

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

Transcript of Proceedings
and
Testimony before the Commission
sitting at the
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Saskatoon, Saskatchewan

On Tuesday, September 19th, 2006

Volume 185

Inquiry Proceedings



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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** Mr. Eugene Williams



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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning. Ms. Cox?

MURRAY BROWN, continued:

BY MS. COX:

Q Good morning, Mr. Brown. My name is Jennifer Cox,
and I'm here on behalf of the federal Minister of
Justice.

I wanted to talk to you just
generally, first, about your involvement with
Federal Justice, as it began, and I think your
evidence was that you initially became involved on
a very cursory basis after Mr. Milgaard's first
application was filed in late 1988; is that
correct?

A Umm, yes, sometime after that. It may have been a
little later.

Q Right.

A But it was some -- maybe 1990, maybe late '89, I'm
not sure, something like that.

Q And so would it be your evidence that Mr. -- your
contact with the Federal Department of Justice
basically increased on a gradual basis over that
period of time?



1 A That's correct, yes.

2 Q And the nature of your responsibility was to
3 essentially respond internally to your department
4 with respect to matters that arose in the media,
09:06 5 or questions that may have arisen from time to
6 time?

7 A Umm, well initially it was simply to advise the
8 director of prosecutions what the David Milgaard
9 matter was, then I'm guessing that she was having
09:06 10 communications with federal officials and was
11 wanting information, so she would ask me something
12 and, I'm again guessing, she was passing it on.

13 Q So --

14 A Her requests was very specific, and they
09:06 15 wouldn't -- she wouldn't be making those requests
16 if she wasn't being asked for something.

17 Q And there was no formal relationship established
18 between yourself, meaning Sask. Justice, and the
19 Federal Department of Justice during this period
09:06 20 of time?

21 A No.

22 Q It was very ad hoc?

23 A Oh, yes, absolutely.

24 Q And it's your evidence, then, that your
09:06 25 relationship with the federal Department of



1 Justice was satisfactory, that you had all your
2 questions answered?

3 A Umm, yes, we weren't having any difficulty with
4 Federal Justice.

09:07 5 Q And, as you asked questions, you were satisfied,
6 with the answers that you received, that the
7 matter was being thoroughly investigated or looked
8 at?

9 A I was satisfied, yes.

09:07 10 Q And that would be in your eyes as a former
11 prosecutor and having had at least 20 years
12 experience at that point in time in your career?

13 A That's correct, yes.

14 Q So could you characterize your relationship with
09:07 15 the federal officials you dealt with, did -- was
16 it a cordial, a collegial relationship?

17 A Oh yes, we didn't have any trouble with federal
18 officials. There were some things they couldn't
19 tell us, and we appreciated that, but there was no
09:07 20 problem between us.

21 Q If we could go to transcript 37109. If we start
22 at the top here, Mr. Brown, your answer to the
23 question here was:

24 "A No, it wasn't of concern, because we
25 were of the view that the Federal



1 Government people did a very thorough
2 job when they investigated these claims.
3 If they came up with anything they would
4 share it with us eventually so, no, it
5 wasn't a huge concern that they were
6 trampling in our garden."

7 I'm just wondering if you could give us a little
8 bit of background as to where you would come up,
9 where you would get that impression of Federal
09:08 10 Justice, meaning that they were very thorough in
11 their investigation?

12 A Well we had dealt with them, I mean this wasn't
13 the first time they'd ever done a 690 application,
14 we had had one or two of those in the past, and it
09:09 15 was our view that they were very thorough.
16 Certainly, what they were telling us about what
17 they were doing on this case, on the *Milgaard*
18 case, indicated that they were being very thorough
19 in investigating it.

09:09 20 Q And one of the things that you learned in your
21 conversations, in particular with Mr. Williams,
22 was that the federal Department of Justice did
23 have a line that they wouldn't cross in terms of
24 information sharing; is that correct?

09:09 25 A Well, I mean, they always made it clear that their



1 responsibility, first and foremost, was to their
2 minister and, I mean, they certainly weren't
3 prepared to give us the advice that they provided
4 to the minister and I think in, you know, in the
09:09 5 circumstances, that was proper. They could have
6 summarized it, perhaps, but in essence I think, by
7 the time it got to going to the minister, we knew
8 pretty much what their investigation had uncovered
9 anyway.

09:09 10 Q And, in your words, Mr. Williams tended to be
11 fairly discreet?

12 A Yeah.

13 Q So it was pretty clear, I mean, there was no
14 fuzziness about what the Department of Justice was
09:10 15 prepared to discuss and what they weren't prepared
16 to discuss?

17 A Oh, absolutely. Generally the discussions that we
18 had with them concerned very specific points,
19 usually something arising out of a newspaper
09:10 20 article. Ellen Gunn, who was the director of
21 prosecutions at the time, or I would check with a
22 federal official to find out what that was about
23 so that the minister could be briefed or the
24 deputy minister could be briefed, but they were --
09:10 25 they would give us the information we needed but



1 not, you know, a whole lot more, and they usually
2 didn't volunteer much.

3 Q Your communications with Mr. Williams were so
4 clear, in terms of the documents or the
09:10 5 information that they wouldn't share, that you
6 actually recognized inadvertently-disclosed
7 documents, if I can use lawyer-speak for a minute?
8 You recognized that there were documents
9 disclosed, prior to the reference, that shouldn't
09:11 10 have been disclosed; is that correct?

11 A Yes. They were internal communications.

12 Q Right. So what I am trying to establish here, Mr.
13 Brown, is that over the course of time it was very
14 clear to you that there were just certain things
09:11 15 that the federal minister just did not want to
16 share as a result of privilege and other concerns?

17 A Yes.

18 Q Okay. Now when you actually got to see the file
19 materials prior to your preparation of the
09:11 20 reference, and that apparently included the
21 McIntyre opinion as well, did you notice anything
22 out of step with what you had already understood
23 the matters to be; in other words were there any
24 red flags?

09:11 25 A No, there was nothing that came as a big surprise



1 in any of that.

2 Q So it was all consistent with what you had been
3 previously told by either Mr. Williams or your
4 department had been advised by --

09:12 5 A Yes.

6 Q -- other officials?

7 A Yes.

8 Q Once you participated in the reference and you had
9 the opportunity to observe the witnesses that Mr.
09:12 10 Williams had interviewed, had a more in-depth
11 knowledge of the application itself, did that
12 provide you with any more insight?

13 A Well obviously, once we got to read the actual
14 statements and stuff like that, we had a more
09:12 15 thorough knowledge of exactly what they'd
16 gathered. But in terms of sort of filling in any
17 big details, no, we had pretty much all the big
18 details by the time we got there.

19 Q So the impression of the live witnesses, and the
09:12 20 manner in which they gave their evidence, didn't
21 -- didn't --

22 A I don't recall any big surprises jumping out at
23 us. The only, again, the only witness we didn't
24 sort of know anything about before he testified
09:13 25 was David Milgaard, and we didn't have a -- much



1 from him that was current.

2 Q So in retrospect, when you look at the minister's
3 first decision to deny Mr. Milgaard relief, could
4 you understand the rationale behind the minister's
09:13 5 decision at that point?

6 A Oh yes.

7 Q Once you'd had the experience at the Supreme Court
8 reference and you'd also had the benefit of the
9 Supreme Court's decision in the matter, do you
09:13 10 feel that your ability to advise the federal
11 Department of Justice -- or sorry -- the
12 Saskatchewan Justice was independent, in other
13 words you were able to do that on the basis of
14 your experience and the Supreme Court's decision,
09:13 15 that you were no longer relying on what the
16 federal Minister of Justice had done?

17 A Well we -- the advice that was given to the
18 provincial minister after the Supreme Court
19 reference was based on what came out at the
09:13 20 Supreme Court.

21 Q Right.

22 A Not anything from the federal minister.

23 Q Now, Mr. Brown, if we could talk a little bit
24 about the reference process, and if we could bring
09:14 25 up transcript 37525. And if we could go here --



1 sorry -- to 526, at the tail end here, this is
2 a -- your evidence with respect to what the Chief
3 Justice had said prior to the reference
4 commencing?

09:14 5 A Yeah.

6 Q And the Chief -- here you have -- sorry -- you
7 have:

8 "... the Chief Justice made a couple of
9 comments, as I recall, that indicated
10 that he wasn't happy this was in the
11 Supreme Court and he thought the reason
12 it was there was the Federal Minister
13 needed to be bailed out."

14 And prior, if you want to skip back to the first
09:15 15 page here, to 525, at the top it says:

16 "We had a meeting ...",

17 whoops, sorry, at the bottom of that page:

18 "A We had a meeting early on with the Chief
19 Justice ...";

09:15 20 do you see that?

21 A Yes.

22 Q So that would be a meeting, probably, that
23 occurred where you and Mr. Neufeld were present,
24 Mr. Wolch, Mr. Asper, Mr. Frater; does that --

09:15 25 A Yes.



1 Q -- ring a bell?

2 A Yeah.

3 Q And is it possible that that meeting was early
4 December 1992?

09:15 5 A Umm, could have been. There was an early December
6 meeting and then again in July, as I recall, with
7 everybody.

8 Q In July?

9 A Or in January, sorry.

09:15 10 Q Sorry?

11 A 16 -- before the 16th.

12 Q So do you recall whether this meeting that you are
13 referring to here, that early meeting, would be
14 the meeting that was -- that the Court had set
09:16 15 deadlines for the disclosure of documents, they
16 had discussed reading materials over Christmas?

17 A I believe that December the 9th, or something like
18 that, or in around there, early December.

19 Q So at that point the Court wouldn't have had any
09:16 20 of the materials that were filed with Mr.
21 Milgaard's application, they wouldn't have really
22 had any knowledge of the file at all, right?

23 A No, I would think at that point they would have
24 just had the reference documents themselves, I
09:16 25 don't think they had anything filed with them.



1 Q So can you -- would you agree with me that the
2 atmosphere at that point was fairly anxious, that
3 the Court was in a hurry to get on with the
4 matter?

09:16 5 A Well certainly the, as I say, the impression that
6 I had in speaking with the Chief Justice at that
7 meeting was that they weren't terribly happy to be
8 having their time taken with this, they were
9 anxious that the time they provided not be wasted.

09:17 10 Q Do you recall that the documents were to be filed
11 within 10 days of that meeting; is that --

12 A I don't specifically recall that, but if there is
13 a memorandum to that effect, I would accept that.
14 Although, that said, I think we were filing
09:17 15 documents pretty much up to the last day of the
16 hearing.

17 Q And this would be an unusual procedure in that,
18 for the Court, in the sense that they are not used
19 to hearing live witnesses?

09:17 20 A No, that was the, what was it, the second time in
21 25 years they'd done that -- third time? Mr.
22 Wolch says it was the third time in 25 years, oh
23 yes, Truscott, Coffin, and this.

24 Q Okay. So is it possible that, at that point in
09:17 25 time, that the Chief Justice's remarks were



1 perhaps a little bit premature?

2 A Well, perhaps. I don't think he was referring to
3 the substance of the way the matter was handled, I
4 think he was referring to the public relations war
09:18 5 that was waged.

6 Q Okay. Now, Mr. Brown, the last thing I need to
7 speak to you about is media relations, in general,
8 from a government lawyer's perspective.

9 A Yes.

09:18 10 Q And I'm sure that, over the years, you have had
11 the benefit of watching media relations evolve in
12 terms of how lawyers and the media get along?

13 A Yes.

14 Q And that probably, early in your career, it would
09:18 15 have been common for the, for particularly justice
16 lawyers, not to speak with the media or engage the
17 media?

18 A Well, as I think I've said, the rules the Federal
19 Government was playing by in 1988, '89, '90, '91
09:19 20 were the same ones that we were playing by, you
21 didn't talk about things that were under
22 investigation or before the courts, period.

23 Q And that this, sort of, has changed over time?

24 A Well it's changed largely in response to the fact
09:19 25 that the position of defence lawyers, and those



1 who have clients whose interests need to be dealt
2 with, has changed. They now seek out the media
3 and put information before it, and our view is
4 that if you don't respond, you end up in the same
09:19 5 kind of situation that happened here.

6 Q And you probably are aware of the fact that media
7 training is something that lawyers are offered
8 more and more?

9 A That's right, yes.

10 Q It's more common --

11 A We offer it to our people.

12 Q Yeah. It's more common these days than it was
13 even at the beginning of, say, mid-'90s?

14 A Oh, yes, yes.

09:19 15 Q And do you recall when the policy started to
16 shift; was it around the mid-'90s?

17 A Umm, early '90s, mid-'90s, yes, it would be around
18 that period.

19 Q Okay. And I think your evidence has been that the
09:20 20 lack of provision of the McIntyre opinion to your
21 department after the minister's first decision
22 caused a great deal of frustration for your
23 department?

24 A Well, I don't know that it caused -- it wasn't so
09:20 25 much the lack of provision of that information to



1 my department that caused the frustration, it was
2 the failure of the Federal Government to respond
3 publicly and either make this available, or at
4 least comment on it such that they could answer
09:20 5 some of the suggestions being made by the Milgaard
6 camp. I mean we -- we wanted to see it, but I
7 don't know that we wanted to see it because we
8 were concerned that the minister may have been
9 misinformed, we were more concerned at that point
09:21 10 about the federal Department of Justice doing
11 something to answer the storm that was brewing in
12 the news, in the newspapers and television.

13 Q Right. So would you say that your experience post
14 reference, meaning your experience from the time
09:21 15 the decision from the Supreme Court was released
16 through the Breckenridge era and on, did your
17 perception of how to deal with the media change?

18 A Yes.

19 Q If we can go to transcript 37332, and if we can
09:21 20 just look at this paragraph here, you say:

21 "A Well, that said, I expect that had the
22 Federal Minister made public everything
23 that was given to Justice McIntyre, they
24 would have found some other way to be
11:53 25 critical of it. At the end of the day



1 they didn't get what they wanted and
2 their view was, you know, that the
3 campaign continues and there would have
4 been something else they would have
11:53 5 attached their sights to."

6 A Yes.

7 Q So would that be your post Breckenridge point of
8 view, if I could call it that?

9 A I -- well, certainly they were trying to make
09:22 10 something out of anything they could. That I
11 think is in reference to the February, 1991
12 decision of the minister. My view was that if
13 they had, if the federal government had provided
14 all of that material, they would have come up with
09:22 15 something else to be concerned about or something
16 else to fasten their sights to because they had a
17 campaign that they were still waging, they didn't
18 get what they want and they were going to continue
19 to push. The point, however, is that if you
09:23 20 provide some of that material, the public is then
21 in a position to do the assessment for itself, it
22 doesn't have to take just what one side is saying.

23 Q You are aware that at times individuals were
24 publicly named, particularly Federal Justice
09:23 25 officials, among others, in terms of inappropriate



1 comments or comments on their performance?

2 A Yes.

3 Q So would you agree with me that perhaps if
4 Mr. McIntyre's opinion had been released and it
09:23 5 didn't grant Mr. Milgaard the relief, or suggested
6 the relief that the Milgaard camp wanted to see,
7 that perhaps Mr. McIntyre would have been
8 subjected to inappropriate or poor comments?

9 A Oh, yeah, why wouldn't they attack him.

09:23 10 Q So would you agree with me that perhaps that might
11 have been a consideration for the Minister of
12 Justice?

13 A Could have been.

14 Q Given your experience, I'm asking you in that
09:24 15 context.

16 A Well, it's possible, but knowing the way the
17 federal government worked at that time, my better
18 guess would be that it was the sort of attitude
19 that advice to ministers is never shared.

09:24 20 Q Okay. And if some of this information had been
21 shared and had been the subject of a public, a
22 negative public campaign, you know, naming
23 Mr. McIntyre, for example, and suggesting that he
24 didn't do what the Milgaard people thought he
09:24 25 should have done, do you think that that would



1 have had an impact on the administration of
2 justice as well given that he was a retired
3 Supreme Court of Canada justice?

09:24 4 A Well, again, if you've released the information
5 that Justice McIntyre has and the opinion he
6 writes, the public is in a position and the news
7 media are in a position to see for themselves what
8 was there and what he made of it. Then the
9 Milgaard camp can fire whatever bullets they have
09:25 10 and the public can assess the whole thing. The
11 difficulty, as I said, was that we went through,
12 what, three years of only the Milgaard camp
13 addressing the news media and they used it very
14 effectively.

09:25 15 Q But I guess it would be unpredictable to know
16 exactly what the impact of releasing some of those
17 documents would be on the individuals who had
18 authored them?

19 A Oh, yeah, I think one could assume that if it was
09:25 20 unfavourable, if the results of their opinions
21 were unfavourable to the Milgaards, they would be
22 criticized by the Milgaards.

23 Q Now, in your role within Saskatchewan government,
24 I'm sure you've come across the situation where
09:26 25 it's desirous or it would be nice to release



1 privileged, solicitor/client privileged material
2 or material that's not ordinarily released because
3 it would certainly explain, or answer any
4 questions that might be raised. Would you agree
09:26 5 that that happens from time to time?

6 A Oh, yes.

7 Q And the dilemma for governments is that if you do,
8 you release this information on one file, that you
9 are compelled to do it on others as well. Would
09:26 10 you agree?

11 A Well, the dilemma right now for us is that the
12 Freedom of Information and Protection of Privacy
13 Act usually blocks --

14 Q A lot of it?

09:26 15 A -- a lot of information from being released even
16 when, quite frankly, nobody can particularly see
17 the harm in releasing it, but in terms of setting
18 precedence, yes, I suppose that's always a concern
19 too.

09:26 20 Q And at the time the documents are prepared, they
21 are not prepared with the intention that they will
22 be distributed for public consumption?

23 A No, not usually.

24 Q So to assist in that process, a document that was
09:27 25 prepared that contained the facts but was also



1 prepared in anticipation of public consumption
2 would probably solve that dilemma?

3 A Yes.

4 COMMISSIONER MacCALLUM: Can you give me
09:27 5 the name of that statute again that you cited
6 there?

7 A Freedom of Information and Protection of Privacy.

8 COMMISSIONER MacCALLUM: Thank you.

9 BY MS. COX:

09:27 10 Q And from an internal point of view, being required
11 to provide privileged advice, or being --
12 producing privileged advice would cause some
13 stifling of discussions within, you know, amongst
14 the lawyers within the government departments, or
09:27 15 has the potential to do that?

16 A Well, yes, if you assume that every document is
17 liable to be made public, yes, that could have
18 that effect.

19 Q And that would have a negative impact possibly?

09:27 20 A Yes.

21 Q On the administration of justice?

22 A If officials can't be candid with each other and
23 with their minister, that's a problem.

24 Q One of the comments that you made to Mr. Hodson
09:28 25 was with respect to the Supreme Court reference



1 never happening. I think your evidence was that
2 you suggested that the reference would never have
3 happened had it not been for the media campaign;
4 is that correct?

09:28 5 A That's correct.

6 Q Now, the perspective that you have on that is not
7 that anybody wanted to deny Mr. Milgaard his day
8 in court, is it, like, they weren't maliciously --

9 A No, my point was that had it not been for the
09:28 10 media campaign, particularly the one between the
11 reference being called and the first application
12 being denied, the minister would never have gone
13 looking for a public forum in which to air this.

14 Q Right. And another way of putting it perhaps
09:29 15 would be that the federal -- the public needed to
16 know what the federal government knew as well as
17 what the Saskatchewan government knew about Mr.
18 Milgaard's applications and the evidence regarding
19 his convictions; correct?

09:29 20 A Well, certainly what they knew, yes.

21 Q Right. So it was -- when we talk about a public
22 forum, it's just to let everybody else know what
23 it was that you as Sask Justice knew as well as
24 what the federal government knew about the file
09:29 25 itself?



1 A Yes, subject to the fact that we didn't know
2 everything.

3 Q Correct. But I guess the context within that
4 comment was just simply that it wasn't that Mr.
09:29 5 Milgaard wasn't going to be given a remedy if he
6 had demonstrated --

7 A Oh no, no, no, no, I didn't mean to imply that, I
8 meant to suggest that the reason for the public
9 airing was because of that publicity campaign.

09:30 10 Q And --

11 A Otherwise it would have been handled I expect, his
12 second application would have been handled through
13 the same process as the first.

14 Q Right. And, I mean, we're all in agreement that
09:30 15 if there was a remedy to be given, that Mr.
16 Milgaard would have been given, or would have been
17 sent to a court and we all agree that it wasn't
18 going to be the Saskatchewan Court of Appeal in
19 any event, it had to be the Supreme Court of
09:30 20 Canada?

21 A That's right.

22 MS. COX: Okay. Those are all my
23 questions, Mr. Brown. Thank you very much.

24 BY MS. KROGAN-STEVELY:

09:30 25 Q Mr. Brown, it's for the record that I say my name



1 is Lana Krogan.

2 I would like to start, Mr.
3 Brown, with the similar fact evidence. Sir, would
4 it be fair to say that you weren't the only one
09:31 5 who assessed the similar fact evidence argument
6 put forward by the Milgaards and weren't the only
7 one who concluded that there was an insufficient
8 link between the Larry Fisher information and the
9 Gail Miller murder to either re-open an
09:31 10 investigation or proceed with charges?

11 A Yes, certainly that was the view that Eric Neufeld
12 held. It was the view that the federal lawyers
13 held as well.

14 Q Thank you. And in fact there are a few more, and
09:31 15 I intend to go through that list, and I just want
16 to consider this issue, Mr. Brown, pre-DNA test
17 and post-DNA test, and let's just start with the
18 pre-DNA test results. Now, the first application
19 contained the argument that Larry Fisher, those --
09:32 20 the sexual assaults or rapes that he committed
21 were sufficiently similar to the Gail Miller
22 murder and therefore it had to be -- it had to be
23 him; is that correct?

24 A That's correct.

09:32 25 Q And in fact David Asper testified before this



1 inquiry that this information was put in both the
2 first and second applications and he thought the
3 same quantity or amount had been put in both, it
4 was just packaged differently, but because it was
09:32 5 in the first application, the federal government
6 officials, to your understanding, oversaw the RCMP
7 investigate that part of the allegations; is that
8 correct?

9 A That was my understanding, yes.

09:32 10 Q And were you aware, sir, that Rick Pearson, after
11 that investigation, concluded that there was,
12 although suspicious, there was an insufficient
13 link between the similar fact evidence, if I can
14 call it that, or almost similar fact evidence, and
09:33 15 the Gail Miller murder; were you aware of that?

16 A I was aware of that, yes.

17 Q So we've got Rick Pearson, his investigation, or
18 the fruits of that investigation then go to
19 Minister Campbell who also concluded there was an
09:33 20 insufficient link between this similar fact
21 evidence and the Gail Miller murder; would you
22 agree with that?

23 A Yes.

24 Q Of course, as there has been much discussion about
09:33 25 this, former Justice McIntyre reviewed that



1 information as well and came to the same
2 conclusion; correct?

3 A That's right, yes.

4 Q The Supreme Court then considered the issue and
09:33 5 considered it specifically, after argued by Mr.
6 Wolch, that they should make the connection and
7 that was not their finding; would you agree with
8 that?

9 A That would be my interpretation of the judgment,
09:33 10 yes.

11 Q All right. Number five on my list then is
12 Mr. Eric Neufeld who of course did accompany you
13 to Ottawa and, as you say, he held that view as
14 well; correct?

09:33 15 A Yes.

16 Q And number six on my list is the federal officials
17 involved in the reference and, as you say, they
18 did not come to that conclusion either; is that
19 correct?

09:34 20 A That's correct.

21 Q I have a number seven on my list, and this again
22 is pre DNA, sir, the Flicker investigation, and
23 that was in 1993 when we had a team of RCMP
24 members who ostensibly reinvestigated the matter
09:34 25 and the conclusion was likely -- well, the



1 conclusion was that David Milgaard was the person
2 most likely to have committed the rape and murder
3 of Gail Miller; is that correct?

4 A That's correct, yes.

09:34 5 Q Now, I count seven in support of you at that
6 point, at this point, Mr. Brown, but -- so until
7 this point, and this is of course pre DNA, Mr.
8 Wolch seems to be in the minority in this argument
9 that there is a link between the similar fact
09:34 10 evidence and the Miller murder; is that correct?

11 A Well, certainly he and Mr. Asper --

12 Q Yes, indeed.

13 A -- saw something the rest of us weren't seeing.

14 Q All right. Now, Mr. Brown, Mr. Asper and Mr.
09:35 15 Wolch also thought that (V14)- (V14)- was
16 sufficiently similar to include the circumstances
17 of that sexual assault in with the similar fact
18 evidence argument; is that correct?

19 A Yes. She was in the chart I think.

09:35 20 Q I believe she was, and in fact she was the one who
21 thought that David Milgaard had perpetuated that
22 sexual assault on her; is that correct?

23 A I believe so, yes.

24 Q And of course not all the other, not all of the
09:35 25 incidents put forth in that application as



1 sufficiently similar were in fact accepted by the
2 Larry Fisher trial judge; isn't that correct?

3 A Oh, that's correct, yes.

4 Q Now, post DNA, and when of course there is an
09:35 5 absolute link between Mr. Fisher and the Gail
6 Miller, as you say, rape and the logical inference
7 is the murder as well, the examples that Mr. Wolch
8 put to you yesterday of those who supported his
9 argument were post DNA; is that correct?

09:36 10 A Yes.

11 Q And of course he mentioned the Larry Fisher trial
12 prosecutors and the Supreme Court, but also
13 appellate counsel on the Larry Fisher conviction
14 matter, Mr. Gerein; is that correct?

09:36 15 A That's correct.

16 Q And would it, sir, be safe -- would it be correct
17 to say that appellate counsel are largely bound by
18 the views and the facts argued by trial counsel?

19 A Yes. It's pretty difficult to stray from the
09:36 20 position they've taken.

21 Q Now, in light of the DNA results, Mr. Brown, are
22 you able to tell us whether or not your view of
23 many of the elements of the evidence such as the
24 Linda Fisher evidence or Ken Cadrain, Nichol
09:37 25 John's statement or Ron Wilson, might your views



1 of the value of those items of evidence have
2 changed, or have they in light of the DNA
3 evidence?

4 A Well, again, my view is that while yes, you can
09:37 5 review a single piece of evidence and if you find
6 it utterly unreliable discard it. If you don't
7 find it utterly reliable, then the value, the
8 weight you might assign to it is going to vary
9 depending on what the rest of the evidence is, so
09:37 10 you look at the whole picture, not just individual
11 little parts.

12 Q And as you stated several times yesterday, the
13 picture, that picture changed once the DNA test
14 was completed?

09:37 15 A Oh, ab -- for me it certainly did, yes.

16 Q Absolutely, and for many others. Mr. Brown,
17 yesterday Mr. Wolch walked you through many points
18 that you raised in the course of your closing
19 argument to the Supreme Court and he did not limit
09:38 20 that walk through to the views or his views on the
21 similar fact evidence and he challenged you on all
22 of that. Did he not similarly challenge your
23 views of this evidence at the Supreme Court?

24 A Oh, yes.

09:38 25 Q Made the very same argument --



1 A He was making the argument that the Larry Fisher
2 evidence proved he was guilty.

3 Q And made argument as to the value of the other
4 pieces of evidence as well; is that correct?

09:38 5 A Yes, absolutely.

6 Q And of course if we take, as you say, the literal
7 meaning of the Supreme Court's decision, we know
8 that all of his points, or many of them, weren't
9 accepted by the Supreme Court; is that correct?

09:38 10 A Well, the Supreme Court said that there wasn't
11 enough evidence to charge Larry Fisher, so
12 presumably they didn't -- I wouldn't say they
13 didn't accept that evidence, but they didn't give
14 it the weight he did.

09:38 15 Q And they also concluded, sir, that David Milgaard
16 was not either innocent beyond a reasonable doubt
17 nor probably innocent; is that correct?

18 A That's correct, yes.

19 Q Mr. Brown, do you know how many witnesses were
09:39 20 called at the Supreme Court reference, and if you
21 don't, I do.

22 A No, I don't know. I would have to tally it up
23 from the index.

24 Q Does 22 sound about right?

09:39 25 A Yes. If you say it's 22, I'll accept it's 22.



1 Q Mr. Brown, Stickel, Dozenko and Ken Cadrain would
2 be three of 22 if you accept, and I'm accurate,
3 that there were 22 called at the reference; would
4 that be correct?

09:39 5 A Yes.

6 Q And the volume of the evidence they provided
7 compared to the evidence in total, how would you
8 characterize that, Mr. Brown?

9 A Well, it wasn't particularly great and it wasn't
09:39 10 particularly strong, but it was there.

11 Q For what it was?

12 A For what it was, yes.

13 Q And I'm going to state the obvious, Mr. Wolch did
14 have an opportunity at that time to comment, make
09:40 15 comment and make argument before the Supreme Court
16 as to the value of that evidence; is that correct?

17 A Oh, yes.

18 Q Now, let me preface this next comment by saying
19 hindsight is 20/20 and of course we do know now
09:40 20 that Larry Fisher is guilty of the offence, but at
21 that time, that is, the time of the Supreme Court
22 reference, we had Mr. Wolch and Mr. Asper wanted
23 two witnesses in particular called, those being
24 Brett Morgan and John Patterson. Do you recall
09:40 25 those two witnesses?



1 A Yes. I believe Patterson was the one that worked
2 for Saskatchewan Corrections and the other guy was
3 the guy in jail serving a manslaughter sentence I
4 think.

09:41 5 Q Unless my research is inaccurate, and I'll be
6 corrected, I think Hewitt was the corrections
7 officer. Pardon me, Patterson is?

8 A He was the corrections officer I'm pretty sure.

9 Q It doesn't actually matter. Brett Morgan was an
09:41 10 inmate at that time?

11 MR. WOLCH: Just to correct firstly,
12 Mr. Stickel did not testify.

13 MS. KROGAN-STEVELY: Oh, well, evidence was
14 put forward or statements --

09:41 15 MR. WOLCH: Oh, it was put forward.

16 MS. KROGAN-STEVELY: That was your
17 argument.

18 MR. WOLCH: I'm just saying Stickel was not
19 a witness at the Supreme Court and Patterson, who
09:41 20 was a witness in the Fisher trial as well, was
21 not at that time -- when he heard the comment he
22 was an inmate, but he was a correctional officer
23 by the time he testified in the Supreme Court, he
24 had rehabilitated himself to the point where he
09:41 25 was a correctional officer himself and he was a



1 witness in the Fisher trial.

2 MS. KROGAN-STEVELY: I appreciate that
3 correction.

4 COMMISSIONER MacCALLUM: Thank you.

09:42 5 MS. KROGAN-STEVELY: I don't think it
6 impacts on my question, Mr. Commissioner. Brett
7 Morgan -- Mr. Wolch, if you have something
8 further to add, please do.

