

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

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

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Volume 190

Inquiry Proceedings



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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

SPENCER RONALD FAINSTEIN, continued:

BY MR. HODSON:

Q Good morning, Mr. Fainstein. If we could call up 157840, this is where we left off yesterday, just a couple of questions on -- oh, sorry. Actually, while they are calling that up I can ask -- we were talking yesterday about the Supreme Court reference and we talked about the scope and dealing with police conduct and I think you told us that yes, that was certainly within the ambit of what the Supreme Court was looking at; correct?

A That was certainly my view, yes.

Q And that -- let's talk about Crown conduct or misconduct, one or both of those, whether it be by way of disclosure at the trial setting or the disclosure or lack of disclosure of the Larry Fisher information that was discovered in 1970. Was it your understanding that that was an issue that could be considered by the Supreme Court in determining whether a miscarriage of justice had or would occur?



1 A Yes, in my view anything that might have
2 contributed to a miscarriage was germane to the
3 proceedings.

4 Q And so the failure of the Crown to disclose
09:03 5 documents to defence counsel before trial would be
6 something that could fall within the ambit?

7 A Yes.

8 Q And after trial and before Mr. Milgaard's appeals
9 are concluded, if the police and/or Crown became
09:03 10 aware of information about Larry Fisher as they
11 did and whether they did or did not disclose that,
12 was that something that you felt was within the
13 ambit that the Supreme Court considered in
14 determining a miscarriage of justice?

09:03 15 A Yes.

16 Q And do you have a recollection, I mean, the record
17 speaks for itself, but a recollection -- I think
18 there was some evidence of Mr. Karst and his
19 interviews of Larry Fisher in 1970 as well as some
09:03 20 documentary evidence about how that was dealt
21 with; is that correct?

22 A Yes, I believe so. I recall that Mr. Karst went
23 to Winnipeg and interviewed Mr. Fisher there and
24 that Mr. Fisher had mentioned I guess to Winnipeg
09:04 25 police before that when he was apprehended for a



1 sexual assault in Winnipeg that he had committed
2 some offences in Saskatchewan.

3 Q And is it fair to say that one of the issues at
4 the Supreme Court was the fact that David Milgaard
09:04 5 and his counsel didn't know about the fact that
6 Mr. Karst went to Winnipeg and the fact that Larry
7 Fisher had confessed and the fact that Larry
8 Fisher went through the Saskatchewan courts and
9 was convicted and that that was something they
09:04 10 didn't know about, and the fact that they didn't
11 know about it, that somehow that would be a
12 component of a miscarriage of justice. Is it your
13 understanding that that issue was before the
14 court?

09:04 15 A Yes, that was certainly something that was put
16 forward at times by the people representing David
17 Milgaard.

18 Q Can you comment on -- and I'm not sure, Mr.
19 Fainstein, whether this issue or decision may have
09:05 20 been dealt with before you became involved. We've
21 heard evidence from Murray Brown on behalf of the
22 Government of Saskatchewan that indicated that
23 they were essentially asked to participate in the
24 reference and asked to take the role of, maybe
09:05 25 adversary is too strong, but to defend the



1 conviction in a sense; in other words, to test the
2 Milgaard evidence but to defend the conviction.

3 Was that your understanding of their role?

4 A I think that was implicit in their involvement in
09:05 5 the reference.

6 Q And do you know how that came about, were you
7 involved in that process, to ask them to take that
8 role, or how did that come about?

9 A No, I wasn't actually.

09:05 10 Q But that was your understanding of the role they
11 took?

12 A I probably just assumed that and I don't recall
13 any express discussion about the matter, but
14 basically all of the people with a specific
09:05 15 interest in the matter were represented and each
16 of them was there to help illuminate the situation
17 for the court so it could make a fair
18 determination.

19 Q Okay. Go to 002663, and I'm going to go through
09:06 20 chronologically, Mr. Fainstein, and we'll go
21 through a bit of the DNA and a bit of the
22 reference, my focus is going to be on the DNA, and
23 here's a December 20th, 1991 letter from Murray
24 Brown to Eugene Williams, and just to assist you
09:06 25 here, I think the evidence we heard from both Mr.



1 Brown and Mr. Williams was to the effect that
2 around December 20th, 1991 the issue of further
3 DNA testing came about and Mr. Brown had a
4 discussion with Mr. Williams about pursuing the
09:06 5 testing and Mr. Williams couldn't recall whether
6 it was Mr. Brown or his thought, but in any event,
7 there seemed to be some consensus from the federal
8 and provincial governments that DNA testing should
9 be pursued. Is that your understanding?

09:07 10 A Yes, there was a consensus. I can't say now
11 exactly how it arose in my own case. I know that
12 my interest was stimulated by that memo you showed
13 me yesterday.

14 Q Right.

09:07 15 A Which referred to the possibility of sophisticated
16 testing a couple of years down the road, and I
17 latched onto that fairly quickly and was very
18 anxious to pursue it and was in contact with
19 counsel to try to arrange for what was required
09:07 20 to --

21 Q If we could go to 156827, and this is a letter of
22 the same date from Mr. Brown to Mr. Wolch talking
23 about DNA, and in this letter Mr. Brown is talking
24 about perhaps testing done in Houston, Texas. Do
09:07 25 you have a recollection of that being a possible



1 lab to do testing? Do you remember that? I think
2 Mr. Brown said he was just aware, probably from
3 the RCMP, that there was a lab there that was
4 known for DNA testing.

09:07 5 A I have no recollection of that specifically.

6 Q Okay.

7 A I've seen it in the material, but --

8 Q If we can go to 334337, and this is December 30th,
9 1991 and this is Mr. Williams' phone call note
09:08 10 with Dr. Emerson of the Home Office's Lab in
11 England, and you're familiar with that lab?

12 A Yes.

13 Q And looking through the documents, it would appear
14 that while the reference case was going on,
09:08 15 January, February, March, I presume that you were
16 busy in court and that Mr. Williams was assisting
17 you from time to time in making contact with the
18 DNA people; is that a correct assumption on my
19 part?

09:08 20 A Yes. Because Mr. Williams had been engaged on the
21 file for so long, we took advantage of his various
22 connections and his availability to track things
23 down or to assist in sorting things out as we
24 proceeded.

09:09 25 Q Now, I went through these documents with Mr.



1 Williams just recently and I think he told us that
2 he became aware of the expertise of the Forensic
3 Science Service in England and made contact with
4 them. What is your recollection of how they
09:09 5 became involved?

6 A I really don't recall exactly how it came about at
7 that point. At some point fairly early on I had
8 discussions with Dr. Fourney and then things
9 proceeded from there, but I didn't recall
09:09 10 precisely what Eugene's involvement had been.

11 Q Okay. If we can maybe go to 334382, and we'll
12 just go through a couple of these documents, and
13 this is the January 6, 1991 letter from Mr.
14 Williams to Dr. Emerson, and if we can go to the
09:09 15 next page, and this is where Mr. Williams is
16 asking the English lab to apply PCR-based
17 technologies including short tandem repeat and
18 mitochondrial testing to the samples, and I think
19 his evidence was that at this time information
09:10 20 from the RCMP was that short tandem repeat was
21 being used in England, I think in the testing
22 stage, I'm not sure it had been validated, and the
23 hope was that the English lab would undertake
24 short tandem repeat testing, and we'll see -- we
09:10 25 know from some later documents they came back and



1 said no, although we're doing it, we're not
2 prepared to do it for your purposes because we
3 haven't validated it. Is that your understanding?

4 A Yes, that's right. It was certainly premature. I
09:10 5 understand that the Forensic Science Service only
6 began using short tandem repeats on a regular
7 basis in the spring or summer of 1994.

8 Q Right. And 157242, this is Mr. Frater's letter,
9 and we should just pause for a moment. Mr. Frater
09:11 10 was a lawyer with Federal Justice who was
11 assisting you in the reference case; is that
12 correct?

13 A Yes, that's right.

14 Q He would be performing a similar role to you in
09:11 15 the reference?

16 A That's right.

17 Q And so here seeking from Mr. Wolch a consent form
18 from David Milgaard to provide his bodily fluids
19 for the DNA testing, and it's my understanding
09:11 20 that Mr. Milgaard voluntarily provided that and
21 had no difficulty with providing samples for DNA
22 testing; is that --

23 A Yes, he did. In fact, I have a note among the
24 material I prepared suggesting that on January
09:11 25 22nd, 1992 Mr. Milgaard gave blood and saliva



1 samples.

2 Q Right. But as far as his willingness to provide
3 it, would you agree that he was willing at all
4 times to undergo any DNA testing and to provide
09:12 5 his bodily fluids for that?

6 A Yes, he provided that very early on in the
7 process.

8 Q And then 268668 is the same letter to Mr. Fisher
9 and I think we know from the record that, I think
09:12 10 Mr. Fisher's position was initially either a no or
11 a maybe and then it became a yes and he provided a
12 sample I think around March 9th or 13th?

13 A My note says March the 8th.

14 Q March the 8th?

09:12 15 A Yes. I understand on that occasion he had just
16 gotten to Ottawa, he was going to be on the stand
17 soon thereafter and he took that occasion to give
18 various samples of bodily fluids to a Dr. Davidson
19 who -- on March the 8th and that a couple of days
09:13 20 later, three days later, March 11th, Dr. Davidson
21 conveyed that material along with an affidavit to
22 the RCMP Central Forensic Lab in Ottawa.

23 Q Okay. If we can go to 115797, and this is a
24 letter from Mr. Lamer, former Chief Justice Lamer
09:13 25 to Mr. Wolch with copies to you about witnesses,



1 and it looks like from the letter that there was
2 difficulty in getting a witness list from Mr.
3 Wolch and to get subpoenas. Is that -- do you
4 recall that being an issue?

09:13 5 A All of the counsel were under considerable
6 pressure to help us determine, you know, who
7 should be called and when and so forth. The
8 commencement of the proceedings was imminent and
9 this still hadn't been completely resolved. Now,
09:14 10 there were a lot of complications in various
11 instances, a lot of things to think about, but I
12 do recall chasing after Mr. Wolch a little bit
13 to -- and he did send a letter very, very quickly
14 after that.

09:14 15 Q Was there -- just your comment on this, Mr.
16 Fainstein. The reference was called November 28th
17 and started January 16th or January 20th with the
18 holiday season in there. Was it -- how would you
19 describe the time constraints in getting ready, at
09:14 20 least from your perspective and what you observed
21 of other parties, in getting ready for this?

22 A It was a very short time frame considering all of
23 the material that had to be assimilated by the
24 various parties and all the preparations that had
09:14 25 to be done, but the court was anxious to get on



1 with the proceedings and to give its advice as
2 soon as possible.

3 COMMISSIONER MacCALLUM: Could I ask you
4 something, it went by me a little fast here, on
09:15 5 268668 Mr. Frater asked for samples from Beresh.
6 Was this connected with Fisher having been
7 granted standing at the Supreme Court reference,
8 was it a condition of his standing that he
9 provide samples?

09:15 10 A No, it wasn't a condition. We wanted this to be
11 voluntary. We had had some discussions with
12 counsel for both Fisher and Milgaard and we were
13 hopeful that they would give us the samples so
14 that we could do the test and there were some
09:15 15 equivocal responses from the Fisher camp, but
16 there was never a no in that time frame and
17 ultimately, as I mentioned, the samples were
18 forthcoming from Mr. Fisher as soon as he arrived
19 in Ottawa in March, early March.

09:15 20 COMMISSIONER MacCALLUM: And it wasn't, it
21 didn't have anything to do with him being called
22 as a witness either then, eh? He would have been
23 called irrespective of whether or not he gave a
24 sample?

09:16 25 A Well, I'm sure that someone would have asked him



1 why he hadn't given the samples if he had not done
2 so, --

3 COMMISSIONER MacCALLUM: Oh.

4 A -- and so I'm sure he was anxious to have that
09:16 5 done before he took the stand.

6 BY MR. HODSON:

7 Q And let me follow up on that. I think that is
8 evident in the transcript, or at least in the
9 submissions, that Mr. Fisher was there saying "I
09:16 10 didn't do this", and the response then, at least
11 from the Milgaard group, was "well then provide
12 your samples if you've got nothing to hide"; is
13 that a fair --

14 A Well there's an exchange with his counsel when he
09:16 15 was on the stand about his willingness to give the
16 samples, --

17 Q Okay.

18 A -- and I don't have the exact language in front of
19 me, but it was to the effect that "oh always, when
09:16 20 you want these things, I'm happy to co-operate.

21 Q Okay. If Mr. Fisher had not applied to have
22 standing at the reference case, can you comment on
23 whether or not he still would have been a witness?
24 And I appreciate that it's somewhat speculative,
09:17 25 but the fact that he had standing, did that change



1 the decision to have him as a witness, in your
2 view?

3 A I can't imagine him not being given standing since
4 it was Milgaard's assertion that not only was he
09:17 5 was innocent, but that it was Larry Fisher who had
6 committed the offence.

7 Q Let me back up. Let's say that Mr. Fisher chose
8 not to seek standing, --

9 A All right.

09:17 10 Q -- in other words to stay away from those
11 proceedings?

12 A Okay.

13 Q In that scenario, do you think presumably someone
14 would have asked Mr. Fisher to be a witness?

09:17 15 A Oh, he would have been subpoenaed, undoubtedly.

16 Q Okay. And then the next question is, had he not
17 been a party that sought standing, can you comment
18 on whether or not you would have sought bodily
19 fluids from him for the purpose of DNA testing,
09:17 20 and were you influenced with the fact that he was
21 a party with standing?

22 A I don't think so. I mean, logically, these were
23 the two people of interest in this connection and
24 we wanted to have samples from both.

09:18 25 Q And so was it your evidence that, had Mr. Fisher



1 taken the position "I'm going to stay away from
2 this reference, I'm not going to get involved",
3 it's your view that you still would have sought,
4 from him, bodily fluids for DNA testing?

09:18 5 A Well, in my view he undoubtedly would have been
6 subpoenaed, and in my view he would necessarily
7 have been asked if he would give those samples.

8 Q And it's my --

9 COMMISSIONER MacCALLUM: If --

09:18 10 MR. HODSON: I'm sorry, go ahead?

11 COMMISSIONER MacCALLUM: But you couldn't
12 compel him at that time, could you?

13 A No. Well, he could be subpoenaed to testify on
14 the reference, --

09:18 15 COMMISSIONER MacCALLUM: Yes?

16 A -- but there was no coercive power within the 617
17 or 690 process --

18 BY MR. HODSON:

19 Q It's also -- sorry.

09:18 20 A -- that granted the reference.

21 Q I was going to follow up. It's my understanding
22 of the law as well that there was not an ability
23 to obtain a DNA warrant at that time?

24 A That's right, the legislation wasn't in place at
09:19 25 that time.



1 Q And so I guess, just on this point, that Mr.
2 Fisher presumably could have said "I'm not going
3 to get involved in the reference, you can subpoena
4 me to testify, I will come, I will not say
09:19 5 anything", invoke whatever protection he wishes,
6 "and I will not provide bodily substances for
7 testing"; correct?

8 A It's conceivable, yes.

9 Q And was it your sense that, in light of the fact
09:19 10 that he was a party with standing and there
11 positively asserting his innocence, that it may
12 have made it more difficult for him to say "I'm
13 not going to provide my bodily fluids for
14 testing"?

09:19 15 A I think that bespoke a certain responsibility.

16 Q If we can just go back to 115797, and just at the
17 bottom, former Chief Justice Lamer says:

18 "While it is the Court's, and
19 only the Court's decision to call or not
09:19 20 to call witnesses, it was agreed during
21 our meeting in early December that we
22 would let counsel of parties granted
23 status under s. 53(6) of the *Supreme*
24 *Court Act* indicate to the Court which
09:20 25 witnesses they feel should be called."



1 And was that your understanding of essentially
2 what happened, that --

3 A Yes.

4 Q -- the party, even though they were the Court's
09:20 5 witnesses, essentially the parties worked out who
6 should be called?

7 A Yes, that's right. Umm --

8 Q Go to 165664, please. Just a couple of issues.
9 Go to the next page. And this relates to, and
09:20 10 this is a letter from Mr. Frater to Mr. Wolch
11 trying to get a copy of the tape-recorded
12 interview of Mr. Henderson and Ron Wilson, and do
13 you recall that being an issue before the Court,
14 efforts to try and get that tape-recorded
09:20 15 interview, or the tape of that interview?

16 A Umm, yes, it was. Mr. Wilson's recantation was a
17 pretty dramatic development, and when we saw
18 mention of the fact that a tape recording had been
19 made we certainly wanted to hear it, but it never
09:21 20 did become available to us.

21 Q And can you comment on, I mean we've been through
22 Mr. Wilson's evidence at the Supreme Court a
23 number of times and the citation for contempt, I
24 take it there were some questions before the Court
09:21 25 about the credibility of his, well, various of his



1 statements, --

2 A Yes.

3 Q -- including the recantation statement?

4 A Well, he was a very unimpressive witness on the
09:21 5 stand, and he contradicted himself on a number of
6 occasions as he spoke before the Court. It was
7 impossible that everything he said before the
8 Court was true, so that was very frustrating for
9 the panel.

09:21 10 Q 268673. And this is a letter from Mr. Frater to
11 Mr. Beresh about Larry Fisher's transcript of his
12 interview with Eugene Williams, and it's my
13 understanding that when Mr. Williams interviewed
14 Mr. Fisher, there was an agreement that there was
09:22 15 limitations on what could be used?

16 A Yes.

17 Q What use could be made, and that at the Supreme
18 Court reference, ultimately it became available,
19 is that correct, to the parties?

09:22 20 A That's correct. Because we had no coercive power,
21 at times we did have to accept conditions on the
22 use of the information in order to be able to have
23 discussions with these people.

24 Q If we can go to 334413, please. This is just to
09:22 25 get the DNA chronology in order. This is a letter



1 from the English lab, Dr. Emerson, to Mr. Williams
2 basically saying that we can't do short tandem
3 repeat:

4 "... for casework analysis because we
09:22 5 have not completed our validation ...",
6 and I think you've talked about that yesterday,
7 --

8 A Yes.

9 Q -- what was involved, and that they were only
09:23 10 doing the DQ Alpha system in case work. And that
11 was your understanding at the time, that that was
12 the position of the lab?

13 A I -- yeah, just -- right.

14 Q If we can then go to 208523. And this is the
09:23 15 transcript of the opening proceedings, and if we
16 can two to page 208535, and this is your opening
17 remarks, Mr. Fainstein, and go to the next page.
18 And I just want to confirm, I think this is
19 essentially what you have told us, you state to
09:23 20 the Court:

21 "This reference arises as a
22 result of an application for mercy Mr.
23 Milgaard made under section 690 of the
24 Criminal Code. In processing such an
09:23 25 application, the Minister of Justice is



1 free to look at anything she feels is
2 germane. We are beyond the adversarial
3 process. We are beyond the point where,
4 as your lordship has pointed out, the
09:24 5 normal rules of evidence and procedure
6 apply."

7 And then to the next page. You state:

8 "... I believe all counsel here agree
9 that you are not constrained by the
09:24 10 normal rules of evidence or procedure
11 and can entertain and consider anything
12 which common sense and logic suggest is
13 relevant. You are thus as free as the
14 Minister would be when entertaining an
09:24 15 application for mercy."

16 And I think that's consistent with what you've
17 told us here, that it was pretty -- anything that
18 would be relevant for the minister to hear to
19 determine a miscarriage of justice was fair game
09:24 20 for the Supreme Court?

21 A That's right.

22 Q And we've had, we have seen on the record that
23 prior to the second or around the time of the
24 second application, were you aware of allegations
09:24 25 made publicly that David Milgaard was framed and



1 there was a coverup; would you have been generally
2 aware of that being an allegation made in the
3 media?

4 A Umm, yes, I expect I was.

09:25 5 Q And was it your understanding that evidence
6 establishing a frame and coverup, would that have
7 been relevant and admissible before the Supreme
8 Court on the reference case?

9 A Yes, certainly.

09:25 10 Q And can you think of a miscarriage of justice more
11 egregious than a frame or a coverup?

12 A No, that's pretty serious.

13 Q And, again, do you recall, in the course of the
14 reference, the allegation of frame or coverup
09:25 15 being part of what was before the Court? And I
16 mean the transcript speaks for itself, Mr.
17 Fainstein, I just want to get your general sense
18 of whether you understood that to be one of the
19 positions put forward?

09:25 20 A I think so. It's hard for me, so many years
21 later, to separate out in my mind what was
22 entertained directly at the reference with all the
23 other stuff that I was learning there.

24 Q Okay. If we can go ahead to page 208548, and
09:26 25 there is a lengthy discussion here about whether



1 Mr. Milgaard was medically able to testify; do you
2 recall that being an issue before the Court?

3 A I do.

4 Q And I think that the Court indicated they wanted
09:26 5 to hear from Mr. Milgaard first; is that correct?

6 A That's right.

7 Q And there were some concerns about Mr. Milgaard's
8 health and ability to testify; what do you recall
9 about that?

09:26 10 A Mr. Wolch expressed some concerns about that, yes.

11 Q And just, just generally about Mr. Milgaard and
12 his testimony, he would have been testifying, I
13 guess, for the first time after having been
14 incarcerated for 22 years, --

09:26 15 A That's right.

16 Q -- close to 22 years at the time, and just in a
17 general sense what was your observations of
18 whether he had some difficulty in appearing in
19 that setting and telling his story in the Court
09:27 20 setting?

21 A Umm, I thought he was very composed and did very
22 well.

23 Q If we can go to 334423.

24 A Well I should say, you know, I mean there were
09:27 25 certainly times when he was being examined he was



1 under stress, there is no doubt about that, but I
2 didn't see any signs of undue difficulty in
3 dealing with the questions he was asked or, you
4 know, answering.

09:27 5 Q Mr. Brown testified that when I think it was
6 Mr. Neufeld who examined Mr. Milgaard about a
7 number of inconsistencies, and in particular the
8 chicken soup/heater alibi --

9 A Yes.

09:28 10 Q -- I think was how he put it, that was a matter
11 that appeared to be a new matter before the Court;
12 was that your understanding?

13 A That's right.

14 Q And was -- did that have some significance, in
09:28 15 your view, did that --

16 A Well, it did, because there was a lot of
17 discussion about the time frame and whether there
18 was sufficient time for David Milgaard to have
19 been involved in this, or if, in effect, he had an
09:28 20 alibi that precluded his involvement.

21 Q And I think Mr. Brown's view was that there was
22 some inconsistencies between what Mr. Milgaard
23 testified and what other witnesses, in particular
24 Mr. Tallis --

09:28 25 A Yes.



1 Q -- and then to some degree Mr. Wilson, at least at
2 certain parts of Mr. Wilson's evidence there were
3 some contradictions?

4 A Probably, yes.

09:28 5 Q This --

6 A There certainly were inconsistencies with what, a
7 number of inconsistencies with what Mr. Justice
8 Tallis said when he gave evidence.

9 Q And here, just back on the DNA, looks like Mr.
09:29 10 Williams is responding back about the DQ Alpha and
11 a control sample from the victim, that being Gail
12 Miller, meaning a blood stain; is that correct? I
13 think this is just her, this is January 16th, and
14 so the English lab has said "no, we won't do
09:29 15 STR", --

16 A Right.

17 Q -- "we'll do DQ Alpha", Mr. Williams is writing
18 back saying "okay, do DQ Alpha, but can you still
19 do the STR as a backup", and I think they
09:29 20 eventually say "no".

21 A Uh-huh.

22 Q Would that have been your understanding, or would
23 this have been Mr. Williams carrying the ball
24 here?

09:29 25 A You know, it's funny, I have no discreet memory of



1 this at the time but --

2 Q Okay.

3 A -- I'm sure about was some discussions between Mr.
4 Williams and either Mr. Frater and myself about
09:29 5 how that was going.

6 Q Okay. 009092. And this is a letter from former
7 Chief Justice Lamer to you, and this deals with
8 Mr. Tallis and whether or not he would testify,
9 and I take it there was some discussion about
09:30 10 whether Mr. Tallis, who was a judge of the Court
11 of Appeal at the time, would be a witness, and if
12 he was a witness who would question him, whether
13 he would give his evidence in some other form, and
14 things of that nature; is that correct?

09:30 15 A Yes.

16 Q And, ultimately, it was determined that he would
17 be called as a witness?

18 A That's right.

19 Q There is a comment here, former Chief Justice
09:30 20 Lamer says that he has had a discussion with his
21 colleagues, that he would be calling Mr. Justice
22 Tallis, he says:

23 "I will be inviting him to send us his
24 version of the events as regards the
09:30 25 reason why Mr. Milgaard did not take the



1 stand, and as to whether he was in
2 possession, or knew of the existence, of
3 Wilson's first statement to the police
4 at the time of the trial."

09:31 5 And that, of course, is Ron Wilson's March 3rd,
6 1969 statement, correct, that's -- is that your
7 understanding of what Chief Justice Lamer would
8 be referring to there?

9 A Yes. I don't recall the date of the statement,
09:31 10 but --

11 Q Yeah. And are you able to tell us how that issue
12 might have been brought before him? This is
13 before the proceedings start, and in the
14 application materials I don't believe there is a
09:31 15 specific reference to the issue of whether or not
16 Mr. Tallis received the first statement, we've
17 heard evidence before the Commission that it was
18 contained in a newspaper article in July of 1990
19 that talked about that statement, and I -- do you
09:31 20 recall whether this had been an issue raised in
21 chambers with him by the parties, or what would
22 have prompted him to --

23 A I --

24 Q -- ask Mr. Tallis this?

09:31 25 A It's quite possible it was the subject of



1 discussion in chambers, because we did have
2 discussions from time to time about who should be
3 called and in what context, and I suppose some
4 indication would be given in some instances about
09:32 5 what the witness could contribute.

6 Q So it may have been a case where counsel said that
7 one of the issues may be whether or not he got the
8 first statement; do you have a recollection of
9 that or --

09:32 10 A No, I'm sorry.

11 Q Next, if we can go to 267287. And this is the
12 Court of Queen's Bench order that released the
13 exhibits to the Supreme Court, and I'll just read
14 it. It says the exhibits are authorized to be
09:32 15 delivered to the Court, etcetera:

16 "They are to be returned to the Local
17 Registrar upon completion of the
18 proceedings in the Supreme Court of
19 Canada."

09:32 20 And we'll touch on this a bit later, Mr.
21 Fainstein, but it's my understanding that, at the
22 conclusion of the hearing part of the reference
23 case, it was determined by you and perhaps others
24 that, notwithstanding the conclusion of the
09:33 25 hearings, there was a couple things alive, and



1 I'll ask you to comment on this; number one,
2 either an understanding or an undertaking with
3 the Court that further testing would be done on
4 exhibits for DNA; and secondly, I understand the
09:33 5 broader power under section 749 of the *Criminal*
6 *Code*, the royal prerogative of mercy, that I
7 think you felt either gave you the right to, or
8 perhaps the responsibility, to continue your
9 efforts to test; and if you can maybe just
09:33 10 comment on that now?

11 A Sure. I think I should say, first of all, that
12 the letter that's before me here must have escaped
13 me at the time. I must not have been aware, at
14 that particular juncture, that there was an order
09:33 15 that the exhibits were to be returned to the
16 registrar upon completion of the reference, you
17 know, or I would have dealt with that expressly.

18 Q Okay.

19 A I would have been in touch with the Court in
09:34 20 Saskatchewan to seek its concurrence as well.

21 Q Now, just in fairness, the non-DNA-type exhibits
22 were returned to the Court at the conclusion of
23 the hearings, --

24 A Okay.

09:34 25 Q -- and when you were done your DNA testing, they



1 were then returned to the Court?

2 A Yes, yes indeed. Now as far as the prerogative of
3 mercy is concerned, Section 690 is one expression
4 of the powers that are available, but the
09:34 5 prerogative has its origin, you know, in the mists
6 of history, and it's a very broadly-based
7 prerogative that the sovereign has to ensure that
8 justice is done in any case. And the section of
9 the code you mentioned, the 749 or 748, is to the
09:34 10 effect that nothing in the code affects the royal
11 prerogative of mercy, and so it transcends the
12 specific provisions in the code that relate to
13 mercy.

14 My view was that the result of
09:35 15 the reference was that Milgaard was released from
16 prison but he was not exonerated, there was a
17 great cloud over the situation, and if it were
18 possible for science to give us the answer as to
19 who, in fact, was Gail Miller's assailant, then it
09:35 20 was certainly something that should be pursued in
21 the public interest, and consistent with my
22 understanding of the ambit of the royal
23 prerogative of mercy, and without even necessarily
24 the need for a further 690 application or
09:35 25 something to that effect, it was just something



1 that had to be done.

2 Q And what about -- did you -- and I'll take you to
3 this a bit later, the exchange with the Court
4 about that.

09:36 5 A Yes.

6 Q I think you also, at least I saw in some later
7 documents, suggested that the Court, that there
8 may have been an understanding, either implicit or
9 express, to the Supreme Court that further testing
09:36 10 would be done; can you comment on that, please?

11 A Yes. In -- in my statement to the Court of -- see
12 if I can find it.

13 Q I think it's March 9th. You know, I can take you
14 to that.

09:36 15 A Yeah. No, it was after the testing by Roche labs
16 which was unsuccessful.

17 Q April 6th, I think it was?

18 A Right, that's right. I gave an update to the
19 Court about what had happened, and I told them
09:36 20 about the efforts to secure some results in North
21 Carolina while the reference was in hiatus for a
22 few weeks, and that unfortunately those had been
23 unsuccessful. And at that time I indicated that
24 we were still hopeful that, before too terribly
09:37 25 long, it would be possible to apply the newer,



1 much more sophisticated and discriminating
2 techniques, and to get a result, and that I asked
3 the Court's indulgence so that we could maintain
4 control of the exhibits for that purpose, but at
09:37 5 the same time not knowing how long it would take
6 and whether there would be a result, submitted
7 that the Court should nevertheless give the
8 Governor-in-Council its opinion, and then we would
9 see what could be done in due course.

09:37 10 Q Right. And is it fair to say that, at that time,
11 the Court was essentially being told that
12 "proceed, and decide the question of whether or
13 not you believe David Milgaard is innocent or
14 probably innocent, and later science will shed
09:38 15 some light on this subject", in other words may
16 tell us more than we know right now?

17 A Yeah. It might or might not, but it would be
18 helpful, in the meantime, for the
19 Governor-in-Council to have the considered views
09:38 20 of the panel.

21 Q And I guess my question is that the Court, the
22 Supreme Court would have been made aware that at
23 some point, science may have a more definitive
24 answer on the question they were asked to
09:38 25 consider?



1 A Yes.

2 Q Go to 0 -- 0 -- sorry. On the issue of
3 post-hearing, did the Attorney General for
4 Saskatchewan or the Government of Saskatchewan
09:38 5 agree with you continuing the DNA efforts?

6 A Yes. I think, when I made that statement to the
7 Court in April, that I said "I think I speak for
8 all counsel".

9 Q All right.

09:39 10 A And so my understanding at the time was that no
11 one had any difficulty with my doing that.

