10   Those rules will apply if we, in

11   answering questions A and B, order a

12   rehearing or a retrial."

13   That's sort of a, I take it, a slip because A and

14   B don't order a rehearing or a trial.

02:17 15   "Then, of course, if that is ordered,

16   that will be governed by the Criminal

17   Code. This is not the Criminal Code.

18   We have been asked by Cabinet

19   to assist them in exercising their power

02:17 20   of mercy, which is an administrative

21   power. In that way, while we are still

22   a Court, we are assisting in the

23   exercise of an administrative power. We

24   are entitled in that regard to do most

02:17 25   of what Cabinet itself could do. We

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1   intend to proceed judicially, though I

2   think we could not necessarily go that

3   route."

4   Odd comment, but:

02:17 5   "The rules of evidence, also

6   those sections that have to do with

7   previous statements and hostile

8   witnesses and putting previous

9   statements in writing to witnesses do

02:17 10   not apply. The rules that govern us are

11   the rules of fairness and the rules of

12   natural justice. Of course, they are

13   not very far away from the rules of

14   evidence, but in some regards they are

02:17 15   not identical."

16   Now, I'll leave it there, but that's what --

17   where the Chief Justice makes it pretty clear, or

18   quite clear, that it's not your everyday,

19   ordinary proceeding, that the rules are very

02:18 20   different, and it's not a royal commission into

21   whatever, and they are -- they have been asked

22   the question and they are going to answer it.

23   Now when -- I've indicated

24   before, now David Milgaard is set free, Fisher is

02:18 25   saying he's exonerated, and is it not a fact that

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1		government, the Saskatchewan Government, was
2		still saying David Milgaard was guilty?
3	A	The Government of Saskatchewan said that?
4	Q	Well, let's take a look at 164842, and scroll down
5		the first. Well, look at the headline, *Minister*
6		*stands firm on Justice record*, it's the *Globe and*
7		*Mail*, and it's this little piece down here is what
8		I'm interested in. I'm not sure if you can read
9		it.
10		"Mr. Mitchell, however,
11		remains adamant. In an ...",
12		sorry, if somebody could help me with that word?
13		MS. McLEAN: Unusual.
14		BY MR. WOLCH:
15	Q	"... unusual comment by a justice
16		minister on a case before the courts,
17		Mr. Mitchell said in an interview, 'I
18		think he was properly convicted, I think
19		he did it.'"
20		Can you comment on that?
21	A	Well, Mr. Wolch, one of the problems with
22		Ministers is sometimes they decide they will speak
23		out on their own --
24	Q	Okay.
25	A	-- and they sometimes don't take the precise

02:19 (lines 5, 10, 15)
02:20 (line 25)

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1   counsel we give them. I believe the briefing

2   notes I sent him didn't say "he did it", I said

3   "the Supreme Court found he had been properly

4   convicted, that there was still evidence upon

02:20   5   which he could be convicted", and so on.

6   Q   Well, --

7   A   Mr. Mitchell was expressing his opinion.

8   Q   -- okay, but here you have the highest law

9   enforcement person in the province saying that a

02:20 10   person who is presumed innocent committed murder

11   and rape; is that not true?

12   A   Well, he appears to have said "I think he did it",

13   yes.

14   Q   Yes. Now --

02:20 15   A   And I think that the newspaper notes that that's

16   an unusual comment for a justice minister on a

17   case --

18   Q   Well, it's more than unusual, isn't it?

19   A   -- that's before the courts.

02:21 20   Q   You know, you expressed outrage that Michael

21   Breckenridge had been a vehicle to get an

22   investigation or whatever when he was accusing

23   people of perhaps obstruction of justice --

24   A   And when you knew very well that that was false.

02:21 25   MR. WOLCH: Can I finish the question?

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	1	COMMISSIONER MacCALLUM: Just a minute.
	2	MR. WOLCH: Can I finish the question?
	3	COMMISSIONER MacCALLUM: Okay.
	4	BY MR. WOLCH:
02:21	5	Q And yet, at the Supreme Court reference, you put
	6	in Stickel, Dozenko, and Kenny Cadrain, and here
	7	you have the Attorney General saying somebody is
	8	guilty of murder when they are not charged and not
	9	convicted. Is that not worse?
02:21	10	A Well, Mr. Wolch, if you want to talk about what
	11	the minister of justice said or did perhaps you
	12	can call him as a witness. I can tell you what
	13	advice I gave him, and you should have the
	14	documents in the CaseVault, what he does with that
02:22	15	information is up to him.
	16	Q I guess what I am getting at, Mr. Brown, is you've
	17	expressed outrage at Mr. Breckenridge, you've
	18	expressed outrage at some of the media reports,
	19	I'm wondering why you don't have the same
02:22	20	outrage when --
	21	A Well, let's correct the record here.
	22	Q I'm not finished the question.
	23	A Let's correct the record, Mr. Wolch. I didn't
	24	express outrage over Mr. Breckenridge,
02:22	25	Mr. Breckenridge can say whatever he wants. It's

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1   the way it was used by people who knew the

2   statements were false, that's what caused me some

3   concern.

4   Q   An investigation was asked for. Surely you knew

02:22   5   that Stickel was false, surely you knew that

6   Dozenko was false, surely you knew that Cadrain,

7   Kenny Cadrain --

8   A   If I had known their evidence was false it would

9   not have been put, I would not have recommended it

02:22 10   being put before the Supreme Court.

11   Q   In the Stickel case you had --

12   A   If it's of limited weight --

13   Q   -- Sergeant Pearson --

14   A   If it's of limited weight, that's a different

02:23 15   matter, you are perfectly entitled to argue that

16   Cadrain's evidence, that Stickel's evidence, that

17   Dozenko's evidence is of no value and no weight.

18   Q   Okay. Whatever Breckenridge did, he caused there

19   to be an investigation?

02:23 20   A   Yes.

21   Q   And that investigation could have found the real

22   killer? It didn't, but it could have?

23   A   Well, it thought it did, actually.

24   Q   Sorry?

02:23 25   A   I said "it thought it did".

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	1	Q	Well, it thought it did, but it could have found
	2		the real --
	3	A	Well, if the DNA had been done at that point, yes.
	4		I mean there was as much evidence on Larry Fisher
02:23	5		as there was going to be, apparently, at that
	6		point absent the DNA.
	7	Q	Well I'm going to suggest to you there was enough
	8		evidence to convict Larry Fisher at that time?
	9	A	Well, I disagree, Mr. Wolch.
02:23	10	Q	But, in any event, Breckenridge would keep a
	11		matter alive that needed to be kept alive?
	12	A	Well, that's your view.
	13	Q	Well, the real killer was free?
	14	A	Well except, Mr. Wolch, to be perfectly honest
02:24	15		with you, I don't think you were the slightest bit
	16		concerned about that.
	17	Q	Well --
	18	A	You were after money at that point.
	19	Q	Let me ask you this. If somebody is going to get
02:24	20		money from the government for wrongful
	21		convictions, how many ways can you get money?
	22	A	How many ways?
	23	Q	What are the means for wrongfully convicted people
	24		to get compensation?
02:24	25	A	Well I suppose you start by showing there's been a

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1		miscarriage of justice, some wrongdoing that's
2		resulted in your conviction, or you can sue, or
3		you can do --
4	Q	But --
02:24 5	A	-- whatever.
6	Q	Okay. To save a little bit of time, would you
7		agree with me the only two ways are either to sue
8		or get an ex gratia payment?
9	A	An ex gratia payment, yes.
02:25 10	Q	Those are the only two ways?
11	A	Yes.
12	Q	Suing you can always do, --
13	A	Well --
14	Q	-- and that was done here?
02:25 15	A	Well, presuming you can prove your case, yes.
16	Q	Well, it was done here; correct?
17	A	Well, you started a lawsuit, you didn't advance it
18		any. Did you go to examinations for discovery?
19	Q	Yes .
02:25 20	A	And did you do any?
21	Q	I wasn't acting for David in that.
22	A	Were you at the point of --
23	Q	Before you ask too many questions, it went, the
24		lawsuit proceeded, it went to the Court of Appeal
02:25 25		for rulings, it was proceeded vigorously, it

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1   proceeded --

2   A   Well --

3   Q   -- and it was settled for a large amount of money.

4   That's not the issue.

02:25   5   My question to you was lawsuit

6   or ex gratia are the only two ways to go?

7   A   Yes.

8   Q   Okay. And a lawsuit, it doesn't matter what you

9   say, it's going to be settled in a courtroom or

02:25   10   between the parties?

11   A   That's the usual course, yes.

12   Q   And if it's ex gratia, if you are calling somebody

13   a crook, is he going to give you money?

14   A   Not usually, no.

02:25   15   Q   So how is accusing wrongdoing going to advance the

16   government to pay you money?

17   A   How is accusing wrongdoing? You were trying to

18   keep this matter alive and get an inquiry in order

19   to advance your cause for a claim.

02:26   20   Q   Maybe the cause for the claim was to catch Larry

21   Fisher?

22   A   Well, I wish I believed that, Mr. Wolch.

23   Q   Well, you said it had to be kept alive?

24   A   Well, that was your view, not mine. I was of the

02:26   25   view that it still was alive, as long as those DNA

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1		samples weren't done it was still alive. The
2		Federal Government was holding them, they were
3		waiting to get on with doing it.
4	Q	They were waiting?
02:26 5	A	They were waiting.
6	Q	Okay. I'm trying to understand, though, how
7		calling people whatever they are called and then
8		saying "please give me money" works, just, I'm
9		trying to reconcile that?
02:27 10	A	Well, of course, you weren't accusing sort of
11		current people except for Serge Kujawa. Ken
12		Lysyk, by that point, had moved to Alberta -- to
13		B.C., Roy Romanow was Premier but not involved in
14		the Justice portfolio --
02:27 15	Q	Well --
16	A	-- and, I mean, it was clearly aimed at trying to
17		generate an inquiry, get the federal minister to
18		call an inquiry.
19	Q	Well, getting an inquiry is far different than
02:27 20		your accusation of money grab?
21	A	Well, with respect, that's what it was aimed at is
22		getting money. You weren't going to get evidence
23		of Larry Fisher's guilt in an inquiry.
24	Q	Okay, but the Inquiry that went on had 12 RCMP
02:27 25		officers looking into the case?

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	1	A	Well that was, quite frankly Mr. Wolch, that
	2		wasn't my fault.
	3	Q	No, but wouldn't that be a good thing now that you
	4		know the guilty guy was still at -- loose?
02:27	5	A	Well except you may recall, Mr. Wolch, that that
	6		actually brought up more evidence of David
	7		Milgaard's guilt, that didn't --
	8	Q	Only --
	9	A	That didn't --
02:28	10	Q	Only in the eyes of the investigator, Mr. Brown.
	11	A	Well, it confirmed Nichol John's story that she
	12		saw something, she apparently told a friend.
	13	Q	I will be dealing with that. You said that you
	14		were getting support from the public at that time?
02:28	15	A	Well, at that point it was my impression that the
	16		public had kind of lost interest. We weren't
	17		getting the kinds of inquiries that we were, for
	18		example, between -- when was it -- the first
	19		application was turned down February of '91 --
02:28	20	Q	You --
	21	A	-- until the reference was called.
	22	Q	But you were getting letters?
	23	A	We were getting a few, yes.
	24	Q	As far as the matter being current, I think the --
02:29	25		there was a TV movie about it that was suggesting

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1		David's innocence?
2	A	Yes.
3	Q	Yeah. I think it won the award as the best movie
4		of the year?
02:29 5	A	Okay. I don't know.
6	Q	I'm talking about the idea that this thing was
7		dying, so to speak?
8	A	Well, the public's concern about what had happened
9		was dying.
02:29 10	Q	Well --
11	A	That seemed to start dying after the Supreme
12		Court's decision.
13	Q	That's your assessment of it?
14	A	Well, I mean certainly there was some interest in
02:29 15		the public, but I'm simply saying that it wasn't
16		nearly as intense as it was --
17	Q	Oh.
18	A	-- from that February period until the reference
19		was called.
02:29 20	Q	Well certainly, once David is out of jail, it
21		can't have the same degree of intensity?
22	A	Well, whatever the reason, it was --
23	Q	There was lots of support in this province; was
24		there not?
02:29 25	A	Not a huge amount, Mr. Wolch.

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1	**Q**	I --
2	*A*	Not a huge amount.
3	**Q**	I don't mean to raise it, but I think even your
4		own family was supporting David Milgaard?
02:30 5	*A*	That was before, Mr. Wolch, that my mother sent
6		him $5. It was before, I think, even before the
7		first application was --
8	**Q**	Your mother was supporting -- she had it right?
9		COMMISSIONER MacCALLUM: Mr. Wolch?
02:30 10		MR. WOLCH: Oh, certainly, that's a good
11		time.
12		*(Adjourned at 2:30 p.m.)*
13		*(Reconvened at 2:51 p.m.)*
14		BY MR. WOLCH:
02:51 15	**Q**	Mr. Brown, at the end of the Supreme Court
16		reference and the decision has come down, what
17		would have been your view as to the guilt or
18		innocence of David Milgaard?
19	*A*	Well, I suspect I probably was of the view that he
02:51 20		was guilty at that point.
21	**Q**	And what would have been your view as to the guilt
22		or innocence of Larry Fisher?
23	*A*	Well, I certainly didn't think that he was guilty
24		of the Gail Miller murder at that point.
02:52 25	**Q**	And so you didn't place much credence in Linda

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1   Fisher, or the jailhouse confessions of Fisher, or

2   the similar acts?

3   A   Well the -- again, I mean, my view was that Linda

4   Fisher had substantially backed away from what

02:52 5   she'd said in the sense that she said it wasn't

6   her knife and that there was no blood on any of

7   his clothing when she washed it. I mean, at the

8   end of the day Linda's evidence was that when she

9   accused him of that he appeared shocked, and he

02:52 10   should have been at work that morning and wasn't.

11   The rest of it, well, the similar fact was what it

12   was. I didn't think it -- certainly didn't think

13   it proved Larry Fisher was guilty.

14   Q   Okay. And then there was an inmate named

02:53 15   Patterson who seemed quite credible I think?

16   A   Well, yeah. I mean all of their statements,

17   including the one by that what's his name, the guy

18   that ended up murdering the --

19   Q   Morgan?

02:53 20   A   -- Morgan, they all had a, you know, certainly in

21   retrospect they all have a ring of truth about

22   them, but I didn't think that then, and I

23   certainly wouldn't be prepared to rely on that

24   kind of evidence.

02:53 25   Q   The reason I mention Patterson is that in Larry

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1   Fisher's trial the Crown put him forward as a

2   witness and I wouldn't expect them to do that

3   unless they thought he was credible?

4   *A*   Oh, I don't think we thought he was incredible, we

02:54 5   just didn't think that his evidence was kind of a

6   confession of Larry Fisher's.

7   **Q**   Okay. And the fact that Fisher lived in the same

8   house as Cadrain was dismissed as a coincidence,

9   was it, or --

02:54 10   *A*   Yes.

11   **Q**   Okay. So it's fair to say, at the end, you

12   believed David had done it and that Fisher was

13   innocent of the murder of Gail Miller?

14   *A*   That's right, yes.

02:54 15   **Q**   I want to just touch on a few of the letters that

16   you've written at various times, just a few points

17   on them, and I'll try to go through them fairly

18   quickly. 033150. This is a letter March the 9th

19   of '93, and if we can go to 53, I'm just

02:55 20   interested in this paragraph here:

21   "I am satisfied that in the final

22   analysis, the Supreme Court judges were

23   satisfied he was guilty of Gail Miller's

24   murder."

02:55 25   That's David Milgaard, of course.

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1   "Reading between the lines of the

2   judgement, that's the only conclusion I

3   can come to."

4   Now, in fairness, you say "go talk to Mr. Asper",

02:55 5   but you say that, in your mind, that you felt the

6   judges were satisfied of David Milgaard's guilt;

7   --

8   A Yes.

9   Q -- is that correct? And you were of the view that

02:55 10   they would recommend the quashing of a murder

11   conviction of somebody they thought was guilty?

12 A Yes, --

13 Q And --

14 A -- because they thought he'd been punished enough.

02:55 15 Q And --

16 A You have to -- the other thing I would point out,

17   Mr. Wolch, is that you have to put that in the

18   context of a 16-year-old committing that offence

19   at that point. When you are looking at three

02:56 20   years custody and two years supervision, that's a

21   very different thing than 22 years in jail, and he

22   certainly wouldn't have been serving it in a

23   federal penitentiary.

24 Q Okay, that's your view of the Supreme Court,

02:56 25   that's fine.

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1	A	Well, that's a background consideration I'm sure
2		they had.
3	Q	026986. Sorry, just for the record's sake, the
4		previous letter was your letter. This letter --
5		if we can go --
6	A	Yes, it will be signed by the Minister of Justice,
7		yes.
8	Q	Yeah, but prepared by yourself or --
9	A	Yes.
10	Q	Okay. I'm interested in the first page. You say:

02:56 (line 5)

02:57 (line 10)

11   "Even if Mr. Milgaard's lawyer ...",

12   and this is August the 10th of '92:

13   "Even if Mr. Milgaard's lawyer had known

14   about Larry Fisher's conduct, that

15   evidence would not have been considered

16   sufficiently relevant to be admissible

17   at Mr. Milgaard's trial. This lack of

18   relevance at law is also the reason

19   Crown counsel did not have to disclose

20   it to defence counsel at that time. It

21   was because of this the Supreme Court

22   was able to say the Crown disclosed all

23   that was required by law in 1970."

24   Now you're saying, here, that the evidence would

25   not have been considered relevant to be

02:57 (line 20)

02:57 (line 25)

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1   admissible at his trial?

2   A   Well I, to be honest with you, I went back and

3   forth on that and I -- I'm still not convinced,

4   today, that in 1969 -- or for the sake of what I

02:58 5   know in the way of trial work go back to 1976

6   even -- I'm not sure, in 1976, a lawyer in this

7   province would have been able to get that before

8   the Court.

9   Q   To prosecute or to defend?

02:58 10   A   To defend. Oh no, that's a reference to

11   defending, Mr. Wolch.

12   Q   No, I understand that. But you're saying on, even

13   given the lesser standard, you feel it couldn't --

14   might not have been admissible?

02:58 15   A   That's right.

16   Q   When did the law change?

17   A   Well, that, I mean that's your -- you have a

18   different interpretation of the law. You asked me

19   what my view was, that's my view.

02:58 20   Q   No, but I'm asking you, there is no question it's

21   considered admissible today; correct?

22   A   Oh, I would think probably yes, there's very

23   little doubt about that.

24   Q   Okay. And wouldn't -- I don't want to get into a

02:58 25   legal debate with you, but would it be fair to say

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1   there is a difference when you are using acts to

2   show propensity as opposed to using acts to show

3   identity?

4   A   For who?

02:59 5 Q   To get into the evidence?

6   A   Well, certainly for the prosecution you can't use

7   propensity, --

8   Q   Right?

9   A   -- that's -- it's limited to something else.

02:59 10 Q   Yeah, but what I am saying is that --

11   A   But you mean for defence counsel?

12   Q   Well, for either side?

13   A   Well you, no, you certainly can't use it for

14   propensity.

02:59 15 Q   Right.

16   A   You could use it for identity if it meets the

17   standard that the *Handy* and *Shearing* sets out for

18   the Crown.

19   Q   But if you are talking about, for example if the

02:59 20   issue is lack of consent, it's pretty hard to get

21   into similar acts when consent is an issue; would

22   that be fair?

23   A   Well, yes, but that -- that's because the *Criminal*

24   *Code* says you can't.

02:59 25 Q   Well, but it's harder, because the issue normally

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1   is identity, how do you identify the perpetrator,

2   as opposed to determine if this particular

3   individual consented or not; that's sort of the

4   difference?

03:00 5 A   Well, yes.

6 Q   And one of the other things you always look at in

7   similar acts is the possible problem of

8   collusion, --

9 A   Yes.

03:00 10 Q   -- that the two people could have talked to each

11   other and said "what happened in your case", "what

12   happened in your case", and with collusion similar

13   acts goes out the window; wouldn't that be fair?

14 A   Well, with collusion, almost any evidence goes out

03:00 15   the window, yes.

16 Q   But in letting in similar acts, the fact that two

17   people see unusual things, then -- but have talked

18   about it is a problem, but the value of it is two

19   independent people are confronted by some unusual

03:00 20   thing; isn't that right?

21 A   Yes.

22 Q   I draw your attention to 164797. And this will

23   not be your letter but one of the Minister of

24   Justice; would you have written this letter or had

03:01 25   any part of it?

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1   *A*   Umm, can you -- is there --

2   **Q**   Turn the page now?

3   *A*   -- anything on the bottom?

4   **Q**   If you turn the page you can see. Next page,

03:01   5   sorry, to 04.

6   *A*   Umm, all I can say is very probably it would have

7   started out on my desk. The process they go

8   through allows for additions by other people, I

9   can't say for sure whether that's all my letter or

03:01   10   not, but it would likely have started out on my

11   desk.

12   **Q**   Okay. I'm interested in this paragraph here.

13   "The suggestion you make that I engage

14   an independent person to review the

03:02   15   Fisher evidence to determine whether he

16   should be prosecuted is astounding.

17   Again, I have to wonder how carefully

18   you have bothered to read the judgement

19   of the Court. All the Fisher evidence

03:02   20   was presented to the Court. The Court

21   makes it clear that they do not think

22   there is enough evidence to charge Mr.

23   Fisher."

24   Now that's not accurate; is it?

03:02   25   *A*   Well, that seemed to be what they said.

