Commission of Inquiry

Into the Wrongful

Conviction of David Milgaard

before

THE HONOURABLE MR. JUSTICE

EDWARD P. MacCALLUM

****

<u>Transcript of Proceedings</u>

and

Testimony before the Commission

sitting at the

Sheraton Cavalier Hotel at

Saskatoon, Saskatchewan

****

On Tuesday, October 3rd, 2006

Volume 192

<u>Inquiry Proceedings</u>

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

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1   ***Transcript of Proceedings***

2   *(Reconvened at 9:01 a.m.)*

3   COMMISSIONER MacCALLUM: Good morning.

4   ALL COUNSEL: Good morning.

09:01   5   COMMISSIONER MacCALLUM: Mr. Kyle.

6   ***DAVID WILLIAM KYLE, continued***:

7   **BY MR. HODSON:**

8   Q   Good morning, Mr. Kyle. I thought maybe we would

9   just pick up on a couple of topics we discussed

09:01   10   yesterday afternoon that I'm not sure we quite

11   finished.

12   The first one dealt with this

13   notion of the floodgates argument and that, I

14   think, my understanding is that at the time your

09:01   15   Commission was put in place there were some who

16   were concerned that this would give rise to a

17   floodgate of applications; is that right?

18   A   I think that's right, yes.

19   Q   And can you comment on, and I think you described

09:02   20   the number of applications, but over the course of

21   your nine years on the Commission, did you notice

22   an increase in the number of applications that

23   came in?

24   A   It seems that the rate of applications remained

09:02   25   remarkably constant throughout the life of the

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1   Commission, and that extends up to the present

2   time, that new applications come in at the rate of

3   between 70 and 80 a month, and that's been

4   remarkably consistent over the life of the

09:02   5   Commission.

6   If I might just assist, and I

7   don't want to get stuck too much into numbers

8   because they can be confusing, but if we take as a

9   rough figure that something in the order of 8,000

09:02   10   applications have been dealt with and cases

11   closed, of those 8,000, about a third of them

12   don't get off first base because they are

13   applications made by applicants who have not

14   previously appealed, and we were looking yesterday

09:03   15   at section 13 of the 1995 *Criminal Appeal Act*

16   which requires there to have been a previous

17   appeal and the Commission cannot make a reference

18   other than in exceptional circumstances where

19   there hasn't been an appeal, so something in the

09:03   20   order of a third of the applications received are

21   closed without any referral because that previous

22   appeal condition is not met.

23   Q   Sorry, if I can just pause there. Would those

24   applicants be entitled to go to the Court of

09:03   25   Appeal for an extension of time?

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1   *A*   Yes.

2   **Q**   And seek the remedy without going through your

3   gate, so to speak?

4   *A*   Yes, and of course if they do that and are refused

09:03   5   an extension of time in which to appeal, they then

6   qualify -- then they get over the first hurdle as

7   far as we're concerned.

8   Of the remaining, the

9   applications which then remain after that third is

09:04   10   knocked out, the Commission introduced a process

11   for, in which it endeavours to identify, in

12   relation to each application received, whether it

13   appears on the basis of the issues raised that the

14   case can be closed; in other words, brought to

09:04   15   completion, the investigation and review can be

16   done with a modest amount of effort which we fix

17   at five working days, so if we think a case can be

18   closed with five caseworker days of effort on

19   investigation and review, they will be dealt with

09:04   20   somewhat more quickly than applications which

21   require a more extensive investigation and review,

22   and of the applications which remain after the

23   appeal cases have been knocked out, something in

24   excess of half, approaching two-thirds of the

09:04   25   remainder are dealt with by this more streamlined

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1   and quicker process. I mean, it might be thought

2   that these are cases which are more likely to

3   result in a non-referral, but in fact the rate of

4   referral is approximately the same for the cases

09:05 5   which are fast-tracked.

6   COMMISSIONER MacCALLUM: So how much of the

7   remaining two-thirds gets through the fast track?

8   A   About between a half and two-thirds.

9   COMMISSIONER MacCALLUM: Of the two-thirds?

09:05 10   A   Yes.

11   COMMISSIONER MacCALLUM: I see. And what

12   kind of a population pool are we speaking about

13   for this 70 to 80 cases per month?

14   A   The population of the United Kingdom at the amount

09:05 15   I think, if you exclude Scotland, is about 65

16   million.

17   COMMISSIONER MacCALLUM: And you don't take

18   Scottish cases?

19   A   No, Scotland has its own separate commission.

09:05 20   COMMISSIONER MacCALLUM: Oh, I see. So how

21   much -- what was the sum again, 70, 80 million?

22   A   It's about 65 million I think is the population of

23   Great Britain at the moment.

24   COMMISSIONER MacCALLUM: Okay, thank you.

09:06 25   Excluding Scotland?

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1   A   Yes.

2   BY MR. HODSON:

3   Q   And maybe I should have clarified that earlier,

4   your Commission deals with cases in England, Wales

09:06 5   and Northern Ireland; correct?

6   A   Yes.

7   Q   And that Scotland has a similar commission, which

8   we won't get into, but they have a commission

9   that's similar in nature to your Commission?

09:06 10   A   Yes.

11   Q   So just on the numbers, about 70 to 80 a month; is

12   that right?

13   A   Yes.

14   Q   The number. And the third that are fast-tracked,

09:06 15   the five working day matter, that some of those

16   then do get referred?

17   A   Yes.

18   Q   And so in five working days you are able to review

19   a file and determine that a reference ought to be

09:06 20   made?

21   A   Yes.

22   Q   And can you give us some idea, what types of cases

23   are those, or what is it that jumps out of those

24   cases that allows a reference to go that quickly?

09:06 25   A   Well, the cases which result in a reference where

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1   it appears from, on the face of the application

2   when it's received that there is some stunningly

3   significant point which appears to give rise to

4   concerns about the safety of the conviction, and

09:07   5   that point can be easily identified and explained

6   without there having to be any significant further

7   investigation.

8   Q   Okay. And it's also my understanding that the,

9   when the CCRC was created, that you also deal with

09:07   10   convictions out of the Magistrates' Court?

11   A   Yes.

12   Q   Which is, I think, my understanding, is a -- would

13   be lesser offences? The Crown court deals with

14   serious or more serious indictable offences and

09:07   15   the Magistrates' Court is lesser offences?

16   A   Yes.

17   Q   And so of those 70 to 80 a month, some of those

18   would be from Magistrates' Court?

19   A   Very few.

09:07   20   Q   Very few?

21   A   Yes.

22   Q   Is it fair to say that most of the applications

23   you would receive would be for serious crimes?

24   A   That's true, yes.

09:07   25   Q   And that you don't get the -- not to differentiate

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1   between crimes, but a conviction for, you know,

2   traffic offences or things of that nature are

3   generally not matters that come to your

4   Commission?

09:08 5 A   Generally that is the case, although the

6   interesting thing, if I can just introduce a

7   lighter note here, is that those people who do

8   apply having been convicted of traffic offences in

9   the Magistrates' Court, there seems to be no other

09:08 10   class of person who feels so aggrieved about the

11   injustice of their situation than the person

12   convicted of careless driving, but very few, I

13   mean, I think less than 8 percent of the

14   applications come from the Magistrates' Court.

09:08 15   Some of them are quite

16   serious, we had one which I had dealings with in

17   my last year at the Commission which involved a

18   number of asylum seekers being prosecuted for

19   offences related to traveling on false

09:08 20   documentation to get to the United Kingdom and

21   they in fact pleaded guilty in the Magistrates'

22   Court, but we referred the case on the basis that

23   as it appeared to us, the prosecution was an

24   abusive process because it was in breach of the

09:09 25   United Kingdom's treaty obligations under the

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1   refugee convention, so some of the cases in the

2   Magistrates' Court can be significant, but we

3   don't get very many applications.

4 **Q** Would it be correct to say that most of the cases

09:09 5   would be homicides, sexual assaults, fraud,

6   burglary, serious crimes of that nature?

7 *A* Yes. In percentage terms, by far the greatest

8   number of applications relate to serious sexual

9   offences.

09:09 10 **Q** We talked yesterday a bit about the media and I'm

11   wondering if you could tell us how the CCRC dealt

12   with the media when you were created and,

13   secondly, to comment on what has happened as a

14   result of the CCRC being in place for nine years

09:10 15   and how the media has taken part in the process.

16 *A* Yes, I would be happy to do that. It's something

17   which I gave thought overnight after you,

18   Mr. Commissioner, had raised the matter of media

19   interest, and I thought it might be relevant if I

09:10 20   just mentioned that prior to the establishment of

21   the CCRC, there were a number of investigative

22   journalists who took an interest in miscarriage of

23   justice cases, and two television programs in

24   particular, a BBC program called *Rough Justice* and

09:10 25   an independent television program called *World in*

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1   *Action* had a great deal to do with investigating

2   and broadcasting programs about possible

3   miscarriages of justice.

4   Indeed it was *World in Action*

09:10 5   which I think was very significant in uncovering

6   the problems which had arisen in the *Birmingham 6*

7   case, but the *Rough Justice* program on the BBC did

8   a number of series over a number of years in which

9   they identified cases which they believed to be

09:11 10   miscarriage of justice and they did, a number of

11   cases did get back to the Court of Appeal as a

12   result of the investigation done by those

13   programs.

14   When the Commission, the CCRC

09:11 15   came into existence, we did have a meeting with a

16   number of people who had been concerned with

17   investigating miscarriage of justice which

18   included investigative journalists and reporters

19   from *Rough Justice* and *World in Action* and what we

09:11 20   were interested to hear from them was we said to

21   them, right, well, we're new, we're about to

22   embark on this exercise, what advice do you have

23   for us about investigating miscarriage of justice,

24   and they were able to give us the benefit of their

09:12 25   experience, but interestingly, the common theme

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1   was if there has been a miscarriage of justice,

2   you always get a smell of it.

3   Now, if you are having to

4   choose which case you investigate for the purpose

09:12 5   of making a television program, you can indulge

6   yourself in the exercise of seeing whether you

7   think the case has a smell about it. We can't do

8   that because we're not restricted in the number of

9   cases -- if we receive an application we have to

09:12 10   review it, we can't pick and choose which ones we

11   do, so that -- but that was quite an interesting

12   observation from the journalists who made these

13   programs.

14   What is significant is *Rough*

09:12 15   *Justice* -- I don't think since the beginning of

16   the Commission's existence the *World in Action* has

17   done any exposés on miscarriage of justice. *Rough*

18   *Justice* did another series, but to all intents and

19   purposes, that particular program has now fizzled

09:13 20   out and, indeed, the presenter of *Rough Justice*,

21   David Jessel, is now a member of the Criminal

22   Cases Review Commission.

23 Q   Okay. And so prior to the CCRC being in place

24   then, is it my understanding then that the media

09:13 25   in England would have played a fairly significant

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1   role in publicizing the plight of people alleging

2   wrongful conviction and putting in the public

3   domain the basis of that claim?

4   A   That is right, but there is a link here between

09:13 5   something we were talking about yesterday again in

6   response to the Commissioner's interest in this

7   particular area, that we were talking about

8   whether the Commission prefers to control and deal

9   with its own investigations and would prefer

09:13 10   private investigators or journalists not to become

11   involved.

12   There was a particular case

13   which was the subject of a *Rough Justice*

14   investigation, the case of *Anthony Steele*, which

09:14 15   happens to be a case which I was responsible for

16   prosecuting when I was in the director of public

17   prosecutions' office. He was convicted of the

18   murder of a young woman who was walking on her way

19   to work along a disused railway line which was a

09:14 20   foot path in Yorkshire and she was battered to

21   death with a rock and Anthony Steele was arrested

22   as a result of eye witness evidence that he had

23   been seen walking down the valley side towards the

24   path and he confessed to the murder and he was

09:14 25   prosecuted and convicted.

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1   The first appeal was, the

2   ground of appeal was that -- related to the

3   turning off of the life support machine and

4   whether that was a break in the chain of causation

09:14 5   which the Court of Appeal gave very short shift

6   to. *Rough Justice* did an investigation and I

7   remember watching the program thinking as I

8   watched it, well, this is mere argument, it's not

9   really introducing anything new and, furthermore,

09:14 10   insofar as the witnesses who the program

11   interviewed were being asked whether they really

12   seen what they said they had seen at trial, I

13   couldn't help noticing that the geography of the

14   area and the lines of sight seemed to have changed

09:15 15   quite radically because of new housing

16   development, and so the line which *Rough Justice*

17   appeared to be pursuing around this seemed to be

18   flawed because of a number of matters. That --

19   the *Rough Justice* program didn't result in any

09:15 20   further action.

21   When the Commission came into

22   existence, Anthony Steele applied to the

23   Commission. I, of course, had nothing to do with

24   the case because I had been, I had had this

09:15 25   earlier responsibility for it, but the focus of

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1   the Commission's investigation was on the

2   reliability of Anthony Steele's confession because

3   by the time the Commission was considering the

4   case, there had been considerable advances in

09:15 5   psychiatric and psychological understanding of the

6   way in which people confess to offences they

7   haven't committed and indeed the case was referred

8   to the Court of Appeal on the basis of new

9   psychological evidence as to the reliability of

09:16 10   the confession and Mr. Steele's conviction was

11   quashed on that basis.

12 Q   Okay. And so over the course of the nine years,

13   then, you were involved in the Commission did you

14   see the role of journalists change then? What

09:16 15   was -- did there seem to be more of an acceptance

16   that the Commission would be investigating and

17   uncovering these matters?

18 A   That seems to have been the case so far, yes.

19   There was a brief production of another television

09:16 20   program called *Clear My Name*, the object of which

21   appears to be to bring to the public's attention

22   the existence of a case which was thought to be a

23   possible miscarriage of justice, and inviting

24   anybody who may have anything to offer to come

09:16 25   forward. So there was no direct investigation by

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1   the program as such, it was simply "if there's

2   anyone out there who can say anything about this

3   case, please get in touch", but I'm not aware of

4   any of those cases being transmitted on to the

09:17   5   Commission.

6   Q   If we can go back to 339726, which is the

7   legislation that we were going through yesterday,

8   and talk about Section 15 of the *Act* which says:

9   "Where a direction is given by the Court

09:17   10   of Appeal under Section 23A(1) of the

11   1968 Act or ... the 1980 Act the

12   Commission shall investigate the matter

13   specified in the direction in such

14   manner as the Commission think fit."

09:17   15 And can you explain what this section deals with

16   and how has it been deployed by the Court of

17   Appeal and the Commission?

18 A   The purpose of this section is to allow the Court

19   of Appeal, in any case which the Court of Appeal

09:17   20   is dealing with, whether or not it results from a

21   reference from the Commission -- so it applies

22   with equal effect to appeals which are being

23   addressed in the ordinary way -- it allows the, if

24   the Court of Appeal requires some sort of factual

09:18   25   investigation to be made, then the Court can ask

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1   the Commission to act as a sort of investigative

2   arm for the Court in order to make those factual

3   inquiries.

4   And I think the purpose behind

09:18 5   this particular provision was given the existence

6   of an independent body, which the CCRC clearly

7   was, this was an opportunity to have necessary

8   factual investigations in the course of an appeal

9   hearing being made independently, so that it

09:18 10   wasn't necessary for the Court to invite either

11   the defence or the prosecution to try and make the

12   inquiries themselves. It is not a power which the

13   Court has used a great deal.

14   An example I can think of,

09:18 15   which arose in the course of an ordinary appeal,

16   was where there had been a suggestion of jury

17   bias. And I think in Canada, as in England, the

18   question -- the process of making investigations

19   of juries is actually quite complicated, because

09:19 20   you are not allowed to ask them about what

21   happened in the course of their deliberations.

22   And it was clearly, the Court of Appeal thought,

23   an appropriate case in which the Commission should

24   be asked to make inquiries to ascertain whether

09:19 25   there had, in fact, been any transactions amongst

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1 the jury members which might indicate bias.

2 **Q** Okay. And so is that a case, then, that the

3 Commission did investigate?

4 *A* Yes.

09:19 5 **Q** And then you'd report back?

6 *A* And we'd report back, yes.

7 **Q** Yes. Just on the issue of juries, and putting

8 aside the policy issues that might arise if the

9 Commission were allowed to talk to jurors -- and I

09:19 10 don't want to get into that -- but assume for the

11 moment that you could, would that be something of

12 benefit to the Commissioners in investigating

13 miscarriages of justice, to be able to speak to

14 jurors?

09:20 15 *A* I think that's an incredibly difficult question.

16 I mean the sort of immediate off-the-cuff thought,

17 I think, of anybody is, well, if you are trying to

18 find out whether someone may have been wrongfully

19 convicted wouldn't it be wonderful if we knew

09:20 20 exactly how it was that the jury went about its

21 task, particularly of course, I suppose, in areas

22 where, if the jury have been charged by the judge

23 in the course of the trial to disregard a piece of

24 evidence which they heard but perhaps they

09:20 25 shouldn't have heard, and there remains the

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1   possibility that in spite of that the jury might

2   have had -- might have taken account of that piece

3   of evidence, then I suppose you could say, well,

4   wouldn't it be useful to be able to ask the jury

09:21 5   "didn't you do what the judge told you?" But I

6   suspect there are so many powerful arguments which

7   one could, which could be employed the other way,

8   that I would hate to sit here and give a view one

9   way or the other.

09:21 10   Q   Yes, and I've tried to preface my question by

11   saying that there may well be a number of policy

12   or principle reasons why the state would not want

13   to have jurors subjected to questions about why

14   they decided a certain way, but if we can put

09:21 15   those aside?

16   A   Uh-huh.

17   Q   I'm just trying to understand whether the ability

18   to talk to jurors -- for example, in the United

19   States they have a different system and jurors are

09:21 20   not only talked to, I think they are interviewed

21   publicly after -- and from your case of

22   investigation would there be some cases there

23   where it might be helpful to know what -- again,

24   keeping in mind that there might be powerful

09:21 25   reasons, as you say, not to --

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1   *A*   Uh-huh.

2   **Q**   -- but just as far as information-gathering?

3   *A*   Well I suppose the answer to that is if you're --

4   if you ignore the policy reasons for not doing it,

09:22 5   yes, it would seem to follow there may be cases

6   which doing it could be -- could provide you with

7   relevant information.

8   **Q**   If we can go to the next page, please. Section 16

9   talks about the prerogative of mercy, and it's my

09:22 10   understanding that with the creation of the CCRC

11   the Home Secretary retained the -- Her Majesty's

12   prerogative of mercy; correct?

13   *A*   Uh-huh.

14   **Q**   And so that there are, in addition to the CCRC,

09:22 15   the Home Secretary was able to pardon people or

16   provide -- exercise the prerogative of mercy?

17   *A*   Yes.

18   **Q**   And can you give us a general idea, is that --

19   when and how is that prerogative exercised over

09:22 20   the course of the CCRC?

21   *A*   Well, the specific powers under Section 16 have

22   never been exercised, the Home Secretary has never

23   asked the Commission to assist him and we've never

24   invited the Home Secretary to consider the issue

09:23 25   of a pardon.

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1   I think, as we were

2   considering yesterday in the context of the Royal

3   Commission report, the residual Royal Prerogative

4   of Mercy has, I think, probably taken an even more

09:23   5   residual position now, with the creation of the

6   CCRC, and in particular the CCRC's powers to

7   review and refer back cases which arose in the

8   Magistrate's Court, which was not a power which

9   had been open to the Home Secretary under the

09:23   10   previous regime.

11   But I think, again as the

12   Royal Commission observed, I think one of the

13   areas in which the Royal Prerogative of Mercy was

14   exercised was in relation to the discovery that

09:24   15   there was some flaw in processes applied to

16   drivers who were thought to have driven with

17   excess alcohol, and so the Home Secretary took the

18   view that the easiest way of dealing with that was

19   to compile a list of everybody who'd been

09:24   20   convicted on the basis of this flawed process and

21   simply issue a pardon to all of them, which was

22   the, at that time, that was the only thing that

23   could be done.

24   The only case which I can

09:24   25   think of at the moment in my own experience where

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1   a pardon has been given in a more serious case

2   was, again, in this case of Derek Bentley, who was

3   convicted and hanged for the murder of a police

4   officer in 1953. And very many years later, as

09:24 5   part of a response to ongoing concern about that

6   and the suggestion that Derek Bentley, who was 19

7   when he was hanged, should never have been hanged,

8   he was posthumously given a pardon in relation to

9   sentence, but not in relation to conviction.

09:25 10   As I say, it's a

11   rarely-exercised power, the exercise of the

12   prerogative of mercy, and I think, with the

13   existence of the CCRC, it will be even rarer.

14   Q   Go to the next page, please. This talks about

09:25 15   supplementary powers and I think it gives the

16   Commission the power to access documents from a

17   public body; is that correct?

18   A   Yes.

19   Q   And can you just elaborate on that? What can you

09:25 20   get, what areas can you get documents, and what --

21   where can you not?

22   A   Well the 'public body' is further defined, I

23   think, in Section 22. And 'public body' is given

24   a wide definition and it really covers anybody,

09:26 25   any public body, which is publicly funded and

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	1	which exercises public functions. So it includes
	2	the police, the -- I'm thinking the start of an
	3	investigation and working outwards -- the power to
	4	obtain documents from police, prosecution, courts,
09:26	5	social services, arises because of Section 17,
	6	and providing our request is reasonable -- and
	7	we've never been challenged over the
	8	reasonableness of any of our requests -- we can
	9	require the production of any material which we
09:26	10	think may assist in the exercise of our functions.
	11	And further on in Section 17
	12	there is a provision which says that a request
	13	which the Commission made can't be defeated by any
	14	suggestion that what we're looking for is secret,
09:26	15	confidential, or in other circumstances would not
	16	be discloseable. So if the material is held by a
	17	public body as defined, and we reasonably think it
	18	might assist us as a Commission in the exercise of
	19	our functions, then we can demand it and get it.
09:27	20	Q Let's talk about a couple of areas. The
	21	prosecutor's file, would that be a source, would
	22	you normally get the prosecutor's file in most
	23	applications?
	24	A In most applications, in -- by -- if it's a case
09:27	25	which has got into the category of application

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1		which requires a fuller and more extended review
2		then, almost invariably, the prosecution files
3		would be obtained.
4	Q	And what about the police files?
09:27 5	A	Them too.
6	Q	What about --
7	A	Particularly, of course, because the question of
8		the prosecution's compliance with its disclosure
9		obligations remains a very fertile source of
09:27 10		investigative activity, and to find out, you
11		investigate that by finding out what the police
12		had, what they'd told the prosecution about, and
13		what the prosecution disclosed, and you'd find
14		that by looking at their material.
09:28 15	Q	Would that be one of the very early steps, then,
16		of your investigation would be to review the
17		police file and the Crown file?
18	A	Yes, it would be, yes.
19	Q	What about defence counsel; would you try and
09:28 20		access his or her file?
21	A	We would, but of course Section 17 doesn't apply
22		to defence lawyers because they are not public
23		bodies.
24	Q	Presumably, the applicant would have the ability
09:28 25		to get authorization for you to get --

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1 A Oh, indeed. And the ap -- the very first

2 application which -- form which the applicant

3 completes has a section on it in which he is

4 invited to waive any privilege which might attach

09:28 5 to his lawyers and their files. So the starting

6 point is that we would ask, if we wanted to get

7 them and it was necessary to have a look at them,

8 then we would be -- we would be pre-armed with a

9 waiver of privilege.

09:29 10 Q And I may have touched on this yesterday, but have

11 there been many cases where an applicant would

12 refuse to waive solicitor/client privilege with

13 respect to communications with his or her defence

14 counsel?

09:29 15 A If there have been, they are no more than a

16 handful, I'm -- in -- I didn't come across that

17 situation in any case that I ever dealt with.

18 Q Go to the next page, please. Section 19 talks

19 about:

09:29 20 "Where the Commission believe that

21 inquiries should be made for assisting

22 them in the exercise of any of their

23 functions in relation to any case they

24 may require the appointment of an

09:29 25 investigating officer to carry out the

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1   inquiries.",

2   and it goes on to the next page. If we can look

3   at, I think it talks here about being able to go

4   to another police force than the one that

09:30 5   originally investigated the case, is that

6   correct, or is that a different section?

7   A   No, that is the provision which enables the

8   Commission to require the appointment of a person

9   serving in a police force different to that which

09:30 10   carried the -- carried out the original

11   investigation.

12   Q   And you talked about this a bit yesterday; does

13   the Commission rely on external police forces to

14   assist in your investigation?

09:30 15   A   It does but, as I was saying yesterday, the

16   principle objective of the Commission in any

17   investigation is to do the investigation itself,

18   and in the great majority of cases that is what

19   happens, even though it may involve the Commission

09:30 20   inviting some form of external assistance in the

21   provision of further evidence or information which

22   generally will include -- will involve

23   commissioning expert reports in forensic science

24   or pathology or matters of that nature, but it may

09:31 25   extend to asking the police for further

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1   assistance. If it's something which is a

2   self-contained "please, will you make this Inquiry

3   for us and report back to us", we will ask the

4   police to do that without going through the

09:31 5   formality of requiring the appointment of an

6   investigating officer.

7   The purpose of this section is

8   to allow us to call upon the resources, usually of

9   a police force. In fact, I think every time we've

09:31 10   requested the appointment of an investigating

11   officer it has been a police officer. It doesn't

12   have to be, it can be an officer from any public

13   body, of which I suppose an example would be if it

14   was a serious or complex fraud we could, in

09:31 15   theory, ask for the appointment of an

16   investigating officer from a serious fraud office.

17   But, in practice, all of the investigating

18   officers we have used have been police officers.

19   And what we're looking for is

09:32 20   a total investigative resource to be applied to

21   certain types of cases, and we identify criteria

22   in which we would usually look for the appointment

23   of an investigating officer under Section 19, and

24   I think from recollection they were essentially

09:32 25   three:

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1   one was if the level of investigation was

2   going to be so great that it was completely

3   unrealistic to expect the Commission's resources

4   to be able to deal with it;

09:32 5   secondly was any investigation which, in

6   order to obtain information, was going to require

7   the particular exercise of police powers such as

8   arrest, interview under caution, obtaining search

9   warrants, because those are powers which the

09:33 10   police officers have but which the Commission

11   doesn't;

12   and the third category was any investigation

13   which looked as if, by its nature, it was going to

14   be looking into allegations of misconduct, such as

09:33 15   perjury or perverting the course of justice,

16   committed by the officers who investigated the

17   original case.

