

*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 Wednesday, September 27th, 2006

Volume 189

Inquiry Proceedings



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*Mr. David Frayer, Q.C. and Ms. Jennifer Cox, for*  
Minister of Justice (Canada),  
The Hon. Vic Toews  
*Mr. Marshall Hopkins, Esq., for* Justice Calvin Tallis  
(Retired)  
*Mr. Kenneth R. McLeod, Esq., for* Mr. Eugene Williams



**INDEX OF PROCEEDINGS****DESCRIPTION:****PAGE:****EUGENE WILLIAMS, CONTINUED**

- BY MS. MCLEAN	39505
- BY MR. LORAN	39635
- BY MS. KNOX	39641
- BY MR. FRAYER	39672
- BY MR. MCLEOD	39685

**SPENCER RONALD FAINSTEIN, SWORN**

- BY MR. HODSON	39706
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**Transcript of Proceedings**

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

09:03 COMMISSIONER MacCALLUM: Good morning.

A Good morning. If I may have a moment before  
counsel begins?

COMMISSIONER MacCALLUM: Yes.

A Okay.

**EUGENE WILLIAMS, continued:**

**BY MS. McLEAN:**

09:04 Q Good morning, sir. For the record, my name is  
Joanne McLean, I represent Joyce Milgaard, and I'm  
also here on behalf of the Association in Defence  
of the Wrongly Convicted. So some of my questions  
are factual, some of them systemic, and sometimes  
a mix of both. I just want you to keep that in  
mind as I ask you questions.

09:05 Now you told us the other day,  
I can't remember what day it is, but you basically  
start out with a presumption of regularity, that  
the trial and the appeal process catches anything  
that went wrong?

A Correct.

09:05 Q And you started in 1989, primarily, when the



1 documents had arrived?

2 A In relation to the Milgaard application?

3 Q I'm sorry, yes?

4 A Yes.

09:05 5 Q And then you were getting some information and  
6 documents and assistance from Mr. Caldwell?

7 A Mr. Caldwell made some introductions for me,  
8 answered some of my questions, and provided  
9 information from his file.

09:05 10 Q Okay. If we could go to 016105, please. This is  
11 a memo to the file from you dated October the 23rd  
12 of 1989, it's just about your request to ask Mr.  
13 Caldwell to photocopy testimony for you, --

14 A Okay.

09:06 15 Q -- Nichol John, Ron Wilson, and Shorty Cadrain?

16 A Excuse me, madam?

17 Q Yes?

18 A Mr. Commissioner, I don't have the image on my  
19 screen.

09:06 20 Q It's probably not turned on.

21 A Thank you.

22 Q Okay. The next page of that document, if I  
23 could --

24 A Madam, I didn't --

09:06 25 Q Sorry?



1 A Like, I didn't see it.

2 Q You didn't get a chance to see it?

3 A Yes.

4 Q Okay. It's not really that I wanted to ask you  
09:06 5 questions about, it's just your memo to file that  
6 indicates that you had spoken to Mr. Caldwell --

7 A Yes.

8 Q -- and asked him to photocopy testimony, Nichol,  
9 Ron Wilson, Shorty Cadrain, and any other things  
09:06 10 that he had identified; that's what I am  
11 interested in?

12 A Yes.

13 Q Okay. And the next page is, attached to it, is a  
14 letter to you from Mr. Caldwell dated October the  
09:07 15 25th, 1989, and he's provided you with a number of  
16 documents that were relative to the preliminary  
17 inquiry, see it down here?

18 A Yes.

19 Q The next page, please. Witnesses required for the  
09:07 20 preliminary inquiry, that was a lengthy document  
21 outlining the case and what various witnesses  
22 would say, and that was prepared by Mr. Ullrich;  
23 do you remember that?

24 A Yes.

09:07 25 Q And then you also received copies of the



1 preliminary inquiry evidence of the three civilian  
2 witnesses you were interested in, Nichol John,  
3 Dale Wilson -- Ronald Dale Wilson, and Albert  
4 Cadrain; and then moving along, down to the trial  
09:07 5 itself, you received information about the -- a  
6 memo with the new witnesses, Lapchuk, Melnyk and  
7 Frank, and that would be related to the Deborah  
8 Hall information; yes?

9 A Yes.

09:08 10 Q And then Mr. Caldwell has pointed out that Ron  
11 Wilson is the one that had told the police about  
12 these witnesses. Number 9 there, you've got the  
13 opening address as given by Mr. Caldwell;  
14 photographs -- next page, please -- Nichol John's  
09:08 15 statement of May the 24th. I don't see anything  
16 there referencing the March 11th statement of  
17 Nichol John; did you get that?

18 A I'm sorry?

19 Q I don't see any reference there to the Nichol John  
09:08 20 March the 11th statement, her first one; did you  
21 receive a copy of that?

22 A At some later date I believe I did, yes.

23 Q Okay. And the closing address given by Mr.  
24 Caldwell?

09:09 25 A His notes.





1 Q Okay, his notes of it?

2 A Yes.

3 Q Okay. And you'd not received any other transcript  
4 of the closing addresses?

09:09 5 A I'm not certain that it had been transcribed, I --  
6 I, frankly, don't recall.

7 Q Yeah, I think you might be right about that,  
8 that's why I wanted to ask you about receiving the  
9 closing address because I think that, the closing  
09:09 10 addresses, were photocopied later -- or  
11 transcribed later, I think.

12 A Yes.

13 Q Moving down to the next section, Miscellaneous  
14 Material, an index to the statements taken,  
09:09 15 there's 95 of them, but not the statements  
16 themselves; the correspondence between Mr.  
17 Caldwell and Mr. Tallis about providing specific  
18 statements to him with respect to the Danchuks;  
19 David Milgaard's statements; a synopsis about two  
09:09 20 potential other suspects, Dennis Elliott and  
21 Leslie Spence. Number 17, you received David's  
22 statements dated March the 3rd and April 18th,  
23 1969, with the notation that:

24 "(Neither of these statements was led in  
09:10 25 evidence by the Crown as they were felt



1 to be untruthful in view of our  
2 knowledge of the case overall)."

3 Clear to you, from that remark, where Mr.  
4 Caldwell stood on the issue?

09:10 5 A I'm sorry, I didn't hear you?

6 Q Clear to you, from that remark, where Mr. Caldwell  
7 stood on the issue of guilt or innocence?

8 A Yes.

9 Q Okay. Next page, please.

09:10 10 A Well, clear to me that he didn't believe the  
11 statements, that's why he didn't want to lead  
12 them.

13 Q And then over into the next page, various other  
14 documents related to the forensics; the statement  
09:10 15 of Ms. Frank as it relates to Deborah Hall; and  
16 then a request passed on from you -- via you from  
17 Mr. Wolch to see if there were any news clippings  
18 or police reports about assaults on other women or  
19 nurses, specifically, or anybody using a knife,  
09:11 20 and in that regard you'd received a report dated  
21 February the 4th, 1969 from Mr. Mackie, and you  
22 also received specific statement numbers 38, 39,  
23 40, 63, and 67, and I believe number 40 is the  
24 (V4)--- statement in that list there. The  
09:11 25 notation:



1 "These are the only statements which I  
2 could find relating to other supposed  
3 sexual offences or attempts on the  
4 Provincial file. None of these episodes  
09:11 5 involved a knife or other weapon."

6 Okay. If we could go to 11293 (sic), please. Is  
7 it -- sorry?

8 JODIE KENDRY (Document Assistant): We're  
9 missing one number, Joanne.

09:12 10 MS. McLEAN: 112393.

11 JODIE KENDRY (Document Assistant): Thank  
12 you.

13 MS. McLEAN: I had it right, I just can't  
14 read.

09:12 15 BY MS. McLEAN:

16 Q Okay. This is about a week later, and it's  
17 another letter from Mr. Caldwell to you. Had you  
18 been speaking about the case with him in that  
19 intervening week; do you remember?

09:12 20 A I suspect, based on the first paragraph of the  
21 letter, that I was in telephone contact with him.  
22 Whether I was acknowledging receipt of materials  
23 he'd sent or some additional requests, I'm not  
24 certain at this moment.

09:13 25 Q Did you have conversations with him to give you



1 the impression that he was quite heavily invested  
2 in the case emotionally?

3 A I didn't draw that from his comments. Certainly,  
4 it was one of the cases, I guess certain -- during  
09:13 5 a career, you recall certain cases which perhaps  
6 were particularly challenging, and sometimes you  
7 can recall a case that developed the law in a  
8 particular area, and to the extent that Milgaard  
9 was one of those types of cases in terms of the  
09:13 10 treatment of a witness and the use of section 9(2)  
11 of the *Canada Evidence Act*, I think he felt a  
12 certain attachment to it. I'm -- my sensitivity  
13 as to his, quote, "emotional attachment", I didn't  
14 make that link.

09:14 15 Q Did he tell you he'd been writing to the parole  
16 board in respect of Mr. Milgaard?

17 A Yes, at some point in time he did.

18 Q Okay. And did you know that when you first  
19 started speaking to him? Like when you say "at  
09:14 20 some point in time" are we talking 1989 when you  
21 began, or in 1991?

22 A Shortly, within weeks of contacting him, I -- and  
23 during some discussions, he told me that he had  
24 written to the parole board.

09:14 25 Q This -- this letter of October the 31st, at the



1 bottom here:

2 "I have also received, and  
3 enclose an excerpt from the book  
4 entitled 'Winnipeg 8 - The Ice-Cold  
5 Hothouse' which ... has a story by  
6 Peter Carlyle-Gordge ...",

7 it says:

8 "... concerning the mother of the  
9 accused and her efforts on his behalf."

10 Did you have some conversation about that article  
11 with him, did you know it was coming?

12 A I didn't know it was coming, but I was happy to  
13 receive it, I just -- it came, so there it was.

14 Q Next page, please:

09:15 15 "You may wonder if you are reading about  
16 the same murder currently under review."

17 How did that comment strike you, sir?

18 A I don't recall my feelings at the time. Reading  
19 the letter now, it suggests that the account in  
09:16 20 the book and the excerpt you referred to me may  
21 differ from his recollection of the trial record.

22 Q Next page, please. This is the copy of *Winnipeg*  
23 *8, The Ice-Cold Hothouse*, this is the cover page,  
24 and handwritten on it:

09:16 25 "This is crap. They don't even have the



1 facts that are on public record right."

2 What did you make of that comment, sir?

3 A I'm not certain that I saw that comment, I just --  
4 that's somebody's opinion. I make my own  
09:16 5 decision.

6 Q Okay. Did you read the article?

7 A I probably did, but I have no specific recall of  
8 it as we speak.

9 Q There are some notations on it. Page 112407 of  
09:17 10 this document, please.

11 A I just have a question, is that a document that  
12 came from our justice files?

13 Q I'm sorry?

14 A Is that document one from the Department of  
09:17 15 Justice files?

16 Q Perhaps somebody --

17 MR. HODSON: This version is from Mr.  
18 Caldwell's file, the version you are looking at.

19 BY MS. McLEAN:

09:17 20 Q The answer is Mr. Caldwell's files.

21 A Okay.

22 MR. HODSON: If you want to call up -- the  
23 version you are looking at is from Mr. Caldwell's  
24 files. There's two other versions, one from the  
09:18 25 Government of Saskatchewan and one from David



1 Milgaard. We're not listing one from, having  
2 been received from the federal government, but  
3 we'll continue to check.

4 BY MS. McLEAN:

09:18 5 Q Thanks. It's very hard to read this document,  
6 it's faded, but down at the bottom, yeah, the very  
7 bottom, there appears to be a question mark  
8 handwritten in the margin there. I just put the  
9 line right on top of that.

09:18 10 A Yes.

11 Q And that's a reference to:

12 "The only witness, the caretaker of a  
13 nearby church, had seen a car parked in  
14 the area at about 7:00 a.m. that day.  
09:19 15 Through the murk he had seen the outline  
16 of a noticeably short man walking back  
17 and forth in front of the headlights..."

18 And that would be a reference to Mr. Diewold, we  
19 saw him in the documentary yesterday. Do you  
09:19 20 remember that?

21 A Yes.

22 Q Do you remember seeing Mr. Diewold in the, or  
23 somebody pretending to be Mr. Diewold?

24 A Yes, I take your point.

09:19 25 Q And the one thing there that is not in his trial



1 evidence is that it was a noticeably short man,  
2 and did you understand that Peter Carlyle-Gordge  
3 was a journalist who had been assisting the  
4 Milgaards in interviewing witnesses?

09:19 5 A I later came to realize that that was the case.

6 Q The next page, please, there's a handwritten note  
7 here in the -- or in between the pages, it says  
8 "Wrong" and this is, it says "several weeks  
9 passed," so this would be several weeks after the  
09:20 10 murder, and:

11 "...in the melting spring snow a close  
12 neighbour of Albert's family, a block  
13 away, found a blood-stained blue toque.  
14 A child found another of the nurse's  
09:20 15 possessions not far from there."

16 And beside that it says "Wrong". Do you  
17 understand from the facts of the case, that  
18 Ms. Helen Gerse, the neighbour of the Cadraings,  
19 found a blue toque some days after the murder and  
09:20 20 turned it over to the police on April the 18th of  
21 1969?

22 A Assuming, counsel, that your recitation is  
23 correct, I'm prepared to acknowledge that. I have  
24 not looked at the transcript in any detail in a  
09:20 25 number of years, so my intimate familiarity with





1 aspects of the evidence is somewhat low at this  
2 point.

3 Q Okay. Just to add another fact for you then, "a  
4 child found another of the nurse's possessions,"  
09:21 5 that's the wallet that belonged to Gail Miller  
6 that was found by -- well, two people now  
7 according to the inquiry evidence, but the trial  
8 evidence was Giles Beauchamp?

9 A Yes.

09:21 10 Q I presume your answer is going to be the same  
11 thing to the next question mark there which is:  
12 "Police inquiries ... turned up the fact  
13 that young David and his friends had  
14 left Saskatoon the day of the murder."

09:21 15 And then it goes on to talk about the four having  
16 split up after, not long after leaving Saskatoon,  
17 and I take it your answer is the same here, not  
18 sufficiently familiar with the facts now to be  
19 able to --

09:21 20 A Well, someone else has put a question mark on  
21 there.

22 Q Yeah.

23 A I have -- I'm not certain what your question is,  
24 you know. Whoever writ the article certainly, I  
09:22 25 guess I intuit by the placement of the question



1 mark had questions perhaps about the accuracy of  
2 the narrative and that's my take on that.

3 Q Okay. Could I have document 120 -- yeah, 125206,  
4 please. This is your interview of Nichol John,  
09:22 5 and I'm simply going to refer to her as Nichol  
6 John just for continuity, November 7th of 1989  
7 with you and Sergeant Tidsbury, and you told us  
8 the other day, what was your purpose in going to  
9 interview Ms. John at that date?

09:23 10 A Well, certainly at the original application there  
11 was, in the original line there was a reference to  
12 Nichol John and my recall now signals that there  
13 was some question about the accuracy of her  
14 testimony, so it was felt prudent to speak with  
09:23 15 her.

16 Q And you are referring there to the original  
17 application from Mr. Wolch where he referenced his  
18 willingness to outline the difficulties or the  
19 impossibilities, implausibilities of Nichol John's  
09:23 20 evidence?

21 A I think there was such a reference, yes.

22 Q I'm sorry, I should correct that, it's not her  
23 evidence, it's her statement of May 24th.

24 A Yes.

09:23 25 Q Could I have 106661, please. This is a report



1           dated April the 18th, it's written by Mr. Karst,  
2           and it references activities in Regina on April  
3           the 14th of 1969. This paragraph here refers to  
4           locating Nichol John in Regina and taking her to  
09:24 5           the city police station where she was interviewed  
6           at length. Now, this would be subsequent to her  
7           March the 11th interview.

8           "Further investigation of this girl when  
9           she was interviewed gave one the feeling  
09:24 10          that she was telling the truth and she  
11          emphatically stated she could not recall  
12          any time while they were in the City of  
13          Saskatoon during the morning of the  
14          murder at which time Wilson or Milgaard  
09:25 15          had left the vehicle in which they were  
16          driving long enough to commit this  
17          offence. She denied that Milgaard had  
18          left their vehicle at any time to go to  
19          a bathroom or go for a cup of coffee  
09:25 20          which she could recall."

21          Did you ask Ms. John any questions about that  
22          interview she had with the police?

23          A           I don't believe I did.

24          Q           Or about the statement that she had given March  
09:25 25          the 11th when she first spoke to the police?



1 A No. As I recall now, my questioning of Ms. John  
2 focused primarily on her testimony under oath at  
3 trial.

4 Q Do you recall asking her any questions that would  
09:25 5 be, that could be construed as challenging the  
6 impossibilities of her May the 24th statement?

7 A I asked her questions dealing with her recall of  
8 the events that were the subject of that May 24th,  
9 1969 statement. However, the questions that you  
09:26 10 ask sometimes are premised or informed by the  
11 response of the witness, both their verbal  
12 responses and their emotional condition.

13 Q Document 125206 again, please. You had made  
14 arrangements with Ms. John to interview her and  
09:26 15 she knew you were coming, right, you weren't a  
16 surprise?

17 A That's correct.

18 Q After the initial introductions, the first thing  
19 that you tell her is:

09:27 20 "The reason I'm here is because David  
21 Milgaard has applied to the Minister of  
22 Justice looking for a review on a 1969  
23 conviction for non-capital murder. He  
24 alleges that he has been wrongfully  
09:27 25 convicted and has asked the Minister to



1 review his case. My job is to determine  
2 whether he was wrongfully convicted or  
3 whether there's any merit in his  
4 application..."

09:27 5 Is that a misstatement of your job there, sir?

6 A It's an over-simplification, yes.

7 Q "...and it's for that reason that I  
8 came to see you because from my review  
9 of the transcript you were a Crown  
09:27 10 witness and you were an important  
11 witness in the case in fact. Judicial  
12 history was made as a result of your  
13 testimony and some of the activities  
14 that ah, occurred during the trial."

09:28 15 What was the purpose in telling her that, sir?

16 A My recollection is that if you are referring to  
17 the last sentence only or if you are referring to  
18 the entire paragraph, it was a form of  
19 introduction. On reviewing it now, it might have  
09:28 20 been more artfully put. As a matter of fact, as I  
21 understood it at least, judicial history was made  
22 in part because of her, shall we say, because she  
23 did not recall at trial nor adopt the statement  
24 that she had made on May 24th, 1969 and that the  
09:28 25 treatment of that situation in a courtroom setting



1 led to the Supreme Court decision which more or  
2 less set out the rules that were followed for  
3 many, many years.

4 Q What was the purpose in telling her that?

09:29 5 A It was -- there wasn't any specific purpose, it  
6 was just part of the narrative.

7 Q Okay. Next page, please, 207, you tell her here  
8 that:

9 "...whatever you say to me today --"

09:29 10 Sorry, it's this section here I'm talking about:

11 "...whatever you say to me today will be  
12 kept confidential and that as result of  
13 your talking to me today I do not  
14 anticipate that you will be called upon  
09:29 15 ... in a Court setting to explain or to  
16 revisit something which happened twenty  
17 years ago, but there are some important  
18 questions that I have to ask and it's my  
19 job to do so."

09:29 20 A couple of questions about that, sir. When you  
21 are saying to her that whatever she says will be  
22 kept confidential, does that indicate that you  
23 were not intending to share it with the  
24 applicant?

09:30 25 A I wasn't intending to publicize it. As and when



1 required, it could well go to the applicant or  
2 some of what she said might have been used to  
3 question other witnesses, but it wasn't a  
4 situation in which it would be publicly broadcast.

09:30 5 Q Okay. Well, I'm not talking about public  
6 broadcast --

7 A Disseminating.

8 Q -- I'm just asking about your use of --

9 A It would be kept confidential?

09:30 10 Q Yeah.

11 A It would be kept for the minister. It was  
12 possible, the possibility existed that it might be  
13 shared with the applicant, but ordinarily when we  
14 speak with witnesses, we indicate to them that it  
09:30 15 will be kept in confidence.

16 Q And then you indicate:

17 "...I do not anticipate that you will be  
18 called upon again ... in a Court  
19 setting..."

09:30 20 What does that mean, that you don't anticipate  
21 you are going to get anything helpful from her  
22 one way or the other?

23 A No, I -- at that point in time I wasn't certain  
24 where this was going to go, but that was my  
09:31 25 feeling at the moment, I don't anticipate you will



1 be called upon, but, you know, anything is  
2 possible.

3 Q Okay. Same page, I just have to find it. Could I  
4 see the whole page, please? Oh, I'm sorry, page  
09:31 5 125207 -- to 209, please, I'm sorry. There we  
6 are. Now, Mrs. Milgaard had made some attempts to  
7 contact Nichol John, I'm just putting this in  
8 context for you a little bit, and she had been,  
9 Ms. John had been telling you that Joyce had been  
09:32 10 calling and wanting her to take sodium pentothal,  
11 and then you go on and you say to her at 209:

12 "I understand about the time that the  
13 statement was taken..."

14 And the statement you are referring to is the May  
09:32 15 24th, 1969 statement:

16 "...you were also interviewed and spoke  
17 with a Mr. Roberts, a fellow who ran a,  
18 a lie detector test. Do you remember  
19 that?"

09:32 20 And she indicates:

21 "I don't remember that.

22 You don't remember..

23 I don't remember half this statement."

24 And your response:

09:32 25 "I see."





1 And she says:

2 "I don't..."

3 So there's a reference there to Mr. Roberts and  
4 the lie detector test. Did you know, when you  
09:32 5 were questioning her, that Mr. Roberts had in  
6 fact not polygraphed Nichol John?

7 A I know that Mr. Roberts had questioned her.  
8 Whether or not he had polygraphed her I wasn't  
9 certain.

09:33 10 Q Did it concern you that she had no recall of  
11 dealing with Inspector Roberts?

12 A I'm not certain that's what she said or that's  
13 what she meant when she said I don't remember  
14 that, I don't remember half this statement.

09:33 15 Q So you are suggesting it may not have been  
16 responsive to your question which was you were  
17 also interviewed and spoke with a Mr. Roberts. Do  
18 you remember that?

19 A It would have been preferable I guess if I had  
09:33 20 broken it up into two separate factual assertions.  
21 The first part was I understand about the time  
22 that the statement was taken and then I go on to  
23 talk about Roberts and she says "I don't  
24 remember," and when I say "You don't remember,"  
09:34 25 she says, "I don't remember half this statement."



1 It was one of those conversations in which there  
2 was a bit of a disconnect and she was focusing her  
3 answer not on the entirety of --

4 Q Uh-huh.

09:34 5 A -- but just on that statement part, "I don't  
6 remember half this statement." She had -- she was  
7 looking at it at the time.

8 Q So you may have had a disconnect between your  
9 question and her answer?

09:34 10 A Yes. I guess the point I'm trying to make in  
11 answer to your question is when she says "I don't  
12 remember that," I understood it, or I understood  
13 her to mean not that she didn't remember speaking  
14 with Roberts, but she didn't remember half the  
09:34 15 statement.

16 Q Okay. And the statement being the statement she  
17 gave to Detective Mackie?

18 A The May 24th statement.

19 Q Yeah. If Nichol John was to actually say and mean  
09:35 20 that she had no memory of dealing with Inspector  
21 Roberts, would you have concerns about that given  
22 the circumstances surrounding that statement, that  
23 interview?

24 A Had that been the case, I'm not certain how I  
09:35 25 would have reacted, but there would have certainly



1           been some cause to question and pursue it.

2           Q       Okay. Page 125212, and again, this is a  
3                   continuation of Nichol John complaining about Mrs.  
4                   Milgaard's attempts to interview her, the lengthy  
09:35 5                   dissertation there about what's been going on with  
6                   Mrs. Milgaard's attempts to contact her, and then  
7                   down at the bottom of this paragraph here she  
8                   says:

9                   "...I've had it with this ... I have  
09:36 10                  nothing to say ... what I had to say was  
11                  said in the trial and I can't remember  
12                  any more than that, it seems like she's  
13                  pressing me for more and I don't have  
14                  any more, and I'm tired of this."

09:36 15               Your response, sir, is:

16                  "Well she's also, through her lawyer,  
17                  pressing the Department. The difference  
18                  between you and the Department is that  
19                  we have to respond."

09:36 20               Sir, do you think a reasonable person hearing or  
21               reading this would possibly have some doubt about  
22               your attitude towards this application?

23           A       In what respect, madam? The fact of the matter is  
24                   Ms. John as a private citizen, was under no  
09:37 25                   obligation to respond to Mrs. Milgaard. The



1 minister receiving a Section 690 application has a  
2 duty to examine it and I, in the capacity of, and  
3 counsel to the minister, it was my obligation to  
4 respond. Now, you may wish to take a sinister  
09:37 5 approach to that, but that's simply the fact as I  
6 understood it.

7 Q And you think that was an appropriate thing to  
8 indicate to the witness in that context?

9 A Obviously I did because I did.

09:37 10 Q You think it was now, sir?

11 A It may have in hindsight, 20/20, 18 years after  
12 the event, perhaps that thought might have been  
13 more artfully communicated.

14 Q Or not at all?

09:38 15 A I say in the context of the conversation I said  
16 what I said.

17 Q Page 215 of the same document, please, you are  
18 asking her questions here about her statement to  
19 Mr. Mackie. She has already told you that she  
09:38 20 doesn't remember half the statement and you say to  
21 her:

22 "At the time, Detective Mackie was  
23 investigating a murder and he had spoken  
24 with you and he also spoke with Ron  
09:38 25 Wilson."



1 She just says:

2 "Uh uhm."

3 You continue:

4 "And at that time I imagine it was

09:38 5 impressed on you that it was a serious

6 thing?"

7 Nichol's response:

8 "Exactly."

9 Your question:

09:39 10 "...is it fair to say that what you told

11 him then ... would be your best

12 recollection?"

13 Her answer is:

14 "Yes."

09:39 15 "And that you didn't fib or lie?"

16 "No. Absolutely not."

17 "Now, what you're saying to me today is

18 that you have no present recollection of

19 some of it?"

09:39 20 And her answer is:

21 "Right."

22 Now, when you are talking about the police,

23 Detective Mackie impressing upon her that the

24 investigation of a murder is a serious thing, why

09:39 25 were you just focusing on the May 24th statement?



1           A           Because that's what we were discussing at the  
2                       moment. My -- my take on the events was as  
3                       follows: At the time my experience was that it's  
4                       not unusual for witnesses not to tell all they  
09:39 5                       know when they first, when they are first  
6                       contacted by the police and that sometimes there  
7                       is more or less a relationship that develops and a  
8                       story emerges, that was how I had interpreted the  
9                       initial, shall we say, denial, and then it  
09:40 10                      progressed, so that the witness disclosed  
11                      additional details. At the time of the interview  
12                      our conversation focused on the May 24th, 1969  
13                      statement. That was the statement that contained  
14                      the information which was the subject of the  
09:40 15                      Milgaard application in the Supreme Court, that  
16                      was the statement that contained some fairly  
17                      incriminating information if it in fact were true  
18                      against David Milgaard, and that's where I was  
19                      focusing my efforts at that moment.

09:41 20           Q           Did you focus any efforts on how that statement  
21                       came to be made in the sense that it was a  
22                       complete 180 from her original statements?

23           A           There was some discussion about it, but I don't  
24                       recall now as we speak what the line of  
09:41 25                       questioning were.



1 Q At the time you were questioning Nichol John you  
2 knew that the police had spoken to her repeatedly  
3 in 1969?

4 A Certainly on more than one occasion, yes.

09:41 5 Q And that they were always investigating a murder?

6 A Yes.

7 Q And can we assume that it was impressed upon the  
8 16-year-old that it was a serious thing?

9 A Yes.

09:41 10 Q And probably her best recollection of the events  
11 that happened on January the 31st would have been  
12 when she was first spoken to?

13 A Between January and March or April or May one  
14 could assume that, provided of course that when  
09:42 15 she spoke to the police in January she told them  
16 all that she knew.

17 Q My question was actually what her best  
18 recollection would be, the time of her best  
19 recollection would be closer to an event or a  
09:42 20 non-event wouldn't it?

21 A I think --

22 Q Whether or not she communicated her best  
23 recollection, her best recollection would be  
24 closer to the event?

09:42 25 A I think that's a fair assumption, yes.



1 Q Do you think it's somewhat suggestive or leading  
2 to tell her that she didn't lie in that statement?

3 A It is a leading question, but I put the question  
4 directly to her so that she could answer it one  
09:42 5 way or the other and she did.

6 Q If we assume -- let's not assume, let's just go  
7 with the known fact, that David Milgaard did not  
8 commit this murder. Is there any reason that you  
9 can think of why Nichol John would have lied to  
09:43 10 the police repeatedly from March until May the  
11 24th -- May the 23rd?

12 A If your question is to ask me whether I can put  
13 myself into Nichol's position and conjure up  
14 rationale for my behaviour, I'm sorry, I'm not  
09:43 15 prepared to do that.

16 Q 216, please, same document. My question is  
17 actually going to be about the very first part, so  
18 maybe you should go back one page, please, and see  
19 what she starts off with saying. You are having a  
09:44 20 conversation with her about how she doesn't  
21 remember parts of her statement later and she  
22 says:

23 "...what I remember ... I put myself  
24 back there many, many, many times."

09:44 25 "Through the whole thing that I went





1 through."

2 And then going over she says:

3 "What can I say, I don't remember the  
4 murder supposedly, I was put there, I  
09:44 5 was placed at that time, I don't  
6 remember those things, I only remember  
7 certain things that lead up to and after  
8 the fact..."

9 Did that statement strike you as a bit off?

09:44 10 A It did, and that's why I wanted to find out more  
11 about it and make some sense of it.

12 Q Almost sounds like she's saying that she was told  
13 that she was there?

14 A I think that might be one interpretation.

09:45 15 However, I was focusing more on what she said  
16 towards the end, "...I only remember certain  
17 things that lead up to and after the fact..." and  
18 I was more focused on what she recalled. It's her  
19 memory that I was probing. Her use of certain  
09:45 20 language are displaced at that time, it's more or  
21 less in the passive, and I wanted to find out how  
22 it is that she turned from the active to the  
23 passive. I only remember certain things, so I  
24 wanted to take it through to find out precisely  
09:45 25 what she knew.



1 Q I'm sorry, are you finished?

2 A I am.

3 Q 222, please. This is -- okay. She gets into --  
4 yeah, actually, it's right after this. It's when  
09:46 5 she's talking about what she actually does  
6 remember, she says that she only remembers bits  
7 leading up to it, and:

8 "The only thing I can remember is seeing  
9 garbage cans ..."

09:46 10 "... I can even remember sitting in the  
11 alley with the church at the end with  
12 the headlights on and there was two  
13 garbage cans about half way down the  
14 alley."

09:46 15 And you point out to her that she said that she  
16 seemed to recall seeing Dave put a purse into a  
17 garbage can, and she says:

18 "I don't remember ... seeing him do that  
19 right now. I can't, okay, I remember  
09:46 20 the garbage cans though. I can.."

21 Did you find it troubling that all she could  
22 remember was garbage cans?

23 A At that point, no. She didn't merely say that all  
24 she could remember was garbage cans, she situated  
09:47 25 herself in an alley, she situated herself with the



1 headlights and with the church, but she didn't re  
2 -- she recalled garbage cans, that's what she  
3 remembered.

4 Q And you knew that she'd been taken to that very  
09:47 5 alley --

6 A I knew --

7 Q -- by Detective Mackie on May the 22nd in the  
8 evening?

9 A I knew that there had been a drive-by.

09:47 10 Q A 'drive-by'?

11 A Like, I use that phrase, she'd been taken there in  
12 the police -- to see whether or not she recognized  
13 any of the landmarks.

14 Q Yeah. And you knew, from her earlier statement in  
09:47 15 May -- in March of 1969, that the landmark they'd  
16 been looking for was the St. Mary's cathedral, the  
17 church that was there?

18 A Yes.

19 Q And you also know that Nichol John did not take  
09:48 20 anybody to that scene, she was taken by Detective  
21 Mackie?

22 A She was taken to the area by Detective Mackie,  
23 yes.

24 Q Yeah, but not at her direction, is what I am  
09:48 25 getting at?



1 A I'm not certain. I assumed that Mackie took her  
2 there.

3 Q 226, please. You are asking a question here at  
4 the top of the page, and this is a conversation  
09:48 5 that she had told the police about on her May 24th  
6 statement, that she and Ron Wilson had discussed  
7 that she -- excuse me -- that she knew David had  
8 done it. Her answer is, to your question:

9 "What about the conversation ... between  
09:48 10 you and Ron?"

11 And her answer was:

12 "I don't remember that either."

13 Did that strike you as odd or troubling?

14 A Forgetful. Not odd or troubling.

09:49 15 Q All right. Umm, the same page, down at the  
16 bottom. You ask her:

17 "Do you remember a coat? That Mr.

18 Roberts showed you?"

19 And her answer is:

09:49 20 "No, "

21 And that would have been a coat, sir, that  
22 belonged to Gail Miller after she had been  
23 stabbed and left dead in the snow. Did you find  
24 it disturbing that she was shown that coat?

09:49 25 A No.



1 Q The fact that she had been shown it prior to  
2 giving any statement describing it would be not  
3 terribly helpful for any description that she  
4 might have gave; would it?

09:49 5 A It would certainly have coloured the description  
6 and would have affected the weight.

7 Q Did you find it disturbing, at all, that she  
8 didn't recall being shown the murder victim's  
9 coat?

09:50 10 A You use the word "disturbing", no, she didn't  
11 recall.

12 Q And that didn't bother you?

13 A Many years had passed. During our interview she  
14 was struggling with certain emotions and her  
09:50 15 response was she didn't recall. It wasn't very  
16 helpful to me but there wasn't much I could do  
17 about it.

18 Q 125227. You ask her, here, something that's been  
19 bothering you a little bit:

09:51 20 "... I know that some of the cases I've  
21 tried there has been pressure ...  
22 brought to bear on the witnesses, or  
23 potential witnesses and I wondered if  
24 ... any pressure had been brought upon  
09:51 25 you during that course of time ... to



1 tailor your recollections..."

2 And she says:

3 "No.."

4 "... one way or the other?"

09:51 5 "No. To, to, maybe to, what can I say,  
6 really wasn't pressure, not at all. I  
7 had ... take your time, take your time,  
8 we don't wanna ... put words in your  
9 mouth, we don't wanna do this, we don't  
10 wanna do that. I remember that. I  
11 would say no, no pressure."

12 And then the officer interjects:

13 "You're referring to the police when you  
14 say that?"

15 Her answer is:

16 "Right."

17 Is that answer of a great deal of value if she  
18 can't even remember being interviewed?

19 A She testified or she said at that time that she  
09:51 20 didn't remember being questioned by Roberts.

21 Q Or giving the statement to Mackie?

22 A Well, certain parts of the statement she didn't  
23 recall. I didn't understand her to say, then,  
24 that she didn't remember giving the statement.

09:52 25 Q You don't recall that being her trial evidence?



1 A At this moment, I don't.

2 Q Okay. When she was talking about whether or not  
3 she'd been pressured, did you attempt to help her  
4 recollection at all, by making any reference to  
09:52 5 the extensive interviews that had been done with  
6 her?

7 A What -- what you have on the record is the series  
8 of questions and answers that I had at that date.

9 Q The answer is "no"?

09:52 10 A I guess not.

11 Q And no reference to the lack of records that had  
12 been kept, or her repeated denials, or the fact  
13 that her story had suddenly changed after a night  
14 in jail?

09:52 15 A Those, those are some of the things that I was  
16 aware of, but I didn't put to that witness.

17 Q And it was of no interest to you with that  
18 witness?

19 A I wouldn't say it was of no interest to me, but I  
09:53 20 had asked the question, and I guess I had asked it  
21 more or less open-ended, and it's the thing that  
22 was bothering me as to whether or not any pressure  
23 had been brought to bear, and I wanted her  
24 perception of that, and she gave it.

09:53 25 Q 36, please, 236. This is a question asked by the



1 officer that's with you, and it sounds to me, he  
2 asks her some questions about a conversation that  
3 he had with Nichol in the coffee room, and that's  
4 during a break in the interview or maybe earlier,  
09:53 5 before the interview started. He says:

6 "... one thing we were mentioning  
7 between us and I was asking Nichol in  
8 the coffee room ...",  
9 and that's during a break in the interview or  
10 maybe earlier, before the interview started, and  
11 he says:

12 "... one thing we were mentioning  
13 between us and I was asking Nichol ... I  
14 was asking her if she experienced any  
09:54 15 flashbacks of this incident ... either  
16 in her sleep or in the daytime and ...  
17 Nichol did tell me that you do  
18 experience flashbacks of the incident."

19 And then she responds:

09:54 20 "... I have these things that pop into  
21 my head ... I don't know if they're  
22 real."

23 Now, first off, it sounds like you weren't  
24 present in the coffee room for that discussion;  
09:54 25 were you?





1           A           I was not. There was a break, she'd requested a  
2                       few minutes, and she went with her boyfriend, and  
3                       they were escorted to another part of the  
4                       building. I wasn't there.

09:54 5           Q           It's sounds like the officer was the one that was  
6                       introducing the concept of flashbacks there; is  
7                       that a matter of concern?

8           A           No. What I -- what I learned was that -- excuse  
9                       me -- what precipitated the break was a, an  
09:55 10                  emotional response by the witness, Ms. John, which  
11                       didn't -- it was disjointed from the questioning,  
12                       and she requested a few minutes. She went to the  
13                       coffee room with her boyfriend and with Sergeant  
14                       Tidsbury and, while she was there she discussed, I  
09:55 15                  learned later, that she was having a flashback,  
16                       and it was that became the subject of the  
17                       conversation while they were in the coffee room.

18           Q           Okay. So that's what you learned later, but my  
19                       question is when you heard this:

09:55 20                       "... I was asking her if she ever  
21                       experienced any flashbacks of this  
22                       incident ...";

23                       did that concern you when he says "I was asking  
24                       her that"? Doesn't it sound like he was  
09:55 25                       suggesting to her that maybe she was?



1 A I'd sounded as if she'd told him about it.

2 Q Page number, starting on 125236, please, talking  
3 to her about the flashbacks. Sorry. You say to  
4 her -- hmm, hmm, hmm, yup, over to the next page,  
09:56 5 please -- you say to her:

6 "... let's play with this one for a  
7 bit."

8 And you ask her, and she's -- she's already  
9 recounted to you this flashback she has of seeing  
09:56 10 somebody stabbing a woman, seeing somebody take  
11 the purse, putting it in the garbage can, and  
12 then you ask her:

13 "Have you seen any movies with that type  
14 of scene?"

09:57 15 and she says:

16 "... for sure."

17 you say:

18 "You have?"

19 "Well, for sure. Have you never ..."

09:57 20 "No, but exactly the scene that flashes  
21 back."

22 "Never seen a movie like that?"

23 "Have you ever seen a play like that?"

24 "Have you ever read a book which had  
09:57 25 precisely that scene?"



1 "Has anybody ever told you about that?",

2 And her answer is:

3 "No."

4 "No."

5 "No."

6 "No."

7 "No."

8 Were you trying to create a situation there where

9 she must have been having a real flashback

09:57 10 because it wasn't a movie plot?

11 A No, I was trying to find out whether or not the  
12 flashback may have been induced by something that  
13 she may have seen, whether through art, movie, or  
14 something else that was coming back.

15 Q And --

16 A Sometimes, you know, people will see things, and  
17 it terrifies them, and it's repeated, so I wanted  
18 to eliminate those as potential sources for the  
19 emotional reaction she was giving.

09:58 20 Q She's asked to describe the flashback she just had  
21 this very minute, she says:

22 "Could see a woman laying on the ground  
23 and a guy straddled over her and he  
24 ...",

09:58 25 and she's apparently saying there stabbing with a



1 knife because she's upset and she's crying, and  
2 Mr. Tidsbury says:

3 "Stabbing her with a knife? Okay, can  
4 you describe that scene for us?",  
09:58 5 she's still crying and she says:

6 "... he's on his knees and he's  
7 straddling over her".

8 Now, from your answers to Mr. Wolch yesterday, I  
9 presume you still think this was a real flashback  
09:58 10 that she had?

11 A It was certainly real to her, yes.

12 Q Did you think that she had ever seen the event she  
13 described?

14 A Yes, I think she saw something to that effect,  
09:59 15 yes.

16 Q She saw somebody straddling a woman on the ground,  
17 and straddling her, and stabbing her?

18 A I believe she saw that.

19 Q Okay. And, if she saw that event, there is no  
09:59 20 accounting there for how the coat belonging to  
21 Gail Miller would be damaged by the knife blade  
22 and the dress would not?

23 A The -- no, just --

24 Q It doesn't account for it?

09:59 25 A It doesn't account for it.



1 Q 239, please. She has this flashback of the man  
2 stabbing a woman:

3 "It's always ...",

4 and then she says:

10:00 5 "It's always the same."

6 So it's a flashback of a man stabbing a woman,  
7 this is the one of the straddling and the  
8 stabbing, and she says:

9 "And I have, and the one with the church  
10:00 10 all the time, it's just, it's always  
11 there, that that one is so predominant  
12 in my mind."

13 And she's talking about the church at the end of  
14 the alley. Going over to 43, please, the officer  
10:00 15 tries to go back to the flashback again, and  
16 says:

17 "Now this flashback you get of the  
18 scene, does this coincide with the  
19 flashback you've described of this man  
10:00 20 stabbing, a faceless, a faceless man  
21 stabbing a faceless woman?"

22 She says:

23 "I don't know, because they never co,  
24 they're never together."

10:00 25 "They're never together, they're never,



1                   you know, it's not like one happens and  
2                   then the other one happens, it doesn't."

3                   She's having difficulty seeing the two scenes  
4                   together, she sees a separate scene of the  
10:01 5                  garbage cans in the alley, and she sees another  
6                  one that's a man stabbing a woman. Now you know  
7                  that the alley and the church are both on the  
8                  route that the police took her to, as are the  
9                  garbage cans?

10:01 10           A           Yes.

11           Q           And did you make anything of her statements that  
12                       she can't put the two things together, the  
13                       stabbing and the location?

14           A           No. What I understood her to say was that she --  
10:01 15                  the two flashbacks, the one of, quote, "the  
16                  stabbing" and the one of the garbage cans, weren't  
17                  one of a continuous scene, but there was some  
18                  relationship between them, but they just weren't  
19                  -- something else may have interrupted in terms of  
10:01 20               a -- it wasn't, quote, "a narrative", that is one  
21               followed the other, it was just two flashbacks she  
22               had.

23           Q           Uh-huh. Did you have any concerns there about  
24                       what her dealings with the police might have been  
10:02 25               during that two-day period, the 22nd through to



1 the 24th?

2 A I did, and in relation of that I had asked her  
3 about the pressure, and she had given me an  
4 answer.

10:02 5 Q Page 245, still on flashbacks.

6 "... not saying ...",

7 "But you know, like, not saying that ...

8 what was said at that time wasn't true

9 ... I believe what I said at that time

10:02 10 was true, but, I don't remember saying

11 that stuff."

12 And then what comes back to her -- sorry, I'm

13 just looking for where it is, yeah -- you say:

14 "... but what comes back to you is that

10:03 15 scene,"

16 "It comes back repeatedly,"

17 She says:

18 "Right. Repeatedly. Through the last

19 twenty years it's, huh, you know, and

10:03 20 ..",

21 "...and I just, I can remember telling

22 those police, I remember that church, I

23 remember being stuck in that alley,"

24 And it's not surprising that Nichol John would

10:03 25 remember the church, that was the landmark that



1           they were looking for when they were looking for  
2           the Cadrain house; right?

3       A       I know that they were looking for a landmark  
4           church in their efforts to find Mr. Cadrain's  
10:03 5           house.

6       Q       And when she says "being stuck in that alley",  
7           that could well be a reference to the Danchuk  
8           alley, wouldn't it?

9       A       I didn't interpret it to be that at all.

10:04 10      Q       I said "could be". It's the only one she'd  
11           mentioned in March, an extensive description of  
12           being stuck in the alley behind the Danchuks and  
13           helping them with the car?

14      A       What I observed in relation to this conversation  
10:04 15           is she doesn't even mention the Danchuk as part of  
16           this scene so I didn't associate it, that scene,  
17           with being stuck in the Danchuks' alley.

18      Q       And the Danchuk alley is the only alley that was  
19           independently confirmed by independent witnesses,  
10:04 20           i.e. the Danchuks?

21      A       Well, assuming of course Ron Wilson isn't an  
22           independent witness, I guess not.

23      Q       You consider Ron Wilson to be an independent  
24           witness --

10:04 25      A       Well Ron --





1 Q -- to anything?

2 A Ron Wilson was a witness who was placed at that  
3 place, at that time, by Ms. John.

4 Q Are you aware that Ron Wilson was also placed with  
10:05 5 Nichol John prior to either one of them giving  
6 their May 23rd and 24th statements?

7 A I'm not certain I understand. When you say "he  
8 was placed with her", they met?

9 Q With her and Inspector Roberts, and discussed the  
10:05 10 case and various theories of the case?

11 A I wasn't aware of that.

12 Q Okay. The very end of the interview with Nichol  
13 John, 249, please. You have a polite goodbye,  
14 which is hardly surprising, but -- you appreciate  
10:05 15 her efforts in coming down -- but what you say to  
16 her is:

17 "... it moved me and I'm grateful for  
18 that and if I can do something in return  
19 it, it is just a suggestion that you  
10:05 20 consider ... counselling ...",

21 and then you go on with a suggestion that she get  
22 some professional counselling to deal with her  
23 issues. My question is really, when you say "it  
24 moved me", had you reached some personal decision  
10:06 25 and belief that Nichol John had seen the murder



1 at that point?

2 A Nichol John had seen something fairly traumatic.  
3 It had had -- it had had an enormous impact on  
4 her, and it continued for some many, many years.

10:06 5 Imagine, if you will, talking  
6 to someone across from a table, or two tables,  
7 about a topic, and unrelated to let's say that  
8 scene, and the person's entire body starts to  
9 shake uncontrollably, tears, inability to speak,  
10:06 10 fear. It signaled a recall of a very traumatic  
11 event, and yes, I was moved. And it signaled that  
12 there was a condition, and perhaps I shouldn't  
13 have displayed some compassion, but it occurred to  
14 me to suggest to her, if she hadn't already done  
10:07 15 so, that she may wish to get some professional  
16 help to deal with it.

17 Q That wasn't my question, sir. My question was  
18 whether or not you'd reached a personal decision  
19 and belief at that time that Nichol John had seen  
10:07 20 the murder?

21 A I think I was moving towards that. I didn't have  
22 the, or her recollection didn't provide the  
23 details, sufficient details, but it certainly  
24 sounded as if she had.

10:08 25 Q And you still haven't been able to shake that;



1 have you?

2 A I can't say I have. She saw something, whether it  
3 was the murder I'm not sure, but she certainly saw  
4 something there.

10:08 5 Q 338056, please. This is the memo that you wrote  
6 on July the 13th of 1990 regarding your interview  
7 with Larry Fisher. Mr. Wolch asked you questions  
8 yesterday about the interview itself, your -- your  
9 memo about it seems to be very impressed, if I can  
10:08 10 indicate that on the second page there, the fact  
11 that Mr. Fisher had denied the offence, the  
12 murder. You've got it underlined and standing in  
13 a paragraph all by itself:

14 "Mr. Fisher denied attacking anyone on  
10:09 15 the morning of January 31, 1969. He did  
16 not kill anyone, nor did he play any  
17 role in the attack on the woman who was  
18 found in the alley that morning. He  
19 stated that he had never been in the  
10:09 20 alley."

21 That, sorry, going further down here, I suppose  
22 to this paragraph, you indicate there that he  
23 couldn't:

24 "... recall whether there were pairing  
10:10 25 knives of the type found in the vicinity



1 of Gail Miller's body."

2 at his residence, however you say here:

3 "Nor did he recognize the type of knife  
4 which was circulated by the police. The  
10:10 5 photo depicted a weapon similar to the  
6 weapon alleged to be the murder weapon."

7 I'd like you to take a look, sir, at the document  
8 010358. This is your interview with Mr. Fisher.  
9 010418, please, of that document 010418.

10:10 10 "At that point in time ...",  
11 this is your question:

12 "At that point in time did you see a  
13 poster that looked like this? I'm  
14 showing you a photograph of a knife and  
10:10 15 above the photograph is a writing that's  
16 a request by the police for information  
17 relating to that fact."

18 His answer is:

19 "I've never seen that."

10:11 20 And that would be the poster.

21 "Okay. Looking at that photo of the  
22 knife have you seen a knife similar to  
23 that before?"

24 Answer:

10:11 25 "Well, yes I have."



1 "Where?"

2 "In 1970 when I got picked up on the

3 "...",

4 and presumably that's when he said 'the Winnipeg

10:11 5 murder'. So how do we get from that to your

6 memo, sir, that says:

7 "Nor did he recognize the type of knife

8 which was circulated by the police."?

9 A We don't. Could you go back to the other

10:11 10 statement please?

11 Q Yup. Page 338057 please.

12 COMMISSIONER MacCALLUM: I thought the one

13 he got picked up with in Winnipeg was --

14 corresponded to the paring knife that she'd lost

10:11 15 with the wooden handle?

16 MS. McLEAN: It is a paring knife, and I

17 believe the evidence is that it came from his

18 residence in Winnipeg, which was a room he was

19 renting with somebody else.

10:12 20 COMMISSIONER MacCALLUM: Yes, but I mean

21 wasn't that a knife with a wooden handle and

22 rivets?

23 MS. McLEAN: I'm not entirely sure about

24 that.

10:12 25 COMMISSIONER MacCALLUM: I thought some --



1 I thought that was the evidence, whereas the  
2 police were showing him a knife similar to the  
3 murder weapon?

4 MS. McLEAN: And he says in the interview  
10:12 5 that that looks like the knife he was picked up  
6 with in Winnipeg. I'm not responsible for Mr.  
7 Fisher's veracity, but that's what he said.

8 COMMISSIONER MacCALLUM: Okay. Just show  
9 me that again, please, so I don't get mixed up  
10:12 10 here?

11 A Could you highlight the passage?

12 BY MS. McLEAN:

13 Q Can we get them both up? Maybe that would help.

14 A No, I just need to see the one on the memo.

10:12 15 Q The Fisher interview or the memo?

16 A The memo.

17 Q The memo is this section here, and the part that  
18 starts with:

19 "Nor did he recognize ..."

10:13 20 A That is incorrect.

21 Q Okay. And the next part of the memo, Mr.  
22 Commissioner, deals with, I think, your question:

23 "Mr. Fisher said that he had obtained  
24 the knife used in the Winnipeg rape from  
10:13 25 the kitchen of his Winnipeg residence."



1 Memo, please, 338057, this same page here.

2 COMMISSIONER MacCALLUM: So you are telling  
3 me, sir, that he didn't, when you spoke to Fisher  
4 he didn't recognize the type of knife which was  
10:13 5 circulated by the police, that is the one which  
6 supposedly matched the murder weapon?

7 A He said he did in relation to the Winnipeg rapes,  
8 that's what -- that's what his answer is to my  
9 question, at least at that point. I'm not certain  
10:13 10 if he may have corrected it later, but certainly  
11 the two points that counsel put to me, or that  
12 portion certainly signals an answer that showed  
13 that he recognized the murder weapon and he had  
14 associated it with something that happened in  
10:14 15 Winnipeg. Umm, he may have corrected it later,  
16 but if that's the only reference to it on the  
17 transcript then the statement in that memo is  
18 incorrect.

19 BY MS. McLEAN:

10:14 20 Q The next part of this memo that you seem to have  
21 been impressed with here is down towards the  
22 bottom where you've got:

23 "A check of the Saskatoon  
24 police files revealed that the only  
10:14 25 records of Mr. Fisher's Saskatoon rapes



1 in existence related to the assault on  
2 (V5)-- (V5)--- which occurred on  
3 February 21, 1970 at 9:00 p.m. behind a  
4 dwelling at ...",

10:15 5 a location, and in capitals:

6 "NO WEAPON WAS USED DURING THAT  
7 ASSAULT."

8 A That was the information I had at the time.

9 Q Now as of July 1990 -- sorry, could I have 010718,  
10:15 10 please. This is a document that was shown to you  
11 during your examination-in-chief, I believe, and  
12 it's a letter from detective -- or Deputy Cory of  
13 the Saskatoon police to the Crown prosecutors in  
14 Regina concerning Larry Fisher and the Saskatoon  
10:15 15 offences. You've indicated, sir, that you had  
16 that letter; did you have it as of July 1990?

17 A I'm not certain. I may have. I think it just --  
18 can you flash it up a bit more?

19 Q Yeah. First -- this is just a recounting of the  
10:16 20 information.

21 A Yes.

22 Q The informations.

23 A Yeah, there's a second page.

24 Q Go to the next page, that's the one that itemizes  
10:16 25 the offences, this paragraph here, the offences in





1 relation to --

2 A That's (V1)-.

3 Q (V1)-, grabbed from behind and at knife point  
4 forced down a lane, forced to remove most of her  
10:16 5 clothes and raped, knife appeared similar to a  
6 paring knife. Down to Ms. (V2)-----.

7 A (V2)-----, yeah.

8 Q Sorry. November 13th, 1968, walking along the  
9 street, grabbed by a man carrying a knife, forced  
10:16 10 down a lane where coat and dress were removed at  
11 knife point, he raped her. The knife is described  
12 as carrying a small jackknife.

13 And then charge number 3,  
14 (V3)-----, November 29th, '68, followed by a man,  
10:17 15 grabbed from behind, forced into a lane, armed  
16 with what appeared to be a paring knife,  
17 threatened to use it if she failed to co-operate.

18 And then (V5)-- (V5)---,  
19 February 21st, 1970, got off the same bus with  
10:17 20 her, followed her off the bus, crossed the street,  
21 grabbed her from behind, put his hand over her  
22 mouth, dragged into a yard, overpowered and raped  
23 and there was no mention there at all of a --

24 A Of a knife.

10:17 25 Q -- of a knife one way or the other; right?



1 A Yeah. I'm not certain when we got that. My sense  
2 is had I had that document when I was questioning  
3 him, I probably would have put some of the items  
4 to him. I do recall requesting a second  
10:18 5 interview, but that never took place, and it  
6 didn't take place because it was refused.

7 Q 8058 -- despite -- sorry, next page:

8 "Despite his denials, there are some who  
9 disbelieve him."

10:18 10 And that's a reference to people disbelieving  
11 Larry Fisher when he denies he did the murder?

12 A That's what he said.

13 Q And then under conclusion, you reach the  
14 conclusions we've already, you've already  
10:18 15 discussed, but down at the bottom:

16 "Further, there may be significance in  
17 the fact that Larry Fisher volunteered  
18 information following his capture in  
19 Winnipeg which resulted in the laying of  
10:19 20 five additional sexual assault charges  
21 against him."

22 I think it's actually four, but:

23 "At the time of his arrest he was not...

24 And you've underlined not,

10:19 25 "...a suspect in any of the offences to



1 which he later entered a plea of  
2 guilty."

3 And then you conclude that you:

4 "...have no evidence or reason to  
5 conclude that..."

6 He,

7 "...participated in the death of Gail  
8 Miller."

9 Could I see 093342, please, September 25th  
10 letter, it's a letter dated September the 25th of  
11 1970 from the police in Winnipeg to the chief  
12 constable in the Saskatoon police and it's  
13 indicating that Mr. Fisher has been arrested and  
14 charged in Winnipeg with two charges of rape, one  
15 of theft by violence and one of an offence of  
16 possession of an offensive weapon, that weapon  
17 being a paring knife. They were unable to find  
18 any records of previous convictions on him and  
19 since he used to live in Saskatoon they want any  
20 information that they are able to provide about  
21 his background, and then it says:

22 "I will also briefly outline the  
23 offences allegedly committed by the  
24 accused, in the hope that it may help to  
25 clear up any similar offences that have



1 occurred in your jurisdiction."

2 And then it goes on to outline the offences in  
3 Winnipeg where he had followed the girl home,  
4 attacked her, raped her, robbed her of \$15, and  
10:20 5 then again the one where he had been caught in  
6 the act, he was armed with a paring knife and had  
7 raped another girl that he had followed.

8 The next document -- I'm  
9 sorry, did you have a copy of that letter, sir,  
10:21 10 when you were working on the case?

11 A At some point in time I had got a copy of it. I'm  
12 not certain I had it at that time, at the time of  
13 the interview.

14 Q Okay.

10:21 15 A I had some information about the Winnipeg attacks,  
16 yes.

17 Q Okay. 002019, another letter from Winnipeg --

18 COMMISSIONER MacCALLUM: Excuse me, you had  
19 some information about the Winnipeg attacks, but  
10:21 20 did you have information that Winnipeg was making  
21 a request of Saskatoon relative to those attacks?

22 A I think I knew that, yes.

23 COMMISSIONER MacCALLUM: Okay, thank you.

24 BY MS. McLEAN:

10:22 25 Q Okay, this is a letter of October 20th again from



1 Winnipeg to Saskatoon and this is one where  
2 there's an intervening letter which doesn't seem  
3 to have survived the last 36 years, from Saskatoon  
4 to Winnipeg, and that letter would have been dated  
10:22 5 October the 15th, 1970, so you see that this  
6 letter here starts off with:

7 "As requested in your letter dated  
8 October the 15th..."

9 A Yes.

10:22 10 Q So we can assume that that was requested in the  
11 letter of October the 15th.

12 "...members of our Department..."

13 And this is Winnipeg,

14 "...attended at the jail and interviewed  
10:22 15 the above named accused. He denied any  
16 knowledge of the offences committed in  
17 your area."

18 So that would be a denial by Mr. Fisher of any  
19 Saskatoon sexual assaults. Yes?

10:22 20 A Yes.

21 Q "I am sorry that I could not have had  
22 better news for you..."

23 But that's our report.

24 002032, please. The next day  
10:23 25 Mr. Fisher is charged with two, what are now



1 called sexual assaults, including one in which he  
2 was caught in the act and he's cautioned and  
3 gives a statement and in response to the caution  
4 he says:

10:23 5 "I want to clear up three more things,  
6 the first one was in Saskatoon sometime  
7 around this spring."

8 And I believe that is Larry Fisher's account of  
9 the (V5)-- (V5)--- rape, and the other one he  
10:23 10 refers to here:

11 "The second one was also in Saskatoon,  
12 near the University."

13 Dragged her into a back alley, tried to rape her,  
14 and I think that may be the (V3)----- assault,  
10:24 15 and then he admits to another charge in Winnipeg  
16 that is subsequently laid against him. It  
17 doesn't really seem like Mr. Fisher volunteered  
18 his guilt on offences without being a suspect,  
19 does it, given the circumstances, he had been  
10:24 20 questioned at the request of Saskatoon police,  
21 denied it?

22 A He denied it and then for some odd reason he had a  
23 change of heart.

24 Q Uh-huh. I don't think we need to bring them up,  
10:24 25 but for references and for your information, sir,



1 the next day, 010721, Mr. Karst from Saskatoon  
2 took a statement from --

3 A Mr. Fisher.

4 Q -- Mr. Fisher in relation to the (V3)-----

10:24 5 offence, and at 012111 he took a statement from  
6 Mr. Fisher recounting Fisher's version of the  
7 (V5)-- (V5)--- assault. And if we could have the  
8 Corey letter again, please, 010718, the second  
9 page of it, and this letter is being prepared --  
10:25 10 sorry, third page of it -- this letter is being  
11 prepared from Larry Fisher's guilty pleas which  
12 have taken place in Regina and the Deputy Chief  
13 Corey sets out:

14 "During October 22 ... Members of our  
10:25 15 Force interviewed Fisher while he was  
16 confined to cells... Fisher admitted  
17 being responsible for the rape of (V5)--  
18 (V5)----- (V5)--- ... and also the  
19 attempted rape of (V3)-- (V3)-----...  
10:25 20 Fisher was questioned about the offences  
21 committed on October 21 and November 13,  
22 1968, and denied any knowledge of same."

23 And he subsequently pled guilty to those two  
24 offences, it was part of the package deal he got  
10:26 25 where he got no time. So these offences, the



1 additional two he plead guilty to, although when  
2 questioned about them initially, he denied any  
3 Saskatoon offences?

4 A Correct.

10:26 5 Q When questioned later he admitted to two, but  
6 denied two apparently, and then ultimately pled  
7 guilty to four; yes?

8 A Yes.

9 Q Mr. Fisher is somebody that initially denies an  
10:26 10 offence and then eventually, for whatever his  
11 reasons are, comes around to entering guilty  
12 pleas?

13 A It appears so. Despite my request for a second  
14 interview, I didn't get a chance to get him to  
10:26 15 fess up to anything else.

16 MS. McLEAN: I'm going to be about -- the  
17 next part is about 10 minutes. Should we break  
18 now or in 10 minutes?

19 COMMISSIONER MacCALLUM: You are only going  
10:27 20 to be another 10 minutes?

21 MS. McLEAN: No, no, the next part is 10  
22 minutes.

23 COMMISSIONER MacCALLUM: Oh, no, we'll  
24 break now.

10:27 25 (Adjourned at 10:27 a.m.)





(Reconvened at 10:49 a.m.)

BY MS. McLEAN:

Q Just to finish up some Fisher documents, I should have also put to you document 004374 at 378, this is your memo, your report, August 28th of 1990, and I should just point out that you have put in here about Mr. Fisher:

"Additionally I examined his prison records and the available occurrence reports relating to his convictions to determine whether the circumstances of the crimes for which he entered pleas of guilty, bore any similarities to the circumstances surrounding Ms. Miller's death. They were not similar."

And that's all you have to say in your report about that; correct?

A On the August, '91, yes.

Q I'm sorry?

A Yes.

Q Could I have 333474, please. This is your memo to file dated July the 9th of 1990 and it references your interview the proceeding month on June 14th of Mr. Karst. Was the interview with Mr. Karst taped?



1 A It was not.

2 Q Okay. So the record of it is as outlined in your  
3 memo here of July the 9th?

4 A Yes.

10:51 5 Q Now, speaking of tapes, you've got here that:

6 "Detective Karst indicated that the May  
7 21, 1969 conversation with Ron Wilson  
8 was taped. However, the tapes have been  
9 lost. He also said that during his  
10:51 10 interviews with Mr. Wilson the  
11 conversations were conducted in a normal  
12 tone. He advised Wilson initially, that  
13 he was also under investigation."

14 Do you see a problem there, that the very time  
10:51 15 period when the witnesses were changing their  
16 story we don't have -- we don't have any notes,  
17 we don't have any tapes and we don't have  
18 contemporaneous records even?

19 A We don't some many years after the event. If we  
10:52 20 were in a trial context and disclosure had been  
21 requested of that and they were lost, I would have  
22 taken a different view, but having regard to,  
23 among other things, the file destruction policies  
24 and archiving and the problems associated with  
10:52 25 archiving, it's regrettable that they weren't



1 available, but that was the situation.

2 Q And there's not even anything in the reports that  
3 really covers the type of questioning or the  
4 questions that were asked or suggestions that were  
10:52 5 made to the witnesses? Like, you know the report  
6 that Detective Karst prepared.

7 A Assuming that there were suggestions, there's  
8 nothing about that that remains, so if you wish to  
9 speculate as to what may have occurred or what may  
10:52 10 have been there, that's for others to do.

11 Q Okay. And then you've got:

12 "Specifically he noted as follows:

13 1. There was no truth to the charge  
14 that the police manipulated Wilson."

10:53 15 Mr. Karst of course could only speak to occasions  
16 when he was present?

17 A Correct.

18 Q And did any of the police that you spoke to tell  
19 you that there had been a setup of equipment in  
10:53 20 the room next door to Inspector Roberts at the  
21 hotel and that people were monitoring the  
22 conversations, and by people I mean police  
23 officers, sorry.

24 A Okay. Those facts seem familiar. I'm not certain  
10:54 25 when I learned of them and who provided that



1 information. It's possible that they may have,  
2 but I just don't recall.

3 Q And would it have been -- okay, without -- without  
4 trying to put it in the time period of necessarily  
10:54 5 '88, was it '88, '89, '90, '91, was it in the time  
6 period prior to the Supreme Court reference?

7 A I believe so, yes.

8 Q Yes?

9 A I think so. I'm not certain.

10:54 10 Q Okay.

11 A I just don't know.

12 Q Can you be certain that it was before this public  
13 inquiry which started in 2005 that you learned of  
14 that?

10:54 15 A Yes.

16 Q And did anybody ever, or did you learn that the  
17 proceedings with Mr. Roberts had been taped by  
18 virtue of equipment used in the room next door?

19 A My recollection was that they had been taped and I  
10:55 20 believe that the tapes went with Mr. Roberts and I  
21 thought I was trying to pursue that with him when  
22 I spoke with him, but --

23 Q I'm not talking about any recordings that Mr.  
24 Roberts might have done in his own interview, I'm  
10:55 25 just speaking of any recordings that were made



1 from the next room. Do you know anything about  
2 those?

3 A No, I don't.

4 Q 333476, please, this again is your memo, you say  
10:56 5 here that:

6 "...Mr. Wilson re-visited Mr. Roberts."

7 This after he had made the statement number 1.

8 "Arrangements were made with Detective

9 Karst to obtain a supplementary

10:56 10 statement the next morning.

11 May 24, 1969, Mr. Wilson gave  
12 the supplementary statement... He added  
13 the conversation with Milgaard about the  
14 car getting stuck and the conversation  
10:56 15 with Nichol John when they were alone  
16 together in Calgary."

17 Do you think a really significant point of the  
18 May 24th statement was that Mr. Wilson had added  
19 that I forgot to mention that I left the car too?  
10:56 20 Do you think that was a significant thing that he  
21 had left out of the May 23rd statement?

22 A It was certainly, yes.

23 Q And that doesn't seem to have made its way into  
24 your memo does it?

10:57 25 A I'm not certain that I understand. "He added the



1 conversation with Mr. Milgaard about the car  
2 getting stuck and the conversation with Nichol..."  
3 The details of it aren't there, but I understood  
4 what that meant.

10:57 5 Q And that you've -- I think this may have been  
6 covered with Mr. Wolch, but Mr. Wilson, in May  
7 23rd and 24th, has told about a supposed  
8 confession from David Milgaard in the bus depot in  
9 Calgary and a claim that David Milgaard had told  
10:57 10 him that he put the purse of the woman in the  
11 garbage can and that he fixed her, and those are  
12 certainly confessions if true?

13 A Well, they are certainly incriminating.

14 Q Uh-huh. Is it your position today, sir, that  
10:58 15 those statements were made to Mr. Wilson by Mr.  
16 Milgaard?

17 A I don't know, in light of Mr. Wilson's various  
18 testimonies, whether it is a fact or not.

19 Q It seems pretty preposterous, doesn't it, given  
10:58 20 that Mr. Milgaard did not attack Gail Miller?

21 A Whether the statements related to Ms. Miller or to  
22 someone else, I don't know.

23 Q Are you aware of any other assaults on the morning  
24 of January the 31st apart from Ms. (V4)---, any  
10:58 25 other offences of assault on women in the general



1 vicinity?

2 A I'm not aware of any. I just -- I'm left with a  
3 number of questions and some of them include the  
4 cosmetic case and where it came from.

10:58 5 Q Well, it didn't come from Gail Miller, we know  
6 that.

7 A It came from someone.

8 Q And there's no allegation that these three young  
9 people were ever separated apart from that one  
10:59 10 incident that Ron Wilson talked about where he  
11 left the car and came back?

12 A As far as I'm aware there wasn't, with the  
13 exception of Mr. Milgaard had left the party I  
14 believe after arriving at the Cadraains for a  
10:59 15 period of time.

16 Q Uh-huh.

17 A There was that.

18 Q You are not suggesting that he went out and  
19 attacked a woman?

10:59 20 A No. I'm trying to respond to your question which  
21 she said there was only one instance of  
22 separation.

23 Q Yes, okay, but you are not suggesting that in that  
24 period, that he was attacking a woman and later  
10:59 25 confessed to Ron Wilson about it?



1 A I'm not.

2 Q It's just a lie that Ron Wilson told at trial  
3 isn't it?

4 A That's your view. That's something that the jury  
10:59 5 had to contend with.

6 Q Is it your view, sir?

7 A That he lied at trial?

8 Q Yeah.

9 A I don't know.

11:00 10 Q 475, the paragraph says:

11 "The next morning..."

12 We're speaking of May the 23rd,

13 "...Art Roberts interviewed Wilson and  
14 performed a polygraph test. Mr. Wilson  
11:00 15 was truthful except for two answers  
16 which he admitted were lies."

17 Was it your understanding when you wrote that,  
18 sir, that Mr. Roberts had polygraphed Mr. Wilson  
19 on any of his statements?

11:00 20 A I was under the impression that he had polygraphed  
21 him with respect to the statement that was taken  
22 the day previous.

23 Q With respect to the May 23rd statement?

24 A Yes.

11:00 25 Q Okay. So he had been asked questions specifically





1 dealing with the May 23rd statement and he had  
2 answered yes or no on a lie detector test, that  
3 was your understanding?

4 A Well, he had undergone a lie detector test to  
11:01 5 determine whether or not the statements contained,  
6 or whether or not the facts recited in it were  
7 true.

8 Q That was your understanding?

9 A Yes.

11:01 10 Q Just running through the dealings with Mr. Wilson  
11 and Ms. John -- or sorry, Mr. Wilson and Mr.  
12 Roberts, I don't see, and you can take my word for  
13 it on this, there's no reference in here, in this  
14 document to Nichol John and Ron Wilson being put  
11:01 15 together at any time and discussing their  
16 evidence. Is that something that was unknown to  
17 you, is that why it's not in the memo?

18 A I recall that they were together at some point in  
19 time during that weekend. Whether or not -- and  
11:02 20 there may have been discussions about it, but it's  
21 not in the memo.

22 Q I know it's not in the memo, but is it something  
23 that you were unaware of at the time you wrote the  
24 memo, is that why it didn't make it in?

11:02 25 A No, I was aware that they had been together. I,



1           however, was under the impression that the  
2           statements were taken separately.

3           Q       Okay. But it would be important, would it not, to  
4           know whether or not two witnesses had been put  
11:02 5           together and were given opportunities to discuss  
6           their proposed statements before making them?

7           A       Well, if that were the case, that's a factor, yes.

8           Q       It's an important fact?

9           A       It's a fact that could weigh on the weight to be  
11:03 10          given.

11          Q       Must weigh on it wouldn't it?

12          A       Well, yes.

13          Q       Well, if you are going to argue that -- or if  
14          anybody is going to argue that one statement  
11:03 15          corroborates another.

16          A       Yes, and I think that was a live issue at trial.

17          Q       Could I have 001477, please. This is a statement  
18          of Kenneth Cadrain that was given to Sergeant  
19          Pearson on July the 18th of 1990, the first record  
11:03 20          of Ken Cadrain speaking about the events that  
21          happened when he was six. Ken Cadrain has  
22          testified at the inquiry, and I believe he was  
23          also called as a defence witness at the Fisher  
24          trial, his statement here says, at the bottom of  
11:04 25          the first page:



1 "I cannot recall if I saw blood on  
2 Milgaard's clothes or if his clothes  
3 were ripped."

4 Mr. Pearson referred to this document, or this  
11:04 5 statement in his report, and that is 002369,  
6 please, and I don't have a number, it's the  
7 fourth page, this report dated I believe August  
8 28th of 1990, and he's reporting on the  
9 statement, it starts off:

11:04 10 "The most significant development in  
11 this investigation since last reporting  
12 regards our locating and interviewing  
13 one Kenneth Cadrain..."

14 And then he goes here, recounts a conversation  
11:05 15 that he believes or says he remembers between  
16 David and Albert Cadrain, and it says:

17 "Ken Cadrain cannot recall if Milgaard  
18 had blood on his clothes or if  
19 Milgaard's clothes had been ripped."

11:05 20 And that's the same as what's in Ken Cadrain's  
21 statement; yes?

22 A Yes.

23 Q 004374, please, and at 390. This again is your  
24 report dated August the 28th of 1990, paragraph 2:

11:05 25 "Kenneth Cadrain was interviewed.



1                   Although he was 6 years old at the time,  
2                   he recalled seeing blood on Milgaard's  
3                   pants."

4                   Where does that come from, sir?

11:06 5           A           Can you refer back to Mr. Cadrain's statement  
6                   again, please?

7           Q           001477.

8           A           May I see the entire statement? It appears to be  
9                   an error, madam.

11:07 10          Q           And it's in fact the polar opposite of what he  
11                   said?

12          A           Yes.

13                   COMMISSIONER MacCALLUM: Just a second,  
14                   please.

11:07 15                   "When Milgaard first came into the house  
16                   and he was talking to Albert, Albert  
17                   said something like "what happened to  
18                   your pants" and Milgaard replied  
19                   something like "I screwed a virgin" or  
11:07 20                   "I was with a virgin."

21                   Didn't know what that meant. Does that have any  
22                   bearing on your interpretation of what he said?

23          A           It -- it -- it does, but I think the inference was  
24                   that there was, that there was blood there, but  
11:07 25                   Kenneth Cadrain did not say he saw blood.



1 COMMISSIONER MacCALLUM: Thanks.

2 A It may have been my inference which found its way  
3 into the August memo.

4 BY MS. McLEAN:

11:08 5 Q Thank you. 988000, this is your memo dated June  
6 the 16th and it refers to your interview on June  
7 the 15th of 1990 with Albert Cadrain.

8 COMMISSIONER MacCALLUM: Are you sure the  
9 number is right?

11:08 10 MS. KENDRY: That number doesn't exist.

11 MS. McLEAN: Actually, I think I'm looking  
12 at -- yeah, the number is stamped upside down, so  
13 try 000836. Yeah, there it is.

14 BY MS. McLEAN:

11:08 15 Q Okay, this is your memo June the 16th referencing  
16 your interview on June the 15th with Albert  
17 Cadrain. The same question about this, was the  
18 interview with Albert Cadrain taped?

19 A It was not.

11:09 20 Q So the record of that interview is as contained in  
21 this document?

22 A Correct.

23 Q You invited Mr. Cadrain to review the statements  
24 that he gave to the police and you had them read  
11:09 25 them aloud to him asking if he had recollected



1 anything, you hadn't asked him anything about the  
2 evidence he gave. How come?

3 A Well, I did.

4 Q Did you?

11:09 5 A I asked him about his trial transcripts. I didn't  
6 question him -- I didn't question him intensively  
7 about his trial transcripts because at that time  
8 Mr. Cadrain was, shall we say, a very difficult  
9 witness. He was clearly agitated and I wanted to  
11:10 10 find out in a general way whether or not he had  
11 told the truth at trial and that was specifically  
12 addressed.

13 Q Yeah. If we look at the bottom here, you've got:

14 "Mr. Cadrain responded emphatically and  
11:10 15 affirmatively..."

16 Both underlined,

17 "...when I asked him whether he had told  
18 the truth when he was a witness at the  
19 trial."

11:10 20 And then you go back to:

21 "While reading the statement..."

22 I don't see any reference in here, sir, that you  
23 actually discussed the specifics of his evidence  
24 with him as distinct from the two statements he  
11:10 25 had given.



1 A Well --

2 Q Is it your recall that you did discuss his  
3 evidence as opposed to the two statement?

4 A Oh, yes. I underlined emphatically and  
11:11 5 affirmatively because when I broached the subject  
6 he affirmed it with a stream of words that would  
7 make a sailor proud and he continued for some  
8 period of time.

9 Q I'm sorry, I missed it, I've got --

11:11 10 COMMISSIONER MacCALLUM: That would make a  
11 sailor proud.