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1	Q	No, they --
2	A	Yes, it did.
3	Q	They said they are not making comment on it, they
4		didn't say "there is not enough evidence to charge
03:02 5		him"?
6	A	Well again, Mr. Wolch, that's a point we're going
7		to have to differ on, because I think the decision
8		says that they are saying there isn't enough
9		evidence to charge Mr. Fisher.
03:02 10	Q	Did you ever consider having somebody independent
11		come in and say "look, I may not have perhaps
12		tunnel vision, I may not have a view, let me look
13		at it fresh"?
14	A	Well, ultimately, we did. It was the RCMP.
03:02 15	Q	But not with a view to charging Fisher. Somebody
16		independent, a prosecutor?
17	A	Have it referred by another -- reviewed by another
18		prosecutor, --
19	Q	Yes?
03:03 20	A	-- no, I don't think that was ever considered.
21	Q	I mean just with a view is there enough to charge
22		Fisher or not?
23	A	I don't recall that ever being -- that issue being
24		brought to my attention. That's not to say
03:03 25		somebody didn't look at it.

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1   **Q**   Okay.

2   *A*   But I would assume, frankly, if that was a live

3   issue, I would have been asked.

4   **Q**   Okay. 026946. This is a letter of October 29th,

03:03 5   and if I can just turn the page to see, it's a

6   letter from the minister but seems to be prepared

7   by yourself?

8   *A*   Yes.

9   **Q**   Okay. If we can go back to the first page, then,

03:04 10   I'm interested in this portion here:

11   "The answer to your question

12   is that Mr. Milgaard is neither 'guilty'

13   nor 'not guilty' in the eyes of the law.

14   I can't blame anyone for thinking it's a

03:04 15   curious result, but I will attempt to

16   explain how it arose."

17   Let's just go to the next paragraph.

18   "Guilty or not guilty are

19   verdicts found after a trial and the

03:04 20   only trial Mr. Milgaard had produced a

21   guilty verdict. That verdict was set

22   aside and a new trial ordered, so we are

23   now back in the position that there is

24   no verdict. Mr. Milgaard is therefore,

03:04 25   neither guilty nor not guilty."

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	1	A	He's presumed innocent.
	2	Q	No, but that's not what it says?
	3	A	Well yes, I agree, it says he is neither guilty
	4		nor not guilty.
03:04	5	Q	No.
	6	A	Those are verdicts after a trial.
	7	Q	Oh, I appreciate that, but do you not think that
	8		this is an incorrect impression given to the
	9		reader?
03:05	10	A	Well no, --
	11	Q	The only verdict was guilty --
	12	A	-- Mr. Wolch, I don't.
	13	Q	The only verdict was guilty, we are now back in a
	14		position where there was no verdict. No, we're
03:05	15		not, because the position earlier had a trial --
	16		had a charge outstanding. There is no charge
	17		outstanding?
	18	A	That's correct, and so --
	19	Q	Same as no verdict. He had a stay entered.
03:05	20	A	That's right.
	21	Q	Stay means there's no credible case to put to --
	22	A	No, it doesn't.
	23	Q	What does a stay mean?
	24	A	It means we're not proceeding.
03:05	25	Q	For what reason?

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1   A   There can be all kinds of reasons.

2   Q   But normally it's because there's no case?

3   A   That could be one, or it could be that we chose

4   not to proceed.

03:05   5   Q   Oh, but when you chose not to proceed, why would

6   you leave the impression that this person is in

7   limbo when they are presumed innocent?

8   A   I didn't think we were suggesting he was in limbo.

9   Q   We are now back in the position that there is no

03:06   10   verdict?

11   A   Yes.

12   Q   It implies there's an accusation or a charge out

13   there doesn't it?

14   A   Well, that's your interpretation, Mr. Wolch, we'll

03:06   15   have to differ on that too, because I don't think

16   that suggests what you are saying.

17   Q   I can say the same about yourself, you have never

18   been found not guilty.

19   A   True enough.

03:06   20   Q   If we can go to 028861, and this will be an

21   earlier letter, so I don't want to mislead you,

22   this is back in July of '91, and if we can go to

23   the last page, it is prepared by you even though

24   it comes from Minister Lane?

03:07   25   A   Yes.

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1 Q   I just want to go over a couple of things here.

2   You say:

3   "Let me begin by explaining the process

4   of review involved..."

03:07 5 Here we're talking about not the Supreme Court,

6   but pre Supreme Court.

7   "The initial investigation of the murder

8   of Gail Miller was conducted by the..."

9   SCP.

03:07 10   "The initial prosecution of Milgaard was

11   handled by officials in my department.

12   Neither the Saskatoon City Police nor my

13   department played any major role in the

14   re- investigation of this case... The

03:07 15   Saskatoon Police and my officials were

16   confined to providing information to

17   federal investigators. This was done by

18   allowing these investigators free and

19   unrestricted access to <u>all</u> the files

03:07 20   concerning this matter... The purpose

21   of the federal review is to provide an

22   independent, impartial assessment of the

23   handling of the case by both the

24   original police agency and the original

03:07 25   prosecutor. In this case as well, since

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1   there were allegations that there was

2   new evidence, this review had to assess

3   this evidence to determine how reliable

4   it might be and whether it could

03:08   5   reasonably be expected to have any

6   effect on the original verdict."

7   Isn't that exactly what the question, or the

8   question that was posed? It zeros in on the

9   question, but I'll go further:

03:08   10   "During this assessment, any ambiguity

11   or doubt was resolved in favour of Mr.

12   Milgaard's arguments."

13   Where does that come from?

14   A   Well, that was our understanding of the federal

03:08   15   government's process. I mean, we were told that

16   if there was a doubt about something, it would be

17   resolved in favour of the applicants.

18   Q   And who told you that?

19   A   That would have come from somebody at the Federal

03:08   20   Department of Justice.

21   Q   Any ambiguity resolved in favour. Now, you say:

22   "In this case something extra-ordinary

23   happened. Because Mr. Milgaard's lawyer

24   complained about the Department of

03:08   25   Justice review, everything, including

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1   copies of the police and prosecution

2   file material, the original transcript

3   of the trial, the new evidence as

4   submitted by Milgaard's counsel and the

03:09   5   R.C.M.P. reports on the reinvestigation,

6   were turned over to an outside party for

7   re-assessment."

8   If we can just turn the page:

9   "That outside party was retired Supreme

03:09 10   Court of Canada Justice ... MacIntyre.

11   Mr. MacIntyre had a great deal of

12   experience as a defence counsel ...

13   earned a very good reputation ... as a

14   judge ... took his time and reviewed

03:09 15   everything. In the end he was satisfied

16   that the review done by the Department

17   ... came to the correct conclusion and

18   that there was no reason to order a

19   review by the ... Court of appeal. He

03:09 20   was satisfied that the original trial

21   had reached a just and fair conclusion

22   concerning Milgaard's guilt. And he was

23   also satisfied that the so called new

24   evidence was more illusory than real."

03:09 25   Now, where did you get all that information?

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1	A	Well, that information came from Federal Justice
2		officials. I don't know that I would have got
3		that directly from them, but, I mean, keep in mind
4		that the director of prosecutions at that time was
03:10 5		talking to Federal Justice people more than I was.
6	Q	Okay, but it says that McIntyre got everything.
7	A	That's what we were told. I'm sure of that.
8	Q	And that his decision was that there was a just
9		and fair conclusion regarding Milgaard's guilt and
03:10 10		the so-called new evidence was more illusory than
11		real?
12	A	Yes.
13	Q	That was what McIntyre supposedly said?
14	A	Well, that's the information I had. Whether I may
03:10 15		have embellished on it a little or not I don't
16		know, but I know certainly that he came to the
17		conclusion that there was no basis to re-open the
18		case.
19	Q	Okay. So you can't source that as to how you
03:10 20		would have got that information?
21	A	As I say, Ellen Gunn was talking to a number of
22		federal officials, I was talking mostly to Eugene
23		Williams at that point. He and I were both sort
24		of on the lower order, so we talked together and
03:11 25		the upper echelon talked together. I think the

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1   deputy minister may have even been talking to

2   their deputy minister.

3   Q   Then go to 83, you say:

4   "The third proposed new evidence is a

03:11 5   suggestion that some one named Larry

6   Fisher might have committed the murder

7   because he lived in that area. On

8   careful investigation of this prospect,

9   the R.C.M.P. were able to find

03:11 10   absolutely no evidence connecting Mr.

11   Fisher to the murder. This aspect of

12   the new evidence has no basis in reality

13   at all."

14   How did you come to that conclusion?

03:11 15 A   Which, that it has no basis in reality?

16 Q   Yeah.

17 A   The point I'm making is that it, in my view, did

18   not affect the conviction of David Milgaard and

19   that there was nothing there to connect Fisher to

03:12 20   the murder.

21 Q   Not even a basis in reality?

22 A   Well, that may be a little strong, Mr. Wolch, but

23   there wasn't a basis, in my view, to suggest that

24   Larry Fisher was the person who committed that

03:12 25   murder.

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1	Q	And the investigation by the RCMP was what? Do
2		you know what you were referring to?
3	A	Well, we were told that the RCMP had investigated
4		all the Larry Fisher matters. I understand now
03:12 5		that's not quite the case, but at that point we
6		were told that they had taken the thing from
7		Federal Justice and done an investigation.
8		COMMISSIONER MacCALLUM: I take it from
9		Federal Justice?
03:13 10	A	It would have come from Federal Justice, yes.
11		BY MR. WOLCH:
12	Q	Can you tell us something about your reaction when
13		you found out about the DNA?
14	A	I -- to be perfectly honest with you, Mr. Wolch, I
03:13 15		was flabbergasted by that. I really was not
16		expecting it to show that Larry Fisher had
17		committed that rape, but it then seemed to me that
18		if he did that, the inference has to be drawn that
19		he's the one responsible for the murder too.
03:13 20	Q	It's the only possible conclusion isn't it?
21	A	Well, Mr. Wolch, you would be surprised how many
22		two-perpetrator theories there are out there, none
23		of which I, frankly, give any credence to, but
24		there are some very reasonable people who hold the
03:14 25		view that she encountered two people on that

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1   occasion, one was Larry Fisher, the other was

2   David Milgaard.

3   Q But that's not a view that you share?

4   A No. No, no, no. You know, at the very least --

03:14 5   at the very least, and I think it goes beyond

6   this, but at the very least had the Saskatoon

7   police known who raped Gail Miller, David Milgaard

8   would have been absolutely no interest to them at

9   all and they would have just chased Shorty Cadrain

03:14 10   out of the police station as fast as they could,

11   but I -- my view is that if you know who raped

12   her, then you know logically who has murdered her,

13   it has to be the same person.

14   Q Okay. And when you came to that conclusion, what

03:15 15   was your view about Nichol John?

16   A Well, my view about Nichol John was then and is

17   now there's no question she didn't see David

18   Milgaard doing anything, but I don't know whether

19   she saw something. According to their evidence,

03:15 20   they were stopped in that area, I mean, even Ron

21   Wilson is still at that point, so I don't know.

22   As I say, the only thing I'm sure of is I'm sure

23   she didn't see David Milgaard doing anything.

24   Q Are you saying there's some possibility she saw

03:15 25   the murder?

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1   A   I don't know frankly, Mr. Wolch, what she may or

2   may not have seen, and I don't suppose anyone is

3   ever going to be able to establish that --

4   Q   I'm not so sure about that.

03:16 5   A   -- perfectly, and to be honest with you, the two

6   prosecutors who prosecuted Larry Fisher take the

7   view that she was lying from the get-go.

8   Q   Lying about what?

9   A   About seeing anything.

03:16 10   Q   They take the view she never saw a thing?

11   A   Yeah, that's right, about seeing anything or

12   seeing David Milgaard or anybody else.

13   Q   Let's deal with that then. Now, one of the

14   prosecutors was Al Johnston?

03:16 15   A   Al Johnston, yes.

16   Q   Tell us a bit about him.

17   A   A senior prosecutor with Saskatchewan Justice,

18   been there maybe two years less than I have.

19   Q   Okay. A highly respected prosecutor?

03:16 20   A   Yes.

21   Q   And Dean Sinclair?

22   A   I think he's been -- well, it would certainly be

23   24, 25 years, something like that now. Again,

24   senior prosecutor in the head office now.

03:17 25   Q   Also very competent?

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1	A	Yes.
2	Q	Now, with the exception of the DNA, they would be
3		looking at basically the same evidence that you
4		considered?
5		COMMISSIONER MacCALLUM: Who would be?
6		MR. WOLCH: Sinclair and Johnston.
7	A	I'm sorry, Mr. Wolch, you can't say with the
8		exception of the DNA, I mean, that is the smoking
9		gun, and that is the thing that points directly at
10		Larry Fisher and irrevocably at Larry Fisher.
11		BY MR. WOLCH:
12	Q	But it doesn't change what Nichol John said.
13	A	Well, no, it doesn't change what she said.
14	Q	It doesn't change what Linda Fisher said.
15	A	No, it doesn't, and it doesn't change the problems
16		with what Linda Fisher said.
17	Q	Well, we'll deal -- what I'm saying is the DNA
18		doesn't change any of the other evidence. It
19		might change how you look at it and how you
20		evaluate it, but with all due respect, it
21		shouldn't.
22	A	Well, maybe it shouldn't in your view, Mr. Wolch,
23		but the reality is it did.
24	Q	Because shouldn't the prosecutor look and evaluate
25		the evidence without an agenda?

03:17 (line 5)
03:17 (line 10)
03:18 (line 15)
03:18 (line 20)
03:18 (line 25)

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1   A   Well, and we looked at the Larry Fisher evidence

2   and our view was it didn't establish Larry Fisher

3   was guilty, didn't establish a case we could run

4   against him. I know you take a different view,

03:18 5   but that's our view.

6   Q   Well, those prosecutors looked at Nichol John's

7   evidence as having no merit whatsoever, the case

8   against David Milgaard having no merit, and I'm

9   trying to zero in on why they would see it one way

03:18 10   and you would see it the other.

11   A   Well, no, no, their view is that Nichol John's

12   evidence indicating that David Milgaard was, had

13   some involvement was false. I agree. Whatever

14   Nichol John did or didn't see, she could not have

03:19 15   seen David Milgaard committing that assault. Did

16   she see something? I don't know.

17   Q   Well, I would like to deal with how they saw the

18   same case that you saw with, albeit, the exception

19   of the DNA, but in looking at the same evidence,

03:19 20   and if I can get to 297487, and that's document

21   297421, this is from Larry Fisher's trial, and

22   this is Mr. Johnston addressing the jury. I want

23   to go over some portions with you.

24   A   Well, except before you do that, Mr. Wolch, if you

03:20 25   want to know why Al Johnston and Dean Sinclair

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1   took the position they did, ask them, I didn't run

2   this trial.

3   Q   No, no.

4   A   I didn't direct the trial.

03:20 5   Q   That's not my question. Johnston says:

6   "These are the signposts along the real

7   evidence road which we tell you -- which

8   we suggest to you are significant and

9   tell you something significant about

03:20 10   this crime. You remember way back when

11   when this trial started six weeks ago or

12   so, one of the -- I think maybe it was

13   the first witness we heard, Detective

14   Parker, Parker told us that he spoke to

03:20 15   Larry Fisher, to the accused, the

16   morning of February 3, 1969. That is

17   the morning, three days after Friday

18   morning when Gail Miller was killed. He

19   spoke to Fisher who told him that he,

03:20 20   that is Larry Fisher, lived at 334

21   Avenue O South... And I suggest it's

22   very significant now, it wasn't to the

23   police back then, but I suggest to you

24   knowing what we now know it is very

03:21 25   significant that Larry Fisher was that

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1   time living at 334 Avenue O South, and

2   on Monday morning at 6:49 a.m. he was at

3   that bus stop. That is the same bus

4   stop that Gail Miller caught her bus to

03:21   5   work most mornings."

6   So I pause there. See, you said to us you

7   considered it a coincidence. He considers the

8   same thing significant.

9   *A*   Well, and as I said, Mr. Wolch, ask him why he --

03:21   10   **Q**   No, I'm asking you.

11   *A*   Why? I didn't run the trial. It wasn't my

12   prosecution.

13   **Q**   Okay.

14   *A*   What's more, the evidence we had, as I recall from

03:21   15   the Supreme Court, was that she frequently used

16   the N bus stop.

17   **Q**   We'll get -- okay.

18   "You heard evidence as well early on

19   that Gail was killed about that time on

03:21   20   Friday, January 31, really just yards

21   away, just yards away from the bus stop.

22   There is a red X I'm referring to, My

23   Lord, there is a red X here, we were

24   told by any number of witnesses that the

03:22   25   bus stop was on the southwest corner of

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1   20th Street and Avenue O. And if you

2   remember the evidence of Maria Trupej,

3   she was the lady who is now getting a

4   little elderly, and as I recall her

03:22 5   testimony she said she remembered each

6   morning a pretty young nurse walking

7   from the north and a construction worker

8   with a hard hat walking from the south.

9   And remember this, Gail Miller lived at

03:22 10   130 Avenue O South, and her friend

11   Adeline Hall told us that to catch the

12   bus she would walk south to that bus

13   stop. You remember Linda Fisher told us

14   that Larry Fisher took the bus and when

03:22 15   he did he walked north. It's for you to

16   say, but who do you think Maria Trupej

17   is talking about? Because I suggest

18   this to you, Ladies and Gentlemen, if

19   Maria Trupej noticed Gail coming from

03:22 20   the north and Fisher coming from the

21   south, do you think Larry Fisher noticed

22   Gail coming from the north?"

23   Now, that submission there would destroy, if

24   accepted, would destroy the entire Crown theory

03:22 25   of how David Milgaard killed Gail Miller, it has

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 1              it on a different street; do you agree?

 2      A       Well, certainly the -- as I recall from the trial

 3              transcript, the theory I think was that she was

 4              taking the N -- going to the N stop, that's why

03:23 5         she was on Avenue N.

 6      Q       I'm not going to debate that with you, but --

 7      A       I think that's the case isn't it?

 8      Q       No, it's not.

 9      A       Oh.

03:23 10    Q   Simon Doell is another issue that I'm not going to

11              take the time.

12      A       No, no, my point is that that was the theory of

13              how she ended up being going down that street.

14      Q       Oh, yeah, Simon Doell, that's another story.  Go

03:23 15        to 297493:

16                       "McCorriston, you will recall, found

17                       Gail's purse.  And he testified that he

18                       found Gail's purse in the lane behind

19                       either 414 or 418 - 20th Street.  The

03:23 20                 only point I want to make there is if

21                       you go down the lane and take a right

22                       and then a left to get to Larry Fisher's

23                       house, you walk by that garbage can."

24              Is that something you would have considered?

03:24 25    A   To be honest with you, I'm not even sure what he's
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1   talking about there.

2   Q   All right.

3   A   I thought her purse was found in the garbage can

4   in the T alley. Is that what we're talking about?

03:24 5   Q   Yes.

6   A   And then you take a right and a left to get to

7   Larry Fisher's house?

8   Q   Yes. Anyway, leave that --

9   A   Yeah.

03:24 10   Q   I'll move on.

11   A   I would have to look at a map.

12   Q   I'll move on, I don't want you to start looking it

13   up, but here's something which I think is very

14   significant. We've heard very much about the

03:24 15   cosmetic bag, okay, we've heard about it from

16   Nichol John, we've heard about it from Ron Wilson,

17   Cadrain testified to that, we have the conflict

18   between David and Justice Tallis, it's been a

19   major factor, we've heard about it here over and

03:25 20   over again. I would like you to see how the

21   prosecutors handled that piece of evidence:

22   "Now that little bit of evidence takes

23   on a little bit more significance

24   because in exhibit P-19 ... there is

03:25 25   another booklet of photographs but I

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1   won't make you scramble for it ...

2   photograph 14 in it was a photograph

3   taken of Gail's purse that was found in

4   that garbage can and you will see, and I

03:25 5   will invite you to look at it at your

6   pleasure when you're deliberating, but

7   you will see the purse and all the

8   contents. One of the contents is a

9   cosmetic bag, and you will see the

03:25 10   cosmetic bag right there below the

11   purse. The evidence of McCorriston was

12   Gail's purse was found in that garbage

13   bag (sic) and this photo depicts the

14   contents."

03:25 15   Turn the page:

16   "...and you can compare it, if you wish,

17   to the photograph.

18   Now, you might say well what

19   is that cosmetic bag have to do

03:25 20   anything, it's not a big deal, but

21   Nichol John, and a big deal was made of

22   it here, Nichol John in her second

23   statement, and I'll talk about that

24   second statement more, said a cosmetic

03:26 25   case was thrown out between Saskatoon

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1		and Rosetown. Well, it wasn't Gail
2		Miller's because we have Gail Miller's."
3		Now that's -- well, I mean, I'm having a
4		difficulty how this prosecutor can see it so
5		clearly, same facts, we have the cosmetic bag,
6		it's in the purse, the one out on the road means
7		nothing, and yet in David Milgaard's case it
8		means everything.
9	A	Well, it could be because he had the DNA results
10		that absolutely tied Larry Fisher to the murder.
11	Q	But it shouldn't cause you to see the cosmetic bag
12		any differently should it?
13	A	Well, first of all, I'm not sure I would say that
14		that necessarily excludes that as being a cosmetic
15		bag she may have had. Certainly she had one in
16		her -- with her purse, maybe she had two, I don't
17		know, but the point is that the whole colour of
18		all of the evidence changes dramatically when you
19		know the results of that DNA, because it then --
20	Q	Shouldn't the cosmetic --
21	A	Maybe it won't for you, Mr. Wolch, but it
22		certainly does for me. If I had known the results
23		of the DNA, the process in the Supreme Court would
24		have been very short.
25	Q	Well, I appreciate that, but why should it cause

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	1		you to look at straight evidence and interpret it
	2		different ways; that is, the cosmetic bag was
	3		always in the purse, it was always --
	4	A	A cosmetic bag was always in the purse.
03:27	5	Q	This prosecutor says look, much ado about nothing,
	6		because Mr. Beresh obviously made a big deal of
	7		it, much ado about nothing, it's in the purse,
	8		take a look at it, ladies and gentlemen.
	9	A	Yeah.
03:27	10	Q	That prosecutor is looking at the same evidence as
	11		you in the same factual circumstances.
	12	A	Well, see, Mr. Wolch, that's not correct, it's not
	13		in the same circumstances, it's with the very
	14		different circumstance that he now knows Larry
03:28	15		Fisher is the one that raped Gail Miller and is
	16		likely the one therefore that murdered her, most
	17		likely the one that murdered her.
	18	Q	You are saying you start with the presumption of
	19		guilt and then evaluate evidence that fits the
03:28	20		presumption?
	21	A	He has the evidence to establish that Larry Fisher
	22		raped Gail Miller and that puts a whole different
	23		colour on all of the other evidence. It puts a
	24		whole different colour on Nichol John's evidence,
03:28	25		it's useless. It puts a whole different colour on

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1   Ron Wilson's evidence, it's largely useless.

