

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

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

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On Tuesday, September 26th, 2006

Volume 188

Inquiry Proceedings



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Transcript of Proceedings

(Reconvened at 9:05 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

EUGENE WILLIAMS, continued:

BY MR. HODSON:

Q Good morning, Mr. Williams.

A Good morning.

Q Call up 010283, please. I just want to finish up,  
or follow up on this DNA matter. Yesterday I  
think we finished up with the advice from Pat  
Alain and the RCMP lab, their recommendation that  
Roche Diagnostics be approached to perform AmpFLP  
analysis; is that right?

A Yes.

Q And then here's a February 25 letter from Barry  
Gaudette to you and it's a follow-up to Pat  
Alain's report, and I think in Pat Alain's  
testimony at the Larry Fisher preliminary hearing,  
she indicated that the DNA recommendations in her  
February 17th report were assisted by either Barry  
Gaudette and/or Ron Fourney. Would that have been  
your understanding, that she relied on those  
people for the DNA recommendations to you, or were  
you aware of that?



1 A I wasn't aware of that, but it wouldn't surprise  
2 me because Ron Fourney was a highly-qualified  
3 individual in terms of DNA analysis at that time.

4 Q Okay. And here Mr. Gaudette says that Roche -- so  
09:06 5 this is two days after I think the recommendation  
6 and your decision to go to Roche:

7 "Roche ... have now stated that they  
8 will conduct AmpFLP analysis in this  
9 case only if all parties agree to  
09:06 10 stipulate in writing that they will not  
11 contest or attack either AmpFLP  
12 technology or Roche's application of it.  
13 Given that you have informed me that  
14 unanimous agreement to so stipulate  
09:06 15 cannot be obtained, and in view of the  
16 British Home Office's previous refusal  
17 to conduct either Short Tandem Repeat or  
18 Mitochondrial DNA analysis at this time,  
19 only three possible options ... remain."

09:07 20 And can you tell me, Mr. Williams, are you aware  
21 of what was the issue there about getting a  
22 unanimous agreement to stipulate this?

23 A My recollection is that AmpFLP was relatively new  
24 and Roche was concerned that there be no challenge  
09:07 25 to it if it were used in this case in terms of



1           either the methodology they used or the results.  
2           It was in more or less -- I shouldn't say that.  
3           It was a new type of process and just as the Brits  
4           were unwilling to use mitochondrial DNA or short  
09:07 5           tandem repeats at that time, my sense was that  
6           Roche was perhaps just a little bit ahead of the  
7           British in terms of their validation, but they  
8           didn't want to risk future cases by challenge at  
9           this time.

09:08 10        Q           If we could just go back to the February 17th  
11           report, 009437, and go to page 439, and this is  
12           Pat Alain's report on this, and this is the  
13           technology that I think had been tentatively  
14           agreed to pursue, but it could,

09:08 15                   "...only be done on an exclusionary  
16                   basis; if an inclusion occurred no  
17                   statistical frequency can be associated  
18                   with it."

19           And as I understand that, Mr. Williams, what that  
09:08 20           means is that you could exclude somebody as the  
21           perpetrator or the donor of the semen, but you  
22           couldn't identify unlike other DNA technologies;  
23           is that correct?

24        A           That's my understanding also, yes.

09:08 25        Q           And so was that one of the issues, if we can go



1 back to 010283, with getting all the parties to  
2 agree that -- to proceed in this fashion? Does  
3 that assist you at all?

4 A That's certainly one of the considerations,  
09:09 5 because while it might exclude one, it wouldn't  
6 positively or could not be used to positively  
7 identify someone else.

8 Q Do you have any recollection or knowledge as to  
9 who would not agree to stipulate what Roche had  
09:09 10 requested?

11 A I don't recall at this time, sir.

12 Q I think we may hear from Mr. Fainstein on that.  
13 And as far as getting Larry Fisher's blood for DNA  
14 purposes, was that something you were directly  
09:09 15 involved in or did Mr. Fainstein --

16 A I think in terms of the negotiations, Mr.  
17 Fainstein.

18 Q What is your recollection or knowledge about Mr.  
19 Fisher's position around this time about whether  
09:09 20 he would or would not give bodily fluids for the  
21 purposes of DNA analysis?

22 A Initially there was some reluctance, but  
23 ultimately he provided samples.

24 Q And do you know at what point?

09:09 25 A I don't, no.



1 Q That's fine. If we can go to the next page, it  
2 looks like Mr. Gaudette, he then talks about the  
3 DQ Alpha and the stains and says:

4 "Since all these options have serious  
09:10 5 drawbacks, the recommendation of the  
6 RCMP is that none of them should be  
7 taken at this time. Rather ... delayed  
8 until ... PCR technology options (Short  
9 Tandem Repeats)..."

09:10 10 Etcetera,

11 "...is ready for casework application."

12 In about one year. And so is that basically the  
13 status on February 25, 1992, that in light of the  
14 developments identified in the letter, that DNA  
09:10 15 testing was basically put on hold?

16 A That was his recommendation, that's Mr. Gaudette's  
17 recommendation. It wasn't followed because we did  
18 follow up with DQ Alpha testing.

19 Q Right. And I'm just trying to get a sequence  
09:10 20 here, Mr. Williams, about what prompted the  
21 change, and so maybe we can come back to this, but  
22 at this point it appears the advice is to do no  
23 testing, and I'll show you a transcript in a  
24 moment where I think on March 6th Mr. Fainstein  
09:11 25 tells the Supreme Court that testing can't be done



1 at this time, or maybe it's March 9th, and then  
2 later that it is done, so -- and maybe you are not  
3 familiar with all the details on that; is that  
4 correct?

09:11 5 A That's correct.

6 Q Okay. If we can go through 049548, and this is a  
7 March 9th, '92 fax from Mr. Pearson to you, and I  
8 think this is just before Larry Fisher's  
9 testifying at the Supreme Court, and he says:

09:11 10 "The following is submitted to assist in  
11 establishing a line of questioning on  
12 activities associated to Larry Fisher:"  
13 And then provides a number of pages, and if we  
14 can go to the last page -- next page, please:

09:11 15 "In summary, it would be appreciated if  
16 the examination of Larry Fisher could be  
17 exhaustive, as it will be the police who  
18 are tasked with any follow-up  
19 investigation of Fisher, should the  
09:12 20 Supreme Court determine this requires  
21 further investigation. Larry Fisher's  
22 appearance as a witness in the Supreme  
23 Court will probably be as close as we  
24 will ever get to him."

09:12 25 Can you tell me what, to your knowledge, what



1           gave rise to this report by Mr. Pearson and what  
2           did you do with it, if anything?

3           A        I'm not certain what prompted the development of  
4           the report. I believe I would turn that over  
09:12 5           either to Mr. Fainstein or to Mr. Frater, counsel  
6           who were appearing before the Supreme Court  
7           reference.

8           Q        And was this something -- do you recall, did you  
9           ask him to do this or was this something that he  
09:12 10           did on his own initiative?

11          A        I have no recall of me requesting that. It's  
12          something that we may have talked about in terms  
13          of developing an historical, shall we say, an  
14          historical template of Mr. Fisher and his  
09:13 15          activities.

16          Q        Go to 067169, and this is a memo where you --  
17          March 10, 1992 -- where you ask Sergeant Pearson  
18          to go see Mr. Caldwell, present a note to Mr.  
19          Caldwell and inquire into the circumstances which  
09:13 20          prompted him to write it, and I think this is the  
21          note that Mr. Caldwell had made on his file about  
22          what Nichol John had said to other witnesses in  
23          the witness room; is that correct?

24          A        Yes.

09:13 25          Q        And can you tell us, what were the circumstances



1           that gave rise to this request?

2           A       That note I think emerged as part of the  
3                   prosecution file and perhaps there were  
4                   conversations between Mr. Brown and our counsel  
09:14 5                   and the potential was that Mr. Caldwell might be  
6                   called as a witness to talk about that writing and  
7                   before that took place, it was felt prudent to  
8                   have Sergeant Pearson interview Mr. Caldwell and  
9                   get some additional details about it.

09:14 10          Q       And were you involved at all in the decision to  
11                   have Mr. Caldwell testify or not testify or  
12                   what --

13          A       That was the call for counsel at the Commission.  
14                   I may have been present during some of the  
09:14 15                   conversations, but it wasn't my call.

16          Q       Do you recall anything discussed about whether Mr.  
17                   Caldwell would be a witness, would not be a  
18                   witness, things of that nature?

19          A       I know that there was some discussion about it,  
09:14 20                   but I didn't pay particular attention to it at  
21                   that time.

22          Q       If we can go to 230977, and this is just a fax  
23                   from you to Pat Alain of March 11th, part of the  
24                   transcript. If you go to the next page. I'm  
09:15 25                   sorry, I think earlier I said March 6th and March



1 9th. It was actually -- oh, sorry, it is March  
2 9th, in court, and this is where Mr. Fainstein, if  
3 we can go to page 230981, please, and this is  
4 where Mr. Fainstein tells the court that testing  
09:15 5 for DNA can be done at the present time and in the  
6 circumstances,

7 "...ask the Court's permission to  
8 maintain this material securely until  
9 such time as these tests have been  
09:15 10 developed for use in court..."

11 And so that was March 9th, 1992, and are you  
12 familiar with what prompted that decision at the  
13 time, Mr. Williams?

14 A I believe it was the remarks of Mr. Gaudette  
09:16 15 contained in his letter to me. When AmpFLP was  
16 not seen as -- when we couldn't use AmpFLP, there  
17 was -- the recommendation from Mr. Gaudette was  
18 that we postpone until another form of  
19 mitochondrial or short tandem repeats had  
09:16 20 developed to the point where meaningful results  
21 could be obtained.

22 Q And it's my understanding from the record, and  
23 we'll hear a bit more from Mr. Fainstein on this,  
24 that at this time Larry Fisher had not yet  
09:16 25 provided bodily fluids for testing, and is it



1 possible that that may have been one of the  
2 reasons that testing was not being pursued given  
3 that it was exclusionary only and Mr. Fisher's  
4 sample had not yet been obtained?

09:17 5 A That certainly would have been one of the  
6 considerations, yes.

7 Q Okay. And then I think it's after this court  
8 date, and I stand to be corrected, but I think  
9 it's after these submissions, within a day or so,  
09:17 10 that Mr. Fisher did provide blood and other bodily  
11 fluids for testing. Are you aware of that?

12 A Yes.

13 Q And then go to 062862, and here we're into March  
14 19th, and this is your letter to Mr. Pearson  
09:17 15 asking him to arrange for the transfer of trial  
16 exhibits to Roche Biomedical Lab in North Carolina  
17 and they are going to do testing on samples from  
18 David Milgaard, Larry Fisher, Gail Miller, and  
19 again, do you know what -- actually, let me show  
09:17 20 you one other letter, 268698, it's a letter from  
21 Mr. Fainstein to counsel saying:

22 "Now that we have known samples of  
23 genetic materials from both David  
24 Milgaard and Larry Fisher, it would  
09:18 25 appear that one of the new PCR-based DNA



1 testing techniques, which an eminent  
2 laboratory in the United States is  
3 willing to apply for us, may be of  
4 assistance."

09:18 5 And it appears from this that it's Mr. Fisher's  
6 genetic materials or the blood samples he  
7 provided that allowed Federal Justice to pursue  
8 DNA testing again; is that a correct assumption?

9 A Yes.

09:18 10 Q 230 -- and would Mr. Fainstein, would he have been  
11 the one primarily involved in coordinating that  
12 and making the decisions?

13 A Yes, Mr. Fainstein was lead counsel or Commission  
14 Counsel at the Supreme Court reference and in that  
09:19 15 capacity he dealt with counsel for all parties,  
16 and particularly Messrs. Wolch and Beresh, with  
17 respect to the testing. Those types of decisions  
18 were made by him and his colleague Mr. Frater. My  
19 role was simply to facilitate -- my role was to  
09:19 20 implement those decisions.

21 Q Okay. If we can go to 230988. This is a note  
22 from Dr. Ferris to you April 1, 1992, and it's Dr.  
23 Ferris sending you some of his laboratory working  
24 documents and x-ray radiographs; do you recall  
09:19 25 what gave rise to this information and why it was



1           being sent at this time?

2           A           That may have been a delayed response to a request  
3                       that we had made -- by "we" I mean Dr. Fourney and  
4                       I -- had made of Dr. Ferris when we visited him  
09:20 5                       in, I believe it was, 1990.

6           Q           So a couple years earlier?

7           A           Yes.

8           Q           And this had been information that you had  
9                       requested from Dr. Ferris in 1990 to assist you  
09:20 10                      with determining whether DNA testing was a  
11                      possibility?

12          A           Yes, and to see -- or that's correct. The other  
13                      motive was to see what, if any, results they had  
14                      obtained during their testing, and these were the  
09:20 15                      rads.

16          Q           And was this something that the RCMP lab wanted to  
17                      look at, the precise testing that Dr. Ferris had  
18                      done?

19          A           I think Dr. Fourney was interested in it, and --

09:21 20          Q           Do you --

21          A           -- he was the person who I think generated the  
22                      request.

23          Q           Do you recall being aware of any concerns  
24                      expressed by the RCMP, or others, about Dr. Ferris  
09:21 25                      and the provision of information from Dr. Ferris?



1 A No, I'm not.

2 Q If we can go to 008879. This is the Supreme Court  
3 decision, and I only bring it up to ask you this  
4 question. Once the Court provided its advice to  
09:21 5 the federal minister and the federal minister then  
6 set aside the conviction, and the events that  
7 followed in the next couple of days, can you tell  
8 us what further tasks you may have been engaged in  
9 in connection with this matter? After the Supreme  
09:22 10 Court decision was done and implemented, if I can  
11 put it that way, what duties did you then  
12 perform -- and "duties" is the wrong word; what  
13 was your involvement in this matter?

14 A I may have been -- I think my direct involvement  
09:22 15 was at an end. Possibly assisting in the drafting  
16 of the order and just dealing with a number of the  
17 details relating to the case on reference in terms  
18 of administration and preparing the file for  
19 archive.

09:22 20 Q Okay. I'll just go through a few documents from  
21 the following years and get you to comment. The  
22 first is 334760. And this is a letter to Pat  
23 Alain April 15, '92, and the next page is simply a  
24 copy of Dr. Marcia Eisenberg's report to  
09:23 25 Mr. Fainstein of April 6th, basically indicating



1           that no DQ Alpha type was obtained in their  
2           testing; is that correct?

3           A       That's correct.

4           Q       And it's my understanding that when the Roche  
09:23 5           Laboratory, that what they looked at was the small  
6           portion or a part of the portion of the panties,  
7           the stain that had been identified by Patricia  
8           Alain, they looked at part of that and did some  
9           testing to try and do an DNA match by the DQ Alpha  
09:23 10          type, and they were unsuccessful?

11          A       That's correct. What they found was  
12          that initially they were successful in extracting  
13          DNA, however, there was something in the sample  
14          that was eroding or eating away the DNA. And to  
09:24 15          test that hypothesis they took a solution from  
16          that sample and mixed it with a known quantity of  
17          DNA, and then they retested, and they found that,  
18          after the mixing, the volume of DNA was  
19          substantially reduced. So there was something in  
09:24 20          the solution that was eating away or destroying  
21          the DNA that --

22          Q       Yeah. It's my understanding that, on this PCR,  
23          that essentially what it can do is take small  
24          amounts of DNA and replicate it; correct, that's  
09:24 25          the basic premise?



1 A Yes.

2 Q And when they talk about 'sample being inhibitory  
3 to the PCR reaction', my understanding is that  
4 refers to something in the sample that inhibits  
09:25 5 the ability of the PCRs --

6 A To reproduce.

7 Q -- to reproduce?

8 A That's part of it, but there was another part as  
9 well, and that was once you had some DNA, quite  
09:25 10 apart from reproducing it, there was something  
11 that was destroying it.

12 Q Yeah. And it's my understanding that, in the time  
13 that followed, science provided a technique to  
14 deal with both of those matters; is that your  
09:25 15 understanding?

16 A That's correct.

17 Q In other words to deal with both the inhibitors,  
18 the PCR inhibitors, and the other concerns?

19 A Yes.

09:25 20 Q And was it your understanding then that, after the  
21 tests had been done by Dr. Eisenberg, that there  
22 remained a portion of the stain identified by Pat  
23 Alain that had not been tested for fear of  
24 destroying it?

09:25 25 A That's correct.



1 Q In other words they just tested part of it and  
2 left part for science to advance?

3 A Yes.

4 Q Is that your understanding? 067090. This is a  
09:26 5 letter from Mr. Pearson on April 23, '92, so ten  
6 days after the Supreme Court decision, and he's  
7 sending forth the two theories which support the  
8 involvement of a vehicle and sort of a lengthy  
9 summary prepared by Sergeant Pearson; do you  
09:26 10 recall what gave rise to this and why he would be  
11 sending this to you after the Supreme Court  
12 reference?

13 A Sergeant Pearson, after the reference he was still  
14 troubled by some, call it, unanswered questions,  
09:26 15 and at this time we would talk about what could  
16 have happened and he ran these theories, he  
17 presented them to me for my comment. I had  
18 forgotten about that, but --

19 Q Was it part of any investigative steps that you  
09:27 20 had asked him to take?

21 A No. I mean it flowed from the request to look  
22 into the Larry Fisher matter, but by now the Court  
23 had provided its opinion, the minister had made  
24 her decision, and I think Saskatchewan had acted  
09:27 25 on it. I'm not -- I believe this is April, is it



1 not?

2 Q Yes, this is April 23rd. Would you agree, Mr.  
3 Williams, that the investigation of Gail Miller's  
4 death at this time would have been the Saskatoon  
09:27 5 City Police, then, that would be the agency that  
6 would be the ones that would be responsible for  
7 investigating the two-car theory?

8 A I think primarily, yes.

9 Q And so your, was it your understanding, then, that  
09:28 10 this was just a follow-up to what work he had  
11 done?

12 A Yes.

13 Q 334788. This is a May 7th, 1992 letter from you  
14 to Dr. Richardson with the lab in Ottawa, and you  
09:28 15 are referred to him by Mr. Gaudette, and basically  
16 you're asking him to assist in reviewing lab notes  
17 of an unsuccessful attempt to extract DNA on the  
18 trial exhibits in the *David Milgaard* case and the  
19 lab work of Dr. Ferris, and:

09:28 20 "... we hope to interview the technician  
21 to verify the contents ..."

22 And down at the bottom:

23 "We have examined the notes ... and have  
24 consulted with Dr. Fourney ... Our  
09:28 25 assessment, which was confirmed by Dr.



1                   Fourney, was that the notes were  
2                   incomplete. Thus it was impossible to  
3                   draw any meaningful assessments from  
4                   them. We intend to interview the  
09:29 5                   technician ...",

6                   and interview him. Can you comment on that?  
7                   What was happening with respect to Dr. Ferris'  
8                   work?

9           A        As you recall, previously, Dr. Ferris had sent the  
09:29 10               notes and certain reports. Once they'd been  
11               examined by Dr. Fourney he communicated to me that  
12               they had -- that they were incomplete, and that it  
13               would be useful to interview the technician, and  
14               perhaps a further interview of Dr. Ferris. In  
09:29 15               order to do that I wrote to his supervisor to  
16               obtain permission for Dr. Fourney to accompany me.  
17               Although, for the purposes of 690, the issue had  
18               been decided in favour of David Milgaard, I --  
19               there was still a desire to finally, or to run  
09:30 20               down, or the promise was that we would continue  
21               with the DNA to get some meaningful results as and  
22               when that were possible, and that's just part of  
23               it.

24           Q        Okay. Let me just ask you to comment on that.  
09:30 25               What was your understanding, then, of the



1 responsibility of Federal Justice officials to  
2 follow up on the DNA testing? And maybe  
3 "responsibility" is too strong a word, but what  
4 was your understanding of what you and  
09:30 5 Mr. Fainstein and others were to do with the Gail  
6 Miller exhibits, and the prospect of further DNA  
7 testing?

8 A I believe that there had been conversations with  
9 the Chief Justice in open Court to the extent that  
09:30 10 we would endeavour, as and when technology  
11 permitted, to get a definitive answer.

12 Q Okay. And so is it fair to say, then, these  
13 efforts of Dr. Ferris were in pursuit of that  
14 objective?

09:30 15 A Of Dr. Fournery, yes.

16 Q Yeah, but to go and see Dr. Ferris?

17 A Yes.

18 Q Were you hoping to find something in his notes, or  
19 his technique, or in the materials that he looked  
09:31 20 at, that might provide the answer to the DNA  
21 question?

22 A I think Dr. Fournery was hopeful that a review of  
23 the notes and a discussion with the technician  
24 would shed some light on some of the problems that  
09:31 25 they had encountered, because I -- my recollection



1           was that he was surprised that -- the initial set  
2           of testing signaled an abundance of DNA.

3       Q       Are you talking Dr. Ferris'?

4       A       I'm sorry, yes, doctor -- a review of the notes  
09:31 5       provided by Dr. Ferris --

6       Q       Yes.

7       A       -- signaled that initially a lot of DNA had been  
8       extracted, but when it came time to compare the  
9       knowns with the unknowns the DNA was, it  
09:31 10      disappeared. I think there was some kind of  
11      inhibitor or some type of reaction that destroyed  
12      it.

13      Q       And do you recall what size, I think the evidence  
14      that we've heard was that there was a -- and I  
09:32 15      can't recall the dimensions -- but a part of Gail  
16      Miller's panties that were cut out by Dr. Ferris  
17      and that was consumed in the course of his DNA  
18      testing?

19      A       Yes, the -- my re -- I was present when the  
09:32 20      technician was interviewed. Virtually most of the  
21      crotch portion had been cut out but it hadn't --  
22      it had been cut out in successive attempts to  
23      extract DNA.

24      Q       If we can just pause, if we can go to 068967, and  
09:32 25      this is the letter you sent to Dr. Ferris to meet



1 at his lab, and I take it that meeting happened  
2 with Dr. Ferris; --

3 A It did, --

4 Q -- is that correct?

09:32 5 A -- yes.

6 Q Was Mr. Fourney with you, Dr. Fourney?

7 A Yes, yes.

8 Q And Kelly McNeill?

9 A Kelly McNeill was, I'm not certain if he was at  
09:33 10 Dr. Ferris' lab initially, or I believe we met Dr.  
11 Ferris first, then we went to the location where  
12 Mr. McNeill --

13 Q Was he the lab technician?

14 A He's the lab technician, --

09:33 15 Q Yeah, okay.

16 A -- yes.

17 Q So, again, you would have met with Mr. McNeill and  
18 Dr. Ferris. So if you could carry on, then, what  
19 was your understanding, a couple of things; number  
09:33 20 one, what was the size, or how much of the panties  
21 had been consumed in Dr. Ferris' testing?

22 A I think most of the crotch area had been removed.

23 Q Okay. And what was your understanding, based on  
24 these discussions, about how much semen was there  
09:33 25 and the quantity of DNA? And I'm not -- not in



1 pure scientific terms, but was it your impression  
2 that there was a significant amount, not a lot;  
3 what do you remember?

4 A My recollection is that initially they seemed to  
09:33 5 extract a great deal, but there was something that  
6 was eating away at it, and that's why they  
7 repeated the tests -- or repeated the extraction  
8 process.

9 Q If we can go to -- and sort of --

09:34 10 COMMISSIONER MacCALLUM: I'm sorry, and  
11 what was the date of that letter, please?

12 MR. HODSON: The date of the letter is --

13 COMMISSIONER MacCALLUM: May 12th, '92?

14 BY MR. HODSON:

09:34 15 Q -- May 12th. And do you know if the meeting was  
16 May 19th, does that sound right, of '92?

17 A Yes.

18 Q And what, then, was the result out of the meeting  
19 with Dr. Ferris? What did you conclude about  
09:34 20 whether anything he had done either helped or  
21 hindered the attempts to get further DNA testing?

22 A Well it certainly, I think the preference would  
23 have been to have stopped at an earlier point  
24 where -- leaving intact some of the sample in the  
09:34 25 panties until such time as they had found a way to



1 prevent whatever substance there was that was  
2 eating away at the DNA they had initially  
3 collected.

4 Q Now in fairness to Dr. Ferris, though, the -- I  
09:35 5 take it you would agree you wouldn't know that  
6 there's an inhibitor or a problem unless you  
7 actually tested; correct?

8 A Correct.

9 Q And I think his evidence was that he tested, I  
09:35 10 think, some of it but could not extract DNA.  
11 What, did you have a concern that, or did you hear  
12 a concern from the RCMP people that too much of  
13 the sample had been used in the 1988 testing?

14 A I recall that being said, yes.

09:35 15 Q Okay. By whom?

16 A I believe Dr. Fourney.

17 Q And do you recall any discussion about what -- any  
18 discussion about the dress, and whether Dr. Ferris  
19 checked the dress, anything of that nature?

09:35 20 A No, sir, I do not.

21 Q So, at the conclusion of your meeting with Dr.  
22 Ferris, was there anything in his notes, in  
23 anything he told you or anything his technician  
24 told you, that provided you with information that  
09:36 25 would assist in the DNA efforts?



1 A I think the information we gathered was that it  
2 certainly alerted us to the fact that there was  
3 some type of inhibitor, and that that's something  
4 that should be flagged at -- for the future when  
09:36 5 another attempt was made.

6 Q And do you recall any discussion in this meeting  
7 about -- questions about the technique employed by  
8 the technician or Dr. Ferris?

9 A I know that the technique was discussed but, to be  
09:36 10 honest, I didn't understand the technical --

11 Q Yeah, I know --

12 A -- discussion that took place.

13 Q Yeah, I know, and I guess was -- do you recall  
14 there being any discussion about whether or not  
09:37 15 the procedure was improper, or whether a different  
16 technique might have had a different result,  
17 anything of that nature, in any of your  
18 discussions?

19 A No. I recall Dr. Fourney questioning the  
09:37 20 technician about the various steps that he took,  
21 but I don't recall any questions along the lines  
22 that you suggested, no.

23 Q Do you recall Dr. Fourney expressing any view to  
24 you about either the manner in which Dr. Ferris  
09:37 25 and his technician conducted the DNA test, and



1           whether that testing was done properly?

2           A       I don't recall Dr. Fourney commenting directly on  
3                   whether or not the tests were done properly. I  
4                   think his preference, he would have preferred it  
09:37 5                   if certain, or different processes had been used  
6                   with respect to preparing the material for  
7                   testing, as I recall, but -- umm, there was that  
8                   plus the general disarray of the materials that  
9                   had been left over -- but I don't recall now what  
09:38 10                  was said about their testing methodology. I know  
11                  that he wasn't overly happy with it but, apart  
12                  from that, I have no specific recall of it.

13          Q       Do you recall any discussion on the topic of  
14                  whether the sample that had been tested by Dr.  
09:38 15                  Ferris and his team in 1988, if it had not been  
16                  tested, in other words not destroyed, whether that  
17                  might have been enough, in 1992, to do a DNA test,  
18                  based on the technology at that time?

19          A       Certainly, I recall Dr. Fourney indicating that  
09:39 20                  sufficient DNA had been extracted to support RFLP  
21                  testing, and that was the testing that the RCMP  
22                  had done. The challenge, he acknowledged, would  
23                  be to develop procedures that would prevent the  
24                  erosion of the DNA once it had been extracted,  
09:39 25                  yes.



1 Q Right. And I guess my question is whether there  
2 had been any discussion about whether that  
3 technique, if it had been employed by the RCMP in  
4 1988, would have resulted in a successful DNA  
09:39 5 match or if, in 1992, if the sample had not been  
6 destroyed, whether they would have been able to do  
7 that?

8 A That was left as an open question, there was some  
9 discussion about that, but I don't recall --

09:39 10 Q Okay.

11 A -- what conclusions, if any, came to --

12 Q If you can go to 334823. There is a number of  
13 documents, this is going into the Michael  
14 Breckenridge matter and this is a fax from you to  
09:40 15 Sergeant Pearson, the next page is a statement of  
16 Michael Breckenridge; you are familiar with the  
17 Michael Breckenridge matter?

18 A Yes.

19 Q Can you tell us, what was your involvement in the  
09:40 20 investigation of that?

21 A Our minister had received some information from  
22 Mr. Wolch, and I think the thrust was to encourage  
23 the Minister of Justice to consider opening up an  
24 inquiry, and this material was provided. I asked  
09:40 25 Sergeant Pearson to check into it if he'd be so



1 kind.

2 Q And so if we can just for the record, maybe, call  
3 up 004064. This is the letter of Mr. Wolch to the  
4 minister that we have been through a number of  
09:41 5 times, that calls for a federal inquiry, and has a  
6 copy of the Breckenridge statement. Can I  
7 summarize it this way, and let me ask if you agree  
8 with this, that after this letter came in to the  
9 minister, in your capacity as counsel for the  
09:41 10 federal minister, you asked Sergeant Pearson to  
11 follow up and gather information about the matters  
12 alleged in the letter, Sergeant Pearson  
13 interviewed a number of people which I'll go  
14 through a couple of those, and at some point it  
09:41 15 was determined that the matter would then be  
16 pursued by Saskatchewan Justice because it was a  
17 matter relating to allegations of criminal  
18 misconduct which was a provincial concern; is that  
19 a fair summary?

09:41 20 A Yes.

21 Q And, to the extent that you became involved in it,  
22 is it fair to say that it was as a result of your  
23 minister being asked to look into the matter and  
24 take action?

09:42 25 A Correct. And, specifically, to launch a public



1 inquiry.

2 Q And that your engagement of Sergeant Pearson was  
3 for that purpose, to assist you in investigating  
4 the matter for the minister?

09:42 5 A Well, yes, certainly to confirm some of the facts  
6 that had been brought to our attention.

7 Q And, just on that, if we can go to 334826. And  
8 this is a memo of September 18th, presumably 1992,  
9 to Mr. MacFarlane. I don't, again, want to get  
09:42 10 into any advice, but just to ask you about what is  
11 stated here. It appears that you learned from a  
12 number of witnesses, in particular Mr. Wollbaum,  
13 that the witness who signed this statement was  
14 employed between October '73 and June '75, and  
09:43 15 this would be on September 18th; is that right?

16 A Yes.

17 Q And where did you learn that information from?

18 A I'm not certain whether it came from Sergeant  
19 Pearson or whether it came from provincial  
09:43 20 officials. As I speak right now I'm --

21 Q Okay.

22 A One of those two.

23 Q Okay. So this would be -- you are familiar with  
24 the press conference that was held September 19th?

09:43 25 A Yes.



1       Q       And so what was, just generally, what was your  
2               reaction to the Michael Breckenridge statement and  
3               the allegations that were made with respect to it?

4       A       I guess the first initial reaction was here we go  
09:43 5               again. Umm, this was yet another chapter in the  
6               saga. I mean, by then David Milgaard had been out  
7               of custody, but I was aware that there was an  
8               issue, a live issue of compensation, and it seemed  
9               to me that the airing of a potential, shall we  
09:44 10              say, conspiracy aimed at maintaining a wrongful  
11              conviction would certainly be a springboard for  
12              either the federal minister or the provincial  
13              minister to launch an inquiry and the inquiry  
14              might provide the platform for later compensation.  
09:44 15             I was -- I mean by the 19th, shortly after we had  
16             received the Breckenridge information, we knew  
17             that there was some foundation facts contained in  
18             the statement that were patently untrue and, as a  
19             result, I guess I was just dismayed that a number  
09:45 20             of people of relatively sterling reputation would  
21             be cast as sinister characters intent on depriving  
22             someone of their liberty unlawfully. It was -- it  
23             was quite a bold step to take and a step which, I  
24             guess having regard to my own experiences, perhaps  
09:45 25             was not that surprising.



1 Q And, again, is it fair to say that on September  
2 18th, then, by this time, based on your review of  
3 the statement and either information from Sergeant  
4 Pearson or discussions with Saskatchewan  
09:45 5 officials, that you concluded the Breckenridge  
6 statement did not have merit?

7 A Correct. Mr. Breckenridge was not working in the  
8 department at the time he said he was, and the  
9 timing was really critical to the assertion that  
09:46 10 there had been a conspiracy.

11 Q And the fact that he was not working there at the  
12 time, what did that mean to you in looking at the  
13 rest of the allegations in his statement?

14 A It made no sense, it would only make sense if it  
09:46 15 had happened before the appeals.

16 Q And can you tell us, did you become aware that  
17 there was going to be a press conference to  
18 announce this information?

19 A I think at some time, some point in time, I did.

09:46 20 Q And if we can call up 004068. This is a fax from  
21 you to Mr. Brown, and then the next page is a  
22 transcript of the press conference held on  
23 September the 19th, and it's my understanding that  
24 Justice Canada had arranged to have the press  
09:47 25 conference taped; is that correct?



1 A I'm not certain if we arranged to have it taped,  
2 but quite often there are media services that  
3 provide transcripts of those conferences, and we  
4 arranged to get a copy of the transcript.

09:47 5 Q If we could get 334854, I should have shown you  
6 this, this looks to be the September 19th cassette  
7 picked up by Mr. Williams through Media Tapes and  
8 Transcripts; is that a service that provides that?

9 A Yes.

09:47 10 Q And what would have been the purpose in getting a  
11 transcript of the press conference; do you recall?

12 A Certainly, we wanted to hear precisely what was  
13 said at the conference, and to have a record of  
14 it.

09:48 15 Q And did you have any reaction to what was said at  
16 the press conference?

17 A Umm, knowing what I then knew, I was perhaps a bit  
18 dismayed.

19 Q And when you say "knowing what you then knew" are  
09:48 20 you talking about Mr. Breckenridge's employment?

21 A Yes.

22 Q If we can then go to 334822, please. And this is  
23 just jumping back a bit, September 9th, but it  
24 appears that Pat Alain talked to you about  
09:48 25 retaining the Gail Miller's dress, bra, panties,



1           etcetera, and that you asked her to retain all of  
2           this until further notice, and I take it that was  
3           because you were still looking at doing further  
4           DNA testing?

09:49 5           A           That was still a possibility, yes.

6           Q           And, from the documents, it looks like doctor --  
7           or that Mr. Fainstein was the lawyer who had  
8           primary carriage of the DNA testing from this  
9           point on; is that correct?

09:49 10          A           That, that's correct.

11          Q           Just a couple other matters here before I finish  
12          up. I want to talk about two -- a couple of  
13          areas. One is information that you received. And  
14          I think you've said on a number of occasions, Mr.  
09:49 15          Williams, that in the course of your investigation  
16          of the first application, and perhaps to the  
17          extent that you did on the second application, you  
18          testified to the effect that your job was to  
19          investigate the information that was provided to  
09:49 20          you; is that fair?

21          A           That's correct.

22          Q           If we could call up 337731, this is a document  
23          that the Commission prepared based on various  
24          information that the Commission received in our  
09:50 25          proceedings, and it identifies transcripts and



1 interviews primarily conducted in 1981 through to  
2 1983, and in fact it goes into 1990 and '91 as  
3 well, but interviews conducted in the early '80s  
4 by Joyce Milgaard and Peter Carlyle-Gordge and one  
09:50 5 on Chris O'Brien, and I think you've had a chance  
6 to briefly look at this, have you, Mr. Williams?

7 A Yes.

8 Q And are you generally aware that -- let me ask you  
9 this. When you were doing your investigation on  
09:50 10 the 690 applications, were you aware that Mrs.  
11 Milgaard had prepared transcripts of either  
12 telephone interviews or personal interviews with  
13 many of the key witnesses?

14 A No, I was not.

09:51 15 Q And I had asked you specifically about the Nichol  
16 John interview and I think I showed you parts of  
17 that, the 1981 interview, and I think you told us  
18 that that would have been helpful to you in your  
19 work; is that correct?

09:51 20 A Yes. I knew that Nichol had been, or when I spoke  
21 with Nichol I realized that she had spoken with  
22 Mrs. Milgaard previously, but I didn't realize  
23 that a transcript had been prepared and may have  
24 been available.

09:51 25 Q If we can just go through the list. Ron Wilson,



1           there's two transcripts of interviews, January  
2           26th, '81 and there's another one on April 15th on  
3           the next page, of two interviews about -- we've  
4           looked at them on a number of occasions where he  
09:51 5           talks about the polygraph and what he remembers  
6           and things of that nature. Have you -- do you  
7           know if you've had a chance to look at those  
8           transcripts?

9           A       No, sir, I haven't.

09:52 10          Q       Would that -- would those transcripts, that type  
11           of information have been of assistance to you in  
12           the investigation you did and, in particular, your  
13           investigation of Ron Wilson's recantation?

14          A       Yes.

09:52 15          Q       And I appreciate you haven't read them, but just  
16           generally can you tell us what and how would you  
17           use a 1981 transcript of Mr. Wilson?

18          A       Well, certainly I guess our experience is that the  
19           closer to the event -- the closer the recording of  
09:52 20           the event is to that event, usually the more  
21           reliable the recollection, and here we have, you  
22           know, something in 1981, keeping in mind that some  
23           nine years later Mr. Wilson recanted, it would  
24           certainly have been of use to me to see what  
09:52 25           questions had been asked of him in '81, what his



1 responses were and to compare those to what he  
2 said in 1990. It's a statement of the witness  
3 previously recorded. It certainly would have  
4 given some additional context to the claims in  
09:53 5 1990 that he had been wrongly treated by the  
6 police.