12 BY MS. McLEAN:

13 Q I wasn't sure if it was "proud" or "cry".

14 A No, he --

11:11 15 Q Yeah, we have had the benefit of Mr. Cadrain's  
16 utterances on occasion. But my question --

17 COMMISSIONER MacCALLUM: But I thought  
18 counsel was asking you, sir, whether it was the  
19 trial evidence you put to him in regard to his  
11:11 20 truthfulness, --

21 A Yes.

22 COMMISSIONER MacCALLUM: -- or whether it  
23 was his statements? That says there, your memo  
24 refers to the statement?

11:11 25 A My memo refers to the statement, but I also put to



1 him whether or not, what he testified at trial,  
2 whether he wanted to resile from any part of that,  
3 --

4 BY MS. McLEAN:

5 Q Okay.

6 A -- whether or not he told the truth, and I was met  
7 with a stream of words, some of which were  
8 colourful.

9 Q Okay. We're kind of at crossed purposes here. I  
10 can understand that you specifically asked him  
11 words to the effect "did you tell the truth when  
12 you testified at trial". My question is did you  
13 discuss the actual evidence that he'd given?

14 A Mr. Cadrain gave me a summary, a very  
15 highly-agitated summary, of certain points and he  
16 said "I told the truth then". He also indicated  
17 that he had been approached on several occasions  
18 questioning the veracity of his trial testimony,  
19 and that's my synopsis of his response, yes.

11:12 20 Q Did he talk about evidence that he'd given in  
21 respect of a grilling that he'd had in Regina  
22 about being a murder suspect?

23 A No. He talked about a grilling he had gotten in  
24 Saskatoon.

11:13 25 Q Uh-huh?





1 A But, in Regina, I think there were different  
2 issues.

3 Q Okay. On August 28th memo again, please, that's  
4 004374, and it's at 390, the report of August the  
11:13 5 28th of -- yeah, this next one. Cleaning up Mr.  
6 Cadrain's language:

7 "During my interview with Albert  
8 Cadrain, the latter steadfastly  
9 maintained the accuracy of his testimony  
11:14 10 at trial ...",

11 and then you had indicated:

12 "... and adopted with one minor change,  
13 his statement to police. He now recalls  
14 that Milgaard took his soiled clothes to  
11:14 15 the garbage container in the laneway."

16 Did you really consider that to be minor, a minor  
17 change to his evidence?

18 A Minor in a sense that I recall his trial evidence  
19 was that Milgaard went out with the clothes and  
11:14 20 came back, or went out with his suitcase. Umm,  
21 yes, I did.

22 Q And you recall that his evidence had been that the  
23 bloody clothing, which, incidentally, he'd never  
24 described, went into a suitcase that went in the  
11:14 25 car with him, and then there's some sort of



1 exchange with a truck driver and --

2 A I don't remember those details.

3 Q You don't remember his testimony like that?

4 A I don't remember the details, no.

11:15 5 Q And do you know that Albert Cadrain's real, apart  
6 from the claims of the Virgin Mary and the Mafia  
7 and various stories that he has told, and  
8 threatening to kill Nichol John, David threatening  
9 to kill Ron Wilson, the only thing that Albert  
11:15 10 Cadrain really had of importance to say at this  
11 trial was that he saw blood on David Milgaard the  
12 morning of Gail Miller's murder; is it not?

13 A That's your take on it. I also believe that his  
14 testimony about the events that happened in the  
11:15 15 car on the way to either Calgary or Edmonton  
16 certainly confirmed some of the events later on.  
17 Umm --

18 Q As regards to whether or not David Milgaard killed  
19 Gail Miller, would you not agree that the most  
11:15 20 significant thing he had to say was that there was  
21 blood on David Milgaard's pants right after that  
22 murder?

23 A It was quite significant, yes.

24 Q Okay. And that when he's telling, some 20 years  
11:16 25 later, a different story about what happened to



1           those clothes?

2       A       It occurred to me that that may be enhanced recall  
3           or confabulation, but it was what it was.

4       Q       Are you aware now, sir, that in 19 -- I believe it  
11:16 5           was 1993, Kenny Cadrain started telling the story  
6           about David Milgaard running out to the garbage  
7           truck with bloody clothing?

8       A       In 1993? I wasn't aware of that.

9       Q       Uh-huh. Were you aware that Kenny Cadrain and  
11:16 10           Albert Cadrain had spent some 20 years as brothers  
11           and Albert Cadrain had frequently discussed the  
12           case?

13      A       It wouldn't surprise me.

14      Q       You certainly learned that, in discussions with  
11:16 15           Dennis Cadrain, if nothing else Albert was  
16           constantly what we could call 'obsessed' with it?

17      A       Albert had a number of issues and Albert had  
18           suffered, and he had had some psychiatric  
19           assistance and help.

11:17 20     Q       So did --

21      A       Insofar as some of the other facts that you have  
22           recited to me, I specific -- I don't recall Dennis  
23           specifically bringing them to my attention as  
24           you've framed it.

11:17 25     Q       In terms of one witness -- and what's the word --



1 corroborating -- sorry -- one witness  
2 corroborating another, we'd have reason to be  
3 concerned about corroboration that emerges after  
4 some 20 years of contact within a family, and  
11:17 5 discussions, that there might be some absorption  
6 of information from one person to another?

7 A There could be some exchanges, yes, --

8 Q Yeah.

9 A -- and that could colour the weight to be attached  
11:17 10 to it, yes.

11 Q Okay. If we could go to 003561, please. This is  
12 a document that you prepared on June the 19th of  
13 1990, and it was as a result of your failed  
14 attempt to interview Mr. Wilson on that June the  
11:18 15 18th. You then prepared what is a nine-page memo  
16 discussing Ron Wilson's statement, the allegations  
17 made within it, and contrasting it to various  
18 things in his evidence at trial or his statements  
19 to the police; correct?

11:19 20 A Yes.

21 Q And the conclusion you reached was that the  
22 recantation of June the 4th was completely  
23 unbelievable, --

24 A If I can --

11:19 25 Q -- unreliable?



1 A If you can refer to the conclusion?

2 Q Sure. I was just trying to summarize it for you.

3 At the very end:

4 "In these circumstances, little if any  
11:19 5 weight can be given to the unsworn  
6 allegations contained in this recent  
7 statement."

8 A Yes.

9 Q Yeah.

11:19 10 A And it sets out why.

11 Q Okay. So if we go to 3562, please. You've got a  
12 summary of police contacts with Ronald Wilson  
13 March to May 1969, and your summary, what you set  
14 out here is meant to show that there was nothing  
11:20 15 intensive about the police contact with Mr.  
16 Wilson; wasn't it?

17 A It was meant to describe the contacts as I  
18 understood them at the time.

19 Q All right. 3563, point number 4:

11:20 20 "In Saskatoon, Wilson was  
21 taken on a drive of the area to  
22 determine if he could identify any  
23 landmarks. Then he was brought to the  
24 police station where accommodation  
11:20 25 arrangements were made."



1           Those accommodation arrangements were a night in  
2           jail; were they not?

3       A       With respect to Mr. Wilson?

4       Q       Yes?

11:21 5       A       I believe he was put up in a hotel.

6       Q       He was after he gave the police a statement, but  
7           on the night of May the 21st, he was held  
8           overnight in the jail as a sleeper; did you know  
9           that?

11:21 10      A       I -- I think I may have heard that, yes.

11      Q       And then 3564, you've gone and pulled that out,  
12           highlights from the preliminary inquiry with Mr.  
13           Wilson's attitude towards the police questioning  
14           at the time that he was a witness for the Crown?

11:21 15      A       Yes, and at trial, I believe.

16      Q       Umm, I think you probably did that later. Well  
17           you've certainly got references to the trial, I  
18           don't know that you set it out with that kind of  
19           detail. 3565. And you've got what can only  
11:22 20           amount to an assessment, here, where you've got  
21           THE RECENT ALLEGATIONS VS THE HISTORICAL AND  
22           EVIDENTIARY RECORD. The first point here:

23                   "... April 25th, 1969, the Saskatoon  
24                   police knew that Ron Wilson had type 'B'  
11:22 25                   blood and thus was not ..."



1 her:

2 "... assailant. Although they believed  
3 that he was withholding information, he  
4 was not considered a prime suspect."

11:22 5 Did you have any information whatsoever that Ron  
6 Wilson had been told that, and by that I mean do  
7 you have any information that he'd been told that  
8 his blood type excluded him from being her  
9 assailant?

11:22 10 A I'm not certain what the details were that he had  
11 been told. My understanding was that he more --  
12 he had been told that he was no longer a suspect,  
13 whether it was because of the blood type or not, I  
14 think I may have been mixing two --

11:23 15 Q What --

16 A -- sources of information.

17 Q And what was the source of your information that  
18 he had been told that he was no longer a suspect?

19 A I believe that it came from one of the police  
11:23 20 officers that I interviewed, I'm not certain which  
21 one.

22 Q Okay. Next page, please. You've got paragraph  
23 c), a recitation of Ron Wilson's criminal record,  
24 referencing the preliminary inquiry where he gave  
11:23 25 it, and you've indicated:



1 "His antecedent behaviour is not  
2 consistent with that of a frightened 17  
3 yr. old youth."

4 You appear to be suggesting there that because  
11:24 5 he'd been a, let's see, he'd been a car theft,  
6 joyriding, stolen property, break and enter,  
7 breach of probation, theft, and that he had had  
8 police contacts and convicted of six previous  
9 offences. That doesn't make him a match for  
11:24 10 police on a murder charge; does it?

11 A I'm sorry?

12 Q Well if he's a 17-year-old juvenile delinquent,  
13 we'll call him, breaking into places, stealing  
14 cars, that certainly doesn't make it unlikely that  
11:24 15 he could be intimidated if questioned by police on  
16 a murder charge?

17 A No. My simple point was this. Mr. Wilson had had  
18 a number of contacts with the police --

19 Q Uh-huh?

11:24 20 A -- from which, on several occasions, he had been  
21 charged --

22 Q Uh-huh?

23 A -- and that he had served time in jail. Given the  
24 nature, the number of contacts, without more,  
11:25 25 there was some basis for me to say, lookit, here's





1 a kid who's been around, and it seemed to me that  
2 the nature, frequency, and the number of contacts  
3 signaled a familiarity with the process that  
4 suggested that perhaps it -- you know, merely  
11:25 5 being interviewed by the police wouldn't frighten  
6 him or intimidate him necessarily.

7 Q And if he was merely interviewed on a car theft or  
8 a break and enter or something that may well be  
9 true, but wouldn't it be different, don't you  
11:25 10 think, if he was being questioned as a suspect in  
11 a murder?

12 A I think a lot would depend on how the questioning  
13 occurred, the circumstances of it.

14 Q And we have no records whatsoever of that; do we?

11:25 15 A Umm, apparently not.

16 Q 003567. You've got c), that Mr. Wilson had:

17 "... described the knife during the  
18 preliminary inquiry ...",

19 and then you've added:

11:26 20 "It is interesting to note that Nichol  
21 John who also said that she saw a knife  
22 on Milgaard during the trip, gave her  
23 statement after Mr. Wilson had completed  
24 his statement."

11:26 25 Is your meaning, there, that one corroborates the



1 other?

2 A I'm not sure what I meant at the time, but I note  
3 that I have underlined 'after'. It may simply  
4 signal that, when Wilson made his statement, there  
11:27 5 wasn't a previous statement from Ms. John to the  
6 same effect to put to him. That's all, I guess, I  
7 can re-interpret this several years after the  
8 event.

9 Q And you've also got -- and I just, I'm very  
11:27 10 confused about this, this is something that you  
11 testified to the other day:

12 "That the police planted the story that  
13 Milgaard confessed ...",

14 your opinion of that is that that allegation  
11:27 15 could not be true because it contained facts that  
16 only Mr. Wilson could know, and that's the -- the  
17 Heather Beaton telephone call where Mr. Wilson  
18 took advantage of a situation where he and David  
19 Milgaard were together, and that would be the  
11:28 20 time that he phoned Heather Beaton and inserted  
21 in that a claimed confession of having hit a girl  
22 and put a purse in a garbage can. Now why would  
23 the police have to know Heather Beaton's name in  
24 order for Mr. Wilson to insert a false confession  
11:28 25 into that story?



1           A           Quite frankly, they wouldn't, but it -- the level  
2                       of detail, the type of detail was a factor that I  
3                       considered at that time, and at that time was in  
4                       advance of my -- my discussion with Mr. Wilson.  
11:29 5                    But that, that was, that was my thinking  
6                       pre-interview.

7           Q           Okay. So if somebody had, had given a detailed  
8                       account of something that truly did happen, all  
9                       right, there would be no need for the police to  
11:29 10                  know anything about it. Like if Ron Wilson had  
11                      truly called Heather Beaton, all right, at a time  
12                      that he was truly with David Milgaard at a bus  
13                      depot in Calgary, that statement could be  
14                      extremely detailed; --

11:29 15           A           Yes.

16           Q           -- could it not? And if one were to simply insert  
17                      into that occasion a confession, "while he was  
18                      with me he told me this", that wouldn't require  
19                      the police to have any detailed knowledge of  
11:29 20                  Heather Beaton at all; would it?

21           A           It would not. However, the context in which Mr.  
22                      Wilson had framed his June 4th, 1990 statement was  
23                      that the police had planted the story, and to me  
24                      that signals an infusion of information and facts,  
11:30 25                  firstly in terms of date, time, and place, and



1 some of the contextual colorings to give it an air  
2 of reality, and it was from that vantage point  
3 that I was focusing on the detail. And keeping in  
4 mind that this was my initial thinking, which took  
11:30 5 place before the actual interview.

6 Q Page 3568, just about paragraph c), you've  
7 referenced the May 23rd, 1969 statement where Ron  
8 Wilson says that he and Nichol had a discussion in  
9 Calgary where he tells her about this alleged  
11:31 10 confession, and she says she already knew. And  
11 then he says:

12 "I might also add that I am sure  
13 Milgaard killed that nurse, Gail  
14 Miller."

11:31 15 And then you've put:

16 "Contrary to his recent  
17 allegation, Mr. Wilson was convinced of  
18 Mr. Milgaard's guilt before charges in  
19 this case were laid."

11:31 20 That statement, sir, assumes that his statement  
21 given May 23rd was true; doesn't it?

22 A It does.

23 Q And paragraph c):

24 "Mr. Wilson's allegation was denied  
11:31 25 categorically by Mr. Karst, whose



1 version the writer prefers to the bare  
2 allegation of Mr. Wilson."

3 And then you've got a discussion, again, which I  
4 guess is a reference to your Heather Beaton  
11:32 5 theory, and you've got:

6 "Further information received from  
7 Nichol John confirms that they had a  
8 conversation about David and the girl.  
9 Ms. John however, does not now recall  
11:32 10 the details of that conversation."

11 And that, again, assumes that that May 24th  
12 statement given by Nichol John is true?

13 A Yes.

14 Q Last page, *Conclusions and Recommendations*, you've  
11:32 15 said here that you've:

16 "... also learned that Mr. Wilson is  
17 distraught about this episode in his  
18 life and is only prepared to entertain  
19 questions before a judge."

11:33 20 And that, to you -- sorry, it's here -- that, to  
21 you, raised several questions about the manner in  
22 which the statement to Mr. Henderson was taken.

23 "... it was reported that at least 8  
24 hours of questioning was involved in the  
11:33 25 taking of this seven page document."



1 and:

2 "... it raises several questions about  
3 the accuracy of the statement."

4 Did you have the same concerns about the  
11:33 5 statements taken from Mr. Wilson in May 23rd-May  
6 24th, 1969?

7 A I had some concerns, yes, which I tried to explore  
8 with him when I spoke with him, and which I tried  
9 to explore with Mr. Karst.

11:33 10 Q Okay.

11 A The difference between the Wilson statement in  
12 June of 1990 is that this was a -- this was an  
13 event that was 15 days, that occurred 15 days  
14 previous. By comparison, the earlier statements  
11:34 15 taken by police detectives in Saskatoon and Mr.  
16 Roberts took place in 1969, almost 20 or 21 years  
17 prior. The inability -- the unavailability of the  
18 eight hours of questioning certainly raised some  
19 questions for me, because yes, in both instances  
11:34 20 there was a -- there was not background material.  
21 On the one hand, however, it was a fairly recent  
22 series of questions, whereas on the other we knew  
23 from previous attempts to access the file that  
24 some of that material had gone missing.

11:35 25 Q But in terms of the raising the questions about



1 the manner in which the statement was taken, a  
2 statement that took several days of questioning,  
3 or hours and hours and hours at a time that spread  
4 out over a period of days and involved numerous  
11:35 5 police officers, give you concerns about the  
6 manner in which the statement might have been  
7 taken, given that it's an about-face to what he  
8 had been saying?

9 A I had some concerns, and I raised them with the  
11:35 10 witnesses when I interviewed them.

11 Q Okay. And that -- could we have 003560, please.  
12 This is a memo from Mr. Corbett written June the  
13 19th, same day, --

14 A Yes.

11:35 15 Q -- and it appears that, after talking to you, Mr.  
16 Corbett got on the phone to Wilson's counsel  
17 himself --

18 A Yes.

19 Q -- and confirmed that he was unwilling to speak.  
11:36 20 And what he's got here:

21 "Mr. Wilson is not interested in having  
22 his client provide evidence of perjury  
23 on oath."

24 A That's --

11:36 25 Q And then goes on about:



1 "His client is in a highly emotional  
2 state ... Providing the statement is a  
3 turning point in his life ...",  
4 doesn't know:

11:36 5 "... where he stands ... He wants to see  
6 this all out in the open and is prepared  
7 to tell his story to a judge and get  
8 things totally off his chest."

9 Does that sound unreasonable to you, sir, that  
10 somebody who is exposing themselves to a perjury  
11 charge doesn't want it out there as just evidence  
12 but, rather, would like to give it in a Court  
13 proceeding?

14 A Doesn't it sound unreasonable that --

11:36 15 Q Yeah? That, it sounds like good legal advice,  
16 doesn't it?

17 A Well I -- I can appreciate the dilemma, however,  
18 it's one of his own making because he had given a  
19 statement which was tantamount, or could be  
11:37 20 considered perjury.

21 The second point I acknowledge  
22 is that, given the *Charter*, the likelihood that  
23 that might be used on a -- you know, was probably  
24 quite slim.

11:37 25 Q You know that in 1991-'92-'93 there was some





1 investigations into whether or not Ron Wilson  
2 could or should be charged with perjury as a  
3 result of the evidence he gave at the Supreme  
4 Court?

11:37 5 A I suspect that there was, or there may have been,  
6 because the Chief Justice cited him for contempt  
7 on -- on the face of -- contempt in the face of  
8 the Court.

9 Q And then withdrew it?

11:37 10 A Ultimately, yes.

11 Q And it was subsequent to that that there was  
12 perjury considerations. Can we go to 004380,  
13 please. This is a report that is being made  
14 August the 28th, and it's after -- sorry, it's 374  
11:38 15 at 80. Oh, you're good. Mr. Wilson, nonetheless,  
16 did interview -- did sit down with an interview  
17 with you on July the 20th of 1990?

18 A Yes.

19 Q It was taped and it was under oath?

11:38 20 A Yes.

21 Q And if we look at item number 2, *Summary of Police*  
22 *Contacts with Ronald Wilson*, it looks like it's  
23 been put in in its entirety from a memo that you  
24 had written prior to interviewing him. With  
11:39 25 respect to the summary of the police contacts,



1 here, moving through *THE RECENT ALLEGATIONS VS.*  
2 *THE HISTORICAL AND EVIDENTIARY RECORD* at 383, and  
3 you've inserted some other things as a result of  
4 your interview, but your basic opinions had not  
11:39 5 changed; had they?

6 A That's correct.

7 Q Okay. 381 of this document, please, point 4.  
8 You've got Lieutenant Karst interviewed Wilson on  
9 May 21st:

11:40 10 "... who admitted that Milgaard had left  
11 the car ..."

12 Now that should actually be six officers  
13 interviewed him in Regina -- or I'm sorry -- four  
14 officers interviewed him in Regina while he was  
11:40 15 in police custody for an unspecified length of  
16 time; correct?

17 A I'm not certain of that, no.

18 Q Okay. 384, you've got Mr. Wilson confirming for  
19 you what is, I say, sir, your misunderstanding:

11:40 20 "...that the polygraph questions related  
21 to the facts contained on his May 23rd,  
22 1969 statement."

23 A I'm sorry, madam, where are you reading from?

24 Okay.

11:41 25 Q At the time you wrote this you didn't have the



1 benefit of Mr. Roberts' evidence at the Supreme  
2 Court in 1992?

3 A I did not.

4 Q So Mr. Wilson simply confirmed your  
11:41 5 misunderstanding that the polygraph questions  
6 related to the facts contained in his May 23rd  
7 statement?

8 A Mr. Wilson said what he said and I tried to repeat  
9 it.

11:41 10 Q Yeah. Okay, 385, this is something -- number (c):  
11 "At trial Mr. Wilson said that he  
12 implicated Milgaard in the death of Gail  
13 Miller before he was questioned by the  
14 polygraph..."

11:42 15 Operator. Now, did you understand at the trial  
16 Mr. Wilson didn't even know what implicated  
17 meant, he had to have it explained by the judge?

18 A I used the word implicated because that is my  
19 description of my observations of his statement.

11:42 20 Q Okay. And that's a term that you used in your --

21 A In my report.

22 Q Yeah.

23 A Because it signals I guess my assessment of his  
24 actions, but I'm not, in paragraph (c), purporting  
11:42 25 to recite what Mr. Wilson told me.



1 Q Yeah, that's fine.

2 A And in the sense of attributing that word  
3 implicated to him.

4 Q No, it is your word.

11:43 5 A It is my word.

6 Q Go to the document if you need to, but just for  
7 reference, it's 333474 at 475, and it's simply you  
8 stating that a review of the occurrence report of  
9 May 25th, Wilson then implicated Milgaard and  
11:43 10 accepted an invitation to return to Saskatoon.  
11 It's your use of the word implicate.

12 A Yes.

13 Q And that's the kind of language that finds itself  
14 into the minister's letter. 067278, please, the  
11:43 15 February 27th letter, at 285, the minister writes  
16 in dismissing David Milgaard's application:

17 "In June 1990, Mr. Wilson also stated  
18 that he began to implicate Milgaard  
19 after lengthy interviews by police  
11:44 20 authorities. However, in July 1990, he  
21 acknowledged that he had forgotten that  
22 he had implicated Milgaard in Regina  
23 before he arrived in Saskatoon, where he  
24 was interviewed by police. I consider  
11:44 25 this oversight by Mr. Wilson to be very



1 important in assessing the allegations  
2 of police coercion and manipulation that  
3 he advanced to explain his incriminating  
4 statement of May 1969, and his trial  
11:44 5 testimony."

6 It features again in this statement, sir -- not  
7 this statement, this letter, at the next page,  
8 286, she's questioning his account of the  
9 polygraph session which also appears, by the way,  
11:45 10 to have been confirmed by Mr. Roberts at the  
11 Supreme Court the next year, but in disbelieving  
12 his account she's indicated:

13 "This is underscored by Mr. Wilson's  
14 admission that he had forgotten that he  
11:45 15 implicated Milgaard in Gail Miller's  
16 death before he went to Saskatoon, and  
17 not as a result of the questioning in  
18 Saskatoon by police and the polygraph  
19 operator."

11:45 20 And again on the next page, referring to Mr.  
21 Wilson:

22 "His suggestion that he implicated  
23 Milgaard only as a result of a "sweat  
24 session" in Saskatoon is negated by his  
11:46 25 admission that he implicated Milgaard



1 before his visit to Saskatoon."

2 Quite important that, the use of that word  
3 implicated, sir?

4 A It seems, in my view, to describe the  
11:46 5 circumstances, yes.

6 Q 003349, please. I suggest to you, sir, that the  
7 only thing that Mr. Wilson did in Regina was  
8 provide an opportunity for David Milgaard to have  
9 committed the offence.

11:46 10 "At 2:00 PM --"

11 COMMISSIONER MacCALLUM: Sorry, what is the  
12 suggestion?

13 BY MS. McLEAN:

14 Q All that Mr. Wilson did in Regina on May 21st was  
11:46 15 provide an opportunity for Mr. Milgaard by saying  
16 that they were separated, and if we look at the  
17 document that's prepared by Mr. Karst on the 25th  
18 of May, it's the document that you've been  
19 referencing in your reports:

11:47 20 "At 2:00 PM, May 21st, Ronald Wilson was  
21 interviewed at the Regina City Police  
22 station, the following officers being  
23 present, D/Sgt. Mackie, Cst. Walters and  
24 Cst. Dike..."

11:47 25 And I believe it's Dyck,



1 "...of the Regina department, along with  
2 myself."

3 The author being Mr. Karst.

4 "This conversation also being taped and  
11:47 5 presently in my possession."

6 And no longer in his possession as I understand  
7 it.

8 "During this conversation with Ronald  
9 Wilson, he admitted attending in  
11:47 10 Saskatoon with Milgaard and Nickey on  
11 the early morning of January 31st..."

12 And that's the same as he had said in every  
13 signal statement he had made and every interview.

14 "...in contradiction to his original and  
11:47 15 other interviews, he admitted that  
16 Milgaard had left the car when they  
17 became stuck at approx. 6:45 that  
18 morning, while looking for the Cadrain  
19 residence. All Wilson would state at  
11:48 20 this time was that Milgaard appeared to  
21 be puffing and running, slightly out of  
22 breath when he returned to the vehicle,  
23 and he admitted that he had since  
24 thought that this was the time that  
11:48 25 Milgaard was probably involved in a



1 murder."

2 That seriously strikes you as implicating Mr.

3 Milgaard in a murder?

4 A That's the first time that Mr. Wilson made the  
11:48 5 suggestion and connected Mr. Milgaard with the  
6 murder and I viewed that as an implication with a  
7 murder, yes.

8 Q But we don't know from this whether or not Mr.  
9 Wilson made the statement, or made the suggestion  
11:48 10 or somebody made the suggestion to him, we don't  
11 how long he spent with these four police officers,  
12 but it says he admitted Milgaard had left the car.  
13 Now, that creates the first time, sir, an  
14 opportunity for Mr. Milgaard to have committed the  
11:48 15 offence because prior to that Mr. Wilson had been  
16 insisting that they hadn't been separated. You  
17 understand that?

18 A I understand that Mr. Milgaard had not been  
19 separated, yes.

11:49 20 Q Okay.

21 A Or prior to that he had not admitted being  
22 separated from Mr. Milgaard.

23 Q Okay. Let's say he had not said it.

24 A He hadn't said it.

11:49 25 Q All Wilson would state was that he?





1 "...appeared to be puffing and running,  
2 slightly out of breath ... and he  
3 admitted that he had since thought that  
4 this was the time that Milgaard was  
11:49 5 probably involved in a murder."

6 That's rather a bizarre thought to have if  
7 there's no other evidence, isn't it, it's  
8 bizarre?

9 A It was certainly something that the police wanted  
11:49 10 to investigate further, but I've used the term  
11 implicate to describe Mr. Wilson connecting Mr.  
12 Milgaard with a murder.

13 Q Well, there's no connection there, is there?

14 A Well, he thought that this was the time that  
11:49 15 Milgaard was probably involved in, quote, "a  
16 murder".

17 Q I mean, no indication of what made him think that,  
18 no indication that it was followed up by anybody  
19 in Regina, any questioning that took place,  
11:50 20 anybody asking him what in the world do you mean  
21 by that, why would you think just because he's  
22 away from you he's involved in a murder.

23 A The document speaks for itself. Those questions  
24 are not answered in the document.

11:50 25 Q Maybe it went something like this, if he did do



1 it, that's the only time he could have done it?

2 A I don't know.

3 Q All right. 003349 at 350, same document, sir,  
4 this is the en route to Saskatoon, Mr. Karst's  
11:50 5 report prepared on the 25th:

6 "He..."

7 Being Wilson,

8 "...also stated at this time that he  
9 could not recall a knife being in the  
11:51 10 car nor did he see Milgaard bring one  
11 from the elevator. On further

12 questioning, he thought that possibly  
13 Milgaard could have picked up a knife  
14 from the Champs Hotel where they had  
11:51 15 eaten earlier that day where Nickey had  
16 been employed, however, could shed no  
17 further light on that aspect."

18 That is clearly not Mr. Wilson saying that he saw  
19 David Milgaard with a knife is it?

11:51 20 A Certainly not on that occasion, no.

21 Q If we could go to 001327, please, at 387.

22 COMMISSIONER MacCALLUM: This being what?

23 BY MS. McLEAN:

24 Q This being the interview that Mr. Williams had  
11:52 25 with Mr. Wilson on July the 20th of 1990, and you



1 are asking him questions, sir, about the stop in  
2 Craik, the break and entering place, the theft of  
3 a flashlight from the elevator, and then you say:

4 "I suggest to you that you told them at  
11:52 5 that time that you and David left on the  
6 trip you ate at Champ's?"

7 "And you told them about Champ's in the  
8 context of where they might look to find  
9 the knife you saw with David -- on  
11:52 10 David?"

11 And he says:

12 "I don't know."

13 You say:

14 "You don't know. It's possible?"

11:52 15 And the answer is:

16 "It's possible."

17 I mean, that's not really an accurate rendition  
18 of that conversation is it? He hadn't said that  
19 there was a knife; in fact, he denied that David  
11:53 20 had a knife. Aren't you putting to him sort of a  
21 situation that suggests to him that he said that,  
22 that he had a knife?

23 A Not exactly. Can you flip back to the preceding  
24 page, please?

11:53 25 Q Uh-huh.



1 A Next page.

2 Q Forward or backward, sorry.

3 A That's fine.

4 "And you told them about Champ's in the  
11:53 5 context of where they might look to find  
6 the knife they saw with David -- on  
7 David?"

8 Q Yes.

9 A You are correct in setting out that on the 21st he  
11:53 10 did not say he saw a knife. He did, however, on  
11 the subsequent day, say he saw a knife, and it's a  
12 question of putting two sets of events, --

13 Q Uh-huh.

14 A -- one on one date, one on another date, which  
11:54 15 furthered the narrative in that question.

16 Q 004374, please, at 387, please, this is again your  
17 theory about the Heather Beaton detail being an  
18 indication that the police were not planting a  
19 story of putting the purse in the trash can or  
11:55 20 getting a girl in Saskatoon, and then you have at  
21 the bottom, you've got, when you interviewed Mr.  
22 Wilson:

23 "...he denied that he spoke to Ms. John  
24 in Calgary about Milgaard killing a  
11:55 25 woman in Saskatoon. However, Ms. John



1 is adamant that the incident took place,  
2 although she has no present recollection  
3 of the conversation."

4 Problem with that?

11:55 5 A There's a problem with that in that Ms. John is  
6 adamant that she told the truth to the police in  
7 her statement, although she no longer recalls  
8 independently the conversation, and the recitation  
9 by Ms. John in her statement is that she did have  
11:56 10 a chat with Mr. Wilson in Calgary about Milgaard  
11 killing a woman.

12 Q Uh-huh.

13 A Although she had no present recall.

14 Q If we can go to, on the Heather Beaton issue  
11:56 15 again, if we can go to 001395, this is where you  
16 are cross-examining Mr. Wilson on July 20th, 1990  
17 on the Heather Beaton issue, you are asking:

18 "How would they know about Heather  
19 Beaton to put the story in that  
11:56 20 context?"

21 And the answer is:

22 "Because it all fit in that way, that's  
23 why. Sure I told them about probably  
24 Heather Beaton and everything else and  
11:56 25 needed a place to put it someplace.



1 That was a good place to put it."

2 That's a perfect answer isn't it?

3 A It's a pretty good answer, yes.

4 Q And a month later when you write your report --

11:57 5 A But I also go on to probe a bit further on  
6 question 667 and thereafter.

7 Q Uh-huh.

8 A Can we see that, please?

9 Q Sure.

11:57 10 A Okay.

11 Q All right. Your opinion, August the 28th, 1990,  
12 hadn't changed from what it was in June before you  
13 had ever spoken to him had it? It's there at 4387  
14 of your report.

11:57 15 A Certainly on that point it had not.

16 Q 4388, point number 8 at the bottom:

17 "The writer learned on August 1, and 2,  
18 1990, that Wilson had told two of his  
19 acquaintances in 1969, that he (Wilson)  
11:58 20 had seen blood on Milgaard's hands, (or  
21 on a wallet in Milgaard's hands) when  
22 Milgaard came back to Wilson's car,  
23 after they had each separately sought  
24 help in freeing the snowbound car."

11:58 25 Why is that in there?



1 A I think it's in there because I received that  
2 information, but as I sit here today, I'm not  
3 certain where the source of that was, whether it  
4 was Mr. Melnyk or Mr. Lapchuk or some other  
11:58 5 source.

6 Q It's Mr. Lapchuk, sir. 002131, your memo to file,  
7 the 6th of August, 1990:

8 "Mr. Lapchuk noted that he spoke..."

9 Sorry, it's at the second page of it:

11:59 10 "Mr. Lapchuk noted that he spoke with  
11 Ron Wilson after the trial. Wilson told  
12 him that he saw blood on the clothes of  
13 David Milgaard when they were in  
14 Saskatoon."

11:59 15 That's all we have on that isn't it?

16 A Yes.

17 Q You really attach credibility to that statement  
18 made 20 years after the event?

19 A I'm not certain what I attached to it. I put it  
11:59 20 in because it was information that was obtained.

21 Q About as valuable as the information from Kenny  
22 Cadrain and Ron Stickel?

23 A It's there because it was presented. The weight  
24 to be attached would be measured in terms of when  
12:00 25 it was given and the circumstances of its giving.



1 Q In July of '90 when you were wanting to explore  
2 Mr. Wilson's allegations with him, you didn't ask  
3 him how many times the police had talked to him,  
4 any specifics of what they had said, you didn't  
12:00 5 give him any documents to review, didn't ask him  
6 where he had been spoken to?

7 A Well, perhaps we can go one at a time.

8 Q Uh-huh.

9 A When I interviewed Mr. Wilson, with the exception  
12:00 10 of the statements and some of the police notes --

11 Q Yeah.

12 A -- there were very few matters left in the file to  
13 put to him.

14 Q Uh-huh.

12:00 15 A My questions responded to his allegations and, to  
16 the extent that I had information on those  
17 questions, I put it to him.

18 Q Okay, maybe I can ask it this way. I'm going to  
19 suggest to you, sir, if you are trying to find out  
12:01 20 and you are trying to assist a witness, you are  
21 trying to explore an allegation that he had been  
22 intimidated and coerced by the police some 20  
23 years earlier when he was 17 years old, that the  
24 appropriate questions might be to ask him not just  
12:01 25 did they talk nicely to you, did they yell at you,





1 but to ask them how many people were around, what  
2 circumstances did you speak to them in, were you  
3 in jail at the time, how did you feel, what did  
4 they tell you was going to happen to you, did you  
12:01 5 think something was going to happen to you, don't  
6 you think questions like that would elicit perhaps  
7 a more enlarged response?

8 A Certainly those questions are excellent follow-up  
9 questions when you have some indication, some  
12:02 10 stronger indication. Based on the witness' own  
11 recital of the circumstances, yes, those are  
12 questions that may have been asked, but in light  
13 of the fact that his answers, his preceding  
14 answers didn't signal to me asking them, I did  
12:02 15 not.

16 COMMISSIONER MacCALLUM: That is the  
17 statement of Wilson didn't -- was generalized and  
18 not specific?

19 A Yeah, and so I would ask him -- now, keep in mind  
12:02 20 that when Wilson is questioned, he's an adult, how  
21 did they do it, what did they do, I wanted to get  
22 it from his words what he perceived what had  
23 transpired.

24 MR. HODSON: Sorry, I don't mean to  
12:03 25 interrupt, Mr. Commissioner, I'm wondering, it's



1 12 o'clock, I know a couple of people may have  
2 commitments and I think there might be a desire  
3 to continue until 12:30 or break and I'm just --  
4 I'm fine either way, I just thought I would raise  
12:03 5 it because I know there's a couple of counsel  
6 that would like to know if we're going to sit  
7 until 12:30 and maybe, Ms. McLean, maybe I can  
8 get your views or where you are at.

9 MS. McLEAN: One page to go. Maybe 15  
12:03 10 minutes. Don't hold me.

11 MR. HODSON: And then if we break at that  
12 time, if we break at that time until 1:30 -- if  
13 we go now until 12:15, 12:30 and then break at  
14 1:30, I think we have Ms. Knox and Mr. McLeod and  
12:03 15 Mr. Frayer. Does that work satisfactory? I  
16 don't think it does for -- and Mr. Loran may. It  
17 doesn't work great for Mr. Williams's 2:30 flight  
18 I know, but --

19 A There are other flights.

12:03 20 MR. HODSON: I'm sorry to interrupt, but  
21 maybe if we just -- I think if we can continue  
22 until Ms. McLean is done and then break?

23 COMMISSIONER MacCALLUM: That might be best  
24 if we can all manage it.

12:04 25 MS. McLEAN: Unless there's somebody that



1 needs to get away that can slot themselves in for  
2 15 minutes?

3 MR. HODSON: No. Carry on.

4 BY MS. McLEAN:

12:04 5 Q The end of the report of August the 28th, 1990,  
6 004391, Deborah Hall has no new evidence to offer,  
7 conclusion in Dr. Ferris' report doesn't do  
8 anything to advance the case for Mr. Milgaard, nor  
9 do the other reports of Markesteyn, evidence of  
12:04 10 Linda Fisher doesn't help, Gail Miller's death  
11 circumstances aren't similar to Mr. Fisher's  
12 offences, Dale Wilson isn't believable, Nichol  
13 John continues to have nightmares of a scene in  
14 which a man is sitting astride a woman, doesn't  
12:05 15 appear further investigation beyond the interview  
16 of Mrs. Cadrain is required to determine whether  
17 there was a probable miscarriage of justice in  
18 this case. Nothing that was presented to the  
19 minister that you reviewed was sufficient for you  
12:05 20 to recommend or to believe that a remedy should be  
21 granted; right?

22 A In August?

23 Q Yeah, as of August 28th.

24 A That's correct.

12:06 25 Q That's correct. Now, I want you to look at this



1 from the perspective now that you know David  
2 Milgaard is innocent, and from what you know of  
3 the evidence in the case and the materials that  
4 are available, is there anything that could have  
12:06 5 been presented to you that would have caused you  
6 to reach a favourable conclusion?

7 A Had some of the facts, had we been able to get the  
8 DNA at that time --

9 Q Yeah.

12:06 10 A -- that was one of the first avenues that I  
11 considered exploring. That certainly would have  
12 done it.

13 Q Yeah.

14 A Had some of the information with respect to Mr.  
12:06 15 Fisher been perhaps a bit more detailed or in  
16 existence at the time of my interviews, we may  
17 have been able to pursue that a bit further. We  
18 had conducted a number of inquiries concerning Mr.  
19 Fisher and his whereabouts. Regrettably, we found  
12:07 20 that some of the information had been destroyed  
21 just months before.

22 Larry Fisher's, and the ground  
23 surrounding Larry Fisher, was the ground that  
24 ultimately proved to be the strongest and proved  
12:07 25 to be the ground upon which a remedy was granted.



1 The other grounds did not have the factual  
2 foundation required and, to the extent that they  
3 did not, I so reported.

4 Q Okay. I know it's difficult to do this because  
12:07 5 you didn't have DNA then, David didn't have DNA  
6 evidence to produce. Given the situation he was  
7 in and given the state of the knowledge of  
8 everything at that time, is there anything that he  
9 could have put in there that would have caused you  
12:08 10 to reach a favourable conclusion?

11 A It's not a question of what he puts in that  
12 prompts me to reach a favourable conclusion, it's  
13 a question of what we're able to discern and what  
14 potential facts exist. It's not a question of --  
12:08 15 certainly when you put in an application, if a  
16 decision had been made in, let's say, September of  
17 1989 on the basis of Linda Hall (sic) and Dr.  
18 Ferris --

19 Q Uh-huh.

12:08 20 A -- there wasn't the factual foundation to give a  
21 remedy even though factually he may have been  
22 innocent.

23 Q Yeah, okay.

24 A It's really important to put the 690 process in  
12:09 25 the context of our process for adjudicating guilt



1 and innocence and I think it would be, it could  
2 put the administration of justice into disrepute  
3 if a decision of a court confirmed on appeal  
4 having been convicted on the basis of truth beyond  
12:09 5 a reasonable doubt is vacated on the basis of a  
6 witness whose perception of the evidence of two  
7 others is that it was a lie but whose description  
8 of events mirrors that which the jury heard.  
9 Secondly, it would put the administration of  
12:09 10 justice into disrepute if you vacate on the basis  
11 of an hypothetical, an hypothetical opinion from  
12 Dr. Ferris who, when it's put to him directly with  
13 respect to contamination, says it doesn't  
14 exonerate. Therefore, when you say is there  
12:10 15 anything that he could put, I think he put as much  
16 as he did because perhaps it wasn't anything until  
17 science caught up with our ability to deal with  
18 it.

19 Q Okay. So just --

12:10 20 A And I guess, in relation to the other ones, you  
21 know, we -- we have to look at it, and look at it  
22 in terms of getting that factual basis. Where a  
23 factual basis exists, there is no hesitation in  
24 saying "this needs to be addressed".

12:10 25 Q Okay. What I am talking about, sir, is really the



1 future David Milgaards that don't have DNA. You  
2 get to that point where there's -- your concerns  
3 are with the bringing the administration of  
4 justice into disrepute if you vacate a conviction,  
12:11 5 but we are talking about referring something back  
6 to the Court, so it's not a free pass; okay?

7 A It's not a free pass, but in that respect the  
8 courts have set up certain thresholds in which  
9 they expect the Minister to respect, and I'm  
12:11 10 talking about the fresh evidence in *Palmer and*  
11 *Palmer* and the cases flowing from it.

12 Q Well, the courts decide their own issues on fresh  
13 evidence, and the minister decides what their  
14 threshold is for referring a case; okay?

12:11 15 A Yes. But the minister, in making the decision to  
16 refer, certainly has an eye on what the courts  
17 accept.

18 Q Even if it results in innocent people being in  
19 jail because they don't meet the threshold?

12:11 20 A That's an unfair assertion in this context.

21 Q It's not an assertion, it's a question. Even if  
22 it results, you said "even if", take back the "if"  
23 --

24 A If the facts --

12:11 25 Q Yeah?



1 A If the facts don't meet that threshold, until such  
2 time as they do, it may, unfortunately, have that  
3 result.

4 Q Yeah.

12:12 5 A Yes.

6 Q So if we take, if we just took David's case, if  
7 the situation of the Ferris and the Hall thing,  
8 that they aren't enough --

9 A Yes.

12:12 10 Q -- in the opinion of the Justice Department, but  
11 yet we know he really is factually innocent --

12 A We now know that, yes.

13 Q Well, some of us have known a lot longer than  
14 others.

12:12 15 A Yes.

16 Q -- but if you take somebody else in his position  
17 who's factually innocent, the way this system  
18 operates, that factually innocent person would  
19 stay in jail?

12:12 20 A Until such time as facts emerged, yes.

21 Q And --

22 A It's not a perfect system --

23 Q Right.

24 A -- but it's the one we have.

12:12 25 Q The last thing I want to talk to you about is the





1 memo you wrote in November of '91, it's document  
2 334136. 334136. It should be the -- no, that's  
3 not the right number -- yeah, the memo to file  
4 November the 22nd of 1991 from yourself. And it's  
12:13 5 addressing:

6 "... appendix 1 under the heading: *The*  
7 *Impossibility of Nichol John's*  
8 *Statement*".

9 And I assume, from that title, that it is  
12:13 10 something prepared by Mr. Wolch and submitted on  
11 behalf of Mr. Milgaard, and you address the  
12 submissions in the appendix. You've written  
13 here -- this is about the Avenue O/Avenue N  
14 discrepancy?

12:14 15 A Yes.

16 Q You've written:

17 "The submission also ignores  
18 the possibility Gail Miller may have  
19 exited her residence via the back door.  
12:14 20 Ms. Nycazi, a resident of the rooming  
21 house testified that she exited by the  
22 back door. Had Gail Miller used the  
23 rear door she would have been situated  
24 between Avenue 'N' and Avenue 'O' and  
12:14 25 equidistant to the bus stops at Avenues



1 'N' and 'O'. Therefore, the testimony  
2 that places her on Avenue 'N' can not be  
3 dismissed because it's not plausible  
4 because the route to the bus stop on  
12:14 5 Avenue 'N' was also a direct route."

6 Lots of N's and O's in there, but firstly is that  
7 not speculative, sir?

8 A It's a theory that was advanced. You could call  
9 it speculation, but it's a possibility, yes.

12:15 10 Q No, but I mean your speculation here, it ignores  
11 the possibility had Gail Miller used the rear  
12 door, --

13 A Each --

14 Q -- testimony can't be dismissed?

12:15 15 A I'm not saying it --

16 Q Uh-huh?

17 A -- is -- it is a commentary on a theory that had  
18 been advanced and it's fair, in relation to that  
19 commentary, --

12:15 20 Q Uh-huh?

21 A -- to also set out other possibilities in just the  
22 same fashion that counsel had set out a possible  
23 theory. The jury heard evidence on that, --

24 Q Okay.

12:15 25 A -- they heard argument about that.



1           Q           But the jury did hear evidence, sir, and it's  
2                       Ms. Nyczai's at 005536, and it's at 624.  
3                       Ms. Nyczai testified at 624 she was living in the  
4                       rooming house -- umm, 293, three pages long, 689,  
12:16 5                       try at 27, please, 28. And that -- sorry, my  
6                       references are coming from the bringing it up as  
7                       an electronic document, so it's about three pages  
8                       in from 524. She's testifying about going out to  
9                       her car, or going out to the car, can we just scan  
12:17 10                      it?

11                      MR. HODSON: Do you want to go back  
12                      earlier?

13                      MS. McLEAN: I'm not sure. Go back. Okay.  
14                      So here she is saying that she herself was home,  
12:17 15                      she left early in the morning -- next page --  
16                      she'd seen Gail Miller -- carry on, carry on,  
17                      next page please, next page, okay -- she says she  
18                      left herself for university about 7:30, she was  
19                      getting a ride from somebody else:

12:18 20                      "Q ... which way did you head out from the  
21                      house with him? ?"

22                      And she says:

23                      "A The car was parked at the rear of the  
24                      house ... and we headed south towards  
12:18 25                      21st Street, turned left ...",



1           etcetera, and her directions. So the reason she  
2           is going out the back is because the fellow who  
3           is giving her a ride is parked out the back; do  
4           you see that?

12:18 5           A       Yes.

6           Q       Okay. And, ahead from this about four more pages,  
7           she testifies to her own walking route down at the  
8           bottom of that page there:

9                    "Q     ... as I understand it your usual route  
12:18 10                is out the front door and down south on  
11                Avenue "O" ..."

12           Over to the next page:

13                    "Q     ... do you go out the front door to get  
14                to the car at the back or do you go out  
12:19 15               the back door?

16           A       We went out the back door.

17           Q       ... do you know how Gail usually got to  
18           work ...

19           A       ... I believe it was usually the  
12:19 20           bus.",

21           occasionally taxis maybe. Can I see the whole  
22           page, please? Next page. Describes where the  
23           bus stops are there, Avenue O and Avenue N. Next  
24           page, please, repetition:

12:19 25           "Q     As I understand it, your usual route



1                   then to catch the bus would be out your  
2                   front door and straight down Avenue 'O'  
3                   ...",

4                   full page, please. Next page:

12:20 5                "Q   And if you came out the front door your  
6                   usual route would be to walk straight  
7                   down 'O'?"

8                "Q   And if you came out the back door - if  
9                   you happened to come out the back door  
12:20 10             which way would you go to get to a bus?

11               A    I'd probably go down 'O' again.

12               Q    You would walk back to 'O'?

13               A    Yes.

14               Q    Why wouldn't you come straight down  
12:20 15             through these lanes here?

16               A    I wouldn't do that.

17               Q    Why?

18               A    Well, I just normally take the street,  
19                    I wouldn't go down the alley.

12:20 20             Q    You just don't like going down alleys?

21               A    No."

22               And these are questions by the Court, and the  
23               Court says:

24               "THE COURT: I see. Thank you; I don't  
12:20 25             blame you."



1 Do you think what you've written in your argument  
2 there on November the 22nd is really a fair  
3 characterization of Nyczai's evidence? The  
4 document is 334136.

12:21 5 A I think what -- the point I was trying to make was  
6 that, having regard to Nyczai's evidence, there  
7 was always a possibility of going out the back  
8 door, and she said possibly going down the alley,  
9 or going across the end. She, however, did not  
12:21 10 take a route, even if she did go out the back  
11 door, of going down N.

12 Q Yeah.

13 A But I'm simply raising a hypothesis of another  
14 explanation.

12:21 15 Q Yeah. And what you rely on it to do is to say  
16 "Ms. Nyczai, a resident of the rooming house,  
17 testified that she exited by the back door"?

18 A Yes.

19 Q And as far as the walking pace it's just  
12:21 20 ridiculous, isn't it, sir, to suggest that Gail  
21 Miller would not have passed the car already?

22 A We don't know the speed of her walking.

23 Q But we know that she walked, and that if anybody  
24 is stuck in a car they are going to try and get  
12:22 25 out for a little bit, I mean it would just be



1           stupid to go wandering off to look for help when  
2           you hadn't even tried to get your car unstuck;  
3           wouldn't it?

4       A       I'm not certain.

5       Q       40 below?

6       A       I'm not certain, madam, what they would do at that  
7           time.

8       Q       Okay. 138, please:

9                       "The fact that Milgaard is left handed  
12:22 10               does not prevent him from wielding a  
11               knife with his right hand, particularly  
12               if he was grasping something in his left  
13               hand."

14           That's pretty lame, isn't it?

12:22 15       A       It is what it is, madam, how you interpret it is  
16           up to you.

17       Q       And it is certainly open to the interpretation  
18           that you are desperately trying to hold onto a  
19           conviction on November 22nd, 1991?

12:22 20       A       On November 22nd, 1991 this case was headed to the  
21           Supreme Court. Whatever I said was merely there  
22           for an intellectual exercise. It would not rely  
23           on my views, my opinions, it was headed for the  
24           Court and the minister would be guided by the  
12:23 25           Court's advice.



1 Q Uh-huh. Okay. You will be happy to know I have  
2 only one more question.

3 A What is my name?

4 Q I'm sorry?

12:23 5 A What is my name?

6 Q Not quite. Section 696.1 of the *Criminal Code*  
7 contains some amendments which, in effect, codify  
8 existing practice in the years before; correct?

9 A In --

12:23 10 COMMISSIONER MacCALLUM: 690 what?

11 BY MS. McLEAN:

12 Q 696.1.

13 A It codifies practices that, I guess, were a  
14 follow-up from those that took place during the  
12:23 15 Milgaard inquiry.

16 Q With I believe two exceptions, they are simply a  
17 codification of existing practice at the time, the  
18 two exceptions being the annual report requirement  
19 and the power of compulsion?

12:24 20 A No, I beg to differ.

21 Q Uh-huh?

22 A You're quite right, there is the annual report,  
23 there is the power of compulsion.

24 Q Uh-huh?

12:24 25 A However, what I think is quite important is that





1 in setting out, in setting out, by way of  
2 regulation, what an applicant needs to submit, --

3 Q Uh-huh.

4 A -- what the test is, --

12:24 5 Q Yeah?

6 A -- what the process and procedure is, that goes a  
7 long way to informing the applicant so that they  
8 have, I would call it, a reasonable expectation.  
9 In addition they, Parliament, has seen fit to set  
10 out a test, a statutory test, and it has also seen  
11 fit to identify with, I think, greater specificity  
12 the types of things that qualify for a Section 690  
13 review.

14 And what I am simply meaning  
12:25 15 by that is this. It clearly states 'if you are  
16 applying, make sure that you've got fresh  
17 evidence, don't expect that the 690 process is  
18 just another form of appeal", and that goes a long  
19 ways towards assuring some certainty in the  
12:25 20 process.

21 Q But it's simply a codification of the existing  
22 practice is my question? It may very well, by  
23 being in the *Criminal Code*, make it --

24 A It codified and went further, yes, but when you  
12:25 25 say the existing practice --



1 Q Yeah?

2 A -- it's really important to put a time frame on  
3 when, what -- what year of existence.

4 Q I think the first public dissemination -- and I'm  
12:26 5 sorry, I don't have it on me -- but I think it was  
6 in the, maybe in connection with *Thatcher* there  
7 was a memo put out by the Department of Justice  
8 that indicates "this is what we do in a review",  
9 and that sort of document followed a number of  
12:26 10 other ones, --

11 A Yeah.

12 Q -- and it seems to be exactly, with the exceptions  
13 that I've noted, --

14 A Yes.

12:26 15 Q -- seems to be section 696?

16 A Certainly, I think *Thatcher* was the  
17 springboard, --

18 Q Yeah?

19 A -- but there was some further refinements after  
12:26 20 that.

21 Q So they are articulated --

22 A Yes.

23 Q -- in some documents that were released, but they  
24 have enacted as law "do what you have been doing  
12:26 25 with these additions" in whatever year it was,



1 696.1?

2 A Yes, but fairly important ones, yes.

3 Q Yeah. And none of them would have made any  
4 difference to assist David Milgaard; would they?

12:26 5 A I can't answer that as we speak. It may not have.

6 Q Yeah. And they wouldn't assist anybody else in  
7 his position where there simply is not evidence  
8 that satisfies the Minister of Justice or her, his  
9 or her advisors, in that test?

12:27 10 A I can answer it this way, Ms. McLean. The test is  
11 set out, --

12 Q Yes?

13 A -- it's set out by Parliament, --

14 Q Yes?

12:27 15 A -- and where an applicant reaches a threshold --

16 Q Yeah?

17 A -- a remedy is applied.

18 Q Yes. So there is nothing in the additions, the  
19 changes, or the amendments that have been made  
12:27 20 between 690 and 696 that would have helped David  
21 Milgaard get out of jail faster?

22 A I think, to the extent that we heard some  
23 testimony that the applicants didn't know what was  
24 required, those amendments certainly would inform  
12:27 25 them of precisely the standards that they would



1           have to meet and the type of evidence that they'd  
2           have to bring.

3           Q       Yeah.

4           A       So, to answer your question, it would be pure  
12:28 5           speculation.

6           Q       The answer has to be "no"; does it not? The only  
7           thing that got David Milgaard out of jail was the  
8           application that was made that included all of the  
9           Fisher information, all of the Fisher information  
12:28 10          that was available to date, the intervention of  
11          the media and quite possibly the intervention of  
12          the Prime Minister, depending on whose account you  
13          accept? There's nothing in 696 that would have  
14          made any -- 696.1, the amendments, that would have  
12:28 15          made any of that faster, would have got him out of  
16          jail earlier than it did?

17          A       I beg to differ. In terms of the speed, --

18          Q       Yes?

19          A       -- certainly the compulsory powers would have  
12:28 20          avoided some of the delays that we incurred in  
21          terms of reaching witnesses, the timetable for  
22          interviewing some of the witnesses, --

23          Q       Yeah?

24          A       -- the ability to re-interview certain witnesses  
12:29 25          --



1 Q Yeah?

2 A -- as additional information came up. Certainly  
3 those would have assisted us and might have added  
4 to the knowledge.

12:29 5 Compulsory powers with respect  
6 to gathering evidence and gathering information,  
7 we now know that there were a number of other  
8 documents that were out there that could have  
9 informed the questioning of some of the witnesses  
12:29 10 had they been provided --

11 Q And what --

12 A -- with the initial application. Those are my  
13 views.

14 Q Well, certainly not, sir. The documents with  
12:29 15 respect to Larry Fisher, okay, are there; you had  
16 them?

17 A We had some.

18 Q And are you saying that some authority figures  
19 refused to cooperate with you that would have if  
12:29 20 you had had a power of compulsion --

21 A If we had a power --

22 Q -- to give you documents?

23 A If we had a power of compulsion I think we would  
24 have been able to set -- firstly, interview Larry  
12:30 25 Fisher the second time, certainly interview,



1           compel the attendance of Mr. Wilson. We lost a  
2           month or more --

3           Q       A month for Mr. Wilson, who you didn't believe  
4                    anyway?

12:30 5           A       Well, it's not a question of whether or not the  
6                    result was there, but you are asking me whether or  
7                    not it would speed it up.

8           Q       No, that, I didn't ask that. I said "that would  
9                    have got David Milgaard out of jail earlier", not  
12:30 10           that would have got a report dismissing his  
11                    application earlier?

12           A       There's one other thing you should know.

13           Q       Uh-huh?

14           A       696.1, I think, now contains a provision for a  
12:30 15                   form of judicial interim release, --

16           Q       Uh-huh?

17           A       -- and the other one did not.

18           Q       And we have been taking some advantage of it.

19           A       Indeed.

12:30 20           Q       Thank you. Those are my questions.

21                    COMMISSIONER MacCALLUM: Mr. Williams, does  
22                    the power of compellability in the amendments  
23                    extend to agents of the provincial Crown?

24           A       I suspect it does. I hope that we would not have  
12:31 25                    to use it in relation to a provincial Crown



1 agency, but that -- it would be an interesting,  
2 interesting exercise to have one Crown agency  
3 trying to compel information from a provincial  
4 one. I don't know, Commissioner. Ordinarily, we  
12:31 5 haven't had any concerns, or while I was in that  
6 chair I didn't have any concerns about getting  
7 information from the provincial Crown agencies,  
8 but it's certainly an interesting question that I  
9 would have to research before I could give you an  
12:31 10 informed answer.

11 COMMISSIONER MacCALLUM: Well I was just  
12 wondering, to take an example, there are some  
13 provincial police forces like the QPP, the OPP,  
14 and so on. If they, for some reason, resisted,  
12:31 15 could you compel them?

16 A That's what I understand.

17 COMMISSIONER MacCALLUM: Okay. Do you  
18 know?

19 A I think it's, I think it can be done, but I would  
12:32 20 have to research that.

21 COMMISSIONER MacCALLUM: Okay. Until 1:30.

22 *(Adjourned at 12:32 p.m.)*

23 *(Reconvened at 1:35 p.m.)*

24 **BY MR. LORAN:**

01:35 25 Q Good afternoon, Mr. Williams.



1 A Good afternoon.

2 Q For the record, my name is Pat Loran and I'm here  
3 for the Saskatoon Police Service. I'll be quite  
4 brief this afternoon, Mr. Williams.

01:35 5 I'm going to ask first of all  
6 for document 056743 to be brought up, that's Mr.  
7 Pearson's report, and I would ask to turn to page  
8 056751 of that document. Paragraph 40 is the  
9 paragraph I'm interested in in particular. Now,  
01:36 10 in this report is it fair to say that Sergeant  
11 Pearson was making these inquiries on the basis of  
12 your instruction?

13 A Yes.

14 Q It would appear that he phoned Winnipeg's police  
01:36 15 department record section looking for the Fisher  
16 files relative to the two rape offences in  
17 Winnipeg and apparently these files were destroyed  
18 in 1974, some four years after the offences  
19 occurred. Is that the information you were  
01:36 20 provided?

21 A I believe so. If we could scroll down just a bit  
22 more, I think he provides a result of his  
23 inquiries.

24 Q If one looks -- let's go back to the previous  
01:36 25 page. I'm interested in this portion:





1 "I was advised these files were  
2 destroyed in 1974..."

3 A Yes.

4 Q "...after Fort Garry amalgamated."

01:37 5 All right. And I'm going to ask to have document  
6 number 338040 called up, and this is a letter  
7 from Sergeant Pearson. I'll give you a moment to  
8 look at the letter, but I take it from this  
9 letter that you did eventually manage to obtain  
01:37 10 the files regarding the Fisher Winnipeg rapes  
11 from the penitentiary records?

12 A I believe so, yes.

13 Q Thank you. Now, in terms of these records having  
14 been destroyed some four years after the offences  
01:38 15 occurred, is it fair to say that you didn't draw  
16 any sinister inferences about those files having  
17 been destroyed regarding the motivations of the  
18 Winnipeg police?

19 A I did not.

01:38 20 Q Just to ask about confirmation of some of your  
21 earlier evidence, was it fair for me to summarize  
22 your evidence as saying that you found the  
23 Saskatoon Police Service to be open and  
24 co-operative in allowing you access to their  
01:38 25 records through your contact with them?



1 A Yes.

2 Q When in the late '80s you asked for files from the  
3 Saskatoon police regarding the Fisher rapes which  
4 had occurred back in, well, nearly 20 years before  
01:38 5 that and you found that portions of some of those  
6 files had been destroyed, you didn't draw any  
7 sinister inferences regarding their motivations  
8 from that either?

9 A I did not.

01:39 10 Q Halfway there. I'm going to ask now for document  
11 025659 to be called up, and at page 660 --  
12 actually, I'm going to ask to go back to the  
13 previous page just to help with identification of  
14 this document. This document is sent to Murray  
01:39 15 Montague who was the deputy chief at that time,  
16 it's dated March 1st, 1990. Do you recognize the  
17 document?

18 A It appears to be a copy of a letter that I wrote  
19 to Deputy Chief Montague on that date.

01:40 20 Q Thank you. Perhaps we can go back to page 2 and  
21 again the second paragraph. Thanks. Is it fair  
22 to characterize this letter -- well, I guess would  
23 it be fair to say first of all that you thought  
24 the Saskatoon Police Service would likely be  
01:40 25 criticized by the Milgaard camp if they took any



1 part in the investigation of Larry Fisher?

2 A Yes, it would certainly raise a perception of a  
3 conflict of interest if the role of the Saskatoon  
4 police was a fairly active one, particularly if  
01:40 5 there were allegations of police misconduct by or  
6 on behalf of officers or former officers. It  
7 would be akin to them investigating themselves.

8 Q And there had in fact been experiences you  
9 encountered which probably led you to believe that  
01:41 10 this would have been a likely outcome had the  
11 Saskatoon police been carrying the investigation.  
12 Would it be fair to say that?

13 A Yes.

14 Q Your experiences with Mr. Caldwell in particular  
01:41 15 are what I'm thinking of. You had approached him  
16 for information regarding the original prosecution  
17 and your inquiries were characterized by the  
18 Milgaard camp and reported in the press as a  
19 matter of Mr. Caldwell being asked to investigate  
01:41 20 his own conduct in the original prosecution. Is  
21 that sort of a fair analysis of what you perceived  
22 to have been reported?

23 A Yes.

24 Q Under the circumstances, would it be fair to say  
01:42 25 you thought it likely that the same criticisms



1 would be made of the Saskatoon police for any role  
2 they played in investigating Larry Fisher?

3 A Yes.

4 Q Is it fair to say then that you thought it was  
01:42 5 prudent to have the RCMP take charge of the  
6 investigation?

7 A Yes.

8 Q And in this letter, your paragraph 2 here, is it  
9 fair to characterize it as advising the Saskatoon  
01:42 10 police of two things; number one, that they could  
11 step back from investigating the Larry Fisher  
12 matter confident in the knowledge that the RCMP  
13 would be taking care of that matter?

14 A Yes.

01:42 15 Q And, two, that it would be appropriate for them to  
16 step back from the investigation in light of issue  
17 number one and the risk that was involved that  
18 their actions might be characterized as  
19 inappropriate?

01:43 20 A Yes. I also wanted to give them a heads up as to  
21 the nature of the things I would be asking for and  
22 to more or less introduce the notion that Rick  
23 Pearson would be coming around to see them.

24 Q Okay. And Mr. Pearson's reports to you regarding  
01:43 25 his contact with the police, they worked out well?



1 A Yes. He reported that he received full  
2 co-operation.

3 Q Thank you. I have no further questions, Mr.  
4 Williams.

01:43 5 A Thank you.

6 BY MS. KNOX:

7 Q Mr. Williams, for the record, my name is Catherine  
8 Knox and you know that I am counsel for the former  
9 trial prosecutor T.D.R. Caldwell?

01:44 10 A I do, yes.

11 Q I have a brief number of areas to canvass with you  
12 primarily arising out of questions asked by  
13 Ms. McLean this morning and by Mr. Wolch in his  
14 cross-examination of you, and if I could start  
01:44 15 perhaps with this morning.

16 Ms. McLean asked you if my  
17 client, Mr. Caldwell, had told you that he had  
18 been writing letters to the National Parole Board,  
19 or he had written a couple of letters, you  
01:44 20 indicated that he had, but you couldn't turn your  
21 mind to when in time, you thought it was early. I  
22 ask if we could have brought up a letter from Mr.  
23 Caldwell to you dated June 16th, 1989. The  
24 document number is 332496, and if we could centre  
01:45 25 in on the first paragraph of that, please.



1 As I indicated -- and I had  
2 the staff gloss over, the date of this letter is  
3 June 16th, 1989, and it's a letter to you from Mr.  
4 Caldwell telling you he's finally been able to  
01:45 5 obtain copies of the two letters that he wrote to  
6 the National Parole Board and he's providing them  
7 to you, so would you agree, based on the date and  
8 the language of this letter, that certainly in  
9 advance of June 16th, so relatively -- within six  
01:45 10 months of you getting the application or the  
11 department getting the application, not only had  
12 he talked to you about it, but he had tracked down  
13 copies of the letters for you?

14 A That's correct.

01:45 15 Q Okay. Now, sir, you were asked some questions as  
16 well by Ms. McLean about a letter that Mr.  
17 Caldwell sent to you in October of 1989 where he,  
18 in response, I believe, to a delay in your making  
19 a trip to Saskatoon, he went through the file and  
01:46 20 copied a fairly large volume of material and sent  
21 it to you?

22 A Yes.

23 Q And that letter, again just for the record  
24 reference, the date of the letter is October 25th,  
01:46 25 1989 as identified by Ms. McLean and the document



1 number is 016106, I don't think we need to have it  
2 brought up, but, Mr. Williams, some questions were  
3 asked of you yesterday with respect to the length  
4 of time it took you to process the application and  
01:46 5 how that upset the Milgaards, and in fairness to  
6 you, there was a document in Mr. Caldwell's file,  
7 the document number, Mr. Commissioner, is 332490.

8 Mr. Williams, I'm not sure if  
9 you would have reviewed this, but this is a note  
01:46 10 prepared by Mr. Caldwell on the 26th of September,  
11 1989 and if you can't read his handwriting, he's  
12 recorded that he had a telephone conversation with  
13 you, that you had had a communication from Mr.  
14 Wolch's office about some news clippings on files  
01:47 15 or things to do with a knife-wielding assailant or  
16 attacks on nurses?

17 A Yes, I see that.

18 Q And he indicated or he documented that you were  
19 asking him to go through the times, so although he  
01:47 20 didn't reply to you until his October 25th letter,  
21 his records show you had actually communicated  
22 that request to him a month earlier, September  
23 26th, 1989?

24 A Yes.

01:47 25 Q Okay. And with respect to that, do you have a



1 memory of calling him as the person that could  
2 assist you in finding that information from his  
3 file given his obvious familiarity with the file?

4 A Yes.

01:47 5 Q Okay. At any point when you called him, did he  
6 appear to offer any hesitation or any resistance  
7 to accommodating your requests for information or  
8 getting file access for you or anything of that  
9 nature?

01:48 10 A There was no hesitation whatsoever.

11 Q Mr. Williams, when you first make contact with him  
12 after the application came into your hands  
13 sometime after December 28th, 1988, did you  
14 realize that no one on behalf of David Milgaard  
01:48 15 through the Wolch -- Mr. Wolch, Mr. Asper, had  
16 made any request of him to be allowed access to  
17 his file?

18 A No.

19 Q Okay. Did you realize that in fact he had given  
01:48 20 access to his file to a previous counsel for Mrs.  
21 Milgaard in 1981 and in fact invited him to come  
22 look at the file, to partake in the file? I'm  
23 thinking of a lawyer by the name of Gary Young.

24 A No.

01:48 25 Q Okay. Did you realize at that early stage that





1 not only had he given access to Mr. Young and  
2 invited him to come and review his file, but that  
3 he had given access to Peter Carlyle-Gordge, to  
4 the CBC and, from all indications, whenever he was  
01:49 5 asked by appropriate persons for access to the  
6 file, he gave it?

7 A I've since learned that, but I didn't realize it  
8 early.

9 Q Did he ever communicate to you in any manner  
01:49 10 whatsoever to suggest that he would have resisted  
11 a request from Mr. Wolch or Mr. Asper to have  
12 access to his file?

13 A No. Based on the conversations I had, he was  
14 quite open in providing access to whoever saw it.

01:49 15 Q And, sir, Mr. Asper testified at various points in  
16 time at this inquiry, and I don't have the exact  
17 document, page dates from his transcript, but  
18 essentially when the application was sent to you,  
19 we've determined that no contact had been made  
01:49 20 with Mr. Caldwell to get access to his file on  
21 behalf of the law firm, no contact had been made  
22 with Mr. Tallis to get access to his file, no  
23 contact had been made with Gary Young to get  
24 access to his file, and no contact had been made  
01:50 25 with Tony Merchant, who you may recall also



1           briefly represented Mrs. Milgaard, so no contact  
2           had been made with any of those agencies.

3                           Additionally, we know that no  
4           contact was made with Saskatoon Police Service  
01:50 5           despite the fact that then Chief Joe Penkala in  
6           1987 extended an invitation to David Asper that  
7           his department would assist him in his quest to do  
8           this application, so there was no contact there,  
9           and did you at any point in time receive any  
01:50 10          request from Mr. Asper or get any understanding  
11          from him or Mr. Wolch that they expected it was  
12          your job to get that file information for them,  
13          that you would go out and they would, you would  
14          get all that for them because that's just the way  
01:50 15          it should work?

16        A           I never got that impression from them.

17        Q           Mr. Asper said that basically they expected they  
18           would walk hand in hand down a path with you, you  
19           would give them everything. Did he ever, ever,  
01:51 20          ever communicate to you any impression that that's  
21          what he thought your role was, to go out and find  
22          all that stuff out for him?

23        A           No. On occasion I received requests for specific  
24           bits of information and when I did I relayed them.

01:51 25        Q           But would you agree, sir, in terms of the specific



1 information bits that you were requested to get,  
2 like the Ute Frank statement, information on  
3 Deborah Hall, that knowing now or what was in Mr.  
4 Caldwell's file, that was all information they  
01:51 5 could have gotten themselves?

6 A Yes.

7 Q The (V4)---- (V4)--- statement that Mr. Wolch  
8 asked you about yesterday, statement number 40, he  
9 asked when you got it and when you disclosed it,  
01:51 10 that was sitting on Mr. Caldwell's file, they  
11 could have had it any time from 1986 forward had  
12 they bothered to go in and ask for it?

13 A So it would appear, yes.

14 Q Uh-huh. Sir, Ms. McLean referred you this morning  
01:52 15 to a copy of a chapter from a book, *The Ice-Cold*  
16 *Hothouse*, that was sent to you by Mr. Caldwell,  
17 and the copy drawn up at that time had handwritten  
18 notes on it. You indicated that what was sent to  
19 you had no writing on it?

01:52 20 A I don't believe it did.

21 Q Mr. Commissioner, with the assistance of the  
22 staff, I'm advised they found a copy of that  
23 portion of the book that was in the federal  
24 government files, the number is 332295 I'm  
01:52 25 advised. If we could have that brought up,



1 please. Now, the cover page clearly has no  
2 notations on it, Mr. Commissioner, I don't think  
3 it's necessary for us to go through it, but just  
4 for the record I'm advised that this has no  
01:52 5 writing on it at all and it would appear that this  
6 is likely the copy that Mr. Williams had because  
7 it does come from federal government files.

8 Mr. Commissioner, as well I  
9 can indicate from Mr. Caldwell's file that that  
01:53 10 chapter that he sent was copied from the book, he  
11 had physical possession of the book, not just a  
12 photocopy. That book is in my possession, I can  
13 produce it to the Commission if you wish, but his  
14 copy has none of the handwriting that appeared in  
01:53 15 the text that we looked at this morning, but I do  
16 have the physical book itself in its original form  
17 as it was sent to him.

18 COMMISSIONER MacCALLUM: Thank you.

19 BY MS. KNOX:

01:53 20 Q Sir, yesterday in the course of his  
21 cross-examination, Mr. -- and I'll be a little bit  
22 all over the board here, but I don't expect to be  
23 very long -- Mr. Wolch, through his own questions  
24 and through the language used in a video clip he  
01:53 25 showed you, referenced the fact that Mr. Caldwell



1 had failed to disclose certain information that  
2 should have been disclosed to Mr. Tallis at the  
3 time of the trial. Do you recall generally being  
4 questioned in that area?

01:53 5 A Yes.

6 Q And as I understood your answers, it was your  
7 perception, and Mr. Tallis has testified, that the  
8 disclosure he received at the time was in  
9 accordance with the practices of the day, and I'm  
01:54 10 not sure that you are aware of it, Mr. Caldwell  
11 has testified that in hindsight there's some  
12 things that should have been turned over knowing  
13 now what he didn't know then, so he takes no issue  
14 that, like you, some 40 years later, if he had to  
01:54 15 do it over he would do things differently, but one  
16 of the questions put to you and one of the  
17 statements in that video tape was that there were  
18 certain statements about the route that Gail  
19 Miller took, whether it was Avenue O, Avenue N,  
01:54 20 that were not disclosed, and reference was made to  
21 two roommates, Betty Hundt and Ann Friesen?

22 A Yes.

23 Q Do you recall that area of questioning, sir?

24 A Yes.

01:54 25 Q Now, I know that you've read many years ago the



1 transcript of the preliminary inquiry. Do you  
2 remember that in fact in the cross-examination of  
3 the other roommate, Adeline Nyczai I think is the  
4 pronunciation, at the preliminary inquiry,  
01:55 5 Mr. Tallis questioned her using the name of Betty  
6 Hundt and Ann Friesen, asking where those ladies  
7 were at the time of the preliminary inquiry in  
8 1969?

9 A I have no specific recall of that portion of the  
01:55 10 transcript.

11 Q Mr. Commissioner, it's found in the transcript,  
12 and I've referenced it before, in the pages of the  
13 transcript in the preliminary inquiry, it's  
14 between pages 97 and 103. The document number for  
01:55 15 the transcript again is 007421. Ms. Nyczai at  
16 that time in the transcript told him that Betty  
17 Hundt was in Whitehorse and Ann Friesen had moved  
18 and was living in B.C. on the record, sir. Now,  
19 sir, given that he was able to ask those  
01:55 20 questions, would that indicate to you this was not  
21 a case of the statements of these young women not  
22 being disclosed?

23 A Certainly that's an inference you could draw, how  
24 would he know about their existence unless he had  
01:56 25 been told.



1 Q He had the names, he used them?

2 A Yes.

3 Q But are you aware, sir, that Mr. Tallis testified  
4 that it was a practice, or a courtesy that was  
01:56 5 extended to him, that he often read file materials  
6 even though he wasn't given copies of it and he  
7 believes that the prosecutor, the city prosecutor,  
8 before Mr. Caldwell took over the file, even may  
9 have given him an opportunity to read the file?

01:56 10 A I wasn't aware of that, but in my conversations  
11 with Mr. Tallis, he indicated that he had received  
12 full co-operation and his requests had been  
13 satisfied.

14 Q And the fact that he might not have gotten copies  
01:56 15 of something doesn't mean that we can or should  
16 conclude he didn't have the information; is that  
17 your understanding?

18 A Well, disclosure in the early days didn't  
19 necessarily mean turning over copies, it did mean  
01:56 20 providing access.