2   David Milgaard isn't in the picture any more and

3   so anything having to do with David Milgaard isn't

4   in the picture any more.

03:28 5   Q   So what you are saying is that you can look at

6   objective evidence and it will be evaluated

7   differently whether you -- as to whom you presume

8   to be guilty?

9   A   The inference you draw from that evidence is going

03:28 10   to be different depending on what facts you know,

11   and if you happen to know that Larry Fisher is the

12   one who committed the rape, that allows you to

13   draw a very different inference with respect to

14   whether David Milgaard is involved. The case

03:29 15   against Milgaard was largely circumstantial with

16   the exception of those, whatever you call thems,

17   in the motel room and whatever you call what

18   Nichol John said and Wilson said, I mean, the sort

19   of confessions. At this point all of that was

03:29 20   irrelevant, it was gone.

21   Q   So you are saying the same objective evidence will

22   be looked at differently depending on what you

23   think the conclusion is?

24   A   No, no, Mr. Wolch, what I said was the same

03:29 25   objective evidence, you will draw different

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1   inferences from it depending on what the other

2   circumstances are, and if one of those other

3   circumstances is you know who raped the woman,

4   that's a whole different case.

03:30 5   Q   So you are saying that it's your view that if

6   Mr. Johnston looked at this evidence without the

7   DNA, he would have formed a different conclusion

8   on the same point?

9   A   No, he may very well have. I would note that the

03:30 10   Supreme Court of Canada didn't see it that way,

11   they thought there was a basis to prosecute David

12   Milgaard, and ample evidence upon which he was

13   convicted, and again, all of that evidence that

14   convicted him was something that was looked at

03:30 15   without the knowledge of who raped Gail Miller

16   and, as I said before, had the police known that

17   then, David Milgaard, the purse, Nichol John, none

18   of them would have been of any interest to them.

19   Q   What I'm getting at is you are a prosecutor and

03:30 20   Mr. Johnston is a prosecutor, you are both looking

21   at the same evidence. I'm trying to understand

22   how you could interpret it so differently.

23   A   And I've just told you, because the case that

24   Mr. Johnston and Mr. Sinclair was looking at was a

03:31 25   very different one.

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1	Q	Well, let's look --
2	A	It included the evidence that Larry Fisher was the
3		man who raped Gail Miller.
4	Q	Well, let's look at this if we could --
03:31 5	A	And this, I mean, the cosmetic bag wasn't evidence
6		against Larry Fisher, it was nothing. That was
7		something that Brian Beresh introduced to try and
8		prove that David Milgaard was the one who
9		committed the murder, or at least used that to
03:31 10		raise a reasonable doubt.
11	Q	Let's look at 297495:
12		"You will remember as well when we're
13		talking about these early witnesses,
14		Reid and Parker, Detectives Reid,
03:31 15		Parker, Penkala, Kleiv, they were, as I
16		recall, all asked as to whether or not
17		they saw any signs of a car being stuck
18		in that alley, and not one of them did.
19		Not one of them saw any signs in that
03:32 20		alley of a car being stuck."
21		Did the fact that there was no sign of a car
22		being stuck cause you any concern when you were
23		handling this matter?
24	A	Well, as I recall the evidence from the Supreme
03:32 25		Court, the evidence was that you wouldn't have

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1   seen anything anyway at the entrance to the alley

2   because either the snow was packed down, and you

3   are not going to see the result of anybody being

4   stuck there, or they didn't observe it.

03:32   5   Q   Okay. Let's take a look at Nichol John:

6   "Now, I want to deal with the evidence

7   of Nichol John. This was the lady who

8   remembers nothing. And it's up to you

9   what you want to take of her evidence

03:32 10   but, of course, I have to deal with it

11   because it's before you, what to believe

12   of her statements back then because you

13   will recall she made two. One as a

14   simple witness on March 11, 1969 when

03:33 15   she gave a recitation of what she and

16   Milgaard did, and the other guy. And

17   then on May 24 she gave another

18   statement. It was in that May 24

19   statement that she alleged she had seen

03:33 20   David Milgaard stab a woman. And I

21   suggest to you, Ladies and Gentlemen,

22   it's up to you, but I suggest to you

23   it's important that not one day since

24   May 24, 1969 has that lady Nichol John

03:33 25   ever remembered that happening. She was

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1   on the stand for quite a while and, as I

2   recall her evidence, she indicated that

3   not one time before that had she alleged

4   she saw David Milgaard do anything and,

03:33 5   as a matter of fact, not one time since

6   then. That was the only day in that

7   woman's life that she alleged she saw

8   David Milgaard do anything, and my

9   friend suggests you should take a lot

03:33 10   out of that. She has never made that

11   allegation since.

12   The March 11 statement,

13   Ladies and Gentlemen, was read to you,

14   and I just want to read her recitation

03:33 15   of what happened when they got to

16   Saskatoon that day. March 11, 1969, a

17   little less than six weeks after Gail

18   Miller was murdered:"

19   It then follows a paragraph I won't read for the

03:34 20   record, unless I'm asked to, which quotes from

21   the March 11th statement about the arrival and

22   looking for Shorty, and then another paragraph

23   about driving around the block and coming across

24   a convertible. He continues:

03:34 25   "Now, in that statement, in the witness

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1   statement, that's the first and only

2   mention she makes of their first stop,

3   and it's behind a convertible stuck in

4   an alley. And you remember Mr. Danchuk

03:34 5   just testified the other day, the fellow

6   who had such a hard time remembering,

7   but the one thing..."

8   He,

9   ...had was a statement that he made in

03:34 10   1969. ...he testified that the alley he

11   was in if I'm not mistaken was way aver

12   here, Avenue T. I digress. I'll come

13   back to that. But Nichol continues in

14   that first witness statement..."

03:34 15   And she says, and another paragraph is quoted,

16   where it's coming upon the Danchuks.

17   Mr. Johnston continues:

18   "Listen to this, Ladies and Gentlemen,

19   and see if it compares to Mr. Danchuk's

03:35 20   evidence..."

21   And then there's a paragraph from Mr. Danchuk

22   talking about the tow truck and being stuck.

23   Johnston continues:

24   "Now, when you look at her second

03:35 25   statement of May 24, she claimed that

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this happened after she saw David

2 Milgaard stabbing this woman. Imagine

3 this situation; it is alleged here that

4 David Milgaard did these things to Gail

03:35 5 Miller, and moments later they stopped

6 to help a guy who is stuck and then they

7 hang around in the guy's house for an

8 hour or two, and you heard Mr. Danchuk

9 say the other day David Milgaard was the

03:35 10 chatty one. Does that make any sense to

11 you?

12 He also said, you might

13 recall, that when they took him to the

14 tow truck and got the tow truck,

03:35 15 Milgaard had no money. Well, if he

16 killed Gail Miller he had money. And he

17 also had a lot of blood on him. The man

18 saw nothing. He did say that Milgaard's

19 pants were ripped, the same as Nichol

03:36 20 says in this statement. Nobody has ever

21 quarrelled with that. But Nichol says

22 specifically in this first statement

23 Milgaard's pants were ripped. "I didn't

24 see any blood on anybody's clothing".

03:36 25 She says as well in this first statement

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1   that's very significant, I suggest ...

2   because she sure didn't spend any time

3   in jail before she gave this one."

4   So he's alluding to the fact that Nichol John was

03:36 5   kept in custody before she made the statement.

6   "All during the morning we were in

7   Saskatoon..."

8   Next page,

9   "...the 3 of us were together and I am

03:36 10   sure that David or Ron never left me for

11   more than one or two minutes that

12   morning."

13 And that statement is corroborated, he says, word

14 for word by Danchuk.

03:36 15   "Then we go to the May 24, 1969

16   statement, the statement she has never

17   remembered before or since. I suggest

18   that statement, Ladies and Gentlemen, is

19   riddled, riddled with evidence of the

03:37 20   suggestions that had been made to her.

21   I'm not saying this is an evil thing or

22   even that it wad done deliberately, but

23   I do suggest that statement of the 24th,

24   the one and only day in her life that

03:37 25   Nichol John ever alleged David Milgaard

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1   did anything wrong is riddled with

2   suggestion. She says, in talking about

3   the maroon handled knife:

4   "This knife was the same one of a group

03:37   5   of knives that I was shown by Mr.

6   Roberts."

7   She says:

8   "After we got to Saskatoon we drove

9   around for about 10 or 15 minutes. Then

03:37   10   we talked to this girl. This was in the

11   area where Sgt. Mackie drove me around."

12   You'll remember when I asked

13   Sergeant Mackie, I said specifically,

14   "did you take her there or did she take

15   you there?" He said, "I took her

16   there". So again, I'm not saying it's

17   deliberate, but she's 16 years old, she

18   has just spent two nights in the jug.

19   She didn't do anything wrong. The only

03:37   20   thing she was doing was not implicating

21   David Milgaard.

22   She then says very

23   significantly, Ladies and Gentlemen,

24   because this is the part of the

03:38   25   statement upon which people jump:

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1   "We ended up stuck at the entrance to

2   the alley behind the funeral home."

3   Somebody, one of the

4   witnesses, I think maybe it was Mackie,

03:38 5   I'm not sure, wrote in hey, right at the

6   entrance to the alley behind the funeral

7   home, right across the street from where

8   Mrs. Merriman ... lived. And you will

9   remember the other day Mrs. Merriman ...

03:38 10   said they called a cab for 6:55, and she

11   saw no one stuck there. And that was

12   steps away from her cab -- from where

13   her cab would have been. 6:55 a.m. If

14   Nichol John's statement has any element

03:38 15   of truth, they had to have been stuck

16   right at the spot as Mrs. Merriman

17   walked out of her house looking right at

18   them, and she didn't see them because I

19   suggest it didn't happen. And I suggest

03:38 20   it shouldn't come as a surprise to you

21   that it didn't happen because the one

22   and only time Nichol John in her

23   lifetime said it did was on May 24,

24   1969, after she had been talked to by a

03:38 25   number of police officers and spent two

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1   nights in the jug."

2   So the prosecutor is clearly saying it's not

3   true, that Nichol John was kept overnight in

4   jail, suggestions were made to her, etcetera,

03:39 5   etcetera.

6   COMMISSIONER MacCALLUM: Mr. Wolch, can I

7   just ask you one thing?

8   MR. WOLCH: Absolutely.

9   COMMISSIONER MacCALLUM: Was the background

03:39 10   to this address a suggestion by defence counsel

11   that they should accept the May 24th statement of

12   Nichol John --

13   MR. WOLCH: Yes?

14   COMMISSIONER MacCALLUM: -- as raising a

03:39 15   reasonable doubt of Fisher's guilt?

16   MR. WOLCH: Yes. I think what happened if

17   I'm correct, and I'll try and be -- hopefully I'm

18   precise. Crown counsel -- sorry -- defence

19   counsel asked that Nichol John's May 24th

03:39 20   statement be ruled admissible.

21   COMMISSIONER MacCALLUM: Sure.

22   MR. WOLCH: The Crown said that you can't

23   put it in a vacuum because of the earlier

24   statement given should put it on a different

03:39 25   light, and the trial judge ruled that both

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1   statements should go in.

2   THE COURT: Right.

3   MR. WOLCH: I think the Court of Appeal

4   said neither should have gone in. I'll get to

03:39 5   that, but I think they said neither should have

6   gone to the jury.

7   COMMISSIONER MacCALLUM: Okay.

8   MR. WOLCH: But I might be wrong about

9   that, I don't know.

03:39 10   COMMISSIONER MacCALLUM: Well, at any rate,

11   what I was -- what had just occurred to me, that

12   it was -- it then fell to Mr. Johnston to

13   discredit the statement of Nichol John --

14   MR. WOLCH: Yes.

03:40 15   COMMISSIONER MacCALLUM: -- in order to get

16   Fisher convicted?

17   MR. WOLCH: Yes.

18   COMMISSIONER MacCALLUM: Okay.

19   MR. WOLCH: Yes.

03:40 20   COMMISSIONER MacCALLUM: Go ahead there,

21   I'm sorry to interrupt, but --

22   MR. WOLCH: No, that's helpful, thank you.

23   BY MR. WOLCH:

24   Q   So:

03:40 25   "Remember Danchuk's evidence.

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1   He cited David Milgaard as the chatty

2   one was my note. ... as I recall

3   Danchuk's evidence he said these three;

4   two guys including Milgaard, a girl, and

03:40   5   another guy, were in his presence *from

6   between 7:30 and 7:40 until 9:30 or

7   10:00. We are to believe that this guy

8   who has just committed this offence

9   against Gail Miller is sitting ...

03:40   10   chatting with Mr. Danchuk some blocks

11   away. Sitting in the house talking to

12   him and his wife, with no money.

13   Nichol John also says in the

14   May 24 statement:"

03:41   15   about the cosmetic case. And he says:

16   "Well, I suggest, Ladies and

17   Gentlemen, it's for you to determine it

18   wasn't there because we have it here.

19   Perhaps the most significant

03:41   20   statement in this May 24 statement which

21   I suggest is a fantasy ... is the one on

22   the second-last page where she says:

23   'I have not told anyone about

24   witnessing this murder. I didn't

03:41   25   recall actually witnessing a murder

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1   until yesterday when I talked with

2   Mr. Roberts.'

3   Never recalled it before and has never

4   recalled it since, and I suggest it's

03:41 5   because there is nothing to recall. She

6   can get hypnotized until the blue moon

7   comes out and there is nothing there to

8   recall.

9   You see, I suggest for the

03:41 10 reasons I have ... gone over ... Nichol

11 John's statement cannot be true. And I

12 want to suggest it for one last reason

13 and one very important reason that what

14 she says in the statement, and it's

03:41 15 important you remember she has never

16 said it since, is that she saw Milgaard

17 with this woman that they had talked to

18 on the street beside the car and saw him

19 stabbing her, saw him stabbing her, and

20 dragging her around the corner down the

21 alley. ... Well, Gail Miller has no

22 stab wounds in her dress, there are no

23 stab wounds in the back of her dress,

24 the wounds inflicted to her back were

03:42 25 inflicted after her dress was off and

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1   after her coat was back on. There is no

2   other explanation."

3   And then he goes on to continually talk about how

4   her statement can't be true, the Merrimans would

03:42   5   have seen it, and then he says:

6   "And for the reason that she was

7   obviously suggested to over and over and

8   over in the course of the statement and

9   finally for the reason that 'I didn't

03:42   10   even remember witnessing this until I

11   spoke to Mr. Roberts'."

12   So your prosecutor there, looking at the same

13   evidence, is saying "this is ridiculous". I'm

14   interested in why you didn't look at it the same

03:42   15   way?

16   A   Well, I didn't have the same information that

17   Mr. Johnston did.

18   Q   Well you had Mr. Merriman?

19   A   At the end of the day, you know, you argued all

03:43   20   those things in the Supreme Court --

21   Q   No, no, that's not my question, Mr. Brown.

22   A   Her evidence was what it was.

23   Q   Mr. Brown?

24   A   He takes a different view of it.

03:43   25   Q   No, I'm not -- I'm asking you why you, why you

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1		think, as the prosecutor, you couldn't see what he
2		saw in terms of the incredibility of the story,
3		the fact that the Merrimans would have had to have
4		seen this thing if it had happened, how ridiculous
5		it is that "I now remember, out of the blue, a
6		murder", it went through a coat and not through a
7		dress? I'm not going to repeat everything there,
8		it's very powerful, but I'm just wondering why you
9		didn't see it? I mean, surely, DNA doesn't change
10		any of that?
11	A	No, it doesn't change any of that, but it does
12		change the lens that you look at all of this
13		evidence through, it changes it very
14		substantially.
15	Q	Do you think it should?
16	A	Well are you saying that, if you know substantial
17		and very important new facts, that doesn't change
18		how you interpret other things?
19	Q	Well --
20	A	Of course it does.
21	Q	Well, look at the next paragraph here:
22		"We are to ...",
23	A	The point I would make with respect to Nichol
24		John -- and I think I may have made it to
25		Ms. McLean -- is, at this point, we know she did

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1   not see -- or she did not see anything, so we know

2   that's -- or didn't see David Milgaard doing

3   anything, so we know the, you know, slashing her

4   beside the car and all of that is false, we know

03:44 5   that now.

6 Q   Well --

7 A   Absolutely know that now.

8 Q   -- aren't we sort of --

9 A   Because the DNA evidence proves it wasn't David

03:44 10   Milgaard.

11 Q   But aren't we supposed to evaluate it fairly, and

12   look at the absurdity of it, or --

13 A   You look at it in the context in which it occurs

14   and the context in the case we had in the Supreme

03:45 15   Court, and you argued all of these things, and the

16   Supreme Court didn't jump to the conclusion that

17   you now want.

18 Q   I'm dealing with the prosecutor's role, you are

19   the prosecutor, that's what I am asking you?

03:45 20 A   And we looked at it, and it went to the Supreme

21   Court on the basis of it is what it is, some of it

22   is corroborated by what Wilson says, by where

23   things are found, it's there.

24 Q   Carrying on:

03:45 25   "We are to believe, if you believe

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	1	Nichol John, that David Milgaard
	2	commenced this attack when their car was
	3	stuck. What, did he rape and murder
	4	Gail Miller and then come back and push
03:45	5	the car out and then drive a couple
	6	blocks and stop and help push somebody
	7	else out? It's ridiculous. It's
	8	transparent in its lack of credibility.
	9	But I don't want you to get distracted
03:45	10	by it, I'm compelled to deal with it
	11	because it's been tendered as evidence
	12	...",
	13	A Well, that's Mr. Johnston's view.
	14	Q It is --
03:45	15	A Obviously Bobs Caldwell didn't take that view, I
	16	didn't take that view, Eugene Williams didn't take
	17	that view, Eric Neufeld didn't take that view, --
	18	Q But do you agree it's the correct view?
	19	A -- all of them prosecutors.
03:46	20	Q It is the correct view; isn't it?
	21	A Well, now that we know who committed the murder,
	22	yes.
	23	Q Well, wasn't it patently absurd to begin with?
	24	A Well, I wouldn't say it was patently absurd, no.
03:46	25	Q I mean Mr. Johnston says it was transparent,

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1		anybody can see?
2	A	Well, that's Mr. Johnston's characterization of
3		it, if you want to know why he characterized it
4		that way call him?
5	Q	No, I'm interested in why you didn't characterize
6		it that way or see any problems with the evidence
7		that you were relying on?
8	A	Well I didn't say we didn't see any problems with
9		the evidence that we were relying on, there were
10		problems with the evidence in the Supreme Court,
11		there were problems with the evidence that showed
12		up at trial, and one of them was Nichol John.
13		What do you make of that, how does that go before
14		a jury?
15	Q	Okay. Now Mr. Johnston says he wants to talk
16		about real evidence:
17		"And I want ... to recall the evidence
18		of (V1)--- ...",
19		if you can turn the page:
20		"... (V1)--- (V1)-, (V2) (V2)--, and
21		(V8)-- (V8)---. These are the three
22		women that we know with certainty Larry
23		Fisher raped. We know that with
24		certainly because with respect to two of
25		them ...",

03:46 (line 5), *03:46* (line 10), *03:46* (line 15), *03:47* (line 20), *03:47* (line 25)

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1   there were convictions that were recorded and he

2   was convicted of (V8)---. It talks about:

3   "... introducing evidence of similar

4   fact, and His Lordship talked to you a

03:47   5   little bit about this just even before

6   we called the evidence, we are not

7   asking you to find that Mr. Fisher is

8   the type of guy to do this. That has

9   nothing to do with the tendering of this

03:47   10   witness and is it is wrong for you to

11   consider it that way. We are asking you

12   however, to consider as a result of

13   those similar acts that he is the very

14   person, the very person who raped and

03:47   15   killed Gail Miller. These offences,

16   Ladies and Gentlemen, with respect to

17   ... (V2)-- ... (V1)-, and ... (V8)---,

18   we suggest are strikingly similar to the

19   rape and murder of Gail Miller."

03:48   20   That's something you wouldn't agree with?

21   A   Again, that's Mr. Johnston's characterization,

22   I've already told you mine.

23   Q   It's also consistent, I suppose, with the judge's

24   ruling that it was admissible?

03:48   25   A   Yes. Well, I don't know that the judge found it

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1 was strikingly similar, why didn't he include the

2 others if they were strikingly similar?

3 Q Yeah, well, we'll deal with that. And here's, I

4 suppose Mr. -- he is talking about Mr. Beresh's

03:48 5 argument, which is fairly consistent with your

6 position:

7   "My Learned Friend says

8   they're different. Well, of course they

9   are. They took place on different dates

03:48 10   and they were different women. There is

11   always differences. The significance

12   here, from our perspective, is not the

13   differences but the similarities.