7 Q And go to the next page, we have the Albert -- I'm  
8 sorry, back a page. We have an Albert Cadrain  
9 interview by Peter Carlyle-Gordge. Were you aware  
09:53 10 or are you aware of who Peter Carlyle-Gordge is?

11 A I believe he was a researcher, writer.

12 Q Were you aware when you did your work on the 690  
13 applications that he had interviewed a number of  
14 witnesses, including an interview of Albert  
09:53 15 Cadrain that had been taped and transcribed?

16 A I wasn't aware of the tape or the transcriptions.  
17 I think I became aware at some point that Mr.  
18 Gordge had interviewed some folks, but --

19 Q And again, would that have been Mr. Cadrain  
09:54 20 talking about the matter in 1983 and his brother  
21 Dennis talking about it in 1983, would that  
22 information have been of assistance to you?

23 A Well, certainly whenever a witness has discussed  
24 the event, it's very useful to have their  
09:54 25 recollections.



1 Q If we can go to 337766, please, and this is a  
2 document I think that either you or Mr. Frayer  
3 provided to me which is a booklet published by the  
4 Department of Justice Canada regarding the current  
09:54 5 Section 696; is that correct?

6 A Yes.

7 Q And if we can go to page 337772, I think you  
8 alluded to earlier in your evidence, or we've  
9 heard other evidence that the Section 690  
09:55 10 provisions that apply to David Milgaard's  
11 applications were amended I think in early -- do  
12 you recall the date of the amendments?

13 A Within the last three years.

14 Q Okay. And it's now known as Section 696.1 to  
09:55 15 Section 696.6, and although there are some  
16 similarities to 690, there are some changes; is  
17 that correct?

18 A That's correct.

19 Q And I think it would be of benefit to this  
09:55 20 Commission, Mr. Williams, if you could just walk  
21 through for us and tell us what changes to the law  
22 were made from the Section 690 provisions that you  
23 dealt with, and I'm not sure where or how you want  
24 to start, but I think just focusing on the  
09:55 25 changes.



1           A           Well, I think the most significant improvement to  
2                       the legislation is that it sets out in statutory  
3                       context the test to be used by the minister in  
4                       making a decision and it I guess regularizes the  
09:56 5                       application process by setting out quite clearly  
6                       the form of the application, how the application  
7                       is to be reviewed and very importantly it provides  
8                       for powers of investigation that permit the  
9                       minister or those acting on behalf of the minister  
09:56 10                      compulsory powers or the powers under *The*  
11                      *Inquiries Act*, and that is significant because in  
12                      a number of instances the speed with which the  
13                      investigation proceeded depended on the  
14                      co-operation of witnesses. For example, Larry  
09:57 15                      Fisher, there was no power to compel his  
16                      attendance and to question him and that was also  
17                      the case with Mr. Wilson. We traveled a  
18                      substantial distance only to be refused the  
19                      interview and we could not at that time compel  
09:57 20                      him.

21                                      The creation of, shall we say,  
22                      regulations which set out the form and the content  
23                      of the process is tremendously important and more,  
24                      shall we say, a more comprehensive description of  
09:57 25                      the powers of the Minister of Justice, I think the



1 powers remain identical to what had been  
2 articulated under Section 690, but it's just  
3 broken up differently. For example, the power to  
4 refer in subparagraph 696.3(2) is essentially what  
09:58 5 used to be the Section 690 sub (c) power, and  
6 under 696.3(3), or subsection (3), you have a  
7 statutory description of the test:

8 "(a) if the Minister is satisfied that  
9 there's a reasonable basis to conclude  
09:58 10 that a miscarriage of justice likely  
11 occurred,"

12 There it's set out in statute instead of being  
13 set out in, shall we say, policy document.

14 Q And would that, I think you told us that is the  
09:59 15 test that you deployed; is that correct?

16 A Yes.

17 Q And just if I can back up, the powers of  
18 investigation you've talked about, you've talked  
19 about the test being set out in 696.3 sub 3(a), if  
09:59 20 we can just go over to the right-hand side at the  
21 top, as well it says here in *Considerations*:

22 "The Minister ... shall take into  
23 account all matters that the Minister  
24 considers relevant, including  
09:59 25 (a) whether the application is supported



1 by new matters of significance that were  
2 not considered by the courts or  
3 previously considered by the Minister...

4 (b) the relevance and reliability of  
09:59 5 information that is presented in  
6 connection with the application; and  
7 (c) the fact that an application under  
8 this Part is not intended to serve as a  
9 further appeal and any remedy available  
09:59 10 on such an application is an  
11 extraordinary remedy."

12 And so that would be spelling out in the  
13 legislation some of the considerations; is that  
14 correct?

10:00 15 A Correct.

16 Q Now, they sound awfully similar to what you told  
17 us you applied in your investigation; is that  
18 correct?

19 A It's similar, yes.

10:00 20 Q Similar. And is it fair to say that this perhaps  
21 codifies the considerations and the test that you  
22 applied when you investigated the matter?

23 A Yes.

24 Q If you can go to the next page, which are the  
10:00 25 regulations, and again I don't think there were



1 any regulations under Section 690, and based on my  
2 review it appears that these set out mandatory  
3 requirements for the type of application, the type  
4 of information and what's required; is that  
10:00 5 correct?

6 A That's correct.

7 Q And it also sets out specifically in sections 3  
8 and 4 and 5 a bit of the process that talks about  
9 the preliminary assessment and then the minister  
10:01 10 review; is that correct?

11 A Yes.

12 Q Now, is there a change with respect to -- I think  
13 you told us when you investigated the matter there  
14 was a preliminary assessment as well that got the  
10:01 15 applicant to the investigative stage and that  
16 seems to be similar to what's in here; is that  
17 correct?

18 A Yes.

19 Q There is a new provision I think that provides for  
10:01 20 the disclosure to the applicant of the  
21 investigation, or of an investigation report; is  
22 that correct?

23 A Yes. One of the lessons learned during the  
24 Milgaard application was the necessity or the need  
10:01 25 to share information that had been collected with



1 the applicant. We started to do that on a more  
2 regular or formalized basis as a result of  
3 submissions brought to us and following Milgaard  
4 it was done as a matter of course. We took  
5 certain steps to ensure that information that was  
6 confidential or subject to freedom of information  
7 concerns would be kept confidential and so, for  
8 example, in cases like the application of  
9 Mr. Thatcher and all of the other applications  
10 thereafter, we amended the way we prepared our  
11 reports so that it was a two part report. One was  
12 simply a recitation of the facts as discovered  
13 with the supporting documents and that was  
14 provided to the applicant for comment, this is  
15 what we found, and the applicant was then  
16 permitted or an invitation was given to the  
17 applicant to make submissions based on those facts  
18 or to further investigate and clarify or bring  
19 additional materials to the minister's attention  
20 before a decision was finalized, and we find that  
21 step now being, shall we say, put into regulation  
22 form.

23 Q Okay.

24 A And that's 5(1).

25 Q And am I correct that what is now provided to the



1 applicant is the investigation report, but that  
2 the advice of Federal Justice lawyers that's  
3 provided to the minister is not provided to the  
4 applicant; is that correct?

10:03 5 A That's correct, the advice is a separate document.

6 Q And so the factual part would be the fruits of the  
7 investigation by Federal Justice lawyers are  
8 provided to the applicant for comment, but Federal  
9 Justice lawyers' advice or anybody else's legal  
10:04 10 advice to the minister is still, under the current  
11 system, is not provided to the applicant; is that  
12 correct?

13 A By and large, yes. There's some exceptions,  
14 but --

10:04 15 MR. HODSON: I think those are all my  
16 questions, Mr. Williams. I'm wondering,  
17 Mr. Commissioner, whether you maybe want to take  
18 a short break and I can sort out who's going to  
19 be questioning in what order or we can start in.  
10:04 20 It's a bit early, but if we maybe just take a  
21 short break and --

22 COMMISSIONER MacCALLUM: It's a bit early,  
23 but we can take our morning break.

24 (Adjourned at 10:04 a.m.)

10:24 25 (Reconvened at 10:25 a.m.)



1 BY MR. WOLCH:

2 Q Mr. Wilson, I'm Hersh Wolch, counsel for David  
3 Milgaard, for the record.

4 A Good morning, sir.

10:25 5 Q Mr. Williams, would you agree that the conviction  
6 of David Milgaard has always been a miscarriage of  
7 justice?

8 A I agree, sir, that David Milgaard was wrongly  
9 convicted.

10:25 10 Q You have trouble calling his conviction a  
11 miscarriage of justice?

12 A To the extent that he was wrongly convicted you  
13 could say it's a miscarriage of justice.

14 Q I could say it, but do you agree with it?

10:25 15 A Yes.

16 Q Okay. And it always was, it didn't become a  
17 miscarriage later, it was always a miscarriage?

18 A I think in hindsight we can say that there are now  
19 facts that signal that he was wrongfully convicted  
10:26 20 and as a result there was a miscarriage of  
21 justice. At the time of the conviction certainly  
22 there weren't any facts that came forward to  
23 challenge its correctness until much later on.

24 Q But it was still a miscarriage?

10:26 25 A I don't disagree.



1 Q Okay. I thought it was a simple question when I  
2 started. It took a little longer than I thought.  
3 Over what period of time were you in the position  
4 of assessing 690 applications?

10:26 5 A When did I first start?

6 Q Start and end, yeah.

7 A I believe I did my first one in 1985.

8 Q And your last one?

9 A I guess 1998.

10:26 10 Q Pardon me?

11 A 1998.

12 Q '98. Any idea how many you've personally been  
13 involved in? If I may interrupt myself there, in  
14 more than just a passing way, I mean with some  
10:26 15 significance, not just reading the file, but being  
16 involved.

17 A 30 to 40.

18 Q 30 to 40. And can you tell me on how many of  
19 those you recommended a remedy?

10:27 20 A How many of those -- a positive remedy?

21 Q A positive finding.

22 A Three.

23 Q Three? Does that include Milgaard?

24 A I did not make a recommendation with respect to  
10:27 25 Milgaard.



1 Q So there's three that you recommended?

2 A Yes.

3 Q Were they all after Milgaard or before?

4 A I think most were after.

10:27 5 Q So all three were after. So the time of David  
6 Milgaard's you had never made a positive  
7 recommendation?

8 A Circumstances didn't present themselves, sir, no.

9 Q That wasn't my question. At the time of David  
10:27 10 Milgaard's you had never made a positive  
11 recommendation?

12 A Correct.

13 Q Yeah. And up until David Milgaard's application,  
14 how many would you have had contact with Kim  
10:28 15 Campbell in regards to?

16 A I'm not certain. We may have -- we may have sent  
17 up one or two previously.

18 Q One to two prior to David?

19 A I believe so. I'm not sure.

10:28 20 Q Were they difficult in the sense they were hard to  
21 get to or hard to analyse or were they what might  
22 be called fairly routine?

23 A An application that gets the full, shall we say,  
24 full investigation is rarely routine. Each one  
10:28 25 has its own set of challenges.



1 Q Okay. So you had met with Kim Campbell on one or  
2 two prior cases?

3 A No. You had asked whether I had sent them up  
4 to -- sent up applications for Minister Campbell  
10:29 5 to make a decision on. It's not on every  
6 application that you will meet the minister.

7 Q So prior to the Milgaard, had you ever met with  
8 Kim Campbell to discuss the merits of an  
9 application?

10:29 10 A No.

11 Q No? Now, would it be fair to say that your entire  
12 legal career has been with the Department of  
13 Justice or do I have that wrong?

14 A My entire career has been in the service of the  
10:29 15 Government of Canada. The bulk of it has been  
16 with the Department of Justice, but I did spend  
17 four years with what was then the Department of  
18 Consumer & Corporate Affairs, now called Industry  
19 Canada.

10:30 20 Q And I think you articulated with the Department of  
21 Justice; did you not?

22 A I did.

23 Q So you have never ever functioned as a defence  
24 lawyer?

10:30 25 A That's correct.



1 Q You've never defended anybody on any offence ever  
2 in your career?

3 A As the -- that's not quite correct. In student  
4 Legal Aid I did have occasion.

10:30 5 Q Okay, student Legal Aid you may have had a traffic  
6 case or a shoplifting, but I'm talking about as  
7 a -- you've never been a defence lawyer it's fair  
8 to say?

9 A That's correct.

10:30 10 Q Do you feel that for the position that you are in,  
11 that is, investigating these applications, the  
12 person handling that position would be better  
13 suited if they had a more balanced background and  
14 not just one as being a prosecutor?

10:30 15 A The role of a prosecutor is to be balanced, sir.

16 Q But in real life it doesn't really happen all the  
17 time does it?

18 A That's not my finding.

19 Q You find that prosecutors are balanced in their  
10:31 20 view?

21 A I find that prosecutors, the role of the  
22 prosecutors that we wish to cultivate are one who  
23 is an objective counsel whose task it is to put  
24 the facts before the court for adjudication, and  
10:31 25 that is consistent with the role that those who



1 investigate 690s play.

2 Q So you feel it wouldn't matter whether the person  
3 was a lifetime prosecutor or somebody more  
4 balanced who was handling the investigation?

10:31 5 A No, I wouldn't say that. I simply say that when  
6 examining or when deciding on who is an  
7 appropriate person to handle the type of inquiries  
8 required for a 690, being a prosecutor or having a  
9 prosecutor background doesn't disqualify you from  
10:32 10 that position.

11 Q I'm not saying disqualifying, I'm asking you  
12 whether you think it would be better or wiser to  
13 have somebody with a broader background or more,  
14 different perspective to take to that role?

10:32 15 A Better than what? I simply say that while I was  
16 there I had retained counsel with a defence  
17 background to assist, but it's not a -- the  
18 generalization, sir, doesn't fit in all  
19 circumstances, you do want someone with a varied  
10:32 20 background with an objective approach.

21 Q Do you appreciate, though, from a public  
22 perception, knowing that the person who is doing  
23 the investigating is a lifetime prosecutor, might  
24 not be wise?

10:32 25 A I don't agree with that. From a public



1 perception, the public places a certain amount of  
2 trust in its prosecutors firstly to make the  
3 decision to prosecute, and that's a huge decision  
4 which affects millions of Canadians annually and  
10:33 5 it's a tremendous responsibility of public trust,  
6 and it's that, that ability to accept or recognize  
7 the trust, and I guess the humility to understand  
8 the implications, those are some of the  
9 characteristics that you want in an investigator.

10:33 10 Q Do you not agree though, that a prosecutor, a  
11 lifetime prosecutor might be more hesitant to be  
12 critical of his fellow prosecutors?

13 A That possibility exists, but in the role that, of  
14 a 690 counsel, that is not a consideration.

10:34 15 Mostly -- there are prosecutors and, as you  
16 recognize, sir, given our system, the bulk of our  
17 cases are, deal with co-defences. With the  
18 exception of the Northwest Territories, Nunavut  
19 and the Yukon, most of the files we deal with are  
10:34 20 not prosecuted by those employed by the Federal  
21 Department of Justice. While there is a kinship  
22 among prosecutors in the sense that we both suffer  
23 the same types of travails at the hands of defence  
24 counsel, that's as far as it goes.

10:34 25 Q Did -- to your knowledge, would Kim Campbell have



1           been aware of your background?

2       A       I'm not certain what Madam Campbell was aware of  
3           at the time, sir.

4       Q       Now, regarding Mr. McIntyre, when did he get into  
10:35 5           the process?

6       A       I have now learned that, I know that Mr. McIntyre  
7           was retained by Minister Campbell in late 1990.

8       Q       You say you've now learned.

9       A       Well, I learned after the retention.

10:35 10      Q       Do you know how much after?

11      A       Probably within days.

12      Q       And where would you have been in the process at  
13           that time?

14      A       At that time I had completed my report.

10:36 15      Q       In terms of --

16                   COMMISSIONER MacCALLUM: This is late '90  
17           did you say? Did I hear you right?

18      A       Yes.

19                   COMMISSIONER MacCALLUM: Okay.

10:36 20      BY MR. WOLCH:

21      Q       In terms of -- I'm not sure if we call him Justice  
22           McIntyre or Mr. McIntyre, he was retained as  
23           private counsel?

24      A       Yes.

10:36 25      Q       And he was paid by the government for an opinion?



1 A Yes.

2 Q It's not like he was a judge being asked anything,  
3 he was a private lawyer being asked for a legal  
4 opinion?

10:36 5 A He was in private practice at the time, yes.

6 Q Who would have had access to him?

7 A Excuse me, sir?

8 Q Who would have access to him to get counsel, that  
9 is Campbell, you, Rutherford, MacFarlane, Corbett,  
10:36 10 who had access, what -- what was the chain?

11 A I don't know, I -- it would be speculative. I  
12 suspect that Mr. Rutherford may have retained, or  
13 may have had contact with him, certainly there was  
14 a meeting attended by Mr. Rutherford, Mr.

10:37 15 MacFarlane and myself. In terms of the  
16 circumstances of his retainer, I don't know.

17 Q To your knowledge, would he and Campbell have had  
18 direct communication?

19 A I don't know. I suspect there may have been but I  
10:37 20 -- it's -- you're asking the wrong person.

21 Q Well, all I can do is ask you for your knowledge,  
22 but you have no knowledge of Campbell and McIntyre  
23 talking to each other?

24 A I have no direct knowledge of it or indirect  
10:37 25 knowledge of it, sir, I just don't know.



1 Q So you never saw reports or documents of any kind  
2 of communication between the two of them?

3 A That's correct.

4 Q Okay.

10:37 5 A Certainly not at -- just a minute. I may have  
6 seen a letter after the event, after the -- but  
7 certainly not at that time.

8 Q I'm primarily concerned during the important time  
9 of decision-making. I'm just interested, then, as  
10:38 10 to who would have been responsible, if anybody,  
11 for furnishing Mr. McIntyre with the material to  
12 make his decision?

13 A I was.

14 Q Who was -- that was just you?

10:38 15 A On the direction of Mr. Rutherford and possibly  
16 Mr. MacFarlane.

17 Q Okay. So you would be the only one that would  
18 give him the material to consider?

19 A I wouldn't say I was the only one, but I was  
10:38 20 certainly asked to provide him with certain  
21 materials, and I did.

22 Q And anybody else could go to him and say whatever  
23 they wanted, there is no chain of authority or  
24 whatever?

10:38 25 A Well I know that there had been contact with the



1 Assistant Deputy Attorney General Mr. MacFarlane  
2 at the time, and the Associate Deputy Attorney  
3 General Mr. Rutherford at the time, but I took my  
4 instructions from them.

10:39 5 Q And what did you understand his role to be?

6 A I understood that he would be providing an opinion  
7 to the Minister of Justice in relation to the  
8 Section 690 application of David Milgaard. The  
9 details of that opinion and the specific questions  
10:39 10 that were asked were matters between retaining  
11 counsel and Mr. McIntyre.

12 Q But was there any thought given to the Milgaard  
13 position being properly put before Justice  
14 McIntyre?

10:39 15 A Yes.

16 Q And then why wasn't there an opportunity for the  
17 Milgaards to put their position before Justice  
18 McIntyre?

19 A The Milgaards' position, as set out in various  
10:40 20 letters, were included in the materials that were  
21 sent.

22 Q So you're saying that Milgaard's letters were  
23 given to McIntyre?

24 A Yes.

10:40 25 Q You're sure of that? All those letters saying



1 about similar act and "Larry Fisher did it" and  
2 that?

3 A In fact your September 10th, 1990 letter, yes.

4 Q But you do agree that oral persuasion can be very  
10:40 5 helpful in advancing a cause?

6 A On occasion, yes.

7 Q And you would be, of course, present to articulate  
8 your view, for example, of the Larry Fisher  
9 evidence, and the fact that it wasn't similar act  
10:41 10 evidence; that was something that you had access  
11 to Justice McIntyre about if you so wished?

12 A I -- your question contains an assumption of  
13 facts, sir, about how Justice McIntyre arrived at  
14 his opinion. This was not a debate. I was asked  
10:41 15 to provide certain information and I had provided  
16 it. He gave his opinion to the minister.

17 Q Was he actually consulted because your department  
18 truly wanted an opinion or was he consulted  
19 because of the media pressure and the perception,  
10:41 20 as you saw it, that the Milgaards were not being  
21 treated fairly?

22 COMMISSIONER MacCALLUM: Just a 'sec.

23 MR. FRAYER: Just before the question is  
24 answered, this is really getting very, very close  
10:41 25 to the line set out by Chief Justice Laing in his



1 judgement on the judicial review.

2 COMMISSIONER MacCALLUM: I think we're  
3 right there, Mr. Wolch.

4 MR. WOLCH: I agree I'm very close but I  
10:42 5 don't think I'm there.

6 MR. FRAYER: Well, and very close to the  
7 line, in fact it's indeed starting to encroach  
8 over that line because it's now getting into the  
9 internal management, internal workings of the  
10:42 10 Department of Justice.

11 COMMISSIONER MacCALLUM: Well the very word  
12 "reasons" was in the judgement, Mr. Wolch, I  
13 don't know how you can go any further.

14 MR. WOLCH: Perhaps, if Mr. Frayer will sit  
10:42 15 down for a minute, I'll ask my next question. He  
16 may want to object. This is where I was going.

17 MR. FRAYER: I'll stay here. I can use the  
18 exercise.

19 MR. WOLCH: Pull up 151787. Now this is a  
10:42 20 document from Bruce MacFarlane to the deputy  
21 minister, and I do wish to question Mr. Williams  
22 about paragraph 3, in which it says:

23 "In this case, there were allegations or  
24 comments about the Departments' handling  
10:43 25 of the case. McIntyre's advice was



1                   sought only to deal with the possible  
2                   perception created by the comments  
3                   made."

4                   I feel that's important as to -- and I do wish to  
10:43 5                  ask if that was the understanding, that Justice  
6                  McIntyre was just for perception, and I think  
7                  it's relevant and important to the hearing, and  
8                  I'm not sure how that clashes with the decision.

9                  MR. FRAYER: I --

10:43 10                 MR. WOLCH: It's not advice given, it's the  
11                 reason for action.

12                 COMMISSIONER MacCALLUM: The reasons, as I  
13                 said, was right in the judgement that we put up  
14                 yesterday.

10:43 15                 MR. FRAYER: This is clearly one of these  
16                 documents that is clearly between federal  
17                 officials, from the deputy minister to Bruce  
18                 MacFarlane, and this is a document which is one  
19                 on which privilege was waived but, once again,  
20                 it's subject to the constitutional restraints  
21                 imposed by Chief Justice Laing in his -- in the  
22                 judicial review decision.

23                 MR. WOLCH: Mr. Commissioner, I appreciate  
24                 what my friend is saying, but it seems to me  
10:44 25                 absurd that, as a Commissioner, you are going to



1 be asked for advice on how to handle these  
2 matters, what to do, and to look at how things  
3 are handled in a broad sense, for possibly  
4 recommendations on how future 696's should be  
10:44 5 handled. We have this document in front of us,  
6 it's given to us, and we're now being told we  
7 can't better understand what it meant?

8 MR. FRAYER: We have the minister's letter  
9 in response to the first application that makes  
10:44 10 reference to the retaining of Mr. McIntyre and  
11 the seeking his advice and it sets out there, in  
12 a very general sense, the reason why the minister  
13 did it. This is going into much more detail  
14 behind those reasons and I think, with respect,  
10:44 15 is within the Laing decision.

16 COMMISSIONER MacCALLUM: Mr. Hodson has  
17 some material there.

18 MR. HODSON: Yes, I'm sorry, I would just  
19 indicate that if you could call up 001529. This  
10:45 20 is the Minister Campbell's decision that  
21 Mr. Frayer referred to, and go to the second  
22 page. I'm not sure whether this assists Mr.  
23 Wolch, and -- but the subject is talked about.  
24 If you can call up the, about two-thirds of the  
10:45 25 way down that paragraph where the minister, in



1 her letter that has been made public, explains:

2 "In view of the allegations that were  
3 made, senior officials concluded that,  
4 in the particular circumstances of this  
10:45 5 case ...",

6 etcetera, that touches on that. I'm not sure if  
7 that provides a better avenue in for Mr. Wolch  
8 that's not objectionable.

9 MR. WOLCH: Fine. Well, it does, and I  
10:45 10 appreciate that, but I --

11 COMMISSIONER MacCALLUM: I guess there is  
12 no argument about that having been one of the  
13 reasons for the engagement of Mr. McIntyre.

14 MR. WOLCH: I --

10:45 15 COMMISSIONER MacCALLUM: Are you suggesting  
16 that there were others, Mr. Wolch?

17 MR. WOLCH: I think, later, we may take a  
18 different view as to whether there were others,  
19 but I see your point, Mr. Commissioner.

10:46 20 COMMISSIONER MacCALLUM: Well, yes. I'm  
21 afraid my hands are tied, Mr. Wolch. I mean  
22 there is no argument made at this time about the  
23 relevance of your question, it's simply the fact  
24 that we must abide by the decision of the Court  
10:46 25 of Queen's Bench, and that's that.



1 MR. FRAYER: Thank you.

2 COMMISSIONER MacCALLUM: Thank you.

3 BY MR. WOLCH:

4 Q Well, perhaps I might refer you to another  
10:46 5 document. After the first turn-down by Campbell  
6 there was quite a bit of furore, obviously, from  
7 those supporters of David Milgaard; correct?

8 A Yes.

9 Q I think one of the complaints that I think perhaps  
10:46 10 you have voiced, or the minister herself has  
11 voiced, is that the reporting of her turn-down was  
12 somewhat one-sided; would that be a fair, fair  
13 comment? I'll help you a little bit if you like,  
14 but you folks were saying that all they were  
10:47 15 reporting was the reaction, that it was wrong, it  
16 was mistaken, as opposed to the merits of why Kim  
17 Campbell turned David down. Now was that your  
18 view or did -- I thought I heard you express that,  
19 but maybe not?

10:47 20 A My view was that insufficient attention had been  
21 paid to the reasons set out in the letter which  
22 tended to dispel some of the factual assertions  
23 that had been publicly made while the application  
24 was being assessed. It was difficult for the  
10:47 25 public to understand, in the face of headlines



1 which shouted that there was scientific evidence  
2 that exonerated David Milgaard, that key witnesses  
3 had lied, and that there were other shortcomings  
4 in terms of what factual foundations remained to  
10:48 5 support the conviction. Many of the things that  
6 we discovered either weren't reported or weren't  
7 fully understood.

8 Q Well perhaps I might suggest, Mr. Williams, that  
9 the public understood it better than you did, the  
10:48 10 public understood that a witness had lied, the  
11 public understood that Fisher did it, the public  
12 understood all that?

13 A But that assertion of fact that the witness lied  
14 was not borne out by what I considered the facts,  
10:48 15 sir.

16 Q Well, at that time, but surely now you agree that  
17 Ron Wilson lied?

18 A At what point in time?

19 Q On his first --

10:48 20 A In the --

21 Q On his first recantation?

22 A I'm sorry?

23 Q On his first recantation to the police on May 24th  
24 and 3rd?

10:49 25 A To the extent that Mr. Wilson's testimony was



1 confirmed by other evidence and other witnesses, I  
2 had no reason to disbelieve him. It is difficult  
3 some many years after the event, having regard to  
4 the many twists and turns of Mr. Wilson's  
10:49 5 testimony, to say at this point that he didn't  
6 mistake the truth or didn't -- wasn't confused at  
7 some point or another, but --

8 Q So you're saying you still cling to the belief  
9 that David Milgaard confessed to a murder to Ron  
10:49 10 Wilson?

11 A I did not cling to that belief.

12 Q Isn't that crucial?

13 A Mr. Wilson made certain statements that was  
14 believed by the jury.

10:49 15 Q But whether the jury believed it or not, do you  
16 not now believe it's a lie?

17 A I, quite frankly, haven't considered it in the  
18 context of whether or not it was true or not. It  
19 wasn't for me to decide.

10:50 20 Q No, but even now you are not prepared to say that  
21 Wilson lied when he implicated David Milgaard in  
22 the murder, even today?

23 A Even today, sir, in considering Mr. Wilson and  
24 whatever testimonies he provided I examined the  
10:50 25 contentions that he made in relation to being



1 manipulated and coerced by police in the context  
2 of the circumstances giving rise to that. It's  
3 not for me to make any kinds of judgements as to  
4 whether or not individual pieces of testimony by a  
10:50 5 witness at trial is a lie or is not a lie. That  
6 is a decision for the adjudicator, whether it's a  
7 jury or a judge.

8 I can say, in relation to  
9 issues raised on application, whether or not there  
10:51 10 are facts to support that particular contention or  
11 not, and that is the scope, and that is how I saw  
12 my role, and I continue to see my role in that  
13 fashion.

14 Q Mr. Williams, you're aware that Ronald Wilson's  
10:51 15 very first statement to the police, which appeared  
16 to be credible to some, had nothing in it remotely  
17 connected to Gail Miller?

18 A That's correct.

19 Q Okay. Looking at it now, did he have any reason  
10:51 20 to hold anything back, any particular reason to  
21 hold anything back about the Gail Miller murder?

22 A You would have to ask him. There are certain  
23 suppositions one can make; one, that he was afraid  
24 to get into contact with the police; two, he was  
10:51 25 afraid to put himself at or near the killing



1           because it might shift suspicion to him, but those  
2           are all speculation, sir.

3           Q       Mr. Williams, now that you know that David  
4           Milgaard didn't do it, none of that can possibly  
10:52 5           be a fact?

6           A       Why not?

7           Q       Well you still think that Wilson and Milgaard were  
8           at the scene of the murder; is that what you are  
9           saying?

10:52 10          A       There is no evidence to dispel the fact that they  
11          got stuck in an alley at or near where the body  
12          was discovered. Whether or not David Milgaard  
13          is -- you know, committed murder, that's not the  
14          issue, but it's quite possible that they were  
10:52 15          stuck in that location. That was the evidence at  
16          trial and there is no evidence, that I am aware  
17          of, that dispels the correctness of that.

18          Q       What evidence supports it?

19          A       The testimony of Nichol John, the testimony of  
10:52 20          Wilson about the location, about the location of  
21          where the car was and its proximity to the funeral  
22          home and the proximity to the church.

23          Q       So you still believe they were stuck there and --  
24          at the time of the murder?

10:53 25          A       I believe what was on the transcript. I make no



1           personal judgement, but that's what the transcript  
2           says. I, you know, it's not -- it's not for me to  
3           decide.

4           Q       But it was for you to decide because you  
10:53 5           recommended never re-opening this case; didn't  
6           you?

7           A       There was a recommendation to the Minister of  
8           Justice and the minister made a decision, sir.

9           Q       No, but that was over your objection, you never  
10:53 10          wanted to re-open this case ever; is that not a  
11          fact?

12          A       I did make recommendations to the minister but  
13          that decision wasn't for me to make.

14          Q       My question is so simple.

10:53 15                 COMMISSIONER MacCALLUM: I know it's so  
16          simple, but it's also proscribed.

17                 MR. WOLCH: Sorry.

18                 COMMISSIONER MacCALLUM: If the  
19          recommendation to the minister is not advice, Mr.  
10:54 20          Wolch, what is it?

21                 MR. WOLCH: Okay.

22          BY MR. WOLCH:

23          Q       Leaving out your recommendation -- and if I may,  
24          Mr. Commissioner, please help me on this one --  
10:54 25          leaving out your recommendation to the minister, I



1 don't want to know about that, was there any point  
2 in time where you personally, based on your  
3 investigation, felt that this case requires  
4 re-opening?

10:54 5 A What I can tell you, sir, is that, based on the  
6 materials that I examined, I found no facts that  
7 supported the allegations that were made.

8 Q So the answer to my question is "yes?" I just  
9 want to be sure I have it right. At no time did  
10:54 10 you come to the conclusion that this case should  
11 be re-opened?

12 A While I was asked to assess the case, and that is  
13 primarily in relation to the first application, I  
14 investigated the factual foundations giving rise  
10:55 15 to the grounds, I found in many instances that  
16 they were not supported.

17 Q So the answer to my question is "yes"?

18 A If you wish to take it that way, yes.

19 Q All it requires is a "yes" or "no". I just want  
10:55 20 to draw to your attention an interview, I believe,  
21 of -- well, it is of Kim Campbell after her  
22 decision. I don't know if you've seen it before,  
23 but it's document 333676. This would be October  
24 the 7th of 1991, "Scrum", it says; have you seen  
10:56 25 that before?



1       A       I may have, sir, yes. I have seen several scrums  
2               in which the minister was questioned by reporters.

3       Q       Okay. The question is posed:

4               "Q: Have you made any appointments to meet  
10:56 5               with Mrs. Milgaard?

6               R: I think it would be improper for me to  
7               meet with her."

8       And then:

9               "Q: Are you going to be sending this review  
10:56 10              to a third party, as you did with the  
11              previous one?

12              R: I will indicate what the process is when  
13              I indicate the result. It will come to  
14              my desk I am the final decision maker so  
10:56 15              there is no referring out after that at  
16              all. Any advice that I have obtained, I  
17              have obtained up till now and when it is  
18              on my desk I make the decision.

19              Q: When the file is finally closed or  
10:57 20              reopened is there any problem with  
21              releasing some of the materials?

22              R: Well, you have to understand the point I  
23              tried to make in the House is that I am  
24              able to reach out quite broadly beyond  
10:57 25              normal processes to try and determine



1 the situation so there are some aspects  
2 of the file that are governed by privacy  
3 legislation where people are prepared to  
4 speak to our Council for example on the  
10:57 5 condition that their views are held  
6 confidential. It is a very difficult  
7 situation. With respect to the release  
8 of a legal opinion (of Mr. MacIntyre), I  
9 have considered whether that is  
10:57 10 appropriate or not, it would require  
11 waiving solicitor-client privilege to do  
12 that. It is not impossible to do that,  
13 my main concern is the public  
14 credibility of the process which I  
10:57 15 believe to be scrupulously fair. If in  
16 order to insure public perception that  
17 we are fair I had to do that I would  
18 certainly consider doing that. It would  
19 be a great precedent, normally the  
10:58 20 government does not release its legal  
21 opinions."

22 So you have Kim Campbell saying that, to ensure  
23 public perception that they are fair, she would  
24 consider releasing the McIntyre materials; do you  
10:58 25 see that?



1 A Yes, I see it.

2 Q And, if we can go to the next page, the questioner  
3 says:

4 "Q: We could always go through John Grace  
10:58 5 and get it?"

6 I believe Mr. Grace would be the information,  
7 public information man, or whatever you call him?

8 A He was the Information Commissioner at the time.

9 Q Yeah. And the response is:

10:58 10 "R: Well I mean no, you can't get it, it's a  
11 matter of Solicitor-client privilege...  
12 which is about the only privilege  
13 allowed by the law and if you are in  
14 trouble with the law in fact you will be  
10:59 15 glad of it, I know you never will be.  
16 But... it is something I have  
17 considered, one of the reason why for  
18 example why I will not meet with the  
19 principle in cases like these is that I  
10:59 20 deal with about 30 of these applications  
21 every year. Every person who applies  
22 must know ...",

23 etcetera, etcetera. Now I'm interested to know,  
24 the minister says how important solicitor/client  
10:59 25 privilege is, do you see that? She is sort of



1 saying, well, if there is a perception that this  
2 was done wrong we might consider releasing  
3 McIntyre's material. Okay. And just so the  
4 record is clear, the allegation in letters  
10:59 5 everywhere has been that McIntyre was given the  
6 wrong material and Milgaard didn't have access,  
7 that's been in letter after letter, so there is  
8 that, and in spite of that there is still no  
9 release, yet the minister emphasizes the  
11:00 10 importance of solicitor/client privilege. Why is  
11 it that your department requires the applicant to  
12 waive privilege?

13 A The applicant is seeking an extraordinary remedy  
14 in circumstances in which the courts have already  
11:00 15 adjudicated guilt. An extraordinary remedy which  
16 seeks to overturn the decision of the courts,  
17 usually confirmed on appeal, signals a need for  
18 the fullest disclosure, including the waiver of  
19 solicitor/client privilege, so that investigating  
11:00 20 counsel can speak to the defendant's counsel and  
21 find out --

22 Q Truly --

23 A -- matters relating to the application.

24 I understand minister's  
11:01 25 concern, that has been the policy, and beyond



1 that, beyond the practical need to obtain  
2 information from defendant's counsel, knowing that  
3 waiver is required in order to speak to counsel  
4 for the defendant, or in this case the applicant,  
11:01 5 that's required.

6 Q But you would agree that it's fundamental in our  
7 jurisprudence that, when a person is charged, they  
8 should be able to confide in their lawyer fully  
9 confident that it is confidential to the ultimate  
11:01 10 extreme?

11 A It's confidential, sir, until such time as that  
12 person wishes a remedy which is beyond the normal  
13 Court process, which calls for an extraordinary  
14 remedy, and which calls for the favourable  
11:01 15 discretionary powers given to a minister of the  
16 Crown. At that point in time there is no, quote,  
17 "interest to protect" because that person has been  
18 convicted.

19 Q Well I guess, Mr. Williams, what I am saying is on  
11:02 20 one side we're talking about an accused person who  
21 places their confidence in their defence counsel,  
22 their trust, that they can say whatever they want,  
23 yet that on the other side of the coin you have a  
24 fellow who is paid by the government, by the  
11:02 25 taxpayer, to give a legal opinion to an elected



1           representative and we can't know, it's somehow got  
2           to be guarded; do you not see a little bit of  
3           hypocrisy in that?