9 MR. WOLCH: I don't believe Kenny Cadrain
09:42 10 testified either at the Supreme Court.

11 MS. KROGAN-STEVELY: His statements went in
12 in the documentary evidence.

13 MR. WOLCH: I guess what I'm saying, that
14 the point was made that of the witnesses that
09:42 15 were called, three of them were Cadrain, Dozenko
16 and Stickel. Kenny Cadrain and Stickel were not
17 witnesses of the 23, that's all I'm saying.

18 MS. KROGAN-STEVELY: Then that diminishes
19 the --

09:42 20 MR. WOLCH: Well, yeah, I'm just telling
21 you.

22 BY MS. KROGAN-STEVELY:

23 Q I appreciate that, Mr. Wolch, and my point is that
24 diminishes even more sort of the quantity of the
09:42 25 evidence comparatively put before the Supreme



1 Court.

2 A Well, okay.

3 Q I appreciate that, Mr. Wolch. Brett Morgan was an
4 individual, sir, who was -- the information -- and
09:43 5 now I better check. Yes, he was actually called.
6 He was an individual --

7 A Oh, he testified all right.

8 Q Yes, he did.

9 A He was the one who caught the attention of the
09:43 10 young freelance reporter who he later married and
11 murdered.

12 Q Well, so an individual of not such stellar
13 character who he knew at the time had committed a
14 manslaughter?

09:43 15 A I think everyone knew going into the Supreme Court
16 that he wasn't particularly stellar in character.

17 Q And my point, Mr. Brown, is that he was, and, as I
18 say, hindsight is 20/20, I accept that, but at
19 that time he was put forward by, at the suggestion
09:43 20 of Mr. Asper and Mr. Wolch as someone who had
21 credible evidence that Larry Fisher had made an
22 admission to him during their time in the
23 penitentiary; is that correct?

24 A Well, yes, but, you know, it was there for what it
09:43 25 was worth.



1 Q And my point is that's similar to what
2 Mr. Stickel's evidence was put in, for that reason
3 as well?

4 A Yes.

09:44 5 Q For what it's worth?

6 A It was there for what it was worth.

7 Q The complexion of the evidence from Mr. Stickel or
8 Mr. Morgan really amounts to the same type of
9 evidence being offered by both sides, if I can put
09:44 10 it that way. Would you agree?

11 A Well, I would agree that there was certainly
12 evidence that you wouldn't be allowed to put into
13 a court and wouldn't try to get into a court put
14 in by both sides and I would think in a courtroom
09:44 15 you wouldn't be inclined to call Brett Morgan
16 because he was just such a reprehensible
17 character, such a bad record.

18 Q Mr. Brown, Saskatchewan, and you've said this a
19 number of times, relied on the literal, a literal
09:44 20 interpretation of the Supreme Court decision;
21 correct?

22 A Yes.

23 Q And of course we know that Mr. Wolch and Mr. Asper
24 took different views of many of the things that
09:45 25 the Supreme Court said. You would agree with that



1 as well?

2 A Absolutely.

3 Q Now, is there -- Mr. Brown, did Saskatchewan have
4 any investment at all in massaging that decision,
09:45 5 in manipulating what the Supreme Court said or
6 might have said, is there any reason at all that
7 Saskatchewan would have done that?

8 A No. The decision was there for the public to
9 read. We're not going to try to put a spin on it
09:45 10 that's indefensible.

11 Q And in fact, Mr. Brown, you testified here that
12 you were prepared, and I presume Mr. Neufeld was
13 as well, you were prepared that if there was any
14 miscarriage of justice that you identified in the
09:45 15 course of that hearing, you would have been
16 prepared to call it such and proceed based on that
17 miscarriage having been made public or made known;
18 is that correct?

19 A Yes.

09:46 20 Q Mr. Brown, on the issue of police misconduct, in
21 the course of cross-examination I believe it was
22 Mr. Wolch who brought up your interview with the
23 CBC and that was on January 20th, 1992. Do you
24 recall that?

09:46 25 A Yes.



1 Q And for ease of reference, that document number,
2 that is, the transcript of that January 20th
3 interview, is number 327858. We don't have to
4 bring that up though. And it was brought to your
09:46 5 attention that at that time you made comment, you
6 explained that comment to us, but I think the
7 argument in cross-examination was that
8 Saskatchewan wasn't of the view that police
9 misconduct was on the table at the Supreme Court
09:47 10 reference. Would you agree with me?

11 A Well, that was --

12 Q -- the argument?

13 A That was the argument, yes.

14 Q That certainly wasn't your position, I don't want
09:47 15 to --

16 A That's correct.

17 Q -- confuse either of us. If we could bring up
18 document 010085, please. Mr. Brown, these are
19 your notes I think you testified before this
09:47 20 inquiry?

21 A Yes.

22 Q And at the top of that page, December 9th, 1991;
23 is that correct?

24 A Yes.

09:47 25 Q And that predates of course the December -- pardon



1 me, the January 20th interview with CBC; correct?

2 A That's correct.

3 Q If we could turn to page 87 and call that out,
4 please, you've made a notation, sir:

09:48 5 "Do Sktn city police have note books re
6 interviews of Cadrain John Wilson etc."

7 Correct?

8 A Yes.

9 Q And do you recall who was looking for those notes,
09:48 10 sir?

11 A Well, I suspect it was probably the federal people
12 that wanted to see whether there were notes and
13 asked us to go back and look for them, though they
14 would have been of interest to us because
09:48 15 certainly there wasn't much -- by then I had read
16 the file and by then I knew that there wasn't much
17 in the way of a description of the process of the
18 interviews with those people in the actual
19 occurrence report that was on T.D.R. Caldwell's
09:49 20 file.

21 Q So this issue was discussed at that meeting,
22 though, clearly given that you made a notation of
23 it?

24 A Yes.

09:49 25 Q If we can go back to page 85, please, I just



1 neglected to point out to you, we've got December
2 9th meeting in Ottawa, Milgaard briefing meeting,
3 and apparently the names here are listed as to who
4 was present at the meeting. Would I be correct?

09:49 5 A Yes, that's correct.

6 Q Wolch, Asper, MacFarlane, Neufeld. All right. So
7 clearly Mr. Wolch and Mr. Asper would have been
8 aware that this was an issue that was discussed
9 during the course of that meeting then?

09:49 10 A Yes.

11 Q Can we have document 002623 brought up, January
12 14th, 1992 letter to Mr. Fainstein. If you can
13 just go to the last -- the second page, please.
14 Yours sincerely, Murray Brown. This is a letter
09:50 15 that's originated from you; correct, Mr. Brown?

16 A Yes.

17 Q Back to the first page, kindly, thank you. Oh,
18 I'm sorry, pardon me, back to the second page.
19 Starting there:

09:50 20 "Edward Karst would be expected to
21 testify about the handling and
22 questioning of Ronald Wilson and Nicole
23 John ... when they gave their statements
24 implicating Milgaard."

09:50 25 And if you could just go down on that page as



1 well, please, it is c.c.'d to Mr. Wolch and Mr.
2 Asper?

3 A Yes.

4 Q Clearly that letter dated January 14th, 1992,
09:50 5 which again predates the January 20th interview,
6 it would appear that this is a live issue;
7 correct?

8 A That's correct.

9 Q 009782, please. January 17th, 1992 letter, this
09:51 10 is from the Wolch firm, if we could please turn it
11 to the next page, it is a letter from Mr. Wolch.
12 Back to the first page, please. Mr. Wolch is
13 outlining his areas of concern, and that
14 paragraph:

09:51 15 "Considerable effort has been
16 made through hypnosis to revive Nicol
17 John's 'memory'. You already have our
18 views in this regard but I am wondering
19 whether any effort has been made to have
09:51 20 her recount her interrogation by the
21 police and in particular, the
22 polygrapher."

23 Would you agree, Mr. Brown, that as of January
24 17th, 1992, particularly with respect to Ms.
09:52 25 John, Mr. Wolch is wanting to know whether or not



1 the police may have properly or improperly
2 proceeded with questioning; would you agree?

3 A Yes.

4 Q Again this document 009799. This is a letter --
09:52 5 we have actually, Mr. Commissioner, used an
6 alternative document ID number previously, but I
7 wanted this document brought up because of the
8 cover letter, but the previous document ID that
9 we've used is 156858.

09:53 10 A cover letter from
11 Saskatchewan Justice, and I believe that's your
12 handwriting, isn't it, Mr. Brown?

13 A Oh yes.

14 Q And this is directed to Mr. Hersh Wolch on January
09:53 15 30th, 1992; is that correct?

16 A Yes.

17 Q And, if we could, would you kindly turn to the
18 next page. Starting right there, you write:

19 "We would also expect that the Court

09:53 20 would want to hear from Detectives

21 Short, Mackie & Karst ...",

22 as well as:

23 "... Deborah Hall and Ute Frank."

24 Mr. Brown, would there be other reasons or -- why
09:53 25 those individuals, those police officers, would



1 be called other than to examine their dealings
2 with the witnesses?

3 A No, that was, based on the date there, that would
4 have been after David Milgaard, Ron Wilson, Nichol
09:54 5 John testified, and the whole point of calling
6 them was to discuss or get out the evidence with
7 respect to how they were -- these witnesses were
8 questioned, how they were treated by the police,
9 etcetera.

09:54 10 Q And in fact that's the very reason that Mr.
11 Roberts was called to provide evidence; correct?

12 A Yes.

13 Q So even if, despite the previous correspondence,
14 one might not have been aware that this was a live
09:54 15 issue, would you agree that certainly after Ron
16 Wilson and Nichol John had testified at the
17 Supreme Court it was a live issue?

18 A Oh yes.

19 Q And, finally, 009810 please. This is a letter
09:55 20 dated January 31st, 1992 from Mr. Frater to
21 yourself, and if we could turn to the next page,
22 please, it's a copy to you and the original letter
23 was sent to the Mr. Justice Lamer. And if we
24 could call out that paragraph, kindly, it reads:

09:55 25 "Agreement was reached on



1 three sets of witnesses, whose names
2 appear in the attached draft Order. Dr.
3 Fleming ...",

4 and:

09:55 5 "The next set of witnesses are former
6 police officers, who can speak, inter
7 alia, to the way in which statements
8 were obtained from Mr. Wilson and Ms.
9 John."

09:56 10 Agreement was reached on these three sets of
11 witnesses. And there is a c.c. on the next page,
12 if you'd kindly turn over, Mr. Wolch and Mr.
13 Asper are listed in that c.c. as well. One would
14 presume that agreement did include Mr. Wolch and
09:56 15 Mr. Asper; correct?

16 A I would assume so, yes.

17 Q If I could have transcript, it's a May 30th
18 transcript, and it is a -- the transcript of
19 Mrs. Joyce Milgaard. Could we -- could I have
09:56 20 page 31557 put on the screen, please. Actually,
21 the next page. This, Mr. Brown, began a
22 discussion about Mrs. Milgaard's response to some
23 of the letters that Mr. Mitchell had signed and
24 had provided to members of the public, and in
09:57 25 examination by Mr. Hodson he raises one of those



1 letters and it, the document ID of the letter he
2 raised is 162851, and it's contained in the
3 previous page of his transcript. But, starting
4 there, the tenor of that letter is:

09:57 5 "... Mr. Milgaard's counsel was given
6 the broadest possible latitude in
7 calling whatever evidence he thought
8 would establish his allegations that his
9 client had been the subject of police or
10 crown wrongdoing and that Larry Fisher
11 was the guilty party. Not once was Mr.
12 Milgaard's counsel told he could not
13 call the evidence he wanted and not once
14 was he refused a subpoena for any
15 witness he thought might be helpful."

16 At the bottom:

17 "Since you apparently have
18 access to the transcript of the Court
19 proceedings, you will note that Mr.
20 Milgaard's counsel did call two police
21 officers and did go into the police
22 investigation. All other police
23 officers involved with these cases would
24 have been available had his counsel
09:58 25 wanted them to testify."



1 If we could turn to the next page, please, page
2 31560. Thank you. Then Mr. Hodson asks
3 Mrs. Milgaard:

4 "Q And what was your response to this
5 position that Mr. Mitchell was taking
6 about, I think if I can summarize,
7 saying 'lookit', to the public, 'David
8 Milgaard's lawyer could have called all
9 these witnesses if he had chose and he
10 chose not to'?

11 And Mrs. Milgaard's response was:

12 "A I would have said it wasn't true.

13 Q Okay. And that --

14 A Because I remember we were trying to
15 get Mackie, we were trying to get
16 others, and we couldn't get them for
17 the -- out of town or, you know, there
18 were different reasons given at the
19 time. But I, I would have certainly
20 said this was not true."

21 Mr. Brown, based on that exchange and
22 Mrs. Milgaard's response, would you agree with me
23 that she was of the view or that she wanted the
24 other police officers called to address that
09:59 25 issue?



1 A Well, she appeared to, yes.

2 Q Thank you. She was of the view, sir, that it was
3 a live issue, would you agree, based on that, that
4 exchange?

09:59 5 A Oh yes.

6 Q Mr. Brown, Ms. McLean questioned you about how the
7 Milgaards could have proved the allegations of
8 impropriety, and this I think was in the context
9 of the Supreme Court reference, "how could we have
10:00 10 proved things such as police misconduct or coverup
11 on the part of the Crown"; do you recall that, --

12 A Yes.

13 Q -- those questions? I just want to take it a step
14 back for a moment. Can you comment on the
10:00 15 propriety of making allegations publicly and not
16 being able to prove them?

17 A Well, generally one has the proof in one's back
18 pocket before you go after slandering people, but
19 --

10:00 20 Q But that's your view?

21 A That's my view, yes.

22 Q Mr. Wolch in cross-examination, and this was in a
23 discussion about the information that was put
24 forward in the media, Mr. Wolch had suggested to
10:01 25 you that two main issues they put forward were in



1 fact accurate, those two being that David Milgaard
2 is innocent and Larry Fisher is guilty; do you
3 recall that exchange?

4 A Yes.

10:01 5 Q And, of course, you would agree that that is
6 certainly the case?

7 A That's, yes.

8 Q Those are accurate?

9 A Yes.

10:01 10 Q And have been shown to be so due to the DNA test
11 results?

12 A That's correct, yes.

13 Q Now in characterizing it that way, that is in
14 characterizing or perhaps I should say
10:01 15 generalizing the theses put forward in the media,
16 would you agree with me, firstly, that these are
17 generalizations of the stories that were being put
18 forward to the media through the Milgaard group?

19 A Well, I mean, that was the advocate's position,
10:01 20 that David Milgaard was innocent and Larry Fisher
21 was guilty, and I have no objection to them
22 putting that out. It's when you support that with
23 unsubstantiated slander against other people.

24 Q And that's my point, sir.

10:02 25 A That was my concern.



1 Q The specifics of those two theses, the
2 underpinnings, if I could put it that way, those
3 weren't necessarily true, despite that the
4 over-arching 'Mr. Milgaard is innocent and Mr.
10:02 5 Fisher is guilty', those were true, --

6 A Yes.

7 Q -- it's the specifics that weren't; would you
8 agree? For instance, Ron Wilson's statement not
9 being disclosed, --

10:02 10 A Yes.

11 Q -- bone-handled hunting knife mysteriously going
12 missing; would you agree with me on those two?

13 A Yes.

14 Q The semen containing a number of human pubic hairs
10:02 15 was, in fact, dog urine?

16 A Yes.

17 Q That Deb Hall's story contradicted what -- the
18 evidence that Mr. Melnyk and Mr. Lapchuk provided
19 at the original trial?

10:02 20 A Yes.

21 Q That Saskatchewan -- or pardon me -- that
22 Saskatoon Police Service framed David Milgaard?

23 A Yes.

24 Q And, finally, that Saskatchewan Justice officials
10:02 25 suppressed evidence?



1 A Yes.

2 Q False, all false?

3 A Yes.

4 Q Mr. Brown, you were also asked about the written,
10:03 5 Mr. Caldwell's written note documenting what he
6 was told about Nichol John's witness waiting room
7 comments. And that document, for the record, is
8 059128, and perhaps it just -- would you kindly
9 just put that up for a moment? Do you recall a
10:03 10 conversation about this, --

11 A Yes.

12 Q -- about this notation made by --

13 A Yes.

14 Q -- Mr. Caldwell? Mr. Wolch read excerpts of Mr.
10:03 15 Caldwell's inquiry testimony, and do you recall
16 that, sir?

17 A Yes.

18 Q And he suggested that, and given Mr. Caldwell's
19 answers, either that the evidence wouldn't have
10:03 20 had any value at the reference had he been called,
21 or perhaps Nichol John's message wasn't accurately
22 recorded, I suppose either of them would be a
23 logical inference to draw based on the questions
24 Mr. Wolch was putting forward to you?

10:04 25 A It was an argument that could have been made, yes.



1 Q And would you agree, though, with the general
2 proposition that a person's memory fades over time
3 and, for instance, between 1992 and 2005 memories
4 could fade?

10:04 5 A Yes.

6 Q Now, in terms of the accuracy of what Mr. Caldwell
7 recorded, if I could have a transcript brought up,
8 this is a -- an April 13th, 2005 transcript here
9 at the Inquiry, Ms. Peggy Morrow is testifying,
10:04 10 it's page 7684. Ms. Morrow was asked about the
11 incident in the witness waiting room and, here,
12 Mr. Hodson is asking the questions:

13 "Q Now, I want to ask you about while you
14 were at the preliminary hearing. Did
15 you have occasion to be in a room with
16 other witnesses?

17 A Yes, I was.

18 Q And can you tell us what you recall
19 about what you observed and heard at
20 that time?

21 A Well, I remember being in the witness
22 room and I remember sitting beside a
23 girl and her mom and then I couldn't
24 recall who else was in there, ...",
10:05 25 and then she goes on to explain that she recalls



1 Albert and Nichol and Ron. If we could turn the
2 page, please, the question is:

3 "Q And tell us what you recall observing
4 and hearing?

5 A Well, I remember, like I said, Nichol
6 and Albert were in front of me and I
7 remember her, Nichol saying I don't
8 know why he didn't arrest me because I
9 seen him do it.

10 Q And who was she saying that to?

11 A I have no idea.

12 COMMISSIONER MacCALLUM: Don't know why he
13 didn't what?

14 A I don't know why he didn't arrest me,
15 why they didn't arrest me because I
16 seen him do it."

17 If you would go to the next page, kindly. And
18 Mr. Hodson then brings up that very note that was
19 just on the screen:

20 "BY MR. HODSON:

21 Q I'm just going to call up a note here, I
22 think of Mr. Caldwell, it's 059128, and
23 this note relates to someone
24 overhearing -- it actually says here at
25 the top, if we can just call it out, it



1 says:

2 'Mrs. Miller, Mary Marcoux, Albert
3 Cadrain all heard N. John say, "I
4 don't know why he didn't kill me too
5 - I was right there and saw it all,
6 but I'm not going to say nothing".'

7 Now, those quoted words, does that -- I
8 think you told us what you recall is
9 that I don't know why they didn't arrest
10 me; is that right?

11 A Uh-huh."

12 Q These words here, 'I don't know why he
13 didn't kill me too,' do you recall those
14 words being --

15 A That could have been, it could have
16 been either killed or arrested.

17 Q Arrested, okay. And so the rest of
18 what's recorded here, is that close to
19 or accurate as to what you heard in that
20 room but from Nichol John?

21 A Yes."

22 So, in terms of corroborating Mr. Caldwell's
23 information that he received at that time, it
24 would appear that Ms. Morrow had corroborated
25 that here at the Inquiry; would you agree?

10:07



1 A Yes.

2 Q Mr. Brown, again in cross-examination Mr. Wolch
3 raised and you responded to a number of
4 circumstances surrounding the Larry Fisher guilty
10:07 5 pleas that Mr. Wolch or Mr. Asper argued were
6 suspicious, one of those being that the victims
7 wasn't -- pardon me -- the victims weren't told of
8 the outcome of those guilty pleas; is that
9 correct?

10:08 10 A That's correct.

11 Q And your response was "well that was done
12 sporadically in 1970, prosecutors didn't do it,
13 the police did"; and I -- do I have that response
14 accurate?

10:08 15 A That's correct.

16 Q In terms of the direct indictment, Mr. Wolch again
17 identified that as being something, an element of
18 suspicion, your response was "well, expedience, it
19 eliminated an appearance in Provincial Court which
10:08 20 Mr. Fisher would have had to have made to have
21 consented to the committal"; is that correct?

22 A That's correct.

23 Q It happened in Regina, again there was some --
24 that was shrouded in suspicion; your response was,
10:08 25 well, head office was there, it was easier for



1 Greenberg to travel there, that was your
2 understanding in any event?

3 A Yes.

4 Q That it took a while, Larry Fisher had received 13
10:08 5 years, what was the rush; do I -- am I --

6 A Well, yeah, I mean there was no huge rush. But I
7 will concede that Mr. Greenberg's letters seem to
8 have sat an awful long time without being
9 responded to.

10:09 10 Q Indeed. And, finally, that there was no media
11 coverage. I think that was even raised by Ms.
12 Knox yesterday at day's end?

13 A Yes.

14 Q That that was sort of sporadically covered; is
10:09 15 that correct?

16 A That's correct. Generally they, the media, tended
17 to show up in Provincial Court, which was sort of
18 where most of the action was. If there was some
19 interesting case going on in what was then the
10:09 20 District Court or the Court of Queen's Bench judge
21 and jury, they might show up for that, but
22 otherwise it wasn't sort of a regular part of
23 their patrol to show up in the Court of Queen's
24 Bench.

10:09 25 Q So, Mr. Brown, with all those suspicious elements,



1 if I could put it that way, those questions that
2 Mr. Wolch and Mr. Asper had and issues that were
3 put forward publicly as items, suspicious items;
4 to your knowledge, were Saskatchewan officials
10:10 5 ever contacted and were inquiries made about those
6 suspicious circumstances?

7 A No, not that I am aware of.

8 Q And I mean inquiries by either Mr. Wolch or Mr.
9 Asper?

10:10 10 A No.

11 Q So --

12 A Not that I am aware of.

13 Q So those suspicions were put forward publicly and
14 Saskatchewan officials weren't contacted?

10:10 15 A That's my understanding, yes.

16 Q 048235, please. This was in your -- this goes
17 back to the heater/chicken soup, heater
18 fix/chicken soup, --

19 A Yes.

10:10 20 Q -- and it was Ms. McLean who raised this letter to
21 Ron Wilson from David Milgaard and, in there,
22 there is a mention of having some soup at the
23 garage before crossing a bridge. Thank you for
24 calling that out. Mr. Brown, when was the first
10:11 25 time that you had seen that document?



1 A When Ms. McLean showed it to me.

2 Q And had --

3 A I had -- I wasn't aware of that, the existence of
4 that, and I'm actually surprised that wasn't
10:11 5 brought out at the Supreme Court, because we made
6 much of --

7 Q Indeed.

8 A -- David Milgaard's what we referred to as 'the
9 new alibi' at that point.

10:11 10 Q Never disclosed to you; correct?

11 A Never disclosed, well, and never raised by counsel
12 in the Supreme Court either.

13 Q In fact your understanding, if we could go to the
14 earlier 009800 --

10:11 15 COMMISSIONER MacCALLUM: So when you say
16 "Ms. McLean showed it to me", you mean here?

17 A Yes.

18 BY MS. KROGAN-STEVELY:

19 Q And it was here that you saw this for the first
10:12 20 time?

21 A That's correct.

22 Q Thank you. This is a January 29th, 1992 letter to
23 Mr. Fainstein. If you'd kindly go to 802, it's
24 your letter, Mr. Brown?

10:12 25 A Yes.



1 Q A copy to Mr. -- his firm as well. And back to
2 the first page, please. Thank you. Starting
3 there, your view, and this is January 29th, again,
4 1992:

10:12 5 "However, in light of Mr. Milgaard's
6 testimony, particularly the startling
7 first-time revelation of the 'heater
8 fix/chicken soup' incident, we would
9 expect that the Court would wish to hear
10:12 10 from Mr. Justice Tallis."

11 Is that correct?

12 A That's correct.

13 Q Here you have documented that, certainly, this was
14 the first time Mr. Milgaard's evidence containing
10:12 15 this statement was the first you'd heard of it;
16 correct?

17 A That's correct.

18 Q And, in fact, Mr. Tallis was called and was
19 questioned. 232815. This was transcript from
10:13 20 March the 4th, 1992 at 10:00 a.m., this is the
21 date that Mr. Tallis testified, and if I -- we
22 could go to the 232841, please. And in fact, sir,
23 you are questioning Mr. Tallis at this point.
24 Beginning right there:

10:13 25 "Q Specifically, sir, did he ever tell you



1 "...",

2 and "he", you are referring to Mr. David

3 Milgaard:

4 "... did he ever tell you that he and

10:13 5 the other two ...",

6 Nichol John and Ron Wilson:

7 "... stopped at a garage just before the

8 bridge to get the car's heater fixed?

9 A No.

10 Q You have no recollection of that?

11 A No.

12 Q Did he ever tell you about buying

13 chicken soup at this garage or at any

14 other location?

15 A No. I am quite sure that no reference

16 was made to stopping to get a heater

17 fixed, or anything like that.

18 Q Did he mention anything about being

19 stopped at a garage around 7:00 a.m. in

20 the morning on that date?

21 A No.

22 Q Did he ever ask you to find somebody to

23 confirm an alibi like that?"

24 And the answer is:

10:14 25 "A No. "



1 Do you recall that?

2 A Yes.

3 Q So it seems that Mr. Tallis hadn't been made aware
4 of that, or that alibi hadn't been provided to him
10:14 5 either, correct?

6 A That's correct.

7 Q And 013979, please. February 17th, 1992 day of
8 evidence at the Supreme Court, and this is the
9 transcript, sir. If we could go to 014162,
10:15 10 please. And this is the day that Mr. Karst is
11 testifying, and he's being examined here by
12 Mr. Neufeld. Starting there, this is
13 Mr. Neufeld's question:

14 "Q ... At the time that you were
15 questioning Mr. Milgaard you were quite
16 specific to try to find out what his
17 recollection was of his whereabouts in
18 the early morning hours of January 31st?

19 A Yes.

20 Q At any time did he indicate to you that
21 the car had been stopped or fixed prior
22 to the Danchuk stuck incident?

23 A No. All I recall him saying is that
24 they had car trouble."

10:16 25 And down two questions:



1 "Q Never any indication that they stopped
2 to get the heater fixed or get chicken
3 soup or anything like that?"

4 And the answer is:

5 "A No. I think he did make mention of the
6 car wasn't working good coming from
7 Regina to Saskatoon, but I don't think
8 there was any mention of -- I know there
9 was no mention of getting the heater
10 fixed.

11 Q Okay. All right. If that had happened
12 and a time could be ascribed to that,
13 that would be a significant thing you
14 would have checked out?

10:16 15 And Mr. Karst answers:

16 "A I would think so."

17 Do you recall that?

18 A Yes.

19 Q And it would seem that neither Mr. Tallis nor Mr.
10:16 20 Karst had been aware of that information; is that
21 right?

22 A Yes, that's right. And, you know, and I can
23 certainly understand how that might happen, I
24 suppose, but my concern, certainly at this point,
10:17 25 is we kept coming back to that with witness after



1 witness.

2 Q Uh-huh?

3 A If David Milgaard, Joyce Milgaard, Hersh Wolch or
4 David Asper had that document, you mean nobody
10:17 5 read their documents before Court? Why wasn't
6 that raised? I mean that was, in my view that was
7 an, a serious problem for David Milgaard's
8 credibility in that Court, and had the Court had
9 that 1982 document it would have eliminated a lot
10:17 10 of their concern. I don't know that that would
11 necessarily have meant he'd have been found
12 innocent, but it would certainly have had a
13 substantial impact on, again, the evidence that we
14 kept going back to.

10:17 15 Q Well, Mr. Brown, it might be that some didn't
16 believe in its accuracy either. If we would --
17 could have a May 30th, 2006 transcript brought up
18 on the screen, page 31768.

19 COMMISSIONER MacCALLUM: You say, when you
10:18 20 referred to 'a 1982 document', you mean the
21 letter from Milgaard to Wilson?

22 A That I believe to be the --

23 COMMISSIONER MacCALLUM: It doesn't bear a
24 date, does it?

10:18 25 A Yeah, but I believe I was told sometime it was in



1 1982 that it was created.

2 COMMISSIONER MacCALLUM: Okay, thanks.

3 A But that's the document I'm referring to, yes.

4 COMMISSIONER MacCALLUM: Okay.

10:18 5 MS. KROGAN-STEVELY: Mr. Commissioner, you
6 are correct, there is no -- it's not dated.

7 BY MS. KROGAN-STEVELY:

8 Q This, Mrs. Milgaard is testifying before this
9 Inquiry, Mr. Brown, and she's being questioned
10:18 10 about the RCMP Flicker investigation at this, at
11 this point, and this was -- Mr. Hodson is going
12 over an interview conducted by Mr. Sawatsky during
13 the course of that Flicker investigation, and Mr.
14 Hodson brings to Mrs. Milgaard's attention a
10:19 15 specific answer and states:

16 "You answer:

17 'That's fine. Well, you know, I, at
18 the Supreme Court they took him
19 through uh ... both his version of
20 the events at that time and one of
21 the things that he talked about there
22 uh, and it's interesting because um,
23 it was about the heater, about (break
24 in tape), they pounced on him when he
25 said that they got the heater in the



1 car fixed. ...think that probably
2 they never have got the heater in the
3 car fixed, but what happened, if
4 you'd ever driven on the prairie and
5 you're out in the country driving,
6 it's quite cold in the car. As soon
7 as you get into town you know how the
8 heater gets really hot, and you turn
9 it down. So, he said, well I don't
10 know, I just remember being really
11 hot so he was thinking ...",

12 I presume that's her son, David Milgaard:

13 "... I just remember being really hot
14 so he was thinking they got the
15 heater fixed but they made it sound
16 like, at the Supreme Court that he
17 was adding something that wasn't
18 there. But later he and I talked
19 about it and he said, no mom, he said
20 I suddenly just remembered that my
21 feet and everything, that we got
22 really hot. And, so I just assumed
23 that the ... I said, well you made it
24 sound like you got the heater fixed,
25 and he said, well, I didn't mean



1 that, I meant that it got hot in
2 car."

3 And could we go to 31770, at the bottom, and this
4 is Mr. Hodson now questioning Mrs. Milgaard:

10:20 5 "Q Am I reading this exchange correct,
6 ...",

7 next page, please:

8 "... did you talk to your David and
9 conclude that David maybe had wrongly
10 assumed that they got the heater
11 fixed --",

12 and she replies:

13 "A Yes.

14 Q -- and maybe had been mixed up?

10:21 15 A I think that's what it was."

16 "Q And therefore the car was hot and it was
17 cold before and they must have got the
18 heater fixed.