14   Because remember this, we suggest these

03:49 15   are some of the similarities, around the

16   same time (V2) and (V1)--- were raped I

17   think in October and November of 1968,

18   just of couple of months before Gail

19   Miller, they were raped just a few

03:49 20   blocks away from Larry Fisher's house.

21   Where was Ms. Gail Miller was raped and

22   killed. They were raped in residential

23   areas, and this is something that I

24   suggest you might find strikingly

03:49 25   similar, in residential areas where

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1   there are houses all around and people

2   all around. Now, my friend says she

3   must have been in a car and nobody heard

4   her screaming. Well, nobody heard (V2)

03:49 5   (V2)-- scream and nobody heard (V1)---

6   (V1)- scream. And why do you suppose

7   that is? Because Larry Fisher had his

8   hand over their mouths and a knife at

9   their throat. Would you scream? Maria

03:49 10   Trupej had that figured out when she

11   said to my friend 'How are you going to

12   scream with a knife to your throat'.

13   And we know Gail Miller had a knife to

14   her throat, with all too much certainty.

03:49 15   You see, I suggest the

16   striking similarities include the

17   residential area, the time, the

18   location, the fact that they were

19   attacked on the street and pulled down

03:50 20   an alley with a knife to their throat,

21   from behind, with a hand over their

22   mouth. And I'm going to come back to

23   the hand over the mouth because when you

24   look at the photographs of Gail Miller's

03:50 25   dead body and remember Penkala's

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1   evidence of how her mouth was scrunched

2   up, I suggest you will know why.

3   And of particular interest, I

4   suggest, Ladies and Gentlemen, in those

03:50 5   other rapes is the fact that (V2)

6   (V2)--, (V2)-----, and (V1)--- (V1)-,

7   with each of them, he attacked them on

8   the street, dragged them down the alley

9   in the way I suggested, and then, and

03:50 10   then in a residential area, ordered them

11   to take their clothes off, to take their

12   coat off and lay on it.

13   Now, if you want an

14   explanation for how Gail Miller came to

15   be stabbed with her dress off and her

16   coat on, look to those people, because

17   they too were ordered to take their

18   clothes off and lay on their coat.

19   What is strikingly similar is

03:50 20   the fact that Larry Fisher in those

21   other rapes was prepared to take those

22   kinds of risks, those kinds of risks

23   just to strip these women down, in a

24   residential area, with his hand over

25   ...",

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1   her

2   "... mouth and a knife to their throat.

3   (V1)--- (V1)- said that she

4   was raped on October 21st ...",

03:51   5   now I won't go through this but it goes through

6   all the facts of (V1)--- (V1)-; -- if we can

7   scroll down -- then we have (V2) (V2)-----, and

8   it goes through all or some of the facts, at

9   least, of her statement; and then (V8)-- (V8)---,

03:51 10   it goes through her facts. And then he says:

11   "Now, our position with

12   respect to those, Ladies and Gentlemen,

13   are that there are striking similarities

14   between the acts, that is between the

03:51 15   rapes of those three women and the rape

16   and murder of Gail Miller. The value of

17   the similar fact evidence is that it

18   tells us, I suggest, what happened to

19   Gail Miller. If you want to know how

03:51 20   Gail Miller got to that alley where her

21   body was found; ask ... (V1)- ... (V2)--

22   ... (V8)---. If you want to know how

23   Gail Miller got her face all scrunched

24   up; ask those three women. If you want

03:51 25   to know how Gail Miller came to have her

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1   dress down and her coat on; ask ...

2   (V2)-- ... (V1)- ... and ... (V8)---.

3   And If you want to know why no one heard

4   Gail Miller screaming; ask those three

03:51 5   woman. In each assault it was the same

6   type of weapon, in a residential area,

7   and on each occasion he made them

8   disrobe and lay on the coat. Not with

9   (V8)-- (V8)---. He told her to take her

03:52 10   coat off but they never got that far.

11   I suggest that it's

12   important, Ladies and Gentlemen, that

13   these women, I'm now referring to ...

14   (V1)- and ... (V2)--, were strangers.

03:52 15   They may very well be living today

16   because they were strangers to Fisher.

17   I suggest to you, Ladies and Gentlemen,

18   from the evidence of ... Trupej and ...

19   Humen that Gail Miller and Larry Fisher

03:52 20   took the same bus and consequently if

21   they weren't introduced to one another,

22   like Tony Humen, they very likely

23   recognized one another, and I suggest

24   that that's why Gail Miller is dead. My

03:53 25   friend suggests these other women

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1   weren't stabbed, and he's right, they

2   were just threatened to have their

3   throat cut. But he didn't know them.

4   And he went to work on the same bus with

03:53 5   Gail. Mrs. Trupej, as I recall it,

6   described it as each morning. And you

7   may find, it's up to you, but you may

8   find Larry Fisher determined it was

9   either kill Gail Miller or get caught.

03:53 10   Because how could you rape a person who

11   knew you to see you? Then what are you

12   going to do, let her go? If you weren't

13   going to kill her you wouldn't pick

14   somebody you knew. You wouldn't pick

03:53 15   somebody you rode on the bus with."

16   Well there's, there is the use that Mr. Johnston

17   makes of similar acts, and I take it you would

18   disagree with that?

19   A   I disagree with his characterization that all of

03:54 20   that proves Larry Fisher raped Gail Miller. It

21   only does that when you line it up with the DNA

22   evidence.

23   Now the last part that you

24   read about him attacking someone he knew, that's

03:54 25   my reasoning for why, if you know who raped Gail

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1   Miller, you know who killed her. If you know it's

2   Larry Fisher, the guy she took the bus with for

3   several months in a row, that's why he killed her.

4   Q   I guess I'm having trouble with -- and I don't

03:54   5   want to be unfair to you -- but I'm having trouble

6   with the suggestion that we get the conclusion

7   first --

8   A   Well, Mr. Wolch, you are starting --

9   Q   -- I haven't finished the question -- we get the

03:54 10   conclusion first and then interpret the evidence

11   to fit the ultimate conclusion?

12   A   Mr. Wolch, you are starting first of all with the

13   presumption that the DNA evidence and that is

14   irrelevant to how you assess the other evidence,

03:54 15   and I'm telling you it's not. You look at what

16   you've got, all of what you have got, and you make

17   your assessments on the pieces of evidence based

18   on that.

19   And, second, you are assuming

03:55 20   that every prosecutor sees everything the same

21   way, and that's simply not the case. And I'm not

22   sure, even today, given what the Supreme Court has

23   said in *Handy* and *Shearing*, that that fresh

24   evidence application would turn out the same way,

03:55 25   because they seem to have raised the bar back up

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1   quite substantially with that, with those cases.

2   Q   They were both considered in the Court of Appeal

3   in this case; weren't they?

4   A   Umm, yes they were, and the Court of Appeal

03:55 5   thought that you probably got by that. But again,

6   if you're looking at that, the Court of Appeal is

7   also looking at the DNA evidence, which wasn't

8   challenged in the slightest.

9   Q   Oh?

03:55 10   A   And the DNA evidence said it's Larry Fisher.

11   Q   Well, no, it was certainly tried to be challenged

12   by Mr. Beresh?

13   A   It wasn't touched.

14   Q   Oh, it wasn't touched, but it was tried to be?

03:56 15   A   Well, he did, but --

16   Q   Well, and --

17   A   -- I think it blew up on him.

18   Q   And you keep mentioning *Handy* and *Shearing*?

19   A   *Handy* and *Shearing*.

03:56 20   Q   Wasn't that a collusion case?

21   A   Well that, I mean, that was one of the issues they

22   had to deal with.

23   Q   It was consensual sex, --

24   A   Arguably.

03:56 25   Q   -- arguably?

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1	A	Possibly. It seems to me that was the situation
2		where they'd had a relationship before?
3	Q	Yeah, and -- but the two women knew each other.
4	A	Oh, yeah, right.
03:56 5	Q	It's totally different?
6	A	Well, no, there's elements of the idea that a few
7		similarities don't a similar fact evidence case
8		make.
9	Q	But Justice Allbright would have been aware of
03:56 10		those cases?
11	A	Umm, I rather doubt it. When was that trial? I
12		think this trial was run before those cases came
13		down.
14	Q	Around the same time, I think. We'll check that,
03:56 15		but --
16	A	Well, very shortly after those cases came down, --
17	Q	We'll get to that.
18	A	-- at the end of this trial. But no, it seems to
19		me they were before, they are in the middle,
03:57 20		between the trial and the Court of Appeal, but
21		it's --
22	Q	I want to deal with another little bit of
23		evidence, 297507. I think Mr. Beresh actually
24		called Kenny Cadrain, if you can believe it. Down
03:57 25		here:

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1   "You know, Mr. Fisher through

2   his counsel strenuously attacked the

3   credibility of Linda Fisher, John

4   Patterson and Pat Alain, and then to

03:57 5   support his theory he puts Ken Cadrain

6   on the stand. Ken Cadrain was a child

7   when all of this happened. He says you

8   should believe Ken Cadrain. Kenny

9   Cadrain was five years old when all this

03:57 10   happened and he gave no statement, as

11   far as I know of, to anyone until about

12   1990. In his statement to Pearson he

13   said specifically, 'I never seen

14   tattered clothes or blood'. I never

03:58 15   seen tattered clothes or blood. But by

16   1993 in the statement he gave that had

17   changed. Now he says he saw blood and

18   he saw Milgaard go out the back door and

19   back in. Today, or the other day when

03:58 20   he testified, now he remembers seeing a

21   garbage truck. 'I remember this garbage

22   truck'. The man is remarkable. His

23   memory is improving as time goes on. I

24   was joking with Sinclair, I said you

03:58 25   call him to the stand a couple more

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	1	times we'll solve the Lindbergh
	2	kidnapping."
	3	A rather colourful way of assessing Ken Cadrain,
	4	but certainly ridiculing the absurdity of relying
03:58	5	on a five-year-old now in his twenties to have
	6	any probative value. Umm, any comment on that at
	7	all?
	8	A Well, at that point, his job was to do whatever he
	9	could to discredit that because that was being --
03:58	10	that was the evidence being called to put the
	11	David Milgaard theory before the Court and, of
	12	course, that wasn't where he was going at that
	13	point.
	14	I would point out however,
03:58	15	just for your information, that Mr. Johnston has
	16	prosecuted child sexual abuse cases where he has
	17	called people who have indicated they were abused
	18	when they were very, very young and are testifying
	19	a decade or two later, so it's not that you never
03:59	20	believe them.
	21	Q Well, fine.
	22	A In this instance he had a reason for attacking the
	23	credibility or the reliability --
	24	Q Mr. Brown, --
03:59	25	A -- of that witness.

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1   Q   -- is there not a big difference between a child

2   being able to recall some adult molesting their

3   body as compared to a child being able to recall

4   whether somebody came and went on a particular

03:59   5   day, do you not see a major difference?

6   A   Ken Cadrain said that he remembered that, that was

7   put before the Supreme Court for what it was

8   worth, and again, it was corroborated by the

9   notion that David Milgaard had changed his clothes

03:59   10   there.

11   Q   Okay. Just carrying on:

12   "I want to talk about Linda

13   Fisher ... because she said -- you might

14   remember Linda's evidence, on the day of

04:00   15   Gail Miller's murder Larry Fisher was

16   supposed to be at work and he wasn't.

17   He was at home in his dress clothes,

18   freshly showered when she awoke between

19   9:00 and 10:00 that morning. She said

04:00   20   under oath, they had an argument and she

21   not seriously, and I suggest it's for

22   you to say, but I suggest she said to

23   him, not seriously 'you probably killed

24   that nurse'. And you will recall his

04:00   25   response to her, as described by Linda,

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1   I think she said something like the

2   colour drained from his face or he

3   appeared shocked or something like that.

4   My learned friend says Linda, if she was

04:00   5   telling the truth, would have mentioned

6   that to the police. Well why, she

7   didn't blame him at the time. She told

8   us that. She was mad at him for being

9   out all night. She made the accusation

04:00 10   in a moment of anger. She even said

11   when he looked so shocked she backed off

12   because now she felt bad, she thought

13   she had gone too far. My friend says

14   she is just vindictive. Well, is that

04:00 15   vindictive? I suggest, and it's

16   entirely up to you, but I suggest

17   Ms. Fisher was very forthright because

18   she never talked about scratches or

19   bruises or missing any bloody clothes or

04:00 20   any of that stuff, she said to the

21   contrary, 'I said that to him I didn't

22   even mean it.'"

23   So he is looking at her as being forthright while

24   you are saying that her not saying there was that

04:01 25   supported his case. Do you see the difference?

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1   A   Oh, I can see the difference, and I can understand

2   why he would be arguing a different tack.

3   Q   Going down to here:

4   "It was only after that she found out

04:01 5   about the rapes that he was committing

6   in Saskatoon and then later the rape in

7   Winnipeg, and she testified that it was

8   around 1980, and I recall and again His

9   Lordship will have better notes, but I

04:01 10   recall her saying that she thought he

11   was getting out or something, and this

12   was bugging her so she had -- she drove

13   to the police station or her boyfriend

14   or something drove her to the police

04:01 15   station at four o'clock in the morning

16   in 1980, she had been drinking and she

17   gave this statement to the police.

18   Well, you know, when you think about it

19   first, you think she's just -- she's

04:02 20   half-loaded, it's 4:00 in the morning,

21   I'm sure that's what the police officers

22   thought because he didn't do anything

23   with the statement, but he kept it. And

24   I'll suggest something to you, Ladies

25   and Gentleman, Linda Fisher has not

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1   wavered significantly from that

2   statement that she gave in 1980 to this

3   day, and she has been called upon to

4   testify and talked to a lot of people

04:02   5   about it, and I suggest she has not

6   wavered in any significant way. I

7   suggest the evidence proves that she has

8   not waived because my friend certainly

9   had an opportunity to cross-examine her

04:02 10   on it."

11   So Linda Fisher is being assessed very, very

12   differently by one prosecutor, here, as to you

13   assessed her back then?

14 A   Yes. Now, after the break, Mr. Johnston continues

04:03 15   down here. He talks about Linda Fisher and her

16   credibility, I won't read that, but if we can go

17   down to the next page.

18   "As I recall from the evidence, the

19   first time anybody raised the spectre of

04:03 20   Larry Fisher in regards to the Gail

21   Miller murder was in 1990. ... between

22   1969 and 1980 to the best of our

23   knowledge from this evidence, no one

24   connected him, except Linda, and her

04:03 25   voice went unheard. The only thing she

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04:03

1   did was go down to the police station in

2   1980 and give a statement. And I say

3   it's significant because she has never

4   wavered significantly from that

5   statement. And nobody else ever

6   connected them until 1990. Linda

7   Fisher's evidence is significant for

8   several reasons. She says Larry Fisher

9   was at home the day Gail Miller was

10   murdered and was supposed to be at work.

11   You will recall Mr. Fisher told

12   Detective Parker that he was at work not

13   at home. Linda Fisher says she accused

14   him of the murder and stopped him in his

15   tracks. She says additionally that she,

16   with Larry Fisher, bought a knife

17   similar to the murder weapon at the OK

18   Economy, and that these two items ...",

19   he identifies P-18 and, perhaps erroneously,

20   P-15.

21   "Now, it may be my fault,

22   Ladies and Gentlemen, because I know in

23   questioning her there may have been some

24   confusion about these knives, and I want

25   to talk a little bit about my

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1   recollection of Linda's evidence.

2   Linda Fisher has maintained

3   from the first day and continues to

4   maintain that the knife she missed was a

04:04   5   wooden handled paring knife with rivets

6   in it. She has never said anything

7   different, and you may have been

8   confused about that. His Lordship will

9   correct me if I'm wrong, but Linda

04:04   10   Fisher has maintained from day one that

11   the knife she missed was a wooden

12   handled paring knife with rivets, not

13   this knife. She did however testify

14   that at the preliminary hearing, you

04:05   15   heard that was back in January of 1998,

16   she was for the first time, for the

17   first time shown this knife handle and

18   the blade, and it was then she said

19   'Good heaven's, we had a knife like

04:05   20   that, Larry and I bought it at the OK

21   Economy. She never, ever claimed and

22   didn't claim on the stand that she was

23   talking about the same knife. Clearly

24   the knife she described as believing was

04:05   25   missing was a different one, wooden

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1   handle with rivets. But when she was

2   shown the knife for the first time she

3   said that was 'similar to one Larry and

4   I bought at the OK Economy.'

04:05 5   If you remember there was a

6   bit of to-do with Eugene Williams and

7   whether she was shown a photo or not.

8   And when I questioned Linda Fisher I put

9   this question to her, I said, 'Do you

04:05 10   remember the interview with Eugene

11   Williams?' she said 'Yes'. And I said

12   did Eugene Williams ask you these

13   questions and did you give these

14   answers:

04:05 15   Q   Okay. I'm producing and showing to

16   you this document which is entitled

17   'murder still under investigation'

18   and ask you to look at that. My

19   question is, have you ever seen this

04:06 20   document before?

21   The answer is no. I said: 'Linda did

22   you hear the question and say the answer

23   'yes'.

24   The next question is:

04:06 25   Q   It reads; the police department are

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1   interested in learning from any

2   householder that may be missing a

3   paring knife of this description;

4   kitchen paring knife, 6 inches in

04:06 5   length, maroon handle, made in Japan.

6   Anyone having information kindly

7   phone ...",

8   a certain number.

9   'Below that is a depiction of a|

04:06 10   paring knife. At the time that you

11   went to the police did you know that

12   a blade from a paring knife had been

13   found underneath the victim's body?'

14   She said no. I said 'Linda, were you

04:06 15   asked that question and did you give

16   that answer'? Now I simply say this,

17   Ladies and Gentlemen, that question from

18   Linda, if you accept her evidence

19   indicates that it was this document that

04:06 20   was shown to her. Now I simply ask you

21   this; she is shown this document, she

22   doesn't recognize it, she is shown this

23   item and says she does. I leave it to

24   you but, I suggest, it's not

04:07 25   unreasonable that a person doesn't

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1   recognize this and might recognize the

2   real thing. But I do want to suggest to

3   you that Linda Fisher has never, ever

4   claimed they were one and the same. The

04:07   5   knife she has always talked about was a

6   wooden handled knife with rivets. This

7   is a different knife. She talked about

8   two different knives.

9   I suggest to you when it

04:07   10   comes to Mrs. Fisher and when it comes

11   to John Patterson, that their evidence

12   stands alone. There is no evidence to

13   the contrary before you and you are

14   entitled to consider that when you are

04:07   15   deciding whether or not to accept it."

16   So this Crown attorney puts a lot of weight on

17   Linda Fisher and, I won't go through it all, and

18   John Patterson as well, and are you saying it's

19   because the end result causes prosecutors to look

04:07   20   at people's evidence differently?

21   A   No, I'm telling you that it's the evidence in its

22   totality that causes prosecutors to assess their

23   cases differently. Had we had, you know, had

24   Eugene Williams and Ron Fainstein and Rob Frater

04:07   25   and Eric Neufeld and I had all that, the Larry

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1   Fisher DNA evidence, in the Supreme Court, we

2   would have seen it differently too.

3   Q   You mentioned Ron Fainstein and Robert Frater;

4   what was their position?

04:08   5   A   Their position on what?

6   Q   At the Supreme Court reference? Were they --

7   A   Well they --

8   Q   -- partisan or non-partisan?

9   A   Well in -- they were there to assist the Court,

04:08 10   but I'm aware of the fact that they didn't take

11   any different view than what we had.

12   Q   Well, Fainstein actually cross-examined David?

13   A   Well, he started to, and isn't that at the point

14   where the Chief Justice reminded him that they

04:08 15   were basically there just to assist the Court?

16   Q   Would you accept that Fainstein and Frater were,

17   let's say, on the same side as you?

18   A   Oh, I would think that's a fair characterization,

19   yes.

04:09 20   Q   Just go to 297538. Just as interest, here's how

21   Mr. Johnston ended his address to the jury:

22   "... Ladies and Gentlemen, I say with

23   respect, it's time to leave David

24   Milgaard alone. Finally let's leave him

04:09 25   in peace because, I suggest, knowing

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1		what you all now know that the verdict
2		you ultimately come to will be the just
3		and proper one."
4		I take it you would agree with that?
04:09 5	A	Yes. I think David Milgaard's potential
6		culpability was the only real defence Larry Fisher
7		had. The attempt to discredit the DNA, if I
8		recall correctly, blew up in his face.
9	Q	So I just -- well, I'll leave it for now, but I'm
04:10 10		interested in how -- or your point you make about,
11		when you know the end result, you look at specific
12		evidence differently, I mean --
13	A	No, no, when you have all of the evidence you look
14		at the specific parts differently, and I don't --
04:10 15		I mean suppose, for whatever reason, the jury had
16		come in and said "not guilty" at the Fisher trial,
17		that wouldn't have changed my mind.
18	Q	No, but what I am saying is I'm having a very hard
19		time coming to grips with the idea that, if Nichol
04:10 20		John's evidence is not worthy of belief, why
21		that's influenced as to whether you have DNA or
22		not?
23	A	Well, because you come to the conclusion that it's
24		not worth any credit because you know all of the
04:11 25		evidence, you know that Larry Fisher is the one

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1   who raped Gail Miller, and therefore you know

2   Nichol John's evidence can't be true.

3   Q   But why can't you form the same opinion just

4   assessing the frailty of the evidence, --

04:11 5   A   Well, --

6   Q   -- assessing the nonsense of the evidence?

7   A   -- and you can look at its frailties, and

8   certainly those were before the Supreme Court and

9   they were argued before the Supreme Court, but at

04:11 10   the end of the day it was what it was.

11   Q   I'm zeroing in on the prosecutor, I'm interested

12   in the prosecutor's assessment of this case,

13   because how a prosecutor looks at his case is a

14   great influence on whether a miscarriage of

04:12 15   justice occurs or not?