12 Q And so that would include counsel for Mr. Milgaard
13 and --

14 A Yeah.

09:39 15 Q -- counsel for Mr. Fisher as well?

16 A That's right, because we had samples from them for
17 the express purpose of DNA testing.

18 Q If we can go to 020171. I think Mr. Brown also
19 said that Federal Justice had the money as well,
09:39 20 so he didn't mind you people looking after it.
21 020171 is Mr. Beresh's letter to you about his
22 client's position, and it appears that Mr. Fisher
23 is saying "go to England and check the known
24 samples, and then once you check to see if there
09:39 25 are known samples, we'll decide whether or not



1 he's going to provide his bodily fluids"?

2 A Yes. What's the date on that again?

3 Q This is January 20th, 1992.

4 A '92?

09:39 5 Q So this is right, it's actually opening day, I
6 think.

7 A Yeah. And --

8 Q So --

9 A -- that's before we received the samples from Mr.
09:40 10 Fisher.

11 Q Right.

12 A Umm, there were, there was a demurral there, there
13 were some other demurrals later, but there was
14 never -- well for the longest time, almost until
09:40 15 the final testing was done, there wasn't an
16 express refusal to provide the samples, there was
17 usually a qualification. In one instance the
18 suggestion was, I think, that Mr. Fisher was
19 inclining toward giving a sample but he wanted a
09:40 20 report in writing from his counsel first, and so
21 forth; in some other instances the indication was,
22 well, perhaps we should test the samples from
23 Milgaard first and then, if it's still germane,
24 I'll consider giving a sample.

09:41 25 Q And is it fair to say that ultimately, given that



1 he was testifying, given that his position before
2 the reference was that "I'm innocent", that
3 effectively that, although he had a choice not
4 much of a choice, if he didn't provide the samples
09:41 5 it would look unfavourable to his position; is
6 that fair?

7 A Yes. And that certainly affected Justice
8 Allbright's analysis of what we did when it was
9 being considered at Fisher's trial.

09:41 10 Q Right. And that's the voir dire about the
11 admissibility of -- I think at Mr. Fisher's trial
12 there is a question of whether or not he
13 voluntarily gave the samples, number one; and
14 number two, whether he anticipated that the
09:41 15 testing that was done in 1997 was part of what he
16 gave the samples for, or --

17 A Yes, you could put it that way.

18 Q If we can go to --

19 A I, if I can just turn that around, --

09:41 20 Q Sure.

21 A -- because as it happened I argued the *Borden* case
22 in the Supreme Court of Canada, it was the first
23 DNA case that the Court entertained, and I just
24 have to give you some background for a moment?

09:42 25 Q Sure.



1 A Borden was charged with having raped a senior
2 citizen in her own bed in an apartment in a senior
3 citizens' complex, and he was under suspicion for
4 another sexual assault where there was no genetic
09:42 5 material available for testing, and he was brought
6 in by the police, ostensibly to be interviewed by
7 the other assault where there was no genetic
8 material and no interest in DNA testing, and he
9 was asked by the police if he would give them a
09:42 10 sample. And in that context, of course, he had no
11 difficulty at all, and he didn't express any
12 limitations about it, but the police didn't say
13 that he was suspected of having committed this
14 other offence. So they had an ulterior motive
09:43 15 which was not expressed to him, and so whatever
16 consent there was from him was not fully informed,
17 and on that basis the Supreme Court rejected the
18 DNA evidence which showed that this lady had
19 indeed been victimized by Mr. Borden. So it was
09:43 20 impossible to secure a conviction.

21 One of the things I was very
22 concerned about when I was arguing for the Federal
23 Crown was that eventually there would be a DNA
24 data bank, and it would be an integral aspect of
09:43 25 investigations in the future in cases like this,



1 and in the case of fingerprints, for example, when
2 a person is charged with an indictable offence he
3 can be fingerprinted, and fingerprints go into the
4 data bank, and then if fingerprints are found at
09:44 5 any kind of a crime scene at any time, the crime
6 not having been in contemplation at the time the
7 person gave his prints, there could still be a
8 comparison, and that could be used in Court. And
9 I felt it was crucial that DNA evidence should be
09:44 10 able to be used in the same way, and the Court
11 agreed with that, with the proviso that the way it
12 was obtained in the first place was completely
13 above board, and if there was, if it was secured
14 on the basis of consent but the consent wasn't
09:44 15 fully informed, it couldn't be used in any other
16 investigations, but if it was secured properly in
17 the first instance it could be used in any
18 investigation in the future.

Q

19 Okay. And as we relate to Mr. Fisher, then, in
09:44 20 1992 am I correct that Mr. Justice Allbright
21 concluded that, when Mr. Fisher gave his samples
22 in March of 1992 in connection with the reference
23 case, that there was no ulterior motive, that the
24 testing that was done in 1997 was part of what was
09:45 25 contemplated when the samples were taken,



1 essentially?

2 A He was concerned about the extent to which
3 Fisher's concurrence was voluntary, because the
4 atmosphere was somewhat coercive. I mean he was
09:45 5 under pressure, questions would have been asked of
6 him, and there would have been a serious
7 implication for him to deal with if he didn't
8 cooperate, and so it was on that basis that my use
9 of his sample in 1997 for testing by the Forensic
09:45 10 Science Service was considered improper by Justice
11 Allbright. I -- can I just explain --

12 Q Sure?

13 A -- what my perspective was having argued *Borden*
14 and being familiar with the judgment, and also the
09:46 15 *Arp* case which dealt similarly with the matter. I
16 felt I had common-law authority to make use of the
17 sample that Fisher had given. In fact, I felt my
18 position was even stronger than what *Borden* and
19 *Arp* allowed because I was going to make use of the
09:46 20 sample for the very purpose for which it was given
21 initially, to see if in fact it was the same
22 profile as was left by Gail Miller's assailant, it
23 wasn't even in connection with some unrelated
24 case.

09:46 25 Now, when Mr. Beresh protested



1 that there was no longer any consent and that we
2 would proceed at our peril if we made use of the
3 sample, I considered the possibility of securing a
4 judicial authorization and I, after a lot of
09:47 5 consideration, I decided that the best approach
6 would be to seek a warrant under section 487.01 of
7 the *Criminal Code* for, in effect, seizing from
8 ourselves from the lab the sample that had been
9 given earlier and for an assistance order to
09:47 10 accompany that to allow a representative of the
11 lab to take that sample to England and have it
12 tested.

13 Now, section 487.01 would have
14 permitted that so long as the judge was satisfied
09:47 15 that it might shed some light on the situation.
16 We didn't have to have reasonable and probable
17 grounds to believe that this person committed the
18 offence, which I believe you do for a DNA warrant
19 per se, if you wanted to go and get a sample now
09:48 20 from an individual, and I believed that this would
21 shed some light, and in the affidavit that I
22 prepared to support the application I indicated
23 that at the reference there was essentially a
24 universe of two suspects and this testing would be
09:48 25 helpful in that it would help us to consider



1 whether indeed Mr. Fisher was involved and so I
2 was prepared to go forward on that basis, but then
3 I ran into difficulty with the RCMP.

4 Q And so there was no warrant obtained; is that
09:48 5 correct?

6 A No, that's right. The RCMP in Saskatchewan had
7 been involved in a substantial reinvestigation in
8 '94 I believe.

9 Q Yes, we've heard from Mr. Sawatsky who indicated
09:48 10 that he wasn't prepared --

11 A I guess you've heard the evidence.

12 Q Yeah.

13 A And so --

14 Q So what ultimately happened at Mr. Fisher's trial
09:48 15 then, was there another, I believe, another
16 sample, there was a DNA warrant obtained?

17 A Yes. I -- when we got the results, and even in
18 anticipation of this, I mean, I thought through
19 what the ramifications would be, you know, before
09:49 20 we actually sent the material over to England for
21 testing, and my sense was that since we had David
22 Milgaard's consent, if in fact the testing
23 eliminated him as the contributor of that genetic
24 profile from the clothing of Gail Miller, that
09:49 25 that would afford a sufficient basis for securing



1 a conventional DNA warrant to take a fresh sample
2 from Mr. Fisher and that that should be done to
3 allay any concerns about the fact that I had sent
4 his sample for testing at the same time without
09:49 5 consent and without judicial authorization, but on
6 the basis of what I understood to be common-law
7 authority to do so.

8 There was something else I
9 wanted to say, but it escapes me.

09:50 10 Q Just a comment on having Mr. Fisher's sample, --

11 A Yes.

12 Q -- did that provide more options by way of
13 testing; in other words --

14 A Yes.

09:50 15 Q -- having Mr. Milgaard and Mr. Fisher as opposed
16 to just Mr. Milgaard?

17 A Yes, that's what I wanted to say, and thank you
18 for that. Dr. Fournery, and it may have been in
19 his letter of April 18th or so, 1996 to me which
09:50 20 was a response to -- I'm getting way ahead of
21 myself here.

22 Q No, that's fine.

23 A Was a response to what Dr. Blake was proposing.

24 Q But as far as --

09:50 25 A I think in one of his letters to me he made it



1 very clear that in the interests of justice and
2 from a scientific perspective, he felt it was
3 important that samples from both Fisher and
4 Milgaard should be tested by the same lab using
09:51 5 the same procedures and in the same time frame and
6 from my understanding of the various
7 considerations, one of the things that he was
8 undoubtedly thinking about was that if it turned
9 out that there was almost nothing to work with,
09:51 10 then it might be best to determine the profiles of
11 the suspects first so that if they shared a
12 profile at any particular location in their
13 genetic make-up, the very limited crime scene
14 sample wouldn't be tested for the existence of
09:51 15 that profile because it wouldn't give any
16 information to distinguish between the two of
17 them, but a different, a test at a different locus
18 would be done.

19 Q If there was only Mr. Milgaard that was being
09:52 20 tested, and we'll see later the belief at the time
21 was there was only a small amount of semen on Gail
22 Miller's panties --

23 A Yes.

24 Q -- but if the test had been done, DNA found and it
09:52 25 excluded Mr. Milgaard as the donor of that semen,



1 there might still be some who would say, well,
2 that could have been from a consensual partner of
3 Gail Miller's and that does not necessarily
4 exclude Mr. Milgaard as the perpetrator. Was that
09:52 5 -- were you aware of that being a possible
6 response?

7 A Yes.

8 Q And that by having Mr. Fisher there and
9 identifying Mr. Fisher's DNA in that sample can
09:52 10 answer the potential response to a non-match of
11 David Milgaard; is that fair?

12 A Yes. There's a little more though that I think
13 has to be mentioned here. We knew that Gail
14 Miller had gone out with a fellow named Dennis
09:53 15 Elliott the night before and he was interviewed
16 and he said that there was no sexual congress
17 between them, but he voluntarily did give blood
18 for testing, so that that possibility could be
19 excluded, but I had another concern based on the
09:53 20 advice that I had been given, we were dealing with
21 samples that were more than 20 years old and we
22 didn't know just how far they had been degraded,
23 you know, what the quality of the samples were.

24 Now, where it's possible to do
09:53 25 a microscopic examination of some of the material



1 to see if there are in fact spermatozoa, that's
2 generally done because then you can associate the
3 DNA you get with spermatozoa and you help to
4 illuminate the possibility that that DNA could
09:54 5 have come from someone who had absolutely nothing
6 to do with the crime; for example, a clerk or a
7 lawyer sneezing on the exhibit during the trial.
8 I mean, it's very, very easy to transfer DNA
9 and --

09:54 10 Q Just -- oh, sorry.

11 A And if there was an exclusion, if -- it has
12 happened in some instances that the spermatozoa
13 are no longer intact, that they've broken down,
14 they can't be identified microscopically, but that
09:54 15 good quality DNA results can nevertheless be
16 obtained, so we were anxious to be able it proceed
17 with the testing whether or not spermatozoa were
18 found, but in that case, not knowing whether the
19 source of that DNA would have been the assailant,
09:54 20 what we would have been looking and hoping for
21 would have been an exclusion of one of the two
22 suspects and a match with the other.

23 Q Right. So let me just --

24 A That that would have been very significant to us.

09:55 25 Q Just to follow up on this, so again at the time,



1 on the assumption that there's a small semen stain
2 on Gail Miller's panties, that if you find DNA
3 cells there that are not Gail Miller's, you find
4 DNA that you can type but it's not from
09:55 5 spermatozoa, it's just DNA, and it doesn't match
6 David Milgaard, the question is okay, well, could
7 that be from someone sneezing on it, could be --
8 who knows where it may come from?

9 A Yes.

09:55 10 Q So that's step number one, simply excluding David
11 Milgaard from non-spermatozoa DNA may not get you
12 very far; correct?

13 A Exactly.

14 Q Secondly --

09:55 15 A It could be misleading in fact.

16 Q It could be misleading. Secondly, if you can then
17 relate it -- now, if you match that with David
18 Milgaard, for example, or Larry Fisher, that's a
19 different story because unless they sneezed on the
09:55 20 exhibits or somehow had their bodily fluids on
21 there, it's a little bit more implicating; is that
22 fair?

23 A Absolutely. There would have to be a compelling
24 explanation as to how it got there.

09:56 25 Q Next, though, if the DNA comes from spermatozoa



1 and that's the DNA that's tested and that doesn't
2 match Mr. Milgaard, for example, in the absence of
3 someone else being tested, that would indicate
4 that it's not from him, but there still might be
09:56 5 the argument that says, well, it was from a
6 previous partner, previous consensual partner;
7 correct?

8 A That's right.

9 Q However, if you identify the spermatozoa DNA from
09:56 10 Larry Fisher, since I think the evidence is pretty
11 clear that Larry Fisher had never met or been with
12 Gail Miller according to his evidence --

13 A That was his evidence, yes.

14 Q Yeah -- so therefore he must have been the
09:56 15 perpetrator, so that's the scenario why
16 spermatozoa was necessary and why having two
17 suspects in the universe of comparisons was
18 helpful. It wasn't just a case of saying we found
19 DNA, it's not David Milgaard's, end of story, it
09:57 20 was a little more complicated; is that a fair way
21 to put it?

22 A That's right, and I should add something else at
23 this point. There was some discussion between us
24 and counsel for Milgaard as to whether this
09:57 25 examination for spermatozoa should be done first



1 and the concern that Dr. Fournery had, and which I
2 relayed, was that in order to do that, some of the
3 material would have to be abstracted, fixed to a
4 slide, stained and so on and it wouldn't be
09:57 5 available for use in the genetic testing to
6 achieve the profile later on, and if we had only
7 the most minute quantity of material to work with
8 then, what we might be doing in examining for
9 spermatozoa was sacrificing the very little bit
09:57 10 extra that we needed to get the genetic profile,
11 so there was a risk there. There was a -- in the
12 normal course of events, 10 to 20 percent of the
13 material would be sacrificed to examine for
14 spermatozoa.

09:57 15 Q Okay.

16 A And there was an issue as to whether that should
17 in fact be done.

18 Q And I just want to talk a bit about the issue of
19 discrimination, we'll get into the details later,
09:58 20 but just while we're talking about this, when
21 we're looking at what was believed to be the only
22 sample at the time on the panties and this issue
23 of spermatozoa and non-spermatozoa cells and Mr.
24 Fisher and/or Mr. Milgaard, it's my understanding
09:58 25 as well that with the DQ Alpha technique, that



1 when you go in that it might eliminate someone, it
2 might say okay, we can say you are eliminated,
3 this is not your DNA, but an inclusion might be
4 that okay, it could be you but it could be 15,000
09:58 5 other people as well based on population
6 statistics, so that --

7 A Yes.

8 Q -- a match was not a real match in the sense of
9 identifying who was the donor of the semen --

09:58 10 A Uh-huh.

11 Q -- or the cells; is that correct?

12 A Yes. Perhaps I can elaborate on that a little
13 bit.

14 Q Sure.

09:58 15 A I'm aware of a case in the United States first of
16 all where DQ Alpha testing was done and it turned
17 out that the person who was charged had the same
18 DQ Alpha profile exactly as the complainant, so
19 the results can be that common, that that sort of
09:59 20 thing can happen and that doesn't tell you
21 anything, but to give you a more specific
22 indication, although the testing that was done in
23 1992 in North Carolina didn't get results from the
24 crime scene samples, the DQ Alpha profiles of
09:59 25 Fisher and Milgaard were established and they were



1 known and the frequency with which those profiles
2 occur in the general population were also known,
3 and as Dr. Fournery indicated in his letter of
4 April, '96, April 18th, 1996, in Milgaard's case
09:59 5 his profile was shared with one in every 15 people
6 in the general population, his DQ Alpha profile;
7 in Fisher's case, his profile was shared with one
8 in every 14 people in the general population,
9 which would mean in a city of about 200,000
10:00 10 people, which I believe is roughly the population
11 of Saskatoon, there would be more than 14,000
12 people any of whom could have contributed that
13 profile, so the significance of a match wouldn't
14 be nearly as great.

10:00 15 In the case of short tandem
16 repeats, the resolving power is phenomenal and the
17 results, when the testing was completed by the
18 Forensic Science Service in 1997 in England,
19 showed that there not only was a match, but that
10:00 20 using the British statistics, the possibility that
21 the profile was shared with any other individual
22 was only one in 400 million and I think that the
23 statistics were even more impressive using the
24 Canadian population information.

10:01 25 Q So is it fair to say that the DQ Alpha technique



1 would be a good technique to eliminate in a sense,
2 but if your profile didn't match -- but if it did
3 match what it meant is, well, you or 13,999 other
4 people could have been the donor of this?

10:01 5 A Exactly.

6 Q It wasn't --

7 A Exactly, and that, in my view, and in the view of
8 some others who were associated with this case, is
9 exactly why we were at loggerheads with Mr.
10:01 10 Milgaard's representatives. In our view, they
11 wanted testing done. It wasn't as precise as what
12 short tandem repeats would afford because if there
13 was a match, that was the ball game, they wanted
14 to hedge their bets so that hopefully the testing
10:01 15 would exclude David, but if there was a match,
16 there would be plenty of bases for argument that
17 he wasn't guilty of the offence.

18 COMMISSIONER MacCALLUM: Just a second, I
19 want to get this down.

10:02 20 BY MR. HODSON:

21 Q And was that your view of why they wanted DQ
22 Alpha?

23 A That was my view. I'm sure they, that other
24 explanations might be forthcoming, but -- I mean,
10:02 25 and another concern they had was that the expert



1 they wanted to be involved on their behalf, Dr. Ed
2 Blake from California, was using DQ Alpha in his
3 work, was not conversant at all with STRs, I
4 believe he hadn't even seen an STR sequencer until
10:02 5 he got to England, and so there was a limit to
6 what he could contribute.

7 Q Okay.

8 A And -- but he did have --

9 COMMISSIONER MacCALLUM: Just a minute,
10:03 10 please. I asked you to -- for a minute to write
11 this down.

12 MR. HODSON: Mr. Commissioner, if it will
13 assist, I do intend to come back to this point
14 with a document.

10:03 15 COMMISSIONER MacCALLUM: No, I understand
16 it now and I want to record it, please.

17 A In due course, I'm sure you will elicit Dr. Waye's
18 comments.

19 MR. HODSON: Yeah.

10:03 20 COMMISSIONER MacCALLUM: Why are we talking
21 about it now then? When you speak about
22 Milgaard's counsel, who are you talking about,
23 sir?

24 A In the first instance I was approached by Greg
10:04 25 Rodin, R-O-D-I-N, who was in Mr. Wolch's office,



1 and then not too long afterward James Lockyer
2 assumed responsibility for that aspect of the case
3 and I dealt with him.

4 COMMISSIONER MacCALLUM: All right. And
10:05 5 just going back a little bit --

6 A I'm sorry, if I can just qualify that by saying
7 the issue of what form of testing was the subject
8 of discussions with Mr. Lockyer.

9 COMMISSIONER MacCALLUM: And you were
10:05 10 talking about getting a sample. You didn't
11 succeed in getting a warrant for a sample --

12 A For the Fisher sample.

13 COMMISSIONER MacCALLUM: -- for the Fisher
14 sample that you had pursuant to the reference
10:05 15 because of some disagreement with the RCMP, so
16 you thought you should get another one for the
17 purpose of the Fisher trial. Did you get it?

18 A Yes, Saskatchewan Justice did that, yes.

19 COMMISSIONER MacCALLUM: Oh, okay,
10:06 20 Saskatchewan Justice. And that was the one that
21 was used for the purpose of evidence in the
22 Fisher trial?

23 A Both sets of testing were the subject of
24 consideration in Fisher's trial, but that was done
10:06 25 to preclude any impediment causing that DNA



1 evidence to be excluded from Fisher's trial.

2 COMMISSIONER MacCALLUM: So when they are
3 producing evidence of the known Fisher sample,
4 they used both his 1992 sample and the one that
10:06 5 you got later on; is that right?

6 A Well, I'll put it this way, that because of the --
7 I felt that I had a reasonable basis for doing
8 what I did, I felt I had common-law authority to
9 send the sample that Fisher had given during the
10:07 10 reference for this further test, but I knew that
11 that could well be the subject of argument down
12 the road and -- but I also felt that when results
13 were secured, if Milgaard was excluded and Fisher
14 was matched with the questioned profile, then a
10:07 15 conventional DNA warrant could be secured by
16 Saskatchewan on the basis that given that there
17 had been a universe of two suspects essentially
18 and that Milgaard had been eliminated, that there
19 were then reasonable and probable grounds to
10:08 20 believe that Fisher was indeed Gail Miller's
21 assailant.

22 COMMISSIONER MacCALLUM: Yes.

23 A So it proceeded in stages.

24 COMMISSIONER MacCALLUM: Okay.

10:08 25 A And I suggested that the judge entertaining the



1 application for the conventional DNA warrant later
2 should be apprised of the fact that both had been
3 tested, but that the application should be based
4 on the fact that the exclusion of Milgaard then
10:08 5 afforded reasonable and probable grounds for
6 securing a regular DNA warrant for believing that
7 Fisher was indeed responsible.

8 COMMISSIONER MacCALLUM: Go ahead then,
9 please.

10:08 10 BY MR. HODSON:

11 Q Go to 334429, please, and this January 21, 1992,
12 and I think, Mr. Fainstein, this is where Mr.
13 Williams told us that the plan -- the English lab
14 was prepared to do DQ Alpha and that they are now
10:09 15 prepared to proceed with the case, and I think Mr.
16 Williams told us that that's in late January,
17 1992, those were your plans, to send exhibits to
18 England to do DQ Alpha testing; is that correct?
19 It didn't happen, but that was --

10:09 20 A There was -- there was some discussion about that.
21 There was continuing consultation with Dr. Fournery
22 and at some point Dr. Fournery said look, I'm well
23 acquainted with Dr. Marsha Eisenberg who works for
24 Roche Labs, it's a subsidiary of Hoffmann-La
10:09 25 Roche, they've been doing a lot of advanced work



1 in this field, and they can certainly do the DQ
2 Alpha test for you. This was after we had samples
3 from both Milgaard and Fisher.

4 Q Okay. I think if we can just pause there. I
10:10 5 think at this time, though, the plan was to go to
6 England and then on February 17th I will show you
7 Patricia Alain's report that has the advice about
8 going to North Carolina. Does that refresh your
9 memory, that it was maybe at that time?

10:10 10 A That's helpful because I don't recall expressly
11 how it developed, but I do recall what did
12 develop.

13 Q So 009811, or 810, and here's a letter from you to
14 former Chief Justice Lamer, and this is dealing
10:10 15 with witnesses and you talk about:

16 "The next set of witnesses are former
17 police officers, who can speak, inter
18 alia, to the way in which statements
19 were obtained from Mr. Wilson and
10:10 20 Ms. John."

21 And I think that was Karst, Mackie and Short who
22 was contemplated at that time?

23 A Yes, I think so.

24 Q And subpoenas were issued for those three and Mr.
10:11 25 Karst testified, Mr. Mackie and Short did not;



1 correct?

2 A That's right.

3 Q And there's been some suggestion that Mr. Short's
4 medical condition may have precluded it and the
10:11 5 fact that Mr. Mackie was out of the country. Do
6 you have any knowledge as to whether any efforts
7 were made to get Mr. Mackie to come back?

8 A I don't know offhand. This would have been
9 something that either Mr. Williams or Mr. Frater
10:11 10 would have been pre-occupied with while I was
11 dealing with what was unfolding at the reference.

12 Q Go to 002090, please, and this is a February 17th,
13 1992 lab report from Patricia Alain who was the
14 chief scientist of serology. What was your
10:11 15 knowledge and understanding of who Patricia Alain
16 was at the time?

17 A I didn't know any more than that indicated. I did
18 meet her at some point and she was a very pleasant
19 lady, but --

10:12 20 Q Now, we know from the record that she did an
21 examination of various pieces of clothing in
22 February, 1992. Were you involved in providing
23 instructions to her as to what she should do or
24 what garments to look at and what to look for?

10:12 25 A I think the only indication from us would have



1 been to examine the crime scene materials and to
2 see what's available for testing.

3 Q And you are now aware, Mr. Fainstein, that in her
4 report, or that she did not find any semen on the
10:12 5 dress and that in July of 1997, when the English
6 lab checked, they found some significant semen and
7 that that was the basis of testing?

8 A Can I point something out now because it only
9 jumped out at me the other day when I was
10:12 10 reviewing this. It's a little further along in
11 this report.

12 Q I'll get to that.

13 A Oh, actually -- well, it strikes me that she
14 didn't examine the dress for that purpose.

10:13 15 Q Well, I intended to ask you about that.

16 A Okay.

17 Q The next page.

18 A And as I say, that only jumped out at me the other
19 day. I was astonished to see that.

10:13 20 Q Well, maybe go to the next page, we'll see exhibit
21 10 is the dress?

22 A Right.

23 Q And I've asked this question -- let me just go
24 through so that we have a context here and then

10:13 25 I'll ask you some questions. I covered this with



1 Mr. Williams. It talks about examining four
2 exhibits for DNA typing analysis and those are the
3 panties, the girdle, the two vials which had the
4 frozen semen, I think that had disappeared, and
10:13 5 the toque. Purpose two is to examine the half
6 slip, the brassier, the dress and Gail Miller's
7 hair for known standard samples of Gail Miller,
8 and to examine Ron Wilson's blood, and then it
9 goes on, and I think what you are saying, Mr.
10:14 10 Fainstein, if you look at the purpose, it doesn't
11 appear that she, at least according to the report,
12 checked the dress for semen. Is that your reading
13 of it?

14 A That's right, there's no reference to exhibit 10,
10:14 15 the dress, in number one there.

16 Q Right.

17 A Which lists the materials that were examined for
18 materials for DNA analysis.

19 Q And then if we scroll down to the results, it says
10:14 20 a test was made for semen on the panties, blood on
21 the toque, nothing in three, and then if we can go
22 to the next page, a record here that no semen was
23 found on the girdle, but no other mention of the
24 dress. Now, I should tell you, Ms. Alain's
10:14 25 evidence at the Larry Fisher preliminary hearing



1 and her evidence that this Commission will be
2 hearing or has obtained and will be filed is that
3 notwithstanding what's in the report, she did in
4 fact check the dress --

10:15 5 A Okay.

6 Q -- and did an acid phosphatase random test on the
7 dress, that's her evidence. But what was your
8 understanding at the time and where did that come
9 from as to what had been checked, who had checked
10:15 10 it and how they checked it?

11 A At the time my understanding was that the lab knew
12 how important this was and was examining the
13 materials to see if there was anything there that
14 could be used in this determination.

10:15 15 Q What was your under --

16 COMMISSIONER MacCALLUM: What materials do
17 you mean?

18 A Whatever they logically thought might be helpful.

19 BY MR. HODSON:

10:15 20 Q And so let's put aside blood for a moment, because
21 I think there was a need from England to have a
22 known DNA sample for Gail Miller, so one of the
23 efforts would be to get her blood from the
24 garments --

10:15 25 A That's right.



1 Q -- and that was done. Let's put that aside. The
2 next objective would be to find semen on the
3 garments on the theory that whoever killed Gail
4 Miller was the one who raped her, and that apart
10:16 5 from a consensual sexual partner, that identifying
6 who belonged to the semen would assist in
7 identifying the perpetrator; correct?

8 A Yes.

9 Q And so it would be to review the clothing to
10:16 10 identify semen; correct?

11 A Absolutely.

12 Q And so what was your understanding then, around
13 this time after the testing was done, as to
14 what -- what, of Gail Miller's clothing, had
10:16 15 identifiable semen that could be used for DNA
16 testing?

17 A My understanding was that there was only a small
18 stain on the panties which was presumptively
19 positive for acid phosphatase, and which in turn
10:16 20 suggested the existence of spermatozoa there.

21 Q And what was you are understanding as to whether
22 or not Gail Miller's dress had been checked for
23 semen?

24 A I must have been told or understood that -- or I
10:17 25 simply assumed that, I mean, everything that might



1 have yielded what we were looking for would have
2 been examined.

3 COMMISSIONER MacCALLUM: When you spoke of
4 your understanding, was this your understanding
10:17 5 before the clothing was sent to the RCMP lab or
6 Patricia Alain to test it, or was that your
7 understanding, that i.e. there was only a small
8 stain on the panties found, was that your
9 understanding afterwards?

10:17 10 A It was afterwards. It was as a result of her
11 examination --

12 COMMISSIONER MacCALLUM: Okay.

13 A -- that that became my understanding of what there
14 was to work with.

10:17 15 BY MR. HODSON:

16 Q And is it correct to say, Mr. Fainstein, that from
17 and after this point, whether it was within days
18 or weeks I don't think matters, but -- or let's
19 take it that your efforts to pursue DNA testing,
10:17 20 up until the time testing was done in 1997, was it
21 your understanding that the only available semen
22 to be tested for DNA was that which Patricia Alain
23 had identified on the panties, which was a small
24 stain; correct?

10:18 25 A That's right. I mean, it complicated the



1 situation for us, it meant we had to be that much
2 more careful in the way we proceeded because my
3 understanding was we might only have one shot at
4 this.

10:18 5 Q And would you agree that that was not only your
6 understanding, but you would have communicated
7 that understanding to others, counsel for Mr.
8 Milgaard, the various labs you dealt with, and
9 that that seemed to be a common understanding of
10:18 10 everybody, that --

11 A Yes, I did, and in fact Dr. Fournery did in a
12 letter that was circulated to counsel for Fisher
13 and Milgaard.

14 Q Right. What was, when you learned of the results
10:18 15 in July of 1997, I take it you would have been
16 informed at that time that, in addition to the
17 semen stain identified by Patricia Alain on the
18 panties, there was in fact another -- and I don't
19 want to use the word "significant" -- but another
10:18 20 semen stain on the panties that yielded DNA. As
21 well as a significant stain on the dress that
22 yielded semen, did -- you would have become aware
23 of that?

24 A Yes, certainly.

10:19 25 Q And --



1 A I was shocked.

2 Q And why?

3 A Because it didn't comport with my understanding
4 that there was almost nothing there.

10:19 5 Q And did you have a chance to go back and check out
6 why that might have been the case?