19 A I think that's what he assumed in his
10:21 20 mind."

21 At the bottom of that page:

22 "Q Would it also be fair to say that his
23 memory might not be reliable and that
24 this heater/chicken soup thing might be
10:21 25 an example where he at the Supreme Court



1 said something that --"

2 Mrs. Milgaard says:

3 "Q -- didn't really bear out."

4 Mr. Hodson:

10:21 5 "Q That maybe wasn't true, but that he had
6 thought had happened, but really didn't
7 happen?"

8 And Mrs. Milgaard says:

9 "That's right."

10:21 10 So it seems that Mrs. Milgaard wasn't convinced
11 that they had actually stopped to get the heater
12 fixed and get the chicken soup; is that correct?

13 A It appears that way, yes.

14 Q Mr. Brown, on the issue of disclosure, you've
10:22 15 already commented that the, that one particular
16 letter to Ron Wilson from David Milgaard had not
17 been disclosed, but if we could bring up 213342,
18 please, this is a memorandum from Mr. David Asper
19 to Mr. David Milgaard and the last page of the
10:22 20 memorandum, 46, indicates that it's a September
21 (sic) 12th, 1991 memorandum. If we could go to
22 page 43, please, of that memo?

23 COMMISSIONER MacCALLUM: December 12th,
24 '94?

10:23 25 MS. KROGAN-STEVELY: '91. Did I misspeak?



1 December 12th, 1991.

2 COMMISSIONER MacCALLUM: No, I misheard.

3 BY MS. KROGAN-STEVELY:

4 Q Pardon me. Mr. Asper writes to Mr. Milgaard:

10:23 5 "Some of the other issues that we
6 discussed involved full and complete
7 disclosure by the Feds and the Province
8 of Saskatchewan of everything that they
9 have relating to both your case and
10:23 10 Larry Fisher. This process I expect
11 will begin within the next few days, and
12 I am confident that we will receive
13 everything that there is to get. All
14 parties have agreed to make full
10:23 15 disclosure..."

16 Was that your understanding, Mr. Brown?

17 A That was the understanding, yes.

18 Q And in fact if we could go to 002665, please,
19 December 20th, 1991 letter from you to Mr. Wolch:

10:24 20 "Dear sir:

21 Further to your assurance to us of full
22 disclosure, I am writing to request the
23 following materials:"

24 So indeed you have documented that that was your
10:24 25 understanding?



1 A Yes.

2 Q Correct, sir? You stated in the course of your
3 evidence here at the inquiry, Mr. Brown, that
4 transcripts of interviews of witnesses certainly
10:24 5 would have been helpful to yourself and Mr.
6 Neufeld in both assessing credibility in
7 conducting thorough examinations or examinations;
8 is that correct?

9 A Yes.

10:24 10 Q And in fact I think you advised the inquiry that
11 Mr. Henderson's interview of Ron Wilson, you were
12 searching or you were seeking to have that
13 transcription of that interview but didn't get it;
14 correct?

10:24 15 A That's correct.

16 Q And you did say that it would have been useful?

17 A It would have been interesting, yes.

18 Q Now, Mr. Brown, were you aware then, and perhaps
19 you are now, that -- but at the time of the
10:25 20 reference particularly, were you aware that Mrs.

21 Milgaard interviewed Ron Wilson on two occasions?

22 A I think I was aware that she had spoken to him at
23 least once. I don't know whether she had been
24 there two, three, 10 times, but I know she had
10:25 25 contacted him on at least one occasion.



1 Q 331978. This is a very light copy of a
2 transcription of an interview dated -- at the top
3 you'll see Dale (Ron) Wilson with Joyce, April 15,
4 1981. Did you ever receive a copy of this
10:25 5 transcript, sir?

6 A No.

7 Q 331993, bring out the top again, it's quite faint,
8 it says, "Joyce: Dale, it's Joyce Milgaard
9 speaking," and in the corner of that it says, "Ron
10:26 10 Wilson Jan 26/81." It seems to be a transcript
11 from a telephone conversation of that, or a
12 conversation of that date. Would you agree?

13 A Yes.

14 Q Did you ever receive a copy of that, sir?

10:26 15 A No.

16 Q Mr. Wilson was also interviewed by Neil Boyd.
17 Were you aware of that, Mr. Brown? This was prior
18 to the preparation of their report.

19 A Yes, I believe we were aware of that.

10:26 20 Q Did you ever receive a transcript of that?

21 A No.

22 Q Can I have 336312 brought up. This is a
23 transcript of a tape recording dated,
24 conversations dated November 19th, 1991 and that's
10:27 25 a few months prior to the commencement of the



1 reference; is that correct, Mr. Brown?

2 A Yes.

3 Q Can I have page 360, a conversation between
4 Mr. David Asper and Mrs. Milgaard beginning at the
10:27 5 bottom:

6 "...and I also got Neil Boyd's
7 conversation with Wilson."

8 And Mrs. Milgaard responds:

9 "Oh, good."

10:27 10 Next page, please. Mr. Asper:

11 "I got a transcript of that
12 conversation. It's -- you know, it's
13 really nothing. You know, he says that
14 he and David had been taking acid the
10:27 15 day of the trip and he can't remember
16 whether they were coming down when they
17 left or just on their way up."

18 Mrs. Milgaard:

19 "Well, that's something that --"

10:28 20 Mr. Asper:

21 "I don't think that that really
22 matters."

23 Mrs. Milgaard:

24 "I don't even think that's true."

10:28 25 Mr. Asper:



1 "Well, I don't think it matters..."

2 Mrs. Milgaard:

3 "Then why are we putting this in. This
4 could be a real negative. This wasn't
10:28 5 in the Report."

6 Mr. Asper:

7 "It wasn't in which Report."

8 Mrs. Milgaard:

9 "His Report."

10:28 10 "Wilson's report."

11 "Boyd's report."

12 says Mr. Milgaard. Asper:

13 "Yeah. Well --"

14 Mrs. Milgaard said:

10:28 15 "Don't give them something they don't
16 need. What positive aspect is there of
17 it."

18 Asper:

19 "Oh, I mean, the whole -- I mean, he
10:28 20 gives a pretty detailed --"

21 And Mrs. Milgaard says:

22 "But they have the Boyd Report."

23 Next page:

24 "I don't -- I think I'd be very careful
10:28 25 of any negatives. You've already got



1 all you need from that Report. He's put
2 in the things that should go in. I'd be
3 very careful of that. I don't think it
4 should go in."

10:29 5 Asper:

6 "Okay."

7 And Mrs. Milgaard:

8 "She'll just grab hold of it..."

9 Presumably the minister,

10:29 10 "...the way she grabbed hold of the
11 remark that Debra Hall made and use it
12 against us. Don't put it in."

13 Asper:

14 "Okay."

10:29 15 She says:

16 "Okay?"

17 Asper:

18 "Yeah, all right."

19 And they sign off on the conversation. The
10:29 20 stance that's recorded in this conversation, Mr.
21 Brown, is this stance, does this run contrary to
22 your understanding of the disclosure agreement?

23 A Well, the disclosure agreement was that they would
24 give us what they had, we would give them what we
10:29 25 had.



1 Q Right. And at the time of the reference did you
2 have any understanding of whether or not, or any
3 view of whether or not they were providing full
4 disclosure to you?

10:29 5 A Oh, I think it was fairly clear they weren't, they
6 weren't providing any disclosure. Any time we
7 wanted something, we would just get excuses for
8 why it couldn't be provided.

9 MS. KROGAN-STEVELY: All right.
10:30 10 Mr. Commissioner, it's 10:30, or perhaps shortly
11 after.

12 COMMISSIONER MacCALLUM: Okay.

13 *(Adjourned at 10:29 a.m.)*

14 *(Reconvened at 10:48 a.m.)*

10:48 15 BY MS. KROGAN-STEVELY:

16 Q Could I please have document 155260 brought up on
17 the screen, please. Mr. Brown, this is another
18 transcribed telephone call and if you'll note --
19 thank you very much -- note from the top, present
10:49 20 on this conference call are David, and we'll see
21 it's David Milgaard, Joyce Milgaard, Peter
22 Carlyle-Gordge and a lawyer, and as it turns out
23 is Mr. Young, and I believe that this, on December
24 1st, 2005, this document was put to Mr. Gary Young
10:49 25 during the course of this hearing and he



1 identified that he was indeed the lawyer
2 participating in this telephone conversation, and
3 you'll note at the top corner this conversation is
4 dated January 22nd, 1981. Do you see that?

10:49 5 A Yes.

6 Q Could I please have the next page brought up, 61,
7 and there's conversation, and conversation about
8 the route that was taken into Saskatoon by Mr.
9 Milgaard and Ron Wilson and Nichol John and the
10:50 10 discussion, if we could bring it up anywhere in
11 there -- thank you -- Peter Carlyle-Gordge is
12 asking David about stopping the woman they stopped
13 and asked directions of. David:

14 "The woman I talked to?"

10:50 15 Mr. Carlyle-Gordge:

16 "Yes, you know, when you stopped and
17 asked where is the district where Shorty
18 lives? The Pleasant Hill or Peace
19 Hill--"

10:50 20 "Oh, for directions."

21 says Mr. Milgaard. Mr. Carlyle-Gordge:

22 "Can you remember if that was before
23 you'd crossed the river?"

24 Mr. Milgaard says:

10:50 25 "You see, that's the point that I wrote



1 to my mother about in the letter --"

2 "I have a note here..."

3 says Mr. Carlyle-Gordge,

4 "...about you recall a bridge and a

10:50 5 garage on the right."

6 And Mr. Milgaard says:

7 "Well yeah. That's the letter I sent

8 off this morning. I thought it might be

9 important, because I thought possibly --

10:51 10 since I was very free..."

11 And it's kind of confusing in there, but the

12 point being that at that point in the

13 conversation there is a mention of, would you

14 agree, a bridge and a garage?

10:51 15 A Yes.

16 Q And that's in January of 1981. And if I could
17 please have page 64 put up on the screen. The
18 conversation continues and Mr. Milgaard continues
19 his explanation:

10:51 20 "-- it was like this. We turned around,

21 alright but the tires were spinning on

22 the car. It was very old tires on the

23 car, and I'm not even sure if we went up

24 there to ask her directions. The idea

10:51 25 was to turn around, and I'll be honest



1 with you. The idea was to look her over
2 to see if we could possibly grab her
3 purse, you know. Cuz we were short of
4 funds at that time. But as we turned
10:52 5 around, I'm not sure whether we asked
6 her for directions or whether we just
7 continued turning back again, around the
8 centre of the boulevard and then going
9 to the garage."

10:52 10 Someone has written there "check".

11 "We had some soup in the garage...You
12 know a little package of soup? We had
13 some soup."

14 So would you agree, sir, that in January of 1981
10:52 15 David Milgaard's lawyer, Mr. Young, Mrs. Milgaard
16 and Peter Carlyle-Gordge, who was assisting them
17 in the course of their investigation, were aware
18 that David Milgaard said that they stopped at the
19 garage and had soup?

10:52 20 A Yes, that's correct.

21 Q And again, this transcribed conversation, this
22 wasn't disclosed to you in the course of the
23 reference proceedings was it?

24 A No.

10:52 25 Q 009092, this again relates to a disclosure issue,



1 Mr. Brown. This is a letter written by Chief
2 Justice Lamer to Mr. Fainstein with the federal
3 government, and he writes, and this is a comment
4 on Mr. Tallis:

10:53 5 "I will be inviting him to send us his
6 version of the events as regards the
7 reason why Mr. Milgaard did not take the
8 stand, and as to whether he was in
9 possession, or knew of the existence, of
10:53 10 Wilson's first statement to the police
11 at the time of the trial."

12 It seems as of January 17th, 1992, when this
13 letter was written -- if you would kindly scroll
14 up a bit -- that the Chief Justice of the Supreme
10:53 15 Court of Canada was not aware that, was not aware
16 that this document had in fact been disclosed to
17 Mr. Tallis; is that correct?

18 A Which document was that?

19 Q The Ron Wilson statement, Mr. Wilson's first
10:54 20 statement.

21 A Oh, yes, we were trying to confirm that, or Mr.
22 Fainstein was trying to confirm that information.

23 Q And this is information that you knew prior, prior
24 to this time; is that correct?

10:54 25 A And he would know as well, based on the fact that



1 the federal government by that point had had
2 plenty of access to whatever was on our files and
3 would have had the transcript, but I think they
4 wanted to see if they could get that from Justice
10:54 5 Tallis himself.

6 Q All right. Mr. Brown, Mr. Wolch questioned you
7 about RCMP reports that were found in the course
8 of the Flicker investigation, these were reports
9 that you testified were misfiled on correspondence
10:55 10 files. Do you recall those?

11 A That appears to be the case, yes.

12 Q And Mr. Wolch suggested to you that their argument
13 respecting Larry Fisher might have been more
14 warmly received, if I could put it that way, by
10:55 15 the Supreme Court had the court been aware that
16 investigators contemplated this connection at the
17 time of the investigation. Do you recall that?

18 A I recall that, yes.

19 Q Now, we've heard much about disclosure provided by
10:55 20 parties at the reference. Can we have 052923.

21 It's a letter dated February 5th, 1969, it's
22 penned by then Lieutenant Penkala, and this was
23 going to the Crime Index section of the Royal
24 Canadian Mounted Police, February 5th, 1969 as I
10:55 25 say, and if you kindly go to page 25 of that.



1 Actually, why don't you go a page before first so
2 I can identify what he's done. Mr. -- or pardon
3 me, Penkala at that time was writing to the Crime
4 Index section giving them information about the
10:56 5 Gail Miller murder and on the last page of that
6 informational document he writes:

7 "Our Department has two unsolved cases,
8 dating back into October and November of
9 1968, which involve complaints of rape.
10:56 10 In both these cases, the victim was
11 attacked from behind while walking in
12 the late evening, forced into a lane
13 and, under threat with a knife, made to
14 undress and submit to intercourse."

10:56 15 And he goes on. Have you seen this letter
16 before?

17 A I don't recall ever seeing that, no.

18 Q Okay.

19 A I mean, I might have, but as I say, I don't recall
10:56 20 it offhand.

21 Q Okay. Document 025537, this is a Saskatoon Police
22 Department --

23 A Just let me clarify that. If that came off the
24 Saskatoon Police Service file, then I have seen
10:57 25 it, because I did see their file, but I don't



1 specifically recall the document.

2 Q And the disclosure provided by the Saskatoon
3 Police Service, was it your understanding that
4 they provided you with the -- or provided the
10:57 5 parties with the entire file?

6 A Yes, that was my understanding.

7 Q So if this document originated from that file, as
8 you say, you would have seen it, either you or Mr.
9 Neufeld?

10:57 10 A I would have seen it, yes, or Mr. Neufeld.

11 Q And indeed the other parties would have had access
12 to this as well?

13 A Yes.

14 Q And similarly with this investigation report or
10:57 15 continuation report, it is a document, again if
16 you turn to page 38, please, this is a report that
17 has been prepared by Penkala as well when he was
18 in the identification section. Would reports like
19 this have been disclosed to all parties during the
10:58 20 course of the reference?

21 A Yes.

22 Q And again, if this was on the file that the
23 Saskatoon Police Service had, this would have been
24 given to all?

10:58 25 A It would have been available to everybody.



1 Q First page please, at the bottom, again Lieutenant
2 Penkala at that time notes:

3 "The similarity of our department's
4 occurrences..."

10:58 5 And the numbers are listed and, frankly, I don't
6 know which of the sexual assaults those attach
7 to, but he specifies that they are complaints of
8 rape. The similarity of the:

9 "...complaints of rape, with this murder
10:58 10 investigation, lists the following itmes
11 which are reported missing, identifiable
12 and could be of evidential value."

13 So again, there is a notation in there that there
14 is a connection that has been made between the
10:58 15 unsolved sexual assaults that had occurred and
16 the Gail Miller murder; would you agree with
17 that?

18 A Yes. My recollection as well is that in the
19 occurrence report that was on Bobs Caldwell's
10:59 20 file, there was also very early on in the
21 investigation some mention made of at least the
22 (V1)- incident, maybe another, I don't recall, but
23 it was something they were thinking about early on
24 in that investigation.

10:59 25 Q And you were certainly aware of it at the time of



1 the Supreme Court reference; would that be
2 correct?

3 A Yes, absolutely.

4 Q And that understanding was based on documentation
10:59 5 that you had seen in the course of the disclosure
6 that was made?

7 A Yes, that's right.

8 Q Now, were these, or documents like these, ever
9 tendered at the Supreme Court by Mr. Wolch arguing
10:59 10 that this would have enhanced the connection, that
11 is, the similar fact evidence and --

12 A Well, I don't specifically recall that kind of
13 argument being made. With respect to what was
14 tendered, I think ultimately just about everything
11:00 15 but the kitchen sink went in in terms of
16 documents. I couldn't say whether that did or
17 didn't offhand without checking with the 26
18 volumes of materials.

19 Q Oh, that's fair, but do you recall Mr. Wolch
11:00 20 making an argument like that --

21 A No.

22 Q -- to the Supreme Court orally?

23 A No.

24 Q Or drawing it to their attention I should say.
11:00 25 162865, this is an August 27, 1992 letter written



1 by, if you'll kindly go to the next page, written
2 by Mr. Wolch, and back to the first page, to then
3 Minister of Justice Robert Mitchell, and if I
4 could just go through a few of the comments made
11:01 5 in that letter, Mr. Brown, and ask for your
6 comment on it. Beginning there, that paragraph:

7 "Prior to the Supreme Court Reference
8 the Chief Justice in Chambers advised
9 all counsel that the question for the
11:01 10 Court to answer did not involve any
11 inquiry into police misconduct and that
12 there should be no effort made to focus
13 on that area."

14 And I know we've danced that dance, you disagree
11:01 15 with that comment as I understand it, Mr. Brown?

16 A Absolutely, yes.

17 Q "At a later point in time, when a highly
18 suspect document found in Crown
19 Counsel's file ... was entered into
11:01 20 evidence, the Chief Justice clearly
21 indicated to counsel that the document
22 could be used to assist in establishing
23 Mr. Milgaard's innocence, but in no way
24 could it be used to impugn police
11:01 25 conduct in the matter, since that was



1 beyond the scope of the Reference."

2 Does that accurately reflect what you recall of
3 that?

4 A No, it certainly doesn't.

11:02 5 Q So you disagree with that statement as well?

6 A I disagree, yes.

7 COMMISSIONER MacCALLUM: Which paragraph is
8 that, please?

9 A The second one towards the end.

11:02 10 COMMISSIONER MacCALLUM: Highly suspect
11 document, is that the --

12 MS. KROGAN-STEVELY: That would be the
13 Mackie summary, sir.

14 COMMISSIONER MacCALLUM: Mackie summary,
11:02 15 okay.

16 BY MS. KROGAN-STEVELY:

17 Q Mr. Wolch goes on to talk about the Saskatoon
18 Police Service investigators as witnesses and
19 beginning there in paragraph 3 of that letter, Mr.
11:02 20 Wolch writes:

21 "We had specifically requested Mackie
22 and Short as witnesses, but were advised
23 that Mackie was somewhere in the
24 southern United States and could not be
11:02 25 located, and that Short was ill. We



1 were also guided by the fact that within
2 a few days of the hearing the Chief
3 Justice indicated that the Court was
4 more concerned with hearing Saskatchewan
11:02 5 evidence that pointed to guilt than any
6 other aspect of the potential evidence."

7 Now, can we start with that last sentence first?

8 A Yes.

9 Q Sorry, I should have broken that down. Do you
11:03 10 recall an onus shift in the manner described by
11 Mr. Wolch?

12 A Well, there was briefly, on one occasion, the
13 Chief Justice did indicate that he wanted to know
14 whether we could still prove David Milgaard was
11:03 15 innocent, but the very next day it's my
16 recollection that they then decided that they
17 would hear evidence, or they would take argument
18 with respect to what the test should be, who
19 should have the onus and what the onus would
11:03 20 ultimately be. It was, I'm guessing, sometime
21 around the end of the first week of evidence or
22 something like that.

23 Q So by August 27th, 1992 that issue was certainly
24 decided; correct?

11:03 25 A Oh, yes, yes.



1 Q Mr. Wolch wrote that they requested Mackie and
2 Short as witnesses, Mackie was in the States and
3 couldn't be located and Mr. Short was ill. If I
4 understood you correctly, your evidence, Mr.
11:04 5 Brown, there was some discussion about a video
6 feed with respect to Mr. Short?

7 A Well, there was some discussion, as I recall,
8 about some way to accommodate the police officer
9 who was ill rather than bringing him to Ottawa.
11:04 10 By then the Supreme Court was routinely using
11 video conferencing, we were prepared to look at
12 that, and the one that was in the U.S., we were
13 fairly confident we could find him and get him to
14 Ottawa if necessary.

11:04 15 Q So whose decision was it not to call them?

16 A Ultimately that would have been Mr. Wolch's. We
17 had no reason to call these witnesses. He was the
18 one alleging that they had misconducted themselves.

19 Q Fourth paragraph, in terms of calling Mr. Caldwell
11:04 20 or perhaps Mr. Kujawa:

21 "Discussions with your senior Crown..."
22 That would either be you or Mr. Neufeld,
23 "...resulted in our being offered a
24 summary of what Mr. Caldwell could say,
11:05 25 which did not add very much to the case



1 at all. Your Crown's position was
2 firstly that Mr. Caldwell could not
3 really add to the evidence touching upon
4 the innocence of David Milgaard.
11:05 5 Secondly, any other inquiry as to Mr.
6 Caldwell's conduct would be strenuously
7 objected to as irrelevant in the
8 hearing..."

9 To your knowledge, did Mr. Neufeld or did you
11:05 10 provide a summary of what Mr. Caldwell could say
11 to Mr. Wolch?

12 A I don't recall providing any summaries, I don't
13 recall any of that paragraph to be honest with
14 you.

11:05 15 Q So no strenuous objection either?

16 A No.

17 Q To your recollection. And in fact, Mr. Brown, did
18 you not say that you recognize that one of the
19 reasons or one of the purposes of this reference
11:06 20 was to investigate the conduct, or to look into
21 the conduct of Saskatchewan Justice which made you
22 uncomfortable taking the role you did in the
23 course of the reference; is that right?

24 A Well, that's correct. The allegations were
11:06 25 floated out there that there had been a cover-up



1 by Saskatchewan Justice. We were, in my view,
2 part of what the Supreme Court was to look at, or
3 could look at if they wanted to bring that in.

4 Q Next page, please, the paragraph that reads:

11:06 5 "Since the Larry Fisher evidence came to
6 light in October, 1970, the Crown was
7 aware in October of 1970 that there
8 existed credible evidence which could
9 reasonably be expected to have affected
11:06 10 the verdict of the jury considering the
11 guilt or innocence of David Milgaard.
12 This evidence was wilfully suppressed by
13 the Crown Attorney's office."

14 Now, Mr. Brown, by August 27, 1992 the reference
11:07 15 has occurred, the Supreme Court has come down
16 with its decision. Was there any evidence of
17 this that supports the statement that Mr. Wolch
18 made in his --

19 A None whatsoever, no.

11:07 20 Q 026935, please. This is an April 20th, 1992
21 letter, again written to Mr. Mitchell, and I know
22 this predates the letter that we just reviewed.
23 Again, can we just see page 39, please. Mr. Wolch
24 has also prepared this letter and sent it to then
11:07 25 Minister Robert Mitchell; correct?



1 A That's correct.

2 Q Just a few points from this letter, Mr. Brown. If
3 you can go to page 37 of that letter, please,
4 under the heading *Mr. T.D.R. Caldwell*, starting
11:08 5 there, in that paragraph:

6 "We also enclosed for your information
7 copies of letters that Mr. Fisher's
8 counsel wrote complaining of the
9 abnormal delay in processing the Fisher
11:08 10 cases... The Milgaard/Miller file
11 clearly demonstrates that Mr. Caldwell
12 had to have made the connection."

13 Again, Mr. Brown, anything like that raised
14 during the Supreme Court reference?

11:08 15 A Never made any attempt to do that.

16 Q And this was post reference as well?

17 A Yes.

18 Q April 20th. There's a heading, number 3, the
19 third heading, *Mr. Serge Kujawa*. Mr. Kujawa
11:09 20 wasn't called at the reference again, was he, Mr.
21 Brown?

22 A No.

23 Q And the choice -- Saskatchewan didn't have any
24 need to have him called; is that correct?

11:09 25 A No, they didn't bring up any evidence of



1 misconduct by the Crown specifically that would
2 call us to have to, require us to have to call
3 him, but there were always those allegations out
4 there.

11:09 5 Q So Mr. Kujawa's handling of the David Milgaard
6 appeal and the Larry Fisher guilty pleas could
7 have but was not canvassed in the course of the
8 reference; is that right?

9 A Yes.

11:09 10 Q And so now in April of 1992 when it appears that
11 Mr. Wolch is seeking to persuade the Saskatchewan
12 Minister of Justice to launch an inquiry, did that
13 ring a bit hollow, that this information or this
14 allegation hadn't been canvassed with Mr. Kujawa
11:10 15 during the course of the reference?

16 A They had the opportunity to demonstrate Crown
17 cover-up or misconduct and they didn't bother
18 pursuing it, so yes.

19 Q Page 38, please, the bottom of the page, Mr. Wolch
11:10 20 in this paragraph is advocating that an
21 independent prosecutor should have a look at the
22 Larry Fisher information.

23 "If there is doubt in this area, we
24 would certainly welcome that question
11:10 25 being put to an independent inquirer.



1 We also feel that independent advice
2 should be sought as to whether Mr.
3 Fisher should be prosecuted."

4 Mr. Brown, was the Supreme Court an independent
11:10 5 reviewer of this information?

6 A I would say so, yes.

7 Q "It is our view that the evidence is
8 compelling and strong. We of course are
9 biased, but at the same time, how can
11:11 10 your Department one day contend
11 unsuccessfully in the Supreme Court that
12 the Fisher evidence wasn't probative,
13 and the next day pursue that evidence
14 with a view to prosecuting Fisher."

11:11 15 And at the bottom, just skip a line in there,
16 Mr. Wolch concludes the paragraph saying:

17 "Even if the prosecutor was to..."

18 This is the independent prosecutor,

19 "...was to come to the conclusion that
11:11 20 there was insufficient evidence, then he
21 should be in a position to direct
22 investigators as to fruitful avenues of
23 pursuit to gather sufficient evidence."

24 Does that kind of sound like a frame to you, Mr.
11:11 25 Brown? Does that concern you?



1 A Gather where, gather how? We had the evidence
2 with respect to Larry Fisher. The only thing that
3 was left was the DNA.

4 Q So the comment, does that comment cause you
11:12 5 concern, even if a prosecutor has come to this
6 conclusion that there's insufficient evidence,
7 that prosecutor should still direct police
8 authorities to find the evidence?

9 A Well, I know where you are going with that and I
11:12 10 appreciate that it's a curious sort of way to put
11 it, but I would be inclined, frankly, to give Mr.
12 Wolch the benefit of the doubt on that and say
13 that his view was that the prosecutor could give
14 them advice on where they might fruitfully pursue
11:12 15 further investigation, that would have been my
16 interpretation of it at the time. I just -- first
17 of all, there wasn't any doubt, in our view there
18 wasn't any doubt with respect to what the Supreme
19 Court said and we didn't view there as being any
11:12 20 avenues of investigation that could be fruitfully
21 pursued with respect to the Larry Fisher matter at
22 this stage.

23 Q Mr. Brown, I just, I'm coming to the conclusion of
24 my questions for you, and this is ostensibly just
11:13 25 to summarize, and perhaps many of these things



1 you've already commented on, so be patient as I go
2 through this. This is a bit of a timeline. The
3 first application, that is the first 690
4 application, was made, and even prior to the
11:13 5 application being made there were media stories
6 that Saskatchewan was aware of and -- Saskatchewan
7 officials -- and had identified those stories as
8 being false, either identified on their own as
9 being false, or had been advised by federal
11:13 10 officials that there was no merit to the
11 allegations; would that be correct?

12 A That's correct, yes.

13 Q And, with the filing of that first application, it
14 was Saskatchewan's understanding that virtually a
11:13 15 complete reinvestigation of the matter had taken
16 place at the behest of and with the direction of
17 Federal Government officials; correct?

18 A Well they, yes, they had certainly investigated
19 all of the allegations that had been made to them
11:14 20 by the Milgaard people, and it was my
21 understanding that they had investigated the Larry
22 Fisher rapes as well.

23 Q And once you received, as you've stated,
24 disclosure in the course of the reference, you
11:14 25 fully appreciated how thorough that investigation



1 was; correct?

2 A That's correct.

3 Q Post-first application, as you stated, because of
4 the tenor of the media stories Saskatchewan was
11:14 5 supportive of a public airing of the
6 circumstances; --

7 A That's correct.

8 Q -- is that correct? And, prior to the second
9 application even being tendered or submitted by
11:14 10 Mr. Milgaard, Saskatchewan officials were aware
11 that there actually would be a public airing of
12 the issue; is that correct?

13 A Well we, I mean there was a -- a -- there were
14 discussions between I believe it was Ellen Gunn
11:15 15 and somebody in Federal Justice with respect to
16 whether this was desirable, how they would go
17 about it, and things like that.

18 Q Okay.

19 A So we knew they were going along that line, and as
11:15 20 things became more certain we were advised of
21 that, and it then became a question of where.

22 Q All right. And then we've got the reference?

23 A That's correct.

24 Q And wide latitude, we have seen many of your
11:15 25 letters that have been prepared by you that states



1 that wide latitude was given to all parties --

2 A Yes.

3 Q -- to call any evidence that any party thought was
4 necessary, appropriate for the Supreme Court to
11:15 5 consider; correct?

6 A That's correct.

7 Q The Supreme Court concludes no misconduct, there
8 is no declaration of innocence -- of course I'm
9 relying on a literal view of the decision, --

11:15 10 A Yes.

11 Q -- and that Larry Fisher couldn't be charged;
12 correct?

13 A That's correct.

14 Q Post-reference Saskatchewan was receiving inquiry
11:16 15 requests from Mr. Milgaard; --

16 A Yes.

17 Q -- correct? And the view that Saskatchewan took
18 was that, if the information that was then being
19 put forward was legitimate, it should have or
11:16 20 could have been raised at the time of the Supreme
21 Court?

22 A Yes.

23 Q 1993 we've got the RCMP, a team of RCMP members
24 conducting the, what we now know, call the Flicker
11:16 25 investigation, and essentially that was a



1 reinvestigation of the entire file; would you
2 agree with that?

3 A That's correct, yes.

4 Q And in fact when Mr. Sawatsky testified, and in
11:16 5 answer to a question put to him by Mr. Hodson, the
6 question was "had your marching orders been
7 different and you'd been asked to entirely
8 reinvestigate the file would you have done
9 anything differently", Mr. Sawatsky's answer was
11:16 10 "no, ostensibly it was a reinvestigation", and
11 that was certainly Saskatchewan's understanding;
12 is that right?