21 Q Okay. Mr. Williams, Mr. Loran in his questions to  
22 you referenced the next area that I want to go to  
23 and it's the fact that my client became vilified,  
24 victimized in the media with accusations of things  
01:57 25 that he did do that he shouldn't have done or



1 things that he didn't do that he should have done,  
2 and you are familiar with some of that publicity,  
3 including the allegation that he was in conflict  
4 because he was giving you information from his  
01:57 5 file?

6 A Yes.

7 Q Okay. Sir, Mr. Caldwell has testified about some  
8 of the impact of that on him and his family and  
9 yesterday in his questions Mr. Wolch asked you --  
01:57 10 so I can get this right -- whether -- and,  
11 Mr. Commissioner, I'm referring to the transcript  
12 from yesterday's proceedings, at transcript page  
13 39490, and at about line 7 when Mr. Wolch was  
14 asking you some questions about the role of the  
01:58 15 media and that the media played, you responded at  
16 line 7 saying:

17 "A I think we're embarking on a whether or  
18 not the ends justify the means."

19 Mr. Wolch responded by say:

01:58 20 "Q No, no, I'm just suggesting that the  
21 media is the only place to turn, and the  
22 media are intelligent people who will  
23 not champion a bad cause?"

24 Your response:

01:58 25 "A That's your view, sir."





1 And then Mr. Wolch continues:

2 "Q You think they would? Have you ever  
3 heard of anybody who has been wrongly  
4 convicted, allegedly, that the media  
01:58 5 sort of went to bat for that didn't turn  
6 out to be innocent?"

7 And then he goes on, and I'll come back, I'll  
8 just go through the whole passage and then ask  
9 you some questions, his question at line 19:

01:58 10 "In your experience of having 690  
11 applications can you think of one..."

12 Case,

13 "...where the media didn't agree with  
14 your decision and they were wrong?"

01:58 15 You respond to that, and if we go to the next  
16 page, Mr. Wolch says, or the question starts at  
17 line 1, Mr. Wolch in his question says:

18 "Q I'm not quarrelling with your response.  
19 We'd like to have a system that's fair  
01:59 20 and works, we'd like to have a system  
21 where the applicant knows what's going  
22 on and is heard by somebody, but I'm  
23 suggesting to you that the media is the  
24 only place to turn when you don't know  
01:59 25 what the investigators are doing and it



1 looks like they are biased."

2 Do you remember that series of questions and  
3 answers from yesterday?

4 A Yes.

01:59 5 Q Sir, did you realize, or have you been made aware  
6 that on the very day that David Milgaard's  
7 application was forwarded to the Minister of  
8 Justice, December 28th, 1988, a letter went to the  
9 CBC sending them a copy of the application the  
01:59 10 very day that it was sent to your department?

11 A No.

12 Q Mr. Commissioner, I ask if we could bring up  
13 document 163061. Sir, this is a letter under the  
14 signature of Mr. Asper, it is going to Sandra  
02:00 15 Bartlett who is a producer at the CBC, you see at  
16 the Canadian Broadcasting Corporation in Regina,  
17 and I'll allow you a moment to read it since you  
18 haven't seen it before. You hadn't seen that  
19 before?

02:00 20 A No.

21 Q The tenor of Mr. Wolch's questions, as I just put  
22 them to you, and they were brought up on the  
23 screen, suggests that the resort to the media has  
24 to be had when there's delays or there's an  
02:00 25 indication of bias. Would you agree with me that



1           this letter is not in keeping with that question,  
2           this was a letter that went out before the Justice  
3           Department even got -- or got the application in  
4           their hands?

02:01 5           A           The same day, yes.

6           Q           Okay. Mr. Commissioner, I wonder if I could ask  
7           the staff to bring up document 182097, if we could  
8           bring out the -- sir, this is a document dated  
9           September 2nd, and although it doesn't have a year  
02:01 10          on it, the records indicate that it would be  
11          September 2nd, 1986 which would be two years,  
12          three months in advance of the application, and  
13          it's a memo to Hersh Wolch from David Asper, and  
14          it's about the -- they are in the relatively early  
02:01 15          stages of the preparation of their application,  
16          but my summary of the content of this is that  
17          effectively what Mr. Wolch is telling David Asper  
18          is that, if you look at the last sentence, is  
19          that:

02:02 20                    "Our opinions appear to be in a 617  
21                    application but it seems to me that if  
22                    we can get a T.V. show done first to get  
23                    some support we would be far better  
24                    off."

02:02 25          A           Yes, I see that.



1 Q Well in advance of the application ever being  
2 filed, well in advance of contact with the  
3 Department of Justice, but certainly indications  
4 that the media campaign didn't get generated  
02:02 5 because of frustration at how long you were taking  
6 to do the file or the fact that there was  
7 information coming to them suggesting bias on the  
8 part of you and others in justice does it?

9 A It does not. It would appear that the resort to  
02:02 10 the media was part and parcel of an approach to  
11 get a result. The reference to 617 application is  
12 a reference to the predecessor section in the  
13 *Criminal Code* which later became Section 690.

14 Q And keeping in mind this is September 2nd, 1986,  
02:03 15 the use of that section numbers makes sense, does  
16 it not, because it would have been 617 in 1986?

17 A Yes.

18 Q Six -- nine months, sorry, they were retained  
19 January 16th, 1986, this memo is written September  
02:03 20 2nd, 1986, so within months -- and I can go  
21 through the record with you, but this would be  
22 long before contact, much longer before any  
23 indication being made or any feedback to them from  
24 the government because the government had nothing  
02:03 25 to give them feedback on in 1986 did they?



1 A No.

2 Q If we could jump forward in time, the application  
3 is filed on December 28th, 1988, CBC is given a  
4 letter December 28th, 1988, to January 5th, 1989.

02:03 5 If I could have document number 182100. This is a  
6 memo to Mr. Wolch from David Asper, seven, eight  
7 days after the application is put into the mail to  
8 the minister. In addition to the letter written  
9 to Sandra Bartlett on the 28th of December when he  
02:04 10 sent out the application to her, he's in  
11 conversation with her within eight days, January  
12 5th, 1989?

13 A Yes.

14 Q Okay. And now if we could go forward to February  
02:04 15 10th, 1989, 333285, this would be five weeks  
16 later, this is basically the first correspondence  
17 or the first documentation with respect to the  
18 application being received at your department and  
19 some direction being given with respect to  
02:05 20 starting some work on it, but this would be  
21 several weeks after it's in the hands of CBC;  
22 agreed?

23 A Yes. What's on the screen is my memo to Mr.  
24 Fainstein of February 20th -- of January 20th.  
02:05 25 It's approximately two weeks after, or three weeks



1 after it's in the hands of CBC.

2 Q Okay.

3 A Umm, the memo signals that the application is not  
4 complete, and I've drafted a letter setting out  
02:05 5 the materials required to complete the  
6 application.

7 Q Okay. Sir, if I could bring up 004868, please.  
8 This is a February 16th letter, 1989, that the  
9 minister sent back to Mr. Wolch listing all the  
02:06 10 things that needed to be sent in before the  
11 department could even start to take a look at  
12 this?

13 A Yes.

14 Q So, again, well in advance of even, you know, the  
02:06 15 basic materials being forwarded by Mr. Wolch's  
16 office to your department they have engaged in an  
17 in-the-media strategy that built to the point that  
18 we know it to have evolved as a result in this  
19 Inquiry?

02:06 20 A So it appears, yes.

21 Q I wonder if the staff could help me. There is a  
22 February 10th, 1989 letter that Mr. Wolch wrote to  
23 David Milgaard that I have the wrong document  
24 number for. The date of the letter is February  
02:06 25 10th, 1989, it's Hersh Wolch to David Milgaard, I



1           made an error in copying it down. Sir, if we  
2           could bring this up, this is a letter written to  
3           David Milgaard by Mr. Wolch. The date is, as I've  
4           indicated, February 10th, 1989, and if you could  
02:07 5           take a -- a quick read through it. And if you  
6           could take a quick read of it, have you seen this  
7           letter before?

8           A       No, I have not.

9           Q       Okay. If you could continue, then, and read it.  
02:08 10           When you're ready, just ask the staff to move it  
11           to the next page.

12          A       (Witness reading) Yes, I've read it.

13          Q       Okay. Sir, again, this is a letter that was  
14           written ten days before the minister wrote Mr.  
02:08 15           Wolch and said "where's your stuff, where's the  
16           transcript, where's the lab reports". Would you  
17           agree the tenor of that is a confirmation that  
18           this application wasn't about getting the media  
19           involved because it started to go south on them,  
02:09 20           but that the strategy he outlined to Mr. Milgaard  
21           in this letter is to use publicity, he says  
22           "responsible publicity", as part of the process  
23           that they would -- they saw the two operating hand  
24           in glove?

02:09 25          A       The -- yes.



1 Q And your experience with the process, as it went  
2 along, would you agree that that appears to be  
3 exactly what happened?

4 A Yes. Quite often various instalments in this  
02:09 5 application arrived at about the same time that a  
6 press story detailing the same subject matter  
7 appeared.

8 Q Okay. Did it sometimes happen that the press had  
9 the story in it before the letter or the issue was  
02:09 10 in your hands?

11 A On occasion.

12 Q They beat the mail in other words?

13 A Yes.

14 Q Okay. And, sir, I -- I have many pages of other  
02:09 15 kinds of media overtures being made before the  
16 file material was complete, the transcripts were  
17 received, talking about when CBC didn't do a *Fifth*  
18 *Estate* program that they were hoping for. If we  
19 could bring up a memo March 13th, 1989, 182102.

02:10 20 And this is a March 13th memo to Hersh from David  
21 Asper, being David Asper, and the suggestion in  
22 here being that since they are not getting a --  
23 the show out that they had hoped for with CBC they  
24 would like to consider plan B, go public with  
02:10 25 someone else; do you see that?





1 A Yes.

2 Q Okay. So we move from Sandra Bartlett, when that  
3 didn't gel as it was hoped, they start looking at  
4 the possibility of using other media outlets?

02:10 5 A Yes.

6 Q And if we could bring up 163025, a May 18th, 1989,  
7 and I don't know that we need to go through the  
8 content. The recipient, *Winnipeg Free Press*, Dan  
9 Lett, referencing telephone conversations with him  
02:11 10 and sending him consents to get access to David  
11 Milgaard's records, psychiatric records, --

12 A Yes.

13 Q -- through the prison system?

14 A Yes.

02:11 15 Q So we've got CBC, we've got Dan Lett, and it  
16 continues on. If we go to September 6th, 1989 --  
17 and I won't bring it out -- and copies of the  
18 application sent to Southam News September 18th,  
19 1989, a copy of the application sent to CTV  
02:11 20 National News, but just a continuing increasing  
21 amount of media attention. And would you agree  
22 all of this would be well in advance of the  
23 expressed concerns about bias or delay on your  
24 part?

02:11 25 A Yes.



1 Q Indeed, all of that would be well in advance of  
2 contact being made, or much of it was well in  
3 advance of basic materials like transcripts and  
4 the like being forwarded to you; wasn't it?

02:12 5 A I believe I received the transcripts in May of  
6 that year.

7 Q So around the time Dan Lett was getting consents  
8 to get into file records?

9 A So it would appear.

02:12 10 Q Sir, I just have one other area to touch on, I  
11 think. Well just, actually, two areas to touch  
12 on.

13 Now were you made aware, prior  
14 to Mr. Wolch and Mr. Asper becoming involved, that  
02:12 15 Mrs. Milgaard/David Milgaard, had initiated  
16 contact with the press as well and in fact in  
17 December of 19 -- or sorry -- in January 1986,  
18 when they hired them, they were already working  
19 with the *Fifth Estate* about doing a program on  
02:13 20 David Milgaard and his story?

21 A No.

22 Q Okay. Just so that the record is clear, there's  
23 some correspondence from David Milgaard to the  
24 minister in fact, and I raise it to inquire  
02:13 25 whether you had seen it, saying that he thought



1 the *Fifth Estate* was going to be doing a program  
2 about him when he made his own initial contacts  
3 with the minister, and that when Mr. Asper was  
4 following up with Sandra Bartlett she had already  
02:13 5 had some lengthy involvement in the file through  
6 the Milgaard family?

7 A I'm aware that, before the receipt of the December  
8 1998 application, David Milgaard had written to a  
9 -- the then-minister of justice, I'm not sure if  
02:13 10 it was '85 or '86, and there had been a response  
11 to him. But insofar as the CBC *Fifth Estate*, I'm  
12 not -- not aware of that communications as we now  
13 speak.

14 Q Just for the completeness of the record, I had  
02:14 15 asked you earlier, the CBC went and saw Mr.  
16 Caldwell in about 1987 because they were working  
17 on a story that never did air, but you were aware  
18 that he gave access to the CBC to his file, I  
19 believe? Because it was through Sandra Bartlett,  
02:14 20 the CBC gal at that time, seeing his file that the  
21 request came to you about the other nursing  
22 attacks and knife-wielding assailants; do you  
23 remember being told that she said she saw news  
24 clippings or something on Mr. Caldwell's file?

02:14 25 A Yes.



1 Q So there was some involvement in the public media  
2 before Mr. Wolch and Mr. Asper became involved,  
3 but they certainly paralleled it and built up on  
4 it as part of their strategy on his application,  
02:14 5 as evidenced by some of the documents I have shown  
6 you; would you agree?

7 A Yes.

8 Q Okay. Sir, going back to the portion of  
9 transcript that I referred you to for -- where Mr.  
02:14 10 Wolch was questioning you yesterday at page 39490,  
11 he asked you the questions about whether you were  
12 aware of any time that the media had advocated for  
13 a person that he was innocent where they'd turned  
14 out to be wrong?

02:15 15 A I recall that exchange, yes.

16 Q Okay. Sir, during the lunch hour today I asked,  
17 with the permission of your counsel, you to review  
18 some materials.

19 And, Mr. Commissioner, I'm  
02:15 20 referring to a media blitz that occurred on and  
21 about January 12th, 2006.

22 And are you familiar, now,  
23 with the name of a Roger Keith Coleman?

24 A Yes, I am.

02:15 25 Q Okay. And, for the record, can we agree that



1 Mr. Coleman was the gentleman who was executed on  
2 death row in the United States in 1982 -- '92,  
3 sorry; that there was a protestation, a huge media  
4 campaign advocating his innocence that involved  
02:15 5 Centurion Ministries, the Pope as it turns out,  
6 the cover of *Time* magazine, and multiplicity of  
7 media resources claiming that he had been  
8 wrongfully convicted, lots of castigation of the  
9 state and state authorities, but it turned out,  
02:16 10 with DNA results that were arranged through  
11 Mr. Lockyer in Toronto and the efforts of the  
12 Association in the Defence of Wrongfully  
13 Convicted, that the media got it wrong?

14 A Yes.

02:16 15 Q That it was one of those cases where many people  
16 had attacks done on their reputations, that in  
17 retrospect there was lots of very irresponsible  
18 media reporting, and it turned out to be wrong?

19 A I observe --

02:16 20 MR. WOLCH: Mr. Commissioner, if I may, my  
21 friend is making a number of comments as fact.  
22 One is that there was a media blitz, the media  
23 supported, I haven't looked at what she has there  
24 but I'm going by memory.

02:16 25 My memory is that the issue



1 in that case was that there was an effort made to  
2 do DNA testing and the state was resisting. The  
3 media, as I recall, was arguing that the DNA  
4 testing should be done, they weren't advocating  
02:17 5 innocence, they were saying that there should be  
6 DNA. If I remember it right the governor said  
7 there should be a polygraph, and did that. I  
8 don't believe that's a case that supports my  
9 friend's contention that the media was backing  
02:17 10 anything. My memory is that parts of the media  
11 were saying there shouldn't be DNA, the evidence  
12 is overwhelming.

13 I believe that's the case of  
14 the fellow who was alleged to have raped and  
02:17 15 killed his sister-in-law, he had a bad criminal  
16 record too. But, I mean, to boldly assert that  
17 the media was championing a cause, they were  
18 reporting what they were being told, that should  
19 there be DNA or shouldn't there be DNA, and I  
02:17 20 don't know of any media championing.

21 MS. KNOX: Mr. Commissioner, if it would  
22 assist Mr. Wolch, I'll read an article in *The*  
23 *American Spectator*. This was published on the  
24 17th of January 2006, and there is much reporting  
02:18 25 about media, CNN, the cover of *Time* magazine, the



1           protestations by this gentleman on the night that  
2           he was taken to the death chamber that that "time  
3           will show that an innocent man was put to death",  
4           a press release from Reverend McCloskey saying  
02:18 5           that he had believed them, and to find out that  
6           he was wrong was like being kicked in the gut  
7           with a horse.

8                           But one paragraph, if I may,  
9           from *The American Spectator* -- or, sorry, two  
02:18 10          paragraphs:

11                           "As late as Thursday morning,  
12           Senator ... Leahy was throwing the case  
13           in Judge Alito's face ...",  
14           they are talking about cases in Virginia now  
02:18 15          where:

16                           "... it appears the possibility that a  
17           number of innocent people were executed.

18                           Then the results came back --  
19           astonishing, perhaps, only to those TV  
02:18 20          reporters who, in their usual 'in-depth  
21           analysis,' had no idea what they were  
22           talking about. The Coleman case is in  
23           fact one of the most bizarre episodes in  
24           the history of American journalism,  
02:19 25          escaping notice probably only because it



1 is indistinguishable from so many other  
2 cases. It's a perfect example of how  
3 the wandering moralists of the media  
4 overrun established institutions with  
02:19 5 their crusading myopia and staggering  
6 naivete."

7 And it's going through, then, a list of all of  
8 the various *Time* magazine that proclaimed his  
9 innocence, books, TV documentaries, *The Phil*  
02:19 10 *Donahue Show*, and I can provide all of these  
11 printouts to Mr. Wolch and to the Commission, but  
12 certainly they talk about an apoplectic media  
13 reaction with responses all over the world,  
14 including an intervention from the Pope to try to  
02:19 15 stop the execution of an innocent man.

16 MR. WOLCH: This is a view of *The American*  
17 *Spectator*?

18 MS. KNOX: Oh, I also have the *Toronto*  
19 *Star*.

02:20 20 MR. WOLCH: Saying that the media went  
21 wrong or --

22 MS. KNOX: Yup.

23 MR. WOLCH: Mr. Commissioner, my memory is  
24 they were -- if a man on death row says "I'm  
02:20 25 innocent" and the media reports that, why is that





1 media pushing a cause, they are just reporting  
2 what they were told.

3 MS. KNOX: I was reviewing the articles in  
4 response to the question framed by Mr. Wolch  
02:20 5 yesterday because of a comment Mr. Henderson made  
6 in his testimony here.

7 MR. WOLCH: No, --

8 MS. KNOX: But, certainly, all of the  
9 documentation, I think last night when I did an  
02:20 10 Internet search I got like 77,000 hits, we can  
11 debate whether it was a media frenzy or what, but  
12 I have the examples I took from the Canadian  
13 papers because they had good summaries. I'm  
14 prepared to provide them to Mr. Wolch and to  
02:20 15 provide them to the Commission.

16 MR. WOLCH: My --

17 COMMISSIONER MacCALLUM: That's okay, Mr.  
18 Wolch. This simply arose from your challenge to  
19 the witness to name one instance where the media  
02:20 20 championed somebody who turned out to be guilty,  
21 and I don't think the witness was prepared to  
22 come up with anything on -- from the top of his  
23 head, and this is a reply through Ms. Knox  
24 indicating that, well, there you are.

02:21 25 MR. WOLCH: Mr. Commissioner, my question



1 to the witness was "have you come across in your  
2 experience", I didn't say in the broad world.  
3 But if my friend wants to go to the broad world,  
4 then to say that that fellow was championed by  
02:21 5 the media, the media gave both sides of the story  
6 and the real issue was should there be DNA  
7 testing. The government was refusing to do DNA  
8 and that was the real issue there.

9 COMMISSIONER MacCALLUM: No, I think the  
02:21 10 real issue as far as this Inquiry is concerned,  
11 as I recorded it, was the media don't lightly  
12 champion people --

13 MR. WOLCH: That's right.

14 COMMISSIONER MacCALLUM: -- unless they are  
02:21 15 convinced of his innocence.

16 MR. WOLCH: That's right, and they weren't  
17 championing that fellow.

18 COMMISSIONER MacCALLUM: And here they did,  
19 they went wrong, that's what I heard.

20 MR. WOLCH: No, they were only reporting  
21 what they were being told.

22 COMMISSIONER MacCALLUM: "The wandering  
23 moralists of the media", whose quote is that, by  
24 the way?

02:22 25 MR. WOLCH: The media's quote.



1 MS. KNOX: *The American Spectator*.

2 COMMISSIONER MacCALLUM: *The Spectator*  
3 writer made that?

4 MS. KNOX: Yes. *The Spectator* article is  
02:22 5 an 11-page article that is a good review of the  
6 history, that's why I copied it. But, as I said,  
7 I also have the *Toronto Star*, the *National Post*  
8 had an article, and others that I can provide to  
9 --

02:22 10 COMMISSIONER MacCALLUM: It's all right, I  
11 mean I have the picture perfectly well. The idea  
12 that the media are infallible, of course, is a  
13 stretch in anybody's --

14 MR. WOLCH: No, oh no, I'm not suggesting  
02:22 15 that. But I'm saying that there's a big  
16 difference between championing a cause and  
17 reporting somebody else championing a cause, they  
18 are two different things.

19 COMMISSIONER MacCALLUM: Well, we're going  
02:22 20 to hear evidence on that subject from a media  
21 expert.

22 MR. WOLCH: I appreciate that.

23 MS. KNOX: I will provide my articles to  
24 Mr. Wolch so he can see them.

02:22 25 MR. WOLCH: I'll be happy to see them.



1 COMMISSIONER MacCALLUM: Yes.

2 MS. KNOX: There was much media  
3 championing, there was much media championing of  
4 his innocence, according to the --

02:22 5 MR. WOLCH: I don't know of any reporter  
6 who said he was innocent.

7 MS. KNOX: I will make sure that I put his  
8 mind at rest, that I'm not trying to mislead the  
9 Inquiry.

02:23 10 COMMISSIONER MacCALLUM: Please do.

11 MS. KNOX: And I have no further questions  
12 for Mr. Williams. Thank you.

13 COMMISSIONER MacCALLUM: Thank you.

14 **BY MR. FRAYER:**

02:23 15 **Q** Mr. Williams, I'm David Frayer, and I'm  
16 representing Justice Canada. You and I know each  
17 other --

18 **A** Yes.

19 **Q** -- and have known each other for a number of  
02:23 20 years.

21 Just a couple of areas I'd  
22 like to touch with you and go over with you. The  
23 first of them relates to a document that was  
24 produced yesterday by Mr. Wolch, 152076. If I  
02:23 25 could have that, please, 152076. And this is this



1 memorandum from you to Peter Lugli, the special  
2 assistant to the Minister of Justice, dated  
3 October the 24th of 1991, and I particularly want  
4 to draw your attention to the information that  
02:23 5 appears after the introduction and the first  
6 heading, *The frequency of sexual assaults in*  
7 *Saskatoon, 1968-1970*. Now what you have said here  
8 is that you have attached, as appendix 1, excerpts  
9 from the annual report of the Saskatoon Police  
02:24 10 Department for the years 1968, 1969, and 1970.  
11 And while I'm going to this particular document as  
12 there was a suggestion by Mr. Wolch yesterday,  
13 which you agreed with, that this particular  
14 information wasn't shared with the applicant; do  
02:24 15 you recall him asking you that and you saying "no  
16 it wasn't"?

17 A Yes.

18 Q Essentially so? With respect to the annual report  
19 of the Saskatoon Police Department, while I'm not  
02:24 20 certain that you can answer this question, would I  
21 be correct in saying that those are public  
22 documents?

23 A Yes.

24 Q They can be obtained by any citizen, upon  
02:24 25 request, --



1 A I believe so.

2 Q -- to your knowledge?

3 A I believe so, yes.

4 Q Okay. And you went through the statistics

02:24 5 collected over the course of those three years and  
6 you arrived at this particular analysis that you  
7 were providing to the special advisor to the  
8 minister, and this was work you did directly, was  
9 it?

02:25 10 A Yes. I was simply putting in, into that memo,  
11 some of the information contained in the report,  
12 just --

13 Q Okay. And you have a descriptor at the paragraph  
14 below the statistical data where you say:

02:25 15 "The bracketed numbers represent the  
16 number of assault and rape files that  
17 were located and analyzed by Saskatoon  
18 police in August, 1991 to determine the  
19 kind of weapon used by the assailants."

02:25 20 So, just so that we can put this to rest, Mr.  
21 Wolch or Mr. Asper, or anybody else on behalf of  
22 David Milgaard, could have gone to the Saskatoon  
23 Police Department, or to some other source, and  
24 obtained what are public documents?

02:25 25 A Yes.



1 Q The second material I'd like to refer you to is a  
2 document that's been referred to from time to time  
3 during the course of this Inquiry, and that's  
4 document 337474. And this, Mr. Williams, is a  
02:26 5 document that I believe is some nine pages, or  
6 eight pages in length, it's headed *David Milgaard,*  
7 *Chronology of Events*, and it's dated April 23rd of  
8 1992. And it says:

9 "The following is a chronology of events  
02:26 10 concerning David Milgaard's application  
11 under 690 of the *Criminal Code*."

12 Who prepared that particular document?

13 A That was prepared by me or at my direction.

14 Q And this particular document was prepared shortly  
02:26 15 following the results of the Supreme Court  
16 reference on April the 14th of 1992?

17 A Yes.

18 Q Okay. And can you state, in general terms, the  
19 purpose for which this document was prepared?

02:26 20 A There had been a number of published reports which  
21 had criticized the length of time it had taken to  
22 come up with this result and, as a result, it was  
23 felt that at least the folks in our communications  
24 section, and certainly the public, should be made  
02:27 25 aware of the events or the significant steps in



1 the application process that might inform them and  
2 explain why it took as long as it did.

3 Q Thank you. Now I'm gonna go through this not in  
4 much detail because it's a document that was  
02:27 5 referred to you by Commission Counsel in part, but  
6 I'd like to touch upon some of the salient parts  
7 of this chronology, and especially so where it  
8 appears that certain information has been placed  
9 in brackets after a certain date and then  
02:27 10 describes something that you did or didn't do as a  
11 result of information you received. I think it's  
12 safe to say that this, in a way, supports the  
13 suggestion that you've made throughout your  
14 evidence that, when you were receiving information  
02:28 15 from the applicants, it was essentially in  
16 installment form?

17 A Yes.

18 Q That every time you would receive something new,  
19 that would require you to stop your investigation  
02:28 20 at that stage and to go out and to do something,  
21 essentially, further in order to follow up on the  
22 information you were being provided with?

23 A Yes.

24 Q Okay. Now this starts out with, of course, the  
02:28 25 first application on December the 28th of 1988,





1 and Ms. Knox already drew to your attention the  
2 document of February the 16th of 1989, that was  
3 doc. ID 004868. And when I refer to the doc.  
4 number, unless you request that it be put up on  
02:28 5 the screen, I'm simply going to put it in the  
6 record and not ask the staff to put it up. Are  
7 you comfortable with that?

8 A Yes.

9 Q Okay. Thank you. Now the next event appears to  
02:29 10 be -- and this document, of course, speaks for  
11 itself -- but the May 8th of 1989. It was as a  
12 result of that letter February the 16th of 1989  
13 that was previously shown to you that the trial  
14 and appellate record were sent by counsel for Mr.  
02:29 15 Milgaard?

16 A Yes.

17 Q And then, on August the 29th of 1989, the:

18 "Affidavit of David Milgaard ..."

19 was:

02:29 20 "... forwarded by counsel for the  
21 applicant; also, counsel for Milgaard  
22 sought information from the Department."

23 A Yes.

24 Q So the affidavit of David Milgaard, that I believe  
02:29 25 was sworn back in 1986, was produced as part of



1           this application to you some almost eight months  
2           after the application had been filed?

3           A       That's correct.

4           Q       And then, at the bottom, it says October the 2nd,  
02:29 5           1989:

6                       "Counsel for Milgaard wrote to ask for a  
7                       status report on the Departmental  
8                       review."

9           If I could have 475, please. And it says, on  
02:30 10           October 11th, 1989:

11                       "A status report was prepared and  
12                       forwarded to counsel for Milgaard, and  
13                       Mr. Wolch was told of his client's  
14                       desire to provide the Minister with a  
02:30 15                       family presentation as part of the  
16                       application."

17           And you recall the circumstances surrounding the  
18           family presentation, in a very general sense?

19           A       Yes.

02:30 20           Q       And am I correct in saying that, with respect to  
21                       that family presentation, that it was asserted as  
22                       something that was going to be forthcoming and was  
23                       going to form part of the application?

24           A       Yes, both -- yes.

02:30 25           Q       In other words, I believe it to be your view that



1 nothing would be done with respect to a final  
2 decision on the application until such time as the  
3 investigation had been completed to your  
4 satisfaction, and you had received that family  
02:30 5 presentation?

6 A Yes.

7 Q And I think it's common knowledge that that  
8 particular family presentation was never received  
9 by you?

02:31 10 A I think we got something later on, perhaps another  
11 affidavit, umm --

12 Q We may get to that. I think there was a video  
13 provided by Joyce Milgaard later on in the  
14 proceedings, but I'm not sure it was --

02:31 15 A The family presentation.

16 Q -- part of the family presentation. In any  
17 event, it shows the activities November 6th to  
18 8th, 1989, your interview of Deborah Hall, Justice  
19 Tallis, Nichol John, and Dr. Emson. And then you  
02:31 20 have in brackets your observation:

21 "(A preliminary Departmental report was  
22 prepared in November/December, 1989. It  
23 was not pursued due to the events  
24 described below.)"

02:31 25 And if we could just scroll up on that, please,



1           these are the -- and I'm not going to go through  
2           all of these, but if you read them, Mr. Williams,  
3           these essentially set out the key points in the  
4           chronology.

02:31 5                       The January 10th, 1990 letter  
6           from counsel for Mr. Milgaard, that was the wish,  
7           to develop the evidence further, to refine the  
8           submission, the request for some form of  
9           financial resources to do so.

02:32 10                    Then, on January the 23rd of  
11          1990, again a letter from counsel for Mr.  
12          Milgaard, additional information was provided.

13                       And then the very important  
14          event of February the 28th of 1990 when you  
02:32 15          received information from David Asper with  
16          respect to the identification of Larry Fisher?

17          A            Yes.

18          Q            And this for the first time, despite the fact that  
19          you were in a position, at least with a  
02:32 20          preliminary report, to proceed to do your report  
21          to the Minister of Justice, that this particular  
22          information stopped that process; am I accurate in  
23          that?

24          A            Yes.

02:32 25          Q            Okay. And you've recorded here:



1                   "(The department pursued this aspect of  
2                   the investigation. On March 1, 1990 the  
3                   RCMP were asked to investigate these  
4                   allegations ...",

02:33 5                   that's the obtaining of the work of Sergeant Rick  
6                   Pearson, and you made a request separately to  
7                   Saskatoon police; and what did that relate to --

8           A           Umm, --

9           Q           -- in the general sense?

02:33 10          A           -- there were some inquiries, I -- and it was  
11                   contained, I believe, in -- or discussed briefly  
12                   in my examination by Ms. Knox in which we  
13                   requested some information.

14          Q           And then we have the entry March 3rd of 1990:

02:33 15                   "Joyce Milgaard, mother of the  
16                   applicant, forwarded material to the  
17                   Department."

18                   I believe that to be the video?

19          A           Yes.

02:33 20          Q           Yes. If we can go over to 76, please. Then again  
21                   we have -- and I won't go through all of these --  
22                   sort of a chronology of what occurred. And we get  
23                   to April the 17th of 1990 and we have:

24                   "Sgt. Pearson sent his report that  
02:34 25                   outlined his investigations of Larry



1 Fisher."

2 Again you've got in brackets and parentheses:

3 "(In April, 1990 the Departmental report  
4 to the Minister was once again prepared  
02:34 5 in draft, but was abandoned due to the  
6 events described below.)"

7 And those events that are described below again,  
8 now, are information relating to the retention of  
9 Dr. Markesteyn by counsel for David Milgaard, and  
02:34 10 then the events that followed the providing of  
11 that report, and so on?

12 A That's correct.

13 Q And then on June the 6th of 1990 you have:

14 "Counsel for Milgaard advised that he  
02:34 15 had identified another witness that  
16 would assist him in the application,  
17 Ronald Wilson."

18 A Yes.

19 Q So these are the -- these are characterized as an  
02:34 20 application by instalments, as each thing is  
21 identified, it required you to take the action as  
22 you've outlined there in this chronology?

23 A Yes.

24 Q Okay. And this is a summary, I appreciate, of  
02:35 25 your activities, it's much more in-depth than what



1 this reflects; am I accurate in that?

2 A Yes.

3 Q Okay. If you could move on to the next page,  
4 please. And then we have the series of events  
02:35 5 that are set out there, I'm not going to go  
6 through all of them, they are there for the -- as  
7 part of the Inquiry record. The event of July the  
8 5th of 1990:

9 "Counsel for Milgaard wrote to the  
02:35 10 Department and asked for our assistance  
11 in obtaining Saskatoon Police Department  
12 files concerning the person identified  
13 as the real killer."

14 And you observed, in brackets and parentheses:

02:35 15 "(July: The Department sought,  
16 unsuccessfully, to obtain all of these  
17 reports.)"

18 And you testified at considerable length as to  
19 the efforts you made to get these from the  
02:36 20 reports from the Saskatoon police service?

21 A Yes.

22 Q Thank you. And if we can just -- and then there's  
23 all the events relating to Ron Wilson and so on.  
24 If we can move on to 78, please. 337474, you've  
02:36 25 got early September of 1990, final submissions



1 sought by the department, September 10th, final  
2 written submissions received from counsel for  
3 Milgaard, and then there's further investigator  
4 reports, and then there's a meeting of October 1,  
02:36 5 1990 which you've given evidence of in some  
6 detail, and then you've got the activities that  
7 followed that, and if we can just scroll onto the  
8 next page, please, 79, you have the proceedings  
9 leading up to the minister's letter of February  
02:36 10 the 27th of 1991?

11 A Yes.

12 Q And then you have what occurred with respect to  
13 the second application, I won't go through that  
14 other than to verify that it was on August the  
02:37 15 14th of 1991 that the second application relating  
16 specifically to Larry Fisher was provided to the  
17 department?

18 A That's correct.

19 Q And it goes on. I don't think it's necessary for  
02:37 20 me to go through any of what follows there,  
21 there's a chronology that would appear to be, on  
22 its face, fairly reflective in a general sense of  
23 your activities during the period of time from  
24 December the 28th of 1988 until this document was  
02:37 25 prepared shortly following the Supreme Court





1 reference?

2 A Yes.

3 MR. FRAYER: Thank you, sir. Those are my  
4 questions.

02:38 5 BY MR. McLEOD:

6 Q Mr. Williams, as you know, my name is Ken McLeod,  
7 I'm your counsel.

8 A Yes.

9 Q I have a few questions for you, although you'll be  
02:38 10 pleased to know that some of the areas I was going  
11 to canvass with you have been covered by other  
12 counsel.

13 I would, though, like to start  
14 off with the document, please, 152076, that My  
02:38 15 Learned Friend Mr. Frayer asked you about a few  
16 moments ago, and this is -- you recall being asked  
17 about this yesterday by My Learned Friend Mr.  
18 Wolch?

19 A I do.

02:39 20 Q And at one point he said to you, this is -- I  
21 don't think we need to look at it precisely, but  
22 at 39335 of the transcript:

23 "I'm wondering why you wouldn't share  
24 this with the applicants."

02:39 25 Do you recall that question?



1 A Yes.

2 Q And although despite what Mr. Frayer said a few  
3 moments ago, I think when one looks at the  
4 transcript surrounding that question, you are  
02:39 5 basically uncertain if it had been shared with the  
6 applicants, but that if it hadn't been, you would  
7 take responsibility for it?

8 A Yes.

9 Q Mr. Commissioner, this is not so much a question I  
02:39 10 think Mr. Williams can answer, but I just want to  
11 clarify the record in this respect. As I  
12 understand it, and perhaps Mr. Hodson or  
13 Commission staff can help me with this, there were  
14 eight versions or copies of that document provided  
02:39 15 to the Commission; that is, there were eight  
16 sources for that document, and one of those  
17 sources was in fact Mr. Wolch's office, and I  
18 think it important that we clarify that for the  
19 record if we can.

02:40 20 MR. HODSON: I believe Ms. Boswell checked  
21 yesterday for this doc. ID and there were eight  
22 versions and the one version that had the  
23 handwritten notes on it, if I'm thinking of the  
24 same document, was the version that we received  
02:40 25 from Mr. Wolch on behalf of David Milgaard.



1 BY MR. McLEOD:

2 Q Perhaps while we're checking it, I can ask another  
3 question of Mr. Williams related to that, and you  
4 will recall the discussion that you and Mr. Wolch  
02:40 5 had with respect to the last page of the version  
6 of that document, the memo from you to Peter Lugli  
7 that was presented to the Commission that had  
8 handwritten notes, and I think you said  
9 essentially you didn't recognize that and couldn't  
02:41 10 account for it?

11 A That's correct.

12 MR. HODSON: Sorry, if I can, I can confirm  
13 that this version of the document with the notes  
14 the Commission received from Mr. Wolch on behalf  
02:41 15 of David Milgaard, there are eight other versions  
16 of the same memorandum. None of those  
17 memorandums have the handwritten notes after it.

18 COMMISSIONER MacCALLUM: I seem to have in  
19 one place seven copies and --

02:41 20 MR. HODSON: Sorry, there is nine in total.

21 COMMISSIONER MacCALLUM: Nine in total?

22 MR. HODSON: I misspoke, there's this  
23 version and eight other copies; correct?

24 MS. BOSWELL: Yes.

02:42 25 COMMISSIONER MacCALLUM: Okay.



1 BY MR. McLEOD:

2 Q So having heard that, Mr. Williams, if Mr. Wolch  
3 were to say to you today, "I'm wondering why you  
4 wouldn't share this with the applicants," does  
02:42 5 that refresh your memory?

6 A It would appear that I did share it.

7 Q And does it also account for your inability to  
8 recognize or identify the handwritten notes that  
9 were appended to the document?

02:42 10 A Yes.

11 Q If we could please look at 004374, and it would  
12 be -- that's your August 28th, 1990 memo to Bruce  
13 MacFarlane?

14 A Yes.

02:43 15 Q If we could please turn to 004380 -- I hope I have  
16 the right page -- and if we look at the paragraph  
17 down towards the bottom of the page, do you recall  
18 this morning My Friend Ms. McLean asking you a  
19 series of questions about particularly the phrase,  
02:43 20 "implicated Milgaard," and you see the second  
21 sentence in the first full paragraph that's shown  
22 on the screen now:

23 "Stating that he was weakened by this  
24 intense questioning, Mr. Wilson now  
02:43 25 asserts that he "implicated Milgaard in



1 the murder by telling them the things  
2 they wanted to hear".

3 Do you see that there?

4 A I believe that phrase comes from his June 4th,  
02:44 5 1990 statement.

6 Q And in order to refresh your memory about that, as  
7 I appreciate or understood the question this  
8 morning, it was to the effect that those must have  
9 been your words rather than Mr. Wilson's?

02:44 10 MS. McLEAN: Excuse me, I think the witness  
11 understood me this morning, but perhaps his  
12 counsel didn't. The reference was to Mr. Wilson  
13 having implicated Mr. Milgaard in Regina prior to  
14 coming to Saskatoon and it was the use of the  
02:44 15 word "implicated" as regards Regina and what took  
16 place in Regina. Do you follow? I think the  
17 witness understood it this morning.

18 MR. McLEOD: Okay. Perhaps maybe I didn't  
19 appreciate that, but --

02:45 20 COMMISSIONER MacCALLUM: Neither one has a  
21 corner on the word "implicate" obviously.

22 BY MR. McLEOD:

23 Q I understood some of the concern to be, Mr.  
24 Williams, and perhaps you did not, that you were  
02:45 25 effectively putting a gloss on what Mr. Wilson had



1           said by in part attributing to him the word  
2           "implicated"?

3           A       Certainly that was one of the thrusts of the  
4                   question because the word implicated is found  
02:45 5                   in -- at least my attention was drawn to several  
6                   of my writings which had the word implicated and,  
7                   secondly, it was drawn, my attention was drawn to  
8                   a passage in the minister's letter which used the  
9                   word "implicated Milgaard", and it was drawn in  
02:46 10                  juxtaposition to the assertion put to me that Mr.  
11                  Wilson had testified that he didn't understand  
12                  what the word implicated meant, so there was that  
13                  aspect to it in addition to the point raised by  
14                  counsel for Mrs. Milgaard.

02:46 15           Q       Mr. Commissioner, just perhaps to allow me to  
16                   clarify, I'll go and get a reference here.

17                           COMMISSIONER MacCALLUM:    Sure.

18           BY MR. McLEOD:

19           Q       If we could please have document 124983, and this  
02:47 20                   is the transcript of your interview, Mr. Williams,  
21                   with Ronald Wilson on July 20th, 1990?

22           A       Yes.

23           Q       And if we could turn to page, or to 125040,  
24                   please, and my understanding of this passage is  
02:47 25                   that at about line 564 you are quoting from the



1 Henderson interview of Mr. Wilson?

2 A I believe I am, yes.

3 Q And that is a quote of the words of Mr. Wilson as  
4 they were recorded in the Henderson interview:

02:48 5 "Finally I began to implicate Milgaard  
6 in the murder telling the police the  
7 things they wanted to hear."

8 A I believe those were the words contained in the  
9 statement. The statement speaks for itself. I  
02:48 10 don't think I misread it, but, you know, there is  
11 a record of that statement.

12 Q And then if we turn to --

13 MS. McLEAN: If we could, just before  
14 turning to the next page, if you carry on there,  
02:48 15 you see what my point was, is that the suggestion  
16 was made to him that he had implicated Mr.  
17 Milgaard and his answers are that that's what  
18 I've been told, that's what I see in the  
19 transcripts, and what I had pointed out to Mr.  
02:48 20 Williams at the outset was that when Mr. Wilson  
21 agreed at the trial he didn't even understand  
22 what the word implicated meant and he had to have  
23 it explained to him, so this has been put to him  
24 as a contradiction in 1990 when it really wasn't,  
02:49 25 that was my point.



1 BY MR. McLEOD:

2 Q Perhaps if we could, just to complete the matter,  
3 go to 125042, please, and again, Mr. Williams, if  
4 you look at the passage starting at line 574, this  
02:49 5 is your continuing questioning of Mr. Wilson, you  
6 see at line, or just at the end of that paragraph,  
7 these are his words apparently in response to your  
8 question:

9 "...that's the only way I could see that  
02:50 10 he was implicated the day before."

11 A It appears as if those are Mr. Wilson's words.

12 Q And would that have a bearing on the way you  
13 framed things in your memorandum about six weeks  
14 later?

02:50 15 A It certainly would signal that Mr. Wilson, of his  
16 own accord, had used that word in answer to a  
17 question and that I had perhaps adopted that word  
18 throughout.

19 Q Mr. Williams, I'll take you to another matter, and  
02:50 20 this arises out of some of Mr. Wolch's questions  
21 yesterday with respect to whoever former Justice  
22 Minister Campbell's book, and you'll remember that  
23 he read you substantial passages from that book  
24 and, if I understood you correctly, your general  
02:51 25 response to that was that you were not consulted





1 or had no input, at least so far as you  
2 understood, in that chapter in that book. Did I  
3 understand that correct?

4 A Yes. I mean, I certainly didn't review any drafts  
02:51 5 or was consulted with some of the factual  
6 assertions in there.

7 Q And there were two assertions that Mr. Wolch  
8 yesterday was concerned about, the one, former  
9 Minister Campbell's assertion that you were at one  
02:52 10 time a defence lawyer, and the second with respect  
11 to her understanding of Nichol John's evidence at  
12 Mr. Milgaard's preliminary inquiry?

13 A Yes.

14 Q All right. And although no objection was taken,  
02:52 15 Mr. Wolch indicated to you that he felt he could  
16 not ask you whether or not you misled former  
17 Minister Campbell with respect to either of those  
18 matters. Do you recall that?

19 A Yes.

02:52 20 Q Let's take them one at a time. With respect to  
21 the assertion in the book that you had at one time  
22 practiced as a defence lawyer, did you at any time  
23 advise Minister Campbell or others who might have  
24 told her that, that you had practiced as a defence  
02:53 25 lawyer?



1 A I did not.

2 Q So did you in any way mislead her with respect to  
3 that matter?

4 A I did not.

02:53 5 Q Similarly, with respect to her understanding as  
6 expressed in that book with respect to the  
7 evidence that Nichol John provided at the  
8 preliminary inquiry of David Milgaard, did you at  
9 any time provide information that would have given  
02:53 10 her the understanding that that was the case?

11 A I did not. As you will recall, there was a  
12 passage in the book that described the materials  
13 that she actually had on her table. Among those  
14 materials were the preliminary hearing transcripts  
02:54 15 and it contained the testimony of Nichol John.  
16 The minister in the book also indicated that she  
17 had reviewed the transcripts and my only  
18 speculation at this point is that -- all I can say  
19 is that the raw material of the transcripts, and  
02:54 20 particularly Nichol John's, was there. The  
21 minister reviewed it. Whether between the time of  
22 the review and the time that that chapter in the  
23 book was written or drafted her memory failed or  
24 there was some incorrect reporting of the facts, I  
02:54 25 don't know.



1 Q Just with respect to the minister's, the former  
2 minister's description of the pile of documents on  
3 her desk, I understood you to, at least to infer,  
4 that part of your duty was gathering up what you  
02:55 5 might call the fruits of your labour, your  
6 investigations?

7 A Yes.

8 Q And is that something that was passed on by you  
9 that likely ended up as part of that large pile of  
02:55 10 materials on the minister's desk?

11 A Yes.

12 Q And did you pass on everything pertinent to the  
13 investigation that you undertook?

14 A Yes. In addition, I was asked to provide  
02:55 15 additional things.

16 Q And just to go back to where we commenced this  
17 discussion, Mr. Williams, am I to understand that  
18 at no time did you ever mislead the then minister  
19 or any other departmental official with respect to  
02:56 20 those two items Mr. Wolch identified yesterday,  
21 Nichol John's evidence at the preliminary inquiry  
22 or your having acted as a defence lawyer at one  
23 time?

24 A I did not, and each of those areas is quite easy  
02:56 25 to check, the transcripts are there and my CV was



1                   certainly well known to my employers.

2           **Q**           You had said a moment or two ago that you cannot  
3                   tell us what occurred with respect to former  
4                   Minister Campbell's recollection of the events  
02:56 5                   between her decision on the first application in  
6                   February, 1991 and the publication of that book in  
7                   1996. However, Mr. Williams, can you tell us  
8                   whether or not, so far as you have reviewed the  
9                   matter, the minister's letter of February, 1991  
02:57 10                   reflects the facts as were brought to you and you  
11                   uncovered them in the course of your duties as  
12                   counsel with the department?

13           **A**           The portions of the letter that contain a summary  
14                   of the facts certainly reflect my understanding of  
02:57 15                   them.

16                               MR. McLEOD: Mr. Commissioner, I note the  
17                   time, but I do not have a great deal more to go  
18                   through, so I'm content, subject to the wishes --

19                               COMMISSIONER MacCALLUM: You can finish,  
02:58 20                   sure.

21           BY MR. McLEOD:

22           **Q**           In response to one of My Learned Friend Mr.  
23                   Wolch's questions yesterday, Mr. Williams, you  
24                   indicated, and I believe, if anybody wants to  
02:58 25                   check, I don't believe we need it, it's at page



1 39442 of the transcript from yesterday, you  
2 indicated more or less that Kim Campbell, at least  
3 your understanding was that Kim Campbell had said,  
4 and this is with respect to what former Justice  
02:58 5 McIntyre had:

6 "Mr. McIntyre had all the evidence  
7 available to the government or the  
8 Justice Department."

9 Do you recall giving that response more or less?

02:59 10 A I believe that was a quote or a portion of what  
11 Mr. Wolch had read.

12 Q Now, does Ms. Campbell's commentary in that  
13 respect accord with your own recollection or  
14 understanding of the informational component that  
02:59 15 you assisted in putting together, I think you told  
16 us, in the latter stages of 1990?

17 A Yes.

18 Q And, in particular, so far as you understood it,  
19 did all of the products of your labours, witness  
02:59 20 statements, transcripts, that sort of thing, go  
21 into a package that was to go to former Justice  
22 McIntyre for his review?

23 A Yes.

24 COMMISSIONER MacCALLUM: Sorry, just state  
03:00 25 your question again? I got mixed up between



1 McIntyre and the minister. Did all the products  
2 of your labours go to --

3 MR. McLEOD: -- Justice McIntyre or former  
4 Justice McIntyre for the purpose of his review.

03:00 5 COMMISSIONER MacCALLUM: Okay.

6 MR. WOLCH: Mr. Commissioner, I'm not sure  
7 what factual findings you will be able to make  
8 out of that. It really isn't clear how the  
9 witness can say that he knows it went to Justice  
03:00 10 McIntyre unless that's explored. I mean, is it  
11 something he was told, something he saw,  
12 something he did, we don't know that, and I don't  
13 know where we go from there with that kind of  
14 evidence. I'm not going to belabour the point  
03:01 15 that we still feel we should know what went, but  
16 how do we take comfort in a witness saying I  
17 understand it went, I know it went, I saw it go.  
18 Where do we go with that, if I can sort of ask  
19 that question?

03:01 20 COMMISSIONER MacCALLUM: Yes, Mr. McLeod?

21 MR. McLEOD: I'm content to ask another  
22 question about it and I thank My Learned Friend  
23 for that. If there's a gap, I probably should  
24 fill it.

03:01 25 MR. WOLCH: Thank you.



1 MR. McLEOD: And anything that remains  
2 following the evidence, of course we're all free  
3 to make our submissions about it.

4 COMMISSIONER MacCALLUM: Okay.

03:01 5 BY MR. McLEOD:

6 Q Mr. Williams, I understood at one point you were  
7 requested to put together a package of materials  
8 at least with respect to the work you had done  
9 that was to go to Mr. McIntyre?

03:02 10 A Yes.

11 Q And did you put together that package and did it  
12 include, in a sense, your file?

13 A Yes.

14 Q And at about what time did that occur; do you  
03:02 15 recall?

16 A I think late November, 1990 to early December,  
17 1990.

18 Q This morning --

19 MS. McLEAN: I'm sorry, this issue is of  
03:03 20 vital importance to the Milgaard family, they've  
21 been trying for a long time to find out what  
22 Mr. McIntyre was doing, what Mr. McIntyre  
23 received in addition to this report. My Friend's  
24 question says did you send him in that sense your  
03:03 25 file or did you put together in a sense your



1 file. Is he asking the witness did you make a  
2 photocopy of all of the materials in your file to  
3 be delivered to Mr. Milgaard or did you give  
4 him -- I'm sorry, not to be delivered to Mr.  
03:03 5 Milgaard, to be delivered to Mr. McIntyre -- did  
6 you send him copies of the entirety of the file,  
7 reports from the file? "In a sense" doesn't  
8 really help us, if I can ask My Friend.

9 COMMISSIONER MacCALLUM: I didn't hear you  
03:03 10 say "in a sense". Did you say "in a sense"?

11 MR. McLEOD: I probably framed it a couple  
12 of different ways, sir, and I may have used that  
13 phrase. I'm cognizant of the restriction on,  
14 well, two fronts, I suppose the ability of this  
03:04 15 inquiry to look into advice or communications as  
16 between counsel within the department or counsel  
17 retained by the Department of Justice, so I  
18 appreciate that there is a limitation to the  
19 extent which Mr. Williams can tell us about that  
03:04 20 activity there, and so my question was  
21 necessarily broad in order to, I hope, respect  
22 that limitation.

23 MR. FRAYER: Mr. Commissioner, I have no  
24 difficulty with the broad scope of the question  
03:04 25 being asked, and Mr. McLeod is very mindful of





1 the fact that he shouldn't be encroaching on the  
2 limitations as set out by Chief Justice Laing. I  
3 don't want to be perceived to be taking a  
4 different position with Mr. McLeod than I did  
03:04 5 with Mr. Wolch yesterday and, so it's clear, I  
6 have not risen to object to those questions up to  
7 this point, but as long as it remains in the  
8 general sense -- I use the word sense -- in the  
9 way that it has been framed, I'm comfortable with  
03:05 10 that. If it gets more particularized, then I  
11 will have to rise again and say it's limited by  
12 what Chief Justice Laing has said.

13 COMMISSIONER MacCALLUM: It has become a  
14 question of weight. If I'm not satisfied with  
03:05 15 the answer, that the answer truly describes the  
16 totality of what was given to Justice Laing -- or  
17 to Mr. McIntyre, then it's up to me to find out  
18 or to comment on it. I don't think more should  
19 be said.

03:05 20 MR. FRAYER: Thank you, Mr. Commissioner.

21 MR. McLEOD: Thank you, sir.

22 BY MR. McLEOD:

23 Q Mr. Williams, you'll recall this morning my friend  
24 was, Ms. McLean was asking you, towards the end of  
03:05 25 her questioning, more or less what you thought the



1 Milgaard team could have done to have, in a sense,  
2 brought an answer to their application sooner?

3 MS. McLEAN: A favourable answer.

4 COMMISSIONER MacCALLUM: What was that?

03:06 5 BY MR. McLEOD:

6 Q A favourable answer?

7 A Yes, I recall that question.

8 Q And you provided a couple of examples of things  
9 that you felt might have accomplished that?

03:06 10 A Yes.

11 Q In addition to the items you mentioned this  
12 morning I think you've told us, and the effect of  
13 what Mr. Frayer was saying or asking you about  
14 earlier, was that Milgaard's application  
03:06 15 proceeded, effectively, in instalments?

16 A Yes.

17 Q Bearing in mind my friend Ms. McLean's question  
18 from this morning, had the application been  
19 brought, in a sense, all at once, had everything  
03:07 20 that they had been given to you from the outset,  
21 could that have had a bearing on the timing of a  
22 favourable outcome on the application?

23 A It -- it's possible, but I couldn't go any further  
24 than that.

03:07 25 Q Mr. Williams, you've, I think in some detail at



1 various points in your testimony, told us about  
2 your understanding of your role, your duties as  
3 counsel on this particular matter. I'm not going  
4 to ask you to go through that again, but bearing  
03:08 5 that in mind as a sort of a background, you have  
6 at various times also expressed -- I think these  
7 are the terms you've used -- 'disappointment' or  
8 'dismay', and you used those terms to describe  
9 your reaction to certain things that occurred  
03:08 10 during the course of this application. Having  
11 regards to your role or duties in this matter can  
12 you elaborate on your disappointment or dismay  
13 that you felt at different times?

14 A Yes. I had used the term "disappointment" in  
03:08 15 response to Commission Counsel's questions about  
16 how I felt when there were published reports that  
17 were critical of our behaviour, and quite often --  
18 and in particular there was a published report  
19 quoting counsel for Mr. Milgaard, I think at that  
03:09 20 time Mr. Asper, as referring to departmental  
21 officials as 'The Three Stooges'. Disappointment,  
22 I guess, stems from my realization that when I  
23 entered the practice of law although, in dealing  
24 with counsel opposite whether in a civil or  
03:09 25 administrative matter or in my role as Crown and



1 in their role as defence counsel, the relationship  
2 between us was always one of respect. And to be  
3 characterized as a stooge in a publication which  
4 gets widespread dissemination is terribly  
03:09 5 disappointing, because it signals a complete  
6 change in the way in which counsel and  
7 professionals deal with each other, and it was  
8 disappointing. In -- and there were a number of  
9 other things like that.

03:10 10 It is disappointing when --  
11 and in relation to Court applications you make  
12 your pitch to the judge, not to the press, and  
13 there were a number of incidents like that, and we  
14 saw a repetition of that, and that was  
03:10 15 disappointing because it put us in a -- put us,  
16 being the department, in a very unenviable  
17 position of having to defend it publicly when we  
18 didn't have the facts.

19 "Dismay", dismay came after  
03:10 20 the minister had ordered a new trial and  
21 Saskatchewan had, and there were a number of  
22 serious allegations against public officials, and  
23 the seriousness of those allegations and the  
24 potential impact that it may have on their  
03:11 25 reputations in situations in which no one's



1 liberty was then at stake, signaled to me that the  
2 utmost care be taken to ensure that the factual  
3 underpinnings of those accusations were accurate,  
4 and based on what I knew at the time it -- that  
03:11 5 did not appear to be the case. That type of  
6 activity, I felt, was dismaying, and it's in that  
7 context that I made those remarks.

8 Q Can you, in a very brief way, relate that back to  
9 how you perceived your role in an application of  
03:11 10 this kind?

11 A My role, I wasn't the enemy, I was simply the  
12 person who went out to ascertain whether the  
13 grounds advanced had a factual foundation, and to  
14 the extent that we used or relied on the defence  
03:12 15 and on the Crown, so be it. It was not an  
16 adversarial process as we saw it, and consequently  
17 where there appeared to be an adversarial approach  
18 taken by representatives of the applicants, indeed  
19 that was disappointing because it seemed as if the  
03:12 20 message that we were trying to convey wasn't  
21 getting across.

22 Q Thank you very much, Mr. Williams. I think, Mr.  
23 Commissioner, those are my questions.

24 COMMISSIONER MacCALLUM: Thanks, Mr.  
03:12 25 McLeod.



1 MR. HODSON: I think that is all. I do not  
2 have any further questions.

3 If I can thank you, Mr.  
4 Williams, for your cooperation, and of your  
03:13 5 counsel and your previous counsel for your  
6 cooperation.

7 I think it's probably  
8 appropriate to break. Our next witness is  
9 Mr. Fainstein.

03:13 10 COMMISSIONER MacCALLUM: Yes. Mr.  
11 Williams, thank you very much for coming.

12 A Thank you.

13 COMMISSIONER MacCALLUM: You're excused.

14 *(Adjourned at 3:13 p.m.)*

03:13 15 *(Reconvened at 3:33 p.m.)*

16 MR. HODSON: The next witness, Mr.  
17 Commissioner, is Spencer Ronald Fainstein.

18 **SPENCER RONALD FAIRSTEIN, sworn:**

19 BY MR. HODSON:

03:33 20 Q Good afternoon, Mr. Fainstein. Thank you for  
21 agreeing to testify.

22 For the record, you're here  
23 represented by counsel for the federal minister,  
24 Jennifer Cox and David Frayer; correct?

03:33 25 A Yes.



1 Q And if we could call up 339840, please, which is a  
2 curriculum vitae that you provided to us, and I  
3 just want to go through parts of this. I think  
4 the, and I'll just lead you through this and ask  
03:33 5 for some comments, that you were employed with the  
6 federal Justice Department from 1972 until 2002;  
7 is that correct?

8 A Yes.

9 Q And working in the Winnipeg Regional Office for  
03:33 10 five years and then off to Ottawa for the  
11 remainder of your career; is that correct?

12 A That's right.

13 Q And it's my understanding that your involvement in  
14 the David Milgaard matter, if I can put it that  
03:34 15 way, is essentially in two respects; the first was  
16 acting as counsel for the federal minister in the  
17 Supreme Court reference?

18 A That's right.

19 Q And, secondly, after, and during the course of and  
03:34 20 following the Supreme Court reference, you would  
21 have been the individual for Federal Justice that  
22 looked after the DNA testing on Gail Miller's  
23 clothing; is that a fair way to put it?

24 A I did, yes.

03:34 25 Q Okay. And is it correct that you would have had



1 little involvement in the investigation of the  
2 first application and second application, that  
3 your primary involvement began when you became  
4 counsel for the Supreme Court reference; is that  
03:34 5 correct?

6 A That's correct. I had no substantive involvement  
7 in the applications for mercy under the 617, 690,  
8 696 process, except that I think there may be one  
9 or two proforma letters that I sent out just  
03:34 10 indicating to Mr. Milgaard what was required so  
11 that we could deal with such an application.

12 Q Right. And, Mr. Fainstein, in our earlier  
13 discussions with you and your counsel you are  
14 familiar with the limitations in my questioning of  
03:35 15 you --

16 A Yes.

17 Q -- arising out of Chief Justice Laing's decision,  
18 namely questions about advice given or received,  
19 and I think we have a good understanding between  
03:35 20 you and I and your counsel on that front. And  
21 it's my understanding that your role as counsel  
22 before the reference, and your role in looking  
23 after the DNA exhibits, was one that did not  
24 necessitate the giving and receiving advice on  
03:35 25 very many occasions; is that fair?





1 A That -- there were certainly reports on the  
2 progress of the proceedings and with respect to  
3 the DNA, but --

4 Q But, primarily, they would be your activities as  
03:35 5 opposed to --

6 A Exactly, yes.

7 Q Okay. If we can go to the next page, please, just  
8 go through some of your work experience. I see  
9 here that you appeared as counsel in about 90  
03:36 10 cases in the Supreme Court of Canada -- if we drop  
11 the nine, you and I are on about the same footing,  
12 Mr. Fainstein -- involving criminal and  
13 constitutional law over your career; is that  
14 correct?

03:36 15 A Yes, it is.

16 Q And I note with interest, if we can go to page  
17 843, you would have been involved in the *Arp*  
18 decision, is that correct, decision?

19 A I was, yes.

03:36 20 Q And that was a case involving similar-fact  
21 evidence?

22 A Yes, and DNA. And *Borden*, which I mention a  
23 little bit before that, was the first DNA case  
24 that was entertained by the Supreme Court of  
03:36 25 Canada.



1 Q If we can just go back up to that, 1994, so you  
2 would have had some involvement in litigating  
3 before the Supreme Court on issues relating to DNA  
4 and similar-fact evidence?

03:36 5 A I did.

6 Q If we can go to page 339845. It's my  
7 understanding, Mr. Fainstein, from your curriculum  
8 vitae that for a time period, and I think you say  
9 1977 to mid-1980s, you were involved in dealing  
03:37 10 with applications under -- you've listed various  
11 sections, if we can go up, 617 being the primary  
12 one, and 690, but as well 748 and 749, the royal  
13 prerogative of mercy, that you would have been  
14 involved in handling those applications; is that  
03:37 15 correct?

16 A Yes, I was, this was one component of my practice  
17 and a fairly substantial one at times.

18 Q And again, I don't want to get into much in the  
19 way of details of those applications, but would  
03:37 20 you have performed essentially a similar function  
21 on those applications as Mr. Williams did on David  
22 Milgaard's first application?

23 A I did, yes.

24 Q And approximately how many applications would you  
03:37 25 have been involved in in your career as far as



1 being the investigator, just a rough ballpark?

2 A My guess would be between 200 and 300 files would  
3 have been opened and dealt with by me.

4 Q And, again, I don't want to get into the details  
03:38 5 but they would be applications for a remedy under  
6 617, or a similar provision, for the mercy of the  
7 Crown alleging a wrongful conviction?

8 A Yes.

9 Q And you would investigate those and they would go  
03:38 10 through and be dealt with by the minister?

11 A That's right.

12 Q You've identified a couple of examples here where  
13 the minister granted relief, and I think you  
14 listed *Donald Marshall*, on the next page *Warwick*  
03:38 15 and *St. Cyr*, and were those matters that you would  
16 have had some involvement in then?

17 A They were, yes.

18 Q And if we could go down, then, you describe your  
19 involvement in the *Milgaard* case as counsel. And  
03:38 20 just -- just generally, Mr. Fainstein, can you  
21 comment on the following. Would you agree that  
22 the *David Milgaard* case, and in particular the  
23 application under Section 690, would have been a  
24 case that may have been more difficult or more  
03:39 25 challenging than many of the others, or can you



1 give us some general idea of that?

2 A I certainly encountered a number of challenging  
3 cases over the years but I must say that this  
4 case, especially the way it unfolded, was a very  
03:39 5 challenging case, just from what I could see from  
6 the sidelines and from what I learned during the  
7 reference process, and I think that that's  
8 validated by the Supreme Court's advice to the  
9 Governor-in-Council.

03:39 10 There is one sentence, as you  
11 know, that I would like to highlight, and maybe  
12 this is as good a time as any?

13 Q Sure.

14 A It's at the top of page 6 of the advice that was  
03:39 15 given, and I think it's around April 14th or 15th  
16 of 1992, by the Supreme Court. Some might refer  
17 to it as a judgement but technically, when the  
18 Court is giving its answer to a reference, it's  
19 advice to the Crown. And I don't see it in front  
03:40 20 of me there, but --

21 Q I can bring it up, 008879, and go to page 87.

22 A Thank you.

23 Q Don't worry, I'll let you go back to your CV. Go  
24 to page 87.

03:40 25 A I'll -- thank you. Yes, the Court says there, at



1 the top of the page:

2 "... we are not satisfied, on the basis  
3 of the judicial record, the Reference  
4 case and the further evidence heard on  
03:40 5 this Reference, on a preponderance of  
6 all the evidence, that David Milgaard is  
7 innocent of that murder."

8 This was the Court expressing its view, having  
9 been exposed to everything but the DNA evidence  
03:40 10 essentially, that it wasn't satisfied that he did  
11 not commit the murder.

12 And so, if someone wants to  
13 speak about tunnel vision or other failings, I  
14 think it's very important to recognize that this  
03:41 15 was a panel of five learned justices, highly  
16 intelligent people, dispassionate, with no axe to  
17 grind, and their view at the end of the  
18 proceedings was that they couldn't say, on a  
19 balance of probabilities, that he was innocent.  
03:41 20 It was at least equally possible that he was the  
21 culprit in this case. And so I think that  
22 highlights very clearly the degree of difficulty  
23 that was inherent in this case when you look at  
24 all the facts together.

03:41 25 It's very easy, with the



1 benefit of hindsight, to eviscerate the case, to  
2 abstract certain references, and to create a web  
3 that suggests something different, but I think  
4 this is a very important touchstone for the  
03:42 5 Commission when it's evaluating exactly what  
6 transpired.

7 Q Okay. And we'll come back to the reference a  
8 little bit later, Mr. Fainstein. If we can just  
9 go back to 339847?

03:42 10 A Yes.

11 Q You then talk about DNA evidence and some of your  
12 involvement there in 1992, and then as well I  
13 think there's another reference. Can you tell us,  
14 did you become fairly familiar, then, with DNA  
03:42 15 issues as a result of your involvement in the  
16 David Milgaard matter, but, as well as other  
17 matters for the Department of Justice?

18 A I did. I was absolutely fascinated by this. I  
19 don't have a background in science, but may I just  
03:43 20 take a --

21 Q Yes.

22 A -- moment and indicate why I was so enthralled  
23 with this?

24 Q Yes.

03:43 25 A Apart from the fact that it's a fantastic gift



1 from science to the resolution of serious criminal  
2 cases -- I shouldn't even say 'apart from', I mean  
3 that's fantastic -- but as I understand it the  
4 average person has something like 100 trillion  
03:43 5 cells in his and her body, and all those cells  
6 apart from red blood cells, which have no nuclei,  
7 and sperm or egg cells which only have half the  
8 complement of DNA, have, in the 23 pairs of  
9 chromosomes in the nucleus, one's full genetic  
03:43 10 blueprint. And so you take something that's in  
11 the nucleus of 100-trillionth of yourself, and you  
12 find that the DNA within the 23 pairs of  
13 chromosomes is expressed in pairs of organic  
14 bases. Adenine and guanine always mesh  
03:44 15 together -- it's like a ladder, the double helix,  
16 and so there are complementary bases at each  
17 rung -- and thymine and cytosine are the other  
18 two, and you have a sequence of bases.

19 You know that computers  
03:44 20 operate on the binary system, it's like a switch  
21 is either on or off, and you can see how much  
22 information they can contain. This system, which  
23 nature has provided for us, is a quaternary system  
24 with these four bases, and in a single cell within  
03:44 25 the nucleus of that cell, within the 23 pairs of



1 chromosomes, there are more than 3 billion pairs  
2 of organic bases. Now that just blows me away. I  
3 can't imagine a microcosm like that. And the fact  
4 that scientists can deal with that, that they can  
03:44 5 focus on specific sites within those chromosomes,  
6 is almost miraculous to my non-scientific mind,  
7 and so I have been very, very fascinated by this.

8 And it was that, and it was my  
9 experience with Milgaard, that caused me to feel  
03:45 10 that it was very important that the Department of  
11 Justice got up to speed on this, and that  
12 legislation be passed providing for DNA warrants,  
13 for data banks, and that we establish a DNA  
14 resource centre so we could bring our counsel up  
03:45 15 to speed, and so forth, and so I did continue to  
16 remain involved in this area within the  
17 department.

18 Q Can you tell us just generally in 1992 then, at  
19 that time where was -- and we've heard some  
03:45 20 evidence that DNA had been evolutionary starting  
21 mid to late '80s --

22 A Yes.

23 Q -- as a forensic tool. 1992, if you're able to go  
24 back, at the time you started the reference case  
03:45 25 --





1 A Right.

2 Q -- what was the status of the prevalence of DNA in  
3 the legal world?

4 A Okay. If I can just go back a little bit --

03:45 5 Q Sure.

6 A -- to give you a more complete picture very  
7 quickly?

8 DNA was first used in a  
9 forensic context in England in 1986 in the  
03:46 10 *Pitchfork* case. And that was the case where there  
11 had been two separate murders at different times,  
12 the police secured a confession from one Richard  
13 Buckland, and the policeman who was investigating  
14 felt that the person who committed that particular  
03:46 15 offence must have been responsible for the other  
16 one as well so he went to Alec Jeffries, now Sir  
17 Alec Jeffries who developed DNA fingerprinting,  
18 and, with the appropriate samples, and he asked  
19 him to see if his thesis was correct. And the  
03:46 20 scientist said "well, I have some good news and  
21 some bad news for you, you were right in surmising  
22 that the same person committed the two offences,  
23 but that person is not Richard Buckland".

24 And so the first use of DNA in  
03:47 25 a forensic context in criminal matters was to



1 eliminate a suspect, someone who had actually  
2 confessed, and that's a very famous case written  
3 about by Joseph Wambaugh in a book called *The*  
4 *Blooding*. So it's as recently as 1986 that this  
03:47 5 began.

6 And then the main test that  
7 was developed early on was one called RFLP, but  
8 that required a certain quantity of material to  
9 work with and it wasn't as effective with old and  
03:47 10 degraded materials as more recent tests that  
11 superceded it have been. And then there were  
12 other developments, one major one being the  
13 invention of a sort of a molecular Xerox machine  
14 that would facilitate the -- a process called  
03:47 15 Polymerase Chain Reaction, PCR, which enabled the  
16 scientists to take a very minute quantity, we're  
17 talking about billionths of a gram of DNA, and to  
18 replicate it through a number of cycles so they  
19 would have more material to work with. And so  
03:48 20 they developed very, very sensitive tests that  
21 required only the use of perhaps as little as .2  
22 of an nanogram, .2 of 1-billionth of a gram of  
23 genetic material, or 1 nanogram of genetic  
24 material, to get the most remarkable results.  
03:48 25 And, of course, all of that was happening over



1 time.

2 I, my first involvement with  
3 the DNA in this connection is when I was asked to  
4 be counsel for the Attorney General of Canada on  
03:48 5 the reference. And the first thing I did, we  
6 didn't have much time before the reference was  
7 actually going to begin and I had very little  
8 acquaintance with case by then so I had to sit and  
9 read through, literally, thousands of pages of  
03:49 10 material to learn everything I could about the  
11 case, and one of the things that I came across was  
12 a letter that I don't recall extremely well, but I  
13 did refer to it in Court so that's refreshed my  
14 memory, to the effect that 'within about two years  
03:49 15 there will be far more sophisticated testing  
16 measures available and we will be able to  
17 accomplish a lot more at that time'. And I noted,  
18 when I encountered the letter, that that had been  
19 written about two years before. So one of the  
03:49 20 first things that I did, along with reading  
21 material for background in the case, was to  
22 consult Dr. Ron Fournery, F-O-U-R-N-E-Y, who was  
23 the chief research scientist for the RCMP in the  
24 area of DNA and a very well-known and reputed  
03:49 25 scientist in DNA circles worldwide, and to ask



1 him, you know, what we could do with this tool.

2 And what he had to say was  
3 quite encouraging, and so I asked counsel for  
4 David Milgaard and for Larry Fisher if they would  
03:50 5 give me samples of blood to use as known samples  
6 for DNA testing, and secured the release of  
7 exhibits. I think some of them may have been in  
8 Saskatoon at the time, and some in Ottawa, I don't  
9 recall that.

03:50 10 Q That would have been around -- while the reference  
11 was going on?

12 A This was early on in the reference.

13 Q Yeah.

14 A At the end of January of 1992.

03:50 15 Q Right. And I'll maybe call up a couple of  
16 documents --

17 A Okay.

18 Q -- to go through that. Just on Dr. Fourney, would  
19 he have been your primary advisor then throughout  
03:50 20 this process?

21 A Yes, he was. I met other people in the lab and  
22 got to know them a little bit, but I was relying  
23 on Dr. Fourney essentially for my advice.

24 Q Let's just -- if we can maybe leave the DNA for a  
03:51 25 moment and just go through a couple of other items



1           that lead up to the reference and then we'll pick  
2           it up again.

3                           The first is 333272, please,  
4           and there's a couple of letters here I want to ask  
03:51 5           you about, and this is Mr. Milgaard's January  
6           28th, 1986 letter to John Crosbie and indicating  
7           that he is innocent and referring to the *Fifth*  
8           *Estate* program?

9           A           Yes.

03:51 10          Q           And I think, Mr. Fainstein, you would have been --  
11           if I can call up 333261 -- it appears that this  
12           letter would have been brought to your attention;  
13           is that correct, and here's a --

14          A           Yes.

03:51 15          Q           -- February 21, 1986 letter to Henry Brown who I  
16           understand was in the minister's office at that  
17           time?

18          A           He was, yes.

19          Q           And it appears that you went and researched the  
03:52 20           case, provided that, and then if we can go to  
21           333262 --

22          A           Yes. If I can just interject?

23          Q           Sure.

24          A           Of course purely as a matter of first impression  
03:52 25           and with nothing more than Chief Justice



1 Culliton's recitation of the facts as he  
2 understood them.

3 Q Right. So, I'm sorry, yes, so this would have  
4 been based on what you read in the Court of Appeal  
03:52 5 decision?

6 A Yes.

7 Q And then here is your, I think this is a draft  
8 letter that ends up going out that you would have  
9 prepared to be sent out; is that correct?

03:52 10 A That's right.

11 Q And we've been through this a few times, but  
12 essentially saying:

13 "...you may make application to the  
14 minister for relief. We would request  
03:52 15 the following from you: A brief ...  
16 detailing why you say that there was an  
17 injustice; copies of transcripts of the  
18 preliminary hearing and trial; copies of  
19 any judgments..."

03:52 20 Etcetera, and:

21 "On receipt of this material your  
22 application will be duly considered."

23 And the requirement for transcripts, can you just  
24 comment on that? At that time what was the  
03:53 25 purpose of that?



1 A So we would have as much background as possible as  
2 to how the case had unfolded and how it had been  
3 dealt with through the various stages of courts.  
4 These applications only come to the department  
03:53 5 after all conventional recourse has been exhausted  
6 and so there must necessarily have been  
7 transcripts prepared for the appeal process.

8 Q If we can go to 333264, it appears that in light  
9 of Mr. Milgaard's letter, you opened a file in  
03:53 10 anticipation of getting an application; is that  
11 fair?

12 A Yes.

13 Q And then 333268, I think is, just for the record,  
14 a March 11, '86 letter to Mr. Milgaard -- if we  
03:53 15 can go to the next page -- it's from Henry Brown,  
16 the fellow you sent it to, and I think it roughly  
17 tracks your memo?