18   So, against those, those are

19   the sorts of criteria which the Commission would

09:33 20   apply, and the application of those criteria has

21   resulted in the making of 41 appointments under

22   Section 19 out of all the cases which the

23   Commission has dealt with.

24   Q   Can you tell us, to what extent does the

09:33 25   Commission get involved in investigating another

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1   perpetrator? And let me just give you a bit more

2   background there. Would you agree that in most

3   cases where a person alleges wrongful conviction

4   or a miscarriage of justice, that if they are

09:34   5   correct in their assertion, then someone else

6   committed the crime for the most part; is that a

7   fair premise?

8   A   Well the assumption must be, of course, if

9   somebody hasn't committed it someone else has.

09:34 10   Q   Right.

11   A   Umm, as I was saying yesterday, very few of our

12   applicants actually take the trouble to say in

13   their application "I am innocent of this offence,

14   I am factually innocent of it". But leaving that

09:34 15   aside, as we were developing at some length

16   yesterday, what the Commission is concerned to do

17   is to investigate the safety of our applicant's

18   conviction, and that is the focus of the

19   investigation. It may be, in some of them, that

09:34 20   it is a necessary part of that investigation to

21   inquire into the possibility of identifying or

22   establishing the commission of the -- the actual

23   commission of the offence by someone else, but we

24   wouldn't be going into the investigation trying to

09:35 25   establish a prosecutable case against someone

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1   else. That is, and remains, the responsibility of

2   the police, not the Commission.

3   So, if I can give you an

4   example, I have -- there are two examples I can

09:35   5   give. One is a, what one might regard as being a

6   relatively run-of-the-mill type of case, if I can

7   put it that way, the other was a much more

8   notorious case in England.

9   But the first was a young man

09:35 10   who was at the university, he was a law student

11   convicted of armed robbery on a shop, and he was

12   arrested by police officers who were called to the

13   scene. He was carrying his law books, but he

14   seemed to fit the description of one of the -- he

09:36 15   seemed to fit the description of the robber and,

16   also, he was wearing shoes, the imprint of which

17   matched a footprint, or the sole of which matched

18   a footprint in the soil out -- in soil outside the

19   shop. So he was prosecuted and convicted and his

09:36 20   defence was "I didn't do it, what happened was I

21   was just walking past the shop and someone came

22   out" -- I can't remember if he said he knew this

23   other person or not, but that may not matter. But

24   his defence, what he said was "this person came

09:36 25   running out of the shop, threatened me, and said

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1   'I want to swap shoes with you', and so I did

2   that, and that's how I come to have shoes which

3   match the imprint".

4   Now this defence probably

09:36 5   didn't sound particularly plausible, and it

6   certainly wasn't one which the jury thought much

7   of, and he was convicted, the first appeal

8   dismissed. He comes to the Commission, and the

9   first thing we do is to have these shoes tested

09:37 10   for DNA, and lo and behold, you know, there is a

11   significant amount of DNA on these shoes which is

12   not his. Again, I can't remember whether the DNA

13   which we found was matched to anyone else, but to

14   us that was not a significant point. We told the

09:37 15   police we had got this DNA, and they might wish to

16   investigate as to whether they could find the

17   person who had the DNA which was in these shoes,

18   but from our point of view we now had the

19   evidence, the fresh evidence, which we felt was

09:37 20   sufficient to give rise to the real possibility

21   that the Court of Appeal would quash the

22   conviction because, whereas his defence had seemed

23   highly unlikely at the time of trial, all of a

24   sudden here was some hard DNA evidence which

09:37 25   actually gave some credence to what he was saying.

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1   So we referred the case to the Court of Appeal and

2   his conviction was quashed.

3   So that was a situation where

4   our, the nature of our investigation necessarily

09:38 5   embraced the possibility of somebody else having

6   committed the offence and, indeed, the evidence

7   which we obtained tended to suggest that that may

8   have been the case, but our purpose was served by

9   doing what I've described. We weren't, as a

09:38 10   Commission, concerned to go on to try and identify

11   who that perpetrator might have been and ensure

12   that he was investigated for the robbery.

13   The other example -- I don't

14   want to waste the Commission's time, I'm --

09:38 15   Q   No, you're quite fine, please carry on?

16   A   -- on stories, but there was a notorious case in

17   United Kingdom some ten years ago where the deputy

18   headmaster of a school in the south of England was

19   convicted of the murder of a young 13-year-old

09:38 20   girl who was his foster daughter. He and his

21   family, I think he had four natural children, who

22   at the time were aged from -- there was a baby and

23   then I think the eldest child at the time was 12

24   or thereabouts. But they had this girl who had

09:39 25   been fostered with them, who by all accounts,

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1   seemed to be settling into the family very well,

2   and she was murdered in a particularly unpleasant

3   way. She was beaten about the head with an iron

4   bar as she was sitting in the garden of the family

09:39   5   home painting some French doors, and eventually

6   her father -- the name of the case was Shawn

7   Jenkins -- Mr. Jenkins was prosecuted and

8   convicted of her murder. And I think one of the

9   significant pieces of evidence which resulted in

09:39   10   his conviction was the appearance of blood on his

11   clothing, which was said to have come from his

12   foster daughter as he'd hit her.

13   I mean there were a number of

14   strange things about the case, not least if you

09:40   15   batter someone over the head and she was bleeding,

16   the victim was very heavily bloodstained, as to

17   why there wasn't more blood on the father. And he

18   said, anyway, that when he'd got -- when he found

19   his daughter -- he denying responsibility -- he

09:40   20   thought she was still alive and he cradled her and

21   he thought she was still breathing. But he was

22   convicted of murder.

23   And as you might imagine with

24   this type of case, in the -- when the case was

09:40   25   initially reported, but in the press, there was a

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1   sort of underlying suggestion that maybe there had

2   been some sort of sexual motivation behind the

3   relationship between Mr. Jenkins and this young

4   girl. In fact there was absolutely none, but it

09:41 5   had the effect of turning his wife against him,

6   which in turn had the effect of having a severely

7   adverse impact so far as the conduct of his

8   defence was concerned around the question of

9   whether two of his children should give evidence

09:41 10   on his behalf, because on the prosecution case the

11   time available for Mr. Jenkins to have killed his

12   foster daughter was no more than four minutes,

13   because he'd brought one of his children home from

14   a music lesson and four minutes later they had

09:41 15   driven off somewhere else and then returned and,

16   according to him, found the body. So there was a

17   very, very short time frame in which he could have

18   done this, and I think the defence would very much

19   have liked to have called these two girls to give

09:41 20   evidence and they didn't for reasons I'll come

21   onto for a moment.

22   But one of the, another very

23   strange and never satisfactorily-explained part of

24   the case was that the pathologist, when the

09:42 25   postmortem was conducted, discovered a piece of

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1   plastic, the sort of plastic which comes from bin

2   liners, --

3   **Q**   Yes?

4   *A*   -- yeah, stuffed deep up one of the child's

09:42   5   nostrils, and that -- that, to this day I don't

6   think that has ever been really explained.

7   But the significance of it --

8   and this was something which was known at trial --

9   was that there was another man who was known to

09:42   10   have been in the area where the family lived,

11   there was park land adjacent to the house, and he

12   was known to have been in this park at around the

13   material time, someone who had some strange

14   propensity for stuffing plastic into holes,

09:43   15   usually into electrical outlets. Now that was

16   known at the time of trial but the police

17   investigated that at the time and there was --

18   they were satisfied that actually, at the time

19   when this murder must have taken place, he wasn't

09:43   20   in a position to have been the perpetrator, so he

21   was rejected by the police as a suspect and the

22   defence, although they were aware of it, weren't

23   really able to make very much of it at trial.

24   When the case came to the

09:43   25   Commission there were three broad strands which

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1   the Commission investigated, one of which related

2   to this man with the propensity for

3   sticking/stuffing plastic in holes, and we were

4   able to find new evidence which actually

09:44   5   significantly diminished the earlier evidence

6   providing him, effectively, with an alibi. So we

7   were able to make some inroads into the alibi of

8   this particular person and that was something

9   which, when we referred the case, we relied on as

09:44   10   part of our reasoning for referring the case.

11   The other strand of the

12   investigation which we pursued related to

13   scientific evidence concerning the blood

14   spattering and how that might have occurred.

09:44   15   And the third line was to deal

16   with the question of these two young girls, who by

17   now were in their late teens, as to what had been

18   going on with them as to -- which had precluded

19   them from giving evidence because, effectively,

09:44   20   their mother had refused to allow them to give

21   evidence and she had been telling the police, in

22   the period between Mr. Jenkins' arrest and trial,

23   about what the girls had been saying to her about

24   their father's behaviour, all of which tended to

09:45   25   be pretty adverse to Mr. Jenkins. But the defence

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1   lawyers were unable to explore this because they

2   were not allowed to interview the girls, and so

3   although defence counsel believed that the girls

4   could give evidence which was extremely helpful to

09:45 5   their father, he couldn't run the risk of calling

6   them because he didn't actually know what they

7   were going to say. He had every reason to think

8   that they may have been manoeuvred, in the

9   intervening months between the offence and the

09:45 10   trial, into being hostile towards their father,

11   and he had no way of finding out what the position

12   actually was, so they weren't called.

13   So we investigated that at the

14   Commission and, again linking this back to

09:45 15   something, what we were talking about yesterday,

16   we weren't that interested in what their

17   recollection of the incident was because we're, by

18   now, seven or eight years on, and in any case

19   their interview, their interviews at the time had

09:46 20   fortuitously been video recorded so we knew what

21   they could have said if they were consistent with

22   their evidence. What we were interested to find

23   out is what they had to say about all these

24   behaviours of their father which their mother had

09:46 25   ascribed to them, so we obtained the consent of

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1   the Family Division High Court to interview these

2   two girls, and did so, and, to a certain extent,

3   were able to demonstrate, through their mouths,

4   that a lot of what they were reported to have said

09:46 5   which was hostile to their father, in fact, they

6   didn't -- they did not agree with. So a

7   significant part of the reference back to the

8   Court of Appeal, in addition to the blood and the

9   man with the plastic, was the fact that the

09:47 10   defence had been unfairly deprived of the

11   opportunity of calling evidence which was

12   favourable to the defence.

13   When it eventually got to the

14   Court of Appeal, one of the first things the court

09:47 15   did was to make a request to the Commission under

16   Section 15 for further inquiries into the man and

17   the plastic and, in particular, into his

18   psychiatric record, so we did that for the Court

19   of Appeal and reported back to them with the

09:47 20   further information about this man.

21   In the event, the Court of

22   Appeal attached little significance to the man

23   with the plastic and, as I say, that appeared, the

24   appearance of the plastic deep in her nostril

09:47 25   remains to this day a very strange and unexplained

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1   part of the case.

2   The Court of Appeal was not

3   that persuaded either by the arguments around the

4   two girls' evidence and what won the day for Mr.

09:48   5   Jenkins was the fresh evidence on the blood

6   splattering, so in this particular instance the

7   Court of Appeal ordered, quashed the conviction

8   and ordered a retrial. Mr. Jenkins was retried.

9   As a result, the first jury failed to agree, so he

09:48   10   was tried again and acquitted.

11   Q   Okay. So that would be a case then where, I guess

12   from the Court of Appeal inquiries, would be made

13   about another possible perpetrator?

14   A   Yes.

09:48   15   Q   Can you comment on, and again I'll give you, I

16   think you have a general understanding of the

17   Larry Fisher -- Larry Fisher's involvement in the

18   David Milgaard case?

19   A   Uh-huh.

09:48   20   Q   He was part of the first application, and I think

21   the ground put forward, at least in part, was

22   David Milgaard -- there had been a miscarriage of

23   justice because Larry Fisher had committed the

24   crime, not David Milgaard?

09:49   25   A   Uh-huh.

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1	**Q**	Can you tell us generally, how would the
2		Commission deal with an application of an inmate
3		who says I was wrongfully convicted and I think X
4		committed the crime and here's why I think so --
09:49 5	*A*	Uh-huh.
6	**Q**	-- and if you can prove that X did the crime, then
7		I didn't, and so that type of ground. First of
8		all, is that something that the Commission would
9		normally receive, that type of argument, and
09:49 10		secondly, how would you approach that?
11	*A*	Well, I think interestingly, from my recollection,
12		I don't think that the Commission has ever
13		received an application in such stark terms. I
14		can think of an example which I'll come onto in a
09:49 15		moment where another name has come into the frame
16		subsequent -- subsequent to -- in a slightly
17		different way, but I don't think that the
18		Commission has ever been, ever had an application
19		which is quite so stark in its terms, "I didn't do
09:49 20		it, I'm nominating a named person as being
21		responsible."
22		Where it has arisen has been
23		more in the circumstances of the two examples that
24		I've given, that there is a suggestion -- that
09:50 25		there is an inference from the way the application

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1   is framed that someone else has done it, but it

2   may not be someone known to the applicant, but

3   assume there was such an application. Well, the

4   Commission would embark on an inquiry to see to

09:50 5   what extent evidence could be found which tended

6   to support the suggestion which was being made,

7   but as I say, the objective that the Commission

8   was following was to find that evidence which

9   would be sufficient to meet the Commission's test

09:50 10   for referral and the focus would be on new

11   evidence tending to show that our applicant had

12   been wrongly convicted.

13   Now, if that involved

14   endeavouring to show that somebody else had

09:51 15   committed the offence, all we would be looking for

16   would be sufficient evidence to suggest that that

17   was a possibility and a sufficiently significant

18   possibility to give rise to real -- to doubt as to

19   whether our application, our applicant was in fact

09:51 20   the perpetrator. As I said earlier, what we

21   wouldn't be doing is trying to prove a

22   prosecutable case.

23   Now, I can envisage a

24   circumstance, but it has never happened, in which

09:51 25   that might be necessary, and I think that would

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1   almost certainly be a circumstance in which we

2   would have asked for the appointment of an

3   investigating officer.

4   Q   So just back on the first point then, if the

09:51 5   Commission would investigate and find that the

6   possible involvement of a third party might be a

7   basis to say that the conviction of the applicant

8   is unsafe, that would be the extent of your

9   investigation?

09:52 10   A   Yes, yes. So, I mean, if I take what I understand

11   to be the position of Larry Fisher --

12   Q   Yes.

13   A   -- that I think if I was putting this in the

14   context of an investigation by the CCRC, we would

09:52 15   have -- the first thing -- or we would hope that

16   we would have found from a review of all the

17   police files that Larry Fisher's wife had made,

18   had suggested to the police that she thought her

19   husband might be responsible, so we would then be

09:52 20   looking and saying, well, what was the police

21   response to that, and the investigations we

22   carried out would develop from there and

23   presumably we would then reach the point which was

24   reached when the application went before the

09:52 25   Supreme Court here in 1992, that here was a man

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1   who, in relation to whom there was certainly

2   substantial reason to think that he was a

3   plausible suspect for this offence, particularly

4   having regard to previous convictions in a matter

09:53 5   of that nature. I mean, I can't sit here and say

6   we would definitely have found our test to have

7   been satisfied because that would depend on the

8   rest of the case, and of course there's an awful

9   lot more to this case than simply the Larry Fisher

09:53 10   dimension, but what we would be looking at was we

11   have now found this new evidence which was

12   probably available at the time if anyone had made

13   the links, but whether that's, those links were

14   made right or not and whatever the situation was,

09:53 15   there was information about this suspect which

16   wasn't disclosed to the defence at trial and we

17   think that had this information been available to

18   them, they could have deployed it effectively to

19   suggest that there was a reasonable doubt about

09:53 20   Mr. Milgaard's guilt, and if that was the case, we

21   might welcome the conclusion that our real

22   possibility test was satisfied and refer to the

23   Court of Appeal for them to consider.

24 Q   And so would it be correct to say that your focus

09:53 25   would not be on whether or not Larry Fisher

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1		committed the crime or David Milgaard committed
2		the crime, but whether the information relating to
3		Larry Fisher that had not been known by defence,
4		if it had been known, what effect if any it would
09:54 5		have on the jury's verdict?
6	A	Yes, could it have been deployed effectively to
7		induce the sort of doubt which the defence would
8		be interested to induce in the minds of the jury.
9	Q	And so really looking at the safety of Mr.
09:54 10		Milgaard's original conviction with this new
11		information being other sexual assaults and Mr.
12		Fisher's involvement in those assaults, could that
13		information have made a difference at Mr.
14		Milgaard's trial, that would be the focus?
09:54 15	A	That would be the focus, and it would of course
16		be, I think it would take into account the fact
17		that Mr. Fisher lived close by to, I think he
18		lived in the same building as one of the
19		significant Crown witnesses in the case.
09:54 20	Q	Yes, that's correct.
21	A	Yes. So, you know, it's -- it clearly is not --
22		as matters were known when the application was
23		considered by the Supreme Court in the early
24		1990s, it certainly was not an off-the-wall
09:55 25		suggestion that here was another plausible

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1 candidate and it might have been possible for the

2 defence to deploy that information effectively in

3 Mr. Milgaard's defence had they known about it at

4 the time.

09:55 5 Q And so would you look at questions as to whether

6 or not evidence about Mr. Fisher would have been

7 admissible at David Milgaard's trial?

8 A Yes.

9 Q And, secondly, we've heard a fair bit of evidence

09:55 10 about similar act and whether or not the other

11 rapes committed by Mr. Fisher are similar to Gail

12 Miller's murder which I think many witnesses have

13 said goes to the question of whether or not the

14 Fisher evidence is significant enough to have

09:55 15 raised a doubt. Is that something that you would

16 have pursued as well?

17 A Yes, I'm sure.

18 Q And then I take it, though, your test is not to

19 say that it would have affected the verdict of the

09:56 20 jury, but rather is it something that might be

21 expected to affect the verdict?

22 A Yes.

23 Q And in fact even one step removed, is there a real

24 possibility that the Court of Appeal might

09:56 25 conclude that this evidence might have affected

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1   the verdict; is that a fair way to put it?

2   A   Yes, I mean, you get quite a convoluted sentence,

3   but what we would be saying, asking ourselves is,

4   is there a real possibility that the Court of

09:56 5   Appeal will receive this fresh evidence and,

6   having received it, is there a real possibility

7   that they will conclude that it might have

8   resulted in the jury reaching a different verdict.

9   Q   And it's correct to say then that you would leave

09:56 10   it up to the -- if you decided that there was the

11   real possibility, you would leave it up to the

12   Court of Appeal to decide -- I guess maybe the

13   tougher question is would it have affected the

14   verdict, and the Court of Appeal would decide,

09:56 15   number one, whether to receive the evidence and,

16   two, to decide how it might have affected the

17   safety of the verdict?

18   A   Yes. I mean, the Court of Appeal would be asking

19   "might", they wouldn't be asking "would" I don't

09:57 20   think, and I think the test the Court of Appeal

21   applies, which is identified in the House of Lords

22   case of *Pendleton,* is that if they have any

23   difficulty with fresh evidence because, I mean,

24   some fresh evidence will be utterly overwhelming

09:57 25   in showing that the conviction is unsafe, other

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1   fresh evidence may be equally overwhelming the

2   other way, but the grey area, and this would be a

3   grey area, this type of evidence, the House of

4   Lords in *Pendleton* said in those situations the

09:57   5   Court of Appeal should ask itself to test their

6   own view of it, what impact that evidence might

7   have had on the jury.

8   Q   And just to finish up on that point then, I take

9   it that you would not need to investigate Larry

09:57   10   Fisher as a suspect to the point of trying to

11   establish that he committed the crime?

12   A   Well, not in the circumstances that we've been,

13   we've just been talking about, no. I mean, the

14   reality in Mr. Milgaard's case now, if an

09:58   15   application on the basis -- if one hypothesizing

16   an application from someone convicted in the sorts

17   of circumstances which Mr. Milgaard was and the

18   circumstances are, as we now know them to be;

19   namely, that there is available at the time the

09:58   20   application is made to the Commission exhibits

21   available, forensic examination, the first thing

22   the Commission would now do would be to have those

23   existing, those still existing forensic exhibits

24   examined for DNA because of the ongoing

09:58   25   improvement in DNA techniques, so it's quite

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1   likely that in 2006 a review by the Commission of

2   a murder of this nature in the late 1970s would

3   start with a DNA analysis of available exhibits,

4   and given what we now know about the outcome of

09:59   5   the DNA analysis which was done in Mr. Milgaard's

6   case, the Commission would presumably discover

7   fairly quickly that the semen at the scene did not

8   come from Mr. Milgaard and that, irrespective of

9   whether or not that DNA could be matched to

09:59   10   someone else, that would be a knock-down reason

11   for referring the case back to the Court of

12   Appeal.

13   COMMISSIONER MacCALLUM: You did say

14   however, sir, that you would have asked for the

09:59   15   appointment of an investigating officer given the

16   circumstances of the case?

17   A   I'm sorry, if you understood me to have said that,

18   that was not what I intended to say. What I

19   intended to say was if we thought it was necessary

10:00   20   to conduct an investigation which was -- in order

21   to conduct the inquiries necessary for our

22   purposes, it was also necessary to investigate the

23   actual involvement of someone else --

24   COMMISSIONER MacCALLUM: Yes.

10:00   25   A   -- which might involve arresting that person and

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1   questioning them, and we have done that in one of

2   our cases. It wasn't specifically about trying to

3   prove that someone else had done it, but someone

4   else who might have had a criminal involvement in

10:00 5   the offence in question was identified and so we

6   asked the police to arrest and interview that

7   person under caution. If that was necessary for

8   our part of it, for our investigations, we would

9   probably invite the appointment of an

10:00 10   investigating officer to do it.

11   COMMISSIONER MacCALLUM: Uh-huh.

12   A   But in this case, our initial step would be to see

13   to -- this was an offence in which a woman was

14   raped and murdered. There was evidence that we

10:01 15   would see as part of our review of the history of

16   the case that there was blood grouping evidence

17   given around the frozen semen samples found in the

18   snow and we might reasonably assume that there

19   could have been further relevant forensic evidence

10:01 20   on clothing, so we would find out what was

21   available to be examined now and -- because of an

22   offence of this nature almost invariably results

23   in the deposit of relevant bodily fluids which can

24   be examined, we would do that first, and we

10:01 25   wouldn't need an investigating officer to do that,

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1   we would simply get on to the Forensic Science

2   Service and say will you take these exhibits from

3   me and examine them.

4   COMMISSIONER MacCALLUM: And assuming the

10:01 5   need for an investigating officer, your choice of

6   a policeman interests me. Inasmuch as we've

7   heard evidence in this case that the mere mention

8   of a policeman being involved in the

9   investigation of matters where police were

10:02 10   alleged to have committed a wrongdoing raised a

11   suspicion of bias and --

12   *A*   Yes.

13   COMMISSIONER MacCALLUM: And so do I take

14   it then that you just, you approach the matter

10:02 15   from a different point of view, from the

16   presumption of regularity, that the police will

17   do what they are supposed to never mind the

18   criticism from suspicious people?

19   *A*   Yes, and this is -- there have been occasions when

10:02 20   precisely this problem has arisen and we deal with

21   it at an early stage as part of the ongoing

22   management of our applicants, because the reality

23   is that if you are wanting to have a full-scale

24   investigation of something to be done by

10:02 25   experienced investigators, you can say -- you can

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1   ask the applicant, well, who actually do you think

2   is going to do it, who do you suggest has the

3   necessary expertise and powers other than a police

4   officer, which is usually a question which they

10:03 5   can't satisfactorily answer.

6   The next thing after that, or

7   maybe even before asking that question, is to make

8   sure that they understand absolutely that if the

9   Commission requires the appointment of an

10:03 10   investigating officer, that investigation is going

11   to be carried out under the direction and

12   supervision of the Commission and the actual

13   process of getting one of these investigating

14   officer reviews underway is an extensive and

10:03 15   protracted one and involves a considerable amount

16   of discussion with the police around the nature of

17   the investigation, the sort of officer we would be

18   looking for to investigate it, and once we've

19   identified a suitable investigating officer, we

10:04 20   work out terms of reference for the investigation

21   with them and the ongoing investigation is

22   supervised and directed by Commission staff.

23   So it isn't a question of

24   saying to the police we would like you to

10:04 25   investigate this, get on with it and let us know

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	1	what you find out, it's much more closely confined
	2	than that, and as I say, the final thing which we
	3	can do to, both to improve the likely
	4	effectiveness of the investigation and in passing
10:04	5	allay the applicant's fears about all of this is
	6	to require the appointment of a police officer
	7	from a different police force.
	8	COMMISSIONER MacCALLUM: Yes.
	9	A And I might say that in two of the cases which I
10:04	10	dealt with when I was at the Commission where we
	11	did require the appointment of an investigating
	12	officer, that circumstances arose in the course of
	13	that investigation where we were not 100 percent
	14	impressed with the way in which our investigating
10:05	15	officer had gone about certain of the inquiries
	16	and we simply got him to do them again.
	17	COMMISSIONER MacCALLUM: Okay.
	18	A So any foot dragging or how he might express it by
	19	the investigating officer would be acted on by the
10:05	20	Commission.
	21	COMMISSIONER MacCALLUM: Okay.
	22	BY MR. HODSON:
	23	Q Do I understand, Mr. Kyle, that again -- just back
	24	to the, this analysis of the Larry Fisher crimes
10:05	25	and whether that information might have affected

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1   the verdict of the jury. Would that be something

2   that, and I appreciate this is just a very general

3   discussion, but would you normally go to Mr.

4   Fisher then and interview him or would you go --

10:05 5   would you rely upon the record of his offences?

6   In other words, here's the information about this

7   man, would it matter to you whether or not he

8   denied his involvement or the rest of the matters

9   that might link him to that crime?