16   A   Quite true, but the point I would make, Mr. Wolch,

17   is you don't take a single piece of evidence, look

18   at it in isolation and then decide, well, there's

19   a flaw here, discard it, then go the next piece of

04:12 20   evidence, look at it in isolation and discard it,

21   you look at all of your evidence together. Now,

22   obviously if there's a piece of evidence that is

23   totally unreliable, you will discard that, but

24   everything is looked at in terms of the whole

04:12 25   case, it's not looked at piecemeal.

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1   Q   Well, I'm still astounded by your assertion that

2   you think Nichol John may have seen something

3   after hearing Mr. Johnston --

4   A   I mean, I don't know whether she seen something or

04:12 5   not. What I am absolutely sure about is she

6   didn't see David Milgaard do anything. Now,

7   whether she saw somebody else, whether she got out

8   of the car, if they got stuck, I don't know, it's

9   impossible -- how do you probe someone's evidence

04:13 10   when their only response is I don't remember.

11   Q   Wouldn't you look at the circumstances of how the

12   statement took place, wouldn't you look at her

13   original statement?

14   A   Yes, we looked at all of that and the arguments

04:13 15   that Johnston made were the kinds of things that

16   were put to the Supreme Court and the issues

17   taken.

18   Q   You keep taking refuge in the Supreme Court.

19   A   No, no.

04:13 20   Q   I'm asking about you.

21   A   I'm simply pointing out that those arguments were

22   made and they are arguments you can make and there

23   were counter arguments that you can make and at

24   the end of the day it's for the court to decide

04:13 25   what they are going to do.

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1	Q	Okay, I want to turn, and I'm heading towards the
2		end you will be happy to know.
3	A	It's all pensionable service, Mr. Wolch. I'm here
4		this evening anyway.
04:14 5	Q	I appreciate that.
6	A	I'm staying at a motel with a bar right across the
7		driveway from me.
8	Q	Okay. Perhaps you'll make a statement tomorrow.
9		But anyway, we'll leave that. If we can --
04:14 10		COMMISSIONER MacCALLUM: Please leave it to
11		me, would you.
12		BY MR. WOLCH:
13	Q	Can we turn to 307464, this would be the Crown's
14		factum in Larry Fisher's appeal, and this is doc.
04:14 15		ID number 3074-- is that a six?
16	A	It looks like it.
17	Q	60. Now, do you know who prepared the factum?
18	A	Tony Gerein, Anthony Gerein.
19	Q	Okay. He's a very competent prosecutor?
04:15 20	A	Yes.
21	Q	He provides a summary starting at, on page 464:
22		"On January 31 ... Gail Miller resided
23		in a rooming house at 130 ... O ...
24		worked as a certified nursing
04:15 25		assistant...

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1   Ms. Miller usually took the

2   bus to and from work, catching the

3   "Route 2" bus which travelled east on

4   20th St. to downtown Saskatoon. She

04:15   5   would normally walk south on Ave. O to

6   20th St. and catch the bus at that

7   location. Her shift at City Hospital on

8   January 31 began at 7:30 a.m.

9   Gail Miller was last seen

04:15 10   alive between 6:35 and 6:45 a.m. on

11   January 31, 1969... She was looking out

12   the window onto Avenue O. ...ready to

13   go to work and was dressed for that

14   purpose."

04:16 15   Now, I'm just wondering, the evidence here, and

16   the evidence has always appeared to be, that Gail

17   Miller would logically leave her door, go up

18   Avenue O and get to the bus stop. Were you ever

19   troubled by the fact that the Crown's theory

04:16 20   depended on her going up Avenue N?

21   A   Not particularly, no. I mean, I recall examining

22   the diagrams that we had and the logical route for

23   her to go would be out the front door and up O,

24   but that doesn't mean she can't take a different

04:16 25   route from time to time.

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1   Q   Well, it's 40 below.

2   A   Well, it's not like it's a hugely longer trek.

3   Q   But did you ever question that at all, like, say,

4   why would she?

04:17 5   A   I mean, you question it in the sense that you look

6   at it and say, well, don't have an explanation,

7   but not impossible.

8   Q   Didn't shake you a little bit on the Crown's

9   theory?

04:17 10   A   No.

11   Q   And getting back to the fact that the Merriman's

12   didn't see anything, that wouldn't shake you

13   either?

14   A   Well, that, I mean, the Merriman thing was a

04:17 15   little bit more of a concern, but again, you

16   adjust the times a little and it can fit.

17   Q   She's leaving between 6:35 and 6:45, they are

18   looking out at 6:55 and Gail never gets to the bus

19   stop.

04:17 20   A   Yes.

21   Q   It's not a very big window.

22   A   No, I'm not arguing that he had an hour to commit

23   the crime, or that the Crown's theory was that he

24   had an hour to commit the crime, and frankly, I

04:18 25   mean, if a jury was going to have a reasonable

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1   doubt based on the evidence in that case, the time

2   numbers would be where it should have been I would

3   have thought.

4 Q   Can I take you to 467:

04:18 5   "Before and after Gail Miller's death

6   the Appellant attacked seven other women

7   in highly similar fashion, sometimes

8   within blocks of the very spot where

9   Gail Miller was killed. The evidence of

04:18 10   three was admitted as similar fact at

11   trial."

12   You'll find that your counsel, Crown counsel was

13   arguing that the judge should have let all of

14   them in, that he erred?

04:18 15 A   Well, yeah, but again, that's in the context of

16   defending the fact that some of them were let in.

17   I suppose the notion there is that the best

18   defence is a good offence. Did you say seven?

19 Q   Yes.

04:19 20 A   Before the Gail Miller murder?

21 Q   No, before and after.

22 A   Oh, okay.

23 Q   If we can go to 481, one of the grounds advanced

24   was that:

04:19 25   "The Learned Trial Judge was correct in

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1   telling the Jury to disregard David

2   Milgaard's ... conviction for the murder

3   of Gail ... Miller."

4   And here's Beresh's position:

04:19 5   "To effectively present this defence

6   [that David Milgaard is ... culpable],

7   it is necessary to show that there is a

8   link between the third party and the

9   offence in addition to an air of reality

04:20 10   to that link. Tendering a prior

11   conviction of that third party for the

12   same offence, regardless of the fact

13   that the conviction was later stayed, is

14   substantial evidence of that required

04:20 15   link."

16   That was the Beresh position. And here is the

17   Crown's position:

18   "That is untenable. Firstly, as the

19   prior conviction would be based on all

04:20 20   the evidence in that other proceeding,

21   which evidence was not presented here,

22   there is no way to effectively evaluate

23   the propriety of the original conclusion

24   and determine whether there was in

04:20 25   actuality any link at all. Secondly,

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1   the Supreme Court of Canada reference

2   overturned the original conviction.

3   Thirdly, despite whatever evidence there

4   was in 1970, a stay was entered by the

04:20 5   Crown indicating that there is no

6   reasonable likelihood of conviction and

7   supporting the conclusion that the

8   original conviction was unsound. To

9   permit consideration of a conviction

04:21 10   notwithstanding that it was subsequently

11   overturned and the proceedings stayed

12   would be to foist a half truth upon the

13   jury."

14   I'm particularly interested in your reaction to

04:21 15   "...a stay was entered after the overturning by

16   the Crown indicating there is no reasonable

17   likelihood of conviction and supporting the

18   conclusion the original conviction was unsound"?

19 A   Well, number one, I think perhaps Mr. Gerein is

04:21 20   making some inferences there that aren't correct.

21   I don't recall him asking me why that stay was

22   entered. I did at the time think that when the

23   stay was entered, that the likelihood of being

24   able to successfully re-prosecute was considerably

04:21 25   reduced, but the other reason, the principal

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 1   reason was that in my view it was no longer in the

 2   public interest to prosecute him, and as for

 3   supporting the conclusion that the original

 4   conviction was unsound, the Supreme Court said

 5   that the original conviction was proper.

 6 Q Are you saying he's wrong in what he's saying

 7   here?

 8 A Well, that's -- particularly the last part there

 9   is not correct.

10 Q Okay. Just turn the page, he goes on to say:

11   "Equally, if the defence evidence had

12   stood in favour of an inference

13   benefiting the Appellant, then one would

14   also have to allow information in

15   regarding the Supreme Court Reference

16   and the background to the stay of

17   proceedings. In the end that would

18   render the entire issue a wash and the

19   conviction of no probative value. That

20   was the destination reached by the

21   learned trial judge's ruling, without

22   going on a circuitous and unnecessary

23   route."

24   You see the judge instructed:

25   *"You must decide what the facts of the*

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1   *case are only on the basis of evidence*

2   *presented here in the courtroom."*

3   If we can go to 784, this is the interesting

4   situation where you have the Respondent on an

04:23 5   appeal arguing that the judge erred in making a

6   decision, which is a rather unusual choice, and I

7   think you might agree?

8   A   Well, I mean, we occasionally have to do that and

9   then you go to the no substantial miscarriage of

04:24 10   justice fallback.

11 Q   You talk about Nichol John:

12   "Through numerous interviews, and

13   numerous court proceedings ... Nichol

14   John did not implicate...

15   Milgaard,

16   "...in the Gail Miller murder save on

17   one occasion: May 24... The single

18   time Ms. John gave a statement

19   incriminating David Milgaard, telling

04:24 20   Detective Mackie of the Saskatoon Police

21   Service that she saw David Milgaard

22   stabbing Ms. Miller.

23   In her testimony on a voir

24   dire in the case at bar, Nichol

04:24 25   indicated that she could recall almost

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	1		nothing from January, 1969. In
	2		particular, she could recall almost
	3		nothing of travelling by car to
	4		Saskatoon from Regina in the company of
04:24	5		David Milgaard and ... Wilson, of their
	6		search for Cadrain ... or of any other
	7		events ... she could not recall the
	8		various occasions when she was
	9		interviewed by police and gave
04:24	10		statements. She claimed that she could
	11		not even recall appearing before the
	12		Supreme Court ... that led to the
	13		exoneration of David Milgaard."
	14		I take it you wouldn't agree with those words?
04:25	15	A	I don't know that it exonerated him and I suggest
	16		you wouldn't agree with it either.
	17	Q	Pardon me?
	18	A	I say I don't think you agree with that either.
	19	Q	Oh, no, I would, but anyway --
04:25	20	A	That it exonerated David Milgaard in the Supreme
	21		Court.
	22	Q	They quashed the conviction.
	23	A	They quashed the conviction. I don't know that
	24		they exonerated him.
04:25	25	Q	Well, leaving that aside, that's the words that

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1   our prosecutor --

2   A   And she couldn't remember --

3   COMMISSIONER MacCALLUM: I'm sorry, the

4   words of the prosecutor are that led to the

04:25 5   exoneration of David Milgaard.

6   A   Yes.

7   COMMISSIONER MacCALLUM: Right. Didn't say

8   that that happened at the Supreme Court.

9   BY MR. WOLCH:

04:25 10   Q   It was during the reference that led to the

11   exoneration. I'm sorry, I may have -- I may have

12   heard it pretty quickly, but I think

13   Mr. Commissioner said during the reference that

14   led to the exoneration.

04:26 15   A   Well, and I, frankly, Mr. Wolch, would consider

16   the reference as something that continued until

17   that DNA evidence was tested.

18   Q   The reference continued?

19   A   Well, I appreciate that they had given their

04:26 20   decision, but the federal government kept that

21   evidence, they kept it for the purpose of

22   following up on a commitment given to the Chief

23   Justice that that would be tested in due course

24   and that's what was done and that's what led to

04:26 25   David Milgaard's exoneration.

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1   Q   And you think that's what the prosecutor was

2   thinking about?

3   A   I don't know whether he was thinking of that or

4   not.

04:26   5   Q   All right.

6   A   I said that was my view. I was actually taken by

7   the statement that she didn't recall being in the

8   Supreme Court.

9   Q   Okay.

04:26 10   "The May 24 statement came nearly four

11   months after Gail Miller's murder. It

12   was only taken after Ms. John had been

13   brought to Saskatoon from Regina on May

14   22 - two days before. She spent those

04:27 15   two days either in cells or in the

16   company of police officers. Detective

17   Raymond Mackie, the officer who took the

18   May 24 ... statement, had been the one

19   who picked her up in Regina on May 22.

04:27 20   On the voir dire he could not recall if

21   he told her where they were going or how

22   long they would be. He could not recall

23   if he told her parents about what was

24   happening, although she was only

04:27 25   sixteen. He took her to the Regina

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1   Police station where a statement not

2   implicating David Milgaard was completed

3   (it is apparently lost). He could not

4   recall the circumstances of that. He

04:27   5   then drove her to Saskatoon and

6   immediately drove her to the place of

7   the murder in an attempt to "get her

8   memory reestablished".

9   He next took her to the

04:27 10   Saskatoon police station where he did an

11   interview regarding her recent and

12   repeated use of LSD. That statement is

13   also apparently lost. She was then kept

14   in police cells for much of two nights

04:27 15   and two days. Her second day in Regina

16   she was interviewed by ... Arthur

17   Roberts of the Calgary Police service at

18   a Saskatoon hotel. On the third day in

19   Regina she provided the statement to

04:28 20   detective Mackie."

21   *A*   In Regina? No, that should be Saskatoon I assume.

22   *Q*   It may be an error there.

23   *A*   Yeah.

24   *Q*   But basically, though, he is certainly questioning

04:28 25   the method in which the statement was arrived at?

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1	A	Yup.
2	Q	I mean, police conduct is certainly on his mind
3		there?
4	A	He is repeating the issues that Al Johnston raised
04:28 5		in the evidence.
6	Q	Okay. But he does seem to be concerned about how
7		Nichol John was handled, the losing of statements,
8		the suggestions. Did those things cause you
9		concern?
04:28 10	A	Yes, those were concerns to us. We were
11		particularly concerned that Art Roberts' report,
12		he said he filed a report on this, was never found
13		by anybody. Yeah, I mean, certainly those were
14		concerns and for the very reasons that you
04:29 15		wouldn't do that today.
16	Q	What about the Mackie statements that couldn't be
17		found?
18	A	Well, yeah, that's -- actually, I don't recall the
19		notion that he took specific statements, that I
04:29 20		think is new. I know he talked to her, but I
21		didn't know that he had specifically taken
22		statements from her that were now lost.
23	Q	Did that cause you concern?
24	A	Well, that would cause me some concern. I can
04:29 25		understand how Art Roberts' statement might get

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1   missed because it wasn't of any value to the

2   Calgary police, but I don't know why the

3   information of Art Roberts would have recorded --

4   wouldn't have been on the file.

04:29 5   MR. WOLCH: Mr. Commissioner, I note the

6   time.

7   COMMISSIONER MacCALLUM: Yes. We'll just

8   continue until you are finished.

9   MR. WOLCH: Sorry?

04:30 10   COMMISSIONER MacCALLUM: We'll continue

11   until you are finished.

12   MR. WOLCH: Finished completely?

13   COMMISSIONER MacCALLUM: When might that

14   be?

04:30 15   MR. WOLCH: I probably have about 45

16   minutes.

17   COMMISSIONER MacCALLUM: Yes, continue.

18   MR. WOLCH: Just keep going?

19   COMMISSIONER MacCALLUM: Yeah.

04:30 20 A We can order pizza if you are feeling faint, Mr.

21   Wolch.

22   MR. WOLCH: I appreciate the consideration.

23   COMMISSIONER MacCALLUM: Does anybody need

24   a bathroom break? We can stop for five minutes

04:30 25   for that purpose if you wish.

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1		MR. WOLCH: I wouldn't mind five minutes.
2		COMMISSIONER MacCALLUM: Five minutes it
3		is.
4		*(Adjourned at 4:30 p.m.)*
04:36 5		*(Reconvened at 4:37 p.m.)*
6		BY MR. WOLCH:
7	Q	Can I have the last document back up, please.
8		Next page, please. Next page. Mr. Brown, I was
9		going to take you through this, but I won't take
04:37 10		you through this part, but one of the points that
11		Crown counsel makes regarding Nichol John's
12		statement and the oath that was administered, you
13		will recall the May 24th was sworn, he takes issue
14		with the fact it was sworn after the statement was
04:37 15		taken, not before. Do you see the difference?
16		She wasn't told --
17	A	Yes, I can see the difference.
18	Q	-- you should tell the truth, it was more here's
19		your statement, is it true. You see the
04:38 20		difference?
21	A	Yeah.
22	Q	He takes quite a bit of issue with that?
23	A	Well, I'm assuming that what they were thinking
24		about there was the issue of using it as some kind
04:38 25		of KGB statement or whatever and proving that it

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1   was sworn in order to do that. Well, yeah,

2   obviously that makes a big difference.

3 Q   Can we go to paragraph 77 then. You see:

4   "The defence adduced no evidence from

04:38 5   Detective Roberts, who though deceased

6   had testified previously in the

7   proceedings involving David Milgaard.

8   The statement came after he was with

9   Ms. John and even had exhibits

04:39 10   delivered... No evidence was adduced

11   from officers in detention, or who

12   otherwise dealt with her during her time

13   in Saskatoon."

14 And 78:

04:39 15   "Then there are the positive indicators

16   the statement is in fact unreliable.

17   The knife which Ms. John described as

18   being stolen from the grain elevator at

19   Aylesbury did not come from there.

04:39 20   Further, though she described a struggle

21   over the purse and David Milgaard

22   stabbing Gail Miller, the wounds

23   suffered ... were not accompanied by

24   holes in her dress. Her clothing had

04:39 25   all been moved to the middle of her body

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1   before the stabbing."

2   Her,

3   "... statement therefore cannot be

4   correct. Such basic errors demonstrate

04:39   5   it was unreliable to a degree that

6   should have forestalled it being read to

7   the jury. Her admitted history of LSD

8   use causes further concern."

9   If we can just turn the page, paragraph 80:

04:40   10   "The learned trial judge's ultimate

11   decision to permit in the earlier

12   statement as well went some distance in

13   negating the error in that it gave the

14   jury a more complete picture. In the

04:40   15   end, the initial error went in the

16   Appellant's favour, and admitting the

17   second statement in no way overbalanced

18   it. Any injustice went to the

19   Appellant's advantage."

04:40   20   Now, in a general sense, you see how this Crown

21   also deals with Nichol John's statement? I still

22   come back that you still think she saw something

23   possibly, it just seems so totally opposite of

24   how these Crowns look at it.

04:40   25   A   No, I said I don't know whether she saw something.

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1   Maybe she did, maybe she didn't. As I say, the

2   one thing I'm sure about is that it wasn't David

3   Milgaard killing anybody.

4   Q   Okay. I would like to quickly go through similar

04:41   5   acts and how he dealt with it at 504:

6   "In the course of pre-trial motions, the

7   Crown sought to adduce as similar fact

8   the evidence of seven confirmed victims

9   of the Appellant. Each of them had been

04:41 10   raped or suffered attempted rape by him.

11   One he tried very hard to kill. In most

12   instances he had or claimed to have a

13   knife. Each had strong hallmarks shared

14   with Gail Miller's tragedy.

04:41 15   115. Their evidence was relevant to

16   determining the identity of Gail

17   Miller's attacker. The learned trial

18   judge allowed three of the Appellant's

19   victims to testify..."

04:41 20   (V1)-, (V2)-- and (V8)---. I won't go through

21   it, but he summarizes (V1)--- (V1)- and then (V2)

22   (V2)----- -- and next page -- and then (V8)--

23   (V8)--- -- just go down -- and he talks about the

24   law:

04:42 25   "The definitive statement on the law..."

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1		Is *Regina versus Arp*. That's a case you referred
2		to?
3	*A*	Yes.
4	Q	You are familiar with it?
04:42 5	*A*	Yes. I thought it was a lot earlier than that
6		though. A 1998 decision?
7	Q	That's what he says. If you can turn the page:
8		"*Arp* holds that similar fact evidence is
9		admissible where it is sufficiently
04:42 10		probative to overcome the potential
11		prejudice..."
12		And:
13		"There was no dissent from ... Justice
14		Cory."
04:42 15		And keep going down, there's no need to, but it
16		does also refer to the Supreme Court case of 1989
17		of Justice Sopinka's.
18	*A*	*L.E.D.*, yes.
19	Q	And then goes on to talk about the basic law on
04:43 20		similar acts. And if you can turn the page, I'm
21		not going to go through it, but it's purely the
22		law, general law on similar acts.
23		And then if we can go to 09,
24		this will clarify what we were talking about
04:43 25		earlier in paragraph 123:

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1   "The learned trial judge relied on *Arp*

2   in considering the admissibility of

3   similar act evidence. Since the trial

4   the Supreme Court has issued two other

04:43   5   judgments on the subject:"

6   Shearing in 2002 and Handy in 2002.

7   "While neither changes the principles

8   set down in *Arp*, they do provide helpful

9   guidance on the manner in which to

04:43   10   approach the evidence."

11   Would you agree with that?

12   A   Yes. *Shearing* and *Handy* don't change *Arp*.

13   Indeed, *Arp* purported not to change the law, it

14   was the application of the law to the facts in

04:44   15   that case --

16   Q   Right.

17   A   -- that gave people the notion that somehow the --

18   Q   So it would appear that the Court of Appeal had

19   *Shearing* and *Handy* when they made their decision

04:44   20   in this case?

21   A   Yes.

22   Q   And if we can go to the next page:

23   "The second aspect..."

24   In paragraph 126,

04:44   25   "...is to identify the issue. The only

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1   issue in this case is the identity of

2   the person who attacked Gail Miller.

3   Evidence of "strikingly similar",

4   "unique", "distinctive" or peculiar

04:44   5   criminal acts can provide powerful

6   evidence of identity. However, *Handy*

7   and *Arp* confirm that such jargon is less

8   important than assessing probative value

9   and prejudicial effect bearing in mind

04:45 10   the issue the similar act evidence

11   speaks to."