7 A I have to say that that concern was overtaken very
8 quickly by the fact that there was a result and I
9 had to deal with all of the outfall from that
10:19 10 result.

11 Q And can you tell us, and I appreciate this
12 involves a bit of speculation, but if in February
13 of 1992 you would have known then what you learned
14 in July of 1997, namely that there was another
10:19 15 stain on the panties with semen and that the semen
16 stain on the dress, might that have affected the
17 steps you took and, if so, how?

18 A Yes, absolutely. I should say that when Dr.
19 Eisenberg was engaged in 1992 to do DQ Alpha
10:20 20 testing she was directed, by the RCMP lab, to
21 focus on an area that was circled, which was the
22 area that reacted on the acid phosphatase test
23 that Pat Alain did, and to take no more than half
24 of that to use in her testing. And of course, if
10:20 25 it had been known that there was this trove



1 available for the test at that time, that surely
2 would have been tested as well, and we might have
3 had a DQ Alpha exclusion of Milgaard and match
4 with Fisher before the reference was complete, and
10:21 5 of course that would have had a very dramatic
6 impact.

7 Q What about following the reference and your
8 decision about where to send it and what type of
9 DNA typing to do? Is it correct to say that, had
10:21 10 -- if you would have been aware that that was
11 significantly more DNA available, that that would
12 have allowed you to perhaps pursue different types
13 of testing?

14 A Well we wouldn't have had to wrangle with
10:21 15 Mr. Lockyer over what form of testing should be
16 done because there was plenty there for both kinds
17 of tests.

18 Q And --

19 A But, of course, my interest was in getting the
10:21 20 most advanced tests concluded with the highest
21 power of identification.

22 Q Okay.

23 A I wanted an individual identified, I didn't want a
24 result that suggested that 1 of 14 or 15,000
10:21 25 people in Saskatoon could have left the profile.



1 Q But -- and is it correct to say, though, that, in
2 the post-reference efforts on DNA typing, it was
3 your view and the view of others that you really
4 had one chance left to do it, and if the test did
10:22 5 not work, you likely would have consumed what you
6 believed to be the only available material left?

7 A The concern was that that might be the case, yes.

8 Q And so that --

9 A And that's why Dr. Eisenberg was only allowed to
10:22 10 extract the material from half of the stain which
11 had been circled by Patricia Alain.

12 COMMISSIONER MacCALLUM: In which lab was
13 that, Dr. Eisenberg?

14 A That was in North Carolina.

10:22 15 COMMISSIONER MacCALLUM: In North Carolina?

16 A Dr. Eisenberg in 1992.

17 BY MR. HODSON:

18 Q If we can go to the next page her, and the
19 remarks, down to the -- sorry, the previous page.
10:22 20 This is, and I've gone through this with Mr.
21 Williams, but this was the RCMP recommendation
22 that I think was based upon the assumption which
23 we now know to be incorrect that the only
24 available semen was on the panties. And they talk
10:23 25 about amplified, or AMPFLP, RFLP, and then on the



1 next page they talk about DQ Alpha:

2 "The probability of discriminating with
3 this system is very low."

4 And then Short Tandem Repeats, it's in its
10:23 5 infancy.

6 A That's right. That's what we were faced with in
7 1992. I should say that Dr. Fournery would not
8 concur with the use of Short Tandem Repeats before
9 the validation was completed. His concern was
10:23 10 that the expectation was that this would become
11 the standard but that, if it were used prematurely
12 before all the validation was completed, the
13 results might prejudice the -- at least the time
14 frame within which everyone would concur that that
10:24 15 was a good kind of test to use.

16 Q Okay. If we could just go back to the previous
17 page, I think they talk about this AmpFLP --

18 A Yes.

19 Q -- at Roche laboratory; is that -- is that -- what
10:24 20 type of testing was that? Was that different than
21 the --

22 A It's a PCR test, I believe, it's another
23 variation. But, again, there were no population
24 statistics for that, and so all you could have, at
10:24 25 best, was a match or an exclusion, whereas with DQ



1 Alpha at least, you know, you could --

2 Q Okay.

3 A -- you could have some sort of population
4 statistics.

10:24 5 Q If we can go to the next page, then, it looks like
6 the RCMP lab is recommending this AmpFLP in Roche
7 as the best option, and at this time you simply
8 had Mr. Milgaard's blood, you didn't have Mr.
9 Fisher's; is that correct?

10:25 10 A Yes, that's right. And that was Patricia Alain's
11 report and I was relying on Dr. Fournery, who was
12 the chief scientist for research and on the
13 cutting edge of all these developments, to give me
14 advice as to how we should proceed.

10:25 15 Q If we can go to 231497. And this is Mr. Williams'
16 letter back to Patricia Alain indicating that:

17 "... the Department of Justice will
18 follow your recommendation that Roche
19 ... be approached to perform AMPFLP DNA
20 ..."

21 Now I'll show you some documents, Mr. Fainstein,
22 that suggest this didn't happen, but I just want
23 to walk through chronology.

24 A Right.

10:25 25 Q Would you have been involved in this decision, or



1 was this Mr. Williams doing this, or do you
2 recall?

3 A What's the date on that?

4 Q February 24th, 1992.

10:26 5 A I don't remember. I'm sure Eugene would have
6 consulted with me.

7 Q Yeah. If we can go to 010283. This is a letter
8 of the next day from Barry Gaudette; are you
9 familiar with who Barry Gaudette was, --

10:26 10 A Yes.

11 Q -- he was the lab?

12 A Yes.

13 Q And he writes here that Roche now states:

14 "... they will conduct AmpFLP ... only
10:26 15 if all parties agree to stipulate in
16 writing that they will not contest or
17 attack either AmpFLP technology or
18 Roche's application of it. Given that
19 you have informed me that unanimous
10:26 20 agreement to so stipulate cannot be
21 obtained ...",

22 etcetera:

23 "... only three possible options ...
24 remain."

10:26 25 A Okay.



1 Q Do you recall who was not prepared to agree to
2 this and on what basis; are you able to shed any
3 light on that?

4 A Umm, no I don't, but what was the date of that
10:26 5 again?

6 Q February 25, 1992?

7 A That was before we had a sample from Mr. Fisher,
8 so --

9 Q Yes.

10:27 10 A -- we didn't even have the standard, let alone the
11 consent to what type of testing would be done.

12 Q No, but I'm wondering, was there a concern from
13 Mr. Milgaard's behalf at this point, or
14 Saskatchewan Justice, or are you able to shed any
10:27 15 light on that?

16 A I'm sorry, I don't recall this really early stuff
17 at all.

18 Q All right. Then if we can go to 317717. This is
19 now March 9th, 1992, and if we can go to page
10:27 20 317723 -- 722. And you tell the Court about the
21 DNA analysis, go to the next page, saying:

22 "Of particular interest are
23 two items. There are the victim's
24 panties which have a small stain of
25 organic material on them, which has been



1 tested positive on a presumptive basis
2 for semen."

3 And then scroll down, you talk about the residue
4 and the vial:

5 "Those are essentially the
6 only things we have to work with at this
7 time."

10:28 10 And would that, would your view have been based
11 upon, then, the testing that the RCMP lab had
12 done on the dress, for example, --

11 A Yes.

12 Q -- and the garments? So is it fair to say at this
13 time your understanding was that the small stain
14 on the panties was it?

10:28 15 A That's right.

16 Q And then the next page you say:

17 "If the test were undertaken,
18 it would consume all of the material we
19 have available and would preclude any
20 other testing."

21 And then to the next page, indicating that:

22 "We are told now that it may take as
23 much as another year."

24 And I think you're, here, referring to PCR
10:29 25 technology, and is that correct, the validation



1 of the PCR methodology?

2 A Yes.

3 Q And then you say:

4 "In the circumstances -- and I think all
5 counsel join with me in this -- I would
6 ask the Court's permission to maintain
7 this material securely until such time
8 as these tests have been developed for
9 use in court and we can secure whatever
10 results may be available."

11 And would this be the genesis of the undertaking
12 with the Court, or where you believed you had an
13 obligation to the Supreme Court once testing
14 became available or techniques became available,
15 in later years, to do the testing?

16 A I --

17 Q I think that --

18 A -- felt I had a responsibility, as a
19 representative of the Crown, to ensure that, as
20 far as possible, we got to the bottom of this
21 thing.

22 Q Yeah. In fact, in the next page, let me just show
23 you another comment:

24 "For all those reasons -- and
25 I believe I can speak with confidence on



1 behalf of all counsel -- we would simply
2 ask that we be allowed to maintain this
3 material but that this not deter you
4 from rendering your opinion in due
5 course."

6 And you indicate to Chief Justice Lamer that the
7 order granted is sufficient. But would that
8 capture the exchange about, sort of, your
9 continued efforts after the reference?

10:30 10 A Umm, yes. You know, I think it's clear that I was
11 anxious that this be done whenever it could be
12 accomplished.

13 Q And then if we can go to 317730. And this is the
14 same day, and Mr. Wolch raises the question about
10:30 15 a video, and then:

16 "There is one other witness
17 who we think may be of assistance. That
18 is Mr. Caldwell who was the prosecutor
19 in the case. The area we feel he may be
20 of assistance in relates to that
21 document which was taken from his file,
22 which we think is important. We would
23 like to question him as to how he may
24 have gotten that or who may have been
25 the authors of that document. In



1 particular, we feel another area of
2 importance may be the area of disclosure
3 in terms of the other offences in the
4 area and matters of that nature."

10:31 5 etcetera. And then I think we've heard some
6 evidence that Mr. Caldwell was flown to Ottawa;
7 is that correct?

8 A That's right.

9 Q And do you know what, was it this exchange that
10:31 10 prompted that, or do you know what -- why did he
11 not end up being a witness; do you know?

12 A I don't recall. He was available, he certainly
13 could have been called if anyone wanted to pursue
14 such matters with him, but --

10:31 15 COMMISSIONER MacCALLUM: His first question
16 was is that why he was brought to Ottawa, what
17 you see on the screen there?

18 A Well he was the prosecutor in the *Milgaard* case,
19 and I'm sure there were a variety of
10:31 20 considerations, but this was certainly among them.

21 BY MR. HODSON:

22 Q And I guess, more specifically, was it at Mr.
23 Wolch's request that Mr. Caldwell was brought to
24 Ottawa to be a potential witness?

10:32 25 A I would gather so.



1 Q Do you recall anybody else asking for him to be a
2 witness or a potential witness?

3 A No.

4 Q Okay. And again, as far as why he wasn't called,
5 can you shed any light on that?

6 A Umm, he was available, he could have been, and I
7 don't remember why he wasn't, except that if any
8 counsel had any interest in pursuing it, they
9 could have done so.

10 Q What about Mr. Kujawa; do you recall any
11 discussion about having him as a witness?

12 A No, I don't.

13 Q Just 322475. This is an affidavit of Dr. Peter
14 Davison that just confirms that it was March 8th
15 that Larry Fisher gave blood --

16 A Yes.

17 Q -- for the sample. So it appears that on March
18 8th Larry Fisher gave blood, on March 9th you
19 advised the Court that no testing could be done;
20 correct?

21 A Yes.

22 Q Now that changed fairly quickly; didn't it?

23 If we can go to 062862 -- and
24 I'll just show you two documents before I ask you
25 a question -- this is Mr. Williams asking



1 Mr. Pearson to get the exhibits ready to send them
2 to North Carolina.

3 And then, if we can go to
4 008996, this is Mr. Fainstein, this is your letter
10:33 5 to all counsel saying:

6 "Now that we have known
7 samples of genetic material from both
8 David Milgaard and Larry Fisher, it
9 would appear that one of the new
10:33 10 PCR-based DNA testing techniques, which
11 an eminent laboratory in the United
12 States is willing to apply for us, may
13 be of assistance."

14 And I think this is where the materials were sent
10:33 15 down to North Carolina, is that correct?

16 A That's right. After I made my statement to the
17 Court on March the 9th, which conveyed my best
18 understanding of where we were at, I went back to
19 Dr. Fournery informally and I expressed my
10:34 20 frustration. And I said 'I know that one of the
21 concerns that you indicated to me was, you know,
22 determining the significance of any match, the
23 population statistics," and I said, "you know, I
24 know that DQ Alpha, for example, doesn't have high
10:34 25 resolving power. But given that we have, you



1 know, a universe of two suspects basically, you
2 know, surely a match of one and an exclusion of
3 another you know, could be very powerful, you
4 know, isn't that something we can do?" And as
10:34 5 much as he was concerned to protect the Short
6 Tandem Repeats process, so that it would not be
7 done until it had been fully validated, he didn't
8 have any kind of a stake in DQ Alpha, but at the
9 same time the RCMP lab wasn't doing that kind of
10:34 10 work so it would have to be sent elsewhere, and so
11 at that point he was in touch with Dr. Eisenberg
12 and he said that she was prepared to do DQ Alpha
13 testing on it, and so we decided to proceed with
14 that.

10:35 15 Q Okay. Just, is it fair to say that having Mr.
16 Fisher's sample changed things now, in other words
17 that you -- if you had not had Mr. Fisher's
18 sample, would you have still done the testing in
19 March of '92 at the Roche lab?

10:35 20 A I think I still would have been optimistic that we
21 would get a sample from Mr. Fisher before the
22 reference was over, and so I probably wouldn't
23 have pursued it that soon.

24 Q And, no, but I guess my question is this; if you
10:35 25 had not obtained Mr. Fisher's sample, would you



1 have still done the testing in North Carolina?

2 A If I hadn't at all?

3 Q Yes?

4 A Are you saying at that stage or by the end of the
10:36 5 reference?

6 Q At any time?

7 A It makes a difference in my mind, because I think
8 my expectation would have been that we were going
9 to get a sample from him.

10:36 10 Q Okay, but the --

11 A He wasn't going to risk the opprobrium and the
12 adverse implications that would be drawn.

13 Q I guess what I am trying to understand is that on
14 March 8th he gave a sample, on March 9th you said
10:36 15 "we're going to wait for a year, no further
16 testing", and then a few days or ten days later
17 you decide to send it, --

18 A Right.

19 Q -- and I'm trying to understand what prompted the
10:36 20 change?

21 A Sure. I probably was unaware that he had given
22 the sample to Dr. Davison, you know, who was not
23 associated in any way with the RCMP or Federal
24 Justice, he was just a doctor in private practice
10:36 25 in Ottawa and it was something that Mr. Beresh



1 arranged himself, I probably didn't know about
2 that until several days later when Mr. Fisher's
3 samples and Dr. Davison's affidavit were conveyed
4 to the lab, to the RCMP lab.

10:37 5 Q Just before we break, if we can just go back, if
6 we can call up 317717. I read you the -- go to
7 page 730, please. I read you the comment about
8 Mr. Caldwell, I neglected to get the next page,
9 and this is the part I said about having him
10:37 10 questioned on the next page. Chief Justice Lamer
11 says:

12 "LAMER, C.J.: We have been signing.
13 subpoenas all along, if you want to have
14 him come. What you might do is get a
15 statement from him. Maybe you could all
16 agree as to what he is going to say, and
17 we won't have to have him come. It's a
18 bit like Clare Hoffer. Perhaps you
19 could air things out with him before.
20 If he doesn't remember anything, there
21 is no point in flying people down here
22 to say, 'I really don't remember
23 anything.' Why don't you check with
24 him.

25 MR. WOLCH: I will."



1 Does that assist you at all in your recall on
2 that point, about Mr. Caldwell and why, why he
3 went to Ottawa and why he didn't testify?

4 A Well he was a, you know, a pivotal actor in this
10:38 5 whole thing. Having been the prosecutor at
6 Milgaard's trial, in my view it was extremely
7 likely he would have plenty of relevant things to
8 say, if anybody wanted to pursue that with him.

9 Q I see it's a little after 10:30, probably an
10:38 10 appropriate spot to break.

11 (Adjourned at 10:38 a.m.)

12 (Reconvened at 11:00 a.m.)

13 BY MR. HODSON:

14 Q Call up 245562. And this is a document, Mr.
11:00 15 Fainstein, I'm not sure if you're familiar with
16 it, but this is -- just for our reference, this is
17 the Pat Alain's memo that sends, I think that was
18 involved with sending the materials down to the
19 Roche Laboratory in North Carolina, and you are
11:01 20 aware or familiar with that?

21 A Yes.

22 Q And was that your decision, then, or how did that
23 come about, to send these garments, being the
24 panties and what else is identified there, down to
11:01 25 the Roche lab?



1 A Well it was based on our best understanding of
2 what we had to deal with at the time and the
3 advice of Dr. Fournery that this was an excellent
4 place to have that work done.

11:01 5 Q And it's clear that the dress was not sent down to
6 North Carolina; correct?

7 A That's right.

8 Q And do you know why that -- was that based on the
9 February 17th report that did not identify semen
11:01 10 on the dress?

11 A Yes.

12 Q Or Pat Alain's --

13 A Yes.

14 Q -- review? It's also my understanding, and I'd
11:02 15 ask you to confirm this, that when the panties
16 were sent down, that Marsha Eisenberg was
17 specifically told "test half of an identified
18 stain"?

19 A That's right.

11:02 20 Q And I believe her evidence at the Larry Fisher
21 proceedings, if I'm not mistaken, was "we weren't
22 asked to look anywhere else on the panties, we
23 weren't asked to test them, we were simply to test
24 one half of what Pat Alain had identified";
11:02 25 correct?



1 A That's correct.

2 Q And I think you alluded to this earlier, that when
3 the English lab tested the same panties in 1997,
4 they located a semen stain adjacent to the area
11:02 5 that Marsha Eisenberg had looked at; is that your
6 understanding?

7 A Exactly.

8 Q And was the concern then, in limiting Marsha
9 Eisenberg and the Roche lab to only looking at one
11:02 10 half of that semen stain, because that's what you
11 thought you had left?

12 A Umm, yes. We still wanted to maintain a little
13 bit, because we were still hopeful that Short
14 Tandem Repeats might be available in due course.

11:03 15 Q If we can go to 230988, please. And this is a
16 letter April 1, 1992 from James Ferris to Mr.
17 Williams with various notes of his DNA testing.
18 Do you recall following up with Dr. Ferris, and
19 looking at any of these notes, as far as what he
11:03 20 had done on the DNA testing?

21 A I didn't personally, but I know that efforts were
22 made to find out if he had retained anything in
23 his lab that might be fruitful to examine, and
24 whether his x-rays might contain some information
11:03 25 that might be helpful.



1 Q I'll go to 122967. And this is the last day of
2 formal submissions on the reference case; is that
3 correct?

4 A Yes.

11:04 5 Q April 6th, '92. Go to page 122971. Just go over
6 here. I think you are reporting:

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

16 Though it is not as
17 discriminatory as other techniques which
18 are now under development, it would only
19 consume a small portion of the
20 evidentiary material, leaving enough for
21 better tests when they are validated.
22 Unfortunately, due to the age and
23 condition of the material from the crime
24 scene, we were not able to achieve
25 results with that test.



1 It is still possible that
2 other procedures which are not yet ready
3 for court use will, in time, help to
4 resolve a case like this. We have at
5 least the comfort of knowing that we
6 have done everything we can for now."

7 And that would have been the position, then, that
8 you put forward to the Court?

9 A That's right.

11:05 10 Q And if we can call up 174222, this is an April 6,
11 1992 letter from Dr. Marsha Eisenberg to you
12 reporting on the DQ Alpha test and confirming that
13 the tests were done. If you can just scroll down,
14 this paragraph:

11:05 15 "No DQ alpha type was obtained.
16 Additional tests indicated that the
17 sample contained an inhibitor of the PCR
18 reaction. Upon further testing the
19 sample was not found to contain
11:06 20 quantifiable amounts of DNA."

21 So in essence they were not able to do a DNA
22 typing with what they looked at?

23 A That's right. Dr. Eisenberg did a very sensitive
24 test called a slot blot test I believe to quantify
11:06 25 any DNA that may have been present and she wasn't



1 able to find any quantifiable DNA in the sample
2 that she had cut out from the panties. I should
3 also note that the original of this letter has the
4 DQ Alpha profiles of --

11:06 5 Q Yeah, and I'll get to that later, Mr. Fainstein,
6 and on that point, it's my understanding that as
7 far as the testing that she was doing, there's two
8 steps. One, you determine the DQ Alpha type for
9 Gail Miller, David Milgaard and Larry Fisher; in
11:06 10 other words, their profile, that's step one?

11 A Yes.

12 Q Correct?

13 A Yes.

14 Q And so you know what you are looking for when you
11:06 15 go look at the sample; correct?

16 A Well, it can be done before or after, but it has
17 to be done.

18 Q The purpose of it, that's their identifier?

19 A Yes.

11:07 20 Q You then go look at the panties to see whether
21 there's a match or an exclusion; correct?

22 A Right.

23 Q So in this scenario then, as far as the testing
24 that was done by Marsha Eisenberg, is it correct
11:07 25 that just on this PCR reaction, that the PCR as



1 you explained is a process that can effectively
2 replicate the DNA to give you a better chance of
3 finding the DQ Alpha, whatever you need to find on
4 the DNA, and that in this case there was something
11:07 5 in the semen stain that inhibited the ability of
6 PCR to work; is that a fair way to put it?

7 A Yes. At that particular time scientists were
8 having some difficulty dealing with the
9 contaminants in the samples and not long
11:07 10 thereafter they began to be able to determine what
11 it was that was causing the difficulty and they
12 found ways of dealing with it.

13 Q Right. So just on that point, one of the
14 developments that PCR technology, or the PCR
11:08 15 process came in place, that scientists then
16 encountered in some stains inhibitors --

17 A Yes.

18 Q -- that they then dealt with, and that, my
19 understanding is that different inhibitors were
11:08 20 dealt with in different ways?

21 A Yes.

22 Q We don't need to get into the details, but that
23 was the challenge at this time; correct?

24 A Well, she had a double challenge because as she
11:08 25 says in the last line of that paragraph, she



1 wasn't able to find any quantifiable DNA.

2 **Q** Go to 230984, and this is your April 7th, 1992
3 letter to Barry Gaudette, Patricia Alain, Ron
4 Fourney at the RCMP, and you say:

11:08 5 "I understand that new technology, which
6 has not yet been validated for Court
7 purposes, might be worth pursuing in due
8 course. Please advise me as soon as any
9 such possibility becomes available. If
11:09 10 the Court takes five or six months to
11 render judgment, then perhaps we'll have
12 another opportunity to endeavour to
13 assist it with scientific results."

14 And so would that have been your position at the
11:09 15 time? Now, this is after argument but before the
16 Supreme Court decision.

17 **A** That's right, and I think that makes perfectly
18 clear my desire to pursue the matter further.

19 **Q** 008879, this is the Supreme Court decision which
11:09 20 we're all very familiar with. Did you consider,
21 after this decision came out, and after the
22 conviction was set aside, returning Gail Miller's
23 exhibits to the Court of Queen's Bench? You've
24 touched on this a bit earlier.

11:09 25 **A** Uh-huh. No, it escaped me that the Court of



1 Queen's Bench order --

2 Q Sorry, I didn't mean --

3 A -- required the return after the reference.

4 Q Putting aside the order, I'm just talking
11:10 5 generally.

6 A Yes.

7 Q For example, what if the Attorney General of
8 Saskatchewan had decided to prosecute Mr.
9 Milgaard, would you have returned the exhibits
11:10 10 back for that purpose?

11 A I expect so, yes.

12 Q Or if the province would have said lookit, we want
13 to re-open the investigation --

14 A Uh-huh.

11:10 15 Q -- can we have the exhibits back, are you able to
16 tell us what your position would have been if that
17 request had been made?

18 A Yes, I expect we would have co-operated.

19 Q And if the province wanted them for their own
11:10 20 reinvestigation purposes --

21 A Uh-huh.

22 Q -- you think you would have complied and returned
23 them?

24 A Right. I mean, our role during the reference
11:10 25 proceedings was, in essence, you know, to liaise



1 with and to deal with all counsel and I think we
2 were respected as people who were at, more or less
3 at arm's length in some respects and that everyone
4 seemed to be happy with our maintaining this
11:11 5 interest and seeing this through, but certainly if
6 Saskatchewan had other ideas, we would have dealt
7 with that.

8 Q If we can go to 334763, and this is April 15th,
9 1992 from you to Dr. Fourney, and this is the day
11:11 10 after the Supreme Court decision where you say:

11 "Regardless of what happens, I think it
12 would still be appropriate for us to
13 pursue further testing if and when a
14 reasonably promising technique becomes
11:11 15 available."

16 And again, would that have been your position at
17 the time?

18 A Yes.

19 Q Can you tell us generally how -- was there an
11:11 20 understanding then between you and the RCMP lab
21 people that keep me advised when something comes
22 up, let me know and we'll take another look at it,
23 or how was it left with them?

24 A Yes, I spoke to Dr. Fourney from time to time and
11:12 25 I sometimes had other reasons to call him and, you



1 know, I would want to know where they were at with
2 respect to the validation of short tandem repeats
3 and so forth, so --

4 Q And was it a case, though, that -- were you
11:12 5 waiting for them to contact you or would you
6 follow up with them or was it a bit of an ad hoc
7 understanding?

8 A I think they were well aware of my anxiety to see
9 this done when it could be done, but as I say, I
11:12 10 did touch base with them myself from time to time.

11 Q 162865, and this is an August 27th, 1992 letter
12 from Mr. Wolch to The Honourable Robert Mitchell
13 dealing with certain matters at the Supreme Court
14 reference that I just want you to comment on, your
11:13 15 view of what happened. The second paragraph says:

16 "Prior to the Supreme Court Reference
17 the Chief Justice in Chambers advised
18 all counsel that the question for the
19 Court to answer did not involve any
11:13 20 inquiry into police misconduct and that
21 there should be no effort made to focus
22 on that area. The Chief Justice
23 indicated on the record that the
24 Reference was not an inquiry virtually
11:13 25 immediately upon the commencement of the



1 proceedings. At a later point in time,
2 when a highly suspect document found in
3 Crown Counsel's file (T.D.R. Caldwell)
4 was entered into evidence, the Chief
11:13 5 Justice clearly indicated to counsel
6 that the document could be used to
7 assist in establishing Mr. Milgaard's
8 innocence, but in no way could it be
9 used to impugn police conduct in the
11:13 10 matter, since that was beyond the scope
11 of the Reference."

12 I wouldn't mind your comment, Mr. Fainstein,
13 whether you agree with Mr. Wolch's assessment of
14 what was before the court and, in particular,
11:13 15 whether you recall any discussion with the Chief
16 Justice in Chambers where he advised that the
17 question for the court to answer did not involve
18 any inquiry into police misconduct and that there
19 should be no effort made to focus on that area.

11:14 20 A Yeah. I did speak about this briefly yesterday
21 and unfortunately I just don't recall anything
22 like this happening and nor does my colleague Mr.
23 Frater, and I do know that police officers were
24 subpoenaed, so it's kind of hard to integrate all
11:14 25 that information and to reconstruct what happened.



1 Q Was it your understanding that police misconduct,
2 to the extent that it related to evidence that was
3 gathered and presented against David Milgaard, was
4 relevant to the Supreme Court reference?

11:14 5 A In my view it would have been absolutely germane
6 and certainly had I been representing David
7 Milgaard, I expect I would have wanted to pursue
8 some of that.

9 COMMISSIONER MacCALLUM: Can we agree that
11:15 10 the document referred to there to be used only to
11 show Milgaard's innocence was the Mackie summary?

12 A I'm sorry?

13 COMMISSIONER MacCALLUM: Do you know what
14 document he was referring to there, he might have
11:15 15 been referring to?

16 BY MR. HODSON:

17 Q Yes, that's a good point. I think, Mr. Fainstein,
18 here what Mr. Wolch is referring to, "when a
19 highly suspect document ... was entered into
11:15 20 evidence," I think we called it the Mackie
21 summary.

22 A Yes.

23 Q You are familiar with that document?

24 A Yes, I am, and I expect that's what the reference
11:15 25 is to.



1 Q And you recall that document being of significance
2 at the Supreme Court reference?

3 A Yes.

4 Q And then as well --

11:15 5 A I think so. I have to be fair, it's so hard to
6 remember exactly --

7 Q No, and --

8 A -- under what circumstances I became acquainted
9 with particular facts.

11:15 10 Q And then:

11 "In terms of calling Mr. Caldwell or
12 perhaps Mr. Kujawa, discussions with
13 your senior Crown..."

14 That's Saskatchewan,

11:15 15 "... resulted in our being offered a
16 summary of what Mr. Caldwell could say,
17 which did not add very much to the case
18 at all. Your Crown's position was
19 firstly that Mr. Caldwell could not
11:16 20 really add to the evidence touching upon
21 the innocence of David Milgaard.
22 Secondly, any other inquiry as to Mr.
23 Caldwell's conduct would be strenuously
24 objected to as irrelevant to the
11:16 25 hearing, which it indeed would have been



1 having regard to the Chief Justice's
2 remarks referred to herein."

3 And on that point, what was your view as to
4 whether or not Mr. Caldwell's conduct, for
11:16 5 example, disclosure, was that an issue that could
6 have been or was before the court on the
7 reference?

8 A Well, there certainly were some allegations at
9 some point, but again, I can't recall exactly when
11:16 10 or in what context they arose.

11 COMMISSIONER MacCALLUM: If you were the
12 Crown referred to, did you say any such thing,
13 sir?

14 MR. HODSON: I think the letter is to
11:17 15 Mr. --

16 A I think that's a reference to Saskatchewan.

17 BY MR. HODSON:

18 Q Let me ask it this way, Mr. Fainstein.

19 A This is a letter to the Attorney General of
11:17 20 Saskatchewan and he says your Crown's position.

21 COMMISSIONER MacCALLUM: Okay, thank you.

22 BY MR. HODSON:

23 Q To the extent that there was Crown misconduct or
24 Mr. Caldwell's conduct contributed to a
11:17 25 miscarriage of justice, would that have been



1 relevant evidence before the Supreme Court in your
2 view?

3 A Yes. If that was being alleged, it could have
4 been pursued I would think.

11:17 5 Q And if we can go to the next page -- or just hang
6 on a second. Then the next page, it talks about:

7 "Since the Larry Fisher evidence came to
8 light in October, 1970, the Crown was
9 aware in October of 1970 that there
11:17 10 existed credible evidence which could
11 reasonably be expected to have affected
12 the verdict of the jury considering the
13 guilt or innocence of David Milgaard.
14 This evidence was wilfully suppressed by
11:18 15 the Crown Attorney's office."

16 And again, two questions; number one, is that the
17 type of issue that in your view would have been
18 relevant to the Supreme Court, an allegation that
19 the Crown suppressed evidence from David
11:18 20 Milgaard?

21 A Yes.

22 Q And that would be relevant, and two, do you have a
23 recollection, again the record speaks for itself,
24 but that being an issue raised about suppression
11:18 25 of the October, 1970 Larry Fisher information from



1 the Milgaards?

2 A I don't recall what's in the transcripts, I'm
3 sorry.

4 Q Now if we can go to 1993, 1994. I won't call up
11:18 5 the documents, but do you have a recollection or
6 were you made aware that the RCMP were conducting
7 an investigation in 1992, '93, '94 arising out of
8 allegations made by Michael Breckenridge?