10:06 10   A   Well, our starting point, I suppose in a way this

11   should be, we would adopt the same sort of

12   approach and strategy to the investigation,

13   bearing in mind we know what our objective is,

14   which is to see whether we can obtain new evidence

10:06 15   which calls the safety of the conviction into

16   doubt, that's the objective. We would start with

17   the -- we would start at the beginning and work

18   outwards, and interviewing Larry Fisher as part of

19   the objective we wanted to serve is likely to be a

10:06 20   long way down the road in terms of earlier

21   investigative activity and what we would be

22   looking for, because what we would be looking for

23   is what, in some respects, whether Larry Fisher

24   admits or denies the offence and, frankly, if the

10:07 25   Commission just knocked on his door and said would

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1   you -- we think you may have murdered Gail Miller,

2   what do you say about that, likely he would tell

3   us to go away and deny it, there would be a lot of

4   proprietary investigation before any question of

10:07   5   interviewing Larry Fisher arose, and if there was

6   a need to interview Larry Fisher, then, as I've

7   indicated to the Commission a moment ago, I think

8   that by that point an interview of Larry Fisher,

9   if it was that sig -- if we needed to do that as

10:07 10   part of our investigation, would necessarily then

11   involve the introduction of a dimension to the

12   investigation which included investigating Larry

13   Fisher for the actual commission of the offence

14   and that's a police matter, so that's why I say we

10:07 15   would be looking at that stage to ask for the

16   appointment of an investigating officer.

17   Q   But do I understand that those cases would be rare

18   where your investigation leads you to engage a

19   police force to investigate another alleged

10:08 20   perpetrator?

21   A   Yes.

22   Q   Can you comment on, just on how the Commission

23   deals with weighing the credibility of evidence or

24   information that you seek to gather? Is there --

10:08 25   again, keeping in mind your objective is the real

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1   possibility whether the Court of Appeal might find

2   a basis to find the verdict unsafe, when you look

3   at evidence of witnesses, what is your -- what do

4   you do -- do you weigh the evidence, is it

10:08   5   something that you let the Court of Appeal decide,

6   or how do you weed out that which might be not

7   credible?

8   A   Well, I think in this context, as indeed in many

9   others, you quite rightly pointed out on a number

10:08   10   of occasions the Commission is a gateway into the

11   Court of Appeal and because real possibility is

12   not defined in the act and has been given a broad

13   definition by the high court in the case of *ex*

14   *parte* Pearson, we approach our work on the basis

10:09   15   that we are a wide gateway, we're not -- we see

16   the real possibility test as being a relatively

17   low threshold, it's not a hugely difficult hurdle

18   for an applicant to overcome.

19   As we were looking at the

10:09   20   figures, the two-third/one-third split in the

21   Court of Appeal suggests that there is a

22   reasonable application of that real possibility

23   test, but in assessing the weight of evidence and

24   the impact it's likely to have and its

10:09   25   credibility, the Commission has to have regard to

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1   precisely the same matter that the Court of Appeal

2   is going to have because one of the factors the

3   Court of Appeal has to take into account when

4   considering whether to receive fresh evidence is

10:10   5   whether it's capable of belief and that may, in

6   some respects, have some subjective elements to

7   it, but generally speaking, assessing whether a

8   witness is capable of belief is something which

9   the Commission does on an objective,

10:10   10   evidence-based basis, so we will be looking for

11   essentially just how credible does this evidence

12   appear, is it supported.

13   This goes back to what we were

14   saying yesterday with witnesses who recant or

10:10   15   co-accused who try to suggest after the event that

16   their partner in crime was innocent, we know that

17   the Court of Appeal is cynical about that and is

18   unlikely to find capable of belief a bare

19   assertion by a witness that something is different

10:10   20   now to what it was, and so the assessment of

21   credibility of evidence, I mean, it's not really

22   capable in a scientific analysis to how one goes

23   about it, but it is a matter of taking the

24   evidence that you've got and assessing how

10:11   25   credible it is in the context of the case as a

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1   whole.

2   Q   Okay. Go to 339755, please, and I obtained this

3   from the web site, I think this is the current

4   application that's used for inmates; is that

10:11 5   correct?

6   A   It certainly looks like it, yes.

7   Q   And if we can just go to page 339759, and it looks

8   like this is the part, if you can just enlarge the

9   top part, talking about -- would it be fair to say

10:11 10 that this application is geared towards the inmate

11   or the convicted person?

12   A   Uh-huh.

13   Q   As opposed to perhaps their counsel?

14   A   Yes, it is. I mean, the majority of applications

10:12 15 are received completed by the applicants

16   themselves or by friends of theirs and so the

17   language of the application is deliberately chosen

18   to make it easy for applicants to fill in

19   themselves.

10:12 20 Q   And here it says:

21   "Please use this space to tell us what

22   you think went wrong and what is new

23   about your case. If there is nothing

24   new, but you think there are

10:12 25   'exceptional circumstances' that we

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1   should know about, please tell us what

2   the circumstances are and what you can

3   show us to support what you say."

4   A   Uh-huh.

10:12   5   Q   And you commented on this yesterday and I think

6   you said generally that the grounds that the

7   Commission investigates are often quite different

8   than what the applicant puts forward?

9   A   Yes. In some cases the applicant will --

10:13 10   applicants will put their finger on what seems to

11   have gone wrong and will be able, in their own

12   terms, to identify issues which the Commission

13   subsequently thinks are significant. In other

14   cases applicants may not say anything, they will

10:13 15   fill in this part of the form, but it won't

16   actually identify anything which could conceivably

17   impact on the safety of the conviction, and in

18   other cases it may be a mixture, and then when the

19   Commission comes to review the case and decide on

10:13 20   the nature of the investigation and the extent of

21   it, that will include consideration being given by

22   the Commission as to whether there are any

23   relevant issues which the applicant simply hasn't

24   mentioned at all but which ought to be looked at.

10:14 25   Q   And I think you told us yesterday, and maybe even

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1   again this morning, that your objective or your

2   focus is to investigate those grounds that you

3   think, if established, would provide a remedy; in

4   other words --

10:14 5   A   Yes.

6   Q   -- your focus is on what might get you through the

7   gateway?

8   A   Absolutely right, and it is now, and it probably

9   wouldn't surprise anyone, that in the very early

10:14 10   days of the Commission, before we had really got a

11   grip on our own process and procedures, and in

12   particular where there was no Commission member

13   involvement with the case review manager in the

14   structuring and conduct of the investigation, that

10:14 15   we were finding that our case review managers were

16   full of enthusiasm to expose wrongful convictions

17   and were investigating anything and everything

18   which the applicant told them, and anything and

19   everything of issues which they, the case review

10:14 20   managers, identified, and what we were finding was

21   that an awful lot of time was being spent

22   investigating issues which, even if they had been

23   factually resolved in the applicant's favour,

24   could never have made any difference to the safety

10:15 25   of the conviction, so the development of the

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1   Commission's processes and working methods has

2   been around this attempt to identify at an early

3   stage what it is about the case which, were it to

4   be resolved in the applicant's favour, could

10:15   5   genuinely be said to have an impact on the safety

6   of the conviction, but that is the focus of the

7   investigation.

8   Q   If we can go to 339668, please. This is a

9   document again from the CCRC web site that just

10:15 10   goes through the application phases, and I'll just

11   generally deal with this, and I think you talked,

12   the first step:

13   "Is it a valid application?"

14   And that is whether the appeals have expired, or

10:16 15   if there has been no appeal --

16   A   Yeah.

17   Q   -- then it's a no. If it's yes, then it looks

18   like:

19   "Review amount of work required."

10:16 20   And that is, is it a five day fast-track?

21   A   Yes.

22   Q   Or is it something else?

23   A   Yes.

24   Q   And then case review -- and I'll get into this in

10:16 25   a moment, that would be the substantial

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1   investigative work?

2   A   Yes.

3   Q   And then a provisional view; it's my understanding

4   the Commission would create a provisional view of

10:16 5   either reference or no reference; correct?

6   A   Yes. I mean I'm, certainly when I was at the

7   Commission the provisional view and the response

8   to provisional review related only to those cases

9   where we were provisionally deciding not to refer.

10:16 10   Q   Okay.

11   A   Now it may be that they have changed in the 12,

12   well, certainly that was still the case in March

13   last year when I was there as the case review

14   manager.

15   Q   So --

16   A   So if they've changed their position now to give a

17   provisional view of a reference, then I'm not

18   aware of it.

19   Q   Yeah. There may be elaboration later on. So, in

10:17 20   any event, it's those cases where a reference

21   would not be made, then there would be a

22   provisional view and an opportunity of the

23   applicant to respond to that before a final

24   decision is made?

10:17 25   A   Indeed. And there have been cases where we have

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1   responded, we have considered the response to our

2   provisional view and changed our mind, and made a

3   reference.

4   Q   There have been cases?

10:17   5   A   Yes.

6   Q   Go to the next page. It talks a bit about the

7   process, and I want to spend a bit of time on case

8   review, it says:

9   "Once a case is allocated to a

10:17   10   caseworker (usually called a Case Review

11   Manager or a Case Worker) the review

12   begins. At this stage the caseworker

13   will examine the issues raised in the

14   application, as well as any issues the

10:17   15   caseworker spots, to see if there might

16   be anything that could give grounds for

17   referring the case. In most cases we do

18   all the work on a case ourselves, but we

19   do have the power to appoint an

10:18   20   investigating officer (usually from the

21   police) to carry out investigations for

22   us."

23   And is it correct that this is where the legwork

24   would be done, by the case review manager?

10:18   25   A   Yes.

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	1	Q	And --
	2	A	Under the guidance of a member of the Commission.
	3	Q	So one Commission member would be assigned to
	4			oversee the case review manager or the
10:18	5			caseworkers' investigation; --
	6	A	Yes.
	7	Q	-- is that correct? And that investigator or
	8			caseworker would gather, that would be the person
	9			who would gather the documents, review
10:18	10			transcripts, review the files. And you talked,
	11			yesterday, about creation of -- and I can't
	12			remember what you called it -- whether it was a
	13			plan or an investigation plan --
	14	A	A case plan, yes.
10:18	15	Q	-- or a case plan; can you tell us a bit about
	16			that?
	17	A	Well the object of the case plan is to identify
	18			all the issues which had been raised by the
	19			applicant or by the Commission, and in its early
10:18	20			stages that, of course, would include issues which
	21			had been raised by the applicant which the
	22			Commission then judges not to be of significance
	23			to the safety of the conviction and, therefore,
	24			not meriting any further investigation or review,
10:19	25			and the case plan will identify those issues and

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1   it will record the decisions which are taken by

2   the case review manager and the Commission member

3   as to what issues should be investigated and how

4   that investigation should be started, you know,

10:19 5   how that -- how the -- what the components of

6   those, of the investigation against each issue,

7   should be.

8   And the case plan remains a

9   living document in the sense that as the

10:19 10   investigation progresses, outcomes are recorded

11   and any new lines of investigation are then put

12   into the case plan, and so as the investigation

13   progresses the steps which have been taken, and

14   their outcomes, are recorded in the case plan.

10:20 15   And the -- there is a -- there is a monitoring

16   exercise which the Commission has introduced.

17   Because one of the matters

18   which the Commission is particularly concerned

19   about, and something we touched briefly on

10:20 20   yesterday, is how long these investigations take,

21   and some of them can take a considerable amount of

22   time. What the Commission is anxious to know is

23   are they taking a long time because they genuinely

24   are taking a long time, or are they taking a long

10:20 25   time because, for some reason or another, the

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1   investigation has lost its impetus. Which may

2   happen, for example, if you ask for further

3   scientific examination to be done and you send the

4   stuff off to be examined and it doesn't come back,

10:20 5   and so you've got a chunk of time in which

6   actually nothing is happening on the investigation

7   at all, but the overall length of time that the

8   investigation takes is ticking on. So the

9   Commission had just started introducing a

10:21 10   procedure, as I left from being a member of the

11   Commission, whereby I think, I think after every

12   six -- if six months had gone by since work

13   started on one of these cases requiring an

14   extended review, and that case hadn't been put up

10:21 15   for decision, then a case review committee of

16   three Commission members would be assembled and

17   they would require to be brought up to date on

18   what had been happening in the investigation and

19   why it was that, six months after work had

10:21 20   started, no -- the case hadn't been put up for

21   decision. And that would be the opportunity for

22   Commission members not actually involved in the

23   investigation to take stock of the position and we

24   found, when we first started doing this, that the

10:22 25   prospect of a case review committee prompted a

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1   considerable amount of activity on the case in the

2   weeks before that case review committee actually

3   met so that, by the time the case review committee

4   met, the case was actually put to them for

10:22 5   decision.

6   So that it's -- but that,

7   that, effectively, is what the case plan is about,

8   it's to provide the control mechanism for the case

9   review manager and the Commission member to

10:22 10   self-monitor, if I can put it that way, what they

11   are doing and why, and it also provides a record

12   of what's been going on, so that if it is a case

13   in which a case review committee is assembled,

14   they can see what's been done.

10:22 15   Q   If we can go to the next page, provisional view,

16   and I think this will clarify what we've talked

17   about earlier. It says:

18   "When we reach a provisional view that

19   there are no grounds to refer a case,

10:23 20   the person who has made the application

21   to us will normally be given 20 working

22   days to respond to the provisional

23   view."

24   So it appears that --

10:23 25   A   Then nothing has changed.

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 1    Q      -- nothing has changed?

 2    A      Yeah.

 3    Q      If we can go to 339667.  And this is simply a Case

 4           Statistics, and I think this is up to August 31,

10:23  5           2006, that we obtained from your web site, and I

 6           think it's consistent with the numbers you've

 7           provided.  Yours may have been --

 8    A      I'm happy to say that they are, they are the same

 9           numbers, yeah.

10:23 10    Q      Yes.

11    A      It doesn't always happen in these situations.

12    Q      Yes.  So these would be, up until the end of

13           August, the 'Total applications', 'Open' would

14           be -- what would 'Open' mean; do you know?

10:23 15    A      'Open' means that they are awaiting review.

16    Q      Okay.  And --

17    A      In other words, they are sitting on the shelf,

18           waiting to be allocated for review.

19    Q      Okay.  And then 420 'Actively being worked on'?

10:24 20    A      Yes.

21    Q      And 'Completed', 8,260 would be rejected, and that

22           would be -- or dismissed, but that would include

23           ineligible --

24    A      Yes, which is about a third of that number, I mean

10:24 25           the actual number of dismissed as being ineligible
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1   is 2,346.

2   Q   And then 340 referrals to the Court of Appeal?

3   A   Yes.

4   Q   And it looks as though some are still in the que,

10:24 5   but of the 287 that were heard by the Court of

6   Appeal, 198 convictions were quashed and 89 were

7   upheld; --

8   A   Yes.

9   Q   -- is that correct?

10:24 10   A   Yes.

11   Q   That's probably a good spot, Mr. Commissioner.

12   A   I might just say, for the sake of completeness on

13   that point, that --

14   Q   Yes?

10:24 15   A   -- within those figures there will be the very few

16   cases which have been referred, summary

17   convictions of the Magistrate's Court, which have

18   been referred to the Crown Court by the

19   Commission, and also referrals, equally few in

10:25 20   number, which have been made on the grounds of

21   sentence only.

22   Q   Okay, both -- so primarily convictions. Of the

23   198 that are quashed, and we talked a bit about

24   this yesterday, --

10:25 25   A   Uh-huh.

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1	Q	-- they would be quashed because the verdict is
2		not safe; --
3	A	Yes.
4	Q	-- correct? And as far as the factual innocence
10:25 5		-- or let me back up. I take it, once the
6		conviction is quashed, these people would be in
7		the position of being innocent; --
8	A	Yes.
9	Q	-- correct? Innocent because there is no longer a
10:25 10		conviction?
11	A	Yes.
12	Q	And as far as the factual innocence, or I think
13		your term was "innocence in the absolute sense",
14		am I to understand your evidence that that would
10:25 15		not be something that your Commission would look
16		into, nor would the Court of Appeal consider in
17		granting the remedy?
18	A	That's right.
19	Q	If we could break?
10:25 20		COMMISSIONER MacCALLUM: Uh-huh.
21		(Adjourned at 10:25 a.m.)
22		(Reconvened at 10:50 a.m.)
23		BY MR. HODSON:
24	Q	Just call up 339667 again. I think at the break,
10:50 25		Mr. Kyle, you were telling me that of these 198

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1   cases that were quashed by the Court of Appeal

2   there were seven new trials ordered; is that

3   correct?

4   A That appears to be so. I've just been through the

10:50 5   list of the referred cases and their outcomes and

6   I've -- on a quick review of that list there

7   appears to be seven cases in which the Court of

8   Appeal has quashed the conviction and, also, gone

9   on to order a retrial.

10:50 10   COMMISSIONER MacCALLUM: Only seven, did I

11   hear correctly?

12   A Seven, yes.

13   BY MR. HODSON:

14   Q And what, and I appreciate we're speculating a bit

10:51 15   about what the Court of Appeal is doing and why it

16   is doing it, but is there any theme as to where

17   the Court of Appeal will order a retrial as

18   opposed to just quashing the conviction? Is there

19   anything that you can provide to assist us in

10:51 20   understanding what cases the English Court of

21   Appeal would order a new trial?

22   A I think the main consideration in any case is

23   going to be whether the Court of Appeal considers

24   that it would be possible for any retrial to be

10:51 25   fair, and that, of course, would be 'fair' in the

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1   widest sense, whether it would be possible, taking

2   account of both the prosecution position and the

3   defence position, for any further trial to be a

4   fair one. And the sort of considerations which

10:51 5   are going to arise there are the length of time

6   since the offence giving rise to the criminal

7   proceedings, the nature of the evidence, the

8   extent to which it depends on witness

9   recollection, because -- and, of that, I think

10:52 10   probably the time lapse is likely to be the most

11   significant, because lapse of time is likely to

12   have the most significant impact on whether an

13   ensuing trial can be fair or not.

14 Q   And so, in the *David Milgaard* case, I think the

10:52 15   Supreme Court -- well not I think -- the Supreme

16   Court did advise the federal minister to set aside

17   the conviction which happened in 1992, --

18 *A*   Uh-huh.

19 Q   -- so 23 years after the crime. Just, again based

10:52 20   on your general understanding of the English Court

21   of Appeal cases, would it be correct to assume

22   that in England it would be highly unlikely that

23   the English Court of Appeal would order a new

24   trial 23 years later?

10:52 25 *A*   Umm, yes, I think so, particularly given what I

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1   understand to be the nature of the -- and

2   character of the evidence which was involved in

3   this particular case.

4   Q   Can you tell us whether, again just generally,

10:53 5   whether those applicants who get a remedy from the

6   Commission, go to the Court of Appeal and have

7   their conviction quashed without a new trial,

8   whether those people are put in a state of -- or

9   perceive that they are in a state of legal limbo;

10:53 10   in other words that they have been convicted once,

11   it's been quashed, but they haven't been found not

12   guilty? Do you follow that? I'm just wondering

13   if there is -- and the reason I raise that, it's

14   one of the items this Commission has heard about a

10:53 15   bit, that where an accused is -- has been

16   convicted, and then later the conviction has been

17   set aside, that there might still be a cloud or

18   some uncertainty over that person's perceived

19   guilt or innocence?

10:53 20   A   Uh-huh.

21   Q   And I'm just wondering in England, where your

22   Commission sends cases to the Court of Appeal and

23   a remedy is granted, do the applicants express the

24   same concern that they have not been exonerated

10:54 25   sufficiently by having the conviction quashed?

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1   A   They may have that concern because it's easy, it's

2   quite easy to envisage why someone who's in that

3   situation might think that in their inner souls,

4   if I can put it that way, but it's very unusual

10:54   5   for an applicant to express such feelings

6   outwardly. Most, in my experience, are quite

7   prepared to accept that the quashing of the

8   conviction entitles them to tell anybody who's

9   interested that they are innocent.

10:54 10   Q   And having a second trial and being acquitted, in

11   your view, would that give that person any better

12   status as far as being innocent?

13   A   Well not as a matter of -- it wouldn't make any

14   different legal position. It would be -- I --

10:55 15   whether it would actually make any factual

16   difference to the individual applicant, I don't

17   know, but of course in very many of these cases

18   the applicant might be sufficiently realistic to

19   appreciate that if there was a retrial, he might

10:55 20   find himself reconvicted. And, you know, the

21   notion that applicants will say "well I'm not

22   satisfied with this outcome, I wish to be retried

23   so that I can clear my name through an acquittal

24   by a jury", that's easy to say, but you can't

10:55 25   actually guarantee that outcome.

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1   Q   But, again, would -- from a legal sense, though, I

2   think what you are telling us, that an acquittal

3   by the jury puts that person in no different legal

4   position than that person was in before the trial,

10:56   5   because the conviction had been quashed?

6   A   Absolutely, yes.

7   Q   Can you comment at all on -- well, let's just talk

8   for a moment about compensation, and I don't want

9   to get into it in too much detail because I

10:56   10   think -- it's my understanding that that's dealt

11   with quite separate and apart from the CCRC?

12   A   Yes, it is.

13   Q   And I have tried to locate some information on

14   that, I'm not going to put it to you, I may end up

10:56   15   filing it with the Commission and providing it to

16   the parties.

17   A   Uh-huh.

18   Q   But it's my understanding that there is

19   legislation in England -- and if I can find the --

10:56   20   A   Section 133 of the *Criminal Justice Act 1988*.

21   Q   Right. And it's actually Section 133, but it

22   says:

23   "When a person has been convicted of a

24   criminal offence and when subsequently

10:56   25   his conviction has been reversed or he

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1   has been pardoned on the ground that a

2   new or newly discovered fact shows

3   beyond a reasonable doubt that there has

4   been a miscarriage of justice the

10:57 5   Secretary of State shall pay

6   compensation for the miscarriage of

7   justice to the person."

8   And then it's my understanding of the law that,

9   where the CCRC refers a case to the Court of

10:57 10   Appeal and the Court of Appeal quashes a

11   conviction, that that person then would be

12   entitled to apply to the Secretary of State for

13   compensation pursuant to that statute; is that

14   correct?

10:57 15   A   Umm, well, he'd certainly be in a position to

16   apply because he has now -- the convicted person

17   has now had his conviction quashed.

18   But the legis -- the

19   particular section in the legislation, whilst it's

10:57 20   mandatory in its terms as to the entitlement to

21   compensation so the only issue is going to be the

22   amount of compensation, the language of the

23   section is quite tightly drawn and it depends on

24   the applicant being able to show to the Home

10:58 25   Secretary, who is responsible for the payment of

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1   compensation, that, as a result of some new or

2   newly-discovered fact, it can be said that, beyond

3   a reasonable doubt, there has been a miscarriage

4   of justice. And as I understand the way in which

10:58 5   the Home Secretary approaches his interpretation

6   of that section, 'miscarriage of justice' is given

7   the narrow sort of meaning that we were talking

8   about yesterday, and what the Home Secretary would

9   be looking for is to be satisfied beyond

10:58 10   reasonable doubt that the person who is making the

11   claim for the compensation is factually innocent.

12   Q   Okay. And so that would be something separate and

13   apart from what the CCRC deals with?

14   A   Absolutely. And I hope that if, sort of, one

10:59 15   thing stands out from the evidence that I have

16   been giving to this Commission, I think the two

17   questions are entirely separate. Whether or not

18   somebody has been wrongfully convicted, I think,

19   is a matter of quite wide interpretation, as I was

10:59 20   endeavouring to explain yesterday. Whether

21   someone who has been wrongfully convicted is

22   entitled to compensation is an entirely separate

23   question, and that's a matter for which the

24   criteria can be set as a wholly distinct exercise

10:59 25   and, as it happens, the legislation in the

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1   *Criminal Justice Act 1988*, I think, is being

2   treated by the Home Secretary as effectively

3   saying "compensation will be paid if I'm satisfied

4   beyond reasonable doubt that this applicant is

10:59   5   factually innocent, and not otherwise".

6   Until, I think, the spring of

7   last year, the Home Office also applied a system

8   of making ex gratia payments of compensation, in

9   other words outside the statutory scheme, but I

11:00 10   understand, from inquiries which I've made, that

11   the system of -- or the willingness of the -- or,

12   yeah, the system's making ex gratia payments has

13   actually been stopped.

14   And I think the -- some

11:00 15   support for what I am suggesting about the narrow

16   interpretation to be given to 'miscarriage of

17   justice' in Section 133 is supported by a decision

18   of the House of Lords in a case called *Mullen*, who

19   applied for compensation after his conviction was

11:00 20   quashed by the Court of Appeal, where, on any

21   view, the evidence against Mr. Mullen for being

22   responsible for terrorist offences was

23   overwhelming, but he had managed to remove himself

24   from the jurisdiction of the English courts and

11:01 25   was, in fact, in Zimbabwe. He was returned to the

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1   United Kingdom and put on trial in circumstances

2   which the courts categorized as being absolutely

3   outrageous, there was collusion between the

4   security services in both countries to get him

11:01 5   back to England without going through the proper

6   extradition process, the belief being that if the

7   United Kingdom applied for Mr. Mullen's

8   extradition from Zimbabwe the political defence

9   argument would be raised and a lot of time would

11:01 10   pass while that was sorted out. So he was

11   effectively --

12   Q   Kidnapped?

13   A   -- kidnapped and brought back to England from

14   Zimbabwe, and that was characterized as quite

11:01 15   outrageous conduct by the Court of Appeal, which

16   quashed his conviction on the basis that the

17   prosecution, from the outset, had been an abuse of

18   process.