12   I take it you have no difficulty with that?

13   A   Yes, that's correct.

14   Q   And the bottom of the page:

04:45 15   "The first factor is proximity in time.

16   The Supreme Court suggested this was

17   relevant because a person might change

18   his behaviour over time. In this case

19   the trial judge considered this issue to

04:45 20   be a significant element favouring

21   admission, and it was operative in his

22   exclusion of (V10) (V10-'s evidence.

23   The events admitted were all very close

24   in time, which supports the trial

04:45 25   judge's decision. Indeed, the Crown

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1   submits that in the end this is another

2   reason to instead admit at least the

3   (V10) (V10)- evidence - it showed the

4   Appellant did not change over time."

04:45   5   And then on paragraph 129:

6   "The similarities among those whose

7   evidence was admitted, and the attack on

8   Gail Miller, were clear and

9   compelling:",

04:46   10   age and gender, residential area, walking alone

11   in dark with no one else around, highly

12   vulnerable, each victim was close to home when

13   attacked, the appellant was not afraid to

14   confront, drag, struggle with and rape women in

04:46   15   areas surrounded by occupied homes, the Appellant

16   initiated attacks by walking past his victims,

17   grabbing them from behind, putting his hand over

18   their mouths, held a knife to their throats.

19   "Gail Miller's assailant was armed with

04:46   20   a knife. He applied considerable force

21   to the area of her mouth and nose before

22   she died. Her right boot was missing

23   and there was a scratch on the *back* of

24   her right leg."

25   "In each case the Appellant compelled

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1   the victim into an alley or area between

2   houses;",

3   "The use or threatened use of a knife.

4   The Appellant did not just arm himself

04:46   5   with a knife when he attacked his

6   victims. He also threatened to use that

7   knife. He variously threatened to stab,

8   kill or cut the throat of whichever

9   victim he was attacking. Gail Miller

10   was stabbed, had her throat slashed and

11   she was killed."

12   "In each case the Appellant concentrated

13   on threatening them with harm from the

14   knife if they made noise or resisted;"

04:47   15   "In each case the Appellant had the

16   victim remove her coat and pushed her

17   clothing out of the way. The Appellant

18   was not interested merely in a quick act

19   of forced vaginal intercourse.

04:47   20   Notwithstanding the danger of detection,

21   he significantly prolonged his attacks

22   by forcing his victims to expose most if

23   not all of their bodies to him before he

24   raped them. So did Gail Miller's

04:47   25   assailant. He could have raped her

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1   simply by unbuttoning her coat, pulling

2   down her underwear and completing the

3   act. However, he chose to forcibly

4   strip his victim on one of the coldest

04:47   5   mornings of the winter."

6   He:

7   "... was particularly intent on exposing

8   or assaulting the chest area of his

9   victims. So was Gail Miller's

04:47 10   assailant. Her chest was exposed, her

11   right bra strap was broken."

12   "The Appellant allowed his victims the

13   comfort of lying on their coats after he

14   had forcibly removed them. Gail

04:47 15   Miller's assailant allowed her to put

16   her coat on, perhaps in recognition of

17   the temperature. Nevertheless, and in

18   keeping with above, her assailant did

19   not allow her the comfort of doing her

04:48 20   coat up."

21   "In each case, save the one where he was

22   caught in the act, the Appellant made

23   off with personal items from the victim.

24   While the Appellant argues they were not

04:48 25   scattered like Ms. Miller's were, there

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1   is no indication anyone ever looked for

2   that in the other instances. The

3   similarity is that the items were taken

4   at all. It may be the Appellant feared

04:48   5   being seen with her recognizable

6   personal items; that would explain her

7   sweater and her right boot found *buried*

8   at the head of the alley. He went

9   through the contents of her purse. He

10   discarded that purse before leaving the

11   alley. He carried her wallet away from

12   the scene when he left."

13   "In some of the instances, the Appellant

14   indicated he had seen the victim before

04:48   15   or had ridden the bus with her. The

16   Appellant rode the bus with Gail

17   Miller."

18   When you read that, do you not find that

19   compelling?

04:48   20   A   Not -- well it, it has more weight in light of the

21   DNA evidence, but I still take the Supreme Court's

22   view that is there wasn't evidence upon which

23   Larry Fisher could be prosecuted using that,

24   and --

04:49   25   Q   Well, we may disagree as to what they said about

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1   that.

2   A   Well, we can agree to disagree on that.

3   Q   I --

4   A   But, no, I -- my view of the similar-fact evidence

04:49 5   remains unchanged. It's there, it's -- I didn't

6   think it was enough upon which the Supreme Court

7   should quash the conviction, the Supreme Court

8   thought it was, and thought it was something that

9   could be used to raise a reasonable doubt.

04:49 10   Q   All right. I'm trying to look at this, a

11   prosecutor looking at this evidence, I'm having a

12   hard time you not seeing it generally the same way

13   that these two prosecutors did?

14   A   Well --

04:49 15   Q   I mean, it's set out here in point form, but it

16   does seem awfully compelling?

17   A   The point I would make is that they see it, as I

18   said, the five of us in the, involved in the

19   Supreme Court reference didn't see it. They saw

04:49 20   it as evidence sufficient to prove Larry Fisher

21   was guilty, I didn't, and I -- again, while we may

22   disagree, I don't think the Supreme Court saw it

23   that way either.

24   Q   Just turn to 521. Here's the Crown position:

04:50 25   "Indeed, the Crown's ultimate position

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1   on this appeal is that the other similar

2   fact witnesses should also have been

3   heard. While the argument was not as

4   strong in regards to such victims as ...

04:51 5   (V5)--- and ... (V7)---, the only

6   significant difference is the apparent

7   absence of a knife. All the other

8   hallmarks are present and combine with a

9   distinctiveness that warranted them

04:51 10   testifying before the jury. If

11   anything, the learned trial judge erred

12   in excluding most if not all of the

13   other victims."

14   "That was particularly so in respect of

04:51 15   (V10) (V10)-."

16   So the Crown, here, is saying they all should

17   have gone in, and you are saying none of them

18   should have gone in?

19   A   Well I'm saying that, in my view, they did not

04:51 20   provide evidence that Larry Fisher was guilty of

21   that crime. Absent the DNA evidence --

22   Q   Okay. Well these two Crowns seem to think it

23   does?

24   A   Well, that's their view.

04:51 25   Q   And perhaps an independent prosecutor may have

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1   come to that same conclusion many years before?

2   A   Well, that's possible, who knows.

3   Q   Now (V10) (V10)- was a bit different. If we can

4   scroll down to this part here. Now you'll recall

04:52 5   (V10) (V10)- was horrific?

6   A   Yeah, the 1980 case --

7   Q   Yeah, I mean --

8   A   -- in the Battlefords.

9   Q   It was, for all intents and purposes, a murder;

04:52 10   was it not?

11   A   Well, he certainly did his best.

12   Q   "During the rape he told her, 'I've spent

13   ten years for doing this, only I slit

14   her throat.' The victim asked him what

04:52 15   his mother would think of this if she

16   knew. He told her, 'Leave my mother out

17   of this.'"

18   If we can go to 154, sorry, paragraph 154.

19   "(V10) (V10-'s experience was the same

04:52 20   as Ms. Miller's, save that the Appellant

21   had opportunity to prolong it and that

22   she survived. The difference the

23   learned trial judge noted between the

24   two regarding age was premised on an

04:53 25   assumptions as to how she would have

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1   appeared to the Appellant when he first

2   encountered her and his lust and rage

3   took over. Such assumption is not

4   defensible as he met her at night, on

04:53   5   the street, in the dark, in autumn.

6   More to the point, however, other than

7   the victims' age difference, the two

8   crimes are essentially identical."

9   "He used his standard method of attack,

04:53 10   he made her undress, he had a knife, he

11   cut her with the knife, he attempted to

12   inflict fatal wounds, he talked of

13   having done it before (regardless of

14   whether he meant Gail Miller, he was

04:53 15   confirming by his own admission that he

16   raped and killed/tried to kill). He

17   left her to die."

18   "(V10) (V10)- was accosted while walking

19   near her home on the streets of her

04:53 20   community. It was a residential area."

21   He:

22   "... was not concerned about

23   confronting, subduing and raping his

24   victims close to occupied houses. He

25   grabbed her from behind and held a knife

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1   to her throat. He dragged her to a more

2   secluded location."

3   "What is particularly striking about the

4   similarity between the murder of Gail

04:54   5   Miller and the attempted murder of (V10)

6   (V10)- is the manner in which each

7   assailant wounded his victim.

8   Ms. (V10)- had her throat cut and was

9   stabbed numerous times. Ms. Miller had

04:54   10   her throat slashed numerous times and

11   her body was repeatedly stabbed. After

12   he Appellant had finished with his

13   knife, he covered Steel's nose in an

14   effort to smother her. Lt. Penkala

04:54   15   testified that when Gail Miller's body

16   was found there were indentations at

17   each corner of her mouth frozen into her

18   face, and bruising to her mouth and

19   nose. A trier of fact could reasonably

04:54   20   infer Miller's nose and mouth were

21   covered shortly before she died."

22   "The similarities between the attack on

23   (V10)- and the attack on Miller

24   continue. After Fisher stabbed (V10)

04:54   25   (V10)- he rifled through the contents of

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	1		her purse and stole money from it. Gail
	2		Miller's assailant did the same thing.
	3		All these things made the evidence
	4		highly probative."
04:55	5		"Yes it was potentially the most
	6		prejudicial. It did not, however, on
	7		its face invite conclusions beyond its
	8		probativeness. The Appellant had pled
	9		guilty. He had been punished for it.
	10		The defence case and a proper direction
	11		from the learned trial judge would have
	12		controlled the possibility of reasoning
	13		errors flagged by the Supreme Court.
	14		Frankly, the more heinous the crime the
04:55	15		more probative its happening - fewer
	16		people do such things. The question is
	17		will that be abused. The answer is that
	18		there was no basis to conclude it would
	19		have been and the potential for that was
04:55	20		controllable."
	21		Now, in making the ruling on similar acts, the
	22		judge would have known there was DNA evidence;
	23		right?
	24	A	Yes, oh yes.
04:55	25	Q	Would you agree with me, if there was going to be

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1		an error made, it would be an exclusion rather
2		than inclusion on similar acts?
3	A	Oh, absolutely.
4	Q	You would take the safe route anyway, you've got
5		the DNA?
6	A	Well, my view was that -- you can argue with this
7		as well -- but my view is that the trial judge
8		admitted that, the cases he did, so that the case
9		did not simply rest on the DNA.
10		In terms of any of the
11		similar-fact evidence, in terms of just what
12		happened, the (V10) (V10)- one is the most
13		similar. No question it's the most similar.
14		Whether it amounts to similar-fact evidence or
15		not, whether it can pass the *Arp* test and the
16		*Handy* and *Shearing* test, I don't think it can
17		because I think it is so prejudicial you run into
18		problems, and that was what the trial judge held,
19		I understand.
20	Q	Well, if you look at the pictures of (V10) (V10)-
21		and Gail Miller --
22	A	Oh, --
23	Q	-- they are almost identical?
24	A	-- there is no question that she had her throat
25		slashed and was dealt with in some similar

04:56 (line 5)
04:56 (line 10)
04:56 (line 15)
04:56 (line 20)
04:57 (line 25)

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1   fashions.

2   If I had been running the

3   trial I would have simply wanted the statement,

4   just as the motel room incidents can be fashioned

04:57   5   as confessions, the statement made to (V10) (V10)-

6   that he had done it to a woman in Saskatoon, or

7   evidence of a confession.

8   Q No, I understand that. And (V10) (V10)- is a very

9   credible lady?

04:57 10 A Oh yes. I suppose the problem, though, is how do

11   you get that in in isolation without getting into

12   the whole incident.

13 Q Well I guess my question to you is why wouldn't

14   that have influenced you when you were assessing

04:57 15   the case against Milgaard?

16 A We looked at that. Our view was that the ten-year

17   difference in Larry Fisher's life, where he'd

18   been, had a substantial or very likely changed the

19   way he looked at the world, he'd been in

04:58 20   penitentiary for ten years, and the statement at

21   that point was as consistent him attempting to

22   intimidate her as it was -- and control her as it

23   was a confession, and I think that's the argument

24   we made.

04:58 25 Q Okay. I'll just conclude Mr. Gerein at 307535:

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1   "The learned ...",

2   he says at this page:

3   "The learned trial judge could not allow

4   the jury to be misled. He gave leeway

04:58   5   to the accused whenever it could be done

6   without distortion. While that led him

7   to erroneously exclude certain probative

8   evidence - such as (V10) (V10)- - and to

9   sometimes relax the rules of evidence

04:58   10   excessively to favour the Appellant -

11   such as with Nichol John's May 24, 1969

12   statement - he never visited unfairness

13   upon the Appellant, or applied the law

14   on his rulings ... without full

04:59   15   justification and reasonable conclusion.

16   He did not err in law to the prejudice

17   of the Appellant, nor did he suffer any

18   miscarriage of justice."

19   Now I'm -- the last item I want

04:59   20   to deal with briefly, and I don't know if it's on

21   the system or not, is the Court of Appeal

22   decision. I wasn't able to find it, I don't know

23   if it's there or not.

24   COMMISSIONER MacCALLUM: In which trial?

04:59   25   MR. WOLCH: The Larry Fisher trial.

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 1    A      The Fisher.

 2              MR. HODSON:  Does anyone know a date?

 3              MR. WOLCH:  Yes, September 29th, 2003.  My

 4         copy has notes on it.

 5              COMMISSIONER MacCALLUM:  You can just put

 6         the sections to him that you are interested in

 7         orally if you wish.

 8              MR. WOLCH:  Okay.  Perhaps I'll try and do

 9         it expeditiously as possible.

10      BY MR. WOLCH:

11    Q      The Fisher appeal was heard before Justices

12         Sherstobitoff, Cameron, and Gerwing; is it?

13    A      Gerwing.

14    Q      The day I have is September 29th, 2003.  One issue

15         is did the trial judge err in admitting the

16         similar-fact evidence, and the Court reviews all

17         that, and then they summarize the Crown's factum,

18         they actually refer to the Crown's factum and read

19         it and they go through it all, and they actually

20         quote from the -- that list I read you earlier

21         from the Crown's factum in terms of where it's

22         similar, why it's similar, that -- all the

23         features that -- so they go through all of that.

24         And then at page 52, or paragraph 52 of the

25         judgement, they very briefly say:
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1   While we cannot know the details of the

2   assault upon Ms. Miller the most reasonable

3   inference given the time, place and other

4   circumstances is that while on the way to

05:01   5   her usual bus stop to go to work she was

6   dragged from the street into the alley and

7   sexually assaulted with the aid of a knife

8   with which she was stabbed. It's on that

9   basis that a comparison may be made to the

05:02   10   other attacks.'

11   I won't read paragraph 53, but it goes through

12   comparing. And paragraph 54:

13   All of this, considered along with other

14   similarities in the assaults, lead us to

05:02   15   conclude that it was open to the judge to

16   find as he did that there were sufficient

17   similarity of the acts, that they were

18   likely done by the same person, and that it

19   was unlikely that the similarities were the

05:02   20   product of coincidence. The evidence in

21   question had a very high and substantial

22   probative value.'

23   And the Court then goes to assess *Handy* and talks

24   about those cases. Now here's the Court of

05:02   25   Appeal saying this evidence has a very high and

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1   substantive probative value; I take it you don't

2   agree with that?

3 A   No, that wouldn't be my assessment of it, and I

4   don't think it was the Supreme Court's assessment

05:03 5   of it either.

6 Q   Well, they turned down Larry Fisher's appeal?

7 A   I'm aware of that, yes. It's just, when you've

8   got the DNA evidence there, it's -- it becomes a

9   little easier to measure the probative value of

05:03 10   this evidence when you know very well that it

11   leads to the right conclusion.

12 Q   And they also dealt with the Nichol John in

13   paragraph 77, Mr. Commissioner. This is the one I

14   referred to earlier. In paragraph 77, which is on

05:03 15   page 7 of my copy at least:

16   We are ...

17   actually discussing Nichol John:

18   We are inclined to the view that neither

19   statement should have been admitted because

05:03 20   both were unreliable but we need not decide

21   the question since the admission of the

22   statements can only help the Appellant. We

23   are satisfied that the judge having

24   determined that one statement was admissible

05:04 25   was required to admit the other as he did so

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1   that the jury would be given the whole of

2   Ms. Demyen's evidence viva voce and the *KGB*

3   statements, something necessary to enable

4   the jury to fairly assess the credibility of

05:04   5   Ms. Demyen and to assess the weight to be

6   given to the various components of her

7   evidence. As the appellate himself argued,

8   the trial judge is under a duty to see the

9   trial was a fair one -- a fair trial. That

05:04   10   duty is owed to the Crown as well as the

11   defence. As part of that duty, it was his

12   obligation to see the jury was not given a

13   misleading view of the evidence of

14   Ms. Demyen by allowing one statement given

05:04   15   to her to be placed before the jury while a

16   conflicting statement was concealed from the

17   jury, particularly when she had no memory of

18   the material parts of either of the

19   statements.

05:04   20   So what I understand the Court to be saying is

21   that neither statement should have gone to the

22   jury, and that Beresh would have had the benefit

23   of it -- or at least Fisher would have had,

24   rather, the benefit of it, and was not prejudiced

05:05   25   by the inclusion of the first?

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1	*A*	And I agree, neither statement should have gone to
2		the jury in the *Fisher* case, because you can't, as
3		far as I can see, you can't pass the reliability
4		test in *KGB*.
05:05 5	Q	Now you have -- I'm just about concluded -- you
6		have three judges in the Court of Appeal here, you
7		have two very able prosecutors, taking an
8		extremely different view of the importance of
9		Larry Fisher's evidence. I think it's fair to say
05:05 10		that these prosecutors might very well have said
11		that the similar act, Linda Fisher, John
12		Patterson, and all those circumstances alone would
13		have been sufficient to convict Larry Fisher?
14	*A*	Well I'm not sure I'd go there, Mr. Wolch, but you
05:06 15		can certainly call them and ask them.
16	Q	But at least they saw extreme significance in
17		Larry Fisher. I'm trying to understand why you
18		saw it to be of no merit, that's what I am --
19	*A*	No, I said very limited merit.
05:06 20	Q	Okay.
21	*A*	I mean, yeah, there was something there.
22	Q	But it wasn't similar or what?
23	*A*	But in my view it wasn't -- now I'm, granted, I
24		may well have been applying too high a standard in
05:06 25		the argument to the Supreme Court, but I still

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1   take the view that the Supreme Court has said that

2   you couldn't convict him on the basis of just the

3   similar-fact evidence, and I agree.

4   Q   Well, the decision will speak for itself as to

05:06   5   whether they said that or not, but I'm just

6   wondering how you could take this position -- and

7   I'll bring it to your attention if you can -- the

8   last document I want to bring up is 233116, and

9   that's in document 233007. Now these are your

05:07 10   words to the Supreme Court in oral argument:

11   "I would suggest, in fact, that that

12   evidence ...",

13   and we're talking about Larry Fisher:

14   "... isn't even capable of raising a

15   doubt. There is no unique criminal

16   fingerprint demonstrated in anything

17   Larry Fisher did. He, in fact, seems to

18   be, if I could use the expression

19   without getting into a great deal of

20   trouble, a pretty garden variety

21   stranger rapist. There are no unique

22   patterns, unusual aspects of his

23   behaviour.

24   Everything that shows a

25   pattern, everything that shows some

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	1		common factor in any of these assaults
	2		is pretty standard stuff."
	3		Those were your views then?
	4	A	Yes.
05:08	5	Q	Are they your views now?
	6	A	Umm, my view still is that, as stranger rapists
	7		go, Larry Fisher wasn't that unusual.
	8	Q	Well, there are very few stranger rapists, aren't
	9		there?
05:08	10	A	Well it's certainly -- most of the cases we deal
	11		with are people who knew the victim, yeah, that's
	12		true.
	13	Q	There aren't --
	14	A	There aren't a lot, but --
05:08	15	Q	They are very rare I would think?
	16	A	Well, no, unfortunately, not.
	17	Q	I see. Given (V10) (V10)-, given the knives,
	18		given the coat, given everything we've heard, you
	19		are saying that he's a pretty garden variety?
05:09	20	A	Again, Mr. Wolch, I looked at the similar-fact
	21		evidence on the chart you presented and it didn't
	22		strike me that it pointed inextricably at Larry
	23		Fisher.
	24	Q	Okay, but now that you have seen what the Court of
05:09	25		Appeal said, and what your own prosecutors said

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1   and what Justice Allbright said, do you think

2   perhaps you were in error there?

3   A   Oh, obviously I underestimated the evidence. The

4   Supreme Court took a different view, the Court of

05:09 5   Appeal took a different view, I'm not entirely

6   sure that it's quite as strong as they seem to

7   suggest, but I quite readily admit I took a

8   different view of the similar-fact evidence and

9   the strength of it.

05:09 10   Q   Not -- are you saying that was on an assessment or

11   perhaps influenced by a form of tunnel vision?

12   A   No, that's my assessment of it. I don't, you know

13   --

14   Q   But if you have to look at the DNA -- if you have

05:10 15   to look at the DNA to evaluate evidence, then

16   we're always going to have tunnel vision, will we

17   not?

18   A   Well, I don't know what you are referring to as

19   'tunnel vision'?

05:10 20   Q   Well you --

21   A   We look at -- any case is assessed on the basis of

22   all the evidence.