4           A       There's an irony, but there are two different  
11:02 5           circumstances. No one involved in the criminal  
6           administration of justice at the trial and  
7           appellate level requires a defendant or an accused  
8           to waive solicitor/client privilege, but once the  
9           matter is at an end, once conviction has been  
11:03 10          registered and the person has exhausted all of  
11          their appellate remedies and that person still  
12          desires an extraordinary remedy from the  
13          executive, then the normal considerations that you  
14          have during the adjudicative process, which  
11:03 15          includes the safeguards of solicitor/client  
16          privilege, those no longer apply.

17          Q       Well, Mr. Williams, I can appreciate that there  
18          may be times you have to talk to defence counsel.  
19          For example, "Mr. Tallis, did you get disclosure  
11:03 20          of this or that or this or that", that's -- makes  
21          sense, but "Mr. Tallis, what did David tell you" I  
22          suggest is not necessary to do a 690 review, and  
23          it's not appropriate, and you're saying that you  
24          think it should continue to be the case?

11:04 25          A       Yes.



1 Q Is it currently the case?

2 A Excuse me, sir?

3 Q Can anybody take a 696 today and keep their  
4 confidential meetings with their lawyer private?

11:04 5 A I believe a waiver is usually requested. A lot  
6 would depend on the issues.

7 Q There was considerable publicity attached to the  
8 meeting between Joyce Milgaard and Prime Minister  
9 Mulroney, you will -- you would recall that?

11:05 10 A I read about it, yes.

11 Q Well, did it cause you concern when it happened?

12 A Not unduly.

13 Q Any concern?

14 A Mrs. Milgaard was free to meet with any politician  
11:05 15 she chooses, no.

16 Q Well, except Kim Campbell?

17 A That's a decision for Minister Campbell. The  
18 timing and the circumstances is up to the  
19 minister.

11:05 20 Q What, if any, effect did that meeting have on you?

21 A Minister -- Mrs. Milgaard's meeting with --

22 Q Well the Prime Minister was getting involved?

23 A Well certainly, certainly to the extent that the  
24 PMO's office is involved, it hastens our step in  
11:05 25 the sense that there were calls for us to expedite



1           our work, and we were certainly aware of the  
2           public attention that this application had  
3           generated, and we continued to work as quickly as  
4           we could but as thoroughly as we had to.

11:05 5       Q       And did you feel that he was undermining your  
6           process --

7       A       No.

8       Q       -- by showing sympathy to David?

9       A       The expression of compassion by the prime minister  
11:06 10       doesn't undermine our process.

11       Q       But it was public opinion that was exceptionally  
12           important to your department?

13       A       As framed, the answer would be no. I think the  
14           department was concerned that incorrect reporting  
11:07 15       of certain facts ran the risk of lessening public  
16           confidence in the process.

17       Q       I think the evidence is, and I think Murray Brown  
18           testified to it, and perhaps others, that without  
19           the public pressure and the media reporting, there  
11:07 20       never would have been a remedy granted?

21       A       Well, that may be Mr. Brown's view. It's not  
22           mine.

23       Q       Well, doesn't the order even say that, because of  
24           perception; that is, the order-in-council?

11:07 25       A       It may well, sir, but that's -- what the order



1           says and how you framed it are two different  
2           things.

3           Q       Well, Mr. Commissioner, I'm not going to pursue it  
4           necessarily, but I do wish to express my  
11:07 5           frustration that we have a memo saying that.

6                   COMMISSIONER MacCALLUM: Oh, I was just  
7           about to interject on the subject of your, the  
8           accuracy of your recall of the evidence. It  
9           wasn't related to the question of constitutional  
11:08 10          limits at all.

11                  MR. WOLCH: No, I tried to frame it that  
12          way --

13                  COMMISSIONER MacCALLUM: No. So go ahead,  
14          whatever it was you were going to ask.

11:08 15          BY MR. WOLCH:

16           Q       Would it not be fair that your view was, has been  
17           that there should be no review, any contrary view  
18           was predicated on clearing up the public  
19           perception, not the merits, the public perception,  
11:08 20          the entire public is wrong, they are all either  
21           stupid or misinformed or ill-advised, they are all  
22           wrong but us and we're going to have to do this  
23           only because we have to teach them a lesson or  
24           teach them the real facts. Isn't that where your  
11:09 25          department was at?



1           A           It was not. This is where we were at. We had  
2                       received the first application which contained  
3                       four or possibly five grounds. When we  
4                       investigated those grounds, we found that the  
11:09 5                      factual foundation had not -- wasn't there. We  
6                       were severely criticized because of our, quote,  
7                       "secrecy" about the length of time that it took  
8                       and we were hamstrung by a number of rules that  
9                       were there to protect Canadians concerning the  
11:09 10                     disclosure of information. When the second  
11                      application arrived, there was a certain  
12                      realization that to provide the same type of  
13                      assessment as we did in the first application  
14                      would have with it the prospects of additional,  
11:10 15                     the same types of hamstrung in that we were unable  
16                      to publicly respond to mistakes that were  
17                      perpetuated sometimes by your co-counsel in the  
18                      public domain and an attempt was made I think in  
19                      the final result to find an assessment mechanism  
11:10 20                     that was public, that was transparent and that  
21                      would permit the minister to get the best advice  
22                      possible.

23           Q           Isn't that what the Milgaard group was always  
24                       asking for, that it not be done behind closed  
11:10 25                      doors or with Mr. McIntyre or whatever, that it be



1 done in an open forum? Isn't that what was always  
2 asked for?

3 A That's not what I understood was asked for. What  
4 was asked for was a remedy and if the Milgaards  
11:11 5 had received a favourable remedy in the first, I  
6 think that would have been the end of it. As it  
7 turned out, the remedy was not to their liking.

8 Q Why do you say that?

9 A Because it was denied.

11:11 10 Q Oh, the remedy. Okay, I see what you are saying.  
11 I misunderstood you. Was there any real  
12 difference between the first application and the  
13 second?

14 A Yes.

11:11 15 Q What would that be?

16 A Well, you expressed it in your own words, sir.

17 Q Well, first of all, let's face it, putting in the  
18 same application again wouldn't carry much weight  
19 would it?

11:11 20 A Reapplying on the same grounds would not increase  
21 the success unless there were additional facts  
22 that were not presented in the first application.

23 Q Okay. And what were the additional facts in a  
24 general sense?

11:12 25 A Well, there were additional details and more,



1           shall we say, a different approach with respect to  
2           the -- not just the identification of Larry Fisher  
3           as the killer, but that was the thrust of the  
4           second application, Larry Fisher.

11:12 5       Q       But Larry Fisher was part of the first  
6           application.

7       A       Yes, as of February of 1990 he was.

8       Q       Did you look at it from your view as a fresh  
9           application or just the old application just  
11:12 10       restated a bit?

11      A       It was a new application.

12      Q       So you are saying that the difference was that  
13           Fisher was just a little more emphasized?

14      A       It was your application, Mr. Wolch.

11:13 15      Q       No, I'm asking how you viewed it when you got it.

16      A       Well, certainly the thrust of the application had  
17           to do with Larry Fisher, and certainly there were  
18           other grounds advanced, but that was the thrust of  
19           it.

11:13 20      Q       Mr. Williams, what role, if any, does the family  
21           of the victim play in a 690 application? When I  
22           point out that you have a family who has been  
23           perhaps comforted with the thought that a killer  
24           is behind bars and in most cases they would be  
11:13 25           firmly convinced of it because that's something



1           that people want to believe as human beings, you  
2           want to believe that the killer is behind bars,  
3           what influence do they have on your assessments?

4           COMMISSIONER MacCALLUM: The family -- oh,  
11:14 5           the victim, I'm sorry.

6           MR. WOLCH: The victim.

7           COMMISSIONER MacCALLUM: Yeah.

8           MR. WOLCH: I'm sorry, Gail Miller.

9           A           The family of the victim?

11:14 10          BY MR. WOLCH:

11          Q           Well, yeah, Gail Miller's family. Again, if I  
12                       may, just before you answer that, if you pull  
13                       up 160024 --

14                      COMMISSIONER MacCALLUM: I think there's  
11:14 15                      too many digits there.

16                      MR. WOLCH: 160024.

17                      COMMISSIONER MacCALLUM: Oh, I heard 162,  
18                      sorry.

19                      MR. WOLCH: 160024.

11:14 20                      COMMISSIONER MacCALLUM: Okay.

21          BY MR. WOLCH:

22          Q           Here's the headline, *Family of victim backs*  
23                       *Milgaard, 'Staggering' evidence points to known*  
24                       *rapist*, and then there's an article below, *Brutal*  
11:14 25                       *rapes follow pattern, And Miller murder fits*, and



1           this is August the 11th of '91 in the *Winnipeg*  
2           *Sun.* Is this the kind of media coverage you were  
3           complaining about?

4           A       No, that's not the kind of media coverage I was  
11:15 5           complaining about.

6           Q       It's pretty --

7           A       What your question was, what's the role of  
8           the family --

9           Q       Well, here you've got --

11:15 10          A       -- in the Section 690 application? To the extent  
11           that family members provided evidence at trial and  
12           that evidence is important to the assessment of  
13           the issues, certainly we would look at that  
14           testimony, but in this particular case, the family  
11:15 15           of the victim played no role.

16          Q       So you wouldn't be conscious of their feelings  
17           that they might like to know for sure that they  
18           have the right guy or --

19          A       I mean, that's usually an issue for the prosecutor  
11:15 20           and the prosecution during the trial, but  
21           certainly once the conviction has been registered  
22           and there's an application for ministerial review,  
23           the family's feelings don't enter into -- or the  
24           victim's family's feelings are not the prime  
11:15 25           concern.



1 Q I didn't say prime concern, I mean any concern  
2 that you have of the victims and, you know, the  
3 sympathy to the Miller family, what they have been  
4 through is --

11:16 5 A Certainly we're all --

6 Q I haven't finished the question.

7 A We're always --

8 COMMISSIONER MacCALLUM: He hasn't finished  
9 his question.

11:16 10 A I'm sorry.

11 COMMISSIONER MacCALLUM: Yeah.

12 BY MR. WOLCH:

13 Q The Miller family has been put through a complete  
14 nightmare of this matter being kept alive all  
11:16 15 these years, we know that, it's horrible for them,  
16 and I'm just wondering why their concern, when  
17 they say, "hey, we're worried about this  
18 conviction," that that might not factor into  
19 whether it needs a public airing or needs at least  
11:16 20 some review, a transparent one to satisfy the  
21 family that the right killer is behind bars.

22 A Sir, while I can appreciate the concerns of the  
23 families of victims across Canada whose assailant,  
24 accused, you know, have claimed innocence, our  
11:17 25 process in terms of 690 does not place their



1 concerns above the concerns of the need to have an  
2 orderly process for reviewing convictions that are  
3 claimed to be wrong.

4 Q I'm not --

11:17 5 A And quite apart from the result in this case, the  
6 process that had been utilized deals with families  
7 and deals with cases quite apart from, on a much  
8 wider basis, so yes, there is concern and  
9 consideration for the feelings of the families of  
11:18 10 victims, but that consideration and concern does  
11 not trump and replace the need to have a process  
12 which works for families or for a wider spectre of  
13 society.

14 Q Mr. Williams, I'm not asking it to trump or  
11:18 15 overtake or be predominant, I'm just asking  
16 whether it should be a factor or would be a factor  
17 in the overall picture, and if I may take you to  
18 279671, and here's what you end up with --  
19 279671 -- you see the family says, Gail Miller's  
11:19 20 younger brother says:

21 "We want to know (who committed the  
22 murder). I don't know why they (the  
23 authorities) don't want to know. Why  
24 should one guy have to suffer while the  
11:19 25 other guy goes free?"



1 And you have Lloyd Miller quoted as well, saying:

2 "...he is disturbed at the handling of  
3 the case. In particular, he wonders how  
4 the police could have either overlooked  
11:19 5 or ignored evidence pointing to Larry  
6 Fisher as the killer."

7 So my question is, do you in the 690 take into  
8 account the family, some sort of reaching out to  
9 them to say look, this is what we're doing, I  
11:19 10 want to inform you of what we're doing, what are  
11 your views, just as a matter of decency and  
12 compassion?

13 A As a matter of decency and compassion, we would  
14 certainly, if the situation called for it, reach  
11:20 15 out to the family. Ordinarily we don't contact  
16 the families unless they are required to be  
17 contacted because they have evidence that's  
18 relevant to the 690 application.

19 Q A different topic for you. What part, if any, did  
11:20 20 David's so-called psychiatric history play in your  
21 deliberations?

22 A Excuse me?

23 Q What part if any did David's so-called psychiatric  
24 background play in evaluating his application?

11:21 25 A Very little.



1 Q Pardon me?

2 A Very little, if any. David's psychiatric history  
3 I think -- mainly we looked at the grounds that  
4 were advanced, not at David's psyche until, that  
11:21 5 may have been brought up much later I think at the  
6 reference when some of the files, the penitentiary  
7 files were brought up, but in terms of the first  
8 assessment, I don't think we asked for it or got  
9 it.

11:21 10 Q But when you did see it, I think you would have  
11 learned that David had no criminal record and no  
12 violence in his background, I think you would have  
13 seen that, or did you?

14 A Well, I think that you are talking about his  
11:22 15 criminal record.

16 Q Well, he had no criminal record and he had no  
17 mention of violence in any of the reports that  
18 we've seen.

19 A That's -- I'm not prepared to debate it. I think  
11:22 20 a review of some of the juvenile records will show  
21 that there were some brushes with the law.

22 Q Well, take auto, a joy ride, but I'm talking about  
23 -- there's some hint of that, but violence?

24 A I'm not aware of any.

11:22 25 Q So it didn't factor into anything?



1 A No.

2 Q Let me ask you this, and this may be an unfair  
3 question, but on a different case if you have  
4 somebody asserting their innocence and their  
11:22 5 psychiatric background had no play in the trial,  
6 it wasn't led, it wasn't entered, would  
7 psychiatric records be relevant? Let's say you  
8 came across some disturbing psychiatric records  
9 that played no part in the trial, zero, would they  
11:23 10 be relevant to your considerations?

11 A In a vacuum, sir, it's very difficult to answer  
12 that question. I mean, the task of the Section  
13 690 counsel looking at a file is to investigate  
14 the grounds advanced. If the grounds didn't touch  
11:23 15 on the psychiatric background and history of the  
16 accused and that wasn't a live issue at trial,  
17 unless additional new information brought it into,  
18 or made it relevant, it would be surprising for  
19 someone to look into it.

11:23 20 Q I want to take you to a point in time when you've  
21 completed your investigation, and I don't think it  
22 really matters if it's before the first or second  
23 decision by the minister because I think you  
24 didn't change your mind at all. Would I be  
11:24 25 correct on that point?



1 A What really is important in relation to an  
2 application isn't the mind of the investigator,  
3 sir, it's the mind of the minister.

4 Q I appreciate that, we'll deal with her mind later,  
11:24 5 but in terms of your mind, would it be fair to say  
6 that you were of the view that David was guilty?

7 A Mr. Wolch, that is not a question that I've ever  
8 addressed in terms of making an individual  
9 assessment of the guilt or innocence of an  
11:25 10 applicant. The applicant comes to the minister  
11 having been convicted and that's the starting  
12 point for any work that I do. I do not, have not  
13 imposed my, quote, "personal" review of the facts  
14 and put myself in the position of judge in terms  
11:25 15 of applying or assessing 690 applications, that's  
16 not the approach I've taken and that's not the  
17 type of question that I would frame. My question  
18 would be having regard to the conviction that has  
19 been registered, is there any basis to conclude  
11:25 20 that a miscarriage likely occurred and that's the  
21 basis upon which I proceed.

22 Q Did you view the minister's role as that of a  
23 judge?

24 A The minister performs a quasi-judicial function in  
11:26 25 making a decision as to whether or not the



1 minister is satisfied that there is a basis to  
2 conclude a miscarriage of justice occurred.

3 Q So she was basically acting as a judge?

4 A In that capacity, yes.

11:26 5 Q And taking her fact finding from you?

6 A In part, yes.

7 Q So your assessment of the evidence is crucial?

8 A My assessment of the evidence is one of the  
9 factors that the minister takes into account. The  
11:26 10 evidence is there for the minister to review.

11 Q But if you looked at all the evidence, finished  
12 the investigation and concluded that David was  
13 innocent, wouldn't you say so?

14 A If there were facts that supported a conclusion  
11:26 15 that there was a reasonable basis to conclude that  
16 there was a miscarriage, I would say so.

17 Q Well, the media was reporting positive assertions  
18 from many people that David Milgaard was innocent.  
19 I take it you disagreed with that?

11:27 20 A To the extent that those positive assertions were  
21 based on an incomplete or incorrect appreciation  
22 of the facts, I did, yes.

23 Q It's not a matter of what they were based on, you  
24 can get to the right conclusion for the wrong  
11:27 25 reasons. If they are saying he's innocent, you



1 just don't agree with it, you are not saying I  
2 don't like your reasoning, you are saying I don't  
3 like your conclusion, aren't you?

4 A I'm not certain I understand your question, sir.

11:27 5 Q I'm saying that there were positive assertions of  
6 David's innocence which you didn't accept because  
7 you didn't accept David's innocence. I think it's  
8 self-evident.

9 MR. WOLCH: I think Mr. McLeod has --

11:27 10 COMMISSIONER MacCALLUM: Sorry.

11 MR. McLEOD: I think the difficulty that,  
12 at least that I'm perceiving, is that My Learned  
13 Friend is attempting in a variety of ways to  
14 simply ask the question of Mr. Williams as to  
11:28 15 whether or not his view was David Milgaard was  
16 guilty or innocent and I think on many occasions  
17 Mr. Williams' response has been my opinion, my  
18 personal view of the matter is not relevant, I  
19 have a job to do and he provided the answer, and  
11:28 20 it's just another way to I think attempt to ask  
21 the same question that we've heard many times so  
22 far this morning and I think it would be  
23 appropriate for Mr. Wolch to move on to another  
24 matter. Thank you, sir.

11:28 25 COMMISSIONER MacCALLUM: Thank you, Mr.



1 McLeod. Mr. Wolch?

2 MR. WOLCH: Well, I hate to think that you  
3 would have recommended no action if you thought  
4 the man was innocent, but, I mean, that's the  
11:28 5 converse of it. I just -- it was one of those  
6 questions where I thought the answer was simple,  
7 it's simply self-evident. I mean, if he wants to  
8 leave the impression that he might have let it go  
9 through on an innocent person because of some  
11:29 10 formality or following strict, whatever he was  
11 following, that's fine.

12 COMMISSIONER MacCALLUM: Well, as  
13 Mr. McLeod points out, he answered more than once  
14 that it simply wasn't his job to ponder  
11:29 15 innocence, the question of innocence, it was his  
16 job to find the facts to lay before the minister  
17 for her consideration on that subject and so  
18 that's his answer.

19 BY MR. WOLCH:

11:29 20 Q Okay. Well, looking at what you did find, you  
21 interviewed Linda Fisher; correct?

22 A I did.

23 Q And your assessment of her evidence was that it  
24 wasn't very helpful. I'm trying to cut it down,  
11:29 25 but --



1           A           My assessment was Ms. Fisher was a conscientious  
2                       woman who was concerned that perhaps her husband  
3                       had been a murderer. She came forward, she  
4                       provided her evidence, she didn't strike me as  
11:30 5                       having any particular axe to grind, she was  
6                       troubled, and that she may have some information  
7                       that bore on the issue and she gave it candidly  
8                       and as frankly as she could. Her testimony to me  
9                       or her answers signaled that she had a  
11:30 10                      recollection of events and she relayed that as  
11                      best as she could and I was grateful for her  
12                      answers. In the result, I think she was concerned  
13                      that maybe it was her knife that was used as the  
14                      murder weapon and she described it as a  
11:30 15                      brown-handled paring knife. My information at the  
16                      time was that the murder weapon was not a  
17                      brown-handled paring knife and that was that.

18           Q           At the end of the day she wasn't of much value?

19           A           Well, she didn't support the contention that her  
11:31 20                      brown paring knife, or her missing knife was the  
21                      murder weapon, so in terms of her value, that's  
22                      for others to comment on, but --

23           Q           Okay. And John Patterson, to his extreme credit,  
24                      has turned his life completely around, the inmate  
11:31 25                      who talked about Larry Fisher, you found that his



1 evidence was not of much value either?

2 A No, to the contrary. Mr. Patterson -- there was  
3 an account in, I think it was *The Globe and Mail*,  
4 that Mr. Fisher had, quote, "confessed", at least  
11:31 5 that was one of the headlines in one of the  
6 things, and my job was simply to verify that that  
7 was the case, and to the extent that Mr. Patterson  
8 did not agree or affirm or confirm some of the  
9 statements in the context in which they appeared  
11:32 10 in press, then it did not support the headlines  
11 that had been proclaimed.

12 Q And you questioned Larry Fisher as well?

13 A I did.

14 Q And that questioning was kept confidential; was it  
11:32 15 not?

16 A For a period of time it was not shared.

17 Q And it was released -- do you know when?

18 A At the latest, October 1.

19 Q I believe it was released in the Supreme Court, we  
11:33 20 went through it the other day, that Mr. Beresh  
21 raised it and the court directed it be disclosed.

22 A Then I stand corrected.

23 Q Now, taking the evidence of Linda Fisher, John  
24 Patterson, the evidence of Larry Fisher, you still  
11:33 25 had the similar act evidence to consider; correct?



1 A Yes, or evidence that was described as similar  
2 act, yes.

3 Q Okay. And you say that it's not similar act?

4 A I'm saying that there's some similarities, but --

11:34 5 COMMISSIONER MacCALLUM: Mr. Wolch, it  
6 would help me if discussion on this subject  
7 followed some precision. There's similar act  
8 evidence which might be admissible in a trial  
9 which is subject to fairly well-defined  
11:34 10 standards, whether used by the Crown or by the  
11 defence. There is also similar act evidence  
12 which might be considered obviously under Section  
13 690 of the -- in a Section 690 investigation, and  
14 I presume that the standard might be different,  
11:34 15 although I haven't heard anybody say that, so I  
16 would like to know what we're talking about here.  
17 It's one thing for the Section 690 investigator  
18 to make a decision that this would not be, in his  
19 view, admissible in court, but is that the  
11:35 20 question that he faces.

21 MR. WOLCH: Yes, I intend to do that,  
22 Mr. Commissioner.

23 COMMISSIONER MacCALLUM: Okay.

24 MR. WOLCH: In fact, I provided a copy of  
11:35 25 some material I'm going to have put up in a



1 moment.

2 BY MR. HODSON:

3 Q Mr. Williams, talking about similar acts, I think  
4 we all understand generally what they are, you  
11:35 5 have a fair understanding do you think?

6 A Yes.

7 Q And do you see a difference between the use of  
8 them against an accused as opposed to by an  
9 accused, to point a finger at somebody else?

11:06 10  
11 A Yes, there is a different threshold that courts  
12 will entertain if the evidence is being led by the  
13 Crown to establish the identity of the accused as  
14 the culprit in a particular crime by reference to  
11:35 15 other offences that can be specifically linked to  
16 that accused, yes.

17 Q Okay. And what if an accused is saying "the other  
18 guy did it"?

19 A The courts will entertain, based on the strength  
11:36 20 of the evidence they may permit some evidence to  
21 be led to signal that another perpetrator -- that  
22 someone else other than the accused had committed  
23 the crime for which that accused is charged.

24 Q Did you recognize, when you were evaluating this  
11:36 25 case, that there is a different standard?



1 A Yes.

2 Q Do you understand the rationale for the standard?

3 A I believe I do.

4 Q Why do you think it's different?

11:36 5 A Certainly, it's a different threshold when the  
6 Crown is putting it on, because the probative  
7 value has to outweigh its prejudicial effect.  
8 That's on the Crown's standard.

9 Q Yes.

11:36 10 A There is a lower standard when the accused is  
11 offering the evidence to establish or to create a  
12 reasonable doubt about his guilt.

13 Q I believe, and I haven't got it in front of me,  
14 but in one of the letters to you, you were  
11:37 15 directed to a book by Heather Leonoff in which she  
16 points out that when you're prosecuting somebody  
17 you've got the probative value and the prejudicial  
18 to weigh, that is there is prejudice, but when  
19 you're pointing the finger at a third party  
11:37 20 prejudice is not a factor because the third party  
21 isn't on trial. That seems to be the law as I  
22 understand it?

23 A I don't disagree with you.

24 Q Yeah. The -- it's not -- you can't prejudice a  
11:37 25 third party because the jury isn't weighing their



1           guilt or innocence, but the accused can be  
2           prejudiced if the jury will be swayed so severely  
3           by evidence that, in actual fact, the probative  
4           value is minimal or low; are we on the same wave  
11:38 5           length?

6           A       Yes, I didn't disagree with you.

7           Q       Now is it my understanding that your assessment of  
8           the Larry Fisher similar acts -- what -- first of  
9           all, what threshold did you apply to say it  
11:38 10           wouldn't help David Milgaard?

11          A       Well, I think the first question that someone  
12           looking at it would do is assess the acts which  
13           are being advanced as similar act to see whether  
14           there are points of, shall we say, comparison with  
11:38 15           the homicide, and to examine whether or not there  
16           are distinctive patterns that point exclusively,  
17           or point towards that third person. There are a  
18           number of factors that I would look at to see  
19           whether or not one can say that there is a  
11:39 20           signature there which --

21                   COMMISSIONER MacCALLUM: What, you mean  
22           pointing to the accused, sir, when you said  
23           "third person"?

24          A       Yeah, pointing to the accused, or the person who  
11:39 25           is now -- in this case it was David Milgaard



1 saying that "these acts show that this is Larry  
2 Fisher, the culprit".

3 BY MR. WOLCH:

4 Q Okay. Let me back up. The -- I sort of wanted to  
11:39 5 get, first, were you applying the standard for an  
6 accused or for a defence assertion that somebody  
7 else did it; which standard, if either, were you  
8 applying?

9 A I applied the one for the defence.

11:39 10 Q So you didn't care about prejudice?

11 A Well, I didn't care about it.

12 Q Officially?

13 A Well, official wasn't going to be -- I was -- no,  
14 I didn't care about it.

11:39 15 Q So we can take prejudice out of the equation, it's  
16 strictly probative value?

17 A Certainly.

18 Q Okay. And you found it didn't have probative  
19 value?

11:40 20 A My assessment was that there wasn't a sufficient  
21 link to Larry Fisher to make that a basis for a  
22 favourable review.

23 Q Now clearly in the public, through the Milgaards  
24 or whatever, it was being asserted that this was  
11:40 25 highly probative and Fisher did it, etcetera,



1           etcetera. That is some of the publicity you take  
2           issue with I take it?

3           A       Well there's lots of things that are asserted in  
4           the press with which I take issue. I guess, in  
11:40 5           evaluating a 690 application, I evaluate it on the  
6           basis of the evidence that's tendered and on the  
7           basis of the research and the fact-finding that we  
8           do. I do not evaluate it on published press  
9           reports.

11:41 10          Q       I'm sorry, I got --

11          A       I will use published press reports as a lead to  
12          identify additional witnesses that had not been  
13          brought to our attention, but I don't get my law  
14          from *The Globe and Mail*, nor do I get my facts  
11:41 15          from the *Winnipeg Free Press* or the *Sun*.

16          Q       I appreciate that. So on what basis did you  
17          conclude or what didn't you see was similar in the  
18          MO of Larry Fisher?

19          A       My overall conclusion, based on the factors that I  
11:41 20          look at, was that it was not similar. And one of  
21          the areas that I think was different was the level  
22          of violence in those acts that preceded the  
23          homicide, and also the level of violence  
24          afterwards, the use of a knife.

11:41 25          Q       The use of a knife?



1 A Well some of the similarities that were set out as  
2 being identifiers for Larry Fisher I didn't agree  
3 with.

4 Q Did you seek any other legal opinion on similar  
11:42 5 acts from a law professor or from a defence  
6 counsel, something like that, specifically,  
7 without giving them your opinions, ask them for a  
8 fresh opinion?

9 A I did not. I did do -- I reviewed the law, I  
11:42 10 reviewed the texts, I reviewed the cases, I made  
11 an assessment, I may have discussed it with  
12 colleagues within the department.

13 Q Are you still of the view that it wasn't similar  
14 acts?

11:42 15 A I'm aware that two of -- or three of the incidents  
16 were admitted as similar act at Mr. Fisher's  
17 trial.

18 Q That wasn't my question to you.

19 A And, based on that finding, my view is -- when  
11:43 20 you're asking, you're asking whether or not my  
21 opinion now, as informed by the law, has changed,  
22 and yes, to the extent that a judge has admitted  
23 some of those acts as similar act, I accept that.

24 Q No, that was -- that was admitted against the  
11:43 25 accused.



1 A That was admitted against the accused, yes.

2 Q A high test. Okay. So are you saying you were  
3 persuaded by their decision or are you still of  
4 the view that it's not similar acts?

11:43 5 A I'm persuaded by that decision.

6 Q So you think it's right?

7 A I have no reason --

8 Q Well, people disagree with the decision all the  
9 time.

10 A Yes.

11 Q The Supreme Court is five to four, half the  
12 country is close to four.

13 A You have my answer, I think it's right.

14 Q Well, also the Supreme Court found it was similar,  
11:43 15 five judges?

16 A Well, I -- I'm not certain that the Supreme Court  
17 made a specific finding of similar act, but the  
18 Supreme Court recommended that the minister give a  
19 remedy.

11:44 20 Q And Larry Fisher was the main reason; was it not?

21 A You -- you can argue that.

22 Q I'm not arguing it, I'm just saying is it -- do  
23 you disagree?

24 A I think Larry Fisher and some of the other  
11:44 25 evidence combined provided a basis for the Supreme



1 Court's ruling, yes.

2 Q But number one was Larry Fisher, can you not agree  
3 with that, that Larry Fisher was the main reason  
4 why the Supreme Court recommended that the  
11:44 5 conviction be quashed?

6 A I think, for argument's sake, we can agree with  
7 that, yes.

8 Q Okay. And unless the evidence was admissible,  
9 then there is no reason to refer for a -- to  
11:44 10 quash? I mean they are not going to quash it on  
11 inadmissible evidence?

12 A No, I think what the Supreme Court said was that  
13 he should get a new trial so that that evidence  
14 could be brought before a jury.

11:45 15 Q Well clearly, Mr. Williams, if the evidence wasn't  
16 admissible, there is no point?

17 A Well certainly, from a defence side, it would --  
18 some of it would be admissible, yes.

19 Q Obviously. So we have five judges of the Supreme  
11:45 20 Court, then we have Justice Allbright allowing in  
21 three, --

22 COMMISSIONER MacCALLUM: Sorry, Mr. Wolch,  
23 but you are not suggesting that the Supreme Court  
24 was binding the trial judge, in a new trial, to  
11:45 25 admit that evidence as similar fact evidence?



1 MR. WOLCH: No, I'm suggesting that, unless  
2 they believe it is admissible, that a ruling  
3 could not be possible.

4 COMMISSIONER MacCALLUM: Well they thought  
11:45 5 it might be admissible, I suppose it was --  
6 which, if accepted, might have affected the  
7 verdict of the jury.

8 MR. WOLCH: Yeah, but if it was their view  
9 it wasn't accepted, why would they ever quash the  
11:45 10 conviction?

11 COMMISSIONER MacCALLUM: Well, as a trial  
12 judge, I would certainly bristle at the prospect  
13 of the Supreme Court telling me how to make  
14 evidentiary rulings.

11:45 15 MR. WOLCH: Well, I appreciate that.

16 COMMISSIONER MacCALLUM: With all due  
17 respect.

18 MR. WOLCH: But I think it would be  
19 persuasive and get back to them too. But, in any  
11:46 20 event, I'm prepared later, in argument, to say  
21 that is an inference.

22 BY MR. WOLCH:

23 Q But in any event, three were admissible by Justice  
24 Allbright, that was upheld in the Court of Appeal,  
11:46 25 by three more judges, correct, and then



1 application to the Supreme Court was turned down,  
2 so it may be as many as 14 judges have all said  
3 it's admissible, nine or 14, well, three, six,  
4 seven, seven or 12?

11:46 5 A Mr. Wolch, you know, the point is certain judges  
6 have held it to be admissible. I don't disagree  
7 with that.

8 Q But you did disagree with it, you said it was of  
9 no weight?

11:46 10 A Well, at that time, that was my view. Others  
11 have, shall we say in a judicial position, have  
12 disagreed. That happens to those in the Crown  
13 service often. Not everything that -- my view is  
14 not always upheld by judges, and this is just  
11:47 15 another example of that.

16 Q Well, let's look at it a little more thoroughly.  
17 If I could have the Court of Appeal decision.  
18 Unfortunately, Mr. Commissioner, I don't believe  
19 it's in the database.

11:47 20 COMMISSIONER MacCALLUM: The Court of  
21 Appeal on *Fisher*?

22 MR. WOLCH: Yes.

23 COMMISSIONER MacCALLUM: Oh.

24 BY MR. WOLCH:

11:47 25 Q And this is at page 8 of 16 in the judgement, and



1 the question posed is:

2 "DID THE TRIAL JUDGE ERR IN ADMITTING  
3 SIMILAR-FACT EVIDENCE?"

4 And if we can skip down to paragraph 48, I just  
11:47 5 brought that out to show where it starts, that  
6 they describe some of the acts, but if you can go  
7 to paragraph 48, I think it's two pages down.  
8 Okay.

9 "The issue in respect of which the  
11:48 10 evidence is proffered is the issue of  
11 the identity of the person who caused  
12 Ms. Miller's death. The Crown's  
13 submission is that the attacks upon the  
14 three witnesses by the Appellant are so  
11:48 15 similar to the attack upon Ms. Miller,  
16 that it is likely that the same person  
17 committed all of them, or to use the  
18 words of Cory J. in *Arp*, it is  
19 objectively improbable that the  
11:48 20 similarities are products of  
21 coincidence."

22 Paragraph 49:

23 "The Crown listed the following  
24 similarities between the attacks on the  
11:48 25 witnesses and the attacks on Ms. Miller:



1                   a) The age and gender of the victims;"

2                   that was information you had, is that not

3                   correct?

4           A           Correct.

11:48 5           Q           "b) A residential area - often the same

6                   one;"

7                   that's information you had?

8           A           Yes.

9           Q           "c) In each case the victims were walking

11:48 10                   alone in the dark with no one else

11                   around and highly vulnerable;"

12                   that's information that you had?

13          A           Correct.

14          Q           "d) Each victim was close to home when

11:49 15                   attacked;"

16                   that's information that you had?

17          A           Well, for some of them, yes.

18          Q           "The Appellant ...",

19                   Fisher:

11:49 20                   "... was not afraid to confront, drag,

21                   struggle with and rape the women in

22                   areas immediately surrounded by occupied

23                   houses. Neither was Gail Miller's

24                   assailant."

11:49 25                   That's information you had?



1 A Correct.

2 Q "The Appellant initiated his attacks by  
3 walking past his victims then grabbing  
4 them from behind. He then putting [sic]  
11:49 5 his hand over their mouths and held a  
6 knife to their throats or bodies. Gail  
7 Miller's assailant was armed with a  
8 knife. He applied considerable force to  
9 the area of her mouth and nose before  
11:49 10 she died. Her right boot was missing  
11 and there was a scratch on the back of  
12 her right leg."

13 That's all information you had?

14 A Correct.

11:50 15 Q "g) In each case the Appellant compelled the  
16 victim into an alley or an area between  
17 houses;"

18 that's information you had?

19 A Certainly by the second application, yes.

11:50 20 Q Okay.

21 "The use or threatened use of a knife.  
22 The Appellant did not just arm himself  
23 with a knife when he attacked his  
24 victims. He also threatened to use that  
11:50 25 knife. He variously threatened to stab,



1 kill or cut the throat of whichever  
2 victim he was attacking. Gail Miller  
3 was stabbed, had her throat slashed and  
4 she was killed;"

11:50 5 that's information you had?

6 A Correct.

7 Q "i) In each case the Appellant concentrated  
8 on threatening them with harm from the  
9 knife if they made noise or resisted;"

11:50 10 that's information you had?

11 A I'm not certain about that, sir. Certainly not on  
12 the first application.

13 Q "j) In each case the Appellant had the victim  
14 remove her coat and pushed her clothing  
11:51 15 out of the way. The Appellant was not  
16 interested merely in a quick act of  
17 forced vaginal intercourse.

18 Notwithstanding the danger of detection,  
19 he significantly prolonged his attacks  
11:51 20 by forcing his victims to expose most if  
21 not all of their bodies to him before he  
22 raped them. So did Gail Miller's  
23 assailant. He could have raped her  
24 simply by unbuttoning her coat, pulling  
11:51 25 down her underwear and completing the



1 act. However, he close to forcibly  
2 strip his victim on one of the coldest  
3 mornings of the winter."

4 That's information you had?

11:51 5 A I had information with respect to Gail Miller and  
6 the circumstances of her assault, on some of the  
7 others, I did not have that information.