19   He applied for compensation

11:02 20   under the statutory provision and was refused by

21   the Home Office on the basis that, even though the

22   prosecution itself had been an abuse, there was

23   certainly no fact or newly-discovered fact which

24   suggested that he had been the victim of a

11:02 25   miscarriage of justice, implicit in that is

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1		miscarriage of justice means being factually
2		innocent, and therefore we're not going to pay
3		compensation, and that decision of the Home Office
4		was upheld by the House of Lords.
11:02 5	Q	And do I take it from your evidence, sir, that you
6		have a fairly strong view that the issue of
7		factual innocence, and looking at whether the
8		remedy granted by CCRC and ultimately by the Court
9		of Appeal in tying that to a compensation claim,
11:02 10		that those matters should be kept very separate?
11	A	Yes.
12	Q	And maybe asked another way, if, in the CCRC work,
13		that one of the elements imported into what you
14		were doing was either looking at factual innocence
11:03 15		or trying to devise a remedy that would put the
16		applicant in a better position to get compensation
17		once the process is done, that you would view that
18		as being counterproductive; is that fair?
19	A	Well, I would, because I think the work, the
11:03 20		actual work of the Commission, would be made
21		immeasurably more difficult if the objective -- if
22		the Commission's objective and the test which had
23		to be applied as to whether a case should go back
24		to the Court of Appeal in any sense rested on
11:03 25		establishing factual innocence.

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1   Q   Let me put it to you this way. Under your current

2   system it's my understanding that an individual

3   who gets a remedy, gets to the Court of Appeal and

4   has the conviction quashed, is in a position of

11:04 5   being a legally innocent person?

6   A   Yes.

7   Q   And in a position, a better position to seek

8   compensation from the Home Secretary, than he was

9   before the process; correct?

11:04 10   A   That's true, yes.

11   Q   And that whether he is entitled to compensation is

12   another matter dealt with by another minister --

13   another agency, --

14   A   Yes.

11:04 15   Q   -- correct, that may well deal with factual

16   innocence?

17   A   Yes.

18   Q   And if we go back, if in your system that what was

19   necessary to deal with, in addition to getting the

11:04 20   conviction set aside, to also deal with factual

21   innocence and/or entitlement to compensation, if

22   that was sort of put in as part of it, is it fair

23   to say that your bar would be much higher?

24   A   I think inevitably, yes.

11:04 25   Q   And so that in other words, if the granting of a

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1   remedy meant automatic compensation and factual

2   innocence, are you -- I think you are telling us

3   that there would be quite a different set of

4   standards applied to your review?

11:05 5   A   I think that's right, yes.

6   Q   And a much higher bar?

7   A   But I -- and also, the point I was making, I think

8   that to align the two concepts that way would be

9   wrong in principle.

11:05 10   Q   And why is that?

11   A   Simply because I think the question of whether --

12   there is much -- there is much more to being --

13   having a record of a conviction against you, in

14   terms of its impact on your life generally, than

11:05 15   the question whether you should -- whether you get

16   any monetary compensation for having been

17   prosecuted in the first place. And if you haven't

18   been rightly convicted in the wider sense, as I

19   was describing it yesterday, then you should not

11:05 20   have that conviction recorded against you because

21   of the impact it is likely to have on virtually

22   the whole aspect of -- virtually every aspect of

23   your life.

24   Q   And can you comment on whether those people who go

11:06 25   through the CCRC and get a remedy, is it correct

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1 that the -- or comment on this. Is compensation

2 on factual innocence something that they raise

3 with you, or is it generally understood that

4 that's to be dealt with after the CCRC and the

11:06 5 Court of Appeal deals with the conviction?

6 A I'm -- I think it very rare, indeed, for

7 applicants to be concerned, at the stage they

8 apply to the Commission about compensation, and if

9 they are they don't tend to express it.

11:06 10 Q Okay. If we can call up 339389. And this is an

11 article, Mr. Kyle, that you wrote for the *Drake*

12 *Law Review* in 2004; is that correct?

13 A Yes.

14 Q I just want to go through parts of it. We've

11:06 15 covered much of what is in here, but if we can go

16 to page 391, and actually just go to the top. And

17 again, talking about wrongful convictions, you

18 say:

19 "Why do these things happen?

11:07 20 No doubt, the higher the profile of the

21 case, the greater the risk of

22 miscarriage of justice, fuelled by

23 public concern and resulting pressure on

24 investigators to 'get those

11:07 25 responsible.' There is the potential

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1   for tunnel vision once a suspect is in

2   the frame, accompanied, at worst, by

3   determination to produce the evidence by

4   whatever means or, less culpably, by

11:07 5   ignoring the possibility that the wrong

6   suspects have been arrested. The quest

7   of any criminal jurisdiction, faced with

8   incidents of miscarriages of justice, is

9   to discover whether there is a systemic

11:07 10   problem to be addressed or whether some

11   idiosyncratic reason can be attributed

12   to the individual case. It is

13   significant that each of the cases

14   mentioned above was investigated and

11:07 15   prosecuted at a time when there was no

16   legislation defining and regulating the

17   exercise of police powers, particularly

18   relating to the detention and

19   questioning of suspects, and when there

11:08 20   was no adequate definition of the

21   prosecution's obligations to disclose

22   unused material that might assist the

23   defence."

24   And the cases that are referred to earlier in the

11:08 25   article are the, I think, the blockbuster cases,

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1   --

2   A   Yes.

3   Q   -- the terrorist cases?

4   A   Yeah.

11:08   5   Q   Just comment on a couple of things. First, the

6   comment here about whether some idiosyncratic

7   reason can be attributed to the individual case,

8   or a systemic problem, and maybe just elaborate on

9   that comment please?

11:08   10   A   Well what I had in mind when I was making that

11   particular observation in this article by

12   reference back to the blockbuster cases, which had

13   already been described, when you look at the

14   reasons why those cases turned out to be appalling

11:08   15   miscarriages of justice, they were symptomatic of

16   significant systemic problems which existed in the

17   criminal justice system at the time, particularly

18   in relation to the way in which the police went

19   about investigating cases and dealt with the

11:09   20   questioning of suspects, because in all the cases

21   there was some form of fabrication of police

22   evidence around interview notes and confessions

23   which were allegedly made; and, also, systemic

24   problems arising out of the fact that the defence

11:09   25   were deprived of the opportunity to explore

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1   possibly exculpatory aspects of the case because

2   relevant information simply wasn't disclosed,

3   particularly in the context of the scientific

4   evidence which was relied on. So that, that was

11:09 5   the context in which I made that particular

6   comment.

7   Because there are clearly

8   cases where things go wrong, where it is simply a

9   matter of something having going wrong, gone wrong

11:10 10   in that particular case, and it can't be

11   attributed at all to be a systemic failure of some

12   aspect of the criminal justice system, and I think

13   the point I endeavour to make in this particular

14   article is that the intervening introduction,

11:10 15   particularly of the *Police and Criminal Evidence*

16   *Act* of 1984, and various other substantial

17   developments such as the creation of the Crown

18   Prosecution Service, have been quite fundamental

19   in overcoming the sort of systemic deficiencies

11:10 20   which gave rise to those blockbuster cases.

21 Q   So do I take it from that that in light of those

22   legislative changes that arose in the blockbuster

23   cases, some of the systemic issues that were

24   evident in those cases -- maybe eliminated is too

11:11 25   strong a word, but had been reduced?

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1   A   Substantially reduced, yes, and I think one of

2   the -- if I don't make the point clearly in the

3   article, then I certainly make it now, that one of

4   the longer-term benefits, if I can put it that

11:11 5   way, of the existence of the Criminal Cases Review

6   Commission which gets to look at, as we've seen,

7   some eight or 900 cases a year in which something

8   has been set to go wrong, is that the Commission

9   itself is a body which is in a position to monitor

11:11 10   what is going on with the investigation and

11   prosecution of offences and ought to be able to

12   contribute as time goes on to the early

13   identification of any further systemic problems

14   which may be becoming apparent.

11:11 15   Q   And so do I take it from that that in the course

16   of your work, if themes develop as to potential

17   problems, that obviously those matters go to the

18   Court of Appeal and become public, that that

19   operates as a bit of a check and balance for

11:12 20   authorities who may be investigating and

21   prosecuting crimes?

22   A   Well, that's certainly true, I mean, that will

23   happen in individual references which we make, but

24   I see no reason why the Commission shouldn't

11:12 25   undertake a responsibility of reporting in a more

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1   generic sense either through its annual report or

2   directly with the relevant body such as the

3   director of public prosecutions or the Home Office

4   or the Association of Chief Police Officers, there

11:12 5   are bodies such as those who are responsible for

6   their individual aspects of the criminal justice

7   system, and if the Commission were to detect what

8   appeared to be a developing systemic problem in

9   the way either the police or the prosecuting

11:13 10   authorities went about, were going about their

11   work, then they should flag them off.

12   COMMISSIONER MacCALLUM: Do they do so,

13   sir?

14   A   It has rather taken the view up until now that

11:13 15   because the cases which have been reviewed by the

16   Commission have been, have extended over half a

17   century, the initial years that the Commission has

18   been dealing with cases which have gone back into

19   the 1950s, in fact the earliest case, we made a

11:13 20   reference of a case which had been prosecuted in

21   1927, we thought our test had been met and the

22   Court of Appeal disagreed and we didn't get a lot

23   of praise from the Court of Appeal for referring a

24   1927 conviction, but certainly some of the real

11:13 25   old dog s of the miscarriage of justice system, if

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1   I can put it that way, like *Derek Bentley*, *James*

2   *Hanratty*, *Ruth Ellis*, all of which were in the

3   1950s and '60s, they have occupied a considerable

4   amount of the Commission's investigative review

11:14 5   and decision-making activity and they have had the

6   effect of playing a significant part, I think, in

7   helping to restore confidence in the operation of

8   the criminal justice system, because however much

9   the Court of Appeal may dislike dealing with old

11:14 10   cases, and they are at pains to point out on

11   occasions we do think the Commission would be

12   better spending its time on more recent cases, but

13   where you have these cases which are a blot on the

14   landscape and have been for years, the Commission

11:14 15   has taken the view that they should be dealt with,

16   but the effect of that has been that we don't

17   really, or haven't had, it may be that now the

18   situation is beginning to become more

19   contemporaneous, if I can put it that way, all

11:14 20   these old cases now seem to have been cleared out

21   of the system by and large, so the cases which the

22   Commission is now dealing with are going to be,

23   across the board, more contemporaneous which

24   should allow a better analysis of what is actually

11:15 25   happening now.

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1   I mean, for example, I

2   mentioned, there is reference in this article I

3   think, and certainly in the Royal Commission

4   report, to the West Midlands serious crime squad

11:15 5   which was operating in the late 1970s, early 1980s

6   and there was some quite dreadful investigative

7   misconduct going on in those, in cases handled by

8   that particular squad which was set up to deal

9   with a spate of armed robberies which was the,

11:15 10   sort of the vogue crime in the West Midlands at

11   that time, serious mishandling of supergrasses.

12   Do you understand what I mean by supergrass? It's

13   an informant who is a heavy-weight criminal

14   involved in very many offences which informs on

11:16 15   hundreds of people and gets a very light sentence,

16   and there was serious mishandling of two

17   supergrass informants by that squad.

18   BY MR. HODSON:

19   Q   Sorry, is that supergrass?

11:16 20   A   Supergrass. Yes, if you grass on somebody, then

21   you inform on them, and a supergrass is someone

22   who does it to a very extensive level.

23   Q   Okay.

24   A   Additionally, the methods which were used for

11:16 25   interrogating suspects throughout, in the

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1   disturbing information, that suspects would have

2   plastic bags put over their heads and virtually

3   suffocated before making their confessions.

4   Now, a great deal of the

11:16   5   Commission's time has been spent on cases arising

6   out of the investigations of the West Midlands

7   serious crime squad, but in terms of systemic

8   problem, the intervention of the *Police and*

9   *Criminal Evidence Act 1984* means that the

11:17 10   opportunity for wholesale misconduct of that

11   nature by a police squad is virtually unthinkable

12   now.

13   Q   Are you telling us, Mr. Kyle, and again just your

14   views, that by the Commission detecting and

11:17 15   remedying wrongful conviction, that the Commission

16   may also be assisting in the prevention of

17   wrongful convictions?

18   A   Well, I would like to think that over the longer

19   term that is one of the benefits of an

11:17 20   organization like the Commission because it will,

21   albeit on a relatively small form, because, after

22   all, 800 cases a year out of the total number

23   prosecuted is a relatively small number, but it

24   will have some finger on the pulse of what is

11:18 25   going on in terms of investigating and prosecuting

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1   crime.

2   **Q**   Are you able to comment on whether or not the

3   existence of the Commission may have an effect on

4   either investigators, prosectors or others

11:18 5   involved in the criminal justice system; in other

6   words, knowing that if something goes wrong,

7   someone is there to check it?

8   *A*   Oh, I think that -- I think it will -- I think it

9   does and has been seen to have that effect in

11:18 10   terms of -- there are cultural issues involved

11   here. If an investigator thinks he might be able

12   to get away with something by some form of

13   improper practice, then knowing that the

14   Commission is there is likely to be a factor which

11:18 15   might deter him from doing so, and we have had

16   cases where, and I'll call it idiosyncratic

17   misconduct has occurred, and if we discover it and

18   there is publicity about it, then it's likely to

19   have a deterrent effect, so I think there is the

11:19 20   positive effect of knowing that there is a body

21   which is likely to be interested in the process by

22   which people are prosecuted and convicted and also

23   the sort of individual deterrent on the way in

24   which investigations are carried out, and I'll

11:19 25   give you an example where we have, where that sort

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1   of idiosyncratic discovery has been made, was a

2   case which depended on identification evidence,

3   always recognized as a fertile source of possible

4   miscarriages of justice, and the Defendant

11:19 5   concerned had said, well, he had been caught on a

6   camera -- it was an arson case and there was a

7   camera and the arsonist, whoever he was, was

8   caught on camera, and it was the usual thing, not

9   very clear, you couldn't see features clearly, and

11:20 10   he said that's not me because the figure in that

11   video is wearing a white T-shirt and I was wearing

12   a black T-shirt that night and I can prove that

13   because I was at a nightclub and there was

14   security cameras at a nightclub and that will show

11:20 15   me wearing a black T-shirt, so that was his

16   defence at trial, and the position which the

17   police adopted in that case was, well, there may

18   well have been a security camera at the nightclub,

19   but -- and it was somewhat unclear as to whether

11:20 20   the evidence was the camera wasn't working that

21   night or, if it was, the film, the tape has been

22   mislaid, which is fine as far as it went.

23   Well, he applied to us after

24   conviction and our case review manager went to the

11:21 25   police station concerned and simply went through

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1   all the material in the police station relevant to

2   that investigation and found the tape from the

3   security camera and, you know, the way in which

4   the evidence had come out suggested that that was

11:21   5   a deliberate concealment.

6   Now, a cynic would say all the

7   Commission, all the existence of the Commission

8   will do is make police officers a bit more careful

9   if they are wanting to conceal evidence, but

11:21   10   equally, you know, the fact that there is a body

11   which is going to be thorough and is going to look

12   very carefully at these things, and there have

13   been cases maybe of more substance, there was a

14   case involving a terrorist offence in Northern

11:21   15   Ireland where the suggestion had been made that

16   the officers had shown, in interview, the

17   Defendant a list of names which they wanted this

18   particular Defendant to tell them about as having

19   been involved in terrorist offences, the deal

11:22   20   being, well, if you tell us about all these

21   people, we'll go easy on you or we won't prosecute

22   you, and this was completely denied by the police.

23   Well, when our case review manager went to

24   Northern Ireland and reviewed all the police

11:22   25   material, there was this list of names which had

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1   always been denied as being in existence, so, you

2   know, the thoroughness of the investigation I

3   think is a factor.

4 Q   Are --

11:22 5 A   And one of the, if I can just sort of finish again

6   on a slightly lighthearted note, is that the

7   Defendant who was wrongly identified, so he said,

8   in relation to the security video which was found,

9   the Court of Appeal did order a retrial in that

11:22 10   case and when the retrial came up he pleaded

11   guilty.

12   COMMISSIONER MacCALLUM: Would you give me

13   the citation, the name of that act of 1984 again,

14   sir?

11:23 15 A   The *Police and Criminal Evidence Act*.

16   COMMISSIONER MacCALLUM: *The Police and --*

17 A   *-- Criminal Evidence Act.*

18   COMMISSIONER MacCALLUM: Is that on our

19   database, Mr. Hodson?

11:23 20   MR. HODSON: Yes, it is. I believe it's in

21   the documents that were put up for Mr. Kyle. If

22   they are not, we certainly have it and --

23   COMMISSIONER MacCALLUM: If anybody has the

24   doc. ID, I would like to write it down.

11:23 25   MR. HODSON: I'm not sure if I have it.

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1   I'll maybe get it at the break.

2   COMMISSIONER MacCALLUM: All right.

3   MR. ELSON: I've got it.

4   MR. HODSON: Have you got it?

11:23 5   MR. ELSON: 339900.

6   MR. HODSON: 339900.

7   COMMISSIONER MacCALLUM: Thanks very much.

8   BY MR. HODSON:

9   Q   On this issue of idiosyncratic reasons, are there

11:23 10   cases, Mr. Kyle, where references are made to the

11   Court of Appeal and convictions are quashed where

12   you find that there has been no deliberate

13   wrongdoing by any of the participants in the

14   original investigation and trial?

11:23 15   A   I think that is frequently the case.

16   Q   In the sense that -- would that be a non-systemic

17   or would that -- how would you describe that as

18   being -- of those -- is that what you meant by

19   idiosyncratic reason, or did I misread that?

11:24 20   A   I -- well, I think there are two ways in which you

21   could look at idiosyncratic reasons. If -- I

22   mean, generally speaking, in the absence of any

23   deliberate misconduct or I guess any deliberate

24   failure by someone to do what they should do,

11:24 25   then -- and assuming that there are no, that there

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1   are no systemic deficiencies such as, well, I did

2   this because, you know, I'm a police officer,

3   there is no, there is nothing which tells me what

4   I should or should not do when I'm interviewing a

11:24 5   suspect, therefore, what I did I thought was all

6   right. In the absence of any sort of systemic

7   deficiency of that sort, the sort of idiosyncratic

8   reason why a case may result in a wrongful

9   conviction is because, it's either going to be

11:25 10   because there is a one-of act of failure to act

11   properly or it is going to result from the fact

12   that someone, someone somewhere in the system,

13   whether it's the police, the prosecutor, the

14   Defendant or the trial judge has done -- has not

11:25 15   done, to the full extent, that which should have

16   been done, and that need not be deliberate, it may

17   just be a mistake.

18 Q   And so again, so I understand it, the majority of

19   the cases where a remedy is granted are cases

11:25 20   where there has been no misconduct or deliberate

21   wrongdoing by anybody involved, i.e., police,

22   witnesses, Crown prosecutor; is that correct?

23 A   That's correct, yes.

24 Q   And that in cases where -- are there some cases

11:26 25   where presumably mistakes would be made, good

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1   intention mistakes that end up resulting in a

2   miscarriage of justice?

3   A   Yes.

4   Q   And are there some cases where just due to the

11:26 5   nature of the case it may have been that the

6   system worked how it was supposed to, but just

7   arrived at the wrong result?

8   A   Yes.

9   Q   And are those -- are there many of those?

11:26 10   A   Of which, the latter?

11   Q   The latter one where at the end of the day it is a

12   case where the system worked how it was supposed

13   to, but it just arrived at the wrong result based

14   on information that was found out later?

11:26 15   A   Yes.

16   Q   If we can go to 339392, a couple of questions

17   here, and you talk about, you say:

18   "Of equal importance is the question of

19   why it took so long for the miscarriages

11:26 20   of justice represented by these cases to

21   be remedied."

22   And I think Judith Ward was the lady you told us

23   about yesterday?

24   A   Uh-huh.

11:27 25   Q   Being in jail for quite some time. And just your

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1		comment on that. I think you told us yesterday
2		that -- let's take a look at the David Milgaard
3		case. It was 20 -- almost 20 years after the
4		offence?
5	A	Uh-huh.
6	Q	I think 19 or 18 years after the conviction before
7		the conviction was first reviewed by authorities.
8		Can you comment on the difficulty, based on your
9		experience with the Commission, in looking at a
10		matter 19 years, 20 years after the event compared
11		to five years or 10 years?
12	A	Or ideally even less than that.
13	Q	Or, sorry, at an earlier date.
14	A	Well, yes. I think there is quite a significant
15		point here because the longer which has elapsed
16		between offence and conviction and subsequent
17		review which exposes a miscarriage of justice --
18		well, actually that's rather putting the cart
19		before the horse. The ability to expose a
20		wrongful conviction and a miscarriage of justice
21		is, the ability to do that is adversely affected
22		by the length of time which elapses because
23		memories dim, relevant evidence may disappear and
24		generally the ability to find out what went on and
25		what can still be done to identify the new

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1   evidence is made all the more difficult the longer

2   the time which elapses. For example, I mean, just

3   take routine destruction of documentation, the

4   police and indeed all other public bodies in the

11:28   5   United Kingdom have destruction of document

6   policies which means that if a case at the moment

7   is more than five years old, it's quite likely

8   that the Crown court file will have been

9   destroyed, if the Defendant wasn't sentenced to a

11:29 10   term of imprisonment of longer than five years the

11   Crown prosecution file would have been destroyed,

12   and as may the police file, so simply by operation

13   of routine destruction policies, length of time

14   can make a difference, and that's in addition to

11:29 15   the problem which arises over expecting witnesses

16   to recollect what's going on, but the point -- the

17   point I was emphasizing at this point in the

18   article is that given that in most, I think in all

19   of the cases which gave rise to the establishment

11:29 20   of the Commission, the basis on which the

21   convictions were quashed was clear evidence of

22   misconduct in relation to the interviewing of

23   suspects and the recording of confessions and

24   clear and significant deficiencies in the process

11:30 25   of scientific examination of relevant exhibits and

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1   disclosure affecting them, so what was discovered

2   and presented to the Court of Appeal in the 1990s

3   was, if anyone had chosen to look at it, equally

4   discoverable and presentable to the Court of

11:30   5   Appeal at a very, very much earlier stage, and the

6   question arises why is it in such cases, when

7   there's no shortage of people saying that these

8   are miscarriages of justice, we do have people

9   here who have been wrongfully convicted, why is it

11:30   10   that it takes from the mid 1970s through to 1991

11   before the remedy of the exposure is a miscarriage

12   of justice and quashing the convictions actually

13   happens, to which the obvious answer is that

14   during that period, although there was a lot of

11:30   15   noise and a lot of investigative journalism, there

16   was in place within the United Kingdom's criminal

17   justice system no mechanism to pick up the

18   messages which were being flashed out and sounded

19   loud and clear and get stuck in to doing something

11:31   20   about them.

21   Q   If we can -- the bottom of this paragraph you say:

22   "However, because it is idle to pretend

23   that things will not go wrong in even

24   the best regulated criminal justice

11:31   25   system, there is a question of critical

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1   cultural importance. Will whatever

2   mechanism that is adopted to address the

3   cries of those who claim to have been

4   wrongly convicted have at its heart the

11:31 5   will to own up to mistakes and learn

6   lessons, or will it strive to preserve

7   the status quo?"

8   And I'm wondering if you can just elaborate on

9   that comment?

11:31 10   A   Well, I think that is a comment which is very much

11   related to what I have just said, that is the

12   question. The point I seek to make is that if a

13   country or a jurisdiction has a criminal justice

14   system in which it is confident, then it will

11:32 15   recognize that however good the system is, things

16   are going to go wrong from time to time, that is

17   the way of the world, and it may be going wrong

18   because there is some fundamental defect of a

19   systemic nature, in which case that can be

11:32 20   addressed, or it may be that an individual case

21   has gone wrong for reasons which are peculiar to

22   that particular case, but either way, my view is

23   that a mature criminal justice system recognizes

24   that and doesn't feel threatened by looking at

11:32 25   those cases, and if they do turn out to have

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1   resulted in a wrongful conviction, ensuring that

2   some early steps are taken to identify that and

3   put it right, and I pose the question in this way

4   because without expressing a particular view one

11:33 5   way or another, if you have cases where there has

6   been outright police misconduct and systemic

7   failure to disclose in a number of cases which are

8   being portrayed publicly as being miscarriages of

9   justice and they take 20 odd years to put right,

11:33 10   one comment which might be made is that that is

11   the consequence of a criminal justice system which

12   is frightened at looking into possible mistakes

13   and doing something about it, whereas if you have

14   a system which, when these types of cases arise,

11:33 15   immediately picks them up and investigates them

16   thoroughly and makes an informed, independent,

17   objective decision after a thorough investigation

18   as rapidly as possible, then that can draw the

19   comment this is a mature criminal justice system

11:34 20   which is not threatened by the fact that things

21   will occasionally go wrong.

22 Q   And are you able to comment, again from your

23   experience on the CCRC, as to whether you've

24   noticed a cultural change in the criminal justice

11:34 25   system in England from 1997 to date?

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1   *A*   Well, I think I can only answer that by reference

2   to the way in which the reputation of the

3   Commission appears to have developed over that

4   period and the fact that it now appears to have a

11:34 5   position within the criminal justice system where

6   its value and the contribution it can make to

7   maintaining confidence in the criminal justice

8   system is recognized, particularly in those

9   areas -- I have in mind the media in particular

11:34 10   and members of parliament, and the parliamentary

11   oversight committee is like the home affairs

12   committee, do appear to rate quite positively what

13   the Commission is doing.

14   I make the point later in the

11:35 15   article that one of the concerns which might be

16   expressed is, well, if you have so many

17   applications and you only refer 4 percent of them

18   to the Court of Appeal, doesn't that mean that you

19   are failing in your job, which is an easy comment

11:35 20   to make because it's based simply on the figures,

21   and our response to that is, well, we're always

22   looking to make sure that cases which ought to go

23   through the gate do so, but do bear in mind that

24   we don't pick and choose which cases we

11:35 25   investigate, they all get a thorough investigation

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1   to the extent which appears to be necessary having

2   regard to the case and the issues which are

3   raised, and although it will always be the case

4   that there may be wrongful convictions which

11:35   5   simply cannot, by any amount of investigation, be

6   exposed as such. The fact that any applicant says

7   that they've been wrongfully convicted is picked

8   up by the Commission, thoroughly investigated and

9   a decision made at the end of that investigation,

11:36 10   it is equally valid to suggest that a thorough

11   investigation of complaints of wrongful conviction

12   which turn out to be unfounded is as valuable to

13   contributing to maintain confidence in the

14   criminal justice system as exposing those where

11:36 15   the convictions can be shown to be wrong.