13 A Umm, well when we saw the report it was, and
14 when -- I suppose back up from that. When we
11:17 15 heard, when Richard Quinney and I heard exactly
16 what they were planning to do, yes, it appeared
17 that that was going to be a re-investigation. I
18 can tell you that that caught us by surprise, we
19 were not expecting that the RCMP were going to do
11:17 20 that, --

21 Q Uh-huh?

22 A -- or were asked to do that.

23 Q But your understanding is that they did that?

24 A They did that, yes.

11:17 25 Q Okay. Post-Flicker there is, until the DNA



1 results there is nothing new that comes to the
2 attention of Saskatchewan officials that would
3 cause anyone to think any differently of the
4 circumstances -- or the situation; is that
11:17 5 correct?

6 A No.

7 Q And, after the DNA test results, Saskatchewan did
8 move quickly to offer an apology and to look at
9 the issue of compensation; is that correct?

11:17 10 A That's correct, yes.

11 Q So in the course of that timeline, Mr. Brown, we
12 essentially have three investigations; that
13 conducted by Federal Justice with the first
14 application, and I should add that it was reviewed
11:18 15 by both the minister and former Justice McIntyre;
16 correct?

17 A That's correct.

18 Q The second one being the Supreme Court reference,
19 and the third one being the Flicker investigation;
11:18 20 correct?

21 A That's correct.

22 Q All of which Saskatchewan Justice, the results of
23 which or the conclusions contained therein, are
24 things that Saskatchewan officials relied upon;
11:18 25 correct?



1 A That's correct.

2 Q Thank you, Mr. Brown.

3 MR. HODSON: I do not have any further
4 questions.

11:18 5 COMMISSIONER MacCALLUM: Okay. So, Mr.
6 Brown --

7 MR. HODSON: Thank you very much, Mr.
8 Brown.

9 COMMISSIONER MacCALLUM: -- thank you very
11:18 10 much for coming, sir, to testify.

11 A Thank you.

12 MR. HODSON: I'd like to call back
13 Mr. Eugene Williams, please.

14 **EUGENE WILLIAMS, acknowledges oath, continued:**

11:19 15 COMMISSIONER MacCALLUM: Mr. Williams, have
16 a chair, please.

17 **BY MR. HODSON:**

18 Q Good morning, Mr. Williams.

19 A Good morning, sir.

11:19 20 Q For the record, since you were here the last time,
21 you have had a change in counsel from David Frayer
22 and Jennifer Cox, you are now represented by
23 Mr. Ken McLeod who is present today; is that
24 correct?

11:19 25 A That's correct.



1 MR. HODSON: Mr. Commissioner, before we
2 start with formal questions of Mr. Williams, I
3 wanted to just provide a bit of background of
4 what has transpired.

11:20 5 COMMISSIONER MacCALLUM: I wonder if you
6 could just give me a date for his last testimony,
7 please?

8 MR. HODSON: His last testimony was June
9 21st, I believe.

11:20 10 COMMISSIONER MacCALLUM: Thanks.

11 MR. HODSON: And, in fact, Mr. Williams
12 testified on the week of June 5 for four days,
13 and again during the week of June 19th for three
14 days, and I want to provide a summary of what has
11:20 15 transpired since then with respect to both the
16 issue of constitutional limits and the issue of
17 solicitor/client privilege.

18 And, by way of background,
19 April 14th, 2006 is when we received a letter
11:20 20 from counsel for the federal minister, and at
21 that time counsel for Mr. Williams, outlining
22 general categories of documents over which
23 solicitor/client privilege were claimed, and
24 included in those documents over which privilege
11:20 25 was claimed were the federal department report to



1 the minister and the William McIntyre opinion.

2 Our Commission rules
3 specifically recognize the right of a party to
4 assert privilege with respect to any document
11:21 5 over which privilege is properly claimed.

6 It later became apparent, Mr.
7 Commissioner, from communications from parties,
8 that some parties objected to the privilege
9 claimed by the federal minister on essentially
11:21 10 two bases. The first, I think, a suggestion that
11 some of the documents over which privilege was
12 claimed were not truly advice in that sense, and
13 therefore not privileged to start with, if I can
14 put it that way. The second response from some
11:21 15 of the parties was that the federal minister had
16 waived the privilege with respect to certain
17 documents by either public comments or by
18 disclosure. So those were two positions we
19 received from parties.

11:21 20 In May, before Mr. Williams
21 began his testimony, the federal minister asked
22 that you deal with their assertion that
23 constitutional limits prevented any questions of
24 Federal Justice officials with respect to advice
11:22 25 given or received.



1 Now this Commission had
2 already indicated, before we even commenced
3 hearings, that, being a provincial inquiry, there
4 were limits on the extent to which this
11:22 5 Commission could inquire into the Section 690
6 proceedings. That was set out in our earlier
7 position paper, and I think there is no issue
8 there, that the question was arising out of the
9 Keable decision of the Supreme Court that
11:22 10 prohibited a provincial commission of inquiry
11 into inquiring into the operation and management
12 of a federal institution, and the question was
13 not so much what the law stated, but rather how
14 did that limitation effectively limit the
11:22 15 questions that could be asked of Federal Justice
16 witnesses.

17 Argument was heard by you,
18 Mr. Commissioner, back in May from both federal
19 and provincial counsel, and if I could, I just
11:23 20 want to draw up and read out a portion of what
21 was said on that day. It's on transcript page
22 31706, and this was in the course of argument
23 between -- or in the course of Mr. Frayer making
24 his submissions, and you commented that:

25 "COMMISSIONER MacCALLUM: Yes. I think, Mr.



1 Frayer, that you can't expect too much
2 from me in terms of guidelines which are
3 very specific, because in large measure
4 they will be fact driven by what we hear
5 from a witness and then it will be up to
6 me to decide whether what he's saying is
7 a proscribed area as being under -- as
8 being administration or rule or
9 procedure or whatever, so I'll do my
10 best to give some guidelines, but I
11 can't promise that they will answer all
12 the questions at the time."

13 On June 1, 2006, Mr.

14 Commissioner, you ruled on the application and,
11:23 15 in essence, in that application the federal
16 minister had asked, I believe, for a general
17 prohibition on any questions relating to advice
18 given or received by Federal Justice officials on
19 the basis that that was a proscribed area under
11:24 20 *Keable*. You ruled that there was no general
21 prohibition on that basis, but that you would
22 deal with the limitations on a case --
23 question-by-question or case-by-case basis. And
24 if I can call up 338005, which is your decision,
11:24 25 and go to 009, and these are your concluding



1 remarks. You say:

2 "Counsel will frame their
3 questions so as to avoid the areas
4 proscribed by *Keable*, namely the
11:24 5 administration or management of a
6 federal institution or entity.
7 Objections to questions will be resolved
8 by reference to the plain meaning of
9 those terms, wherever possible."

11:24 10 I then proceeded to question
11 Mr. Williams for seven days. I did not question
12 him with respect to any area where
13 solicitor/client privilege was claimed or engaged
14 as that issue had not been determined.

11:25 15 Mr. Frayer, who was Mr. Williams' counsel at the
16 time, did not object to any of my questions on
17 any ground, be it constitutional, privilege, or
18 relevance. My questioning, as reflected in the
19 record, included a number of questions probing
11:25 20 the reasons for steps taken by Mr. Williams in
21 his investigative steps.

22 Early -- late June or early
23 July of 2006 the Federal Minister applied for
24 judicial review of your June 1, 2006 ruling. The
11:25 25 minister sought, from the Court of Queen's Bench,



1 an order quashing your decision, and for an order
2 from the Court prohibiting the Commission from
3 inquiring into advice given or received by
4 Federal Justice officials, I think including
11:25 5 reasons.

6 That matter was heard by the
7 Court in August, and on August 18th, 2006 Chief
8 Justice Laing of the Court of Queen's Bench
9 issued a judgement in that matter, and he quashed
11:25 10 your June 1, 2006 ruling. And if we can go to
11 339089, please, and go to page 339106. And, in
12 the concluding paragraph, Chief Justice Laing
13 indicates that:

14 "The constitutional limitation set out
11:26 15 in the Keable decision precludes the
16 Commission from asking federal
17 Department of Justice lawyers 'questions
18 which seek to probe the reasons behind
19 actions, including questions about
11:26 20 advice given or received.' The
21 Commissioner's ruling is set aside."

22 Now Chief Justice Laing did not issue an order of
23 prohibition, Mr. Commissioner, he simply set
24 aside the ruling. It's my understanding that
11:26 25 Chief Justice Laing's decision has not been



1 appealed, nor will it be appealed, by any of the
2 parties. I can't speak for the Federal
3 Government, but I think the appeal period may
4 have expired yesterday, so I don't believe that
11:27 5 decision is under appeal.

6 Just on this question about
7 the reasons behind actions, in the course of the
8 judicial review proceedings Federal Justice
9 lawyers, not those present at the hearing but
11:27 10 rather Mr. Kindrachuk, acknowledged to Chief
11 Justice Laing that the questioning of Mr.
12 Williams to that date was appropriate. As well,
13 I understood from Mr. Kindrachuk's submissions
14 that probing reasons behind actions would not be
11:27 15 considered to be constitutionally limited by the
16 federal minister unless those reasons related to
17 advice given or received by Federal Justice
18 lawyers.

19 And the reason I point that
11:27 20 out is that, for example, I asked Mr. Williams in
21 June why he questioned Deborah Hall under oath as
22 opposed to an interview, I asked him many
23 questions about why he did things. It's my
24 understanding -- and I've confirmed it with
11:28 25 Mr. Frayer this morning, if I'm wrong, I'm sure



1 he will say otherwise -- that the federal
2 minister does not view questions of their
3 witnesses probing the reasons for their actions
4 to be constitutionally limited unless it relates
11:28 5 to advice given or received, and so I'm
6 proceeding on that basis. I'll ask Mr. Frayer to
7 speak when I'm done here but that's, I think, an
8 important distinction. And in fairness, if there
9 was no issue taken with my questioning in June
11:28 10 probing reasons, I take some comfort from the
11 fact that the federal minister not only didn't
12 object to that, but didn't raise it in the Court
13 proceedings.

14 COMMISSIONER MacCALLUM: But I think you
11:28 15 just told me that, at page 106, Chief Justice
16 Laing said that we were not entitled to look into
17 the reasons behind, including advice given?

18 MR. HODSON: That's what his ruling states.
19 Now I think --

11:29 20 COMMISSIONER MacCALLUM: So, irrespective
21 of whether people take a different view now, am I
22 not bound by that?

23 MR. HODSON: Well, I would -- and we'll
24 hear from Mr. Frayer. First of all I think the
11:29 25 issue -- let me back up.



1 In May of 2006, in the
2 limitations that the federal minister asked you
3 to impose, they did not raise reasons, they
4 simply said they wished to have a prohibition of
11:29 5 any questions relating to advice.

6 COMMISSIONER MacCALLUM: Uh-huh.

7 MR. HODSON: In your ruling you wrote words
8 to the effect that, since Commission Counsel will
9 be probing the reasons behind actions of Federal
11:29 10 Justice officials, this may or will necessarily
11 engage advice, or words to that effect.

12 COMMISSIONER MacCALLUM: Yeah.

13 MR. HODSON: It's my understanding, at
14 least from my discussions with federal lawyers,
11:29 15 at least some of them, that that's what prompted
16 the language they used in their motion, and so
17 I'm simply going by -- well, put it this way, I'm
18 relying on the fact that I questioned Mr.
19 Williams for seven days probing the reasons
11:30 20 behind his actions unrelated to advice,
21 Mr. Frayer did not object, and their counsel,
22 different counsel before the Court of Queen's
23 Bench, accepted that the questioning was
24 appropriate.

11:30 25 So I guess the other thing,



1 as far as Chief Justice Laing's decision, I can
2 tell you that in my questioning of this witness I
3 will not be at least intentionally questioning
4 him with respect to advice given or received by
11:30 5 Federal Justice officials, in other words that I
6 will try and guide my questions by Chief Justice
7 Laing's ruling. There's no formal prohibition
8 and, keeping in mind that your ruling was a
9 general limitation, you were asked to rule on the
11:30 10 limitation without any questions, and it was that
11 matter that went to Court, it does present a bit
12 of a problem. But maybe we can come back to that
13 and Mr. Frayer can answer that.

14 For example, if I were to ask
11:30 15 Mr. Williams, as I did, "why did you talk to this
16 witness", it has absolutely nothing to do with
17 advice given or received, I have been assured by
18 his counsel and the federal minister that they
19 don't object on constitutional grounds. Is that
11:31 20 --

21 COMMISSIONER MacCALLUM: Well the
22 difficulty I, that I want you to consider is
23 that, as a Commissioner, I must not merely
24 respect Chief Justice Laing's decision, I must
11:31 25 follow it, and -- because I'm, you know, I'm



1 bound. Now perhaps I'm entitled to read the
2 decision and decide what is obiter and what is
3 the ratio of the decision, and go that way, but
4 I'd like some assurance about that from counsel
11:31 5 because I don't want to be seen as doing an end
6 run, in the vernacular, around Chief Justice
7 Laing.

8 MR. HODSON: And certainly, Mr.
9 Commissioner, nor do I, which is why I raised it.
11:31 10 And the difficult position that I have been put
11 in is that I've dealt with six different lawyers
12 for Federal Justice, in some form or another, or
13 for Mr. Williams. I want to be clear on the
14 record what their position is on this issue, I'm
11:32 15 only conveying what I understand it to be.

16 COMMISSIONER MacCALLUM: Uh-huh. Well, I
17 hope Mr. Frayer will let us know that.

18 MR. HODSON: Yes.

19 COMMISSIONER MacCALLUM: Yeah.

11:32 20 MR. HODSON: So maybe let me just finish up
21 here and we can come back to that.

22 So again, subject to what
23 Mr. Frayer has to say and what you have to say,
24 Mr. Commissioner, I intended, in my questioning,
11:32 25 to avoid anything related to advice given or



1 received by Federal Justice officials, and again,
2 this is where the challenge comes in.

3 I believe that, in some
4 cases, I can question Mr. Williams about
11:32 5 communications he may have had with Federal
6 Justice officials. Whether they are advice or
7 not is sometimes difficult to say. Certainly,
8 let me give you an example of this. There is no
9 issue about me questioning Mr. Williams about the
11:33 10 conclusions he reached in his investigation. We
11 have had -- we've spent time where he's
12 interviewed a witness and he'll prepare a memo to
13 file that says "here's what I did, here's why I
14 did it, here's my assessment of the evidence, and
11:33 15 here's the conclusions I draw with respect to the
16 information I gathered", which I think is clearly
17 relevant. To the extent that that's in a memo to
18 file, I've questioned him on that, and I intend
19 to do so.

11:33 20 If he chooses to put that
21 same summary in a communication to another
22 lawyer, does that make it advice? I don't think
23 it does. Certainly the -- certainly the content
24 of that memo that says --

11:33 25 COMMISSIONER MacCALLUM: Doesn't make it



1 advice, I suppose, but is it part of the
2 proscription against conduct?

3 MR. HODSON: Well, and again, that's
4 something that -- and I guess what I'm saying is
11:33 5 the fact that information that is relevant finds
6 its way in documents that are communications
7 between lawyers, does that automatically make it
8 advice, and I would suggest that we have to at
9 least look a little closer at the document. I'm
11:34 10 simply flagging this to identify --

11 COMMISSIONER MacCALLUM: Oh, excuse me, I
12 just wanted to interject there. I don't suppose
13 it's advice as between third-party lawyers and
14 Mr. Williams that concerns us, it's advice given
11:34 15 or received as between Mr. Williams and his
16 principal?

17 MR. HODSON: Precisely.

18 COMMISSIONER MacCALLUM: Yeah.

19 MR. HODSON: And, for example, if Mr.
11:34 20 Williams and Mr. MacFarlane discuss amongst them
21 advice that they are going to give to the
22 minister, I would view that as being proscribed.

23 COMMISSIONER MacCALLUM: Right.

24 MR. HODSON: If Mr. Williams simply advises
11:34 25 Mr. MacFarlane of what he did that day, I'm not



1 so sure that that is advice, and again keeping in
2 mind that it is the federal minister that sought
3 to impose this limit.

4 COMMISSIONER MacCALLUM: Well, advised Mr.
11:34 5 MacFarlane of what he did that day, is that what
6 you said?

7 MR. HODSON: Yes.

8 COMMISSIONER MacCALLUM: Well, yeah,
9 that's -- the use of the verb is ill-advised in
11:35 10 that case. I know lawyers do it all the time, "I
11 was advised by somebody", meaning that I was told
12 by somebody. So 'advice', in that case just
13 avoid the use of that particular verb and say he
14 was told, what he told Mr. MacFarlane is not
11:35 15 advice necessarily.

16 MR. HODSON: And I, based on my preliminary
17 discussions with Mr. Williams' counsel and
18 Mr. Frayer, I believe we're gonna get into some
19 areas where there may be disagreement between Mr.
11:35 20 Williams' counsel and the federal minister as to
21 what, what is and isn't proscribed, and I'm just
22 flagging that.

23 COMMISSIONER MacCALLUM: Yeah, that's a --
24 yeah, that's a real problem, of course. We might
11:35 25 as well bring it right out. I mean if Mr.



1 Williams is being put in a position, by reason of
2 this decision, where he can't explain his actions
3 after having been accused of misconduct, he is in
4 an unenviable spot, let's put it that way. But I
11:35 5 don't see what we -- I don't see anything we can
6 do about it.

7 MR. HODSON: I am simply identifying the
8 fence posts I'm going to try and stay between as
9 I proceed, and I did not mean to refer to the
11:36 10 other counsel as the -- but those are the
11 positions.

12 Certainly, what he did and
13 the conclusions he drew with respect to the
14 information he gathered is what I am looking at,
11:36 15 so I will proceed on that basis. Certainly, I
16 have asked Mr. Frayer and Mr. McLeod --
17 presumably Mr. Frayer -- to object to any
18 question that he feels is inappropriate in light
19 of Chief Justice Laing's ruling, and I want to
11:36 20 reiterate it -- reiterate that I intend to
21 respect that ruling in my questions. The
22 challenge is applying it to the documents, to the
23 questions; secondly, to balance that with my duty
24 to this witness and to the Commission to ensure
11:36 25 that I get all relevant information out, and I



1 appreciate that Mr. Williams' counsel will have,
2 perhaps have a different view about where the
3 line ought to be drawn.

4 COMMISSIONER MacCALLUM: On the subject,
11:37 5 Mr. Hodson, of getting all the relevant
6 information out, I believe it was argued by
7 federal counsel not present at the time of the
8 judicial review that information which the
9 Federal Government had pursuant to the Section
11:37 10 690 applications was not communicated to the
11 provincial government and therefore was
12 irrelevant. Now we've heard Mr. Brown testify
13 that, in fact, he was receiving information from
14 the Federal Government about what it had learned
11:37 15 under Section 690, so I'm not sure that that
16 argument made at the judicial review was a valid
17 one, and might in fact have been misleading to
18 the Chief Justice.

19 MR. HODSON: I can actually -- if we want
11:37 20 to call up 339089, and this is the reference in
21 the judgement, if we can go to page 098. And,
22 again, part of the application on judicial review
23 did relate to relevancy. I think the Chief
24 Justice indicated that, since that had not been
11:38 25 addressed in your ruling, he was not going to



1 deal with it. But the position stated here, this
2 is from his judgement --

3 COMMISSIONER MacCALLUM: No, and by the --
4 and before you leave that, I just want to state
11:38 5 my unhappiness with the fact that Justice Canada
6 lawyers would bring an application for judicial
7 review about something we didn't even consider,
8 that is relevance.

9 MR. HODSON: It's stated here:

11:38 10 "It is the position of counsel for the
11 applicant that the only term of
12 reference with respect to which the s.
13 690 *Criminal Code* proceedings could be
14 relevant is the third one which
11:39 15 authorizes the Commission:

16 'To seek to determine whether the
17 investigation should have been
18 re-opened based on information
19 subsequently received by the police
11:39 20 and the Department of Justice.'

21 Counsel raises the question of how
22 advice exchanged by federal Department
23 of Justice lawyers between themselves or
24 with their Minister, which advice has
11:39 25 never been made public, and therefore



1 never received by Saskatchewan Justice
2 or the police, would assist the
3 Commission in determining whether the
4 investigation should have been re-opened
11:39 5 prior to when in fact it was in the year
6 1997."

7 And, certainly, that issue was a live one before
8 Chief Justice Laing. I believe that was the
9 first question he asked me, about how advice
11:39 10 could be relevant to our terms of reference if it
11 was never received by the province. At that time
12 I had indicated to the effect, as I did in my
13 brief, that we had not heard from Murray Brown
14 yet, had not heard the evidence.

11:39 15 So, certainly, the issue of
16 relevance was dealt with, and just to be fair,
17 what Chief Justice Laing concluded on relevance,
18 if we could go to the next page, I think he says:

19 "Commission Counsel did not
11:40 20 specifically address the foregoing
21 position, but put forward the position
22 this Court should not address the
23 applicant's request to set aside the
24 Commissioner's ruling on the basis the
11:40 25 proposed inquiries of federal Department



1 of Justice lawyers were outside of the
2 Commission's terms of reference because
3 this position was not advanced before
4 the Commissioner, and he has not ruled
11:40 5 on the same. His position is that as
6 there has been no ruling by the
7 Commissioner on this point, there is
8 nothing to judicially review. There is
9 merit to this submission."

11:40 10 And then it goes on to discuss the various
11 positions. So, certainly, that was one of the
12 issues dealt with, and again, certainly to the
13 extent that there would be questions of this
14 witness -- let me back up.

11:41 15 In the absence of the Court
16 ruling I anticipate that either I or other
17 parties might have questioned Mr. Williams in
18 relation to the matters that Mr. Brown has now
19 testified about, namely the communication, if
11:41 20 any, of the McIntyre report to the province.

21 COMMISSIONER MacCALLUM: Yes.

22 MR. HODSON: I must say that I am not sure
23 how I'm able to do that in light of the Court
24 ruling. Certainly, to the extent that it was
11:41 25 advice given or received, umm --



1 COMMISSIONER MacCALLUM: Well we already
2 know that, from Mr. Brown if his evidence is
3 accepted, that he heard about the McIntyre ruling
4 and its contents, so unless I hear anything
11:41 5 contrary, that seems to me that would be the
6 finding.

7 MR. HODSON: If I may, just one last point
8 before we leave this subject, and it's the issue
9 of privilege. After your ruling of June 1 I
11:42 10 think I'd agreed not to invoke the issue of
11 privilege in my questioning to Mr. Williams, I
12 had enough evidence to get through that, and
13 around the time of the Court application I was
14 asked by counsel for the federal minister to
11:42 15 either have the privilege issue determined or to
16 get the views of other parties, which I did. I
17 sent a letter to all the parties and received
18 replies from a number of them who challenged
19 privilege. And I indicated, at that time, that I
11:42 20 would ensure that the issue of privilege was
21 resolved by you.

22 The concern expressed by some
23 of the parties is that it was difficult to, in an
24 informed way, challenge privilege without knowing
11:42 25 the documents. If we can call up 339108, this is



1 a more -- the April 14th letter provided general
2 categories, this is the final list of privileged
3 documents, and it identifies 272 documents that
4 are -- you know, for example memo to Bruce
11:43 5 MacFarlane from Corbett and dated December 4,
6 1989, things of that nature, and that's been
7 provided to the parties. The position I received
8 back from a number of them were that; (a) it's
9 difficult to say whether they are or aren't
11:43 10 privileged because there is not enough
11 information there, the context; (2) the view of
12 some that they are not privileged, that Mr.
13 Williams is a functionary, not a lawyer; and (3)
14 that there may be waiver. So that, I guess, is a
11:43 15 live issue which I think has been significantly
16 affected by Chief Justice Laing's ruling.

17 If these documents truly
18 aren't privileged, in other words they are not
19 part of the solicitor/client privilege in either
11:44 20 communications between lawyer and client or
21 between lawyer and lawyer with a view to giving
22 advice, or the other categories that would give
23 rise to solicitor/client privilege, then they
24 ought to be disclosed subject to relevance and
11:44 25 constitutional issues.



1 On the question of waiver,
2 though, I'm not sure whether this issue needs to
3 be addressed in light of the Court's ruling that
4 precludes questioning of Federal Justice
11:44 5 witnesses about advice received or given, and the
6 best example of that is Mr. McIntyre's opinion.
7 That if, for example, that privilege issue was
8 determined, it was determined by you, Mr.
9 Commissioner, that privilege had been waived with
11:44 10 respect to that opinion, I'm not sure that that
11 gets us any further, because the federal
12 minister's position is then "you are
13 constitutionally proscribed from inquiring into
14 it, from questioning it, even getting it.

11:45 15 COMMISSIONER MacCALLUM: Yes.

16 MR. HODSON: So I think, in fairness, what
17 I am trying to say is I'm not sure it's necessary
18 for us to determine any waiver issues.

19 COMMISSIONER MacCALLUM: Probably not, they
11:45 20 are probably moot, because constitutionality
21 clearly trumps solicitor/client privilege.

22 MR. HODSON: Yeah. So I think in fairness
23 to parties, I will be today and tomorrow and into
24 next week with Mr. Williams, that if any party
11:45 25 wishes to continue to assert that either



1 privilege is not proper or it has been waived and
2 that Chief Justice Laing's ruling does not either
3 make it moot or prescribe getting a document
4 that's not privileged or waived, we'll have to
11:45 5 have that dealt with.

6 COMMISSIONER MacCALLUM: Yes, I would
7 rather do it on a case-by-case basis.

8 MR. HODSON: And certainly, just the last
9 point, I know we've heard Mr. Brown's evidence on
11:45 10 the McIntyre opinion and the departmental report,
11 and certainly if those reports had been made
12 public back in 1991, undoubtedly they would have
13 been exhibits before this Commission and part of
14 our record. I think the Commission has made
11:46 15 efforts to get all relevant documents that we are
16 entitled to and we are not able to get the
17 McIntyre opinion or the departmental report for
18 reasons stated, and the Federal Minister has not,
19 and my understanding will not voluntarily
11:46 20 disclose that to the parties or to the Commission
21 for the reasons stated, so with that, and I
22 apologize, Mr. Williams, for having you sit there
23 while I went through that, but I think it's
24 important before we start up again that we're all
11:46 25 on the same page, and perhaps I could invite Mr.



1 Frayer to comment, and Mr. McLeod.

2 COMMISSIONER MacCALLUM: Mr. Frayer?

3 MR. FRAYER: Thank you. I don't have the
4 advantage of having a formal presentation to give
11:47 5 to you with respect to the issues raised by Mr.
6 Hodson. I did have the benefit of Mr. Hodson
7 going through those with me this morning.

8 I might say that we've had
9 some discussions with respect to the nature of
11:47 10 certain documents and whether indeed they are
11 documents that are advice or a narrative of the
12 investigation and so on and there are still some
13 areas, some grey areas, and if those documents
14 arise, it's my intention to get up and to say to
11:47 15 you in very brief terms that the
16 constitutionality of those documents is protected
17 by virtue of the decision of the Chief Justice
18 and at that time you may be invited to review the
19 document and to make a determination as to
11:47 20 whether it comes within advice or without advice.

21 Now, there are very few of
22 those documents that are before the inquiry, some
23 of which have already been referred to, for
24 example, the one of October the 2nd of 1991 that
11:48 25 arose during the course of Mr. Brown's evidence



1 last week as I gather, and it was put on the
2 record by my colleague Ms. Cox that that was a
3 constitutionally protected document and that
4 there may be some limitations on its use.

11:48 5 There are documents of a
6 similar nature between Mr. Williams and his
7 superiors in the Department of Justice that may
8 be arguably advice and fall within the
9 constitutional boundaries, but we'll have to deal
11:48 10 with these, I think, on sort of a case-by-case
11 basis.

12 We've had some considerable
13 discussions, Mr. Hodson, Mr. McLeod and myself,
14 about resolving some of these issues so that the
11:48 15 evidence of Mr. Williams can move forward in sort
16 of a freer-flowing fashion than my getting up and
17 objecting to them and we're still in the throes
18 of some of those discussions. I'm not certain
19 whether Mr. Hodson intends to raise those this
11:49 20 morning. I do know that during the course of his
21 questioning of Mr. Williams, that he is going to
22 be raising those. The first of those I think is
23 a document dated August the 28th of 19 --

24 MR. HODSON: Yes.

11:49 25 MR. FRAYER: '91?



1 MR. HODSON: 1990.

2 MR. FRAYER: I'm sorry, August the 28th of
3 1990, which I think is the first document of the
4 nature. It's one of those ones in which the
11:49 5 Minister of Justice waived privilege because it
6 was inadvertently disclosed, but relies on the
7 constitutional limitations as set out in the
8 decision of Chief Justice Laing.

9 COMMISSIONER MacCALLUM: What do you say
11:49 10 about my ability to interpret the judgment of
11 Chief Justice Laing, can I give it a narrow
12 reading and just say, well, the only real thing
13 that was before him was advice and therefore
14 anything he said beyond that, for example,
11:50 15 conduct, is simply overture and I'm not bound by
16 it?

17 MR. FRAYER: I'm not sure I can speak to
18 that issue. I get your concerns and you've
19 expressed them in response to the issues as
11:50 20 raised by Mr. Hodson. I would like to think
21 about that if I could before formally responding
22 to that if you're okay with that.

23 COMMISSIONER MacCALLUM: Well, if you get
24 any brilliant thoughts, let me know would you.

11:50 25 MR. FRAYER: They will likely not be



1 brilliant, Mr. Commissioner, but hopefully some
2 rational way of reviewing that, because it's very
3 clear from what Mr. Hodson said and my conduct
4 leading up to the proceedings that asked you to
11:50 5 place certain limitations on the questioning of
6 certain Federal Justice witnesses, that there was
7 seven days of evidence, I don't dispute that.

8 COMMISSIONER MacCALLUM: Right.

9 MR. FRAYER: And at no time did I get up on
11:50 10 any occasion and object to the line of
11 questioning by Mr. Hodson of Mr. Williams. I
12 expect in most cases that will still be the
13 approach taken despite the constitutional
14 limitations, but when getting into those
11:51 15 documents that are pivotal documents, I may be
16 obliged to get up and speak to them at that time.

17 COMMISSIONER MacCALLUM: I understand.

18 MR. FRAYER: So those are my comments.

19 COMMISSIONER MacCALLUM: Thanks, Mr.
11:51 20 Frayer.

21 MR. HODSON: If I may, I'm still I guess in
22 a bit of a difficult position having been put in
23 the position of having to deal with two different
24 sets of counsel for the Federal Minister.