18 A Yes.

19 Q I don't think anything turns on the wording.

03:54 20 A Right.

21 Q And then 333266, this is Mr. Milgaard's letter  
22 back to Mr. Crosbie. Are you able to tell us at  
23 this time, Mr. Fainstein, were you the lawyer  
24 looking after these applications; is that -- or  
03:54 25 were there others as well, but were you the main



1 person?

2 A This may have been the moment of transition for  
3 me. I can't place it all that well, but from the  
4 time I moved to Ottawa in the summer of 1977 until  
03:54 5 sometime in the mid 1980s, I was doing virtually  
6 all the applications for mercy with the exception  
7 of those that came in French, but at some point,  
8 perhaps roughly around then, I was doing other  
9 things as well, I had a full litigation practice,  
03:55 10 I had the good fortune of being able to litigate  
11 in the Supreme Court from a fairly early stage,  
12 and there was an awful lot going on, and my  
13 assistant Deputy Attorney General I believe in his  
14 wisdom decided that maybe I should hand off some  
03:55 15 or all of this mercy work to enable me to  
16 concentrate more on some other matters.

17 Q So there was a transition at some point?

18 A At some point.

19 Q Around this time?

03:55 20 A Somewhere in there.

21 Q But it appears in light of the fact that you  
22 drafted the earlier letter --

23 A Right.

24 Q -- you would have had some involvement at this  
03:55 25 time?





1 A That's right. That's why I say it appears to be  
2 very close to the point of transition.

3 Q And in this letter Mr. Milgaard writes back to Mr.  
4 Crosbie saying:

03:55 5 "I am aware of how to proceed legally  
6 and have a reputable solicitor, Mr.  
7 Hersh Wolch, presently retained."

8 And goes on to talk about it. And it's my  
9 understanding that you would have known Mr. Wolch  
03:55 10 at this time having worked with him; is that  
11 right, prior to this?

12 A Yes, very well. Mr. Wolch was in the Winnipeg  
13 regional office of justice when I joined it as an  
14 articled student and, if I recall correctly, he  
03:56 15 was probably on the board that hired me.

16 Q Go to 157000 --

17 A No, actually I don't think you were, sorry. I  
18 remember now who it was.

19 Q This is a May 28th, 1986 letter from you back to  
03:56 20 Mr. Milgaard indicating about the letter and  
21 saying:

22 "We look forward to receiving Mr.  
23 Wolch's representations in connection  
24 with your application for mercy."

03:56 25 Now, the record shows that the application was



1 filed December 28th, 1988. Do you recall any  
2 discussions with Mr. Wolch during that time frame  
3 about section 617, any legal requirements,  
4 anything of that nature?

03:56 5 A No, I have no recollection of that at all, I'm  
6 sorry.

7 Q Go to 002486. I'm just going to go through some  
8 of these documents somewhat chronologically, Mr.  
9 Fainstein. This is a September 13th, 1988 report  
03:57 10 of Dr. Ferris to Mr. Wolch, and if we can go to  
11 page 492, this is the last page, and would you  
12 have been at some point in 1992 generally aware  
13 that a fellow by the name of Dr. Ferris attempted  
14 DNA testing on some of Gail Miller's clothing, did  
03:57 15 you at some point become aware of that?

16 A At some point I did, but I don't recall when that  
17 was.

18 Q And this is the actual report, and this was filed  
19 I think for another purpose, this dealt with the  
03:57 20 secretor issue?

21 A Uh-huh.

22 Q It was filed as part of the first application, but  
23 it's, I think it is the extent of Dr. Ferris'  
24 report on the DNA?

03:57 25 A Uh-huh.



1 Q And what was your understanding, maybe just  
2 generally, of what Dr. Ferris had looked at and  
3 what his conclusions were?

4 A Okay. If I may just clarify?

03:57 5 Q Yes.

6 A I may not have encountered this, probably didn't I  
7 think, until I was assigned to serve as counsel on  
8 the reference.

9 Q Right, sorry, I didn't mean to suggest that you  
03:58 10 were.

11 A Right.

12 Q I'm talking, and I appreciate it's dated  
13 September, 1988 --

14 A Right.

03:58 15 Q -- but in 1992 when you were dealing with DNA  
16 issues --

17 A Yes.

18 Q -- do you think you would have looked at this and  
19 --

03:58 20 A Oh, I definitely did, I was aware of it, and I was  
21 dismayed that the testing was done without result,  
22 some precious material was sacrificed and I didn't  
23 know what sort of qualifications or background Dr.  
24 Ferris had to be doing this work and that sort of  
03:58 25 compounded my concern.



1 Q And why was that?

2 A Because these were very early days, this was not  
3 long -- within two years after the *Pitchfork* case  
4 and the first use of DNA and --

03:58 5 Q And it appears --

6 A And I didn't know how much material there was,  
7 genetic material there was that could be harvested  
8 and used for analysis.

9 Q And did you ever -- did you ever reach any  
03:59 10 conclusions or become aware of any information  
11 regarding whether or not the testing in 1988 was  
12 done inappropriately or anything of that nature?

13 A No, I'm not suggesting that. I just don't know to  
14 what extent Dr. Ferris was (*spoken in French*) with  
03:59 15 whatever was known, with whatever protocols were  
16 being used at the time because it was so new.

17 Q And did you ever come --

18 A I'm not suggesting anything nefarious by any  
19 means.

03:59 20 Q Did you come to realize later at any point in your  
21 work that either the samples used by Dr. Ferris  
22 could have been looked at by another scientist and  
23 maybe obtained results or that had he not done the  
24 work he did in 1988, that other work could have  
03:59 25 been done much sooner?



1 A Well, we just don't know because some material was  
2 consumed in that process and we didn't know what  
3 the consequence of that would be until much later.

4 Q Go to 000002, and this is the first application  
04:00 5 made under Section 690, and just for the record,  
6 it's my understanding then that you would have had  
7 little or no involvement in responding or  
8 investigating this matter; is that correct?

9 A That's right. I believe Mr. Wolch sent me a copy  
04:00 10 of it because he knew I had been working in the  
11 area and he knew me, but as it turned out, Mr.  
12 Williams did the substantive work on the case.

13 Q And if we can go to 002479, and I'm going to show  
14 you two documents before I ask you a question.  
04:00 15 This is just Mr. Williams' memo to file about  
16 talking to Barry Gaudette and DNA testing and  
17 current technology would not enable, will be  
18 developed within two years, and then secondly, a  
19 letter, 002480 --

04:01 20 A That must be the memo that I had seen.

21 Q Actually, sorry, maybe the memo -- this is a  
22 letter two days later from the RCMP to Mr.  
23 Williams that talks about -- scroll down to the  
24 bottom -- about two years' time. Is this possibly  
04:01 25 the letter that you came across in 199 -- late



1 '91, '92?

2 A Quite likely, yes. Can I just see that for a  
3 moment?

4 Q Sure.

04:01 5 A I'm just curious, I haven't seen it in a long,  
6 long time. Yeah, the concern was that the -- the  
7 standard technique that was used at that time,  
8 wherever possible, was RFLP, but that required a  
9 good deal of material and they were concerned that  
04:01 10 -- it was unlikely that there would be enough to  
11 subject to that process, so they were anxious to  
12 wait a little while until much better testing was  
13 available because they new it was in the offing.

14 Would you like me to speak  
04:02 15 briefly to what was required? You know, they had  
16 the theory worked out, they were very excited  
17 about what was in prospect, but before these  
18 things could be used in court certain things had  
19 to be done.

04:02 20 They had to develop a protocol  
21 so that the work could be replicated, it would all  
22 be done in a standard fashion by whatever lab was  
23 doing it, they had to determine what the limits of  
24 the testing would be, how sensitive it would be,  
04:02 25 they had to determine if it could work well with



1 material that was degraded or subject to whatever  
2 kind of environment insult, be it chemical or  
3 whatever, and ultimately they had to determine  
4 what would be the significance of a match if there  
04:03 5 was a match and they would develop population  
6 statistics to understand the frequency with which  
7 any given profile would occur within a population,  
8 so these were all the steps that were required  
9 from the time the basic science had been worked  
04:03 10 out.

11 Q So it's my understanding then that people were  
12 aware of this PCR which allowed replication which  
13 held some promise for old and degraded samples?

14 A Yes.

04:03 15 Q But the scientists, it's my understanding, were  
16 not prepared to provide opinions on it until  
17 matters were checked out and they could give  
18 reliable opinions that would stand up in court; is  
19 that a fair way to put it, that --

04:03 20 A PCR is not a test per se, it's an element in the  
21 process.

22 Q Okay.

23 A That's the molecular Xerox machine process, to put  
24 it in lay terms, that's the process that makes  
04:04 25 more DNA from a tiny sample and enables a



1           successful analysis using very little material.  
2           PCR-based processes that were in the offing were  
3           starting to be used depending on what time frame  
4           you look at, were such things as DQ Alpha and  
04:04 5           short tandem repeats, they both used PCR as part  
6           and parcel of their processes, but although there  
7           was more experience at that point with DQ Alpha,  
8           it had some limitations that suggested to the  
9           scientists that it would be better if possible to  
04:04 10          await the availability of short tandem repeats.

11       Q           And so both DQ Alpha and I think, was it  
12           Polymarker, was that another PCR --

13       A           Yes.

14       Q           PCR-based DNA typing was a scientific process that  
04:05 15          involved the PCR process; is that correct?

16       A           I'm sorry, could you say it again?

17       Q           Just so that I understand this, the PCR process  
18          was the replication?

19       A           Yes.

04:05 20       Q           And there were different techniques -- maybe  
21          that's the wrong word.

22       A           Different tests.

23       Q           -- tests to look at what was replicated to do the  
24          DNA match?

04:05 25       A           Yes.





1 Q And so DQ Alpha was one and short tandem repeat  
2 was another?

3 A That's right.

4 COMMISSIONER MacCALLUM: And poly, what did  
04:05 5 you say?

6 BY MR. HODSON:

7 Q Oh, Polymarker. Is that related to DQ Alpha or is  
8 that --

9 A They have been used in tandem and that's what  
04:05 10 Dr. Blaise ultimately suggested we use here, DQ  
11 Alpha and Polymarker.

12 Q And so those are two different test proceedings?

13 A That's right.

14 Q And without getting too technical, would the  
04:05 15 different tests be looking at different parts of  
16 the molecule or the DNA, looking at different  
17 parts and comparing different parts, was that --

18 A Yes, and they use somewhat different mechanisms.  
19 The DQ Alpha test was what they called the dot  
04:06 20 blot test, they subjected the DNA that they wanted  
21 to type to a strip that had dots on it with  
22 certain probes that would pick up the existence of  
23 particular profiles if they existed in that sample  
24 and the short tandem repeats process was more akin  
04:06 25 to RFLP in that it measured the length of



1 fragments of DNA at a particular locus in a  
2 person's chromosome.

3 Q Is it -- it's my understanding, Mr. Fainstein,  
4 that as these new, that as PCR-type testing, if  
04:06 5 that's the right term, became more prevalent, that  
6 various labs in different parts of the world had  
7 more expertise in one area than perhaps another  
8 lab; is that correct?

9 A Yes, that's very much the case.

04:07 10 Q And I think the RCMP had used RFLP and then went  
11 from RFLP to short tandem repeat; is that correct?

12 A That's right.

13 Q And didn't do DQ Alpha whereas other labs --

14 A That's right.

04:07 15 Q -- picked up on DQ Alpha and pursued that?

16 A Yes.

17 Q So depending on what type of test, and I think the  
18 labs that we're going to hear about, the Forensic  
19 Science Service in the UK was one that was using  
04:07 20 short tandem repeat significantly; is that  
21 correct?

22 A From the spring of 1994.

23 Q Right. And then we've also heard about the Roche  
24 Laboratory in North Carolina that had done some DQ  
04:07 25 Alpha?



1 A Yes.

2 Q And various other labs, so that it wasn't the case  
3 if there's one type of DNA and every scientist  
4 does it the same way, that it was developing in  
04:07 5 different parts of the world at different speeds?

6 A It was, and I expect that some labs were using  
7 more than one technique. I can distinguish  
8 between the two PCR-based techniques that are  
9 germane here if you like?

04:08 10 Q Sure.

11 A Just very briefly.

12 Q And just, sorry, before that, for the benefit of  
13 you, Mr. Commissioner, we are going to get into  
14 the significance of this when we hit the 1995 time  
04:08 15 period, so I think it's helpful if you explain  
16 that.

17 A There were several limitations with DQ Alpha that  
18 made it less preferable than short tandem repeats  
19 when the latter became available. Basically there  
04:08 20 was some concern about whether it was the best  
21 test to use when there were mixed samples. Very  
22 often, especially in sexual assault cases, you had  
23 some genetic material from the complainant or  
24 victim and some from the assailant and there were  
04:08 25 techniques of preferential extraction of materials



1 where you could break down the, let's say, the  
2 female component of the materials first and  
3 hopefully centrifuge that out and analyse it  
4 separately and then break down the spermatozoa  
04:09 5 which are more hardy using a stronger chemical  
6 bath and analyse that separately, but the reality  
7 was that in many instances you would still end up  
8 with some sort of a mixture in spite of having  
9 sorted most of it out.

04:09 10 You see, with the DQ Alpha  
11 test, you either got a dot reacting or not  
12 reacting and so you could have a multiplicity of  
13 dots and not know exactly whose profile you were  
14 looking at because you could have a bit from each  
04:09 15 of the parties involved, so that was one concern.

16 Another thing was that short  
17 tandem repeats has been found to be extremely good  
18 with old and degraded and very challenged  
19 material. I'm getting a bit ahead of myself, but  
04:10 20 certainly -- well, I guess I should wait about  
21 that.

22 Q That's fine, we can come back to that.

23 A And if I can just add one --

24 Q Yes.

04:10 25 A -- just to finish the thought. The main thing was



1           that DQ Alpha profiles would be much more common  
2           in the population than an STR profile would be and  
3           so there was a chance of a random match. If you  
4           had a match, you couldn't say almost without a  
04:10 5           doubt, as you often can do with short tandem  
6           repeats, that you got the right person.

7           Q       So --

8           A       You could only say that it's possible that the  
9           genetic material came from this person, but you  
04:11 10           have to acknowledge that in a city of medium size  
11           there could be thousands of other people in the  
12           city any of whom could have contributed that  
13           profile.

14          Q       And we see the term discriminatory used in more or  
04:11 15           less?

16          A       Yes.

17          Q       And it's my understanding that DQ Alpha, although  
18           it could eliminate an individual in some cases,  
19           that if it was a match, that all that might mean  
04:11 20           is that you are one of thousands that could have  
21           been the contributor, whereas short tandem repeat  
22           was more discriminatory and that if it was a  
23           match, you would be one in a much larger number;  
24           is that fair?

04:11 25          A       Exactly.



1 Q And was it your understanding that -- is DQ Alpha  
2 still used today?

3 A No. I had a chat with Dr. Fourney recently just  
4 to understand what has been happening since I  
04:11 5 retired and he tells me that short tandem repeats  
6 is the standard used by the FBI, used by the Armed  
7 Forces pathology labs in the United States, used  
8 by labs in Europe, used by the Forensic Science  
9 Service in England and used for our own DNA data  
04:12 10 bank in Canada and, moreover, the DQ Alpha test  
11 kits with the dot blot strips are no longer  
12 manufactured.

13 Q If we could go to 000901, this is the second  
14 application, and I don't believe -- the first  
04:12 15 application under Section 690 or the second  
16 application under Section 690. To your knowledge,  
17 did either of these raise the issue of DNA  
18 testing?

19 A No, I don't believe they did.

04:12 20 Q And I think we've heard some evidence that in each  
21 of these, or at the time that Mr. Milgaard was  
22 prepared to have his blood or whatever tested at  
23 any time; in other words, that if tests were  
24 available he was prepared to take them; is that  
04:12 25 your understanding?



1 A I'm sorry, I cycled out for a moment.

2 Q No, that's fine.

3 A He being?

4 Q David Milgaard was prepared, during the course of  
04:13 5 both of his applications to the Federal Minister,  
6 to have his bodily fluids used for any DNA type of  
7 testing?

8 A Yes, he was, and I would like to point out one  
9 thing in fairness to Mr. Milgaard and the people  
04:13 10 who were representing him, that if you look back  
11 at Dr. Ferris' report --

12 Q Yes.

13 A -- he was expressing pessimism that any of the  
14 PCR-based techniques that were being developed  
04:13 15 might be helpful and that was his advice to them,  
16 so in that context I suppose it's more  
17 understandable that they weren't --

18 Q Were you a little less --

19 A -- asking, moreover, for further testing.

04:13 20 Q And was it -- was it your understanding that the  
21 Dr. Ferris opinion may have dissuaded David  
22 Milgaard's counsel from pursuing DNA testing?

23 A I don't know. I'm just saying that that was, that  
24 appears to be the advice that they were given by  
04:14 25 Dr. Ferris whom they had commissioned to do the



1 work, so, you know, it's understandable that they  
2 would be pessimistic for sure.

3 Q Go ahead to 002663, please. Sorry, let me back  
4 up, 157840, and this is the letter that sets up  
04:14 5 the reference case, and maybe you can just tell us  
6 generally, Mr. Fainstein, what was your role on  
7 behalf of the Federal Minister? If you want to go  
8 to the order we can, just go to the third page.  
9 Can you tell us generally, what was your role --

04:14 10 A Yes.

11 Q -- in the Supreme Court reference?

12 A Well, it was a multifarious role. For one thing,  
13 the court didn't have all of the resources and  
14 facilities that commissions of inquiry have, they  
04:15 15 didn't have a secretariat to assist them, and so  
16 it fell to me and to counsel working with me, Rob  
17 Frater, to do a lot of that. We liaised between  
18 the court and counsel, we did our best to bring  
19 everyone onto the same page when there were  
04:15 20 controversies or concerns to see that everyone was  
21 satisfied to the extent they could be with how  
22 things were proceeding, we arranged for the  
23 subpoenas and all of the logistics for the  
24 attendance of witnesses, we dealt with all the  
04:15 25 other counsel with respect to what witnesses





1           should be called and when and what subjects should  
2           be tackled at what time. An issue developed early  
3           on in the reference as to what test the court  
4           should apply ultimately and there was a bit of a  
04:16 5           kerfuffle over that. We had a sense around the  
6           time that the reference started, or maybe a little  
7           before, that there would be an onus on Mr.  
8           Milgaard to demonstrate on a balance of  
9           probabilities that he in fact did not commit the  
04:16 10          offence and then there was a comment made by the  
11          Chief Justice in chambers that suggested that if  
12          the Crown couldn't prove its case beyond a  
13          reasonable doubt all these many years after the  
14          fact, that that might be enough to warrant a  
04:16 15          remedy, and then the day after that, which as I'm  
16          sure you'll imagine left us in some disarray, the  
17          court invited counsel to make representations as  
18          to what the test should be, and on behalf of the  
19          Attorney General of Canada I submitted a brief and  
04:16 20          briefs were submitted by other counsel as well and  
21          then the court issued a ruling as to what the  
22          guidelines were to be.

23          Q           And as far as the -- maybe just go to the next  
24                      page. I think you described it as an opinion from  
04:17 25                      the court?



1 A Yes.

2 Q And I believe that, and I'll take you to this a  
3 bit later in some of your opening submissions,  
4 essentially I think your position was that the  
04:17 5 Supreme Court of Canada was in the same position  
6 of the Federal Minister and they could hear or  
7 receive any information that the Federal Minister  
8 could receive to consider whether or not David  
9 Milgaard's continued conviction constituted a  
04:17 10 miscarriage of justice and, in effect, get the  
11 same information the Federal Minister could so  
12 that the court could give their advice to the  
13 minister. Is that a fair way to put it?

14 A I think it is, yes. That was my understanding.

04:17 15 Q And so that as far as the rules of evidence, I  
16 think they were relaxed somewhat?

17 A They were.

18 Q And --

19 A I believe the Chief Justice referred to fairness  
04:17 20 and natural justice as being the relevance.

21 Q And would it be fair to describe the relevancy  
22 parameters as being any evidence or information  
23 that might go to the issue of whether or not David  
24 Milgaard's continued conviction constituted a  
04:18 25 miscarriage of justice?



1 A That was certainly my appreciation of the  
2 situation.

3 Q What about the calling of witnesses then, I think  
4 you said you were the individual responsible,  
04:18 5 primarily responsible for that. How did that  
6 work, who decided in practical terms what  
7 witnesses were called?

8 A No, actually there was a lot of, there were a lot  
9 of interchanges between counsel. I should go back  
04:18 10 a little bit. I mean, the first indication we  
11 received from the court was that, you know, this  
12 was the court's reference, it had a job to do and  
13 it was going to decide, you know, what it wanted  
14 to entertain, who it wanted to hear from, it was  
04:19 15 going to be asking most of the questions and then  
16 counsel, if they wished, could supplement those  
17 questions, that was sort of a first indication,  
18 but I think it very quickly became clear that this  
19 was a case that had, that involved a good many  
04:19 20 factors, countless details, required fairly  
21 Encyclopedic knowledge of all the facts, and that  
22 the court needed assistance to determine exactly,  
23 you know, what were the major issues that it  
24 should entertain and it needed help in eliciting  
04:19 25 from the witnesses what the counsel who had been



1 representing various interests as the case  
2 developed felt were important, and so it became a  
3 more conventional proceeding at that point with  
4 myself and Mr. Frater chasing after the other  
04:20 5 counsel to say, hopefully by a short deadline  
6 because we were going to start very soon, okay,  
7 you know, what issues do you feel we should lead  
8 with and what witnesses do you feel should be  
9 called, and then in the event of any controversy,  
04:20 10 we sought, we tried to see to what extent we could  
11 sort that out, and then there were some  
12 discussions in chambers and the court said okay,  
13 we'll hear from X, Y and Z on this issue.

14 Q So, as far as witnesses who could be called,  
04:20 15 counsel could come to you and say "we want the  
16 following ten witnesses", --

17 A Yes.

18 Q -- and then what, you would then say "okay" or  
19 would you go to the Court and get their blessing,  
04:20 20 or how did that work?

21 A It wasn't for us, ultimately, to say, we were just  
22 facilitating things, but we certainly were  
23 liaising between counsel and the Court trying to  
24 ensure that everyone got what they needed and we  
04:21 25 were able to make progress.



1 Q Would it be correct to say that, where witnesses  
2 had been identified, that you would go to the  
3 Court and unless they said "no" you would go and  
4 call them, or -- I'm just trying to understand  
04:21 5 that?

6 A Umm, yes, I -- well, generally there were a number  
7 of discussions in chambers from time to time with  
8 all the counsel present where we went through  
9 various of these things but, you know, in order to  
04:21 10 make them as productive as possible there was  
11 often material in writing submitted in advance so  
12 that all the counsel could consider that and  
13 digest it, and then we got some direction from the  
14 Court. Now there may have been some times where  
04:21 15 the Court communicated with me and I communicated,  
16 in turn, with the other counsel, --

17 Q Do you recall --

18 A -- there undoubtedly were.

19 Q Do you recall whether there were many or any  
04:21 20 instances where, for example, counsel for David  
21 Milgaard would ask to have a witness called and  
22 the Court would say "no"?

23 A I remember one instance where the Court wanted to  
24 hear from a witness that no one else really felt  
04:22 25 would contribute very much, and that was Albert



1 Cadrain, because of his disability. But I don't  
2 recall -- and it's very important for me to couch  
3 this in this way because I just don't remember --  
4 I don't recall the Chief Justice or the panel ever  
04:22 5 foreclosing the calling of any witness that any of  
6 the counsel felt the Court should hear because  
7 what he or she had to say was germane to the terms  
8 of the reference.

9 Q And maybe, more specifically, any police officers  
04:22 10 or former police officers who were involved in the  
11 investigation of Gail Miller's death; do you  
12 recall whether the Court said "no" to any of those  
13 police officers being called as a witness?

14 A No. Now I know there is a suggestion by Mr. Wolch  
04:22 15 that that was foreclosed, and I wish I could help  
16 further, but all I can really say from my own  
17 recollection is that two officers did testify, of  
18 course that was Art Roberts and Officer Karst, and  
19 I know that two others were subpoenaed, being  
04:23 20 Short and Mackie, and of course the subpoenas were  
21 issued by the Court so, you know, you can read  
22 into that what you will. It would seem that that  
23 carried some sort of Imprimatur from the Court.  
24 But it was learned, in the process of trying to  
04:23 25 serve those subpoenas, that Mr. Short was



1           apparently quite ill and unable to travel, and  
2           Mr. Mackie, I think, was ultimately tracked down  
3           in Phoenix.

4           Q       Yes, I think that's what the record reflects.

04:23 5           A       And I understand, from reading through  
6           Mr. Pearson's notes, that he had some discussion  
7           with Eugene Williams about the possible use of the  
8           Court's closed-circuit facilities to receive some  
9           evidence from distant witnesses.

04:24 10          Q       Is that something you would have entertained for  
11           Mr. Short?

12          A       I wouldn't have had a problem with it because the  
13           Court -- you see, it used to be the case years ago  
14           that, before the Court had that facility, that  
04:24 15           applications for leave to appeal, which were  
16           limited to 15-minute submissions, were made by  
17           counsel in person, and so counsel would have to  
18           come across country at great expense to present  
19           themselves, and the Court finally dealt with that  
04:24 20           by putting in TV monitors and all the other  
21           facilities that were needed for two-way  
22           closed-circuit proceedings where counsel in  
23           Vancouver or Halifax, or whatever, could make his  
24           application for leave to appeal without having to  
04:25 25           travel, and he could see the Court in turn. And



1 so they were available, they were in the Courts,  
2 the Court was comfortable with using them, and  
3 that was one possibility. But I have no idea  
4 whatever became of that suggestion except that  
04:25 5 that never happened.

6 Q Okay. And then, as far as Mr. Mackie being out of  
7 country, --

8 A Yes.

9 Q -- I think we heard some evidence or saw some  
04:25 10 documents that he was away until sometime in the  
11 spring, but do you have any recollection of  
12 whether efforts were made to wait for him or bring  
13 him in, or things of that nature?

14 A No. And I must say that, given my division of  
04:25 15 labour with Mr. Frater, that would have been  
16 something that he would have dealt with primarily.

17 Q And what about other police officers then? I  
18 don't, I don't recall seeing on the record a  
19 request for other police officers, but for example  
04:25 20 if Mr. Penkala or some of the other officers were  
21 involved, if counsel wished to have them called to  
22 give evidence would that have been any difficulty  
23 from your end or from the Court's end, based on  
24 your dealings with the Court?

04:26 25 A The Court had a job to do which was framed by the





1 terms of reference, it said that the rules of  
2 evidence which normally obtain in Court  
3 proceedings didn't apply, that things could be a  
4 bit more freewheeling than that, and they were  
04:26 5 limited only by relevance and fairness and natural  
6 justice. And so I think there was an expectation  
7 on the part of the Court that anything that any of  
8 the counsel representing any interest felt was  
9 germane and important for the Court to consider  
04:26 10 should be proposed and the Court, if it agreed  
11 with that characterization, would accept it and  
12 hear the witness.

13 Q And for example on the issue of police misconduct  
14 in the investigation of David Milgaard, and in  
04:27 15 particular the police interaction with witnesses  
16 who gave evidence against David Milgaard at the  
17 trial, would that be the type of evidence and  
18 information, in your view, would have been  
19 properly brought before the Court on the  
04:27 20 reference?

21 A Umm, given concern as to how the statements of Ron  
22 Wilson and Nichol John were obtained, and  
23 especially in light of Ron Wilson's recantation  
24 and Nichol John's extreme difficulty with recall,  
04:27 25 I think it would have been absolutely germane to



1 consider whether -- what, well, what sort of  
2 conduct there was on the part of police who took  
3 these young people from Regina to Saskatoon before  
4 they were polygraphed, and how they were dealt  
04:27 5 with, and whether that possibly contributed to a  
6 miscarriage. Because, according to the one view  
7 that was propounded, that was the case.

8 Q Now --

9 A And so, I mean, how can you expound that view  
04:28 10 and -- on the one hand, and not want that evidence  
11 entertained by the panel that's making these  
12 decisions.

13 Q Was that your understanding of Mr. Roberts and  
14 Mr. Karst's evidence, primarily to give evidence  
04:28 15 about their interaction with Nichol John and Ron  
16 Wilson?

17 A Umm, yes. Roberts was the --

18 Q Polygraph?

19 A -- polygraphist, he was from the Calgary City  
04:28 20 Police, and he spoke at length about his role in  
21 the proceedings. I recall some of the things that  
22 Karst did but I don't recall his evidence,  
23 particularly, at this juncture.

24 Q But was it your understanding that the issue of  
04:28 25 police misconduct, or police conduct and how they



1           dealt with the main witnesses in the case against  
2           David Milgaard, was an issue that was before the  
3           Supreme Court reference in considering whether a  
4           miscarriage of justice had or would occur?

04:29 5           A       If anyone had asked me for my opinion at the time  
6           I would have said absolutely, and if I had been  
7           representing interests that might have been  
8           affected by that I would have insisted that those  
9           officers be heard, if I had any suspicion that  
04:29 10          something untoward transpired.

11          Q       And so as, in your role as counsel for the federal  
12          minister, if something would have come to your  
13          attention that suggested police misconduct or even  
14          Crown misconduct in the course of evidence that  
04:29 15          was there, you would have gone and called that  
16          evidence, is that -- or made arrangements to try  
17          and get that evidence in?

18          A       Absolutely.

19          Q       Probably an appropriate spot to break for the day,  
04:29 20          Mr. Commissioner. I think, if we can get a start  
21          at 9:00 tomorrow, we can hopefully get  
22          Mr. Fainstein done tomorrow.

23                   COMMISSIONER MacCALLUM: Okay.

24                   (Adjourned at 4:30 p.m.)

25



**OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATES:**

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Karen Hinz, CSR

Official Queen's Bench Court Reporter

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<b>\$</b>	<b>002131</b> [1] - 39611:6	<b>11</b> [1] - 39723:14	<b>180</b> [1] - 39530:22	39642:25, 39643:11,
	<b>002369</b> [1] - 39575:5	<b>11-page</b> [1] - 39671:5	<b>182097</b> [1] - 39655:7	39643:23, 39657:4,
<b>\$15</b> [1] - 39560:4	<b>002479</b> [1] - 39729:13	<b>112393</b> [1] - 39511:10	<b>182100</b> [1] - 39657:5	39657:12, 39657:15,
	<b>002480</b> [1] - 39729:19	<b>112407</b> [1] - 39514:9	<b>182102</b> [1] - 39660:19	39658:8, 39658:22,
<b>'</b>	<b>002486</b> [1] - 39726:7	<b>11293</b> [1] - 39511:6	<b>189</b> [1] - 39501:22	39658:25, 39659:4,
	<b>002663</b> [1] - 39740:3	<b>11th</b> [5] - 39508:16,	<b>18th</b> [7] - 39509:22,	39660:19, 39661:6,
	<b>003349</b> [2] - 39602:6,	39508:20, 39519:7,	39516:20, 39519:1,	39661:16, 39661:19,
	39606:3	39519:25, 39678:10	39574:19, 39584:15,	39677:2, 39677:11,
	<b>003560</b> [1] - 39595:11	<b>12</b> [1] - 39614:1	39661:6, 39661:18	39677:12, 39677:17,
	<b>003561</b> [1] - 39584:11	<b>120</b> [1] - 39518:3	<b>19</b> [3] - 39583:4,	39678:5, 39678:10,
	<b>003567</b> [1] - 39589:16	<b>124983</b> [1] - 39690:19	39653:9, 39662:17	39679:18, 39679:22
	<b>004374</b> [5] - 39565:4,	<b>125040</b> [1] - 39690:23	<b>1968</b> [3] - 39557:8,	<b>199</b> [1] - 39729:25
	39575:23, 39581:4,	<b>125042</b> [1] - 39692:3	39563:22, 39673:10	<b>1990</b> [40] - 39551:6,
	39608:16, 39688:11	<b>125206</b> [2] - 39518:3,	<b>1968-1970</b> [1] - 39673:7	39556:9, 39556:16,
	<b>004380</b> [2] - 39597:12,	39520:13	<b>1969</b> [24] - 39509:23,	39565:5, 39565:22,
	39688:15	<b>125207</b> [1] - 39524:5	39510:21, 39516:21,	39574:19, 39575:8,
	<b>004391</b> [1] - 39615:6	<b>125212</b> [1] - 39527:2	39519:3, 39520:9,	39575:24, 39577:7,
	<b>004868</b> [2] - 39658:7,	<b>125227</b> [1] - 39537:18	39520:22, 39521:24,	39584:13, 39591:22,
	39677:3	<b>125236</b> [1] - 39542:2	39524:15, 39530:12,	39594:12, 39597:17,
	<b>005536</b> [1] - 39623:2	<b>12:15</b> [1] - 39614:13	39531:3, 39535:15,	39600:17, 39600:20,
	<b>007421</b> [1] - 39650:15	<b>12:30</b> [3] - 39614:3,	39551:15, 39566:7,	39606:25, 39609:16,
	<b>008879</b> [1] - 39712:21	39614:7, 39614:13	39569:11, 39585:13,	39610:11, 39610:18,
	<b>010358</b> [1] - 39552:8	<b>12:32</b> [1] - 39635:22	39586:23, 39592:7,	39611:7, 39615:5,
	<b>010418</b> [2] - 39552:9	<b>12th</b> [1] - 39664:21	39594:6, 39594:16,	39638:16, 39680:5,
	<b>010718</b> [2] - 39556:9,	<b>13</b> [1] - 39563:21	39598:22, 39601:4,	39680:11, 39680:14,
	39563:8	<b>138</b> [1] - 39627:8	39610:19, 39650:8,	39681:2, 39681:14,
	<b>010721</b> [1] - 39563:1	<b>13th</b> [5] - 39551:6,	39673:10	39681:23, 39682:3,
	<b>012111</b> [1] - 39563:5	39557:8, 39660:19,	<b>1970</b> [6] - 39553:2,	39682:13, 39683:8,
	<b>016105</b> [1] - 39506:10	39660:20, 39726:9	39556:3, 39557:19,	39683:25, 39684:5,
	<b>016106</b> [1] - 39643:1	<b>14th</b> [5] - 39519:3,	39559:11, 39561:5,	39688:12, 39689:5,
	<b>025659</b> [1] - 39638:11	39565:23, 39675:16,	39673:10	39690:21, 39691:24,
	<b>056743</b> [1] - 39636:6	39684:15, 39712:15	<b>1972</b> [1] - 39707:6	39697:16, 39699:16,
	<b>056751</b> [1] - 39636:8	<b>15</b> [4] - 39594:13,	<b>1974</b> [2] - 39636:18,	39699:17
	<b>067278</b> [1] - 39600:14	39614:9, 39615:2	39637:2	<b>1991</b> [10] - 39512:21,
	<b>093342</b> [1] - 39559:9	<b>15-minute</b> [1] -	<b>1977</b> [2] - 39710:9,	39621:4, 39627:19,
		39747:16	39724:4	39627:20, 39673:3,
<b>1</b>		<b>152076</b> [3] - 39672:24,	<b>1980s</b> [1] - 39724:5	39674:18, 39684:10,
		39672:25, 39685:14	<b>1981</b> [1] - 39644:21	39684:15, 39696:6,
		<b>157000</b> [1] - 39725:16	<b>1982</b> [1] - 39665:2	39696:9
		<b>157840</b> [1] - 39740:4	<b>1986</b> [14] - 39647:11,	<b>1991-92-93</b> [1] -
		<b>15th</b> [6] - 39561:5,	39655:11, 39656:14,	39596:25
		39561:8, 39561:11,	39656:16, 39656:19,	<b>1992</b> [10] - 39599:2,
		39577:7, 39577:16,	39656:20, 39656:25,	39675:8, 39675:16,
		39712:15	39662:17, 39677:25,	39712:16, 39714:12,
		<b>16-year-old</b> [1] -	39717:9, 39718:4,	39716:18, 39716:23,
		39531:8	39721:6, 39721:15,	39720:14, 39726:12,
		<b>163025</b> [1] - 39661:6	39725:19	39727:15
		<b>163061</b> [1] - 39654:13	<b>1987</b> [2] - 39646:6,	<b>1993</b> [2] - 39583:5,
		<b>16th</b> [9] - 39577:6,	39663:16	39583:8
		39577:15, 39641:23,	<b>1988</b> [11] - 39644:13,	<b>1994</b> [2] - 39710:1,
		39642:3, 39642:9,	39654:8, 39657:3,	39734:22
		39656:19, 39658:8,	39657:4, 39676:25,	<b>1995</b> [1] - 39735:14
		39677:2, 39677:12	39684:24, 39726:1,	<b>1996</b> [1] - 39696:7
		<b>17</b> [3] - 39509:21,	39726:9, 39727:13,	<b>1998</b> [1] - 39663:8
		39588:2, 39612:23	39728:11, 39728:24	<b>19th</b> [2] - 39584:12,
		<b>17-year-old</b> [1] -	<b>1989</b> [31] - 39505:25,	39595:13
		39588:12	39506:12, 39507:15,	<b>1:30</b> [3] - 39614:12,
		<b>17th</b> [2] - 39666:24,	39512:20, 39518:6,	39614:14, 39635:21
		39681:23	39617:17, 39641:23,	<b>1:35</b> [1] - 39635:23
		<b>18</b> [1] - 39528:11	39642:3, 39642:17,	<b>1st</b> [1] - 39638:16
<b>0</b>				
	<b>000002</b> [1] - 39729:4			
	<b>000836</b> [1] - 39577:13			
	<b>000901</b> [1] - 39738:13			
	<b>001327</b> [1] - 39606:21			
	<b>001395</b> [1] - 39609:15			
	<b>001477</b> [2] - 39574:17,			
	39576:7			
	<b>002019</b> [1] - 39560:17			
	<b>002032</b> [1] - 39561:24			



<b>2</b>	39529:25, 39530:12, 39532:11, 39536:5, 39547:1, 39549:6, 39569:18, 39570:7, 39593:11, 39594:6, 39673:3 <b>25th</b> [9] - 39507:15, 39559:9, 39559:10, 39586:23, 39600:9, 39602:17, 39606:5, 39642:24, 39643:20 <b>26th</b> [2] - 39643:10, 39643:23 <b>27</b> [1] - 39623:5 <b>27th</b> [3] - 39501:21, 39600:15, 39684:10 <b>28</b> [1] - 39623:5 <b>285</b> [1] - 39600:15 <b>286</b> [1] - 39601:8 <b>28th</b> [21] - 39565:5, 39575:8, 39575:24, 39581:3, 39581:5, 39597:14, 39610:11, 39615:5, 39615:23, 39644:13, 39654:8, 39657:3, 39657:4, 39657:9, 39676:25, 39680:14, 39684:24, 39688:12, 39721:6, 39725:19, 39726:1 <b>293</b> [1] - 39623:4 <b>29th</b> [2] - 39557:14, 39677:17 <b>2:00</b> [2] - 39602:10, 39602:20 <b>2:30</b> [1] - 39614:17 <b>2nd</b> [5] - 39655:9, 39655:11, 39656:14, 39656:20, 39678:4	<b>3</b>	3 [2] - 39557:13, 39716:1 <b>300</b> [1] - 39711:2 <b>31</b> [1] - 39551:15 <b>31st</b> [4] - 39512:25, 39531:11, 39570:24, 39603:11 <b>332295</b> [1] - 39647:24 <b>332490</b> [1] - 39643:7 <b>332496</b> [1] - 39641:24 <b>333261</b> [1] - 39721:11 <b>333262</b> [1] - 39721:21 <b>333264</b> [1] - 39723:8 <b>333266</b> [1] - 39723:21 <b>333268</b> [1] - 39723:13 <b>333272</b> [1] - 39721:3 <b>333285</b> [1] - 39657:15
2 [7] - 39575:24, 39597:21, 39610:17, 39638:20, 39640:8, 39718:21, 39718:22 <b>20</b> [7] - 39582:24, 39583:10, 39584:4, 39594:16, 39611:18, 39612:22, 39638:4 <b>20/20</b> [1] - 39528:11 <b>200</b> [1] - 39711:2 <b>2002</b> [1] - 39707:6 <b>2005</b> [1] - 39568:13 <b>2006</b> [3] - 39501:21, 39664:21, 39666:24 <b>207</b> [1] - 39522:7 <b>209</b> [2] - 39524:5, 39524:11 <b>20th</b> [7] - 39560:25, 39597:17, 39606:25, 39609:16, 39657:24, 39690:21 <b>21</b> [5] - 39556:3, 39563:21, 39566:7, 39594:16, 39721:15 <b>215</b> [1] - 39528:17 <b>216</b> [1] - 39532:16 <b>21st</b> [7] - 39557:19, 39586:7, 39598:9, 39602:14, 39602:20, 39608:9, 39623:25 <b>22</b> [1] - 39563:14 <b>222</b> [1] - 39534:3 <b>226</b> [1] - 39536:3 <b>22nd</b> [6] - 39535:7, 39546:25, 39621:4, 39626:2, 39627:19, 39627:20 <b>23</b> [3] - 39715:8, 39715:12, 39715:25 <b>236</b> [1] - 39539:25 <b>239</b> [1] - 39545:1 <b>23rd</b> [15] - 39506:11, 39532:11, 39549:6, 39569:21, 39570:7, 39572:12, 39572:23, 39573:1, 39592:7, 39592:21, 39594:5, 39598:21, 39599:6, 39675:7, 39680:10 <b>23rd-may</b> [1] - 39594:5 <b>24</b> [1] - 39569:11 <b>245</b> [1] - 39547:5 <b>249</b> [1] - 39549:13 <b>24th</b> [18] - 39508:15, 39518:23, 39520:6, 39520:8, 39521:24, 39524:15, 39526:18,	<b>4</b>	4 [2] - 39585:19, 39598:7 <b>40</b> [6] - 39510:23, 39627:5, 39636:8, 39647:8, 39649:14 <b>43</b> [1] - 39545:14 <b>4387</b> [1] - 39610:13	
		<b>5</b>	4388 [1] - 39610:16 <b>475</b> [3] - 39572:10, 39600:7, 39678:9 <b>492</b> [1] - 39726:11 <b>4:30</b> [1] - 39751:24 <b>4th</b> [4] - 39510:21, 39584:22, 39591:22, 39689:4
		<b>6</b>	6 [2] - 39576:1, 39712:14 <b>617</b> [7] - 39655:20, 39656:11, 39656:16, 39708:7, 39710:11, 39711:6, 39726:3 <b>624</b> [2] - 39623:2, 39623:3 <b>63</b> [1] - 39510:23 <b>660</b> [1] - 39638:11 <b>667</b> [1] - 39610:6 <b>67</b> [1] - 39510:23 <b>689</b> [1] - 39623:4 <b>690</b> [15] - 39528:1, 39617:24, 39628:10, 39629:12, 39629:17, 39631:20, 39653:10, 39656:13, 39675:11, 39708:7, 39710:12, 39711:23, 39729:5, 39738:15, 39738:16 <b>696</b> [4] - 39630:15, 39631:20, 39632:13, 39708:8 <b>696.1</b> [5] - 39628:6, 39628:12, 39631:1, 39632:14, 39634:14 <b>6:45</b> [1] - 39603:17 <b>6th</b> [4] - 39611:7, 39661:16, 39679:17, 39682:13
		<b>7</b>	7 [2] - 39652:13, 39652:16 <b>748</b> [1] - 39710:12 <b>749</b> [1] - 39710:12
		<b>8</b>	76 [1] - 39681:20 <b>77,000</b> [1] - 39669:10 <b>78</b> [1] - 39683:24 <b>79</b> [1] - 39684:8 <b>7:00</b> [1] - 39515:14 <b>7:30</b> [1] - 39623:18 <b>7th</b> [1] - 39518:6
		<b>9</b>	8 [4] - 39513:4, 39513:23, 39593:23, 39610:16 <b>80</b> [1] - 39597:15 <b>8058</b> [1] - 39558:7 <b>843</b> [1] - 39709:17 <b>87</b> [2] - 39712:21, 39712:24 <b>8th</b> [2] - 39677:11, 39679:18
		<b>A</b>	9 [1] - 39508:12 <b>9(2)</b> [1] - 39512:10 <b>90</b> [1] - 39709:9 <b>95</b> [1] - 39509:15 <b>97</b> [1] - 39650:14 <b>988000</b> [1] - 39577:5 <b>9:00</b> [3] - 39505:2, 39556:3, 39751:21 <b>9th</b> [2] - 39565:22, 39566:3
			<b>abandoned</b> [1] - 39682:5 <b>ability</b> [4] - 39618:17, 39632:24, 39700:14, 39752:7 <b>able</b> [15] - 39517:19, 39550:25, 39559:20, 39616:7, 39616:17, 39617:13, 39633:24, 39642:4, 39650:19, 39698:7, 39716:23, 39719:16, 39723:22, 39724:10, 39744:25 <b>about-face</b> [1] - 39595:7 <b>Absolutely</b> [2] - 39529:16, 39751:18 <b>absolutely</b> [3] - 39714:18, 39749:25, 39751:6 <b>absorption</b> [1] -



<p>39584:5</p> <p><b>abstract</b> [1] - 39714:2</p> <p><b>accept</b> [3] - 39619:17, 39632:13, 39749:11</p> <p><b>accepted</b> [1] - 39600:10</p> <p><b>access</b> [16] - 39594:23, 39637:24, 39644:8, 39644:16, 39644:20, 39645:1, 39645:3, 39645:5, 39645:12, 39645:14, 39645:20, 39645:22, 39645:24, 39651:20, 39661:10, 39663:18</p> <p><b>accommodating</b> [1] - 39644:7</p> <p><b>accommodation</b> [2] - 39585:24, 39586:1</p> <p><b>accomplish</b> [1] - 39719:17</p> <p><b>accomplished</b> [1] - 39702:9</p> <p><b>accord</b> [2] - 39692:16, 39697:13</p> <p><b>accordance</b> [1] - 39649:9</p> <p><b>according</b> [3] - 39517:7, 39672:4, 39750:6</p> <p><b>account</b> [10] - 39513:19, 39544:24, 39544:25, 39562:8, 39591:8, 39601:8, 39601:12, 39632:12, 39687:10, 39688:7</p> <p><b>accounting</b> [1] - 39544:20</p> <p><b>accuracy</b> [4] - 39518:1, 39518:13, 39581:9, 39594:3</p> <p><b>accurate</b> [4] - 39607:17, 39680:22, 39683:1, 39705:3</p> <p><b>accusations</b> [2] - 39651:24, 39705:3</p> <p><b>accused</b> [3] - 39513:9, 39559:24, 39561:15</p> <p><b>acknowledge</b> [3] - 39516:23, 39596:21, 39737:10</p> <p><b>acknowledged</b> [1] - 39600:21</p> <p><b>acknowledging</b> [1] - 39511:22</p> <p><b>acquaintance</b> [1] - 39719:8</p> <p><b>acquaintances</b> [1] - 39610:19</p> <p><b>act</b> [2] - 39560:6, 39562:2</p>	<p><b>Act</b> [1] - 39512:11</p> <p><b>acted</b> [1] - 39695:22</p> <p><b>acting</b> [1] - 39707:16</p> <p><b>action</b> [1] - 39682:21</p> <p><b>actions</b> [2] - 39599:24, 39640:18</p> <p><b>active</b> [2] - 39533:22, 39639:4</p> <p><b>activities</b> [7] - 39519:2, 39521:13, 39679:17, 39682:25, 39684:6, 39684:23, 39709:4</p> <p><b>activity</b> [2] - 39700:20, 39705:6</p> <p><b>actual</b> [3] - 39580:13, 39592:5, 39726:18</p> <p><b>adamant</b> [2] - 39609:1, 39609:6</p> <p><b>add</b> [3] - 39517:3, 39592:12, 39736:23</p> <p><b>added</b> [5] - 39569:12, 39569:18, 39569:25, 39589:19, 39633:3</p> <p><b>addition</b> [6] - 39629:9, 39657:8, 39690:13, 39695:14, 39699:23, 39702:11</p> <p><b>additional</b> [7] - 39511:23, 39530:11, 39558:20, 39564:1, 39633:2, 39680:12, 39695:15</p> <p><b>Additionally</b> [2] - 39565:8, 39646:3</p> <p><b>additions</b> [2] - 39630:25, 39631:18</p> <p><b>address</b> [4] - 39508:13, 39508:23, 39509:9, 39621:11</p> <p><b>addressed</b> [2] - 39578:12, 39618:24</p> <p><b>addresses</b> [2] - 39509:4, 39509:10</p> <p><b>addressing</b> [1] - 39621:5</p> <p><b>Adeline</b> [1] - 39650:3</p> <p><b>Adenine</b> [1] - 39715:14</p> <p><b>Adjourned</b> [4] - 39564:25, 39635:22, 39706:14, 39751:24</p> <p><b>adjudicating</b> [1] - 39617:25</p> <p><b>administration</b> [3] - 39618:2, 39618:9, 39619:3</p> <p><b>administrative</b> [1] - 39703:25</p> <p><b>admission</b> [2] - 39601:14, 39601:25</p> <p><b>admits</b> [1] - 39562:15</p>	<p><b>admitted</b> [10] - 39563:16, 39564:5, 39572:16, 39598:10, 39603:9, 39603:15, 39603:23, 39604:12, 39604:21, 39605:3</p> <p><b>adopt</b> [1] - 39521:23</p> <p><b>adopted</b> [2] - 39581:12, 39692:17</p> <p><b>adult</b> [1] - 39613:20</p> <p><b>advance</b> [11] - 39591:4, 39615:8, 39642:9, 39655:12, 39656:1, 39656:2, 39658:14, 39661:22, 39662:1, 39662:3, 39745:11</p> <p><b>advanced</b> [4] - 39601:3, 39622:8, 39622:18, 39705:13</p> <p><b>advantage</b> [2] - 39590:18, 39634:18</p> <p><b>adversarial</b> [2] - 39705:16, 39705:17</p> <p><b>advice</b> [12] - 39596:15, 39627:25, 39700:15, 39708:18, 39708:24, 39712:8, 39712:14, 39712:19, 39720:23, 39739:15, 39739:24, 39742:12</p> <p><b>advise</b> [1] - 39693:23</p> <p><b>advised</b> [6] - 39566:12, 39637:1, 39647:22, 39647:25, 39648:4, 39682:14</p> <p><b>advising</b> [1] - 39640:9</p> <p><b>advisor</b> [2] - 39674:7, 39720:19</p> <p><b>advisors</b> [1] - 39631:9</p> <p><b>advocated</b> [1] - 39664:12</p> <p><b>advocating</b> [2] - 39665:4, 39666:4</p> <p><b>affected</b> [2] - 39537:6, 39751:8</p> <p><b>affidavit</b> [2] - 39677:24, 39679:11</p> <p><b>Affidavit</b> [1] - 39677:18</p> <p><b>affirmatively</b> [2] - 39578:15, 39579:5</p> <p><b>affirmed</b> [1] - 39579:6</p> <p><b>afternoon</b> [4] - 39635:25, 39636:1, 39636:4, 39706:20</p> <p><b>agencies</b> [2] - 39635:7, 39646:2</p> <p><b>agency</b> [2] - 39635:1, 39635:2</p> <p><b>agents</b> [1] - 39634:23</p> <p><b>agitated</b> [2] - 39578:9,</p>	<p>39580:15</p> <p><b>ago</b> [6] - 39522:17, 39649:25, 39685:16, 39686:3, 39696:2, 39747:13</p> <p><b>agree</b> [11] - 39582:19, 39642:7, 39646:25, 39653:13, 39654:25, 39659:17, 39660:2, 39661:21, 39664:6, 39664:25, 39711:21</p> <p><b>agreed</b> [4] - 39657:22, 39673:13, 39691:21, 39749:10</p> <p><b>agreeing</b> [1] - 39706:21</p> <p><b>ahead</b> [3] - 39624:6, 39736:19, 39740:3</p> <p><b>air</b> [2] - 39592:1, 39663:17</p> <p><b>akin</b> [2] - 39639:7, 39733:24</p> <p><b>Albert</b> [16] - 39508:3, 39575:16, 39576:16, 39577:7, 39577:16, 39577:18, 39581:7, 39582:5, 39582:9, 39583:10, 39583:11, 39583:15, 39583:17, 39745:25</p> <p><b>Albert's</b> [1] - 39516:12</p> <p><b>Alec</b> [2] - 39717:16, 39717:17</p> <p><b>Alito's</b> [1] - 39667:13</p> <p><b>allegation</b> [7] - 39571:8, 39590:14, 39592:17, 39592:24, 39593:2, 39612:21, 39652:3</p> <p><b>Allegations</b> [2] - 39586:21, 39598:1</p> <p><b>allegations</b> [9] - 39584:16, 39585:6, 39601:1, 39612:2, 39612:15, 39639:5, 39681:4, 39704:22, 39704:23</p> <p><b>alleged</b> [3] - 39552:6, 39592:9, 39666:14</p> <p><b>allegedly</b> [2] - 39559:23, 39653:4</p> <p><b>alleges</b> [1] - 39520:24</p> <p><b>alleging</b> [1] - 39711:7</p> <p><b>alley</b> [19] - 39534:11, 39534:14, 39534:25, 39535:5, 39545:14, 39546:5, 39546:7, 39547:23, 39548:6, 39548:8, 39548:12, 39548:17, 39548:18, 39551:18, 39551:20,</p>	<p>39562:13, 39625:19, 39626:8</p> <p><b>alleys</b> [1] - 39625:20</p> <p><b>allow</b> [2] - 39654:17, 39690:15</p> <p><b>allowed</b> [2] - 39644:16, 39731:12</p> <p><b>allowing</b> [1] - 39637:24</p> <p><b>almost</b> [4] - 39594:16, 39678:1, 39716:6, 39737:4</p> <p><b>Almost</b> [1] - 39533:12</p> <p><b>alone</b> [1] - 39569:15</p> <p><b>aloud</b> [1] - 39577:25</p> <p><b>Alpha</b> [16] - 39732:4, 39732:7, 39732:11, 39733:1, 39733:7, 39733:11, 39733:19, 39734:13, 39734:15, 39734:25, 39735:17, 39736:10, 39737:1, 39737:17, 39738:1, 39738:10</p> <p><b>amalgamated</b> [1] - 39637:4</p> <p><b>amendments</b> [5] - 39628:7, 39631:19, 39631:24, 39632:14, 39634:22</p> <p><b>American</b> [5] - 39666:23, 39667:9, 39667:24, 39668:16, 39671:1</p> <p><b>amount</b> [2] - 39586:20, 39661:21</p> <p><b>analyse</b> [2] - 39736:3, 39736:6</p> <p><b>analysis</b> [5] - 39639:21, 39667:21, 39674:6, 39728:8, 39732:1</p> <p><b>analyzed</b> [1] - 39674:17</p> <p><b>Ann</b> [3] - 39649:21, 39650:6, 39650:17</p> <p><b>annual</b> [4] - 39628:18, 39628:22, 39673:9, 39673:18</p> <p><b>answer</b> [38] - 39514:20, 39517:10, 39517:17, 39526:3, 39526:9, 39526:11, 39529:13, 39529:20, 39532:4, 39536:8, 39536:11, 39536:19, 39538:15, 39538:17, 39539:9, 39543:2, 39547:4, 39552:18, 39555:8, 39555:12, 39607:15, 39609:21, 39610:2, 39610:3, 39631:5, 39631:10, 39632:4,</p>
--	--	---	--	---



<p>39632:6, 39635:10, 39673:20, 39686:10, 39692:16, 39701:15, 39702:2, 39702:3, 39702:6, 39712:18 <b>Answer</b><sup>[1]</sup> - 39552:24 <b>answered</b> <sup>[3]</sup> - 39506:8, 39573:2, 39605:24 <b>answers</b> <sup>[8]</sup> - 39539:8, 39544:8, 39572:15, 39613:13, 39613:14, 39649:6, 39654:3, 39691:17 <b>antecedent</b> <sup>[1]</sup> - 39588:1 <b>anticipate</b> <sup>[4]</sup> - 39522:14, 39523:17, 39523:20, 39523:25 <b>anticipation</b> <sup>[1]</sup> - 39723:10 <b>anxious</b> <sup>[1]</sup> - 39730:11 <b>anyway</b> <sup>[1]</sup> - 39634:4 <b>apart</b> <sup>[4]</sup> - 39570:24, 39571:9, 39582:5, 39715:6 <b>Apart</b><sup>[1]</sup> - 39714:25 <b>apoplectic</b> <sup>[1]</sup> - 39668:12 <b>appeal</b> <sup>[6]</sup> - 39505:22, 39618:3, 39629:18, 39723:7, 39747:15, 39747:24 <b>Appeal</b><sup>[1]</sup> - 39722:4 <b>appear</b> <sup>[12]</sup> - 39588:4, 39615:15, 39636:14, 39644:6, 39647:13, 39648:5, 39655:20, 39656:9, 39662:9, 39684:21, 39688:6, 39705:5 <b>Appearances</b><sup>[1]</sup> - 39503:1 <b>appeared</b> <sup>[8]</sup> - 39557:5, 39557:16, 39603:20, 39605:1, 39648:14, 39660:7, 39705:17, 39709:9 <b>appellate</b> <sup>[1]</sup> - 39677:14 <b>appended</b> <sup>[1]</sup> - 39688:9 <b>appendix</b> <sup>[3]</sup> - 39621:6, 39621:12, 39673:8 <b>applicant</b> <sup>[10]</sup> - 39522:24, 39523:1, 39523:13, 39629:2, 39629:7, 39631:15, 39653:21, 39673:14, 39677:21, 39681:16 <b>applicants</b> <sup>[6]</sup> - 39631:23, 39676:15, 39685:24, 39686:6,</p>	<p>39688:4, 39705:18 <b>application</b> <sup>[73]</sup> - 39506:2, 39518:10, 39518:17, 39521:4, 39527:22, 39528:1, 39530:15, 39600:16, 39617:15, 39632:8, 39633:12, 39634:11, 39642:10, 39642:11, 39643:4, 39644:12, 39645:18, 39646:8, 39654:7, 39654:9, 39655:3, 39655:12, 39655:15, 39655:21, 39656:1, 39656:11, 39657:2, 39657:7, 39657:10, 39657:18, 39658:3, 39658:6, 39659:18, 39660:5, 39661:18, 39661:19, 39663:8, 39664:4, 39675:10, 39676:1, 39676:25, 39678:1, 39678:2, 39678:16, 39678:23, 39679:2, 39682:16, 39682:20, 39684:13, 39684:15, 39696:5, 39702:2, 39702:14, 39702:18, 39702:22, 39703:10, 39705:9, 39708:2, 39708:11, 39710:22, 39711:23, 39722:13, 39722:22, 39723:10, 39725:24, 39725:25, 39726:22, 39729:4, 39738:14, 39738:15, 39738:16, 39747:24 <b>applications</b> <sup>[14]</sup> - 39653:11, 39704:11, 39708:7, 39710:10, 39710:14, 39710:19, 39710:21, 39710:24, 39711:5, 39723:4, 39723:24, 39724:6, 39739:5, 39747:15 <b>applied</b> <sup>[2]</sup> - 39520:21, 39631:17 <b>apply</b> <sup>[2]</sup> - 39741:4, 39749:3 <b>applying</b> <sup>[1]</sup> - 39629:16 <b>appreciate</b> <sup>[8]</sup> - 39549:14, 39596:17, 39671:22, 39682:24, 39689:7, 39689:19, 39700:18, 39727:12 <b>appreciation</b> <sup>[1]</sup> - 39743:1 <b>approach</b> <sup>[3]</sup> - 39528:5, 39656:10, 39705:17</p>	<p><b>approached</b> <sup>[2]</sup> - 39580:17, 39639:15 <b>appropriate</b> <sup>[7]</sup> - 39528:7, 39612:24, 39640:15, 39645:5, 39706:8, 39717:18, 39751:19 <b>approx</b> <sup>[1]</sup> - 39603:17 <b>April</b><sup>[11]</sup> - 39509:22, 39516:20, 39519:1, 39519:2, 39531:13, 39586:23, 39675:7, 39675:16, 39681:23, 39682:3, 39712:15 <b>archiving</b> <sup>[2]</sup> - 39566:24, 39566:25 <b>area</b> <sup>[13]</sup> - 39512:8, 39515:14, 39535:22, 39561:17, 39585:21, 39649:4, 39649:23, 39651:22, 39662:10, 39716:16, 39719:24, 39729:11, 39734:7 <b>areas</b> <sup>[5]</sup> - 39641:11, 39662:11, 39672:21, 39685:10, 39695:24 <b>argue</b> <sup>[2]</sup> - 39574:13, 39574:14 <b>arguing</b> <sup>[1]</sup> - 39666:3 <b>argument</b> <sup>[2]</sup> - 39622:25, 39626:1 <b>arises</b> <sup>[1]</sup> - 39692:20 <b>arising</b> <sup>[2]</sup> - 39641:12, 39708:17 <b>armed</b> <sup>[2]</sup> - 39557:15, 39560:6 <b>Armed</b><sup>[1]</sup> - 39738:6 <b>arose</b> <sup>[1]</sup> - 39669:18 <b>Arp</b><sup>[1]</sup> - 39709:17 <b>arranged</b> <sup>[2]</sup> - 39665:10, 39740:22 <b>Arrangements</b> <sup>[1]</sup> - 39569:8 <b>arrangements</b> <sup>[4]</sup> - 39520:14, 39585:25, 39586:1, 39751:16 <b>arrest</b> <sup>[1]</sup> - 39558:23 <b>arrested</b> <sup>[1]</sup> - 39559:13 <b>arrived</b> <sup>[4]</sup> - 39506:1, 39600:23, 39660:5, 39674:6 <b>arriving</b> <sup>[1]</sup> - 39571:14 <b>art</b> <sup>[1]</sup> - 39543:13 <b>Art</b><sup>[2]</sup> - 39572:13, 39746:18 <b>artfully</b> <sup>[2]</sup> - 39521:20, 39528:13 <b>article</b> <sup>[7]</sup> - 39513:10, 39514:6, 39517:24, 39666:22, 39671:4,</p>	<p>39671:5, 39671:8 <b>articled</b> <sup>[1]</sup> - 39725:14 <b>articles</b> <sup>[2]</sup> - 39669:3, 39671:23 <b>articulated</b> <sup>[1]</sup> - 39630:21 <b>ascertain</b> <sup>[1]</sup> - 39705:12 <b>aspect</b> <sup>[3]</sup> - 39606:17, 39681:1, 39690:13 <b>aspects</b> <sup>[1]</sup> - 39517:1 <b>Asper</b><sup>[18]</sup> - 39644:15, 39645:11, 39645:15, 39646:6, 39646:10, 39646:17, 39654:14, 39655:13, 39655:17, 39657:6, 39660:21, 39662:14, 39663:3, 39664:2, 39674:21, 39680:15, 39703:20 <b>assailant</b> <sup>[4]</sup> - 39587:2, 39587:9, 39643:15, 39735:24 <b>assailants</b> <sup>[2]</sup> - 39663:22, 39674:19 <b>assault</b> <sup>[7]</sup> - 39556:1, 39558:20, 39562:14, 39563:7, 39570:25, 39674:16, 39735:22 <b>Assault</b><sup>[1]</sup> - 39556:7 <b>assaults</b> <sup>[5]</sup> - 39510:18, 39561:19, 39562:1, 39570:23, 39673:6 <b>assert</b> <sup>[1]</sup> - 39666:16 <b>asserted</b> <sup>[1]</sup> - 39678:21 <b>assertion</b> <sup>[5]</sup> - 39619:20, 39619:21, 39690:10, 39693:9, 39693:21 <b>assertions</b> <sup>[3]</sup> - 39525:20, 39693:6, 39693:7 <b>asserts</b> <sup>[1]</sup> - 39688:25 <b>assessing</b> <sup>[1]</sup> - 39601:1 <b>assessment</b> <sup>[2]</sup> - 39586:20, 39599:23 <b>assigned</b> <sup>[1]</sup> - 39727:7 <b>assist</b> <sup>[8]</sup> - 39612:20, 39631:4, 39631:6, 39644:2, 39646:7, 39666:22, 39682:16, 39740:15 <b>assistance</b> <sup>[5]</sup> - 39506:6, 39583:19, 39647:21, 39683:10, 39743:22 <b>Assistant</b><sup>[4]</sup> - 39502:5, 39502:6, 39511:8, 39511:11 <b>assistant</b> <sup>[2]</sup> - 39673:2, 39724:13</p>	<p><b>assisted</b> <sup>[2]</sup> - 39633:3, 39697:15 <b>assisting</b> <sup>[1]</sup> - 39516:3 <b>associate</b> <sup>[1]</sup> - 39548:16 <b>associated</b> <sup>[2]</sup> - 39555:14, 39566:24 <b>Association</b> <sup>[2]</sup> - 39505:14, 39665:12 <b>assume</b> <sup>[6]</sup> - 39531:7, 39531:14, 39532:6, 39561:10, 39621:9 <b>assumed</b> <sup>[1]</sup> - 39536:1 <b>assumes</b> <sup>[2]</sup> - 39592:20, 39593:11 <b>Assuming</b><sup>[2]</sup> - 39516:22, 39567:7 <b>assuming</b> <sup>[1]</sup> - 39548:21 <b>assumption</b> <sup>[1]</sup> - 39531:25 <b>assuring</b> <sup>[1]</sup> - 39629:19 <b>astonishing</b> <sup>[1]</sup> - 39667:19 <b>astride</b> <sup>[1]</sup> - 39615:14 <b>ate</b> <sup>[1]</sup> - 39607:6 <b>attach</b> <sup>[1]</sup> - 39611:17 <b>attached</b> <sup>[5]</sup> - 39507:13, 39584:9, 39611:19, 39611:24, 39673:8 <b>attachment</b> <sup>[2]</sup> - 39512:12, 39512:13 <b>attack</b> <sup>[2]</sup> - 39551:17, 39570:20 <b>attacked</b> <sup>[2]</sup> - 39560:4, 39571:19 <b>attacking</b> <sup>[2]</sup> - 39551:14, 39571:24 <b>attacks</b> <sup>[6]</sup> - 39560:15, 39560:19, 39560:21, 39643:16, 39663:22, 39665:16 <b>attempt</b> <sup>[2]</sup> - 39539:3, 39584:14 <b>attempted</b> <sup>[2]</sup> - 39563:19, 39726:13 <b>attempts</b> <sup>[5]</sup> - 39511:3, 39524:6, 39527:4, 39527:6, 39594:23 <b>attendance</b> <sup>[2]</sup> - 39634:1, 39740:24 <b>attended</b> <sup>[1]</sup> - 39561:14 <b>attending</b> <sup>[1]</sup> - 39603:9 <b>attention</b> <sup>[8]</sup> - 39583:23, 39661:21, 39673:4, 39677:1, 39690:5, 39690:7, 39721:12, 39751:13 <b>attitude</b> <sup>[2]</sup> - 39527:22, 39586:13</p>
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<p><b>Attorney</b><sup>[3]</sup> - 39719:4, 39724:13, 39741:19</p> <p><b>attributing</b> <sup>[2]</sup> - 39600:2, 39690:1</p> <p><b>Audio</b><sup>[1]</sup> - 39502:13</p> <p><b>August</b><sup>[18]</sup> - 39565:5, 39565:18, 39575:7, 39575:24, 39577:3, 39581:3, 39581:4, 39597:14, 39610:11, 39610:17, 39611:7, 39615:5, 39615:22, 39615:23, 39674:18, 39677:17, 39684:14, 39688:12</p> <p><b>author</b> <sup>[1]</sup> - 39603:3</p> <p><b>authorities</b> <sup>[2]</sup> - 39600:20, 39665:9</p> <p><b>authority</b> <sup>[1]</sup> - 39633:18</p> <p><b>availability</b> <sup>[1]</sup> - 39732:10</p> <p><b>available</b> <sup>[10]</sup> - 39565:9, 39567:1, 39616:4, 39632:10, 39697:7, 39719:16, 39730:13, 39735:19, 39738:24, 39748:1</p> <p><b>Avenue</b><sup>[11]</sup> - 39621:13, 39621:24, 39622:2, 39622:5, 39624:11, 39624:23, 39625:2, 39649:19</p> <p><b>avenues</b> <sup>[1]</sup> - 39616:10</p> <p><b>Avenues</b><sup>[1]</sup> - 39621:25</p> <p><b>average</b> <sup>[1]</sup> - 39715:4</p> <p><b>avoided</b> <sup>[1]</sup> - 39632:20</p> <p><b>await</b> <sup>[1]</sup> - 39732:10</p> <p><b>aware</b> <sup>[26]</sup> - 39539:16, 39549:4, 39549:11, 39570:23, 39571:2, 39571:12, 39573:25, 39583:4, 39583:8, 39583:9, 39649:10, 39651:3, 39651:10, 39654:5, 39662:13, 39663:7, 39663:12, 39663:17, 39664:12, 39675:25, 39725:5, 39726:12, 39726:15, 39727:20, 39728:10, 39731:12</p> <p><b>awful</b> <sup>[1]</sup> - 39724:12</p> <p><b>axe</b> <sup>[1]</sup> - 39713:16</p>	<p>39719:21, 39723:1, 39727:23</p> <p><b>backing</b> <sup>[1]</sup> - 39666:9</p> <p><b>backward</b> <sup>[1]</sup> - 39608:2</p> <p><b>bad</b> <sup>[3]</sup> - 39652:23, 39666:15, 39717:21</p> <p><b>balance</b> <sup>[2]</sup> - 39713:19, 39741:8</p> <p><b>ballpark</b> <sup>[1]</sup> - 39711:1</p> <p><b>bank</b> <sup>[1]</sup> - 39738:10</p> <p><b>banks</b> <sup>[1]</sup> - 39716:13</p> <p><b>bare</b> <sup>[1]</sup> - 39593:1</p> <p><b>Barry</b><sup>[1]</sup> - 39729:16</p> <p><b>Bartlett</b> <sup>[5]</sup> - 39654:15, 39657:9, 39661:2, 39663:4, 39663:19</p> <p><b>Based</b> <sup>[2]</sup> - 39613:10, 39645:13</p> <p><b>based</b> <sup>[9]</sup> - 39511:20, 39642:7, 39705:4, 39722:4, 39732:2, 39732:14, 39735:8, 39739:14, 39748:23</p> <p><b>bases</b> <sup>[5]</sup> - 39715:14, 39715:16, 39715:18, 39715:24, 39716:2</p> <p><b>basic</b> <sup>[4]</sup> - 39598:4, 39658:15, 39662:3, 39731:9</p> <p><b>basis</b> <sup>[9]</sup> - 39588:25, 39617:17, 39618:4, 39618:5, 39618:10, 39618:22, 39618:23, 39636:11, 39713:2</p> <p><b>bat</b> <sup>[1]</sup> - 39653:5</p> <p><b>bath</b> <sup>[1]</sup> - 39736:6</p> <p><b>bathroom</b> <sup>[1]</sup> - 39519:19</p> <p><b>Bc</b><sup>[1]</sup> - 39650:18</p> <p><b>bear</b> <sup>[2]</sup> - 39537:22, 39539:23</p> <p><b>Bearing</b><sup>[1]</sup> - 39702:17</p> <p><b>bearing</b> <sup>[4]</sup> - 39576:22, 39692:12, 39702:21, 39703:4</p> <p><b>beat</b> <sup>[1]</sup> - 39660:12</p> <p><b>Beaton</b><sup>[10]</sup> - 39590:17, 39590:20, 39591:11, 39591:20, 39593:4, 39608:17, 39609:14, 39609:17, 39609:19, 39609:24</p> <p><b>Beaton's</b> <sup>[1]</sup> - 39590:23</p> <p><b>Beauchamp</b><sup>[1]</sup> - 39517:8</p> <p><b>became</b> <sup>[11]</sup> - 39541:16, 39603:17, 39651:23, 39656:13, 39664:2, 39708:3, 39734:5, 39735:19, 39743:18,</p>	<p>39744:2, 39748:4</p> <p><b>become</b> <sup>[4]</sup> - 39701:13, 39714:14, 39726:15, 39728:10</p> <p><b>becoming</b> <sup>[1]</sup> - 39662:14</p> <p><b>beg</b> <sup>[2]</sup> - 39628:20, 39632:17</p> <p><b>began</b> <sup>[5]</sup> - 39512:21, 39600:18, 39691:5, 39708:3, 39718:5</p> <p><b>begin</b> <sup>[1]</sup> - 39719:7</p> <p><b>begins</b> <sup>[1]</sup> - 39505:7</p> <p><b>behalf</b> <sup>[11]</sup> - 39505:14, 39513:9, 39621:11, 39639:6, 39644:14, 39645:21, 39674:21, 39686:25, 39687:14, 39740:7, 39741:18</p> <p><b>behaviour</b> <sup>[3]</sup> - 39532:14, 39588:1, 39703:17</p> <p><b>behind</b> <sup>[5]</sup> - 39548:12, 39556:3, 39557:3, 39557:15, 39557:21</p> <p><b>Beitel</b><sup>[1]</sup> - 39502:9</p> <p><b>belabour</b> <sup>[1]</sup> - 39698:14</p> <p><b>belief</b> <sup>[2]</sup> - 39549:25, 39550:19</p> <p><b>believable</b> <sup>[1]</sup> - 39615:12</p> <p><b>believes</b> <sup>[2]</sup> - 39575:15, 39651:7</p> <p><b>belonged</b> <sup>[2]</sup> - 39517:5, 39536:22</p> <p><b>belonging</b> <sup>[1]</sup> - 39544:20</p> <p><b>below</b> <sup>[5]</sup> - 39627:5, 39674:14, 39679:24, 39682:6, 39682:7</p> <p><b>Bench</b> <sup>[4]</sup> - 39752:1, 39752:3, 39752:14, 39752:20</p> <p><b>benefit</b> <sup>[4]</sup> - 39579:15, 39599:1, 39714:1, 39735:12</p> <p><b>beside</b> <sup>[1]</sup> - 39516:16</p> <p><b>best</b> <sup>[10]</sup> - 39529:11, 39531:10, 39531:17, 39531:18, 39531:22, 39531:23, 39614:23, 39735:20, 39740:18, 39752:6</p> <p><b>better</b> <sup>[4]</sup> - 39561:22, 39655:23, 39730:12, 39732:9</p> <p><b>Betty</b><sup>[3]</sup> - 39649:21, 39650:5, 39650:16</p> <p><b>Between</b><sup>[1]</sup> - 39531:13</p> <p><b>between</b> <sup>[25]</sup> -</p>	<p>39509:16, 39516:7, 39526:8, 39527:18, 39536:9, 39540:7, 39540:13, 39546:18, 39575:15, 39594:11, 39621:24, 39631:20, 39650:14, 39671:16, 39694:21, 39696:5, 39697:25, 39700:16, 39704:2, 39708:19, 39711:2, 39735:8, 39740:17, 39743:9, 39744:23</p> <p><b>beyond</b> <sup>[3]</sup> - 39615:15, 39618:4, 39741:12</p> <p><b>bias</b> <sup>[3]</sup> - 39654:25, 39656:7, 39661:23</p> <p><b>biased</b> <sup>[1]</sup> - 39654:1</p> <p><b>big</b> <sup>[1]</sup> - 39671:15</p> <p><b>billion</b> <sup>[1]</sup> - 39716:1</p> <p><b>billionths</b> <sup>[1]</sup> - 39718:17</p> <p><b>binary</b> <sup>[1]</sup> - 39715:20</p> <p><b>bit</b> <sup>[22]</sup> - 39524:8, 39526:2, 39533:9, 39537:19, 39542:7, 39556:18, 39610:5, 39616:15, 39616:17, 39626:25, 39636:21, 39648:21, 39709:23, 39714:8, 39717:4, 39720:22, 39736:14, 39736:19, 39741:4, 39742:3, 39743:10, 39749:4</p> <p><b>bits</b> <sup>[3]</sup> - 39534:6, 39646:24, 39647:1</p> <p><b>bizarre</b> <sup>[3]</sup> - 39605:6, 39605:8, 39667:23</p> <p><b>blade</b> <sup>[1]</sup> - 39544:21</p> <p><b>Blaise</b><sup>[1]</sup> - 39733:10</p> <p><b>blame</b> <sup>[1]</sup> - 39625:25</p> <p><b>blissing</b> <sup>[1]</sup> - 39744:19</p> <p><b>blitz</b> <sup>[2]</sup> - 39664:20, 39665:22</p> <p><b>block</b> <sup>[1]</sup> - 39516:12</p> <p><b>blood</b> <sup>[16]</sup> - 39516:13, 39575:1, 39575:18, 39576:2, 39576:24, 39576:25, 39582:11, 39582:21, 39586:25, 39587:8, 39587:13, 39610:20, 39611:12, 39715:6, 39720:5, 39738:22</p> <p><b>blood-stained</b> <sup>[1]</sup> - 39516:13</p> <p><b>Blooding</b> <sup>[1]</sup> - 39718:4</p> <p><b>bloody</b> <sup>[2]</sup> - 39581:23, 39583:7</p>	<p><b>blot</b> <sup>[2]</sup> - 39733:20, 39738:11</p> <p><b>blows</b> <sup>[1]</sup> - 39716:2</p> <p><b>blue</b> <sup>[2]</sup> - 39516:13, 39516:19</p> <p><b>blueprint</b> <sup>[1]</sup> - 39715:10</p> <p><b>board</b> <sup>[4]</sup> - 39512:16, 39512:24, 39648:22, 39725:15</p> <p><b>Board</b> <sup>[2]</sup> - 39641:18, 39642:6</p> <p><b>Bobs</b><sup>[1]</sup> - 39503:5</p> <p><b>bodily</b> <sup>[1]</sup> - 39739:6</p> <p><b>body</b> <sup>[3]</sup> - 39550:8, 39552:1, 39715:5</p> <p><b>Boechler</b><sup>[1]</sup> - 39502:13</p> <p><b>boldly</b> <sup>[1]</sup> - 39666:16</p> <p><b>book</b> <sup>[19]</sup> - 39513:3, 39513:20, 39542:24, 39647:15, 39647:23, 39648:10, 39648:11, 39648:12, 39648:16, 39692:22, 39692:23, 39693:2, 39693:21, 39694:6, 39694:12, 39694:16, 39694:23, 39696:6, 39718:3</p> <p><b>books</b> <sup>[1]</sup> - 39668:9</p> <p><b>Borden</b><sup>[1]</sup> - 39709:22</p> <p><b>bore</b> <sup>[1]</sup> - 39565:13</p> <p><b>Boswell</b><sup>[3]</sup> - 39502:4, 39686:20, 39687:24</p> <p><b>bother</b> <sup>[1]</sup> - 39537:12</p> <p><b>bothered</b> <sup>[1]</sup> - 39647:12</p> <p><b>bothering</b> <sup>[2]</sup> - 39537:19, 39539:22</p> <p><b>bottom</b> <sup>[15]</sup> - 39513:1, 39515:6, 39515:7, 39527:7, 39536:16, 39555:22, 39558:15, 39574:24, 39578:13, 39608:21, 39610:16, 39624:8, 39678:4, 39688:17, 39729:24</p> <p><b>Boychuk</b><sup>[1]</sup> - 39503:8</p> <p><b>boyfriend</b> <sup>[2]</sup> - 39541:2, 39541:13</p> <p><b>bracketed</b> <sup>[1]</sup> - 39674:15</p> <p><b>brackets</b> <sup>[4]</sup> - 39676:9, 39679:20, 39682:2, 39683:14</p> <p><b>breach</b> <sup>[1]</sup> - 39588:7</p> <p><b>break</b> <sup>[18]</sup> - 39540:4, 39540:9, 39541:1, 39541:9, 39564:17, 39564:24, 39588:6, 39589:8, 39607:2, 39614:3, 39614:11, 39614:12, 39614:13,</p>
<b>B</b>				
<p><b>background</b> <sup>[7]</sup> - 39559:21, 39594:20, 39703:5, 39714:19,</p>				