23   Q   No, but --

24   A   And if you have evidence sort of as clear and

05:10 25   strong as DNA, I don't know where tunnel vision

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1		comes into it, it just changes the way you assess
2		the strengths of your case.
3	Q	But DNA could be a confession, it could be
4		anything very strong evidence, correct?
5	A	Well, yes, I suppose.
6	Q	A positive eye witness?
7	A	Yes.
8	Q	But if you're looking at that to how you interpret
9		the original evidence, that's a terrible error?
10	A	No, no, I'm not saying that that changes the way
11		you do everything, I'm saying you look at all of
12		the evidence you've got and if part of the
13		evidence you've got is a very strong piece of
14		evidence like the motel room incident confessions,
15		which looked like the confessions of the day, or
16		the DNA evidence that clearly pointed at Larry
17		Fisher, I mean it's -- you assess it, you assess
18		the whole package. You don't, as defence counsel
19		would like us to do, take one piece out, look at
20		it, toss it away because there's some minor
21		imperfection, and then keep doing that, You look
22		at everything.
23	Q	I'm not saying minor, but if it doesn't make any
24		sense or have any probative value?
25	A	Well if you come across something that doesn't

05:10 (line 5)
05:10 (line 10)
05:11 (line 15)
05:11 (line 20)
05:11 (line 25)

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1   make any sense, then yeah, you would.

2   Q   Nichol John's evidence made no sense?

3   A   Well, that's your view.

4   Q   That's your view now?

05:11 5   A   It looked to us, at that time, that it made some

6   sense.

7   Q   And you still have no trouble with your use of the

8   words "a pretty garden variety stranger rapist"?

9   A   Well, but there wasn't that much different about

05:12 10   what Larry Fisher did to what most people who

11   attack women they don't know do.

12   Q   Lay them on coats?

13   A   They usually leave them in pretty bad shape.

14   Q   Lay them on --

05:12 15   A   These are violent people, by and large.

16   Q   Lay them on coats?

17   A   Well I -- Mr. Wolch, that's one, one particular

18   aspect, but you've got to look at the whole

19   picture.

05:12 20   Q   Those are my questions, Mr. Commissioner.

21   COMMISSIONER MacCALLUM: Thank you. Okay.

22   Who's next?

23   MR. HODSON: Mr. Gibson, I think.

24   COMMISSIONER MacCALLUM: Mr. Gibson, go

05:12 25   ahead, please. We are going until 6:00, by the

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1   way.

2   **BY MR. GIBSON:**

3   Q   I will be brief.

4   For the record, Mr. Brown, my

05:13   5   name is Bruce Gibson, I represent the RCMP.

6   You made some comments, early

7   in your direct examination with Mr. Hodson, that

8   during the 690 process you never actually saw the

9   work that Rick Pearson had done; do you remember

05:13   10   that?

11   A   I didn't, no.

12   Q   And I take it that your communication in that

13   process was with the federal Department of Justice

14   and not with the RCMP?

05:13   15   A   That's correct. The RCMP, at that point, were

16   basically acting as the agents of the federal

17   Justice Department.

18   Q   And it was your understanding, and correct me if

19   I'm wrong but I will try to go through this

05:13   20   quickly, they were assisting the federal

21   Department of Justice and were taking direction

22   from the Federal Department of Justice on what

23   needed to be done in that process?

24   A   That was my understanding, yes.

05:14   25   Q   If we could put up document 056743, please. You

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1   made a comment that you -- and I hope I'm getting

2   this right -- were told by the Federal Department

3   of Justice that the RCMP had investigated Fisher,

4   but that it was something short of a full

05:14 5   investigation into the Miller murder; is that

6   accurate?

7   A   Well, that's what I have been told since, it was

8   our understanding that the RCMP did a full

9   investigation of the Larry Fisher cases.

05:14 10   Q   And I will take you through this. These are Staff

11   Sergeant Rick Pearson's notes, and this is just

12   the first page, it's about 200 pages like this.

13   There is also other documents. Staff Sergeant

14   Pearson testified for a number of days at this

05:14 15   Inquiry and his evidence is clearly before the

16   Commissioner, but I just want to go through a

17   couple of parts of this which show the efforts

18   that Mr. Pearson went through on the Fisher

19   connection.

05:15 20   If we could just go to

21   paragraph 8 of this document, it is likely on the

22   next page or the one after that, I'm just going to

23   make reference to the paragraphs there. And

24   paragraph 8, it indicates that Staff Sergeant

05:15 25   Pearson got ahold of the Prince Albert

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1   Penitentiary, and he is trying to track down Larry

2   Fisher's penitentiary records. And as you can

3   appreciate, Mr. Brown, judging, you know, by your

4   background and the work that you've done, it's

05:15   5   pretty difficult to investigate a case like this

6   some 20 years later?

7   A   Yes.

8   Q   It's fairly cold at that time?

9   A   That would be correct.

05:15 10   Q   And if we can go to paragraph 15, there's not very

11   many places one can look, and again, paragraph 15

12   shows that Staff Sergeant Pearson is out

13   contacting the Prince Albert Penitentiary and he's

14   going to the North Battleford Hospital and he's,

05:16 15   in essence, trying to track down Larry Fisher's

16   blood type and that may be of some probative value

17   in his investigation. So were you aware of some

18   of the steps that he might have been taking to

19   follow up on this?

05:16 20   A   No, we were simply told that he had investigated

21   it.

22   Q   Okay. And I'm not going to go through numerous

23   paragraphs here, I think we're all tired of this

24   evidence, but were you aware that he was trying to

05:16 25   locate and assess the evidence of Sidney Wilson,

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1		the person who came forth with the connection to
2		Larry Fisher?
3	A	Well, I'm aware of that now. I don't know that I
4		was aware of that in 1991, '92.
05:16 5	Q	And he was following up on the possibility of
6		Larry Fisher having borrowed a car and having used
7		the car in the offence and that there was a car
8		seen outside Miller's residence the night when she
9		was dropped off?
05:16 10	A	Yes, I'm aware of that.
11	Q	And he was trying to determine whether the knife
12		used in the Miller murder somehow could be
13		connected to other offences that he was involved
14		in that they knew about in Winnipeg. Were you
05:17 15		aware of those efforts that he was taking?
16	A	No. I thought our theory was the knife was lying
17		under Gail Miller.
18	Q	But there could have been other knives similar
19		following up on knives?
05:17 20	A	Yeah.
21	Q	That he was following up on those aspects. And
22		that he was working to locate Mr. Fisher's work
23		records?
24	A	Yes, we knew that.
05:17 25	Q	But your understanding is that that was fully

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1   investigated and you accepted that?

2   A   Yes.

3   Q   Okay. I know you've been through this a lot

4   already, you've indicated numerous times that you

05:17 5   didn't see the other assaults involving Mr. Fisher

6   as similar fact evidence to the Miller murder.

7   You would agree that they were suspicious?

8   A   Yes.

9   Q   And would you agree with Staff Sergeant Pearson's

05:18 10   evidence that there wasn't anything you could do

11   with that without actually having some sort of

12   direct evidence linking Larry Fisher to the crime?

13   A   Well, that was my view, that absent that, it

14   really didn't have a reference.

05:18 15   Q   And --

16   A   And that was why I thought its relevance was very

17   limited.

18   Q   And what impact did Mr. Milgaard's conviction have

19   on prosecuting Larry Fisher when all you have at

05:18 20   that point is, if you want to say you have it, is

21   similar fact evidence?

22   A   Well, I mean, certainly when Larry Fisher

23   surfaced, you still had the Nichol John statement.

24   For what it was worth, the police still believed

05:18 25   that she had told the truth when she gave the

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1   statement that implicated David Milgaard, they

2   still believed that Ron Wilson had told the truth

3   when he implicated him, they knew certainly by

4   then about the motel room incident and the

05:19 5   witnesses involved there, so my guess is that even

6   if every police officer on that force had known

7   about the Larry Fisher guilty pleas, none of them

8   would have associated it with the Miller murder.

9 Q   And if you only have the similar fact evidence and

05:19 10   you have the Milgaard conviction, and of course

11   its gone throughout Supreme Court by that time, is

12   it going to be fairly easy for defence counsel to

13   raise a reasonable doubt in defending that case?

14 A   Well, given what happened with Ron Wilson and

05:19 15   Nichol John and all, the passage of time, I think

16   it just inexorably becomes easier to raise a

17   reasonable doubt.

18 Q   What would have happened, and I guess I probably

19   know the answer to this, if you go and you

05:20 20   prosecute Mr. Fisher simply on the similar fact

21   evidence and a reasonable doubt is raised, what

22   does that do if DNA is found three years later,

23   two years later?

24 A   Well, he's in the position of pleading *otra foi*

05:20 25   *acquit* (ph) and he cannot be prosecuted at that

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1   point.

2   Q   So if I'm a prosecutor and I'm trying to assess

3   whether I move ahead with this and I simply have

4   similar fact evidence, or I'm a police officer and

05:20   5   that's all I can come up with on the investigation

6   are these similarities, is there a fairly large

7   risk that until I find other evidence, that I

8   could be jeopardizing ever prosecuting an

9   individual that I may have very strong suspicions

05:21 10   about?

11   A   Yes, that's certainly a problem.

12   Q   I think you indicated in your evidence that in the

13   course of the Supreme Court of Canada reference,

14   you said, and again please correct me if I'm

05:21 15   wrong, if you came across any information that

16   would have caused you to re-look into the Miller

17   death once again, or cause an investigation to be

18   started into the Miller death, you would have done

19   so?

05:21 20   A   Yes, that's correct, and when we ultimately did

21   get that evidence, that's exactly what happened.

22   Q   And that was the --

23   A   The DNA evidence.

24   Q   And in the interim, with the investigation that

05:21 25   was carried out by Staff Sergeant Pearson and Mr.

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	1		Williams, there was no evidence that was uncovered
	2		that raised that, and nothing obviously that was
	3		brought forth by the Milgaard camp that caused you
	4		to change your mind?
05:22	5	A	That's correct.
	6	Q	And subsequently when the RCMP followed up in 1993
	7		and 1994 into the investigation of wrongdoing by
	8		police and prosecutors, again, from your view
	9		there was nothing coming out of that investigation
05:22	10		that caused you to think the Miller murder
	11		investigation should be re-opened at that time?
	12	A	That's correct.
	13	Q	Yes. And it was only the DNA link that led to
	14		that?
05:22	15	A	Absolutely. In my view that was the only way we
	16		were going to get a conviction on Larry Fisher
	17		and, frankly, notwithstanding what everyone has
	18		said about the similar fact evidence, it remains
	19		my view that if we did not have that DNA evidence,
05:22	20		we would not have got a conviction on Larry
	21		Fisher.
	22	Q	You indicated that the Saskatoon Police Service
	23		could have investigated without your direction,
	24		but they didn't do that. I guess it was open to
05:23	25		them, it was in their jurisdiction to follow up

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1   and continue on with the Miller murder

2   investigation following the Supreme Court of

3   Canada reference had they wanted to do so?

4   A   Had they wanted to do so or seen a need to, yes.

05:23 5   Q   And regardless of what any police agency might

6   have uncovered, would you think that it would be

7   reasonable in the circumstances that were at play

8   here, that they likely would have contacted your

9   office before they would have done anything with

05:23 10   respect to preferring charges?

11   A   Oh, absolutely, yes.

12   Q   I want to touch on a slightly different matter,

13   and you indicate in your evidence, and I think you

14   were somewhat surprised that Pat Alain, a

05:23 15   scientist with the RCMP, was chosen to examine the

16   exhibits that went forth in the Supreme Court of

17   Canada reference?

18   A   Yes.

19   Q   And I think your evidence was that it was your

05:24 20   understanding that at that point in time she had

21   been more in an administrative capacity for a

22   couple of years?

23   A   Well, it was more than a couple of years, you

24   know, my memory suggests a six to eight kind of

05:24 25   period.

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1   Q   And I believe you are wrong on that and there will

2   be evidence likely put forth on that. My

3   understanding is it's two years.

4   A   Yes.

05:24 5   Q   And I take it that you may not be in a good

6   position to give evidence on that and I'm not

7   going to push you on that.

8   A   Well, no, I'm relying on what somebody told me.

9   Q   And I take it that you were not aware that prior

05:24 10   to that she had done about 20 years of serological

11   work in the RCMP lab?

12   A   I knew she had been sort of the hands-on analyst,

13   but as I say, it was -- the information I had was

14   that she had been out of that for quite some time.

05:24 15   Q   And I guess today you are not entirely clear as to

16   what that length of time was and what the source

17   of that information was?

18   A   Well, if you say that it's only two years since

19   the Supreme Court that she had been put into

05:25 20   administration, I'll accept that.

21   Q   Okay. And were you aware that when she did the

22   analysis, that she was heading up the serological

23   department within the RCMP?

24   A   I think so, yes, I think that's how she was

05:25 25   introduced.

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1	Q	And you were aware that in the subsequent Fisher
2		prosecution, that she was qualified as an expert
3		in serology?
4	A	Yes.
05:25 5	Q	I take it you have some knowledge now about the
6		manner in which she may have examined the
7		evidence?
8	A	Yes.
9	Q	The exhibits rather, that she used a tactile
05:25 10		examination, a visual examination and a random
11		acid phosphatase testing procedure?
12	A	Yes.
13	Q	And would you be aware or would you have been
14		aware that that would have been standard
05:25 15		protocol within the RCMP and whether she had done
16		it or another serologist had done it, that's the
17		manner in which they would have approached that?
18	A	No, I wouldn't have been aware of that. I hadn't
19		been doing trial work at that point for six, seven
05:26 20		years, something like that, and absent doing that,
21		you kind of lose touch with what they do.
22		COMMISSIONER MacCALLUM: What was the third
23		test? I've got tactile, acid phosphatase and
24		what else?
05:26 25		MR. GIBSON: Visual analysis, Mr.

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1   Commissioner.

2   COMMISSIONER MacCALLUM: Visual under

3   ultraviolet or --

4   MR. GIBSON: No, just visual analysis.

05:26 5   COMMISSIONER MacCALLUM: All right.

6   BY MR. GIBSON:

7   Q   And as it turned out, the difference between the

8   RCMP approach and the Forensic Science Services

9   approach in Britain was a mapping technique as

05:26 10   opposed to a random mapping technique?

11   A   Yes.

12   Q   Now, obviously I think you would agree that it

13   would have been better if that sample had been

14   found on the uniform in 1992 by Ms. Alain?

05:27 15   A   Yes.

16   Q   It would have assisted everybody I believe?

17   A   Oh, absolutely, yeah.

18   Q   And it likely would have been better had

19   Mr. Ferris, Dr. Ferris rather, had found that

05:27 20   sample in 1988, '89 when he looked at the uniform

21   dress?

22   A   Yes.

23   Q   And you also agree that it likely would have been

24   better if Dr. Ferris had retained the portion that

05:27 25   he had cut out of the panty area for further

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1   analysis rather than destroying it, that may have

2   assisted in the process as well?

3   A   Yes.

4   COMMISSIONER MacCALLUM: Mr. Gibson, I'm

05:27 5   sorry to interrupt again, was the distinction

6   between a mapping technique and simply a random

7   technique?

8   MR. GIBSON: Yes. There was a mapping

9   technique using a full blotter, if you recall

05:27 10   some of the evidence, where it was a full sheet

11   of blotter paper that was laid on the uniform,

12   versus individual pieces of --

13   COMMISSIONER MacCALLUM: I understand,

14   thank you.

05:27 15   MR. GIBSON: -- blotter paper that was --

16   I'm sorry, Mr. Commissioner, I wasn't clear on

17   that.

18   BY MR. GIBSON:

19   Q   We do know that Pat Alain did find a small amount

05:28 20   of DNA on the panties?

21   A   Yes.

22   Q   You are aware of that?

23   A   Yes.

24   Q   And you would agree with me that that was

05:28 25   fortunate because that did in fact keep alive the

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1   whole question of DNA analysis which eventually

2   cleared David Milgaard's name and had she not

3   found that, it's likely that there may not have

4   been any other testing ever attempted?

05:28 5   A   Yes, that's probably true. Had she not found

6   that, I suspect the exhibits would have been

7   returned, and given that they were the only

8   exhibits in the courthouse from 1969, '70, they

9   might well even have been destroyed.

05:28 10   Q   And of course we do know that by the time the

11   subsequent testing was done in Britain, Mr.

12   Milgaard had already been freed for a number of

13   years and was no longer in prison?

14   A   Yes, that's true.

05:28 15   Q   And are you aware that the DNA sample that she did

16   find on the panties was eventually analysed and

17   matched up to Mr. Fisher?

18   A   No, I wasn't specifically aware of that.

19   Q   Well, there likely will be evidence to that

05:29 20   effect. Thank you very much, Mr. Brown.

21   COMMISSIONER MacCALLUM: Thanks.

22   MS. KNOX: Mr. Brown, for the record only,

23   my name is Catherine Knox and I appear as counsel

24   for T.D.R. Caldwell, the trial prosecutor.

05:29 25   A   Yes.

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1   MS. KNOX: And I just have a few areas that

2   I want to touch on with you, and,

3   Mr. Commissioner, I will finish before six

4   o'clock if that's of any assistance in planning

05:29   5   the day.

6   COMMISSIONER MacCALLUM: Thank you.

7   **BY MS. KNOX**:

8 Q   Sir, you had indicated during the course of your

9   direct examination that it was your view and

05:29 10   indeed the view of the Supreme Court of Canada

11   that Mr. Caldwell had complied with the disclosure

12   rules of the day in terms of the information that

13   he provided to Mr. Tallis with respect to the

14   investigation of David Milgaard?

05:30 15 A   Yes, that's correct.

16 Q   And, sir, with respect to that, are you aware that

17   additional to the documentary evidence that we

18   have been able to show through his file that had

19   some fairly detailed correspondence as to

05:30 20   materials he sent, conversations he had with

21   Mr. Tallis, that we have as well indications that,

22   from Mr. Tallis certainly, that he was treated in

23   a very cordial fashion and was permitted to read

24   prosecution files, although not necessarily given

05:30 25   copies of materials of certain aspects of the

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1   file?

2   A   He told me that at one point, yes.

3   Q   And are you aware through a review of the

4   transcript, and I'm thinking particularly of the

05:30 5 preliminary inquiry, that he, for example, had

6   knowledge of witnesses whose statements he didn't

7   have copies of, like Betty Hundt, Anne Friesen,

8   who were of the view that when Ms. Miller took the

9   bus, sometimes she would have gone down Avenue O

05:31 10 versus Avenue N?

11   A   I don't know that I was aware of that

12   specifically, but I was aware, as you say, that

13   Mr. Caldwell allowed Justice Tallis to read his

14   files.

05:31 15 Q   Okay. Mr. Brown, in the interests of time, I

16   won't go to the transcript, but in the

17   cross-examination of Adeline, and I won't

18   pronounce her name properly, but one of the woman

19   in the rooming house, Nyczai I think is perhaps

05:31 20 one pronunciation of it, that Mr. Caldwell

21   questioned her about where Betty Hundt was, where

22   Anne Friesen was and was told that those

23   particular ladies, one I believe was in the

24   Northwest Territories, one was in B.C., but

05:31 25 certainly that his questions would indicate a

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1   knowledge that information had been obtained from

2   them as part of the investigation?

3   A   Yeah. Well, I would have known that because I did

4   read both the preliminary hearing and the trial

05:32 5   transcript. I don't recall it specifically today.

6   Q   But like most of us, it's gone from your mind,

7   even those of us who have read it more recently.

8   Sir, with respect to the file itself, you

9   indicated in your direct examination to -- or

05:32 10   actually, before I go there, did you review the

11   address to the jury that Mr. Caldwell did at the

12   conclusion of the case prior to the judge

13   instructing them?

14   A   Yes. I believe those came to us in Ottawa. They

05:32 15   had not been reproduced as part of the original

16   record, but the notes were around and they were

17   able to find someone who could interpret the court

18   stenographer's notes and they were produced.

19   Q   And Mr. Wolch in particular has referenced you to

05:33 20   the theory of the Crown that he described as, and

21   I'm not paraphrasing, I'm summarizing, but

22   basically he described them as needing the

23   evidence to place Gail Miller going down Avenue N?

24   A   Yes.

05:33 25   Q   Do you recall that in fact in the address to the

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1   jury, that Mr. Caldwell referenced both a theory

2   Avenue O and Avenue N and that both theories, in

3   terms of her passage of travel, were put to the

4   jury as part of the instructions that the judge

05:33   5   gave them?

6   A   Well, again, I don't recall that specifically, but

7   if that's what's in those notes, I would have read

8   it at the time, yes.

9   Q   Okay.

05:33 10   COMMISSIONER MacCALLUM: You are speaking

11   about what the judge told the jury though?

12   MS. KNOX: Yes, and Mr. Caldwell as well,

13   if I'm recalling correctly, referred to both

14   Avenue N and Avenue O as possibilities.

05:33 15   COMMISSIONER MacCALLUM: Yes.

16   BY MS. KNOX:

17   Q   But that certainly the jury was given instruction

18   and direction with respect to either of the routes

19   as being a possible route of travel for her. Do

05:33 20   you recall that?

21   A   Well, again, I don't specifically recall it, but

22   that could be why it didn't particularly concern

23   me, that it might have been Avenue O as opposed to

24   Avenue N.

05:34 25   Q   And not by any means to have this question taken

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1   as a way of criticism or critique of the work that

2   was done by the prosecution office and yourself

3   and Mr. Neufeld in particular in preparation for

4   your attendance at Supreme Court of Canada, but

05:34   5   did you or he to the best of your memory actually

6   sit down and do a page-by-page comparison of the

7   materials that were in Mr. Caldwell's prosecution

8   file with the materials that were in what was

9   described as the Saskatoon City Police Gail Miller

05:34 10   murder investigation file?

11   A   Well, not page by page, but I do recall it was our

12   view that there was really nothing left out of the

13   prosecutor's file that, from the police that was

14   of any real significance.

05:35 15   Q   Okay. Do you realize that what was not in the

16   prosecution file as an example, that has been

17   referenced here as having some significance, is

18   the police report, the investigation report that

19   contained the content of the interview, I believe

05:35 20   it was with Mr. Merriman, that in his file there

21   was a paragraph in the police report about one of

22   the Merrimans, I believe Mrs. Merriman, but that

23   in fact he didn't have the Mr. Merriman interview

24   in his police file as we look at it?