11:51 25 COMMISSIONER MacCALLUM: Yes, uh-huh.



1 MR. HODSON: Namely, Mr. Frayer and
2 Ms. Cox, and Mr. Pierce and Mr. Kindrachuk who
3 argued the judicial review application, and
4 without getting into too fine a point, there were
11:51 5 a number of contradictions in positions taken
6 before the court and taken here.

7 On this issue of reasons, I
8 need to know what the Federal Minister's position
9 is for the purposes of this inquiry, I do not
11:51 10 want to ask a question of Mr. Williams about
11 reasons on the basis of what I understand to be
12 perhaps Mr. Frayer's position and find out that
13 someone else has a different position and that
14 we're back in court because I have stepped over
11:52 15 the line. I raised it before Chief Justice
16 Laing, I raised it with Mr. Kindrachuk, I've
17 raised it with Mr. Frayer. I simply would like
18 someone from the Federal Minister of Justice to
19 represent to this Commission what their position
11:52 20 is on whether or not asking a witness about
21 reasons, quite apart from advice, is, in their
22 view, prescribed, because I've been informed that
23 it is not, and if there's different views, I
24 think we need to clarify that immediately.

11:52 25 MR. FRAYER: Hopefully over the course of



1 the lunch break I can do that, I would hope to be
2 able to be in a position to come back and to
3 alleviate those concerns or otherwise.

4 MR. HODSON: Well, that's fine.

11:52 5 COMMISSIONER MacCALLUM: Okay.

6 MR. HODSON: And I can leave it. The
7 question is, it puts Mr. Williams in a difficult
8 position if I'm entitled to get into reasons,
9 which I have for seven days, and I've not because
11:53 10 of some incorrect view of the minister's
11 position, it's not fair to him, so I think it is
12 important to get that clarified.

13 COMMISSIONER MacCALLUM: Okay.

14 MR. FRAYER: And I get that as being
11:53 15 significant, Mr. Commissioner.

16 COMMISSIONER MacCALLUM: Thanks. Try your
17 best then, Mr. Frayer.

18 MR. FRAYER: I will, Mr. Commissioner.

19 COMMISSIONER MacCALLUM: Thank you.
11:53 20 Mr. McLeod, do you want to say anything to us now
21 or would you rather wait until after lunch, or
22 say nothing?

23 MR. McLEOD: Mr. Commissioner, thank you.
24 I suppose sooner or later I'll have to say
11:53 25 something.



1 As My Friends have indicated,
2 we've had a number of discussions about some of
3 the difficulties that arise partly as a result of
4 applying Justice Laing's decision, but I think
11:53 5 like My Learned Friends, the fundamental position
6 I would make at the moment is that we almost have
7 to decide this on a case-by-case basis. It's a
8 bit regrettable, but that's the nature of the
9 process, and the only thought that I might leave
11:54 10 with my colleagues and the Commissioner is this,
11 that a single piece of evidence, whether it's a
12 document or testimony from a witness like Mr.
13 Williams may well be admissible in a proceeding
14 for a whole range of purposes which may well be
11:54 15 within the mandate of this Commission and I think
16 there's a difference between what Chief Justice
17 Laing described in his decision as probing into a
18 matter or inquiring into a matter and receiving
19 evidence on the other end, and that may assist us
11:54 20 on a question-by-question basis. For example, if
21 the purpose is clearly a proper one and clearly
22 one that's related to the mandate of the
23 Commission and the constitutional limitations,
24 then perhaps we all have an understanding that
11:55 25 incidentally it might appear to tread into other



1 areas, but because of its purpose, it may well be
2 permissible. I'm hopeful that that will help us
3 get through --

4 COMMISSIONER MacCALLUM: I hope so,
11:55 5 Mr. McLeod.

6 MR. McLEOD: Thank you, sir.

7 MR. HODSON: I'm wondering in light of the
8 time, maybe we should start at 1:30 questioning?

9 COMMISSIONER MacCALLUM: Yes.

11:55 10 MR. HODSON: Sorry, Mr. Williams.

11 (*Adjourned at 11:55 a.m.*)

12 (*Reconvened at 1:30 p.m.*)

13 MR. HODSON: Good afternoon, Mr. Williams.
14 Just to update you, Mr. Commissioner, I
01:31 15 understand from Mr. Frayer that he does not have
16 any further instructions on this issue of whether
17 the Federal Minister is of the view that this
18 Commission and, in particular, Commission
19 Counsel, cannot ask this witness about the
01:31 20 reasons for actions unrelated to advice. I will
21 proceed on this basis, I will rely upon Mr.
22 Frayer being counsel for the Federal Minister
23 before this Commission to object if the Federal
24 Minister is of the view that I am crossing the
01:32 25 constitutional line and offending Chief Justice



1 Laing's ruling, and if he does not do so, I will
2 assume that I am on a footing that is
3 appropriate.

4 COMMISSIONER MacCALLUM: Okay.

01:32 5 MR. HODSON: And I think Mr. Frayer will --

6 MR. FRAYER: Thank you, Mr. Hodson.

7 MR. HODSON: Fair enough. And then I think
8 we may be able to clarify this reasons issue
9 later. If we happen to bump into it today and we
01:32 10 need to set it aside until tomorrow to allow Mr.
11 Frayer to follow up, I'm fine with that as well.

12 COMMISSIONER MacCALLUM: Okay.

13 BY MR. HODSON:

14 Q Now, Mr. Williams, back to you, sir. If we could
01:32 15 call up 003570. I just want to do a brief recap
16 of where we left off, and I'm told it was June
17 22nd of 2006 that we left off, and we spent seven
18 days going through a fair bit of your
19 investigative work and your fact finding matters,
01:33 20 and just to clarify, what it is that I'm seeking
21 to get from you is firstly what I have questioned
22 you on and intend to continue, is to review what
23 you did in your review of the Section 690
24 applications and your assessment and conclusions
01:33 25 with respect to the information that you reviewed



1 and gathered and, in particular, whether the
2 information that you gathered tended to establish
3 a reasonable likelihood that a miscarriage of
4 justice occurred under Section 690, and I think
01:33 5 that was the language, and please correct me if
6 I'm wrong, that we had used last time, that when
7 you looked at a piece of information, you were
8 trying to assess it to conclude whether it was the
9 type of information that might provide the basis
01:34 10 for a remedy being granted; is that correct?

11 A That's correct.

12 Q And maybe just in your own words, what was the
13 threshold test? I believe it was establish a
14 reasonable likelihood that a miscarriage of
01:34 15 justice occurred. Is that a fair way to put it?

16 A I would frame it as follows: Whether or not there
17 is a reasonable basis to conclude that there was a
18 likely miscarriage of justice.

19 Q And I think you told us your task then was to
01:34 20 review information that was put forward,
21 investigate it, often by interviewing witnesses
22 and gathering other information, and making an
23 assessment and your own conclusion as to whether
24 or not the information, or to what extent that
01:34 25 information may fall into that category; is that



1 correct?

2 A Yes, it's largely so, I would make -- I would
3 gather the information, make some form of
4 assessment and pass that along.

01:34 5 Q But the assessment was whether or not the
6 information might provide a basis to grant a
7 remedy under Section 690?

8 A Yes.

9 Q Now, just for the record, in some cases you would
01:35 10 put your conclusions, or your assessment in the
11 form of memorandums to the file; is that -- and we
12 saw a number of those in your earlier evidence?

13 A Individual bits of information were assessed and
14 sometimes the assessment was in relation to what
01:35 15 was said at trial and sometimes in relation to
16 what other witnesses said or what other forms of
17 evidence had to bear on that particular fact. I
18 mean, collectively, at the end of the process, one
19 would draw certain conclusions, but as you moved
01:35 20 along, not knowing how long it would take, and
21 while it was still fresh in your mind, you would
22 certainly want to record what you had seen,
23 observed, and how it related to other bits of
24 information that were relevant to that topic.

01:36 25 Q Now -- and I just want to deal with this generally



1 now, we'll see some documents later. Would there
2 be occasions where your conclusions or your
3 assessment would be recorded in memorandums that
4 may have been provided to other lawyers in the
01:36 5 Federal Department of Justice for different
6 purposes?

7 A Yes.

8 Q And is it fair to say generally, and I'm not
9 asking you to commit, to commit to every document,
01:36 10 but that in some cases documents that would be
11 communicated to other lawyers for purpose A,
12 namely, related to advice, might as well include
13 some factual information related to your
14 investigative work?

01:36 15 A Yes.

16 Q And so that some documents we might find have more
17 than one purpose to them?

18 A Some documents would include fact as well as
19 assessment and conclusions, yes.

01:37 20 Q And I think, Mr. Commissioner, just for the
21 record, I think that will be our challenge in
22 going forward with some of the documents, but just
23 so that we have it clear, if I were to ask you to
24 go through and tell me in all of the documents
01:37 25 where's the best record of what conclusions and



1 assessments you made of an interview, for example,
2 would it likely be documents you prepared for
3 whatever purpose around that time?

4 A Yes. Generally speaking, yes.

01:37 5 Q I'll take you back, we were at June 25 of 1990
6 when we last adjourned and we were talking about,
7 I think we finished off with you telling us about
8 your efforts to interview Ron Wilson after his
9 recantation and I went through with you a
01:37 10 memorandum you prepared shortly after, I think it
11 was June 18th or 19th of 1990 when you went out to
12 Nakusp, and I think you told us you thought you
13 were going to interview Mr. Wilson, you got there
14 and he refused to talk to you. Is that basically
01:38 15 correct?

16 A Yes.

17 Q And then you prepared a memorandum. This document
18 is a memorandum from Mr. Corbett to the file and
19 it appears that he got a call from Mr. Wolch in
01:38 20 the absence of Mr. MacFarlane now saying that Ron
21 Wilson was prepared to be interviewed on June 28th
22 in Nakusp according to the following terms, court
23 reporter, Mr. Watson be present, and:

24 "- that Hersh Wolsh be allowed to attend
01:38 25 the interview, but would not take part



1 in any questions or cross-examination,
2 that Mr. Williams not be the counsel
3 assigned to interview Mr. Wilson."

4 Do you have any recollection as to why these
01:38 5 communications were made with Mr. Corbett and/or
6 Mr. MacFarlane or did you simply become aware of
7 the fact that they were going, I guess, above you
8 in the hierarchy to get something done?

9 A It was obvious at that time that either Mr. Asper
01:39 10 and Mr. Wolch were unhappy with the work I had
11 done to date and felt that it would be appropriate
12 to speak to those to whom I reported, effectively
13 to get someone else assigned to the file.

14 Q If we can go to the next page, and Mr. Corbett's
01:39 15 memo talks about the position conveyed to Mr.
16 Wolch on the interview of Ron Wilson, that
17 Mr. Watson could be present, that:

18 "...a copy of the transcript would be
19 provided to Mr. Wolsh..."

01:39 20 But:

21 "- that we objected to the presence of
22 Mr. Wolsh at the interview,"

23 and:

24 "- that Mr. Williams would be assigned
01:39 25 to conduct the interview."



1 What is your recollection as to the position
2 about why Mr. Wolch would not be allowed to be
3 present at the interview?

4 A Mr. Wilson had been interviewed at some length by
01:40 5 a representative from Centurion Ministries and
6 they were acting on behalf of Mr. Milgaard. A
7 decision was taken that it would be preferable for
8 us to have our own separate interview with Mr.
9 Wilson without the distraction, perhaps, of the
01:40 10 Milgaard representative at that time. They had
11 already, in the absence of anyone from the Federal
12 Department of Justice, had an opportunity to
13 question Mr. Wilson. We were told that that
14 questioning was of some length and we felt that
01:40 15 this would provide us with an opportunity to
16 review that material with Mr. Wilson without any
17 potential distraction. He could have counsel
18 representing him and to the extent that there was
19 any concern that his rights as a witness might be
01:41 20 in some jeopardy, he would be in a position, with
21 counsel, to assert whatever rights and maintain
22 whatever rights to which he was entitled.

23 Q Are you able to tell us whether it was a specific
24 concern in that you were concerned that something,
01:41 25 that Mr. Wolch's presence at the examination might



1 somehow have an effect, an untoward effect on the
2 proceedings, or was it a more general concern that
3 if you started to allow witnesses, certain
4 witnesses to have Mr. Milgaard's counsel present,
01:41 5 that there was something more general, general in
6 nature that caused the concern?

7 A My inquiry is not a trial. Where a witness
8 chooses, or chose to have counsel, we have no
9 objection. However, we felt that since the
01:42 10 Milgaards had had an opportunity to question this
11 particular witness and had provided a significant
12 statement, we felt it was appropriate for us to
13 test the veracity of that in their absence.

14 Q Were you concerned that Mr. Wolch's presence would
01:42 15 have an effect on Mr. Wilson's answers?

16 A I didn't have that specific concern, but it could
17 prove to be, shall we say, counter productive.
18 Our experience to date had been that we had had
19 some level of comfort in making our inquiries in
01:43 20 private in what I considered a non-adversarial
21 context. The inclusion of counsel for the
22 applicant would insert an element of advocacy or
23 adversarial dimension that we felt was not
24 appropriate.

01:43 25 Q Go to 333466, please, and again I'm going through



1 chronologically here, this is not a very good
2 copy, this is a June 25, 1990 letter from the
3 Asper -- or, pardon me, the Wolch Pinx firm,
4 actually, it's from Mr. Wolch. I can't read it
01:43 5 very well, but attached is a statement from Albert
6 Cadrain which I'll go to in a moment. And do you
7 recall receiving from Mr. Wolch, or the department
8 receiving a copy of Albert Cadrain's statement
9 around this time?

01:44 10 A Yes.

11 Q And if we can scroll up, this is sent to Mr.
12 Corbett as opposed to you. Do you recall whether
13 any significance was placed on that fact or why
14 that came about?

01:44 15 A I just don't know. I suspect that there had been
16 some recent communications between Mr. Wolch and
17 Mr. Corbett or Mr. Wolch was perhaps hoping that
18 in light of an earlier request to have someone
19 else assigned, that he would go directly to my
01:44 20 superior, Mr. Corbett.

21 Q Now, this would be a few days after the request to
22 have you removed from the interview of Mr. Wilson.
23 Is that how you took this communication, to be an
24 attempt to go to someone else at Federal Justice
01:44 25 other than you?



1 A Well, quite frankly, it may well have been one of
2 the things that occurred to me. I knew that there
3 had been some unhappiness expressed about my
4 questioning of Miss Hall and Miss Fisher, there
01:45 5 had been some complaints or suggestions that my
6 behaviour was inappropriate and this perhaps was
7 just an extension of that unhappiness.

8 Q If we can go to the next page, just so that you
9 can see the handwritten version, you are familiar,
10 or generally familiar with the Albert Cadrain
11 statement that was provided in June of 1990?

12 A Yes, I reviewed it.

13 Q This is a typed version of the statement, and this
14 is dated June 24th, 1990, and this is the
01:45 15 statement that, and we've been through this on a
16 number of occasions, where Mr. Cadrain talks about
17 his treatment by the police and says here:

18 "They put me through hell and mental
19 torture. It finally reached the point
01:45 20 where I couldn't stand the constant
21 pressure, threats and bullying any
22 more."

23 And the next page, the comment here:

24 "From the evidence it now appears that
01:46 25 David Milgaard is innocent."



1 And statement provided to Paul Henderson of
2 Centurion Ministries. Now, the statement does
3 not recant any of his trial evidence; namely, his
4 evidence where he saw blood on David's clothes
01:46 5 and David in a hurry to leave and I think the
6 cosmetic case would have been the primary pieces
7 of incriminating evidence at trial. What is your
8 recollection of what -- what was your assessment
9 of this statement?

01:47 10 A It was largely conclusory and, for example "from
11 the evidence it now appears that David Milgaard is
12 innocent", and the first question that came to my
13 mind is what evidence was Albert Cadrain referring
14 to? It needed to be clarified.

01:47 15 Q And what about the statement that he went through
16 mental hell, or "they put me through hell and
17 mental torture", and his treatment by the police;
18 what was your assessment of that piece of
19 information?

01:47 20 A Well I wasn't quite certain what he was referring
21 to. I had known, based on information I'd
22 received previously, that he had had a very
23 unhappy experience with the Regina City Police and
24 that, when he brought to the Saskatoon police his
01:47 25 suspicions about David Milgaard's perhaps



1 involvement in the death of Gail Miller, that he
2 was questioned repeatedly because the police
3 initially didn't believe him and kept on
4 double-checking his story against that of his
01:47 5 travelling companions.

6 So, to the extent that he was
7 often interviewed and that his initial account had
8 been challenged by the police who initially didn't
9 believe him, that was traumatic for him, and
01:48 10 certainly I knew of that so I wasn't certain if
11 that was what he was referring to in this second
12 statement, or in this statement, or whether there
13 was additional information about his treatment
14 with the police that I wasn't aware of, so that
01:48 15 also required some investigation.

16 Q And did you have any concerns with the fact that
17 this information was obtained by Paul Henderson?

18 A I knew, from previous statements that had been
19 obtained by Mr. Henderson, that it required
01:48 20 additional probing.

21 Q If we can go to 003 -- so I take it, at this
22 point, you determined that some follow-up was
23 required of Mr. Cadrain's --

24 A Yes. Umm, the statement wasn't, I call it,
01:49 25 'sourced' in the sense that if you say "from



1 evidence it now appears that David Milgaard is
2 innocent", I would have expected some reference in
3 the statement to the evidence to which Mr. Cadrain
4 was referring. There are other -- there are
01:49 5 other, shall we say, characteristics of some
6 statements which merely state a conclusion but
7 omit the factual foundation upon which that
8 conclusion is based, and I call that 'sourcing'.

9 Q And, again, can you -- what was your assessment as
01:49 10 to whether this statement provided a reasonable
11 basis to conclude that a miscarriage of justice
12 may have occurred?

13 A Well, by itself it -- it was conclusory, it
14 required some additional investigation before any
01:50 15 meaningful assessment of its -- of it could be
16 undertaken.

17 Q Go to 003559, please. Actually, sorry, go to
18 039118. This is a newspaper article that appeared
19 I think either that day or the next day after you
01:50 20 received it, *Milgaard witness says detectives*
21 *'tortured' him:*

22 "The star witness from
23 Milgaard's trial said he was
24 psychologically tortured by Saskatoon
01:50 25 police officers until he suffered a



1 mental breakdown and was committed to a
2 hospital psychiatric ward."

3 And if we could just scroll down the full page,
4 here:

01:51 5 "In a statement given several
6 weeks earlier to Henderson, Cadrain said
7 he had a recurring vision of the Virgin
8 Mary appearing from the clouds and
9 stomping on a serpent that displayed
01:51 10 Milgaard's head.

11 Federal Justice Department
12 investigator Eugene Williams interviewed
13 Cadrain last week in Port Coquitlam,
14 B.C., but Dennis Cadrain said Williams
01:51 15 was unimpressed with Cadrain's
16 statements."

17 First, your comment on the article itself, did
18 that have any influence on how you looked at the
19 Albert Cadrain statement?

01:51 20 A If you could scroll back to the --

21 Q Sure.

22 A -- to the date of that article?

23 Q June the 26th, 1990. So the article, the
24 statement was given June 24th, 1990 and faxed to
01:51 25 you on the 25th of June -- or faxed to Mr.



1 Corbett, pardon me.

2 A On the 25th?

3 Q Yes.

4 A It probably would have come to me about the same
01:52 5 time as the article was published. The statement
6 provides the basis for the article, and I think
7 the headline says it all, and it had the desired
8 impact, and that was simply to add another plank
9 in the growing campaign to signal that there was
01:52 10 something that required a ministerial
11 intervention. If you look at the statement and
12 its conclusory nature I guess, to the uninitiated,
13 you might think that that mere conclusion deserves
14 a favourable result.

01:52 15 Q Now it's been observed that there are, I think, a
16 couple of things that perhaps aren't identified in
17 the article; number one is that Albert Cadrain did
18 not recant --

19 A Any of his testimony.

01:53 20 Q -- his evidence; and two, the fact that, as you
21 had pointed out, he had gone into the Saskatoon
22 City Police initially on his own and gave
23 incriminating evidence, and if he indeed was
24 tortured it was -- would have had a favourable
01:53 25 effect on Mr. Milgaard and to his case, --



1 A Yeah.

2 Q -- and how do you react to that commentary?

3 A Well, certainly those are key omissions which a
4 reader not familiar with the facts couldn't
01:53 5 appreciate and couldn't fully understand the
6 significance of the term "torture". This was not
7 a situation in which Albert Cadrain was tortured
8 to provide an incriminating statement, this was a
9 situation in which Albert Cadrain was, if you want
01:53 10 to use the word 'tortured' -- I wouldn't subscribe
11 to it -- but this is a situation in which any
12 torture he may have felt came from the fact that
13 the police did not believe his incriminating
14 account and constantly tested him on various
01:54 15 facets of that account.

16 Q And the last paragraph, where Dennis Cadrain said
17 that you were unimpressed with Cadrain's
18 statements, back in June we had gone through your
19 -- you went out and visited Mr. Cadrain, we went
01:54 20 through -- Albert Cadrain -- we went through that
21 with you. Did you say anything to Dennis Cadrain
22 about the fact you were unimpressed with his
23 statements or are you able to shed any light on
24 that?

01:54 25 A I had some discussions with Dennis Cadrain but



1 it's -- it was not my practice to comment to one
2 witness about another witness' statement or to
3 comment about his own statement other than to
4 receive it, so Mr. Cadrain's perception is his own
01:55 5 and I don't subscribe to it.

6 Q And so is it your evidence that that would likely
7 be his observation or assessment as opposed to
8 something that you believe you said to him?

9 A Correct. Because my recollection is that, when I
01:55 10 spoke with Albert, I spoke alone with Albert.
11 Dennis was not present at the time of my interview
12 with Albert, I had spoken with Dennis separately.
13 Now wherever, I am not certain where he got his
14 impression, but he's free to relay it to the
01:55 15 reporter, and it was published as fact.

16 Q Go to 002108. This is your June 27th, 1990 memo
17 to file relating to your interview of Art Roberts,
18 and you're familiar with Art Roberts and where he
19 fit in?

01:56 20 A Yes.

21 Q And it indicates that on Tuesday, June 26th you
22 phoned him:

23 "... to discuss Ron Wilson's allegations
24 that he had been harassed and
01:56 25 manipulated by the police when he was



1 questioned in 1969."

2 And is it fair to say that this would be the
3 first occasion when any allegation had been made
4 relating to Art Roberts and his involvement in
01:56 5 the matter?

6 A You, when you say "the first", it flowed from
7 allegations made by Mr. Wilson --

8 Q I'm sorry, I meant --

9 A -- contained in his --

01:56 10 Q Yeah, I'm sorry, let me rephrase that. Is it fair
11 to say that your -- the purpose in you contacting
12 Mr. Roberts is because of what was in Ron Wilson's
13 June 4th, 1990 statement, and in particular that
14 he had been harassed and manipulated by the police
01:57 15 when he was questioned, and in particular the
16 polygraph; is that correct?

17 A That's correct.

18 Q Prior to this time had there been any allegation
19 about Art Roberts' treatment of Nichol John in the
01:57 20 original investigation?

21 A Not to my knowledge, no.

22 Q And so this appears to be in response to the Ron
23 Wilson statement, is that fair, your contact?

24 A Yes.

01:57 25 Q You say:



1 "After the passage of 20 years,
2 Mr. Roberts does not recall the details
3 of his interview. He does recall,
4 however, that they said something which
01:57 5 prompted him to think that they were in
6 the alley when Milgaard took the girl."

7 Do you recall anything more about that
8 conversation?

9 A Mr. Roberts was vague about details. He merely
01:57 10 recited that as a highlight, something that stuck
11 in his mind, but when I probed him further he
12 couldn't provide the specifics. It was just an
13 impression, or I think more than an impression,
14 but he had a recollection of having heard
01:58 15 something to that effect but he couldn't, for
16 example, provide any of the words said or anything
17 more about the context in which he received that
18 statement.

19 Q And is it fair to say that that would have been
01:58 20 related to his interview of Ron Wilson?

21 A Of both.

22 Q Actually, it just says "they", so it could have
23 been Wilson or Nichol John?

24 A Yeah.

01:58 25 Q And you ask him about records, and I think we will



1 see later you tried to follow up and never did
2 locate any records from Art Roberts; correct?

3 A Correct.

4 Q And Mr. Roberts asked you to contact the Calgary
01:58 5 Police department; do you recall -- or what was
6 your recollection of what -- maybe better to
7 phrase it this way. What was your understanding
8 at this time, based on your discussion with Mr.
9 Roberts and any other information, as to what,
01:59 10 what statement of Ron Wilson was polygraphed or
11 verified or not verified by polygraph?

12 A I'm not certain, as we speak some several years
13 later, whether it was the initial statement that
14 was polygraphed or whether it was the account that
01:59 15 he provided to the Saskatoon police, either on the
16 trip from Regina to Saskatoon, and then secondly
17 later on. But, certainly, the utterances of Mr.
18 Wilson were polygraphed.

19 Q Okay. And I guess we've heard, we've heard two
01:59 20 different scenarios, or maybe more. One scenario
21 where Mr. Wilson's non-incriminating statements
22 were tested and determined to be deceptive and,
23 therefore, the conclusion was drawn that when he
24 later said incriminating statements they must be
02:00 25 true since his utterances, non-incriminating



1 utterances, were false. A second scenario is that
2 he was actually tested on his incriminating
3 statements and that those were verified to be
4 true?

02:00 5 A I believe, I believe it was the -- they may have
6 well done the former in terms of finding if there
7 was some deception in the first set of statements,
8 but certainly my recollection is that the second
9 statement which tended to incriminate David
02:00 10 Milgaard was tested.

11 Q That was your understanding?

12 A Yeah, yes.

13 Q And did you get that from your discussions with
14 Mr. Roberts?

02:00 15 A That's my recollection, yes.

16 Q And so the May 23rd and/or -- well the May 23rd
17 statement, which is the first incriminating
18 statement that was given to Detective Karst after
19 the polygraph session, was it your understanding
02:01 20 that the substance of that, particularly the
21 incriminating statements, were verified by Mr.
22 Roberts?

23 A I may stand to be corrected but that, to me, is
24 what I now recall.

02:01 25 Q Okay. 002109. This is a letter June 27th, 1990



1 to the Calgary police looking for the records, and
2 you say here:

3 "I have spoken with Mr.

4 Roberts. While his recall of the

02:01 5 details of that session is limited, he

6 recalls that 'nothing untoward occurred

7 during that session.'"

8 Did you probe Mr. Roberts about that, about his
9 conduct in questioning Mr. Wilson and Ms. John?

02:01 10 A I did.

11 Q And what is your recollection of what he told you
12 and what was your sense of what he was telling
13 you?

14 A Well I wanted to find out from him what his
02:02 15 involvement was in the questioning of Ms. John, or
16 Demyen, and Mr. Wilson, the circumstances under
17 which it occurred, and whether or not he was alone
18 or with others during the course of his
19 questioning. And although he was short on
02:02 20 details, that was his conclusion, that nothing
21 untoward -- and I understood that to mean that
22 there weren't any, any oppressive behaviour
23 towards the two youthful witnesses, or anything of
24 which he might be ashamed or would be illegal.

02:02 25 Q Would you expect him to tell you that on the



1 telephone if you asked him that?

2 A I asked him, so I anticipated that he would give
3 me a candid response, yes.

4 Q And, apart from getting a candid response from
02:03 5 him, what other ways might you go about trying to
6 determine whether something untoward or
7 inappropriate occurred during Mr. Roberts'
8 questioning of Mr. Wilson or Ms. John in 1990 when
9 you're reviewing this?

02:03 10 A Well I think, by that time, I had already spoken
11 with Nichol John and I had questioned her in part
12 about her experiences with the police and with the
13 polygraph.

14 Q And, what, did you reach any conclusions, then, as
02:03 15 far as Mr. Roberts and his involvement at this
16 time?

17 A Well based on the information available to me at
18 that time and the perceptions I had of Ms. John's
19 description to me of her experiences, I -- I had
02:04 20 nothing, I had no information to contradict it,
21 Mr. Roberts, when he said "nothing untoward
22 occurred during that time". Certainly, had Ms.
23 John, or Ms. Demyen, felt that she had been
24 treated badly or that the questioning was
02:04 25 oppressive or not in accordance with her



1 perception of how it should have happened, I fully
2 expected that she would have told me.

3 Q And your sense from Ms. John's statements to you
4 or information to you was that she found there was
02:04 5 nothing untoward that Mr. Roberts did?

6 A Correct. She wasn't happy with the experience,
7 but she didn't attribute any blame to him.

8 Q And is it fair to say that -- well, one more
9 question on the notes. Would you agree that
02:05 10 getting access to Mr. Roberts' notes or reports of
11 his interviews and the polygraph records would
12 have been of assistance to you in probing what
13 might have happened in those interviews?

14 A Yes. Certainly the questions asked by the
02:05 15 polygrapher, and the responses, would have shed an
16 enormous amount of light on the conclusions that
17 they had reached.

18 Q And so, in the absence of those, are you left then
19 with Wilson, John, and Roberts being the three
02:05 20 people who were with each other on May 23rd to try
21 and find out whether anything untoward happened?

22 A That, that's correct, but you must also keep in
23 mind that there had been, at the preliminary
24 inquiry and at the trial, the -- this topic was
02:05 25 canvassed, I believe, by justice -- Mr. Tallis in



1 his questioning of the two witnesses.

2 Q And so is it a case where you put some credence in
3 the fact that this was all tested in the trial
4 process and that, if something untoward had
02:06 5 happened, it could have or maybe should have
6 become apparent in the course of the trial
7 proceedings?

8 A Yes.

9 Q If we can go to 003559. And this gets back to
02:06 10 your dealings with Mr. Watson on behalf of Mr.
11 Wilson, and you're familiar with Kenneth Watson
12 being counsel for Mr. Wilson?

13 A Yes.

14 Q This is his June 26th, 1990 letter to you --
02:06 15 actually, sorry, it's getting back to Mr. Corbett,
16 Mr. Corbett wrote to him with the conditions. And
17 Mr. Watson says that Wilson now is prepared to be
18 interviewed with respect to the recent statement:

19 "As I mentioned to Mr. Wolch, however,
02:07 20 Mr. Wilson wishes to see the transcripts
21 of the original trial before speaking
22 with your representatives. I understand
23 that one is being delivered to me by
24 courier but at this point it has not yet
02:07 25 arrived."



1 Did that request cause you any concern in light
2 of Mr. Wilson's June 4th statement, which I think
3 made some reference to his trial evidence, that
4 he was now asking for them?

02:07 5 A It -- it just prompted me to question what he had
6 seen at the time. The possibility existed that he
7 had been shown his trial transcripts and that it
8 had been taken away, and that to prepare for
9 whatever questioning I proposed, he wished to see
02:07 10 it again. But it certainly caught, caught my
11 attention, and I believe we caused a copy to be
12 made and provided to him.