8 Q Well they are talking here they had (V1)-,  
9 (V2)-----; you had them?

11:51 10 A I had (V1)-, I believe I got (V1)- in '91, after  
11 the first application had been concluded. I did  
12 not, and was not directly involved in the  
13 assessment of the second application that went to  
14 the Court in relation to making some kind of  
11:52 15 pronouncement on the similar act evidence.

16 Q Just carrying on then:

17 "The Appellant was particularly intent  
18 on exposing or assaulting the chest area  
19 of his victims. So was Gail Miller's  
11:52 20 assailant. Her chest was exposed, her  
21 right bra strap was broken."

22 That was information you had?

23 A No, it wasn't.

24 Q You didn't?

11:52 25 A Some of the details that we had didn't go to that



1 extent, sir, no.

2 Q And what were you missing there?

3 A Well, we were missing some of the file materials.

4 I'm not certain which ones are being referred to

11:52 5 in that particular passage. We did have (V5)--

6 (V5)--- and we did have (V8)--- and -- but I'm not

7 certain about some of the details that are recited

8 in that particular paragraph.

9 Q Okay. If we can go to 1) then:

11:53 10 "The Appellant allowed his victims the

11 comfort of lying on their coats after he

12 had forcibly removed them. Gail

13 Miller's assailant allowed her to put

14 her coat on, perhaps in recognition of

11:53 15 the temperature. Nevertheless, and in

16 keeping with above, her assailant did

17 not allow her the comfort of doing her

18 coat up."

19 You were aware of that?

11:53 20 A Well, I was aware that Ms. Miller had her coat

21 off. In terms of some of the other details that

22 are recited, umm, I'm not aware of them.

23 Q Well you were aware that Ms. Miller was stabbed

24 through the coat and not through her dress?

11:54 25 A That's correct.



1 Q So there was something strange?

2 A Yes, it's perplexing, yes.

3 Q Now you have victims who say they were forced to  
4 lie on their coat; don't you see some kind of  
11:54 5 connection?

6 A Yes, some of the information about the victims  
7 lying on their coats I may not have had or  
8 considered for the first application, and to the  
9 extent that we didn't have that information I  
11:54 10 guess the assessment suffered.

11 Q Okay.

12 "In each case, ...",

13 for m):

14 "... save the one where he was caught in  
11:54 15 the act, the Appellant made off with  
16 personal items from the victim. While  
17 the Appellant argues they were not  
18 scattered like Ms. Miller's were, there  
19 is no indication anyone ever looked for  
11:54 20 that in the other instances. The  
21 similarity is that the items were taken  
22 at all. It may be that the Appellant  
23 feared being seen with her recognizable  
24 personal items; that would explain her  
11:54 25 sweater and her right boot found buried



1 at the head of the alley. He went  
2 through the contents of her purse. He  
3 discarded that purse before leaving the  
4 alley. He carried her wallet away from  
11:55 5 the scene when he left."

6 And that's also information you had, I'm  
7 assuming?

8 A In some instances yes.

9 Q And then:

11:55 10 "n) In some of the instances the Appellant  
11 indicated that he had seen the victim  
12 before or had ridden the bus with her.  
13 The Appellant rode the bus with Gail  
14 Miller."

11:55 15 That's information you had?

16 A No, it's not.

17 Q It's not?

18 A Well, I knew that the Appellant may have ridden  
19 the bus with Gail Miller, but on some of the  
11:55 20 others, I just don't know, it's the first I have  
21 seen of that.

22 Q Mr. Williams, when you go through all of that, do  
23 you not begin to wonder how you didn't see it  
24 then, that this is a pattern, striking pattern,  
11:55 25 condemning Larry Fisher?



1 A Mr. Wolch, I made my assessment, the courts have  
2 made theirs.

3 Q And you were wrong?

4 A And I was wrong.

11:56 5 Q And do you have any suggestion as to why you were  
6 wrong?

7 A Sir --

8 Q What caused you to go wrong do you think?

9 A You --

11:56 10 Q It may happen again, there may be another  
11 assessment, I don't know?

12 A Anything is possible, Mr. Wolch. All I can say is  
13 this. The degree of detail recited in the  
14 judgement is much greater than the details that we  
11:56 15 had at the time. To the extent that that  
16 assessment is based on, shall we say, identifiers  
17 such as those details, this assessment perhaps was  
18 better informed than the one I provided.

19 Q Let me just draw to your attention paragraph 52:  
11:57 20 "While we cannot know the details of the  
21 assault upon Ms. Miller, the most  
22 reasonable inference, given the time,  
23 place, and other circumstances, is that  
24 while on the way to her usual bus stop  
11:57 25 to go to work, she was dragged from the



1 street into the alley and sexually  
2 assaulted with the aid of a knife with  
3 which she was stabbed. It is on that  
4 basis that a comparison may be made to  
11:57 5 other attacks."

6 And then the analysis continues in paragraph 53:

7 "It is not so much the details of the  
8 assaults that connects the various  
9 offences, it is the modus operandi of  
11:57 10 the perpetrator of the various rapes  
11 that links them to the assault upon  
12 Ms. Miller. The attacks were all  
13 brazen, taking place in the dark, but  
14 always at hours when other people were  
11:57 15 out and about, and in residential areas  
16 full of houses with people in them.  
17 These circumstances made it almost  
18 inevitable that the perpetrator, if he  
19 continued such conduct, would eventually  
11:58 20 be caught in the act. With the aid of a  
21 knife or the threat of a knife, the  
22 perpetrator forced the victim, whom he  
23 found walking on the street, into an  
24 alley, and forced her to fully or  
11:58 25 partially undress and raped her. Two of



1 the rapes occurred within a few months  
2 of the Miller murder and the third about  
3 a year and a half later. Two of the  
4 rapes occurred in Saskatoon in an area  
11:58 5 about twelve city blocks away from where  
6 the Miller murder occurred and where the  
7 appellant lived at the time. The third  
8 rape occurred in Winnipeg when the  
9 appellant was caught in the act. It was  
11:58 10 the third rape which brought the  
11 appellant to the attention of the police  
12 and led to the convictions for the other  
13 two rapes."

14 "All of this ...",

11:58 15 in paragraph 54:

16 "... considered along with other  
17 similarities in the assaults, leads us  
18 to conclude that it was open to the  
19 judge to find, as he did, that there was  
11:58 20 sufficient similarity of the acts that  
21 they were likely done by the same  
22 person, and that it was unlikely that  
23 the similarities were the product of  
24 coincidence. The evidence in question  
11:59 25 had a very high and substantial



1 probative value."

2 Do you see that,

3 "... very high and substantial probative  
4 value."

11:59 5 is the finding of the Court of Appeal. Now I'm  
6 trying to understand, because you weren't being  
7 asked to find value over prejudice, and you  
8 weren't being asked to find it's a fact that  
9 Fisher did it, all you were being asked was is  
11:59 10 the evidence sufficiently important that it  
11 should give rise either to a new trial or a  
12 review, or some remedy, so you were being asked  
13 for a much lesser, much lesser than what the  
14 Court was asked, and you were also not being  
11:59 15 asked to make a final conclusion, I'm trying to  
16 understand why you couldn't see even close to  
17 what the Court could see?

18 A Mr. Wolch, at the time that I made my assessment  
19 some of that information wasn't available. To the  
12:00 20 extent that it was not, admittedly, my assessment  
21 suffered.

22 I admit the Court disagreed  
23 with my assessment. Why I didn't find certain  
24 things, perhaps my assessment or my consideration  
12:00 25 of the evidence was different from that presented



1 by the Crown at trial. However, I made it, it has  
2 been the subject of a -- it has been the subject  
3 of judicial determination and the judges have  
4 disagreed.

12:00 5 Q Mr. Commissioner, I note the time, it's, for me  
6 it's a logical place.

7 COMMISSIONER MacCALLUM: Okay. Mr.  
8 MacLeod, you are aware of the Coventry rule?

9 MR. McLEOD: Yes.

12:01 10 (*Adjourned at 12:01 p.m.*)

11 (*Reconvened at 1:33 p.m.*)

12 BY MR. WOLCH:

13 Q Mr. Williams, I believe this morning I asked you  
14 about the first application compared to the second  
01:34 15 application and the emphasis on similar acts and  
16 you were saying it was different or --

17 A I'm saying that the information put forward in the  
18 second application with respect to the details was  
19 certainly much more than had accompanied the first  
01:34 20 application. You will recall that the first  
21 application came in a number of installments  
22 starting out with the Dr. Ferris evidence;  
23 secondly, Deborah Hall; thirdly, I believe it  
24 was -- I guess the third was Larry Fisher, then  
01:34 25 followed by Cadrain, Wilson, etcetera.



1 Q But did you feel that the second application then  
2 added considerable force to the similar act  
3 argument?

4 A I think there were additional details that were  
01:35 5 provided for us to consider in relation to the  
6 second application, yes.

7 Q But it didn't persuade you?

8 A Well, it wasn't up to me to be persuaded on the  
9 second application, sir, because as you full well  
01:35 10 realize, the second application was handled by way  
11 of a reference to the Supreme Court of Canada.

12 Q No, I mean it didn't persuade you to recommend a  
13 remedy.

14 A At that point in time that wasn't a question that  
01:35 15 was addressed to me. In terms of making a  
16 recommendation to the minister, I think -- I think  
17 it's helpful to set out that with the second  
18 application I was asked to verify certain facts  
19 with respect to the facts that were alleged, a  
01:36 20 decision was taken by senior management and the  
21 minister to have the Supreme Court examine the  
22 grounds advanced in the second application and the  
23 minister said that she would be guided by the  
24 advice of the Supreme Court in terms of the  
01:36 25 disposition of the second application. Now,



1           whatever personal views I may have had didn't  
2           really factor into the assessment of the second  
3           application insofar as it went to the Supreme  
4           Court by reference for the purpose of  
01:36 5           investigating all of the grounds that had been  
6           advanced in that application.

7           Q       You are saying that as the main investigator your  
8           views had no influence on the decision-maker?

9           A       I'm saying that in relation to the second  
01:36 10          application, my investigative role was secondary  
11          to that of the reference work that was done. I  
12          was there, as you are well aware, to assist in  
13          gathering and compiling the materials that had  
14          been used in the first application to develop the  
01:37 15          case on the reference. I did perform some  
16          interviews, a few, and I asked and coordinated the  
17          getting, the obtaining of statements by Sergeant  
18          Pearson. I was also involved, as you are well  
19          aware, in facilitating the retention or getting  
01:37 20          some of the exhibits from Queen's Bench here, but  
21          that's all fully set out. The extent of work that  
22          I did on the second application was miniscule by  
23          comparison to the work I did on the first  
24          application.

01:37 25          Q       Okay. Are you saying that your recommendation



1           wasn't sought in the second application?

2           A       My recommendation wasn't sought, I didn't prepare  
3                   a work similar to what I did for the first, that's  
4                   not how it went.

01:38 5           Q       But the second application went to Justice  
6                   McIntyre?

7           A       The second application came to the department.  
8                   Aspects of it may have gone to Justice McIntyre  
9                   for the answer to certain questions that were put  
01:38 10           to him, I'm aware of that.

11          Q       Without going into the detail of what occurred,  
12                   did not you, Rutherford and MacFarlane meet with  
13                   Justice McIntyre on the second application?

14          A       I'm not sure if it was the second application, I  
01:38 15               believe it was the first application that there  
16               was a meeting, it's possible we met or discussed  
17               it, but that had -- that had nothing to do with  
18               finalizing recommendations to the minister in  
19               terms of the disposition of the second  
01:39 20               application.

21          Q       So you are saying that you felt the second  
22                   application enhanced, or whatever, the Larry  
23                   Fisher argument of similar acts?

24          A       I'm saying that there was additional information  
01:39 25               that was provided by the applicants relating to



1 Larry Fisher on the second application.

2 Q I wonder if I can get 016094. Now, this is a memo  
3 to Mr. Corbett from yourself, August 20th of 1991.  
4 If I can get the next page. Here under  
01:40 5 observation you say:

6 "The applicant has mistakenly  
7 assumed the similarities between the  
8 attack on Gail Miller and the Fisher  
9 assaults were not brought to the  
01:40 10 Minister's attention or considered  
11 during the first application. This  
12 assumption is based on a mistaken  
13 recollection of a conversation I had  
14 with Mr. Wolch.

01:40 15 I had told Mr. Wolch that  
16 the occurrence reports for the 1968  
17 assaults in Saskatoon were not  
18 available, and that the quality of the  
19 photocopy of the 1970 assault in  
01:40 20 Saskatoon was poor.

21 However, I had obtained a  
22 sufficient information relating to the  
23 October - November 1968 charges from  
24 court documents and considered this  
01:40 25 information during the assessment of the



1 first application. I had also obtained  
2 and considered the occurrence reports  
3 from the Winnipeg assaults."

4 Now, when I read that, that doesn't appear  
01:41 5 consistent with what you are saying today. I'll  
6 give you an opportunity to either agree or  
7 disagree.

8 A Well, I'm not certain what the question is. What  
9 that -- that paragraph refers to the materials  
01:41 10 that I looked at in relation to application number  
11 one. In the second application the submission was  
12 made that the assaults weren't brought to the  
13 minister's attention or considered and that was  
14 simply my observations to Mr. Corbett on that  
01:41 15 subject. Granted, I grant you that the amount of  
16 information that was sent on the second  
17 application and the information that was developed  
18 subsequently before the Supreme Court, and I guess  
19 I'm not certain of -- occurred with all of the  
01:41 20 evidence tendered at the Larry Fisher trial, but I  
21 suspect that there was additional evidence  
22 tendered at the trial which solidified the similar  
23 act evidence, but what that memo states is that, a  
24 description of the materials I looked at.  
01:42 25 Admittedly, they were much smaller in volume than



1           that which later came.

2           **Q**       Okay. Mr. Williams, I guess what I'm suggesting  
3                   is that when I read that it sounds like you were  
4                   satisfied that the minister had all she had needed  
01:42 5                   to know on the first application.

6           **A**       No, sir, I'm suggesting to you that it says what  
7                   it says, that there were certain things that were  
8                   looked at and that's that.

9           **Q**       Well, you say I had obtained sufficient  
01:42 10                  information, so you seem to be satisfied.

11          **A**       Yes. I obtained certain information, yes.

12          **Q**       That's all I'm getting at. I'm just saying,  
13                  suggesting it's a bit at variance I believe.

14          **A**       I'm sorry, I didn't hear you.

01:43 15          **Q**       I'm looking at it as a bit at variance with what  
16                  you are saying here, that there was an influx of a  
17                  great deal more material. When you are saying I  
18                  had enough before is the impression I get from  
19                  your memo.

01:43 20          **A**       Well, I mean, we could debate it certainly, Mr.  
21                  Wolch, you presented more evidence, more  
22                  information on the second application.

23          **Q**       I want to turn to another document, 152, I hope  
24                  it's 076. This is a memo from yourself to  
01:43 25                  Peter -- is it pronounced Lugli?



1 A Peter Lugli.

2 Q And special assistant to who?

3 A He was the minister's special advisor.

4 Q He would be a lawyer?

01:44 5 A Yes.

6 Q And he's made requests for information in October  
7 of '91?

8 A Yes.

9 Q And I think Commission Counsel went over some of  
01:44 10 this with you yesterday, but for starters, this  
11 information here, would that be shared with the  
12 applicant?

13 A Well, that information came between the first and  
14 second application. I'm sorry, it came after the  
01:44 15 second application as I recall. I think there was  
16 a reference to it yesterday, there was a document  
17 from Saskatoon police and I used the information  
18 on that document in the preparation of that memo.  
19 Whether that found its way into the case on  
01:44 20 reference I'm not certain as we speak today, but I  
21 suspect it probably did.

22 Q Was there any mechanism for releasing this  
23 information? I don't believe it made it into the  
24 reference, we'll check that, but in any event, you  
01:45 25 were aware that the applicant was saying that



1 Fisher is an unique sort of individual, these kind  
2 of rapes are very rare, and the position of  
3 Saskatchewan was quite opposite, this is a, I  
4 think eventually, a garden-type variety rapist or  
01:45 5 whatever. This would suggest to me that in  
6 Saskatoon rapes at knife point were quite rare and  
7 I'm wondering why you wouldn't share this with the  
8 applicants.

9 A Well, at that point in time I didn't have full  
01:45 10 carriage of the case, number one. Number two, in  
11 October of '91, that was within weeks of the  
12 announcement or days of the announcement that it  
13 was going to the Supreme Court. Three, I was  
14 questioned by the Commissioner about that  
01:46 15 information yesterday and I believe the original  
16 document described under the heading weapon, those  
17 instances in which the victim saw a weapon and it  
18 is quite possible that there were more rapes in  
19 which a weapon was, or a knife was threatened but  
01:46 20 not observed by the victim, and secondly, there  
21 was some question about the completeness of that  
22 information, but to answer your question, I  
23 received the information. The responsibility for  
24 including that material in the case on reference  
01:46 25 wasn't entirely mine and if you didn't get it, I



1 have no explanation as to why you did not.

2 Q If this sort of thing arose in the course of your  
3 investigation --

4 A Excuse me?

01:47 5 Q If this sort of information came to your attention  
6 at the beginning of your investigation, would you,  
7 as a matter of form, release that to the  
8 applicant, be it this case or any other case?

9 A Given -- in the current 690 process, yes, that  
01:47 10 would be released.

11 Q In the old process?

12 A In the old process, certainly there was some  
13 information, a lot of the information that was  
14 collected, there may have been one or two  
01:47 15 exceptions that was provided to you. Yes, that is  
16 the type of information that is now released, but  
17 it would be on certain caveats.

18 Q And if we just turn the page. You then spend a  
19 fair bit of time going through hypnosis, and I'm  
01:48 20 not going to go through it, but it's just there,  
21 if you turn the page again, and you've got the  
22 basis for introducing evidence arrived through  
23 hypnosis, so you are spending a fair bit of time  
24 obviously on Nichol John. And if you turn the  
01:48 25 page, and then one more page. Now, I'm puzzled by



1           these notes that are on -- just scroll down to the  
2           bottom for a second -- 152079, and do you know  
3           whose handwriting this is? It's attached to that  
4           memorandum.

01:48 5           A           No, I don't.

6           Q           I'm interested here:

7                       "Fisher only perp. using knives in  
8                       68/69/70?"

9           A           I don't know whose writing that is.

01:48 10          Q           It's attached to your memo I think, that's all I'm  
11           trying to figure out.

12          A           Keep in mind, sir, that I delivered that memo to  
13           someone else and it would be unusual for me to put  
14           that handwriting on there. I would ordinarily, if  
01:49 15           there were certain questions, I think I would  
16           likely put it in the body of the text in  
17           typewritten form. I have not seen those notations  
18           until today.

19          Q           Okay. That comment could be a fact that's true?

01:49 20          A           I can't comment on that.

21          Q           Okay. The top of it says:

22                       "Kujawa/Caldwell affid."

23           Affidavit I think. Do you have any idea of what  
24           that's there for?

01:49 25          A           It's not my document, it's not my handwriting. I



1 don't know.

2 Q Okay. Now, I asked you this morning about your  
3 questioning of Linda Fisher and John Patterson and  
4 you cross-examined them?

01:50 5 A I examined them.

6 Q Well --

7 A Some portions of it may take the form of  
8 cross-examination, but by and large I tried to use  
9 open-ended questions.

01:50 10 Q And at the end of the day you didn't place too  
11 much weight in what they said did you?

12 A At the end of the day I was able to take their  
13 information and put it in the context of the  
14 factual assertions that the applicant had  
01:50 15 advanced.

16 Q You didn't find it to be particularly important?

17 A On the contrary, Linda Fisher was important in the  
18 sense that her description of the paring knife  
19 that she lost, or the one she described to me at  
01:50 20 least, she was firm in her recall and she also  
21 said that, she also described it without any  
22 prompting from me. That was important because  
23 that information could then be compared to the  
24 murder weapon that had been retrieved.

01:51 25 Q Okay. When important, I was thinking from the



1 Milgaard perspective.

2 A Well, I guess when I'm looking at the application,  
3 it's from a getting-the-truth perspective.

4 Q Okay. But your cross-examination, I suggest, was  
01:51 5 designed to cast doubt on her evidence, or at  
6 least what she was saying that incriminated  
7 Fisher, and the same with Patterson? You  
8 cross-examined, I would suggest, both of them in a  
9 manner that would make Clarence Darrow proud.

01:51 10 A Well you certainly flatter me, sir, but if you  
11 take a look at some of the questions you'll find  
12 that, by contrast to the traditional  
13 cross-examination technique, they were fairly  
14 open-ended, and particularly when it came to  
01:51 15 eliciting answers of a descriptive nature.  
16 Certainly they are -- I think an analysis of the  
17 document which showed that there were some leading  
18 questions, admittedly, but --

19 Q And their evidence was accepted at the Fisher  
01:52 20 trial?

21 A I have no comment on that. I suspect so.

22 Q They both testified?

23 A Fine.

24 Q The jury accepted their evidence?

01:52 25 A Yes, I have no reason to dispute your assertions,



1           sir. But I certainly didn't dispute what they had  
2           to say, I just took it and put it in the context  
3           of the other information that we had.

4           Q       I'm gonna suggest to you that your  
01:52 5           cross-examination of the two of them, or your  
6           examination, if I can use your word, which I would  
7           suggest was exceptionally skilful, was not the  
8           same skill you took to cross-examining or  
9           examining Larry Fisher?

01:53 10          A       As I mentioned to you, sir, the quality of the  
11           questions you ask a particular witness is often  
12           informed by the amount of information that you are  
13           able to collect, so that you can frame your  
14           questions accordingly. Admittedly, when I  
01:53 15           questioned Larry Fisher -- or I'm sorry. I had a  
16           certain body of information. As you're aware,  
17           following the initial examination we sought to  
18           question him further as more information became  
19           available, that request was denied.

01:53 20                       I suspect, if a student of  
21           advocacy were looking at the two examinations,  
22           they may note some differences, but I attribute  
23           that to just the narrowness of the issues and  
24           then, secondly, the body of the information I had  
01:54 25           to frame my questions.



1 Q Well, I don't want to go through it in horrific  
2 detail, but if I can get to 010358. Now this is  
3 the interview on the 12th of July of '90 with  
4 Larry Fisher, his counsel was present, you're  
01:54 5 present and Sergeant Pearson are present, as I  
6 understand it?

7 A That's correct.

8 Q And since it was gone through before I don't want  
9 to spend a great deal of time going page by page,  
01:54 10 but I want to deal with it a little bit, and  
11 you've gone through it recently and I want you to  
12 correct me if I'm wrong. And I'd ask you, if you  
13 could, to sort of pay attention to what I have to  
14 say, because I don't want to misstate it, if you  
01:55 15 think I'm wrong, correct me. But when I read it,  
16 the first 30 pages of it that deal with the --  
17 your -- his background, the weather that day,  
18 where he worked, and a bit about his wife where  
19 he's kind of bashing her a bit; at page 30 you  
01:55 20 talk about the toque; at page 31 you start  
21 questioning about the bus; at page 34, that deals  
22 with Linda and her drinking; 45 is Linda's  
23 statement; 50 is the McCorriston questioning where  
24 he says he had told him the truth and things like  
01:55 25 that, although later on there is a contradiction



1 on that, but I won't spend too much time; now 59  
2 he talks about his neighbourhood being safe; at 60  
3 he missed all the media about the murder; at 61  
4 he's shown a poster regarding the murder weapon,  
01:56 5 he says he saw one similar when he was picked up  
6 in Winnipeg, or he had seen one similar --

7 MS. McLEAN: Meaning the weapon?

8 BY MR. WOLCH:

9 Q -- yes, that's correct, the murder weapon; at 63  
01:56 10 there's questions about knives, just general  
11 questions; at 66 he recalls Linda's accusations;  
12 69 about whether or not Linda knew certain things  
13 he'd done, contact with women, things like that;  
14 at 74 we get on to his work history, talking again  
01:56 15 about Linda's statement; at 77 it was a Friday, he  
16 was at work; at 78 cars; at 82 he didn't have a  
17 role in the death of that woman; and at 82 you say  
18 how should you respond to allegations it was  
19 Fisher; at 87 he says he's a likely suspect; at 88  
01:57 20 you try to get him to recount being with the  
21 police and where he was on January 31st; at 89 he  
22 agrees, that he is saying under oath he didn't do  
23 it, and then you talk about the horrible media  
24 things happening; and then at 107 he denies he was  
01:57 25 ever in the alley; he volunteers at 108 that he



1           used train tracks for Avenue H, but you never  
2           asked any questions about (V4)---; at 111 he  
3           denies assaulting or stabbing that woman; and 113  
4           about his beatings in Headingley; 114 he doesn't  
01:57 5           know David; 115 he denies the murder; and 115 also  
6           he got a job through the Cadrain kid; at 117  
7           Pearson starts asking questions, and he asks some  
8           questions that one might consider more probing  
9           than yours, but he does ask some questions, and  
01:58 10          then later his own counsel asks questions.

11                               Now I've only gone through it  
12          that way to try to, you know, hit the highlights,  
13          and some might have different views of the  
14          highlights, and in fact you might have as you've  
01:58 15          read it recently, but the difficulty I'm  
16          suggesting with that interview is that it was --  
17          there was no probing, there was no tough  
18          questioning, it was basically a friendly  
19          conversation, totally unlike the Linda Fisher and  
01:58 20          the Patterson. How would you respond?

21          A           That is your assessment, sir, it's not mine.

22                               One of the things that an  
23          interviewer does, or I do, is respond to the  
24          particular subject at that date, time, place.

01:59 25          Larry Fisher presented himself as someone who was



1 not well, certainly quite nervous physically,  
2 emotionally, and the initial part of the interview  
3 was to put him more or less at ease. I needed to  
4 get him talking, and talking about items that  
01:59 5 were, quote, "non-threatening", so the tone of  
6 voice, perhaps the style of the conversation, were  
7 there.

8 Admittedly, at the time we  
9 didn't have a great deal of information about  
01:59 10 Larry Fisher, despite our efforts, and  
11 consequently the absence of information perhaps  
12 informed the extent to which we could probe.  
13 Subsequently, as more information became  
14 available, we sought to amplify that particular  
01:59 15 interview, but it didn't happen. I must take  
16 responsibility for that.

17 But that was my, my judgement  
18 at that time. When you have the goods, you use  
19 them.

02:00 20 Q So you --

21 A Sometimes, however, you need to introduce the  
22 topic gently and, that day, that was my decision.

23 Q Did you seek any professional help, that is from  
24 any psychiatrist or psychologist, as to how best  
02:00 25 to approach a serial rapist like Larry Fisher?



1 A I did not.

2 Q Do you think, with hindsight, that might have been  
3 beneficial?

4 A I guess, hindsight being 20:20, it's conceivable  
02:00 5 that if I had to do it again I might consider  
6 that.

7 Q Okay. Now I'm a little interested in your comment  
8 that Fisher was a little nervous, a little  
9 uptight, whatever your words were. I mean this is  
02:01 10 a man who's spent most of his life in jail, he  
11 hides in back alleys and rapes women, I'm  
12 wondering about his sensitivity to being nervous  
13 in talking to you? He's been in jail for all  
14 those years; it would suggest to me he's kind of  
02:01 15 tough?

16 A Yes, and in a prison environment, sir, there are  
17 certain rules, and my information was that he had  
18 been the subject of some physical and verbal abuse  
19 and threats and consequently within the  
02:01 20 penitentiary, the confines of a penitentiary or a  
21 psych centre, a place inhabited by folks who have  
22 been convicted of criminal offences, that could be  
23 a significant source of worry and concern. That  
24 was relayed to us.

02:01 25 Q Now when I went through what you questioned him



1 about I can find nothing about similar acts, the  
2 main focus of the allegation against him, because  
3 surely "Larry, did you do it?", is not likely to  
4 get "oh, yeah, sure I did." But what about the  
02:02 5 similar acts; why didn't you question him about  
6 that?

7 A There were some questions, sir, directed towards  
8 his recall of the events giving rise to the  
9 various convictions. The answers, as I recall  
02:02 10 them, was that he didn't have a specific recall of  
11 some of them, and I -- at the time I didn't push  
12 it.

13 Q Well why wouldn't you have taken the police  
14 reports that you had and say "look, here are the  
02:02 15 facts, here is your own statement, here's what you  
16 admit, tell me about your method of how you commit  
17 these things?" Why wouldn't you go down that very  
18 obvious route?

19 A At this point in time, sir, I don't recall why I  
02:03 20 didn't choose that particular route. On that  
21 date, time and place, I did not.

22 Q What about the coat? I mean, one of the really  
23 significant pieces of evidence in the Gail Miller  
24 murder was her coat and that the coat must have  
02:03 25 been off, and etcetera, etcetera, and we know



1 Larry Fisher had his victims lying on coats; why  
2 wouldn't you at least explore how he used his  
3 victims' coats?

4 A My initial questions to Mr. Fisher did not elicit  
02:03 5 the type of response that prompted that follow-up.

6 Q Well, what was the harm in saying "Larry, I read  
7 your police reports, you have the victims lying on  
8 their coats, why do you do that? What, do you  
9 always do that, Larry, why? Why do you take  
02:04 10 things, Larry?" That whole area is totally left  
11 out?

12 A It may well be, sir, that I had recognized that  
13 and sought to deal with it later. It did not  
14 happen.

02:04 15 And as for being like Clarence  
16 Darrow, certainly the proof is in the pudding, and  
17 perhaps the pudding of Clarence Darrow wasn't in  
18 evidence on that date. Some days you have good  
19 days, some days you don't.

02:04 20 Q No, but I guess what I'm saying is you're Clarence  
21 Darrow questioning Linda Fisher and John  
22 Patterson, and then when you're questioning Larry  
23 Fisher you're barely having a little session with  
24 him?

02:04 25 A That's your assessment, sir.



1 Q But you, assuming that you are correct that it was  
2 just a bad day or whatever, do you see how others,  
3 looking at it, might come to the conclusion Larry  
4 Fisher had a walk in the park and the people on  
02:04 5 David's sort of side got grilled up and down?

6 A That's, that's your view, I can understand how you  
7 might come to that conclusion.

8 Q And if I can go to 010014. This is a letter of  
9 August the 9th of '90 to the regional deputy  
02:05 10 commissioner, Corrections Canada, and if you can  
11 just go to the next page it's signed by Mr.  
12 Corbett. Go back to the first page, he says:

13 "On behalf of ... counsel ...",  
14 and talks about the application of David  
15 Milgaard:

16 "... Larry Fisher ... was being  
17 investigated by the Justice Department  
18 in relation to the murder of Gail  
19 Miller. In addition to his photograph,  
02:05 20 the C.B.C. published a list of his  
21 offences, all of which related to sexual  
22 assault or indecent assault. The  
23 content of the documentary, the host's  
24 narrative and the juxtaposition of the  
02:06 25 interviews could leave the uninformed



1 viewer with the impression that Larry  
2 Earl Fisher was involved in the death of  
3 Gail Miller."

4 I'm not sure, maybe "uninformed" could have been  
02:06 5 "informed", but in any event. Next paragraph:

6 "Recently, departmental  
7 officials and the R.C.M.P. ...",  
8 that being yourself:

9 "... requested and obtained an interview  
02:06 10 with Mr. Fisher. He was co-operative  
11 throughout and endeavoured to respond  
12 fully to the questions we asked."

13 Now is that based on how you looked at it?

14 A I think, by and large, yes. I say:

02:07 15 "... endeavoured ...",  
16 or it said:

17 "... endeavoured to respond fully to the  
18 questions we asked."

19 It was not an easy interview in the sense that  
02:07 20 Mr. Fisher was in some pain throughout, or  
21 certainly appeared to be in some pain or some  
22 discomfort from a medical condition quite apart  
23 from the apprehension, and that may have  
24 informed, perhaps, some of my perceptions as the  
02:07 25 interview proceeded.



02:07 1 Q Okay. I'm just a bit concerned that here you are  
2 sending out a letter saying that, you know, any --  
3 you know, the view that Larry Fisher was involved  
4 is one that's uninformed, and then saying this is  
5 our cooperative man who is attempting to just, you  
6 know, respond fully to us.

02:08 7 A On the basis of the information then available to  
8 us, sir, Larry Fisher, at that time, had not been  
9 implicated in the death of Gail Miller. The  
10 thrust of the letter was to bring to the attention  
11 of the prison officials certain facts, and Mr.  
12 Corbett did that.

13 COMMISSIONER MacCALLUM: Did you draft the  
14 letter for Corbett?

02:08 15 A I probably had a hand in it, but I -- I may have.  
16 If I -- can you flip to the next page, please?

17 BY MR. WOLCH:

18 Q Well there's --

02:08 19 A I'm not certain. What I suspect would probably  
20 have happened is that, at the very least, I would  
21 have seen the -- a draft of the letter. It is  
22 possible I drafted a portion of it or contributed  
23 to it.

24 Q Yes. The line that says:

02:09 25 "Based on the information,



1                   obtained by my official ...";

2                   'my official' would be you?

3           A           That's correct.

4           Q           Now I want to talk briefly about Nichol John. In

02:09 5                   the Larry Fisher trial, and even the appeal, one

6                   of the points that the prosecutors made very

7                   powerfully was that Nichol John's May 24th

8                   statement was the only time that she indicated

9                   that she saw David Milgaard commit the murder,

02:09 10                  that she didn't say it before and she didn't say

11                  it after; is that something you agree with?

12          A           I -- yes.

13          Q           And the prosecutors made quite a bit of it. How

14                  did you look at the fact that never before and

02:10 15                  never after?

16          A           It was one of the difficulties or the challenges

17                  in that application. We tried to find out why or

18                  why not, and one of the aspects that occurred to

19                  us was that whatever Ms. John saw had a

02:10 20                  significant impact on her, and created an

21                  emotional upset that prevented her from repeating

22                  it.

23                                   Although she did not repeat

24                  it, on the basis of my observations of her, and

02:11 25                  particularly June 1st interview, it was clear to



1 me that she was troubled by a recollection of a  
2 very traumatic event.

3 Q Did you ever consider the possibility she never  
4 saw anything?

02:11 5 A Yes.

6 Q I mean, I take it you might agree that had she  
7 come to the preliminary and remembered seeing a  
8 killing, that would have been significant?

9 A She --

02:11 10 Q Had she testified under oath --

11 A Yes.

12 Q -- that would have been very significant; wouldn't  
13 it?

14 A Yes.

02:11 15 Q Did you ever believe that she did testify at the  
16 preliminary hearing and recounted that she saw the  
17 murder?

18 A I don't recall her testimony at the prelim.

19 Q Well, it didn't, but I'm asking you if that was  
02:11 20 your opinion?

21 A No, it's not. I'm -- quite frankly, I'm not  
22 certain I understand your question?

23 Q Well did you understand, as the prosecutors and  
24 Fisher (sic) did, that the May 24th statement was  
02:12 25 the only time that she recounted seeing David



1 commit a murder?

2 A That's my understanding, yes.

3 Q Okay. Would it be fair to say, though, that you  
4 went on the assumption that she had seen David do  
02:12 5 it and had repressed it?

6 A I went on the assumption that she saw something.

7 Q Why wouldn't you consider that it was just  
8 suggestions given by Art Roberts?

9 A Based on the information that Ms. Demyen provided  
02:12 10 to me, I had no reason to believe or suspect that  
11 Mr. Roberts had suggested that narrative to her.

12 Q The questioning of Nichol John, with the showing  
13 of bloodstained clothes, etcetera -- well, first  
14 off, were you aware of that?

02:13 15 A I believe certain exhibits were showed to her.  
16 Whether or not she saw the bloodstained clothes or  
17 not I can't say for certain.

18 Q That might have had a traumatic effect on a  
19 16-year-old?

02:13 20 A Perhaps, yes.

21 Q And maybe that's what she's suppressing?

22 A I would be speculating to offer a view.

23 Q Well, now that you know she never saw a murder,  
24 perhaps that's what she's holding back?

02:13 25 A I know she saw something, sir, whatever it was I



1 can't speculate.

2 Q You know she saw something?

3 A She said she saw something.

4 Q And you accept that?

02:13 5 A I accept that.

6 Q So, to this day, you believe that she was looking  
7 into the alley?

8 A Yes, that's her evidence and it remains her  
9 evidence.

02:13 10 Q Well, there's lots of peoples' evidence that you  
11 don't necessarily accept, I'm asking you if you  
12 accept the idea that she --

13 A I accept the idea that Ms. Demyen or Ms. John saw  
14 something.

02:13 15 Q And --

16 A All of her responses signaled that she did.

17 Q And any explanation as to why she wouldn't have  
18 told the police, the first time they questioned  
19 her, that she saw something that morning?

02:14 20 A She would have to provide that explanation. There  
21 are a number of reasons why witnesses don't, on  
22 the first interview, indicate to the police all  
23 they know, and there are a myriad of examples of  
24 that. Some of them are innocent, and some of them  
02:14 25 are not, in terms of the explanations. Umm --



1 Q Did you do a critical analysis of her statement  
2 where she talks about, you know, "Mr. Roberts  
3 reminded me", or "it wasn't until he told me this  
4 that I understood that", or analysis?

02:14 5 A I examined her statement carefully, yes.