<p>39614:22, 39706:8, 39736:1, 39736:4, 39751:19</p> <p><b>breaking</b> [1] - 39588:13</p> <p><b>breath</b> [2] - 39603:22, 39605:2</p> <p><b>brief</b> [5] - 39636:4, 39641:11, 39705:8, 39722:15, 39741:19</p> <p><b>briefly</b> [5] - 39559:22, 39646:1, 39681:11, 39730:15, 39735:11</p> <p><b>briefs</b> [1] - 39741:20</p> <p><b>bring</b> [15] - 39562:24, 39606:10, 39632:2, 39654:12, 39655:7, 39655:8, 39658:7, 39659:2, 39660:19, 39661:6, 39661:17, 39712:21, 39716:14, 39740:18, 39748:12</p> <p><b>bringing</b> [3] - 39583:23, 39619:3, 39623:6</p> <p><b>broached</b> [1] - 39579:5</p> <p><b>broad</b> [4] - 39670:2, 39670:3, 39700:21, 39700:24</p> <p><b>broadcast</b> [2] - 39523:4, 39523:6</p> <p><b>Broadcasting</b> [1] - 39654:16</p> <p><b>broken</b> [1] - 39525:20</p> <p><b>brothers</b> [1] - 39583:10</p> <p><b>brought</b> [14] - 39537:22, 39537:24, 39539:23, 39585:23, 39636:6, 39641:22, 39643:2, 39647:25, 39654:22, 39696:10, 39702:2, 39702:19, 39721:12, 39749:19</p> <p><b>Brown</b> [2] - 39721:15, 39723:15</p> <p><b>Bruce</b> [2] - 39503:9, 39688:12</p> <p><b>Buckland</b> [2] - 39717:13, 39717:23</p> <p><b>building</b> [1] - 39541:4</p> <p><b>built</b> [2] - 39658:17, 39664:3</p> <p><b>bus</b> [10] - 39557:19, 39557:20, 39570:8, 39591:12, 39621:25, 39622:4, 39624:20, 39624:23, 39625:1, 39625:10</p> <p><b>by</b> [1] - 39535:10</p>	<p><b>C</b></p> <p><b>Cadrain</b> [30] - 39506:15, 39507:9, 39508:4, 39548:2, 39574:18, 39574:20, 39574:21, 39575:13, 39575:16, 39575:17, 39575:25, 39576:25, 39577:7, 39577:17, 39577:18, 39577:23, 39578:8, 39578:14, 39580:14, 39581:8, 39582:10, 39583:5, 39583:9, 39583:10, 39583:11, 39583:15, 39603:18, 39611:22, 39615:16, 39746:1</p> <p><b>Cadrain's</b> [6] - 39548:4, 39575:20, 39576:5, 39579:15, 39581:6, 39582:5</p> <p><b>Cadrians</b> [2] - 39516:18, 39571:14</p> <p><b>Caldwell</b> [28] - 39503:5, 39506:6, 39506:7, 39506:13, 39507:6, 39507:14, 39508:10, 39508:13, 39508:24, 39509:17, 39510:4, 39510:6, 39511:17, 39639:14, 39639:19, 39641:9, 39641:17, 39641:23, 39642:4, 39642:17, 39643:10, 39645:20, 39647:16, 39648:25, 39649:10, 39651:8, 39652:7, 39663:16</p> <p><b>Caldwells</b> [8] - 39514:18, 39514:20, 39514:23, 39643:6, 39647:4, 39647:10, 39648:9, 39663:24</p> <p><b>Calgary</b> [8] - 39569:16, 39570:9, 39582:15, 39591:13, 39592:9, 39608:24, 39609:10, 39750:19</p> <p><b>Calvin</b> [1] - 39503:13</p> <p><b>camp</b> [2] - 39638:25, 39639:18</p> <p><b>campaign</b> [2] - 39656:4, 39665:4</p> <p><b>Campbell</b> [4] - 39693:17, 39693:23, 39697:2, 39697:3</p> <p><b>Campbell's</b> [4] - 39692:22, 39693:9,</p>	<p>39696:4, 39697:12</p> <p><b>Canada</b> [9] - 39503:11, 39512:11, 39672:16, 39709:10, 39709:25, 39719:4, 39738:10, 39741:19, 39742:5</p> <p><b>Canadian</b> [2] - 39654:16, 39669:12</p> <p><b>Candace</b> [1] - 39502:3</p> <p><b>cannot</b> [3] - 39575:1, 39575:17, 39696:2</p> <p><b>cans</b> [9] - 39534:9, 39534:13, 39534:20, 39534:22, 39534:24, 39535:2, 39546:5, 39546:9, 39546:16</p> <p><b>canvass</b> [2] - 39641:11, 39685:11</p> <p><b>capacity</b> [1] - 39528:2</p> <p><b>capital</b> [1] - 39520:23</p> <p><b>capitals</b> [1] - 39556:5</p> <p><b>capture</b> [1] - 39558:18</p> <p><b>car</b> [23] - 39515:13, 39548:13, 39569:14, 39569:19, 39570:1, 39571:11, 39581:25, 39582:15, 39588:5, 39589:7, 39598:11, 39603:16, 39604:12, 39606:10, 39610:22, 39610:24, 39623:9, 39623:23, 39624:14, 39626:21, 39626:24, 39627:2</p> <p><b>care</b> [2] - 39640:13, 39705:2</p> <p><b>career</b> [4] - 39512:5, 39707:11, 39709:13, 39710:25</p> <p><b>caretaker</b> [1] - 39515:12</p> <p><b>Carlyle</b> [3] - 39513:6, 39516:2, 39645:3</p> <p><b>Carlyle-gordge</b> [3] - 39513:6, 39516:2, 39645:3</p> <p><b>Carolina</b> [1] - 39734:24</p> <p><b>carried</b> [1] - 39746:23</p> <p><b>Carry</b> [1] - 39615:3</p> <p><b>carry</b> [3] - 39623:16, 39691:14</p> <p><b>carrying</b> [3] - 39557:9, 39557:12, 39639:11</p> <p><b>cars</b> [1] - 39588:14</p> <p><b>Case</b> [1] - 39653:12</p> <p><b>case</b> [62] - 39507:21, 39510:2, 39511:18, 39512:2, 39512:7, 39516:5, 39516:17, 39521:1, 39521:11,</p>	<p>39526:24, 39549:10, 39560:10, 39571:4, 39574:7, 39583:12, 39592:19, 39615:8, 39615:18, 39616:3, 39619:14, 39620:6, 39627:20, 39650:21, 39666:1, 39666:8, 39666:13, 39667:12, 39667:22, 39694:10, 39705:5, 39709:20, 39709:23, 39711:19, 39711:22, 39711:24, 39712:4, 39712:5, 39713:4, 39713:21, 39713:23, 39714:1, 39716:24, 39717:10, 39718:2, 39719:8, 39719:11, 39719:21, 39721:20, 39723:2, 39728:3, 39729:12, 39734:9, 39735:2, 39740:5, 39741:12, 39743:19, 39744:1, 39747:13, 39750:7, 39751:1</p> <p><b>cases</b> [13] - 39512:4, 39512:5, 39512:9, 39537:20, 39619:11, 39665:15, 39667:14, 39668:2, 39709:10, 39712:3, 39715:2, 39735:22, 39737:18</p> <p><b>castigation</b> [1] - 39665:8</p> <p><b>catch</b> [1] - 39625:1</p> <p><b>catches</b> [1] - 39505:22</p> <p><b>categorically</b> [1] - 39592:25</p> <p><b>cathedral</b> [1] - 39535:16</p> <p><b>Catherine</b> [2] - 39503:5, 39641:7</p> <p><b>caught</b> [3] - 39560:5, 39562:2, 39618:17</p> <p><b>caused</b> [3] - 39616:5, 39617:9, 39716:9</p> <p><b>caution</b> [1] - 39562:3</p> <p><b>cautioned</b> [1] - 39562:2</p> <p><b>Cbc</b> [17] - 39502:11, 39645:4, 39654:9, 39654:15, 39657:3, 39657:21, 39658:1, 39660:17, 39660:23, 39661:15, 39663:11, 39663:15, 39663:18, 39663:20, 39752:3, 39752:18, 39752:19</p> <p><b>cell</b> [2] - 39715:24, 39715:25</p>	<p><b>cells</b> [5] - 39563:16, 39715:5, 39715:6, 39715:7</p> <p><b>centre</b> [2] - 39641:24, 39716:14</p> <p><b>centrifuge</b> [1] - 39736:3</p> <p><b>Centurion</b> [1] - 39665:5</p> <p><b>certain</b> [47] - 39509:5, 39511:24, 39512:4, 39512:5, 39512:12, 39514:3, 39517:23, 39523:23, 39525:9, 39525:12, 39526:24, 39533:7, 39533:16, 39533:19, 39533:23, 39536:1, 39537:14, 39538:22, 39549:7, 39555:9, 39556:17, 39558:1, 39560:12, 39567:24, 39568:9, 39568:12, 39569:25, 39580:15, 39587:10, 39587:20, 39598:17, 39611:3, 39611:19, 39619:8, 39627:4, 39627:6, 39632:24, 39649:1, 39649:18, 39673:20, 39676:8, 39676:9, 39703:9, 39714:2, 39718:8, 39730:18, 39733:22</p> <p><b>certainly</b> [43] - 39517:24, 39518:10, 39526:25, 39537:5, 39544:11, 39550:23, 39551:3, 39555:10, 39555:12, 39569:22, 39570:12, 39570:13, 39582:16, 39583:14, 39586:17, 39588:14, 39594:18, 39605:9, 39616:11, 39617:15, 39619:16, 39627:17, 39631:24, 39632:19, 39633:14, 39633:25, 39635:8, 39639:2, 39642:8, 39656:3, 39664:3, 39668:12, 39669:8, 39675:24, 39692:15, 39693:4, 39696:1, 39696:14, 39709:1, 39712:2, 39736:20, 39743:1, 39744:22</p> <p><b>Certainly</b> [9] - 39512:3, 39531:4, 39606:20, 39610:15, 39613:8, 39630:16, 39633:2, 39650:23, 39690:3</p> <p><b>certainty</b> [1] - 39629:19</p>
---	---	--	---	--



<p><b>Certificates</b> [1] - 39752:1</p> <p><b>certify</b> [1] - 39752:4</p> <p><b>Chain</b> [1] - 39718:15</p> <p><b>chair</b> [1] - 39635:6</p> <p><b>challenge</b> [1] - 39669:18</p> <p><b>challenged</b> [1] - 39736:18</p> <p><b>challenging</b> [5] - 39512:6, 39520:5, 39711:25, 39712:2, 39712:5</p> <p><b>chamber</b> [1] - 39667:2</p> <p><b>chambers</b> [3] - 39741:11, 39744:12, 39745:7</p> <p><b>Champ's</b> [3] - 39607:6, 39607:7, 39608:4</p> <p><b>champion</b> [2] - 39652:23, 39670:12</p> <p><b>championed</b> [2] - 39669:20, 39670:4</p> <p><b>championing</b> [7] - 39666:17, 39666:20, 39670:17, 39671:16, 39671:17, 39672:3</p> <p><b>Champs</b> [1] - 39606:14</p> <p><b>chance</b> [3] - 39507:2, 39564:14, 39737:3</p> <p><b>change</b> [4] - 39562:23, 39581:12, 39581:17, 39704:6</p> <p><b>changed</b> [3] - 39539:13, 39598:5, 39610:12</p> <p><b>changes</b> [1] - 39631:19</p> <p><b>changing</b> [1] - 39566:15</p> <p><b>chapter</b> [4] - 39647:15, 39648:10, 39693:2, 39694:22</p> <p><b>characterization</b> [2] - 39626:3, 39749:11</p> <p><b>characterize</b> [2] - 39638:22, 39640:9</p> <p><b>characterized</b> [4] - 39639:17, 39640:18, 39682:19, 39704:3</p> <p><b>charge</b> [7] - 39557:13, 39562:15, 39567:13, 39588:10, 39588:16, 39596:11, 39640:5</p> <p><b>charged</b> [4] - 39559:14, 39561:25, 39588:21, 39597:2</p> <p><b>charges</b> [3] - 39558:20, 39559:14, 39592:18</p> <p><b>Charter</b> [1] - 39596:22</p> <p><b>chasing</b> [1] - 39744:4</p> <p><b>chat</b> [2] - 39609:10,</p>	<p>39738:3</p> <p><b>check</b> [4] - 39515:3, 39555:23, 39695:25, 39696:25</p> <p><b>checked</b> [2] - 39686:20, 39731:17</p> <p><b>checking</b> [1] - 39687:2</p> <p><b>chemical</b> [2] - 39731:2, 39736:5</p> <p><b>chest</b> [1] - 39596:8</p> <p><b>Chief</b> [11] - 39563:12, 39597:6, 39638:19, 39646:5, 39701:2, 39701:12, 39708:17, 39721:25, 39741:11, 39742:19, 39746:4</p> <p><b>chief</b> [4] - 39556:11, 39559:11, 39638:15, 39719:23</p> <p><b>child</b> [2] - 39516:14, 39517:4</p> <p><b>Chris</b> [1] - 39503:8</p> <p><b>chromosome</b> [1] - 39734:2</p> <p><b>chromosomes</b> [4] - 39715:9, 39715:13, 39716:1, 39716:5</p> <p><b>chronologically</b> [1] - 39726:8</p> <p><b>Chronology</b> [1] - 39675:7</p> <p><b>chronology</b> [6] - 39675:9, 39676:7, 39680:4, 39681:22, 39682:22, 39684:21</p> <p><b>church</b> [10] - 39515:13, 39534:11, 39535:1, 39535:17, 39545:9, 39545:13, 39546:7, 39547:22, 39547:25, 39548:4</p> <p><b>circles</b> [1] - 39719:25</p> <p><b>circuit</b> [2] - 39747:8, 39747:22</p> <p><b>circulated</b> [3] - 39552:4, 39553:8, 39555:5</p> <p><b>circumstances</b> [13] - 39526:22, 39562:19, 39565:11, 39565:14, 39585:4, 39589:13, 39602:5, 39611:25, 39613:2, 39613:11, 39615:11, 39639:24, 39678:17</p> <p><b>cited</b> [1] - 39597:6</p> <p><b>citizen</b> [2] - 39527:24, 39673:24</p> <p><b>city</b> [4] - 39519:5, 39651:7, 39737:10,</p>	<p>39737:12</p> <p><b>City</b> [3] - 39519:12, 39602:21, 39750:19</p> <p><b>civil</b> [1] - 39703:24</p> <p><b>civilian</b> [1] - 39508:1</p> <p><b>claim</b> [1] - 39570:9</p> <p><b>claimed</b> [1] - 39590:21</p> <p><b>claiming</b> [1] - 39665:7</p> <p><b>claims</b> [1] - 39582:6</p> <p><b>clarify</b> [4] - 39686:11, 39686:18, 39690:16, 39727:4</p> <p><b>Cleaning</b> [1] - 39581:5</p> <p><b>Clear</b> [2] - 39510:3, 39510:6</p> <p><b>clear</b> [7] - 39510:10, 39559:25, 39562:5, 39662:22, 39698:8, 39701:5, 39743:18</p> <p><b>clearly</b> [5] - 39578:9, 39606:18, 39629:15, 39648:1, 39713:22</p> <p><b>Clerk</b> [1] - 39502:9</p> <p><b>client</b> [4] - 39595:22, 39596:1, 39641:17, 39651:23</p> <p><b>client's</b> [1] - 39678:13</p> <p><b>clip</b> [1] - 39648:24</p> <p><b>clippings</b> [3] - 39510:17, 39643:14, 39663:24</p> <p><b>close</b> [2] - 39516:11, 39725:2</p> <p><b>closed</b> [2] - 39747:8, 39747:22</p> <p><b>closed-circuit</b> [2] - 39747:8, 39747:22</p> <p><b>closer</b> [2] - 39531:19, 39531:24</p> <p><b>closing</b> [4] - 39508:23, 39509:4, 39509:9</p> <p><b>clothes</b> [9] - 39557:5, 39575:2, 39575:18, 39575:19, 39581:14, 39581:19, 39583:1, 39611:12</p> <p><b>clothing</b> [4] - 39581:23, 39583:7, 39707:23, 39726:14</p> <p><b>Cnn</b> [1] - 39666:25</p> <p><b>co</b> [5] - 39545:23, 39557:17, 39637:24, 39641:2, 39651:12</p> <p><b>co-operate</b> [1] - 39557:17</p> <p><b>co-operation</b> [2] - 39641:2, 39651:12</p> <p><b>co-operative</b> [1] - 39637:24</p> <p><b>coat</b> [6] - 39536:17,</p>	<p>39536:21, 39536:24, 39537:9, 39544:20, 39557:10</p> <p><b>Code</b> [4] - 39628:6, 39629:23, 39656:13, 39675:11</p> <p><b>codification</b> [2] - 39628:17, 39629:21</p> <p><b>codified</b> [1] - 39629:24</p> <p><b>codifies</b> [1] - 39628:13</p> <p><b>codify</b> [1] - 39628:7</p> <p><b>coerced</b> [1] - 39612:22</p> <p><b>coercion</b> [1] - 39601:2</p> <p><b>coffee</b> [6] - 39519:19, 39540:3, 39540:8, 39540:24, 39541:13, 39541:17</p> <p><b>cognizant</b> [1] - 39700:13</p> <p><b>coincide</b> [1] - 39545:18</p> <p><b>cold</b> [3] - 39513:4, 39513:23, 39647:15</p> <p><b>Coleman</b> [3] - 39664:23, 39665:1, 39667:22</p> <p><b>collected</b> [1] - 39674:5</p> <p><b>colorings</b> [1] - 39592:1</p> <p><b>colour</b> [1] - 39584:9</p> <p><b>coloured</b> [1] - 39537:5</p> <p><b>colourful</b> [1] - 39580:8</p> <p><b>comfort</b> [1] - 39698:16</p> <p><b>comfortable</b> [3] - 39677:7, 39701:9, 39748:2</p> <p><b>coming</b> [10] - 39513:11, 39513:12, 39520:15, 39543:14, 39549:15, 39623:6, 39640:23, 39656:7, 39689:14, 39706:11</p> <p><b>commenced</b> [1] - 39695:16</p> <p><b>comment</b> [8] - 39513:17, 39514:2, 39514:3, 39669:5, 39701:18, 39711:21, 39722:24, 39741:10</p> <p><b>commentary</b> [3] - 39622:17, 39622:19, 39697:12</p> <p><b>comments</b> [3] - 39512:3, 39665:21, 39707:5</p> <p><b>Commission</b> [15] - 39501:2, 39501:14, 39502:1, 39502:2, 39502:9, 39648:13, 39668:11, 39669:15, 39676:5, 39686:13, 39686:15, 39687:7, 39687:14, 39703:15,</p>	<p>39714:5</p> <p><b>commissioned</b> [1] - 39739:25</p> <p><b>Commissioner</b> [84] - 39505:3, 39505:5, 39505:8, 39506:18, 39553:12, 39553:20, 39553:25, 39554:8, 39554:22, 39555:2, 39560:18, 39560:23, 39564:19, 39564:23, 39576:13, 39577:1, 39577:8, 39579:10, 39579:17, 39579:22, 39602:11, 39606:22, 39613:16, 39613:25, 39614:23, 39628:10, 39634:21, 39635:4, 39635:11, 39635:17, 39635:21, 39643:7, 39647:21, 39648:2, 39648:8, 39648:18, 39650:11, 39652:11, 39654:12, 39655:6, 39664:19, 39665:20, 39666:21, 39668:23, 39669:17, 39669:25, 39670:9, 39670:14, 39670:18, 39670:22, 39671:2, 39671:10, 39671:19, 39672:1, 39672:10, 39672:13, 39686:9, 39687:18, 39687:21, 39687:25, 39689:20, 39690:15, 39690:17, 39696:16, 39696:19, 39697:24, 39698:5, 39698:6, 39698:20, 39699:4, 39700:9, 39700:23, 39701:13, 39701:20, 39702:4, 39705:23, 39705:24, 39706:10, 39706:13, 39706:17, 39733:4, 39735:13, 39751:20, 39751:23</p> <p><b>commissions</b> [1] - 39740:14</p> <p><b>commit</b> [4] - 39519:16, 39532:8, 39713:11, 39741:9</p> <p><b>commitments</b> [1] - 39614:2</p> <p><b>committed</b> [7] - 39559:23, 39561:16, 39563:21, 39602:9, 39604:14, 39717:14, 39717:22</p> <p><b>common</b> [2] - 39679:7, 39737:1</p>
---	--	---	---	--



<p><b>communicate</b> [2] - 39645:9, 39646:20</p> <p><b>communicated</b> [5] - 39528:13, 39531:22, 39643:21, 39745:15</p> <p><b>communication</b> [1] - 39643:13</p> <p><b>communications</b> [3] - 39663:12, 39675:23, 39700:15</p> <p><b>comparing</b> [1] - 39733:17</p> <p><b>comparison</b> [1] - 39594:14</p> <p><b>compassion</b> [1] - 39550:13</p> <p><b>compel</b> [3] - 39634:1, 39635:3, 39635:15</p> <p><b>compellability</b> [1] - 39634:22</p> <p><b>complainant</b> [1] - 39735:23</p> <p><b>complaining</b> [1] - 39527:3</p> <p><b>complement</b> [1] - 39715:8</p> <p><b>complementary</b> [1] - 39715:16</p> <p><b>complete</b> [7] - 39530:22, 39658:4, 39658:5, 39660:16, 39692:2, 39704:5, 39717:6</p> <p><b>completed</b> [2] - 39589:23, 39679:3</p> <p><b>completely</b> [1] - 39584:22</p> <p><b>completeness</b> [1] - 39663:14</p> <p><b>component</b> [3] - 39697:14, 39710:16, 39736:2</p> <p><b>compounded</b> [1] - 39727:25</p> <p><b>compulsion</b> [4] - 39628:19, 39628:23, 39633:20, 39633:23</p> <p><b>compulsory</b> [1] - 39632:19</p> <p><b>Compulsory</b> [1] - 39633:5</p> <p><b>computers</b> [1] - 39715:19</p> <p><b>concentrate</b> [1] - 39724:16</p> <p><b>concept</b> [1] - 39541:6</p> <p><b>concern</b> [9] - 39525:10, 39541:7, 39541:23, 39689:23, 39727:25, 39730:6, 39735:20,</p>	<p>39736:15, 39749:21</p> <p><b>concerned</b> [4] - 39584:3, 39670:10, 39693:8, 39730:9</p> <p><b>concerning</b> [5] - 39513:8, 39556:14, 39616:18, 39675:10, 39683:12</p> <p><b>concerns</b> [11] - 39526:21, 39546:23, 39594:4, 39594:7, 39595:5, 39595:9, 39619:2, 39635:5, 39635:6, 39661:23, 39740:20</p> <p><b>conclude</b> [3] - 39559:3, 39559:5, 39651:16</p> <p><b>conclusion</b> [7] - 39558:13, 39584:21, 39585:1, 39615:7, 39616:6, 39617:10, 39617:12</p> <p><b>Conclusions</b> [1] - 39593:14</p> <p><b>conclusions</b> [3] - 39558:14, 39727:3, 39728:10</p> <p><b>condition</b> [2] - 39520:12, 39550:12</p> <p><b>conduct</b> [3] - 39639:20, 39750:2, 39750:25</p> <p><b>conducted</b> [2] - 39566:11, 39616:18</p> <p><b>confabulation</b> [1] - 39583:3</p> <p><b>confessed</b> [3] - 39571:25, 39590:13, 39718:2</p> <p><b>confession</b> [6] - 39570:8, 39590:21, 39590:24, 39591:17, 39592:10, 39717:12</p> <p><b>confessions</b> [1] - 39570:12</p> <p><b>confidence</b> [1] - 39523:15</p> <p><b>confident</b> [1] - 39640:12</p> <p><b>confidential</b> [3] - 39522:12, 39522:22, 39523:9</p> <p><b>confined</b> [1] - 39563:16</p> <p><b>confirm</b> [1] - 39687:12</p> <p><b>confirmation</b> [2] - 39637:20, 39659:17</p> <p><b>confirmed</b> [6] - 39548:19, 39582:16, 39595:19, 39599:4, 39601:10, 39618:3</p> <p><b>confirming</b> [1] -</p>	<p>39598:18</p> <p><b>confirms</b> [1] - 39593:7</p> <p><b>conflict</b> [2] - 39639:3, 39652:3</p> <p><b>confused</b> [1] - 39590:10</p> <p><b>Congram</b> [1] - 39502:3</p> <p><b>conjure</b> [1] - 39532:13</p> <p><b>connected</b> [1] - 39604:5</p> <p><b>connecting</b> [1] - 39605:11</p> <p><b>connection</b> [4] - 39605:13, 39630:6, 39719:3, 39725:23</p> <p><b>consents</b> [2] - 39661:10, 39662:7</p> <p><b>consequence</b> [1] - 39729:3</p> <p><b>consequently</b> [1] - 39705:16</p> <p><b>consider</b> [9] - 39548:23, 39549:20, 39581:16, 39600:24, 39660:24, 39742:8, 39745:12, 39749:9, 39750:1</p> <p><b>considerable</b> [1] - 39683:18</p> <p><b>considerations</b> [1] - 39597:12</p> <p><b>considered</b> [5] - 39587:4, 39591:3, 39596:20, 39616:11, 39722:22</p> <p><b>considering</b> [1] - 39751:3</p> <p><b>consistent</b> [1] - 39588:2</p> <p><b>constable</b> [1] - 39559:12</p> <p><b>constantly</b> [1] - 39583:16</p> <p><b>constituted</b> [2] - 39742:9, 39742:24</p> <p><b>constitutional</b> [1] - 39709:13</p> <p><b>construed</b> [1] - 39520:5</p> <p><b>consult</b> [1] - 39719:22</p> <p><b>consulted</b> [2] - 39692:25, 39693:5</p> <p><b>consumed</b> [1] - 39729:2</p> <p><b>contact</b> [19] - 39511:21, 39524:7, 39527:6, 39584:4, 39585:15, 39637:25, 39640:25, 39644:11, 39645:19, 39645:21, 39645:23, 39645:24, 39646:1,</p>	<p>39646:4, 39646:8, 39656:2, 39656:22, 39662:2, 39662:16</p> <p><b>contacted</b> [1] - 39530:6</p> <p><b>contacting</b> [1] - 39512:22</p> <p><b>contacts</b> [8] - 39585:12, 39585:17, 39588:8, 39588:18, 39588:24, 39589:2, 39597:25, 39663:2</p> <p><b>Contacts</b> [1] - 39597:22</p> <p><b>contain</b> [3] - 39696:13, 39715:22, 39752:5</p> <p><b>contained</b> [12] - 39530:13, 39530:16, 39573:5, 39577:20, 39585:6, 39590:15, 39598:21, 39599:6, 39674:11, 39681:11, 39691:8, 39694:15</p> <p><b>container</b> [1] - 39581:15</p> <p><b>contains</b> [2] - 39628:7, 39634:14</p> <p><b>contamination</b> [1] - 39618:13</p> <p><b>contemporaneous</b> [1] - 39566:18</p> <p><b>contempt</b> [2] - 39597:6, 39597:7</p> <p><b>contend</b> [1] - 39572:5</p> <p><b>content</b> [4] - 39655:16, 39661:8, 39696:18, 39698:21</p> <p><b>contention</b> [1] - 39666:9</p> <p><b>context</b> [14] - 39524:8, 39528:8, 39528:15, 39566:20, 39591:21, 39607:8, 39608:5, 39609:20, 39617:25, 39619:20, 39705:7, 39717:9, 39717:25, 39739:16</p> <p><b>contextual</b> [1] - 39592:1</p> <p><b>continuation</b> [1] - 39527:3</p> <p><b>continue</b> [6] - 39515:3, 39529:3, 39614:3, 39614:21, 39659:9, 39716:15</p> <p><b>Continued</b> [1] - 39504:3</p> <p><b>continued</b> [5] - 39505:10, 39550:4, 39579:7, 39742:9, 39742:24</p> <p><b>continues</b> [3] - 39615:13, 39653:1,</p>	<p>39661:16</p> <p><b>continuing</b> [2] - 39661:20, 39692:5</p> <p><b>continuity</b> [1] - 39518:6</p> <p><b>continuous</b> [1] - 39546:17</p> <p><b>contradiction</b> [2] - 39603:14, 39691:24</p> <p><b>Contrary</b> [1] - 39592:16</p> <p><b>contrasting</b> [1] - 39584:17</p> <p><b>contribute</b> [1] - 39745:25</p> <p><b>contributed</b> [2] - 39737:12, 39750:5</p> <p><b>contributor</b> [1] - 39737:21</p> <p><b>controversies</b> [1] - 39740:20</p> <p><b>controversy</b> [1] - 39744:9</p> <p><b>conventional</b> [2] - 39723:5, 39744:3</p> <p><b>conversation</b> [24] - 39513:10, 39528:15, 39530:12, 39532:20, 39536:4, 39536:9, 39540:2, 39541:17, 39548:14, 39566:7, 39569:13, 39569:14, 39570:1, 39570:2, 39575:14, 39593:8, 39593:10, 39603:4, 39603:8, 39607:18, 39609:3, 39609:8, 39643:12, 39657:11</p> <p><b>conversations</b> [7] - 39511:25, 39526:1, 39566:11, 39567:22, 39645:13, 39651:10, 39661:9</p> <p><b>convey</b> [1] - 39705:20</p> <p><b>Convicted</b> [2] - 39505:15, 39665:13</p> <p><b>convicted</b> [6] - 39520:25, 39521:2, 39588:8, 39618:4, 39653:4, 39665:8</p> <p><b>Conviction</b> [1] - 39501:4</p> <p><b>conviction</b> [6] - 39520:23, 39619:4, 39627:19, 39711:7, 39742:9, 39742:24</p> <p><b>convictions</b> [2] - 39559:18, 39565:10</p> <p><b>convinced</b> [2] - 39592:17, 39670:15</p> <p><b>cooperate</b> [1] - 39633:19</p>
--	---	--	--	--



<p><b>cooperation</b> [2] - 39706:4, 39706:6</p> <p><b>copied</b> [3] - 39642:20, 39648:10, 39671:6</p> <p><b>copies</b> [13] - 39507:25, 39642:5, 39642:13, 39651:6, 39651:14, 39651:19, 39661:17, 39686:14, 39687:19, 39687:23, 39700:6, 39722:17, 39722:18</p> <p><b>copy</b> [13] - 39508:21, 39513:22, 39560:9, 39560:11, 39638:18, 39647:15, 39647:17, 39647:22, 39648:6, 39648:14, 39654:9, 39661:19, 39729:9</p> <p><b>copying</b> [1] - 39659:1</p> <p><b>Corbett</b> [2] - 39595:12, 39595:16</p> <p><b>Corey</b> [2] - 39563:8, 39563:13</p> <p><b>corner</b> [1] - 39689:21</p> <p><b>Corporation</b> [1] - 39654:16</p> <p><b>correct</b> [39] - 39516:23, 39518:22, 39520:17, 39565:17, 39584:19, 39598:6, 39598:16, 39608:9, 39615:24, 39615:25, 39628:8, 39642:14, 39673:21, 39678:3, 39678:20, 39682:12, 39684:18, 39687:11, 39687:23, 39693:3, 39706:24, 39707:7, 39707:11, 39707:25, 39708:5, 39708:6, 39709:14, 39709:18, 39710:15, 39717:19, 39721:13, 39722:9, 39729:8, 39732:15, 39734:8, 39734:11, 39734:21, 39745:1, 39752:5</p> <p><b>Correct</b> [4] - 39505:24, 39564:4, 39567:17, 39577:22</p> <p><b>corrected</b> [2] - 39555:10, 39555:15</p> <p><b>correctly</b> [2] - 39692:24, 39725:14</p> <p><b>corresponded</b> [1] - 39553:14</p> <p><b>correspondence</b> [3] - 39509:16, 39657:16, 39662:23</p> <p><b>corroborates</b> [2] - 39574:15, 39589:25</p>	<p><b>corroborating</b> [2] - 39584:1, 39584:2</p> <p><b>corroboration</b> [1] - 39584:3</p> <p><b>Cory</b> [1] - 39556:12</p> <p><b>cosmetic</b> [1] - 39571:4</p> <p><b>couch</b> [1] - 39746:2</p> <p><b>council</b> [1] - 39712:9</p> <p><b>Counsel</b> [6] - 39502:2, 39505:4, 39676:5, 39678:6, 39682:14, 39683:9</p> <p><b>counsel</b> [68] - 39505:7, 39516:22, 39528:3, 39555:11, 39579:18, 39595:16, 39614:5, 39622:22, 39641:8, 39644:20, 39664:17, 39677:14, 39677:20, 39677:21, 39678:12, 39680:6, 39680:11, 39682:9, 39684:2, 39685:7, 39685:12, 39689:12, 39690:14, 39696:12, 39700:16, 39703:3, 39703:19, 39703:24, 39704:1, 39704:6, 39706:5, 39706:23, 39707:16, 39708:4, 39708:13, 39708:20, 39708:21, 39709:9, 39711:19, 39716:14, 39719:4, 39720:3, 39727:7, 39739:22, 39740:16, 39740:18, 39740:25, 39741:17, 39741:20, 39743:9, 39743:16, 39743:25, 39744:5, 39744:15, 39744:23, 39745:8, 39745:12, 39745:16, 39745:20, 39746:6, 39747:17, 39747:22, 39748:21, 39749:8, 39751:11</p> <p><b>Counsel's</b> [1] - 39703:15</p> <p><b>counselling</b> [2] - 39549:20, 39549:22</p> <p><b>countless</b> [1] - 39743:20</p> <p><b>country</b> [2] - 39747:18, 39748:7</p> <p><b>couple</b> [11] - 39522:20, 39614:1, 39614:5, 39641:19, 39672:21, 39700:11, 39702:8, 39711:12, 39720:15, 39720:25, 39721:4</p> <p><b>course</b> [20] - 39531:14,</p>	<p>39537:25, 39548:21, 39567:15, 39648:20, 39671:12, 39674:5, 39675:3, 39676:24, 39677:10, 39696:11, 39699:2, 39703:10, 39707:19, 39718:25, 39721:24, 39739:4, 39746:18, 39746:20, 39751:14</p> <p><b>Court</b> [63] - 39502:10, 39522:1, 39522:15, 39523:18, 39530:15, 39568:6, 39596:12, 39597:4, 39597:8, 39599:2, 39601:11, 39619:6, 39625:22, 39625:23, 39625:24, 39627:21, 39627:24, 39675:15, 39684:25, 39704:11, 39707:17, 39707:20, 39708:4, 39709:10, 39709:24, 39710:3, 39712:16, 39712:18, 39712:25, 39713:8, 39719:13, 39722:4, 39724:11, 39740:11, 39742:5, 39744:19, 39744:23, 39745:3, 39745:14, 39745:15, 39745:22, 39745:23, 39746:6, 39746:12, 39746:21, 39746:23, 39747:13, 39747:14, 39747:19, 39747:25, 39748:2, 39748:24, 39748:25, 39749:2, 39749:7, 39749:9, 39749:10, 39749:19, 39751:3, 39752:1, 39752:3, 39752:14, 39752:20</p> <p><b>court</b> [13] - 39618:3, 39730:18, 39731:18, 39740:13, 39740:18, 39741:3, 39741:17, 39741:21, 39741:25, 39742:12, 39743:11, 39743:22, 39744:12</p> <p><b>Courts</b> [4] - 39627:25, 39712:8, 39747:8, 39748:23</p> <p><b>court's</b> [1] - 39743:12</p> <p><b>courtesy</b> [1] - 39651:4</p> <p><b>courtroom</b> [1] - 39521:25</p> <p><b>courts</b> [4] - 39619:8, 39619:12, 39619:16, 39723:3</p> <p><b>Courts</b> [1] - 39748:1</p>	<p><b>cover</b> [4] - 39513:23, 39648:1, 39665:6, 39666:25</p> <p><b>covered</b> [2] - 39570:6, 39685:11</p> <p><b>covers</b> [1] - 39567:3</p> <p><b>Cox</b> [2] - 39503:10, 39706:24</p> <p><b>Craik</b> [1] - 39607:2</p> <p><b>crap</b> [1] - 39513:25</p> <p><b>create</b> [2] - 39543:8, 39714:2</p> <p><b>creates</b> [1] - 39604:13</p> <p><b>credibility</b> [1] - 39611:17</p> <p><b>crimes</b> [1] - 39565:12</p> <p><b>criminal</b> [5] - 39587:23, 39666:15, 39709:12, 39715:1, 39717:25</p> <p><b>Criminal</b> [4] - 39628:6, 39629:23, 39656:13, 39675:11</p> <p><b>critical</b> [1] - 39703:17</p> <p><b>criticisms</b> [1] - 39639:25</p> <p><b>criticized</b> [2] - 39638:25, 39675:21</p> <p><b>Crosbie</b> [3] - 39721:6, 39723:22, 39725:4</p> <p><b>cross</b> [4] - 39609:16, 39641:14, 39648:21, 39650:2</p> <p><b>cross-examination</b> [3] - 39641:14, 39648:21, 39650:2</p> <p><b>cross-examining</b> [1] - 39609:16</p> <p><b>crossed</b> [2] - 39557:20, 39580:9</p> <p><b>Crown</b> [14] - 39509:25, 39521:9, 39556:13, 39586:14, 39634:23, 39634:25, 39635:2, 39635:7, 39703:25, 39705:15, 39711:7, 39712:19, 39741:12, 39751:14</p> <p><b>Crr</b> [4] - 39502:11, 39752:2, 39752:18, 39752:19</p> <p><b>crusading</b> [1] - 39668:5</p> <p><b>cry</b> [1] - 39579:13</p> <p><b>crying</b> [2] - 39544:1, 39544:5</p> <p><b>Csr</b> [8] - 39502:10, 39502:11, 39752:2, 39752:12, 39752:13, 39752:18, 39752:19</p> <p><b>Cst</b> [2] - 39602:23, 39602:24</p>	<p><b>Ctv</b> [1] - 39661:19</p> <p><b>Culliton's</b> [1] - 39722:1</p> <p><b>culprit</b> [1] - 39713:21</p> <p><b>cup</b> [1] - 39519:19</p> <p><b>curious</b> [1] - 39730:5</p> <p><b>current</b> [1] - 39729:17</p> <p><b>curriculum</b> [2] - 39707:2, 39710:7</p> <p><b>custody</b> [1] - 39598:15</p> <p><b>Cv</b> [2] - 39695:25, 39712:23</p> <p><b>cycled</b> [1] - 39739:1</p> <p><b>cycles</b> [1] - 39718:18</p> <p><b>Cyr</b> [1] - 39711:15</p> <p><b>cytosine</b> [1] - 39715:17</p>
<b>D</b>				
<p><b>D/sgt</b> [1] - 39602:23</p> <p><b>Dale</b> [3] - 39508:3, 39615:12</p> <p><b>damaged</b> [1] - 39544:21</p> <p><b>Dan</b> [3] - 39661:8, 39661:15, 39662:7</p> <p><b>Danchuk</b> [3] - 39548:7, 39548:15, 39548:18</p> <p><b>Danchuks</b> [3] - 39509:18, 39548:12, 39548:20</p> <p><b>Danchuks'</b> [1] - 39548:17</p> <p><b>data</b> [3] - 39674:14, 39716:13, 39738:9</p> <p><b>date</b> [14] - 39508:22, 39518:9, 39539:8, 39591:25, 39608:14, 39632:10, 39638:19, 39642:2, 39642:7, 39642:24, 39658:24, 39659:3, 39676:9</p> <p><b>dated</b> [18] - 39506:11, 39507:14, 39509:22, 39510:20, 39519:1, 39559:10, 39561:4, 39561:7, 39565:22, 39575:7, 39575:24, 39577:5, 39638:16, 39641:23, 39655:8, 39673:2, 39675:7, 39727:12</p> <p><b>dates</b> [1] - 39645:17</p> <p><b>Dave</b> [1] - 39534:16</p> <p><b>David</b> [79] - 39501:4, 39503:2, 39503:10, 39509:19, 39514:25, 39517:13, 39520:20, 39530:18, 39532:7, 39536:7, 39570:8, 39570:9, 39575:16,</p>				



<p>39582:8, 39582:11, 39582:18, 39582:21, 39583:6, 39590:18, 39591:12, 39593:8, 39600:16, 39602:8, 39606:19, 39607:5, 39607:9, 39607:10, 39607:19, 39608:6, 39608:7, 39611:13, 39616:1, 39617:5, 39619:1, 39631:4, 39631:20, 39632:7, 39634:9, 39644:14, 39646:6, 39654:6, 39655:13, 39655:17, 39657:6, 39658:23, 39658:25, 39659:3, 39660:20, 39660:21, 39661:10, 39662:20, 39662:23, 39663:8, 39672:15, 39674:22, 39675:6, 39675:10, 39677:18, 39677:24, 39680:15, 39682:9, 39686:25, 39687:15, 39694:8, 39706:24, 39707:14, 39710:21, 39711:22, 39713:6, 39714:16, 39720:4, 39739:4, 39739:21, 39742:8, 39742:23, 39745:20, 39749:14, 39749:16, 39751:2 <b>David's</b> [2] - 39509:21, 39620:6 <b>days</b> [11] - 39516:19, 39594:13, 39595:2, 39595:4, 39651:18, 39657:7, 39657:11, 39659:14, 39728:2, 39729:22 <b>daytime</b> [1] - 39540:16 <b>dead</b> [1] - 39536:23 <b>deadline</b> [1] - 39744:5 <b>deal</b> [10] - 39538:17, 39549:22, 39550:16, 39563:24, 39618:17, 39696:17, 39704:7, 39708:11, 39716:4, 39730:9 <b>dealing</b> [7] - 39520:7, 39525:11, 39526:20, 39573:1, 39703:23, 39710:9, 39727:15 <b>dealings</b> [3] - 39546:24, 39573:10, 39748:24 <b>deals</b> [1] - 39554:22 <b>dealt</b> [9] - 39711:3, 39711:10, 39723:3, 39726:19, 39740:24,</p>	<p>39747:19, 39748:16, 39750:4, 39751:1 <b>death</b> [10] - 39559:7, 39565:15, 39599:12, 39601:16, 39615:10, 39665:2, 39667:2, 39667:3, 39668:24, 39746:11 <b>debate</b> [1] - 39669:11 <b>Deborah</b> [5] - 39508:7, 39510:15, 39615:6, 39647:3, 39679:18 <b>December</b> [11] - 39644:13, 39654:8, 39657:3, 39657:4, 39657:9, 39662:17, 39663:7, 39676:25, 39684:24, 39699:16, 39726:1 <b>decide</b> [2] - 39619:12, 39743:13 <b>decided</b> [2] - 39724:14, 39743:6 <b>decides</b> [1] - 39619:13 <b>decision</b> [14] - 39514:5, 39522:1, 39549:24, 39550:18, 39617:16, 39618:3, 39619:15, 39653:14, 39679:2, 39696:5, 39708:17, 39709:18, 39722:5 <b>decisions</b> [1] - 39750:12 <b>defence</b> [7] - 39574:23, 39693:10, 39693:22, 39693:24, 39695:22, 39704:1, 39705:14 <b>Defence</b> [2] - 39505:14, 39665:12 <b>defend</b> [1] - 39704:17 <b>definitely</b> [1] - 39727:20 <b>degraded</b> [4] - 39718:10, 39731:1, 39731:13, 39736:18 <b>degree</b> [1] - 39713:22 <b>delay</b> [2] - 39642:18, 39661:23 <b>delays</b> [2] - 39632:20, 39654:24 <b>delinquent</b> [1] - 39588:12 <b>delivered</b> [3] - 39700:3, 39700:4, 39700:5 <b>demonstrate</b> [1] - 39741:8 <b>denial</b> [2] - 39530:9, 39561:18 <b>denials</b> [2] - 39539:12, 39558:8 <b>denied</b> [12] - 39519:17,</p>	<p>39551:11, 39551:14, 39561:15, 39562:21, 39562:22, 39563:22, 39564:2, 39564:6, 39592:24, 39607:19, 39608:23 <b>denies</b> [2] - 39558:11, 39564:9 <b>Dennis</b> [3] - 39509:20, 39583:15, 39583:22 <b>Department</b> [21] - 39514:14, 39527:17, 39527:18, 39561:12, 39620:10, 39630:7, 39655:3, 39656:3, 39673:10, 39673:19, 39674:23, 39677:22, 39681:17, 39683:10, 39683:11, 39683:15, 39697:8, 39700:17, 39707:6, 39714:17, 39716:10 <b>department</b> [16] - 39603:1, 39636:15, 39642:11, 39646:7, 39654:10, 39657:18, 39658:11, 39658:16, 39681:1, 39684:1, 39684:17, 39696:12, 39700:16, 39704:16, 39716:17, 39723:4 <b>Departmental</b> [3] - 39678:7, 39679:21, 39682:3 <b>departmental</b> [2] - 39695:19, 39703:20 <b>depicted</b> [1] - 39552:5 <b>depot</b> [2] - 39570:8, 39591:13 <b>depth</b> [2] - 39667:20, 39682:25 <b>Deputy</b> [4] - 39556:12, 39563:12, 39638:19, 39724:13 <b>deputy</b> [1] - 39638:15 <b>describe</b> [8] - 39543:20, 39544:4, 39585:17, 39602:4, 39605:11, 39703:8, 39711:18, 39742:21 <b>described</b> [10] - 39544:13, 39545:19, 39557:11, 39581:24, 39589:17, 39679:24, 39682:6, 39682:7, 39694:12, 39741:24 <b>describes</b> [2] - 39676:10, 39701:15 <b>Describes</b> [1] - 39624:22</p>	<p><b>describing</b> [1] - 39537:2 <b>Description</b> [1] - 39504:2 <b>description</b> [6] - 39537:3, 39537:5, 39548:11, 39599:19, 39618:7, 39695:2 <b>descriptor</b> [1] - 39674:13 <b>desire</b> [2] - 39614:2, 39678:14 <b>desk</b> [2] - 39695:3, 39695:10 <b>desperately</b> [1] - 39627:18 <b>despite</b> [4] - 39558:7, 39646:5, 39680:18, 39686:2 <b>Despite</b> [2] - 39558:8, 39564:13 <b>destroyed</b> [6] - 39616:20, 39636:17, 39637:2, 39637:14, 39637:17, 39638:6 <b>destruction</b> [1] - 39566:23 <b>detail</b> [9] - 39516:24, 39586:19, 39591:2, 39592:3, 39608:17, 39676:4, 39684:6, 39702:25 <b>detailed</b> [4] - 39591:7, 39591:14, 39591:19, 39616:15 <b>detailing</b> [2] - 39660:6, 39722:16 <b>details</b> [11] - 39530:11, 39550:23, 39570:3, 39582:2, 39582:4, 39587:10, 39593:10, 39710:19, 39711:4, 39743:20 <b>detective</b> [1] - 39556:12 <b>Detective</b> [9] - 39526:17, 39528:22, 39529:23, 39535:7, 39535:20, 39535:22, 39566:6, 39567:6, 39569:8 <b>detectives</b> [1] - 39594:15 <b>detector</b> [4] - 39524:18, 39525:4, 39573:2, 39573:4 <b>determine</b> [10] - 39521:1, 39565:11, 39573:5, 39585:22, 39615:16, 39674:18, 39730:23, 39730:25,</p>	<p>39731:3, 39743:22 <b>determined</b> [1] - 39645:19 <b>develop</b> [3] - 39680:7, 39730:20, 39731:5 <b>developed</b> [8] - 39512:7, 39717:17, 39718:7, 39718:20, 39729:18, 39739:14, 39741:2, 39744:2 <b>developing</b> [1] - 39735:4 <b>development</b> [1] - 39575:10 <b>developments</b> [1] - 39718:12 <b>develops</b> [1] - 39530:7 <b>Diewold</b> [3] - 39515:18, 39515:22, 39515:23 <b>differ</b> [3] - 39513:21, 39628:20, 39632:17 <b>difference</b> [4] - 39527:17, 39594:11, 39631:4, 39671:16 <b>Different</b> [1] - 39732:22 <b>different</b> [20] - 39566:22, 39581:1, 39582:25, 39589:9, 39671:18, 39700:12, 39701:4, 39703:13, 39714:3, 39717:11, 39732:20, 39733:12, 39733:15, 39733:16, 39733:17, 39733:18, 39734:6, 39735:5 <b>differently</b> [1] - 39649:15 <b>difficult</b> [3] - 39578:8, 39617:4, 39711:24 <b>difficulties</b> [1] - 39518:18 <b>difficulty</b> [5] - 39546:3, 39700:24, 39713:22, 39748:22, 39749:24 <b>digest</b> [1] - 39745:13 <b>Dike</b> [1] - 39602:24 <b>dilemma</b> [1] - 39596:17 <b>direct</b> [1] - 39622:5 <b>direction</b> [4] - 39535:24, 39657:19, 39675:13, 39745:13 <b>directions</b> [1] - 39624:1 <b>directly</b> [3] - 39532:4, 39618:12, 39674:8 <b>Director</b> [1] - 39502:3 <b>disability</b> [1] - 39746:1 <b>disappointing</b> [5] - 39704:5, 39704:8, 39704:10, 39704:15, 39705:19</p>
--	--	--	--	--



<p><b>disappointment</b> [2] - 39703:12, 39703:14 <b>Disappointment</b> [1] - 39703:21 <b>disarray</b> [1] - 39741:16 <b>disbelieve</b> [1] - 39558:9 <b>disbelieving</b> [2] - 39558:10, 39601:11 <b>discern</b> [1] - 39617:13 <b>disclose</b> [1] - 39649:1 <b>disclosed</b> [5] - 39530:10, 39647:9, 39649:2, 39649:20, 39650:22 <b>disclosure</b> [3] - 39566:20, 39649:8, 39651:18 <b>disconnect</b> [2] - 39526:2, 39526:8 <b>discrepancy</b> [1] - 39621:14 <b>discriminatory</b> [2] - 39737:14, 39737:22 <b>discuss</b> [3] - 39574:5, 39579:2, 39580:13 <b>discussed</b> [7] - 39536:6, 39541:14, 39549:9, 39558:15, 39578:23, 39583:11, 39681:11 <b>discussing</b> [3] - 39530:1, 39573:15, 39584:16 <b>discussion</b> [8] - 39530:23, 39540:24, 39591:4, 39592:8, 39593:3, 39687:4, 39695:17, 39747:6 <b>discussions</b> [8] - 39512:23, 39573:20, 39583:14, 39584:5, 39708:13, 39726:2, 39744:12, 39745:7 <b>disjointed</b> [1] - 39541:11 <b>dismay</b> [2] - 39703:12, 39704:19 <b>Dismay</b> [1] - 39704:19 <b>dismayed</b> [1] - 39727:21 <b>dismaying</b> [1] - 39705:6 <b>dismissed</b> [2] - 39622:3, 39622:14 <b>dismissing</b> [2] - 39600:16, 39634:10 <b>dispassionate</b> [1] - 39713:16 <b>displaced</b> [1] - 39533:20 <b>displayed</b> [1] -</p>	<p>39550:13 <b>disrepute</b> [3] - 39618:2, 39618:10, 39619:4 <b>Disseminating</b> [1] - 39523:7 <b>dissemination</b> [2] - 39630:4, 39704:4 <b>dissertation</b> [1] - 39527:5 <b>dissuaded</b> [1] - 39739:21 <b>distant</b> [1] - 39747:9 <b>distinct</b> [1] - 39578:24 <b>distinguish</b> [1] - 39735:7 <b>distraught</b> [1] - 39593:17 <b>disturbing</b> [3] - 39536:24, 39537:7, 39537:10 <b>division</b> [1] - 39748:14 <b>Dna</b>[53] - 39616:8, 39617:5, 39619:1, 39665:10, 39666:2, 39666:3, 39666:6, 39666:11, 39666:19, 39670:6, 39670:7, 39707:22, 39708:23, 39709:3, 39709:22, 39709:23, 39710:3, 39713:9, 39714:11, 39714:14, 39715:8, 39715:12, 39716:12, 39716:13, 39716:20, 39717:2, 39717:8, 39717:17, 39717:24, 39718:17, 39719:3, 39719:24, 39719:25, 39720:6, 39720:24, 39726:14, 39726:24, 39727:15, 39728:4, 39729:16, 39731:25, 39732:14, 39732:24, 39733:16, 39733:20, 39734:1, 39735:3, 39738:9, 39738:17, 39739:6, 39739:22 <b>doc</b> [3] - 39677:3, 39686:21 <b>document</b> [69] - 39506:22, 39507:20, 39514:10, 39514:11, 39514:14, 39515:5, 39518:3, 39528:17, 39532:16, 39552:7, 39552:9, 39556:10, 39558:2, 39560:8, 39565:4, 39573:14, 39575:4, 39577:21, 39584:12, 39593:25,</p>	<p>39598:7, 39600:6, 39602:17, 39602:18, 39605:23, 39605:24, 39606:3, 39621:1, 39623:7, 39626:4, 39630:9, 39636:6, 39636:8, 39637:5, 39638:10, 39638:14, 39638:17, 39641:24, 39642:25, 39643:6, 39643:7, 39645:17, 39650:14, 39654:13, 39655:7, 39655:8, 39657:5, 39658:23, 39672:23, 39673:11, 39675:2, 39675:4, 39675:5, 39675:12, 39675:14, 39675:19, 39676:4, 39677:2, 39677:10, 39684:24, 39685:14, 39686:14, 39686:16, 39686:24, 39687:6, 39687:13, 39688:9, 39690:19 <b>Document</b> [6] - 39502:4, 39502:5, 39502:6, 39511:8, 39511:11, 39520:13 <b>documentaries</b> [1] - 39668:9 <b>documentary</b> [1] - 39515:19 <b>documentation</b> [2] - 39657:17, 39669:9 <b>documented</b> [1] - 39643:18 <b>documents</b> [18] - 39506:1, 39506:6, 39507:16, 39510:14, 39565:3, 39612:5, 39630:23, 39633:8, 39633:14, 39633:22, 39664:5, 39673:22, 39674:24, 39695:2, 39720:16, 39726:8, 39729:14, 39748:10 <b>Don</b>[1] - 39502:11 <b>Donahue</b> [1] - 39668:10 <b>Donald</b> [3] - 39711:14, 39752:2, 39752:19 <b>done</b> [24] - 39536:8, 39539:5, 39550:14, 39568:24, 39606:1, 39614:22, 39616:12, 39635:19, 39651:25, 39652:1, 39655:22, 39665:16, 39666:4, 39679:1, 39699:8, 39702:1, 39727:21, 39728:12, 39728:23,</p>	<p>39728:25, 39730:19, 39730:22, 39734:24, 39751:22 <b>door</b> [17] - 39567:20, 39568:18, 39621:19, 39621:22, 39621:23, 39622:12, 39624:10, 39624:13, 39624:15, 39624:16, 39625:2, 39625:5, 39625:8, 39625:9, 39626:8, 39626:11, 39626:17 <b>dot</b> [3] - 39733:19, 39736:11, 39738:11 <b>dots</b> [2] - 39733:21, 39736:13 <b>double</b> [1] - 39715:15 <b>doubt</b> [4] - 39527:21, 39618:5, 39737:5, 39741:13 <b>Douglas</b> [1] - 39502:2 <b>Down</b> [1] - 39557:6 <b>down</b> [35] - 39507:17, 39508:4, 39509:13, 39515:6, 39527:7, 39534:13, 39536:15, 39549:15, 39551:21, 39555:21, 39557:4, 39557:10, 39558:15, 39577:12, 39597:16, 39624:7, 39624:10, 39625:2, 39625:7, 39625:11, 39625:14, 39625:19, 39625:20, 39626:8, 39626:11, 39636:21, 39642:12, 39646:18, 39659:1, 39688:17, 39711:18, 39729:23, 39736:1, 39736:4, 39747:2 <b>Dq</b> [16] - 39732:4, 39732:7, 39732:11, 39733:1, 39733:7, 39733:10, 39733:19, 39734:13, 39734:15, 39734:24, 39735:17, 39736:10, 39737:1, 39737:17, 39738:1, 39738:10 <b>Dr</b> [20] - 39615:7, 39617:17, 39618:12, 39679:19, 39682:9, 39719:22, 39720:18, 39720:23, 39726:10, 39726:13, 39726:23, 39727:2, 39727:23, 39728:14, 39728:21, 39733:10, 39738:3, 39739:11, 39739:21, 39739:25</p>	<p><b>draft</b> [2] - 39682:5, 39722:7 <b>drafted</b> [3] - 39658:4, 39694:23, 39724:22 <b>drafts</b> [1] - 39693:4 <b>dragged</b> [1] - 39557:22 <b>Dragged</b> [1] - 39562:13 <b>draw</b> [5] - 39512:3, 39637:15, 39638:6, 39650:23, 39673:4 <b>drawn</b> [5] - 39647:17, 39690:5, 39690:7, 39690:9 <b>dress</b> [2] - 39544:22, 39557:10 <b>drew</b> [1] - 39677:1 <b>drive</b> [2] - 39535:9, 39585:21 <b>drive-by</b> [1] - 39535:9 <b>driver</b> [1] - 39582:1 <b>driving</b> [1] - 39519:16 <b>drop</b> [1] - 39709:10 <b>due</b> [2] - 39679:23, 39682:5 <b>duly</b> [1] - 39722:22 <b>During</b> [5] - 39537:13, 39556:6, 39563:14, 39581:7, 39603:8 <b>during</b> [22] - 39512:4, 39512:23, 39519:13, 39521:14, 39537:25, 39540:4, 39540:9, 39546:25, 39556:11, 39566:9, 39573:19, 39589:17, 39589:22, 39628:14, 39664:16, 39675:3, 39684:23, 39703:10, 39707:19, 39712:6, 39726:2, 39739:4 <b>duties</b> [3] - 39696:11, 39703:2, 39703:11 <b>duty</b> [2] - 39528:2, 39695:4 <b>dwelling</b> [1] - 39556:4 <b>Dyck</b> [1] - 39602:25</p>
<div>E</div>				
<p><b>early</b> [14] - 39603:11, 39623:15, 39641:21, 39644:25, 39645:8, 39651:18, 39655:14, 39683:25, 39699:16, 39718:7, 39720:12, 39724:11, 39728:2, 39741:2 <b>easy</b> [2] - 39695:24, 39713:25</p>				



<p><b>eaten</b> [1] - 39606:15</p> <p><b>Eddie</b> [1] - 39503:8</p> <p><b>Edmonton</b> [1] - 39582:15</p> <p><b>Edward</b> [1] - 39501:7</p> <p><b>effect</b> [8] - 39544:14, 39580:11, 39590:6, 39628:7, 39689:8, 39702:12, 39719:14, 39742:10</p> <p><b>effective</b> [1] - 39718:9</p> <p><b>effectively</b> [3] - 39655:17, 39689:25, 39702:15</p> <p><b>effort</b> [1] - 39666:1</p> <p><b>efforts</b> [8] - 39513:9, 39530:19, 39530:20, 39548:4, 39549:15, 39665:11, 39683:19, 39748:12</p> <p><b>egg</b> [1] - 39715:7</p> <p><b>eight</b> [10] - 39594:18, 39657:6, 39657:11, 39675:6, 39678:1, 39686:14, 39686:15, 39686:21, 39687:15, 39687:23</p> <p><b>either</b> [11] - 39536:12, 39540:15, 39549:5, 39582:15, 39614:4, 39638:8, 39693:17, 39715:21, 39728:21, 39736:11, 39738:17</p> <p><b>elaborate</b> [1] - 39703:12</p> <p><b>electronic</b> [1] - 39623:7</p> <p><b>element</b> [1] - 39731:20</p> <p><b>elevator</b> [2] - 39606:11, 39607:3</p> <p><b>elicit</b> [1] - 39613:6</p> <p><b>eliciting</b> [1] - 39743:24</p> <p><b>eliminate</b> [3] - 39543:18, 39718:1, 39737:18</p> <p><b>Elliott</b> [1] - 39509:20</p> <p><b>embarking</b> [1] - 39652:17</p> <p><b>emerged</b> [1] - 39620:20</p> <p><b>emerges</b> [2] - 39530:8, 39584:3</p> <p><b>emotional</b> [5] - 39512:13, 39520:12, 39541:10, 39543:19, 39596:1</p> <p><b>emotionally</b> [1] - 39512:2</p> <p><b>emotions</b> [1] - 39537:14</p> <p><b>emphatically</b> [3] - 39519:11, 39578:14,</p>	<p>39579:4</p> <p><b>employed</b> [2] - 39606:16, 39707:5</p> <p><b>employers</b> [1] - 39696:1</p> <p><b>Emson</b> [1] - 39679:19</p> <p><b>en</b> [1] - 39606:4</p> <p><b>enable</b> [2] - 39724:15, 39729:17</p> <p><b>enabled</b> [1] - 39718:15</p> <p><b>enables</b> [1] - 39731:25</p> <p><b>enacted</b> [1] - 39630:24</p> <p><b>enclose</b> [1] - 39513:3</p> <p><b>encountered</b> [4] - 39639:9, 39712:2, 39719:18, 39727:6</p> <p><b>encouraging</b> [1] - 39720:3</p> <p><b>encroaching</b> [1] - 39701:1</p> <p><b>Encyclopedic</b> [1] - 39743:21</p> <p><b>end</b> [14] - 39533:16, 39534:11, 39545:13, 39549:12, 39585:3, 39615:5, 39626:9, 39692:6, 39701:24, 39713:17, 39720:14, 39736:7, 39748:23</p> <p><b>ended</b> [2] - 39539:21, 39695:9</p> <p><b>ends</b> [2] - 39652:18, 39722:8</p> <p><b>enemy</b> [1] - 39705:11</p> <p><b>engaged</b> [1] - 39658:16</p> <p><b>England</b> [2] - 39717:9, 39738:9</p> <p><b>enhanced</b> [1] - 39583:2</p> <p><b>enlarged</b> [1] - 39613:7</p> <p><b>enormous</b> [1] - 39550:3</p> <p><b>ensure</b> [2] - 39705:2, 39744:24</p> <p><b>enter</b> [2] - 39588:6, 39589:8</p> <p><b>entered</b> [3] - 39559:1, 39565:12, 39703:23</p> <p><b>entering</b> [2] - 39564:11, 39607:2</p> <p><b>entertain</b> [3] - 39593:18, 39743:14, 39743:24</p> <p><b>entertained</b> [3] - 39709:24, 39747:10, 39750:11</p> <p><b>enthralled</b> [1] - 39714:22</p> <p><b>entire</b> [3] - 39521:18, 39550:8, 39576:8</p> <p><b>entirely</b> [1] - 39553:23</p> <p><b>entirety</b> [3] - 39526:3,</p>	<p>39597:23, 39700:6</p> <p><b>entitled</b> [1] - 39513:4</p> <p><b>entry</b> [1] - 39681:14</p> <p><b>environment</b> [1] - 39731:2</p> <p><b>episode</b> [1] - 39593:17</p> <p><b>episodes</b> [2] - 39511:4, 39667:23</p> <p><b>equally</b> [1] - 39713:20</p> <p><b>equidistant</b> [1] - 39621:25</p> <p><b>equipment</b> [2] - 39567:19, 39568:18</p> <p><b>error</b> [2] - 39576:9, 39659:1</p> <p><b>escaping</b> [1] - 39667:25</p> <p><b>escorted</b> [1] - 39541:3</p> <p><b>especially</b> [4] - 39676:7, 39712:4, 39735:22, 39749:23</p> <p><b>Esq</b> [6] - 39503:6, 39503:7, 39503:8, 39503:9, 39503:13, 39503:15</p> <p><b>essentially</b> [11] - 39645:18, 39676:15, 39676:21, 39680:3, 39687:9, 39707:15, 39710:20, 39713:10, 39720:23, 39722:12, 39742:4</p> <p><b>Essentially</b> [1] - 39673:18</p> <p><b>establish</b> [1] - 39716:13</p> <p><b>established</b> [1] - 39668:4</p> <p><b>Estate</b> [5] - 39660:18, 39662:19, 39663:1, 39663:11, 39721:8</p> <p><b>etcetera</b> [1] - 39624:1</p> <p><b>Etcetera</b> [1] - 39722:20</p> <p><b>Eugene</b> [4] - 39503:15, 39504:3, 39505:10, 39747:7</p> <p><b>Europe</b> [1] - 39738:8</p> <p><b>evaluating</b> [1] - 39714:5</p> <p><b>evening</b> [1] - 39535:8</p> <p><b>event</b> [16] - 39528:12, 39531:19, 39531:20, 39531:24, 39544:12, 39544:19, 39550:11, 39566:19, 39590:8, 39594:13, 39611:18, 39677:9, 39679:17, 39680:14, 39683:7, 39744:9</p> <p><b>events</b> [17] - 39520:8, 39530:2, 39531:10, 39574:20, 39582:14, 39582:16, 39608:12,</p>	<p>39618:8, 39675:9, 39675:25, 39679:23, 39682:6, 39682:7, 39682:10, 39683:4, 39683:23, 39696:4</p> <p><b>Events</b> [1] - 39675:7</p> <p><b>eventually</b> [2] - 39564:10, 39637:9</p> <p><b>evidence</b> [79] - 39508:1, 39509:25, 39516:1, 39517:1, 39517:7, 39517:8, 39518:20, 39518:23, 39538:25, 39553:17, 39554:1, 39559:4, 39573:16, 39578:2, 39578:23, 39579:3, 39579:19, 39580:13, 39580:20, 39581:17, 39581:18, 39581:22, 39584:18, 39595:22, 39596:11, 39597:3, 39599:1, 39605:7, 39615:6, 39615:9, 39616:3, 39617:6, 39618:6, 39619:10, 39619:13, 39622:23, 39623:1, 39626:3, 39626:6, 39629:17, 39631:7, 39632:1, 39633:6, 39637:21, 39637:22, 39666:11, 39671:20, 39676:14, 39680:7, 39684:5, 39693:11, 39694:7, 39695:21, 39697:6, 39698:14, 39699:2, 39709:21, 39710:4, 39713:4, 39713:6, 39713:9, 39714:11, 39716:20, 39738:20, 39742:15, 39742:22, 39747:9, 39748:9, 39748:22, 39749:2, 39749:16, 39749:17, 39750:10, 39750:14, 39750:22, 39751:14, 39751:16, 39751:17</p> <p><b>Evidence</b> [1] - 39512:11</p> <p><b>evidenced</b> [1] - 39664:5</p> <p><b>Evidentiary</b> [2] - 39586:22, 39598:2</p> <p><b>eviscerate</b> [1] - 39714:1</p> <p><b>evolutionary</b> [1] - 39716:20</p> <p><b>evolved</b> [1] - 39658:18</p> <p><b>exact</b> [1] - 39645:16</p> <p><b>exactly</b> [7] - 39542:20, 39607:23, 39630:12, 39660:3, 39714:5,</p>	<p>39736:13, 39743:22</p> <p><b>Exactly</b> [3] - 39529:8, 39709:6, 39737:25</p> <p><b>examination</b> [5] - 39556:11, 39641:14, 39648:21, 39650:2, 39681:12</p> <p><b>examination-in-chief</b> [1] - 39556:11</p> <p><b>examine</b> [1] - 39528:2</p> <p><b>examined</b> [1] - 39565:8</p> <p><b>examining</b> [1] - 39609:16</p> <p><b>example</b> [5] - 39635:12, 39668:2, 39745:20, 39748:19, 39749:13</p> <p><b>examples</b> [3] - 39669:12, 39702:8, 39711:12</p> <p><b>excellent</b> [1] - 39613:8</p> <p><b>except</b> [3] - 39572:15, 39708:8, 39748:4</p> <p><b>exception</b> [3] - 39571:13, 39612:9, 39724:6</p> <p><b>exceptions</b> [3] - 39628:16, 39628:18, 39630:12</p> <p><b>excerpt</b> [2] - 39513:3, 39513:20</p> <p><b>excerpts</b> [1] - 39673:8</p> <p><b>exchange</b> [2] - 39582:1, 39664:15</p> <p><b>exchanges</b> [1] - 39584:7</p> <p><b>excited</b> [1] - 39730:16</p> <p><b>excluded</b> [1] - 39587:8</p> <p><b>excuse</b> [2] - 39536:7, 39541:8</p> <p><b>Excuse</b> [3] - 39506:16, 39560:18, 39689:10</p> <p><b>excused</b> [1] - 39706:13</p> <p><b>executed</b> [2] - 39665:1, 39667:17</p> <p><b>execution</b> [1] - 39668:15</p> <p><b>Executive</b> [1] - 39502:3</p> <p><b>exercise</b> [2] - 39627:22, 39635:2</p> <p><b>exhausted</b> [1] - 39723:5</p> <p><b>exhibits</b> [2] - 39708:23, 39720:7</p> <p><b>exist</b> [2] - 39577:10, 39617:14</p> <p><b>existed</b> [2] - 39523:12, 39733:23</p> <p><b>existence</b> [5] - 39556:1, 39616:16, 39630:3, 39650:24, 39733:22</p> <p><b>existing</b> [4] - 39628:8,</p>
---	---	--	--	--