13 Q Just one moment. Yeah, if we can go to 000248,
14 and go to the third page. Actually, the next
02:08 15 page. This is the June 4th, 1990 statement, he
16 says:

17 "From reading the transcript
18 of my 1970 trial testimony, a copy of
19 which was provided to me by Paul
02:08 20 Henderson on this date, I can attest to
21 having made the following additional
22 allegations ...",
23 and then it goes on. So, again, did -- was it
24 your view that he had -- he just needed another
02:08 25 copy, or did you have concerns that he may not



1 have looked at everything?

2 A Well it occurred to me that his transcripts may
3 have been given to him, he may have reviewed
4 portions of it, sufficient portions so that he
02:09 5 could make those statements, and perhaps when Mr.
6 Henderson left he took the transcripts with him.
7 But now that he had counsel, and I presume he had
8 a copy of his statement, he wanted another copy of
9 the transcript. I had no objection to that.

02:09 10 Q If we could go back to the letter, 003559, and
11 Mr. Watson writes:

12 "With respect to the ... interview ...",
13 he says:

14 "He is adamant ...",

02:09 15 being Ron Wilson:

16 "... that Mr. Williams not be present.

17 I realize that this is not your wish,

18 but my client is steadfast in his

19 resolve that someone other than Mr.

02:10 20 Williams conduct the interview."

21 Had you ever met Ron Wilson prior to this letter?

22 A No, I hadn't.

23 Q Now I think, when you tried to meet with him in --

24 I think 10 days earlier when you went out to

02:10 25 Nakusp, was that an RCMP officer that --



1 A Well, I -- he may have been present but I -- I
2 spoke with Mr. Watson on that occasion.

3 Q With who, I'm sorry?

4 A With Mr. Watson.

02:10 5 Q Okay. So is it your evidence that you don't
6 believe you spoke directly with Mr. Wilson on that
7 --

8 A No. What -- my recollection is that we went out,
9 he didn't show, an officer was dispatched to his
02:10 10 house and -- because we had tried telephoning him
11 without, without success. It was a day in which
12 there were a number of showers, it was raining
13 periodically, the officer found him outside of his
14 dwelling and when he asked him why he wasn't
02:11 15 showing up he gave an explanation much to the
16 effect that, you know, nobody told him about it or
17 -- and to contact his lawyer. We did that, and
18 there was a conversation and some negotiation
19 about where and when it would take place, but we
02:11 20 didn't resolve that.

21 I did, I believe, meet Watson
22 at, on that occasion at his office, or he may have
23 come to the detachment, that's where we had
24 proposed to do the interview, but we weren't able
02:11 25 to resolve it on that date.



1 But, previously, I don't
2 recall having had any contact with Mr. Wilson
3 because I had asked Sergeant Tidsbury to make the
4 arrangements for that particular interview and he
02:11 5 had done so.

6 Q And what conclusions, if any, did you reach in
7 response to this suggestion by Mr. Wilson, given
8 the fact you had not met him yet, that he was
9 adamant that you not be doing the interview?

02:12 10 A Well, obviously person or persons unknown had
11 perhaps warned him against me doing -- or
12 interviewing him. I think there had been some
13 suggestions that, I think conveyed to his counsel
14 or to him by members of the Wolch firm, that
02:12 15 suggested that my questioning of witnesses had
16 been unfair, or perhaps they had reason to worry
17 about it being fair, and I -- that was brought to
18 my attention by Mr. Watson, and I simply said to
19 him "lookit, I have no objection if you remain, to
02:13 20 you remaining throughout the interview, and I'm
21 certain that you will be in a position to protect
22 your client's interests".

23 Q What did Mr. Watson tell you?

24 A He simply recited that his client was adamant that
02:13 25 he wished someone else to do the questioning.



1 Q No, but sorry, the basis of that; did Mr. Watson
2 tell you where that came from?

3 A I believe he may have attributed that to someone
4 in the Wolch firm.

02:13 5 Q Okay. If we can just scroll down to the bottom,
6 in the June 25, 1990 memo that I showed you
7 earlier today, which Mr. Corbett wrote regarding
8 his call with Mr. Wolch, it ind -- Mr. Wolch
9 indicated that Ron Wilson's terms were to have
02:13 10 Hersh Wolch be allowed to attend, and here
11 Mr. Watson is saying that:

12 "Mr. Wolch has requested that
13 he be present at the interview and I
14 have no objection to it. I would
02:14 15 therefore anticipate that those present
16 would be Mr. Wolch, Mr. Wilson, the
17 reporter, your interviewer and me."

18 Who did you think was putting forward Mr. Wolch
19 as being present; Mr. Wilson, or Mr. Wolch, or
02:14 20 both?

21 A Based on that letter it appears as if the impetus
22 came from Mr. Wolch and was accepted by Mr. Watson
23 and Mr. Wilson.

24 Q Did you have a different understanding earlier,
02:14 25 that it was Mr. Wilson who wanted Mr. Wolch there?



1 A I think that may have been conveyed, perhaps not
2 to me directly, but to either Mr. Corbett or
3 others within the department.

4 Q Go to 333473. And this is your June 27th letter
02:15 5 to Mr. Watson in response, and you are sending
6 him:

7 "... copies of Mr. Wilson's statements
8 dated May 23rd ... 24th ... :,
9 '69:

02:15 10 "... and June 4, 1990. Also enclosed
11 are the transcripts of Mr. Wilson's
12 testimony at the preliminary and the
13 trial ..."

14 And this letter does not specifically identify
02:15 15 the March 3rd, '69 statement, that's the first
16 statement Mr. Wilson gave to Inspector Riddell,
17 you are familiar with that statement?

18 A Yes I am.

19 Q And we'll see later there is a newspaper article
02:15 20 by Dan Lett on July 17th, 1990 that quotes
21 Mr. Watson as saying when he got the package of
22 materials from you to prepare for the interview,
23 he was, I think, astounded, or some word like
24 that, in getting the March 3rd statement because
02:15 25 it was a denial that anything had happened, and



1 I'm wondering whether it's possible it was
2 included with this package and just not listed.

3 Are you able to shed any light on that?

4 A If he received in it in that package, it may have
02:16 5 been an omission.

6 Q He received it -- according to the article he
7 received it in -- before July 17th, and I'm just
8 assuming that it would have gone with this package
9 as opposed to some other?

02:16 10 A I suspect so. It's possible he may have gotten
11 that earlier statement from Mr. Wolch. I'm not
12 certain. What I was hoping to do was to provide
13 him with materials, the written materials or the
14 written statements that his client may have given
02:16 15 to the police and the ones which we had in our
16 possession. I make specific reference to the May
17 23rd and 24th statement, but I believe at that
18 time I had had the earlier statement in which Mr.
19 Wilson had denied any knowledge of anything to do
02:16 20 with a murder in Saskatoon, or any implication of
21 David Milgaard in anything, criminal activity in
22 Saskatoon.

23 Q Would there be any reason you would not send all
24 the statements?

02:17 25 A There's no reason I wouldn't send it all. It may



1 just have been an omission from describing it in
2 that letter.

3 Q Go to 010016, I'm skipping around a bit, we're
4 going chronologically, this relates to Larry
02:17 5 Fisher, June 28th, 1990. Back in June you told us
6 about the efforts that you and Mr. Pearson were
7 making to interview Mr. Fisher and at this stage
8 you were dealing with Harold Pick and you were
9 trying to do two things, one, you were trying to
02:17 10 set up a polygraph session with Mr. Fisher and,
11 two, you were trying to get an interview with him.
12 Do you recall giving us that general evidence?

13 A Yes.

14 Q And here, this deals with an issue about Mr.
02:17 15 Fisher's safety in the penitentiary, and you
16 touched on that a bit, and it appears, maybe you
17 can just quickly elaborate on what's mentioned
18 here, and the conditions that were being put on
19 the interview? Maybe I can just point out the
02:18 20 comment here, that the information not be used, or
21 that any evidence developed as a result of
22 information not be used to prosecute him. Was
23 that a condition that he put forward?

24 A Yes. I guess my response to Mr. Pick in that
02:18 25 regard was to remind him that, to the extent that



1 it would be taken under oath and to the extent
2 that his client had rights under the Charter, we
3 certainly wouldn't use any of the statements in an
4 incriminating way, there was some Charter
02:19 5 protection that might be afforded him in relation
6 to that.

7 Q Then down at the bottom, the comment that:

8 "...Mr. Fisher's current emotional and
9 psychological state, is such that Mr.
02:19 10 Fisher is not yet prepared to be
11 interviewed or to undergo the polygraph
12 test."

13 A That was the information relayed to us about his
14 client by Mr. Pick.

02:19 15 Q And was that in connection with the threats that
16 he had allegedly been receiving in the
17 penitentiary as a result of the exposure?

18 A Yes.

19 Q And I may have asked you this last June, but I'll
02:19 20 ask you again. Was it your assessment that the
21 public and media exposure indicating that Larry
22 Fisher was either the killer or may be the killer,
23 or whatever language was used, but identifying him
24 as being involved in the death of Gail Miller, did
02:19 25 that have an adverse affect on your ability to get



1 a proper polygraph session from him and a proper
2 interview from him?

3 A It did in the following way: First in relation to
4 the polygraph, I later learned that the emotional,
02:20 5 shall we say, well-being or balance of the subject
6 could inform the polygraph results. Secondly, I
7 mean, it appears as if Mr. Fisher was more upset
8 about I guess his survival and didn't want to do
9 anything that would jeopardize that in prison, in
02:20 10 a prison context, and as a result it delayed or
11 certainly it affected the ability to get
12 meaningful results when the polygraph test was
13 taken, and similarly, and this is I guess known
14 only to him, the emotional upset that it caused
02:21 15 him prompted him to inform his counsel that he
16 wasn't ready to speak with us and we simply at
17 that time had no means of compelling him to talk
18 to us, so we awaited the result.

19 Q If we can go to 157092, this is a June 29th, 1990
02:21 20 letter from Mr. Corbett to Mr. Asper, and this is
21 responding to the June 12th letter which contained
22 suggestions about your interviews of Deborah Hall
23 and Linda Fisher, and it would appear here that
24 Mr. Corbett or somebody reviewed the record made
02:21 25 of the interviews and concluded there was:



1 "...nothing untoward in the manner in
2 which these interviews were conducted."

3 A Yes. There had been a complaint. I provided the
4 transcript to my superiors of both interviews and
02:22 5 I believe I also ordered up the tapes from the
6 reporters so that not only what was said, but how
7 it was said could be evaluated.

8 Q If we can go 010019, this is July 5, 1990 and it
9 deals with the July 4, 1990 discussion. I'll just
02:22 10 go through parts of this. It says:

11 "On July 4, 1990, I learned from Bruce
12 MacFarlane that Hersh Wolch had the
13 names of four Saskatoon rape victims,
14 allegedly assaulted by Larry Fisher.
02:22 15 This information did not accord with the
16 information we had earlier received from
17 the R.C.M.P. and the Saskatoon City
18 Police, who advised us that there were
19 not any incidents of rape attributed to
02:23 20 Larry Fisher, which occurred in
21 Saskatoon."

22 Can you just comment on what that information
23 was?

24 A I think we were relying primarily on the CPIC
02:23 25 printout of the criminal record of Larry Fisher



1 which indicated that there were pleas of guilty
2 that were taken in Regina and we had wrongly
3 assumed that since the convictions had been
4 recorded in Regina, that that also, that Regina
02:23 5 was also the place in which the offences occurred.
6 Larry Fisher did not show up on the radar of the
7 Saskatoon police in any significant way except
8 for, at least in relation to the Gail Miller
9 killing, except that he was identified as a
02:24 10 witness or someone who had been interviewed one
11 morning, and I know later on that Ed Karst I
12 believe had traveled to Winnipeg to interview him
13 in relation to certain rapes, but we didn't get an
14 awful lot of file material on him when we did our
02:24 15 first run-through of that information.

16 Q I believe Sergeant Pearson's, or Mr. Pearson's
17 evidence was that when he checked this in March,
18 April of 1990 with the Saskatoon City Police
19 checking the name Larry Fisher, they didn't have
02:24 20 any record, and (b), he assumed, based I think on
21 the CPIC, that they were Regina offences, and
22 would that have been your understanding as well?

23 A Yes.

24 Q And here it appears it identifies four Saskatoon
02:25 25 victims, and I take it that at this time, or very



1 shortly after that, you determined that these in
2 fact were the incidents referred to in the CPIC;
3 is that fair?

4 A Yes.

02:25 5 Q Did you initially think that they were in addition
6 to the Regina rapes in the CPIC do you recall?

7 A I don't recall, but I believe that around that
8 time our impression that the incidents that
9 provided the foundation for the convictions in
02:25 10 Regina were these four.

11 Q Okay. So at this point you would have determined
12 that they were Saskatoon offences?

13 A Yes.

14 Q But Regina pleas?

02:25 15 A Yes.

16 Q It says:

17 "Mr. Wolch requested copies of the
18 occurrence reports and the witness
19 statements relating to these offences.

02:25 20 He noted that the information about
21 these victims came from a C. B. C.

22 documentary which was recently aired."

23 Do you recall whether you would have obtained
24 those occurrence reports and witness statements

02:26 25 as relating to these offences and, if so, whether



1 you provided them to Mr. Wolch?

2 A I recall making a request either of Sergeant
3 Pearson or of the Saskatoon police for whatever
4 information they had on their file and I believe I
02:26 5 relayed what I received to Mr. Wolch.

6 Q And we'll get into the records, and I think we
7 touched on this a bit earlier, would you have
8 provided any, copies of any occurrence reports or
9 witness statements relating to these four offences
02:26 10 prior to the October 1, 1990 meeting?

11 A I believe we gave what we had before the October
12 1st meeting, but I'm not certain about the timing,
13 because I know that there had been a search
14 conducted by the Saskatoon police and only
02:26 15 portions of one or two files were recovered at
16 that time, so there was I guess comparatively
17 little information by way of the occurrence
18 reports, witness statements. I think there were,
19 there was a letter containing a summary of the
02:27 20 events giving rise to these offences and there may
21 have been one or two occurrence reports, but it
22 was not a complete file.

23 Q I believe what we've heard evidence, I think from
24 Sergeant Pearson, and I think I went over this
02:27 25 with you a bit as well, that by the end of the



1 first application the only Saskatoon City Police
2 file related to these four would be the (V5)--
3 (V5)--- file which was provided by the city police
4 at some point I think in the months that followed
02:27 5 this memorandum. Does that sound correct?

6 A I have nothing to dispute that.

7 Q Okay. And I'll show you some documents a bit
8 later that will, I think, confirm that. So would
9 that have been -- if you would have received the
02:27 10 (V5)-- (V5)--- file then as part of the first
11 application, would you have provided that to Mr.
12 Asper and Mr. Wolch?

13 A Yes, either at that time or, at the very latest,
14 when they came to speak with us on October 1st.

02:28 15 Q And just down at the bottom, your memo indicates
16 that Mr. Wolch:

17 "...repeated his beliefs that his client
18 was innocent, and indicated that he
19 wanted to use the occurrence reports to
02:28 20 establish a pattern of similar act, to
21 identify Larry Fisher as Gail Miller's
22 assailant."

23 And would this have been the first occasion where
24 this, this was being put forward as sort of a
02:28 25 supplement to the earlier ground that Larry



1 Fisher is the killer of Gail Miller?

2 A Yes.

3 Q Based on the Linda Fisher information?

4 A Yes. It may not have been the first. It's one of
02:28 5 the earlier reported descriptions of the use to
6 which that information could be put or would be
7 put.

8 Q Okay. And what was your understanding then at
9 this time of what it was that was being put
02:29 10 forward as a ground in the application as it
11 related to this pattern of similar act to identify
12 Larry Fisher as Gail Miller's assailant?

13 A Simply that the allegation would be that since Mr.
14 Fisher is a rapist and there's evidence that
02:29 15 Miss Miller had been raped, this might be,
16 depending on the pattern, could be evidence that
17 signals that he, Mr. Fisher, was the culprit who
18 sexually assaulted and murdered Ms. Miller.

19 Q You had earlier in June testified that when I
02:30 20 tried to go through and have you identify the
21 grounds put forward in the first application, and
22 we referred to the initial letter of December
23 28th, 1988, and then you indicated that the
24 grounds were supplemented later on, and I think
02:30 25 you testified that there was not one document that



1 concisely put together all the grounds on behalf
2 of David Milgaard; is that fair, that had all the
3 grounds listed in the form of an application form?

4 A No, I think I mentioned that it came by
02:30 5 installments, that there was a document, I
6 believe, in September of 1990 which responded to
7 an earlier request, or a request of a few days
8 previous asking Mr. Wolch to identify the grounds,
9 but this correspondence contains an indication of
02:31 10 one of the grounds that Mr. Wolch wanted to
11 develop and that is that there's similar fact or
12 similar act evidence to identify Larry Fisher as
13 Gail Miller's assailant.

14 Q And that if the similar act evidence identified
02:31 15 Larry Fisher as Gail Miller's assailant, then that
16 would automatically mean that David Milgaard did
17 not commit the crime and there's a miscarriage of
18 justice; fair enough?

19 A Fair enough.

02:31 20 Q And so would you agree sir, then, that on the
21 first application, one of the grounds put forward
22 on behalf of David Milgaard as it related to Larry
23 Fisher was, in addition to the fact that Larry
24 Fisher is the killer, therefore, David Milgaard
02:31 25 isn't, that as a part of that, is that the reason



1 we're saying he's the killer is because of the
2 pattern of similar act of his known offences?

3 A I think the similar act argument was advanced to
4 support the contention that, you know, Mr. Fisher
02:32 5 killed Gail Miller.

6 Q And was that an allegation, an assertion then that
7 you investigated and ultimately reached some
8 conclusions on?

9 A Certainly that was one of the aspects which was
02:32 10 the object of Sergeant Pearson's activity which
11 was conducted on our behalf, yes.

12 Q Next paragraph, you say you:

13 "...told Mr. Wolch that our interviews
14 had not been completed, partly because
02:32 15 of the intervention of his office - a
16 suggestion he denied..."

17 What were you referring to there?

18 A Well, I was referring to our inability to speak
19 with Mr. Wilson and what I perceived as their
02:33 20 intervention in warning Mr. Wilson and his counsel
21 against being interviewed by me. We had arrived
22 in Nakusp ready, willing and able to interview Mr.
23 Wilson and that event was postponed.

24 Q Go down, you say:

02:33 25 "After speaking with Mr. Wolch, I asked



1 Sgt. Pearson to search the Saskatoon
2 City Police Files to determine whether
3 Larry Earl Fisher was convicted, as
4 alleged of the rapes and indecent
02:33 5 assaults of the victims noted above. If
6 there was a link, I requested that he
7 send occurrence reports and witness
8 statements, where available, which
9 relate to the offences. He agreed to do
02:33 10 so."

11 And was the purpose there not only to review them
12 yourselves, but also to provide them to Mr. Wolch
13 as he had requested?

14 A Yes.

02:33 15 Q And did that in fact happen?

16 A I believe so. We didn't get all of the files, but
17 what we got we shared.

18 Q And then:

19 "In a later conversation that day, Sgt.
02:33 20 Pearson noted that the convictions
21 registered in Regina apparently occurred
22 in Saskatoon. He will redouble his
23 efforts to locate the files and provide
24 the materials I requested."

02:34 25 And so is it fair to say that you tasked Sergeant



1 Pearson with this job of getting the occurrence
2 reports and witness statements from the Saskatoon
3 City Police?

4 A I did, yes.

02:34 5 Q 010033, again on the same subject, this is a
6 letter from Mr. Wolch saying:

7 "This will also confirm that we are most
8 anxious to receive all the details
9 regarding the seven other serious sexual
02:34 10 assaults committed by Larry Fisher. As
11 I indicated to you, we have the names of
12 the victims so it is not a matter of
13 prying into their personal affairs, but
14 rather we are interested in looking at
02:34 15 patterns and similar acts, etcetera."

16 And I think you've already told us that was at
17 this point now an issue, or part of the
18 application; namely, look at the similar acts of
19 the Larry Fisher assaults in trying to reach the
02:35 20 conclusion that he was the perpetrator of Gail
21 Miller's murder?

22 A Yes.

23 Q Just scroll down, it says:

24 "It is also disconcerting that the
02:35 25 entire nature of the review



1 investigation appears to be directed at
2 trying to maintain the status quo and is
3 not directed at obtaining any
4 information that would exonerate David.
02:35 5 All of the information which exonerates
6 David has come from our sources."

7 And again, was it your view that that's how it
8 was supposed to work or do you take issue with
9 that?

02:35 10 A Well, this was Mr. Wolch's argument, that we had
11 done nothing in terms of uncovering material that
12 exonerated his client and until that time all of
13 our inquiries did not turn up information that,
14 quote, "exonerated" his client. You will recall
02:36 15 that there had been a great deal of publicity
16 surrounding the statements of Deborah Hall and I
17 think by then Ute Frank as being bits of
18 information that had been supplied to us that
19 exonerated David Milgaard. I was not then in a
02:36 20 position to dispute Mr. Wolch's characterization
21 of that information as exculpatory or exonerating,
22 but it was his submission and I received it.

23 Q The comment here, scroll down:

24 "It was somewhat disturbing to learn
02:36 25 that as of this date you were not



1 totally familiar with the nature and
2 substance of the record of Larry Fisher.
3 Clearly you would have had better access
4 to the record and the police reports
02:37 5 than we would, and yet in spite of the
6 fact that we furnished the information
7 some time ago, it appears that you
8 either did not receive the information
9 or received wrong information in this
02:37 10 regard."

11 And your comment on that?

12 A I take some comfort in the fact that his
13 colleague, Mr. Asper, had come to the, had
14 indicated that these were Regina convictions, we
02:37 15 took him at his word, but when we took a look at
16 the CPIC, we made the wrong assumption that it was
17 indeed a Regina file. We had, I believe, Sergeant
18 Pearson had either on his own initiative or at my
19 request made some inquiries of the Regina police
02:37 20 to get some details of the file without success.

21 Q I believe Sergeant Pearson's evidence was that he
22 checked both Regina and Saskatoon --

23 A Yeah.

24 Q -- police.

02:37 25 A So, you know, it -- the rate at which we received



1 the information obviously wasn't to Mr. Wolch's
2 liking, but that did not detract from the fact
3 that when the information was provided to us, we
4 looked at it immediately, we asked the question.
02:38 5 The answers took some time to develop, but those
6 were answers that we could not provide without the
7 assistance of others.

8 Q And then just down at the bottom, he says:

9 "It is our view that the Minister is now
02:38 10 in a position to make a favourable
11 response to our plea. I am not sure
12 what has to be done now could be
13 accomplished after David is released and
14 that he should not have to wait while
02:38 15 the case against Fisher is perfected."

16 And then the next page:

17 "As I have stated many times we do not
18 wish to be in a confrontational position
19 with your Department. Having
02:38 20 established David's innocence, and
21 having identified the real killer should
22 be enough."

23 Was there anything that could be done to release
24 David Milgaard at that time while the case
02:39 25 against Fisher is perfected procedurally?



1 A Absent a decision by the Minister of Justice that
2 directed a -- or procedurally the Minister of
3 Justice could have, had the minister been so
4 satisfied of Mr. Milgaard's factual innocence,
02:39 5 applied or recommended to the governor-in-council
6 that a free pardon be granted. At the time,
7 however, I certainly wasn't in possession of
8 information that prompted the conclusion that
9 factual innocence had been demonstrated.

02:39 10 Q Go 010018, this is July 5, 1990, your memo to file
11 regarding your discussions with Mr. Pick, and the
12 interview dated July 12th, and here were his
13 conditions on behalf of Mr. Fisher, under oath,
14 and he wanted a letter from you setting out the
02:40 15 areas that you proposed to question him. Is that
16 correct?

17 A Yes.

18 Q 011841, this is your letter back, July 6, 1990,
19 and you indicate the general areas are:

02:40 20 "The events which comprise the
21 convictions that are contained on the
22 criminal record of Larry Earl Fisher."
23 Why would those be relevant or important?

24 A Well, it flows from the desire to look at similar
02:41 25 act or similar fact in relation to the killing of



1 Gail Miller.

2 Q If we can go to 011840, this is your July 10, 1990
3 memo to file I think reporting on the polygraph,
4 we've already heard from Mr. Robinson on this, and
02:41 5 you say due to Mr. Fisher's condition he cannot be
6 polygraphed.

7 "Apparently the combination of his gall
8 bladder condition, and the effects of a
9 recent confrontation with fellow inmates
02:41 10 at the Saskatoon Regional Psychiatric
11 facility have created conditions which
12 present the taking of a polygraph test."

13 And that would have been your information at the
14 time?

02:41 15 A Yes, sir.

16 Q And the document suggests that following this for
17 some time, either you and/or Mr. Pearson pursued
18 another polygraph of Mr. Fisher and that that
19 never happened; is that right?

02:42 20 A That's correct.

21 Q And would this have been then your only
22 opportunity -- or your only occasion when Mr.
23 Fisher at least, when you were dealing with him,
24 had agreed to a polygraph?

02:42 25 A Yes, that, you know, we pursued it for a period of



1 time and I think the instructions to Mr. Pick were
2 he was content to be polygraphed. Then I believe
3 he was moved to another institution and those
4 instructions -- we never got around to the
02:42 5 polygraph and I'm not certain -- I'm not certain
6 that his physical condition coupled with his
7 emotional state were ever at a point that
8 permitted a polygraph.

9 Q 061960, this is your interview of Mr. Fisher, it's
02:43 10 the transcript. If we can go to page 061962, or
11 961, just indicates the date that Mr. Pick is
12 present, Sergeant Pearson, and that he is,
13 Mr. Pick swore Mr. Fisher; is that right? No
14 court reporter, but it was taped and he was under
02:43 15 oath?

16 A Yes.

17 Q I'm going to go through parts of this, but can I
18 just get your general recollection of the
19 interview with Mr. Fisher and what your assessment
02:43 20 was of him? I'll give you an opportunity to touch
21 on both some of the questions and answers in the
22 transcript and your follow-up memo, but just your
23 general comments?

24 A The interview was conducted in kind of a
02:43 25 conference room at the psychiatric facility, it



1 was a reasonably relaxed atmosphere. Mr. Fisher
2 appeared, he appeared to be somewhat nervous, he
3 was accompanied by Mr. Pick, his counsel, and
4 without much further ado, we went directly to the
02:44 5 questioning. There had been some conversation
6 between myself and Mr. Pick just to confirm our
7 earlier conversations about the nature or the
8 scope of the questioning and the circumstances and
9 from there we went directly to the questioning.

02:44 10 Q And were you satisfied that you had an opportunity
11 then to question Mr. Fisher about what you wished
12 to question him about?

13 A Yes. I didn't feel unduly constrained in terms of
14 the topics I raised or the questions I put. I
02:45 15 don't believe there were many, if any, objections
16 brought by or on behalf of Mr. Fisher during the
17 course of the questioning. There were a couple of
18 interruptions when -- at some point in the
19 questioning he felt ill and requested a brief
02:45 20 recess.

21 Q That was Mr. Fisher?

22 A That was Mr. Fisher, yes.

23 Q Go to the next page, this is just a comment that
24 Mr. Pick put on the record, he says:

02:45 25 "Therefore, there will be no publication



1 of any kind outside the Department of
2 Justice or outside this room of the
3 contents of these discussions except
4 insofar as may be necessary to assess
02:45 5 the application of David Milgaard for
6 mercy, or, to further the investigation
7 to formulate a recommendation to the
8 Minister of Justice of Canada for the
9 disposition of Mr. Milgaard's
02:45 10 application."

11 And would that have been Mr. Fisher's request to
12 have that limit?

13 A Yes, I think that was a negotiated position. At
14 one time my recollection was that the request was
02:46 15 that it was not to be shared, and I -- I -- I
16 didn't take that as being particularly
17 satisfactory, because if we wanted to test any
18 portion of what Mr. Fisher had said to us we
19 couldn't put information obtained from his
02:46 20 interview to another witness, so the fallback
21 position was this is for the purposes of the
22 application and to the extent that we may have to
23 share it, whether it's with the Milgaards or with
24 another witness who can either confirm or
02:46 25 challenge what you are telling us, we certainly



1 want -- don't want to be restricted in uses
2 consistent with the purpose for which we're
3 collecting it, and that is the assessment of this
4 690 application.

02:46 5 Q And if Mr. Fisher would have, for example,
6 confessed to the murder of Gail Miller in this
7 interview, I take it that you could have used --
8 and assuming that you accepted the credibility of
9 that confession -- you could have used that in
02:47 10 dealing with Mr. Milgaard's 690 application; is
11 that fair?

12 A Yes.

13 Q But not necessarily in a later prosecution against
14 Mr. Fisher?

02:47 15 A That was -- was the undertaking.

16 Q So, in other words, that -- is it fair to say that
17 Mr. Fisher could have confessed at this interview
18 without having the confession being used against
19 him in a later proceeding; is that fair?

02:47 20 A That was our understanding, yes.

21 Q Go to 061975. Just a couple areas to get your
22 comments. You questioned him about alcohol, or
23 his marriage with Linda and alcohol, and whether
24 that was a problem for he and Linda. What was the
02:47 25 purpose of that questioning or that area?



1 A Well, a couple of things. I think, when he said
2 that the marriage was rotten, sometimes, I guess
3 drawing on experience, sometimes alcohol,
4 sometimes money, these are the factors that affect
02:48 5 it.

6 The other fact of which I was
7 aware of was that Linda Fisher, at the time when
8 she gave her first statement to the police I
9 believe in 1980, it had come early in the morning
02:48 10 after a night of some drinking, and I wanted to
11 find out whether there was any problem with
12 alcohol at the time, or during their marriage, and
13 if so that might have some impact on the
14 subsequent statement or on some of the motivations
02:49 15 behind it.

16 Q Is it fair to say that, at the time you were
17 interviewing Mr. Fisher, what you had for evidence
18 or information implicating him would have been the
19 Linda Fisher statements; correct?

02:49 20 A Yes.

21 Q I think the Clifford Pambrun and Roy Pambrun
22 statements related to the car; correct?

23 A Yes. Subject, of course, to the dates, I'm not --
24 I don't have, at the tip of my fingertips, when
02:49 25 those statements were taken. I do know that --



1 Q Yeah, I think they were March, before this
2 interview.

3 A Yeah.

4 Q And so it would be the Linda Fisher -- the
02:49 5 information learned from Linda Fisher by Joyce
6 Milgaard, Paul Henderson, and then later Sergeant
7 Pearson, and as well from --

8 A From our own interviews.

9 Q Right.

02:49 10 A And we also knew about, I think by then -- and
11 when I say "then", by the time of this interview
12 with Larry Fisher -- we were aware that the
13 convictions relating to the CPIC entries in Regina
14 had, in fact, related to offences in Saskatoon, we
02:50 15 had that, and we also had the Winnipeg assaults as
16 well.