9 A Yes.

11:19 10 Q Are you familiar with the investigation? And I
11 think they made some efforts to do some DNA
12 testing and may have been in contact with the same
13 people that you were dealing with in the RCMP lab?

14 A Yes.

11:19 15 Q What's your recollection of how, of what happened
16 there, as to whether -- sort of the intersection
17 between what you were doing and they were doing?

18 A I believe Mr. Fraser or Mr. McCrank was in touch
19 with me at one point. I don't know if we ever
11:19 20 met, I just don't recall that, but I have seen a
21 letter dated March 4th, '94 from Mr. McCrank to
22 the Central Forensic Lab where he says -- I
23 believe it's your number 231469 or 470.

24 Q March 3rd or March 4th?

11:20 25 A March 4th, '94 I think.



1 Q Okay, we can maybe call that up. And again, I
2 just -- the point I would like you to address is
3 this, Mr. Fainstein.

4 A Right.

11:20 5 Q Mr. Sawatsky, who testified here, was the
6 principal investigator, they wanted to do some DNA
7 testing as part of their criminal investigation,
8 they had some discussions, and I think the effect
9 of Mr. Sawatsky's evidence was that they were told
11:20 10 that the RCMP were pursuing it for your purposes
11 and therefore they didn't and I think ended up
12 deferring to you on it. Would you agree with that
13 general statement?

14 A I don't know exactly what the people at the lab
11:20 15 said to Mr. McCrank and Mr. Fraser, but they would
16 have apprised them of the fact that I had a
17 continuing interest in the matter and they would
18 have indicated surely why it was that the testing
19 hadn't been, the further testing hadn't been done
11:21 20 yet.

21 Q Can you give us that doc. ID number you stated?

22 A Yes. I've got 231469 or 470. Yes, it's at the
23 start of the third paragraph, if you can just
24 highlight that. Mr. McCrank is saying to the
11:21 25 people in the lab:



1 "I am also concerned with the process
2 that was initially set up whereby the
3 test would be done before it was
4 validated and the results given to me
11:21 5 with an undertaking that they not be
6 made public."

7 I didn't know anything about that.

8 Q Okay.

9 A But it looks like they were trying to find a way
11:21 10 in which the testing could be done without
11 prejudicing things, or in a way at least that the
12 people from the lab would be willing to pursue,
13 and there was some discussion of that nature.

14 Q Did you have any objections or concerns with
11:21 15 turning over the exhibits to the RCMP for them to
16 do their testing in the investigation they were
17 conducting?

18 A The RCMP labs to do the STR testing?

19 Q Well, yeah, let me back up a bit. The RCMP were
11:22 20 investigating, they went to their lab --

21 A Yes.

22 Q -- and said we would like to do DNA testing for
23 the purposes of our investigation we're
24 conducting, and I think the same lab people that
11:22 25 you are dealing with, I think the evidence of Mr.



1 Sawatsky was that it was ultimately determined
2 that the RCMP would not, at least as part of the
3 provincial investigation, do it because you were
4 doing it, and that's the only point I wish you to
11:22 5 address.

6 A No, I think a better characterization is they
7 wouldn't do it because STRs hadn't been validated
8 yet and they did not want to prejudice --

9 Q Okay, fair enough.

11:22 10 A -- the availability of STRs in due course.

11 Q And I think the letter here relates to a
12 discussion about whether, even if it had not been
13 validated, whether you could do some testing that,
14 for information purposes as opposed to court
11:22 15 purposes. Fair enough?

16 A Yeah, and I didn't know anything about that at the
17 time.

18 Q If we can move ahead to January, 1995, and I think
19 that is when you would have been contacted by a
11:23 20 Mr. Rodin; is that correct?

21 A Yes.

22 Q And can you tell us just generally, he was Mr.
23 Milgaard's counsel and called you to talk about
24 DNA testing?

11:23 25 A He was a lawyer in Mr. Wolch's office and he



1 phoned me one day and -- I believe this was after
2 DNA testing was done in the *Morin* case, and that
3 was DQ Alpha testing, and so he said that Mr.
4 Milgaard was interested in pursuing the matter
11:23 5 further.

6 Q Prior to that call, from the end of the Supreme
7 Court reference in April of 1992 and prior to Mr.
8 Rodin's call, I think January 26, 1995, were you
9 contacted by anybody on behalf of David Milgaard
11:23 10 about getting DNA testing done?

11 A No.

12 Q And did Mr. Rodin's call -- tell us what you did
13 and what it prompted you to do?

14 A I was back in touch with Dr. Fournery and I asked
11:24 15 where are we at now and the indication that
16 eventuated was that the Forensic Science Service
17 had been doing this now in their case work, using
18 STRs in their case work since the preceding spring
19 or summer and that the RCMP was conducting pilot
11:24 20 projects, wasn't using it yet for case work, but
21 that we might be able to do that testing now.

22 Q And so was it Mr. Rodin's call then that prompted
23 you to bring this matter forward then in early
24 1995?

11:24 25 A Yes, it prompted me to make the further inquiries



1 and, coincidentally, it did finally seem to be an
2 appropriate time to proceed.

3 Q And had Mr. -- are you telling us that if Mr.
4 Rodin had not called you, what would you have
11:24 5 done, if anything?

6 A I expect I would have spoken to Dr. Fourney from
7 time to time and heard what he had to say as to
8 where they were at.

9 Q 164907, this is Mr. Rodin's letter to you I think
11:25 10 of February 21, 1995?

11 A Yes.

12 Q And talks about:

13 "...obviously be necessary for us to
14 arrive at an agreed protocol for
11:25 15 conducting further DNA testing. I would
16 suggest that we could use the agreed
17 protocols in the Guy Paul Morin matter
18 to guide us in terms of negotiating this
19 agreement."

11:25 20 And I would like you to just comment at this
21 point, what was your understanding then of the
22 protocol and agreement, number one, the need for
23 it, why did -- or did you think there needed to
24 be an agreement from David Milgaard and his
11:25 25 counsel as to how the DNA testing was done and,



1 if so, why?

2 A Well, his counsel were insisting on it, they had
3 the precedent from *Morin* and they wanted something
4 worked out in fulsome detail before the testing
11:26 5 was actually done.

6 Q And --

7 A And they sent me copies of some of the material
8 that was generated in connection with *Morin*.

9 Q And did you think, would you have been

11:26 10 comfortable -- or did you think you had the
11 ability to simply send the Gail Miller exhibits
12 wherever you wanted to have whatever testing you
13 wanted done or Dr. Fournery told you to have, do
14 you think that was something you could have done
11:26 15 if you wished to?

16 A I probably wasn't thinking in those terms, I was
17 probably thinking in terms of what was best, and
18 I've always been very cautious in my approach to
19 things like this and I'm sure my feeling was that
11:26 20 if this could be done with consent, then that
21 would make the results that much less assailable
22 in due course. I certainly had no sense that it
23 could take more than two years to come to an
24 agreement at that point.

11:27 25 Q And so just --



1 A But I also felt, if I might just add this, that,
2 you know, given my feeling that we might just have
3 one remaining shot at this, that it was perfectly
4 appropriate for Milgaard's and/or Fisher's
11:27 5 representatives to have some say as to how we
6 proceed. If they had their own scientific
7 resources and they wanted to contribute to the
8 discussion, I certainly had no problem with that.

9 Q And at this time, February, 1995, did you expect
11:27 10 that it would take two and a half years to get the
11 protocols in place and the testing done?

12 A Not at all.

13 Q And was it your understanding, based on what you
14 now know, that in February of 1995 testing could
11:27 15 have been done at that time, that science had
16 advanced to the point that testing could have been
17 done?

18 A Yes, it could, and, in fact, at the end of March
19 of 1995 I offered to do short tandem repeats
11:28 20 testing at the Forensic Science Service. It could
21 have been done at that point if there had been
22 agreement.

23 COMMISSIONER MacCALLUM: Just a second,
24 please, sir. Short tandem repeats could have
11:28 25 been done in March?



1 A Definitely.

2 COMMISSIONER MacCALLUM: And March of '94?

3 A '95.

4 COMMISSIONER MacCALLUM: '95. And you said
11:28 5 you told this to somebody. To whom did you tell
6 it, please?

7 A I sent a letter on March 30th to counsel offering
8 to go proceed with short tandem research testing.
9 It's 289652 I believe.

11:28 10 BY MR. HODSON:

11 Q I've got a different version and I'll bring that
12 up, Mr. Fainstein.

13 A Okay.

14 COMMISSIONER MacCALLUM: Okay, thanks.

11:28 15 BY MR. HODSON:

16 Q So at this point, just one other comment here
17 about Dr. Ferris, we touched on this a bit
18 yesterday, there's some question here about what
19 happened with Dr. Ferris, what he extracted from
11:28 20 the panties, was it saved and is there something
21 there. Can you tell us generally, what did you
22 come to learn about whether Dr. Ferris had
23 anything from his 1988 test that might have been
24 of assistance at this point?

11:29 25 A My understanding ultimately was that there wasn't



1 anything retained that was useful and that the
2 autorads, the x-rays, were useless.

3 Q If we could go to 032751, and this is a March
4 16th, 1995 letter from Dr. Fournery to you, and it
11:29 5 appears that you sent him the information you
6 received from David Milgaard's lawyers from the
7 *Morin* case and asked for his advice; is that
8 correct?

9 A Yes.

11:29 10 Q We'll go through parts of this, it says, Dr.
11 Fournery:

12 "Although we had no involvement with the
13 Jessop case..."

14 And that's the victim in Guy Paul Morin; right,
11:30 15 the *Jessop* case?

16 A Yes.

17 Q "...after reviewing the documentation
18 provided by your office, it was obvious
19 that the Jessop and Miller cases are
11:30 20 completely different with respect to
21 evidential exhibits."

22 And it goes on to talk about some of those
23 differences. And then down at the bottom, it
24 talks about Ms. Pat Alain's review of the
11:30 25 exhibits, and I think it's fair to say at this



1 point both you and Dr. Fourney believed that the
2 only semen stain available was that found on the
3 panties?

4 A That's right.

11:30 5 Q Half of which was used up by Roche in 1992?

6 A Right.

7 Q Dr. Fourney writes:

8 "This constitutes very little biological
9 sample for DNA analysis, especially when
11:30 10 the presence of a PCR inhibitor as noted
11 by Roche Biomedical Laboratories is
12 considered. In addition, due to the
13 location on the panties, it is entirely
14 possible that the semen stain may
11:30 15 represent a mixture of male sperm and
16 female epithelial cells or blood from
17 the victim. It is critical that the
18 most appropriate DNA typing approach be
19 applied since it is unlikely that the
11:31 20 size and nature of the sample will
21 permit the luxury of additional
22 testing."

23 And that would have been again your understanding
24 at the time as well with the information you had?

11:31 25 A Yes.



1 Q "Consequently, I cannot recommend the
2 use of either the Polymarker or DQ Alpha
3 PCR DNA tests that were used in the
4 Jessop case. These two tests are
11:31 5 normally applied to samples originating
6 from a single source and generally do
7 not yield a definitive, interpretable
8 DNA pattern from mixed biological
9 samples. Furthermore, the power of
11:31 10 discrimination afforded by either DQ
11 alpha or Polymarker tests is poor, and
12 may in fact result in shared patterns
13 between the victim and the assailant.
14 These tests are not used by the RCMP
11:31 15 forensic laboratories."

16 And again, I think you touched on that yesterday
17 and this morning, the concerns you had with DQ
18 Alpha; correct?

19 A Yes.

11:31 20 Q And then he goes on to say:

21 "The power of discrimination using STRs
22 is much greater, enabling a more
23 forensically significant interpretation
24 of the DNA pattern existing in the
11:32 25 general population."



1 He says:

2 "I would recommend that both the victim
3 and David Milgaard's PCR based DNA
4 pattern be established from the outset,
11:32 5 using the known samples which are not
6 limiting in the amount of DNA available.
7 This would permit a more informed and
8 prudent choice of the best set of STRs
9 that could identify differences in their
11:32 10 respective DNA patterns."

11 And then it goes on to talk about who does STR
12 DNA and talks about the Forensic Science Service
13 in the United Kingdom. So that would have been
14 the information you received at the time then,
11:32 15 Mr. Fainstein?

16 A That was the advice I received and circulated to
17 other counsel.

18 Q Essentially do STR testing in England with the
19 Forensic Science Services?

11:32 20 A That's right.

21 Q And were you prepared to do that at this time?

22 A Yes. You'll see my letter of March 30th which
23 follows.

24 Q And that's with some details that we'll go
11:32 25 through, but that's essentially what was done in



1 July of 1997, was the STR testing in the lab in
2 England; right?

3 A That's right.

4 Q 032749, this is your March 30th, 1995 letter that
11:33 5 you send to Mr. Rodin, Mr. Beresh and Saskatchewan
6 Justice and you enclose Dr. Fourney's letter, and
7 you say:

8 "We are prepared to proceed with STR
9 testing as Dr. Fourney suggests,
11:33 10 provided that we, Saskatchewan, and
11 David Milgaard can all agree with this
12 proposition, and to any necessary
13 details."

14 And the next page:

11:33 15 "I would hope that Mr. Fisher will also
16 authorize the testing to encompass him
17 as well."

18 And were you prepared to do the testing whether
19 Mr. Fisher agreed or not?

11:33 20 A Probably, but again, I was concerned about some of
21 the things I mentioned earlier, that if there was
22 an examination for spermatozoa, they might have
23 broken down by then and so they might not be seen
24 under the microscope although there might be DNA
11:34 25 there, and if there was only testing of Milgaard's



1 sample and there was an exclusion, in that
2 circumstance we would have no idea what the
3 significance of that exclusion was, so I really
4 felt it was important to have both samples.

11:34 5 Q Now, is it fair to say that over the course of the
6 next two years you were engaged in correspondence
7 and negotiation primarily with Mr. Lockyer on
8 behalf of David Milgaard and involving a number of
9 scientists about putting in place the proper
11:34 10 protocol to do the testing that was ultimately
11 done in July of 1997?

12 A That's right. If I may just say, Dr. Ed Blake was
13 utilized as the scientific advisor I guess for
14 David Milgaard and it was I think nine months or
11:35 15 so after this letter from Dr. Fournery before he
16 finally sent a letter with his --

17 Q And I'll take you through that, Mr. Fainstein. If
18 we could go to 340175, and I'll try and go through
19 the chronology with you, but I just want to
11:35 20 identify what were the issues, and this is a
21 document that I prepared based upon my review of
22 the documents that hopefully will assist us in
23 what the issues were and I just want to go through
24 them with you, and again I'm talking from 1995
11:35 25 until 1997. Is it fair to say that one of the key



1 issues was what type of DNA typing approach would
2 be used, and I've listed Polymarker, DQ Alpha,
3 PCR, (b), the PCR based short tandem repeat, or a
4 combination of the two approaches, and is it fair
11:35 5 to say that those would be, that there was really
6 two types of DNA testing that were being
7 negotiated; correct?

8 A That's right.

9 Q And is it fair to say that Mr. Lockyer and Dr.
11:35 10 Blake wanted DQ Alpha and you and Dr. Fourney
11 wanted PCR based short tandem repeat?

12 A That's right.

13 Q And I think, at some point, the discussions got to
14 whether you could try and do both, but the concern
11:36 15 being that there may not be enough material; is
16 that fair?

17 A Exactly.

18 Q And so that -- and is it fair to say that your
19 position in March of 1995 was PCR-based short
11:36 20 tandem repeat, you didn't change from that
21 position, and that's what actually happened in
22 July -- the test that resulted in the Larry Fisher
23 match was the PCR-based short tandem repeat?

24 A That's correct.

11:36 25 Q The second issue that seemed to be the subject of



1 discussion is where, and I've listed four, there's
2 probably more, but your position in March 1995 was
3 to have it done at the Forensic Science Services
4 in the United Kingdom; correct?

11:36 5 A Yes.

6 Q And that's where it was done in July of 1997?

7 A That's right.

8 Q And I've listed the RCMP laboratory as a
9 possibility; is it fair to say that, depending on
11:37 10 the type of DNA used, that different labs would or
11 would not be in play? In other words, not every
12 lab did DQ Alpha, not every lab did short tandem
13 repeat?

14 A That's right. The RCMP lab was capable of doing
11:37 15 STR testing at that time, but there was a little
16 concern about the optics involved because of the
17 investigation that took place in Saskatchewan
18 after the Breckenridge --

19 Q Yes.

11:37 20 A -- kerfuffle, because it seemed there was a very
21 extensive further investigation, and the people
22 doing that investigation had a very strong opinion
23 as to who, in fact, had been Gail Miller's
24 assailant, and we wanted to avoid any possibility
11:37 25 of a suggestion that that would have somehow



1 tainted the results that were secured in the RCMP
2 labs.

3 Q Would, did David Milgaard's counsel and Dr. Blake,
4 would they agree to have the test done at the RCMP
11:38 5 lab, or did they object to it?

6 A Well actually at one point, because we were at
7 loggerheads and were searching for a way to make
8 progress, I invited Mr. Lockyer to come to the lab
9 in Ottawa, to meet Dr. Fournery, to see how the
11:38 10 testing is done, we could get Dr. Blake on the
11 phone and we could hash out exactly what we were
12 going to do. And I recall him being, my sense
13 certainly was that he was impressed with Dr.
14 Fournery, and I recall him making the comment at
11:38 15 one point that the RCMP labs could do the testing.

16 Q Could do the testing?

17 COMMISSIONER MacCALLUM: He actually came
18 to the lab, did he?

19 A Yes, he did.

11:38 20 COMMISSIONER MacCALLUM: At your
21 invitation? Okay.

22 A It wasn't until the fall of '96, I believe. But
23 he said at one point that he would have been
24 satisfied if the RCMP did that.

11:38 25 BY MR. HODSON:



1 Q And so, again, why did you not go to the RCMP lab
2 and do the test in '95 or '96?

3 A Because having it done outside by the Forensic
4 Science Service would ensure it was being done by
11:39 5 the most experienced lab for this process, and
6 would do away with any possible suggestion that
7 the results were tainted by work that the RCMP had
8 done elsewhere on the case.

9 COMMISSIONER MacCALLUM: Does that mean
11:39 10 that you -- you overrode Lockyer by saying that
11 --

12 A Oh no, he didn't say that it should be or has to
13 be, or whatever, but he said it could be.

14 COMMISSIONER MacCALLUM: Oh, just said it
11:39 15 could be?

16 A Yes.

17 COMMISSIONER MacCALLUM: He was satisfied
18 with the adequacy of the lab in other --

19 A He wouldn't have objected if we were suggesting
11:39 20 that it should have been done there.

21 BY MR. HODSON:

22 Q Would it be fair to say, Mr. Fainstein, that over
23 the course of the 2 1/2 or whatever years of
24 negotiations, or two years, that there was some --
11:40 25 or I sensed from your earlier answer that, if a



1 result were obtained that was unfavourable to Mr.
2 Milgaard, you were concerned that they would take
3 issue with who did it, how it was done, things of
4 that nature; was that a concern that was on your
11:40 5 mind in these negotiations?

6 A Sure. I was thinking ahead to the eventually use
7 of the materials, and I didn't know what the
8 result would be, but I considered what would
9 happen in either event and, in my cautious way,
11:40 10 was trying to eliminate any possible bones of
11 contention.

12 Q And what about the converse, that if they were
13 favourable to Mr. Milgaard, the results, did you
14 have concerns about whether they would be accepted
11:40 15 by either a Court and/or the government or the
16 Attorney General of Saskatchewan as far as his
17 culpability for the crime?

18 A Basically, I wanted the most solid results to be
19 achieved.

11:40 20 Q And did you sense that there was some, I don't
21 know if "suspicion" is the right word, but that
22 there was some lack of comfort by everybody
23 involved as to who and how and where and why it
24 would be done?

11:41 25 A Well there were some differences of view put



1 forward, let me put it that way. I don't know if
2 it was a matter of comfort or of tactics.

3 Q And --

4 A I don't see any reason, certainly not
11:41 5 scientifically, why Milgaard's representatives
6 wouldn't have been satisfied to have short tandem
7 repeats done rather than DQ Alpha, except for the
8 fact that it's -- it has a much greater power of
9 identifying who left the sample in question.

11:41 10 Q And so I guess, if I can get right to the point, I
11 guess the question is why wasn't the testing done
12 in March 1995, or April, or the months that
13 followed?

14 A Because there was no agreement, because there were
11:42 15 several issued that hadn't yet been resolved, and
16 I was hoping in short order we could nail them
17 down and then proceed with the tests.

18 Q Scientifically, was there any reason that you
19 could not do the test March-April-May 1995?

11:42 20 A None.

21 Q As far as the laboratory to conduct the test,
22 we'll see the Suffolk County Laboratory and Dr.
23 Ballantyne on Long Island, and Dr. Waye in
24 Hamilton, they were, at various parts of the
11:42 25 negotiations, brought in as possible labs; is that



1 correct?

2 A Yes. It was probably Dr. Fournery's suggestion
3 that, rather than going to England, it might be
4 possible to have it done in Long Island by Dr.
11:42 5 Ballantyne, who was using this technique, and --

6 Q Were --

7 A -- we were prepared to have that done but then
8 ultimately, I guess Mr. Lockyer had been in
9 contact with Dr. Ballantyne, and then Mr. Lockyer
11:43 10 advised me that Dr. Ballantyne was not available
11 to do this.

12 Q Do you recall whether Mr. Lockyer had a concern
13 about using the Forensic Science Service lab?

14 A Specifically?

11:43 15 Q Yes?

16 A Only that it was a long way from where his expert
17 resided, which was California, and there was a
18 suggestion early on, before they were told that we
19 were prepared to pay for Dr. Blake to travel to
11:43 20 England at least to observe the proceedings on
21 behalf of the Milgaards, that if we were to do the
22 testing in England, that might preclude his
23 involvement.

24 Q So let's talk about that.

11:43 25 A Which was never our intent.



1 Q Your intent to what?

2 A To preclude involvement of an expert on behalf of
3 the Milgaards, at least in the role of an
4 observer, when the testing was done.

11:44 5 Q Okay. Now, again, is it fair to say -- I'm just
6 trying to identify the points that you negotiated
7 over the, over the 1995 to 1997, and the role of
8 observers. It's my understanding that in July of
9 1997 Dr. Edward Blake attended as the Milgaard's
11:44 10 observer in England, and that Cathy Bowen attended
11 as the RCMP observer?

12 A Yes.

13 Q Can you tell us a couple of things on this point.
14 Did you ever object to then, or have any concern
11:44 15 about David Milgaard having an observer present,
16 wherever the tests were done?

17 A I had some concerns about the role of Dr. Blake.

18 Q Sorry, let me, I'll -- let's just do it in steps
19 here.

11:44 20 A Yes, sure.

21 Q The fact that they would be there as an observer,
22 I'll then get to the role of the observer.

23 A Okay.

24 Q But did you have any objection --

11:44 25 A No.



1 Q -- to David Milgaard having Dr. Blake attend and
2 observe at the tests, wherever they took place
3 done?

4 A None whatsoever.

11:44 5 Q And that you would pay, or the Federal Government
6 would pay, for Dr. Blake to go wherever the tests
7 were done to observe?

8 A We were prepared to pay for his travel and his
9 professional fees.

11:45 10 Q And, secondly, the RCMP as an observer, again, was
11 there any issue there about whether -- did the
12 representatives of David Milgaard ever object to
13 having the RCMP attend as an observer?

14 A No.

11:45 15 Q Now let's talk about the role of the observer.
16 And I want to just identify right now, we'll go
17 chronologically, but just identify what the issue
18 was that ended up being the subject of
19 negotiation, and I took this out of, the quotes
11:45 20 out of one of the letters about Dr. Blake's
21 involvement --

22 A Right.

23 Q -- in the hands-on work in the DNA testing?

24 A That's right.

11:45 25 Q Can you tell us, what was the issue that was the



1 subject of negotiation about Dr. Blake's
2 involvement in the testing?

3 A Mr. Lockyer was adamant that Dr. Blake was the
4 world's leading scientist in this area, and that
11:45 5 he should participate in the actual direct
6 hands-on work that was being done in the lab, and
7 my concern was that we were -- we wanted to
8 commission the lab that had the greatest degree of
9 experience and familiarity with the kind of
11:46 10 testing that was being done, which was obviously
11 the Forensic Science Service, and that once they
12 were commissioned they would have -- they would
13 insist, surely, on having full responsibility for
14 what transpired. And so, well, my understanding
11:46 15 was they would have refused to do the testing if
16 we had said that "well Dr. Blake is going to come
17 and he is going to be doing whatever he wants
18 while you're attempting to secure result", it was
19 a non-starter in my view, and I was concerned
11:46 20 about why they wanted that.

21 So my view was I had no
22 problem with his attending as an observer, with
23 his making comments, with his giving advice with
24 respect to any aspect of the testing, with his
11:47 25 stating objections and recording them, but that he



1 would not be permitted to participate directly,
2 hands-on, unless he was invited to do so by the
3 Forensic Science Service, which would be
4 responsible for the testing.

11:47 5 Q And without getting into the details, because I'll
6 go through the documents with you, was that the
7 subject of some to'ing and fro'ing over the next
8 couple of years, as to whether or not Dr. Blake --
9 the extent to which Dr. Blake could become
11:47 10 involved?

11 A Yes, there was a great deal of to'ing and fro'ing.
12 And one of the points I made in one of my letters
13 to Mr. Lockyer was, you know, "how is it going to
14 look if there is a match with Fisher, ultimately,
11:47 15 and it turns out that a scientific expert for
16 someone who was adverse in interest to him was
17 actually doing the work?"

18 Q So then next, the fourth area of, I think, some
19 negotiation, was -- and there is two things here;
11:48 20 one, the examination of Gail Miller exhibits for
21 semen, and screening for spermatozoa. Was there
22 ever an issue about whether or not you would let
23 scientists look at the clothing again to identify
24 semen; was that something you were prepared to do?

11:48 25 A Umm, everyone agreed that everything that was



1 available should be looked at again as carefully
2 as possible to see if there was something else
3 that might be used.

4 Q And then the second issue that I think was the
11:48 5 subject of negotiation, and we've touched on this
6 a bit earlier, was this screening for spermatozoa.

7 A Yes.

8 Q As can you just explain, again, what was the issue
9 there that was -- and I'll get into the letters
11:48 10 with you --

11 A Right.

12 Q -- but just identify for me --

13 A Yeah.

14 Q -- the issue that was the subject of discussion?

11:48 15 A The concern was that there was very little
16 material to work with, and the question was
17 whether it was worthwhile to sacrifice 10 or 20
18 percent of the material to the microscopic
19 examination for spermatozoa before the genetic
11:49 20 profile was obtained or not, and my firm view was
21 that, whether spermatozoa were identified or not,
22 that the testing should continue. Because if
23 there were a match with one and an exclusion of
24 the other we could assume most logically that that
11:49 25 profile would have come from spermatozoa, even if



1 they had broken down.

2 And, moreover, part of the
3 short tandem repeats multiplex testing involved
4 something called Amelogenin, which indicates
11:49 5 whether the person from whom that profile was
6 taken is a male or a female, so that would have
7 been helpful as well.

8 So there was some -- Dr.
9 Fourney raised the issue as to whether it was
11:49 10 really necessary to sacrifice part of that
11 material to examine for sperm at the outset if,
12 indeed, we were going to continue regardless of
13 whether we could identify sperm or not. The
14 position that was taken by the Milgaard camp was
11:50 15 that if no spermatozoa are found, that should end
16 it, there shouldn't be any further examination.

17 Q Well, that gets us into number 5?

18 A Yeah, and I disagreed with that very strongly,
19 because I felt it might still be possible to get
11:50 20 significant results.

21 Q And --

22 A The problem for Milgaard would have been that an
23 exclusion would have been meaningless, but
24 certainly a match would have required an
11:50 25 explanation.



1 Q And so, just so that I am clear on that, that if
2 you found DNA material but could not identify it
3 as spermatozoa, and you did a match and it
4 excluded David Milgaard, that that wouldn't
11:50 5 necessarily exclude him as the perpetrator?

6 A No. But of course, if we were able to test
7 Fisher's sample at the same time and there was a
8 match with him, that would be very significant.

9 Q Right. So that if --

11:51 10 A Even in the absence of microscopically-identified
11 sperm.

12 Q Right. And we talked about this earlier. If you
13 found Fisher's DNA on the substance on Gail
14 Miller's panties, that even though it wasn't
11:51 15 spermatozoa, it would be sufficient to match him;
16 is that fair?

17 A Yes.

18 Q Is that why, is that the reason you wanted to
19 pursue it?

11:51 20 A Yes.

21 Q And does that fairly summarize the issues, then,
22 that were the subject of negotiations over the two
23 years, at least the main points?

24 A Umm, yes. There was just one more, and that was
11:51 25 the sequence in which the profiles were going to



1 be ascertained. Should the profiles of the
2 knowns, Milgaard and Fisher, be secured first, or
3 should the profile be developed from the
4 questioned material before any one of the
11:51 5 scientists knew what was the profile of either
6 suspect.

7 Q And why would that be an issue?

8 A Again, because there was a concern that there was
9 very little material to work with, and if the
11:52 10 profiles of the knowns were ascertained first, in
11 the event that the profile was the same at any
12 particular STR locus there wouldn't be testing for
13 the profile at that locus when the work was being
14 done with the crime scene samples, they would use
11:52 15 another STR locus to test for it, because they
16 were looking to differentiate between the two.
17 It's a little hard to explain.

18 Q And what was your concern about -- did you care
19 what order they went in?

11:52 20 A Only if it was found, in fact, there was almost
21 nothing left to work with.

22 Q And --

23 A In that event, I felt that it would make most
24 sense to secure the samples from the knowns first.

11:52 25 Q And what was the concern from -- on behalf of



1 David Milgaard?

2 A Umm, the possibility that once Milgaard's sample
3 was known, there might be some hanky-panky, and
4 the sample would -- later purported to have been
11:53 5 generated from the crime scene materials would
6 match his if someone wanted that to be the case.
7 It's a pretty jaundiced view.

8 COMMISSIONER MacCALLUM: Dr. Blake was
9 supposed to be there to guard against that, isn't
11:53 10 that right?

11 A Well, that's right.

12 BY MR. HODSON:

13 Q So that was the issue, that if someone would
14 get -- a scientist would know David Milgaard's STR
11:53 15 profile, and that would somehow influence his or
16 her view of the crime scene samples?

17 A That was the concern. Dr. Blake is very cynical,
18 and he practices in an area where litigation is
19 conducted a little differently than it is in this
11:53 20 country, and he expressed a concern.

21 Q If we can go to 289554 and go to page 556. And I
22 don't want to confuse you, Mr. Fainstein, but I'm
23 going to actually go to the 1997 agreement --

24 A Okay.

11:53 25 Q -- before we go through the negotiations, because



1 I think that may help to --

2 A Sure.

3 Q -- crystalize things. And this is, when we get to
4 the last page we'll note that it is signed by the
11:54 5 parties in April 1997, and would this agreement
6 have been the product of your couple of years of
7 negotiations?