39628:17, 39629:21, 39629:25 <b>exists</b> [1] - 39618:23 <b>exited</b> [3] - 39621:19, 39621:21, 39626:17 <b>exonerate</b> [1] - 39618:14 <b>expect</b> [4] - 39619:9, 39629:17, 39648:22, 39735:6 <b>expectation</b> [2] - 39629:8, 39749:6 <b>expected</b> [2] - 39646:11, 39646:17 <b>expense</b> [1] - 39747:18 <b>experience</b> [8] - 39530:3, 39540:18, 39653:10, 39660:1, 39670:2, 39709:8, 39716:9, 39732:7 <b>experienced</b> [2] - 39540:14, 39541:21 <b>experiences</b> [2] - 39639:8, 39639:14 <b>expert</b> [1] - 39671:21 <b>expertise</b> [1] - 39734:7 <b>explain</b> [4] - 39522:15, 39601:3, 39676:2, 39735:15 <b>explained</b> [2] - 39599:17, 39691:23 <b>explanation</b> [1] - 39626:14 <b>explore</b> [4] - 39594:7, 39594:9, 39612:1, 39612:21 <b>explored</b> [1] - 39698:10 <b>exploring</b> [1] - 39616:11 <b>exposed</b> [1] - 39713:9 <b>exposing</b> [1] - 39596:10 <b>expound</b> [1] - 39750:9 <b>expressed</b> [4] - 39661:23, 39694:6, 39703:6, 39715:13 <b>expressing</b> [2] - 39713:8, 39739:13 <b>extend</b> [1] - 39634:23 <b>extended</b> [2] - 39646:6, 39651:5 <b>extensive</b> [2] - 39539:5, 39548:11 <b>extent</b> [10] - 39512:8, 39612:16, 39617:2, 39631:22, 39700:19, 39705:14, 39726:23, 39728:14, 39740:21, 39744:10 <b>extraction</b> [1] - 39735:25	<b>extreme</b> [1] - 39749:24 <b>extremely</b> [3] - 39591:14, 39719:12, 39736:17 <b>eye</b> [1] - 39619:16  <b>F</b>  <b>face</b> [5] - 39595:7, 39597:7, 39667:13, 39684:22 <b>faceless</b> [3] - 39545:20, 39545:21 <b>facilitate</b> [1] - 39718:14 <b>facilitating</b> [1] - 39744:22 <b>facilities</b> [3] - 39740:14, 39747:8, 39747:21 <b>facility</b> [1] - 39747:14 <b>fact</b> [46] - 39517:3, 39517:12, 39521:11, 39521:20, 39525:6, 39527:23, 39528:5, 39530:17, 39532:7, 39533:8, 39533:17, 39537:1, 39539:12, 39551:10, 39552:17, 39558:17, 39570:18, 39574:8, 39574:9, 39576:10, 39607:19, 39613:13, 39627:9, 39639:8, 39644:19, 39644:21, 39646:5, 39648:25, 39650:2, 39651:14, 39651:23, 39656:6, 39662:16, 39662:24, 39665:21, 39667:23, 39680:18, 39686:17, 39701:1, 39709:20, 39710:4, 39714:25, 39716:3, 39724:21, 39741:9, 39741:14 <b>factor</b> [2] - 39574:7, 39591:2 <b>factors</b> [1] - 39743:20 <b>facts</b> [22] - 39514:1, 39516:17, 39517:18, 39567:24, 39573:6, 39583:21, 39590:15, 39591:24, 39598:21, 39599:6, 39616:7, 39617:14, 39619:24, 39620:1, 39620:20, 39694:24, 39696:10, 39696:14, 39704:18, 39713:24, 39722:1, 39743:21 <b>factual</b> [10] - 39505:16,	39525:20, 39617:1, 39617:20, 39618:22, 39618:23, 39693:5, 39698:7, 39705:2, 39705:13 <b>factually</b> [4] - 39617:21, 39620:11, 39620:17, 39620:18 <b>faded</b> [1] - 39515:6 <b>failed</b> [4] - 39557:17, 39584:13, 39649:1, 39694:23 <b>failings</b> [1] - 39713:13 <b>Fainstein</b> [17] - 39504:9, 39657:24, 39706:9, 39706:17, 39706:18, 39706:20, 39708:12, 39709:12, 39710:7, 39711:20, 39714:8, 39721:10, 39723:23, 39726:9, 39734:3, 39740:6, 39751:22 <b>fair</b> [22] - 39529:10, 39531:25, 39622:18, 39626:2, 39636:10, 39637:15, 39637:21, 39638:21, 39638:23, 39639:12, 39639:21, 39639:24, 39640:4, 39640:9, 39653:19, 39707:23, 39708:25, 39723:11, 39731:19, 39737:24, 39742:13, 39742:21 <b>fairly</b> [11] - 39530:16, 39550:2, 39594:21, 39631:2, 39639:4, 39642:20, 39684:22, 39710:17, 39714:14, 39724:11, 39743:20 <b>fairness</b> [4] - 39643:5, 39739:9, 39742:19, 39749:5 <b>false</b> [1] - 39590:24 <b>familiar</b> [6] - 39517:18, 39567:24, 39652:2, 39664:22, 39708:14, 39714:14 <b>familiarity</b> [3] - 39516:25, 39589:3, 39644:3 <b>family</b> [12] - 39516:12, 39584:4, 39652:8, 39663:6, 39678:15, 39678:18, 39678:21, 39679:4, 39679:8, 39679:15, 39679:16, 39699:20 <b>famous</b> [1] - 39718:2 <b>fantastic</b> [2] - 39714:25,	39715:3 <b>far</b> [14] - 39516:15, 39571:12, 39626:19, 39655:23, 39670:10, 39693:1, 39696:8, 39697:18, 39710:25, 39719:15, 39741:23, 39742:15, 39744:14, 39748:6 <b>fascinated</b> [2] - 39714:18, 39716:7 <b>fashion</b> [2] - 39622:22, 39730:22 <b>faster</b> [2] - 39631:21, 39632:15 <b>favourable</b> [6] - 39616:6, 39617:10, 39617:12, 39702:3, 39702:6, 39702:22 <b>Fbi</b> [1] - 39738:6 <b>fear</b> [1] - 39550:10 <b>features</b> [1] - 39601:6 <b>February</b> [17] - 39510:21, 39556:3, 39557:19, 39600:15, 39657:14, 39657:24, 39658:8, 39658:22, 39658:24, 39659:4, 39677:2, 39677:12, 39680:14, 39684:9, 39696:6, 39696:9, 39721:15 <b>Federal</b> [6] - 39707:21, 39739:5, 39740:7, 39742:6, 39742:7, 39742:11 <b>federal</b> [7] - 39515:2, 39647:23, 39648:7, 39706:23, 39707:6, 39707:16, 39751:11 <b>feedback</b> [2] - 39656:23, 39656:25 <b>feelings</b> [1] - 39513:18 <b>fell</b> [1] - 39740:16 <b>fellow</b> [7] - 39524:17, 39624:2, 39666:14, 39670:4, 39670:17, 39723:16, 39726:13 <b>felt</b> [14] - 39509:25, 39512:11, 39518:14, 39675:23, 39693:15, 39702:9, 39703:13, 39703:16, 39705:6, 39717:14, 39744:2, 39745:24, 39746:6, 39749:8 <b>female</b> [1] - 39736:2 <b>Ferris</b> [11] - 39617:18, 39618:12, 39620:7, 39726:10, 39726:13,	39727:2, 39727:24, 39728:14, 39728:21, 39739:21, 39739:25 <b>Ferris</b> [3] - 39615:7, 39726:23, 39739:11 <b>fess</b> [1] - 39564:15 <b>few</b> [7] - 39541:2, 39541:12, 39612:12, 39685:9, 39685:15, 39686:2, 39722:11 <b>fib</b> [1] - 39529:15 <b>Fifth</b> [5] - 39660:17, 39662:19, 39663:1, 39663:11, 39721:7 <b>figures</b> [1] - 39633:18 <b>file</b> [49] - 39506:9, 39506:11, 39507:5, 39511:4, 39514:18, 39565:22, 39566:23, 39594:23, 39611:6, 39612:12, 39621:3, 39642:19, 39643:6, 39644:3, 39644:8, 39644:17, 39644:20, 39644:22, 39645:2, 39645:6, 39645:12, 39645:20, 39645:22, 39645:24, 39646:12, 39647:4, 39647:10, 39648:9, 39651:5, 39651:8, 39651:9, 39652:5, 39656:6, 39660:16, 39662:8, 39663:5, 39663:18, 39663:20, 39663:24, 39699:12, 39699:25, 39700:1, 39700:2, 39700:6, 39700:7, 39723:9, 39729:15 <b>filed</b> [6] - 39656:2, 39657:3, 39678:2, 39726:1, 39726:18, 39726:22 <b>files</b> [18] - 39514:12, 39514:15, 39514:20, 39514:24, 39555:24, 39636:16, 39636:17, 39637:1, 39637:10, 39637:16, 39638:2, 39638:6, 39643:14, 39647:24, 39648:7, 39674:16, 39683:12, 39711:2 <b>fill</b> [1] - 39698:24 <b>final</b> [3] - 39679:1, 39683:25, 39684:1 <b>finally</b> [2] - 39642:4, 39747:19 <b>Finally</b> [1] - 39691:5 <b>financial</b> [1] - 39680:9
--	--	---	--	--



<p><b>findings</b> [1] - 39698:7</p> <p><b>fine</b> [5] - 39600:1, 39608:3, 39614:4, 39736:22, 39739:2</p> <p><b>fingerprinting</b> [1] - 39717:17</p> <p><b>finish</b> [3] - 39565:3, 39696:19, 39736:25</p> <p><b>finished</b> [1] - 39534:1</p> <p><b>firm</b> [1] - 39645:21</p> <p><b>first</b> [5:1] - 39508:20, 39511:20, 39512:18, 39519:25, 39520:18, 39525:21, 39530:5, 39531:12, 39532:17, 39540:23, 39562:6, 39574:19, 39574:25, 39576:15, 39586:22, 39604:4, 39604:13, 39616:10, 39630:4, 39636:5, 39638:23, 39641:25, 39644:11, 39655:22, 39657:16, 39657:17, 39672:23, 39673:5, 39676:25, 39680:18, 39688:21, 39696:5, 39707:15, 39708:2, 39709:23, 39710:22, 39717:8, 39717:24, 39719:2, 39719:5, 39719:20, 39721:3, 39721:24, 39726:22, 39728:4, 39729:4, 39736:2, 39738:14, 39743:10, 39743:17</p> <p><b>First</b>[1] - 39556:19</p> <p><b>firstly</b> [3] - 39591:25, 39622:6, 39633:24</p> <p><b>Fisher</b>[42] - 39551:7, 39551:11, 39551:14, 39552:8, 39554:15, 39554:23, 39555:3, 39556:14, 39558:11, 39558:17, 39559:13, 39561:18, 39561:25, 39562:17, 39563:3, 39563:4, 39563:6, 39563:15, 39563:16, 39563:20, 39564:9, 39565:3, 39565:7, 39574:23, 39615:10, 39616:15, 39616:19, 39616:23, 39632:9, 39633:15, 39633:25, 39636:15, 39637:10, 39638:3, 39639:1, 39640:2, 39640:11, 39680:16, 39682:1, 39684:16, 39720:4</p>	<p><b>Fishers</b> [7] - 39554:7, 39555:25, 39562:8, 39563:6, 39563:11, 39615:11, 39616:22</p> <p><b>fit</b> [3] - 39609:22, 39629:9, 39629:11</p> <p><b>five</b> [4] - 39558:20, 39657:15, 39707:10, 39713:15</p> <p><b>fixed</b> [1] - 39570:11</p> <p><b>flash</b> [1] - 39556:18</p> <p><b>flashback</b> [11] - 39541:15, 39542:9, 39543:9, 39543:12, 39543:20, 39544:9, 39545:1, 39545:6, 39545:15, 39545:17, 39545:19</p> <p><b>flashbacks</b> [8] - 39540:15, 39540:18, 39541:6, 39541:21, 39542:3, 39546:15, 39546:21, 39547:5</p> <p><b>flashes</b> [1] - 39542:20</p> <p><b>flashlight</b> [1] - 39607:3</p> <p><b>flight</b> [1] - 39614:17</p> <p><b>flights</b> [1] - 39614:19</p> <p><b>flip</b> [1] - 39607:23</p> <p><b>flowing</b> [1] - 39619:11</p> <p><b>fluids</b> [1] - 39739:6</p> <p><b>focus</b> [2] - 39530:20, 39716:5</p> <p><b>focused</b> [3] - 39520:2, 39530:12, 39533:18</p> <p><b>focusing</b> [5] - 39526:2, 39529:25, 39530:19, 39533:15, 39592:3</p> <p><b>folks</b> [1] - 39675:23</p> <p><b>follow</b> [4] - 39613:8, 39628:14, 39676:21, 39689:16</p> <p><b>follow-up</b> [2] - 39613:8, 39628:14</p> <p><b>followed</b> [10] - 39522:2, 39546:21, 39557:14, 39557:20, 39560:3, 39560:7, 39605:18, 39630:9, 39682:10, 39684:7</p> <p><b>following</b> [11] - 39558:18, 39602:22, 39663:4, 39675:9, 39675:15, 39684:25, 39699:2, 39707:20, 39711:21, 39722:15, 39744:16</p> <p><b>follows</b> [3] - 39530:3, 39567:12, 39684:20</p> <p><b>footing</b> [1] - 39709:11</p> <p><b>Force</b>[1] - 39563:15</p>	<p><b>forced</b> [4] - 39557:4, 39557:9, 39557:15</p> <p><b>forces</b> [1] - 39635:13</p> <p><b>Forces</b>[1] - 39738:7</p> <p><b>foreclosed</b> [1] - 39746:15</p> <p><b>foreclosing</b> [1] - 39746:5</p> <p><b>foregoing</b> [1] - 39752:5</p> <p><b>forensic</b> [3] - 39716:23, 39717:9, 39717:25</p> <p><b>Forensic</b>[2] - 39734:18, 39738:8</p> <p><b>forensics</b> [1] - 39510:14</p> <p><b>Forgetful</b>[1] - 39536:14</p> <p><b>forgot</b> [1] - 39569:19</p> <p><b>forgotten</b> [2] - 39600:21, 39601:14</p> <p><b>form</b> [7] - 39521:18, 39629:18, 39634:15, 39648:16, 39676:16, 39678:23, 39680:8</p> <p><b>former</b> [11] - 39639:6, 39641:8, 39692:21, 39693:8, 39693:16, 39695:1, 39696:3, 39697:4, 39697:21, 39698:3, 39746:10</p> <p><b>Fort</b>[1] - 39637:4</p> <p><b>forth</b> [2] - 39515:17, 39716:15</p> <p><b>forthcoming</b> [1] - 39678:22</p> <p><b>fortune</b> [1] - 39724:10</p> <p><b>Forward</b>[1] - 39608:2</p> <p><b>forward</b> [4] - 39647:11, 39657:2, 39657:14, 39725:22</p> <p><b>forwarded</b> [6] - 39654:7, 39658:15, 39662:4, 39677:20, 39678:12, 39681:16</p> <p><b>foundation</b> [3] - 39617:2, 39617:20, 39705:13</p> <p><b>four</b> [9] - 39517:15, 39558:22, 39564:7, 39598:13, 39604:11, 39624:6, 39636:18, 39637:14, 39715:24</p> <p><b>Fourney</b>[5] - 39719:22, 39720:18, 39720:23, 39738:3</p> <p><b>fourth</b> [1] - 39575:7</p> <p><b>fragments</b> [1] - 39734:1</p> <p><b>frame</b> [3] - 39630:2, 39726:2, 39732:3</p> <p><b>framed</b> [7] - 39583:24, 39591:22, 39669:4,</p>	<p>39692:13, 39700:11, 39701:9, 39748:25</p> <p><b>Frank</b>[3] - 39508:7, 39510:15, 39647:2</p> <p><b>frankly</b> [2] - 39509:6, 39591:1</p> <p><b>Frater</b>[3] - 39740:17, 39744:4, 39748:15</p> <p><b>Framer</b>[12] - 39503:10, 39504:7, 39614:15, 39672:14, 39672:15, 39685:3, 39685:15, 39686:2, 39700:23, 39701:20, 39702:13, 39706:24</p> <p><b>free</b> [3] - 39619:6, 39619:7, 39699:2</p> <p><b>Free</b>[1] - 39661:8</p> <p><b>freeing</b> [1] - 39610:24</p> <p><b>freewheeling</b> [1] - 39749:4</p> <p><b>French</b>[2] - 39724:7, 39728:14</p> <p><b>frenzy</b> [1] - 39669:11</p> <p><b>frequency</b> [3] - 39589:2, 39673:6, 39731:6</p> <p><b>frequently</b> [1] - 39583:11</p> <p><b>fresh</b> [3] - 39619:10, 39619:12, 39629:16</p> <p><b>friend</b> [4] - 39665:21, 39670:3, 39701:23, 39702:17</p> <p><b>Friend</b>[6] - 39685:15, 39685:17, 39688:18, 39696:22, 39698:22, 39700:8</p> <p><b>Friends</b> [1] - 39699:23</p> <p><b>friend's</b> [1] - 39666:9</p> <p><b>friends</b> [1] - 39517:13</p> <p><b>Friesen</b>[3] - 39649:21, 39650:6, 39650:17</p> <p><b>frighten</b> [1] - 39589:5</p> <p><b>frightened</b> [1] - 39588:2</p> <p><b>from'</b> [1] - 39715:2</p> <p><b>front</b> [7] - 39515:17, 39624:10, 39624:13, 39625:2, 39625:5, 39708:20, 39712:19</p> <p><b>fronts</b> [1] - 39700:14</p> <p><b>fruits</b> [1] - 39695:5</p> <p><b>frustration</b> [1] - 39656:5</p> <p><b>full</b> [6] - 39625:4, 39641:1, 39651:12, 39688:21, 39715:9, 39724:9</p> <p><b>function</b> [1] - 39710:20</p> <p><b>furthered</b> [1] - 39608:15</p>	<p><b>future</b> [1] - 39619:1</p>
<b>G</b>				
<p><b>Gail</b>[23] - 39517:5, 39536:22, 39544:21, 39552:1, 39559:7, 39570:20, 39571:5, 39582:12, 39582:19, 39592:13, 39599:12, 39601:15, 39615:10, 39621:18, 39621:22, 39622:11, 39623:16, 39624:17, 39626:20, 39649:18, 39707:22, 39726:14, 39746:11</p> <p><b>gal</b> [1] - 39663:20</p> <p><b>gap</b> [1] - 39698:23</p> <p><b>garbage</b> [15] - 39534:9, 39534:13, 39534:17, 39534:20, 39534:22, 39534:24, 39535:2, 39542:11, 39546:5, 39546:9, 39546:16, 39570:11, 39581:15, 39583:6, 39590:22</p> <p><b>Garry</b>[1] - 39637:4</p> <p><b>Gary</b>[2] - 39644:23, 39645:23</p> <p><b>gathering</b> [3] - 39633:6, 39695:4</p> <p><b>Gaudette</b>[1] - 39729:16</p> <p><b>gel</b> [1] - 39661:3</p> <p><b>General</b>[3] - 39719:4, 39724:13, 39741:19</p> <p><b>general</b> [9] - 39570:25, 39578:10, 39675:18, 39678:18, 39681:9, 39684:22, 39692:24, 39701:8, 39712:1</p> <p><b>generalized</b> [1] - 39613:17</p> <p><b>generally</b> [8] - 39649:3, 39711:20, 39716:18, 39726:12, 39727:2, 39740:6, 39740:9, 39745:6</p> <p><b>generated</b> [1] - 39656:4</p> <p><b>genetic</b> [6] - 39715:9, 39718:23, 39728:7, 39735:23, 39737:9</p> <p><b>gentleman</b> [2] - 39665:1, 39667:1</p> <p><b>germane</b> [4] - 39735:9, 39746:7, 39749:9, 39749:25</p> <p><b>Gerse</b>[1] - 39516:18</p> <p><b>Gibson</b>[1] - 39503:9</p> <p><b>gift</b> [1] - 39714:25</p>				



<p><b>Giles</b><sup>[1]</sup> - 39517:8  <b>girl</b><sup>[6]</sup> - 39519:8,  39560:3, 39560:7,  39590:21, 39593:8,  39608:20  <b>Given</b><sup>[2]</sup> - 39588:23,  39617:6  <b>given</b><sup>[41]</sup> - 39508:13,  39508:23, 39519:24,  39526:21, 39547:3,  39562:19, 39570:19,  39574:5, 39574:10,  39574:18, 39578:25,  39580:13, 39580:20,  39585:5, 39591:7,  39592:21, 39593:12,  39595:7, 39596:18,  39596:22, 39611:25,  39617:7, 39644:3,  39644:19, 39645:1,  39645:3, 39650:19,  39651:6, 39651:9,  39657:3, 39657:19,  39684:5, 39694:9,  39701:16, 39702:20,  39708:18, 39712:15,  39731:7, 39739:24,  39748:14, 39749:21  <b>gloss</b><sup>[2]</sup> - 39642:2,  39689:25  <b>glove</b><sup>[1]</sup> - 39659:24  <b>gonna</b><sup>[1]</sup> - 39676:3  <b>goodbye</b><sup>[1]</sup> - 39549:13  <b>gordge</b><sup>[3]</sup> - 39513:6,  39516:2, 39645:3  <b>Government</b><sup>[2]</sup> -  39503:4, 39514:25  <b>government</b><sup>[7]</sup> -  39515:2, 39647:24,  39648:7, 39656:24,  39670:7, 39697:7  <b>Governor</b><sup>[1]</sup> - 39712:9  <b>governor</b><sup>[1]</sup> - 39666:6  <b>Governor-in-council</b><sup>[1]</sup>  - 39712:9  <b>grabbed</b><sup>[4]</sup> - 39557:3,  39557:9, 39557:15,  39557:21  <b>gram</b><sup>[2]</sup> - 39718:17,  39718:22  <b>granted</b><sup>[3]</sup> - 39615:21,  39616:25, 39711:13  <b>grasping</b><sup>[1]</sup> - 39627:12  <b>grateful</b><sup>[1]</sup> - 39549:17  <b>great</b><sup>[4]</sup> - 39538:17,  39614:17, 39696:17,  39747:18  <b>greater</b><sup>[1]</sup> - 39629:11  <b>grilling</b><sup>[2]</sup> - 39580:21,  39580:23</p>	<p><b>grind</b><sup>[1]</sup> - 39713:17  <b>ground</b><sup>[5]</sup> - 39543:22,  39544:16, 39616:22,  39616:23, 39616:25  <b>grounds</b><sup>[2]</sup> - 39617:1,  39705:13  <b>guanine</b><sup>[1]</sup> - 39715:14  <b>guess</b><sup>[16]</sup> - 39512:4,  39517:25, 39525:19,  39526:10, 39539:10,  39539:20, 39548:22,  39590:6, 39593:4,  39599:23, 39618:20,  39628:13, 39638:22,  39703:22, 39711:2,  39736:20  <b>guided</b><sup>[1]</sup> - 39627:24  <b>guidelines</b><sup>[1]</sup> -  39741:22  <b>guilt</b><sup>[4]</sup> - 39510:7,  39562:18, 39592:18,  39617:25  <b>guilty</b><sup>[8]</sup> - 39559:2,  39563:11, 39563:23,  39564:1, 39564:7,  39564:11, 39565:13,  39669:20  <b>gut</b><sup>[1]</sup> - 39667:6  <b>guy</b><sup>[1]</sup> - 39543:23</p>	<p>39513:24, 39515:8,  39516:6, 39647:17,  39686:23, 39687:8,  39687:17, 39688:8  <b>happy</b><sup>[3]</sup> - 39513:12,  39628:1, 39671:25  <b>hard</b><sup>[1]</sup> - 39515:5  <b>hardly</b><sup>[1]</sup> - 39549:14  <b>hardy</b><sup>[1]</sup> - 39736:5  <b>harvested</b><sup>[1]</sup> - 39728:7  <b>head</b><sup>[3]</sup> - 39540:21,  39623:20, 39669:23  <b>headed</b><sup>[4]</sup> - 39623:24,  39627:20, 39627:23,  39675:6  <b>heading</b><sup>[2]</sup> - 39621:6,  39673:6  <b>headlights</b><sup>[3]</sup> -  39515:17, 39534:12,  39535:1  <b>heads</b><sup>[1]</sup> - 39640:20  <b>hear</b><sup>[13]</sup> - 39510:5,  39623:1, 39671:20,  39689:2, 39691:7,  39700:9, 39734:18,  39742:6, 39743:14,  39744:13, 39745:24,  39746:6, 39749:12  <b>heard</b><sup>[16]</sup> - 39541:19,  39586:10, 39618:8,  39622:23, 39622:25,  39631:22, 39653:3,  39653:22, 39670:19,  39688:2, 39713:4,  39716:19, 39734:23,  39738:20, 39748:9,  39751:9  <b>hearing</b><sup>[3]</sup> - 39527:20,  39694:14, 39722:18  <b>heart</b><sup>[1]</sup> - 39562:23  <b>Heather</b><sup>[11]</sup> - 39590:17,  39590:20, 39590:23,  39591:11, 39591:20,  39593:4, 39608:17,  39609:14, 39609:17,  39609:18, 39609:24  <b>heavily</b><sup>[1]</sup> - 39512:1  <b>held</b><sup>[2]</sup> - 39586:7,  39731:13  <b>Helen</b><sup>[1]</sup> - 39516:18  <b>helix</b><sup>[1]</sup> - 39715:15  <b>help</b><sup>[14]</sup> - 39539:3,  39550:16, 39554:13,  39559:24, 39583:19,  39610:24, 39615:10,  39627:1, 39638:13,  39658:21, 39686:13,  39700:8, 39743:24,  39746:15  <b>helped</b><sup>[1]</sup> - 39631:20</p>	<p><b>helpful</b><sup>[5]</sup> - 39523:21,  39537:3, 39537:16,  39735:15, 39739:15  <b>helping</b><sup>[1]</sup> - 39548:13  <b>Henderson</b><sup>[4]</sup> -  39593:22, 39669:5,  39691:1, 39691:4  <b>Henry</b><sup>[2]</sup> - 39721:15,  39723:15  <b>hereby</b><sup>[1]</sup> - 39752:4  <b>herein</b><sup>[1]</sup> - 39752:6  <b>herself</b><sup>[4]</sup> - 39534:25,  39623:14, 39623:18  <b>Hersh</b><sup>[5]</sup> - 39503:2,  39655:13, 39658:25,  39660:20, 39725:7  <b>hesitation</b><sup>[3]</sup> -  39618:23, 39644:6,  39644:10  <b>highlight</b><sup>[2]</sup> -  39554:11, 39712:11  <b>highlights</b><sup>[2]</sup> -  39586:12, 39713:22  <b>highly</b><sup>[3]</sup> - 39580:15,  39596:1, 39713:15  <b>highly-agitated</b><sup>[1]</sup> -  39580:15  <b>himself</b><sup>[1]</sup> - 39595:17  <b>hindsight</b><sup>[3]</sup> -  39528:11, 39649:11,  39714:1  <b>Hinz</b><sup>[3]</sup> - 39502:10,  39752:2, 39752:13  <b>hired</b><sup>[2]</sup> - 39662:18,  39725:15  <b>Historical</b><sup>[2]</sup> -  39586:21, 39598:2  <b>history</b><sup>[4]</sup> - 39521:12,  39521:21, 39667:24,  39671:6  <b>hit</b><sup>[2]</sup> - 39590:21,  39735:14  <b>hits</b><sup>[1]</sup> - 39669:10  <b>hmm</b><sup>[3]</sup> - 39542:4  <b>Hodson</b><sup>[18]</sup> - 39502:2,  39504:10, 39514:17,  39514:22, 39613:24,  39614:11, 39614:20,  39615:3, 39623:11,  39686:12, 39686:20,  39687:12, 39687:20,  39687:22, 39706:1,  39706:16, 39706:19,  39733:6  <b>hold</b><sup>[2]</sup> - 39614:10,  39627:18  <b>home</b><sup>[2]</sup> - 39560:3,  39623:14  <b>Hon</b><sup>[1]</sup> - 39503:12  <b>Honourable</b><sup>[1]</sup> -</p>	<p>39501:6  <b>hope</b><sup>[4]</sup> - 39559:24,  39634:24, 39688:15,  39700:21  <b>hoped</b><sup>[2]</sup> - 39660:23,  39661:3  <b>hopefully</b><sup>[3]</sup> - 39736:3,  39744:5, 39751:21  <b>hoping</b><sup>[1]</sup> - 39660:18  <b>Hopkins</b><sup>[1]</sup> - 39503:13  <b>horse</b><sup>[1]</sup> - 39667:7  <b>hotel</b><sup>[2]</sup> - 39567:21,  39586:5  <b>Hotel</b><sup>[2]</sup> - 39501:16,  39606:14  <b>Hothouse</b><sup>[3]</sup> - 39513:5,  39513:23, 39647:16  <b>hour</b><sup>[1]</sup> - 39664:16  <b>hours</b><sup>[5]</sup> - 39593:24,  39594:18, 39595:3  <b>house</b><sup>[8]</sup> - 39548:2,  39548:5, 39576:15,  39621:21, 39623:4,  39623:21, 39623:24,  39626:16  <b>huge</b><sup>[1]</sup> - 39665:3  <b>Hundt</b><sup>[3]</sup> - 39649:21,  39650:6, 39650:17  <b>hypothesis</b><sup>[1]</sup> -  39626:13  <b>hypothetical</b><sup>[2]</sup> -  39618:11</p>
				<p><b>I</b></p>
				<p><b>Ice</b><sup>[3]</sup> - 39513:4,  39513:23, 39647:15  <b>Ice-cold</b><sup>[3]</sup> - 39513:4,  39513:23, 39647:15  <b>Id</b><sup>[2]</sup> - 39677:3,  39686:21  <b>idea</b><sup>[4]</sup> - 39667:21,  39671:11, 39712:1,  39748:3  <b>identification</b><sup>[2]</sup> -  39638:13, 39680:16  <b>identified</b><sup>[8]</sup> -  39507:10, 39642:25,  39682:15, 39682:21,  39683:12, 39695:20,  39711:12, 39745:2  <b>identify</b><sup>[3]</sup> - 39585:22,  39629:11, 39688:8  <b>ignores</b><sup>[2]</sup> - 39621:17,  39622:10  <b>ill</b><sup>[1]</sup> - 39747:1  <b>image</b><sup>[1]</sup> - 39506:18  <b>imagine</b><sup>[3]</sup> - 39529:4,  39716:3, 39741:16</p>



<p><b>Imagine</b> [1] - 39550:5</p> <p><b>impact</b> [3] - 39550:3, 39652:8, 39704:24</p> <p><b>implausibilities</b> [1] - 39518:19</p> <p><b>implicate</b> [5] - 39600:11, 39600:18, 39605:11, 39689:21, 39691:5</p> <p><b>implicated</b> [22] - 39599:12, 39599:16, 39599:18, 39600:3, 39600:9, 39600:22, 39601:15, 39601:22, 39601:25, 39602:3, 39688:20, 39688:25, 39689:13, 39689:15, 39690:2, 39690:4, 39690:6, 39690:9, 39690:12, 39691:16, 39691:22, 39692:10</p> <p><b>implicating</b> [1] - 39604:2</p> <p><b>implication</b> [1] - 39604:6</p> <p><b>importance</b> [2] - 39582:10, 39699:20</p> <p><b>important</b> [18] - 39521:10, 39522:17, 39574:3, 39574:8, 39601:1, 39602:2, 39617:24, 39628:25, 39630:2, 39631:2, 39680:13, 39686:18, 39713:14, 39714:4, 39716:10, 39744:2, 39746:2, 39749:9</p> <p><b>impossibilities</b> [2] - 39518:19, 39520:6</p> <p><b>Impossibility</b> [1] - 39621:7</p> <p><b>impressed</b> [4] - 39529:5, 39531:7, 39551:9, 39555:21</p> <p><b>impressing</b> [1] - 39529:23</p> <p><b>impression</b> [6] - 39512:1, 39572:20, 39574:1, 39646:16, 39646:20, 39721:24</p> <p><b>Imprimatur</b> [1] - 39746:23</p> <p><b>in-depth</b> [1] - 39682:25</p> <p><b>in-the-media</b> [1] - 39658:17</p> <p><b>inability</b> [3] - 39550:9, 39594:17, 39688:7</p> <p><b>inappropriate</b> [1] - 39640:19</p> <p><b>inappropriately</b> [1] -</p>	<p>39728:12</p> <p><b>incident</b> [5] - 39540:15, 39540:18, 39541:22, 39571:10, 39609:1</p> <p><b>incidentally</b> [1] - 39581:23</p> <p><b>incidents</b> [1] - 39704:13</p> <p><b>include</b> [2] - 39571:3, 39699:12</p> <p><b>included</b> [1] - 39632:8</p> <p><b>including</b> [3] - 39562:1, 39652:3, 39668:14</p> <p><b>incorrect</b> [3] - 39554:20, 39555:18, 39694:24</p> <p><b>increasing</b> [1] - 39661:20</p> <p><b>incriminating</b> [3] - 39530:17, 39570:13, 39601:3</p> <p><b>incurred</b> [1] - 39632:20</p> <p><b>indeed</b> [1] - 39705:18</p> <p><b>Indeed</b> [2] - 39634:19, 39662:1</p> <p><b>independent</b> [3] - 39548:19, 39548:22, 39548:23</p> <p><b>independently</b> [2] - 39548:19, 39609:8</p> <p><b>index</b> [1] - 39509:14</p> <p><b>Index</b> [1] - 39504:1</p> <p><b>indicate</b> [10] - 39522:22, 39523:14, 39523:16, 39528:8, 39551:10, 39551:22, 39648:9, 39650:20, 39655:10, 39714:22</p> <p><b>indicated</b> [16] - 39556:15, 39566:6, 39580:16, 39581:11, 39587:25, 39601:12, 39641:20, 39642:1, 39643:18, 39647:18, 39651:11, 39659:4, 39693:15, 39694:16, 39696:24, 39697:2</p> <p><b>indicates</b> [3] - 39507:6, 39524:20, 39630:8</p> <p><b>indicating</b> [5] - 39559:13, 39669:24, 39708:10, 39721:6, 39725:20</p> <p><b>indication</b> [9] - 39605:17, 39605:18, 39608:18, 39613:9, 39613:10, 39654:25, 39656:23, 39743:10, 39743:17</p> <p><b>indications</b> [2] - 39645:4, 39656:3</p>	<p><b>indistinguishable</b> [1] - 39668:1</p> <p><b>individual</b> [3] - 39707:21, 39737:18, 39743:4</p> <p><b>induced</b> [1] - 39543:12</p> <p><b>infallible</b> [1] - 39671:12</p> <p><b>infer</b> [1] - 39695:3</p> <p><b>inference</b> [3] - 39576:23, 39577:2, 39650:23</p> <p><b>inferences</b> [2] - 39637:16, 39638:7</p> <p><b>inform</b> [2] - 39631:24, 39676:1</p> <p><b>information</b> [69] - 39506:5, 39506:9, 39508:5, 39508:8, 39530:14, 39530:17, 39552:16, 39556:8, 39556:20, 39558:18, 39559:20, 39560:15, 39560:19, 39560:20, 39562:25, 39568:1, 39584:6, 39587:3, 39587:5, 39587:7, 39587:16, 39587:17, 39591:24, 39593:6, 39611:2, 39611:20, 39611:21, 39612:16, 39616:14, 39616:20, 39632:9, 39633:2, 39633:6, 39635:3, 39635:7, 39636:19, 39639:16, 39644:2, 39644:7, 39646:12, 39646:24, 39647:1, 39647:2, 39647:4, 39649:1, 39651:16, 39652:4, 39656:7, 39673:4, 39673:14, 39674:11, 39676:8, 39676:11, 39676:14, 39676:22, 39677:22, 39680:12, 39680:15, 39680:22, 39681:13, 39682:8, 39694:9, 39715:22, 39728:10, 39742:7, 39742:11, 39742:22, 39749:18</p> <p><b>informational</b> [1] - 39697:14</p> <p><b>informations</b> [1] - 39556:22</p> <p><b>informed</b> [3] - 39520:10, 39633:9, 39635:10</p> <p><b>informing</b> [1] - 39629:7</p> <p><b>infusion</b> [1] - 39591:24</p> <p><b>inherent</b> [1] - 39713:23</p>	<p><b>initial</b> [5] - 39520:18, 39530:9, 39592:4, 39633:12, 39663:2</p> <p><b>initiated</b> [1] - 39662:15</p> <p><b>injustice</b> [1] - 39722:17</p> <p><b>Inland</b> [1] - 39502:13</p> <p><b>innocence</b> [7] - 39510:7, 39618:1, 39665:4, 39666:5, 39668:9, 39670:15, 39672:4</p> <p><b>innocent</b> [16] - 39616:2, 39617:22, 39619:18, 39620:11, 39620:17, 39620:18, 39653:6, 39664:13, 39667:3, 39667:17, 39668:15, 39668:25, 39672:6, 39713:7, 39713:19, 39721:7</p> <p><b>input</b> [1] - 39693:1</p> <p><b>inquire</b> [1] - 39662:24</p> <p><b>inquiries</b> [6] - 39517:12, 39616:18, 39636:11, 39636:23, 39639:17, 39681:10</p> <p><b>inquiry</b> [20] - 39507:17, 39507:20, 39508:1, 39517:7, 39568:13, 39574:22, 39586:12, 39587:24, 39589:18, 39628:15, 39645:16, 39650:1, 39650:4, 39650:7, 39650:13, 39693:12, 39694:8, 39695:21, 39700:15, 39740:14</p> <p><b>Inquiry</b> [7] - 39501:2, 39501:23, 39658:19, 39670:10, 39672:9, 39675:3, 39683:7</p> <p><b>insert</b> [2] - 39590:24, 39591:16</p> <p><b>inserted</b> [2] - 39590:20, 39598:3</p> <p><b>insisted</b> [1] - 39751:8</p> <p><b>insisting</b> [1] - 39604:16</p> <p><b>insofar</b> [1] - 39663:11</p> <p><b>Insofar</b> [1] - 39583:21</p> <p><b>Inspector</b> [4] - 39525:11, 39526:20, 39549:9, 39567:20</p> <p><b>installment</b> [1] - 39676:16</p> <p><b>instalments</b> [3] - 39660:4, 39682:20, 39702:15</p> <p><b>instance</b> [3] - 39571:21, 39669:19, 39745:23</p> <p><b>instances</b> [3] -</p>	<p>39594:19, 39736:7, 39745:20</p> <p><b>institutions</b> [1] - 39668:4</p> <p><b>instruction</b> [1] - 39636:12</p> <p><b>insult</b> [1] - 39731:2</p> <p><b>intellectual</b> [1] - 39627:22</p> <p><b>intelligent</b> [2] - 39652:22, 39713:16</p> <p><b>intending</b> [2] - 39522:23, 39522:25</p> <p><b>intense</b> [1] - 39688:24</p> <p><b>intensive</b> [1] - 39585:15</p> <p><b>intensively</b> [1] - 39578:6</p> <p><b>interaction</b> [2] - 39749:15, 39750:15</p> <p><b>interchanges</b> [1] - 39743:9</p> <p><b>interest</b> [5] - 39539:17, 39539:19, 39639:3, 39709:16, 39749:8</p> <p><b>interested</b> [5] - 39507:11, 39508:2, 39595:21, 39636:9, 39636:25</p> <p><b>interesting</b> [4] - 39589:20, 39635:1, 39635:2, 39635:8</p> <p><b>interests</b> [2] - 39744:1, 39751:7</p> <p><b>interim</b> [1] - 39634:15</p> <p><b>interject</b> [1] - 39721:22</p> <p><b>interjects</b> [1] - 39538:12</p> <p><b>Internet</b> [1] - 39669:10</p> <p><b>interpret</b> [3] - 39548:9, 39590:7, 39627:15</p> <p><b>interpretation</b> [3] - 39533:14, 39576:22, 39627:17</p> <p><b>interpreted</b> [1] - 39530:8</p> <p><b>interrupt</b> [2] - 39613:25, 39614:20</p> <p><b>interrupted</b> [1] - 39546:19</p> <p><b>intervening</b> [2] - 39511:19, 39561:2</p> <p><b>intervention</b> [3] - 39632:10, 39632:11, 39668:14</p> <p><b>interview</b> [46] - 39518:4, 39518:9, 39519:7, 39519:22, 39520:14, 39526:23, 39527:4, 39530:11, 39537:13, 39540:4,</p>
---	--	---	--	---



39540:5, 39540:9, 39540:10, 39549:12, 39551:6, 39551:8, 39552:8, 39554:4, 39554:15, 39558:5, 39560:13, 39564:14, 39565:23, 39565:24, 39568:24, 39577:6, 39577:16, 39577:18, 39577:20, 39581:7, 39584:14, 39591:6, 39592:5, 39597:16, 39598:4, 39603:13, 39606:24, 39615:15, 39632:24, 39633:24, 39633:25, 39679:18, 39690:20, 39691:1, 39691:4 <b>interviewed</b> [20] - 39519:5, 39519:9, 39524:16, 39525:17, 39538:18, 39561:14, 39563:15, 39572:13, 39575:25, 39587:20, 39589:5, 39589:7, 39595:10, 39598:8, 39598:13, 39598:14, 39600:24, 39602:21, 39608:21, 39612:9 <b>interviewing</b> [4] - 39516:4, 39575:12, 39597:24, 39632:22 <b>interviews</b> [5] - 39539:5, 39566:10, 39600:19, 39603:15, 39616:16 <b>intimate</b> [1] - 39516:25 <b>intimidate</b> [1] - 39589:6 <b>intimidated</b> [2] - 39588:15, 39612:22 <b>introduce</b> [1] - 39640:22 <b>introducing</b> [1] - 39541:6 <b>introduction</b> [2] - 39521:19, 39673:5 <b>introductions</b> [2] - 39506:7, 39520:18 <b>intuit</b> [1] - 39517:25 <b>invention</b> [1] - 39718:13 <b>invested</b> [1] - 39512:1 <b>investigate</b> [4] - 39605:10, 39639:19, 39681:3, 39711:9 <b>investigating</b> [7] - 39528:23, 39531:5, 39639:7, 39640:2, 39640:11, 39717:13, 39729:8	<b>investigation</b> [16] - 39519:8, 39529:24, 39566:13, 39575:11, 39615:15, 39639:1, 39639:11, 39640:6, 39640:16, 39676:19, 39679:3, 39681:2, 39695:13, 39708:1, 39746:11, 39749:14 <b>investigations</b> [3] - 39597:1, 39681:25, 39695:6 <b>investigator</b> [2] - 39684:3, 39711:1 <b>investigators</b> [1] - 39653:25 <b>invitation</b> [2] - 39600:10, 39646:6 <b>invited</b> [4] - 39577:23, 39644:21, 39645:2, 39741:17 <b>involved</b> [22] - 39511:5, 39593:24, 39595:4, 39603:25, 39605:5, 39605:15, 39605:22, 39640:17, 39659:19, 39662:14, 39664:2, 39665:4, 39709:17, 39710:9, 39710:14, 39710:25, 39716:16, 39732:15, 39736:15, 39743:19, 39746:10, 39748:21 <b>involvement</b> [14] - 39663:5, 39664:1, 39707:13, 39708:1, 39708:3, 39708:6, 39710:2, 39711:16, 39711:19, 39714:12, 39714:15, 39719:2, 39724:24, 39729:7 <b>involving</b> [2] - 39709:12, 39709:20 <b>Irene</b> [1] - 39502:9 <b>irresponsible</b> [1] - 39665:17 <b>Isabelle</b> [1] - 39502:5 <b>issue</b> [21] - 39510:4, 39510:7, 39574:16, 39609:14, 39609:17, 39640:16, 39649:13, 39660:9, 39665:25, 39670:6, 39670:8, 39670:10, 39699:19, 39726:20, 39738:17, 39741:2, 39742:23, 39744:13, 39749:13, 39750:24, 39751:2 <b>issued</b> [2] - 39741:21, 39746:21	<b>issues</b> [9] - 39549:23, 39581:2, 39583:17, 39619:12, 39710:3, 39714:15, 39727:16, 39743:23, 39744:7 <b>item</b> [1] - 39597:21 <b>itemizes</b> [1] - 39556:24 <b>items</b> [4] - 39558:3, 39695:20, 39702:11, 39720:25 <b>itself</b> [8] - 39508:5, 39551:8, 39551:13, 39600:13, 39605:23, 39648:16, 39677:11, 39691:9	39526:19, 39527:3, 39527:24, 39531:1, 39532:9, 39535:19, 39541:10, 39547:24, 39549:3, 39549:5, 39549:13, 39549:25, 39550:2, 39550:19, 39569:15, 39573:11, 39573:14, 39582:8, 39589:21, 39590:5, 39593:7, 39593:9, 39593:12, 39608:23, 39608:25, 39609:5, 39609:9, 39615:13, 39679:19, 39694:7, 39694:15, 39721:6, 39749:22, 39750:15 <b>Johrls</b> [7] - 39508:14, 39518:19, 39621:7, 39693:11, 39694:20, 39695:21, 39749:24 <b>joined</b> [1] - 39725:13 <b>Joseph</b> [1] - 39718:3 <b>journalism</b> [1] - 39667:24 <b>journalist</b> [1] - 39516:3 <b>Joyce</b> [5] - 39503:3, 39505:13, 39524:9, 39679:13, 39681:15 <b>joyriding</b> [1] - 39588:6 <b>judge</b> [4] - 39593:19, 39596:7, 39599:17, 39704:12 <b>Judge</b> [1] - 39667:13 <b>judgement</b> [1] - 39712:17 <b>judgments</b> [1] - 39722:19 <b>Judicial</b> [1] - 39521:11 <b>judicial</b> [3] - 39521:21, 39634:15, 39713:3 <b>July</b> [14] - 39551:6, 39556:9, 39556:16, 39565:22, 39566:3, 39574:19, 39597:17, 39600:20, 39606:25, 39609:16, 39612:1, 39683:7, 39683:15, 39690:21 <b>jump</b> [1] - 39657:2 <b>junction</b> [1] - 39750:23 <b>June</b> [18] - 39565:23, 39577:5, 39577:6, 39577:15, 39577:16, 39584:12, 39584:14, 39584:22, 39591:22, 39594:12, 39595:12, 39600:17, 39610:12, 39641:23, 39642:3, 39642:9, 39682:13,	39689:4 <b>jurisdiction</b> [1] - 39560:1 <b>jury</b> [4] - 39572:4, 39618:8, 39622:23, 39623:1 <b>justice</b> [13] - 39514:12, 39615:17, 39618:2, 39618:10, 39619:4, 39656:8, 39663:9, 39725:13, 39742:10, 39742:20, 39742:25, 39749:6, 39751:4 <b>Justice</b> [36] - 39501:6, 39503:11, 39503:13, 39514:15, 39520:22, 39597:6, 39620:10, 39630:7, 39631:8, 39654:8, 39655:2, 39656:3, 39672:16, 39673:2, 39679:18, 39680:21, 39692:21, 39697:4, 39697:8, 39697:21, 39698:3, 39698:4, 39698:9, 39700:17, 39701:2, 39701:12, 39701:16, 39707:6, 39707:21, 39708:17, 39714:17, 39716:11, 39721:25, 39741:11, 39742:19, 39746:4 <b>justices</b> [1] - 39713:15 <b>justify</b> [1] - 39652:18 <b>juvenile</b> [1] - 39588:12 <b>juxtaposition</b> [1] - 39690:10				
<b>J</b>								
<b>jackknife</b> [1] - 39557:12 <b>jail</b> [12] - 39539:14, 39561:14, 39586:2, 39586:8, 39588:23, 39613:3, 39619:19, 39620:19, 39631:21, 39632:7, 39632:16, 39634:9 <b>January</b> [17] - 39531:11, 39531:13, 39531:15, 39551:15, 39570:24, 39603:11, 39656:19, 39657:4, 39657:11, 39657:24, 39662:17, 39664:21, 39666:24, 39680:5, 39680:10, 39720:14, 39721:5 <b>Jay</b> [2] - 39502:13, 39503:6 <b>Jeffries</b> [2] - 39717:16, 39717:17 <b>Jennifer</b> [2] - 39503:10, 39706:24 <b>Jerry</b> [1] - 39502:12 <b>Joanne</b> [3] - 39503:3, 39505:13, 39511:9 <b>job</b> [6] - 39521:1, 39521:5, 39522:19, 39646:12, 39743:12, 39748:25 <b>Jodie</b> [3] - 39502:6, 39511:8, 39511:11 <b>Joe</b> [1] - 39646:5 <b>John</b> [49] - 39506:15, 39508:2, 39508:17, 39508:19, 39518:4, 39518:6, 39518:9, 39519:21, 39520:1, 39520:14, 39524:7, 39524:9, 39525:6,								
<b>K</b>								
<b>Kara</b> [1] - 39502:5 <b>Karen</b> [3] - 39502:10, 39752:2, 39752:13 <b>Karst</b> [16] - 39503:8, 39519:1, 39563:1, 39565:24, 39566:6, 39567:6, 39567:15, 39569:9, 39592:25, 39594:9, 39598:8, 39602:17, 39603:3, 39746:18, 39750:22 <b>Karst's</b> [2] - 39606:4, 39750:14 <b>keep</b> [2] - 39505:17, 39613:19 <b>keeping</b> [3] - 39592:3, 39655:1, 39656:14 <b>Keith</b> [1] - 39664:23 <b>Ken</b> [5] - 39574:20,								



<p>39574:21, 39575:17, 39575:20, 39685:6 <b>Kendry</b><sup>[4]</sup> - 39502:6, 39511:8, 39511:11, 39577:10 <b>Kenneth</b><sup>[5]</sup> - 39503:15, 39574:18, 39575:13, 39575:25, 39576:25 <b>Kenny</b><sup>[3]</sup> - 39583:5, 39583:9, 39611:21 <b>kept</b><sup>[6]</sup> - 39522:12, 39522:22, 39523:9, 39523:11, 39523:15, 39539:12 <b>kerfuffle</b><sup>[1]</sup> - 39741:5 <b>key</b><sup>[1]</sup> - 39680:3 <b>kicked</b><sup>[1]</sup> - 39667:6 <b>kid</b><sup>[1]</sup> - 39589:1 <b>kill</b><sup>[3]</sup> - 39551:16, 39582:8, 39582:9 <b>killed</b><sup>[3]</sup> - 39582:18, 39592:13, 39666:15 <b>killer</b><sup>[1]</sup> - 39683:13 <b>killing</b><sup>[2]</sup> - 39608:24, 39609:11 <b>Kim</b><sup>[2]</sup> - 39697:2, 39697:3 <b>kind</b><sup>[7]</sup> - 39580:9, 39586:18, 39600:13, 39674:19, 39698:13, 39705:10, 39731:2 <b>kinds</b><sup>[1]</sup> - 39660:15 <b>kitchen</b><sup>[1]</sup> - 39554:25 <b>kits</b><sup>[1]</sup> - 39738:11 <b>knees</b><sup>[1]</sup> - 39544:6 <b>knife</b><sup>[43]</sup> - 39510:19, 39511:5, 39544:1, 39544:3, 39544:21, 39552:3, 39552:14, 39552:22, 39553:7, 39553:14, 39553:16, 39553:21, 39554:2, 39554:5, 39554:24, 39555:4, 39557:3, 39557:5, 39557:6, 39557:9, 39557:11, 39557:16, 39557:24, 39557:25, 39559:17, 39560:6, 39589:17, 39589:21, 39606:9, 39606:13, 39606:19, 39607:9, 39607:19, 39607:20, 39607:22, 39608:6, 39608:10, 39608:11, 39627:11, 39643:15, 39663:22 <b>knife-wielding</b><sup>[2]</sup> - 39643:15, 39663:22 <b>knives</b><sup>[1]</sup> - 39551:25 <b>knowing</b><sup>[2]</sup> - 39647:3,</p>	<p>39649:12 <b>knowledge</b><sup>[12]</sup> - 39510:2, 39561:16, 39563:22, 39591:19, 39617:7, 39633:4, 39640:12, 39674:2, 39679:7, 39738:16, 39743:21, 39752:7 <b>known</b><sup>[8]</sup> - 39532:7, 39620:13, 39672:19, 39696:1, 39719:24, 39720:5, 39725:9, 39728:15 <b>knows</b><sup>[2]</sup> - 39653:21, 39698:9 <b>Knox</b><sup>[20]</sup> - 39503:5, 39504:6, 39614:14, 39641:6, 39641:8, 39648:19, 39666:21, 39668:18, 39668:22, 39669:3, 39669:8, 39669:23, 39671:1, 39671:4, 39671:23, 39672:2, 39672:7, 39672:11, 39677:1, 39681:12 <b>Krogan</b><sup>[1]</sup> - 39503:4 <b>Krogan-stevely</b><sup>[1]</sup> - 39503:4 <b>Kujawa</b><sup>[1]</sup> - 39503:6</p>	<p><b>landmarks</b><sup>[2]</sup> - 39535:13, 39585:23 <b>lane</b><sup>[3]</sup> - 39557:4, 39557:10, 39557:15 <b>lanes</b><sup>[1]</sup> - 39625:15 <b>laneway</b><sup>[1]</sup> - 39581:15 <b>language</b><sup>[5]</sup> - 39533:20, 39581:6, 39600:13, 39642:8, 39648:24 <b>Lapchuk</b><sup>[5]</sup> - 39508:6, 39611:4, 39611:6, 39611:8, 39611:10 <b>large</b><sup>[2]</sup> - 39642:20, 39695:9 <b>larger</b><sup>[1]</sup> - 39737:23 <b>Larry</b><sup>[17]</sup> - 39551:7, 39556:14, 39558:11, 39558:17, 39562:8, 39563:11, 39616:22, 39616:23, 39633:15, 39633:24, 39639:1, 39640:2, 39640:11, 39680:16, 39681:25, 39684:16, 39720:4 <b>last</b><sup>[9]</sup> - 39521:17, 39547:18, 39561:3, 39575:11, 39620:25, 39655:18, 39669:9, 39687:5, 39726:11 <b>Last</b><sup>[1]</sup> - 39593:14 <b>late</b><sup>[5]</sup> - 39638:2, 39667:11, 39699:16, 39716:21, 39729:25 <b>latter</b><sup>[3]</sup> - 39581:8, 39697:16, 39735:19 <b>law</b><sup>[6]</sup> - 39512:7, 39630:24, 39645:21, 39666:15, 39703:23, 39709:13 <b>lawyer</b><sup>[7]</sup> - 39527:16, 39644:23, 39693:10, 39693:22, 39693:25, 39695:22, 39723:23 <b>lay</b><sup>[1]</sup> - 39731:24 <b>laying</b><sup>[2]</sup> - 39543:22, 39558:19 <b>lead</b><sup>[6]</sup> - 39510:11, 39533:7, 39533:17, 39707:4, 39721:1, 39744:7 <b>leading</b><sup>[4]</sup> - 39532:1, 39532:3, 39534:7, 39684:9 <b>Leahy</b><sup>[1]</sup> - 39667:12 <b>learn</b><sup>[2]</sup> - 39568:16, 39719:10 <b>learned</b><sup>[12]</sup> - 39541:8, 39541:15, 39541:18, 39567:25, 39568:13,</p>	<p>39583:14, 39593:16, 39610:17, 39645:7, 39712:6, 39713:15, 39746:24 <b>Learned</b><sup>[4]</sup> - 39685:15, 39685:17, 39696:22, 39698:22 <b>least</b><sup>[11]</sup> - 39521:21, 39555:9, 39593:23, 39675:23, 39680:19, 39690:5, 39693:1, 39695:3, 39697:2, 39699:8, 39713:20 <b>leave</b><sup>[3]</sup> - 39720:24, 39747:15, 39747:24 <b>leaving</b><sup>[1]</sup> - 39517:16 <b>led</b><sup>[3]</sup> - 39509:24, 39522:1, 39639:9 <b>left</b><sup>[20]</sup> - 39517:14, 39519:15, 39519:18, 39536:23, 39569:19, 39569:21, 39571:2, 39571:11, 39571:13, 39598:10, 39603:16, 39604:12, 39607:5, 39612:12, 39623:15, 39623:18, 39623:25, 39627:9, 39627:12, 39741:16 <b>legal</b><sup>[3]</sup> - 39596:15, 39717:3, 39726:3 <b>legally</b><sup>[1]</sup> - 39725:5 <b>legislation</b><sup>[1]</sup> - 39716:12 <b>length</b><sup>[8]</sup> - 39519:6, 39598:15, 39643:3, 39675:6, 39675:21, 39683:18, 39733:25, 39750:20 <b>lengthy</b><sup>[4]</sup> - 39507:20, 39527:4, 39600:19, 39663:5 <b>Leslie</b><sup>[1]</sup> - 39509:21 <b>less</b><sup>[11]</sup> - 39522:2, 39530:7, 39533:21, 39539:21, 39640:22, 39697:2, 39697:9, 39701:25, 39735:18, 39737:15, 39739:18 <b>Lett</b><sup>[3]</sup> - 39661:9, 39661:15, 39662:7 <b>letter</b><sup>[76]</sup> - 39507:14, 39511:17, 39511:21, 39512:25, 39513:19, 39556:12, 39556:16, 39559:10, 39560:9, 39560:17, 39560:25, 39561:2, 39561:4, 39561:6, 39561:7, 39561:11, 39563:8,</p>	<p>39563:9, 39563:10, 39600:14, 39600:15, 39601:7, 39637:6, 39637:8, 39637:9, 39638:18, 39638:22, 39640:8, 39641:22, 39642:2, 39642:3, 39642:8, 39642:16, 39642:23, 39642:24, 39643:20, 39654:8, 39654:13, 39655:1, 39655:2, 39657:4, 39657:8, 39658:4, 39658:8, 39658:22, 39658:24, 39659:2, 39659:7, 39659:13, 39659:21, 39660:9, 39677:12, 39680:5, 39680:11, 39684:9, 39690:8, 39696:9, 39696:13, 39719:12, 39719:18, 39721:6, 39721:12, 39721:15, 39722:8, 39723:9, 39723:14, 39723:21, 39724:22, 39725:3, 39725:19, 39725:20, 39729:19, 39729:22, 39729:25, 39740:4 <b>letters</b><sup>[6]</sup> - 39641:18, 39641:19, 39642:5, 39642:13, 39708:9, 39721:4 <b>level</b><sup>[1]</sup> - 39591:1 <b>liaised</b><sup>[1]</sup> - 39740:17 <b>liaising</b><sup>[1]</sup> - 39744:23 <b>liberty</b><sup>[1]</sup> - 39705:1 <b>lie</b><sup>[8]</sup> - 39524:18, 39525:4, 39529:15, 39532:2, 39572:2, 39573:2, 39573:4, 39618:7 <b>lied</b><sup>[2]</sup> - 39532:9, 39572:7 <b>lies</b><sup>[1]</sup> - 39572:16 <b>Lieutenant</b><sup>[1]</sup> - 39598:8 <b>life</b><sup>[2]</sup> - 39593:18, 39596:3 <b>light</b><sup>[7]</sup> - 39570:17, 39606:17, 39613:12, 39640:16, 39723:8, 39724:21, 39749:23 <b>lightly</b><sup>[1]</sup> - 39670:11 <b>likelihood</b><sup>[1]</sup> - 39596:22 <b>likely</b><sup>[6]</sup> - 39638:24, 39639:10, 39639:25, 39648:6, 39695:9, 39730:2 <b>limitation</b><sup>[2]</sup> -</p>
---	--	---	---	---



<p>39700:18, 39700:22  <b>limitations</b> [4] -  39701:2, 39708:14,  39732:8, 39735:17  <b>limited</b> [3] - 39701:11,  39747:16, 39749:5  <b>limits</b> [1] - 39730:23  <b>Linda</b> [2] - 39615:10,  39617:17  <b>line</b> [10] - 39515:9,  39518:11, 39530:24,  39652:13, 39652:16,  39653:9, 39653:17,  39690:25, 39692:4,  39692:6  <b>link</b> [1] - 39512:14  <b>list</b> [2] - 39510:24,  39668:7  <b>listed</b> [2] - 39710:10,  39711:14  <b>listing</b> [2] - 39515:1,  39658:9  <b>literally</b> [1] - 39719:9  <b>litigate</b> [1] - 39724:10  <b>litigating</b> [1] - 39710:2  <b>litigation</b> [1] - 39724:9  <b>live</b> [2] - 39559:19,  39574:16  <b>living</b> [2] - 39623:3,  39650:18  <b>located</b> [1] - 39674:17  <b>locating</b> [2] - 39519:4,  39575:12  <b>location</b> [2] - 39546:13,  39556:5  <b>Lockyer</b> [1] - 39665:11  <b>locus</b> [1] - 39734:1  <b>logistics</b> [1] - 39740:23  <b>look</b> [24] - 39552:7,  39578:13, 39597:21,  39602:16, 39607:8,  39608:5, 39615:25,  39618:21, 39627:1,  39637:8, 39644:22,  39655:18, 39658:11,  39685:21, 39688:11,  39688:16, 39692:4,  39700:15, 39713:23,  39725:22, 39732:4,  39732:23, 39739:10  <b>looked</b> [8] - 39516:24,  39552:13, 39648:15,  39665:23, 39707:22,  39727:2, 39727:18,  39728:22  <b>Looking</b> [1] - 39552:21  <b>looking</b> [18] - 39514:18,  39514:23, 39520:22,  39526:7, 39535:16,  39547:13, 39548:1,</p>	<p>39548:3, 39577:11,  39603:18, 39636:15,  39661:3, 39708:22,  39723:24, 39733:15,  39733:16, 39736:14  <b>lookit</b> [1] - 39588:25  <b>looks</b> [5] - 39554:5,  39597:22, 39636:24,  39654:1, 39686:3  <b>Loran</b> [6] - 39503:7,  39504:5, 39614:16,  39635:24, 39636:2,  39651:21  <b>lost</b> [4] - 39553:14,  39566:9, 39566:21,  39634:1  <b>low</b> [1] - 39517:1  <b>Lugli</b> [2] - 39673:1,  39687:6  <b>lunch</b> [1] - 39664:16</p>	<p>39528:22, 39529:23,  39535:7, 39535:21,  39535:22, 39536:1,  39538:21, 39602:23,  39746:20, 39747:2,  39748:6  <b>madam</b> [6] - 39506:16,  39527:23, 39576:9,  39598:23, 39627:6,  39627:15  <b>Madam</b> [1] - 39506:24  <b>Mafia</b> [1] - 39582:6  <b>magazine</b> [3] - 39665:6,  39666:25, 39668:8  <b>mail</b> [2] - 39657:7,  39660:12  <b>main</b> [4] - 39718:6,  39723:25, 39736:25,  39751:1  <b>maintained</b> [1] -  39581:9  <b>major</b> [2] - 39718:12,  39743:23  <b>man</b> [13] - 39515:16,  39516:1, 39545:1,  39545:6, 39545:19,  39545:20, 39546:6,  39557:9, 39557:14,  39615:14, 39667:3,  39668:15, 39668:24  <b>manage</b> [2] - 39614:24,  39637:9  <b>Manager</b> [1] - 39502:4  <b>manipulated</b> [1] -  39567:14  <b>manipulation</b> [1] -  39601:2  <b>manner</b> [4] - 39593:21,  39595:1, 39595:6,  39645:9  <b>manufactured</b> [1] -  39738:12  <b>March</b> [16] - 39508:16,  39508:20, 39509:22,  39519:7, 39519:24,  39531:13, 39532:10,  39535:15, 39548:11,  39585:13, 39638:16,  39660:19, 39660:20,  39681:2, 39681:14,  39723:14  <b>margin</b> [1] - 39515:8  <b>mark</b> [4] - 39515:7,  39517:11, 39517:20,  39518:1  <b>Markesteyn</b> [2] -  39615:9, 39682:9  <b>Marshall</b> [2] - 39503:13,  39711:14  <b>Mary</b> [1] - 39582:6</p>	<p><b>Mary's</b> [1] - 39535:16  <b>match</b> [8] - 39588:9,  39731:4, 39731:5,  39732:24, 39737:3,  39737:4, 39737:19,  39737:23  <b>matched</b> [1] - 39555:6  <b>material</b> [25] -  39594:20, 39594:24,  39642:20, 39660:16,  39675:1, 39681:16,  39694:19, 39718:8,  39718:19, 39718:23,  39718:24, 39719:10,  39719:21, 39722:21,  39727:22, 39728:6,  39728:7, 39729:1,  39730:9, 39731:1,  39732:1, 39735:23,  39736:19, 39737:9,  39745:11  <b>Material</b> [1] - 39509:14  <b>materials</b> [15] -  39511:22, 39616:3,  39651:5, 39658:5,  39658:15, 39662:3,  39664:18, 39694:12,  39694:14, 39695:10,  39699:7, 39700:2,  39718:10, 39735:25,  39736:2  <b>matter</b> [18] - 39521:20,  39527:23, 39541:7,  39639:19, 39640:12,  39640:13, 39660:6,  39692:2, 39692:19,  39694:3, 39696:9,  39703:3, 39703:11,  39703:25, 39707:14,  39714:16, 39721:24,  39729:8  <b>matters</b> [7] - 39612:12,  39693:18, 39711:15,  39714:17, 39717:25,  39724:16, 39731:17  <b>Mccloskey</b> [1] -  39667:4  <b>Mcintyre</b> [12] - 39697:5,  39697:6, 39697:22,  39698:1, 39698:3,  39698:4, 39698:10,  39699:9, 39699:22,  39700:5, 39701:17  <b>Mclean</b> [44] - 39503:3,  39504:4, 39505:11,  39505:13, 39511:10,  39511:13, 39511:15,  39514:19, 39515:4,  39553:16, 39553:23,  39554:4, 39554:12,</p>	<p>39555:19, 39560:24,  39564:16, 39564:21,  39565:2, 39577:4,  39577:11, 39577:14,  39579:12, 39580:4,  39602:13, 39606:23,  39614:7, 39614:9,  39614:22, 39614:25,  39615:4, 39623:13,  39628:11, 39631:10,  39641:13, 39641:16,  39642:16, 39642:25,  39647:14, 39688:18,  39689:10, 39691:13,  39699:19, 39701:24,  39702:3  <b>Mclean's</b> [1] - 39702:17  <b>McLeod</b> [25] - 39503:15,  39504:8, 39614:14,  39685:5, 39685:6,  39687:1, 39688:1,  39689:18, 39689:22,  39690:18, 39692:1,  39696:16, 39696:21,  39698:3, 39698:20,  39698:21, 39699:1,  39699:5, 39700:11,  39700:25, 39701:4,  39701:21, 39701:22,  39702:5, 39705:25  <b>mean</b> [24] - 39523:20,  39526:13, 39526:13,  39553:20, 39567:22,  39587:6, 39605:17,  39605:20, 39607:17,  39613:24, 39622:10,  39626:25, 39651:15,  39651:19, 39666:16,  39671:11, 39693:4,  39698:10, 39715:2,  39727:9, 39737:19,  39743:10, 39750:9  <b>meaning</b> [2] - 39589:25,  39629:14  <b>means</b> [2] - 39652:18,  39728:19  <b>meant</b> [9] - 39525:13,  39570:4, 39576:21,  39585:14, 39585:17,  39590:2, 39599:17,  39690:12, 39691:22  <b>measured</b> [2] -  39611:24, 39733:25  <b>measures</b> [1] -  39719:16  <b>mechanisms</b> [1] -  39733:18  <b>media</b> [47] - 39632:11,  39651:24, 39652:15,  39652:21, 39652:22,</p>
---	---	--	--	---



<p>39653:4, 39653:13, 39653:23, 39654:23, 39656:4, 39656:10, 39658:17, 39659:18, 39660:15, 39661:4, 39661:21, 39664:1, 39664:12, 39664:20, 39665:3, 39665:7, 39665:13, 39665:18, 39665:22, 39666:3, 39666:9, 39666:10, 39666:17, 39666:20, 39666:25, 39668:3, 39668:12, 39668:20, 39668:25, 39669:1, 39669:11, 39669:19, 39670:5, 39670:11, 39670:23, 39671:12, 39671:20, 39672:2, 39672:3</p> <p><b>media's</b> [1] - 39670:25 <b>medium</b> [1] - 39737:10 <b>meet</b> [3] - 39619:19, 39620:1, 39632:1 <b>meeting</b> [1] - 39684:4 <b>Melnyk</b> [2] - 39508:6, 39611:4 <b>melting</b> [1] - 39516:11 <b>members</b> [1] - 39561:12 <b>Members</b> [1] - 39563:14 <b>memo</b> [49] - 39506:11, 39507:5, 39508:6, 39551:5, 39551:9, 39553:6, 39554:14, 39554:15, 39554:16, 39554:17, 39554:21, 39555:17, 39555:20, 39565:5, 39565:21, 39566:3, 39569:4, 39569:24, 39573:17, 39573:21, 39573:22, 39573:24, 39577:3, 39577:5, 39577:15, 39579:23, 39579:25, 39581:3, 39584:15, 39595:12, 39597:23, 39611:6, 39621:1, 39621:3, 39630:7, 39655:13, 39656:19, 39657:6, 39657:23, 39658:3, 39660:19, 39660:20, 39674:10, 39687:6, 39688:12, 39723:17, 39729:15, 39729:20, 39729:21 <b>Memo</b> [1] - 39555:1 <b>memorandum</b> [3] - 39673:1, 39687:16,</p>	<p>39692:13 <b>memorandums</b> [1] - 39687:17 <b>memory</b> [11] - 39526:20, 39533:19, 39644:1, 39665:24, 39665:25, 39666:10, 39668:23, 39688:5, 39689:6, 39694:23, 39719:14 <b>mention</b> [4] - 39548:15, 39557:23, 39569:19, 39709:22 <b>mentioned</b> [2] - 39548:11, 39702:11 <b>mentioning</b> [2] - 39540:6, 39540:12 <b>Merchant</b> [1] - 39645:25 <b>mercy</b> [6] - 39708:7, 39710:13, 39711:6, 39724:6, 39724:15, 39725:24 <b>merely</b> [4] - 39534:23, 39589:4, 39589:7, 39627:21 <b>merit</b> [1] - 39521:3 <b>mesh</b> [1] - 39715:14 <b>message</b> [1] - 39705:20 <b>met</b> [3] - 39549:8, 39580:6, 39720:21 <b>Meyer</b> [3] - 39502:11, 39752:2, 39752:19 <b>microcosm</b> [1] - 39716:3 <b>mid</b> [2] - 39716:21, 39724:5 <b>mid-1980s</b> [1] - 39710:9 <b>might</b> [31] - 39509:7, 39521:19, 39523:2, 39523:12, 39528:12, 39533:14, 39537:4, 39546:24, 39568:24, 39584:5, 39592:12, 39595:6, 39596:23, 39607:8, 39608:5, 39612:24, 39614:2, 39614:23, 39633:3, 39640:18, 39651:14, 39676:1, 39693:23, 39695:5, 39702:9, 39712:16, 39737:19, 39739:15, 39741:14, 39742:23, 39751:7 <b>Milgaard</b> [139] - 39501:4, 39503:2, 39503:3, 39505:13, 39506:2, 39512:8, 39512:16, 39515:1, 39519:14, 39519:17,</p>	<p>39520:21, 39524:6, 39527:25, 39530:15, 39530:18, 39532:7, 39569:13, 39570:1, 39570:8, 39570:9, 39570:16, 39570:20, 39571:13, 39575:17, 39576:15, 39576:18, 39581:14, 39581:19, 39582:11, 39582:18, 39583:6, 39589:22, 39590:13, 39590:19, 39591:12, 39592:13, 39598:10, 39599:12, 39600:9, 39600:18, 39600:22, 39601:15, 39601:23, 39601:25, 39602:8, 39602:15, 39603:10, 39603:16, 39603:20, 39603:25, 39604:3, 39604:5, 39604:12, 39604:14, 39604:18, 39604:22, 39605:4, 39605:12, 39605:15, 39606:10, 39606:13, 39606:19, 39608:24, 39609:10, 39610:22, 39611:13, 39615:8, 39616:2, 39621:11, 39627:9, 39628:15, 39631:4, 39631:21, 39632:7, 39634:9, 39638:25, 39639:18, 39644:14, 39644:21, 39646:1, 39658:23, 39658:25, 39659:3, 39659:20, 39662:15, 39662:20, 39662:23, 39663:6, 39663:8, 39674:22, 39675:6, 39677:15, 39677:18, 39677:21, 39677:24, 39678:6, 39678:12, 39679:13, 39680:6, 39680:12, 39681:15, 39682:9, 39682:14, 39683:9, 39684:3, 39686:25, 39687:15, 39688:20, 39688:25, 39689:13, 39690:9, 39690:14, 39691:5, 39691:17, 39694:8, 39699:20, 39700:3, 39700:5, 39702:1, 39703:19, 39707:14, 39708:10, 39711:19, 39711:22, 39713:6, 39714:16, 39716:9, 39720:4, 39723:14, 39725:3, 39725:20, 39738:21,</p>	<p>39739:4, 39739:9, 39741:8, 39745:21, 39749:14, 39749:16, 39751:2 <b>Milgaard's</b> [23] - 39509:19, 39527:4, 39527:6, 39575:2, 39575:19, 39576:2, 39582:21, 39592:18, 39600:16, 39610:20, 39610:21, 39654:6, 39661:11, 39675:10, 39693:12, 39702:14, 39710:22, 39721:5, 39723:9, 39723:21, 39739:22, 39742:9, 39742:24 <b>Milgaard/david</b> [1] - 39662:15 <b>Milgaards</b> [3] - 39516:4, 39619:1, 39643:5 <b>Miller</b> [16] - 39517:5, 39536:22, 39544:21, 39559:8, 39570:20, 39570:21, 39571:5, 39582:19, 39592:14, 39599:13, 39621:18, 39621:22, 39622:11, 39623:16, 39626:21, 39649:19 <b>Miller's</b> [8] - 39552:1, 39565:14, 39582:12, 39601:15, 39615:10, 39707:22, 39726:14, 39746:11 <b>mind</b> [10] - 39505:18, 39545:12, 39592:4, 39613:19, 39641:21, 39656:14, 39672:8, 39702:17, 39703:5, 39716:6 <b>mindful</b> [1] - 39700:25 <b>minister</b> [27] - 39523:11, 39528:1, 39528:3, 39600:15, 39615:19, 39619:13, 39619:15, 39627:24, 39657:8, 39658:9, 39659:14, 39662:24, 39663:3, 39663:9, 39674:8, 39694:16, 39694:21, 39695:18, 39698:1, 39704:20, 39706:23, 39707:16, 39711:10, 39711:13, 39722:14, 39742:13, 39751:12 <b>Minister</b> [21] - 39503:11, 39520:21,</p>	<p>39520:25, 39619:9, 39631:8, 39632:12, 39654:7, 39673:2, 39678:14, 39680:21, 39682:4, 39692:22, 39693:9, 39693:17, 39693:23, 39696:4, 39739:5, 39740:7, 39742:6, 39742:7, 39742:11 <b>minister's</b> [8] - 39600:14, 39684:9, 39690:8, 39695:1, 39695:2, 39695:10, 39696:9, 39721:16 <b>Ministries</b> [1] - 39665:5 <b>minor</b> [3] - 39581:12, 39581:16 <b>Minor</b> [1] - 39581:18 <b>minute</b> [2] - 39543:21, 39718:16 <b>minutes</b> [8] - 39541:2, 39541:12, 39564:17, 39564:18, 39564:20, 39564:22, 39614:10, 39615:2 <b>miraculous</b> [1] - 39716:6 <b>mirrors</b> [1] - 39618:8 <b>miscarriage</b> [5] - 39615:17, 39742:10, 39742:25, 39750:6, 39751:4 <b>Miscellaneous</b> [1] - 39509:13 <b>misconduct</b> [5] - 39639:5, 39749:13, 39750:25, 39751:13, 39751:14 <b>mislead</b> [3] - 39672:8, 39694:2, 39695:18 <b>misled</b> [1] - 39693:16 <b>misread</b> [1] - 39691:10 <b>missed</b> [1] - 39579:9 <b>missing</b> [2] - 39511:9, 39594:24 <b>misspoke</b> [1] - 39687:22 <b>misstatement</b> [1] - 39521:5 <b>misunderstanding</b> [2] - 39598:19, 39599:5 <b>mix</b> [1] - 39505:17 <b>mixed</b> [3] - 39554:9, 39697:25, 39735:21 <b>mixing</b> [1] - 39587:14 <b>mixture</b> [1] - 39736:8 <b>molecular</b> [2] - 39718:13, 39731:23 <b>molecule</b> [1] - 39733:16</p>
--	---	---	---	---