17 Q So was one of your purposes in questioning him
18 would be to, or was it, to verify what other
19 information had come from Linda Fisher, the
02:50 20 Pambruns, and other sources?

21 A That was one of the aspects, yes.

22 Q Go to 061981, please. And this is a question
23 about using Clifford Pambrun's car, and I take it
24 that would have been in relation to the
02:50 25 allegations or the suggestions that he had



1 Clifford Pambrun's car the morning of the murder?

2 A Yes.

3 Q 061990. Question here about a toque; do you
4 recall what prompted that?

02:51 5 A A toque had been found, I think in one of the back
6 yards, a blue toque. I'm just trying to find out
7 if, perhaps, that toque might have belonged to
8 him.

9 Q 061993. He is questioned here, and this is just
02:51 10 an example, there's other questions, but about
11 what time he left for work and what time he got on
12 the bus. Why would that be important?

13 A That was important because, to situate him in
14 relation to the information we had about Gail
02:51 15 Miller's movements and possibly to situate him at
16 or about the place that she might expected to
17 catch the bus on a daily basis.

18 Q So there --

19 A So, essentially, to put -- to see whether or not
02:51 20 there's any evidence to put him and her together.

21 Q 062005. It appears, here, that you provided him
22 with Linda Fisher's statements, is that correct,
23 her statements from March of '90, --

24 A Yes.

02:52 25 Q -- and asked them to read. What was the purpose



1 of that?

2 A I wanted to get his -- I wanted to get his views
3 on it. I was going to question him in relation to
4 it.

02:52 5 Q Go to 062010. You question him here about:

6 "... early February ...",

7 '69:

8 "... you were waiting for a bus to go to
9 work. Do you recall a policeman coming
02:52 10 up to you and asking you questions about
11 where you had been the previous Friday?

12 Mr. Fisher: Yup.

13 Mr. Williams: All right ... asked what you
14 did ...

02:52 15 Mr. Fisher: Yes.

16 Mr. Williams: Did you tell him the truth?

17 Mr. Fisher: Yes.

18 Mr. Williams: You ... caught a bus ...",
19 etcetera. Did that strike you in any way
02:52 20 unusual, that he would have a recollection of
21 that encounter with a police officer back 20
22 years earlier?

23 A Probably not as unusual because, I mean, it's not
24 often that a citizen is questioned by a police
02:53 25 officer at 6:30 in the morning.



1 Q Okay. At page 062012 you ask him about, again,
2 whether the police officer:

3 "... asked you about an event that
4 happened three days before on the
02:53 5 Friday; do you recall that?

6 Mr. Fisher: No I don't.

7 Mr. Williams: Do you recall him asking you
8 what you did that Friday morning?

9 Mr. Fisher: No I don't."

02:53 10 Again, anything unusual with that response, that
11 he remembered the encounter but didn't remember
12 the questions?

13 A I wouldn't call it unusual. Sometimes perhaps the
14 only lasting impact is that something happened but
02:53 15 that the particular details of the conversation
16 have long disappeared from memory.

17 Q 062021. I think you showed him the poster of the
18 knife, the photograph of the knife, and:

19 "Mr. Williams: ... Looking at that photo
02:54 20 ... have you seen a knife similar to
21 that before?

22 Mr. Fisher: Well, yes I have.

23 Mr. Williams: Where?"

24 And then it goes on to talk about an offence.

02:54 25 What was your reaction to that statement, that he



1 had seen a knife similar to the photograph of the
2 murder, or what was believed to be the murder
3 weapon?

4 A Well it certainly began an area of potential
02:54 5 inquiry to find out the circumstances of the
6 sighting.

7 Q Okay. 062026. And, again, you questioned him
8 about Linda's accusation. You will recall Linda
9 Fisher's statement that on what she said was the
02:55 10 morning of the murder Larry was home, and she
11 accused him of being involved in the nurse of the
12 murder (sic), you are familiar with that
13 allegation; correct?

14 A Yes.

02:55 15 Q And, again, you would have asked Mr. Fisher that,
16 and he says 'I remember':

17 "But I don't remember the date."

18 And then, again, he goes on to describe on 062028
19 where he says:

02:55 20 "... do you agree with her assessment at
21 the time that your face went pale and
22 drained?

23 Mr. Fisher: Sure.

24 Mr. Williams: Why was that?

02:55 25 Mr. Fisher: It shocked me.",



1 and etcetera, and basically indicated that the
2 accusation shocked him because she would make it,
3 and what did you make of that response?

4 A Well certainly, at the time, it was consistent
02:55 5 with one of the -- it could plausibly be true.

6 Q 062073 (sic). You questioned him about working in
7 bad weather -- no, 062037, I'm sorry:

8 "Is it possible that because of bad
9 weather you stayed away from work."

02:56 10 And what was the purpose of that?

11 A Well, I wanted to probe one aspect, and that was
12 Linda's -- one of the things that Linda Fisher
13 said was that she found her husband at work on
14 that morning, and I knew from other sources that
02:56 15 one, he worked masonry; and two, it was 40 below
16 out; three, it's very difficult to do that type of
17 work in extreme weather, and the possibility
18 existed that he didn't go to work, or if he did go
19 to work he returned because the weather conditions
02:56 20 did not permit him to continue working.

21 COMMISSIONER MacCALLUM: I might have
22 misheard you, sir, I thought you said you wanted
23 to probe Linda's statement that he was at work?

24 A No.

02:57 25 COMMISSIONER MacCALLUM: She said he wasn't



1 at work?

2 A No, she said he wasn't at work.

3 COMMISSIONER MacCALLUM: Wasn't at work,
4 yeah.

02:57 5 A Yeah. So I'm saying it's possible he stayed away
6 from work.

7 COMMISSIONER MacCALLUM: Uh-huh.

8 A Because that would support her contention that her
9 husband wasn't working that morning.

02:57 10 BY MR. HODSON:

11 Q And I suppose, if he wasn't at work due to cold
12 weather, that could be both incriminating and
13 non-incriminating; is that fair?

14 A Well, it, it's a question of confirming some of
02:57 15 the other information we had received.

16 Q Right. I see it's 3:00, probably an appropriate
17 spot to break.

18 (Adjourned at 2:57 p.m.)

19 (Reconvened at 3:16 p.m.)

03:16 20 BY MR. HODSON:

21 Q If we could go to 062042. And this is where you
22 ask Mr. Fisher whether he had:

23 "... any role to play in the death of
24 that woman ...",

03:16 25 and he said:



1 "No, I did not."

2 And we may have touched on this before. Is it
3 fair to say that, in this type of questioning,
4 it's unlikely you're going to get a person who
03:17 5 has committed the crime to simply confess? I
6 appreciate you are being put in his position, but
7 is it fair to say you have to ask the question,
8 but a guilty person may well deny involvement?

9 A Yes. Now sometimes it's not the answer you get
03:17 10 but how the answer is conveyed.

11 Q And, again, anything that stands out in your mind
12 about the manner in which he answered these
13 questions?

14 A No.

03:17 15 Q If we can then go to the next --

16 COMMISSIONER MacCALLUM: So are you saying,
17 sir, that it's a useful thing to do because the
18 tone of the response can tell you something?

19 A The tone of the response, the body language,
03:17 20 physical changes.

21 COMMISSIONER MacCALLUM: Yes.

22 A If someone accuses you, I mean quite often in a
23 trial context an accused takes the stand and the
24 first question the accused is asked is "did you
03:18 25 kill so and so" --



1 COMMISSIONER MacCALLUM: That's right.

2 A -- and the answer is "no" but, that
3 notwithstanding, they are found guilty. But in an
4 interview context, sometimes I'm looking not only
03:18 5 -- I'm not only listening but I'm also looking at
6 the person and gauging the responses.

7 COMMISSIONER MacCALLUM: And then, too, it
8 occurs to me, sir, that there was -- there would
9 be a certain proforma requirement. If you didn't
03:18 10 ask simply because you didn't think you would get
11 a straight answer, you would be criticized for
12 not having put the question, at least?

13 A Yes.

14 COMMISSIONER MacCALLUM: Yes. Okay.

03:18 15 BY MR. HODSON:

16 Q And then, if we can go through to the bottom of
17 that page, and it's difficult to tell from the
18 transcript but it looks as though you go through
19 and say there's been news reports, that they say:

03:18 20 "... because they've been brought to my
21 attention, they say here's Larry Fisher,
22 here's a man whose been convicted of a
23 number of sexual assault cases, rape
24 ..",
25 "attempted murder."



1 Next page, and I won't read it all, but sort of:

2 "Here's a man who used a knife during
3 the commission of these offences."

4 "You used a knife in Winnipeg."

5 Scroll down:

6 "... a knife in North Battleford.",
7 and scroll down, and then the next page:

8 "And there was serious injury to the
9 victim."

03:19 10 "What kind of knife did you use.

11 Mr. Fisher: A pocket knife.",

12 etcetera. And then:

13 "... four attacks in Saskatoon.

14 Mr. Fisher: Right.

03:19 15 Mr. Williams: ... one indecent assault."

16 And then on the next page:

17 "Mr. Fisher: Six rapes, one indecent
18 assault, one attempted murder, one year
19 for carrying an offensive weapon, and a
03:19 20 ten year ban on weapons all totalled.

21 Mr. Williams: Okay. The one in Saskatoon,
22 they say you used a knife.

23 Mr. Fisher: I can't remember, if I did or
24 not. A lot of this has been coming back
03:19 25 lately and I still can't place it."



1 And then the next page:

2 "People are going to say to me look it,
3 you got two people. You've got a fresh
4 faced 16 year old kid no criminal record
03:20 5 who's been sitting in jail for 21-22 odd
6 years and he says he didn't do it. He
7 says he didn't stab this woman. And
8 we've got another guy who's got six
9 rapes, one indecent assault and his M.O.
03:20 10 is similar to that which surrounds the
11 death of Gail Miller. Faced with that
12 Williams don't you think you've got the
13 wrong guy in jail because the real
14 killer is Larry Fisher?

15 Mr. Fisher: Pardon?

16 Mr. Williams: Because the real killer is
17 Larry Fisher.

18 Mr. Fisher: No way."

19 And then the next page you say:

03:20 20 "If you're sitting in my spot what would
21 you say to that?"

22 And then the transcript is inaudible, but he
23 says:

24 "Mr. Fisher: Yes, it would be a likely
03:20 25 suspect."



1 And it appears that he acknowledges that, given
2 his record of offences, he would be a likely
3 suspect; is that a fair reading of that?

4 A Yes, yes it is.

03:20 5 Q And is there anything in the -- I mean, as I
6 stated, I'm just reading the transcript. Do you
7 recall the tone of these questions or what were
8 you trying to do with Mr. Fisher?

9 A This was a form of cross-examination, if you like.
03:21 10 I was trying to test Mr. Fisher, get some
11 responses, possibly -- I mean there's -- rarely, I
12 guess in my experiences as a counsel, do you get a
13 witness to admit they are lying on the stand, but
14 sometimes what is said, how it's said, and how
03:21 15 that relates to other information that you've
16 collected gives you a basis or a foundation for
17 making an assessment of what you make of what you
18 have just heard.

19 Q Now in looking at the transcript, if we can go to
03:21 20 page 062044, it's a question here about the
21 Saskatoon attacks, and then the next page I think
22 about weapons, and there was an answer I read
23 earlier that he did not recall all the details,
24 but it doesn't appear from the transcript that you
03:22 25 asked Mr. Fisher to specifically go through each



1 rape or sexual assault and ask him to describe
2 what happened, or to go through that. Was there a
3 reason for that or do you recall?

4 A I think I started on that, on that tack, but I was
03:22 5 met with a singular lack of recall of some of
6 those -- those events.

7 Q Yeah. Here you say:

8 "Mr. Williams: Okay. The one in

9 Saskatoon, they say you used a knife.

10 Mr. Fisher: I can't remember, if I did or

11 not. A lot of this has been coming back

12 lately and I still can't place it."

13 Again, do you have any -- any other reason why

14 you would not pursue with him other than his lack

03:22 15 of recall?

16 A Only his lack of recall, sir.

17 Q Now if you would have had witness statements at

18 this time from some of the victims, is that

19 something you might have used in questioning of

03:23 20 him?

21 A Umm, certainly, the more informed the questioner,

22 the better the quality of the examination.

23 Q 062056. You question him here about what's

24 happening in the P.A. Pen:

03:23 25 "What are you going to say to the guys



1 in P.A. I mean they say hey look at
2 this T.V. thing and they've got you
3 fingered for it. What do you tell
4 them?"

5 And:

6 "Well what happened?"

7 And then the next page, and he says:

8 "The only thing that I could tell them
9 was that they had not laid a charge and
03:23 10 these two guys believed it and they knew
11 it at the time."

12 What was the purpose of this questioning about --
13 I think at this time, Mr. Williams, there had
14 been a fair bit of media coverage, by this time,
03:24 15 that had actually named him --

16 A Yes.

17 Q -- as the perpetrator, and what were you trying to
18 get at here in asking what people in prison were
19 saying to him about this?

03:24 20 A I was trying to get some impression as to the
21 impact that the, call it the public accusation
22 that he was indeed the killer and that somebody
23 else was doing his time, what impact it was having
24 on him.

03:24 25 Q And why would that be important?



1 A Umm, one of the -- one of the excuses or one of
2 the reasons that had been advanced for the
3 inability to get a successful polygraph was the
4 emotional upset that he was encountering, not
03:24 5 merely because of the public accusation, but also
6 because of the -- more importantly because of the
7 attitude of fellow inmates towards him.

8 My understanding at the time
9 is that within the inmate population there's
03:25 10 certain rules, and one of those rules, it's a
11 cardinal sin to let somebody else do your time,
12 and this certainly amounted to a breach of that
13 fundamental rule, and I wanted to get some sense
14 of what impact it was having.

03:25 15 Q 062072, a question here about the arrest on or
16 about October 18, 1970, and this would have been
17 in Winnipeg. Do you recall what -- actually, just
18 go to the next page, it says here:

19 "Mr. Fisher: I got a little whipping from
03:25 20 a Mountie and I also got a lickin' from
21 the officers at Headingly and then I
22 also got a lickin' from the guys on
23 remand at Headingley."

24 Do you recall what your purpose was in
03:26 25 questioning him about his Winnipeg confessions?



1 A I could well understand why he would confess to
2 the incident that gave rise to his arrest, he was
3 caught red-handed, and he may have been -- he may
4 have been encouraged to accept responsibility for
03:26 5 other offences conducted in Winnipeg, but I was
6 really quite surprised when he confessed to four
7 events in Saskatoon because the folks in Winnipeg
8 had no way of knowing about his being -- his
9 activities in Saskatoon, whereas they might have,
03:26 10 based on their unsolved sexual assault cases, some
11 information that might link him to events in
12 Winnipeg. I guess I wanted to test to see whether
13 or not there was any reason to think that he may
14 have been persuaded to make a false confession to
03:27 15 maybe possibly avoid being whipped while in the
16 institution.

17 Q And that was the Saskatoon offences?

18 A Yes.

19 Q And would you have been aware at this time, and
03:27 20 again I think, I'm not sure the record is clear on
21 when these documents came to light but we have
22 seen evidence that in the Fort Garry police
23 file -- and, again, the file is a bit
24 incomplete -- that -- the following scenario, that
03:27 25 on October 15 th, 1970 or thereabouts there was



1 communication from Fort Garry to the Saskatoon
2 police, I think the evidence we heard is that they
3 were aware that Mr. Fisher had recently resided in
4 Saskatoon, they either called or wrote to the
03:27 5 Saskatoon police "do you have any unsolved
6 offences, we have someone who used to live in your
7 city here", the police apparently, the Saskatoon
8 police apparently got back to the Fort Garry
9 police, although I think that letter is only
03:28 10 partial, and with some offences, we don't know
11 which ones, and then Mr. Fisher was questioned
12 about Saskatoon offences which he denied, and then
13 I think a few days later or a day later he then
14 confessed to two offences and then later pled
03:28 15 guilty to four. And I don't need to call up those
16 documents; do you recall being aware of that
17 information at the time you would have interviewed
18 Mr. Fisher, or becoming aware of that at any time?

19 A I think perhaps I became aware of it later.

03:28 20 Q Does that sound familiar, that scenario that leads
21 up to it?

22 A Yes. I have no present recollection as to when I
23 came into possession of that information, it may
24 have been before my interview or it may have been
03:28 25 after.



1 Q Go to 062086. And here I think Sergeant Pearson
2 asks some questions after you:

3 "Sgt. Pearson: In 1968 there were 4
4 offences that you were involved in and
03:29 5 which you have plead guilty to and
6 served your time on and that's water
7 under the bridge but I ask you this
8 question. Have you had some court
9 records of that? I ask you of those 4
03:29 10 offences did you utilize any kind of a
11 weapon ... a knife?

12 Mr. Fisher: I'm not really sure, that was
13 a long time ago, I'm slowly learning
14 more about myself then and I ...",
03:29 15 and then:

16 "A lot of things are slowly coming
17 back."

18 "Sgt. Pearson: So these 4 that we talked
19 about in 1968 you don't recall the
03:29 20 details of, is that what you're saying?

21 Mr. Fisher: I remember what they were like
22 if somebody could refresh my memory I
23 could probably inform you then but other
24 than that I more or less remember the
03:29 25 more the one that stick in my mind."



1 And, again, I think at this time Sergeant
2 Pearson's evidence was that you would not have
3 had any of the Saskatoon City Police files; is
4 that correct?

03:30 5 A I believe that's correct, sir.

6 Q If we can go to 338056. And I believe this is
7 your file memorandum of July 13th, 1990 following
8 your interview of Mr. Fisher?

9 A Yes.

03:30 10 Q And would this set forth your assessment or
11 conclusions, at least at that time, that you
12 arrived at after your interview with Mr. Fisher?

13 A Yes.

14 Q You say:

03:31 15 "Mr. Fisher's recall of events which
16 occurred over 20 years ago was better in
17 many areas than I anticipated it would
18 be. For example, he readily recalled
19 the names of co-workers and supervisors
03:31 20 with whom he was associated at Masonry
21 Construction. He also recollected
22 events relating to his automobiles.
23 Further, he recalled being approached by
24 a police officer in early 1969, who
03:31 25 questioned him about his whereabouts a



1 few days earlier."

2 And then the next page, you recite the fact that
3 he denied attacking anyone on that morning and
4 never been in the alley, and I think you've
03:31 5 commented on that.

6 If we can scroll down, here
7 you say, about work:

8 "He also disputed Linda's account of the
9 timing of the argument, noting that she
03:31 10 usually slept in till noon or even
11 later. A check with workman's
12 compensation disclosed that he did not
13 file a claim for a work related injury
14 for that period."

03:31 15 Is that something that you or Mr. Pearson had
16 done then?

17 A Yes.

18 Q And if we can scroll down to here, you say:

19 "A check of the Saskatoon police files
03:32 20 revealed that the only records of Mr.
21 Fisher's Saskatoon rapes in existence
22 related to the assault on (V5)--
23 (V5)---... NO WEAPON WAS USED DURING
24 THAT ASSAULT."

03:32 25 And I'm going to show you a note in a minute that



1 suggests that you and Mr. Pearson went to the
2 Saskatoon City Police on July 13th which would
3 be --

4 A The same day.

03:32 5 Q -- the same day, right after the Fisher interview.
6 Do you have a recollection of that?

7 A Yes, I believe we did, sir.

8 Q And so am I correct that after you examined Mr.
9 Fisher -- actually, we can call it up, 056787, and
03:33 10 the doc. ID on that is 056743 -- this is Mr.
11 Pearson's lengthy chronology, a couple of things
12 here. We've had corrections on this record by Mr.
13 Pearson in his evidence. It actually is dated
14 July 13th, '90 and here, this date I think he
03:33 15 indicated was 1970, or should have been, and that
16 he and you:

17 "...attended at the Saskatoon City
18 Police and met with ... Ron Bertrand and
19 obtained a copy of the 1968 offence file
03:33 20 involving Fisher. We were trying to
21 determine if his M.O. (weapon) is
22 consistent with any other crimes. No
23 weapon was used in the very limited
24 material that we received."

03:33 25 And then went on to talk about other matters.



1 And so does that assist your memory? If we can
2 just go back to the memo, 338057, about your
3 meetings?

4 A Yes. Based on the information we had at the time,
03:33 5 that was the finding.

6 Q And so here your memo talks about the records that
7 you obtained from the Saskatoon police being the
8 (V5)-- (V5)--- file, and I take it that would be
9 accurate?

03:34 10 A Yes.

11 Q We have before the Commission a record of that
12 file, it was obtained -- it appeared I think in
13 Mr. Pearson's notes as well that he had obtained
14 about 50 or 60 pages. Do you have a recollection
03:34 15 of what, how much information you got on the
16 (V5)-- (V5)--- file?

17 A Unassisted by a review of the materials, sir,
18 generally I think there were some police reports
19 and an occurrence report. Beyond that, having not
03:34 20 reviewed it in a long time --

21 Q Sure, no, I appreciate that, but is it fair to say
22 that you received something by way of an
23 occurrence report and witness statements --

24 A Yes.

03:34 25 Q -- for (V5)-- (V5)---? And is it fair to say that



1 her witness statement would have been something
2 that you likely saw as well?

3 A If it were there, yes.

4 Q Okay.

03:34 5 A We would review it.

6 Q And would this information, then, that you
7 obtained from the Saskatoon City Police relating
8 to this assault, or to this file, would that have
9 been passed on to Mr. Wolch and Mr. Asper?

03:35 10 A If not -- probably not immediately, but at some
11 further date, probably at the latest by October 1.

12 Q And that's the October 1, 1990 meeting?

13 A Yes, but I seem to recall that Mr. Wolch and Mr.
14 Asper had requested, had asked us to provide them
03:35 15 with the file material from Saskatoon police in
16 relation to the four assaults in Saskatoon and, as
17 I speak now, I have no reason to believe that we
18 didn't provide them.

19 Q You mean prior to the October 1, 1990 meeting?

03:35 20 A Yeah. I -- I have no specific recall of when we
21 provided it and if that happened prior to October
22 1, but I don't seem to -- nothing comes to mind
23 that signals that we didn't give it shortly after
24 we received it.

03:36 25 Q Okay. So just so that I'm clear, are you telling



1 us that it would have been given to Mr. Wolch and
2 Mr. Asper at the October 1, 1990 meeting?

3 A They would have had an opportunity to review it
4 then because I think that was part of the
03:36 5 materials we had collected. Now, whether I gave
6 it to them personally or whether or not a copy was
7 provided to them by Sergeant Pearson I can't say.

8 Q Okay. Sorry, just back up, the October 1, 1990
9 meeting, it was there they either could have
03:36 10 reviewed it or obtained a copy of it; is that
11 correct?

12 A Yes.

13 Q Prior to that is it your evidence that although
14 you don't have a specific recall, you see no
03:36 15 reason why you would not have given it to them
16 closer to the time that you received it; is that a
17 fair way to put it?

18 A Yes.

19 Q And also here it appears that a check of the
03:37 20 Saskatoon police files revealed that the only file
21 in existence was the (V5)-- (V5)--- file, and what
22 was your understanding about whether there were
23 any files for the (V1)-, (V2)----- and (V3)-----
24 rapes?

03:37 25 A I think the -- we were operating under the



1 assumption that that file material had been
2 destroyed because of the usual document
3 destruction process of the Saskatoon police.

4 Q And was it your understanding then at this time
03:37 5 that the (V1)-, (V2)----- and (V3)----- files
6 were not available for you?

7 A Correct.

8 Q Go to the next page, your conclusion, you say:

9 "Larry Fisher did not confess to the
03:37 10 murder of Gail Miller. Nor did his
11 responses to the questions posed
12 indicated that he had any knowledge of
13 the details which relate to the murder
14 of Gail Miller."

03:38 15 Can you just elaborate on that? What did you
16 mean by that?

17 A Well, there wasn't anything in terms of his
18 responses which, you know, there was no
19 confession, and during the course of the
03:38 20 questioning sometimes you would get a tidbit of
21 information that signaled an intimacy with the
22 circumstances of the offence that only someone who
23 was present or who was in contact with someone who
24 was present might know and there weren't any of
03:38 25 those types of hints. It wasn't surprising that



1 he would deny it, but I didn't pick up any hints
2 or perceptions that signaled an implication in the
3 murder.

4 Q Okay. You then, scroll down, recite some of
03:39 5 Mrs. Fisher's, the information from Mrs. Fisher,
6 and you say:

7 "In view of the fact that Mrs. Fisher
8 first reported her suspicions ten (10)
9 years after the event occurred, she may
03:39 10 well have been mistaken about the timing
11 of the argument. It is significant to
12 note that she did not detect any blood
13 on Larry Fisher's clothing, nor did she
14 have any reason, at the time of the
03:39 15 events to link her husband to the murder
16 of Gail Miller."

17 And what was the significance of the fact that
18 she did not detect any blood on his clothing?

19 A Based on Gail Miller was stabbed to death and
03:39 20 there was blood and blood splatter in the area
21 around the body, the assumption was that the fatal
22 blows were delivered at that location. Given the
23 nature of the splattering, one would assume that
24 someone in contact with the victim would also have
03:40 25 some splatter on their person.



1 Q Scroll down, you say:

2 "Further, there may be significance in
3 the fact that Larry Fisher volunteered
4 information following his capture in
03:40 5 Winnipeg which resulted in the laying of
6 five additional sexual assault charges
7 against him. At the time of his arrest
8 he was not a suspect in any of the
9 offences to which he later entered a
03:40 10 plea of guilty."

11 And you've touched on that a bit, but is there
12 anything you want to add to that as far as the
13 significance of him confessing to charges, or
14 offences for which he was not a suspect?

03:40 15 A No, sir.

16 Q Then you conclude:

17 "Although I was left with an uneasy
18 feeling at the conclusion of the
19 interview, I do not have any evidence or
03:40 20 reason to believe that Larry Fisher
21 participated in the death of Gail
22 Miller."

23 And just comment about the uneasy feeling at the
24 conclusion of the interview, what did you mean by
03:41 25 that?



1 A Just that. During the course of the questioning
2 he didn't say anything that linked him up, but
3 sometimes you go by instinct or gut and there were
4 a couple of times in which there were
03:41 5 interruptions in the questioning and at the time
6 it was attributed to the fact that, you know, his
7 gallbladder problem had flared again, but I don't
8 know, call it five, fifth, sixth sense or
9 something, but that I didn't come away with a
03:41 10 comfort level that suggested that, you know, he
11 was totally believable, but I also didn't come
12 away with anything that linked him up. It was one
13 of those situations in which we heard the story,
14 but we still needed to do some further checks.

03:42 15 Q And so is it fair to say, when you say "I do not
16 have any evidence or reason to believe that Larry
17 Fisher participated in the death of Gail Miller,"
18 would that have been the areas that we touched
19 upon, the allegations of Linda Fisher, Cliff
03:42 20 Pambrun, things of that nature?

21 A That's correct. There were some circumstances,
22 but there wasn't the mortar to bind it all
23 together that implicated him in any direct
24 fashion.

03:42 25 Q What if any weight can you give to your gut



1 feeling or sixth sense?

2 A Until such time as we are able to run down some
3 information, it's just an unease. You can't --
4 there's a question there, but you can't really
03:43 5 articulate it or put it into -- into any
6 description that makes sense other than it's a
7 feeling of unease and that's -- the essential
8 signal there was we interviewed, we heard the
9 denials, but there was still work to be done in
03:43 10 relation to Larry Fisher.

11 Q And what would that have been?

12 A Well, I recall Sergeant Pearson and I talking
13 about some further potential leads that he could
14 run down in an effort to either confirm or not
03:43 15 some of the information that we had received. I
16 mean, it was clear that we were dealing with a
17 very, with someone who had been convicted of some
18 violent offences. The information that those
19 offences had taken place in Saskatoon could not be
03:44 20 ignored. Certainly we had looked at the
21 statements from Mrs. Fisher and tried to pursue
22 them, we had looked at some of the theories
23 surrounding, or the potential scenarios
24 surrounding the death of Gail Miller, but we were
03:44 25 unable to come up with anything that in my view,



1 at that time at least, that linked him to the
2 offence, but we didn't discount it as a
3 possibility.

4 Q Is it fair to say that you had concluded by this
03:44 5 point that the information provided by Linda
6 Fisher to both Mrs. Milgaard and Mr. Henderson and
7 to Sergeant Pearson, and indeed to you, was not of
8 a sufficient nature to link Larry Fisher to Gail
9 Miller's murder?

03:45 10 A Yes.

11 Q And you said there were some further avenues to
12 pursue?

13 A Well, that is, I guess, my recollection of the
14 conclusion of our conversation, and that
03:45 15 conversation was between myself and Sergeant
16 Pearson. Call it a post-mortem of the interview
17 and also the review of the files of Saskatoon
18 police, but we would canvass certain avenues that
19 would, or could provide some information one way
03:45 20 or the other.

21 Q What about -- can you tell us what conclusions if
22 any you had reached at this point about the
23 similar act assertion? Now, at this point I think
24 Mr. Wolch had identified it in the earlier letter,
03:46 25 I'm not sure whether all of the circumstances of



1 the rapes had been brought to the forefront, but
2 what was your thinking there as to whether that
3 was an area to pursue?

4 A Well, we were certainly trying to get information
03:46 5 from the files. We had one, we had a summary I
6 think that had been read in at the plea in Regina
7 and we had I think portions of the file in
8 Winnipeg and we knew that the knife at least had
9 been used in at least one of those instances, but
03:46 10 similar act is sometimes used as an identifier of
11 an unknown culprit, it's some circumstantial
12 evidence, and a fairly detailed analysis is
13 undertaken to determine, if you are the Crown at
14 least, whether or not there is sufficient indicia
03:47 15 that signals that the probative value of this
16 similar act evidence outweighs its prejudicial
17 effect, and we just kept on at it, but by then no
18 firm conclusions could be made, it's just that we
19 didn't have very much.

03:47 20 Q And we've heard some evidence, and I think indeed
21 some from you, that similar act evidence is used
22 differently by prosecution and defence in a
23 criminal proceeding; is that fair?

24 A Yes.

03:47 25 Q And I think you told us in your work in reviewing



1 this application, the -- and please correct me if
2 I'm wrong -- but the similar act or similar fact
3 evidence really had two areas of significance;
4 number one, that if it tended to establish or show
03:47 5 that Larry Fisher was the perpetrator of the Gail
6 Miller murder in light of the similarities, that
7 that might be, and I think you told us, together
8 with other information, enough to show that Larry
9 Fisher is the perpetrator; is that correct? So
03:48 10 that's one way it could be used?