16   Q   Okay. You made the comment that there are some

17   cases where, despite the investigative efforts,

18   wrongful convictions cannot be disclosed; is

19   that -- did I hear that right?

11:36 20   A   Cannot be exposed.

21   Q   Cannot be exposed. And do I take it from that

22   that there are some cases where you simply cannot,

23   for whatever variety of reasons, expose a wrongful

24   conviction where there may well be one?

11:37 25   A   I think inevitably that may be the case, yes,

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1   because it's difficult to know -- that's right,

2   because all you can say is our investigation

3   hasn't revealed any basis for saying that the

4   Court of Appeal is likely to find this to be a

11:37   5   wrongful conviction.

6   That slip of the tongue you

7   made there is itself quite -- it reminds me of a

8   case where you are saying we can't disclose

9   wrongful convictions. We have had a case where

11:37   10   the reason why a conviction was unsafe involved

11   matters of such sensitivity that we were unable to

12   tell the applicant what our reasons for referring

13   his case to the Court of Appeal were, although we

14   did give reasons to the Court of Appeal in a

11:37   15   confidential annex which was hand delivered, and

16   the Court of Appeal duly delivered a judgment

17   quashing the conviction saying we know what the

18   reasons are, but they are too sensitive, so to

19   this day the Defendant doesn't know why he's been

11:37   20   acquitted, simply that he has.

21   Q   And I take it we aren't going to know either?

22   A   You certainly aren't.

23   COMMISSIONER MacCALLUM: Excuse me, Mr.

24   Kyle, it strikes me that this attitudinal change

11:38   25   as represented by the establishment of the

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1   Commission provides an alternative to some

2   intractable problems in law reform touching the

3   jury system. For example, everybody involved in

4   the system knows that juries are sometimes

11:38 5   influenced when they shouldn't be and return

6   verdicts which they shouldn't do.

7   *A*   Uh-huh.

8   COMMISSIONER MacCALLUM: But it's

9   practically impossible to do anything about the

11:38 10   jury system, it's such an entrenched perceived --

11   at least it's such an entrenched right of every

12   citizen.

13   *A*   Uh-huh.

14   COMMISSIONER MacCALLUM: So if one simply

11:38 15   accepts that they are going to make mistakes once

16   in a while but we have a means of addressing

17   those mistakes later on, that's a valuable thing;

18   is it not?

19   *A*   I think so, yes.

11:38 20   COMMISSIONER MacCALLUM: Yes. And a jury

21   system is surely not the only problem which

22   arises from time to time, statutory law of course

23   creates problems as well?

24   *A*   Uh-huh.

11:38 25   COMMISSIONER MacCALLUM: At the same time

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1   it seeks to redress or to meet other problems.

2   A   Uh-huh.

3   COMMISSIONER MacCALLUM: We see that in our

4   evidence acts and so forth.

11:39 5   A   Yes.

6   COMMISSIONER MacCALLUM: And so reforming

7   those is a matter of great difficulty, but

8   perhaps it's not all that necessary if you have

9   this mechanism.

11:39 10   A   Well, certainly I think having this mechanism

11   helps, and, sir, you touch on an interesting point

12   there which I might just pick up on, that the

13   Royal Commission on Criminal Justice, amongst

14   other things, touched on the question of whether

11:39 15   the law should be changed to allow adverse

16   inferences to be drawn from a Defendant's failure

17   to answer questions when he's interviewed or

18   failing to give evidence at trial and there was a

19   firm recommendation of the Royal Commission that

11:39 20   there should be no such change.

21   That recommendation was

22   ignored by the government which legislated for the

23   drawing of adverse inferences from silence in the

24   *Criminal Justice and Public Order Act* of 1994 and

11:40 25   that particular statutory change which was highly

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1   controversial has resulted in very many

2   applications to the Commission, very many

3   applications to the European Court of Human Rights

4   to which our domestic courts are now subject

11:40 5   because of the *Human Rights Act* of 1998,

6   considerable difficulty in the Court of Appeal in

7   sorting out exactly what, how that law should be

8   applied, and, in particular, how judges should be

9   required to charge the juries on those issues, so

11:40 10   that's quite an interesting example of something

11   which the Royal Commission said keep your hands

12   off.

13   The government chose a

14   different course and it has actually resulted in a

11:41 15   deal of work for the Commission which has, or

16   certainly had, unless the position has changed

17   which of course it may well do as courts

18   interpret, but certainly when I left the

19   Commission we thought we had reached the position

11:41 20   where we had managed to get the Court of Appeal to

21   bring their two-stranded dividing authority

22   together and have a reasonably clear idea as to

23   what was going to be, what was necessary, so I

24   think that probably is a concrete example, the

11:41 25   point that you were making, that the Commission --

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1   this was not about fresh evidence or anything like

2   this, it was about fairness of trials which is

3   equally important and, in my view, having a fair

4   trial is just as significant in terms of rightful

11:41 5   conviction as anything else and the Commission was

6   able to play a significant part in the

7   development, understanding and proper

8   interpretation of that particular piece of

9   controversial legislation.

11:41 10   COMMISSIONER MacCALLUM: Thank you.

11   BY MR. HODSON:

12   Q   Just on the issue of changes in the law, Mr. Kyle,

13   can you comment on what happens when the law

14   changes, for example on how witnesses are

11:42 15   interviewed from the time of investigation and

16   conviction to when the CCRC looks at it, whether

17   there is a change in either the statutory or the

18   common law, in other words that had the law that

19   was in effect when you looked at the case been in

11:42 20   effect at the time of investigation and trial,

21   there might well have been a different result?

22   A   Uh-huh. The general position is that a change to

23   the law which is affected by statute cannot be

24   backdated unless the statute expressly applies for

11:42 25   that to happen, which, in the sort of changes

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1   which we're particularly considering, doesn't tend

2   to happen. So a statutory change means that an

3   applicant can't benefit from the fact that some --

4   that the law has changed as a result of statute.

11:42 5   If, however, there is a

6   restatement of common law then, on the legal

7   fiction that at any given time the common law as

8   it is now stated is as it has always been, means

9   that an applicant can benefit from stated changes

11:43 10   in the common law. And that, that was reinforced

11   by the Court of Appeal's judgement in the *Derek*

12   *Bentley* case, which was the young man hanged for

13   the murder of the police officer in 1953. When

14   the Court of Appeal quashed his conviction in 1988

11:43 15   -- sorry -- 1998, following a reference by the

16   Commission, the Lord Chief Justice, at the start

17   of the judgement, made quite clear that whilst

18   statutory change could not benefit an applicant,

19   an appellant retrospectively, changes to the

11:43 20   common law could. And, in particular, the Court

21   said that, in those circumstances, whether or not

22   Derek Bentley had had a fair trial had to be

23   judged by today's standards, and not by the

24   standards which were applicable in 1953.

11:44 25   It doesn't take a towering

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1   intellect to realize that there are considerable

2   risks involved in that, because it's quite likely

3   that you could take any case prosecuted in the

4   1950s and find something wrong with it by today's

11:44   5   standards, but the Lord Chief Justice didn't think

6   that that was going to be too much of a problem

7   and it doesn't seem to have been one.

8   Q   Would, in addition to the changes in law, would

9   the reasons for the changes also be a factor in

11:44   10   your inquiries? And let me maybe give you an

11   example. We've heard some evidence that, in this

12   case, in 1969 the manner in which young people

13   were dealt with by authorities --

14   A   Uh-huh.

11:44   15   Q   -- was, at the time, different than, for example,

16   20 years later?

17   A   Uh-huh.

18   Q   Now that may well be as a result of statutory

19   change and/or common law, --

11:45   20   A   Uh-huh.

21   Q   -- but again, if you could comment on the

22   situation where in 1990, looking back at how young

23   people were dealt with by authorities 20 years

24   earlier, --

11:45   25   A   -- uh-huh.

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1   Q   -- if the law had changed --

2   A   Uh-huh.

3   Q   -- and that they would not have been dealt with

4   the same way, and the reason being that dealing

11:45 5   with them the old way may result in evidence that

6   might be unreliable; --

7   A   Uh-huh.

8   Q   -- can you comment on how that type of change

9   would be in play to the CCRC?

11:45 10   A   Well I think that in that sort of situation the --

11   if there is the -- if there is a change to the

12   law, be it statutory or as a result of developing

13   common law, the underlying reason is actually

14   going to be very significant, because if you're

11:45 15   looking in years after the event to the way in

16   which young people were treated when they were

17   being interviewed, whether as witnesses or

18   whatever, and you're looking at the reliability of

19   the evidence which they produced as a result, if

11:46 20   it can be said years later that the factual

21   circumstances which led to the change in the law

22   operated in that particular witness' case, then

23   you're not so much relying on a change of the law

24   to explain why you're taking a view about their

11:46 25   reliability, you're simply saying that the

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1   circumstances giving rise to unreliability apply

2   in -- to this particular witness, and

3   incidentally, it was precisely because of those

4   sorts of circumstances which led to the change in

11:46   5   the law.

6   Did -- is -- have I -- is that

7   sort of confusing?

8   Q   Yes, no, and I guess one further question then.

9   If that were the case, is that something that

11:47 10   would be new, that the Commission could then send

11   to the Court of Appeal?

12   A   Oh yes, I think so, because you'd be -- you'd --

13   what you would be saying was, well, back in --

14   back at the time when this happened the

11:47 15   significance of what was being done simply wasn't

16   understood so there was no -- the -- no

17   representations were made to the Court or no part

18   of the defence case challenged the reliability of

19   this particular witness on the basis of facts

11:47 20   which may well have been known at the time, but

21   when you look at them now in the light of

22   developing knowledge as to how witnesses react to

23   this sort of treatment, you understand that there

24   is a new argument around the potential credibility

11:47 25   of these witnesses.

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1   Q   And would it be a case, then, of saying, if we can

2   use the Ron Wilson/Nichol John by way of an

3   example, that 20 years later you might say "with

4   what we now know it may be, it may be that the

11:48 5   information that was obtained from them through

6   the interviewing process or the polygraph is not

7   as reliable as we thought it was 20 years ago"?

8   A   Yes.

9   Q   And not to say that they are lying or not, not to

11:48 10   say that the police have committed misconduct or

11   not, but that just the circumstances under which

12   the evidence was obtained causes us to think it

13   may not be --

14   A   Reliable.

11:48 15   Q   -- safe, reliable, and therefore the verdict may

16   not be safe?

17   A   Yes.

18   Q   And that would be something that may well provide

19   the basis to go to the Court of Appeal and say

11:48 20   "the conviction is not safe because what we now

21   know, our understanding now of how interviewing

22   techniques, etcetera, may affect the credibility

23   or reliability of the information"?

24   A   Yeah, I think that would be right. I mean, you

11:48 25   know, we would never -- if the CCRC, if the

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1   Commission was looking at the sort of circumstance

2   which arise in Mr. Milgaard's case in the context

3   of evidence given by Nichol John and Ronald

4   Wilson, then the sorts of inquiries which you're

11:49   5   alluding to around their vulnerability as young

6   people, with the lifestyle and characteristics

7   that they had and the way in which they were --

8   their -- the evidence was obtained from them over

9   a protracted period involving all sorts of

11:49 10   activities by the investigating officers,

11   including exposure to a polygraph test, I mean all

12   of those things would be legitimate areas for

13   investigation in the light of current knowledge

14   about the susceptibility and vulnerability of

11:49 15   young people who find themselves in the hands of

16   the authorities. And if -- if, as a result of

17   that investigative process, it appeared that the

18   sort of superimposition, if I can put it that way,

19   of current knowledge about vulnerable people gives

11:50 20   rise to a new argument affecting their, the

21   reliability of the evidence they ultimately gave,

22   then that could be a factor which was relevant to

23   whether the Commission found its test of referral

24   to the Court of Appeal was met.

11:50 25   Q   And, just on that, would -- and you're familiar

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1   with Nichol John and the statement that she gave

2   claiming that she witnessed the murder and the

3   fact that she did not repeat it in Court?

4   A Uh-huh.

11:50 5   Q You're familiar with that?

6   A Yes.

7   Q Would that approach that you just talked about

8   allow you, then, to bring into play, again, the

9   Nichol John statement, even though the jury didn't

11:50 10   hear it for proof of its contents, --

11   A Uh-huh.

12   Q -- but in other words to put that back before the

13   Court even though the Court of Appeal dealt with

14   that as a ground of appeal back in 1970?

11:50 15   A Well I -- obviously that would depend on the

16   circumstances, but I think I -- what the

17   Commission would be anxious to do is to take a

18   holistic view of the case and the product of its

19   investigations and the Commission would recognize,

11:51 20   of course, that the aspect of the Nichol Johnston

21   (sic) evidence and statement which was addressed

22   as a ground of appeal in the first appeal related

23   to a procedure under what I understand was a

24   relatively new piece of legislation in Canada

11:51 25   regarding potentially hostile witnesses, so the

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1   issue for the Court of Appeal was a fairly narrow,

2   narrowly-confined one.

3   Now in the absence of any

4   changes in the law and the interpretation of that

11:51   5   provision which might benefit an applicant, the

6   CCRC would recognize that there is no mileage in

7   trying to go back to the Court of Appeal to get it

8   to reconsider its decision on the process which

9   was adopted at trial, but taking a holistic view

11:52   10   of the case, and particularly that aspect of the

11   evidence, namely the evidence which was given by

12   the two people who were with Mr. Milgaard on the

13   morning of the murder, it may well be that as the

14   issues arise out of the wider investigation into

11:52   15   reliability and vulnerability which could have an

16   impact on both of them, so you wouldn't be going

17   back to the Court of Appeal re-arguing the

18   question of was the process correctly handled in

19   determining whether she was a hostile witness or

11:52   20   not, it would be around the generality of their

21   evidence, the vulnerability of both of them, and

22   the extent to which the evidence and the

23   information which was available to the jury -- and

24   that would include having available to it the

11:52   25   statement she made even though the jury was told

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1   not to pay any attention to it -- all of that, I

2   think, would, on a holistic analysis, be

3   significant to the decision which the Commission

4   made.

11:53 5 Q   And, again, would that -- and we talked about this

6   a bit yesterday where, if you found a new ground,

7   it might allow you to go in and explore something

8   that had been before the jury; is that correct?

9 A   Well, I think so. I think what I am, what I was

11:53 10   trying to say was that the discovery of the ground

11   which justifies the reference may well also

12   entitle the Commission to say, as part of its

13   reasoning, that, because of the discovery of this

14   ground which underpins the reference itself, it

11:53 15   may well be appropriate, then, to put other

16   aspects of the case which may have been considered

17   by the jury, may even have been considered by the

18   Court of Appeal, into the context of the new -- of

19   the new evidence or the new argument which is

11:54 20   being put forward, which may enable a different

21   perception of the significance of that earlier

22   aspect of the case, which was the point I was

23   trying to illustrate with Sally Clark.

24 Q   For example, this was one which I think I had

11:54 25   raised with you earlier about whether or not

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1   Nichol John's statement, having been read to the

2   jury not for proof of its contents but rather to

3   question her credibility, whether that might have

4   contributed in some way to increasing the

11:54 5   credibility and reliability of Ron Wilson's

6   evidence?

7   A   Well I think -- I mean, as I say, we're

8   hypothesizing to an extent here -- but if the

9   Commission found additional bases and made -- and

11:54 10   let's assume for the sake of argument that there

11   were, you know, applying current understanding

12   about the treatment of vulnerable witnesses it was

13   possible to present either new evidence or a -- or

14   new argument, or a combination of both, to suggest

11:55 15   that Ronald Wilson's credibility was -- or the

16   reli -- or the reliability of Ronald's evidence

17   was questioned, and that was a basis and part of

18   the reasoning for the Commission making a

19   reference, then it would be legitimate for the

11:55 20   Commission to point out that the jury had to

21   assess Ronald Wilson's credibility at the time

22   without the benefit of what we now say is current

23   understanding of issues affecting that

24   reliability. And, furthermore, the Commission

11:55 25   might point out, although in the context of Nichol

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1   John the jury were told to disregard her

2   statement, we don't know what the jury did with

3   that admonition from the judge and there has to be

4   a risk, particularly. And bearing in mind that we

11:56   5   know that there are other reasons why Ronald

6   Wilson's evidence should be regarded as

7   unreliable, there has at least to be a risk that

8   the jury may have consciously or subconsciously

9   said "well, Ronald Wilson has to be telling the

11:56   10   truth because he is saying much the same thing as

11   Nichol John said in her statement, which we've

12   heard about".

13   So that's what I am trying

14   rather inelegantly to describe as taking a

11:56   15   holistic view of the situation, where it is

16   legitimate, as part of one's reasoning behind the

17   basis for a reference, to draw in other aspects of

18   the case which may have already been addressed

19   either at trial or on appeal.

11:56   20   Q   I see it's 12:00, Mr. Commissioner, probably an

21   appropriate spot to break.

22   I'll canvass, I shouldn't be

23   too much longer, I'll maybe just canvass with

24   other parties. I don't think we'll have any

11:57   25   difficulty finishing by 4:30, but I will check.

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1   (Adjourned at 11:57 a.m.)

2   (Reconvened at 1:30 p.m.)

3   BY MR. HODSON:

4   Q   Mr. Kyle, just to pick up on a couple of points we

01:32 5   talked about this morning. Can you just explain

6   for us the mechanics of once the Commission makes

7   a reference to the Court of Appeal, they prepare a

8   statement of reasons; is that correct, that goes

9   to the court?

01:32 10 A   Yes.

11 Q   And that would be the grounds upon which the

12   Commission thinks there's a real possibility the

13   appeal may succeed?

14 A   Yes.

01:32 15 Q   And so, for example, on a fresh evidence, would it

16   be the Commission has uncovered the following

17   fresh evidence that may well affect the verdict,

18   the new evidence is summarized as follows,

19   something like that?

01:32 20 A   Yes, together with an articulation of the

21   Commission's evaluation of the impact of that

22   evidence on the case.

23 Q   And then I take it the appellant then, or the

24   applicant then would become an appellant in the

01:33 25   normal sense and would have to file -- would they

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 1              then file a notice of appeal?

 2      A       They would file grounds of appeal.

 3      Q       Or grounds of appeal.  And presumably as well they

 4              would then apply to the Court of Appeal for leave

 5              to call fresh evidence?

 6      A       Yes.

 7      Q       And the court then would deal with that

 8              application and if they allowed it, then would

 9              hear the fresh evidence and then consider the

10              appeal?

11      A       Yes.

12      Q       And the Crown would appear as respondent?

13      A       Yes.

14      Q       And so once you send the reasons over, the normal

15              mechanics of an appeal take over?

16      A       They do.

17      Q       I have a question about the Commission members and

18              the term of appointment.  What is the length of

19              appointment for Commission members?  Is there any

20              limit?

21      A       There's a statutory limit of 10 years, but within

22              that period of 10 years Commission members can be

23              appointed for any term which is thought

24              appropriate, so if it happens that the 14 I think

25              members who were appointed when the Commission was
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1   founded, seven were initially appointed for three

2   years and seven for five, I think the reasoning

3   behind that, although I never spoke to the

4   chairman directly about it, was that if the

01:34   5   hypothetical situation were to arise that when

6   Commission members came to the end of their term

7   none of them wished to apply for another

8   appointment, then continuity would be lost.

9   COMMISSIONER MacCALLUM: Is it full-time

01:34   10   work, sir?

11   A   It's full time or part time. When I was at the

12   Commission I think -- these figures may be wrong,

13   but I think there were five or six that were full

14   time and the remainder were part time.

01:34   15   COMMISSIONER MacCALLUM: So it's a fairly

16   costly institution then to fund is it?

17   A   Well, the allocation of funding from the Home

18   Office is, at the moment, in the order of 8

19   million pounds sterling.

01:35   20   Q   An annual budget?

21   A   Annual budget, yes. And just to respond directly

22   to the question which you were asking, Mr.

23   Commissioner, as in any organization, a

24   substantial amount of that funding goes on paying

01:35   25   the staff who work for it.

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01:35 1   COMMISSIONER MacCALLUM: Yes. Inasmuch as

2   it would represent quite an incursion into ones

3   career, is it difficult to find members to sit on

4   the Commission?

01:35 5   A   I don't believe so. I think that certainly when

6   the Commission was established, I think there was

7   something approaching a thousand applications --

8   COMMISSIONER MacCALLUM: Oh.

9   A   -- for membership on the Commission. I think now

01:35 10   when -- because at that particular time the search

11   was on for the entire body of Commission members

12   whereas now vacancies arise in a more structured

13   manner, so at any given time the Commission may be

14   looking for two or three new appointments.

01:36 15   COMMISSIONER MacCALLUM: I see. Thank you.

16   BY MR. HODSON:

17   Q   Can you comment on the proportion of the Court of

18   Appeal's work load that is represented by the

19   Commission's referrals?

01:36 20   A   It's quite significant. If we've referred

21   something in the order of 30 or 40 cases a year,

22   and I'm not entirely sure, I had the figure of 10

23   percent in my mind, but I think it's probably

24   going to be less than that, but it is still a

01:36 25   significant amount of work for the Court of Appeal

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1   which we generate.

2   Q   If we can go to 339396 which is again --

3   A   Can I just raise --

4   Q   Sure, yeah.

01:37 5   A   As I say, I'm not clear on the figures, but I

6   think there are some figures in the Royal

7   Commission report which do refer to the work load

8   of the Court of Appeal and very many people who

9   apply for leave to appeal to the Court of Appeal

01:37 10   are refused leave and so they never get to a full

11   hearing, so the -- I think the proper way to, if

12   we wanted to look at the actual proportion of work

13   which the Court of Appeal deals with, it would be

14   making a comparison between the number of cases

01:37 15   referred by the Commission and the number of cases

16   which the court hears at a full appeal hearing.

17   Q   And so after conviction in the Crown court then,

18   an accused, a convicted person does not have a

19   right of appeal?

01:38 20   A   No, unless the trial judge certifies that leave to

21   appeal should be given, which rarely happens, it

22   is usually necessary for a convicted person to

23   apply for leave to appeal, and the majority of

24   those applications are dealt with by a single

01:38 25   judge of the Court of Appeal.

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1   Q   And any -- can you give us any idea of the

2   proportion -- are those usually granted, not

3   granted? Any idea of what percentage?

4   A   I don't I'm afraid, but I believe that in the

01:38   5   section in the Royal Commission report dealing

6   with appeals, there is certainly figures relating

7   to the situation as it was in the 1990s, but I'm

8   sure that information, if it was necessary, should

9   be readily available.

01:38   10 Q   Sure. But it would -- can you tell us, is leave

11   something that's not granted as a matter of right,

12   though, that's it's not --

13 A   No, no, not at all, it isn't. I mean, I think the

14   position remains that considerably more people are

01:39   15   refused leave than granted, but of those who are

16   granted leave to appeal, the success rate in the

17   Court of Appeal is quite high.

18 Q   And back to your *Drake Law Review*, you talk here,

19   and I think you've touched on this, but I just

01:39   20   want to have you confirm this, you say:

21   "All would surely agree that convicting

22   somebody of a crime he or she simply did

23   not commit is a miscarriage of

24   justice -- what might be described as a

01:39   25   wrongful conviction of an innocent

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1   person in the absolute sense. But what

2   about the situation when, after

3   conviction, new evidence comes to light

4   that, had the jury heard it, might have

01:39 5   induced some doubt about guilt? Or the

6   situation when there has been a flaw in

7   the trial process? Most people would

8   probably accept that these situations

9   are indicative of miscarriages of

01:39 10   justice, but they would say that whether

11   it is a miscarriage of justice depends

12   on the agree of doubt induced to the

13   significance of the process flaw -- the

14   most extreme view being that "people

01:39 15   should not get off on technicalities."

16   Fortunately, the expression miscarriage

17   of justice is nowhere to be found in the

18   Criminal Appeal Acts 1968 and 1995 in

19   their application either to the

01:40 20   Commission or to the Court of Appeal.

21   This is fortunate because it means that

22   in order to do its job, the Commission

23   does not have to concern itself with

24   questions of guilt or innocence in the

01:40 25   absolute sense (only rarely, in the

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1   Commission's experience, does new

2   evidence of a wholly exonerating nature

3   come to light) and because the

4   Commission is not forced to debate the

01:40 5   meaning of miscarriage of justice either

6   when reaching its decisions or when

7   discussing its role in the wider context

8   of the criminal justice system as a

9   whole."

01:40 10   And I think you've pretty much reiterated that

11   here, Mr. Kyle. Is there anything you wish to

12   add to what's noted there?

13 A   No, I don't think so. I mean, I think that

14   paragraph encapsulates concisely and, I hope,

01:40 15   coherently the views that I've been expressing

16   whilst I've been giving evidence to the Commission

17   about my view that what the Commission, and indeed

18   the Court of Appeal should be interested in, is

19   whether somebody has been rightly or wrongly

01:41 20   convicted having regard to the rules under which

21   persons are prosecuted and the requirements of a

22   fair trial and the standard of proof which have to

23   obtain rather than debating the somewhat more

24   difficult question as to what anyone might

01:41 25   understand by the term miscarriage of justice.

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1   Q   If we can go to page 398, and I believe here this,

2   the notion of real possibility if I understand it,

3   you say:

4   "...is not defined by the statute..."

01:41 5   But if we can go down to the bottom footnote,

6   here it appears that in the *Pearson* case, did the

7   court describe a real possibility as being:

8   "... more certain than an outside chance

9   or a bare possibility, but which might

01:42 10   be less than a probability, or a

11   likelihood, or a racing certainty."

12   Now, is that the court language of what the

13   court's view of what real possibility means?

14   A   It is. I think that case was the first

01:42 15   application for judicial review which was heard in

16   the high court and that is what the court had to

17   say about a real possibility. I mean, it may not,

18   when you read it, actually seem to be particularly

19   helpful in defining what a real possibility

01:42 20   actually is because you are covering a whole

21   spectrum of possibilities there from outside

22   chance through to racing certainty and all points

23   in between, but the flavour of that observation

24   the Commission takes to endorse its view that the

01:42 25   threshold of a real possibility is properly set at

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1   a relatively low level.