8 A Yes, this was the culmination. I think there may
9 have been a slight change later, because of course
11:54 10 I had to run this past the Forensic Science
11 Service, and --

12 Q I think there was an amendment to --

13 A Right, there was a very slight amendment that they
14 suggested, and we both agreed to.

11:54 15 Q So if we can just go through and identify what was
16 ultimately agreed on; number 1, that it was done
17 at the Forensic Science Service in England?

18 A Yes.

19 Q Number 2, that Dr. Ed Blake be permitted to be
11:54 20 present, Dr. Fournery or his designate be permitted
21 to be present, they:

22 "... may observe the proceedings, tender
23 advice ... and, should it invite them to
24 do so, they may participate in the work
11:54 25 itself."



1 So in other words that if Forensic Science
2 Services asked Dr. Blake to participate, then
3 that would be permissible?

4 A That's right. And that accorded with Justice
11:55 5 Dubbin's order in the *Morin* case.

6 Q And was that something that you were comfortable
7 with and would have done back in 1995?

8 A I had no problem with that at all.

9 Q And then:

11:55 10 "3. In the event that the scientists
11 referred to in paragraph 2 have any
12 reservation or concern about the process
13 undertaken by the Forensic Science
14 Service, they shall note that in
11:55 15 writing, and have the FSS acknowledge
16 it, but the FSS shall be the sole
17 arbiters as to how, and by whom, the
18 work is done."

19 And, again, that would have been your position
11:55 20 from the outset?

21 A Yes.

22 Q And that:

23 "All reasonable expenses of the FSS, and
24 of Dr. Blake will be paid for by the
11:55 25 Department of Justice (Canada)."



1 And was that your position from the outset?

2 A Yes.

3 Q And then next, I don't think we need to go through
4 this, Mr. Commissioner, this is the part about
11:55 5 getting the release of the materials and sending
6 it up. Go to the next page. I take it there was
7 no contentious issue over that, about the details?

8 A No.

9 Q And then number 7, that you would:

11:56 10 "... attempt to secure Larry Fisher's
11 assent ...",

12 or the Court's assent:

13 "... to the use of the sample of ...
14 blood ..."

11:56 15 And, again, I take it that was not a contentious
16 issue --

17 A No.

18 Q -- in the negotiations? That:

19 "9. Gail Miller's clothing and any other
11:56 20 crime scene material, or material
21 extracted therefrom, will be examined to
22 determine what should be the subject of
23 DNA testing, in addition to the
24 'presumptive semen stain' on the
11:56 25 panties, which has been described by



1 Patricia Alain."

2 And, again, was that ever an issue with you,
3 about letting the FSS, the U.K. lab look at the
4 clothing again, was that ever an issue?

11:56 5 A No, we all agreed that should be done.

6 Q And then paragraph 10, I think this addresses the
7 screening for spermatozoa:

8 "The FSS shall perform, or cause to be
9 performed, any scientific process
11:56 10 reasonably necessary and appropriate to
11 determine whether spermatozoa are
12 present, and whether there is an
13 adequate quantity of DNA in any sample.
14 It shall endeavour to ensure that any
11:57 15 portion of a sample used to assess the
16 presence of sperm can thereafter be used
17 for DNA analysis, thereby minimizing any
18 loss of the sample."

19 And so it would appear that you left it up to the
11:57 20 lab, the English lab, to do the spermatozoa
21 screening if they thought they should or could;
22 is that fair?

23 A Yes. When Dr. Fourney raised the issue I was a
24 little bit concerned about what our position
11:57 25 should be, because I knew that part of our



1 material would necessarily be sacrificed before
2 the testing was completed, but it didn't take me
3 long to appreciate that, you know, if we could
4 identify the profile with the spermatozoa, that
11:57 5 was a very good thing to do, and it was worth
6 sacrificing a little bit of it and hoping there
7 was still some left.

8 Q And so just so I'm clear, this would have been a
9 point raised by Mr. Lockyer, to have this
11:57 10 spermatozoa screening done?

11 A Yes.

12 Q Or Dr. Blake?

13 A Yes.

14 Q And you then would have agreed to that?

11:58 15 A I did ultimately. I had a little bit of concern,
16 you know, in my own mind, I turned it over, and --
17 because I was worried about how much there was to
18 work with, but I did agree that that could be
19 done.

11:58 20 Q And would that have been your only concern, that
21 you might be destroying that which you could test?

22 A Yes.

23 Q Next page. This issue about:

24 "If no spermatozoa are observed, a total
11:58 25 DNA digestion may be conducted on the



1 fabric itself."

2 And I think this goes to point number 5 in the
3 outline, that your position was that, lookit,
4 even if there isn't spermatozoa identified we
11:58 5 still want DNA profiling done; correct?

6 A Yes. And Mr. Milgaard's counsel finally agreed to
7 that.

8 Q And paragraph 14:

9 "If DNA is found in the sperm fraction,
11:58 10 it shall be subjected to the form of
11 analysis most likely to give meaningful
12 results. A suggested guideline is as
13 follows:

14 a) If there is at least one nanogram of
11:59 15 material in a given sample, STR testing
16 is to be done.

17 b) If there is less than one nanogram, the
18 FSS has suggested that either the Second
19 Generation Multiplex, or the single
11:59 20 components of an STR multiplex, will
21 provide valid and reliable results.
22 These findings will be shared with the
23 representative scientists, and then the
24 parties will decide how the testing will
11:59 25 proceed."



1 Can you just explain that for us?

2 A That was the Forensic Science Services
3 contribution at the end of this process. They did
4 not want to do DQ Alpha, they weren't doing it any
11:59 5 more, and they thought that it would be preferable
6 if there -- you see, ideally what they would have
7 wanted to do was a so-called multiplex STR test
8 where, simultaneously, they would be looking at
9 the DNA profile in several different locations
11:59 10 within the chromosomes. Okay? They were using a
11 kind -- a multiplex that looked at six different
12 loci on the chromosomes, and derived the profile
13 from that, but -- and then that required at least
14 one nanogram, one-billionth of a gram of genetic
12:00 15 material. If there was less than that though, if
16 there was as little as .2 of a nanogram, it would
17 still be possible to do either a single -- the
18 testing of a single locus with STRs or one of the
19 second generation tests that they were --

12:00 20 Q Is it fair to say that DQ Alpha was off the table,
21 then, they were not doing DQ Alpha?

22 A Yeah.

23 Q Correct?

24 A Yes.

12:00 25 Q So this is just a different type of PCR testing



1 then; is that --

2 A Yes. In their view, there was no point in doing
3 DQ Alpha.

4 Q And, again, is this something then, is 14 b), is
12:00 5 that something that they raised or Mr. Milgaard
6 raised, or where did that come from?

7 A 14 b) came from the Forensic Science Service. Our
8 feeling was that if there was at least .2 of a
9 nanogram of the material, well, we could try a DQ
12:01 10 Alpha.

11 Q So is it fair to say that the DQ Alpha issue was
12 resolved by saying "no, it's going to be STR and
13 no DQ Alpha"?

14 A Yes, although I had a letter back from Mr. Lockyer
12:01 15 saying "I hope that if there is enough left over
16 we can still do DQ Alpha testing if necessary in
17 North America."

18 COMMISSIONER MacCALLUM: Mr. Fainstein, by
19 what miraculous agency does one examine such a
12:01 20 minute quantity of material? What is the
21 instrumentation, is it a visual microscope,
22 electron microscope of some kind?

23 A Well, it's interesting. The STR test basically
24 collects information as to the length of a
12:01 25 fragment of DNA at a particular locus --



1 COMMISSIONER MacCALLUM: Yes?

2 A -- that it's focusing on, and in order to
3 ascertain the length -- well, what they do is
4 they, you know, they extract the genetic materials
12:02 5 so that they can work with them, they do the
6 multiplication using the PCR process so that they
7 have enough material to work with, hopefully, and
8 then they subject them -- oh, they use a sort of
9 chemical scissors, an enzyme, that will cut the
12:02 10 strand of DNA at a precise place.

11 COMMISSIONER MacCALLUM: Yes?

12 A Okay. And that results in fragments of a
13 particular length.

14 COMMISSIONER MacCALLUM: Yes?

12:02 15 A And at these loci which are being investigated,
16 there's variability from person to person --

17 COMMISSIONER MacCALLUM: Uh-huh?

18 A -- in the length of these fragments. Okay? So
19 what they have to do, then, is to ascertain the
12:02 20 length of these tiny fragments, --

21 COMMISSIONER MacCALLUM: Yes?

22 A -- perhaps only in 300 pairs of organic bases, and
23 compare them. And to do that, once they have used
24 this chemical scissors, this enzyme to cut the
12:03 25 chromosome in the precise spot, they take the



1 resulting material and they put it into channels
2 on a gel. Okay. And they apply an electrical
3 current to the gel --

4 COMMISSIONER MacCALLUM: Yes?

12:03 5 A -- which causes the fragments to migrate along the
6 gel and the, I guess the shorter fragments will
7 move farther than the longer fragments will, and
8 the position of the fragments at the end of the
9 process is determined using x-rays. They have a,
12:03 10 some sort of radioactive tags involved.

11 COMMISSIONER MacCALLUM: Okay.

12 A Okay. So -- and then they compare those results
13 with the results, from the other parties, of the
14 crime scene materials. And what they generally do
12:03 15 is they run all these things in different channels
16 of the same gels simultaneously, and that's how
17 they get the results.

18 COMMISSIONER MacCALLUM: So it's partly a
19 chemical process?

12:04 20 A Yes.

21 COMMISSIONER MacCALLUM: And partly a
22 process through observation?

23 A And, ultimately, they have an x-ray or some sort
24 of a radiograph --

12:04 25 COMMISSIONER MacCALLUM: Okay.



1 A -- that shows --

2 COMMISSIONER MacCALLUM: Thanks very much.

3 A -- the result.

4 BY MR. HODSON:

12:04 5 Q If we just finish up with this document and we can
6 break then. The last point here, paragraph 18 and
7 19, is on the order of the profiles. And it
8 appears to say that:

9 "Subject to paragraph 19, DNA typing of
12:04 10 the 'questioned' samples shall be done
11 before the 'knowns'."

12 And that would have been the request by Mr.
13 Lockyer or Dr. Blake for the reasons --

14 A Yes.

12:04 15 Q -- you've talked about? But:

16 "Should the FSS feel that it may be
17 helpful to ascertain any of the DNA
18 samples from the 'known' samples first,
19 in order to determine the most desirable
12:04 20 form of testing to be used on the
21 'questioned' samples, it may proceed in
22 that sequence, but the profiles will
23 only be communicated to FSS scientists,
24 until the profiles from the 'questioned'
12:05 25 samples have been obtained, and the FSS



1 and the two representative Scientists
2 have recorded their reading of the
3 'questioned' sample profiles."

4 So does this relate to the concern that Dr. Blake
12:05 5 had had about scientists being influenced by the
6 known profile?

7 A Yes, and our concern that if there was almost
8 nothing to deal with, we shouldn't sacrifice some
9 of it looking at a locus where we wouldn't get any
12:05 10 useful information.

11 Q Just in lay terms, is it fair to say that as a
12 scientist, if you know the known profiles, in
13 other words, you know Mr. Milgaard and Mr.
14 Fisher's profiles, when you actually go look at
12:05 15 the crime scene stains you may be able to be more
16 precise in what you look for because you know what
17 you are looking for?

18 A Exactly.

19 Q And in limited quantities, if you know what you
12:05 20 are looking for, you might find it better and
21 quicker?

22 A That's right.

23 Q And so the converse is that if you know going in,
24 you might be -- now, just on that point, was there
12:06 25 a scientific concern that, a scientific basis to



1 say that a scientist could be confused by knowing
2 the profiles going in or was it precise enough --

3 A No.

4 Q -- that you would say it's -- I don't know how
12:06 5 it's reproduced, I think in bands, is it not
6 something where there's an objective --

7 A Yes, there may at some point arguably be a matter
8 of interpretation, but it's so precise and it's so
9 automated that it's not much of an argument.

12:06 10 MR. HODSON: I see it's probably time to
11 break. I'm going to suggest we come back at one
12 o'clock if that's --

13 COMMISSIONER MacCALLUM: Yes, we will come
14 back at one o'clock, the objective being, of
12:06 15 course, to finish, if humanly possible, with this
16 witness by day's end.

17 A Thank you.

18 (Adjourned at 12:06 p.m.)

19 (Reconvened at 1:00 p.m.)

01:00 20 BY MR. HODSON:

21 Q Mr. Fainstein, just before lunch we talked about
22 this issue of the order of the profile and the
23 question of getting the -- I don't know what you
24 want to call it, the known person first --

01:00 25 A Yes.



1 Q -- before you go look at the crime scene stain,
2 and you indicated that Dr. Blake and Mr. Lockyer
3 had a concern about that?

4 A Yes.

01:00 5 Q It's my understanding that in the *Morin* case, that
6 in fact something happened there where a known
7 profile was known in advance and that it may have
8 improperly influenced a later test; is that
9 correct?

01:00 10 A I've seen that suggestion, but I haven't sought to
11 verify it. I don't know.

12 Q Were you aware that that may have been the basis
13 upon which Dr. Blake and/or Mr. Lockyer put
14 forward that proposition in light of what they had
01:01 15 encountered in the *Morin* case?

16 A It's possible that was relayed to me at some
17 point.

18 Q Go to 032748, and this is Murray Brown's letter
19 back to you, and I think you indicated that you
01:01 20 were getting the agreement of parties. Now, the
21 agreement that I showed you, the April, 1997
22 agreement, did not have Larry Fisher's agreement;
23 correct?

24 A That's right.

01:01 25 Q He was not prepared to agree, but that didn't



1 preclude you from proceeding with the --

2 A No. I was in touch with Mr. Beresh from time to
3 time and I think I sent him copies of some of the
4 drafts that we were discussing in case he wanted
01:01 5 to have any input, but --

6 Q Can we take it from that that in 1995, if you
7 would have had the agreement of the Milgaards and
8 Saskatchewan Justice and not Larry Fisher, that
9 you could have gone ahead at that time with the
01:02 10 testing?

11 A Yes.

12 Q And so here the province, and Murray Brown has
13 given his evidence, essentially I think they were
14 saying lookit, we agree with whatever Dr. Fournery
01:02 15 says, we'll agree to the PCR-based STR analysis
16 but not the DQ Alpha?

17 A Right.

18 Q Is it fair to say that Saskatchewan Justice,
19 throughout this process, was prepared to agree to
01:02 20 whatever you could negotiate with the Milgaards
21 based on the advice of Ron Fournery?

22 A Yes. You know, I think they were looking at it
23 and considering whether it seemed appropriate, but
24 I think they were satisfied that we were doing the
01:02 25 best we could to get this resolved.



1 Q Now here's a document, 174295, that you may not
2 have seen.

3 COMMISSIONER MacCALLUM: What's the date of
4 that last --

01:02 5 MR. HODSON: Oh, I'm sorry, that's April
6 7th, 1995.

7 BY MR. HODSON:

8 Q So April of '95 you've got the province's
9 agreement to do STR in England and you are waiting
01:03 10 to hear from the Milgaards; correct?

11 A That's right.

12 Q And this is a document that we received, I think
13 it's a memo from Greg Rodin to file, and I just
14 want to ask you about this to see whether this was
01:03 15 communicated to you, and this is Mr. Rodin's note,
16 he says that:

17 "Most of what Mr. Ron Fourney said in
18 his letter to Justice was false. James
19 spoke with the Morin expert, Dr. Blake,
01:03 20 who was quite annoyed with what Fourney
21 had said."

22 And then down here:

23 "Almost all of the cases where accused
24 persons were cleared by DNA evidence
01:03 25 involved old and degraded samples and



1 DQ/Polymarker analysis."

2 Was this sentiment expressed to you by
3 Mr. Lockyer at some point, that Dr. Blake had
4 concerns about Dr. Fourney and what he had to
01:03 5 say?

6 A Well, we had to wait until I think it was the
7 following December before we ever got anything in
8 writing from Dr. Blake and I don't recall any
9 exchanges with Mr. Lockyer or anyone else about
01:04 10 Dr. Blake's views before then. It's possible, but
11 we were waiting for him to look through the
12 materials associated with this specific case and
13 to give his observations and recommendations and
14 he was busy with the O.J. Simpson case apparently.

01:04 15 Q So we go to 106901, just chronologically, this is
16 October 18th, 1995, Mr. Rodin's letter back to you
17 again saying we spoke:

18 "... subsequent to your ... March 30th
19 ..."

01:04 20 letter:

21 "... we had ... concern about the STR
22 testing suggested by Dr. Fourney. You
23 were also informed that we had requested
24 a report from Dr. ... Blake, whom you
01:04 25 know is a leading international expert



1 on DNA testing.

2 Unfortunately, due to his
3 commitments in connection with the O.J.
4 Simpson trial, Dr. Blake has not been
01:04 5 able to provide us with his report."

6 It:

7 "...will be forthcoming."

8 And so do I take it from that that after your
9 March 30, 1995 letter, Saskatchewan agreed and
01:04 10 then Mr. Milgaard was waiting to get, or his
11 counsel were waiting to get a report from
12 Dr. Blake who was tied up in other proceedings?

13 A Yes.

14 Q If we can then, the bottom here, it talks about:

01:05 15 "... William Charnetski, Special Advisor
16 with the office of the Minister of
17 Justice ...",

18 asking that you provide a copy to him. Do you
19 know what role, if any, he was playing in this
01:05 20 matter?

21 A No. I can only speculate that some
22 representations may have been made to people on
23 the political level in the department.

24 Q And he would have been part of the -- with the
01:05 25 Federal Minister's office; is that right?



1 A He probably would have been on the political
2 staff, although I'm not even sure about that.

3 Q Go to 268709, please. Sorry, let me just back up.
4 There is one -- if we can go to 230230, and this
01:06 5 is a letter from Mr. Rodin to Mr. Lockyer, but I
6 want the attachments, the next page, just go
7 through -- no, next page, please. I think this is
8 a letter from David to Hersh and Greg:

9 "Read this very carefully.

01:06 10 What is this?

11 Give them no room."

12 And then the next page is a letter from William
13 Charnetski to Mr. Milgaard on behalf of Allan
14 Rock, and I think this may be related to some
01:06 15 direct requests that were made by the Milgaard
16 family to Allan Rock. Were you aware of that at
17 the time? It may have been a letter. Here it
18 says:

19 "Four months ago, in a letter
01:06 20 to your counsel, Department of Justice
21 officials offered to have another DNA
22 test done. It has not been conducted
23 because you have not yet assented to the
24 proposed procedure. You have been
01:07 25 unwilling to agree notwithstanding the



1 fact that the provincial Crown has
2 readily agreed to the procedure.

3 If you indeed wish to
4 pursue this matter further, I would
01:07 5 suggest that you discuss it with your
6 counsel and have him reply in writing,
7 forthwith, to our letter of March 30,
8 1995."

9 Again, would you have been involved --

01:07 10 A Can I see the bottom of that page?

11 Q Yes.

12 A There might be something there which -- I guess
13 that's the one that actually went out to --

14 Q Yeah.

01:07 15 A Because on our copy there would have been an
16 indication as to who drafted it and I just don't
17 know offhand. I would have been asked where we
18 were at and what the appropriate response would be
19 and it's possible I drafted that, I don't know.

01:07 20 Q Do you have a recollection of being aware of
21 efforts being made, apparently to Allan Rock, to
22 have the DNA testing done or something to do with
23 the DNA testing?

24 A I don't think beyond that at that time.

01:07 25 Q Go to 268709, and this is Dr. Blake's letter to



1 you in response to your March 30th, 1995 letter;
2 is that correct?

3 A Yes.

4 Q And would this have been sort of the first
01:08 5 response then expressing concerns about the Dr.
6 Fourney proposal, or had you received them prior
7 orally or in some other way?

8 A No, this was the first indication of what
9 Dr. Blake was concerned about and what sort of
01:08 10 matters he felt should be dealt with.

11 Q And if we can go to page 711, and Dr. -- I'll just
12 go through parts of this. Dr. Blake takes issue I
13 think with what Dr. Fourney says about DQ Alpha,
14 saying:

01:08 15 "It is simply incorrect to assert that a
16 single test using these genes cannot be
17 employed with mixed specimens or that
18 they lack the power to discriminate
19 between individuals in the population."

01:09 20 And then goes on to talk about in response to
21 this, they talk about the PCR, and it says:

22 "This proposal, itself, is unwise for
23 the following reasons:"

24 And says:

01:09 25 "(ii) The recommendation of STR genetic



1 analyses over more established PCR based
2 genetic analyses is based on
3 misconceptions concerning the analysis
4 of sexual assault evidence in
01:09 5 general..."

6 And then the next paragraph:

7 "(iii) It denies Milgaard the
8 opportunity to fully participate in the
9 analysis of evidence in which he is the
01:09 10 real party of interest without being
11 overly burdensome to him. The costs of
12 his involvement in an analysis conducted
13 in Britain would be prohibitive."

14 And:

01:09 15 "(iv) By denying Milgaard's
16 participation, it places a cloud over
17 Crown's motivations and abilities should
18 no result or a result adverse to
19 Milgaard be obtained."

01:09 20 A We never said that we wouldn't allow for
21 participation by someone on behalf of Milgaard, he
22 was just assuming that was the case.

23 Q And then if we can scroll down, Dr. Blake says:

24 "The DQa/Polymarker system is the most
01:10 25 appropriate for the genetic analysis..."



1 And then goes on to cite his reasons and relies
2 on what was done in the *Guy Paul Morin* case; is
3 that correct?

4 A Yes.

01:10 5 Q And then the next page, paragraph 6 outlines a:
6 "...precedent for a wise approach to
7 forensic problems of this nature..."

8 And refers to the *Morin* case and the scientists
9 involved?

01:10 10 A Right.

11 Q And is it fair to say that Dr. Blake's position
12 was lookit, we just did this in *Morin*, let's do
13 the same thing here, we've got everything in
14 place?

01:10 15 A That's right, yes.

16 Q And I take it you were not prepared to do that?

17 A No, Dr. Fournery's advice was there were
18 significant differences in the evidential
19 materials that were available in *Morin* and here
01:10 20 and, moreover, that short tandem repeats was
21 scientifically preferable on every count.

22 Q Okay. If we can go to --

23 COMMISSIONER MacCALLUM: Sorry, Mr.

24 Fainstein, does the same level of disagreement
01:10 25 still prevail between so-called world experts --



1 A No.

2 COMMISSIONER MacCALLUM: -- in these
3 matters?

4 A No.

01:11 5 COMMISSIONER MacCALLUM: Thankfully.

6 A As I mentioned yesterday, the kit that's needed to
7 conduct DQ Alpha testing is no longer even being
8 produced.

9 COMMISSIONER MacCALLUM: No?

01:11 10 A Dr. Blake, who had had no experience with short
11 tandem repeats before he went to England uses
12 short tandem repeats in his lab and it is the
13 standard used in Canada, in England, throughout
14 Europe and by the Armed Forces pathology people in
01:11 15 the United States, by the FBI for their data bank
16 and so on. It is the acknowledged standard.

17 COMMISSIONER MacCALLUM: It's just a bit
18 frightening to me as a finder of fact to think
19 that I'm at the mercy of people like this in
01:11 20 producing evidence which is all but proof beyond
21 a reasonable doubt. Of course it's not, but in
22 the minds of a jury it approaches that.

23 A Yes.

24 BY MR. HODSON:

01:12 25 Q Then if we can go to page 716, this is Dr. Blake's



1 proposal and talks about all remaining relevant
2 evidence including previously extracted DNA,
3 etcetera, to be examined, and I take it from what
4 you said earlier, you did not have an issue with
01:12 5 that?

6 A Absolutely not.

7 Q And then here's where he brings in the sperm,
8 sperm extraction or checking for sperm first,
9 that's where this would be introduced?

01:12 10 A Yes.

11 Q And that's something that you agreed with at some
12 point; correct?

13 A Yes. When Dr. Fourney raised the question, I
14 wasn't quite sure what the appropriate response
01:12 15 would be, but before long I agreed that yes, that
16 should be checked for.

17 Q And finally he says:

18 "If more than one PCR based test is
19 possible, the Crown can follow the
01:12 20 Fourney recommendation with a portion of
21 the sample. If only one test is
22 possible, a joint PCR based DNA analysis
23 should be conducted employing the
24 combined DQa/Polymarker system in one
01:13 25 test."



1 And do I take it from that that what Dr. Blake is
2 saying is that I want DQ Alpha, not STR?

3 A That's right.

4 Q So then if we can go to --

01:13 5 A In my respectful view, it was for other than
6 scientific reasons.

7 Q I'm sorry?

8 A In my respectful view, it was for other than
9 scientific reasons.

01:13 10 Q And what are those, or what did you view those --

11 A Because of the wiggle room that it would provide
12 if there was a match.

13 Q Go to 268708, we'll just go through, so December
14 11th, 1995 you send off Dr. Blake's letter to Mr.
01:14 15 Beresh and to the province indicating you've
16 referred it to Dr. Fourney; correct?

17 A Yes.

18 Q To the lab?

19 A Yes.

01:14 20 Q And then go to 230508, and this is a fairly
21 lengthy letter from Dr. Fourney to you with a
22 number of attachments, and I plan to go through
23 parts of this, but am I correct that this would
24 have been Dr. Fourney's response to Dr. Blake's
01:14 25 report?



1 A Yes, it was a very detailed response prepared
2 after wide consultation with experts in the field.

3 Q It's my understanding from the letter, and we'll
4 go through parts of this, that Dr. Fourney
01:14 5 contacted a number of people in the DNA community
6 in the world to solicit their views of DQ Alpha
7 versus STR; is that correct?

8 A He did. Dr. Fourney himself is a world-class
9 scientist and I may have mentioned yesterday that
01:15 10 his involvement with the body which advises
11 congress on DNA matters, in fact, that he chaired
12 the PCR committee of that body, the technical
13 working group on DNA analysis methods and was well
14 respected and he had a great many contacts in the
01:15 15 field and so he canvassed all those people to see
16 what their view was of what was being put forward
17 by Dr. Blake.

18 Q And at the bottom here he says:

19 "We have taken Dr. Blake's
01:15 20 comments very seriously and in this
21 report I will endeavour to discuss some
22 of the rationale and the science behind
23 my original recommendation to use STR
24 analysis for this extremely challenging
01:15 25 case. It should be noted that in the



1 interest of justice where the true issue
2 is providing the most accurate and
3 current scientific advice to your
4 department we have engaged in
01:15 5 considerable consultation. These
6 experts included the following:"

7 So he lists them, Dr. Gill, Dr. Budowle,
8 Dr. Holland from the U.S. and the United Kingdom,
9 as well as the scientists used in the *Guy Paul*
01:16 10 *Morin* case, John Waye, Dr. Bing and Dr. Blake
11 were consulted, and then as well a number of
12 other scientists that he consulted, and so it
13 appears here he went and talked to the three
14 scientists who did the *Guy Paul Morin* case?

01:16 15 A Yes, he did.

16 Q And after consulting with them, was his conclusion
17 Dr. Fournery still to proceed with STR over DQ
18 Alpha?

19 A Yes, very clearly.

01:16 20 Q Go to the next page, it appears as well that Dr.
21 Fournery also had an extended phone conversation
22 with James Lockyer on March 13th, 1996. Is that
23 your understanding?

24 A Yes.

01:16 25 Q If we can go to the next page --



1 A If I might just add one thing, that even before
2 Dr. Blake's report was received the previous
3 December, that Dr. Fourney did have some
4 discussion with Dr. Blake about what we were
01:17 5 proposing.

6 Q And so --

7 A He didn't even wait for something formal and in
8 writing from Dr. Blake.

9 Q So that from the March 30, 1995 report, and before
01:17 10 Dr. Blake's December 4th, '95 reply, Dr. Fourney
11 would have called Dr. Blake; is that correct?

12 A I don't know if he saw him in person at a
13 conference or whether he talked to him on the
14 phone, but I do recall seeing an indication that
01:17 15 he had some discussion with him about the matter.

16 Q And then on the next page, it talks here about --
17 sorry, to the next page -- I won't go through all
18 this letter, but it's clear here that Dr. Fourney
19 is on the understanding:

01:17 20 "... that we both share the opinion that
21 all relevant approaches for DNA analysis
22 must be carefully considered with the
23 view that there may only be a single
24 opportunity to obtain DNA results even
01:18 25 with the enhanced sensitivity of the PCR



1 process?

2 And that appears to have been in everybody's
3 mind?

4 A Yes.

01:18 5 Q That there might only be one chance?

6 A Yes.

7 Q Then the next page, it looks as though Dr. Blake
8 raised the issue about whether the garments had
9 been properly checked and:

01:18 10 "It was acknowledged that the search and
11 identification of spermatozoa could be
12 carried out on all the exhibits.

13 However it was also pointed out that it
14 was unlikely that Patricia Alain would

01:18 15 have missed any potential semen stains."

16 And so it appears at this time the view was, at
17 least of Dr. Fourney, that we can do a further
18 test, but we think Patricia Alain found all the
19 potential semen stains, and would that have been
01:18 20 your understanding at the time?

21 A That's the understanding he conveyed to me and I
22 had no reason to doubt it.

23 Q And then a discussion here about this issue of
24 checking for spermatozoa and the net result would
01:19 25 be that 20 percent of the original semen sample



1 would be consumed in the search for spermatozoa
2 and he identifies the choice must be made between
3 consuming 20 percent of a limited sample in the
4 examination for sperm or leaving the entire
01:19 5 fraction for DNA testing. And would that
6 succinctly state what the issue was?

7 A Yes.

8 Q If you look for sperm, you lose 20 percent and you
9 might lose the ability to find DNA; if you don't
01:19 10 look for sperm, you may get a result that isn't as
11 valuable. Is that correct?

12 A Exactly.

13 Q And then scroll down, Dr. Fourney says:

14 "These are practical considerations ...

01:19 15 In addition as noted earlier, the
16 suggestion has been made that failure to
17 identify spermatozoa would conclude this
18 case. Perhaps we should reconsider the
19 need to identify spermatozoa."

01:20 20 So it looks to be a live issue at this time?

21 A Yes.

22 Q If we can go ahead to page 230517 -- I'm sorry,
23 518 -- and Dr. Fourney has gone through his review
24 of the DQ Alpha that Dr. Blake puts forward and
01:20 25 says:



1 "If DNA typing is successful
2 but fails to discriminate between the
3 victim and the assailant in a potential
4 mixed sample, we have gained little. I
01:20 5 am in agreement with Dr. Blake that an
6 exclusion is valid even if the
7 probability of discrimination may only
8 be one in 3000 people. However
9 discrimination dramatically decreases if
01:20 10 a mixed DNA profile is encountered
11 between the victim and the assailant ...
12 Taking into account the DQ ..."