<p><b>moment</b> [14] - 39505:6, 39511:24, 39523:25, 39530:2, 39530:19, 39539:1, 39637:7, 39654:17, 39696:2, 39714:22, 39720:25, 39724:2, 39730:3, 39739:1</p> <p><b>moments</b> [2] - 39685:16, 39686:3</p> <p><b>monitoring</b> [1] - 39567:21</p> <p><b>monitors</b> [1] - 39747:20</p> <p><b>Montague</b> [2] - 39638:15, 39638:19</p> <p><b>month</b> [5] - 39565:23, 39610:4, 39634:2, 39634:3, 39643:22</p> <p><b>months</b> [6] - 39616:21, 39642:10, 39655:12, 39656:18, 39656:20, 39678:1</p> <p><b>moralists</b> [2] - 39668:3, 39670:23</p> <p><b>moreover</b> [2] - 39738:10, 39739:19</p> <p><b>morning</b> [28] - 39505:3, 39505:4, 39505:5, 39505:6, 39505:12, 39519:13, 39551:15, 39551:18, 39569:10, 39570:23, 39572:11, 39582:12, 39603:11, 39603:18, 39623:15, 39641:13, 39641:15, 39647:14, 39648:15, 39667:11, 39688:18, 39689:8, 39689:11, 39689:17, 39699:18, 39701:23, 39702:12, 39702:18</p> <p><b>most</b> [7] - 39557:4, 39575:10, 39582:19, 39667:23, 39718:24, 39736:9, 39743:15</p> <p><b>mother</b> [2] - 39513:8, 39681:15</p> <p><b>motivations</b> [2] - 39637:17, 39638:7</p> <p><b>mouth</b> [2] - 39538:9, 39557:22</p> <p><b>move</b> [4] - 39659:10, 39661:2, 39683:3, 39683:24</p> <p><b>moved</b> [5] - 39549:17, 39549:24, 39550:11, 39650:17, 39724:4</p> <p><b>movie</b> [3] - 39542:22, 39543:10, 39543:13</p> <p><b>movies</b> [1] - 39542:13</p>	<p><b>moving</b> [3] - 39508:4, 39550:21, 39598:1</p> <p><b>Moving</b> [1] - 39509:13</p> <p><b>multifarious</b> [1] - 39740:12</p> <p><b>multiplicity</b> [2] - 39665:6, 39736:12</p> <p><b>murder</b> [39] - 39513:16, 39516:10, 39516:19, 39517:14, 39519:14, 39520:23, 39528:23, 39529:24, 39531:5, 39532:8, 39533:4, 39537:8, 39549:25, 39550:20, 39551:3, 39551:12, 39552:6, 39554:3, 39555:6, 39555:13, 39558:11, 39580:22, 39582:12, 39582:22, 39588:10, 39588:16, 39589:11, 39604:1, 39604:3, 39604:6, 39604:7, 39605:5, 39605:12, 39605:16, 39605:22, 39689:1, 39691:6, 39713:7, 39713:11</p> <p><b>murder'</b> [1] - 39553:5</p> <p><b>murders</b> [1] - 39717:11</p> <p><b>murk</b> [1] - 39515:15</p> <p><b>Murray</b> [1] - 39638:14</p> <p><b>must</b> [7] - 39543:9, 39689:8, 39712:3, 39717:15, 39723:6, 39729:20, 39748:14</p> <p><b>Must</b> [1] - 39574:11</p> <p><b>myopia</b> [1] - 39668:5</p>	<p>39671:7</p> <p><b>natural</b> [2] - 39742:20, 39749:5</p> <p><b>nature</b> [8] - 39588:24, 39589:2, 39640:21, 39644:9, 39715:23, 39726:4, 39728:12, 39748:13</p> <p><b>near</b> [1] - 39562:12</p> <p><b>nearby</b> [1] - 39515:13</p> <p><b>nearly</b> [1] - 39638:4</p> <p><b>necessarily</b> [5] - 39568:4, 39589:6, 39651:19, 39700:21, 39723:6</p> <p><b>necessary</b> [2] - 39648:3, 39684:19</p> <p><b>necessitate</b> [1] - 39708:24</p> <p><b>need</b> [8] - 39554:14, 39562:24, 39591:9, 39600:6, 39643:1, 39661:7, 39685:21, 39696:25</p> <p><b>needed</b> [6] - 39609:25, 39658:10, 39743:22, 39743:24, 39744:24, 39747:21</p> <p><b>needs</b> [3] - 39615:1, 39618:24, 39629:2</p> <p><b>nefarious</b> [1] - 39728:18</p> <p><b>negated</b> [1] - 39601:24</p> <p><b>neighbour</b> [2] - 39516:12, 39516:18</p> <p><b>never</b> [13] - 39542:19, 39545:23, 39545:24, 39545:25, 39551:19, 39552:19, 39558:5, 39581:23, 39646:16, 39663:17, 39679:8, 39748:5</p> <p><b>Never</b> [1] - 39542:22</p> <p><b>new</b> [7] - 39508:6, 39615:6, 39676:18, 39704:20, 39728:16, 39730:13, 39734:4</p> <p><b>News</b> [2] - 39661:18, 39661:20</p> <p><b>news</b> [6] - 39510:17, 39561:22, 39643:14, 39663:23, 39717:20, 39717:21</p> <p><b>Next</b> [9] - 39510:9, 39513:14, 39513:22, 39522:7, 39587:22, 39608:1, 39624:22, 39624:23, 39625:4</p> <p><b>next</b> [44] - 39506:22, 39507:13, 39507:19,</p>	<p>39508:14, 39509:13, 39510:13, 39516:6, 39517:11, 39542:4, 39554:21, 39555:20, 39556:24, 39558:7, 39560:8, 39561:24, 39563:1, 39564:17, 39564:21, 39567:20, 39568:18, 39569:1, 39569:10, 39572:11, 39581:5, 39601:7, 39601:11, 39601:20, 39623:15, 39623:17, 39624:12, 39651:22, 39653:15, 39659:11, 39677:9, 39683:3, 39684:8, 39691:14, 39706:8, 39706:16, 39709:7, 39711:14, 39723:15, 39741:23</p> <p><b>nicely</b> [1] - 39612:25</p> <p><b>Nichol</b> [47] - 39506:15, 39507:8, 39508:2, 39508:14, 39508:17, 39508:19, 39518:4, 39518:5, 39518:12, 39518:19, 39519:4, 39524:7, 39525:6, 39526:19, 39527:3, 39531:1, 39532:9, 39535:19, 39540:3, 39540:7, 39540:13, 39540:17, 39547:24, 39549:5, 39549:12, 39549:25, 39550:2, 39550:19, 39569:15, 39570:2, 39573:14, 39582:8, 39589:20, 39592:8, 39593:7, 39593:12, 39615:12, 39621:7, 39679:19, 39693:11, 39694:7, 39694:15, 39694:20, 39695:21, 39749:22, 39749:24, 39750:15</p> <p><b>Nichol's</b> [2] - 39529:7, 39532:13</p> <p><b>Nickey</b> [2] - 39603:10, 39606:15</p> <p><b>night</b> [5] - 39539:13, 39586:1, 39586:7, 39667:1, 39669:9</p> <p><b>nightmares</b> [1] - 39615:13</p> <p><b>nine</b> [5] - 39584:15, 39656:18, 39675:5, 39687:20, 39709:11</p> <p><b>Nine</b> [1] - 39687:21</p> <p><b>nine-page</b> [1] - 39584:15</p>	<p><b>non</b> [3] - 39520:23, 39531:20, 39716:6</p> <p><b>non-capital</b> [1] - 39520:23</p> <p><b>non-event</b> [1] - 39531:20</p> <p><b>non-scientific</b> [1] - 39716:6</p> <p><b>None</b> [2] - 39511:4, 39687:16</p> <p><b>none</b> [2] - 39631:3, 39648:14</p> <p><b>nonetheless</b> [1] - 39597:15</p> <p><b>normal</b> [1] - 39566:11</p> <p><b>normally</b> [2] - 39625:18, 39749:2</p> <p><b>North</b> [1] - 39734:24</p> <p><b>notation</b> [2] - 39509:23, 39510:25</p> <p><b>notations</b> [2] - 39514:9, 39648:2</p> <p><b>note</b> [6] - 39516:6, 39589:20, 39590:2, 39643:9, 39696:16, 39709:16</p> <p><b>noted</b> [5] - 39567:12, 39611:8, 39611:10, 39630:13, 39719:17</p> <p><b>notes</b> [12] - 39508:25, 39509:1, 39566:16, 39612:10, 39647:18, 39686:23, 39687:8, 39687:13, 39687:17, 39688:8, 39747:6, 39752:6</p> <p><b>Nothing</b> [1] - 39615:18</p> <p><b>nothing</b> [9] - 39527:10, 39567:8, 39583:15, 39585:14, 39631:18, 39632:13, 39656:24, 39679:1, 39721:25</p> <p><b>notice</b> [1] - 39667:25</p> <p><b>noticeably</b> [2] - 39515:16, 39516:1</p> <p><b>notion</b> [1] - 39640:22</p> <p><b>November</b> [11] - 39518:6, 39557:8, 39557:14, 39563:21, 39621:1, 39621:4, 39626:2, 39627:19, 39627:20, 39679:17, 39699:16</p> <p><b>November/december</b> [1] - 39679:22</p> <p><b>nuclei</b> [1] - 39715:6</p> <p><b>nucleus</b> [3] - 39715:9, 39715:11, 39715:25</p> <p><b>number</b> [49] - 39507:15, 39510:23, 39511:9,</p>
--	---	---	---	--



<p>39516:25, 39542:2, 39557:13, 39569:7, 39571:3, 39575:6, 39577:9, 39577:10, 39577:12, 39583:17, 39585:19, 39588:18, 39588:24, 39589:2, 39597:21, 39599:10, 39610:16, 39616:18, 39621:3, 39630:9, 39633:7, 39637:6, 39640:10, 39640:17, 39641:11, 39641:24, 39643:1, 39643:7, 39647:8, 39647:24, 39650:14, 39657:5, 39658:24, 39665:21, 39667:17, 39672:19, 39674:16, 39675:20, 39677:4, 39704:8, 39704:13, 39704:21, 39712:2, 39718:18, 39737:23, 39745:6  <b>Number</b> [2] - 39508:12, 39509:21  <b>numbers</b> [3] - 39510:22, 39656:15, 39674:15  <b>numerous</b> [1] - 39595:4  <b>nurse</b> [1] - 39592:13  <b>nurse's</b> [2] - 39516:14, 39517:4  <b>nurses</b> [2] - 39510:19, 39643:16  <b>nursing</b> [1] - 39663:21  <b>Nycazi</b> [1] - 39621:20  <b>Nyczai</b> [4] - 39623:3, 39626:16, 39650:3, 39650:15  <b>Nyczai's</b> [3] - 39623:2, 39626:3, 39626:6</p>	<p><b>observed</b> [2] - 39548:14, 39683:14  <b>obtain</b> [5] - 39569:9, 39637:9, 39642:5, 39683:16, 39749:2  <b>obtained</b> [6] - 39554:23, 39611:20, 39673:24, 39674:24, 39728:23, 39749:22  <b>obtaining</b> [2] - 39681:5, 39683:11  <b>obvious</b> [1] - 39644:3  <b>Obviously</b> [1] - 39528:9  <b>obviously</b> [1] - 39689:21  <b>occasion</b> [6] - 39531:4, 39579:16, 39591:17, 39606:20, 39646:23, 39660:11  <b>occasionally</b> [1] - 39624:21  <b>occasions</b> [4] - 39567:15, 39580:17, 39588:20, 39708:25  <b>occur</b> [3] - 39699:14, 39731:7, 39751:4  <b>occurred</b> [16] - 39521:14, 39550:13, 39556:2, 39560:1, 39567:9, 39583:2, 39589:13, 39594:13, 39636:19, 39637:15, 39638:4, 39664:20, 39681:22, 39684:12, 39696:3, 39703:9  <b>occurrence</b> [2] - 39565:9, 39600:8  <b>October</b> [16] - 39506:11, 39507:14, 39512:25, 39560:25, 39561:5, 39561:8, 39561:11, 39563:14, 39563:21, 39642:17, 39642:24, 39643:20, 39673:3, 39678:4, 39678:10, 39684:4  <b>odd</b> [3] - 39536:13, 39536:14, 39562:22  <b>offence</b> [9] - 39519:17, 39551:11, 39559:15, 39563:5, 39564:10, 39602:9, 39604:15, 39717:15, 39741:10  <b>offences</b> [21] - 39511:3, 39556:15, 39556:25, 39558:25, 39559:23, 39559:25, 39560:2, 39561:16, 39562:18, 39563:20, 39563:24, 39563:25, 39564:3,</p>	<p>39570:25, 39588:9, 39615:12, 39636:16, 39636:18, 39637:14, 39717:22  <b>offensive</b> [1] - 39559:16  <b>offer</b> [2] - 39615:6, 39644:6  <b>Office</b> [1] - 39707:9  <b>office</b> [5] - 39643:14, 39658:16, 39686:17, 39721:16, 39725:13  <b>officer</b> [4] - 39538:12, 39540:1, 39541:5, 39545:14  <b>Officer</b> [2] - 39502:12, 39746:18  <b>officers</b> [17] - 39567:23, 39587:20, 39595:5, 39598:12, 39598:14, 39602:22, 39604:11, 39639:6, 39746:9, 39746:10, 39746:13, 39746:17, 39748:17, 39748:19, 39748:20, 39751:9  <b>official</b> [1] - 39695:19  <b>Official</b> [5] - 39502:10, 39752:1, 39752:3, 39752:14, 39752:20  <b>officials</b> [2] - 39703:21, 39704:22  <b>offing</b> [2] - 39730:13, 39732:2  <b>often</b> [6] - 39651:5, 39660:4, 39703:17, 39735:22, 39737:5, 39745:11  <b>old</b> [6] - 39576:1, 39588:3, 39612:23, 39718:9, 39731:13, 39736:18  <b>once</b> [2] - 39682:4, 39702:19  <b>one</b> [132] - 39508:11, 39508:20, 39511:9, 39512:4, 39512:9, 39514:14, 39514:24, 39514:25, 39515:1, 39515:25, 39519:9, 39523:22, 39526:1, 39531:4, 39531:13, 39532:4, 39532:18, 39533:14, 39538:4, 39540:6, 39540:12, 39541:5, 39542:6, 39545:7, 39545:9, 39545:11, 39546:1, 39546:2, 39546:6, 39546:15, 39546:16, 39546:17, 39546:20,</p>	<p>39548:10, 39549:5, 39553:12, 39554:14, 39555:5, 39556:24, 39557:25, 39559:14, 39559:15, 39560:5, 39561:1, 39562:1, 39562:6, 39562:9, 39562:11, 39571:9, 39571:21, 39574:14, 39575:13, 39581:5, 39581:12, 39583:25, 39584:1, 39584:6, 39587:19, 39587:21, 39589:25, 39591:16, 39594:21, 39596:18, 39606:10, 39608:14, 39612:7, 39616:10, 39620:24, 39628:2, 39634:12, 39634:17, 39635:2, 39635:4, 39636:24, 39639:4, 39640:10, 39640:17, 39644:14, 39649:15, 39649:16, 39653:11, 39662:10, 39665:15, 39667:8, 39667:23, 39669:19, 39685:20, 39686:3, 39686:16, 39686:22, 39687:19, 39689:20, 39690:3, 39693:8, 39693:9, 39693:20, 39693:21, 39695:22, 39696:22, 39699:6, 39704:2, 39708:8, 39708:23, 39710:12, 39710:16, 39710:17, 39712:10, 39717:12, 39717:16, 39718:7, 39718:12, 39719:11, 39719:19, 39733:1, 39734:7, 39734:19, 39735:3, 39735:7, 39736:15, 39736:23, 39737:20, 39737:23, 39739:8, 39740:12, 39745:23, 39745:24, 39748:3, 39750:6, 39750:10  <b>One</b> [2] - 39614:9, 39665:22  <b>one's</b> [2] - 39704:25, 39715:9  <b>ones</b> [3] - 39618:20, 39630:10, 39631:2  <b>onus</b> [1] - 39741:7  <b>open</b> [5] - 39539:21, 39596:6, 39627:17, 39637:23, 39645:14  <b>open-ended</b> [1] - 39539:21</p>	<p><b>opened</b> [2] - 39711:3, 39723:9  <b>opening</b> [2] - 39508:13, 39742:3  <b>operate</b> [2] - 39557:17, 39715:20  <b>operates</b> [1] - 39620:18  <b>operating</b> [1] - 39659:23  <b>operation</b> [2] - 39641:2, 39651:12  <b>operative</b> [1] - 39637:24  <b>operator</b> [1] - 39601:19  <b>Operator</b> [1] - 39599:15  <b>opinion</b> [8] - 39514:4, 39590:14, 39610:11, 39618:11, 39620:10, 39739:21, 39741:24, 39751:5  <b>opinions</b> [5] - 39598:4, 39627:23, 39655:20, 39731:16, 39731:18  <b>Opp</b> [1] - 39635:13  <b>opportunities</b> [1] - 39574:5  <b>opportunity</b> [4] - 39602:8, 39602:15, 39604:14, 39651:9  <b>opposed</b> [2] - 39579:3, 39709:5  <b>opposite</b> [2] - 39576:10, 39703:24  <b>order</b> [6] - 39590:24, 39676:21, 39689:6, 39700:21, 39740:8, 39745:9  <b>ordered</b> [1] - 39704:20  <b>ordinarily</b> [1] - 39523:13  <b>Ordinarily</b> [1] - 39635:4  <b>organic</b> [2] - 39715:13, 39716:2  <b>original</b> [8] - 39518:10, 39518:11, 39518:16, 39530:22, 39603:14, 39639:16, 39639:20, 39648:16  <b>Ottawa</b> [3] - 39707:10, 39720:8, 39724:4  <b>outcome</b> [2] - 39639:10, 39702:22  <b>outlets</b> [1] - 39661:4  <b>outline</b> [4] - 39515:15, 39518:18, 39559:22, 39560:2  <b>outlined</b> [4] - 39566:2, 39659:20, 39681:25, 39682:22  <b>outlining</b> [1] - 39507:21</p>
<b>O</b>				
<p><b>o'clock</b> [1] - 39614:1  <b>Os</b> [1] - 39622:6  <b>Oavenue</b> [1] - 39621:13  <b>oath</b> [3] - 39520:2, 39595:23, 39597:19  <b>object</b> [1] - 39701:6  <b>objection</b> [1] - 39693:14  <b>obligation</b> [2] - 39527:25, 39528:3  <b>observation</b> [1] - 39679:20  <b>observations</b> [1] - 39599:19  <b>observe</b> [1] - 39665:19</p>				



<p><b>outset</b> [2] - 39691:20, 39702:20</p> <p><b>over-simplification</b> [1] - 39521:6</p> <p><b>overall</b> [1] - 39510:2</p> <p><b>overnight</b> [1] - 39586:8</p> <p><b>overpowered</b> [1] - 39557:22</p> <p><b>overrun</b> [1] - 39668:4</p> <p><b>oversight</b> [1] - 39600:25</p> <p><b>overtures</b> [1] - 39660:15</p> <p><b>overwhelming</b> [1] - 39666:12</p> <p><b>own</b> [13] - 39514:4, 39568:24, 39596:18, 39613:10, 39619:12, 39624:7, 39639:20, 39648:23, 39663:2, 39692:16, 39697:13, 39738:9, 39746:16</p>	<p>39648:1, 39652:12, 39653:16, 39659:11, 39664:10, 39683:3, 39684:8, 39687:5, 39688:16, 39688:17, 39690:23, 39691:14, 39696:25, 39709:7, 39709:16, 39710:6, 39711:14, 39712:14, 39712:21, 39712:24, 39713:1, 39723:15, 39726:11, 39740:8, 39740:19, 39741:24</p> <p><b>pages</b> [11] - 39516:7, 39623:4, 39623:7, 39624:6, 39650:12, 39650:14, 39660:14, 39675:5, 39675:6, 39719:9, 39752:5</p> <p><b>pairing</b> [1] - 39551:24</p> <p><b>pairs</b> [5] - 39715:8, 39715:12, 39715:13, 39715:25, 39716:1</p> <p><b>Palmer</b> [2] - 39619:10, 39619:11</p> <p><b>panel</b> [3] - 39713:15, 39746:4, 39750:11</p> <p><b>pants</b> [3] - 39576:3, 39576:18, 39582:21</p> <p><b>papers</b> [1] - 39669:13</p> <p><b>Paragraph</b> [1] - 39636:8</p> <p><b>paragraph</b> [22] - 39511:20, 39519:3, 39521:18, 39527:7, 39551:13, 39551:22, 39556:25, 39572:10, 39575:24, 39587:22, 39592:6, 39592:23, 39599:24, 39636:9, 39638:21, 39640:8, 39641:25, 39667:8, 39674:13, 39688:16, 39688:21, 39692:6</p> <p><b>paragraphs</b> [1] - 39667:10</p> <p><b>paralleled</b> [1] - 39664:3</p> <p><b>parameters</b> [1] - 39742:22</p> <p><b>parcel</b> [2] - 39656:10, 39732:6</p> <p><b>parentheses</b> [2] - 39682:2, 39683:14</p> <p><b>paring</b> [6] - 39553:14, 39553:16, 39557:6, 39557:16, 39559:17, 39560:6</p> <p><b>parked</b> [3] - 39515:13, 39623:23, 39624:3</p> <p><b>Parliament</b> [2] - 39629:9, 39631:13</p>	<p><b>parole</b> [2] - 39512:15, 39512:24</p> <p><b>Parole</b> [2] - 39641:18, 39642:6</p> <p><b>part</b> [33] - 39521:22, 39522:6, 39525:21, 39526:5, 39532:17, 39541:3, 39548:15, 39554:17, 39554:21, 39555:20, 39563:24, 39564:17, 39564:21, 39580:2, 39639:1, 39656:8, 39656:10, 39659:22, 39661:24, 39664:4, 39676:5, 39677:25, 39678:15, 39678:23, 39679:16, 39683:7, 39690:1, 39695:4, 39695:9, 39726:22, 39732:5, 39749:7, 39750:2</p> <p><b>partake</b> [1] - 39644:22</p> <p><b>participated</b> [1] - 39559:7</p> <p><b>particular</b> [18] - 39512:8, 39636:9, 39639:14, 39673:11, 39673:13, 39674:6, 39675:12, 39675:14, 39679:8, 39680:21, 39697:18, 39703:3, 39703:18, 39711:22, 39717:14, 39733:23, 39734:1, 39749:15</p> <p><b>particularized</b> [1] - 39701:10</p> <p><b>particularly</b> [7] - 39512:6, 39627:11, 39639:4, 39673:3, 39688:19, 39694:20, 39750:23</p> <p><b>parties</b> [1] - 39736:15</p> <p><b>parts</b> [10] - 39532:21, 39538:22, 39666:10, 39676:6, 39707:3, 39733:15, 39733:17, 39734:6, 39735:5</p> <p><b>party</b> [1] - 39571:13</p> <p><b>pass</b> [3] - 39619:6, 39619:7, 39695:12</p> <p><b>passage</b> [6] - 39554:11, 39653:8, 39690:8, 39690:24, 39692:4, 39694:12</p> <p><b>passages</b> [1] - 39692:23</p> <p><b>passed</b> [6] - 39510:16, 39516:9, 39537:13, 39626:21, 39695:8, 39716:12</p>	<p><b>passive</b> [2] - 39533:21, 39533:23</p> <p><b>Pat</b> [2] - 39503:7, 39636:2</p> <p><b>path</b> [1] - 39646:18</p> <p><b>pathology</b> [1] - 39738:7</p> <p><b>Pcr</b> [12] - 39718:15, 39731:12, 39731:20, 39732:2, 39732:5, 39732:12, 39732:14, 39732:15, 39732:17, 39734:4, 39735:8, 39739:14</p> <p><b>Pcr-based</b> [4] - 39732:2, 39732:14, 39735:8, 39739:14</p> <p><b>Pcr-type</b> [1] - 39734:4</p> <p><b>Pearson</b> [7] - 39574:19, 39575:4, 39636:11, 39637:7, 39640:23, 39681:6, 39681:24</p> <p><b>Pearson's</b> [3] - 39636:7, 39640:24, 39747:6</p> <p><b>penitentiary</b> [1] - 39637:11</p> <p><b>Penkala</b> [2] - 39646:5, 39748:20</p> <p><b>pentothal</b> [1] - 39524:10</p> <p><b>people</b> [19] - 39517:6, 39543:16, 39558:10, 39567:21, 39567:22, 39571:9, 39613:1, 39614:1, 39619:18, 39652:22, 39665:15, 39667:17, 39670:12, 39713:16, 39720:21, 39731:11, 39737:11, 39739:9, 39750:3</p> <p><b>per</b> [1] - 39731:20</p> <p><b>perceived</b> [4] - 39613:22, 39639:21, 39701:3, 39705:9</p> <p><b>perception</b> [4] - 39539:24, 39618:6, 39639:2, 39649:7</p> <p><b>perfect</b> [3] - 39610:2, 39620:22, 39668:2</p> <p><b>perfectly</b> [1] - 39671:11</p> <p><b>performed</b> [2] - 39572:14, 39710:20</p> <p><b>perhaps</b> [20] - 39512:5, 39518:1, 39528:12, 39550:12, 39589:4, 39612:7, 39613:6, 39616:15, 39618:16, 39641:15, 39667:19, 39679:10, 39686:12, 39689:11, 39689:24, 39690:15, 39692:17,</p>	<p>39718:21, 39724:8, 39734:7</p> <p><b>Perhaps</b> [5] - 39514:16, 39638:20, 39687:2, 39689:18, 39692:2</p> <p><b>period</b> [11] - 39546:25, 39566:15, 39568:4, 39568:6, 39571:15, 39571:24, 39579:8, 39595:4, 39684:23, 39710:8, 39735:15</p> <p><b>perjury</b> [5] - 39595:22, 39596:10, 39596:20, 39597:2, 39597:12</p> <p><b>permission</b> [1] - 39664:17</p> <p><b>person</b> [15] - 39527:20, 39584:6, 39620:18, 39644:1, 39664:13, 39683:12, 39705:12, 39715:4, 39717:14, 39717:22, 39717:23, 39724:1, 39737:6, 39737:9, 39747:17</p> <p><b>person's</b> [2] - 39550:8, 39734:2</p> <p><b>personal</b> [2] - 39549:24, 39550:18</p> <p><b>persons</b> [1] - 39645:5</p> <p><b>perspective</b> [1] - 39616:1</p> <p><b>pertinent</b> [1] - 39695:12</p> <p><b>pessimism</b> [1] - 39739:13</p> <p><b>pessimistic</b> [1] - 39740:2</p> <p><b>Peter</b> [5] - 39513:6, 39516:2, 39645:3, 39673:1, 39687:6</p> <p><b>Phil</b> [1] - 39668:9</p> <p><b>Phoenix</b> [1] - 39747:3</p> <p><b>phone</b> [1] - 39595:16</p> <p><b>phoned</b> [2] - 39590:20, 39636:14</p> <p><b>photo</b> [2] - 39552:5, 39552:21</p> <p><b>photocopied</b> [1] - 39509:10</p> <p><b>photocopy</b> [4] - 39506:13, 39507:8, 39648:12, 39700:2</p> <p><b>photograph</b> [2] - 39552:14, 39552:15</p> <p><b>photographs</b> [1] - 39508:14</p> <p><b>phrase</b> [4] - 39535:11, 39688:19, 39689:4, 39700:13</p> <p><b>physical</b> [2] - 39648:11, 39648:16</p>
<p><b>P</b></p>				
<p><b>pace</b> [1] - 39626:19</p> <p><b>package</b> [4] - 39563:24, 39697:21, 39699:7, 39699:11</p> <p><b>Page</b> [8] - 39504:2, 39514:9, 39527:2, 39528:17, 39542:2, 39547:5, 39553:11, 39592:6</p> <p><b>page</b> [80] - 39506:22, 39507:13, 39507:19, 39508:14, 39510:9, 39510:13, 39513:14, 39513:22, 39513:23, 39516:6, 39522:7, 39524:3, 39524:4, 39532:18, 39536:4, 39536:15, 39542:4, 39551:10, 39555:1, 39556:23, 39556:24, 39558:7, 39563:9, 39563:10, 39574:25, 39575:7, 39584:15, 39587:22, 39593:14, 39593:25, 39601:7, 39601:20, 39607:24, 39608:1, 39611:9, 39614:9, 39623:15, 39623:17, 39624:8, 39624:12, 39624:22, 39624:24, 39625:4, 39636:7, 39636:25, 39638:11, 39638:13, 39638:20, 39645:17,</p>				



<p><b>pick</b> [2] - 39721:1, 39733:22</p> <p><b>picked</b> [5] - 39553:2, 39553:13, 39554:5, 39606:13, 39734:15</p> <p><b>picture</b> [2] - 39671:11, 39717:6</p> <p><b>pile</b> [2] - 39695:2, 39695:9</p> <p><b>pitch</b> [1] - 39704:12</p> <p><b>Pitchfork</b> [2] - 39717:10, 39728:3</p> <p><b>place</b> [18] - 39549:3, 39558:5, 39558:6, 39563:12, 39591:25, 39592:5, 39594:16, 39605:19, 39607:2, 39609:1, 39609:25, 39610:1, 39628:14, 39652:21, 39653:24, 39687:19, 39689:16, 39724:3</p> <p><b>placed</b> [5] - 39533:5, 39549:2, 39549:4, 39549:8, 39676:8</p> <p><b>placement</b> [1] - 39517:25</p> <p><b>places</b> [2] - 39588:13, 39622:2</p> <p><b>plan</b> [1] - 39660:24</p> <p><b>planted</b> [2] - 39590:12, 39591:23</p> <p><b>planting</b> [1] - 39608:18</p> <p><b>plausible</b> [1] - 39622:3</p> <p><b>play</b> [3] - 39542:6, 39542:23, 39551:16</p> <p><b>played</b> [2] - 39640:2, 39652:15</p> <p><b>plea</b> [1] - 39559:1</p> <p><b>plead</b> [1] - 39564:1</p> <p><b>pleas</b> [3] - 39563:11, 39564:12, 39565:12</p> <p><b>pleased</b> [1] - 39685:10</p> <p><b>pled</b> [2] - 39563:23, 39564:6</p> <p><b>plot</b> [1] - 39543:10</p> <p><b>Pm</b> [8] - 39556:3, 39602:10, 39602:20, 39635:22, 39635:23, 39706:14, 39706:15, 39751:24</p> <p><b>point</b> [51] - 39512:17, 39512:20, 39515:24, 39517:2, 39523:23, 39526:10, 39534:15, 39534:23, 39550:1, 39552:10, 39552:12, 39555:9, 39557:3, 39557:11, 39560:11, 39565:6, 39569:17,</p>	<p>39573:18, 39585:19, 39586:22, 39588:17, 39592:2, 39596:3, 39596:21, 39598:7, 39610:15, 39610:16, 39619:2, 39626:5, 39644:5, 39646:9, 39658:17, 39685:20, 39690:13, 39691:15, 39691:25, 39694:18, 39698:14, 39699:6, 39701:7, 39724:7, 39724:17, 39724:18, 39725:2, 39726:12, 39726:15, 39726:16, 39728:20, 39732:7, 39739:8, 39744:3</p> <p><b>pointed</b> [2] - 39508:10, 39691:19</p> <p><b>points</b> [5] - 39555:11, 39580:15, 39645:15, 39680:3, 39703:1</p> <p><b>polar</b> [1] - 39576:10</p> <p><b>police</b> [91] - 39508:11, 39510:18, 39516:20, 39519:5, 39519:22, 39519:25, 39529:22, 39530:6, 39531:2, 39531:15, 39532:10, 39535:12, 39536:5, 39538:13, 39546:8, 39546:24, 39547:22, 39552:4, 39552:16, 39553:8, 39554:2, 39555:5, 39555:24, 39556:13, 39559:11, 39559:12, 39562:20, 39567:14, 39567:18, 39567:22, 39577:24, 39581:13, 39584:19, 39585:12, 39585:15, 39585:24, 39586:6, 39586:13, 39586:24, 39587:19, 39588:8, 39588:10, 39588:15, 39588:18, 39589:5, 39590:12, 39590:23, 39591:9, 39591:19, 39591:23, 39594:15, 39595:5, 39597:25, 39598:15, 39600:19, 39600:24, 39601:2, 39601:18, 39604:11, 39605:9, 39608:18, 39609:6, 39612:3, 39612:10, 39612:22, 39635:13, 39636:14, 39637:18, 39638:3, 39639:4, 39639:5, 39639:11, 39640:1, 39640:10, 39640:25,</p>	<p>39674:18, 39681:7, 39683:20, 39691:6, 39717:12, 39746:9, 39746:10, 39746:13, 39748:17, 39748:19, 39749:13, 39749:15, 39750:2, 39750:25, 39751:13</p> <p><b>Police</b> [13] - 39503:7, 39517:12, 39597:21, 39602:21, 39636:3, 39637:23, 39638:24, 39646:4, 39673:9, 39673:19, 39674:23, 39683:11, 39750:20</p> <p><b>policeman</b> [1] - 39717:13</p> <p><b>policies</b> [1] - 39566:23</p> <p><b>polite</b> [1] - 39549:13</p> <p><b>poly</b> [1] - 39733:4</p> <p><b>polygraph</b> [7] - 39572:14, 39598:20, 39599:5, 39599:14, 39601:9, 39601:18, 39666:7</p> <p><b>Polygraph</b> [1] - 39750:18</p> <p><b>polygraphed</b> [5] - 39525:6, 39525:8, 39572:18, 39572:20, 39750:4</p> <p><b>polygraphist</b> [1] - 39750:19</p> <p><b>Polymarker</b> [3] - 39732:12, 39733:7, 39733:11</p> <p><b>Polymerase</b> [1] - 39718:15</p> <p><b>pop</b> [1] - 39540:20</p> <p><b>Pope</b> [2] - 39665:5, 39668:14</p> <p><b>population</b> [3] - 39731:5, 39731:7, 39737:2</p> <p><b>portion</b> [6] - 39555:12, 39636:25, 39647:23, 39650:9, 39664:8, 39697:10</p> <p><b>portions</b> [2] - 39638:5, 39696:13</p> <p><b>position</b> [9] - 39532:13, 39570:14, 39620:16, 39631:7, 39680:19, 39701:4, 39704:17, 39742:4, 39742:5</p> <p><b>possession</b> [5] - 39559:16, 39603:5, 39603:6, 39648:11, 39648:12</p> <p><b>possessions</b> [2] -</p>	<p>39516:15, 39517:4</p> <p><b>possibilities</b> [1] - 39622:21</p> <p><b>possibility</b> [8] - 39523:12, 39621:18, 39622:9, 39622:11, 39626:7, 39661:4, 39667:16, 39748:3</p> <p><b>possible</b> [14] - 39523:12, 39524:2, 39568:1, 39607:14, 39607:16, 39622:22, 39702:23, 39713:20, 39723:1, 39730:8, 39732:9, 39737:8, 39745:10, 39747:7</p> <p><b>possibly</b> [6] - 39527:21, 39606:12, 39626:8, 39632:11, 39729:24, 39750:5</p> <p><b>Post</b> [1] - 39671:7</p> <p><b>poster</b> [2] - 39552:13, 39552:20</p> <p><b>potential</b> [5] - 39509:20, 39537:23, 39543:18, 39617:14, 39704:24</p> <p><b>power</b> [6] - 39628:19, 39628:23, 39633:20, 39633:21, 39633:23, 39634:22</p> <p><b>powers</b> [2] - 39632:19, 39633:5</p> <p><b>practical</b> [1] - 39743:6</p> <p><b>practice</b> [8] - 39628:8, 39628:17, 39629:22, 39629:25, 39651:4, 39703:23, 39710:16, 39724:9</p> <p><b>practiced</b> [2] - 39693:22, 39693:24</p> <p><b>practices</b> [2] - 39628:13, 39649:9</p> <p><b>pre</b> [1] - 39591:6</p> <p><b>pre-interview</b> [1] - 39591:6</p> <p><b>preceding</b> [2] - 39607:23, 39613:13</p> <p><b>precious</b> [1] - 39727:22</p> <p><b>precipitated</b> [1] - 39541:9</p> <p><b>precisely</b> [4] - 39533:24, 39542:25, 39631:25, 39685:21</p> <p><b>predecessor</b> [1] - 39656:12</p> <p><b>predominant</b> [1] - 39545:11</p> <p><b>preferable</b> [2] - 39525:19, 39735:18</p>	<p><b>preferential</b> [1] - 39735:25</p> <p><b>prefers</b> [1] - 39593:1</p> <p><b>preliminary</b> [17] - 39507:16, 39507:20, 39508:1, 39586:12, 39587:24, 39589:18, 39650:1, 39650:4, 39650:7, 39650:13, 39679:21, 39680:20, 39693:12, 39694:8, 39694:14, 39695:21, 39722:18</p> <p><b>premised</b> [1] - 39520:10</p> <p><b>preparation</b> [1] - 39655:15</p> <p><b>prepared</b> [30] - 39507:22, 39516:23, 39532:15, 39563:9, 39563:11, 39567:6, 39584:12, 39584:15, 39593:18, 39596:6, 39602:17, 39606:5, 39621:10, 39643:10, 39669:14, 39669:21, 39675:12, 39675:13, 39675:14, 39675:19, 39678:11, 39679:22, 39682:4, 39684:25, 39722:9, 39723:7, 39731:16, 39738:22, 39738:24, 39739:4</p> <p><b>preponderance</b> [1] - 39713:5</p> <p><b>preposterous</b> [1] - 39570:19</p> <p><b>prerogative</b> [1] - 39710:13</p> <p><b>present</b> [8] - 39529:18, 39540:24, 39567:16, 39602:23, 39609:2, 39609:13, 39745:8, 39747:18</p> <p><b>presentation</b> [7] - 39678:15, 39678:18, 39678:21, 39679:5, 39679:8, 39679:15, 39679:16</p> <p><b>presented</b> [4] - 39611:23, 39615:18, 39616:5, 39687:7</p> <p><b>presently</b> [2] - 39603:5, 39725:7</p> <p><b>press</b> [6] - 39639:18, 39660:6, 39660:8, 39662:16, 39667:4, 39704:12</p> <p><b>Press</b> [1] - 39661:8</p> <p><b>pressing</b> [2] -</p>
--	---	---	---	---



<p>39527:13, 39527:17  <b>pressure</b> [6] -  39537:21, 39537:24,  39538:6, 39538:11,  39539:22, 39547:3  <b>pressured</b> [1] - 39539:3  <b>presumably</b> [1] -  39553:4  <b>presume</b> [2] -  39517:10, 39544:9  <b>presumption</b> [1] -  39505:21  <b>pretending</b> [1] -  39515:23  <b>pretty</b> [3] - 39570:19,  39610:3, 39627:14  <b>prevalence</b> [1] -  39717:2  <b>prevalent</b> [1] - 39734:5  <b>prevent</b> [1] - 39627:10  <b>previous</b> [10] -  39559:18, 39572:22,  39588:8, 39590:5,  39594:14, 39594:23,  39636:24, 39638:13,  39644:20, 39706:5  <b>previously</b> [1] -  39677:13  <b>primarily</b> [7] -  39505:25, 39520:2,  39641:12, 39709:4,  39743:5, 39748:16,  39750:14  <b>primary</b> [3] - 39708:3,  39710:11, 39720:19  <b>prime</b> [1] - 39587:4  <b>Prime</b> [1] - 39632:12  <b>printouts</b> [1] - 39668:11  <b>prison</b> [2] - 39565:8,  39661:13  <b>private</b> [1] - 39527:24  <b>probabilities</b> [2] -  39713:19, 39741:9  <b>probable</b> [1] - 39615:17  <b>probation</b> [1] - 39588:7  <b>probe</b> [1] - 39610:5  <b>probes</b> [1] - 39733:22  <b>probing</b> [1] - 39533:19  <b>problem</b> [3] - 39566:14,  39609:5, 39747:12  <b>Problem</b> [1] - 39609:4  <b>problems</b> [1] -  39566:24  <b>procedure</b> [1] - 39629:6  <b>proceed</b> [2] - 39680:20,  39725:5  <b>proceeded</b> [1] -  39702:15  <b>proceeding</b> [4] -  39565:23, 39596:13,</p>	<p>39740:22, 39744:3  <b>Proceedings</b> [4] -  39501:12, 39501:23,  39504:1, 39505:1  <b>proceedings</b> [10] -  39568:17, 39652:12,  39679:14, 39684:8,  39709:2, 39713:18,  39733:12, 39747:22,  39749:3, 39750:21  <b>process</b> [28] -  39505:22, 39589:3,  39617:24, 39617:25,  39629:6, 39629:17,  39629:20, 39643:4,  39659:22, 39660:1,  39676:1, 39680:22,  39705:16, 39708:8,  39712:7, 39718:14,  39720:20, 39723:7,  39729:2, 39730:11,  39731:21, 39731:23,  39731:24, 39732:14,  39732:15, 39732:17,  39733:24, 39746:24  <b>processes</b> [2] -  39732:2, 39732:6  <b>proclaimed</b> [1] -  39668:8  <b>produce</b> [2] - 39617:6,  39648:13  <b>produced</b> [2] -  39672:24, 39677:25  <b>producer</b> [1] - 39654:15  <b>productive</b> [1] -  39745:10  <b>products</b> [2] -  39697:19, 39698:1  <b>professional</b> [2] -  39549:22, 39550:15  <b>professionals</b> [1] -  39704:7  <b>profile</b> [4] - 39731:7,  39736:13, 39737:2,  39737:13  <b>profiles</b> [2] - 39733:23,  39737:1  <b>proforma</b> [1] - 39708:9  <b>program</b> [4] - 39660:18,  39662:19, 39663:1,  39721:8  <b>progress</b> [2] - 39709:2,  39744:25  <b>progressed</b> [1] -  39530:10  <b>promise</b> [1] - 39731:13  <b>prompts</b> [1] - 39617:12  <b>pronunciation</b> [1] -  39650:4  <b>properly</b> [1] - 39749:19</p>	<p><b>property</b> [1] - 39588:6  <b>proposed</b> [2] - 39574:6,  39749:10  <b>propounded</b> [1] -  39750:7  <b>prosecution</b> [2] -  39639:16, 39639:20  <b>prosecutor</b> [3] -  39641:9, 39651:7  <b>prosecutors</b> [1] -  39556:13  <b>prospect</b> [1] - 39730:17  <b>protestation</b> [1] -  39665:3  <b>protestations</b> [1] -  39667:1  <b>protocol</b> [1] - 39730:20  <b>protocols</b> [1] -  39728:15  <b>proud</b> [3] - 39579:7,  39579:11, 39579:13  <b>prove</b> [1] - 39741:12  <b>proved</b> [2] - 39616:24  <b>provide</b> [14] - 39550:22,  39559:20, 39595:22,  39602:8, 39602:15,  39668:10, 39669:14,  39669:15, 39671:8,  39671:23, 39678:14,  39694:9, 39695:14,  39731:16  <b>provided</b> [16] - 39506:8,  39507:15, 39531:14,  39567:25, 39633:10,  39636:20, 39676:22,  39679:13, 39680:12,  39684:16, 39686:14,  39694:7, 39702:8,  39707:2, 39715:23,  39721:20  <b>provides</b> [1] - 39636:22  <b>Providing</b> [1] - 39596:2  <b>providing</b> [7] -  39509:17, 39642:6,  39645:14, 39651:20,  39674:7, 39682:10,  39716:12  <b>Province</b> [1] - 39752:4  <b>provincial</b> [5] -  39634:23, 39634:25,  39635:3, 39635:7,  39635:13  <b>Provincial</b> [1] - 39511:4  <b>provision</b> [2] -  39634:14, 39711:6  <b>prudent</b> [2] - 39518:14,  39640:5  <b>psychiatric</b> [2] -  39583:18, 39661:11  <b>public</b> [10] - 39514:1,</p>	<p>39523:5, 39568:12,  39630:4, 39660:24,  39664:1, 39673:21,  39674:24, 39675:24,  39704:22  <b>publication</b> [2] -  39696:6, 39704:3  <b>publicity</b> [3] - 39652:2,  39659:21, 39659:22  <b>publicize</b> [1] - 39522:25  <b>publicly</b> [2] - 39523:4,  39704:17  <b>published</b> [4] -  39666:23, 39675:20,  39703:16, 39703:18  <b>puffing</b> [2] - 39603:21,  39605:1  <b>pulled</b> [1] - 39586:11  <b>pure</b> [1] - 39632:4  <b>purely</b> [1] - 39721:24  <b>purporting</b> [1] -  39599:24  <b>purpose</b> [8] - 39518:8,  39521:15, 39522:4,  39522:5, 39675:19,  39698:4, 39722:25,  39726:19  <b>purposes</b> [1] - 39580:9  <b>purse</b> [5] - 39534:16,  39542:11, 39570:10,  39590:22, 39608:19  <b>pursue</b> [3] - 39527:1,  39568:21, 39616:17  <b>pursued</b> [3] - 39679:23,  39681:1, 39734:15  <b>pursuing</b> [1] - 39739:22  <b>pushing</b> [1] - 39669:1  <b>put</b> [64] - 39515:8,  39517:20, 39521:20,  39532:3, 39532:12,  39532:23, 39533:4,  39534:16, 39538:8,  39539:16, 39546:12,  39555:11, 39557:21,  39558:3, 39565:4,  39565:6, 39568:4,  39570:10, 39573:14,  39574:4, 39579:19,  39579:25, 39586:5,  39590:6, 39590:22,  39592:15, 39597:23,  39609:19, 39609:25,  39610:1, 39611:19,  39612:13, 39612:17,  39617:9, 39617:15,  39617:24, 39618:2,  39618:9, 39618:12,  39618:15, 39630:2,  39630:7, 39649:16,  39654:21, 39657:7,</p>	<p>39667:3, 39672:7,  39674:20, 39677:4,  39677:5, 39677:6,  39690:10, 39691:23,  39699:7, 39699:11,  39699:25, 39704:15,  39707:14, 39707:23,  39731:19, 39731:23,  39742:13  <b>puts</b> [1] - 39617:11  <b>putting</b> [9] - 39524:7,  39542:11, 39607:20,  39608:12, 39608:19,  39674:10, 39689:25,  39697:15, 39747:20</p>
<b>Q</b>				
<p><b>Qb</b> [1] - 39502:10  <b>Qc</b> [2] - 39503:2,  39503:10  <b>Qpp</b> [1] - 39635:13  <b>qualifications</b> [1] -  39727:23  <b>qualify</b> [1] - 39629:12  <b>quantity</b> [2] - 39718:8,  39718:16  <b>quarrelling</b> [1] -  39653:18  <b>quaternary</b> [1] -  39715:23  <b>Queen's</b> [4] - 39752:1,  39752:3, 39752:14,  39752:20  <b>quest</b> [1] - 39646:7  <b>questioned</b> [12] -  39525:7, 39538:20,  39562:20, 39563:20,  39564:2, 39564:5,  39588:15, 39589:10,  39599:13, 39613:20,  39649:4, 39650:5  <b>questioning</b> [24] -  39520:1, 39525:5,  39530:25, 39531:1,  39541:11, 39558:2,  39567:3, 39580:18,  39586:13, 39589:12,  39593:24, 39594:18,  39595:2, 39601:8,  39601:17, 39605:19,  39606:12, 39633:9,  39649:23, 39664:10,  39688:24, 39692:5,  39701:25, 39708:14  <b>questions</b> [64] -  39505:15, 39505:18,  39506:8, 39507:5,  39518:1, 39519:21,</p>				



<p>39520:4, 39520:7, 39520:9, 39522:18, 39522:20, 39528:18, 39539:8, 39540:2, 39551:7, 39567:4, 39571:3, 39572:25, 39593:19, 39593:21, 39594:2, 39594:19, 39594:22, 39594:25, 39598:20, 39599:5, 39605:23, 39607:1, 39612:15, 39612:17, 39612:24, 39613:6, 39613:8, 39613:9, 39613:12, 39625:22, 39634:20, 39641:3, 39641:12, 39642:15, 39643:2, 39648:23, 39649:16, 39650:20, 39651:21, 39652:9, 39652:14, 39653:9, 39654:2, 39654:21, 39664:11, 39672:11, 39685:4, 39685:9, 39688:19, 39692:20, 39696:23, 39701:6, 39703:15, 39705:23, 39706:2, 39708:18, 39743:15, 39743:17 <b>quick</b> [2] - 39659:5, 39659:6 <b>quickly</b> [2] - 39717:7, 39743:18 <b>Quite</b>[4] - 39591:1, 39602:2, 39660:4, 39730:2 <b>quite</b> [13] - 39512:1, 39582:23, 39596:24, 39628:6, 39628:22, 39628:25, 39632:11, 39636:3, 39645:14, 39695:24, 39703:17, 39720:3, 39747:1 <b>quote</b> [8] - 39512:13, 39546:15, 39546:20, 39605:15, 39670:23, 39670:25, 39691:3, 39697:10 <b>quoting</b> [2] - 39690:25, 39703:19</p>	<p>39690:13 <b>raises</b> [1] - 39594:2 <b>raising</b> [2] - 39594:25, 39626:13 <b>ran</b> [1] - 39524:17 <b>random</b> [1] - 39737:3 <b>rape</b> [8] - 39554:24, 39559:14, 39562:9, 39562:13, 39563:17, 39563:19, 39636:16, 39674:16 <b>raped</b> [6] - 39557:5, 39557:11, 39557:22, 39560:4, 39560:7, 39666:14 <b>rapes</b> [4] - 39555:7, 39555:25, 39637:10, 39638:3 <b>rather</b> [3] - 39596:12, 39605:6, 39689:9 <b>rational</b> [1] - 39532:14 <b>raw</b> [1] - 39694:19 <b>Rcmp</b>[7] - 39503:9, 39640:5, 39640:12, 39681:3, 39719:23, 39729:22, 39734:10 <b>re</b> [4] - 39535:1, 39569:6, 39590:7, 39632:24 <b>re-interpret</b> [1] - 39590:7 <b>re-interview</b> [1] - 39632:24 <b>re-visited</b> [1] - 39569:6 <b>reach</b> [5] - 39558:13, 39616:6, 39617:10, 39617:12, 39728:9 <b>reached</b> [3] - 39549:24, 39550:18, 39584:21 <b>reaches</b> [1] - 39631:15 <b>reaching</b> [1] - 39632:21 <b>reacted</b> [1] - 39526:25 <b>reacting</b> [2] - 39736:11, 39736:12 <b>reaction</b> [3] - 39543:19, 39668:13, 39703:9 <b>Reaction</b>[1] - 39718:15 <b>read</b> [21] - 39511:14, 39514:6, 39515:5, 39542:24, 39577:24, 39643:11, 39649:25, 39651:5, 39651:9, 39654:17, 39659:5, 39659:6, 39659:9, 39659:12, 39666:22, 39680:2, 39692:23, 39697:11, 39719:9, 39722:4, 39746:21 <b>reading</b> [7] - 39513:15, 39527:21, 39578:21,</p>	<p>39598:23, 39659:12, 39719:20, 39747:5 <b>Reading</b>[1] - 39513:18 <b>ready</b> [1] - 39659:10 <b>real</b> [9] - 39540:22, 39543:9, 39544:9, 39544:11, 39582:5, 39670:6, 39670:8, 39670:10, 39683:13 <b>reality</b> [2] - 39592:2, 39736:6 <b>realization</b> [1] - 39703:22 <b>realize</b> [7] - 39516:5, 39644:14, 39644:19, 39644:25, 39645:7, 39654:5, 39728:20 <b>really</b> [20] - 39507:4, 39538:6, 39549:23, 39562:17, 39567:3, 39569:17, 39581:16, 39582:10, 39607:17, 39611:17, 39617:24, 39618:25, 39620:11, 39626:2, 39630:2, 39691:24, 39698:8, 39700:8, 39745:24, 39746:16 <b>rear</b> [3] - 39621:23, 39622:11, 39623:23 <b>reason</b> [8] - 39520:20, 39521:7, 39532:8, 39559:4, 39562:22, 39584:2, 39624:1, 39635:14 <b>reasonable</b> [4] - 39527:20, 39618:5, 39629:8, 39741:13 <b>reasons</b> [1] - 39564:11 <b>recalled</b> [3] - 39533:18, 39535:2, 39576:2 <b>recantation</b> [2] - 39584:22, 39749:23 <b>receipt</b> [3] - 39511:22, 39663:7, 39722:21 <b>receive</b> [7] - 39508:21, 39513:13, 39646:9, 39676:18, 39742:7, 39742:8, 39747:8 <b>received</b> [27] - 39507:25, 39508:5, 39509:3, 39509:21, 39510:20, 39510:22, 39513:2, 39515:2, 39593:6, 39611:1, 39641:1, 39646:23, 39649:8, 39651:11, 39657:18, 39660:17, 39662:5, 39676:11, 39679:4, 39679:8,</p>	<p>39680:15, 39684:2, 39686:24, 39687:14, 39699:23, 39708:18, 39743:11 <b>receiving</b> [5] - 39509:8, 39528:1, 39676:14, 39708:24, 39725:22 <b>recent</b> [4] - 39585:6, 39592:16, 39594:21, 39718:10 <b>Recent</b>[2] - 39586:21, 39598:1 <b>recently</b> [2] - 39718:4, 39738:3 <b>recipient</b> [1] - 39661:8 <b>recital</b> [1] - 39613:11 <b>recitation</b> [4] - 39516:22, 39587:23, 39609:8, 39722:1 <b>recite</b> [1] - 39599:25 <b>recited</b> [2] - 39573:6, 39583:22 <b>recognize</b> [8] - 39552:3, 39553:7, 39554:19, 39555:4, 39638:16, 39687:9, 39688:8, 39713:14 <b>recognized</b> [2] - 39535:12, 39555:13 <b>recollected</b> [1] - 39577:25 <b>recollection</b> [18] - 39513:21, 39521:16, 39529:12, 39529:18, 39531:10, 39531:18, 39531:19, 39531:23, 39539:4, 39550:22, 39568:19, 39609:2, 39696:4, 39697:13, 39726:5, 39746:17, 39748:11 <b>recollections</b> [1] - 39538:1 <b>recommend</b> [1] - 39615:20 <b>Recommendations</b>[1] - 39593:14 <b>Reconvened</b>[4] - 39505:2, 39565:1, 39635:23, 39706:15 <b>Record</b>[2] - 39586:22, 39598:2 <b>record</b> [32] - 39505:12, 39513:21, 39514:1, 39539:7, 39566:2, 39574:19, 39577:20, 39587:23, 39636:2, 39636:15, 39641:7, 39642:23, 39648:4, 39650:18, 39656:21,</p>	<p>39662:22, 39663:14, 39664:25, 39666:16, 39677:6, 39677:14, 39683:7, 39686:11, 39686:19, 39691:11, 39706:22, 39713:3, 39723:13, 39725:25, 39729:5, 39747:4, 39748:18 <b>recorded</b> [4] - 39643:12, 39670:11, 39680:25, 39691:4 <b>recordings</b> [2] - 39568:23, 39568:25 <b>records</b> [14] - 39539:11, 39555:25, 39559:18, 39565:9, 39566:18, 39589:14, 39637:11, 39637:13, 39637:25, 39643:21, 39655:10, 39661:11, 39662:8 <b>recounted</b> [1] - 39542:9 <b>recounting</b> [2] - 39556:19, 39563:6 <b>recounts</b> [1] - 39575:14 <b>recourse</b> [1] - 39723:5 <b>red</b> [1] - 39715:6 <b>refer</b> [8] - 39518:5, 39576:5, 39585:1, 39619:16, 39675:1, 39677:3, 39712:16, 39719:13 <b>reference</b> [48] - 39508:19, 39515:11, 39515:18, 39518:11, 39518:21, 39525:3, 39539:4, 39539:11, 39548:7, 39555:16, 39558:10, 39568:6, 39573:13, 39578:22, 39593:4, 39600:7, 39642:24, 39649:20, 39656:11, 39656:12, 39675:16, 39685:1, 39689:12, 39690:16, 39707:17, 39707:20, 39708:4, 39708:22, 39712:7, 39712:18, 39714:7, 39714:13, 39716:24, 39719:5, 39719:6, 39720:10, 39720:12, 39721:1, 39727:8, 39740:5, 39740:11, 39741:3, 39741:6, 39743:12, 39746:8, 39749:1, 39749:20, 39751:3 <b>Reference</b>[2] - 39713:3, 39713:5 <b>referenced</b> [5] -</p>
<b>R</b>				
<p><b>Radisson</b>[1] - 39501:16 <b>raise</b> [4] - 39614:4, 39639:2, 39662:24, 39738:17 <b>raised</b> [4] - 39593:21, 39594:18, 39595:9,</p>	<p>39690:13 <b>raises</b> [1] - 39594:2 <b>raising</b> [2] - 39594:25, 39626:13 <b>ran</b> [1] - 39524:17 <b>random</b> [1] - 39737:3 <b>rape</b> [8] - 39554:24, 39559:14, 39562:9, 39562:13, 39563:17, 39563:19, 39636:16, 39674:16 <b>raped</b> [6] - 39557:5, 39557:11, 39557:22, 39560:4, 39560:7, 39666:14 <b>rapes</b> [4] - 39555:7, 39555:25, 39637:10, 39638:3 <b>rather</b> [3] - 39596:12, 39605:6, 39689:9 <b>rational</b> [1] - 39532:14 <b>raw</b> [1] - 39694:19 <b>Rcmp</b>[7] - 39503:9, 39640:5, 39640:12, 39681:3, 39719:23, 39729:22, 39734:10 <b>re</b> [4] - 39535:1, 39569:6, 39590:7, 39632:24 <b>re-interpret</b> [1] - 39590:7 <b>re-interview</b> [1] - 39632:24 <b>re-visited</b> [1] - 39569:6 <b>reach</b> [5] - 39558:13, 39616:6, 39617:10, 39617:12, 39728:9 <b>reached</b> [3] - 39549:24, 39550:18, 39584:21 <b>reaches</b> [1] - 39631:15 <b>reaching</b> [1] - 39632:21 <b>reacted</b> [1] - 39526:25 <b>reacting</b> [2] - 39736:11, 39736:12 <b>reaction</b> [3] - 39543:19, 39668:13, 39703:9 <b>Reaction</b>[1] - 39718:15 <b>read</b> [21] - 39511:14, 39514:6, 39515:5, 39542:24, 39577:24, 39643:11, 39649:25, 39651:5, 39651:9, 39654:17, 39659:5, 39659:6, 39659:9, 39659:12, 39666:22, 39680:2, 39692:23, 39697:11, 39719:9, 39722:4, 39746:21 <b>reading</b> [7] - 39513:15, 39527:21, 39578:21,</p>	<p>39598:23, 39659:12, 39719:20, 39747:5 <b>Reading</b>[1] - 39513:18 <b>ready</b> [1] - 39659:10 <b>real</b> [9] - 39540:22, 39543:9, 39544:9, 39544:11, 39582:5, 39670:6, 39670:8, 39670:10, 39683:13 <b>reality</b> [2] - 39592:2, 39736:6 <b>realization</b> [1] - 39703:22 <b>realize</b> [7] - 39516:5, 39644:14, 39644:19, 39644:25, 39645:7, 39654:5, 39728:20 <b>really</b> [20] - 39507:4, 39538:6, 39549:23, 39562:17, 39567:3, 39569:17, 39581:16, 39582:10, 39607:17, 39611:17, 39617:24, 39618:25, 39620:11, 39626:2, 39630:2, 39691:24, 39698:8, 39700:8, 39745:24, 39746:16 <b>rear</b> [3] - 39621:23, 39622:11, 39623:23 <b>reason</b> [8] - 39520:20, 39521:7, 39532:8, 39559:4, 39562:22, 39584:2, 39624:1, 39635:14 <b>reasonable</b> [4] - 39527:20, 39618:5, 39629:8, 39741:13 <b>reasons</b> [1] - 39564:11 <b>recalled</b> [3] - 39533:18, 39535:2, 39576:2 <b>recantation</b> [2] - 39584:22, 39749:23 <b>receipt</b> [3] - 39511:22, 39663:7, 39722:21 <b>receive</b> [7] - 39508:21, 39513:13, 39646:9, 39676:18, 39742:7, 39742:8, 39747:8 <b>received</b> [27] - 39507:25, 39508:5, 39509:3, 39509:21, 39510:20, 39510:22, 39513:2, 39515:2, 39593:6, 39611:1, 39641:1, 39646:23, 39649:8, 39651:11, 39657:18, 39660:17, 39662:5, 39676:11, 39679:4, 39679:8,</p>	<p>39680:15, 39684:2, 39686:24, 39687:14, 39699:23, 39708:18, 39743:11 <b>receiving</b> [5] - 39509:8, 39528:1, 39676:14, 39708:24, 39725:22 <b>recent</b> [4] - 39585:6, 39592:16, 39594:21, 39718:10 <b>Recent</b>[2] - 39586:21, 39598:1 <b>recently</b> [2] - 39718:4, 39738:3 <b>recipient</b> [1] - 39661:8 <b>recital</b> [1] - 39613:11 <b>recitation</b> [4] - 39516:22, 39587:23, 39609:8, 39722:1 <b>recite</b> [1] - 39599:25 <b>recited</b> [2] - 39573:6, 39583:22 <b>recognize</b> [8] - 39552:3, 39553:7, 39554:19, 39555:4, 39638:16, 39687:9, 39688:8, 39713:14 <b>recognized</b> [2] - 39535:12, 39555:13 <b>recollected</b> [1] - 39577:25 <b>recollection</b> [18] - 39513:21, 39521:16, 39529:12, 39529:18, 39531:10, 39531:18, 39531:19, 39531:23, 39539:4, 39550:22, 39568:19, 39609:2, 39696:4, 39697:13, 39726:5, 39746:17, 39748:11 <b>recollections</b> [1] - 39538:1 <b>recommend</b> [1] - 39615:20 <b>Recommendations</b>[1] - 39593:14 <b>Reconvened</b>[4] - 39505:2, 39565:1, 39635:23, 39706:15 <b>Record</b>[2] - 39586:22, 39598:2 <b>record</b> [32] - 39505:12, 39513:21, 39514:1, 39539:7, 39566:2, 39574:19, 39577:20, 39587:23, 39636:2, 39636:15, 39641:7, 39642:23, 39648:4, 39650:18, 39656:21,</p>	<p>39662:22, 39663:14, 39664:25, 39666:16, 39677:6, 39677:14, 39683:7, 39686:11, 39686:19, 39691:11, 39706:22, 39713:3, 39723:13, 39725:25, 39729:5, 39747:4, 39748:18 <b>recorded</b> [4] - 39643:12, 39670:11, 39680:25, 39691:4 <b>recordings</b> [2] - 39568:23, 39568:25 <b>records</b> [14] - 39539:11, 39555:25, 39559:18, 39565:9, 39566:18, 39589:14, 39637:11, 39637:13, 39637:25, 39643:21, 39655:10, 39661:11, 39662:8 <b>recounted</b> [1] - 39542:9 <b>recounting</b> [2] - 39556:19, 39563:6 <b>recounts</b> [1] - 39575:14 <b>recourse</b> [1] - 39723:5 <b>red</b> [1] - 39715:6 <b>refer</b> [8] - 39518:5, 39576:5, 39585:1, 39619:16, 39675:1, 39677:3, 39712:16, 39719:13 <b>reference</b> [48] - 39508:19, 39515:11, 39515:18, 39518:11, 39518:21, 39525:3, 39539:4, 39539:11, 39548:7, 39555:16, 39558:10, 39568:6, 39573:13, 39578:22, 39593:4, 39600:7, 39642:24, 39649:20, 39656:11, 39656:12, 39675:16, 39685:1, 39689:12, 39690:16, 39707:17, 39707:20, 39708:4, 39708:22, 39712:7, 39712:18, 39714:7, 39714:13, 39716:24, 39719:5, 39719:6, 39720:10, 39720:12, 39721:1, 39727:8, 39740:5, 39740:11, 39741:3, 39741:6, 39743:12, 39746:8, 39749:1, 39749:20, 39751:3 <b>Reference</b>[2] - 39713:3, 39713:5 <b>referenced</b> [5] -</p>



<p>39518:17, 39592:7, 39648:25, 39650:12, 39651:22</p> <p><b>references</b> [6] - 39519:2, 39562:25, 39565:22, 39586:17, 39623:6, 39714:2</p> <p><b>referencing</b> [5] - 39508:16, 39577:15, 39587:24, 39602:19, 39661:9</p> <p><b>referred</b> [7] - 39513:20, 39575:4, 39647:14, 39664:9, 39675:2, 39676:5, 39742:19</p> <p><b>referring</b> [12] - 39518:16, 39521:16, 39521:17, 39524:14, 39538:13, 39601:20, 39619:5, 39619:14, 39652:11, 39664:20, 39703:20, 39721:7</p> <p><b>refers</b> [5] - 39519:3, 39562:10, 39577:6, 39579:24, 39579:25</p> <p><b>refine</b> [1] - 39680:7</p> <p><b>refinements</b> [1] - 39630:19</p> <p><b>reflect</b> [1] - 39696:14</p> <p><b>reflective</b> [1] - 39684:22</p> <p><b>reflects</b> [3] - 39683:1, 39696:10, 39747:4</p> <p><b>refresh</b> [2] - 39688:5, 39689:6</p> <p><b>refreshed</b> [1] - 39719:13</p> <p><b>refused</b> [2] - 39558:6, 39633:19</p> <p><b>refusing</b> [1] - 39670:7</p> <p><b>regard</b> [4] - 39510:20, 39566:22, 39579:19, 39626:6</p> <p><b>regarding</b> [8] - 39551:6, 39637:10, 39637:17, 39638:3, 39638:7, 39639:16, 39640:24, 39728:11</p> <p><b>regards</b> [4] - 39575:12, 39582:18, 39689:15, 39703:11</p> <p><b>Regina</b> [19] - 39519:2, 39519:4, 39556:14, 39563:12, 39580:21, 39581:1, 39598:13, 39598:14, 39600:22, 39602:7, 39602:14, 39602:21, 39603:1, 39605:19, 39654:16, 39689:13, 39689:15, 39689:16, 39750:3</p>	<p><b>regional</b> [1] - 39725:13</p> <p><b>Regional</b> [1] - 39707:9</p> <p><b>regrettable</b> [1] - 39566:25</p> <p><b>Regrettably</b> [1] - 39616:19</p> <p><b>regularity</b> [1] - 39505:21</p> <p><b>regulation</b> [1] - 39629:2</p> <p><b>relate</b> [2] - 39681:7, 39705:8</p> <p><b>related</b> [8] - 39508:7, 39510:14, 39556:1, 39570:21, 39598:20, 39599:6, 39687:3, 39733:7</p> <p><b>relates</b> [2] - 39510:15, 39672:23</p> <p><b>relating</b> [7] - 39511:2, 39552:17, 39565:10, 39682:8, 39683:23, 39684:15, 39710:3</p> <p><b>relation</b> [10] - 39506:2, 39547:2, 39548:14, 39555:7, 39557:1, 39563:4, 39618:20, 39622:18, 39634:25, 39704:11</p> <p><b>relationship</b> [3] - 39530:7, 39546:18, 39704:1</p> <p><b>relative</b> [3] - 39507:16, 39560:21, 39636:16</p> <p><b>relatively</b> [2] - 39642:9, 39655:14</p> <p><b>relaxed</b> [1] - 39742:16</p> <p><b>relayed</b> [1] - 39646:24</p> <p><b>release</b> [3] - 39634:15, 39667:4, 39720:6</p> <p><b>released</b> [1] - 39630:23</p> <p><b>relevance</b> [2] - 39742:20, 39749:5</p> <p><b>relevancy</b> [1] - 39742:21</p> <p><b>reliable</b> [1] - 39731:18</p> <p><b>relied</b> [1] - 39705:14</p> <p><b>relief</b> [2] - 39711:13, 39722:14</p> <p><b>rely</b> [2] - 39626:15, 39627:22</p> <p><b>relying</b> [1] - 39720:22</p> <p><b>remain</b> [1] - 39716:16</p> <p><b>remainder</b> [1] - 39707:11</p> <p><b>remains</b> [3] - 39567:8, 39699:1, 39701:7</p> <p><b>remark</b> [2] - 39510:3, 39510:6</p> <p><b>remarkable</b> [1] - 39718:24</p>	<p><b>remarks</b> [1] - 39705:7</p> <p><b>remedy</b> [6] - 39615:20, 39616:25, 39617:21, 39631:17, 39711:5, 39741:15</p> <p><b>remember</b> [57] - 39505:20, 39507:23, 39511:19, 39515:20, 39515:22, 39524:18, 39524:21, 39524:22, 39524:23, 39525:13, 39525:14, 39525:18, 39525:24, 39525:25, 39526:6, 39526:12, 39526:13, 39526:14, 39527:11, 39528:20, 39532:21, 39532:23, 39533:3, 39533:6, 39533:16, 39533:23, 39534:6, 39534:8, 39534:10, 39534:18, 39534:19, 39534:22, 39534:24, 39536:12, 39536:17, 39538:10, 39538:18, 39538:20, 39538:24, 39547:10, 39547:21, 39547:22, 39547:23, 39547:25, 39582:2, 39582:3, 39582:4, 39650:2, 39654:2, 39663:23, 39666:6, 39692:22, 39725:18, 39745:23, 39746:3</p> <p><b>remembered</b> [1] - 39535:3</p> <p><b>remembers</b> [2] - 39534:6, 39575:15</p> <p><b>remove</b> [1] - 39557:4</p> <p><b>removed</b> [1] - 39557:10</p> <p><b>rendition</b> [1] - 39607:17</p> <p><b>renting</b> [1] - 39553:19</p> <p><b>repeat</b> [5] - 39599:8, 39733:1, 39734:11, 39734:20, 39737:21</p> <p><b>repeated</b> [2] - 39539:12, 39543:17</p> <p><b>Repeatedly</b> [1] - 39547:18</p> <p><b>repeatedly</b> [3] - 39531:2, 39532:10, 39547:16</p> <p><b>repeats</b> [7] - 39732:5, 39732:10, 39733:24, 39735:18, 39736:17, 39737:6, 39738:5</p> <p><b>repetition</b> [2] - 39624:24, 39704:14</p> <p><b>replicate</b> [1] - 39718:18</p> <p><b>replicated</b> [2] -</p>	<p>39730:21, 39732:23</p> <p><b>replication</b> [2] - 39731:12, 39732:18</p> <p><b>replied</b> [1] - 39576:18</p> <p><b>reply</b> [2] - 39643:20, 39669:23</p> <p><b>report</b> [40] - 39510:20, 39518:25, 39561:23, 39565:5, 39565:16, 39567:5, 39575:5, 39575:7, 39575:24, 39581:4, 39597:13, 39599:21, 39600:8, 39606:5, 39610:4, 39610:14, 39615:5, 39615:7, 39628:18, 39628:22, 39634:10, 39636:7, 39636:10, 39673:9, 39673:18, 39674:11, 39678:7, 39678:11, 39679:21, 39680:20, 39681:24, 39682:3, 39682:11, 39699:23, 39703:18, 39726:9, 39726:18, 39726:24, 39739:11</p> <p><b>reported</b> [5] - 39593:23, 39617:3, 39639:18, 39639:22, 39641:1</p> <p><b>Reporter</b> [2] - 39752:14, 39752:20</p> <p><b>reporter</b> [1] - 39672:5</p> <p><b>Reporters</b> [2] - 39502:10, 39752:3</p> <p><b>reporters</b> [1] - 39667:20</p> <p><b>Reporters</b> [1] - 39752:1</p> <p><b>reporting</b> [9] - 39575:8, 39575:11, 39665:18, 39666:18, 39666:24, 39669:1, 39670:20, 39671:17, 39694:24</p> <p><b>reports</b> [15] - 39510:18, 39565:10, 39567:2, 39602:19, 39615:9, 39640:24, 39659:16, 39668:25, 39675:20, 39683:17, 39683:20, 39684:4, 39700:7, 39703:16, 39709:1</p> <p><b>represent</b> [2] - 39505:13, 39674:15</p> <p><b>representations</b> [2] - 39725:23, 39741:17</p> <p><b>representatives</b> [1] - 39705:18</p> <p><b>represented</b> [2] - 39646:1, 39706:23</p> <p><b>representing</b> [5] - 39672:16, 39739:10, 39744:1, 39749:8,</p>	<p>39751:7</p> <p><b>reputable</b> [1] - 39725:6</p> <p><b>reputations</b> [2] - 39665:16, 39704:25</p> <p><b>reputed</b> [1] - 39719:24</p> <p><b>request</b> [17] - 39506:12, 39510:16, 39552:16, 39560:21, 39562:20, 39564:13, 39643:22, 39644:16, 39645:11, 39646:10, 39663:21, 39673:25, 39677:4, 39680:8, 39681:6, 39722:14, 39748:19</p> <p><b>requested</b> [8] - 39541:1, 39541:12, 39561:7, 39561:10, 39566:21, 39647:1, 39681:13, 39699:7</p> <p><b>requesting</b> [1] - 39558:4</p> <p><b>requests</b> [4] - 39511:23, 39644:7, 39646:23, 39651:12</p> <p><b>require</b> [2] - 39591:18, 39676:19</p> <p><b>required</b> [14] - 39507:19, 39523:1, 39615:16, 39617:2, 39631:24, 39658:5, 39682:21, 39708:10, 39718:8, 39718:21, 39730:8, 39730:15, 39731:8, 39743:20</p> <p><b>requirement</b> [2] - 39628:18, 39722:23</p> <p><b>requirements</b> [1] - 39726:3</p> <p><b>research</b> [3] - 39635:9, 39635:20, 39719:23</p> <p><b>researched</b> [1] - 39721:19</p> <p><b>residence</b> [5] - 39552:2, 39553:18, 39554:25, 39603:19, 39621:19</p> <p><b>resident</b> [2] - 39621:20, 39626:16</p> <p><b>resile</b> [1] - 39580:2</p> <p><b>resistance</b> [1] - 39644:6</p> <p><b>resisted</b> [2] - 39635:14, 39645:10</p> <p><b>resisting</b> [1] - 39666:2</p> <p><b>resolution</b> [1] - 39715:1</p> <p><b>resort</b> [2] - 39654:23, 39656:9</p> <p><b>resource</b> [1] - 39716:14</p> <p><b>resources</b> [3] - 39665:7, 39680:9, 39740:13</p> <p><b>respect</b> [42] - 39509:18,</p>
--	--	---	--	---