2   Q   Go to 339404, you talk here, you say:

3   "Only a small number of applicants to

4   the Commission who have been convicted

01:43 5   in more recent times complain of

6   deliberate police malpractice in the

7   form of fabricating evidence, planting

8   evidence, or otherwise "sitting them up"

9   for crimes they did not commit. Most

01:43 10   are concerned to persuade the Commission

11   that, for one reason or another, they

12   did not have a fair trial, often

13   accompanied by complaints that their

14   lawyers did not understand the case, did

01:43 15   not follow their instructions, did not

16   ask the right questions in

17   cross-examination, or did not call

18   witnesses who should have been called.

19   From the Commission's perspective, cases

01:43 20   that result in referral tend to fall two

21   broad categories. The first is cases in

22   which relevant new evidence appears,

23   occasionally if rarely being wholly

24   exculpatory, but more often being of a

01:43 25   nature that, had it been heard by a

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1   jury, might reasonably have caused them

2   to come to a different verdict."

3   And then you go on to describe:

4   "The second category, more closely

01:44 5   aligned to the types of issues raised by

6   applicants themselves, involves some

7   flaw in the investigation, prosecution,

8   or trial process not brought about by

9   malice but rather, in plain terms,

01:44 10   because someone has not done his or her

11   job properly -- and this may well be

12   something to which the defence lawyers

13   have contributed."

14   And it goes on to say:

01:44 15   "In today's complex criminal justice

16   system, opportunities for falling down

17   on the requirements of fair trial are

18   legion, but it is not the simple fact of

19   failure that counts, but its safety to

01:44 20   the safety of the conviction, taking

21   account of the whole circumstances of

22   the case."

23   And I think you touched on most of this earlier,

24   but would that be an accurate summary then of

01:44 25   what your experience was with the Commission as

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1   far as the types of cases that were advanced and

2   the grounds that were advanced before you?

3   A   Yes, it is.

4   Q   Anything you wish to add to what's stated there?

01:45 5   A   No. I think the only point I think I would make,

6   that whereas applicants are frequently obtained to

7   think that they owe their misfortunes to the

8   failures of their lawyers, that is very rarely the

9   case, and certainly very extremely rarely is it

01:45 10   the case that the Commission has referred cases

11   back to the Court of Appeal based substantially on

12   the question of the competence of counsel who

13   represented the Defendant at trial.

14   Q   If we can go to document 339381, and just rotate

01:45 15   that, please. This is an article by Graham

16   Zellick, and Mr. Zellick is the current chair of

17   the Criminal Cases Review Commission; correct?

18   A   Yes, he is.

19   Q   And if we can go to page 383, and are you familiar

01:46 20   with this article generally? I think it dealt

21   with, I think responding to some criticism that

22   had been leveled at the Commission by authors

23   Nobles and Schiff --

24   A   Uh-huh.

01:46 25   Q   -- about matters, and there's just one point I

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01:46 1   want to ask you about. On the next page -- go to

2   the next page, please, and I think Mr. Zellick

3   here is referring to criticisms that may have been

4   in an article or may have come from the court and

01:46 5   the eight concerns attributed to the court by

6   Nobles and Schiff, so if I read that correctly, I

7   think the authors may have taken from a court

8   decision some criticism, but the one here is

9   *Restricting the re-interviewing of witnesses*, and

01:46 10   Mr. Zellick writes:

11   "We note the sensitivities and

12   difficulties here, and the observations

13   of the court, but we must carry out our

14   reviews as we see fit, and this may on

01:47 15   occasion require the re- interviewing of

16   witnesses whether by us or by the police

17   on our behalf. The court is right to

18   point out the dangers."

19   And do I take it from that that the Commission

01:47 20   does not go out and re-interview witnesses as a

21   matter of course and that when it does, the Court

22   of Appeal has concerns about that, or am I

23   misreading that?

24   A   No, I think you are reading that correctly, the

01:47 25   Commission doesn't routinely re-interview

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1   witnesses, and I think that we have alluded to

2   some of the difficulties which can arise with

3   re-interviewing of witnesses, particularly if it

4   appears that the purpose of the re-interview is

01:47 5   simply to get a different story from the witness

6   to that which they may have told at trial, and I

7   think that's consistent with what I was saying

8   this morning about the fact that if -- we were

9   talking this morning specifically about the

01:48 10   possibility of re-interviewing -- of interviewing

11   other suspects, but it would apply, the same sort

12   of process principles would apply to

13   re-interviewing witnesses, that you would only

14   consider re-interviewing witnesses if -- at a

01:48 15   fairly late stage in the investigation, and that

16   for some precise purpose related to something

17   which had been found during the course of the

18   investigation. The Commission certainly wouldn't

19   start off by saying, well, let's go back and speak

01:48 20   to all prosecution witnesses and see whether they

21   will tell us a different story, that would be a

22   completely futile exercise.

23 Q   I'm done with that article. Just a couple more

24   questions, and we may have touched on this, sorry

01:48 25   if we have, but the oral hearings before the

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1   Commission, --

2   A   Yes.

3   Q   -- do you allow the applicant and/or his lawyer to

4   come forward and make oral presentations to the

01:49 5   Commission before you make your decision on

6   whether to provide a reference?

7   A   It is not part of the general process by which the

8   Commission makes decisions to allow oral

9   representations by the applicant or indeed anyone

01:49 10   else. From the experience, from my experience

11   when I was actually at the Commission, I think

12   that we offered the opportunity for counsel

13   representing an applicant to come and make oral

14   representations to the committee which was making

01:49 15   the decision and in that particular case the basis

16   of the application involved -- it wasn't a case I

17   was personally concerned with, but as I understand

18   it, the nature of the application involved a

19   particular abstruse point of law and its

01:49 20   application to the case and the decision-making

21   committee acceded to the suggestion by the

22   applicant's counsel that it would assist the

23   decision-making committee's understanding of the

24   point to hear from counsel.

01:49 25   Q   Does the Commission often get legal advice?

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1   *A*   Umm, no, not often. The Commission is full of

2   lawyers, in amongst Commission members and its

3   case review managers, and the Commission has two

4   full-time legal advisors.

01:50   5   **Q**   And to the extent that legal advisors, would they

6   then provide advice to the commission or to a case

7   manager, or what role do they play?

8   *A*   They are available to provide advice at any stage

9   of the review and, subsequently, decision-making

01:50 10   process.

11   **Q**   And is that advice generally disclosed to an

12   applicant on an unsuccessful application?

13   *A*   No, because -- the advice is not generally

14   disclosed in discrete form because the nature of

01:51 15   the issue and the Commission's view of it will be

16   expressed in the statement of reasons.

17   **Q**   And you may have touched on this yesterday, but

18   the -- when, in the course --

19   *A*   Could I just supplement --

01:51 20   **Q**   Sure?

21   *A*   -- that observation by if, however, the Commission

22   were to instruct independent legal advice from

23   outside the Commission, then in those

24   circumstances the advice to the Commission which

01:51 25   was obtained externally would, would probably be

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1   disclosed to the applicant as part of the

2   disclosure of the evidence and information on

3   which the decision was based.

4   Q   If, in the course of the investigation, I think

01:51 5   you told us that, for example, if you uncovered a

6   new piece of information that may form the basis

7   of a remedy, that it would not be your practice to

8   contact the applicant or his counsel and say

9   "lookit, here's what we've uncovered, we're

01:52 10   following up, we've identified a new suspect", for

11   example, "and we're following up", and I think you

12   told us, generally, that would not be your

13   practice?

14   A   Umm, no. We might. What I was saying was that we

01:52 15   don't routinely, during the investigation,

16   disclose the fruits of investigation on a

17   piecemeal basis unless there is a reason which

18   assists the furtherance of the investigation to be

19   achieved by disclosing that information to the

01:52 20   applicant and inviting comments. We would,

21   otherwise, leave disclosure of the fruits of the

22   investigation to the point when we were

23   communicating either the decision on a referral,

24   or the provisional conclusion on a potential

01:53 25   non-referral.

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1   However, that's not the same

2   as keeping the applicant informed of what we're

3   doing by way of investigation. We would endeavour

4   to tell the applicant what's -- what investigative

01:53 5   steps are being taken, but the nature of that, of

6   what we tell applicants about the progress of the

7   investigation, would have to take into account the

8   fact that we would not wish to raise expectations

9   which may subsequently be dashed.

01:53 10   So it would be a matter for

11   the discretion of the case review manager and the

12   assigned Commission member, in any individual

13   case, to determine in what form an applicant

14   should be kept abreast of the ongoing

01:53 15   investigation.

16   Q   Okay. Thank you, Mr. Kyle, those are my questions

17   for now.

18   I think next is, is it Mr. Roy

19   or Ms. McLean? And perhaps I could ask counsel

01:54 20   just to identify who you are and which client you

21   represent so Mr. Kyle knows which interest you

22   represent.

23   **BY MR. ROY:**

24   Q   We're going to have to lower this mike about a

01:54 25   foot from where Mr. Hodson was standing for me.

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1   Good afternoon, sir.

2   A   Good afternoon.

3   Q   Good afternoon, Mr. Commissioner.

4   COMMISSIONER MacCALLUM: Good afternoon.

01:54 5   BY MR. ROY:

6   Q   My name is Julian Roy and I'm counsel for AIDWYC,

7   the Association in Defence of the Wrongly

8   Convicted.

9   And, fortunately, your, Mr.

01:54 10   Commissioner, your counsel has done a very

11   thorough job of canvassing the evidence from this

12   witness and I don't have a lot of questions, much

13   shorter than what I had originally intended.

14   What I want to start with is

01:55 15   something that came up, just a housekeeping matter

16   that came up just a few minutes ago when Mr.

17   Hodson was asking you questions, and that's about

18   the stats in terms of the case -- the amount of

19   contributions the CCRC makes in terms of the Court

01:55 20   of Appeal's workload.

21   A   Yes.

22   Q   And there is a passage in Professor Zellick's

23   article that addresses this issue, --

24   A   Oh, good.

01:55 25   Q   -- and I just thought I'd bring it to your

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 1              attention so you could confirm that this is in the

 2              ballpark in terms of --

 3       A      Of my understanding?

 4       Q      Yes.

 5       A      Yes.

 6       Q      But Mr. Zellick reports, in his article, that in

 7              2003 to 2004, for example, that the Court of

 8              Appeal heard 582 conviction appeals, --

 9       A      Uh-huh.

01:55 10    Q    -- and 1,938 sentence appeals, and there were

11              leave applications in the range of 6,000.

12       A      Yes.

13       Q      All right.  And in terms -- in that year there

14              were 34 referrals from the CCRC?

01:56 15    A    Yes.

16       Q      Is that consistent with the normal pattern over

17              the period of time, that --

18       A      As I understand, that would be consistent, yes.

19       Q      All right.

20       A      Yes.

21       Q      But the article does go on to point out that,

22              leaving aside the rather low numbers in terms of

23              the Court of Appeal's total workload, --

24       A      Uh-huh.

01:56 25    Q    -- that the CCRC cases tend to be more complicated
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1   and occupy more of the Court's time than ordinary

2   appeals; is that --

3   A   That would be generally true, yes.

4   Q   All right. I --

01:56 5   A   I think those figures you've just given me tend to

6   suggest my 10 percent figure wasn't far out.

7   Q   No, no, I didn't think so, I just thought I would

8   put more meat on the bones.

9   A   No, I'm grateful to you.

01:56 10   Q   All right. Now another housekeeping matter that

11   arose just before lunch hour, you made reference

12   to the fact that the government institutions which

13   hold records often have destruction schedules in

14   terms of --

01:57 15   A   Yes.

16   Q   -- how long they keep documents?

17   A   Yes.

18   Q   And you mentioned five years for the Court files

19   where a sentence is not more than five years; is

01:57 20   that correct?

21   A   Umm, I was -- I wouldn't want to be taken to

22   giving the strict figures of each organization's

23   --

24   Q   Yes.

01:57 25   A   -- destruction policies, and I --

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1   Q   You don't need to for the purpose of my question.

2   A   And I think I was actual talking about the Crown

3   Prosecution Service files.

4   Q   I see.

01:57 5   A   Their destruction policies, for example the great

6   bulk of Crown Prosecution Service files are

7   destroyed within -- are destroyed 12 months after

8   conviction, but longer retention periods will

9   apply depending on the length of sentence and I

01:57 10   think perhaps, in some cases, the category of

11   case, the type of case.

12   Q   All right. What I am -- what I want to ask you

13   about is whether or not there's been any

14   consideration to reforming the way governments

01:58 15   structure their retention of records in light of

16   the work that the CCRC does?

17   A   The current retention periods which are applied by

18   the agencies most closely involved with the

19   operation of the criminal justice system, that is

01:58 20   the Crown Prosecution Service, the courts, the

21   police, have been settled upon taking into account

22   the fact that there is a possibility of an

23   application to the Criminal Cases Review

24   Commission.

01:58 25   So, for example, I think that

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1   many -- that some of the retention policies for

2   these organizations will extend the period by

3   reference to the fact that an application has been

4   made to the Criminal Cases Review Commission,

01:58   5   which is fine, of course, providing the

6   application has been made. But if the application

7   hasn't been made and isn't made until after the

8   point of time at which that organization's policy

9   destruction -- document destruction policy comes

01:59   10   into effect, then of course the material has been

11   lost already.

12   Q   Yes. And has there been any discussion about

13   changing that rule in terms of accommodating the

14   situation where a conviction review application

01:59   15   occurs long after the document is scheduled to be

16   destroyed?

17   A   Well the, I believe that there was -- that there

18   was discussion which took that into account, --

19   Q   I see.

01:59   20   A   -- but the preponderance of opinion was that the

21   factors in favour of a shorter restructuring -- a

22   shorter destruction period outweighed the

23   retention of all papers against the outside chance

24   that somebody might, many years later, wish to

01:59   25   challenge the safety of the conviction.

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1   Q   All right. But you would agree with me that in

2   any event, if a system such as is in the U.K. were

3   to be contemplated somewhere else, that some

4   attention would have to be also paid to the

02:00 5   retention of documents?

6   A   Oh, I think so, yes.

7   Q   All right. Now I want to ask you about the

8   situation concerning forensic evidence --

9   A   Uh-huh.

02:00 10   Q   -- and biological samples, for example.

11   A   Uh-huh.

12   Q   What is the situation concerning -- is there a

13   uniform policy in England concerning the retention

14   of those types of samples for review by your body

02:00 15   or, perhaps, others?

16   A   Umm, well certainly the Forensic Science Service,

17   which is the major provider of -- as its name

18   suggests -- Forensic Sciences Services will have a

19   retention and destruction policy. Again, I'm not

02:00 20   sure exactly what it is.

21   Q   And has there been communication between the CCRC

22   and the Forensic Sciences Services to --

23   A   I don't know whether there's been specific contact

24   between them.

02:00 25   Q   All right. But in terms of if any kind of system

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1   were to be contemplated somewhere else, is that

2   also an issue that ought to be considered as well?

3 A I think it's something which ought to be

4   considered.

02:01   5   I mean one of the things we

6   have discovered as a matter of practical

7   experience is that, notwithstanding the existence

8   of specific document retention policies, not all

9   organizations adhere to them absolutely and,

02:01 10   therefore, sometimes by chance we find that there

11   is material still existing in a case which,

12   possibly, you might expect no longer to be around.

13 Q Yes?

14 A But, certainly, the question of retaining material

02:01 15   and the length of time for which material is

16   retained, I mean the bottom line of this, of

17   course, is we're talking about storage space as

18   much as anything else.

19 Q Yes.

02:01 20 A Storage of material is, it takes up a lot of

21   physical space, so it's about the ability to

22   restore it -- sorry -- to hang onto it and keep

23   it, and I think the approach which would underpin

24   any consideration of this is that the system

02:02 25   should enable people to make applications relating

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1   to their case, whether it's for appeal or an

2   application to, in our case, the Criminal Cases

3   Review Commission, as promptly as they can and as

4   soon as they are in a position to do so. Of

02:02 5   course, that begs the question as to whether, at

6   the time the application is made, the necessary

7   further evidence can be found, and if it's a case

8   where the ability to produce fresh evidence which

9   called into question the safety of the conviction

02:02 10   depends on advances in science, that may not

11   happen immediately.

12   Q   I see.

13   A   But there is nothing you can do about that.

14   Q   All right. But, in any event, you would agree

02:02 15   with me that those issues that surround

16   advancements in forensic evidence, and how we

17   store samples, is something we ought to pay

18   considerable attention to if we are to consider a

19   competent conviction review process?

02:03 20   A   Well, the availability of material to be

21   re-examined in the course of any subsequent review

22   is an important consideration.

23   Q   Thank you. Now, rather than taking you into

24   the -- line by line through the mechanics of how

02:03 25   you investigate in your case review process, I

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1		want to try and elicit from you some of the
2		guiding principles that seem to animate the rules
3		that are in place there. All right?
4	A	Uh-huh.
5	Q	Now the first principle that I want to ask you
6		about is the notion of independence --
7	A	Yes.
8	Q	-- that you told Mr. Hodson about.
9	A	Uh-huh.
10	Q	Now would you agree with me that the notion of
11		independence, as you understand it and in terms of
12		how it's understood in the context of the CCRC in
13		England, is that independence goes beyond actual
14		independence to the issue of whether or not a body
15		is perceived to be independent?
16	A	Yes.
17	Q	All right. And that concern about the perception
18		of independence is something that has been taken
19		into account in terms of how the CCRC was
20		structured; is that correct?
21	A	Yes.
22	Q	All right. Now you would agree with me that, in
23		terms of the ability of the CCRC to do its work,
24		the perception that it has -- enjoys amongst
25		stakeholders and other members of the public is

02:03 (line 5)
02:03 (line 10)
02:03 (line 15)
02:04 (line 20)
02:04 (line 25)

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1   critical in order for it to do its work properly;

2   is that right?

3   A   Yes.

4   Q   Now, if I could just put a little bit more meat on

02:04 5   the bones in terms of the relationship between the

6   Home Office and the CCRC, because the CCRC does

7   come, generally, within the purview of the Home

8   Office; is that correct?

9   A   Yes. The actual status of the CCRC is that of

02:04 10   non-departmental public body.

11   Q   Yes?

12   A   It's -- essentially the delivery of public sector

13   activity, if it's not to be done directly by a

14   government department, is increasingly given out

02:05 15   to either non-departmental public bodies, of which

16   the Commission is one, or executive agencies.

17   Now the significance, the

18   significant difference between the two is that an

19   executive agency has a management board which

02:05 20   includes, on it, people from the government

21   department of which the agency is an executive

22   agency, whereas with a non-departmental public

23   body the governance of the organization is

24   entirely internal.

02:05 25   So the governance of the

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1		Criminal Cases Review Commission is undertaken by
2		the Commission as a board, with a chief executive,
3		but there is no representation on the management
4		of the Commission, as a matter of governance, from
02:05 5		the Home Office.
6	Q	All right. So in terms of the two models that
7		were sort of available in England in terms of
8		structuring the CCRC, --
9	A	Uh-huh.
02:06 10	Q	-- the one that didn't include any involvement of
11		government officials was the one that was chosen;
12		is that correct?
13	A	That's correct.
14	Q	And that was a very deliberate choice; was it not?
02:06 15	A	I would think so.
16	Q	All right. Now, from the point of view of
17		perception of independence, it's very important
18		that it be clear that there isn't any type of
19		government direct involvement in terms of how
02:06 20		cases are reviewed; is that right?
21	A	That's right.
22	Q	And that was why the choice that -- was made to
23		keep government people out of the direct
24		management of the CCRC; is that right?
02:06 25	A	But it would still have been possible, even if the

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1   Commission had been established as an executive

2   agency, to ensure that the government department

3   had no involvement in -- had no actual involvement

4   in casework or casework decisions, but the process

02:06   5   of keeping it absolutely separate is made that

6   much easier --

7   Q   Yes.

8   A   -- if there is no involvement of the Home Office

9   directly in the management of the Commission.

02:07 10   Q   And it also makes things clear, from a perception

11   point of view, because it's a little more

12   difficult to convey to the public that there's

13   independence when there's actually government

14   people sitting on the board?

02:07 15   A   I think that may be true, yes.

16   Q   Thank you. Now I believe the Commissioner asked

17   you some questions, towards the end of the day,

18   about whether or not there was an actual rule that

19   would prohibit a politician or an elected official

02:07 20   from contacting somebody on -- a Commissioner on

21   the CCRC and attempting to influence them

22   concerning a case; --

23   A   Uh-huh.

24   Q   -- do you remember being asked about that?

02:07 25   A   I do, yes.

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1   Q   And I think your answer was that there wasn't any

2   specific rule that dealt with that issue?

3   A   No, that -- no, there isn't. And, I mean,

4   anybody, whoever they are, I suppose, could seek

02:07 5   to contact the Commission to ask about cases.

6   Indeed, Members of Parliament

7   frequently write to the Commission on behalf of

8   their constituents, asking what's happening and

9   what's going to be done and maybe even making

02:08 10   suggestions about what should be done. Now the

11   Commission would not regard that sort of approach

12   by Members of Parliament as being improper, I

13   mean, that is what Members of Parliament are there

14   to do, to represent the interests of their

02:08 15   constituents.

16   What would be inappropriate,

17   and I've no doubt would draw sort of immediate

18   condemnatory action by the Commission, would be if

19   anybody in the Home Office, either official or

02:08 20   minister, sought to contact the Commission wearing

21   their departmental hats, if I can put it that way,

22   and endeavour to discuss cases or their progress.

23   Q   All right. So there's nothing wrong with an MP,

24   on behalf of a constituent, asking for information

02:09 25   from the organization, but it's a completely

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1   different matter for somebody in an executive or

2   ministerial capacity to attempt to contact the

3   Commission with a view to influencing its

4   decisions; is that right?

02:09 5   A   Yes.

6   Q   And even though that's not written down anywhere

7   that's a principle that's well-recognized within

8   the civil service, and the notion that there isn't

9   to be political interference --

02:09 10   A   Yes.

11   Q   -- with civil servants, okay. So that's a matter

12   of sort of conventional principles of

13   Parliamentary democracy and there is no specific

14   --

02:09 15   A   It would be a constitutional issue I think.

16   Q   Yes. Now in terms of the contact that is

17   permissible between the Home Office and the CCRC I

18   understand that the Home Office is entitled, in

19   fact obligated, to give policy or strategic

02:09 20   direction to the CCRC?

21   A   No. The relationship between the Home Office and

22   the Commission is around the fact that the Home

23   Office provides the funding for the Commission,

24   and to that extent the Commission is obliged to

02:10 25   account for its uses of the funding that it is

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1   given through the Home -- through -- to the Home

2   Office, and ultimately through the Home Office to

3   Parliament. So the Home Office has legitimate

4   interests in, for example, how many Commission

02:10   5   members the Commission wishes to appoint, what

6   other staff resources are to be appointed, and

7   generally to approve the Commission's strategic

8   documents in the form of corporate and business

9   plans, but they are related to what I described a

02:10   10   moment ago as governance issues, to make sure that

11   the Commission is intending to make proper use of

12   the funding which is allocated by the Home Office.

13   And, of course, the amount of that funding is

14   going to depend on the Commission's ability to

02:11   15   persuade the Home Office that its corporate plans,

16   or the strategies which it intends to adopt, are

17   sensible and workable.

18   Q   All right. So, in terms of the reporting

19   relationship between the CCRC and the Home Office,

02:11   20   it's purely with respect to financial matters and

21   not with respect to the meat of what the CCRC does

22   on a day-to-day basis; is that right?

23   A   That's right. I mean, the nature of the

24   relationship is around governance issues, not

02:11   25   about how it deals with casework.

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1   Q   And, again, this is a deliberate choice in terms

2   of ensuring a perception of independence on the

3   part of the CCRC?

4   A   Well, it's actual independence and the perception,

02:11 5   yes.

6   Q   Thank you. Now you gave evidence yesterday

7   concerning the Runciman report and the debate

8   concerning whether or not the Home Secretary

9   should be the one that is involved in conviction

02:12 10   reviews, and you gave evidence that the Runciman

11   report -- and we saw the Runciman report --

12   A   Yes.

13   Q   -- recommended strongly that that issue of

14   conviction review be removed from the Home

02:12 15   Secretary; is that right?

16   A   Yes.

17   Q   All right. Now you gave a couple of reasons why

18   that was recommended, and one of them was the

19   notion of a separation of powers between the

02:12 20   executive and the judiciary?

21   A   Yes.

22   Q   And another of the reasons you gave was what was

23   perceived to be a conflict between the Home

24   Secretary's responsibility for policing and

02:12 25   prosecution on the front end --

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1   *A*   Uh-huh.

2   **Q**   -- versus repairing potential miscarriages of

3   justice on the back end; is that right?

4   *A*   Yes.

02:12   5   **Q**   I'm going to suggest another reason, from a

6   perception point of view, why a political or

7   elected official may not be in the position to be

8   in charge of conviction reviews.

9   *A*   Uh-huh.

02:13   10   **Q**   And that's the issue of, by nature of an elected

11   official, they have to be responsive to public

12   opinion to some extent?

13   *A*   Uh-huh.

14   **Q**   Would you agree with that?

02:13   15   *A*   That would certainly be an issue because, again,

16   the -- the -- what I think is -- lies -- underpins

17   the position which the English CCRC operates under

18   is the -- is this whole concept of independence.

19   And we, I think, would say that the makeup of the

02:13   20   Commission and the way in which it works means

21   that it doesn't have to have any ulterior motive

22   in mind, or any un -- or any external pressure in

23   mind.

24   You suggest one, which is that

02:13   25   if a minister is making decisions on whether to

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1   allow a case through the gateway, that person may

2   be influenced by external pressures around public

3   concern about the case or whatever, but there are

4   other, there are other aspects to the business of

02:14 5   independence, one of which, of course, is that we

6   don't act for the applicant either, so we're not

7   susceptible to having to take into account any

8   particular interest there either.

9   But the suggestion you make, I

02:14 10   think, or the point you make about somebody making

11   decisions who may be susceptible because he had

12   other pressures on him or other factors which may

13   influence his decision-making, is a valid one.