13 Alpha:

14 "... profiles of David Milgaard and Gail
01:21 15 Miller, we note that they both share one
16 allele and that only 70% of the
17 Caucasian population could be excluded
18 as having contributed to either their
19 profiles or the potential genotypes
01:21 20 representative of their individual
21 alleles. This may actually lead to the
22 failure to exclude David Milgaard as a
23 potential donor of any DNA encountered
24 in the forensic evidence."

01:21 25 And on that point, is that due to the fact that



1 the DQ Alpha profiles had already been known for
2 Mr. Milgaard, Ms. Miller and Mr. Fisher and that
3 that was presenting a challenge to do DQ Alpha?

4 A Yes, that's right. In addition to the low
01:21 5 discriminating power of DQ Alpha generally, there
6 was a further complication in that one of the
7 alleles gave the same profile for David Milgaard
8 and Gail Miller, so that would have complicated
9 the analysis and reduced the discriminatory power
01:22 10 of the process.

11 Q Next page says:

12 "How important is

13 discrimination potential in this case?

14 A failure to exclude would certainly not
01:22 15 be in the interest of David Milgaard.

16 Nor would development of a relatively
17 undiscriminating allelic profile aid in
18 the investigation of other potential
19 sources of the DNA, as much as would the
01:22 20 results of a more discriminating test."

21 It says:

22 "Two things have puzzled me regarding
23 Dr. Blake's letter, and the approach
24 suggested in Morin:

01:22 25 1) why the most discriminating test is not



1 used to minimize the possibility of a
2 random match; and

3 2) why the defence does not want to
4 determine in advance the genetic
01:22 5 profiles of the main individuals
6 involved in this case.

7 DNA typing success without
8 discrimination could lead to a stalemate
9 and the evidence completely consumed."

01:22 10 And could you just elaborate on what that concern
11 was? I take it you shared that concern with Dr.
12 Fourney?

13 A Yes, I did. I mean, what scientific reason was
14 there for using a test that was less
01:22 15 discriminating than one, another one that was
16 available, and as for the second thing, you know,
17 there was a concern advanced, the possibility of
18 some hanky-panky in the lab and, you know, I leave
19 that for what it's worth. Our only interest in
01:23 20 determining the known profiles in advance was in
21 the event that there was almost nothing to deal
22 with, it would be worthwhile to look at the known
23 profiles and see if there was any shared result at
24 any particular location in the chromosomes coming
01:23 25 from the knowns. There was no point in using up



1 some of the questioned material to look for the
2 profile at that location.

3 Q And is the point that Dr. Fournery is making here
4 along the following lines, that we could find DNA
01:23 5 on DQ Alpha, we could identify it, we could do a
6 test and we could consume all the material and a
7 successful DNA match and still have disagreement
8 over what it means?

9 A Yes.

01:24 10 Q In other words, it's a stalemate, that an
11 exclusion doesn't really mean an exclusion and a
12 match doesn't really mean a match; is that a fair
13 way to put it?

14 A Yes.

01:24 15 Q Go to the next page.

16 A No, I have to qualify that in one respect. I
17 think everyone would agree that an exclusion is
18 absolute. If there's an exclusion, the profile
19 couldn't have come into question.

01:24 20 Q Sorry, thanks for correcting that.

21 A From the known.

22 Q So that an exclusion, though -- but I suppose an
23 exclusion -- if David Milgaard, if there was an
24 exclusion but that the stain that was identified
01:24 25 did not match someone else, I suppose that could



1 be argued by the authorities that it only excluded
2 David Milgaard as being the contributor of that
3 stain?

4 A That's right.

01:24 5 Q And that may not have come from the perpetrator?

6 A Yes.

7 Q In other words, that there was a scenario there
8 where an exclusion of David Milgaard, unless it
9 was with respect to identifying somebody else, it
01:24 10 might not be an exoneration; is that fair?

11 A Yes.

12 Q So if we can go to page 521, here are the comments
13 and Dr. Fournery's recommendation, he states that
14 with STR, for the reasons stated, strongly
01:25 15 suggests that the discriminating DNA test
16 procedure should be used, and this should include
17 other potential suspects as well as consenting
18 sexual partners that could be ruled out as donors
19 of any semen stains found on undergarments.

01:25 20 And then:

21 "DNA testing should first involve
22 quantitation of extracted samples. Once
23 the amount of DNA is known, a PCR
24 procedure and approach should be chosen
01:25 25 that offers the highest discrimination



1 ..."

2 and then goes on to say, I think, that, lookit,
3 if there's enough there after doing STR we can
4 then do DQ Alpha?

01:25 5 A Right.

6 Q And is that a bit of the compromise, that as long
7 as we can do STR, if there's some left and it's
8 not needed, you can do DQ Alpha; is that correct?

9 A Yes, if anyone felt that further testing was
01:26 10 necessary at that point.

11 Q And then goes on to say:

12 "The examination of spermatozoa on
13 exhibits generally has merit, and could
14 be carried out prior to DNA analysis in
01:26 15 any laboratory with a recognized
16 forensic DNA program. Logically the
17 advantage of knowing that spermatozoa
18 are present should be a better
19 indication of achieving success.
01:26 20 However, if DNA testing would be
21 performed regardless, of whether
22 spermatozoa are found, why consume
23 valuable evidence by conducting such a
24 test? This should be carefully
01:26 25 considered. The DQ and PM procedures



1 cannot determine gender, and therefore
2 spermatozoa identification is
3 advantageous when these tests are
4 performed. This is not the case with
01:26 5 ... STR ..."

6 And do I take it from that that, if you do DQ
7 Alpha, there may be more of a need to do the
8 spermatozoa test because you can't identify male
9 or female gender?

01:26 10 A That's right. (Inaudible) is part and parcel of
11 the STR analysis and that will tell you whether
12 the material comes from a male or a female.

13 Q And then the next page, Dr. Fourney continues to
14 say:

01:27 15 "The Forensic Science Service
16 is currently the most experienced
17 laboratory using STR technology ... and
18 it also has experience with DQ."

19 So I take it that was still the recommendation?

01:27 20 A Yes.

21 Q Then if we can go to the next page, and I think
22 this is a schedule, the discrimination potential
23 DQ Alpha testing, and I'm wondering if you, I
24 think you touched on this earlier, my
01:27 25 understanding is that in 1992 when Dr. Marsha



1 Eisenberg did her work in North Carolina in
2 anticipation of doing a DQ Alpha test, she
3 obtained the profiles or I guess the genotype of
4 Gail Miller, David Milgaard and Larry Fisher?

01:27 5 A That's right.

6 Q And can you comment on what is the significance of
7 this chart and the random match probability?

8 A Those are the population statistics that give you
9 a notion of what a match might signify and in the
01:28 10 cases of each of those three people, it was clear
11 that in a city of any size there would be many,
12 many people who would share the same profile and,
13 moreover, you can see from the second column
14 that -- where you see the three --

01:28 15 Q Yes.

16 A -- across from Gail Miller and the three across
17 from David Milgaard, they share the same profile
18 at one location, so that would complicate things
19 too and make it more difficult to deal with that
01:28 20 material.

21 Q So do I read this right, that one in 15 people
22 would have the same DQ Alpha profile as David
23 Milgaard?

24 A That's right.

01:28 25 Q And one in 14 for Larry Fisher?



1 A That's the statistical expectation.

2 Q So the next page -- so I suppose that's where it
3 would be if you had a match, for example, of Larry
4 Fisher, Larry Fisher could say, well, yeah, but
01:29 5 every one in 14 people as the same DQ Alpha
6 profile as I, therefore, it doesn't mean anything.

7 A It would be more than 14,000 people in Saskatoon
8 who would not be excluded.

9 Q And the next page identifies this issue with the
01:29 10 fact that Gail Miller shares the same allele
11 profile as David Milgaard, and then down at the
12 bottom, talks about that, and:

13 "The net result is that the
14 chance of excluding D. Milgaard as a
01:29 15 contributor of a potential mixed sample
16 using the DQ Alpha system would be ...
17 .73 or approximately 73%. The chance of
18 false inclusion due to a random match
19 would be the reciprocal or approximately
01:29 20 27%."

21 And would that be because David Milgaard shared
22 the same allele as Gail Miller, that there might
23 be a false match, or a risk of that?

24 A I think that may be taking everything into
01:29 25 consideration, you know, including the resolving



1 power of DQ Alpha and Polymarkers not being all
2 that great.

3 Q Okay. If we could then go to 230527. As part of
4 the gathering of information, Dr. Fournery talked
01:30 5 to John Wayne. Who did you understand John Wayne to
6 be and what was his involvement in the *Guy Paul*
7 *Morin* case?

8 A I'm not sure precisely what his involvement was,
9 but I understand he was one of the scientists who
01:30 10 was involved in the DNA work in that case.

11 Q I think he may have been a Crown scientist; does
12 that sound right?

13 A I believe you are right.

14 Q He's with McMaster University.

01:30 15 A Yes.

16 Q But in any event, you were familiar with who he
17 was?

18 A Yes.

19 Q And here Dr. Wayne says:

01:30 20 "I have given some thought to
21 the issues we discussed last month. As
22 I understand it, the lawyers
23 representing Milgaard would like to use
24 DQA1 and PM ..."

01:30 25 which is Polymarker:



1 "... to exonerate their client. This is
2 not at all surprising given the
3 similarities between the Milgaard case
4 and the Morin case. I will attempt to
01:30 5 summarize how things were handled in
6 Morin and relate this process to the
7 present matter. I have also enclosed
8 some material from Ed Blake in which he
9 described the circumstances in which he
01:31 10 would feel it appropriate to proceed
11 with DNA testing."

12 And then if we can go to the next page, I won't
13 go through all of this, but Dr. Wayne provides a
14 case history of the *Morin* case, and if we can go
01:31 15 to page 530 he says *Similarities Between the*
16 *Morin and Milgaard Cases*. He says:

17 "Like it or not, there are
18 many similarities between the Morin and
19 Milgaard cases. Both are sexual
01:31 20 assaults that occurred many years ago.
21 Both involve teams of defence lawyers
22 who have extreme contempt (justifiable
23 or not) for the way in which the police
24 and their affiliated forensic
01:31 25 laboratories have handled these cases.



1 Finally, both involve the Crown
2 assertion that the sperm cells from the
3 victims' underwear originated from their
4 murderers.

01:31 5 It is my understanding that
6 the Crown has proposed that the STR
7 testing be conducted at a neutral and
8 independent laboratory. ... The
9 advantage of STRs (as opposed to DQAl
01:31 10 ...) is increased discrimination and
11 ability to resolve mixed samples.

12 I can foresee considerable
13 difficulty trying to get Milgard's
14 lawyers to consent to STR testing at the
01:32 15 Home Office or any other laboratory.
16 First, I think the close historical
17 relationship between the RCMP and the
18 Home Office would not be viewed
19 favourably by Milgard's lawyers.

01:32 20 Second, I do not think that Milgard's
21 lawyers are seeking a test that has the
22 potential to generate
23 individual-specific profiles. In the
24 event of an inclusion, they would want
01:32 25 the opportunity to argue that there is a



1 reasonable possibility that someone else
2 could have contributed the sample. On
3 the other hand, they want the test to be
4 discriminating enough to exclude their
01:32 5 client if he truly is not the source of
6 the sperm cells. The DQAl& PM systems
7 are well suited for both situations.

8 With respect to mixed
9 samples, Milgard's expert (Dr. Blake)
01:32 10 will argue that his protocol for DQAl &
11 PM typing would be used only if the
12 results could be related back to intact
13 sperm cells. Careful microscopic
14 examination before and after
01:32 15 differential extraction would establish
16 that the 'male fraction' contains DNA
17 isolated from sperm cells and not from
18 the victim. Therefore, any mixture
19 would have to be the result of two or
01:33 20 more sperm donors. A mixed profile
21 would be at odds with the Crown theory
22 that Milgard alone is the rapist and
23 murderer. It would certainly not be in
24 the Milgard's interest to use a test
01:33 25 that could easily sort out mixtures from



multiple sources."

And then:

"In my opinion, it will be very difficult to get Milgard's lawyers to consent to anything but DQAl& PM testing conducted at CBRL in the presence of Ed Blake (and a Crown representative). Regardless of the exact strategy chosen to resolve this matter, it is important to clearly define the ground rules before any testing is done."

And then it goes on but let me just pause there.

Can you comment on this,

Mr. Fainstein, did you receive this information and what -- how did it factor into what you did with respect to the DNA testing?

A Umm, I received it in this form as an attachment to Dr. Fournery's April letter, and it confirmed my suspicion as to why we were wrangling about the kind of test that was to be done.

Q And can you -- in what way?

A Well he, like, he is suggesting here that the reason why they want that test is to give them the wiggle room that I have referred to if it were required.



1 Q And, after getting this information did -- can you
2 tell us whether you changed your view on whether
3 DQ Alpha or STR was the appropriate method to
4 proceed?

01:34 5 A No, I felt more strongly that -- I took heart from
6 Dr. Fournery's, you know, very comprehensive
7 discussions with respected colleagues in the field
8 and his response to all of the concerns that were
9 expressed by Dr. Blake.

01:34 10 Q Go to 032678. This is your April 22nd, 1996
11 letter to Mr. Lockyer, Mr. Beresh, and Murray
12 Brown and Eric Neufeld, and it appears that you
13 sent the entirety of Dr. Fournery's letter to them;
14 is that correct?

01:35 15 A Yes.

16 Q And then the next page you say:

"In accordance with Dr.

Fournery's recommendations, this

Department is prepared to proceed as

01:35 20 follows:",

21 again to have the DNA testing done at the U.K.;

22 two, to pay the fees to cover the reasonable fees

23 and expenses of Mr. Lockyer's expert; to have the

24 clothing examined -- and the next page -- to have

01:35 25 DNA from the questioned samples to be quantified:



1 "If no quantifiable DNA is found, that
2 ends the matter. If there is at least
3 one nanogram of material, STR testing is
4 to be done. If more material remains
01:36 5 after STR testing is to be done. If
6 more material remains after STR
7 multiplex testing is completed, DQ-Alpa
8 might also be tried."

9 So it appears, here, you are prepared to say "as
01:36 10 long as we can do our STR we'll let you do DQ
11 Alpha"; is that fair?

12 A Sure, I had no problem with that.

13 Q And then:

14 "Screening for spermatozoa is not to be
01:36 15 done if that might sacrifice some of the
16 target material needed for STR testing."

17 So that, in other words, that if it can be done
18 without sacrificing the sample you will consider
19 it; is that fair that was your position?

01:36 20 A Yeah. If it was found, when the material was
21 quantified, that there was very, very little to
22 work with, then --

23 Q Was that something you --

24 A -- I was concerned about Dr. Fournery's point.

01:36 25 Q Was that something you would let the scientists



1 doing the test decide, make a judgement call, or
2 were you still, at this point, not sure of --

3 A No, I think I had some responsibility in the
4 matter, and I ultimately agreed. Because I could
01:36 5 see value in doing it, certainly, and other things
6 being equal, it would have been great to relate
7 the sample directly to spermatozoa. My only
8 concern was about the effect of having consumed
9 part of the material --

01:37 10 Q If we could --

11 A -- in that process.

12 Q If we could scroll down, and I think you're
13 putting this forward as a proposal, that you are
14 prepared to do this at that time; correct?

01:37 15 A Yes.

16 Q And that you:

17 "... understand that DQ ...",

18 Alpha:

19 "... is a specialty of Dr. Blake's and
01:37 20 that he has no experience with STRs. If
21 Mr. Lockyer feels he requires someone
22 else to advise him in the circumstances,
23 Dr. Fournery can give him the names of a
24 half a dozen or more experts in the
01:37 25 field."



1 And I think you alluded to this, that Dr. Blake
2 was not involved in STR, correct?

3 A That's right.

4 Q And so were you prepared to have Mr. Lockyer
01:37 5 retain another DNA expert in STR and pay for that
6 person to go and observe the DNA testing?

7 A Yes. Not in addition to but instead, if that was
8 their preference, sure.

9 Q So that is April 22nd, 1996. If we can go to
01:38 10 026014. And this is Mr. Lockyer's letter back to
11 you, and it looks as though that you had a lengthy
12 discussion with him as well?

13 A Yes.

14 Q And then to page 016. Here's the reference at the
01:38 15 bottom about the blind testing and the order.
16 Mr. Lockyer advises why the defence does not want
17 to determine, in advance, the genetic profiles of
18 the main individuals involved in the case.

19 Mr. Lockyer writes:

01:38 20 "The answer is simple - to avoid a false
21 result, a particular concern if STRs are
22 used because they result in an
23 electronic read-out which, by
24 definition, can be manipulated (with the
25 best of intentions) electronically. In



1 the Morin case, a false result was
2 provided by a Crown scientist on a DQa
3 test in 1991. David Metzger from North
4 Carolina, purported to see two DQa
01:39 5 alleles in a 1991 test conducted by Dr.
6 Bing that, if correct, would have
7 included Mr. Morin. *Mr. Metzger at the*
8 *time already knew Mr. Morin's DQa*
9 *alleles."*

10 And so it appears that there was an issue that
11 arose in *Morin* that caused Mr. Lockyer and Dr.
12 Blake to put forward the idea that the genetic
13 profiles of Mr. Milgaard and Mr. Fisher should
14 not be known or identified to the scientists who
01:39 15 go look for the match; is that correct?

16 A That's right, and I had no problem with that, with
17 the one exception that if there was almost nothing
18 left to work with, it might be best to know what
19 those profiles were so that in the event that a
01:39 20 profile at any particular locus didn't give us any
21 meaningful information, we wouldn't consume any of
22 the questioned material looking for the profile at
23 that locus.

24 Q And then the next page, at the bottom, Mr. Lockyer
01:40 25 writes in response to part of Dr. Fournery's



1 report:

2 "... that STRs are 'the current focus of
3 major research and implementation
4 projects in North America'. Yet
01:40 5 DQa/polymarkers have already been the
6 subject of major research and have
7 already been implemented across North
8 America. What is the attraction of a
9 system being researched and implemented
01:40 10 as opposed to a system that has already
11 been researched and implemented in
12 sexual assault cases for several years?"

13 And would you agree with that, that at that time,
14 at least in Canada, DQ Alpha had been the type of
01:40 15 DNA testing that perhaps was more prevalent?

16 A I don't know how widely it had been used, it
17 wasn't being used -- well --

18 Q In the RCMP lab?

19 A I don't think they were using it. But, you know,
01:41 20 that's sort of beside the point.

21 I've adverted several times to
22 Dr. Fournery's very cautious approach to -- and his
23 unwillingness to see STRs used until they were
24 fully validated for Court use.

01:41 25 Q If we can go to the next page.



1 A But once that had been done, surely I didn't see a
2 problem using that, because it was a vastly
3 superior way to proceed.

4 Q So now the proposal coming back from Dr. Fourney
01:41 5 appears to be a little bit different. Number 1:

6 "Three scientists be chosen, one to
7 represent the interests of Mr. Milgaard,
8 one to represent the interests of the
9 Department of Justice, and one neutral
01:41 10 arbiter."

11 "We suggest that Dr. Wayne be asked to
12 play the role of neutral arbiter. He is
13 widely respected in his field. He can
14 hardly be considered biased in Mr.
01:41 15 Milgaard's favour because he was chosen
16 by the Crown to represent their
17 interests in the Morin case. Dr. Wayne
18 has already been consulted in Mr.
19 Milgaard's case so he has some
01:42 20 familiarity with it."

21 "The three scientists come together at a
22 mutually agreeable independent
23 laboratory (Dr. Wayne's lab seems to be
24 the best choice to me)."

25 What was your understanding of what Dr. Wayne had



1 by way of a lab to do this testing?

2 A Umm, I actually related that in a letter of July
3 15th, 1996, and I indicated to Mr. Lockyer that in
4 our view Dr. Wayne was not appropriate because he
01:42 5 has a clinical diagnostic lab and a small
6 consulting service, he does some paternity cases,
7 but I indicated that I was not aware that he does
8 any forensic work. Now, when you compare that
9 with the situation at the Forensic Science
01:42 10 Service, why would you prefer Dr. Wayne's lab.

11 Q And then down at the bottom the extraction of DNA
12 and:

13 "Once the DNA had been extracted, the
14 'scientists shall determine the method
01:42 15 of DNA testing most likely to produce a
16 result, and a location for the testing
17 to be carried out. Dr. Wayne will have
18 the ultimate power of decision. It is
19 understood that he can recommend one of
01:42 20 two forms of testing - DQa/polymarker or
21 STR (or both if there are sufficient
22 quantities) - and the location of the
23 testing."

24 And the next page.

01:43 25 A If I might just interject, I don't even know if



1 Dr. Wayne had had any involvement with STRs as of
2 that time, I mean it was a non-starter.

3 Q And then lastly:

4 "In the event of disagreement at any
01:43 5 time, we request the Chief Justice of
6 the Ontario Court of Appeal (or the
7 Chief Justice of the Supreme Court of
8 Canada) to assist and make
9 recommendations binding on the parties."

01:43 10 So what was your reaction to this proposal of
11 having I guess a panel of three scientists put
12 together, and let one arbitrate issues, and
13 failing that, go to the Court on a method to get
14 this done?

01:43 15 A In my view, it was completely unnecessary.

16 Q And why was that?

17 A Because the science showed very clearly how we
18 should proceed.

19 Q 230478 is your letter back to Mr. Lockyer. You
01:44 20 say:

21 "I discussed its contents
22 with Dr. Fournier. He first observed
23 that this was a *scientific* critique by a
24 lawyer! He then proceeded to detail
01:44 25 numerous errors in your analysis."



1 And, can you recall, what was the nature of that
2 discussion?

3 A With Dr. Fourney?

4 Q Yes?

01:44 5 A Well, when I received the letter from Mr. Lockyer
6 obviously I went back to Dr. Fourney and said
7 "what do you think of this, you know, is there
8 merit in what Mr. Lockyer is putting forward", and
9 so he gave me his critique.

01:44 10 Q And what did --

11 A And, I mean, at that point I just threw up my
12 hands and Dr. Fourney -- you know, because we were
13 at an impasse, it was, to my way of thinking it
14 was ludicrous, and Dr. Fourney suggested that,
01:44 15 "you know, why don't you have Mr. Lockyer come
16 and, you know, spend some time with me in my lab,
17 I'll educate him fully, I'll show him anything he
18 wants to see, we can get Dr. Blake on the phone,
19 you can be there and, you know, we'll work it
01:45 20 out".

21 Q Did you --

22 A So I thought this is a great idea, and so I
23 proposed that to Mr. Lockyer.

24 Q And did you have, I sensed that there was some
01:45 25 frustration on your part at this point, that --



1 A Absolutely.

2 Q -- matters were not getting closer to being
3 resolved?

4 A Yes.

01:45 5 Q So 107127. It appears June 25, 1996 Mr. Lockyer
6 writes back, he says:

7 "Dr. Fournery's offer ... is
8 generous."

9 and that:

01:45 10 I am sure that Dr. Blake would return
11 the compliment to you!"

12 And so was there a suggestion that you would go
13 to Dr. Blake's lab as well, or was that --

14 A Apparently.

01:45 15 Q And he says:

16 "The offer makes sense to me if ...

17 Dr. Blake is in telephone contact with
18 us",

19 and if:

01:45 20 "Dr. Wayne is also invited".

21 And, again, did you have any concerns about that?

22 A I didn't see the point in inviting Dr. Wayne, but I
23 don't remember that ever really being an issue.

24 Q 107124.

01:46 25 COMMISSIONER MacCALLUM: What was that last



1 --

2 MR. HODSON: I'm sorry?

3 COMMISSIONER MacCALLUM: That last doc. ID,
4 please?

01:46 5 MR. HODSON: That is 107127.

6 COMMISSIONER MacCALLUM: I'm just trying to
7 decide whether that was a facetious offer or a
8 genuine one?

9 A For me to see Dr. Blake?

01:46 10 COMMISSIONER MacCALLUM: Yes?

11 A Well, I don't know what he would have told me
12 about STRs --

13 COMMISSIONER MacCALLUM: Okay.

14 A -- that I hadn't already heard from Dr. Fournery.

01:46 15 BY MR. HODSON:

16 Q If we could go to 107124. And it goes on to talk
17 about arranging the meeting, I think later that
18 summer, and indicating that he'll:

19 "... prepare a draft agreement for the
01:47 20 first stage of the testing ...",

21 he then goes on to talk about:

22 "... the 'neutral' scientist ... have
23 the deciding vote in the event of a
24 difference of opinion."

01:47 25 And I take it, I think you've told us you were



1 not prepared to go down that path, were you, to
2 have an arbitration type of thing where a third
3 party would decide?

4 A Right.

01:47 5 Q Next, 147980. It's a newspaper article July 9,
6 1986, *Milgaard waits for DNA test, lawyers fight*
7 *over which exam to use.* It says:

8 "The lawyer for David
9 Milgaard and the federal Justice
01:47 10 Department remain at loggerheads over
11 the most appropriate type of DNA test to
12 use on a key piece of evidence.

13 The two sides cannot agree on
14 what type of test to use ..."

01:47 15 And then, over in the middle column, you are
16 quoted as saying:

17 "'We've wanted this done for
18 a long time, but it requires all parties
19 to agree. We're bending over backwards
01:48 20 to deal with this' ..."

21 And I take it that would have been your position
22 at the time or your view at the time?

23 A Absolutely.

24 Q If we can go to 107122. This is getting back to
01:48 25 Mr. Lockyer's July 3rd, '96 letter. You say:



1 "You indicated that you'd be
2 pleased to have Dr. Waye or Dr. Bing 'as
3 the third scientist'.

4 Let me state clearly my
01:48 5 understanding that such a person or
6 laboratory would be hired to do the work
7 and that your designate and mine would
8 essentially be observers, though they
9 would be free, of course, to give
01:48 10 advice.

11 In my view, Dr. Waye would
12 not be an appropriate choice. I
13 understand he has a clinical diagnostic
14 laboratory and a small consulting
01:48 15 service. He does some paternity cases,
16 but I am not aware that he does any
17 forensic work."

18 And then you go on to talk about Dr. Bing and
19 that:

20 "He agreed that the Forensic Science
21 Service in England would be a good lab
22 to do the work, as it has the most
23 experience with the test that we
24 propose."

01:49 25 Next page.



1 A Yes, this is the Dr. Bing that was involved in
2 Morin, and he was endorsing the course of action
3 that we recommended.

4 Q And then:

01:49 5 "Another North American lab
6 that Dr. Bing recommends is the Suffolk
7 County Crime Lab (Jack Ballantyne)."

8 And then you go on to say:

9 "As you know, my proposal was
01:49 10 based on Dr. Fourney's advice."
11 He has high standing.

12 "Dr. Fourney consulted widely
13 before preparing his report ... and I
14 believe he's given us the best approach.

01:49 15 My offer of April 22nd is
16 still available ..."

17 So I take it your position hasn't changed; --

18 A Credible.

19 Q -- is that right?

01:49 20 A Correct.

21 Q Then it appears, sometime in the fall of 1986
22 (sic), you did have a meeting with --

23 A '96.

24 Q -- '96, I'm sorry -- a meeting with Mr. Lockyer at
01:49 25 the RCMP lab?



1 A Yes, it was in October of 1996.

2 Q And what happened, just tell us generally, what
3 was the purpose of the meeting, what was
4 discussed, and was any headway made?

01:50 5 A Well I actually went to the airport to pick up
6 Mr. Lockyer and his associate and to convey them
7 to the laboratory, and not long after we left the
8 airport Mr. Lockyer said to me "we needn't bother
9 going to the lab, let's just go for coffee and
01:50 10 sort this out", and I said "well my understanding
11 was that you were coming here so that Dr. Fournery
12 could give you any information you required to
13 assess how we should proceed", and I said "he's
14 waiting for us and I'm going to take you there".

01:50 15 Q And did Dr. Fournery then make a presentation or
16 have a discussion with Mr. Lockyer?

17 A It was quite informal, we had a very pleasant time
18 together, and Dr. Blake was on the phone for a
19 part of it, and it was hopeful that we would be
01:50 20 able to advance, before long, to settling all of
21 the outstanding issues.

22 Q And do you recall whether there was any agreement
23 to do the STR at that meeting or whether there was
24 any agreement on any of the remaining contentious
01:51 25 points?



1 A I'd have to look at the documents that followed
2 that to see exactly.

3 Q Okay. If you could call up 231024.

4 A It seems to me we did make some progress as a
01:51 5 result of that, but that there was still some
6 discussion.

7 Q And if you can go to page 024. This is
8 Mr. Lockyer's letter saying:

9 "I was very pleased that we
01:51 10 were able to accomplish so much during
11 our October 4, 1996 meeting in Ottawa.
12 The enclosed 'Agreed Procedure' reflects
13 our discussion. You will note ... a
14 slight modification where paragraph 11
01:51 15 is concerned. It seems to me that it is
16 better left to the scientists to decide
17 the method of testing but bearing our
18 guidelines in mind."

19 If we can go to the next page, And I guess the
01:51 20 first thing, this is just between the feds and
21 David Milgaard, doesn't have Saskatchewan; is
22 that correct?

23 A Right.

24 Q And it appears to contemplate that -- the
01:52 25 designation of a scientist, and the two scientists



1 will designate a third scientist; is that right?

2 A Yes.

3 Q Or somehow --

4 A That's --

01:52 5 Q Was that --

6 A That's what he was proposing.

7 Q And were you agreeable to that?

8 A No.

9 Q And was that something that had been discussed at
01:52 10 your in-person meeting?

11 A I don't recall if that was discussed or not. It
12 was clear to me from some inquiries at some point
13 that an operation such as the Forensic Science
14 Service, or probably any other reputable lab,
01:52 15 would, if it were commissioned to do the work,
16 would expect to be the one to be doing the work
17 and wouldn't book what it might regard as any
18 interference by anyone else. It would be one
19 thing for someone else to be there to observe, to
01:52 20 make comments or whatever, but someone had to have
21 responsibility for the work. And if, for example,
22 it was certainly our advice from the Forensic
23 Science Service that, if they were commissioned to
24 do the testing, they would be the ones who did the
01:53 25 testing unless, in their wisdom, they thought it



1 would be worthwhile to enlist the assistance of
2 anyone else who was present.

3 Q Go to the next page. It looks as though it
4 contemplates that the three scientists shall
01:53 5 decide -- or go to the lab of an independent
6 scientist. And were you prepared to have an
7 agreement where you wouldn't know what lab it was
8 going to or who would do the test, that it would
9 be determined by some -- by the scientists
01:53 10 deciding?

11 A This was nonsense, in my view, it was more delay.

12 Q Next page. And here, as far as the type of DQ
13 Alpha versus STR, it appears that for guidelines,
14 if there's less than 1 milligram of sperm of DNA
01:54 15 retrieved DQ Alpha be applied, if more than 1
16 milligram STR applied. So DQR -- DQ Alpha first,
17 and STR following, so I take it you weren't any
18 closer on --

19 A No, actually that was fine, if you reverse it. If
01:54 20 there was enough for multiplex STR testing, then
21 STR would be applied.