11 A Yes, that's one aspect of its use, yes.

12 Q And I think the second aspect is the extent to
13 which David Milgaard may have been able to use
14 this in defence of charges against him had it been
03:48 15 known at the time. Is that fair?

16 A Yes.

17 Q And do you agree that there's probably two
18 different tests or bars that come into play?

19 A Well, certainly two different standards, and a lot
03:48 20 depends on who's trying to adduce the evidence.
21 Certainly if it's the Crown trying to establish
22 the evidence, the threshold is much higher than if
23 the defence is trying to introduce evidence which
24 could create a reasonable doubt.

03:48 25 Q And I apologize if we've covered this back in



1 June, but would similar fact evidence ever have
2 been enough for you to conclude that, on its own,
3 similar fact evidence would be sufficient reason
4 to believe that Larry Fisher participated in the
03:49 5 death of Gail Miller?

6 A If the evidence were so compelling, so unique that
7 it pointed unmistakably to Larry Fisher in the
8 death of Gail Miller, certainly, but it hadn't
9 reached a threshold -- I'm not putting a threshold
03:49 10 at the ceiling, but I'm putting a threshold where
11 there had to be some links that would put him at
12 the scene.

13 Q What about the other use of that; in other words,
14 that it's sufficiently similar that if it had been
03:49 15 known by the jury at the time of Mr. Milgaard's
16 trial or before his legal proceedings had been
17 concluded it might have affected the verdict, what
18 was it that, as far as reaching your conclusion
19 about whether or not it was evidence that might
03:50 20 establish a miscarriage of justice, what was --
21 where was the bar there?

22 A Well, I had to keep in mind a couple of things. I
23 kept in mind the date of the attack on Gail Miller
24 and the dates of the events which happened prior
03:50 25 to that, the circumstances of those assaults, the



1 timing, the location, the degree of violence. I
2 also took into account the events that happened
3 after the assault on Gail Miller and my assessment
4 was that it wasn't such that it reached that
03:51 5 threshold.

6 Q And that threshold being that it might have
7 affected his verdict, or that it was information,
8 had the jury known, it might have affected the
9 verdict, is that -- or could have affected the
03:51 10 verdict?

11 A Yes.

12 Q Go to 016122, and this is a note from Rick Pearson
13 to you of July 16th, 1990. I think we heard from
14 Sergeant Pearson that he became aware through a
03:51 15 Saskatoon police source of Kenny Cadrain, Albert's
16 brother, who had information that he went to
17 interview. Do you recall becoming aware of this
18 information?

19 A Yes, I do.

03:51 20 Q And is it correct to say that this was information
21 that came to Mr. Pearson as opposed to he or you
22 going out and finding it?

23 A Yes.

24 Q And some suggestion that he was six years old at
03:52 25 the time who apparently recalls seeing blood on



1 Milgaard's clothes. Just generally, and we'll
2 deal specifically with the statement later, but
3 did you have concerns about information coming 20
4 years later from someone who was six at the time?

03:52 5 A Yes, but, I mean, we have to take a look at what
6 was said and the opportunities for observing and
7 how it related to the other information we
8 collected to make some kind of evaluation, but
9 until that time we certainly couldn't ignore it.

03:52 10 Q 027179, and is this the July 17th, 1990 article by
11 Dan Lett, *Witness statement withheld, lawyers say*,
12 and you are familiar, are you, generally with this
13 article?

14 A Yes.

03:53 15 Q And it says:

16 "A statement given by a star witness in
17 the David Milgaard case that could have
18 discredited his entire testimony appears
19 to have been withheld from defence
03:53 20 counsel during the 1969 trial, two
21 lawyers close to the case have charged."

22 And that's referring to the March 3rd, 1969
23 statement of Ron Wilson. If that had been true,
24 Mr. Williams, that Ron Wilson's initial
03:53 25 statement, which I think you described earlier as



1 being non-incriminating, or whatever you want to
2 call it, if that had not been disclosed to
3 defence counsel, would that be something, if that
4 were true, that could provide a reasonable basis
03:53 5 to conclude that a miscarriage of justice had
6 occurred?

7 A Yes, it certainly would go some ways towards
8 reaching that threshold, yes.

9 Q And I suppose if Ron Wilson's statement was
03:54 10 significantly incriminating, which I think it was,
11 and that if the disclosure of the statement might
12 have discredited it, that might be the basis for a
13 miscarriage of justice; is that fair?

14 A Yes.

03:54 15 Q Now, if we can go back to the main page, I think I
16 used the word astounded, it was actually shocked:

17 "Ken Watson, a B.C. lawyer representing
18 Wilson, said he was shocked when he
19 opened a package from the Justice
03:54 20 Department containing, among other
21 things, the two conflicting statements."

22 And then the right-hand side, he talks about the
23 statement to Riddell, and I talked about it
24 earlier. Do you think that -- does that assist
03:55 25 you, is it likely that you had sent that to him



1 on June 27th?

2 A Yes, I believe we only sent one package to him.

3 Q And then I take it you would have had an
4 opportunity to read -- scroll down to the right a
03:55 5 bit further:

6 "Wilson, in an interview from his ...
7 home, said he did not remember giving
8 the first statement, but firmly believes
9 Tallis could have broken him on the
03:55 10 stand if he had used it at the trial."
11 "The first one was the one that was
12 supposed to be in court. If they had
13 used it then, it would all have been
14 over."

03:55 15 And what was your reaction to this media report?

16 A It's just another chapter in an endeavour to, I
17 say poke a hole in the perception that there had
18 been a fair trial. I mean, here you have a
19 witness, and you have to enjoy the irony because
03:56 20 this is Mr. Wilson who gave the statements, who
21 testified, and he's suggesting that had the
22 defence had this statement, the defence would have
23 "broken him on the stand if he had used it at
24 trial." It's a backhanded attack on the
03:56 25 competence of the trial counsel.



1 I had, by then, reviewed both
2 the testimony of Mr. Wilson on the prelim and at
3 the trial and it just seemed to me to be the
4 speculation of someone who is not familiar with
03:57 5 the process or who doesn't, did not recall the
6 nature of his cross-examination.

7 Q And I take it at this time, would you have known
8 that Mr. Tallis was in fact provided with the
9 first statement?

03:57 10 A I believe he, at the time I believe he was, and
11 that belief was, I think that's reinforced by
12 recollection of his cross-examination of Mr.
13 Wilson.

14 Q And can you tell us what effect if any, reading
03:57 15 the comments from Mr. Wilson, and indeed his
16 counsel, did that have any influence on your
17 assessment of his credibility? I think you
18 interviewed him later on, but tell us whether
19 these statements influenced your thinking about
03:57 20 the credibility of his recantation?

21 A Well, I think I was more surprised by his
22 counsel's statement than by Mr. Wilson. Mr.
23 Wilson is not learned in the law and to the extent
24 that the March statement tended to be in force,
03:58 25 his June 4th statement, I could understand that he



1 would take some comfort from it.

2 Q And, sorry, if we can just go to the top, was it
3 the comment there, that:

4 "...it suggests a serious omission in
03:58 5 information given to Tallis."

6 A Yes. I mean, there's the accusation, one, that
7 the Crown withheld it. The second accusation is,
8 or if Wilson comes with the flip side of that and
9 says basically if Mr. Tallis did have it, why
03:58 10 didn't he crucify me with it.

11 Q If we can go to 001477, this is a statement of
12 July 18th, 1990 of Kenneth Cadrain to Rick
13 Pearson, he talks about the morning of the murder
14 he was at home, he was six years old. Just scroll
03:59 15 down. And is it correct to say that prior to this
16 statement Kenny Cadrain had not provided a
17 statement back in 1969, I think that's the record
18 we have; is that correct?

19 A That's correct.

03:59 20 Q So here he says:

21 "When Milgaard first came into the house
22 and he was talking to Albert, Albert
23 said something like "what happened to
24 your pants" and Milgaard replied
03:59 25 something like "I screwed a virgin" or



1 "I was with a virgin." At the time, I
2 didn't know what virgin meant, and asked
3 Albert what it meant, I don't know if he
4 told me.

03:59 5 I cannot recall if I saw
6 blood on Milgaard's clothes or if his
7 clothes were ripped."

8 And then after he changed his clothes he went out
9 the back door. What did you make of this
04:00 10 information, if anything?

11 A Well, I guess my first observation was that that
12 particular bit of information did not form part of
13 the trial record and did not play a role in Mr.
14 Milgaard's conviction. The second observation is
04:00 15 to the extent that the 20-year-old recollection
16 could be believed, it tended to support, in part,
17 some of the information provided by Albert
18 Cadrain.

19 Q And were you ever able to make an assessment about
04:00 20 whether this information was reliable or not?

21 A I don't recall specifically drawing any attention
22 to it, to the -- I mean my function wasn't to
23 retry the case, the fact of the matter is the jury
24 heard the evidence of Albert, it did not hear
04:01 25 this, so it really didn't factor into the in --



1 the body of evidence that could have been used to
2 incriminate David Milgaard and, in relation to my
3 assessment of the information, I was primarily
4 interested in looking at information that
04:01 5 supported the applicant's claim.

6 Q And did you view this information as supporting
7 the applicant's claim?

8 A For what it was worth, it did not support the
9 applicant's claim.

04:01 10 Q If we can go to 001479. Ken Cadrain also talked
11 about:

12 "Not once did Albert ever
13 complain to me about being pressured by
14 the Saskatoon City Police during their
04:01 15 investigation of the Miller murder.
16 Albert had no hate for the police over
17 the years. After Milgaard had been
18 convicted, he escaped once or twice.
19 Det. Karst from the City Police would
04:02 20 phone him and advise him that Milgaard
21 had escaped. As far as I know, the
22 relationship between Albert and the City
23 Police was normal.

24 I recently saw a TV news
04:02 25 program involving my brother Albert and



1 his involvement with the Milgaard case.

2 I know Albert well, and when I saw him

3 on TV he appeared stoned ..."

4 Just scroll down:

04:02 5 "... and shaved his head to probably
6 seek attention or sympathy. Most of the
7 things attributed to Albert on the
8 program I had never heard from Albert
9 himself. I believe there was a power of
04:02 10 persuasion used on Albert, who is
11 currently undergoing mental problems.

12 His mind is open to suggestion."

13 Again, what was the significance of this

14 information from Kenny Cadrain?

04:02 15 A This was a family member who was saying that, you
16 know, he hadn't heard a complaint from his brother
17 about bad treatment by the police.

18 I think, by then, I may have
19 already spoken to Albert and gotten his first-hand
04:03 20 account, and certainly Albert, my recollection was
21 that he was miffed at the fact that he wasn't
22 believed and he felt that --

23 Q By the, sorry, by the police in 1969?

24 A -- by the police in 1969 -- but I didn't receive
04:03 25 any information from Albert that signaled that his



1 incriminating evidence against David Milgaard was
2 as a result of improper police behaviour either in
3 Saskatoon or in Regina.

4 Q Okay. If we can go to 124983. This is the
04:04 5 interview of Ron Wilson, and it's fairly lengthy,
6 we have been through it at least once with Mr.
7 Wilson so I don't intend to go through it in
8 detail with you. There were -- and I'll show you
9 these later, Mr. Williams, and I think you are
04:04 10 familiar with them -- there were allegations made,
11 I think in the media, that were either attributed
12 to Mr. Watson, or by implication that Mr. Watson
13 may have said them, to the effect that you told
14 him that this was a waste of time or that you
04:04 15 believed David Milgaard was guilty, or things of
16 that nature. Are you generally aware of those
17 allegations being made that were made around this
18 time or after?

19 A Yes.

04:04 20 Q Did you have any discussion with Mr. Watson where
21 you told him this was a waste of time or did you
22 express to him any view that you thought David
23 Milgaard was guilty?

24 A No.

04:05 25 Q Did you have any discussions with Mr. Watson about



1 anything related to your -- well, maybe that's not
2 a fair question. Did you have any discussion with
3 Mr. Watson where you discussed the merits of David
4 Milgaard's application?

04:05 5 A It was not my practice to discuss the merits of
6 any application with a witness or the witness'
7 counsel. My -- my opinion, my views, were
8 reserved for that of the Minister of Justice, and
9 although she's not here, that was a consistent
04:05 10 practice I use, whether it was with those who
11 represented witnesses advanced in favour of Mr.
12 Milgaard. And with strangers, even though they
13 purported to be members of the Crown, I would not,
14 and did not, provide my assessment.

04:06 15 I recall getting a phone call
16 from someone whom I didn't know identifying
17 herself as Ellen Gunn and who, at the time,
18 requested a status report. I declined to provide
19 it. I later learned that Ms. Gunn was Mr. Brown's
04:06 20 superior.

21 But it was not my practice to
22 disclose information that ought not to be
23 disclosed, and certainly, whatever views I have
24 about the potential merits of the case would only
04:06 25 crystalize at the conclusion of the material



1 gathering process and would not, in any event, be
2 shared with Mr. Watson.

3 And, certainly, I valued my
4 time enough that I wouldn't want to waste it by
04:06 5 taking a trip, an aircraft trip to Kelowna and a
6 4 1/2-hour drive from Kelowna to Nakusp, not once
7 but twice.

8 Q Umm --

9 COMMISSIONER MacCALLUM: Did you refuse to
04:07 10 give this caller a progress report because you
11 couldn't verify that it was Ellen Gunn or because
12 you wouldn't have told her even if you knew it
13 was her? Because we've heard evidence, sir, that
14 there were progress reports provided?

04:07 15 A There were progress reports provided. I think
16 that if I knew who she was and she asked for a
17 specific question, I may have been inclined to
18 have given her an update, but it wasn't my
19 practice at the time to do so.

04:07 20 I had, in relation to Murray
21 Brown, on occasion indicated what we had done and
22 what we learned. But status reports and where we
23 were and -- is just something that was only
24 reserved for my immediate superiors.

04:08 25 BY MR. HODSON:



1 Q I think one of the examples Mr. Brown may have
2 alluded to was the Deborah Hall allegation, and I
3 think his evidence was to the effect that he
4 learned, at some point before the minister's
04:08 5 February 27th letter, that there was another side
6 to the story about Deborah Hall's allegation that
7 had been in the newspaper?

8 A Yes.

9 Q And that, I think his evidence was to the effect
04:08 10 that he may have learned it from you, that "here's
11 what she said" when you examined her. Is that the
12 type of thing that you might have, or did, update
13 him by saying "lookit, we interviewed her, and
14 here's what she told us"?

04:08 15 A Yes, I had had some personal dealings with Mr. --
16 with Mr. Brown, and that is something I would have
17 said, "this is what I, this is what I got from
18 Deborah Brown (sic) in a nutshell".

19 Q Deborah Hall?

04:09 20 A I'm sorry, Deborah Hall.

21 Q That's right. Okay. If we can go back to the
22 Wilson transcript, and back in June we spent some
23 time going through the June 4th recantation
24 statement, and we've got your evidence on that.
04:09 25 What was the purpose, generally, of this exam with



1 Mr. Wilson then?

2 A Mr. Wilson had testified under oath both at the
3 preliminary inquiry and at trial, in my view he'd
4 been subjected to a rigorous cross-examination by
04:09 5 a skilled counsel, and at the end of it the jury
6 had an opportunity to assess his evidence and to
7 consider it when it was relatively fresh in his
8 mind. Some many years later he provided a
9 statement which recoiled or -- from some of his
04:09 10 earlier observations. It was incumbent on us to
11 examine and explore the circumstances under which
12 the statement was given and to probe, perhaps a
13 little further, some of the conclusory statements
14 that had been -- that had been contained in the
04:10 15 statement.

16 Q In the June 4th statement?

17 A In the June 4th statement.

18 Q And can you tell us generally, I'll go through
19 parts of the transcript, generally what was your
04:10 20 impression of Mr. Wilson in the course of this
21 examination?

22 A Mr. Wilson was not consistent in his re -- in his
23 telling of the story. The message he conveyed was
24 that someone had done, or the police had been
04:10 25 improper in their dealings with him, and I -- I --



1 I asked him, you know, "what did they do", and
2 nothing that he provided by way of recall seemed
3 to match the conclusions or the accusations that
4 had been put or suggested in the statement, so
04:11 5 there were inconsistencies.

6 I had to keep in mind also
7 that that area had been explored I believe at
8 trial or at the prelim, I'm not certain which, but
9 he had had an opportunity to voice those concerns,
04:11 10 and one of the reasons, one of the things I wanted
11 to find out was why now and not then.

12 Q And I had showed you earlier the suggestion that
13 Mr. Wilson was adamant that you not be the one to
14 question him; what was the tone or the tenor of
04:11 15 the examination by the time it was done, did you
16 have any concerns about his cooperation with you?

17 A No, I mean Mr. Wilson was represented by counsel
18 who was present throughout, the tone of my
19 questioning was similar to that that I would use
04:12 20 with other witnesses.

21 Q Yeah, sorry, I meant to say did you get the sense
22 that Mr. Wilson was comfortable being questioned
23 by you, maybe not initially, but by the end of the
24 interview?

04:12 25 A Well he certainly wasn't comfortable. I'm not



1 certain what you understand by 'comfortable'. He
2 answered or he responded, as best he could, to my
3 questions. He wasn't hostile towards me.

4 Q That's maybe what I was getting at --

04:12 5 A Yeah.

6 Q -- so, okay. If you can go to page 985, I'm just
7 going to ask you to comment on a couple of areas.
8 Here you say:

9 "Q I take it, Mr. Wilson, from what you
04:12 10 have described that you had a certain
11 number of police contacts while you were
12 still an adolescent; is that fair to
13 say?

14 A Yes."

04:13 15 And then you show him a criminal record which I
16 think is fairly lengthy. And then to 124988:

17 "Q So you had become accustomed to dealing
18 with law enforcement officers by that
19 time?

04:13 20 A To a point yes.

21 Q To what point was that?

22 A I knew what to expect from them.

23 Q Okay, they would question you?

24 A Yes."

04:13 25 What was the purpose of that area of inquiry?



1 A There had been a suggestion made that you had two
2 young kids who had been, you know, placed in a
3 fairly difficult spot by police officers and who
4 may have been intimidated by the police. To the
04:13 5 extent that Mr. Wilson had had contacts with law
6 enforcement, that might inform his attitude
7 towards them, or it might inform the degree to
8 which he may have felt intimidated, and it was an
9 area that I needed to explore.

04:14 10 Q Would you expect a person in 1969, a 16-year-old
11 who had had no dealings with police, to perhaps
12 behave differently than someone who had extensive
13 dealings with police; is that what you were
14 getting at?

04:14 15 A Well, generally speaking, I mean if someone has
16 had no contact whatsoever with law enforcement as
17 an accused and suddenly they are being questioned
18 and picked up by police officers and subject to
19 interrogation one would, you know, you'd have to
04:14 20 be alive to the issue that perhaps some of the
21 responses may have been informed by fear or
22 some -- fear of the police, and certainly that was
23 the impression that was sought to be conveyed by
24 some of the reporters. However, if someone had
04:14 25 had a number of contacts with the law, knew the



1 procedure, the process, and I had dealt with young
2 offenders and some of them were fairly
3 sophisticated in terms of their knowledge of the
4 process, the procedure, what their rights were,
04:15 5 and sometimes they were cocky, you know, much more
6 so than adults. A lot of the -- I needed to find
7 out the personal experiences of this person in
8 relation to law enforcement as one of the indicia
9 of gauging the extent to which he may have been
04:15 10 intimidated and gauging the extent to which
11 reliance could have been put on his early
12 statements in 1969.

13 Q And what did you conclude in that area?

14 A I -- I felt that Mr. Wilson had had sufficient
04:15 15 contacts that he wasn't, or that there was no
16 indication of intimidation, or that he more or
17 less knew what to expect and this wasn't something
18 that was, quote, "entirely new to him".
19 Certainly, he had not -- been swept up in a murder
04:16 20 investigation, and there was some nervousness, but
21 I found no indication, as my questions continued I
22 found no indications that signaled that there had
23 been inappropriate behaviour by the members of the
24 police force, and I found no indication that the
04:16 25 responses by Mr. Wilson to police questioning had



1 been tailored unfairly or unconscionably by virtue
2 of the fact that it was coming from police
3 officers only.

4 Q Is it correct -- no, sorry -- is it correct to say
04:16 5 that the reason you pursued this line of inquiry
6 with him is because he alleged in his June 4th
7 statement that it was manipulation and coercion by
8 the police that caused him to lie back in 1969 and
9 '70?

04:16 10 A Correct.

11 Q And fair to say you were testing --

12 A Probing.

13 Q Probing?

14 A Yes.

04:17 15 Q And had he not, had he not provided that as a
16 basis for recanting, if he had simply said
17 "lookit, I lied for whatever reason, because I
18 felt like it or I was stoned", again, would you
19 have pursued this line of inquiry with the police?

04:17 20 A Yes.

21 Q You still would have?

22 A They -- if he says he lied, he was stoned,
23 certainly you'd want to pursue that as well.

24 Q But as far as the treatment by the police of him?

04:17 25 A It -- it had been raised and I couldn't ignore it.



1 Q No, and I guess my question is if it had not been
2 raised, is it fair to conclude you wouldn't have
3 pursued it?

4 A Correct. I had no reason, based on my earlier
04:17 5 review of the trial record and the preliminary
6 record, to suspect that that was a factor in
7 shaping his trial testimony.

8 Q If we can go to 124991. Just a couple points
9 here. You asked about his drug addiction until
04:18 10 the 1980s, and then on the next page you ask him
11 about, between May and August of '69, doing drugs:

12 "A Yes.

13 Q ... how frequent ...

14 A Every two or three days.",

04:18 15 LSD, etcetera. What was the significance of
16 these questions and the answers that he provided?

17 A It certainly, in -- it was a factor in making some
18 kind of assessment of the statements that he made
19 at that time.

04:18 20 Q Did that cause you concerns about whether drug use
21 may have affected his memory in 1990?

22 A It may have affected his memory in 1969 as well as
23 1990. Keep in mind that the drug use was in '69,
24 and that's -- that's when, that was the period in
04:19 25 which the statements were taken, but it could also



1 have had some residual effect for his 1990 memory
2 as well, I just didn't realize -- didn't know at
3 that time until I asked.

4 Q Go to 124998. And is it fair to say that, this is
04:19 5 a question here about what they did that morning,
6 that his June 4th, 1990 statement had some
7 recantations but that it was not a point-by-point
8 review of the various pieces of evidence and his
9 comment, rather some specific recantations, but
04:19 10 did not address all of his trial evidence or all
11 of his significant evidence; is that fair?

12 A That's correct.

13 Q And, for example, here the question of whether or
14 not their vehicle got stuck, and at trial Mr.
04:19 15 Wilson testified that after they stopped the woman
16 for directions their vehicle became stuck and he
17 and David Milgaard left the vehicle for a time
18 period; you recall that being the evidence?

19 A Yes.

04:20 20 Q And in his statement to Mr. Henderson on June 4th,
21 1990 I do not believe that he recanted that or
22 even addressed that issue; is that your
23 understanding?

24 A Correct, that -- my recollection, without the
04:20 25 statement directly in front of me, was that there



1 were specific points identified in the statement
2 which he was recanting but it -- it -- it was not
3 crafted so much as a narrative but he basically
4 said "lookit, I testified about this point, this
04:20 5 point, and this point, and that was a lie, and I
6 was manipulated or coerced to do so", and what I
7 was trying to do was just to get his current
8 recollection, and I guess then 1990, as to what
9 happened.

04:20 10 Q Okay. If we can just go to the next page. At the
11 top he says:

12 "A We just asked somebody for directions
13 and they didn't know where we were, and
14 so we went to make a U-turn and go back
04:21 15 the other direction."

16 "A Looking for Albert's Cadrain's house."
17 and got stuck. What was the significance of this
18 evidence, about Ron Wilson saying their vehicle
19 got stuck after they stopped somebody for
04:21 20 directions and Mr. Milgaard leaving the car?

21 A Well, again, I was simply revisiting or trying to
22 get his present recall in narrative form. That's
23 --

24 Q And so --

04:21 25 A My sense also is that -- I wish I had the recant



1 in front of me -- but there were some specific
2 points in that recant that I needed or I preferred
3 to get by way of a narrative as opposed to just a
4 simple denial, so I needed to get the story out as
04:22 5 best as I could from his own recollection of it.

6 Q If we can call up 000248. And I think, if you go
7 to 251, I think this is where:

8 "From reading the transcript of my. ...
9 trial ... a copy of which was provided
04:22 10 to me ... I can attest to having made
11 the following additional allegations
12 against Milgaard in the trial:",

13 and then he goes on and identifies some and says
14 "this was not true"; does that assist you?

04:22 15 A Yes. So he talks about the knife, he talks about
16 the denying that he saw a knife between Regina and
17 Saskatoon.

18 Q Right. But it appears that he did not recant, in
19 his statement, the fact that they stopped a woman
04:23 20 for directions, and then shortly after they got
21 stuck, and he and Mr. Milgaard left the car?

22 A Correct.

23 Q And was there any significance in the fact that he
24 did not recant that part?

04:23 25 A At the time I wasn't looking at it in that, shall



1 we say, piecemeal a fashion, I was trying to get
2 what he now recalled.

3 Q Okay. If we can go back to 125005, and here's
4 where he says that they did go, and that David was
04:23 5 gone for no more than two minutes. Now that would
6 have been different evidence than he gave at
7 trial, correct, I think at trial he said 10 to 15
8 minutes?

9 A Correct.

04:23 10 Q And what was the significance of this information,
11 which had not been the subject of his June 4th
12 statement?

13 A Umm, the significance was that in July he had
14 reduced the interval of separation between himself
04:24 15 and David Milgaard to a mere two minutes, and that
16 would have an impact on the window of opportunity
17 for David Milgaard to assault Gail Miller.

18 Q And did that make his June 4th statement more or
19 less credible in your eyes?

04:24 20 A Well, it was certainly different from it, as I
21 recall. I mean the window of opportunity that
22 David Milgaard had to commit that offence was a
23 live issue at trial, it was a live issue and it
24 was an important issue, and I would have thought
04:24 25 that that would have also been captured, if it



1 weren't captured, when he spoke with Mr.
2 Henderson.

3 Q If we can go to 008, please. And so you put some
4 significance in the fact that Mr. Henderson had
04:25 5 not canvassed that in Ron Wilson's statement?

6 A I -- I think I put significance in the fact that
7 it was now appearing.

8 Q Okay. Here you question him about the stocking
9 feet in the motel:

04:25 10 "Q ... for example, that he ...",
11 and you are referring to David Milgaard:

12 "... walked into the motel in stocking
13 feet, would you agree with that?

14 A No.

04:25 15 Q Why not?

16 A It was too damned cold to do that.

17 Q That's your rationalization?

18 A Yes."

19 "Q ... But you still maintain that he was
04:25 20 wearing shoes when he ... walked in?

21 A Yes."

22 What was the significance of that?

23 A Again, simply testing the recall of Mr. Wilson. I
24 think there was evidence at trial and I believe it
04:25 25 was confirmed, if not by Mr. Tallis, but the



1 evidence on that point was uncontroverted that
2 David Milgaard did walk in in stocking feet at
3 that time.

4 Q And so what -- what's the significance, then, of
04:26 5 Mr. Wilson saying "no, that didn't happen because
6 it was too cold"?

7 A It's just an attempt to get some overall
8 assessment of his independent recall of the
9 events.

04:26 10 Q And what did you conclude from that?

11 A Well, he, his evidence differed. He may have been
12 mistaken but, you know, that's -- you know, he
13 simply didn't recall that fact.

14 Q Okay. And what about the fact that he said it
04:26 15 didn't happen?

16 A Umm --

17 Q Or would you agree with that answer:

18 "A No.

19 Q Why not?

04:26 20 A It was too ... cold ..."?

21 A And then I ask:

22 "Q That's your rationalization?

23 A Yes.

24 Q But are you aware ... of any facts which
04:26 25 dispute the correctness of my suggestion



1 to you that he walked into that motel in
2 his stocking feet?"

3 And by framing the question that way I was trying
4 to get at whether or not he had a directed
04:27 5 observation, "no, he didn't walk in in stocking
6 feet, I saw him, he had boots on". I didn't get
7 that. But 20 years after, you know, if you don't
8 have a specific recall -- and I can relate to
9 that -- sometimes you do respond because it makes
04:27 10 sense to respond in that way, "it's too cold to
11 walk around in minus 40 without shoes or boots",
12 and --

13 Q And were you concerned that in 1990 he was
14 rationalizing rather than recalling?

04:27 15 A I think experience has shown that sometimes
16 there's recall of a series of facts, but not all
17 facts, and that you make assumptions for the ones
18 that -- that are missing, and someone can call it
19 confabulation, or at that time I used the word
04:28 20 'rationalization'.

21 Q Okay.

22 A "It was too damned cold to do that."

23 Q Okay. I see it's 4:30, Mr. Commissioner.

24 Just before we break, just a
04:28 25 couple of points on dates and times. Tomorrow I



1 believe we're sitting until 3:00 only instead of
2 3:30 due to hotel commitments, and I think we're
3 going to sit -- take one hour for lunch, 12:00 to
4 1:00, and go 1:00 to 3:00.

04:28 5 And as well I had scheduled
6 for next week, being our last week, Graham Zelek
7 (ph), Professor Graham Zelek from England, who was
8 to testify. I was advised last week that, or ten
9 days ago that he can't travel due to certain
04:28 10 medical conditions. I've been able to arrange
11 another witness, a retired member of that
12 Commission, David Kyle, who will be attending.
13 However, he cannot arrive until the weekend of
14 September 27th, so we will be sitting October 2nd,
04:28 15 3rd, and 4th to hear from Mr. Kyle and, as well,
16 the other systemic witnesses.

17 So I will send out an Email to
18 the parties, but just to inform you of that. Next
19 week, we'll have Mr. Williams, Mr. Fainstein as
04:29 20 witnesses, and the systemic the following week.

21 COMMISSIONER MacCALLUM: Okay.

22 MR. HODSON: And, in light of your
23 direction that we're not sitting in October, I
24 refer to them as September 32nd, 33rd, and 34th,
04:29 25 for the record.



1 COMMISSIONER MacCALLUM: I hope that's some
2 comfort to Mr. Wolch. I see, as dates move
3 closer to his vacation time, he shows signs of
4 nervousness. Okay. Thank you.

04:29

5 (Adjourned at 4:29 p.m.)
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OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATES:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR, CRR, CBC, Official Queen's Bench Court Reporters for the Province of Saskatchewan, hereby certify that the foregoing pages contain a true and correct transcription of our shorthand notes taken herein to the best of our knowledge, skill, and ability.

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Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR, CRR, CBC

Donald G. Meyer, RPR, CSR, CRR, CBC

Official Queen's Bench Court Reporter



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