6 Q Were you troubled by the "I now remember, I now  
7 remember" kind of thing?

8 A I wasn't overly troubled by it.

9 Q Okay. I am concerned about, for example, your --  
02:15 10 if I could turn to 002950.

11 A There's one thing I should add at this point in  
12 time. The body of evidence that led to the  
13 conviction of David Milgaard did not include the  
14 introduction of her statement as evidence of the  
02:15 15 truth of its contents. You know, she was  
16 cross-examined on that and she, she distinctly  
17 disavowed or had no recall of it.

18 Q Okay. But Nichol John factored into the  
19 decision-making in David's application?

02:15 20 A Only to the extent that her testimony at trial,  
21 there were aspects of it that implicated David  
22 Milgaard, yes.

23 Q And you're telling me you didn't form the opinion  
24 that she -- or come to the conclusion that she had  
02:16 25 incriminated David at the preliminary?



1 A Excuse me, sir?

2 Q You didn't conclude, at any time, that she had  
3 implicated David at the preliminary hearing?

4 A I think some of her testimony at the preliminary  
02:16 5 certainly led to his committal, yes, it -- in  
6 combination with the other evidence.

7 Q All right, sorry, I'll rephrase that a bit: That  
8 her evidence at the preliminary hearing was that  
9 she saw the killing, something significant like  
02:16 10 that?

11 A No, that, I didn't take that from the prelim, no.  
12 Why?

13 Q Yeah. I have a document here, and this is a memo  
14 to file by yourself, and just this little bit  
02:16 15 here:

16 "I also asked her whether she  
17 had given further consideration to the  
18 suggestion of Dr. Lee Pulos that she  
19 obtain professional assistance in  
02:16 20 dealing with the repression of the  
21 murder that she had witnessed 22 years  
22 ago."

23 Now are you not virtually saying to her "you have  
24 repressed a murder"?

02:17 25 A Yes, I am. In that sense, that perhaps does not



1 accurately reflect the situation, but I think I  
2 was probably paraphrasing Lee Pulos' words instead  
3 of my own.

4 Q Okay. Now very briefly with Ron Wilson; you were  
02:17 5 not impressed with his recantation at this time?

6 A I was not.

7 Q Did you deal with it as a second recantation that  
8 might -- by that I mean did you look at his May  
9 23rd and 24th statements as being a first  
02:18 10 recantation?

11 A I looked at the May 24th statement as a  
12 development of the initial March '69 statement.  
13 When I talk, or when I considered recantation, I  
14 considered it in the context of what his trial  
02:18 15 testimony was, and that was a statement taken  
16 under oath subject -- or that was evidence under  
17 oath.

18 Q Okay. Were you concerned about the lack of  
19 information that you received regarding the  
02:18 20 treatment of John and Wilson in the crucial days  
21 when the statements were taken?

22 A Well, I received information in conversations with  
23 the officers that satisfied me that their  
24 behaviour towards John and Wilson was appropriate.  
02:19 25 I believe that I'd requested certain notes, but



1           those notes could not be found, but I did find  
2           some reports. And my conversations later on, I --  
3           with Ms. John and with Mr. Wilson did not indicate  
4           to me that the officers acted inappropriately in  
02:19 5           terms of the questioning of those witnesses.

6           Q       Okay. Okay. If I can get 002108. This is a memo  
7           to file on June 27th of '90, and you say:

8                       "While in Saskatoon, I  
9                       reviewed the entire police file. There  
02:20 10                      were not any notes or records relating  
11                      to the polygraph examinations of Ms.  
12                      John nor Mr. Wilson. Occurrence reports  
13                      dated May 25 ... indicated that  
14                      polygraph examinations ..."

02:20 15           were taken on May 23rd, '69. Were you not  
16           concerned about the lack of notes of any type?

17           A       I wouldn't say there was a lack of notes of any  
18           type. There wasn't a record of the polygraph, and  
19           I think the explanation provided to me was that  
02:20 20           Art Roberts from Calgary had conducted the  
21           polygraph, and whatever materials he had he  
22           returned with them. Certainly the polygraph notes  
23           and things like that did not form part of the  
24           trial record and did not, as I understood it, set  
02:20 25           out any, quote, "new information". Whatever new



1 information was generated as a result of the  
2 interviews was the subject of statements by Ms.  
3 John and Mr. Wilson and those had been recorded  
4 elsewhere.

02:20 5 Q You found out that certain interviews were taped;  
6 were they not? I think Detective Karst told you  
7 that he taped Ron Wilson?

8 A He may well have, but I don't believe the tapes  
9 were available at that time.

02:21 10 Q I agree with you on that, but you were aware that  
11 they were taped?

12 A I think so, yes.

13 Q Did lack of information like that trouble you at  
14 all, that there seems to be a vacuum in terms of  
02:21 15 what was said to these kids, what was told to  
16 them, tapes are gone, tapes in the hotel are gone,  
17 it's all missing, there's nothing there. Did that  
18 concern you?

19 A Well, some 20 years after the events or after the  
02:21 20 case has been closed and it has gone to the  
21 Supreme Court of Canada, you know, I was quite  
22 pleased to find as much as I did because being  
23 aware of some of the destruction policies of  
24 certain police forces, quite often that material  
02:22 25 is disappeared, or disappears.



1 Q I appreciate that, but it would seem that much of  
2 the stuff that wasn't anywhere as near as  
3 important as the crucial days is present, that's  
4 the point I'm getting at.

02:22 5 A You know, I have no comment. I wasn't overly  
6 concerned, no.

7 Q Now, when we started off this morning you talked  
8 about the duties of a Crown attorney and the role  
9 of a Crown. In the course of the investigation  
02:22 10 you came across Kenneth Cadrain; correct?

11 A I believe I did.

12 Q The five or six-year-old?

13 A Well, he was five or six at the time.

14 Q Yeah. And 20 years later he was remembering  
02:23 15 things that no one ever talked to him about. How  
16 do you reconcile putting that type of evidence  
17 forward with the duties of a Crown in assessing  
18 what evidence should go forward?

19 A Well, I believe Kenneth Cadrain and his statements  
02:23 20 surfaced on the second application; did they not?

21 Q Yes. I guess what I'm getting at, is Mr. Beresh  
22 tendered that at Fisher's trial and the  
23 prosecutors there said, you know, give Cadrain a  
24 little more time and he'll solve the Lindbergh  
02:23 25 kidnapping, they made fun of it, it was so silly,



1 but you talked about the duties of the Crown and  
2 I'm wondering how you could reconcile that with  
3 bringing forward such tenuous evidence?

4 A Sir, the decision to bring it forward was not  
02:23 5 mine, it was a decision that was taken and it went  
6 in for what it was worth.

7 Q Well, okay, how about Ron Stickel, the guy who  
8 heard a confession while David was in jail, he was  
9 helping at Smitty's.

02:24 10 A Same. I mean, what I think the counsel at that  
11 time wanted to do was to bring as much evidence as  
12 existed, or as much information as existed before  
13 the court so that the court could have the benefit  
14 of it and give it whatever weight it thought it  
02:24 15 deserved.

16 Q Well, if it has no weight, why are you putting it  
17 forward?

18 A I did not put it forward in the first place.

19 Q You have Ben Dozenko who testified in the Supreme  
02:24 20 Court to a confession, the Supreme Court doesn't  
21 even mention it it was so ridiculous.

22 A And you have Launa Edwards. I mean, there were a  
23 number of witnesses who came forward who provided  
24 testimony. You have Ron Wilson who was cited in  
02:24 25 the face of the court for contempt. I mean, we



1 could debate, sir, but simply stated, there was a  
2 body of information that was placed before the  
3 court for its determination. It wasn't up to me  
4 to make that assessment, it was up to me to  
02:25 5 facilitate getting the witnesses here and  
6 arranging for the collection of information that  
7 counsel involved in the reference thought  
8 desirable. That was my role and that's what I  
9 did.

02:25 10 Q Well, can you appreciate, sir, from the  
11 perspective of those who had it right as to who  
12 committed the crime and who didn't, that you're  
13 going after -- you are producing Ken Cadrain, Ron  
14 Stickel, Ben Dozenko, spending time and money  
02:25 15 galore trying to hypnotize Nichol John, and not  
16 even asking Larry Fisher about his similar acts  
17 might cause those people to think that you have an  
18 agenda or a bias?

19 A Mr. Wolch, you had an opportunity, and you did, to  
02:25 20 correct whatever deficiencies there were in my  
21 examination of Mr. Fisher at the Supreme Court  
22 reference.

23 Q Exactly, but if you have your way there wouldn't  
24 have been a reference, that's the problem.

02:26 25 A Mr. Wolch, I'm not the problem. The problem is



1           that an applicant under a Section 690 has an  
2           obligation to produce certain quality of evidence  
3           to persuade the minister to grant a remedy. My  
4           task is simply to verify that information and  
02:26 5           where the information is found lacking my job then  
6           is to report. I am not the opposition, I am not  
7           the enemy, it's as simple as that. To the extent  
8           that we get full co-operation and assistance from  
9           both the applicant and the Crown, the quality and  
02:26 10          the speed with which we do our job proceeds at a  
11          fairly good pace, but apart from that, my task is  
12          simply to investigate and to report.

13        Q       I want to deal with the issue of disclosure and  
14                it's my intention, Mr. Commissioner, to have a  
02:27 15          tape played. Have you seen the tape from the  
16          Supreme Court?

17        A       Of what, sir?

18        Q       The tape of the argument presented as to the  
19                re-enactment of the murder of Gail Miller. Have  
02:27 20          you ever seen it?

21        A       I may have seen -- there was a TV version.

22        Q       No, it's not a TV version. It's about 15 minutes  
23                I think, I'm not sure, but I would like to play  
24                it. It will save me a lot of time asking you  
02:27 25          questions, it will cut it down by about a 10th.



1 I'm going to ask you some questions after it. If  
2 you can just watch this tape for about 15 minutes.

3 TRANSCRIPT OF NARRATION OF VIDEOTAPE REENACTMENT

4 "A single portrayal of the evidence  
09:30 5 given at the trial of David Milgaard in  
6 January of 1970 is virtually impossible  
7 because of the many conflicting versions  
8 given by the witnesses Nichol John and  
9 Ron Wilson. This videotape attempts to  
09:30 10 provide the viewer with a sense of the  
11 area in which the crime occurred and to  
12 portray the alleged encounter with Gail  
13 Miller.

14 It was unclear as to whether  
09:30 15 this alleged encounter occurred on  
16 Avenue O or Avenue N between 21st and  
17 20th Streets in Saskatoon, so both  
18 versions are shown. In the case of the  
19 encounter on Avenue N, reliance was  
02:28 20 placed on the statement given by Nichol  
21 John on May 24th, 1969, although her  
22 evidence was considerably different at  
23 the trial.

24 In his closing address to the  
09:46 25 jury, the Crown Attorney said the



1 following:

2 "Now, I'd like first to outline the  
3 Crown's theory of the offence. The  
4 evidence is that the girl, Miss Miller,  
09:46 5 was standing at her residence home, 130  
6 O South between, as I get it, 6:35 and  
7 6:45 the morning of the murder. It must  
8 be inferred that she set off on foot for  
9 the bus line on 20th down either Avenue  
09:46 10 P - excuse me, Avenue O or Avenue N, one  
11 or the other. She had to go south from  
12 her residence, and the Crown suggests on  
13 the evidence that it was down Avenue N  
14 proceeding southward on the west side of  
09:46 15 that avenue, proceeding towards 20th  
16 Street where the bus line is."

17 Although the Crown committed  
18 itself to the theory that Milgaard's  
19 encounter with Gail Miller occurred on  
09:47 20 Avenue N, this passage from the jury  
21 address shows that the Crown also had to  
22 allow for the possibility of an attack  
23 on Avenue O.

24 Let us begin with an  
09:47 25 examination of the Avenue O theory.



1 Gail Miller lived at 130  
2 Avenue O South which was slightly over  
3 one block in a straight line from a bus  
4 stop located on the southwest corner of  
09:47 5 Avenue O and 20th Street. There was  
6 also a bus stop located at the corner of  
7 Avenue N and 20th Street. If Gail  
8 Miller were to take the bus to work  
9 along 20th Street, common sense suggests  
09:47 10 that she would take the most direct  
11 route to the bus stop, straight along  
12 Avenue O to 20th Street.

13 As we see in this portrayal,  
14 Gail Miller would leave her home from  
09:47 15 the front door and would have the option  
16 of crossing over to the west side of the  
17 street, either at 21st or when she  
18 reached 20th Street. Here we see her  
19 crossing over to the west side of the  
09:48 20 sidewalk at 21st Street and then  
21 proceeding south.

22 At this point, according to  
23 the Crown theory, she would be stopped  
24 by the Wilson vehicle and Milgaard would  
09:48 25 ask her for directions.



1                               "Hi. Do you know how to get  
2                               to the Peace Hill area?"

3                               "No, I'm sorry."

4                               "Stupid bitch."

09:48 5                               Ms. Miller would then continue in a  
6                               southward direction towards 20th Street  
7                               and, according to Wilson and John, they  
8                               also proceeded in a southward direction,  
9                               arriving at an intersection on a street  
09:48 10                              with a center boulevard. Although 20th  
11                              Street has never had a center boulevard  
12                              or any sort of median, the Crown  
13                              nevertheless insisted that the street on  
14                              which the U-turn was made was 20th  
09:48 15                              Street. Here we see the point at which  
16                              the car has reached the intersection and  
17                              begun its U-turn as well as the location  
18                              of Gail Miller, given her forward  
19                              progress, after the encounter with the  
09:49 20                              vehicle.

21                              The evidence at trial  
22                              disclosed that once the U-turn was  
23                              three-quarters completed, the car became  
24                              stuck and Milgaard and Wilson got out of  
09:49 25                              the car and spent a considerable period



1 of time trying to get it unstuck. By  
2 the time the decision was made for  
3 Milgaard and Wilson to get out of the  
4 car and try to push it, Gail Miller  
09:49 5 would have already arrived at the bus  
6 stop on Avenue O and 20th. The evidence  
7 that Milgaard left on foot to get help  
8 toward where the girl had been walking  
9 in this version removes the possibility  
09:49 10 of an encounter with Gail Miller on  
11 foot. The alleged encounter with Gail  
12 Miller on Avenue O is simply not  
13 possible.

14 Moreover, David Milgaard was  
09:49 15 looking for St. Mary's Church as a  
16 landmark to guide him to Cadrain's home.  
17 Albert Cadrain lived one block south of  
18 St. Mary's Church and, if this alleged  
19 encounter had occurred on Avenue O, then  
09:49 20 the Wilson vehicle would have been stuck  
21 not more than 50 feet from this rather  
22 imposing landmark, a landmark which, at  
23 approximately 9:00 a.m. on the morning  
24 of January 31st, 1969, in fact did guide  
09:50 25 Milgaard to the Cadrain home.



1                   The Avenue N theory evolved  
2                   as a result of the statement given by  
3                   Mr. Henry Diewold who was the caretaker  
4                   of St. Mary's Church. Diewold testified  
09:50 5                   that he walked from the rectory of the  
6                   church to the church itself at  
7                   approximately 7:00 a.m. and as he walked  
8                   he had a clear view into the east-west  
9                   portion of the T-shaped alley. He said  
09:50 10                  that he saw lights of a car positioned  
11                  at approximately the stem of the T in  
12                  the alley which would be approximately  
13                  at the point where the police vehicle is  
14                  positioned in this photograph. As he  
09:50 15                  returned from the church to the rectory  
16                  at about 7:10 a.m. he saw the lights  
17                  again and saw a figure pass back and  
18                  forth in front of the lights.

19                   The evidence of Marie Indyk  
09:51 20                  suggests that either she or Mr. Diewold  
21                  is mistaken about the time. In order to  
22                  connect this car with the murder and  
23                  with Wilson, John and Milgaard, the  
24                  Crown had to explain how it would have  
09:51 25                  been in the alley facing in a westerly



1 direction. The way that this was done  
2 was to place Gail Miller walking in a  
3 southward direction on Avenue N headed  
4 towards the bus stop at 20th Street.

09:51 5 Here we see a portrayal of  
6 the route that Gail Miller would take to  
7 come directly out of her front door,  
8 head south on Avenue O to 21st, then  
9 east on 21st to Avenue N, then south on  
09:51 10 Avenue N toward 20th. With temperatures  
11 hovering about minus 40 Fahrenheit, it  
12 is difficult to conceive of why anyone  
13 would take the longest route possible to  
14 a bus stop. In any event, as Gail  
09:52 15 Miller proceeds south on Avenue N, we  
16 see and hear the alleged encounter with  
17 her.

18 "Hi. Can you tell me how to  
19 get to Pleasant Hill or downtown?"

09:52 20 "No, I'm sorry."

21 "Can we give you a ride  
22 somewhere?"

23 "No, thank you."

24 "Stupid bitch."

09:52 25 Her response to the trio is inconsistent



1 with someone who had lived in the area  
2 for several months, although at the  
3 trial Nichol John testified that after  
4 the encounter the vehicle went to the  
09:52 5 intersection, made a U-turn, got stuck,  
6 then got unstuck, then completed the  
7 U-turn and pulled over toward the curb  
8 before entering the alley behind the  
9 funeral home. In her statement of May  
09:52 10 24th, 1969 she told the police that  
11 after the alleged encounter the vehicle  
12 turned directly into the alley where it  
13 became stuck. She described a period of  
14 time spent trying to get the vehicle  
09:53 15 unstuck with Milgaard and Wilson in the  
16 vehicle. She then described both of the  
17 boys getting out of the car, trying to  
18 push and then ultimately going to seek  
19 help.

09:53 20 As we see in this portrayal  
21 of that statement, Gail Miller is long  
22 past the car and the entrance to the  
23 alley before either Wilson or Milgaard  
24 leave the vehicle. The Crown's theory  
09:53 25 of how this crime occurred did not



1 account for the forward progress of Gail  
2 Miller because in this, the most  
3 damaging scenario for Milgaard, Gail  
4 Miller is at 20th Street and, according  
09:53 5 to Nichol John's trial evidence, a  
6 considerably longer period of time was  
7 spent at the intersection and at the  
8 curb before actually heading into the  
9 alley. An encounter with Gail Miller by  
09:53 10 Milgaard after leaving the vehicle to  
11 seek help was simply not possible.

12 In spite of this, Nichol John  
13 then stated that she saw Milgaard  
14 encounter the woman that they had asked  
09:54 15 for directions, grab for her purse,  
16 struggle and then draw with his right  
17 hand a knife and begin several stabbing  
18 motions at this woman. He then  
19 supposedly dragged or moved this victim  
09:54 20 into the east-west portion of the alley,  
21 ultimately disappearing, as we see, to  
22 the right into the north-south portion  
23 of the stem of the T toward where the  
24 body of Gail Miller was ultimately  
09:54 25 found.



1                   Nichol John's recollection is  
2                   fuzzy after this point. She claims that  
3                   she then ran from the car, came back to  
4                   the car and saw Milgaard at the T  
09:54 5                   portion of the alley depositing a purse  
6                   in a garbage can. Somehow both he and  
7                   Wilson were then back in the car and  
8                   inexplicably it became unstuck and they  
9                   drove away enroute to the motel, the  
09:55 10                  Danchuks and then Cadraains.

11                   Aside from the fact that Gail  
12                   Miller's forward progress would have  
13                   precluded an encounter with Milgaard and  
14                   assuming that the car was stuck in this  
09:55 15                  area, there are several other factors  
16                   which defeat this theory.

17                   First, Gail Miller was  
18                   stabbed through her coat and not her  
19                   dress. This means that Nichol John  
09:55 20                  would also have needed to see David  
21                   Milgaard remove Gail Miller's coat, take  
22                   her dress down around her waist, replace  
23                   the coat and then stab her.

24                   Also, the police  
09:55 25                  identification officers testified that



1                   there was no sign of a struggle  
2                   beginning at one point and leading to  
3                   where the body was found and, in  
4                   particular, there was no blood in the  
09:55 5                   snow.

6                               In addition, identification  
7                   officers testified that there were no  
8                   signs of a car having been stuck  
9                   anywhere in the east-west portion of the  
09:55 10                  alley.

11                              The Avenue N theory,  
12                  according to the most damning version,  
13                  Nichol John's May 24th, 1969 statement,  
14                  simply does not work, and works even  
09:56 15                  less so on the basis of Nichol John's  
16                  evidence at the trial.

17                              The stunning aspect of this  
18                  case is that the Crown had substantial  
19                  information in its possession not  
09:56 20                  apparently disclosed to the defence  
21                  which conclusively establishes the  
22                  fiction of the Avenue N theory.

23                              1. Adeline Nyczai provided a  
24                  statement on January 31st, 1969 stating  
09:56 25                  that she saw Gail Miller alive between



1 6:35 a.m. and 6:45 a.m. dressed for work  
2 but without her coat on. She stated  
3 that Gail Miller usually left for work  
4 before 7:00 a.m. This witness testified  
09:56 5 at the trial.

6 2. Ann Friesen, another of  
7 Gail Miller's roommates whose statement  
8 apparently was not disclosed, said on  
9 January 31st, 1969 that Gail Miller left  
09:57 10 every morning between 6:40 a.m. and 6:45  
11 a.m., walked straight south on Avenue O  
12 to 20th Street and left by the front  
13 door.

14 3. Betty Hundt, another  
09:57 15 roommate, provided a statement on  
16 January 31st, 1969 stating that Gail  
17 Miller left every morning at 6:45 a.m.,  
18 going out the front door, and Miss Hundt  
19 believed that Gail Miller walked south  
09:57 20 on Avenue O to 20th Street.

21 4. According to a witness by  
22 the name of Mary Gallucci on the day  
23 before the murder, a pretty nurse  
24 travelled south on Avenue O to the bus  
09:57 25 stop at 20th. This is consistent with



1 the statements of Nyczai, Friesen and  
2 Hundt. Mrs. Gallucci also observed a  
3 construction worker wearing a yellow  
4 hard hat would come from south of 20th  
09:58 5 Street to the bus stop on Avenue O at  
6 approximately 6:45 a.m.

7 5. At 226 Avenue N South Mr.  
8 and Mrs. Arthur Merriman were waiting  
9 for a taxi that they had ordered for  
09:58 10 6:55 a.m. looking out their front window  
11 directly at the spot where Nichol John  
12 claimed that the car became stuck. They  
13 saw nothing.

14 6. Through the disclosure  
09:58 15 process, the reference case contained  
16 statements of many people who were out  
17 on the streets in the vicinity of the  
18 crime. No one saw a vehicle stuck and,  
19 if Wilson and John are to be believed  
09:58 20 that the car became stuck at the  
21 intersection of Avenue N and 20th, a  
22 considerable amount of traffic,  
23 including city busses, would have had to  
24 circumvent the car. The notion that  
09:58 25 neither Milgaard nor Wilson was able to



1 find any assistance to get the car  
2 unstuck is simply untenable.

3 7. George Jones, a student  
4 who lived on the southeast corner of  
09:59 5 Avenue N and 20th Street, left his home  
6 a few minutes after 7:00 a.m. and walked  
7 north along Avenue N to 22nd Street past  
8 the funeral home and the back lane. He  
9 saw nothing.

09:59 10 8. Another witness  
11 interviewed by police who lived at the  
12 southwest corner of Avenue N and 20th  
13 Street drove his truck north on Avenue N  
14 from 20th to 22nd Street past the  
09:59 15 funeral home and the alley at  
16 approximately 7:00 a.m. He saw nothing.

17 Several independent witnesses  
18 failed to corroborate the Avenue N  
19 theory. In fact, they contradicted it.  
09:59 20 The conclusion is that it, like the  
21 Avenue O theory, must fail.

22 Consequently, there is no  
23 credible evidence placing Milgaard at or  
24 near the scene of the crime when Gail  
10:00 25 Miller was killed."



1 VIDEOTAPE ENDS

2 Q Mr. Williams, is that a film that you haven't seen  
3 before?

4 A Certain aspects of it look familiar. I have no  
02:43 5 specific recall of having seen it, but I've heard  
6 those types of submissions in the past.

7 Q It's consistent with the general submission that  
8 was being made to you and the minister about the  
9 impossibility of the Crown theory?

02:43 10 A There was a submission about the impossibility of  
11 the Crown theory, yes.

12 Q Now, the first point I want to ask you about is  
13 the film talks about witnesses who weren't  
14 disclosed, the Merrimans, some of the roommates.  
02:43 15 Did you have that information?

16 A I don't believe I did. I'm not certain of having  
17 reviewed the Merriman's statements, etcetera,  
18 etcetera.

19 Q I mean, the Merrimans are I believe fairly  
02:44 20 important, I think one was called at the Fisher  
21 trial, but would you agree the Merrimans are very  
22 important based on what they say they were looking  
23 at at the right time?

24 A I think they have some relevant evidence. I don't  
02:44 25 know if I would call it very important. I think



1 one of the things to keep in mind is that having  
2 regard to the date, time and place and the  
3 conditions, whether it's foggy or not, it  
4 certainly would inform their ability to make an  
02:44 5 observation. That's a question that should go to  
6 the trial prosecutor. Certainly they appear to  
7 have some relevant information.

8 Q Okay. But were you aware of their information?

9 A Merriman doesn't ring a bell with me. I don't  
02:44 10 believe I was.

11 Q It would seem to me that that evidence, whether it  
12 is in front of Mr. Tallis or the applicants,  
13 should be out there and I'm just asking you  
14 whether you had it and didn't provide it or didn't  
02:45 15 recognize it or what?

16 A The name Merriman is a new one for me. I don't  
17 believe I came into contact with it.

18 Q Were you aware of Mrs. Gallucci at the corner and  
19 the roommates who indicated Gail Miller went out  
02:45 20 and down Avenue O?

21 A I was aware of the interviews of roommates who  
22 said that traditionally, or that was her usual  
23 route, but I don't believe their evidence went so  
24 far as to say that they saw her take that route on  
02:45 25 the day in question on January 31st.



1 Q When you were doing your assessment, did you come  
2 across the assault on (V4)---- (V4)---?

3 A I think I saw a -- I did see a brief witness  
4 statement or a statement about an assault on  
02:46 5 (V4)---- (V4)---, but it --

6 Q Did it not strike you as important that it  
7 occurred around the same time as Gail Miller's  
8 attack and within quite close proximity?

9 A Oh, I think it was about seven or eight blocks  
02:46 10 away, around 7:06, 7:07 a.m. The nature of the  
11 assault certainly wasn't quite as disastrous in  
12 terms of the assault as had occurred with  
13 Ms. Miller. I believe someone attempted to fondle  
14 or grope Ms. (V4)---.

02:46 15 Q Do you not accept that that's evidence that the  
16 defence should have in David Milgaard's case?

17 A I say, sir, that if the prosecution was aware of  
18 that and its relevance, they may well have given  
19 it, but, you know, if it wasn't given, then it's  
02:47 20 hard to make the link between something that  
21 happened a few minutes or around the same time  
22 several blocks away of that nature, that groping  
23 and the stabbing and robbery that took place  
24 between Avenues N and O.

02:47 25 Q It's 40 below. Are you going to find that many



1 men running around attacking women within seven  
2 blocks?

3 A Sir, I'm not going to speculate about what men are  
4 going to do.

02:47 5 Q Well, it's not speculation to suggest that perhaps  
6 Larry Fisher took the car back to Pambruns' and  
7 saw Ms. (V4)--- on his direct route home.

8 A Well, I guess we'll agree to disagree, sir.

9 Q Well, are you saying it's not relevant at least to  
02:48 10 be considered by the defence?

11 A Certainly if the Crown had linked it and provided  
12 it, yes, but it didn't happen.

13 Q Well, leave aside the Crown linking, and it could  
14 be inadvertence, it could be deliberate, I'm  
02:48 15 leaving that aside, I'm asking you if you think  
16 it's relevant.

17 A In today's climate post *Stinchcombe*, if the Crown  
18 had it, it would be under an obligation I think to  
19 disclose it.

02:48 20 Q You are saying it didn't have an obligation to  
21 disclose another woman being attacked 700 yards  
22 away in the same time frame where she's told it  
23 was the same attacker?

24 A I'm not certain she was told, sir, it was the same  
02:48 25 attacker.



1 Q Well, we have evidence to that effect. But were  
2 you aware of it?

3 A I became aware of (V4)---- (V4)--- at some point  
4 during the application, yes.

02:48 5 Q She came forward, the applicants found out through  
6 the media when (V4)---- came forward, but did you  
7 know before that is my question.

8 A I think I saw an occurrence report at some earlier  
9 time, yes, but I didn't make a link between the  
02:49 10 (V4)--- and the Gail Miller killing.

11 Q Did you not think the applicants should know about  
12 it?

13 A I did not.

14 Q There is a document that we've referred to here as  
02:49 15 the Mackie summary. Do you know the document I'm  
16 talking about? We've seen it hundreds of times.  
17 I don't know if you've seen it.

18 A Without having it on the board, I couldn't answer  
19 that.

02:49 20 Q I think it's 006739. I don't intend to go through  
21 it. If we can go to the -- I think it's the last  
22 page. It's the summary that sort of talks about  
23 the theory and then Nichol John be brought,  
24 etcetera, for either hypnosis or questioning or  
02:50 25 whatever it says. I'll give you time to look at



1 it. I thought you would have known about it.

2 A I believe I've seen that document a long time ago,  
3 yes.

4 Q Did you have that in your possession when you were  
02:50 5 doing your assessment?

6 A I'm not certain, sir. If I did, it would probably  
7 have ended up on the case on reference.

8 Q And do you see that document as significant? And  
9 if you want to take that -- a moment to read it,  
02:50 10 you can.

11 A Well, I think I better read it.

12 Q Pardon me?

13 A I better read it before I respond.

14 Q Mr. Commissioner, I note the hour, do you want the  
02:50 15 break now and maybe he can read it now?

16 COMMISSIONER MacCALLUM: Sure.

17 (*Adjourned at 2:50 p.m.*)

18 (*Reconvened at 3:13 p.m.*)

19 BY MR. WOLCH:

03:13 20 Q Mr. Williams, I trust you've had a chance to  
21 review that document?

22 A I have.

23 Q Might I ask you, prior to the first application  
24 being rejected, had you seen that document?

03:13 25 A I believe I saw either this document or something



1 similar to it.

2 Q Okay. Well there's nothing similar to it, I'm  
3 afraid, so --

4 A Well, must have been this document.

03:13 5 Q Do you know when you would have seen it?

6 A I can't put a specific time on it, sir.

7 Q Okay. What does it appear to be to you?

8 A It appears to be a combination of a timeline  
9 prepared by the police and, well, a potential --  
03:14 10 and it has some aspects of theory as to what might  
11 have occurred, and it also has some suggestions  
12 with respect to investigative avenues.

13 Q When you saw that document did you view it as a  
14 document of importance?

03:14 15 A I viewed it as a document that reflected the  
16 police's thinking at that point in time.

17 Q But --

18 A It, from my vantage point it refers to other  
19 documents which, such as statements and things of  
03:14 20 that nature, which I would expect to be disclosed,  
21 but this I see as kind of a working document that  
22 police officers sometimes prepare on large-sized  
23 cases.

24 Q Okay. If we can go to the last page of it, or at  
03:14 25 least the page of suggestions, it's on the top of



1 the screen if you like, Mr. Williams, if it helps.

2 Now the suggestion that:

3 "... John, Wilson and Cadrain be brought  
4 to Saskatoon where with all present the  
03:15 5 true story can be obtained ...",

6 even:

7 "... if hypnosis or polygraph are  
8 necessary."

9 How would you view that in your assessment?

03:15 10 A It's just, it's a proposed investigative step  
11 that's, I guess that contains the hope that  
12 additional information will be forthcoming either  
13 by way of polygraph or hypnosis.

14 Q Okay. Now what about the, higher up on the page,  
03:15 15 things like the:

16 "- Purse thrown in garbage on the way  
17 through the alley ... possibly when  
18 Nichol John returns to car and is picked  
19 up"

03:15 20 a bit higher on the page, there's all sorts of  
21 things there, but there is no evidence to back it  
22 up, it's just --

23 A Yeah, that's police theory or speculation.

24 Q Yeah, but do you not think it's problematic that  
03:16 25 Nichol John and Ron Wilson, to a lesser degree,



1           adopted that which is stated there to some degree;  
2           do you not see a problem in that?

3       A       No, I don't.

4       Q       You don't?

03:16 5       A       I mean, given the time that this was created, the  
6           police were perhaps speculating or wondering or  
7           hypothesizing as to what may have happened. To  
8           the extent that some of it has been confirmed by a  
9           witness, if it's plausible, it's plausible.

03:16 10      Q       So you don't see any difficulty with this  
11           'summary', as it's called, predicting what John  
12           and Wilson would say to some degree; you don't see  
13           a difficulty in that?

14      A       No, I don't. I mean just the mere fact that the  
03:16 15           summary exists, without any additional information  
16           that signals that something untoward happened, no  
17           I don't.

18      Q       Well, but doesn't it cause you to question your  
19           current belief that John saw something happen?

03:17 20      A       No, sir.

21      Q       It doesn't cause you to take a step back and say  
22           "eh, wait a minute, maybe what John is talking  
23           about is an adoption of what was suggested to  
24           her"?

03:17 25      A       The question is based on the premise that things



1           were suggested to her, and in my conversations  
2           with her I didn't get the impression that those  
3           suggestions were made, at least certainly not by  
4           Mackie.

03:17 5       Q       Well, or that Art Roberts made suggestions to her  
6           as to what she had seen, or things like that?

7       A       That's something that may have been put to Mr.  
8           Roberts but I had no evidence of it.

9       Q       So you're saying even today you think Nichol John,  
03:18 10       in spite of this, in spite of everything, what,  
11       saw a murder or something?

12      A       I'm saying today that based on my interviews with  
13       Ms. John, based on her responses to the questions  
14       and some of the responses outside of the  
03:18 15       questions, she saw an event which still -- or  
16       which gave her a very violent emotional reaction.  
17       That's what I am saying today.

18      Q       Okay. And where would Wilson and Milgaard have  
19       been when she saw it?

03:18 20      A       I don't know, maybe close by, I just don't know.

21      Q       And they wouldn't have seen it?

22      A       That's what she saw, I can't -- I can't speculate  
23       as to where they were or were not. Those were all  
24       matters that were presented to the jury, and those  
03:18 25       were matters for the jury to decide.



1 Q Well, so you're saying on a review, if something  
2 makes no sense at all, that one can say "the jury  
3 decided it" and that's the end of it?

4 A In the absence of any fresh evidence, sir, that  
03:19 5 signals that a jury finding -- in our system it's  
6 pretty hard to know what facts the jury accepted  
7 or not -- but you can argue that it's nonsensical.  
8 I have seen the suggested replay which sets out a  
9 -- two theories, I don't know what the jury  
03:19 10 accepted.

11 Q Well, let me ask you this; when you were finished  
12 with your investigation what was your view as to  
13 what happened?

14 A I recited in my -- my view is the evidence at  
03:19 15 trial signaled that there had been a  
16 confrontation, based on the testimony of Ms. John  
17 and Mr. Wilson, with a woman.

18 Q Well, I appreciate the evidence at trial,  
19 etcetera. Now in the *Fisher* case the Court of  
03:20 20 Appeal says, and basically that the evidence seems  
21 to be that Gail Miller walked out the door, she  
22 walked up the street, Fisher grabbed her with a  
23 knife and his hand over her mouth, dragged her in  
24 the alley, etcetera. There's nothing to  
03:20 25 contradict that in the sense that there is no



1 witness who should have seen something that didn't  
2 see something, there is no flaw in that, and we  
3 know it to be true.

4 What would be happening when  
03:20 5 David Milgaard killed her? She walked out the  
6 door and what happened? Surely you would have to  
7 address that when you're doing a review. What do  
8 you think happened?

9 A What I thought happened was simply a recitation of  
03:20 10 the testimony at trial.

11 Q Okay. Then help me. She comes out the door;  
12 where does she go?

13 A Whether she goes down Avenue N or O, she is  
14 confronted, she's taken to that location --

03:20 15 Q Well --

16 A -- and stabbed. The particular method or route  
17 that she takes, it's not up to me to speculate on,  
18 that's something that's before the jury. A  
19 decision was taken, in the absence of anything new  
03:21 20 or fresh, I'm not there to second-guess it.

21 Q Well the jury didn't know about the Merrimans, the  
22 jury didn't know a lot of things?

23 A I didn't know about the Merrimans, but that's a  
24 matter for the jury to decide.

03:21 25 Q But, once you find out about the Merrimans,



1           wouldn't it cause you concern?

2           A           I found out about the Merrimans today, sir. It  
3                       might have caused me concern, it depends, I'd have  
4                       to take a look carefully at their testimony and  
03:21 5                       their statements.

6           Q           Well do you not think the applicant is entitled to  
7                       assume that you would have all the material as the  
8                       Department of Justice?

9           A           I think that the applicant is entitled to assume  
03:21 10                      that we would make a conscientious effort to get  
11                      evidence relating to the points that they raised,  
12                      and I think the department is also entitled to  
13                      assume that we would get a full accounting and a  
14                      full presentation of the information relevant to  
03:22 15                      the issues that the applicant had collected.

16          Q           Well, much information is in the hands of the  
17                       authorities, is it not?

18          A           The --

19          Q           Such as the Merrimans, the roommates, Ms. (V4)---,  
03:22 20                      that's all in the authorities' hands and you have  
21                      access to that, or you should have?