22 Q Oh, I'm sorry.

23 A If there was more than one nanogram.

24 Q So --

01:54 25 A So, they were ultimately finally coming around, so



1 if there's at least one-billionth of a gram of
2 genetic material we'll do STRs.

3 Q And I --

4 A But if there's less, DQ Alpha can be done, because
01:54 5 it was more sensitive, it just wasn't as highly
6 discriminatory, more sensitive than the multiplex
7 STR.

8 Q So if there was less than one milligram of sperm
9 retrieved, you were prepared to have DQ Alpha done
01:54 10 ahead of STR?

11 A Yeah. Well --

12 Q In lieu of or?

13 A Well the negotiation was the only STR testing
14 could likely be done if there was less than one
01:54 15 nanogram would be not done multiplex testing,
16 where you look at six different locations in the
17 person's genetic makeup, but only a probe of the
18 profile at one or more single locations in
19 sequence until the material was used up. And if
01:55 20 there was that little to deal with, well, maybe it
21 was just as well to use DQ Alpha, because the
22 resolving power of an STR analysis at a single
23 location would also be significantly diminished
24 from what it is at six. I'm sorry, some of this
01:55 25 is very complicated --



1 Q No, that's fine.

2 A -- and I feel very badly that much of this is a
3 matter of first impression to people listening to
4 me.

01:55 5 Q Are you able to answer the difference between DQ
6 Alpha and DQ Blizzard, that's where I'm at,
7 Mr. Fainstein, so --

8 A I have no objection to the latter.

9 Q If we can go to 032491, please. It looks like Dr.
01:56 10 Ballantyne, this is where he comes in, and I'm
11 sorry to bring up a letter that you may not be
12 familiar with. But it looks like the province is
13 then trying to get the exhibits, because they are
14 going to get sent to Jack Ballantyne, and do I
01:56 15 take it from that that there had been -- actually,
16 let me call up 268750.

17 A What's the date of that again, please?

18 Q That is October 24th, 1996.

19 A Okay.

01:56 20 Q And this is a letter to the province about a draft
21 agreement, whether it's acceptable, and then talks
22 about Fred Dehm contacting the lab to get them.
23 If you go to the next page, it looks as though
24 there's been an agreement that Dr. Ballantyne is
01:56 25 gonna do it. Was that reached at one point, that



1 --

2 A Yes.

3 Q -- instead of the English lab --

4 A Dr. Ballantyne's lab would have been acceptable to
01:56 5 us. The Forensic Science Service was really the
6 leader in this particular work, but Dr. Ballantyne
7 certainly had the capability in his lab in Long
8 Island of doing STR testing, and was a very
9 reputable scientist. But unfortunately,
01:57 10 ultimately, Mr. Lockyer advised us later that Dr.
11 Ballantyne had said he was not available.

12 Q What was your understandings as to why Dr.
13 Ballantyne would be better than Forensic Science
14 Service; was there a concern about --

01:57 15 A Only because he was in North America, basically,
16 and it would be unnecessary to go overseas.

17 Q 173044. And this is your letter October 31, 1996,
18 to Mr. Lockyer. You say:

19 "We had agreed that the
01:57 20 scientific work could be done by the
21 Suffolk County Crime Lab ... but
22 unfortunately, Dr. Ballantyne told Dr.
23 Fournery today that his lab is unable to
24 take ..."

25 the:



1 "... case ..."

2 So you're back to suggesting in England?

3 A Right.

4 Q And then it says:

01:57 5 "You were going to sign your
6 draft as a representative of the
7 Association in Defence of the Wrongfully
8 Convicted, but surely you appreciate
9 that that Association has no standing in
01:58 10 this matter. I dealt with you from the
11 outset on the basis that you were
12 representing David Milgaard. My draft
13 has a signature line for counsel for
14 David Milgaard, which can be signed by
01:58 15 whoever indeed is acting in that
16 capacity, and is instructed by Mr.
17 Milgaard to do so."

18 What was the issue, if anything, there?

19 A Well, when he wanted to sign on behalf of AIDWYC,
01:58 20 my question was "whom are you representing".

21 Q And why did he want to sign on behalf of AIDWYC?

22 A You'd have to ask him that.

23 Q You didn't learn that?

24 A No. No.

01:58 25 Q Was there a concern that --



1 A Well, you know, I can make an assumption in that
2 regard, but so can anyone else.

3 Q Was he not able to sign on behalf of David
4 Milgaard; was there a concern there?

01:58 5 A My understanding was that he was representing
6 David Milgaard, and it was implicit that he had
7 authority to do so, but I don't know what was
8 happening between him and his client.

9 Q 230444. And this is November 21, 1996 -- go to
01:59 10 the next page -- and it looks like, now, Mr.
11 Lockyer is saying that he will agree to do it, he
12 says:

13 "In these circumstances, I am
14 reluctantly agreeing that the work be
01:59 15 conducted at the FSS in England. I
16 regret this because it will likely cause
17 further delay. It will also make Dr.
18 Blake's involvement very difficult
19 because of the huge distances that he
01:59 20 will have to travel."

21 And then goes on to talk about Dr. Wayne. So it
22 looks like the forensic lab has agreed to it by
23 this point; right?

24 A Yes.

01:59 25 Q And then the next issue is the role of Dr. Blake



1 and Dr. Fourney. He says:

2 "I will not agree to

3 'observer status' for Dr. Blake. In my
4 view, his personal 'hands-on'

01:59 5 participation is essential. He has
6 particular expertise in dealing with
7 difficult samples and in overcoming the
8 inhibitors which may otherwise prevent
9 the obtaining of results. He was given

02:00 10 most of the credit by Dr. Waye and Dr.
11 Bing for overcoming the inhibitors in
12 the Morin case. His expertise will be
13 wasted as a mere observer. Mr. Milgaard
14 wants to be assured that no effort or
02:00 15 expertise was spared in an attempt to
16 secure a result. His (and my)
17 confidence rests in Dr. Blake and his
18 skills."

19 And what was your reaction to that as far as Dr.
02:00 20 Blake being able to have hands-on involvement?

21 A I want to give Dr. Blake his due, he's certainly
22 regarded within the profession as a very able
23 scientist and very skillful at differential
24 extractions to avoid problems with mixed samples
02:00 25 and dealing with inhibitors and so forth. I



should mention in connection with inhibitors, that in Dr. Fournery's April 18th, I believe, '96 letter to me in response to Dr. Blake, he has a section in there talking about, dealing with inhibitors. Unfortunately, at the time Dr. Eisenberg ran into that difficulty in 1992, the scientists generally were stumped by that, but very soon thereafter they worked out what -- and there's a proper understanding of, you know, what the difficulty was and how to deal with it -- and Dr. Blake was certainly a scientist who had some success in overcoming inhibitors. I had no problem with any of that, I just didn't feel that as someone who was directly representing the Milgaards' interests he should have hands-on involvement in this testing, particularly if it happened to turn out that there was a match with Larry Fisher, that was one concern.

Another concern was, you know, I was struck by the fact that they were so insistent that they wanted Dr. Blake even though he didn't know anything about -- I shouldn't say he didn't know anything about, hadn't had any experience with short tandem repeats and so I made some inquiries on my own, and what I learned was



1 that Dr. Blake was considered to be extremely
2 capable, but that he had a tendency to become an
3 advocate for the party who was paying him.

4 Q And did that influence your thinking then as far
02:02 5 as whether or not you would agree to have him be a
6 hands-on participant?

7 A Absolutely.

8 Q Go to the next page, the other issue here is the
9 issue of testing for sperm and Mr. Lockyer writes:

02:02 10 "While the exclusion of Mr. Milgaard as
11 the donor of DNA isolated from any
12 epithelial cell fraction would not be as
13 conclusive as an exclusionary result
14 obtained from a sperm cell fraction, it
02:02 15 would, in my view, be evidence tending
16 to exonerate Mr. Milgaard. I would like
17 to know your position in this regard
18 prior to the testing of a purely
19 epithelial fraction."

02:03 20 And what was your understanding of that?

21 A If there was an exclusion and it wasn't even
22 associated with spermatozoa, we wouldn't have any
23 idea of where that material came from, and so I
24 don't think it would have proven anything, unless
02:03 25 Mr. Fisher's sample was also analysed and it was



1 found to match that material.

2 Q 230438, and go to the next page, this is your
3 November 26th, 1996 letter, indicates that you
4 have suggested that observer status for Dr. Blake
02:03 5 is insufficient and that his hands-on
6 participation is required.

7 "My draft does not preclude
8 involvement of either, or both, of our
9 designates in the work itself, but that
02:04 10 can only happen at the invitation of the
11 Forensic Science Service, which will
12 have the ultimate responsibility for the
13 results, and will be guided by the
14 direction that the best scientific
02:04 15 method be pursued, in the best possible
16 fashion."

17 So it appears here that if the Forensic Science
18 Service wants Dr. Blake involved and it's their
19 call, you are okay with that?

02:04 20 A It's their call. They were assuming
21 responsibility for the work with all that that
22 entailed.

23 Q And so here, that if the FSS deems that necessary
24 or desirable, you are okay with it?

02:04 25 A Yes.



1 Q Top of the next page, you say:

2 "As to the second point ... I
3 am surprised that you '... continue to
4 insist that in the event that no sperm
02:04 5 fraction is retrieved from any sample,
6 the three scientists shall consult with
7 us as to whether any further testing
8 should be performed.'

9 It sometimes happens that an
02:04 10 old sample contains DNA from sperm, but
11 that the sperm themselves are no longer
12 intact, cannot be identified
13 microscopically, and their DNA can't be
14 differentially extracted ... The DNA is
02:05 15 still there, and it is still possible to
16 secure its profile. A match with
17 Milgaard or Fisher would be persuasive,
18 but an exclusion in these circumstances
19 would not be meaningful ..."

02:05 20 And I think you've talked about that before?

21 A Right.

22 Q And that:

23 "Milgaard, if guilty, would
24 have nothing to gain if testing
02:05 25 proceeded under this scenario, because



1 the most he could hope for would be a
2 meaningless exclusion, and there might
3 well be a match instead. If he is
4 innocent, however, as he suggests, he
02:05 5 would have nothing to fear from the
6 test. It is incompatible with his
7 assertion of innocence that your client
8 might seek to preclude us from
9 conducting the test."

02:05 10 And can you explain that?

11 A If you are innocent, your profile, and a very
12 highly discriminating technique is used, your
13 profile simply isn't going to be there, so you are
14 not going to be implicated by the test, so why
02:05 15 would you have any problem with that. I should
16 say I did very slightly overstate the situation at
17 the beginning of that paragraph where I said,
18 "Milgaard, if guilty, would have nothing to gain
19 if testing proceeded under this scenario, because
02:06 20 the most he could hope for would be a meaningless
21 exclusion," and I just wasn't thinking in terms of
22 the possibility at that point of Fisher's profile
23 also being derived and a match with Fisher which
24 of course would be very significant.

02:06 25 Q And then you say here:



1 "The public interest in this
2 matter requires me to insist on our
3 agreement, in advance, that if DNA is
4 found in a questioned sample, its
02:06 5 profile be established and compared with
6 relevant knowns, including Milgaard's,
7 whether or not it can be related to
8 sperm."

9 A Yes.

02:06 10 Q I think that follows that you weren't prepared to
11 move from that?

12 A No.

13 Q And then you say:

14 "I hope your client will be
02:06 15 prepared to proceed on the basis I've
16 suggested."

17 And so this has an attached agreement that was
18 sent off; correct?

19 A Yes.

02:06 20 Q 107056, it appears -- this is Mr. Lockyer's
21 letter, January 24, '97, role of Dr. Blake, he
22 says:

23 "I remain troubled by your position on
24 the status ... and must continue to
02:07 25 insist that Dr. Blake not be assigned



1 the role of an "observer". I appreciate
2 that Dr. Fournery may view himself as on
3 observer if he were to be a designate,
4 but Dr. Blake is a "hands-on" scientist
02:07 5 who will provide necessary practical
6 skills in ensuring the best possible
7 chance that DNA results will be obtained
8 from the unknown samples."

9 And I take it you were not persuaded by that
02:07 10 position?

11 A No, not at all. I mean, if he were there as an
12 observer and the Forensic Science Service person
13 was proposing to proceed in a certain way and
14 Dr. Blake felt there was a better way to proceed
02:07 15 in differential extraction or dealing with
16 inhibitors or whatever, he could make that
17 comment, and if they accepted it, that would be
18 great, and if they didn't, you know, he could
19 certainly note his objection and they would know
02:08 20 that they would be responsible for whatever the
21 consequences might be if they didn't follow any
22 cogent advice that came from him.

23 Q And then next, *Further Testing in the Event that*
24 *No Sperm is Detected.*

02:08 25 Again, the next page, it



1 appears that Mr. Lockyer says:

2 "...I agree to unconditional DNA testing
3 of any non-sperm fraction which contains
4 sufficient DNA..."

02:08 5 So it appears he agreed with your position at
6 this time?

7 A Yeah, we were finally coming around to an
8 agreement.

9 Q And then the next page, I think a few other points
02:08 10 and some details of the agreement; is that
11 correct, that were being negotiated over?

12 A Yes.

13 Q And then page 059, *Conclusion*:

14 "May I suggest that you telephone me if
02:08 15 problems still remain. I would
16 recommend that Scott Hutchison of the
17 Attorney-General's Office in Toronto
18 informally arbitrate on any remaining
19 differences that we may have. I have
02:09 20 not approached him on this but he was
21 one of the Crown-Attorneys on the Morin
22 appeal who represented the
23 Attorney-General's interests on the DNA
24 testing, and was both knowledgeable and
02:09 25 fair in his dealings with me."



1 What were your thoughts about having Mr.
2 Hutchison or someone else arbitrate differences
3 remaining between you and Mr. Lockyer?

02:09 4 A My view was that it was completely unnecessary
5 because what we were insisting upon was clearly
6 the best way to proceed and that was dictated
7 solely by the science and our concern to get the
8 best possible information, and if that was Mr.
9 Milgaard's and his representatives' interests, I
02:09 10 couldn't fathom why they wouldn't have agreed.

11 Q And then next 268728, this is your letter to Mr.
12 Beresh with the agreements, and I think, I haven't
13 shown you all the documents, but is it correct
14 that you would have kept him apprised and sent him
02:10 15 information?

16 A Yes, I did from time to time. I was still hopeful
17 at some point he would come on board.

18 Q Go to 289574, February 20th, 1997, it looks like
19 the issue of Dr. Blake's involvement is still an
02:10 20 issue?

21 A Yes.

22 Q And you say:

23 "My stance comports with Chief Justice
24 Dubin's Order of October 28, 1994 in the
02:10 25 Morin case..."



1 Your draft does not preclude direct involvement,
2 but that would be for the Forensic Science
3 Service to determine, and again that position was
4 considered?

5 A That's right.

6 Q And then as well:

7 "It has also occurred to me that if (for
8 the sake of argument) Larry Fisher
9 committed the murder of Gail Miller, and
02:10 10 a match with his DNA emerged from
11 testing, the hands-on involvement of a
12 scientist for a party adverse in
13 interest to him, might complicate a
14 later prosecution."

02:11 15 I think you commented on that earlier?

16 A Right.

17 Q 289563, this is a March 21, 1997 letter to
18 Mr. Lockyer from you, and I think the agreement is
19 defined and you are indicating that you should, as
02:11 20 a matter of propriety and courtesy, advise Chief
21 Justice Lamer; is that correct?

22 A That's right, because we had been doing all this
23 without any recourse to the Supreme Court and I
24 felt that since it seemed we were about to
02:11 25 conclude our arrangements, that we should let the



1 court know what we had been doing, and I did write
2 to the Chief Justice with Mr. Lockyer's
3 concurrence.

02:11 4 COMMISSIONER MacCALLUM: Why did you do
5 think that --

6 A Pardon?

7 COMMISSIONER MacCALLUM: Why did you think
8 that, wasn't the court functus by this point?

02:12 9 A As a courtesy, because it would be a matter of
10 continuing interest to the court and I did
11 indicate that we wanted to have this possibility
12 down the road.

13 COMMISSIONER MacCALLUM: Oh, I see.

02:12 14 A So I just wanted to say to him -- I just felt, you
15 know, he shouldn't have to pick up a newspaper one
16 day and learn for the first time that this was
17 going on.

18 Q And just for the record, 230389, and I think this
19 is the -- go to the next page -- this is the
02:12 20 information, or your letter to the lab in England
21 of March 21, 1997?

22 A Yes.

23 Q And then to 230392 is their reply, and this is the
24 part that was added to the agreement; correct?

02:12 25 A That's right.



1 Q 107044 --

2 A They were not interested in doing DQ Alpha
3 Polymarker under any circumstances at that point.

4 Q I was going to say, I think that then got taken
02:13 5 out of the agreement wasn't it?

6 A That's right.

7 Q Because the English lab said they would not do it?

8 A Right.

9 Q And here's Mr. Lockyer's letter of April 16th,
02:13 10 1997 saying:

11 "It seems a shame that FSS does not
12 apparently do DQ Alpha or Polymarker
13 work, but if these new proposals can be
14 shown by the FSS to be more likely to
02:13 15 yield discriminating results, I suppose
16 it will not matter. It would be
17 unfortunate if a DNA sample had to be
18 brought back across the Atlantic for
19 further testing. Dr. Blake presently
02:13 20 remains available."

21 So it looks like the English lab said no DQ Alpha
22 and the suggestion was that if it doesn't -- if
23 STR doesn't work, that maybe he'll try DQ Alpha
24 if there's anything left; is that correct?

02:13 25 A Yes, and the Forensic Science Service said that



1 instead of DQ Alpha, you know, if we get less than
2 one nanogram, there are some other possibilities
3 that we're prepared to apply, but not DQ Alpha.

4 Q And then it looks like the next couple of months
02:14 5 or weeks were sending the agreements around to get
6 signed?

7 A Right.

8 Q And that ultimately -- I'll see if I can find it
9 here -- 268754 is a letter of May 1, 1997 from
02:14 10 Mr. -- from you to the Chief Justice advising that
11 the testing would be done?

12 A Right.

13 Q And that was as you alluded to earlier?

14 A Yes. I also wanted to recall to his attention the
02:14 15 basis upon which we had secured that material in
16 the first place so that if, you know, he wanted to
17 have a look at that, it would be an attachment to
18 the letter instead of something that was in a
19 voluminous file.

02:14 20 Q Go to 107009, this is a press release May 20th,
21 1997, and I think once the agreement was
22 announced, this matter became public; is that
23 correct?

24 A Yes.

02:15 25 Q Did you make it public or --



1 A No.

2 Q And this press release, and I think similar
3 reports may well be in some media:

4 "This attempt of DNA typing comes about
02:15 5 at the instigation of David Milgaard
6 himself. On January 21, 1995, the day
7 that Guy Paul Morin's exoneration by DNA
8 testing was first reported in the
9 national media, David Milgaard retained
02:15 10 counsel for the explicit purpose of
11 negotiating testing of the semen samples
12 retrieved from Ms. Miller's panties."

13 Do you accept that as being accurate?

14 A Yes. Well, you know, except that of course I was
02:15 15 hoping all along that it could be done at my
16 instance and I was taking steps to keep abreast of
17 developments and to ensure that when the testing
18 could be done it would be done, so that even if I
19 hadn't heard from Mr. Rodin, it's very likely, in
02:16 20 my view, that very close to that time I would have
21 spoken again with Dr. Fournery and he might well
22 have said, yeah, I think we can finally do it now.

23 Q Go to 263493, please, and go to page 494. This is
24 a letter from you June 23, 1997 to Mr. Beresh and
02:16 25 I think this is where you talk about the fact that



1 you are going to use his blood sample obtained in
2 1992 whether he agrees or not; correct?

3 A Right.

4 Q And then 032390 is Mr. Beresh's letter back of
02:17 5 June 24, 1997 saying:

6 "Should you proceed in the fashion
7 suggested..."

8 By you,

9 "...you will not only imperil any
02:17 10 subsequent use of the results of the DNA
11 but will also subject the Department to
12 potential civil action."

13 I take it that didn't stop you from using the
14 sample?

02:17 15 A No. It got me to wonder what subsequent use of
16 the DNA testing he was referring to.

17 Q It's my understanding, a quick check I did at the
18 lunch hour at the Larry Fisher trial, that after
19 the results were obtained in England, that the
02:17 20 RCMP I believe seized, did a DNA warrant, seized
21 more bodily fluids from Larry Fisher and used that
22 new substance to do the DNA match. That was
23 presented at trial --

24 A That's right.

02:17 25 Q -- and that Mr. Beresh in fact submitted the 1992



1 samples with a view to I think trying to establish
2 contamination. Does that sound right? That's
3 reflected in the Court of Appeal judgment.

4 A Right.

02:17 5 Q If you don't know --

6 A Yeah. I testified at Larry Fisher's trial about
7 my involvement here and why I used that sample,
8 but I just wanted to add that I had suggested to
9 Saskatchewan that since there was some controversy
02:18 10 about my having sent Fisher's sample that was
11 given within the context of the reference for this
12 testing in England in 1997, that if indeed
13 Milgaard was excluded by the test, they should go
14 on to secure a conventional DNA warrant which they
02:18 15 could have because at that point they would have
16 reasonable and probable grounds to believe that
17 Larry Fisher was the guilty party.

18 Q And then as far as the testing itself, if we can
19 go to 231438, I take it that you were involved in
02:18 20 discussions with counsel for, or with the lab in
21 England when the results came down. Can you tell
22 us just generally what happened there? You got
23 the results and I believe Mr. Brown said you
24 called him; is that correct?

02:19 25 A Probably. I don't have a discrete recollection of



1 that, but the news got out very quickly. In fact,
2 I was somewhat discomforted by the way it emerged.

3 Q And why was that?

4 A Because my first concern then was that Larry
02:19 5 Fisher had to be arrested and of course Milgaard's
6 people knew at the same time I knew what the
7 results were because Dr. White was in England and
8 I called Mr. Wolch who I believe was in Toronto at
9 the time and they had already arranged a media
02:19 10 conference for a short time thereafter and I said
11 can you not hold off for a day or two so that
12 Fisher can be picked up by the police, and the
13 next thing I knew it was all over the airwaves.

14 MR. HODSON: Mr. Commissioner, I think I am
02:19 15 either completed or near completion and a couple
16 of things, I wouldn't mind an opportunity just to
17 talk to Ms. Cox and Mr. Frayer for a moment, but
18 Mr. Wolch I know is, intends to examine Mr.
19 Fainstein for about 10 or 15 minutes or shorter
02:20 20 and has a plane to catch and I'm wondering if --
21 shortly -- whether if -- and the only thing is, I
22 want to just go through my notes at the break. I
23 may have some additional questions when we get
24 back, but unless nobody objects, maybe Ms. Cox or
02:20 25 Mr. Frayer, do you have any concern, that if Mr.



1 Wolch be allowed now and then -- maybe others do,
2 but --

3 COMMISSIONER MacCALLUM: That's fine with
4 me, yes.

02:20 5 BY MR. WOLCH:

6 Q Thank you, Mr. Commissioner.

7 Mr. Fainstein, I'm Hersh
8 Wolch, as you know, counsel for --

9 A Very well.

02:20 10 Q -- David Milgaard. Just on that last point about
11 allowing for the Fisher arrest, that took several
12 days in any event, there was some reluctance?

13 A Yes, it did. I understand that the authorities in
14 Saskatchewan were kind of slow to react to the
02:21 15 news.

16 Q Right. Just on the DNA in general, I recognize, I
17 think, two areas that you had some concern with,
18 one of which -- you used the word hanky-panky I
19 think. Am I correct, after Mr. Hodson questioned
02:21 20 you a little further, that the concern was a
21 concern based on a previous difficulty in the
22 Morin case where a Crown scientist formed an
23 opinion that may have been influenced by knowing
24 the known result?

02:21 25 A Yes, apparently, and I didn't know about that



1 until that was brought to my attention.

2 Q So maybe --

3 A And, you know, I understood where that was coming
4 from.

02:21 5 Q So maybe rather than hanky-panky, it might have
6 been a legitimate concern?

7 A Yes, you know, anything is possible.

8 Q Right.

9 A And you want to safeguard against any untoward
02:22 10 results.

11 Q And just on that point, although I think the term
12 the scientists used later was there was buckets of
13 sample, --

14 A Uh-huh.

02:22 15 Q -- you and Mr. Lockyer were of the view it was a
16 very limited sample and this is it, we have one
17 shot and it could be over?

18 A That's what we thought, yes.

19 Q And when you say that one side seems to be
02:22 20 suggesting, and maybe side is the wrong word, but
21 one side seems to be suggesting a method that's
22 very, very specific in result and the other side
23 is suggesting a less specific one and therefore
24 want wiggle room, I'm going to suggest to you you
02:23 25 are leaving out the difficulty as to which one is



1 more likely to get a result. Do you follow what
2 I'm saying?

3 A Yes, but I disagree with that.

4 Q But it could be a legitimately held view that even
02:23 5 though one is more precise, the other one is more
6 likely to render a result? Rightly or wrongly,
7 that's a view that --

8 A No, and I think that was refuted when Dr. Fournery
9 consulted widely and people who had experience
02:23 10 with both STRs and DQ Alphas said that in these
11 particular circumstances there was no question but
12 that short tandem repeats was the method of
13 choice.

14 Q But that was one of the considerations I'm
02:23 15 suggesting, rather than wiggle room --

16 A It wasn't a valid one in my view.

17 Q It may not have been valid, but it may have been
18 what they were thinking at the time. This is
19 pretty early in DNA.

02:23 20 A I don't know what other people were thinking.

21 Q And you have Dr. Blake with an expertise in
22 extracting for a particular test and it's a choice
23 perhaps in the --

24 A There were some elements, if I may, that would be
02:24 25 used regardless of the test, the differential



1 extraction and dealing with inhibition that might
2 be affecting the PCR process and so on, and yes, I
3 certainly acknowledged that he was considered to
4 have some talents in that area.

02:24 5 Q So it may be --

6 A But I had no reason to think that the Forensic
7 Science Service was any less capable of doing
8 that.

9 Q Right, but it may be from the other point of view
02:24 10 it appeared to be a choice between one method
11 which would be more precise but less chance of
12 succeeding than the other one that will be less
13 precise but better chance of succeeding?

14 A I disagree with that characterization.

02:24 15 Q No, but that would be the thinking that was being
16 advanced to you? I'm not saying it's legitimate
17 or right.

18 A It may be that a non-scientist had that view, but
19 I don't think a scientist who --

02:24 20 COMMISSIONER MacCALLUM: Was the
21 thinking -- I heard you say that might have been
22 the thinking which was advanced to you. Was that
23 given to you as a reason, sir?

24 A Not that I recall.

02:25 25 COMMISSIONER MacCALLUM: No.



1 BY MR. WOLCH:

2 Q Was it not of interest as to getting the best
3 method to extract something?

4 A Absolutely, but, you see, these methods are used
02:25 5 regardless of which of these techniques is used.
6 You are going to do the differential extraction
7 regardless of whether you subject the materials to
8 DQ Alpha or short tandem repeats and you are going
9 to have to deal with inhibition because PCR is
02:25 10 part of each of those processes, so that begged
11 the question of which of those two tests should be
12 applied.

13 Q If you thought it was wiggle room, did you ever
14 put that forward to Dr. Blake or Mr. Lockyer, hey,
02:25 15 I question your motives?

16 A I wasn't born yesterday and neither were they.

17 Q Sorry?

18 A I wasn't born yesterday and neither were they. It
19 was perfectly apparent.

02:25 20 Q No, no.

21 A And I certainly take heart from Dr. Wayne having
22 the same view exactly.

23 Q Mr. Fainstein, that wasn't my question. Did you
24 ever question their motives? It's a pretty
02:26 25 serious thing to say Dr. Blake is trying to get a



1 lesser result for wiggle room. I'm asking you if
2 you ever, ever put it forward to them and say --

3 A I don't think I did. I don't think I did
4 directly, no.

02:26 5 Q Or indirectly, you never put it forward saying --

6 A Probably not.

7 Q You never questioned the motives to give them a
8 chance to say no, no, here's our reason; correct?
9 Is that right?

02:26 10 A I think I had the right take on it.

11 Q That wasn't my question.

12 A Because I can't fathom any scientific reason for
13 the position they were taking.

14 Q Mr. Fainstein, we'll go much quicker if I simply
02:26 15 ask you --

16 COMMISSIONER MacCALLUM: Well, I think he
17 answered your question.

18 A I have answered your question.

19 MR. WOLCH: He didn't do it.

02:26 20 COMMISSIONER MacCALLUM: No, he hadn't put
21 it forward to him.

22 MR. WOLCH: That's all I wanted.

23 COMMISSIONER MacCALLUM: That's what he
24 said.

02:26 25 MR. WOLCH: That was my question.



1 BY MR. WOLCH:

2 Q And as far as DNA testing is concerned, it was
3 initially instigated by the Milgaards through Dr.
4 Ferris?

02:26 5 A Yes.

6 Q So the introduction of DNA into the reference,
7 into the process was initiated by the Milgaards?

8 A That's correct.

9 Q And after the Supreme Court, the initiation for
02:27 10 DNA testing was by the Milgaards?

11 A Well, certainly Mr. Rodin's approach precipitated
12 all that followed and resulted in the --

13 Q Right.

14 A -- you know, in the ultimate testing, but, you
02:27 15 know, with the greatest of respect, I think it's
16 perfectly clear from the record how anxious I was
17 to see this done and --

18 Q Did you write a letter?

19 A I certainly believed wholeheartedly that it would
02:27 20 have been done at my instance if I hadn't heard
21 from Mr. Rodin.

22 Q Did you write a letter to the Milgaards keeping
23 them abreast, or to anybody on their behalf saying
24 this is what we're doing or we're waiting or
02:27 25 anything like that?



1 A No, but between 1992 and January of 1995 I didn't
2 hear anything from anybody representing the
3 Milgaards saying they wanted this done.

4 Q I asked you a question. Did you contact anybody?

02:28 5 A No.

6 Q The first contact was initiated by Mr. Rodin
7 spurred on by the *Morin* result; correct?

8 A Yes.

9 Q And the Milgaards went to the trouble of hiring
02:28 10 Mr. Lockyer who appeared to have expertise from
11 the *Morin* case in this rather new area?

12 A That's right.

13 Q Right. And this was an area, the scientific area
14 in this particular case had a pretty bad history;
02:28 15 correct, a difficult history if you go back to the
16 beginning, '69, with Dr. Emson, Mr. Paynter?

17 A Yes, absolutely.

18 Q I mean, the history of science in this case is --

19 A Sir, the fact that the vaginal aspirate was
02:28 20 discarded by the pathologist and so on --

21 Q Yeah.

22 A -- I mean, these are all complications.

23 Q And that's not even knowing about the sample that
24 was missed before.

02:28 25 A Right, but that was, of course, long before DNA



1 was being used.

2 Q Right. But at the end of the day you see a desire
3 to be very careful?

4 A Yes.

02:29 5 COMMISSIONER MacCALLUM: I don't know if
6 you, on the basis of the evidence we've heard,
7 that you should be lumping Dr. Paynter in with
8 that.