14   Q   Thank you.

02:14 15   COMMISSIONER MacCALLUM: Mr. Roy, do you

16   suggest that there's any difference between 2 and

17   3?

18   MR. ROY: I --

19   COMMISSIONER MacCALLUM: Between separating

02:14 20   the prosecution end and the review end and

21   between the, from a perception point of view,

22   making that distinction?

23   MR. ROY: Yes, I do, I do.

24   COMMISSIONER MacCALLUM: Okay. Perhaps you

02:14 25   could just suggest it again?

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1   BY MR. ROY:

2   Q   Well, in terms of the type of conflict in the

3   second scenario that the Commissioner has just

4   mentioned, the conflict between being both the

02:15   5   prosecutor and the policeman and being the person

6   who fixes the miscarriage of justice, there seems

7   to be a conflict in terms of those roles?

8   A   Yes. As a, just as a, for the purpose of

9   exactitude, the Home Secretary is not, and never

02:15   10   has been, responsible for the prosecution process.

11   That's the responsibility of the Attorney General.

12   Q   Policing?

13   A   But the Home Secretary is responsible for

14   policing, law and order, and the management of the

02:15   15   prison service, the management of the privation

16   service, in other words virtually everything which

17   directly impacts on ensuring that the people who

18   commit offences are investigated and dealt with

19   appropriately. The bit in the middle about

02:15   20   prosecuting is another ministerial responsibility.

21   Q   Okay.

22   A   But it's that -- I think the point you're making

23   is that that front-end responsibility for a huge

24   chunk of the administration of the criminal

02:16   25   justice system, all of which is directed towards

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1   detection and punishment, is in -- it's

2   inappropriate for somebody with those

3   responsibilities also to be expected to make im --

4   appropriate decisions in relation to the fact

02:16 5   that, notwithstanding everything that's gone

6   before, someone has still been wrongly convicted.

7 Q Yes. And the nature of the conflict is that the

8   people that the Home Secretary manages, in terms

9   of the police may be partly responsible for how

02:16 10   the person ended up being wrongfully convicted,

11   and there is a bit of a conflict between whether

12   or not the Home Secretary would be prepared to

13   pronounce that in a given case; is that right?

14 A Well, I think so. I mean I'm sure the Home

02:16 15   Secretary, acting entirely honourably and

16   honestly, would nonetheless hope, in any given

17   case, that all the other aspects of the process

18   for which he is responsible have worked and,

19   therefore, is less able to take -- to stand back

02:17 20   --

21 Q Yes.

22 A -- and take a dispassionate view of someone who

23   says "I'm sorry, Home Secretary, you're wrong, it

24   hasn't worked."

02:17 25 Q And whether or not the Home Secretary, any given

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1   Home Secretary, is able to do that, from a

2   perception point of view there is -- there might

3   be a perception on the part of the public or the

4   applicant that that separation that would be

02:17   5   necessary to do both jobs could be put into

6   practice; is that --

7   A   Yes.

8   Q   Okay. But the third point is a concern about the

9   vulnerability of the Home Secretary to political

02:17   10   pressure from the public. For example, the

11   terrorism cases are a good example?

12   A   Uh-huh.

13   Q   That a concern or a fear generally amongst the

14   public about terrorism might apply some pressure

02:17   15   in terms of the Home Secretary's ability to review

16   a conviction, a potentially wrongful conviction,

17   in a terrorism case; right?

18   A   Yes.

19   Q   Okay.

02:17   20   A   Perhaps I could -- this was something -- and I

21   think the point you make is absolutely right, and

22   it's a valid one, and commentators would say that

23   that -- it is that which lay at the heart of the

24   reasons why some of these cases took so long for

02:18   25   anyone to get a grip of them and deal with them.

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1   But I also have in mind the

2   fact that, in a case which related to the

3   conviction of the Guildford 4, which is another of

4   the blockbuster cases, I seem to recall that there

02:18 5   was some civil proceedings arising out of that in

6   which Lord Denning, who was then one of the -- who

7   was then one of our most senior and respected

8   judges, threw out the civil litigation on the

9   basis that in order to allow this action to

02:18 10   proceed it would necessarily involve an assumption

11   that the police officers in this case had been

12   involved in misconduct, and that would be,

13   frankly, unthinkable.

14   So it, it's not just a

02:18 15   political and ministerial problem, it -- in that

16   particular case, at least in the eyes of one

17   particular judge, the notion that police officers

18   may have been guilty of misconduct in relation to

19   an investigation was unthinkable and the civil

02:19 20   proceeding was stayed on that basis.

21 Q   I see. It's another reason to put the

22   responsibility of reviewing convictions in the

23   hands of a body that's dedicated to that role?

24 A   Well it certainly, it's certainly a re -- it

02:19 25   certainly tends to illustrate and illuminate why

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1   it is that, if the mechanisms for investigating

2   and hopefully redressing miscarriages of justice

3   are left with whoever it may be, but who had --

4   who is trying to balance off one ill against

02:19 5   another, then you might -- you can tend to get

6   some skewed thinking around where you -- what your

7   objectives are.

8   Q   And this, the point of the CCRC is you don't

9   engage in that form of balancing, you have a

02:20 10   inquisitorial type of approach where you --

11   A   Absolutely, I --

12   Q   -- investigate the facts and go where they take

13   you?

14   A   Absolutely. And that was one of the most

02:20 15   refreshing aspects which I found when I started

16   work as a Commission member. Having spent most of

17   my professional career up until that time

18   prosecuting, where all the time you were doing

19   your best to prosecute in a fair and appropriate

02:20 20   manner but, all the time, you had to wonder about

21   whether what you were doing was somehow going to

22   have some adverse effect on the ability to

23   prosecute a case successfully, one of the most

24   refreshing things about being at the Commission

02:20 25   was that all those sorts of concerns and fears

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02:20	1	simply evaporated. We just went out and did what
	2	was necessary, and then we made what we will of
	3	what we found, because we didn't have to worry
	4	about damaging anybody's interests.
	5	Q Now, your article, and Mr. Hodson has already

1   simply evaporated. We just went out and did what

2   was necessary, and then we made what we will of

3   what we found, because we didn't have to worry

4   about damaging anybody's interests.

02:20 5 Q   Now, your article, and Mr. Hodson has already

6   taken you to the passage that I was going to take

7   you to, but I want to put it to you again for

8   emphasis, is -- and that's the passage on page 60.

9   Page 660 rather?

02:21 10   COMMISSIONER MacCALLUM: Can I have the

11   doc. number, Mr. Roy, please?

12   MR. ROY: I'm sorry, it's 339389.

13   COMMISSIONER MacCALLUM: And that's not

14   merely the page number, that's the document

02:21 15   number is it?

16   MR. ROY: That's the document number, and

17   the page number is 339392.

18   COMMISSIONER MacCALLUM: Thank you.

19   BY MR. ROY:

02:21 20 Q   And it's right above -- it's the passage right

21   above the title where it says the Royal Commission

22   on Criminal Justice.

23 A   Yes.

24 Q   And what you pose at the end of that paragraph is

02:21 25   sort of a choice between two ideas:

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1   "Will whatever mechanism that is adopted

2   to address the cries of those who claim

3   to have been wrongly convicted have at

4   its heart the will to own up to mistakes

11:31   5   and learn lessons..."

6   on the one hand?

7   A   Uh-huh.

8   Q   "...or will it strive to preserve the

9   status quo?"

02:22   10   A   Yes.

11   Q   And in terms of how the CCRC and how it's

12   structured, how it tries to answer that question

13   in the way it does its work, it tries to show a

14   will to own up to mistakes and learn lessons in

02:22   15   terms of mistakes made by the criminal justice

16   system; is that right?

17   A   Yes. I mean, I think what I would say about

18   the -- those I think are the questions, and you

19   can either have a situation -- and it may not be

02:22   20   quite as stark as this, but for the purpose of

21   illustration you can look at either end of the

22   spectrum and you have a criminal justice system in

23   which the possibility of mistakes being made is

24   thought to be very threatening and damaging and

02:22   25   therefore you do your best to try and pretend that

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1   they don't happen, or you have a robust and mature

2   criminal justice system which recognizes that

3   mistakes will happen and is prepared to do

4   something about them. I'm not making any

02:23 5   particular comment as to where the English

6   criminal justice system fitted on that particular

7   end of the spectrum, but the mechanism which has

8   been adopted in the United Kingdom is the creation

9   of the Commission and that mechanism, I would say,

02:23 10   tends very strongly to suggest that the -- that

11   the United Kingdom's criminal justice system

12   intends to recognize that mistakes will happen and

13   do something about them rather than try to bury

14   them and pretend they don't.

02:23 15 Q   All right. And I want to take you to certain

16   aspects of the CCRC's work that I'm going to ask,

17   that I'm going to suggest confirm what you just

18   said, that it tends to show a new willingness on

19   the part of United Kingdom to have the will to own

02:24 20   up to mistakes and learn lessons.

21   The first part that I want to

22   ask you about is the, what the CCRC's practices

23   are concerning outreach, in terms of trying to

24   reach out to the community and solicit

02:24 25   applications from potentially wrongfully

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1   convicted.

2   A   Uh-huh.

3   Q   I take it that in order to be effective, the CCRC

4   has to engage in some form of public education

02:24 5   about what its role is?

6   A   Uh-huh.

7   Q   And it's even more important that stakeholders are

8   properly educated about the CCRC's role; correct?

9   A   Uh-huh.

02:24 10   Q   And you would agree with me that potential

11   applicants are potentially a difficult audience to

12   reach in terms of that public education message

13   that has to go on?

14   A   Yes.

02:24 15   Q   And part of the reason for that is from time to

16   time -- it's not uncommon for the potential

17   applicants to actually be in custody; is that

18   right?

19   A   A lot of them are, yes.

02:25 20   Q   Yes. And when they are in custody, they are

21   isolated from their normal social networks?

22   A   Yes.

23   Q   And they are a difficult audience to reach for

24   that reason; correct?

02:25 25   A   Yes.

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1   Q   And the other issue is because of their experience

2   in the system, there may be a lack of trust of

3   authorities?

4   A   Yes.

02:25 5   Q   And there also may be issues of poverty as well

6   and lack of resources?

7   A   Yes.

8   Q   So the CCRC can't sit back and be an obscure

9   little government organization in some office

02:25 10   somewhere, it has to actually go out into the

11   community and reach people; is that right?

12   A   Yes.

13   Q   And are you able to elaborate for us on some of

14   the things that the CCRC does in that regard?

02:25 15   A   Well, certainly I can talk about some of them.

16   You are right about of course that many of the

17   applicants are in prison and therefore the ability

18   to make people who are in prison aware of the

19   Commission has to take account of the

02:26 20   circumstances of their being in prison, but

21   certainly on various levels there is a lot of

22   information about the Commission in the public

23   domain. We've looked at some length at the

24   Commission's web site, for example, which may or

02:26 25   may not be available to prisoners depending on the

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1   institution that they are in, but certainly we

2   have, in every prison, literature about the

3   Commission which is certainly in the hands of the

4   appropriate prison staff who deal with the

02:26   5   reception of prisoners and with the probation

6   officer in the prison who we encourage to make

7   prisoners aware, as part of the induction process

8   of being in prison, about the existence of the

9   Commission and make, giving them to understand

02:27   10   that there is, the Commission is there if they

11   believe that they may have been wrongfully

12   convicted and wish to make applications, so that's

13   how we can deal with -- how we can make the prison

14   population aware of our existence.

02:27   15   I mean, in some respects, if

16   I'm talking about making individuals who feel

17   they've been wrongly convicted aware of the

18   Commission's existence, that in some respects is

19   easier with prisons than it is for people who

02:27   20   don't get custodial sentence because there you are

21   just dealing with the population at large.

22   Q   If you are prepared to go out to the prisons and

23   distribute the material there, then they are, in

24   some sense, an easier population to reach?

02:27   25   A   I think so, yes, and we have from the outset made

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1   conscientious efforts to ensure that the

2   literature about the Commission and the processes

3   which people need go through to apply to the

4   Commission are available throughout the prison

02:28 5   institutions in England, Wales and Northern

6   Ireland.

7   There are also organizations

8   who represent the interests of persons who may

9   have been wrongfully convicted, groups of

02:28 10   solicitors, for example, organizations such as

11   Justice, and again the Commission, from the

12   outset, has taken positive steps to embrace

13   stakeholders who come into those categories to

14   ensure that they are aware of our existence so

02:28 15   that they in turn can disseminate information

16   about the Commission, and from time to time we

17   will have -- we will have stakeholder liaison

18   meetings with organizations of that nature not

19   only from the point of view of making sure that

02:29 20   they know of our existence, but also from the

21   point of view of discussing with them how we're

22   doing, which is something which I refer to later

23   in that *Drake* review article where I point out

24   that although the Commission believes that it is

02:29 25   carving out a good and positive place for itself

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1   within the criminal justice system, it certainly

2   doesn't receive universal acclamation on

3   everything it does, and we are interested to know

4   what the concerns are and respond to them as best

02:29 5   we can, and one of the ways of doing that is to

6   have this engagement with organizations which are

7   interested in the matter of wrongful convictions.

8 Q And this is all consistent with a more proactive

9   as opposed to a reactive approach that was perhaps

02:29 10   the case in the past?

11 A I would say so, yes.

12 Q Thank you. Now, I also notice from your web site

13   and your application form that there seems to be a

14   real effort to ensure that the form is written in

02:30 15   ordinary language, and the form is document

16   339755, Mr. Commissioner, and in fact on the face

17   of the --

18   COMMISSIONER MacCALLUM: 337 was it?

19   MR. ROY: 339755.

20   BY MR. ROY:

21 Q And if you look on the bottom left-hand corner of

22   the document, you've actually got a seal of

23   approval concerning the ease of the language that

24   you use?

02:30 25 A Yes, from the Plain English Campaign, yes.

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1   **Q**   All right.

2   *A*   And the design of the document was done in

3   conjunction with the Plain English Campaign to

4   make sure that it did achieve that objective.

02:30   5   **Q**   And you do the same thing in terms of your web

6   site, you try to not just speak to the lawyers or

7   the professionals in the community, you try to

8   speak directly to the potential applicants; is

9   that right?

02:30 10   *A*   Oh, that's absolutely right, because, as I say,

11   the huge bulk of our applications come from

12   applicants directly with no involvement of the

13   legal fraternity at all.

14   **Q**   Now, in addition to the outreach that you do, the

02:31 15   proactive steps that the Commission takes doesn't

16   stop just with soliciting the applications, it

17   also happens after the applicant makes his

18   application; is that correct?

19   *A*   Sorry, in what respect, the --

02:31 20   **Q**   Well, in terms of the proactive approach that the

21   Commission takes doesn't stop with just soliciting

22   the application, it continues right throughout the

23   process; is that correct?

24   *A*   That's so, yes.

02:31 25   **Q**   It doesn't, for example, depend on the applicant

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1   going out and gathering his own evidence; correct?

2   A   No. I mean, as I was endeavouring to explain, I

3   hope in a coherent way, that in some respects to

4   expect the applicant to do that can be counter

02:31 5   productive.

6   Q   For example, the last thing that you would want to

7   do is come up with a long check list of documents

8   that the applicant has to come up with before his

9   application can get off the ground; correct?

02:32 10   A   We wouldn't think to do that. We encourage

11   applicants to send us whatever they've got and

12   anything they think they would like us to look at.

13   Q   Yes.

14   A   But we certainly don't make it a precondition of

02:32 15   how we go about investigating, that they should

16   send any particular material to us. We regard it

17   as our responsibility to get hold of the necessary

18   information. However, of course, if the applicant

19   has got material which only he has, then obviously

02:32 20   we would want to, we would want him to send us

21   that, but we would discover that I think during

22   the course of the investigation and review, so --

23   for example, if I take a case which I dealt with

24   last year when I was back at the Commission as a

02:32 25   case review manager, it was a case in which, one

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1   of the many cases involving a conviction for

2   sexual offence, and the applicant suggested that

3   he had very many letters and cards from the

4   children he was convicted of assaulting, all of

02:33 5   which would indicate that there had been no abuse

6   at all, so he was the only person who had that

7   material, so the only way we were ever going to

8   see it would be if he gave it to us, which he did.

9   Q   But leaving that aside, you don't make the

02:33 10   applicant jump through a bunch of hoops and gather

11   up all of his own documents before the application

12   can even get considered; right?

13   A   No, no, all we need is to know that there's an

14   application.

02:33 15   Q   Yes. So beyond actually just filling out the very

16   short form that you have and submitting it, the

17   applicant really doesn't have to do a heck of a

18   lot more to get his application considered?

19   A   No.

02:33 20   COMMISSIONER MacCALLUM: I just have one

21   question I would like to ask, Mr. Roy, about

22   that. In a typical sexual assault case, sir,

23   that would not be very onerous, I suggest, for

24   the taxpayer. However, if you take a complicated

02:33 25   fraud case, for example, that went on for months

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1   and months and months, the appeal book might be a

2   very expensive thing to duplicate, and if you

3   thought as a Commission you needed that, then you

4   are simply billing the taxpayer for it aren't

02:34   5   you, whereas the normal rules of appeal require

6   an appellant, at least here I think, require an

7   appellant to provide at least the basic court

8   record in support of his appeal. I mean, how are

9   we to guard against extravagant expense brought

02:34   10   by vexatious litigants or trivial complaints in

11   that respect?

12   A   I'm not sure I fully understand it, and it may be

13   because of differences of procedures.

14   COMMISSIONER MacCALLUM: Well, perhaps,

02:34   15   yes, but take a typical criminal appeal, for

16   example --

17   A   Yes.

18   COMMISSIONER MacCALLUM: -- in the province

19   where I come from, it involves duplicating the

02:34   20   trial record, and depending on the length of the

21   trial obviously, the expense is either small or

22   perhaps very significant.

23   A   Well, we would expect -- I mean, if I understand

24   you correctly, so when an applicant, when a

02:35   25   convicted person applies for leave to appeal, then

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1   as part of that process there will be obtained a

2   transcript of the judge's summing up to the jury,

3   maybe even transcripts of evidence which has been

4   given. Is that the sort of documentation you are

02:35   5   referring to?

6   COMMISSIONER MacCALLUM: That's the sort of

7   thing, yes.

8   A   Well, we would get that simply by asking for the

9   Court of Appeal file.

02:35   10   COMMISSIONER MacCALLUM: Oh, the Court of

11   Appeal file, I see. Okay, that answers my

12   question.

13   A   Yes. And in fact that process is made

14   immeasurably more easy now than it was because we

02:35   15   obtained some particular funding for setting up an

16   IT link with the Court of Appeal which now means

17   that their documentation can be obtained

18   electronically.

19   COMMISSIONER MacCALLUM: Yes, okay.

02:35   20   A   So we don't have to re-invent the wheel every

21   time.

22   COMMISSIONER MacCALLUM: Uh-huh.

23   A   But again, it will depend on what documentation

24   was obtained. This is why I say we set such a

02:36   25   premium in the early stage of investigation to

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1   gather in all the existing material relating to

2   the case.

3   COMMISSIONER MacCALLUM: Yes, surely.

4   A   So that we don't have to start from scratch with

02:36 5   getting transcripts if they've already been

6   obtained.

7   COMMISSIONER MacCALLUM: Uh-huh. Go ahead,

8   Mr. Roy.

9   BY MR. ROY:

02:36 10   Q   But the bottom line in terms of being accessible

11   and being proactive, keeping in mind that you are

12   often dealing with people who are in custody who

13   don't have the ability to go out and gather all

14   the materials that may once have been accessible

02:36 15   to them, you take care of that for the applicants?

16   A   We will if necessary, and some of them are great

17   hoarders and some of them will send in, they will

18   have the judge's summing up and they will have all

19   the transcripts in the cell with them and they

02:36 20   will send them to us, but if they don't or

21   haven't, then the likelihood is that any

22   documentation which they might have had of that

23   nature will already be available for us to obtain

24   from other sources without having to go back to

02:36 25   the drawing board.

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1   **Q**   But that's not going to hold -- but the bottom

2   line is that the applicant's failure to produce

3   these documents is not going to hold up his

4   application process is it?

02:37 5   **A**   Well, it's not going to prevent him, it's not

6   going to prevent his application being considered,

7   but if one takes -- for example, the Commissioner

8   a moment ago was referring to a fairly

9   straightforward case, let's assume that we have an

02:37 10   applicant who suggests he has been wrongfully

11   convicted of a sexual offence and the issue, the

12   pointed issue is some flaw in the trial judge's

13   summing up which may either have been missed last

14   time on appeal or may need to be reviewed in the

02:37 15   light of some change to the law, if the applicant

16   sends us a copy of the summing up, then we'll have

17   it immediately and we won't have to spend time

18   trying it find it from some other source, so it

19   may be that the review can proceed more quickly if

02:37 20   the applicant sends us the documents than if he

21   doesn't, but it makes no difference to our actual

22   willingness to review the case.

23   **Q**   It might slow it down, but it doesn't stop it in

24   its tracks?

02:38 25   **A**   Yes, that's right.

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1	Q	Thank you. Now, I want to ask you about some of
2		the principles that come out of your case review
3		process.
4	A	Uh-huh.
02:38 5	Q	And I noticed from the web site that you have
6		very, very comprehensive written guidelines and
7		policies concerning how the case review process
8		works; is that correct?
9	A	Yes.
02:38 10	Q	And I actually counted, there were around 40
11		written policies --
12	A	Right.
13	Q	-- which the Commission has generated concerning
14		how it does its work.
02:38 15	A	I'll certainly take your word for it on the
16		number.
17	Q	All right. And I take it that generating very
18		detailed policies such as those are a significant
19		expenditure of the Commission's resources?
02:38 20	A	Yes, they are. I mean, when I was there -- I
21		mean, this was something which I took a particular
22		interest in when I was at the Commission and
23		whilst I was at the Commission the majority of
24		that work was undertaken by the case work
02:39 25		operation group which consisted of a

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1   representatives from amongst the Commission

2   members and the case review manager and we would

3   either identify or pick up on matters which were

4   drawn to our attention by the Commission as to

02:39   5   being areas in which either policy or procedural

6   guidance would be helpful. As far as I know, that

7   group still exists, but it's supplemented by a

8   legal advisory group, so I think you'll find when

9   you look at these 40 things, that they are divided

02:39   10   into operational and legal matters.

11   Q   All right. Now, in terms of what principles come

12   out of all that policy and guideline work the

13   Commission has done, I'm going to suggest to you

14   one of the things that comes out of it is the

02:39   15   notion of consistency, in that there's a great

16   effort made to ensure that all applications are

17   dealt with along the same, in the same way in

18   terms of there's a tiered approach, but all the

19   applications follow the basic similar structure;

02:40   20   is that not correct?

21   A   Certainly. I mean, the Commission's objective is

22   to be as open and transparent as possible about

23   its processes and procedures and one way in which

24   that is done of course is to make publicly

02:40   25   available the procedural and legal guidance on

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1   which the Commission staff operate and the topics

2   which are selected as being, as meriting some form

3   of written documentation tend to be those where it

4   is thought that consistency of approach is

02:40   5   important. I mean, the Commission has never had

6   what some organizations do have which is a 25

7   volume manual of procedure and guidance because

8   the sort of work which the Commission does doesn't

9   really lend itself to having every aspect of it

02:41   10   documented in such a way, but there are facets of

11   what the Commission does which, in which guidance

12   to ensure consistency of approach and hopefully

13   outcome is important, and those are the sorts of

14   areas which are covered by the documents to which

02:41   15   you've referred.

16   Q   Now, in terms of the message of consistency that

17   sends, would it -- I'm going to suggest to you in

18   terms of the message it sends, is that an

19   applicant doesn't need to have his lawyer writing

02:41   20   to the Commission constantly to have his file

21   moving forward through the process; is that right?

22   A   We would certainly hope not, that that doesn't

23   need to be the case, yes.

24   Q   And it doesn't suggest to an applicant that he has

02:41   25   to have his MP call the Commission to inquire

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 1            about his file either does it?

 2     A      No.

 3     Q      Because the applicant can actually see that

 4            there's a written process, a detailed process that

02:42  5            his application is going to follow?

 6     A      Uh-huh.

 7     Q      And which leads to the issue of transparency that

 8            you alluded to?

 9     A      Uh-huh.

02:42 10     Q      It's also important from the point of view of the

11            Commission's work to convey that -- be open about

12            how it considers the applications; is that

13            correct?

14     A      Yes.

02:42 15     Q      It shouldn't be a mystery to the applicants or

16            members of the public how the decision-making

17            actually occurs?

18     A      Not at all, no.  I mean, right from the outset the

19            Commission's concern was to ensure that it

02:42 20            developed processes and working methods which were

21            appropriate to the work it was doing and that they

22            should -- they should be publicly available.

23     Q      And you told us in your evidence about a written

24            case plan in terms of how an investigation is

02:43 25            planned?
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1   A   Uh-huh.

2   Q   And that's a written document obviously?

3   A   Yes.

4   Q   And that document is added to record all the

02:43 5   different steps that are taken and conclusions

6   that flow from the documents?

7   A   Yes.

8   Q   Yes?

9   A   Uh-huh.

02:43 10   Q   And that is a method of ensuring that the way

11   investigations are conducted is transparent;

12   correct?

13   A   It's a document which enables the way in which an

14   individual case is being conducted can be

02:43 15   communicated to the applicant, yes.

16   Q   Yeah.

17   A   And we don't make the world at large generally

18   aware of what we're doing in every individual

19   case, the documentation which we do publicize to

02:43 20   make, in furtherance of the transparency objective

21   is around policies and procedures as opposed to

22   the handling of individual cases.

23   Q   All right. But there are rules that govern which

24   documents are to be considered by a Commissioner

02:43 25   when determining an application; is that correct?