22          A           And your question is, sir?

23          Q           Well, at the end of the day, surely -- and maybe  
24                      you don't -- I would think that you would have  
03:22 25                      some idea in your mind as to what happened; that



1 is she came out the door, something happened, in  
2 the Crown's theory, in your theory that turned  
3 down an applicant, what happened? You can't  
4 advance one, can you? Since it didn't, it makes  
03:23 5 it pretty difficult.

6 A I simply, sir, recite the theories that were  
7 advanced at trial and indicate to the -- that one  
8 of those theories was accepted by the jury.

9 Q I appreciate it was accepted, but if it makes no  
03:23 10 sense, surely you're going to look at it?

11 A That's your argument, that it makes no sense. I  
12 mean if -- and that argument is based on two  
13 specific scenarios which may have occurred, but  
14 something else may have occurred, but we'll never  
03:23 15 know for sure.

16 Q Well, of course we know for sure, because we know  
17 Larry Fisher did it. Why wouldn't we know for  
18 sure? Do you not -- you accept Larry Fisher did  
19 it; do you not?

03:23 20 A Yes, he's been convicted.

21 Q Well, you say he's been convicted, but do you  
22 accept it?

23 A Yes.

24 Q Okay.

03:23 25 A But something else happened that morning that



1 involved David Milgaard, Ron Wilson, and Nichol  
2 John, and it --

3 Q Like what?

4 A Like getting stuck in an alley, like confronting a  
03:24 5 woman, asking for directions and that kind of  
6 thing.

7 Q What --

8 A At or near that location.

9 Q Why --

03:24 10 A It's not up to me to validate --

11 Q Why --

12 A -- a Crown theory that was advanced at trial.

13 What it is up to me to do is to examine the

14 specific points raised by an applicant who

03:24 15 suggests that --

16 Q Why do you --

17 A If I may be permitted to continue?

18 Q Sure, go ahead?

19 A -- who suggests that there are specific

03:24 20 deficiencies.

21 And, for example, the  
22 exoneration of Mr. Milgaard by Dr. Ferris, that's  
23 something; the lying witness, that's something,  
24 and we look at the evidence in relation to that.

03:24 25 We are not expected to review every single aspect



1 of the case, and particularly aspects of the case  
2 that were squarely before the jury, in the absence  
3 of fresh evidence. That's the approach we've  
4 taken, that's the approach I took, and that is my  
03:25 5 answer to your question.

6 Q Okay. And you're satisfied a woman was approached  
7 and something occurred or didn't occur; I'm not  
8 sure?

9 A Ms. John testified that there was a confrontation  
03:25 10 between Mr. Milgaard and a woman.

11 Q And he stabbed her?

12 A I don't think she said that.

13 Q She saw a knife in the right hand and stabbing?

14 A That's -- is that her testimony at trial?

03:25 15 Q Of course not, but --

16 A Well, that's my point.

17 Q You're --

18 A Well --

19 Q You're saying that you believe there was a  
03:25 20 confrontation with some woman that morning nearby;  
21 why nearby?

22 A Based on --

23 MR. McLEOD: Mr. Commissioner, I --

24 COMMISSIONER MacCALLUM: Sorry?

03:26 25 MR. McLEOD: I think, I just pause for a



1 moment, just to, I think, reiterate the objection  
2 that I made this morning, that perhaps My Learned  
3 Friend again is persisting in asking Mr. Williams  
4 for his opinion as to what occurred, and Mr.  
03:26 5 Williams on quite a number of occasions now has  
6 advised that that's not his role, that his  
7 purpose was quite different. And I think we're  
8 just going over the same ground again and again  
9 and again, asking questions that Mr. Williams  
03:26 10 simply is not in a position to answer, because  
11 that was not his purpose or his role, and --

12 COMMISSIONER MacCALLUM: Yeah. What do you  
13 say to that, Mr. Wolch?

14 MR. WOLCH: Well I'm, in terms of his role  
03:26 15 advising the minister, I can't imagine how the  
16 person advising won't comment -- I'm not asking  
17 him to comment now -- not comment on, in terms of  
18 merits, on an assessment of whether the  
19 individual is innocent or guilty. That just  
03:26 20 makes no sense at all.

21 COMMISSIONER MacCALLUM: Well, I thought  
22 Mr. Wolch's objective was to demonstrate that,  
23 not what the witness thought now so much, but  
24 that in view of the facts which he, Mr. Wolch,  
03:27 25 takes to be incontrovertible, how could the



1 witness not think it at the time; i.e. that it is  
2 impossible that the Nichol John story was true or  
3 had any merit to it. So I -- I believe that was  
4 your objective; am I right?

03:27 5 MR. WOLCH: Oh, absolutely.

6 COMMISSIONER MacCALLUM: However he's, as  
7 you point out, Mr. MacLeod, he has suggested that  
8 repetitively with no success, so I suppose there  
9 comes a time when he'll move on.

03:27 10 MR. McLEOD: That's correct. Thank you.

11 MR. WOLCH: I'll move on.

12 BY MR. WOLCH:

13 Q And just to be sure that this document that's now  
14 on the screen, where it's suggested that what  
03:27 15 those facts are, does not --

16 COMMISSIONER MacCALLUM: We have another  
17 contributor here.

18 MR. LORAN: Mr. Commissioner, Pat Loran for  
19 the Saskatoon Police Service.

03:28 20 I think it's been put to this  
21 witness that the page of this document which is  
22 up on the screen now was created prior to the  
23 statements being made by Nichol John, Ron Wilson,  
24 and I don't know that that's a matter which has  
03:28 25 been established in evidence.



1 To the extent that Mr. Wolch  
2 wishes to put it forward as his theory in terms  
3 of when the document was created, that's fine,  
4 but I think it's maybe improper to suggest to the  
03:28 5 witness that it's been established in evidence as  
6 to when this document was created.

7 COMMISSIONER MacCALLUM: I didn't hear that  
8 suggestion being made.

9 MR. WOLCH: But I thought it was May 16th  
03:28 10 was agreed upon?

11 COMMISSIONER MacCALLUM: The best evidence  
12 we have is that it was made around May the 16th,  
13 but you are quite right, there has been no direct  
14 evidence of its date.

15 BY MR. WOLCH:

16 Q Well perhaps on that point, Mr. Wilson -- you see  
17 the last line here:

18 "Nichol John, Wilson and Cadrain be  
19 brought to Saskatoon where with all  
03:29 20 present the true story can be obtained  
21 ...",

22 even:

23 "... if hypnosis or polygraph are  
24 necessary."

03:29 25 Do you know of any other time when they were



1 brought to Saskatoon to see Art Roberts?

2 A I do not.

3 Q So this would have to predate it; wouldn't it?

4 A That's a reasonable assumption, yes.

03:29 5 Q Okay. Does it cause you concern though, in your  
6 assessment, that the possibilities suggested  
7 herein find their way into the statements of John  
8 and Wilson?

9 A The mere fact that the suggestion is or a theory  
03:29 10 is set forward there, some portions of which are  
11 repeated in the statements of John and Wilson,  
12 alone does not cause me concern.

13 Q Okay. Okay. There are only two other matters I  
14 want to canvass with you, Mr. Williams. The first  
03:30 15 is fairly brief, I think, and the second might  
16 take a few minutes.

17 I just want to highlight a  
18 document and see if you've seen it before, 165532.  
19 Now this is a letter dated March the 12th of '91  
03:30 20 to Kim Campbell, and if you'll turn to the last  
21 page, please, you'll see it's a letter from David,  
22 Joyce, Lorne, Maureen, and Susan Milgaard; do you  
23 see that?

24 A I see the signatures, yes.

03:30 25 Q Okay. Have you seen this letter before?



1       A       If you would go to the first page? I believe I  
2       have several years ago, yeah.

3       Q       This would have been the family's response to the  
4       turning down of the first application, and I won't  
03:31 5       go through it in detail, but it refers to the  
6       minister's letter and they talk about:

7               "... a gross miscarriage of justice.",  
8       and that:

9               "... your officials either ignored or  
03:31 10       profoundly misunderstood not only the  
11       substance of our application, but also  
12       the evidence at trial."

13       And they didn't particularize it. So it wasn't  
14       just a matter of the Milgaards going to the media  
03:31 15       with their position, they were going right to  
16       Ms. Campbell, saying "here, here's, you're  
17       wrong". And the first point is that they say  
18       that:

19               "The Department of Justice Did Not  
03:32 20       Undertake a Full Review"

21       And I just want to deal with this paragraph here:

22               "In December of 1988, we submitted to  
23       your Department the report of Dr. James  
24       Ferris, as well as the Affidavit of  
03:32 25       Deborah Hall. Dr. Ferris was not



1                   contacted, even by telephone, until  
2                   after we submitted the report of ...  
3                   Markesteyn in June of 1990, which was  
4                   ... eighteen months after the  
03:32 5                   application had been received by your  
6                   Department. Deborah Hall was not  
7                   examined by Department counsel until  
8                   November 6, 1989, which is nearly one  
9                   year after the application had been  
03:32 10                  submitted."

11                 Are those facts correct?

12             A       The facts are correct in the sense that the dates  
13                   recited are correct. However, the application,  
14                   although the application is dated December of 1988  
03:32 15                   the trial transcript and the prelim transcripts  
16                   did not arrive, I believe, before May of 1989, it  
17                   took some time to review it, and consequently that  
18                   informed the timing of the interview of Ms. Hall  
19                   which occurred in November of that year.

03:33 20                                 In relation to the Ferris  
21                   material, I think by August of that year we had  
22                   received certain reports about the value of Dr.  
23                   Ferris' opinion.

24             Q       Okay. But you see, rightly or wrongly, why this  
03:33 25                   might have caused the applicants or the Milgaards



1 to feel that matters were not being dealt with  
2 promptly?

3 A The -- I'm not certain what information the  
4 Milgaards knew, but you certainly knew, sir, in  
03:33 5 February of 1989, that the application was not  
6 complete and that we requested the trial  
7 transcripts, the prelim transcripts, and I believe  
8 some other materials in order to complete the  
9 application, failing which we would not be in a  
03:34 10 position to assess the claims of Deborah Hall.

11 Q Mr. Williams, perhaps I'll repeat the question so  
12 you understand it. Do you see how the Milgaards  
13 might have looked at this and come to the  
14 conclusion, and I said rightfully or wrongly, that  
03:34 15 there was an unreasonable delay on your part,  
16 looking at the time taken to speak to Ferris and  
17 Hall?

18 A That may be your view, it is not mine, sir.

19 Q Okay. But if you -- well they also put in a  
03:34 20 paragraph:

21 "You Have Re-tried the Case."

22 What was your view on this?

23 A I'm sorry?

24 Q What was your view on this:

03:34 25 "The clearest example of this is your



1 finding that Ronald Dale Wilson is not a  
2 reliable witness. Weighing evidence  
3 goes to the heart of the nature of a  
4 trial. The essence of Wilson's  
03:34 5 testimony--that is that he lied--is  
6 totally ignored."

7 Do you have any view on that?

8 A The evidence that Mr. Wilson brought by way of his  
9 June 4th, 1990 statement was not reliable and  
03:35 10 consequently it did not, in our view, dislodge his  
11 trial testimony, which was the subject of  
12 cross-examination, and it was up to the Minister  
13 to make a decision as to what weight, if any, she  
14 wished to give to the June 4th, 1990 statement,  
03:35 15 and I think she set out her reasons in her letter.

16 Q What would be his motive for lying?

17 A You'd have to ask him.

18 Q No, no, as you interpreted it? Normally in  
19 weighing credibility you weigh motive; why is  
03:35 20 somebody saying what they do?

21 A In my assessment of Mr. Wilson's various  
22 statements I simply pointed out the areas of  
23 divergence between what he was now saying and what  
24 he said at trial and what other witnesses  
03:35 25 confirmed. I did not speculate about what his



1 motives may be and I do not embark on that.

2 Q But is that --

3 A That's for others wiser than me to do.

4 Q Well, isn't credibility often determined by

03:36 5 motivation, like isn't that how you determine

6 credibility very often; what is the motive behind

7 what's being said?

8 A And that's a decision for the minister to take.

9 Q I mean Wilson was walking into perjury and

03:36 10 everything else?

11 A You're asking me to get into Mr. Wilson's mind,

12 and that's a journey I'm loath to undertake.

13 Q Well, I think you took it, but anyway we can turn

14 to the next page. I think you dealt with this,

03:36 15 they talk about your department not being

16 objective, and they give as an example Mr. Corbett

17 and the Elvis. I won't go through that, I think

18 you explained that the other day.

19 They talk about interviewing

03:36 20 of witnesses, etcetera, etcetera, and I think you

21 and I went through that in terms of you seemed to

22 be Clarence Darrow on a couple witnesses, and very

23 mild on another, and didn't question Mr. Fisher,

24 so I won't go through all that but they do state

03:37 25 that.



1 And then, if we can turn to  
2 the next page, any comment on this paragraph here  
3 that:

4 "Even more distressing,  
03:37 5 however, is your belief that the advice  
6 of 'independant' counsel somehow makes  
7 the process more palatable. It is  
8 ironic indeed that the advice you sought  
9 was from a former member of the  
03:37 10 judiciary. After all, what we sought in  
11 our application was to have the case  
12 essentially reargued in a Court of law.  
13 The enormous flaw in the thinking of  
14 your officials was that counsel for the  
03:37 15 applicant was not invited to participate  
16 in this, or for that matter, any other  
17 aspect of the case."

18 Any comment on that?

19 A Well you will recall, sir, on October 1st, 1990 a  
03:38 20 significant amount of time was spent with Justice  
21 officials and yourself in which you made  
22 submissions with respect to each of the grounds  
23 advanced in this application. It is the  
24 minister's prerogative to obtain advice from  
03:38 25 whatever source he or she deems appropriate.



1 Minister Campbell chose, in the circumstances of  
2 that application, to obtain the advice of a  
3 preeminent jurist, William McIntyre. That was the  
4 minister's decision. That is one of the  
03:38 5 prerogatives of the minister.

6 And in the context of you  
7 having had a full opportunity to present your  
8 submissions both verbally and in writing, that --  
9 the distress that your client felt is, although  
03:39 10 regrettable, perhaps reflects a misunderstanding  
11 of the entire process of the Section 690 as it  
12 then existed.

13 Q Well, okay. Go to the next paragraph, sir, it  
14 answers it:

03:39 15 "We have no idea what  
16 information was provided to ... Justice  
17 McIntyre, nor are we aware of the  
18 contents of his opinion. After our  
19 counsel met with your officials in  
03:39 20 Ottawa on October 1 ... it became  
21 abundantly clear that there were very  
22 different views with respect to the  
23 facts of the case. How one views those  
24 facts will, in large measure, be  
03:39 25 determinative of how one views the



1 application in its entirety. As you may  
2 be aware, the judicial system is  
3 uniquely geared to the situation where  
4 competing views of the facts of the case  
03:39 5 are presented for evaluation. Over  
6 time, we have come to believe that it  
7 would be best if the views of an accused  
8 (or the applicant in this case) be  
9 presented by someone other than a  
03:39 10 representative of the state, and  
11 adjudicated by an independent body, not  
12 someone who is retained by your  
13 Department."

14 Would you not agree that that makes sense?

03:40 15 A I don't agree.

16 Q The letter is quite lengthy, and I'm not going to  
17 go through it, it can be read. But if you go to  
18 page 37, it's page 6, Larry Fisher. If I can just  
19 highlight that:

03:40 20 "With respect to Larry

21 Fisher, it would appear that you have  
22 completely missed the point insofar as  
23 the relevance of this information is  
24 concerned. The jury was entitled to  
03:40 25 know that there was an extremely violent



1 serial rapist living in the basement of  
2 the home that Milgaard ultimately  
3 visited. Moreover, the jury was  
4 entitled to know that this individual  
03:40 5 had previously attacked two women who  
6 resided in that neighbourhood.  
7 Moreover, the jury was entitled to know  
8 that Larry Fisher took the same bus to  
9 work as did Gail Miller. It may have  
03:40 10 been a critical point in the defence of  
11 this case for the jury to not only  
12 conclude that someone else other than  
13 Milgaard may have committed the crime,  
14 but also be able to identify the likely  
03:41 15 perpetrator. The investigation done by  
16 your Department in this respect since  
17 the disclosure of the information about  
18 Larry Fisher has been wholly  
19 unsatisfactory. The essence of your  
03:41 20 conclusion dismissing this evidence is  
21 that you believe David Milgaard was  
22 able, without any prior knowledge, to  
23 imitate in many ways the modus operandi  
24 of Larry Fisher. It is simply beyond  
03:41 25 belief."



1 Do you take exception to anything in there?

2 A We now know that Larry Fisher committed the murder  
3 of Gail Miller. At the time, in the absence of  
4 the DNA evidence, there was insufficient  
03:41 5 information that linked Mr. Fisher to that murder.

6 Q You say "we" now, you mean "you" now know?

7 A As of 1997.

8 Q You know, but "we" implies others didn't know. It  
9 was clearly asserted in letter after letter Larry  
03:41 10 Fisher did it, it's only you that didn't know;  
11 isn't that correct?

12 A The mere assertion, sir, without a factual  
13 underpinning, does not provide evidence.

14 Q Well there was the similar act evidence that was  
03:42 15 accepted by the Court, there was Larry Fisher's  
16 wife that was accepted by the Court, and there was  
17 John Patterson who was accepted by the Court or  
18 the jury, there was all that; correct?

19 A Those things were accepted at trial, yes.

03:42 20 Q By the jury?

21 A Yes.

22 Q Yes. It was all available before?

23 A What was not available before, sir, was DNA  
24 evidence linking Mr. Fisher to Gail Miller.

03:42 25 Q Okay. There is one last subject I'd like to deal



1 with you. And, you know, we have had a fair bit  
2 of difficulty in determining what was going on in  
3 your department, and I understand the, you know,  
4 judgements and everything, but I do want to draw  
03:43 5 your attention that the minister wrote a book  
6 about this case, didn't she, or at least a  
7 chapter?

8 A There was a discussion in the minister's book --  
9 I'm not sure if my mike is on?

03:43 10 Q I think your mike is off. I'm not sure if that's  
11 a government ploy or is a --

12 A There are a number of sins that are laid at the  
13 feet of government, but perhaps a simple bad  
14 connection will correct.

03:43 15 She did write a book. She did  
16 include, in the book, some of her experiences in  
17 relation to the Milgaard application.

18 Q Did you read the chapter?

19 A I did.

03:43 20 Q Did you have any input before she wrote it?

21 A No.

22 Q She didn't come to you for advice or for comments?

23 A In terms of her book?

24 Q Well, the chapter, the factually accurate  
03:44 25 material, information?



1       A       I wasn't consulted on that.

2       Q       Okay. I'd like to put it on the screen, I don't  
3               think it is in the database, but I did give it to  
4               the -- to our friends over there.

03:44 5               COMMISSIONER MacCALLUM: I thought it was.

6               MR. WOLCH: If it isn't, I would be very  
7               happy -- Mr. Hodson, who knows everything, can  
8               tell us.

9               MR. HODSON: Do you want me to read it for  
03:44 10              you?

11              MR. WOLCH: I notice a --

12              COMMISSIONER MacCALLUM: Is it on the  
13              database, Mr. Hodson?

14              MR. HODSON: Well, there was one book,  
03:44 15              yeah. I think Mr. Wilson had used it and  
16              discovered that there was two different versions.

17              COMMISSIONER MacCALLUM: Oh, I remember  
18              that. I'd like the chapter put on the database,  
19              anyway, from whichever version. Yes, we have it,  
03:45 20              thank you.

21              MR. HODSON: The page numbering may be  
22              different.

23              MR. WOLCH: You'll be happy to know, Mr.  
24              Williams, this is the last thing I'm going to  
03:45 25              cover with you, so --



1 A That's just the beginning, there are still others  
2 lining up, Mr. Wolch.

3 MR. WOLCH: That's your counsel or several  
4 of your counsel.

5 BY MR. WOLCH:

6 Q If I can -- well, okay, Kim Campbell, *Time and*  
7 *Chance, The Political Memoirs of Canada's First*  
8 *Woman Prime Minister*; do you see that? Here is  
9 Chapter 10, *Doing the Right Thing*, a rather  
03:45 10 interesting title. There's some things I'd like  
11 to talk about here. She says that:

12 "In my almost three years as  
13 justice minister, I had to exercise a  
14 quazi-judicial authority, or act 'like a  
03:46 15 judge,' in a number of different  
16 contexts. The Milgaard case was the  
17 most difficult of all. After I left  
18 government following the 1993 election,  
19 I received a letter from a former senior  
03:46 20 official in Justice who had worked with  
21 me on the case. He wrote of his  
22 appreciation for my desire to 'do what  
23 was right, not what was politically  
24 expedient.' "

03:46 25 Were you the author of that letter?



1 A I was not.

2 Q Okay:

3 "... 'do what was right, and not what  
4 was politically expedient.'"

03:46 5 A Okay.

6 Q "The Milgaard case had shown me how  
7 incredibly difficult it can be to  
8 determine what the right thing is, and  
9 how politics can get in the way of doing  
03:46 10 it."

11 Okay? She then goes on to talk about being in  
12 Winnipeg, Meech Lake Accord, she's talking about  
13 the meeting with Joyce Milgaard. If you can turn  
14 the page. And I -- we've all, I think, seen that  
03:47 15 on TV, I'm sure you've seen it, it was played  
16 thousands of times, with Kim Campbell sort of  
17 pushing Joyce away; you've seen that?

18 A I saw the clip of the encounter between  
19 Mrs. Milgaard and Kim Campbell.

03:47 20 Q Okay. She says:

21 "As a decision-maker in a legal process,  
22 my role in this instance was akin to  
23 that of a judge. Unfortunately, people  
24 who would never have dreamed of  
03:47 25 approaching a judge thought it perfectly



1 acceptable to approach me -- after all,  
2 politicians are supposed to be  
3 accessible."

4 Would you say there's a problem when the  
03:47 5 decision-maker is an elected official?

6 A I'm sorry?

7 Q Well, Kim Campbell is elected?

8 A Yes.

9 Q She's accountable to people who believe they can  
03:47 10 call up their member of parliament and say what  
11 they want?

12 A Yes.

13 Q Okay. Do you see a difficulty though when she's  
14 also, as she says, being that of a judge?

03:48 15 A There are certain functions that ministers have  
16 that perhaps are incompatible. On the one hand  
17 they have a political constituency, but ministers  
18 of justice are unique in cabinet in the sense that  
19 as ministers of justice and in exercising the role  
03:48 20 of Attorney General, there's certain  
21 responsibilities that take them above the  
22 political fray and those responsibilities signal  
23 sometimes a different response in terms of the  
24 execution of their duty. Now, this is minister --  
03:48 25 this is Ms. Campbell's appreciation of her role



1 and to the extent that that was her view, that was  
2 her view. You know, I don't necessarily see a  
3 problem. I think there is a method under the  
4 existing Section 690 process and even under the  
03:49 5 former Section 690 process for an applicant to  
6 provide whatever submissions, whatever information  
7 that the applicant wished the minister to  
8 consider. There was a methodology, there was a  
9 way of getting that information there.

03:49 10 Q No, but I guess what I'm getting at is that most  
11 people would not consider approaching Justice  
12 MacCallum and saying, you know, you've got a case  
13 coming on, I want to tell you about this, because  
14 most of us understand a judge is a judge and you  
03:49 15 don't do that kind of thing, but politicians?

16 A The Minister of Justice and the Attorney General  
17 in the cabinet has a unique and special role.

18 Q She's still a politician?

19 A She's still a politician, but in the exercise of  
03:50 20 some of her duties, she's entitled to create the  
21 mechanism for access that she deems appropriate.  
22 Obviously she felt that the personal contact at  
23 that time was not appropriate.

24 Q Okay. Just scroll down to the -- I just want to  
03:50 25 touch on this here:



1 "In Canada, the right of the executive  
2 branch of government (the cabinet) to  
3 address miscarriages of justice derives  
4 from the royal prerogative of mercy."

03:50 5 I just want to pause there for a second. Is  
6 mercy a term that you think should be applied to  
7 690, or whatever number it is, applications?

8 A Well, there are two aspects to the royal  
9 prerogative of mercy and the quote that you refer  
03:50 10 to there refers to a different section of the  
11 *Criminal Code* which deals specifically with the  
12 royal prerogative of mercy, and I believe it was  
13 either 749 or 750, I haven't checked the latest  
14 *Martins* in terms of the renumbering. Quite apart  
03:51 15 from that royal prerogative which is referred to  
16 is a companion section which is Section 696 as it  
17 now stands, which was Section 690. That was the  
18 way, constitutionally, it has devolved down from  
19 the Queen into a dominion and into Canada as we  
03:51 20 now know it, so there still exists two separate  
21 heads of authority for granting what is referred  
22 to as a royal prerogative of mercy and there are  
23 circumstances in which someone who is properly  
24 convicted may be relieved of the punishment by the  
03:51 25 grant of the royal prerogative of mercy.



1 Q Okay. Well, I'm just quoting her words:

2 "It is to this power that people have  
3 recourse when they have exhausted all  
4 legal remedies. It is a cliché of our  
03:51 5 legal tradition that it is better for  
6 ten guilty men to go free than for one  
7 innocent man to be convicted."

8 Does that cliché have anything at all to do with  
9 the 696 application? It doesn't make any sense  
03:52 10 does it?

11 A No, I think what she's basically saying is  
12 repeating a cliché that's often reported, I don't  
13 see the context as you've read it and with the  
14 690, but it doesn't -- I just don't understand the  
03:52 15 connection you are trying to make, sir.

16 Q Well, I'm saying when you are doing an assessment,  
17 that cliché has no bearing on your assessment, you  
18 are not looking to see if, you know, they have,  
19 it's better for 10 guilty guys to go free.

03:52 20 COMMISSIONER MacCALLUM: Can we see the  
21 next page? Maybe there should be a new  
22 paragraph.

23 BY MR. WOLCH:

24 Q "The Department of Justice receives  
03:52 25 about thirty applications for review of



1                   alleged wrongful convictions every  
2                   year."

3       A       Yeah.

4       Q       If you can just scroll down a bit, she says:

03:53 5                   "The test on which the recommendation  
6                   for action is based is: "Is there a  
7                   reasonable basis on which to conclude  
8                   that there has likely been a miscarriage  
9                   of justice?"

03:53 10                  And that's correctly stated is it?

11       A       I believe so, yeah.

12       Q       She talks about Steven Truscott and how she was  
13                   influenced by a book, and I presume by the media  
14                   coverage, which is sort of ironic I would think,  
03:53 15                  that -- she's complaining about media, media,  
16                   media and says the case that inspired her was  
17                   Steven Truscott where she read a book professing  
18                   his innocence. Do you see some irony there?

19       A       I think there's a difference between a book which  
03:53 20                  is well researched and some of the articles we've  
21                  seen.

22       Q       Well, Truscott still hasn't been cleared?

23       A       Truscott is before the Ontario Court of Appeal.

24       Q       Believe me, I'm aware of it. If we can turn to  
03:54 25                  the next page, it's a fair discussion, a



1 discussion on Steven Truscott's case, she talks  
2 about her family and says:

3 "We had both been strongly influenced by  
4 *The Trial of Steven Truscott*, and  
03:54 5 Hall's..."

6 I take it that's Justice Emmett Hall,

7 "...critique seemed to us to be a clear  
8 rationale for the new trial. After my  
9 experience with the Milgaard case, I'm  
03:54 10 less certain of what I know about  
11 Truscott."

12 So Milgaard caused her to question Truscott,  
13 which is quite an interesting development. Now,  
14 at the bottom of the page:

03:54 15 "In mid-January 1991, I finally received  
16 the file. The materials covered a third  
17 of the large conference table that stood  
18 along one wall of my office. Looking at  
19 them, I decided to set aside the weekend  
03:54 20 of January 26 to review them."

21 And she goes on to say, I'll get to it, but how  
22 busy she had been. Now, the weekend to review a  
23 third of a large conference table, would you  
24 think that's adequate to review this case?

03:55 25 A What she said about her intention to set aside a



1 weekend and the amount of time that she spent are  
2 two different things.

3 Q Okay.

4 A Keep in mind that the minister was also assisted  
03:55 5 by her own advisors who participated in that  
6 process.

7 Q We're going to get to them in a second. If we  
8 just turn the page, I won't go through the first  
9 paragraph which talks about the Gulf War and how  
03:55 10 busy she was. Here she says:

11 "I enjoyed working in my Justice office  
12 on the weekend because hardly anyone was  
13 around. The office had a small kitchen  
14 where I could make coffee and put my  
03:56 15 lunch in the fridge. It was a  
16 comfortable environment in which to  
17 hunker down and focus on serious  
18 matters. Peter Lugli, my senior policy  
19 adviser, met me there on Saturday  
03:56 20 morning with Eugene Williams, the highly  
21 professional departmental lawyer in  
22 charge of the Milgaard file. Eugene's  
23 competence and encyclopedic knowledge of  
24 the section 690 files always impressed  
03:56 25 me. "



1           It's quite an endorsement you got there. I  
2           thought --

3       A       It's one of a few.

4       Q       I thought you only had about one file with her or  
03:56 5           something, before this, before Milgaard. I mean,  
6           this makes it sound like you were working with her  
7           quite regularly. I thought you never even talked  
8           to her.

9       A       What I meant --

03:56 10      Q       Until Milgaard you hadn't even talked to her.

11      A       No, it's not that I didn't talk to the minister,  
12           but I was the coordinator of the Section 690  
13           applications that went up. What it simply meant  
14           was that there were other lawyers who would  
03:57 15          perform work on the files, but in my capacity as  
16           coordinator, I would be in touch with the  
17           minister's office, but I wasn't on a first name  
18           basis with Minister Campbell, but I did have a  
19           fairly intimate knowledge of the files that went  
03:57 20          up because they went through my bailiwick.

21      Q       I'll skip the next paragraph which talks about Mr.  
22           Lugli, and then she says:

23                   "I told Peter and Eugene not to stick  
24                   around. As long as I could reach them  
03:57 25                   by phone for urgent questions, I



1 preferred to go through the materials  
2 all at once on my own. Later, Peter and  
3 Eugene came in to discuss what I had  
4 read up to that point, and we met until  
03:57 5 about 10:30 that evening."

6 Now, even though I think she puts it in a book, I  
7 guess I can't ask you about what you meant about  
8 that, I assume that's correct. I'm not sure why,  
9 but -- Mr. Commissioner, am I assuming correctly,  
03:58 10 that even though she puts it in a book that she  
11 met, that we can't ask what they talked about?

12 COMMISSIONER MacCALLUM: Well, I ask for  
13 submissions from Crown in Right of Canada.

14 MR. FRAYER: I don't think Mr. Wolch is  
03:58 15 right in his observations. The mere fact that  
16 she makes that statement in there doesn't give  
17 him the opportunity to go behind what the court  
18 has said.

19 COMMISSIONER MacCALLUM: Well, we mustn't  
03:58 20 confuse the question of privilege, which is  
21 waived here obviously, with one of constitutional  
22 prerogative, which trumps privilege clearly, so  
23 if it comes within the constitutional bar, there  
24 it is.

03:58 25 MR. FRAYER: That's our position.



1 COMMISSIONER MacCALLUM: Okay.

2 MR. FRAYER: Thank you, Mr. Commissioner.

3 BY MR. WOLCH:

4 Q Unfortunately she didn't go further in what she  
03:58 5 talked about, but anyway, so we won't talk about  
6 what you talked about until 10:30 that evening,  
7 but the next paragraph tells us:

8 "The entire weekend was spent becoming  
9 thoroughly familiar with the issues. It  
03:59 10 was all there -- the crime scene, the  
11 statements. The trial and appeal  
12 records. I found myself deeply affected  
13 by the sadness of the crime itself, the  
14 senseless and brutal murder of Gail  
03:59 15 Miller, and by the implications of  
16 whatever decision I would make for a man  
17 who had been in jail since he was 17  
18 years old. I went through it all,  
19 carefully making notes about the points  
03:59 20 I wished to pursue further."

21 She says:

22 "My sense after that weekend was that  
23 there just wasn't enough there to grant  
24 the application. However, this was a  
03:59 25 very serious matter, so I wanted to take



1           some time to reflect. There was another  
2           reason for delaying my decision. During  
3           the department's evaluation of the  
4           application, Milgaard's lawyers had  
03:59 5           publicly called into question the  
6           impartiality of Eugene and other  
7           government lawyers. Although I had seen  
8           no evidence of bias..."

9           She hadn't even talked to you I don't think, but  
04:00 10          anyway,

11           "...in order to ensure confidence in the  
12           integrity of the process, I decided it  
13           would be a good idea to retain "eminent  
14           counsel" -- someone of unimpeachable  
04:00 15           credentials and from outside the  
16           government -- to provide me with a  
17           second independent opinion. We had  
18           retained the Honourable William  
19           McIntyre, a recently retired justice of  
04:00 20           the Supreme Court of Canada and one of  
21           the country's leading criminal law  
22           experts, and I was waiting to receive  
23           his opinion. I had the benefit of his  
24           advice throughout the process."

04:00 25          Is that accurate, that she had the benefit



1 throughout the process?

2 A That's what the minister wrote. I have no facts  
3 to dispute it.

4 Q Okay. If we can just go a little further:

04:00 5 "A concerted effort was made by  
6 Milgaard's advocates to convince the  
7 public that ... Justice ... would be  
8 biased in favour of "the system."

9 And she talks about their job, etcetera,  
04:00 10 etcetera. And then at the bottom:

11 "After a series of meetings with my  
12 departmental officials, whom I  
13 cross-examined..."

14 I take it you were being cross-examined but we  
04:01 15 can't find out what she asked, okay:

16 "...posing questions and testing their  
17 arguments..."

18 It says your arguments.

19 A Testing their arguments.

04:01 20 Q Whose arguments are their arguments?

21 A Departmental officials.

22 Q So your arguments were being tested according to  
23 her?

24 A The arguments of the officials of the department  
04:01 25 were being tested.



1 Q Okay. Then she wrote:

2 "To advise ... that I ... concluded that  
3 a remedy..."

4 Turn the page --

04:01 5 "...was not appropriate in the  
6 circumstances."

7 Then she reviews the case, and I'm not going to  
8 go through it, but you can look at it, and the  
9 facts she gives are heading off to Saskatoon,  
04:02 10 plan to pick up Cadrain, arrived in Saskatoon,  
11 saw a woman wearing a dark coat, we got the  
12 stupid bitch comment in there, car stuck in the  
13 alley, Wilson and John left the car, free it by  
14 pushing, not succeeding, etcetera, etcetera, and  
04:02 15 it's all here anyway, but I don't want to take  
16 the time to read it all. Wilson carried on down  
17 the street, etcetera, etcetera, etcetera, and  
18 Nichol John pushing over beside David and David  
19 was cold and breathing heavily.

04:02 20 So that's holus-bolus  
21 accepting, well, whatever the Crown theory is, it  
22 doesn't say what street, but holus-bolus  
23 accepting it, and then it goes on:

24 "In due course they got the car moving  
04:02 25 and arrived at the Cadrain house."



1           You'll notice that there's a quantum leap there  
2           because we leave out the Danchuks, we leave out  
3           the Rasmussens, just straight to Cadraains. You  
4           see that?

04:03 5           A           Yes.

6           Q           Okay, if we can just turn the page, they talk  
7           about what occurred at Cadraains supposedly, the  
8           car getting repaired, leaving, and then we have  
9           the cosmetic bag being thrown out of the car. Did  
04:03 10          you ever realize that Nichol John -- that Gail  
11          Miller's cosmetic bag wasn't missing? I'll help  
12          with you that. At the Fisher trial the  
13          prosecutors dismissed it quite easily by saying  
14          you have the cosmetic bag in court, you have it in  
04:03 15          the picture, it never went missing. Did you ever  
16          consider that?

17          A           There was evidence at trial that Nichol John  
18          picked out something from the glove box which I  
19          believe was described as a cosmetic bag or case,  
04:04 20          that it was taken from her by David Milgaard and  
21          thrown out the window. My examination of various  
22          witnesses prompted me to conclude that there was  
23          no evidence that contradicted the fact that such  
24          an event took place. Whether or not the cosmetic  
04:04 25          case that was thrown out of the window belonged to



1           that of Gail Miller or not was not the issue. I  
2           assume there was an assumption at some point in  
3           time that it may have belonged to her, but that  
4           was the evidence as I understood it, but I wasn't  
04:04 5           aware of what was led at the Fisher trial.

6           Q       Okay. It talks about the statement that David  
7           supposedly made to Wilson which Wilson said, had  
8           recanted by then; correct?

9           A       He disputed that in his June 4th, 1990 statement,  
04:05 10           yes.

11          Q       Yes. And we now can understand that it was false,  
12           there's no way David confessed to a murder he  
13           hadn't committed, put a purse in a trash can;  
14           correct? You accept that?

04:05 15          A       I accept your submission, yes.

16          Q       Do you accept that -- when Ron says I lied about  
17           that, it's obviously a lie; is it not?

18          A       It appears as if he was mistaken, sir, in relation  
19           to Gail Miller. That's what he testified at trial  
04:05 20           and that's what Minister Campbell repeated in her  
21           book.