9 MR. WOLCH: Mr. Paynter.

10 COMMISSIONER MacCALLUM: Mr. Paynter, yeah.

11 MR. WOLCH: It was an error.

12 COMMISSIONER MacCALLUM: I just wanted to
13 head off cross-examination, but if you insist,
14 then --

02:29 15 MR. WOLCH: Oh, no, I'll skip over that.

16 A Well, I can maybe assist. I mean, Staff Sergeant
17 Paynter looked at the clothing within a couple of
18 months I think after Gail Miller died and he
19 didn't find any stains on the dress at that time.

02:29 20 COMMISSIONER MacCALLUM: Is that what you
21 meant?

22 MR. WOLCH: That, yes.

23 A So, I mean, it was another unfortunate event.

24 COMMISSIONER MacCALLUM: Okay.

02:29 25 MR. WOLCH: If I may say, Mr. Commissioner,



1 I'm not suggesting any bad motive of people,
2 mistakes are mistakes, they happen.

3 COMMISSIONER MacCALLUM: I just wanted a
4 little precision because we know that Dr. Emson
02:29 5 threw out the aspirate, that's been mentioned,
6 but it hadn't been mentioned where Paynter went
7 wrong, if he did.

8 MR. WOLCH: Right. I thank you.

9 A But again, of course, he wasn't looking for it in
02:30 10 the context of something as wonderful as DNA.

11 BY MR. WOLCH:

12 Q No, I appreciate that.

13 A He was looking at it for the very limited
14 serological results he could get.

02:30 15 Q I appreciate that. Now, I want to turn briefly to
16 the Supreme Court reference. When you commenced
17 your evidence you immediately drew the
18 Commission's attention to one particular paragraph
19 in the reference. You recall that?

02:30 20 A Yes.

21 Q You might appreciate that others may see other
22 paragraphs as more important or may wish to look
23 at other parts of it?

24 A Well, I saw some transcript from last June where
02:30 25 Mrs. Milgaard was on the stand and you were using



1 her as the foil to suggest that the Supreme Court
2 was of the view that Mr. Milgaard must be innocent
3 and the substantiation of that was in their
4 suggestion that he should be retried, but that if
02:31 5 he was convicted, he should be released, and at
6 that point the Commissioner interjected that,
7 well, shouldn't someone who serves so much time
8 have a break, what's the problem with that. Does
9 that speak to his guilt or innocence or does it
02:31 10 beg the question.

11 Q So your -- you gave that comment because of what
12 you read and --

13 A Yeah, I read that, and I felt that, --

14 Q You had to add?

02:31 15 A -- you know, for your own purposes you were
16 disregarding that very clear statement of the
17 Court's opinion.

18 Q The Supreme Court, we heard from Murray Brown, had
19 indicated, through the Chief Justice, that they
02:31 20 were a little dismayed at the Minister dumping
21 this problem on their lap; do you recall that?

22 A No, I don't at all, and I consulted with
23 Mr. Frater and he didn't remember that. You know,
24 I remember them having different reactions to what
02:31 25 they were faced with at various times, this was



1 certainly a hot potato, and it wasn't always a
2 source of pleasure to the Court that it had been
3 given this responsibility. Umm --

4 Q So the Court also knew that --

02:32 5 A Oh, I'm sorry, there was one thing I wanted to
6 add. That -- I assume the suggestion here was
7 that if that statement indeed was made, that it
8 was made very early on, before the Court would
9 have been apprised of just how complicated and
02:32 10 detailed this matter was, and how difficult it
11 would be to sort through everything.

12 Q Well, now, the Court was also aware, through
13 yourself, that there might be some future
14 scientific evidence that could positively solve
02:32 15 the --

16 A Yes, they were.

17 Q -- solve it. Would you think that might affect
18 their choice because, if you say "this man is
19 innocent" and DNA comes out later on and the other
02:32 20 way, the Court is made to look foolish?

21 A Umm, certainly, it's one of the things that they
22 may have had in mind. I think they all took their
23 responsibilities very seriously --

24 Q Well, obviously.

02:33 25 A -- and they were being, you know, as honest as



1 they could be in the advice that they were giving
2 to --

3 Q At the end of the day --

4 A -- government.

02:33 5 Q I didn't mean to cut you off, I thought you were
6 finished?

7 A I'm sorry?

8 Q At the end of the day they quashed the conviction,
9 or recommended a quashing of the conviction, is
10 that correct?

11 A They tendered advice to the Governor-in-Council
12 that a new trial should be ordered pursuant to the
13 minister's powers under Section 690 --

14 Q Right.

02:33 15 A -- and they anticipated that, if that happened,
16 there might be a stay of proceedings by
17 Saskatchewan.

18 Q Okay. But that required a quashing of the
19 conviction?

02:33 20 A Yes.

21 Q Did that cause you to react positively,
22 negatively, were you content with that finding,
23 did it meet with your view of the evidence?

24 A Well I didn't have any problem with it. We all
02:33 25 made submissions with respect to the test that



1 should govern the result, and you and I both
2 adverted, in our briefs, to the *Palmer* case and
3 the *Palmer* test, and it was through the
4 application of the *Palmer* test that the Court said
02:34 5 that there should be a new trial.

6 Q Did you have any difficulty with that decision,
7 that is --

8 A No.

9 Q -- at the beginning of the -- would it be fair to
02:34 10 say, at the beginning of the reference, you would
11 have -- before evidence was heard, you were of the
12 view that Mr. Milgaard was guilty?

13 A It's very hard to answer, because I had so little
14 time to get up to speed and I was assimilating so
02:34 15 much material, and of course I was testing and
16 probing in my own mind and I was turning over
17 various possibilities. But, you know, I certainly
18 understood the responsibility to be as open as
19 possible to all sorts of things that might
02:34 20 ultimately colour my view as to where the truth
21 lay in this matter.

22 Q Did you feel your view changed because of what you
23 heard?

24 A In the Supreme Court?

02:35 25 Q Yes?



1 COMMISSIONER MacCALLUM: Your view of what?

2 BY MR. WOLCH:

3 Q Of guilt or innocence, or whether the case should
4 be re-opened or not, or --

02:35 5 A My view was always a tentative one, and it was
6 subject to integrating anything else that came
7 along later on. I'm not trying to be difficult,
8 --

9 Q No.

02:35 10 A -- but it's very hard to answer in that vein. You
11 know, I think you want me to tell you what I
12 thought, ultimately, and I can do that if you
13 want.

14 Q If you could?

02:35 15 A I shared the view with the Court, that Milgaard
16 was probably guilty, before we got the DNA
17 results.

18 Q But, did you feel the conviction should be
19 quashed?

02:35 20 A Well, the *Palmer* test is the guidance of the
21 Supreme Court as to the issue of fresh evidence,
22 and, you know, there are different issues here.
23 One issue is, and it's the mercy issue, did this
24 person actually commit the offence or not, and
02:36 25 then there is another issue in criminal law which



1 is whether the accused is guilty beyond a
2 reasonable doubt, and it's the latter that *Palmer*
3 deals with. And certainly, if the Fisher evidence
4 had been utilized on a fresh-evidence application
02:36 5 in the Court of Appeal, in my view it would have
6 been quite proper for the Court of Appeal to remit
7 the matter for a new trial. So I had no problem
8 with the Supreme Court doing that. But that
9 didn't speak to whether Milgaard actually
02:36 10 committed the offence, it spoke to whether the
11 fresh evidence might have affected the verdict,
12 which was a verdict based on the requirement for
13 the Crown to prove its case beyond a reasonable
14 doubt rather than on a balance of probabilities.

02:37 15 Q What did you make of the Supreme Court saying that
16 the continued conviction would be a miscarriage?

17 A In that event?

18 Q Yeah?

19 A Because of the significance of the fresh evidence.

02:37 20 Q That it was capable of being believed?

21 A That's what they said, yes. That's what they had
22 to say.

23 Q And if it was believed, in the circumstances of
24 this case, if it was believed he would be
02:37 25 innocent?



1 A Yeah. But you see, you know, certain evidence or
2 assertions can be believed and they might give
3 rise to a doubt, or reasonable doubt, or they
4 might give rise to something that's vastly more
02:37 5 significant, you know, in terms of whether the
6 person actually did do the deed or not.

7 I always bridle when I see
8 media reports saying that someone is found
9 innocent because we know, as lawyers, that that's
02:37 10 not what the criminal courts determine. They
11 determine whether the Crown has met the burden of
12 proving its case beyond a reasonable doubt, and if
13 there is a reasonable doubt, the issue of whether
14 or not the accused actually committed the offence
02:38 15 --

16 Q Okay, but --

17 A -- is not determined in that forum.

18 Q -- how do you reconcile that with the presumption
19 of innocence? You are presumed innocent?

02:38 20 A Yeah.

21 Q If you are not convicted, aren't you innocent?

22 A You are presumed innocent at the start of the
23 trial. That presumption may be overcome by virtue
24 of evidence which leads to a conviction.

02:38 25 Q But, if it leads to an acquittal, don't you go



1 back to being presumed innocent?

2 A But all that can be said, fairly, is that the
3 Crown has failed to meet its burden.

4 Q Okay. I just want to check --

02:38 5 A Unless there is something really compelling in the
6 facts that suggests otherwise.

7 Q And you have been involved in 690s for quite a
8 while, and --

9 A Yes.

02:38 10 Q -- I want to -- if we can pull up 058828, and I
11 want to ask you if there's any significance in
12 this. This is the reference to the Supreme Court,
13 and if we can just turn the page.

14 A The terms of reference?

02:39 15 Q Yeah, the -- no, no, the "whereas".

16 A Okay.

17 Q "WHEREAS there exists widespread concern
18 whether there was a miscarriage of
19 justice in the conviction of David
02:39 20 Milgaard and it is in the public
21 interest that the matter be inquired
22 into;"

23 that strikes me as unusual, an unusual "whereas",
24 does it strike you as unusual too?

02:39 25 A Yeah, and I think it's fair for you to raise it.



1 I mean obviously, at that time, there had been so
2 much in the press coming from a party with a
3 specific interest in the matter, and no real
4 counter to that if one was available and
02:39 5 appropriate, and so, you know, that certainly
6 would lead to concern as to whether the public had
7 a reasonably well-informed view of what --

8 Q No, what, I guess what I am getting at is that
9 most of the other ones that I am aware of --

02:39 10 A Yes.

11 Q -- have "whereas there is a likely", or "appears
12 to be a likely miscarriage", or "appears to be" --

13 A Not necessarily when there is a reference of a
14 specific question.

02:40 15 Q But this one seems to be saying because of the
16 publicity, that's why it's going here. Not on the
17 merits, not on what we have seen, but whereas
18 widespread concern?

19 A Yes. I think it's fair for one to construe from
02:40 20 that that there was concern about the publicity
21 that was out there in comparison with the facts as
22 they were understood in-house, and that one might
23 conclude that that was one of the factors that
24 motivated the reference.

02:40 25 Q When you commenced the reference did you



1 understand that it was the public perception, or
2 misperception, that was the reason why it had to
3 be aired?

4 A I -- I certainly felt it was important that there
02:40 5 be a public airing of the facts. I didn't think
6 too much about what had prompted the reference
7 because I didn't have the luxury of time to do
8 that.

9 Q And you looked at your view as, your position
02:41 10 there, as impartial or helpful or --

11 A Yes, essentially.

12 Q I'm just curious of your choice -- or decision
13 that the only witness I think you cross-examined
14 was David Milgaard?

02:41 15 A Yes, that's right.

16 Q Would that not be a suggestion that perhaps you
17 weren't partial or you --

18 A Yeah, you know, and I think I should explain that,
19 and I thank you for the opportunity.

02:41 20 David Milgaard wasn't
21 interviewed by -- as part and parcel of the 690
22 process, I believe. The Court had chosen, in its
23 wisdom, to have him called as the first witness,
24 and I found that personally very awkward because,
02:41 25 you know, normally in a criminal trial if an



1 accused is going to testify it's after the close
2 of the Crown's case and when everybody, including
3 the trier of fact, knows what sort of case there
4 is for the accused to meet. And, here, he was
02:42 5 just parachuted into the Court with no preamble
6 and with no background for the Court and was
7 expected to contribute something meaningful, and I
8 wondered what that could be beyond a strict
9 reversal of his having had any involvement in the
02:42 10 matter, and so I wondered what could be done.

11 And there were two things that
12 caused me to examine him. One was the view that,
13 you know, he hadn't been heard, and here was an
14 opportunity to indicate to him what we thought
02:42 15 were various elements that had brought him to this
16 juncture, so that he could give his response to
17 the extent he was able. And it was also a way of
18 educating the Court as to what those elements
19 were, because I don't recall anything, or much in
02:42 20 the way of opening statements.

21 Q Okay.

22 A And so they didn't have any background at the
23 beginning.

24 Q Okay.

02:43 25 A So I thought it would be a public service to



1 pursue that.

2 Q One point you mentioned several times is the
3 getting up to speed so quickly --

4 A Yes.

02:43 5 Q -- after. It was quite shocking how fast that
6 Supreme Court started from the day of the
7 announcement from Kim Campbell?

8 A I think we were all surprised and we were all
9 stressed.

02:43 10 Q To get that kind of time in the Supreme Court is
11 hard to begin with, but to get that it quickly?

12 A Yes.

13 Q There were literally thousands of pages to read
14 and absorb over Christmas?

02:43 15 A There were. You know, as you know, our case on
16 reference ran to, what was it, 26 volumes.

17 Q Yeah, with only about 15, I think, filed by the
18 time we started, if I recall right.

19 A That's right.

02:43 20 Q They were being filed as the hearing went. But --

21 A It was a mammoth undertaking for all of us.

22 Q Now I'm not going to go through what people
23 perceived to be going on there or not, but I do
24 want to talk to you about the idea that certain
02:44 25 witnesses should be called.



1 A Yeah.

2 Q Now, for example, Mr. Caldwell. In terms of
3 David's guilt or innocence, on what topic do you
4 think he might be called?

02:44 5 A Well, I don't know. I mean if there were concerns
6 about the disclosure rules of the day, and whether
7 they were complied with or -- because that relates
8 to fairness or whatever.

9 Q Okay?

02:44 10 A Umm, if there were concerns about some sort of a
11 coverup or some sort of interference with the
12 judicial process or with parole, because I
13 understood he had written some letters to the
14 correctional authorities.

02:44 15 Q Let me --

16 A Umm --

17 Q If I could stop you there for a second?

18 A Sure.

19 Q Surely letters to the parole board don't delve on
02:44 20 guilt or innocence, there is no connection?

21 A Umm, well, one might have asked why he was so
22 interested in and concerned about the case that he
23 would take the time to write and make
24 representations --

02:45 25 Q I appreciate that.



1 A -- about whether Milgaard should be released, and
2 whether this bespoke some sort of an animus which
3 was inappropriate before.

4 Q If he had an animus, how would that go to David's
02:45 5 guilt or innocence?

6 A Well, it might go to the issue of miscarriage.

7 Q If disclosure isn't granted, does it matter if
8 it -- why it's not granted? In the context of
9 this type of reference, does it matter if it's
02:45 10 deliberate, inadvertent, I mean when all the
11 judge -- justices said is that "we're going for
12 the truth"?

13 A Yeah. You know, I have some difficulty because of
14 this dichotomy I have just described, because in
02:45 15 the mercy process what we really focus on is
16 factual innocence or guilt.

17 Q Right.

18 A Okay.

19 Q Right.

02:45 20 A It's not the niceties of the law that detain us so
21 much, it's if the person truly didn't commit the
22 offence, then by God we've got to give him a
23 remedy, and on the other hand, the way the
24 criminal process conventionally works deals with
02:46 25 the burden to prove the case beyond a reasonable



1 doubt.

2 Q Okay. The last thing I want to deal with is, very
3 briefly, we've heard a lot in this hearing about
4 what's been called the Mackie summary; I think you
02:46 5 know what that is?

6 A Yes.

7 Q Okay. That didn't come to light, did it, until
8 the reference had even started?

9 A I think so, yes.

02:46 10 Q And, I mean, we've talked about Mackie before --

11 A I may be wrong, but it seems to me that you
12 introduced that, and I don't think anyone else
13 knew about it until you did.

14 Q Okay. If I can get to one document, 008981. It's
02:46 15 a letter -- sorry, the next page, then. This is a
16 letter March the 2nd. That would have been right
17 in the heart of the reference, --

18 A Yes.

19 Q -- the reference had been going on, and it's a
02:47 20 letter to Mr. Frater. And I want to look at the
21 first paragraph --

22 A Right.

23 Q -- under number 1, if we can highlight that:

24 "Detective Sergeant Mackie and
02:47 25 Lieutenant Short - are these witnesses



1 to be called and if so; When? I
2 appreciate that Officer Short apparently
3 is not healthy and may have to be
4 excused. I do not know what the
02:47 5 circumstances are regarding Mackie. I
6 think he played a fairly significant
7 role in the case."

8 This is the reference is already on --

9 A Yes.

02:47 10 Q -- and the reference is:

11 "I think he played a fairly significant
12 role in the case. I am particularly
13 interested in pursuing the identity of
14 the author of the summary that was
02:47 15 prepared prior to the arrival of
16 Inspector Roberts."

17 A Right.

18 Q "I do not know if Mackie or Short can
19 shed any light on this subject but I
02:47 20 think all efforts should be made to find
21 the author if at all possible."

22 A Right.

23 Q Was any effort made?

24 A Well, efforts were made to locate both Short and
02:48 25 Mackie, subpoenas had been issued for both of



1 them. And you know what we learned, that Short
2 was ill in Saskatchewan and Mackie was apparently
3 in Arizona, but -- and then there was some
4 discussion between Eugene and Sergeant Pearson as
02:48 5 to whether closed-circuit TV hookup could be used
6 to take evidence from Officer Short, but I don't
7 recall what happened afterward. I'm sorry, I
8 really wish I could help you, --

9 Q No, that's fine.

02:48 10 A -- I just don't remember.

11 Q Okay. And just, if we can go to the next page,
12 and I will be done. Do you remember Roderick
13 McIvor?

14 A I remember the name.

02:48 15 Q Okay.

16 "... I just want to put you on notice
17 that we may not want to call this
18 witness. He did not contact us and was
19 put forward through a statement he made
02:48 20 to the police. We have attempted
21 wherever possible to screen potential
22 witnesses."

23 A Right.

24 Q "There have been a number of potential
02:48 25 witnesses who ostensibly are favourable



1 to our cause ...",

2 I pause there. McIvor was one who received a
3 confession from Fisher

4 A Okay.

5 Q "... but whose credibility is
6 questionable at best. I intend to do
7 further research into McIvor. Perhaps
8 even take a look at his parole files.
9 In the event that I am not satisfied
02:49 10 that his evidence is capable of belief,
11 I would not be proposing to lead. It
12 will of course be open to Saskatchewan
13 or yourselves to lead his evidence if
14 you feel it is capable of belief."

02:49 15 There were witnesses called who were incapable of
16 belief; were there not?

17 A I'm sorry, what?

18 Q Some witnesses were incapable of belief that were
19 called? Dozenko is one that comes to mind?

20 A I missed, who?

21 Q Dozenko? Do you remember him?

22 A Dozenko?

23 Q Yeah. Incapable of belief?

24 A Yeah, because he didn't record anywhere the
02:49 25 suggestion that Milgaard had confessed to him.



1 Q Okay. And just a final point --

2 A And they would have expected him to do that and to
3 bring it to the attention of his superiors.

4 Q The final point number 10, just for your
02:49 5 information, if I can just highlight --

6 A And in fairness, you know, I should add, sure
7 there was pressure on all of us to be as focused
8 and as relevant as we could, and we knew the Court
9 was somewhat impatient in that regard, and sure we
02:50 10 all had to do our vetting with that in mind.

11 Q And the final point:

12 "DNA testing - do you have any further
13 information in this regard? Is there a
14 time frame when we can expect to be told
02:50 15 whether or not it is possible to utilize
16 this evidence?"

17 A Yes, and the date of this letter is?

18 Q March the 2nd.

19 A And a little later that same month the testing was
02:50 20 done in North Carolina.

21 Q So --

22 A At my instance.

23 Q And David Milgaard was always willing to be tested
24 and he was prepared to be tested, etcetera,
02:50 25 etcetera?



1 A Yes, he was.

2 Q Thank you. Those are my questions, Mr.

3 Commissioner, thank you Mr. Fainstein.

4 A Thank you.

02:50 5 COMMISSIONER MacCALLUM: Thanks.

6 MR. HODSON: I'm going to suggest we take a
7 short --

8 COMMISSIONER MacCALLUM: Just before you do
9 it, before Mr. Wolch disappears, because he might
02:50 10 want to hear what I have to ask the witness, sir.

11 MR. WOLCH: Sure.

12 COMMISSIONER MacCALLUM: Sir, I ask this
13 question to you as an expert. You expressed
14 some, well, "umbrage" is perhaps too strong a
02:51 15 word, at the continued habit of people of saying
16 that "so and so was found innocent after a
17 trial".

18 A Yes.

19 COMMISSIONER MacCALLUM: Of course, that's
02:51 20 not a legal concept known to our system of
21 criminal jurisprudence.

22 A Yeah.

23 COMMISSIONER MacCALLUM: He is found guilty
24 or not guilty. Not guilty, as distinct from
02:51 25 innocence, simply means that he hasn't been found



1 guilty beyond a reasonable doubt.

2 A That's right.

3 COMMISSIONER MacCALLUM: Okay. What we see
4 almost daily, or hear in the course of our

02:51 5 Inquiry, is that David Milgaard was found to be
6 innocent by reason of the DNA results. Now that
7 strikes me as, strictly speaking, as a matter of
8 logic, not to be correct. What the DNA results
9 did was surely convicted Larry Fisher, because
02:51 10 they placed him at the scene of the crime, in
11 fact, in contact sexually with the victim?

12 A Right.

13 COMMISSIONER MacCALLUM: Do you agree with
14 me so far?

02:51 15 A Yes.

16 COMMISSIONER MacCALLUM: Now it's very
17 difficult in the context of what has transpired,
18 with the benefit of hindsight, for anybody to say
19 that maybe David Milgaard was not innocent, if
02:52 20 you see what I mean?

21 A Right.

22 COMMISSIONER MacCALLUM: But, at the same
23 time, repeated references to him having been
24 shown to be innocent by way of DNA, I believe,
02:52 25 are misleading and sort of stand in the way of a



1 logical approach to what we're trying to do here.
2 Do you agree or disagree?

3 A Well one concern I've always had with DNA is you
4 have to be very careful in interpreting what it's
02:52 5 telling you.

6 COMMISSIONER MacCALLUM: Yes?

7 A The DNA in this case spoke to who left some
8 spermatozoa on the clothing of the person who was
9 assailed and who died, ultimately. But, for
02:52 10 example, it doesn't speak to her death directly.

11 COMMISSIONER MacCALLUM: Yes.

12 A Okay. And so one might conclude that one -- there
13 was one transaction, and one person was
14 responsible for both, and indeed that was the
02:53 15 determination when Larry Fisher was tried and
16 convicted of the offence.

17 COMMISSIONER MacCALLUM: Yes.

18 A But the DNA itself doesn't go that far.

19 COMMISSIONER MacCALLUM: No.

02:53 20 A Okay. You have to draw an inference from all the
21 facts.

22 COMMISSIONER MacCALLUM: Yes.

23 A And not -- and I take comfort from the fact that
24 Mr. Fisher, in his defence, didn't make any
02:53 25 suggestion that he only raped Gail Miller and



1 didn't kill her.

2 COMMISSIONER MacCALLUM: Yes. That's very
3 useful. Thank you. We'll take our break. Make
4 it a short one, I guess, please. Ten minutes.

02:53 5 (*Adjourned at 2:53 p.m.*)

6 (*Reconvened at 3:06 p.m.*)

7 **BY MR. GIBSON:**

8 **Q** Mr. Fainstein, for the record, my name is Bruce
9 Gibson, I represent the RCMP. It's my
03:06 10 understanding that I am the only counsel that is
11 going to question you and I promise not to be very
12 lengthy with you.

13 Mr. Hodson discussed many
14 things with you, and one of the points that he
03:07 15 raised with you was how things may have been
16 different if, in 1992, further DNA samples had
17 been discovered on the uniform; do you recall that
18 discussion?

19 **A** Yes, yes.

03:07 20 **Q** And I'm afraid I'm, like Mr. Hodson, I'm kind of
21 at the ice cream confection level of understanding
22 all of the various tests that could be applied, --

23 **A** Sure.

24 **Q** -- but it's my understanding -- and please correct
03:07 25 me if I'm wrong --



1 A Yes.

2 Q -- that RFLP examination may have been difficult
3 back in 1992 because of the concern about the
4 degradation of the sample, even if you had found
03:07 5 more?

6 A That's right.

7 Q And, as far as the DQ Alpha testing went, that
8 that could have been done, and that may have in
9 one sense eliminated David Milgaard as the suspect
03:07 10 or the guilty party, but Mr. Hodson also raised
11 with you the possibility of an argument that the
12 stain that could have been found could have been
13 from a consensual sexual partner, and then that
14 may still have kept that alive as to having him as
03:08 15 a suspect if you don't find another perpetrator?

16 A If the profile could be associated with
17 spermatozoa then it would more strongly yield the
18 conclusion that it came from the assailant.

19 Q And --

03:08 20 A But if not, of course, there was an open question
21 as to whether this had any relevance at all.

22 Q And again with the DQ Alpha, its power to provide
23 positive evidence of association with Larry Fisher
24 was limited, I believe you went through the 1 in
03:08 25 14 or 1 in 15 proposition?



1 A The significance of a match would not nearly have
2 been as useful, the significance of a match using
3 STRs.

4 Q And as far as re-opening the investigation into
03:08 5 the death of Gail Miller with that type of a
6 result, if we can speculate, that may have been a
7 little bit difficult because it certainly would
8 have been available to Mr. Fisher to raise a
9 reasonable doubt that that even ties him, at all,
03:09 10 to the crime?

11 A It might. It would depend on whatever other
12 evidence might be available.

13 Q And I was just gonna get to that.

14 A Yes.

03:09 15 Q I -- we do know, from the 1993 RCMP investigation,
16 that there really wasn't anything further
17 uncovered that would have linked Mr. Fisher to the
18 crime and so consequently, if that was all that
19 you were left with at that point, from your view,
03:09 20 as someone who is quite familiar with the law, of
21 course, you could not have proffered charges on
22 that basis, it would have been pretty difficult to
23 do that?

24 A I don't want to express an opinion on that simply
03:09 25 because, although I've had the privilege of



1 arguing on similar-fact issues in the Supreme
2 Court, that was years ago. I have been retired
3 for a few years and I would have to refresh myself
4 in the state of the law to make any kind of a
03:10 5 cogent response.

6 Q But again, if we just step back and look at the
7 amount of evidence pointing to Larry Fisher, and
8 if all you have then is the DQ Alpha, there
9 certainly is some room for doubt there?

03:10 10 A Absolutely.

11 Q Now you commented briefly on Dr. Ferris'
12 examination of --

13 A Yes.

14 Q -- the exhibits, and I think you did comment that
03:10 15 the sample that had been cut out of the panties
16 had been discarded?

17 A Yes.

18 Q You were aware of that?

19 A That was my understanding.

03:10 20 Q And if that sample had been retained, again, it's
21 possible that further testing could have been done
22 on that as well?

23 A That's right.

24 Q And as far as the vaginal aspirate, if that had
03:11 25 been retained as well, we do know that the two



1 samples that had been found in the snowbank had
2 been retained and unfortunately there was no
3 testing that could be conducted on those samples,
4 but if aspirate had been kept, it could have been
03:11 5 possible for examination to have occurred sooner?

6 A Yes. But of course, at that time, DNA testing
7 wasn't available --

8 Q Yes.

9 A -- so, if it were saved, that would have been for
03:11 10 some other objective.

11 Q Right. And that brings me to 1969, more fully,
12 with respect to a question raised by Mr. Wolch
13 about Staff Sergeant Paynter --

14 A Yes.

03:11 15 Q -- and his examination of the exhibits back then.
16 And I know that you have reviewed his evidence at
17 the prelim and at the trial back in 1970, and --

18 A At some point I did, yes.

19 Q At some point. And, again, if you're not feeling
03:12 20 comfortable in answering this then don't.

21 A Right.

22 Q But would you agree with me that the limited
23 serological results that could have been obtained
24 in 1969 by Staff Sergeant Paynter were obtained,
03:12 25 and any further samples that would have been found



1 would not have given him any more information or
2 opportunity to conduct more testing?

3 A That's right. You know, things like blood type
4 and -- are, in essence, expressions at some remove
03:12 5 of one's genetic makeup, but the far more
6 sophisticated DNA testing wasn't available to him.

7 Q One thing I was going to ask you is we do know
8 that the uniform was examined by Pat Alain, at
9 least there will be evidence filed with the
03:12 10 Commission on that point --

11 A Yes.

12 Q -- from her.

13 A And I'm glad to hear that, I -- I certainly always
14 thought it was until I saw that the reference to
03:12 15 that exhibit number wasn't.

16 Q And were you aware of the type of protocol that
17 the RCMP carried out for testing of exhibits at
18 that time, whether they used --

19 A No.

03:13 20 Q So you wouldn't be able to be in a position
21 comment on whether they were using mapping or
22 random testing with the phosphatase test?

23 A No, I was simply relying on the lab to do what it
24 had to do.

03:13 25 Q And we do know that she did identify a particular



1 stain on the panties. Would you agree with me
2 that that did keep the question of further DNA
3 testing alive and had that small sample not been
4 found on the panties by Pat Alain, that there may
03:13 5 never have been further testing on any of the
6 exhibits?

7 A It's possible, indeed.

8 Q One point that you discussed was the quick
9 learning process that had to be undergone --

03:14 10 A Yes.

11 Q -- in December of 1991 to get yourself up to speed
12 for the Supreme Court hearing, and I believe you
13 said you started to work on it in December of
14 1991?

03:14 15 A That's right.

16 Q And do you know when the Milgaard camp would have
17 started working on that? Their application was
18 filed December of 1988.

19 A Right.

03:14 20 Q So as far as getting up to speed on that, fair to
21 say that they had been working with that a lot
22 longer than you and perhaps Murray Brown had been
23 working?

24 A Yes.

03:14 25 MR. GIBSON: Those are my questions. Thank



1 you.

2 MR. HODSON: I don't believe there's any
3 further questions, unless -- I could filibuster
4 for 10 minutes.

03:14 5 COMMISSIONER MacCALLUM: Mr. Fainstein,
6 thank you very much for coming to testify.

7 A It has been my pleasure. I hope it has been
8 helpful.

9 MR. HODSON: I could fill the 10 minutes
03:15 10 with more DNA questions. I don't think so.
11 Thank you very much, Mr. Fainstein.

12 A You're welcome.

13 *(Adjourned at 3:15 p.m.)*

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foregoing pages contain a true and correct transcription
of our shorthand notes taken herein to the best of my
knowledge, skill, and ability.

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