05:35 25   A   I don't recall that. My recollection of the

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1		Merriman one was he had the taxi thing, but I
2		don't recall --
3		COMMISSIONER MacCALLUM: Who did, Caldwell?
4	A	Caldwell did, yes.
05:35 5		COMMISSIONER MacCALLUM: All right.
6		BY MS. KNOX:
7	Q	And the --
8	A	My recollection, Ms. Knox --
9	Q	He had the information?
05:35 10	A	-- was yes, he had the information.
11	Q	Yeah.
12	A	That there were a few files there, or a few
13		statements there and things that they had done
14		during the investigation that weren't in his file,
05:35 15		but again, my recollection is that Eric and I
16		looked at them and didn't think there was anything
17		significant that the police left out.
18	Q	Okay. And again to come back to your original
19		response, you were satisfied that he had complied
05:36 20		with the disclosure rules of the day as they
21		existed in 1969?
22	A	Oh, yes, absolutely.
23	Q	Okay. Now, sir, with respect to a document that
24		has been, a great deal of time has been spent
05:36 25		dealing with it through the course of this

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1   inquiry, and indeed through Ms. McLean's

2   cross-examination of you and to a lesser degree

3   Mr. Wolch, but what has been referred to as the

4   Ray Mackie document, that five page document?

05:36   5   A   Yes.

6   Q   You testified in response to a question from Mr.

7   Hodson some days ago that you believed that that

8   came from Mr. Caldwell's file?

9   A   That's my recollection, yes.

05:36   10 Q   Okay. Sir, at what point in time specifically, if

11   you can, were you actually assigned to become

12   involved in the file and did you take physical

13   possession of what we have as approximately six

14   volumes that were Mr. Caldwell's prosecution file?

05:37   15 A   Well, I was assigned in 1990 to look at the head

16   office file which was essentially the trial

17   transcript and the Supreme Court, or the Court of

18   Appeal materials. We didn't look, we didn't get

19   Bobs Caldwell's file I think until shortly before

05:37   20   the reference was called. We knew it was coming

21   and we knew we were going to have to go into that.

22 Q   Okay. So at that point in time when you say you

23   didn't get it, do you mean that it hadn't made its

24   way out of Saskatoon into Regina?

05:37   25 A   We hadn't called for it and it hadn't been sent

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1   down.

2   Q   So it had stayed in the office here in Saskatoon?

3   A   That's correct.

4   Q   Now, the evidence on the record reveals that a

05:37 5   number of people had gone through that file in

6   1983 -- well, in 1981, perhaps Mr. Young, although

7   he and Mr. Caldwell have a differing recollection

8   of whether he actually went and looked at the

9   file, Mr. Carlyle-Gordge went through it in 1983,

05:38 10   the evidence is that a researcher with CBC, Sandra

11   Bartlett, looked at it and had access to it in

12   1988, Mr. Caldwell went through it a couple of

13   times at the request of Mr. Williams, Mr. Williams

14   went through it, Sergeant Pearson may, I'm not

05:38 15   sure, have had some access to it, but that there

16   was a path of people who had access to the file

17   between 1983 and the time when it would have

18   gotten to your hands?

19   A   Well, yes, I knew some people had gone through it.

05:38 20   I wasn't aware that Mr. Young or Carlyle-Gordge

21   had been through it.

22   Q   Okay. Now, sir, do you know whether any steps

23   were taken after the major focus of attention

24   became a public issue in about 1988 after the

05:38 25   first application was filed to ensure that the

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1   contents of that file, as they existed up to that

2   point in time, were kept intact?

3 A   No, I'm not aware of any special steps that were

4   taken, no. I can't say that I'm aware of anybody

05:39 5   doing anything.

6 Q   Okay. Would it be fair to say that once the

7   Section 690 application was generated, that some

8   of the information that was sought, or information

9   was sought both from Saskatoon City Police files

05:39 10   and the prosecution's files?

11 A   That's my recollection, yes.

12 Q   Okay, sir, and it's more a matter of argument

13   subsequently, but is there any way that you can

14   say with any degree of certainty that that

05:39 15   document, that script document was, that came to

16   your attention was part of Mr. Caldwell's file

17   when he did the prosecution of this matter in

18   1969?

19 A   I have no idea.

05:39 20 Q   Okay.

21 A   I can't say that.

22 Q   And you I believe reviewed various copies of it at

23   the request of Mr. Wolch when he sent a copy to

24   you that somehow -- and I assume through Mr. Asper

05:40 25   in fact -- had been obtained from the file, you

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1   sent copies of it to the Saskatoon Police Service

2   to have them attempt to get a source and

3   authorship of it. In the various versions of that

4   document that you've seen, that you've examined

05:40 5   and you've worked with, did you ever see any

6   marking or anything on any copy of it to indicate

7   that my client, Mr. Caldwell, at any point in time

8   had ever had contact with it during the course of

9   his preparation for trial?

05:40 10   COMMISSIONER MacCALLUM: Contact with whom?

11   MS. KNOX: With the document.

12   COMMISSIONER MacCALLUM: With the Mackie

13   summary?

14   MS. KNOX: Yes.

05:40 15   A   I don't remember anything, no. I know that for

16   most of the time he was with the department Bobs

17   Caldwell wrote in an horrible peacock blue ink.

18   BY MS. KNOX:

19   Q   We've seen it.

05:40 20   A   And it tended to leap out at you wherever it was

21   and there was nothing on the file like that.

22   Q   He also had a fairly, once you look at it, he has

23   a fairly distinctive and persistent kind of

24   handwriting too, doesn't he, and lots of the

05:41 25   documents in his file had marks, notes, underlying

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1   various things on it that can clearly be looked at

2   and say "oh, yeah, that's Bobs Caldwell who did

3   that"?

4   A   Yes.

05:41 5   Q   Okay. And nothing in any copy that you came

6   across would indicate him having physically done

7   anything to it or had contact with it?

8   A   No.

9   Q   So your evidence that you believe it came from his

05:41 10   file when you took possession of it would at best

11   be a guess, but you have no independent evidence

12   to suggest that in fact it was on his file and if

13   there are indications, including his memory, that

14   he had never seen it, there's nothing you can

05:41 15   offer to concretely contradict that is there?

16   A   Well, that's correct. The only reason I think it

17   came off his file is because I believe we provided

18   a copy of that to Mr. Wolch and Mr. Asper when

19   they came to review the file at our office in

05:41 20   Regina and I don't believe we had the police file

21   at that point, so my only source would have been

22   his file.

23   Q   Okay.

24   A   That's the best recollection I have now.

05:42 25   Q   But you don't know who would have done anything to

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 1              have added anything or mixed anything in his file

 2              before it came to you late in 1991 just before the

 3              Supreme Court of Canada reference?

 4       A      That's correct.

 5       Q      Okay.  Did anybody else within headquarters review

 6              the file before it came to you or were you

 7              physically there when it was unpackaged, looked at

 8              and sorted through?

 9       A      My recollection is it was boxed up and sent to my

10              attention and I'm the one that opened it up.

11       Q      Okay, thank you.  Now, sir, just a couple of other

12              areas that I wanted to touch on.  You indicated in

13              response to some questions from Mr. Wolch last

14              week and the discussion about the role of the

15              media that -- was I correct in understanding that

16              you had attended a conference in Winnipeg last

17              year, the *Unlocking Innocence* conference, where

18              Dan Lett was a speaker?

19       A      That's correct, yes.

20       Q      And I take it you were at the presentation where

21              Mr. Lett spoke and where Mr. Asper spoke, and in

22              fact I've had the excerpt of Mr. Asper's

23              presentation played in these proceedings.

24       A      Yes.

25       Q      And I take it you were present when Mr. Asper made
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05:42 5
05:42 10
05:42 15
05:43 20
05:43 25

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1   the statement that the media attention that they

2   garnered in this particular case was a key part of

3   the efforts to get David Milgaard released from

4   custody and without the media they wouldn't have

05:43   5   succeeded?

6   A   Yes.

7   Q   And you would have heard him make the statement,

8   as we heard when we played the tape here, that he

9   could go on record as stating that none of the

05:43   10   stories that had gone in the media had been shown

11   to be incorrect?

12   A   I believe I recall him making that statement.

13   Q   Okay. Sir, do you also, and you've been

14   referenced to a story that was done, and I'll just

05:44   15   pick this particular one because it was a

16   particularly directed one towards my client, but

17   there was that media story in July, I believe, of

18   1990, where the allegation was that Mr. Caldwell

19   had not disclosed the original March 2nd, 1969

05:44   20   statement that Ron Wilson had given to the RCMP.

21   Do you remember that statement?

22   A   Oh, yes, yes.

23   Q   And you in fact, and Mr. Hodson took you through

24   some review that you had done without the benefit

05:44   25   of the file but just based on transcript, that

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1		showed that Mr. Tallis had in fact questioned Ron
2		Wilson about that statement at both his
3		preliminary inquiry and his trial?
4	A	That's correct, yes.
05:44 5	Q	And you would be aware that right in the body of
6		the transcript of the preliminary inquiry before
7		Albert Cadrain testified, Mr. Caldwell went on
8		record and made the statement that he had given
9		copies of the statements of Albert Cadrain, Nichol
05:45 10		John and the combined statements of Ron Wilson
11		both in May, as well as his March 2nd statement,
12		to Mr. Tallis?
13	A	Well, again, I don't recall it specifically, but
14		if that's in the transcript, I would have read it.
05:45 15	Q	Okay.
16	A	The point I was making to the deputy minister was
17		he had to have had it because he used them in
18		cross-examination, which was the point of the
19		whole concern.
05:45 20	Q	Mr. Brown, were you aware or have you become aware
21		that not only did he have it for purposes of
22		cross-examination, but that there was clear
23		evidence in the documentary record that it had
24		been sent to him, there was correspondence between
05:45 25		Mr. Caldwell and Mr. Tallis that confirmed it

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1		being sent to him in August of 1969?
2	A	I'm now aware of that, now that I've seen the
3		prosecutor's file.
4	Q	Sir, you made the statement last week, I -- in
05:45 5		commenting on the role of the media, that as the
6		services of the media become circumscribed there
7		are less people doing the job, and they find
8		themselves in positions that they end up having to
9		take, very quickly digest, and often just put out
05:46 10		what's passed to them by people, and you referred
11		to yourself and Mr. Wolch as people who inform the
12		media?
13	A	Yes.
14	Q	Sir, did you know or have you come to know that in
05:46 15		fact, when that story was written in July 1990,
16		Dan Lett had transcripts of the preliminary
17		inquiry and the trial of David Milgaard?
18	A	No, I didn't know that.
19	Q	Okay. Did you know that, indeed, Mrs. Milgaard
05:46 20		had a copy of the March 2nd statement of Ron
21		Wilson, that she'd had it since 1981?
22	A	No, I didn't know that.
23	Q	Did you know that there were transcripts of
24		telephone discussions she had with Ron Wilson back
05:46 25		in 1981 where she talked to him about his March

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1   2nd statement, referred him to parts of it, and

2   assured him that she had a copy of it.

3   A   No, I know none of that.

4   Q   Okay, didn't know any of that. Sir, did you know

05:47 5   that, after the story was written, Mrs. Milgaard

6   phoned Dan Lett and told him that when she read

7   that story in the paper she nearly freaked because

8   the story was wrong?

9   A   No, I wasn't aware of that.

05:47 10   Q   Did you know that Mrs. Milgaard shared with Mr.

11   Asper the very day after that story, July 18th,

12   that they'd made a mistake when he gave that

13   information or when that story went in the paper,

14   that indeed Mr. Tallis had had that story?

05:47 15   A   No, I didn't know that.

16   Q   Did you know as a result -- well, I'll start by

17   asking -- did you read the examination or

18   cross-examination of Mrs. Milgaard at this

19   Inquiry?

05:47 20   A   No, I -- all I've heard or know about it is the

21   summaries that Ms. Krogan sends, sends to the

22   department every day. I haven't specifically read

23   her evidence, I've trying -- been trying to avoid

24   reading specific evidence before I gave evidence.

05:47 25   Q   I take it, Mr. Brown, then, that you didn't know,

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1   and perhaps will now come to know, that after

2   Mrs. Milgaard contacted Dan Lett and David Asper

3   and told them that the story was a mistake, that

4   she then proceeded to make multiple contacts with

05:48 5   other media outlets and not disclose to them that

6   the story was a mistake, but to encourage them in

7   the belief that what Mr. Caldwell had done was

8   terrible, that indeed he hadn't disclosed that

9   March 2nd statement?

05:48 10   A   I wasn't aware of that, no.

11   Q   Did you know that we have a transcript of a

12   conversation between Mrs. Milgaard and Reverend

13   McCloskey, who subsequently authored that report

14   of Centurion Ministries, where she lied to him and

05:48 15   told him that the statement hadn't been disclosed?

16   A   No, I wasn't aware of that.

17   Q   Okay. Did you hear any such information as that

18   at that conference that you attended where Dan

19   Lett was present and where the statement was made

05:48 20   none of their stories were wrong?

21   A   No, I don't recall anyone bringing that up.

22   Q   Did you ever read in the paper, either under the

23   authorship of Dan Lett or anyone, that in fact

24   that story was wrong the day after or the days

05:48 25   after that misrepresentation had happened and my

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1   client had been accused of misconduct?

2   A   No, it was left out there.

3   Q   And with the exception of the evidence at this

4   Inquiry for those who choose to read it, what

05:49   5   little may have been afforded the attention of

6   that in press, and what I have just told you, had

7   you any knowledge that that in fact was the true

8   state of affairs?

9   A   No, I wasn't aware of that.

05:49 10   Q   Mr. Brown, would you agree with me that with the

11   limited resources that the media has, when they

12   find out that they have made mistakes where the

13   mistakes have been because they just didn't bother

14   to do the work, as in the case of Mr. Lett, he had

05:49 15   the material, that at the very least we could

16   expect from them is that there might be a

17   correction on the record?

18   A   Well, it was a fairly substantial allegation of

19   wrongdoing leveled against a prosecutor, one would

05:49 20   assume that if you're -- you know, trash

21   somebody's reputation in error, you might want to

22   retract, but --

23   Q   Mr. Brown, I just have two other areas to touch

24   with you, and these will seem slightly off topic

05:50 25   to you if you haven't been following the details.

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1   But when the prosecution file was returned, or

2   turned over to the RCMP for project Flicker, and

3   ultimately when it was turned over to the

4   Commission as part of the preparation for these

05:50   5   hearings, there was a file contained in the box of

6   the prosecutor's office that had a label on it

7   *Meeting File* that some have concluded was part of

8   Mr. Caldwell's file. He has indicated that he had

9   no such file and, with the permission of the

05:50 10   Commissioner, I would like to approach you with

11   two files that have writing on them just to ask

12   whether you can identify for us whether these are

13   files that you set up as subcategories of the

14   prosecution file and which didn't get reassembled

05:50 15   back into their original form?

16   COMMISSIONER MacCALLUM: What was the label

17   on that again?

18   BY MS. KNOX:

19   Q   The first one I refer to is one that has a

05:51 20   handwritten label in large blue ink *Meeting,*

21   M-E-E-T-I-N-G, *File*. The number on the file

22   jacket, the Commission number is 331785, and

23   contained in it are some various statements that

24   have witness statements, like Ms. Nichol John,

05:51 25   that have the original handwriting of my client in

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1		that awful ink that Mr. Brown refers to, and
2		perhaps if we could pass it to him and ask him to
3		have a quick review?
4	A	Yeah, that's my writing.
05:51 5	Q	Okay. And it --
6	A	This was just a file cover that we were reusing.
7	Q	So Ms. Krogan was right, that you recycle file
8		covers, because we tracked that one, if you look
9		at the name on the back of it, to a Court of
05:51 10		Appeal matter in 1983?
11	A	Yeah, absolutely.
12	Q	So Mr. Caldwell's recollection that that wasn't a
13		file he set up is correct?
14	A	That's correct.
05:51 15	Q	Mr. Caldwell also testified that the first time he
16		has a memory of seeing the Mackie summary, the
17		script document, was when he went down to the
18		courthouse with Sergeant Pearson while you were in
19		Supreme Court of Canada, and he found a file
05:52 20		folder that had a label on it -- and I may not
21		have this exactly right, yeah, I do have it, I
22		have it in front of me -- *Milgaard witnesses -*
23		*Roberts, Art - polygraph*. And I'm going to pass
24		you another file folder that doesn't appear to
05:52 25		have a number on it, but again it has handwriting

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1   on it and a label that he says is not his, and

2   that it was in this file in the prosecution office

3   in Regina at the courthouse that he found the

4   script document for the first time in 1992; is

05:52   5   that your handwriting?

6   A   That's my handwriting too, yes.

7   Q   So, again, this was a file that was set up by you

8   in preparation for the Supreme Court of Canada?

9   A   Well, subject to the fact that when we got the

05:52   10   file back from the RCMP they had done some

11   resorting, so I don't know whether what's in there

12   is what I originally put in.

13   Q   No, and I'm not --

14   A   But I'm going to tell you that's my file cover.

05:53   15   Q   I'm not suggesting, indeed, that the contents of

16   what was your file, because the one I passed you

17   that says Art Roberts no longer has the script

18   document in it, so there have been changes. But

19   Mr. Caldwell's evidence was that he didn't

05:53   20   recognize these file jackets, that they weren't

21   part of his file, and it's your evidence that in

22   fact these are part of your preparation for the

23   Supreme Court of Canada?

24   A   That's correct.

05:53   25   Q   And I take it, given that you were setting up file

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1   folders, that there was some reassembling or, as I

2   have a tendency to do, you sort your categories of

3   witnesses into file jackets. So what the RCMP

4   received in project Flicker, and what we received,

05:53   5   wouldn't necessarily be Mr. Caldwell's file as he

6   had prepared it and put it together?

7   A   Oh, yes, by the time we got to the Supreme Court

8   of Canada everything was shuffled around. I think

9   what we were trying to do was basically gather all

05:53   10   the statements for a particular witness, and put

11   them all into one file, as opposed to digging them

12   out of different files.

13 Q   Okay. Sir, just a quick question, I meant to get

14   an excerpt of tape and I didn't, but you were

05:54   15   asked some questions by Mr. Wolch about the

16   significance or whether certain actions that

17   happened in 1970, 1971 with respect to Fisher,

18   might have been of a questionable nature, I --

19   that it might have been indications of some

05:54   20   malfeasance on the part of people. And one of the

21   topics that continually comes up in assessing what

22   happened with Fisher, the fact that the charges

23   were, or the pleas were done in Regina, is that

24   there was no media coverage. Do you have any

05:54   25   memory of to what degree the media covered

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 1          anything to do with offences involving women in

 2          1970, '69, '71, as compared to how things changed

 3          in the mid-'80s after the Criminal Code was

 4          amended, sexual assault offences were introduced,

05:55  5    and there was a general whole sociological

 6          movement towards the recognition of the rights of

 7          women as victims of crime?

 8   A      Well certainly one of the things that changed with

 9          respect to dealing with sexual assaults in the

05:55 10    late '80s-early '90s, was the way we treated

11          witnesses, the way we treated complainants.

12   Q      Uh-huh?

13   A      It became clear that it was our responsibility, as

14          the prosecutors, to make sure that there was

05:55 15    communication with them, that they knew what was

16          happening on the file, that they were always

17          informed of the results.  Prior to that, and even

18          when I was prosecuting, I know I did some sexual

19          assault cases and I never told the victims what

05:55 20    happened.  I told the police, I mean I -- we

21          always were supposed to send the police a note

22          with respect to the -- what finally happens on a

23          case, and if they were going to deal with the

24          complainants, then they would do it.

05:56 25  Q      Okay.
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1   A   We didn't. Now certainly, in terms of the news

2   media and whether they became more sensitive to

3   it, umm, they did. But you have to understand

4   that throughout the '80s, as well, you saw the

05:56 5   erosion of news services or the numbers of people

6   they employed steadily through the '80s and the

7   '90s to the point where most of them, now, are

8   really not in a position to cover much news.

9   Certainly the radio stations these days, they get

05:56 10   their news almost exclusively by phoning you and

11   asking you what's happened, they never attend

12   Court.

13   Q   Yeah. To go --

14   A   Go ahead?

05:56 15   Q   No, sorry, you can continue, I didn't mean to

16   interrupt?

17   A   And even back then attendance in Court was, I

18   think the newspaper in Regina had one reporter

19   that was sort of reliably at Provincial Court, but

05:57 20   that was it, the others were basically hit and

21   miss.

22   Q   Okay. Sir, to step up onto my feminist soap box

23   for a minute, the reality is in '68, '69, '70,

24   '71, into the early '80s, that the place of women

05:57 25   in the criminal justice system didn't rank very

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1   highly; did it?

2   A   Well, women or anyone else, they were just

3   witnesses.

4   Q   Yeah.

05:57 5   A   I mean, when we were done with them, we were done

6   with them.

7   Q   And we didn't necessarily check to make sure they

8   were okay, or they knew what had gone on, or to

9   even give a passing thought to how it might affect

05:57 10   them if they didn't find out what had happened in

11   a crime that they'd been a victim in?

12   A   That's correct.

13   Q   Thank you. I have no further questions.

14   MR. HODSON: It's almost 6:00, Mr.

05:58 15   Commissioner. I believe Ms. Cox, for Federal

16   Justice, has about 45 minutes, and Ms. Krogan to

17   follow. Did I miss anybody?

18   COMMISSIONER MacCALLUM: Thank you very

19   much, Mr. Hodson, and thanks very much, counsel,

05:58 20   for staying.

21   *(Adjourned at 5:58 p.m.)*

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