22          Q       Okay. Okay. It goes on to the motel -- next  
23           page, and, Mr. Williams, let me say that while I'm  
24           going through this fairly quickly, I invite  
04:05 25           anybody to read it in its entirety. It then says:



1 "Five issues, or submissions, were  
2 raised..."

3 And I want to deal with a couple:

4 "- that a statement was made by Wilson  
04:06 5 in June 1990, recanting some of his  
6 previous testimony;"

7 And:

8 "- that one Larry Fisher may have  
9 committed the crime and that knowledge  
04:06 10 of his other crimes might have had an  
11 impact on the jury;"

12 If we just turn the page, and go to the next  
13 page, which would be 189:

14 "The third submission called into  
04:06 15 question the reliability of the evidence  
16 given at trial by Ronald Wilson. It  
17 claimed that Wilson, after being coerced  
18 and manipulated by Saskatoon police,  
19 lied at the preliminary ... and ...  
04:06 20 trial. Wilson made statements dated  
21 March 2 ... May 23-24 ... '69, June 4,  
22 1990, and July 20th, 1990. In his June  
23 4, 1990, statement, he denied portions  
24 of his May 23 ... statement.

04:06 25 Nonetheless, the May 23 statement and



1 his comments during his ... interview  
2 place Milgaard in contact with a woman  
3 ... at or near the time it occurred.  
4 Although Wilson denied seeing a knife in  
04:07 5 Milgaard's possession in ... '90, he  
6 admitted in July that he saw a  
7 bone-handled ... knife."

8 Wilson also, in June of '90:

9 "...stated ... he began to implicate  
04:07 10 Milgaard after lengthy interviews by  
11 police in Saskatoon. However, in July  
12 ... '90 he acknowledged that he had  
13 forgotten that he ... implicated  
14 Milgaard in conversations with police in  
04:07 15 Regina before he arrived in Saskatoon,  
16 where he was again interviewed by  
17 police. I considered this oversight by  
18 Wilson to be very important in assessing  
19 the allegations of police coercion and  
04:07 20 manipulation..."

21 And in her letter she said, she stated:

22 "Mr. Wilson now states that he has no  
23 recollection of Nichol John's hysteria  
24 when he returned to the car, nor the  
04:07 25 incident involving a ladies cosmetic



1 case. Although twenty years have  
2 elapsed since this event, others who  
3 witnessed it vividly recall the cosmetic  
4 case incident. Mr. Cadrain and Ms. John  
04:07 5 also confirm events, which were the  
6 subject of Mr. Wilson's trial testimony,  
7 which Mr. Wilson no longer recalls.

8 With respect to the  
9 lie-detector test in Saskatoon that  
04:08 10 Wilson described at one point as a  
11 "sweat session," I wrote: "Mr. Wilson  
12 has acknowledged that the questioning  
13 was polite and courteous ... the tone of  
14 the interview was pleasant. Further, he  
04:08 15 noted that he was neither threatened nor  
16 induced by promises to provide the  
17 statement. He confirmed this at the  
18 preliminary inquiry, at trial and during  
19 his July interview." On the matter of  
04:08 20 Wilson's testimony I concluded: "The  
21 current retraction of Mr. Wilson of much  
22 of his trial evidence is unconvincing."

23 Now, she is finding a credibility finding about  
24 Mr. Wilson's recantation; correct?

04:08 25 A Yes. She wasn't convinced.



1 Q What legal background would she have had?

2 A The minister was a lawyer.

3 Q I know that, but what legal background?

4 A I don't know of her CV, sir.

04:08 5 Q Did she ever practice law?

6 A I don't know her CV.

7 Q You don't know if she practiced criminal law or  
8 any law at all?

9 A The minister was the Minister of Justice whose  
04:09 10 responsibility it was to give careful  
11 consideration to the evidence. She stated she did  
12 so. If you would like to challenge her  
13 credibility, I'm not the person who can assist you  
14 on that.

04:09 15 Q I just asked you a question.

16 "The fourth submission was the  
17 allegation that there was another  
18 possible and even likely perpetrator of  
19 the crime in the area, Larry Fisher.  
04:09 20 Fisher, who by the strangest of  
21 coincidences actually lived in an  
22 apartment in the basement of ...  
23 Cadrain's home, was subsequently  
24 convicted of a number of attacks on  
04:09 25 women. The attacks bore some



1 resemblance to the attack on Gail  
2 Miller. At the time of the first  
3 application, however, information was  
4 incomplete, and there was not then or  
04:09 5 later any evidence whatsoever directly  
6 linking Fisher to the Miller murder. I  
7 wrote, "The observation of Linda Fisher,  
8 his former wife, that her paring knife  
9 was missing at the time of the murder  
04:10 10 was fully investigated, in addition to  
11 other assertions. Neither Ms. Fisher's  
12 suspicions, which were conveyed to the  
13 police in 1980, nor other  
14 well-publicized assertions by her,  
04:10 15 provide any evidence to link Larry  
16 Fisher to Gail Miller's death.  
17 Ms. Fisher noted that the photo and  
18 knife similar to the murder weapon  
19 indicated a different handle type,  
04:10 20 colour and blade from her missing knife.  
21 However serious Mr. Fisher's criminal  
22 record may be, the entire record at  
23 trial and in this application reveals no  
24 evidence to connect him with the killing  
04:10 25 of Gail Miller."



1 So that was her finding; correct?

2 A Yes.

3 Q And it was something you agreed with?

4 A That was the minister's finding.

04:10 5 Q No, but you agreed with it?

6 A I had no reason to dispute it.

7 Q And the fifth submission, regarding that the  
8 impossibility, it's about the impossibility of him  
9 committing the crime:

04:10 10 "It is important to remember that the  
11 jury heard all the evidence at trial.  
12 The jury heard the witnesses, the  
13 counsels' addresses and a proper charge  
14 on this aspect of the case before they  
04:11 15 reached a conclusion. Indeed, this was  
16 one of the primary defences raised at  
17 trial. There is no evidence to suggest  
18 that their conclusion was probably  
19 wrong."

04:11 20 Now we get to something that I suggest might be  
21 considered fairly important.

22 "Since the remedies under ... 690 are  
23 extraordinary ... it has always been  
24 recognized that, in evaluating an  
04:11 25 application, the justice minister is not



1 bound by the rules of evidence. That  
2 is, the minister may take into account  
3 information that may not be admissible  
4 in a court. Such a piece of information  
04:11 5 was before me in considering the  
6 Milgaard case. You may have detected a  
7 gap in the trial evidence of ... John,  
8 who remained in the car when Milgaard  
9 and Wilson went for help. Wilson  
04:11 10 describes her "hysterical behaviour" ...  
11 but there was no clear explanation from  
12 her as to why that was so. Here is what  
13 John was able to say before the trial  
14 about the events of that morning.

04:12 15 On May 24 ... John made a  
16 statement to the police..."

17 And this goes through the statement, May 24th  
18 statement that we have certainly heard. Now look  
19 at this:

04:12 20 "At the preliminary hearing, John told  
21 essentially the same story as Wilson,  
22 and in addition described the events she  
23 had seen in the alley."

24 You see that?

04:12 25 A I see it.



1 Q How wrong is that?

2 A That's not my recollection of the prelim evidence.

3 Q That's seriously wrong isn't it? Very seriously.

4 I asked you earlier about that and you said it

04:12 5 would be very important that she had testified

6 under oath as to seeing the killing. Can the

7 minister be more wrong?

8 A That was the minister's perception of what had

9 happened at the prelim. I think that statement

04:13 10 is, does not reflect the facts at the prelim.

11 Q Well, but it's serious, isn't it, a serious  
12 mistake?

13 A It's a mistake, Mr. Wolch.

14 Q It's not only a serious mistake, but that's

04:13 15 information that she would have got -- well, I

16 guess I can't ask you whether you misled her or

17 not, so we'll move on about that --

18 A Mr. Wolch, you will recall that a portion of the

19 book indicates that she -- the minister had on the

04:13 20 table both the prelim transcript and the trial

21 transcript.

22 Q I appreciate that, but whatever it is, either she

23 misinformed herself or somebody misinformed her on

24 a crucial point. Whether the key, the only person

04:14 25 who says she saw the crime adopted it under oath



1 or didn't, it's a crucial point isn't it?

2 A It's an important point, sir, and it's -- there is  
3 a mistake in the text, but she goes on to reveal  
4 at the trial what transpired, and it's the trial  
04:14 5 evidence that formed the basis of the conviction.

6 Q Well, let's go a little further then:

7 "At the trial, however, she said that  
8 she couldn't remember the events  
9 involving Milgaard in the lane and his  
04:14 10 encounter with the girl. She was  
11 cross-examined on her statement before  
12 the jury, and the jury was properly  
13 directed that her statements at the  
14 preliminary hearing, which incriminated  
04:15 15 Milgaard, would constitute no evidence  
16 against him unless she adopted them and  
17 swore they were true."

18 That's just being made up or totally wrong or  
19 what?

04:15 20 A It's not accurate. I think -- I can't speak for  
21 her publisher or her editor.

22 Q Well --

23 A But I think the law is that unless she had adopted  
24 the statements or adopted the facts contained in  
04:15 25 her statement of May 24th at trial, you know, it



1 would constitute no evidence, but I wasn't asked  
2 to review this and --

3 Q It's not a matter of reviewing it, sir, it's just  
4 that she is positively asserting that Nichol John  
04:15 5 testified in the preliminary hearing under oath  
6 that she saw the killing, and the jury was told  
7 they have to ignore what she said at the  
8 preliminary under oath, both of which are totally  
9 wrong?

04:16 10 A Mr. Wolch, it says what it says, and I don't  
11 disagree with you.

12 Q But what --

13 A But that is the recollections, the memoirs, of a  
14 former minister. I don't know when they were  
04:16 15 drafted. They certainly don't reflect my  
16 understanding of the matter, and it says what it  
17 says, like I have no further explanation.

18 Q But the fact that Nichol John testified at a  
19 preliminary hearing that she saw a killing could  
04:16 20 have been very important in the minister's  
21 assessment?

22 A I'm not certain, sir, whether the facts recited  
23 there in the book were the identical facts that  
24 the minister considered during the course of her  
04:16 25 deliberations. She provided her ruling, or her



1 decision, in her February 27th, 1991 letter to  
2 you. If, subsequently, there was another recital  
3 in which she has gotten some facts wrong, so be  
4 it, but her February 27th, 1991 letter sets out  
04:17 5 the basis of her decision and the reasons she came  
6 to it.

7 It may be, later on, a slip of  
8 the pen or of different memory has produced this,  
9 but that's there for all to see.

04:17 10 Q Okay. If we could turn the page, then, to the  
11 bottom:

12 "A second application was made ... on  
13 August 16, 1991."

14 And then if we can just turn the page? I think I  
04:18 15 may have skipped a page, so just bear with me for  
16 a second.

17 It's 192 is where I want to  
18 be. Sorry, go back a page, please. It's my  
19 fault. Okay.

04:18 20 "Nichol ...",  
21 this is a follow-up to what the minister says:

22 "Nichol John was interviewed  
23 by Department of Justice lawyers during  
24 the investigation into the Milgaard  
04:18 25 application. She still claimed she



1                   couldn't remember some of the vital  
2                   details. It was clear from her  
3                   statement, however, that she saw  
4                   something on that early morning in  
04:18 5                  Saskatoon that affected her seriously  
6                   and that left her tormented by dreams  
7                   that involve a violent attack and  
8                   killing. During the interview, she drew  
9                   a sketch of the position of the vehicle  
04:18 10                and the T-shaped intersection of the two  
11                  adjoining alleys. It is an accurate  
12                  picture of the crime scene and  
13                  illustrates at least part of her earlier  
14                  testimony at the preliminary hearing as  
04:18 15                well as the accurate location of Gail  
16                  Miller's body."

17                Do you see any problem with that?

18           A       Well, I don't agree with some of the assertions of  
19                   fact in the sentence beginning:

04:19 20                "It is an accurate picture of the crime  
21                  scene and illustrates at least part of  
22                  her earlier testimony ...",  
23                  and I'll stop there, because I don't think it  
24                  illustrates her testimony either at trial or at  
04:19 25                the prelim, and I think that's just a repetition



1 of a mistake that was contained on the earlier  
2 page.

3 Insofar as the picture as it  
4 relates to a portion of the diagram that was  
04:19 5 tendered in evidence, it's fairly close, yes.

6 Q Well does it take into account she was shown the  
7 scene?

8 A I didn't realize -- well she was shown the scene,  
9 physically taken there. Yes, I think it does,  
10 so --

11 Q Well, wouldn't that take away from her accuracy of  
12 being able to draw something?

13 A It could inform that, yes.

14 Q But the minister, can I ask you if the minister  
04:19 15 would have known that, or is that --

16 A I don't know what's in the minister's mind at that  
17 time.

18 Q Okay. But she's got it wrong whatever it is,  
19 whatever it says, she's really having difficulty.  
04:20 20 But she says:

21 "When I made my decision on  
22 the first application, my twelve pages  
23 of reasons were communicated to ...  
24 Milgaard through his counsel, and once  
04:20 25 his counsel made them public, I made



1 copies available to anyone on request.

2 However, in the press commentary that  
3 followed there was very little reference  
4 to those reasons. The focus was on the  
04:20 5 hostile reaction of Milgaard's  
6 supporters and counsel to my decision."

7 Can you see why it was hostile? It was wrong,  
8 wasn't it?

9 A Excuse me, sir?

04:20 10 Q Well, look at, I'll follow in the paragraph:

11 "Interviews with Milgaard,  
12 his family, and his lawyers charged  
13 either that I got bad advice and didn't  
14 exercise due diligence, or that I was an  
04:20 15 active co-conspirator in this alleged  
16 injustice. These were serious charges  
17 and cast aspersions not only on my own  
18 integrity but on that of all my  
19 advisers, including a retired justice of  
04:21 20 the Supreme Court of Canada. One of  
21 Milgaard's lawyers, David Asper, accused  
22 the government of using McIntyre 'to  
23 legitimize its process by playing on his  
24 reputation and expertise in criminal  
04:21 25 law.' Well, it was perfectly true that



1 I sought McIntyre's advice to increase  
2 public confidence in the process. Asper  
3 went on to charge that I would not  
4 release McIntyre's opinion because it  
04:21 5 would reflect how tainted and slanted  
6 the evidence presented to him was.  
7 Suggesting that someone of McIntyre's  
8 integrity would ever consent to provide  
9 an opinion unless he had all the  
04:21 10 evidence available to the government or  
11 that the Justice Department would  
12 deceive him was outrageous. It was,  
13 ironically, McIntyre himself who  
14 cautioned me against allowing my anger  
04:21 15 at those offensive attacks to lead me to  
16 take the serious step of waiving  
17 solicitor-client privilege, when doing  
18 so would not put an end to the  
19 accusations of bad faith."

04:22 20 But leaving that aside, to suggest that McIntyre  
21 would give an opinion without the full file, how  
22 would McIntyre know if he had everything? Do you  
23 follow me?

24 A I understand your point, sir.

04:22 25 Q Yeah. I mean she's saying that McIntyre wouldn't



1 give an opinion unless he had everything, how does  
2 he know if he has everything, any way of -- we  
3 don't even know now what he had -- but how would  
4 he know if he had everything? In fact, we know he  
04:22 5 didn't have everything because you didn't have the  
6 Rasmussen reports, but that's another story. But  
7 there is no way of knowing he had everything; is  
8 there?

9 A Mr. McIntyre had, as described by the then-justice  
04:23 10 minister, all the evidence available to the  
11 government or the Justice Department. That's what  
12 she said and I have no information to dispute the  
13 accuracy of that.

14 Q Well, we saw her wrong on several other things, so  
04:23 15 we don't know how accurate anything is. But  
16 carrying on:

17 "A second application was  
18 made by Milgaard on August 16, 1991. It  
19 was based primarily on the possibility  
04:23 20 that if the jury had known about the  
21 criminal career and proximity of Larry  
22 Fisher, they would have acquitted  
23 Milgaard. This application generated  
24 renewed public interest and pressure. I  
04:23 25 continued to seek the advice of William



1 McIntyre, but it became clear to me that  
2 the case needed a public airing.

3 The problem I faced was that  
4 in the course of the Justice Department  
04:23 5 investigation, I had learned certain  
6 things that I couldn't discuss publicly.  
7 I had no difficulty taking the heat for  
8 an unpopular decision that I thought was  
9 right, but that had ceased to be the  
04:24 10 issue. The challenge facing me was to  
11 find some way to put the specific facts  
12 of the case before the public in a way  
13 that would restore its confidence in the  
14 section 690 process. I was also  
04:24 15 genuinely perplexed as to how to deal  
16 with the presence of Larry Fisher, on  
17 the one hand, and what I knew about  
18 Nichol John on the other."

19 What she knew about Nichol John I'm not sure, but  
04:24 20 anyway:

21 "Since there was no direct  
22 evidence connecting Fisher to the Miller  
23 murder, it was unlikely that evidence of  
24 his similar offences would be admissible  
04:24 25 in court if he were to be charged with



1 the murder of Gail Miller."

2 Kind of wrong there.

3 "On the other hand, knowledge of such  
4 events might have affected the views of  
04:24 5 a jury trying Milgaard. But the  
6 question before me was, Can it be said  
7 that a miscarriage of justice has likely  
8 occurred because the jury did not have  
9 this knowledge and, in fact, some of the  
04:25 10 Fisher assaults had not even occurred at  
11 the date of the Milgaard conviction? To  
12 say that a miscarriage has occurred  
13 requires one to overlook the evidence  
14 that was against Milgaard and that  
04:25 15 satisfied a jury of his guilt."

16 Does that make any sense?

17 A The minister is describing some of her -- some of  
18 her deliberations and some of the things she  
19 considered in relation to coming to a decision.  
04:25 20 That was her dilemma, and obviously she sought  
21 advice, and she sought it from the Supreme Court  
22 of Canada.

23 Q Okay. Well, carrying on:

24 "On the other hand, what was  
04:25 25 one to make of Nichol John's accurate



1 knowledge of aspects of the crime and  
2 her ability to describe them when first  
3 questioned?"

4 Now that's not accurate; is it?

04:25 5 A It's not accurate to the extent that it states:  
6 "... her ability to describe them when  
7 first questioned."

8 That's not the case.

9 Q Okay.

04:26 10 "I asked Eugene to inquire into the  
11 possibility that John was suffering from  
12 post-traumatic shock memory loss, which  
13 is a recognized phenomenon in the  
14 psychiatric literature. Efforts to  
04:26 15 unlock John's memories weren't  
16 successful. Were we just to dismiss her  
17 comments, not in the context of  
18 admissible evidence at trial, but in the  
19 context of determining whether there was  
04:26 20 a miscarriage of justice?"

21 Which I think is the question the Commissioner  
22 was asking:

23 "With the exception of her testimony at  
24 the preliminary hearing ...",

04:26 25 there we go again:



1 "... testimony at the preliminary  
2 hearing regarding the events in the  
3 lane, testimony that she did not disavow  
4 but simply could not remember, all her  
04:26 5 other testimony was corroborated by  
6 other witnesses at the trial, and her  
7 own testimony withstood  
8 cross-examination."

9 Do you have any idea what she is talking about:

04:26 10 "... her own testimony withstood  
11 cross-examination ...",  
12 "... corroborated by other witnesses  
13 ...",

14 and the preliminary hearing testimony again; can  
04:27 15 she be more out to lunch?

16 A I believe the reference by Minister Campbell, or  
17 former Minister Campbell, about Ms. John's  
18 preliminary inquiry testimony does not reflect the  
19 record at the prelim.

04:27 20 To the extent that there are  
21 statements about confirmation of her -- of other  
22 parts of her testimony with that of other trial  
23 witnesses, there is some confirmation of other  
24 parts by Messrs. Wilson and Cadrain, at least that  
04:27 25 was the minister's view and that's what she



1           stated.

2           **Q**       Well let's turn the -- sorry, let's go down.  
3                   Here's a portion, you may find it interesting in  
4                   particular:

04:27 5                               "The credibility of this  
6                   review process was an ongoing  
7                   preoccupation with me. I had been  
8                   annoyed at the attacks made on Eugene  
9                   and the other Justice lawyers by  
04:28 10                   Milgaard's counsel. Eugene had been  
11                   accused of a pro-prosecution bias, which  
12                   was certainly not evident to me, nor  
13                   logical given his previous career as a  
14                   defence lawyer."

04:28 15           **A**       That is wrong.

16           **Q**       You never were a defence lawyer for a day in your  
17                   life?

18           **A**       That's correct.

19           **Q**       And she says here that her -- the accusation that  
04:28 20                   you were biased was obviously dispelled by her  
21                   knowledge of your being a defence lawyer; right?

22           **A**       Right.

23           **Q**       Right.

24           **A**       It's obvious that I didn't review the draft before  
04:28 25                   it was published.



1 Q No, I appreciate that. But in any event, I take  
2 it if I was to ask you if you misled her, you  
3 can't answer?

4 A It's obvious that I didn't review the --

04:29 5 Q No, no, but if you misled her as to being a  
6 defence lawyer you can't answer, can you? If I  
7 suggest you lied to her you can't answer?

8 A Mr. Wolch?

9 Q That's her --

04:29 10 A Mr. Wolch, if you have a specific fact that you  
11 wish to put to me that signaled that I misled  
12 anyone, I would welcome the opportunity to respond  
13 to it.

14 Q I could go on.

04:29 15 A However, in the absence of such evidence our usual  
16 rules insofar as questioning a witness regards  
17 such an unsubstantiated attack is scandalous, and  
18 I would resent it.

19 Q Well, Mr. Williams, that information got to her  
04:29 20 from somewhere?

21 A And why -- it could come from a number of sources,  
22 and some of that information insofar as it relates  
23 to me, sir, is wrong. Now I'm testifying under  
24 oath --

04:29 25 Q Well, you're a witness, yeah.



1 A -- and I've testified that I have never been a  
2 defence lawyer in my capacity as a professional  
3 counsel.

4 Q I appreciate that, but this minister seems to  
04:30 5 think you -- she was getting an unbiased view from  
6 a defence lawyer, and --

7 A And --

8 Q -- that's confounding to me?

9 A And what is your question to me?

04:30 10 Q Well, I would like to be able to find out where  
11 she got that from, but I'll move on.

12 A I don't know. I don't know, sir.

13 Q I'll move on. She says:

14 "Eugene had been accused of a  
04:30 15 pro-prosecution bias, which was  
16 certainly not evident to me, nor logical  
17 given his previous career as a defence  
18 lawyer. I had also been completely  
19 puzzled by suggestions by people who  
04:30 20 were not above gaining a little  
21 political mileage from the case that I  
22 was 'playing politics' with the issue.  
23 Surely the most politically expedient  
24 thing for me, given the media hype about  
04:31 25 David Milgaard's 'innocence,' would have



1                   been to grant his application. But  
2                   political expediency had reared its head  
3                   from an unexpected corner.

4                   In September, after a  
5                   particularly exhausting morning at the  
6                   aboriginal justice conference in  
7                   Whitehorse, I had been sitting having  
8                   lunch with John Tait and several of my  
9                   staff. Partway through lunch, Peter  
10                  Lugli was called away from the table to  
11                  pick up an urgent fax from Ottawa. The  
12                  newswire he returned with landed on our  
13                  little group like a bombshell. It  
14                  concerned an encounter the Prime  
04:31 15               Minister had had with Joyce Milgaard on  
16                  a Winnipeg street. The PM had gone out  
17                  of his way, according to the report, to  
18                  salute her courage and determination and  
19                  to show his concern for her son's  
04:31 20               health.

21                  We were all floored. We just  
22                  couldn't understand it. The PM had  
23                  blindsided me on one of my most  
24                  difficult issues."

04:31 25               COMMISSIONER MacCALLUM: Mr. Wolch, just



1 before you --

2 MR. WOLCH: Sure?

3 COMMISSIONER MacCALLUM: I take it you've  
4 left the area of misleading the minister, but the  
04:31 5 witness invited you to give him an example, a  
6 specific example of how that happened, and the  
7 only one I heard from you was the suggestion that  
8 perhaps he was holding out himself as a defence  
9 lawyer. Is that all, is there no other specific  
04:32 10 examples?

11 MR. WOLCH: Well, there's lots, but if he  
12 can't answer what are we going to do?

13 COMMISSIONER MacCALLUM: Oh, well no, he  
14 invited you to give him a concrete example.

15 MR. WOLCH: Well, okay, all right.

16 COMMISSIONER MacCALLUM: Then we'd meet the  
17 problem of not being able to answer. I mean,  
18 that is a very serious thing to leave hanging in  
19 the air.

20 BY MR. WOLCH:

21 Q Well, I would say Nichol John testifying at the  
22 preliminary hearing, where did she get that from?

23 A I don't know.

24 Q Well the advice, the facts of the case, were  
04:32 25 coming from you, weren't they, the -- what she was



1 being given was coming from you?

2 A Sir, what's written in that book is written at a  
3 time after the advice we received. I don't know  
4 what events intervened between the time of her  
04:32 5 decision and the time of that writing.

6 The fact is my knowledge of  
7 the file does not include some of the statements  
8 that are attributed -- or that are contained on  
9 that page. Some of the personal facts about me  
04:33 10 are not correct, so to ask me where the minister  
11 got her information, and particularly information  
12 that -- about my personal situation or my  
13 professional situation that, you know, I've  
14 testified differently here and I've always  
04:33 15 maintained, my CV is certainly relatively public,  
16 I've never held myself out as a defence lawyer, I  
17 just don't know. So --

18 Q What I am getting at is, though, she seems to  
19 indicate in her book that you were the only lawyer  
04:33 20 from Justice giving her advice?

21 A That's --

22 Q It was you and Mr. Lugli, who wasn't a member of  
23 Justice?

24 A That's, that's not my reading of it, I -- I  
04:33 25 understood her to say that she questioned



1 departmental officials. We --

2 Q I thought that was you?

3 A There were more officials that provided her advice  
4 apart from myself.

04:34 5 Q Okay. Well we'll get to more examples. So the  
6 Prime Minister seems to have been taken fairly  
7 seriously by Kim Campbell; might you agree with  
8 that? She does modify her comments, but I'm not  
9 going to take time with that, but I mean she uses  
04:34 10 words like "bombshell" and etcetera, etcetera?

11 A That was her perception, sir.

12 Q So it would appear that the Prime Minister's  
13 involvement had some effect?

14 A It certainly had an impact on Minister Campbell.

04:34 15 Q She goes on:

16 "Was Milgaard's conviction a miscarriage  
17 of justice, and if so, what should be  
18 done?

19 The Court held fifteen days  
04:35 20 of public hearings between January 16  
21 and April 6 ... before a panel of five  
22 justices. This was not a trial and a  
23 broad range of information that would  
24 probably not have been heard in a trial  
04:35 25 setting was available to the Court - and



1 to the public. For instance, David  
2 Milgaard was required to testify,  
3 something he had not done before. And  
4 the court required that both Milgaard  
04:35 5 and Larry Fisher give samples for lab  
6 testing. Since it turned out that both  
7 men had the same relevant biological  
8 characteristics, these tests neither  
9 implicated Fisher nor exonerated  
04:35 10 Milgaard."

11 She then goes on talking about the media being  
12 captivated, and then she has a paragraph here,  
13 and I'll summarize it, I think fairly, quite  
14 fairly, by saying that the media on one  
04:35 15 particular day gave prominence to Launa Edwards  
16 and didn't really pick up on Cal Tallis; do you  
17 see that?

18 A I do.

19 Q Now here's a portion that's of some bewilderment:

04:36 20 "When counsel for the  
21 Province of Saskatchewan attempted to  
22 question David Milgaard about his  
23 psychiatric history, the court refused  
24 to allow him to do so. At the same  
04:36 25 time, the court permitted Milgaard's



1 lawyer ... to cross-examine Larry Fisher  
2 on his psychiatric record. Thus the  
3 court did not have before it crucial  
4 evidence about Milgaard's history of  
04:36 5 serious psychiatric problems going back  
6 to his childhood. It was only after his  
7 release that Milgaard's lawyers  
8 acknowledged that their client had a  
9 troubled psychiatric history and  
04:36 10 complained that he had been set free  
11 without support for his psychological  
12 condition. Milgaard did concede during  
13 the hearing that he takes lithium for a  
14 depressive condition. He then went on  
04:36 15 to compare his condition to that of  
16 Winston Churchill, with the indulgence  
17 of the court."

18 Do you see that paragraph there?

19 A I do.

04:37 20 Q "... crucial evidence about Milgaard's  
21 history of ... psychiatric problems ...";

22 I thought you said there wasn't any?

23 A I said that I didn't look at any evidence with  
24 respect to the first application, but certainly,  
04:37 25 on the second application we had received certain



1 material that both related to Mr. Fisher and to  
2 Mr. Milgaard.

3 Q David's psychiatric history contained no evidence  
4 of violence or no criminal record?

04:37 5 A I don't know what the minister had in mind. I  
6 didn't review Mr. Milgaard's psychiatric history.

7 Q Well --

8 A I received certain records and I passed them on to  
9 counsel at the -- at the Court reference.

04:37 10 Q I'm trying to understand where she would get that  
11 from?

12 A I don't know, Mr. Wolch.

13 Keep in mind that once the  
14 decision had been made to send this matter to the  
04:38 15 Supreme Court, my involvement was essentially a  
16 supportive one of providing materials to all  
17 counsel, arranging for witnesses, and doing a few  
18 interviews.

19 In relation to the decision  
04:38 20 that flowed from the reference, that -- the  
21 minister followed the advice of the Court.

22 That information, it's there,  
23 I'm not certain where it originates and --

24 Q But you see -- I'm sorry?

04:38 25 A -- you can ask me where she got it, I'm not the



1 person that wrote it, and I don't know.

2 Q No, but she was the decision-maker, and what's of  
3 interest is to know what influenced a  
4 decision-maker, particularly one who was wrong?

04:38 5 A There are certain facts recited in the book that  
6 aren't accurate. Her decision is set out in her  
7 12-page letter. If there are facts with which you  
8 wish to take issue on that, to the extent that I  
9 can, I'll try and help you.

04:39 10 However her book, written  
11 after she left office, contains some information  
12 with which I disagree. I can't tell you what the  
13 source is because I don't know.

14 Q She says:

04:39 15 "Milgaard's psychiatric  
16 history was highly relevant."

17 To what issue?

18 A Ask --

19 Q Well, I asked Kim Campbell --

20 A You're asking the wrong person.

21 Q -- to be here, but that's another story.

22 COMMISSIONER MacCALLUM: Well, I don't know  
23 if it's quite fair of you, Mr. Wolch, to ask this  
24 person to indulge in a critique of former  
04:39 25 Minister Campbell's chapter.



1 For one thing, he is still an  
2 employee of the Federal Government.

3 For a second, for a second  
4 thing that should be abundantly clear by this  
04:39 5 time, in the cross-examination he has said  
6 repeatedly that he doesn't know where she got her  
7 information. It wasn't from him. That's the  
8 important thing.

9 MR. WOLCH: That's what I would like to  
04:39 10 find out.

11 COMMISSIONER MacCALLUM: Well, that's all  
12 right. Apart from what was, you know, despite  
13 what was said in the judgement of Chief Justice  
14 Laing, I don't think it's beyond the competence  
04:40 15 of this hearing to -- for the witness to be asked  
16 "did you give such and such advice". If he were  
17 to say "no", that's the end of it, if he --

18 MR. WOLCH: Well that's --

19 COMMISSIONER MacCALLUM: -- but then he,  
04:40 20 you know, if he were to say "yes", "did you  
21 advise the minister", "yes", well then you  
22 couldn't ask him what the advice was. Obviously,  
23 everybody knows that he gave information to the  
24 minister, he has acknowledged as much.

04:40 25 MR. WOLCH: In the material that --



1 COMMISSIONER MacCALLUM: If you want to ask  
2 him if he gave a piece of advice and he says  
3 "no", then you have to accept his answer as "no".

4 MR. WOLCH: Perhaps -- perhaps I can get  
04:40 5 your guidance on this question.

6 COMMISSIONER MacCALLUM: Uh-huh?

7 BY MR. WOLCH:

8 Q In the course of giving information to the  
9 minister, did you provide the minister with  
04:40 10 psychiatric records of David Milgaard? That would  
11 be the question.

12 COMMISSIONER MacCALLUM: That's all right,  
13 yeah, "yes" or "no".

14 A I did not.

04:41 15 BY MR. WOLCH:

16 Q Did you have psychiatric records of David  
17 Milgaard?

18 A For the second application I believe we did  
19 receive psychiatric records of David Milgaard.

04:41 20 Q Do you know if they found their way to the  
21 minister?

22 A I do not know.

23 Q So you don't know the basis for what she's saying  
24 there?

04:41 25 A I know that the department had those on file. I



1 don't -- I did not -- I don't recall giving  
2 anything by way of -- up to the minister on this.

3 Q Okay. Now if we could turn the page.

4 Mr. Commissioner, I'm happy to  
04:41 5 go to conclusion, I'm not -- is that the --

6 COMMISSIONER MacCALLUM: Oh yes.

7 MR. WOLCH: That's the --

8 COMMISSIONER MacCALLUM: I think everybody  
9 is prepared for the -- to sit a little longer.

04:41 10 If anybody needs a break, just say so, please.

11 BY MR. WOLCH:

12 Q Okay. At page 197 the minister states:

13 "Milgaard's conflicts with  
14 the law predated his arrest for the  
04:42 15 Milgaard murder. I think the Supreme  
16 Court had an obligation to look at that  
17 history. Again, this wasn't a trial. A  
18 man who by the court's own judgement had  
19 been convicted of murder in a fair  
04:42 20 process was claiming innocence. The  
21 burden of proof was quite rightly on  
22 David Milgaard."

23 Now "conflicts with the law", we have been told  
24 that David had no criminal record; did you  
04:42 25 provide the minister with any information



1           regarding previous conflicts?

2           A       There was no prior record. There had been some  
3           incidents when he was a youth, but I think what we  
4           would have done was simply to provide the criminal  
04:42 5           record, which included an escape lawful custody  
6           and something else. Apart from that --

7           Q       The minister talks about the Court's decision.  
8           She said:

9                       "The court then went on to

04:43 10                   say, 'However, fresh evidence has been  
11                   presented to us. Ronald Wilson, a key  
12                   witness at the trial, has recanted part  
13                   of his testimony. Additional evidence  
14                   has been presented with respect to the  
04:43 15                   alleged motel room confession. More  
16                   importantly, there was evidence led as  
17                   to sexual assaults committed by Larry  
18                   Fisher which came to light in October  
19                   1970, when Fisher made a confession (to  
04:43 20                   them).

21                       In our view ...",

22                   etcetera, etcetera. And she says:

23                       "The judges were not

24                   satisfied ... that ...",

25           he:



1 "... was innocent. The court concluded:  
2 'While there is some evidence which  
3 implicates Milgaard in the murder of  
4 Gail Miller, the fresh evidence  
04:44 5 presented to us, particularly as to the  
6 locations and the patterns of the sexual  
7 assaults committed by Fisher, could well  
8 affect a jury's assessment of the guilt  
9 or innocence of Milgaard. The continued  
10 conviction ..."

11 would constitute a miscarriage. She goes on to  
12 say:

13 "The court advised me to  
14 quash the conviction and order a new  
04:44 15 trial, and I did."

16 And it then talks about the stay being entered.  
17 And then she says:

18 "The Supreme Court had come  
19 under considerable criticism during the  
04:44 20 hearings. Some thought television  
21 cameras should have been allowed into  
22 the review. At one point, the chief  
23 justice asked Ronald Wilson if he would  
24 submit to a lie-detector test, despite  
04:44 25 the fact that the Supreme Court had



1 ruled in 1987 that such tests were  
2 inadmissible as evidence. The court's  
3 opinion to me was labelled by media as  
4 'at best tortuous' and 'politically  
04:44 5 expedient.' It seemed clear to me that  
6 the court had found the case as  
7 difficult as I had. Certainly they had  
8 been unconvinced of Milgaard's  
9 innocence."

04:44 10 While the next paragraph is somewhat important,  
11 I'll skip it though for time, and get to the next  
12 one.

13 "I confess that I was  
14 perplexed at the opinion of the Supreme  
04:45 15 Court of Canada. The question I had  
16 asked them was whether the continued  
17 conviction of David Milgaard constituted  
18 a miscarriage of justice. 'Reasonable  
19 doubt' is the standard of proof during  
04:45 20 the trial process, which is governed by  
21 a presumption of innocence. These  
22 concepts should not have been applied in  
23 this instance, where a conviction had  
24 been upheld on appeal and where the  
04:45 25 court agreed there was no fault to be



1 found with the trial. It is well  
2 established that a person seeking an  
3 extraordinary remedy under the royal  
4 prerogative of mercy comes not with a  
04:45 5 presumption of innocence but with a  
6 presumption of *guilt*. To dislodge that  
7 presumption requires evidence that calls  
8 into question the whole weight of  
9 evidence that convicted, evidence that  
04:45 10 has withstood appeal. In Canada, we  
11 have phrased this test as whether  
12 evidence shows there has *likely* been a  
13 miscarriage of justice, or a wrongful  
14 conviction."

04:45 15 She goes on to talk about the American  
16 experience, and I'll skip that.