<p>39512:16, 39527:23, 39572:21, 39572:23, 39580:21, 39586:3, 39597:25, 39616:14, 39618:13, 39619:7, 39619:9, 39633:5, 39633:15, 39643:3, 39643:25, 39657:17, 39657:19, 39673:18, 39678:20, 39679:1, 39680:16, 39684:12, 39686:11, 39687:5, 39692:21, 39693:10, 39693:17, 39693:20, 39694:2, 39694:5, 39694:6, 39695:1, 39695:19, 39696:3, 39697:4, 39697:13, 39699:8, 39700:21, 39704:2, 39709:2, 39740:25 <b>respects</b> [1] - 39707:15 <b>respond</b> [5] - 39527:19, 39527:25, 39528:4, 39571:20, 39653:15 <b>responded</b> [4] - 39578:14, 39612:15, 39652:15, 39652:19 <b>responding</b> [1] - 39729:7 <b>responds</b> [1] - 39540:19 <b>response</b> [19] - 39520:11, 39524:24, 39527:15, 39529:7, 39537:15, 39541:10, 39562:3, 39580:19, 39613:7, 39642:18, 39652:24, 39653:18, 39663:10, 39669:4, 39692:7, 39692:25, 39696:22, 39697:9, 39703:15 <b>responses</b> [2] - 39520:12, 39668:13 <b>responsibility</b> [1] - 39686:7 <b>responsible</b> [6] - 39554:6, 39563:17, 39659:22, 39717:15, 39743:4, 39743:5 <b>responsive</b> [1] - 39525:16 <b>rest</b> [2] - 39672:8, 39674:20 <b>restriction</b> [1] - 39700:13 <b>result</b> [18] - 39521:12, 39522:12, 39584:13, 39597:3, 39598:3,</p>	<p>39601:17, 39601:23, 39620:3, 39634:6, 39636:22, 39656:11, 39658:18, 39675:22, 39676:11, 39677:12, 39714:15, 39727:21 <b>resulted</b> [1] - 39558:19 <b>results</b> [7] - 39619:18, 39619:22, 39665:10, 39667:18, 39675:15, 39718:24, 39728:23 <b>retained</b> [3] - 39656:18, 39700:17, 39725:7 <b>retention</b> [1] - 39682:8 <b>retired</b> [1] - 39738:5 <b>Retired</b> [1] - 39503:14 <b>retrospect</b> [1] - 39665:17 <b>return</b> [2] - 39549:18, 39600:10 <b>returned</b> [1] - 39603:22 <b>revealed</b> [1] - 39555:24 <b>Reverend</b> [1] - 39667:4 <b>review</b> [17] - 39513:16, 39520:22, 39521:1, 39521:8, 39577:23, 39600:8, 39612:5, 39629:13, 39630:8, 39645:2, 39664:17, 39671:5, 39678:8, 39693:4, 39694:22, 39697:22, 39698:4 <b>reviewed</b> [5] - 39615:19, 39643:9, 39694:17, 39694:21, 39696:8 <b>reviewing</b> [2] - 39521:19, 39669:3 <b>revisit</b> [1] - 39522:16 <b>Rflp</b> [5] - 39718:7, 39730:8, 39733:25, 39734:10, 39734:11 <b>Richard</b> [2] - 39717:12, 39717:23 <b>Rick</b> [2] - 39640:22, 39681:5 <b>ride</b> [2] - 39623:19, 39624:3 <b>ridiculous</b> [1] - 39626:20 <b>ripped</b> [2] - 39575:3, 39575:19 <b>rise</b> [1] - 39701:11 <b>risen</b> [1] - 39701:6 <b>risk</b> [1] - 39640:17 <b>rivets</b> [1] - 39553:22 <b>Rob</b> [1] - 39740:16 <b>robbed</b> [1] - 39560:4 <b>Roberts</b> [25] - 39524:17, 39525:3, 39525:5,</p>	<p>39525:7, 39525:11, 39525:17, 39525:23, 39526:14, 39526:21, 39536:18, 39538:20, 39549:9, 39567:20, 39568:17, 39568:20, 39568:24, 39569:6, 39572:13, 39572:18, 39573:12, 39594:16, 39601:10, 39746:18, 39750:13, 39750:17 <b>Roberts</b> [1] - 39599:1 <b>Rocher</b> [1] - 39734:23 <b>Roger</b> [1] - 39664:23 <b>role</b> [18] - 39551:17, 39639:3, 39640:1, 39646:21, 39652:14, 39703:2, 39703:11, 39703:25, 39704:1, 39705:9, 39705:11, 39708:21, 39708:22, 39740:6, 39740:9, 39740:12, 39750:20, 39751:11 <b>Ron</b> [31] - 39506:15, 39507:9, 39508:10, 39528:24, 39536:6, 39536:10, 39548:21, 39548:23, 39548:25, 39549:2, 39549:4, 39566:7, 39571:10, 39571:25, 39572:2, 39573:14, 39582:9, 39584:16, 39586:24, 39587:5, 39587:23, 39591:10, 39592:7, 39597:1, 39611:11, 39611:22, 39683:23, 39719:22, 39749:21, 39749:23, 39750:15 <b>Ronald</b> [10] - 39504:9, 39508:3, 39585:12, 39597:22, 39602:20, 39603:8, 39682:17, 39690:21, 39706:17, 39706:18 <b>room</b> [9] - 39540:3, 39540:8, 39540:24, 39541:13, 39541:17, 39553:18, 39567:20, 39568:18, 39569:1 <b>rooming</b> [3] - 39621:20, 39623:4, 39626:16 <b>roommate</b> [1] - 39650:3 <b>roommates</b> [1] - 39649:21 <b>rough</b> [1] - 39711:1 <b>roughly</b> [2] - 39723:16, 39724:8 <b>route</b> [10] - 39546:8,</p>	<p>39606:4, 39622:4, 39622:5, 39624:7, 39624:9, 39624:25, 39625:6, 39626:10, 39649:18 <b>row</b> [2] - 39665:2, 39668:24 <b>royal</b> [1] - 39710:12 <b>Rpr</b> [4] - 39502:11, 39752:2, 39752:18, 39752:19 <b>rules</b> [3] - 39522:2, 39742:15, 39749:1 <b>ruling</b> [1] - 39741:21 <b>rung</b> [1] - 39715:17 <b>running</b> [4] - 39573:10, 39583:6, 39603:21, 39605:1</p>	<p>39637:23, 39638:3, 39638:24, 39639:3, 39639:11, 39640:1, 39640:9, 39642:19, 39646:4, 39673:7, 39673:9, 39673:19, 39674:17, 39674:22, 39681:7, 39683:11, 39683:20, 39689:14, 39720:8, 39750:3 <b>satisfaction</b> [1] - 39679:4 <b>satisfactory</b> [1] - 39614:15 <b>satisfied</b> [5] - 39651:13, 39701:14, 39713:2, 39713:10, 39740:21 <b>satisfies</b> [1] - 39631:8 <b>saw</b> [27] - 39514:3, 39515:19, 39544:14, 39544:16, 39544:18, 39544:19, 39551:2, 39551:3, 39575:1, 39576:25, 39582:11, 39589:21, 39606:18, 39607:9, 39608:6, 39608:10, 39608:11, 39611:12, 39645:14, 39659:23, 39663:15, 39663:23, 39698:11, 39698:17, 39704:14, 39705:16, 39748:9 <b>scan</b> [1] - 39623:9 <b>scene</b> [13] - 39535:20, 39542:14, 39542:20, 39542:25, 39544:4, 39545:18, 39546:4, 39546:17, 39547:15, 39548:16, 39550:8, 39615:13 <b>scenes</b> [1] - 39546:3 <b>Science</b> [2] - 39734:19, 39738:8 <b>science</b> [4] - 39618:17, 39714:19, 39715:1, 39731:9 <b>scientific</b> [2] - 39716:6, 39732:14 <b>scientist</b> [5] - 39717:20, 39719:23, 39719:25, 39728:22, 39735:3 <b>scientists</b> [4] - 39716:4, 39718:16, 39731:15, 39732:9 <b>scope</b> [1] - 39700:24 <b>screen</b> [5] - 39506:19, 39654:23, 39657:23, 39677:5, 39688:22 <b>screwed</b> [1] - 39576:19 <b>scroll</b> [4] - 39636:21,</p>
<b>S</b>				
<p><b>sacrificed</b> [1] - 39727:22 <b>safe</b> [1] - 39676:12 <b>sailor</b> [2] - 39579:7, 39579:11 <b>salient</b> [1] - 39676:6 <b>sample</b> [2] - 39731:25, 39733:23 <b>samples</b> [6] - 39717:18, 39720:5, 39728:21, 39731:13, 39735:21 <b>Sandra</b> [6] - 39502:4, 39654:14, 39657:9, 39661:2, 39663:4, 39663:19 <b>Saskatchewan</b> [5] - 39501:17, 39503:4, 39514:25, 39704:21, 39752:4 <b>Saskatoon</b> [56] - 39501:17, 39503:7, 39517:14, 39517:16, 39519:13, 39555:23, 39555:25, 39556:13, 39556:14, 39559:12, 39559:19, 39560:21, 39561:1, 39561:3, 39561:19, 39562:6, 39562:11, 39562:20, 39563:1, 39564:3, 39580:24, 39585:20, 39586:23, 39594:15, 39600:10, 39600:23, 39601:16, 39601:18, 39601:24, 39602:1, 39603:10, 39606:4, 39608:20, 39608:25, 39611:14, 39636:3,</p>				





<p>39679:25, 39684:7, 39729:23</p> <p><b>se</b> [1] - 39731:20</p> <p><b>search</b> [1] - 39669:10</p> <p><b>second</b> [19] - 39551:10, 39556:23, 39558:4, 39562:11, 39563:8, 39564:13, 39576:13, 39596:21, 39611:9, 39633:25, 39638:21, 39675:1, 39684:13, 39684:15, 39688:20, 39693:10, 39708:2, 39738:13, 39738:15</p> <p><b>secondly</b> [3] - 39690:7, 39707:19, 39729:18</p> <p><b>Secondly</b> [1] - 39618:9</p> <p><b>secretariat</b> [1] - 39740:15</p> <p><b>secretor</b> [1] - 39726:20</p> <p><b>Section</b> [8] - 39528:1, 39628:6, 39629:12, 39656:13, 39711:23, 39729:5, 39738:15, 39738:16</p> <p><b>section</b> [10] - 39509:13, 39512:10, 39522:10, 39554:17, 39630:15, 39636:15, 39656:12, 39656:15, 39675:24, 39726:3</p> <p><b>sections</b> [1] - 39710:11</p> <p><b>secured</b> [2] - 39717:12, 39720:6</p> <p><b>Security</b> [1] - 39502:12</p> <p><b>see</b> [53] - 39507:1, 39507:2, 39507:17, 39508:15, 39508:19, 39510:17, 39521:8, 39524:4, 39524:25, 39532:18, 39535:12, 39543:16, 39543:22, 39552:12, 39554:14, 39559:9, 39561:5, 39566:14, 39573:12, 39576:8, 39578:22, 39588:5, 39596:5, 39606:10, 39610:8, 39624:4, 39624:21, 39625:24, 39640:23, 39643:17, 39654:15, 39655:25, 39660:25, 39671:24, 39671:25, 39688:20, 39689:3, 39691:15, 39691:18, 39692:6, 39692:9, 39709:8, 39712:5, 39712:19, 39715:21, 39717:19, 39730:2, 39736:10, 39737:14,</p>	<p>39740:20, 39744:10, 39747:13, 39747:25</p> <p><b>seeing</b> [10] - 39515:22, 39534:8, 39534:16, 39534:18, 39542:9, 39542:10, 39546:3, 39576:2, 39663:20, 39748:18</p> <p><b>seem</b> [7] - 39555:20, 39561:2, 39562:17, 39567:24, 39569:23, 39687:18, 39746:22</p> <p><b>sees</b> [2] - 39546:4, 39546:5</p> <p><b>Senator</b> [1] - 39667:12</p> <p><b>send</b> [2] - 39699:24, 39700:6</p> <p><b>sending</b> [2] - 39654:9, 39661:10</p> <p><b>sense</b> [20] - 39530:21, 39533:11, 39558:1, 39581:18, 39600:2, 39656:15, 39678:18, 39681:9, 39684:22, 39699:12, 39699:24, 39699:25, 39700:7, 39700:10, 39701:8, 39702:1, 39702:19, 39741:5</p> <p><b>sensitive</b> [2] - 39718:20, 39730:24</p> <p><b>sensitivity</b> [1] - 39512:12</p> <p><b>sent</b> [21] - 39511:23, 39638:14, 39642:17, 39642:20, 39645:18, 39647:16, 39647:18, 39648:10, 39648:17, 39654:10, 39657:10, 39658:9, 39658:10, 39661:18, 39661:19, 39677:14, 39681:24, 39708:9, 39722:9, 39723:16, 39729:9</p> <p><b>sentence</b> [4] - 39521:17, 39655:18, 39688:21, 39712:10</p> <p><b>separate</b> [3] - 39525:20, 39546:4, 39717:11</p> <p><b>separated</b> [5] - 39571:9, 39602:16, 39604:16, 39604:19, 39604:22</p> <p><b>separately</b> [5] - 39574:2, 39610:23, 39681:6, 39736:4, 39736:6</p> <p><b>separation</b> [1] - 39571:22</p> <p><b>September</b> [16] -</p>	<p>39501:21, 39559:9, 39559:10, 39617:16, 39643:10, 39643:22, 39655:9, 39655:11, 39656:14, 39656:19, 39661:16, 39661:18, 39683:25, 39684:1, 39726:9, 39727:13</p> <p><b>sequence</b> [1] - 39715:18</p> <p><b>Serge</b> [1] - 39503:6</p> <p><b>Sergeant</b> [6] - 39518:7, 39541:13, 39574:18, 39636:10, 39637:7, 39681:5</p> <p><b>series</b> [5] - 39539:7, 39594:22, 39654:2, 39683:4, 39688:19</p> <p><b>serious</b> [5] - 39529:5, 39529:24, 39531:8, 39704:22, 39715:1</p> <p><b>seriously</b> [1] - 39604:2</p> <p><b>seriousness</b> [1] - 39704:23</p> <p><b>serve</b> [2] - 39727:7, 39746:25</p> <p><b>served</b> [1] - 39588:23</p> <p><b>service</b> [1] - 39683:20</p> <p><b>Service</b> [7] - 39503:7, 39636:3, 39637:23, 39638:24, 39646:4, 39734:19, 39738:9</p> <p><b>session</b> [2] - 39601:9, 39601:24</p> <p><b>set</b> [13] - 39522:2, 39585:13, 39586:18, 39619:8, 39622:21, 39622:22, 39629:9, 39631:11, 39631:13, 39633:24, 39680:3, 39683:5, 39701:2</p> <p><b>sets</b> [4] - 39563:13, 39585:10, 39608:12, 39740:4</p> <p><b>setting</b> [7] - 39521:25, 39522:15, 39523:19, 39608:9, 39629:1, 39658:4</p> <p><b>setup</b> [1] - 39567:19</p> <p><b>seven</b> [3] - 39593:25, 39657:6, 39687:19</p> <p><b>several</b> [11] - 39516:8, 39516:9, 39580:17, 39588:20, 39590:7, 39593:21, 39594:2, 39595:2, 39657:21, 39690:5, 39735:17</p> <p><b>sexual</b> [6] - 39511:3, 39558:20, 39561:19, 39562:1, 39673:6,</p>	<p>39735:22</p> <p><b>Sgt</b> [1] - 39681:24</p> <p><b>shake</b> [2] - 39550:9, 39550:25</p> <p><b>shall</b> [3] - 39521:22, 39530:9, 39578:8</p> <p><b>share</b> [4] - 39522:23, 39685:23, 39688:4, 39688:6</p> <p><b>shared</b> [3] - 39523:13, 39673:14, 39686:5</p> <p><b>shed</b> [1] - 39606:16</p> <p><b>Short</b> [3] - 39746:20, 39746:25, 39747:11</p> <p><b>short</b> [14] - 39515:16, 39516:1, 39732:5, 39732:10, 39733:1, 39733:24, 39734:11, 39734:20, 39735:18, 39736:16, 39737:5, 39737:21, 39738:5, 39744:5</p> <p><b>shorthand</b> [1] - 39752:6</p> <p><b>Shortly</b> [1] - 39512:22</p> <p><b>shortly</b> [2] - 39675:14, 39684:25</p> <p><b>Shorty</b> [2] - 39506:15, 39507:9</p> <p><b>show</b> [7] - 39554:8, 39585:14, 39643:21, 39655:22, 39660:23, 39667:3, 39729:13</p> <p><b>Show</b> [1] - 39668:10</p> <p><b>showed</b> [3] - 39536:18, 39555:12, 39648:25</p> <p><b>showing</b> [2] - 39552:14, 39554:2</p> <p><b>shown</b> [7] - 39536:24, 39537:1, 39537:8, 39556:10, 39664:5, 39677:13, 39688:21</p> <p><b>shows</b> [2] - 39679:17, 39725:25</p> <p><b>sic</b> [2] - 39511:6, 39617:17</p> <p><b>sidelines</b> [1] - 39712:6</p> <p><b>sides</b> [1] - 39670:5</p> <p><b>signal</b> [4] - 39590:4, 39603:13, 39613:14, 39692:15</p> <p><b>signaled</b> [4] - 39550:10, 39550:11, 39589:3, 39705:1</p> <p><b>signals</b> [6] - 39518:12, 39555:12, 39591:24, 39599:23, 39658:3, 39704:5</p> <p><b>signature</b> [1] - 39654:14</p> <p><b>significance</b> [3] -</p>	<p>39558:16, 39731:4, 39735:14</p> <p><b>significant</b> [6] - 39569:17, 39569:20, 39575:10, 39582:20, 39582:23, 39675:25</p> <p><b>significantly</b> [1] - 39734:20</p> <p><b>similar</b> [11] - 39552:5, 39552:22, 39554:2, 39557:5, 39559:25, 39565:15, 39615:11, 39709:20, 39710:4, 39710:20, 39711:6</p> <p><b>similar-fact</b> [2] - 39709:20, 39710:4</p> <p><b>similarities</b> [1] - 39565:13</p> <p><b>Similarly</b> [1] - 39694:5</p> <p><b>simple</b> [1] - 39588:17</p> <p><b>simplification</b> [1] - 39521:6</p> <p><b>simply</b> [15] - 39518:5, 39528:5, 39590:3, 39591:16, 39599:4, 39600:7, 39626:13, 39628:16, 39629:14, 39629:21, 39631:7, 39669:18, 39674:10, 39677:5, 39705:11</p> <p><b>single</b> [1] - 39715:24</p> <p><b>sinister</b> [3] - 39528:4, 39637:16, 39638:7</p> <p><b>sister</b> [1] - 39666:15</p> <p><b>sister-in-law</b> [1] - 39666:15</p> <p><b>sit</b> [4] - 39597:16, 39611:2, 39614:6, 39719:8</p> <p><b>sites</b> [1] - 39716:5</p> <p><b>sitting</b> [4] - 39501:15, 39534:10, 39615:14, 39647:10</p> <p><b>situated</b> [3] - 39534:24, 39534:25, 39621:23</p> <p><b>situation</b> [9] - 39521:25, 39523:4, 39543:8, 39567:1, 39590:18, 39607:21, 39617:6, 39620:7, 39743:2</p> <p><b>situations</b> [1] - 39704:25</p> <p><b>Six</b> [1] - 39656:18</p> <p><b>six</b> [5] - 39574:21, 39588:8, 39598:12, 39642:9, 39692:13</p> <p><b>size</b> [1] - 39737:10</p> <p><b>skill</b> [1] - 39752:7</p> <p><b>sleep</b> [1] - 39540:16</p>
--	---	--	--	---



<p><b>sleeper</b> <sup>[1]</sup> - 39586:8</p> <p><b>slightly</b> <sup>[2]</sup> - 39603:21, 39605:2</p> <p><b>slim</b> <sup>[1]</sup> - 39596:24</p> <p><b>slot</b> <sup>[1]</sup> - 39615:1</p> <p><b>small</b> <sup>[1]</sup> - 39557:12</p> <p><b>snow</b> <sup>[2]</sup> - 39516:11, 39536:23</p> <p><b>snowbound</b> <sup>[1]</sup> - 39610:24</p> <p><b>sodium</b> <sup>[1]</sup> - 39524:10</p> <p><b>soiled</b> <sup>[1]</sup> - 39581:14</p> <p><b>solicitor</b> <sup>[1]</sup> - 39725:6</p> <p><b>someone</b> <sup>[7]</sup> - 39517:20, 39550:6, 39570:22, 39571:7, 39660:25, 39713:12, 39718:1</p> <p><b>someplace</b> <sup>[1]</sup> - 39609:25</p> <p><b>sometime</b> <sup>[4]</sup> - 39562:6, 39644:13, 39724:5, 39748:10</p> <p><b>sometimes</b> <sup>[5]</sup> - 39505:16, 39512:6, 39520:10, 39530:6, 39660:8</p> <p><b>Sometimes</b> <sup>[1]</sup> - 39543:16</p> <p><b>somewhat</b> <sup>[5]</sup> - 39517:1, 39532:1, 39726:8, 39733:18, 39742:16</p> <p><b>Somewhere</b> <sup>[1]</sup> - 39724:20</p> <p><b>soon</b> <sup>[1]</sup> - 39744:6</p> <p><b>sooner</b> <sup>[2]</sup> - 39702:2, 39728:25</p> <p><b>sophisticated</b> <sup>[1]</sup> - 39719:15</p> <p><b>sorry</b> <sup>[46]</sup> - 39506:3, 39508:18, 39510:5, 39511:7, 39514:13, 39518:22, 39524:4, 39524:5, 39532:14, 39534:1, 39547:12, 39551:21, 39556:9, 39558:7, 39560:9, 39561:21, 39563:10, 39565:19, 39567:23, 39573:11, 39579:9, 39584:1, 39588:11, 39593:20, 39597:14, 39598:13, 39598:23, 39608:2, 39614:20, 39623:5, 39628:4, 39630:5, 39656:18, 39662:17, 39665:3, 39667:9, 39699:19, 39700:4, 39722:3,</p>	<p>39725:17, 39726:6, 39727:9, 39729:21, 39732:16, 39735:12, 39739:1</p> <p><b>Sorry</b> <sup>[11]</sup> - 39506:25, 39522:10, 39542:3, 39557:8, 39602:11, 39611:9, 39613:24, 39687:12, 39687:20, 39697:24, 39740:3</p> <p><b>sort</b> <sup>[17]</sup> - 39581:25, 39607:20, 39630:9, 39639:21, 39653:5, 39681:22, 39697:20, 39698:18, 39703:5, 39718:13, 39727:23, 39727:24, 39736:8, 39743:17, 39744:11, 39746:23, 39750:1</p> <p><b>sorted</b> <sup>[1]</sup> - 39736:9</p> <p><b>sought</b> <sup>[5]</sup> - 39610:23, 39677:22, 39683:15, 39684:1, 39744:10</p> <p><b>sound</b> <sup>[3]</sup> - 39541:24, 39596:9, 39596:14</p> <p><b>sounded</b> <sup>[2]</sup> - 39542:1, 39550:24</p> <p><b>sounds</b> <sup>[5]</sup> - 39533:12, 39540:1, 39540:23, 39541:5, 39596:15</p> <p><b>source</b> <sup>[4]</sup> - 39587:17, 39611:3, 39611:5, 39674:23</p> <p><b>sources</b> <sup>[4]</sup> - 39543:18, 39587:16, 39686:16, 39686:17</p> <p><b>south</b> <sup>[3]</sup> - 39623:24, 39624:10, 39659:19</p> <p><b>Southam</b> <sup>[1]</sup> - 39661:18</p> <p><b>speaking</b> <sup>[7]</sup> - 39511:18, 39512:19, 39526:13, 39566:5, 39568:25, 39572:12, 39574:20</p> <p><b>speaks</b> <sup>[3]</sup> - 39605:23, 39677:10, 39691:9</p> <p><b>special</b> <sup>[2]</sup> - 39673:1, 39674:7</p> <p><b>specific</b> <sup>[10]</sup> - 39509:17, 39510:22, 39514:7, 39522:5, 39583:22, 39613:18, 39646:23, 39646:25, 39650:9, 39716:5</p> <p><b>specifically</b> <sup>[7]</sup> - 39510:19, 39572:25, 39578:11, 39580:10, 39583:23, 39684:16, 39746:9</p> <p><b>Specifically</b> <sup>[1]</sup> -</p>	<p>39567:12</p> <p><b>specificity</b> <sup>[1]</sup> - 39629:11</p> <p><b>specifics</b> <sup>[2]</sup> - 39578:23, 39612:4</p> <p><b>Spectator</b> <sup>[6]</sup> - 39666:23, 39667:9, 39668:17, 39671:1, 39671:2, 39671:4</p> <p><b>speculate</b> <sup>[1]</sup> - 39567:9</p> <p><b>speculation</b> <sup>[4]</sup> - 39622:9, 39622:10, 39632:5, 39694:18</p> <p><b>speculative</b> <sup>[1]</sup> - 39622:7</p> <p><b>speed</b> <sup>[5]</sup> - 39626:22, 39632:17, 39634:7, 39716:11, 39716:15</p> <p><b>speeds</b> <sup>[1]</sup> - 39735:5</p> <p><b>Spence</b> <sup>[1]</sup> - 39509:21</p> <p><b>Spencer</b> <sup>[3]</sup> - 39504:9, 39706:17, 39706:18</p> <p><b>spent</b> <sup>[2]</sup> - 39583:10, 39604:11</p> <p><b>sperm</b> <sup>[1]</sup> - 39715:7</p> <p><b>spermatozoa</b> <sup>[1]</sup> - 39736:4</p> <p><b>spite</b> <sup>[1]</sup> - 39736:8</p> <p><b>split</b> <sup>[1]</sup> - 39517:16</p> <p><b>spoken</b> <sup>[7]</sup> - 39507:6, 39528:23, 39531:2, 39531:12, 39610:13, 39612:6, 39728:14</p> <p><b>spot</b> <sup>[1]</sup> - 39751:19</p> <p><b>spread</b> <sup>[1]</sup> - 39595:3</p> <p><b>spring</b> <sup>[4]</sup> - 39516:11, 39562:7, 39734:22, 39748:11</p> <p><b>springboard</b> <sup>[1]</sup> - 39630:17</p> <p><b>St</b> <sup>[2]</sup> - 39535:16, 39711:15</p> <p><b>stabbed</b> <sup>[1]</sup> - 39536:23</p> <p><b>stabbing</b> <sup>[11]</sup> - 39542:10, 39543:25, 39544:17, 39545:2, 39545:6, 39545:8, 39545:20, 39545:21, 39546:6, 39546:13, 39546:16</p> <p><b>Stabbing</b> <sup>[1]</sup> - 39544:3</p> <p><b>staff</b> <sup>[7]</sup> - 39642:2, 39647:22, 39655:7, 39658:21, 39659:10, 39677:6, 39686:13</p> <p><b>Staff</b> <sup>[2]</sup> - 39502:1, 39502:8</p> <p><b>stage</b> <sup>[3]</sup> - 39644:25, 39676:20, 39724:11</p> <p><b>stages</b> <sup>[3]</sup> - 39655:15,</p>	<p>39697:16, 39723:3</p> <p><b>staggering</b> <sup>[1]</sup> - 39668:5</p> <p><b>stained</b> <sup>[1]</sup> - 39516:13</p> <p><b>stake</b> <sup>[1]</sup> - 39705:1</p> <p><b>stamped</b> <sup>[1]</sup> - 39577:12</p> <p><b>stand</b> <sup>[1]</sup> - 39731:18</p> <p><b>standard</b> <sup>[3]</sup> - 39730:7, 39730:22, 39738:6</p> <p><b>standards</b> <sup>[1]</sup> - 39631:25</p> <p><b>standing</b> <sup>[1]</sup> - 39551:12</p> <p><b>stands</b> <sup>[1]</sup> - 39596:5</p> <p><b>Star</b> <sup>[2]</sup> - 39668:19, 39671:7</p> <p><b>start</b> <sup>[7]</sup> - 39505:21, 39641:14, 39658:11, 39661:3, 39685:13, 39744:6, 39751:20</p> <p><b>started</b> <sup>[9]</sup> - 39505:25, 39512:19, 39540:5, 39540:10, 39568:13, 39583:5, 39659:19, 39716:24, 39741:6</p> <p><b>starting</b> <sup>[5]</sup> - 39542:2, 39657:20, 39692:4, 39716:20, 39732:3</p> <p><b>starts</b> <sup>[7]</sup> - 39532:19, 39550:8, 39554:18, 39561:6, 39575:9, 39653:16, 39676:24</p> <p><b>state</b> <sup>[9]</sup> - 39596:2, 39603:19, 39604:25, 39617:7, 39665:9, 39666:2, 39675:18, 39697:24</p> <p><b>Statement</b> <sup>[1]</sup> - 39621:8</p> <p><b>statement</b> <sup>[107]</sup> - 39508:15, 39508:16, 39508:20, 39510:14, 39510:22, 39510:24, 39518:23, 39519:24, 39520:6, 39520:9, 39521:23, 39524:13, 39524:14, 39524:15, 39524:23, 39525:14, 39525:22, 39525:25, 39526:5, 39526:6, 39526:15, 39526:16, 39526:18, 39526:22, 39528:18, 39528:20, 39529:25, 39530:13, 39530:16, 39530:20, 39532:2, 39532:21, 39533:9, 39535:14, 39536:6, 39537:2, 39538:21, 39538:22, 39538:24, 39553:10, 39555:17, 39562:3, 39563:2, 39563:5,</p>	<p>39569:7, 39569:10, 39569:12, 39569:18, 39569:21, 39572:21, 39572:23, 39573:1, 39574:14, 39574:17, 39574:24, 39575:5, 39575:9, 39575:21, 39576:5, 39576:8, 39578:21, 39579:3, 39579:24, 39579:25, 39581:13, 39584:16, 39585:7, 39586:6, 39589:23, 39589:24, 39590:4, 39590:5, 39591:13, 39591:22, 39592:7, 39592:20, 39593:12, 39593:22, 39594:3, 39594:11, 39595:1, 39595:2, 39595:6, 39596:2, 39596:19, 39598:22, 39599:7, 39599:19, 39601:4, 39601:6, 39601:7, 39603:13, 39604:9, 39609:7, 39609:9, 39611:17, 39613:17, 39647:2, 39647:7, 39647:8, 39689:5, 39691:9, 39691:11</p> <p><b>statements</b> <sup>[29]</sup> - 39509:14, 39509:15, 39509:18, 39509:19, 39509:22, 39509:24, 39510:11, 39511:1, 39530:22, 39546:11, 39549:6, 39570:15, 39570:21, 39572:19, 39573:5, 39574:2, 39574:6, 39577:23, 39578:24, 39579:23, 39584:18, 39594:5, 39594:14, 39612:10, 39649:17, 39649:18, 39650:21, 39697:20, 39749:21</p> <p><b>States</b> <sup>[2]</sup> - 39665:2, 39738:7</p> <p><b>states</b> <sup>[1]</sup> - 39629:15</p> <p><b>stating</b> <sup>[1]</sup> - 39600:8</p> <p><b>Stating</b> <sup>[1]</sup> - 39688:23</p> <p><b>station</b> <sup>[3]</sup> - 39519:5, 39585:24, 39602:22</p> <p><b>statistical</b> <sup>[1]</sup> - 39674:14</p> <p><b>statistics</b> <sup>[2]</sup> - 39674:4, 39731:6</p> <p><b>status</b> <sup>[3]</sup> - 39678:7, 39678:11, 39717:2</p> <p><b>statutory</b> <sup>[1]</sup> - 39629:10</p>
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<p><b>stay</b> [1] - 39620:19</p> <p><b>steadfastly</b> [1] - 39581:8</p> <p><b>stealing</b> [1] - 39588:13</p> <p><b>stems</b> [1] - 39703:22</p> <p><b>step</b> [2] - 39640:11, 39640:16</p> <p><b>steps</b> [2] - 39675:25, 39731:8</p> <p><b>stevelly</b> [1] - 39503:4</p> <p><b>Stickel</b> [1] - 39611:22</p> <p><b>still</b> [7] - 39544:5, 39544:9, 39547:5, 39550:25, 39698:15, 39736:7, 39738:2</p> <p><b>stolen</b> [1] - 39588:6</p> <p><b>stood</b> [2] - 39510:4, 39510:7</p> <p><b>stooge</b> [1] - 39704:3</p> <p><b>Stooges'</b> [1] - 39703:21</p> <p><b>stop</b> [4] - 39607:1, 39622:4, 39668:15, 39676:19</p> <p><b>stopped</b> [1] - 39680:22</p> <p><b>stops</b> [2] - 39621:25, 39624:23</p> <p><b>stories</b> [1] - 39582:7</p> <p><b>story</b> [17] - 39513:5, 39530:8, 39539:13, 39566:16, 39582:25, 39583:5, 39590:12, 39590:25, 39591:23, 39596:7, 39608:19, 39609:19, 39660:6, 39660:9, 39662:20, 39663:17, 39670:5</p> <p><b>Str</b> [1] - 39737:2</p> <p><b>straddled</b> [1] - 39543:23</p> <p><b>straddling</b> [4] - 39544:7, 39544:16, 39544:17, 39545:7</p> <p><b>straight</b> [3] - 39625:2, 39625:6, 39625:14</p> <p><b>strategy</b> [3] - 39658:17, 39659:20, 39664:4</p> <p><b>stream</b> [2] - 39579:6, 39580:7</p> <p><b>Street</b> [1] - 39623:25</p> <p><b>street</b> [3] - 39557:9, 39557:20, 39625:18</p> <p><b>stretch</b> [1] - 39671:13</p> <p><b>strike</b> [3] - 39513:17, 39533:9, 39536:13</p> <p><b>strikes</b> [1] - 39604:2</p> <p><b>strip</b> [1] - 39733:21</p> <p><b>strips</b> [1] - 39738:11</p> <p><b>stronger</b> [2] - 39613:10, 39736:5</p> <p><b>strongest</b> [1] -</p>	<p>39616:24</p> <p><b>struggling</b> [1] - 39537:14</p> <p><b>stuck</b> [8] - 39547:23, 39548:6, 39548:12, 39548:17, 39569:14, 39570:2, 39603:17, 39626:24</p> <p><b>student</b> [1] - 39725:14</p> <p><b>stuff</b> [3] - 39547:11, 39646:22, 39659:15</p> <p><b>stupid</b> [1] - 39627:1</p> <p><b>subject</b> [9] - 39520:8, 39530:14, 39541:16, 39579:5, 39660:6, 39671:20, 39696:18, 39730:11, 39731:1</p> <p><b>subjected</b> [1] - 39733:20</p> <p><b>subjects</b> [1] - 39741:1</p> <p><b>submission</b> [2] - 39621:17, 39680:8</p> <p><b>submissions</b> [6] - 39621:12, 39683:25, 39684:2, 39699:3, 39742:3, 39747:16</p> <p><b>submit</b> [1] - 39629:2</p> <p><b>submitted</b> [4] - 39621:10, 39741:19, 39741:20, 39745:11</p> <p><b>subpoenaed</b> [1] - 39746:19</p> <p><b>subpoenas</b> [3] - 39740:23, 39746:20, 39746:25</p> <p><b>subsequent</b> [3] - 39519:6, 39597:11, 39608:11</p> <p><b>subsequently</b> [2] - 39562:16, 39563:23</p> <p><b>substantial</b> [2] - 39692:23, 39710:17</p> <p><b>substantive</b> [2] - 39708:6, 39729:12</p> <p><b>successful</b> [1] - 39732:1</p> <p><b>suddenly</b> [1] - 39539:13</p> <p><b>suffered</b> [1] - 39583:18</p> <p><b>sufficient</b> [2] - 39550:23, 39615:19</p> <p><b>sufficiently</b> [1] - 39517:18</p> <p><b>suggest</b> [7] - 39550:14, 39602:6, 39607:4, 39612:19, 39626:20, 39645:10, 39727:9</p> <p><b>suggested</b> [5] - 39589:4, 39732:8, 39733:10, 39741:11, 39751:13</p>	<p><b>suggesting</b> [11] - 39525:15, 39541:25, 39571:18, 39571:23, 39588:4, 39652:20, 39653:23, 39656:7, 39671:14, 39728:13, 39728:18</p> <p><b>suggestion</b> [13] - 39549:19, 39549:21, 39601:22, 39602:12, 39604:5, 39604:9, 39604:10, 39660:21, 39673:12, 39676:13, 39691:15, 39746:14, 39748:4</p> <p><b>suggestions</b> [2] - 39567:4, 39567:7</p> <p><b>suggestive</b> [1] - 39532:1</p> <p><b>suggests</b> [4] - 39513:19, 39607:21, 39654:23, 39714:3</p> <p><b>suitcase</b> [2] - 39581:20, 39581:24</p> <p><b>summaries</b> [1] - 39669:13</p> <p><b>summarize</b> [2] - 39585:2, 39637:21</p> <p><b>Summary</b> [1] - 39597:21</p> <p><b>summary</b> [8] - 39580:14, 39580:15, 39585:12, 39585:13, 39597:25, 39655:16, 39682:24, 39696:13</p> <p><b>summer</b> [1] - 39724:4</p> <p><b>superceded</b> [1] - 39718:11</p> <p><b>supplement</b> [1] - 39743:16</p> <p><b>supplementary</b> [2] - 39569:9, 39569:12</p> <p><b>Support</b> [1] - 39502:8</p> <p><b>support</b> [1] - 39655:23</p> <p><b>supported</b> [1] - 39665:23</p> <p><b>supports</b> [2] - 39666:8, 39676:12</p> <p><b>suppose</b> [3] - 39551:21, 39700:14, 39739:16</p> <p><b>supposed</b> [2] - 39511:2, 39570:7</p> <p><b>supposedly</b> [2] - 39533:4, 39555:6</p> <p><b>Supreme</b> [21] - 39522:1, 39530:15, 39568:6, 39597:3, 39599:1, 39601:11, 39627:21, 39675:15, 39684:25, 39707:17, 39707:20, 39708:4, 39709:10,</p>	<p>39709:24, 39710:3, 39712:8, 39712:16, 39724:11, 39740:11, 39742:5, 39751:3</p> <p><b>surmising</b> [1] - 39717:21</p> <p><b>surprise</b> [2] - 39520:16, 39583:13</p> <p><b>surprising</b> [2] - 39547:24, 39549:14</p> <p><b>surrounding</b> [5] - 39526:22, 39565:14, 39616:23, 39678:17, 39686:4</p> <p><b>survived</b> [1] - 39561:3</p> <p><b>suspect</b> [11] - 39511:20, 39558:25, 39562:18, 39580:22, 39587:4, 39587:12, 39587:18, 39589:10, 39597:5, 39634:24, 39718:1</p> <p><b>suspects</b> [1] - 39509:20</p> <p><b>suspicion</b> [1] - 39751:9</p> <p><b>sweat</b> [1] - 39601:23</p> <p><b>switch</b> [1] - 39715:20</p> <p><b>Sworn</b> [1] - 39504:9</p> <p><b>sworn</b> [2] - 39677:25, 39706:18</p> <p><b>synopsis</b> [2] - 39509:19, 39580:19</p> <p><b>system</b> [8] - 39620:17, 39620:22, 39653:19, 39653:20, 39661:13, 39715:20, 39715:22, 39715:23</p> <p><b>systemic</b> [1] - 39505:16</p>	<p>39596:19</p> <p><b>tape</b> [1] - 39649:17</p> <p><b>taped</b> [7] - 39565:25, 39566:8, 39568:17, 39568:19, 39577:18, 39597:19, 39603:4</p> <p><b>tapes</b> [4] - 39566:5, 39566:8, 39566:17, 39568:20</p> <p><b>taxis</b> [1] - 39624:21</p> <p><b>Tdr</b> [2] - 39503:5, 39641:9</p> <p><b>team</b> [1] - 39702:1</p> <p><b>tears</b> [1] - 39550:9</p> <p><b>technical</b> [1] - 39733:14</p> <p><b>technically</b> [1] - 39712:17</p> <p><b>Technician</b> [1] - 39502:13</p> <p><b>technique</b> [2] - 39730:7, 39735:7</p> <p><b>techniques</b> [4] - 39732:20, 39735:8, 39735:25, 39739:14</p> <p><b>technology</b> [1] - 39729:17</p> <p><b>telephone</b> [4] - 39511:21, 39590:17, 39643:12, 39661:9</p> <p><b>ten</b> [2] - 39659:14, 39744:16</p> <p><b>tenor</b> [2] - 39654:21, 39659:17</p> <p><b>term</b> [5] - 39599:20, 39605:10, 39703:14, 39734:5, 39737:14</p> <p><b>terms</b> [18] - 39512:9, 39546:19, 39583:25, 39591:25, 39594:25, 39611:24, 39618:22, 39632:17, 39632:21, 39637:13, 39646:25, 39675:18, 39703:7, 39703:8, 39731:24, 39743:6, 39746:7, 39749:1</p> <p><b>terribly</b> [2] - 39537:3, 39704:4</p> <p><b>terrifies</b> [1] - 39543:17</p> <p><b>test</b> [21] - 39524:18, 39525:4, 39572:14, 39573:2, 39573:4, 39629:4, 39629:10, 39631:9, 39631:10, 39718:6, 39731:20, 39733:12, 39733:19, 39733:20, 39734:17, 39735:21, 39736:11, 39738:10, 39741:3, 39741:18</p>
<b>T</b>				
<p><b>table</b> [2] - 39550:6, 39694:13</p> <p><b>tables</b> [1] - 39550:6</p> <p><b>tackled</b> [1] - 39741:2</p> <p><b>tailor</b> [1] - 39538:1</p> <p><b>talks</b> [1] - 39729:23</p> <p><b>Tallis</b> [9] - 39503:13, 39509:17, 39645:22, 39649:2, 39649:7, 39650:5, 39651:3, 39651:11, 39679:19</p> <p><b>tandem</b> [12] - 39732:5, 39732:10, 39733:1, 39733:9, 39733:24, 39734:11, 39734:20, 39735:18, 39736:17, 39737:5, 39737:21, 39738:5</p> <p><b>tantamount</b> [1] -</p>				



<p><b>tested</b> [1] - 39738:22</p> <p><b>testified</b> [15] -</p> <p>39538:19, 39574:22,</p> <p>39580:1, 39580:12,</p> <p>39590:11, 39621:21,</p> <p>39623:3, 39626:17,</p> <p>39645:15, 39649:7,</p> <p>39649:11, 39651:3,</p> <p>39652:7, 39683:18,</p> <p>39690:11</p> <p><b>testifies</b> [1] - 39624:7</p> <p><b>testify</b> [2] - 39706:21,</p> <p>39746:17</p> <p><b>testifying</b> [1] - 39623:8</p> <p><b>testimonies</b> [1] -</p> <p>39570:18</p> <p><b>testimony</b> [16] -</p> <p>39506:13, 39507:8,</p> <p>39518:14, 39520:2,</p> <p>39521:13, 39580:18,</p> <p>39581:9, 39582:3,</p> <p>39582:14, 39601:5,</p> <p>39622:1, 39622:14,</p> <p>39631:23, 39669:6,</p> <p>39694:15, 39703:1</p> <p><b>Testimony</b>[1] -</p> <p>39501:14</p> <p><b>testing</b> [17] - 39666:2,</p> <p>39666:4, 39670:7,</p> <p>39707:22, 39719:15,</p> <p>39720:6, 39726:14,</p> <p>39727:21, 39728:11,</p> <p>39729:16, 39730:12,</p> <p>39730:24, 39734:4,</p> <p>39738:18, 39739:7,</p> <p>39739:19, 39739:22</p> <p><b>tests</b> [6] - 39718:10,</p> <p>39718:20, 39732:22,</p> <p>39732:23, 39733:15,</p> <p>39738:23</p> <p><b>text</b> [1] - 39648:15</p> <p><b>Thatcher</b>[2] - 39630:6,</p> <p>39630:16</p> <p><b>theft</b> [5] - 39559:15,</p> <p>39588:5, 39588:7,</p> <p>39589:7, 39607:2</p> <p><b>themselves</b> [6] -</p> <p>39509:16, 39596:10,</p> <p>39615:1, 39639:7,</p> <p>39647:5, 39747:19</p> <p><b>then-minister</b> [1] -</p> <p>39663:9</p> <p><b>theories</b> [1] - 39549:10</p> <p><b>theory</b> [6] - 39593:5,</p> <p>39608:17, 39622:8,</p> <p>39622:17, 39622:23,</p> <p>39730:16</p> <p><b>thereafter</b> [1] - 39610:6</p> <p><b>Therefore</b>[2] -</p> <p>39618:14, 39622:1</p>	<p><b>thesis</b> [1] - 39717:19</p> <p><b>they've</b> [1] - 39699:20</p> <p><b>thinking</b> [5] - 39591:5,</p> <p>39592:4, 39639:15,</p> <p>39644:23, 39686:23</p> <p><b>third</b> [2] - 39563:10,</p> <p>39740:8</p> <p><b>thousands</b> [3] -</p> <p>39719:9, 39737:11,</p> <p>39737:20</p> <p><b>threatened</b> [1] -</p> <p>39557:17</p> <p><b>threatening</b> [2] -</p> <p>39582:8</p> <p><b>Three</b>[1] - 39703:21</p> <p><b>three</b> [8] - 39508:1,</p> <p>39562:5, 39571:8,</p> <p>39623:4, 39623:7,</p> <p>39655:12, 39657:25,</p> <p>39674:5</p> <p><b>threshold</b> [4] -</p> <p>39619:14, 39619:19,</p> <p>39620:1, 39631:15</p> <p><b>thresholds</b> [1] -</p> <p>39619:8</p> <p><b>throughout</b> [3] -</p> <p>39676:13, 39692:18,</p> <p>39720:19</p> <p><b>throwing</b> [1] - 39667:12</p> <p><b>thrusters</b> [1] - 39690:3</p> <p><b>Thursday</b>[1] - 39667:11</p> <p><b>thymine</b> [1] - 39715:17</p> <p><b>Tidsbury</b>[3] - 39518:7,</p> <p>39541:14, 39544:2</p> <p><b>time</b> [1] - 39719:17</p> <p><b>timetable</b> [1] - 39632:21</p> <p><b>timing</b> [1] - 39702:21</p> <p><b>tiny</b> [1] - 39731:25</p> <p><b>tired</b> [1] - 39527:14</p> <p><b>title</b> [1] - 39621:9</p> <p><b>today</b> [9] - 39522:9,</p> <p>39522:11, 39522:13,</p> <p>39529:17, 39570:14,</p> <p>39611:2, 39664:16,</p> <p>39688:3, 39738:2</p> <p><b>Toews</b>[1] - 39503:12</p> <p><b>together</b> [16] -</p> <p>39545:24, 39545:25,</p> <p>39546:4, 39546:12,</p> <p>39569:16, 39573:15,</p> <p>39573:18, 39573:25,</p> <p>39574:5, 39590:19,</p> <p>39697:15, 39699:7,</p> <p>39699:11, 39699:25,</p> <p>39713:24, 39715:15</p> <p><b>tomorrow</b> [2] -</p> <p>39751:21, 39751:22</p> <p><b>tone</b> [1] - 39566:12</p> <p><b>Tony</b>[1] - 39645:25</p> <p><b>took</b> [22] - 39536:1,</p>	<p>39546:8, 39558:5,</p> <p>39563:2, 39563:5,</p> <p>39581:14, 39590:18,</p> <p>39592:4, 39594:16,</p> <p>39595:2, 39605:19,</p> <p>39609:1, 39620:6,</p> <p>39628:14, 39638:25,</p> <p>39643:4, 39649:19,</p> <p>39651:8, 39669:12,</p> <p>39676:2, 39689:15,</p> <p>39750:2</p> <p><b>tool</b> [2] - 39716:23,</p> <p>39720:1</p> <p><b>top</b> [5] - 39515:9,</p> <p>39536:4, 39669:22,</p> <p>39712:14, 39713:1</p> <p><b>topic</b> [1] - 39550:7</p> <p><b>toque</b> [2] - 39516:13,</p> <p>39516:19</p> <p><b>Toronto</b>[3] - 39665:11,</p> <p>39668:18, 39671:7</p> <p><b>total</b> [2] - 39687:20,</p> <p>39687:21</p> <p><b>totality</b> [1] - 39701:16</p> <p><b>totally</b> [1] - 39596:8</p> <p><b>touch</b> [4] - 39662:10,</p> <p>39662:11, 39672:22,</p> <p>39676:6</p> <p><b>touchstone</b> [1] -</p> <p>39714:4</p> <p><b>towards</b> [9] - 39527:22,</p> <p>39533:16, 39550:21,</p> <p>39555:21, 39586:13,</p> <p>39623:24, 39629:19,</p> <p>39688:17, 39701:24</p> <p><b>tracked</b> [2] - 39642:12,</p> <p>39747:2</p> <p><b>tracks</b> [1] - 39723:17</p> <p><b>transcribed</b> [2] -</p> <p>39509:5, 39509:11</p> <p><b>Transcript</b>[2] -</p> <p>39501:12, 39505:1</p> <p><b>transcript</b> [19] -</p> <p>39509:3, 39516:24,</p> <p>39521:9, 39555:17,</p> <p>39645:17, 39650:1,</p> <p>39650:10, 39650:11,</p> <p>39650:13, 39650:15,</p> <p>39650:16, 39652:11,</p> <p>39652:12, 39659:16,</p> <p>39664:9, 39685:22,</p> <p>39686:4, 39690:20,</p> <p>39697:1</p> <p><b>transcription</b> [1] -</p> <p>39752:5</p> <p><b>transcripts</b> [14] -</p> <p>39578:5, 39578:7,</p> <p>39660:16, 39662:3,</p> <p>39662:5, 39691:19,</p> <p>39694:14, 39694:17,</p>	<p>39694:19, 39695:25,</p> <p>39697:20, 39722:17,</p> <p>39722:23, 39723:7</p> <p><b>transition</b> [3] - 39724:2,</p> <p>39724:17, 39725:2</p> <p><b>transpired</b> [3] -</p> <p>39613:23, 39714:6,</p> <p>39751:10</p> <p><b>trash</b> [1] - 39608:19</p> <p><b>traumatic</b> [2] - 39550:2,</p> <p>39550:10</p> <p><b>travel</b> [2] - 39747:1,</p> <p>39747:25</p> <p><b>treatment</b> [2] -</p> <p>39512:10, 39521:25</p> <p><b>trial</b> [40] - 39505:22,</p> <p>39508:4, 39513:21,</p> <p>39515:25, 39517:7,</p> <p>39520:3, 39521:14,</p> <p>39521:23, 39527:11,</p> <p>39538:25, 39566:20,</p> <p>39572:2, 39572:7,</p> <p>39574:16, 39574:24,</p> <p>39578:5, 39578:7,</p> <p>39578:11, 39578:19,</p> <p>39579:19, 39580:1,</p> <p>39580:12, 39580:18,</p> <p>39581:10, 39581:18,</p> <p>39582:11, 39584:18,</p> <p>39586:15, 39586:17,</p> <p>39599:11, 39599:15,</p> <p>39601:4, 39611:11,</p> <p>39641:9, 39649:3,</p> <p>39677:13, 39691:21,</p> <p>39704:20, 39722:18,</p> <p>39749:17</p> <p><b>tried</b> [7] - 39537:21,</p> <p>39562:13, 39594:7,</p> <p>39594:8, 39599:8,</p> <p>39627:2, 39744:10</p> <p><b>tries</b> [1] - 39545:15</p> <p><b>trillion</b> [1] - 39715:4</p> <p><b>trip</b> [3] - 39589:22,</p> <p>39607:6, 39642:19</p> <p><b>troubling</b> [3] -</p> <p>39534:21, 39536:13,</p> <p>39536:14</p> <p><b>truck</b> [2] - 39582:1,</p> <p>39583:7</p> <p><b>true</b> [10] - 39530:17,</p> <p>39547:8, 39547:10,</p> <p>39570:12, 39573:7,</p> <p>39589:9, 39590:15,</p> <p>39592:21, 39593:12,</p> <p>39752:5</p> <p><b>truly</b> [4] - 39591:8,</p> <p>39591:11, 39591:12,</p> <p>39701:15</p> <p><b>truth</b> [9] - 39519:10,</p> <p>39567:13, 39578:11,</p>	<p>39578:18, 39580:6,</p> <p>39580:11, 39580:16,</p> <p>39609:6, 39618:4</p> <p><b>truthful</b> [1] - 39572:15</p> <p><b>truthfulness</b> [1] -</p> <p>39579:20</p> <p><b>try</b> [5] - 39577:13,</p> <p>39623:5, 39626:24,</p> <p>39668:14, 39751:16</p> <p><b>trying</b> [19] - 39526:10,</p> <p>39543:8, 39543:11,</p> <p>39568:4, 39568:21,</p> <p>39571:20, 39585:2,</p> <p>39612:19, 39612:20,</p> <p>39612:21, 39626:5,</p> <p>39627:18, 39635:3,</p> <p>39672:8, 39699:21,</p> <p>39705:20, 39744:23,</p> <p>39745:4, 39746:24</p> <p><b>tunnel</b> [1] - 39713:13</p> <p><b>turn</b> [10] - 39636:7,</p> <p>39641:20, 39652:21,</p> <p>39653:5, 39653:24,</p> <p>39688:15, 39690:23,</p> <p>39691:12, 39745:16,</p> <p>39747:25</p> <p><b>turned</b> [11] - 39506:20,</p> <p>39516:20, 39517:12,</p> <p>39533:22, 39623:25,</p> <p>39649:12, 39664:13,</p> <p>39665:9, 39665:18,</p> <p>39669:20, 39729:11</p> <p><b>turning</b> [3] - 39596:3,</p> <p>39651:19, 39691:14</p> <p><b>turns</b> [2] - 39665:5,</p> <p>39723:19</p> <p><b>Tv</b>[4] - 39655:22,</p> <p>39667:19, 39668:9,</p> <p>39747:20</p> <p><b>twenty</b> [2] - 39522:16,</p> <p>39547:19</p> <p><b>two</b> [60] - 39509:19,</p> <p>39514:24, 39517:6,</p> <p>39525:20, 39534:12,</p> <p>39546:3, 39546:12,</p> <p>39546:15, 39546:21,</p> <p>39546:25, 39550:6,</p> <p>39555:11, 39559:14,</p> <p>39561:25, 39563:23,</p> <p>39564:1, 39564:5,</p> <p>39564:6, 39572:15,</p> <p>39574:4, 39578:24,</p> <p>39579:3, 39587:14,</p> <p>39608:12, 39610:18,</p> <p>39618:6, 39628:16,</p> <p>39628:18, 39636:16,</p> <p>39640:10, 39640:15,</p> <p>39642:5, 39649:21,</p> <p>39655:11, 39657:25,</p> <p>39659:23, 39662:11,</p>
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<p>39667:9, 39671:18, 39693:7, 39695:20, 39696:2, 39700:14, 39707:15, 39708:9, 39715:18, 39717:11, 39717:22, 39719:14, 39719:19, 39728:3, 39729:14, 39729:18, 39729:22, 39729:24, 39733:12, 39735:8, 39746:17, 39746:19, 39747:21</p> <p><b>two-day</b> [1] - 39546:25 <b>two-way</b> [1] - 39747:21</p> <p><b>type</b> [18] - 39542:13, 39551:25, 39552:3, 39553:7, 39555:4, 39567:3, 39586:24, 39587:8, 39587:13, 39591:2, 39632:1, 39705:5, 39733:21, 39734:4, 39734:17, 39735:3, 39739:6, 39749:17</p> <p><b>types</b> [2] - 39512:9, 39629:12</p> <p><b>typing</b> [1] - 39732:14</p>	<p><b>under</b> [18] - 39513:16, 39520:2, 39527:24, 39558:13, 39566:13, 39572:20, 39574:1, 39597:19, 39621:6, 39654:13, 39675:11, 39708:7, 39710:10, 39711:5, 39711:23, 39729:5, 39738:15, 39738:16</p> <p><b>undergone</b> [1] - 39573:4</p> <p><b>underlined</b> [5] - 39551:12, 39558:24, 39578:16, 39579:4, 39590:3</p> <p><b>underpinnings</b> [1] - 39705:3</p> <p><b>underscored</b> [1] - 39601:13</p> <p><b>understandable</b> [2] - 39739:17, 39740:1</p> <p><b>understood</b> [18] - 39521:21, 39526:12, 39528:6, 39546:14, 39570:3, 39585:18, 39649:6, 39689:7, 39689:11, 39689:17, 39689:23, 39692:24, 39693:2, 39695:3, 39697:18, 39699:6, 39722:2</p> <p><b>undertook</b> [1] - 39695:13</p> <p><b>undoubtedly</b> [1] - 39745:18</p> <p><b>unenviable</b> [1] - 39704:16</p> <p><b>unfair</b> [1] - 39619:20</p> <p><b>unfolded</b> [2] - 39712:4, 39723:2</p> <p><b>unfortunately</b> [1] - 39620:2</p> <p><b>United</b> [2] - 39665:2, 39738:7</p> <p><b>University</b> [1] - 39562:12</p> <p><b>university</b> [1] - 39623:18</p> <p><b>unknown</b> [1] - 39573:16</p> <p><b>unless</b> [5] - 39650:24, 39670:14, 39677:4, 39698:10, 39745:3</p> <p><b>Unless</b> [1] - 39614:25</p> <p><b>unlikely</b> [2] - 39588:14, 39730:10</p> <p><b>unreasonable</b> [2] - 39596:9, 39596:14</p> <p><b>unrelated</b> [1] - 39550:7</p>	<p><b>unreliable</b> [1] - 39584:25</p> <p><b>unspecified</b> [1] - 39598:15</p> <p><b>unstuck</b> [1] - 39627:2</p> <p><b>unsuccessfully</b> [1] - 39683:16</p> <p><b>unsworn</b> [1] - 39585:5</p> <p><b>untoward</b> [1] - 39751:10</p> <p><b>untruthful</b> [1] - 39510:1</p> <p><b>unusual</b> [1] - 39530:4</p> <p><b>unwilling</b> [1] - 39595:19</p> <p><b>up</b> [77] - 39514:22, 39517:12, 39517:16, 39525:20, 39532:13, 39533:7, 39533:17, 39534:7, 39553:2, 39553:13, 39554:5, 39554:9, 39554:13, 39556:18, 39559:25, 39562:5, 39562:24, 39564:15, 39565:3, 39581:5, 39586:5, 39605:18, 39606:13, 39613:8, 39618:17, 39619:8, 39623:6, 39627:16, 39628:14, 39633:2, 39634:7, 39636:6, 39637:6, 39638:11, 39640:20, 39641:22, 39643:2, 39647:17, 39647:25, 39654:12, 39654:22, 39655:7, 39658:7, 39659:2, 39660:19, 39661:6, 39663:4, 39664:3, 39669:22, 39675:22, 39676:21, 39677:4, 39677:6, 39679:25, 39684:9, 39695:4, 39695:9, 39697:25, 39701:6, 39701:17, 39707:1, 39710:1, 39710:11, 39712:21, 39716:11, 39716:14, 39720:15, 39721:1, 39721:2, 39721:11, 39722:8, 39731:18, 39733:22, 39734:15, 39736:7, 39740:4</p> <p><b>upset</b> [2] - 39544:1, 39643:5</p> <p><b>upside</b> [1] - 39577:12</p> <p><b>usual</b> [4] - 39624:9, 39624:25, 39625:6, 39667:20</p> <p><b>Ute</b> [1] - 39647:2</p> <p><b>utmost</b> [1] - 39705:2</p>	<p><b>utterances</b> [1] - 39579:16</p> <p><b>V</b></p> <p><b>V1</b> [2] - 39557:2, 39557:3</p> <p><b>V2</b> [2] - 39557:6, 39557:7</p> <p><b>V3</b> [5] - 39557:14, 39562:14, 39563:4, 39563:19</p> <p><b>V4</b> [4] - 39510:24, 39570:24, 39647:7</p> <p><b>V5</b> [11] - 39556:2, 39557:18, 39562:9, 39563:7, 39563:17, 39563:18</p> <p><b>vacate</b> [2] - 39618:10, 39619:4</p> <p><b>vacated</b> [1] - 39618:5</p> <p><b>validated</b> [1] - 39712:8</p> <p><b>valuable</b> [1] - 39611:21</p> <p><b>value</b> [1] - 39538:17</p> <p><b>Vancouver</b> [1] - 39747:23</p> <p><b>vantage</b> [1] - 39592:2</p> <p><b>various</b> [17] - 39507:21, 39510:13, 39549:10, 39570:17, 39582:7, 39584:17, 39645:15, 39660:4, 39668:8, 39703:1, 39703:6, 39710:10, 39723:3, 39734:6, 39735:2, 39744:1, 39745:9</p> <p><b>vehicle</b> [3] - 39519:15, 39519:18, 39603:22</p> <p><b>veracity</b> [2] - 39554:7, 39580:18</p> <p><b>verbal</b> [1] - 39520:11</p> <p><b>verify</b> [1] - 39684:14</p> <p><b>version</b> [10] - 39514:17, 39514:18, 39514:23, 39563:6, 39593:1, 39686:22, 39686:24, 39687:5, 39687:13, 39687:23</p> <p><b>versions</b> [4] - 39514:24, 39686:14, 39686:22, 39687:15</p> <p><b>via</b> [2] - 39510:16, 39621:19</p> <p><b>Vic</b> [1] - 39503:12</p> <p><b>vicinity</b> [2] - 39551:25, 39571:1</p> <p><b>victim</b> [1] - 39735:24</p> <p><b>victim's</b> [1] - 39537:8</p> <p><b>victimized</b> [1] -</p>	<p>39651:24</p> <p><b>video</b> [4] - 39648:24, 39649:17, 39679:12, 39681:18</p> <p><b>view</b> [13] - 39510:1, 39566:22, 39572:4, 39572:6, 39602:4, 39652:25, 39668:16, 39678:25, 39713:8, 39713:17, 39749:18, 39750:6, 39750:9</p> <p><b>viewed</b> [1] - 39604:6</p> <p><b>views</b> [3] - 39614:8, 39627:23, 39633:13</p> <p><b>vilified</b> [1] - 39651:23</p> <p><b>violence</b> [1] - 39559:15</p> <p><b>virgin</b> [2] - 39576:19, 39576:20</p> <p><b>Virgin</b> [1] - 39582:6</p> <p><b>Virginia</b> [1] - 39667:14</p> <p><b>virtually</b> [1] - 39724:5</p> <p><b>virtue</b> [1] - 39568:18</p> <p><b>vision</b> [1] - 39713:13</p> <p><b>visit</b> [1] - 39602:1</p> <p><b>visited</b> [1] - 39569:6</p> <p><b>vitae</b> [2] - 39707:2, 39710:8</p> <p><b>vital</b> [1] - 39699:20</p> <p><b>volume</b> [1] - 39642:20</p> <p><b>Volume</b> [1] - 39501:22</p> <p><b>volunteered</b> [2] - 39558:17, 39562:17</p> <p><b>Vs</b> [2] - 39586:21, 39598:1</p> <p><b>W</b></p> <p><b>wait</b> [3] - 39730:12, 39736:20, 39748:12</p> <p><b>walk</b> [3] - 39625:6, 39625:12, 39646:18</p> <p><b>walked</b> [1] - 39626:23</p> <p><b>walking</b> [5] - 39515:16, 39557:8, 39624:7, 39626:19, 39626:22</p> <p><b>wallet</b> [2] - 39517:5, 39610:21</p> <p><b>Walters</b> [1] - 39602:23</p> <p><b>Wambaugh</b> [1] - 39718:3</p> <p><b>wandering</b> [3] - 39627:1, 39668:3, 39670:22</p> <p><b>wanna</b> [3] - 39538:8, 39538:9, 39538:10</p> <p><b>wants</b> [4] - 39596:5, 39670:3, 39696:24, 39713:12</p> <p><b>warrant</b> [1] - 39741:14</p>
<p><b>Uk</b> [1] - 39734:19</p> <p><b>Ullrich</b> [1] - 39507:22</p> <p><b>Ultimately</b> [1] - 39597:10</p> <p><b>ultimately</b> [7] - 39564:6, 39616:24, 39731:3, 39733:10, 39741:4, 39744:21, 39747:2</p> <p><b>umm</b> [2] - 39623:4, 39679:11</p> <p><b>Umm</b> [11] - 39536:15, 39555:15, 39581:20, 39582:17, 39586:16, 39589:15, 39658:3, 39681:8, 39745:6, 39749:21, 39750:17</p> <p><b>unable</b> [2] - 39559:17, 39747:1</p> <p><b>unavailability</b> [1] - 39594:17</p> <p><b>unaware</b> [1] - 39573:23</p> <p><b>unbelievable</b> [1] - 39584:23</p> <p><b>uncertain</b> [1] - 39686:5</p> <p><b>uncontrollably</b> [1] - 39550:9</p> <p><b>uncovered</b> [1] - 39696:11</p> <p><b>Under</b> [1] - 39639:24</p>				



<p><b>warrants</b> [1] - 39716:12</p> <p><b>Warwick</b>[1] - 39711:14</p> <p><b>Watson</b>[1] - 39503:6</p> <p><b>ways</b> [2] - 39629:19, 39700:12</p> <p><b>weakened</b> [1] - 39688:23</p> <p><b>weapon</b> [10] - 39511:5, 39552:5, 39552:6, 39554:3, 39555:6, 39555:13, 39559:16, 39674:19</p> <p><b>Weapon</b>[1] - 39556:6</p> <p><b>web</b> [1] - 39714:2</p> <p><b>Wednesday</b>[1] - 39501:21</p> <p><b>week</b> [2] - 39511:16, 39511:19</p> <p><b>weekend</b> [1] - 39573:19</p> <p><b>weeks</b> [8] - 39512:22, 39516:8, 39516:9, 39657:15, 39657:21, 39657:25, 39692:13</p> <p><b>weigh</b> [2] - 39574:9, 39574:11</p> <p><b>weight</b> [6] - 39537:6, 39574:9, 39584:9, 39585:5, 39611:23, 39701:14</p> <p><b>well-known</b> [1] - 39719:24</p> <p><b>whatsoever</b> [4] - 39587:5, 39589:14, 39644:10, 39645:10</p> <p><b>whereabouts</b> [1] - 39616:19</p> <p><b>whereas</b> [4] - 39554:1, 39594:22, 39734:13, 39737:21</p> <p><b>Whitehorse</b>[1] - 39650:17</p> <p><b>whole</b> [4] - 39524:4, 39532:25, 39624:21, 39653:8</p> <p><b>widespread</b> [1] - 39704:4</p> <p><b>wielding</b> [3] - 39627:10, 39643:15, 39663:22</p> <p><b>Wilde</b>[1] - 39502:12</p> <p><b>Williams</b>[41] - 39503:15, 39504:3, 39505:10, 39606:24, 39634:21, 39635:25, 39636:4, 39641:4, 39641:7, 39643:2, 39643:8, 39644:11, 39648:6, 39651:21, 39672:12, 39672:15, 39675:4, 39680:2, 39685:6, 39686:10,</p>	<p>39687:3, 39688:2, 39689:24, 39690:20, 39691:20, 39692:3, 39692:19, 39695:17, 39696:7, 39696:23, 39699:6, 39700:19, 39701:23, 39702:25, 39705:22, 39706:4, 39706:11, 39710:21, 39729:12, 39729:23, 39747:7</p> <p><b>Williams</b> [1] - 39729:15</p> <p><b>Williams's</b> [1] - 39614:17</p> <p><b>willingness</b> [1] - 39518:18</p> <p><b>Wilson</b>[109] - 39506:15, 39507:9, 39508:3, 39508:11, 39519:14, 39528:25, 39536:6, 39548:21, 39548:23, 39549:2, 39549:4, 39566:7, 39566:10, 39566:12, 39567:14, 39569:6, 39569:11, 39569:18, 39570:6, 39570:15, 39571:10, 39571:25, 39572:2, 39572:13, 39572:14, 39572:18, 39573:10, 39573:11, 39573:14, 39582:9, 39584:14, 39585:12, 39585:16, 39585:20, 39586:3, 39586:24, 39587:6, 39588:17, 39589:16, 39589:23, 39590:4, 39590:16, 39590:17, 39590:24, 39591:4, 39591:10, 39591:22, 39592:8, 39592:17, 39593:2, 39593:16, 39594:5, 39594:11, 39595:21, 39597:1, 39597:15, 39597:22, 39598:8, 39598:18, 39599:4, 39599:8, 39599:11, 39599:16, 39599:25, 39600:9, 39600:17, 39600:25, 39601:21, 39602:7, 39602:14, 39602:20, 39603:9, 39603:19, 39604:4, 39604:9, 39604:15, 39604:25, 39605:11, 39606:7, 39606:18, 39606:25, 39608:22, 39609:10, 39609:16, 39610:18, 39610:19, 39611:11, 39612:9, 39613:17,</p>	<p>39613:20, 39615:12, 39634:1, 39634:3, 39682:17, 39683:23, 39688:24, 39689:12, 39689:25, 39690:11, 39690:21, 39691:1, 39691:3, 39691:20, 39692:5, 39692:15, 39749:22, 39750:16</p> <p><b>Wilson's</b> [12] - 39570:17, 39584:16, 39586:13, 39587:23, 39592:24, 39595:16, 39601:13, 39610:22, 39612:2, 39689:9, 39692:11, 39749:23</p> <p><b>Winnipeg</b>[27] - 39513:22, 39553:4, 39553:13, 39553:18, 39554:6, 39554:24, 39554:25, 39555:7, 39555:15, 39558:19, 39559:11, 39559:14, 39560:3, 39560:15, 39560:17, 39560:19, 39560:20, 39561:1, 39561:4, 39561:13, 39562:15, 39636:17, 39637:10, 39637:18, 39661:8, 39707:9, 39725:12</p> <p><b>Winnipeg's</b> [1] - 39636:14</p> <p><b>wisdom</b> [1] - 39724:14</p> <p><b>wish</b> [6] - 39528:4, 39550:15, 39567:8, 39648:13, 39680:6, 39746:15</p> <p><b>wished</b> [2] - 39743:16, 39748:21</p> <p><b>wishes</b> [1] - 39696:18</p> <p><b>withdrew</b> [1] - 39597:9</p> <p><b>withholding</b> [1] - 39587:3</p> <p><b>Witness</b>[1] - 39659:12</p> <p><b>witness</b> [38] - 39512:10, 39515:12, 39520:11, 39521:10, 39521:11, 39528:8, 39530:10, 39539:16, 39539:18, 39541:10, 39548:22, 39548:24, 39549:2, 39574:23, 39578:9, 39578:18, 39583:25, 39584:1, 39586:14, 39612:20, 39618:6, 39669:19, 39669:21, 39670:1, 39682:15, 39689:10, 39689:17, 39697:19, 39698:9,</p>	<p>39698:16, 39700:1, 39706:8, 39706:16, 39745:21, 39745:24, 39746:5, 39746:13, 39749:12</p> <p><b>witness'</b> [1] - 39613:10</p> <p><b>Witnesses</b>[1] - 39507:19</p> <p><b>witnesses</b> [31] - 39507:21, 39508:2, 39508:6, 39508:12, 39516:4, 39523:3, 39523:14, 39530:4, 39537:22, 39537:23, 39548:19, 39566:15, 39567:5, 39574:4, 39595:10, 39632:21, 39632:22, 39632:24, 39633:9, 39740:24, 39740:25, 39743:3, 39743:7, 39743:25, 39744:8, 39744:14, 39744:16, 39745:1, 39747:9, 39749:15, 39751:1</p> <p><b>Wolch</b>[75] - 39503:2, 39510:17, 39518:17, 39544:8, 39551:7, 39570:6, 39621:10, 39641:13, 39644:15, 39645:11, 39646:11, 39647:7, 39648:23, 39652:9, 39652:13, 39652:19, 39653:1, 39653:16, 39653:17, 39655:13, 39655:17, 39657:6, 39658:9, 39658:22, 39658:25, 39659:3, 39659:15, 39662:14, 39664:2, 39664:10, 39665:20, 39666:22, 39668:11, 39668:16, 39668:20, 39668:23, 39669:4, 39669:7, 39669:14, 39669:16, 39669:18, 39669:25, 39670:13, 39670:16, 39670:20, 39670:25, 39671:14, 39671:22, 39671:24, 39671:25, 39672:5, 39672:24, 39673:12, 39674:21, 39678:13, 39685:18, 39686:25, 39687:4, 39687:14, 39688:2, 39693:7, 39693:15, 39695:20, 39697:11, 39698:6, 39698:25, 39701:5, 39725:7, 39725:9, 39725:12, 39726:2,</p>	<p>39726:10, 39729:9, 39746:14</p> <p><b>Wolch's</b> [7] - 39643:14, 39654:21, 39658:15, 39686:17, 39692:20, 39696:23, 39725:23</p> <p><b>woman</b> [14] - 39542:10, 39543:22, 39544:16, 39545:2, 39545:6, 39545:21, 39546:6, 39551:17, 39570:10, 39571:19, 39571:24, 39608:25, 39609:11, 39615:14</p> <p><b>women</b> [3] - 39510:18, 39570:25, 39650:21</p> <p><b>wonder</b> [3] - 39513:15, 39655:6, 39658:21</p> <p><b>wondered</b> [1] - 39537:23</p> <p><b>wondering</b> [4] - 39613:25, 39635:12, 39685:23, 39688:3</p> <p><b>wooden</b> [2] - 39553:15, 39553:21</p> <p><b>word</b> [21] - 39537:10, 39573:12, 39583:25, 39599:18, 39600:2, 39600:4, 39600:5, 39600:11, 39602:2, 39689:15, 39689:21, 39690:1, 39690:4, 39690:6, 39690:9, 39690:12, 39691:22, 39692:16, 39692:17, 39701:8, 39732:21</p> <p><b>wording</b> [1] - 39723:19</p> <p><b>words</b> [13] - 39538:8, 39579:6, 39580:7, 39580:11, 39613:22, 39660:12, 39678:25, 39689:9, 39691:3, 39691:8, 39692:7, 39692:11, 39738:23</p> <p><b>works</b> [1] - 39653:20</p> <p><b>world</b> [7] - 39605:20, 39668:13, 39670:2, 39670:3, 39717:3, 39734:6, 39735:5</p> <p><b>worldwide</b> [1] - 39719:25</p> <p><b>worry</b> [1] - 39712:23</p> <p><b>writ</b> [1] - 39517:24</p> <p><b>write</b> [1] - 39610:4</p> <p><b>writer</b> [3] - 39593:1, 39610:17, 39671:3</p> <p><b>writes</b> [2] - 39600:15, 39725:3</p> <p><b>writing</b> [6] - 39512:15, 39552:15, 39641:18,</p>
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<p>39647:19, 39648:5, 39745:11 <b>writings</b> [1] - 39690:6 <b>written</b> [17] - 39512:24, 39519:1, 39595:12, 39597:24, 39621:12, 39621:16, 39626:1, 39641:19, 39656:19, 39657:8, 39659:2, 39659:14, 39663:8, 39684:2, 39694:23, 39718:2, 39719:19 <b>wrongful</b> [1] - 39711:7 <b>Wrongful</b> [1] - 39501:3 <b>Wrongfully</b> [1] - 39665:12 <b>wrongfully</b> [3] - 39520:24, 39521:2, 39665:8 <b>wrongly</b> [1] - 39653:3 <b>Wrongly</b> [1] - 39505:15 <b>wrote</b> [11] - 39551:5, 39572:17, 39573:23, 39598:25, 39621:1, 39638:18, 39642:5, 39658:22, 39659:14, 39678:6, 39683:9</p>	<p><b>yell</b> [1] - 39612:25 <b>yesterday</b> [20] - 39515:19, 39544:8, 39551:8, 39643:3, 39647:8, 39648:20, 39652:9, 39654:3, 39664:10, 39669:5, 39672:24, 39673:12, 39685:17, 39686:21, 39692:21, 39693:8, 39695:20, 39696:23, 39697:1, 39701:5 <b>yesterday's</b> [1] - 39652:12 <b>Young</b> [3] - 39644:23, 39645:1, 39645:23 <b>young</b> [4] - 39517:13, 39571:8, 39650:21, 39750:3 <b>yourself</b> [2] - 39621:4, 39715:11 <b>youth</b> [1] - 39588:3 <b>yr</b> [1] - 39588:3 <b>yup</b> [1] - 39542:4 <b>Yup</b> [2] - 39553:11, 39668:22</p>
<b>X</b>	
<p><b>Xerox</b> [2] - 39718:13, 39731:23</p>	
<b>Y</b>	
<p><b>yard</b> [1] - 39557:22 <b>year</b> [5] - 39601:11, 39630:3, 39630:25, 39655:9, 39662:6 <b>years</b> [36] - 39516:25, 39522:3, 39522:17, 39528:11, 39537:13, 39547:19, 39550:4, 39561:3, 39566:19, 39576:1, 39582:24, 39583:10, 39584:4, 39590:7, 39594:16, 39611:18, 39612:23, 39628:8, 39636:18, 39637:14, 39638:4, 39649:14, 39649:25, 39655:11, 39672:20, 39673:10, 39674:5, 39707:10, 39712:3, 39719:14, 39719:19, 39728:3, 39729:18, 39741:13, 39747:13 <b>years'</b> [1] - 39729:24</p>	