17 And then she says:

18 "The Milgaard case shows ... a need to  
19 clarify the tests to be applied in  
04:46 20 evaluating ... 690... In its  
21 explanation of its opinion, the Supreme  
22 Court did not add to our understanding  
23 of this issue. In the Supreme Court's  
24 summary of the evidence linking David  
04:46 25 Milgaard to the murder ... the court



1                   used the term "ample" to describe the  
2                   evidence that was before the jury when  
3                   Milgaard was convicted but used the term  
4                   "some evidence" later in their opinion.  
04:46 5                   I'm unable to determine the basis for  
6                   this change in terminology. In this  
7                   matter the court gave credence to the  
8                   recantation of Ronald Wilson, even  
9                   though the chief justice threatened to  
04:46 10                  cite him for contempt of court for  
11                  giving contradictory answers within the  
12                  space of a few minutes during the  
13                  hearing! In its own jurisprudence, the  
14                  Supreme Court of Canada has described  
04:46 15                  the testimony of recanting witnesses as  
16                  highly unreasonable on principle, yet  
17                  here the justices credited the  
18                  recantations of a witness whose original  
19                  testimony was corroborated by other  
04:47 20                  witnesses and who was shown during the  
21                  hearing to be patently unreliable. I  
22                  was left scratching my head."

23                  Do you know if the minister appreciated that the  
24                  May 23rd and 24th statements were recantations of  
04:47 25                  their first statements?



1 A By your definition of recantation, I suspect you  
2 could frame it that way. I think I've used the  
3 term recantation in relation to the trial  
4 evidence.

04:47 5 Q Okay. She says:

6 "The Supreme Court seems to have set the  
7 evidentiary threshold in the case at the  
8 same level as for a new trial. Given  
9 that this was not a regular appeal, but  
04:47 10 an extraordinary remedy, the lack of  
11 weight that the court put on the  
12 decisions of the trial and appeal courts  
13 is surprising. The importance that the  
14 court attached to the Larry Fisher  
04:47 15 evidence..."

16 Sorry, where is that last I was just reading?

17 A I think its constitutes a low threshold.

18 Q No, just go back a page if I could. Oh, here:

19 "...("speculation" might be a better  
04:47 20 term)..."

21 A That's the minister's view, not mine.

22 Q Larry Fisher's evidence was speculation?

23 A No, the importance the court attached to the Larry  
24 Fisher evidence and she's put speculation might be  
04:48 25 a better term. That's her view.



1 Q Okay, if we can get to the next page:

2 "...constitutes a remarkably low  
3 threshold for challenging convictions  
4 past the appellate process."

04:48 5 Well, what are the results?

6 "A great many Canadians, perhaps a  
7 majority, think David Milgaard was found  
8 innocent... When Larry Fisher was  
9 released from jail ... he was described  
04:48 10 by the media as the man "linked to the  
11 murder of Gail Miller,"... Now, Fisher  
12 is no candidate for the Order of  
13 Canada..."

14 I take it the minister has that right do you  
04:48 15 think?

16 A You get no argument from me on that.

17 Q No argument on that one?

18 "...but he has never been linked in  
19 anyway that counts to the murder of Gail  
04:48 20 Miller. He has been found guilty by the  
21 media in the absence of any evidence.  
22 Milgaard is in a kind of limbo because  
23 innocence hasn't been established in law  
24 and probably never can be. He's free,  
04:49 25 but it isn't clear that he was wrongly



1 convicted. The attorney general of  
2 Saskatchewan at the time of his release,  
3 Robert Mitchell, said publicly that in  
4 his view, Milgaard was properly  
04:49 5 convicted."

6 I might add he also said he did it. So now you  
7 have here the Minister of Justice offering views  
8 on the innocence or guilt of David Milgaard and  
9 putting into it that the provincial minister has  
04:49 10 a problem with David's case as well.

11 A It's the former Minister of Justice by the time  
12 that book was written. That's her take on it and  
13 I'm not certain what your question is, sir.

14 COMMISSIONER MacCALLUM: Did we get down in  
04:49 15 evidence anywhere of when this book was  
16 published?

17 MR. McLEOD: 1996 I believe, sir.

18 COMMISSIONER MacCALLUM: Pardon me?

19 MR. McLEOD: 1996 I believe. Mr.

04:49 20 Commissioner, I don't want to interrupt My  
21 Learned Friend's reading of Ms. Campbell's book,  
22 but I'm really not sure how Mr. Williams can  
23 answer anything arising out of that reading. I  
24 do note, sir, a couple of moments ago in terms of  
04:50 25 discussions we had with respect to what Mr. Wolch



1           could ask of Mr. Williams, that there was  
2           certainly no objection from me to the direction  
3           that he seemed to be heading in a few moments ago  
4           but chose for whatever reason not to take, and I  
04:50 5           thought, or I anticipated that that direction was  
6           to ask two questions of Mr. Williams, which I  
7           would not take any objection to, and that is  
8           whether he ever misled the Minister of Justice  
9           with respect to his having previously been a  
04:50 10          defence lawyer or whether he ever did so with  
11          respect to Nichol Demyen testifying at the  
12          preliminary inquiry, and I certainly have no  
13          objection to those two questions and those are  
14          questions that certainly could be posed to Mr.  
04:51 15          Williams. I thought that in fairness Mr. Wolch  
16          was going to do it because he raised those  
17          matters. It just seems to me that there's  
18          information that is likely within the knowledge  
19          of this witness that may be pertinent, it has  
04:51 20          been raised and I think in fairness he should be  
21          permitted to answer those questions.

22                   COMMISSIONER MacCALLUM: Thank you.

23                   MR. WOLCH: The frustration is I can't see  
24                   what he gave the minister. I mean, I can ask  
04:51 25                   him, but I'm not allowed to see what he gave the



1 minister. I don't know what he gave the  
2 minister, I can never test him.

3 COMMISSIONER MacCALLUM: Well, yes, but if  
4 I interpret Mr. McLeod's objection correctly, it  
04:51 5 is that you shouldn't be using this witness as a  
6 surrogate for Minister Campbell just because she  
7 can't be called to testify on her own behalf, so  
8 his suggestion I believe is that you should  
9 confine your questions to matters which are  
04:52 10 reasonably within the knowledge of his client.  
11 Right?

12 MR. McLEOD: Yes.

13 MR. WOLCH: Well, as I understand it, he --  
14 I would have thought that Mr. Williams, according  
04:52 15 to Ms. Campbell herself, was the main supplier of  
16 information to Ms. Campbell.

17 COMMISSIONER MacCALLUM: Well, sir, you  
18 have -- that is the tact you have taken, but he's  
19 already answered that I think.

20 BY MR. WOLCH:

21 Q Well, then maybe I can ask this question, she says  
22 it was you that gave her the information, or at  
23 least was supplying her with information, you had  
24 an encyclopedic knowledge, etcetera, etcetera.  
04:52 25 Was somebody else briefing her? As I read this,



1           you were in her office at night answering the  
2           questions, giving her the information, etcetera,  
3           etcetera. Was somebody else investigating and  
4           giving her the information?

04:52 5           A       The minister received advice and information from  
6           a variety of sources, including my -- including  
7           me.

8           Q       But factual information, like, who testified, what  
9           was said, what did Nichol John say at the  
04:53 10          preliminary, what did she say at trial, was there  
11          anybody else besides you that was giving her  
12          information on those points?

13          A       I would only speculate if I tried to answer that.  
14          I'm aware that members of her staff provided her  
04:53 15          with information and advice and other members of  
16          the department and outside the department provided  
17          her with information and advice. The specifics of  
18          that, of the knowledge that was conveyed I do not  
19          know in some instances, and in others I'm not in a  
04:53 20          position to comment because it's barred by either  
21          a solicitor/client privilege or constitutionally  
22          barred.

23          Q       Okay. Well, the minister goes on to deal with  
24          some areas that deal with systemic problems and I  
04:54 25          would like to touch upon them briefly. At page



1           201 which is:

2                   "After the Milgaard case, I initiated a  
3                   review of ... 690 ... recommendations  
4                   stemming from that review, I'm told, are  
04:54 5                   now making their way to the office of  
6                   ... Allan Rock. In advance of any major  
7                   reform, Rock has made two departures  
8                   from prior practice in dealing with the  
9                   application of Colin Thatcher ... who  
04:54 10                  was convicted of ... murder... First,  
11                  he provided the department's  
12                  investigation brief (a summary of the  
13                  information gathered during the  
14                  investigation of the application) to the  
04:54 15                  applicant and his counsel for their  
16                  response and comment before he  
17                  considered it."

18               Now, the application -- the investigation brief  
19               is now being given out; is that right?

04:54 20       A       Yes.

21       Q       Did you do an investigation brief in this case, in  
22               Milgaard?

23       A       I did not, not as it's -- as it's described in  
24               there. I did the investigation brief in Colin  
04:55 25               Thatcher, so I know what an investigation brief



1 is. We created a document which was a summary of  
2 the facts that were obtained and it also included  
3 a compilation of the evidence that had been  
4 collected. That was presented to counsel for  
04:55 5 review, comment and further submissions.

6 COMMISSIONER MacCALLUM: I'm sorry, are you  
7 talking about this case now?

8 A No, sir.

9 COMMISSIONER MacCALLUM: The Thatcher?

04:55 10 A The Thatcher case.

11 COMMISSIONER MacCALLUM: Okay.

12 BY MR. WOLCH:

13 Q Well, if it wasn't an investigation brief, what  
14 did you do in the Milgaard case?

04:55 15 A What was prepared in Milgaard and in other cases  
16 was called a departmental report which was a  
17 combination of narrative and advice.

18 Q Is that particularly different than the brief that  
19 you did for Thatcher?

04:56 20 A Yes. In the Thatcher brief it's simply a  
21 narrative of the facts that have been discovered.

22 Q In the Milgaard case it's a narrative plus advice?

23 A It's a narrative and advice and sometimes it's  
24 interwoven, sometimes it's not.

04:56 25 Q Sorry?



1 A Sometimes it's interwoven. It's a legal opinion  
2 which is, which contains a narrative of events or  
3 facts and advice.

4 Q So when Kim Campbell had her table full of paper,  
04:56 5 that would have been investigation and advice?

6 A When Kim Campbell had her papers, she would have  
7 had the benefit of the materials that had been  
8 collected as she described plus whatever advice  
9 she got from the department and from others.

04:56 10 Q And that would include a legal opinion on similar  
11 act prepared by you?

12 A It would include the departmental report, the  
13 contents of which are -- I'm not in a position to  
14 --

04:57 15 Q Did you prepare a legal opinion on similar acts?

16 A *(Answer struck from the record as per Commissioner*  
17 *MacCallum's ruling)*

18 COMMISSIONER MacCALLUM: Umm --

19 MR. WOLCH: Sorry?

04:57 20 COMMISSIONER MacCALLUM: Your Friend was  
21 about to rise and before I could open my mouth,  
22 the witness answered a question which I am not  
23 going to record.

24 MR. WOLCH: I thought I was getting into  
04:57 25 safer territory.



1 COMMISSIONER MacCALLUM: No.

2 MR. WOLCH: Okay, so I can't go there.

3 BY MR. HODSON:

4 Q She says:

04:57 5 "I'm also told that the Department of  
6 Justice is now more aggressive in  
7 respond to inaccuracies or attacks in  
8 the press in relation to the ongoing ...  
9 690 applications."

04:57 10 Is that correct?

11 A I've since left the section, but I think after our  
12 experiences with Milgaard, the press section  
13 certainly changed its advice to us in terms of  
14 responding.

04:58 15 COMMISSIONER MacCALLUM: Now, that  
16 interests me, sir, to inaccuracies. Now, I  
17 thought, inaccuracies, I understood from your  
18 previous testimony that you did not respond to  
19 inaccuracies of fact because you didn't want to  
04:58 20 be seen as prejudging the matter.

21 A Correct.

22 COMMISSIONER MacCALLUM: However, it has  
23 developed that, a policy has developed under  
24 which you will respond to inaccuracies relating  
04:58 25 to the activities of the departmental



1           investigators so as to avoid the, what you  
2           perceive to be the injustice of the press  
3           coverage in the Milgaard case?

4           A           Yes.

04:59 5                   COMMISSIONER MacCALLUM: Yes. So when she  
6           says inaccuracies, it has to be read, in your  
7           view, as inaccuracies of the latter kind that I  
8           put to you?

9           A           Yes.

04:59 10                  COMMISSIONER MacCALLUM: All right.

11           BY MR. WOLCH:

12           Q           So if I understand that correctly, you are not  
13           going to say that the assertion that Fisher did  
14           it, David is innocent, Wilson lied, that's not the  
04:59 15           kind of thing that you're going to respond to?

16           A           I can't -- well, put it in some kind of context,  
17           we probably wouldn't respond blow by blow to  
18           certain facts while it was still in the conviction  
19           review group, but where, for example, there may  
04:59 20           have been assertions about the conduct of some of  
21           the officials, certainly that might generate a  
22           response.

23           Q           Well, I'm just wondering if somebody said Mr.  
24           Williams treated both witnesses differently,  
05:00 25           cross-examined Fisher like they were buddies and



1           grilled Mrs. Fisher, the innocent person, how  
2           would you respond in the media to something like  
3           that?

4           A       Well, I think the first question when receiving,  
05:00 5           when getting something like that is do you want to  
6           respond and, if so, how. Sometimes you just take  
7           it and at some point in time when there's specific  
8           acts alleged of misconduct and not of someone's  
9           perception, then you deal with that. That's my  
05:00 10          answer.

11                   COMMISSIONER MacCALLUM: I think, Mr.  
12           Wolch, if memory serves, the original example  
13           given was one which is fairly germane to the  
14           first application and it concerned the lack of  
05:00 15          response to the Ferris report and if you didn't  
16           agree with it, why in heaven's name didn't you  
17           let us know, that sort of objection.

18                   MR. WOLCH: Oh, yes.

19                   COMMISSIONER MacCALLUM: And I think the  
05:01 20          witness answered about that, well, it wouldn't  
21           have been proper for me, the investigator, to  
22           offer my opinion on the usefulness of the Ferris  
23           report, that was up to the minister, so that was  
24           my memory of the position, the policy as it was  
05:01 25          at the time.



1 BY MR. WOLCH:

2 Q Has that changed?

3 A It didn't change while I was in the conviction  
4 review group with reference to the specific  
05:01 5 example, but it has changed in the sense that if  
6 an investigation brief had been prepared in  
7 Milgaard, for example, that investigation brief  
8 would have included the opinion of Pat Alain, so  
9 the applicants could clearly see the response of  
05:01 10 the department to the opinion of Dr. Ferris and it  
11 would also include I guess a summary of the  
12 interview of Dr. Ferris when he was questioned and  
13 asked what his opinion would be if he took  
14 contamination into account, and in this regard,  
05:02 15 applicants know what has been discovered during  
16 the course of the investigation and get an  
17 opportunity to respond to it.

18 Q Now, if it happened today, would the applicant  
19 have a legal opinion that justice prepared on  
05:02 20 Larry Fisher's similar acts?

21 A No.

22 Q So the minister would look at a legal opinion that  
23 might be wrong and unchallenged in arriving at a  
24 decision?

05:03 25 A That possibility exists.



1 Q Well, it just seems to me that there's something  
2 fundamentally wrong if a minister who may not be  
3 that well trained in law, and may not even be a  
4 lawyer for all I know sometime, that minister  
05:03 5 would get a legal opinion that this is not similar  
6 acts and yet we know that anywhere from nine to 14  
7 or 13 judges say it is and we can provide you with  
8 law professors across the country who would say it  
9 is and yet the minister only gets one wrong view.

05:03 10 A Certainly, sir, every court, every case that goes  
11 to court has competing views. The view of  
12 investigating counsel is vetted by senior  
13 officials in the department who are experienced in  
14 the law.

05:03 15 Q Well, the view taken by your department one way or  
16 the other on similar facts was dead wrong.

17 A It was not the view that was supported by the  
18 Court of Appeal. However, the basis upon which  
19 the initial assessment was made did not have the  
05:04 20 same facts that was considered by the Supreme  
21 Court of Canada and certainly didn't have the same  
22 facts and had much less factual content that was  
23 probably led at the trial of Larry Fisher, so yes,  
24 in the result, with deference to the Court of  
05:04 25 Appeal and with deference to the learned trial



1 judge, there came a different opinion; however,  
2 the assessments were made on a different factual  
3 foundation, so you can argue, quite rightly, that  
4 our initial assessments did not reflect that of  
05:05 5 the Court of Appeal, that we were comparing apples  
6 and oranges.

7 Q No, with all due respect, the Court of Appeal said  
8 it was highly probative evidence. The Court of  
9 Appeal was looking at not evidence to exonerate  
05:05 10 Milgaard, but to convict Fisher. The Court of  
11 Appeal didn't have the other rapes of which the  
12 Crown said they should have had, including (V10)  
13 (V10)-, which appears to be the most probative of  
14 all, that would have been admissible in David's  
05:05 15 case, so there's a lot the Court of Appeal didn't  
16 have that you had to consider, that you had much  
17 more to consider, that you had what they had plus  
18 I would suggest.

19 A I disagree.

05:05 20 Q Pardon me?

21 A I disagree.

22 Q The minister says:

23 "The unresolved issues in the Donald  
24 Marshall case led the government ... to  
05:06 25 convene a royal commission ...



1 recommended ... an independent body to  
2 review claims of wrongful conviction..."

3 Didn't find much support with the Attorney  
4 Generals:

05:06 5 "The most common concern was the  
6 creation of such a body would become yet  
7 another level of court. The move from  
8 the courts to the executive responds to  
9 the need for some finality in the  
05:06 10 process."

11 And she goes on to say:

12 "The British have just concluded their  
13 royal commission into the workings of  
14 their justice system. The powers  
05:06 15 comparable to those granted under  
16 section 690 are exercised in Britain by  
17 the home secretary. The British  
18 situation differs from the Canadian in  
19 that Britain is not a federal state, and  
05:06 20 the home secretary, unlike the Canadian  
21 minister of justice, is in charge of the  
22 prosecutorial arm of the government and  
23 thus not at arm's length from the review  
24 process. This royal commission has  
05:06 25 recommended the creation of an



1 independent body to review applications  
2 for relief from wrongful conviction, or  
3 miscarriage of justice. To the extent  
4 that such an approach could reduce the  
05:06 5 politics surrounding these applications,  
6 it would be desirable, but I doubt that  
7 can really be achieved. I wouldn't want  
8 to do away with public interest or even  
9 public pressure, where it might lead to  
05:07 10 the discovery of evidence or witnesses  
11 capable of establishing a wrongful  
12 conviction. It is important to remember  
13 the desirability of erring on the side  
14 of innocence. The capacity for publicly  
05:07 15 expressed outrage at injustice is a  
16 hallmark of a free and democratic  
17 society."

18 Do you agree with that?

19 A Yes.

05:07 20 Q "The capacity for publicly expressed  
21 outrage at injustice is a hallmark of a  
22 free and democratic society."

23 And I would suggest that the bulk of the media  
24 coverage in this case was exemplary, it brought  
05:07 25 to justice a wrongful conviction, exactly what



1 she says is the hallmark of a free and democratic  
2 society. Without the media David would still be  
3 in jail and Fisher would be free; is that not  
4 true?

05:07 5 A You are asking me to speculate, sir. I don't  
6 agree. I agree that there is a need, and our  
7 society recognizes the importance for folks to  
8 publicly express what they feel is an injustice,  
9 but I think there's a concurrent obligation by  
05:08 10 those who have the ability to reach millions of  
11 people via the various media to report accurately  
12 and to examine the facts and to test them to some  
13 extent before blindly following a quote from one  
14 side or another.

05:08 15 Now, I don't deny anyone the  
16 right to express themselves and consequently I  
17 agree with the expressions of former Minister  
18 Campbell.

19 Q Do you agree that without the media in our case,  
05:09 20 David's application would never have resulted in a  
21 reference?

22 A I think that's too simplistic an approach. I do  
23 believe, sir, that concerns about the process  
24 elicited a response in the second application  
05:09 25 which led to David's freedom.



1 Q As I understand it, the view was, not by you but  
2 by others, was that because of the public's  
3 misconception as to David's innocence, it needed a  
4 fresh airing?

05:09 5 A My sense was that because of the public's concerns  
6 about the correctness of the process and about  
7 concerns about the administration of justice, that  
8 was one of the motivating factors.

9 Q Yes, but the concerns were legitimate because you  
05:10 10 were wrong.

11 COMMISSIONER MacCALLUM: Mr. Wolch, are you  
12 suggesting in your question to the witness that  
13 the perceived need for a public airing was the  
14 only reason for granting the second application?

05:10 15 MR. WOLCH: Yes.

16 COMMISSIONER MacCALLUM: I think you should  
17 be aware that although we haven't heard it spoken  
18 in evidence, there is a tape of a conversation  
19 between Mr. Asper and Joyce Milgaard which was  
05:10 20 referred to, or at least parts of the tape were  
21 referred to her in examination by Commission  
22 Counsel, and if you read further along in the  
23 tape you see this discussion between Asper and  
24 Mrs. Milgaard in which he has good news to bring  
05:10 25 her which consisted of rumours or at least



1 information from the Department of Justice,  
2 federal, that they were looking very seriously at  
3 granting an application on the basis that the  
4 similar fact evidence might have been used in  
05:11 5 Milgaard's defence, so --

6 MR. WOLCH: No, but --

7 COMMISSIONER MacCALLUM: At least from his  
8 perception, that was -- the reason the second  
9 application succeeded was not confined to a media  
05:11 10 airing, so I just wanted you to be aware of that.

11 MR. WOLCH: I'm aware of that. My  
12 frustration is --

13 COMMISSIONER MacCALLUM: Because I don't  
14 want to be making any findings in the absence  
05:11 15 of --

16 MR. WOLCH: Well, my frustration is that I  
17 have the memo as to the reasons.

18 COMMISSIONER MacCALLUM: Yes.

19 MR. WOLCH: I mean, Douglas Rutherford  
05:11 20 wrote a memo and I can't get into it. This is  
21 totally frustrating. I have the memo that says  
22 exactly what I just said, their reasons.

23 COMMISSIONER MacCALLUM: Yes.

24 MR. WOLCH: It's in the database, that's  
05:11 25 what makes this so difficult, and I appreciate,



1 Mr. Commissioner, that you have a difficult task  
2 and you are trying to do it and I don't think you  
3 should be compelled to look at what Mr. Asper  
4 said that somebody told him when we have the  
05:11 5 actual memo, Douglas Rutherford reporting as to  
6 the reasons for re-opening. The same man who  
7 testified in the *Marshall Inquiry* talks about his  
8 view, Mr. MacFarlane's view, Mr. Williams' view,  
9 Mr. McIntyre's view and why we recommended to the  
05:12 10 minister. It's in black and white. I mean, if  
11 somebody will tell me I can, we can go into it,  
12 we can get the truth.

13 COMMISSIONER MacCALLUM: Well, you know,  
14 you can read the judgment as well as I can.

05:12 15 MR. WOLCH: I agree. I see counsel sitting  
16 there indicating that we shouldn't go down that  
17 road, but it's very frustrating, as to what was  
18 decided.

19 BY MR. WOLCH:

05:12 20 Q Now, tell me if I'm going too far on this, I  
21 understand you, Rutherford, MacFarlane met with  
22 Mr. McIntyre, that nobody recommended re-opening.  
23 MacFarlane and Rutherford thought it probably  
24 should be to keep the public quiet for their  
05:13 25 misconception, you didn't agree, and then McIntyre



1           said maybe you are right, quiet the public down,  
2           away you go. That's a paraphrase.

3           COMMISSIONER MacCALLUM: Okay, is that the  
4           end of the question?

05:13 5           MR. FRAYER: I assume that's the end of the  
6           question?

7           MR. WOLCH: Is that true? The question is  
8           is that true. Is that true?

9           MR. FRAYER: That doesn't help, that  
05:13 10          doesn't help the issue. As you indicated,  
11          Mr. Commissioner, this covers the judgment of  
12          Chief Justice Laing, covers this exact question.  
13          I mean, this is just -- I know Mr. Wolch is  
14          frustrated and he's trying to find some method by  
05:13 15          which he can get around having to refer directly  
16          to the memorandum of Mr. Rutherford to the deputy  
17          minister, but it is still a prohibited line of  
18          questioning.

19          COMMISSIONER MacCALLUM: The witness is not  
05:13 20          required to answer.

21          MR. WOLCH: Thank you, sir.

22          BY MR. WOLCH:

23          Q           I'm just about done here. The minister then  
24          asked:

05:14 25                   "Did David Milgaard kill Gail Miller?"



1 Perhaps none of us will ever know for  
2 certain. I had some tough questions  
3 about the Milgaard case, but I don't for  
4 a moment begrudge Milgaard his freedom.  
05:14 5 The issue was never a personal one with  
6 me. Whatever my own views, there came a  
7 point when I had to let it go. Dealing  
8 with this and other cases has made me  
9 quite modest about my own ability to  
05:14 10 know the absolute truth. That is why we  
11 must find methods of post-conviction  
12 review that make possible a fair and  
13 open-minded approach to the possibility  
14 of error in our courts. But I hope I  
05:14 15 can be forgiven for saying that  
16 "wrongful conviction" can be just as  
17 unjust when it occurs in the court of  
18 public opinion as when it happens in a  
19 court of law."

05:15 20 Maybe you can help me. Do you understand what  
21 she's saying?

22 A I can give you my assessment of what it means.

23 Q Please.

24 A I think it's simply this: Just as it's  
05:15 25 undesirable to have someone wrongfully convicted



1 of an offence by a court affirmed on appeal and  
2 re-affirmed on further appeal, it is equally  
3 hurtful where there's an accusation, a trial in  
4 the court of public opinion which is perhaps  
05:15 5 unsupported by the facts.

6 Q Tell me this, Mr. Williams. When people like  
7 David Milgaard, who are innocent, factually  
8 innocent, and have a lot of people who are firmly  
9 believers in their innocence and see the flaws in  
05:16 10 the case and see who the real perpetrator is and  
11 they are getting nowhere with your department,  
12 where can they go?

13 A Mr. Wolch, David Milgaard, under the 690  
14 application process, went to our department on two  
05:16 15 occasions and on the second occasion he was  
16 successful.

17 But it's important to keep in  
18 mind, sir, that whenever someone makes an  
19 application under Section 690 that is designed to  
05:16 20 overturn a conviction, that the foundations that  
21 are advanced have a solid factual footing. When  
22 that happens, generally good things happen. If  
23 the factual foundation isn't there, we are loath  
24 to overturn it because there is a respect for our  
05:17 25 trial process. But there is also a recognition



1           that there needs to be a safety net, and whether  
2           that is 690 or whether it is an appeal directly to  
3           the executive, there's a provision for that.

4           Q       Would you agree, though, that when most reasonable  
05:17 5           people see injustice they get outraged or should  
6           get outraged?

7           A       I think we're embarking on a whether or not the  
8           ends justify the means?

9           Q       No, no, I'm just suggesting the media is the only  
05:17 10           place to turn, and the media are intelligent  
11           people who will not champion a bad cause?

12          A       That's your view, sir.

13          Q       You think they would? Have you heard of anybody  
14           who has been wrongly convicted, allegedly, that  
05:18 15           the media sort of went to bat for that didn't turn  
16           out to be innocent?

17          A       I'm not gonna speculate on that, I just -- that's  
18           your view.

19          Q       In your experience of having 690 applications can  
05:18 20           you think of one where the media didn't agree with  
21           your decision and they were wrong?

22          A       My decision, sir, and my recommendations, are just  
23           for the minister. I know of several in which the  
24           media were not involved and there were adjustments  
05:18 25           made, there were remedies granted.



1 Q I'm not quarrelling with that. We'd like to have  
2 a system that's fair and works, we'd like to have  
3 a system where the applicant knows what's going on  
4 and is heard by somebody, but I'm suggesting to  
05:19 5 you that the media is the only place to turn when  
6 you don't know what the investigators are doing  
7 and it looks like they are biased?

8 A Sir, those accusations have been addressed, they  
9 have been addressed by changes to the system, and  
05:19 10 the circumstances and the prob -- the procedures  
11 that were in place at the time of the Milgaard  
12 application in 1988, some 18 years ago, have been  
13 dealt with specifically by changes in the  
14 legislation, both in terms of the law and in terms  
05:19 15 of the regulation, to address specifically the  
16 issue that you raise, that the applicant get a  
17 factual underpinning of -- and the fact, the  
18 factual -- will get the facts that have been  
19 discovered during the course of the investigation.  
05:19 20 That was the nature of the complaint and that is  
21 how the government has responded to it.

22 Q Would you not agree with me that a better approach  
23 would be to have investigation done, or handled by  
24 not a lifetime prosecutor, and the ultimate  
05:20 25 decision-maker being somebody who may not have



1           spent a day in a courtroom or assessed any  
2           criminal case?

3           A       I say this; that it is important, in an individual  
4           case, to have a thorough examination by competent  
05:20 5           counsel and investigators and a well-reasoned  
6           position, giving the applicant an opportunity to  
7           respond, and providing the applicant with an  
8           ability to advance the case as strongly as they  
9           see fit, and also giving the executive or the  
05:21 10          minister the opportunity to make a well-informed  
11          decision. You're asking me for a comparative  
12          judgement, that is -- that is my feel.

13          Q       My last question, Mr. Williams; is there anything  
14          you think you did wrong?

05:21 15          A       Mr. Wolch, dealing with a file 18 years ago,  
16          there's certain things that I could have done  
17          better. Whether I did wrong in the moral sense,  
18          I'm quite comfortable when I sleep at night, armed  
19          with the knowledge that I did the best job I could  
05:21 20          as conscientiously and as impartially as my office  
21          dictated.

22                               It may well be that additional  
23          evidence discovered afterwards established that  
24          Mr. Milgaard was innocent, and I'm happy for that  
05:22 25          result, but in terms of executing the



1 responsibilities attributed to me I did it as best  
2 as I could.

3 Q Those are all my questions.

4 MR. HODSON: Mr. Commissioner, just one  
05:22 5 point. I think you struck an answer that was  
6 relating to the legal opinion that was going to  
7 be objected to, and just for clarification, our  
8 rules allow that that answer can be formally  
9 struck from the record and, as such, it should  
05:22 10 not be reported on either, because it's not part  
11 of our record, and I just wish to bring that to  
12 your attention in case you wish to give any  
13 specific attention to that?

14 COMMISSIONER MacCALLUM: Well I'm -- Ms.  
05:22 15 Adams, are you the only media present? Do you  
16 know the question in -- the question and answer  
17 which Mr. Hodson speaks of?

18 MR. HODSON: I think the question was "did  
19 you prepare a legal opinion on the similar-fact  
05:23 20 evidence", and there was an answer, I'm not going  
21 to repeat the answer because it was struck, but  
22 that was the question and answer that I believe  
23 you directed to be --

24 COMMISSIONER MacCALLUM: Don't report on  
05:23 25 that.



1 MR. HODSON: Okay. Thanks. And then I  
2 think -- sorry -- tomorrow morning I think we  
3 will have Ms. McLean, and Mr. Frayer, and Mr.  
4 MacLeod, and Mr. Fainstein is standing in the  
05:23 5 wings to resume.

6 COMMISSIONER MacCALLUM: Yes.

7 MR. WOLCH: Mr. Commissioner, I know it's  
8 getting very late, but I just want to put on the  
9 record that I made reference to a document, it's  
05:23 10 152028.

11 COMMISSIONER MacCALLUM: Yes?

12 MR. WOLCH: And that's a document that I  
13 think is important. I don't want to see, Mr.  
14 Commissioner, you come to an erroneous conclusion  
05:23 15 without this document; that is it's a document  
16 that I alluded to, I paraphrased it, I may have  
17 paraphrased it wrong, I don't know, it speaks for  
18 itself.

19 COMMISSIONER MacCALLUM: What is it about?

05:24 20 MR. WOLCH: It's a document from  
21 Mr. Rutherford to the deputy minister October the  
22 2nd, 1991. It's a note on consultation with W.R.  
23 McIntyre, it details the discussion, it indicates  
24 that MacFarlane, Williams, and Rutherford met  
05:24 25 with McIntyre, it details their discussion, it



1 details their conclusions, it details Mr.  
2 Williams' opinion, it details MacFarlane's  
3 opinion, Rutherford's opinion, and why the matter  
4 should be referred.

05:24 5 COMMISSIONER MacCALLUM: Okay.

6 MR. WOLCH: And I think that document is  
7 crucial to your decision-making and I'm not sure  
8 what the position is on this document?

9 MR. HODSON: If I might speak to that, this  
05:25 10 is a document that the Commission has, it was  
11 provided to us by the Government of Saskatchewan.  
12 It is an exhibit, it's part of the Commission  
13 record. I anticipate that at the time we hear  
14 submissions, Mr. Commissioner, that there may be  
05:25 15 various submissions regarding the use, if any,  
16 that can be made of this document. But the  
17 issue, the judgement of Chief Justice Laing  
18 limited questions of Federal Justice officials  
19 with respect to advice given and received, that  
05:25 20 is why I did not question this witness with  
21 respect to the document. I did use the document  
22 in my questioning of Mr. Brown. So I think, if I  
23 may assist, I think Mr. Wolch and other counsel,  
24 including Mr. Frayer, will have an opportunity to  
05:25 25 make submissions about -- apart from questioning



1           this witness -- what use, if any, can be made of  
2           the document.

3           COMMISSIONER MacCALLUM: I want you to  
4           include those arguments in your written  
05:25 5           arguments, please, so that we don't spend an  
6           inordinate amount of time in oral argument on the  
7           subject, and in the meantime the media is  
8           directed not to publish 152028. Is that okay?

9           MR. WOLCH: I would just like to say, Mr.  
05:26 10          Commissioner, that I find it difficult that this  
11          document was given to Saskatchewan --

12          MR. HODSON: I --

13          COMMISSIONER MacCALLUM: Well there goes  
14          the privilege, but the constitutional  
05:26 15          prerogative, if it applies, does not go with the  
16          privilege.

17          MR. HODSON: I'm sorry, Mr. Commissioner,  
18          if I may just add. I do believe this document  
19          has already been made public on a previous  
05:26 20          occasion, I stand to be corrected on that, it's  
21          certainly been referred to in Mr. Brown. So it's  
22          out there, so to speak, and has been for some  
23          time. It may have been referred to a number of  
24          months ago. So I'm not sure, Mr. Frayer, if you  
05:26 25          wish to address this issue?



1 MR. FRAYER: If I'm not mistaken, in my  
2 absence my co-counsel Ms. Cox, when this  
3 particular document was produced to Murray  
4 Brown -- I may be erroneous in this, I haven't  
05:27 5 read the transcript -- spoke to the issue at that  
6 time and submitted it was one of those documents  
7 that fell under the prohibition, if I can put it  
8 in those terms.

9 COMMISSIONER MacCALLUM: I think she might  
05:27 10 have made that submission and didn't we say we  
11 would take it up later?

12 MR. FRAYER: Yeah, I think that may be the  
13 case, I can't quote it directly although I saw a  
14 media report on it.

05:27 15 This, I mean the argument  
16 that Mr. Wolch and I just had with respect to the  
17 questions that he asked of the witness, and your  
18 ruling in that, apply equally to this particular  
19 document.

05:27 20 We will be directing your  
21 attention to it in argument. Mr. Wolch wants it  
22 in, he thinks it's pivotal in the exercise, we  
23 ultimately will argue that the ruling of Chief  
24 Justice Laing prohibits reference to this  
05:28 25 document, for you to make any determinations



1 based on it. So it's consistent, I think, with  
2 the approach that we've taken throughout since  
3 that ruling, and I take your direction with  
4 respect to that in terms of our submissions in  
05:28 5 due course. Thank you.

6 MR. HODSON: I'm just going to add, Mr.  
7 Commissioner, this document became an exhibit on  
8 April 21st, 2006, I believe in the course of Mr.  
9 Asper's evidence, so it is a document that is on  
05:28 10 the Commission web site.

11 I believe the April 14th  
12 letter from counsel for the federal minister on  
13 the issue of the privileged documents that had  
14 been waived is that the documents could form part  
05:28 15 of the Commission database, in other words we --  
16 we have them and we can continue to use them,  
17 subject to submissions on constitutional issues,  
18 and I think we've heard constitutional issues  
19 with respect to questions that can be asked of  
05:29 20 Federal Justice witnesses.

21 I think the question that  
22 needs to be addressed, and will be addressed I  
23 would suspect at submissions, is what does that  
24 mean about the document? I mean the document, we  
05:29 25 have the document and it has been made public, so



1 I'm not sure how we can get it back -- how we can  
2 get it back.

3 COMMISSIONER MacCALLUM: Well, we might  
4 have to resort to a caution to the jury, as we  
05:29 5 have heard was done in 1969.

6 MR. HODSON: Sorry, one last matter. I've  
7 just been advised by Ms. Knox that she may have a  
8 couple questions as well for tomorrow, but we  
9 will convene, I think, at 9:00?

05:29 10 COMMISSIONER MacCALLUM: Thank you. And,  
11 also, everybody knows the time pressures we're  
12 under now so be prepared to have an abbreviated  
13 lunch hour tomorrow, will you.

14 (*Adjourned at 5:30 p.m.*)  
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