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1   A   There are certain -- there are processes which

2   guide the thought processes of both the assigned

3   Commission member and the case review manager as

4   to the documentation they should look for and

02:44 5   there are some -- there are some processes which,

6   if you like, they are set in stone. So, for

7   example, the minute an application is received, as

8   sure as night follows day the Commission's

9   administrative staff will be in touch with the

02:44 10   Court of Appeal asking them to download their

11   file, and that documentation should produce enough

12   information at a very early stage to enable the

13   Commission member who screens the case to decide

14   whether it's going to require an extended review

02:44 15   or whether it can be dealt with in a shorter time

16   to be able to make that sort of decision, but when

17   that screen, it's call a screening process, when

18   that screening process takes place, it's up to the

19   individual Commission member then to form his own

02:45 20   view as to what further documentation may be

21   required.

22   Q   All right. But in terms of -- there is an actual

23   standard form for recording decisions; is there

24   not?

02:45 25   A   Yes, there's a case record.

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1   Q   And that case record will include all the

2   documents that were considered; yes?

3   A   It is -- it will -- the case record will include a

4   reference to the documentation which has been

02:45 5   obtained so that -- particularly, of course, so

6   that if another member of staff takes over the

7   case, they can immediately see by looking at the

8   case record what has been done and what material

9   is available, but the document which records in

02:45 10 detail what information is being considered and

11   the impact that it has on the Commission's

12   decision will be the statement of reasons which is

13   compiled when the decision is made.

14   Q   All right. We're going to get to that in a

02:46 15 moment. Now, the decision, or the document that

16   records the decision provides reasons relating the

17   documents that were considered and how they

18   figured into the decision that was made; is that

19   right?

02:46 20 A   That's right. I mean, the structure of the

21   statement of reasons is one which we designed at a

22   fair, at an early stage and it is quite a

23   comprehensive document and in all cases it will

24   set out the nature of the prosecution of defence

02:46 25 case at trial, it will set out a summary of what

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1   happened at the first appeal hearing, what the

2   grounds of appeal were and the outcome. It will

3   then identify the nature of the investigative

4   steps which have been taken; in other words, it

02:46 5   will identify what documents have been obtained

6   and what other investigative steps have been taken

7   such as the interviewing of witnesses or the

8   commissioning of expert reports, and then having

9   set the stole out in that way, it will then have a

02:47 10   section which will be shorter or longer, depending

11   on the nature of the case, called the analysis and

12   reasons, which draws together all the material,

13   information and facts in the case as they may

14   impact on the safety of the conviction and sets

02:47 15   out the Commission's reasoning against each of the

16   relevant issues as to what new information has

17   been obtained and what impact that is thought to

18   have.

19   Q   So it's clear from written documentation why a

02:47 20   decision is made in terms of an application?

21   A   Yes.

22   Q   Another principle that I'm going to ask you

23   questions about is the idea of fairness.

24   A   Uh-huh.

02:47 25   Q   I take it that there is common-law in England that

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1		would govern the fairness of your process; is that
2		correct?
3	A	Yes, which is now of course also supplemented by
4		article 6 of the European Convention on Human
02:48 5		Rights.
6	Q	And the CCRC functions sort of as an
7		administrative or quasi-judicial body; is that
8		correct?
9	A	Well, we see ourselves as making quasi-judicial
02:48 10		decisions in the sense that the basis of
11		separation of investigation from decision-making
12		functions and the fact that the decision to refer
13		a case or not to the Court of Appeal has a
14		quasi-judicial flavour to it, but particularly by
02:48 15		reference to article 6 of the convention of the
16		right to a fair trial and, more particularly, the
17		subsidiary rights there around being represented
18		by counsel of choice and being able to call
19		witnesses, etcetera, and matters of that nature,
02:49 20		we do not regard our process as being a process to
21		which article 6 directly applies.
22	Q	All right. Now, the provisional decision is one
23		of the primary means, am I right, in ensuring that
24		the applicant has -- ensuring fairness to the
02:49 25		applicant?

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1   A   We think so, yes, and that's not a new concept,

2   it's one which applied to the procedure which was

3   adopted by the Home Secretary, that as a matter of

4   fairness, if the Commission is thinking that there

02:49 5   is no basis for a referral, the applicant should

6   be given prior notice of that as a provisional

7   conclusion together with the reasons why that

8   provisional conclusion has been reached and to be

9   given the opportunity of making further

02:49 10   representations about it.

11   Q   And the reasons in the provisional notice would be

12   consistent with the reasons for decision that

13   you've just elaborated on previously; is that

14   right?

02:50 15   A   The --

16   Q   In terms of the level of detail that would be

17   required?

18   A   It would be exactly the same, yes.

19   Q   Okay. So the applicant, before a final decision

02:50 20   is made, is given a lot of detail concerning why

21   the Commission has made the decision that it has?

22   A   Yes, why it's reached the provisional conclusion,

23   yes.

24   Q   Yes. And then he or she is given an opportunity

02:50 25   to add further evidence or make submissions?

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1 *A* Yes.

2 **Q** And it's only then that a final decision is made;

3   is that correct?

4 *A* Yes.

02:50 5 **Q** And am I right in saying, I've tried to follow the

6   various tiers of your process --

7 *A* Uh-huh.

8 **Q** -- am I right in saying that no application can be

9   dismissed finally without the provisional reasons

02:50 10   being provided and an opportunity to be heard?

11 *A* That's correct.

12 **Q** So regardless of how the application is

13   classified, the applicant always has that right to

14   be heard -- to hear the reasons for why his

02:50 15   application is likely to be dismissed and have an

16   opportunity to make submissions about that?

17 *A* Yes.

18 **Q** I want to ask you about another principle that

19   arises from your procedures, and that's the issue

02:51 20   of timeliness.

21 *A* Uh-huh.

22 **Q** You would agree with me that the timeliness of the

23   resolution of these applications is an issue that

24   affects the perception of the CCRC?

02:51 25 *A* Yes.

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1   Q   And, obviously, any -- most government agencies

2   would like more resources, but there are limits,

3   obviously?

4   A   Yes, all government agencies would like more

02:51 5   resources, and they'd all like to do things

6   quicker than they do but, at the same time,

7   maintaining the required standard.

8   Q   But, to deal with the scarcity of resources, you

9   actually have a formal procedure for priorizing

02:51 10   the applications; is that correct?

11   A   That is correct, yes, yeah.

12   Q   And in fact the cases that are in custody get --

13   or are potentially given more priority?

14   A   Than those at liberty, yes.

02:52 15   Q   Yes. And, also, the issues concerning

16   deterioration of evidence, --

17   A   Yes.

18   Q   -- those cases are given more priority; right?

19   A   Yes.

02:52 20   Q   And once the application is -- starts its path

21   towards being considered, reviewed, and resolved,

22   --

23   A   Uh-huh.

24   Q   -- there are written rules that prescribe the

02:52 25   various stages that the application goes through;

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1   yes?

2   A   Yes.

3   Q   And there is actually an assigned person, a case

4   manager, that's responsible for moving it along

02:52   5   that process; is that correct?

6   A   Yes.

7   Q   And that case manager is actually supervised by

8   one of the Commissioners; right?

9   A   Yes.

02:52 10   Q   And it's not the same Commissioner that makes the

11   decision on the application?

12   A   Correct.

13   Q   And the supervision of the Commissioner ensures

14   that there is some form of accountability in terms

02:52 15   of processing the cases in a timely fashion?

16   A   That is certainly one of the reasons, an

17   associated reason. And the reason why we adopted

18   the role of assigned Commission member to the case

19   review process was that, apart from having a

02:53 20   mechanism for monitoring the progress of the

21   investigation and review, as with so many other

22   aspects of human endeavour it's quite often

23   sensible to have two heads working on a problem

24   than one. And particularly on this all-important

02:53 25   question of trying to identify issues which might

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1   go somewhere and how the investigation might be

2   effectively conducted, we thought that having the

3   combined experience of a case review manager and a

4   Commission member on that process was also a valid

02:53 5   one.

6 Q   And then you also have a mechanism for flagging

7   the applications that have been in the process for

8   more than six months?

9 A   Yes.

02:54 10 Q   And those are given special considerations; is

11   that right?

12 A   They come before a case review committee. Again,

13   that case review committee may well consist of the

14   assigned Commission member as one of the members

02:54 15   as this is not part of any statutory process or is

16   related to the independence of decision-making, it

17   is simply about case management. And that case

18   review committee will review what is being done

19   with that case, how close it is to being brought

02:54 20   to the stage where a decision can be made, and

21   whether there needs to be any pressure applied or

22   escalation procedures adopted externally to ensure

23   that any external work is also progressed.

24 Q   Now I want to ask you about the mechanisms of

02:54 25   accountability for people that work at the

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1   CCRC and --

2   A   Uh-huh.

3   Q   -- Commissioners. I understand that there is a

4   complaint process?

02:54 5   A   Yes.

6   Q   And you, or the CCRC, ensures that all applicants

7   are aware of the complaint process?

8   A   I believe so. I believe that the documentation

9   which is sent out to applicants on receipt of the

02:55 10   application would include the complaints leaflet.

11   Q   And in terms of, regardless of the merits of most

12   of the complaints that you might receive, having a

13   complaint process sends an important message that

14   you are prepared to be accountable for the work

02:55 15   that you do; is that right?

16   A   That's certainly the objective, yes. The

17   difficulty, of course, is getting applicants to

18   understand that the complaints process is not a

19   mechanism by which they can simply ask for a

02:55 20   decision which they don't like to be reviewed, the

21   complaints mechanism is about making sure that the

22   process of review leading to the decision has been

23   conducted in accordance with the Commission's

24   procedures.

02:55 25   Q   But, regardless of the reality that you're going

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1   to get a lot of meritless complaints, it's

2   important to have a complaint process?

3   A   Undoubtedly, yes.

4   Q   And you also have a code of conduct that affects

02:56 5   all Commissioners and staff?

6   A   Yes. It certainly affects all Commissioners, the

7   -- no, I think you are right, yes, I think there

8   is a code of conduct which does cover everybody.

9   Q   Yes. And that deals with issues of conflict of

02:56 10   interest, potentially?

11   A   Yes.

12   Q   And, again, this is --

13   A   So, for example, I mentioned the fact that when

14   the case of *Steele* came to the Commission, which

02:56 15   had been one case, a case which I had prosecuted

16   in the director of the prosecutions office, I had

17   absolutely nothing to do with either the review or

18   the investigation of that case.

19   Q   Again, the code of conduct and ensuring that all

02:56 20   Commission members and staff are bound by it is

21   with a view to enhancing the perception of the

22   CCRC?

23   A   Yes.

24   Q   Now I want to ask you some questions about what

02:56 25   you described as an interdisciplinary approach

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1   that the CCRC takes.

2   A   Uh-huh.

3   Q   And you've already given evidence about the

4   composition, and there is actually a requirement

02:57 5   that there be lay people --

6   A   Yes.

7   Q   -- on the Commission?

8   A   Yes.

9   Q   Now would you agree with me that this, the

02:57 10   requirement that there be non-lawyers involved in

11   this process of reviewing convictions, is also

12   important from the point of view of perceptions?

13   A   I think so, because as I was explaining yesterday,

14   although much of the work of the Commission does

02:57 15   have a heavy legal flavour to it, nonetheless,

16   there is a risk that the taking a too-legalistic

17   approach to particularly the review and

18   investigation carries with it the risk of the

19   consideration of the issues being too narrow and

02:57 20   too -- and too legalistic if it's only done by

21   lawyers. Lawyers like to think in terms of

22   process and rules of evidence and matters of that

23   nature, and you may well miss important points

24   which will be spotted, or at least raised for

02:58 25   consideration by people who are not lawyers.

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1   **Q**   And, in terms of the environment at the CCRC,

2   there's an opportunity for the lay people and the

3   lawyers to actually communicate and develop in a

4   collegial environment; is that right?

02:58 5   **A**   Yes.

6   **Q**   So that the non-legalistic and the non-restrictive

7   approach of the lay people, there is an

8   opportunity for that to have an influence on the

9   people who are lawyers at the Commission?

02:58 10   **A**   Oh, absolutely, yes.

11   **Q**   And that's an intentional --

12   **A**   Yes.

13   COMMISSIONER MacCALLUM: Mr. Roy, it's

14   about time for our afternoon break, are you going

02:58 15   to be a little while longer?

16   MR. ROY: Umm, I won't be done in 5

17   minutes, so --

18   COMMISSIONER MacCALLUM: Okay. Let's take

19   our break now then.

02:58 20   *(Adjourned at 2:58 p.m.)*

21   *(Reconvened at 3:17 p.m.)*

22   BY MR. ROY:

23   **Q**   Good afternoon, Mr. Commissioner.

24   I want to move on to another

03:17 25   issue, and that's the alternate suspect issue --

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1   A   Uh-huh.

2   Q   -- where, through the Commission's work, it

3   appears that there may be another person that's

4   actually committed the offence for which the

03:18 5   applicant has been convicted.

6   A   Uh-huh.

7   Q   All right?

8   A   Yes.

9   Q   And if the, if document 339587 could be put on

03:18 10   screen, please. This is the CCRC's formal

11   memorandum concerning the Section 19 appointment

12   of a police officer?

13   A   Yes.

14   Q   And you gave evidence earlier about how Section 19

03:18 15   works, and I don't want to go over that again, but

16   if you look at paragraph 3, paragraph 3 sets out

17   the considerations --

18   A   Uh-huh.

19   Q   -- for the appointment of a police officer under

03:18 20   Section 19?

21   A   Yes.

22   Q   And if you go to the second, I won't take you

23   through the first three, but if you look at the

24   fourth bullet point on the top of the second

25   page --

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1   *A*   Uh-huh.

2   **Q**   "Where there are grounds to

3   suspect that a person, who is not

4   involved in an official capacity in the

03:19   5   investigation of offences or the

6   prosecution of offenders, has committed

7   a serious offence in such circumstances

8   that if there were to be sufficient

9   evidence there is a real possibility

03:19   10   that the person would be prosecuted."

11   *A*   Yes.

12   **Q**   Now that would cover the situation of an alternate

13   suspect?

14   *A*   Yes.

03:19   15   **Q**   But, if you look back at paragraph 3, there is no

16   mandatory obligation on the part of the CCRC to

17   actually appoint a police officer, the language is

18   "may", not "shall"; correct?

19   *A*   Yes.

03:19   20   **Q**   So even when there is a, according to this

21   memorandum, even if there is an alternate suspect

22   who may be worthy of a police investigation there

23   is no obligation, under this memo, to engage

24   Section 19 and have a police officer appointed,

03:19   25   although it's an option?

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1 *A* Yes.

2 **Q** Okay. Now --

3 *A* Well this document is endeavouring to, as it

4   indicates, set out a non-exhaustive list of

03:20 5   factors which may be taken into account in

6   deciding whether it's a case in which a Section 19

7   investigating officer appointment should be made.

8   I mean the underlying

9   objective so far as the Commission's work is

03:20 10   concerned remains the same, which is to

11   investigate whether or not our applicant's

12   conviction is safe or unsafe, and whether there

13   may be grounds for referring the conviction back

14   to the Court of Appeal.

03:20 15   Now you're absolutely right

16   that the fourth bullet point, the fourth factor

17   there which would, which might well tend to

18   indicate that an appointment of an investigating

19   officer would be desirable is very apt to include

03:20 20   the circumstance where another person may be in

21   the frame for having committed the offence. The

22   re -- but the terms of reference which, and the

23   scope and ambit of the investigation which was

24   agreed with the investigating officer on

03:20 25   appointment, would be clearly directed towards the

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1   Commission's objectives and responsibilities.

2   The reason why we would ask

3   for an investigating officer is not so that we can

4   then control an investigation designed to bring

03:21 5   another person to justice but to make sure that

6   the way in which the investigation is conducted to

7   serve the Commission's purposes does not, at the

8   same time, prejudice the possibility of bringing

9   someone else to justice at a later stage.

03:21 10   Q   All right. Now when you have a Section 19

11   appointment --

12   A   Uh-huh.

13   Q   -- I think what's implicit in your answer is that

14   a police officer, under Section 19, may be wearing

03:21 15   more than just one hat; is that correct?

16   A   Yes, yeah.

17   Q   He's wearing a hat as an agent, effectively, of

18   the CCRC, pursuing the investigation with respect

19   to the wrongful conviction; yes?

03:21 20   A   Yes.

21   Q   But he also, he never takes off his hat of the

22   powers and duties that a police officer ordinarily

23   has?

24   A   Correct.

03:21 25   Q   So that if a police officer appointed under

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1   Section 19, while doing the work on behalf of the

2   Commission, --

3   A   Uh-huh.

4   Q   -- comes across criminal offences, he is obligated

03:22 5   to pursue that in the ordinary way a police

6   officer would?

7   A   Yes.

8   Q   And that's expected and understood by the

9   Commission when they make these appointments; yes?

03:22 10   A   Yes.

11   Q   All right. So there's very little danger, in the

12   case of a Section 19 appointment, that a potential

13   alternate suspect is going to fall through the

14   cracks and end up not being investigated by

03:22 15   anybody?

16   A   One would certainly hope so.

17   Q   No. And there's another memo that I want to bring

18   to your attention that bears on this issue, and

19   that's at 339444, 339444. And the memo is

03:22 20   entitled *Crimes Discovered During the Review*.

21   A   Uh-huh.

22   Q   Are you somewhat familiar with this memo?

23   A   Umm, I believe so. I see that this is version

24   four, which means that there's been three earlier

03:22 25   versions, so the document number of 614,000, I

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1   would think, would be within the time when I was

2   at the Commission. Yes, okay, I'm familiar with

3   there having been a formal memorandum on this

4   subject. Whether this document is identical to

03:23   5   the one which was around when I was at the

6   Commission, I wouldn't like to say, but yes, I'm

7   generally familiar that there is a -- there has,

8   for some time, been a policy which the Commission

9   applies where crimes are discovered during the

03:23   10   review.

11 Q   Yes. And, according to the first three paragraphs

12   of the introduction, it appears to cover just this

13   type of situation where there is a potential

14   alternate suspect; correct?

03:23   15 A   Can I just quickly read through it?

16 Q   Yes, please.

17 A   (Witness reading) I'm sorry, could you repeat the

18   question?

19 Q   What I am asking is, or I'm suggesting to you that

03:24   20   this memo also covers the situation where there is

21   an alternate suspect?

22 A   Well I imagine that, yes, it would. It would

23   cover it if, during the course of the

24   investigation, the Commission discovered, from

03:24   25   interviewing of witnesses, that another -- that an

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1   alternative suspect was being put up at that

2   stage, yes.

3   Q   Yes. And this is, leaving aside a Section 19

4   appointment, --

03:24   5   A   Yes.

6   Q   -- this would cover an investigation where it's

7   just the Commission doing their own investigation;

8   yes?

9   A   Yes.

03:24   10   Q   All right. And if you look at the last sentence

11   of the second paragraph --

12   A   Uh-huh.

13   Q   Well, more generally, the introduction recognizes

14   that there is a bit of a paradox or a difficulty

03:24   15   in terms of ensuring that witnesses are open and

16   candid when they are interviewed by your

17   investigators?

18   A   Yes.

19   Q   And the tension between that and potentially

03:24   20   reporting offences to the authorities; yes?

21   A   Yes.

22   Q   And in terms of how that tension is resolved, in

23   the last sentence of paragraph 2:

24   "However, the Commission is a public

03:25   25   body and an integral part of the

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 1                         criminal justice system - it cannot

 2                         simply ignore the fact that it is aware

 3                         of a crime having been committed."

 4                    Do you see that?

03:25  5    A         Yes.

 6    Q         So there is a balancing or a tension between

 7              reporting and not reporting, keeping in mind the

 8              broader mandate of the CCRC; yes?

 9    A         Yes.

03:25 10    Q         But if you go further down in the memo, under

11              *General Principles*, there are guiding principles

12              with respect to whether an offence ought to be

13              reported?

14    A         Yes.

03:25 15    Q         And if you look at the second bullet point under

16              paragraph 4 it appears that where there is an

17              actual referral to the Court of Appeal, --

18    A         Uh-huh.

19    Q         -- which would be likely in the case of a viable

03:25 20              alternate suspect; yes?

21    A         Yes.

22    Q         That the police are normally informed?

23    A         Yes.

24    Q         And that would trigger the police duty to

03:26 25              investigate crime and prosecute offenders; yes?
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1   *A*   Yes.

2   *Q*   And if you go further, if you go to page 2 of the

3   memo, and the first complete bullet point on that

4   page.

03:26 5   *A*   Uh-huh. Is that the one which begins:

6   "The Commission will take into account

7   ..."?

8   *Q*   Yes.

9   *A*   "... the age and seriousness of the crime

03:26 10   and may also have regard to the Code for

11   Crown Prosecutors."

12   *Q*   And what that refers to is the fact that the more

13   serious the crime that the alternate suspect has

14   committed, the more likely it is that there is

03:26 15   going to be an obligation to report; yes?

16   *A*   Yes.

17   *Q*   And if you go further down in the memo, please, at

18   page 3, please, at the top of page 3 there is a

19   section entitled *Procedure* --

03:26 20   *A*   Yes.

21   *Q*   -- that sets out an actual formal procedure that's

22   supposed to happen when a member of the CCRC

23   discovers that a criminal offence has been

24   committed?

03:27 25   *A*   Yes.

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1	Q	And there is a process where the investigation's
2		advisor is to be notified?
3	A	Yes.
4	Q	And a Commissioner is to be involved; yes?
03:27 5	A	Yes.
6	Q	And they are to consider the issue of whether or
7		not it ought to be reported, keeping in mind the
8		factors that were enumerated in the paragraphs
9		earlier?
03:27 10	A	Yes.
11	Q	And that decision, as to whether or not to make
12		the report, is actually formally logged and
13		recorded; right?
14	A	Uh-huh.
03:27 15	Q	Yes?
16	A	Yes.
17	Q	Again, these are formal procedures that are
18		dedicated to ensure that where there is an
19		alternate suspect, or somebody has committed a
03:27 20		serious criminal offence, that that person doesn't
21		simply fall through the cracks because the CCRC is
22		concerned with a different mandate; yes?
23	A	Yes, that's correct. And when I -- the -- this
24		particular formal memorandum certainly isn't
03:27 25		limited to alternative suspects.

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1   Q   No.

2   A   But, if there were to be an alternative suspect to

3   whom the anticipated circumstances envisaged by

4   this formal memorandum applies, then this

03:28   5   procedure would be apt to cover it, yes.

6   Q   And the bottom line is, because the CCRC has taken

7   the effort to be detailed in the way that it

8   designs its procedures, it actually has

9   contemplated this very situation; correct?

03:28   10   A   It certainly contemplated that, as part of its

11   investigation, it may come across and expose the

12   commission of criminal activity by persons whom it

13   has -- who have been considered during its review,

14   and that would certainly include an alternative

03:28   15   suspect.

16   Q   If we --

17   A   Or could include.

18   Q   If we could go to page 4 of the memo, please.

19   Actually, if you could back up to page 3, please,

03:28   20   I'm sorry. The memo also, at paragraphs 11 and

21   12, even deals with a situation where the police

22   come to the Commission looking for information or

23   evidence about a criminal offence; --

24   A   Yes.

03:29   25   Q   -- correct?

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1   A   Yeah.

2   Q   So, in a situation where the police have become

3   interested in an alternative suspect, --

4   A   Yes.

03:29   5   Q   -- there is a procedure that deals with them

6   coming to you --

7   A   Uh-huh.

8   Q   -- to get information that you've gathered through

9   your investigation of the wrongful conviction;

03:29   10   right?

11   A   Yes.

12   Q   Again, there are guidelines that deal with the

13   situation to make sure that a potential offender,

14   an alternative suspect or not, is -- does not

03:29   15   simply fall through the cracks between the CCRC

16   and the police; is that right?

17   A   Yes.

18   Q   Now you referred, in your evidence, to an

19   educative function that the CCRC has the potential

03:30   20   to provide to other actors within the criminal

21   justice system?

22   A   Uh-huh.

23   Q   I, in listening to your answer, it didn't strike

24   me that there's any formal provision for this

03:30   25   process of education to occur?

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1   A   True.

2   Q   And that happens on sort of an informal or ad hoc

3   level?

4   A   It would. I -- yes, in the sense that it's

03:30 5   something which I believe the Commission thinks it

6   could usefully do once it has the necessary

7   information, evidence, experience in which to do

8   it and would see that as being, if you like, a

9   voluntary benefit which the Commission could

03:30 10   provide to the criminal justice system.

11   Q   Yes. And you earlier testified that a lot of the

12   Commission's work in the early part of its mandate

13   was dealing with some more historic cases, so the

14   educative function was somewhat limited by that;

03:31 15   yes?

16   A   Yes. Not only because there were fewer people

17   having to focus and concentrate on casework, which

18   of course remains the Commission's core function,

19   but also because of the absence of empirical

03:31 20   evidence on which to make those sorts of comments.

21   Q   But now, with the Commission entering its tenth

22   year, I suppose --

23   A   Yes.

24   Q   -- it's dealing with more contemporaneous cases,

03:31 25   there should be more ability to do that?

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1   A   Well, certainly, there should be the availability

2   of empirical evidence and the scope to identify,

3   from that, whether there are matters of a generic

4   nature which can usefully be fed back into the

03:31 5   system.

6   Q   Do you see a role for having that function that

7   we're talking about actually specifically

8   enshrined in statute to make it a requirement for

9   (a) the CCRC to report on such matters, and (b)

03:32 10   for the other actors in the system to actually

11   receive the report and listen to it?

12   A   Umm, that would certainly be a possibility, and as

13   it happens that is a statutory responsibility

14   which is being placed on the fairly

03:32 15   recently-created Independent Police Complaints

16   Commission. The *Police Reform Act* of 2002, which

17   creates the Independent Police Complaint

18   Commission, embodies, as part of the statutory

19   function of the IPCC, the guardianship role in

03:32 20   relation to the treatment and investigation and

21   com -- but not only dealing with police

22   complaints, but also dealing with policing matters

23   generally, which might improve the quality of

24   policing. So the idea of having such a function

03:32 25   embodied in statute would not be a new one.

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1   Whether it's -- whether it would be necessary to

2   do it in relation to the Commission, that may be

3   something which will arise out of the extent to

4   which the Commission, in fact, is able to do it.

03:33 5   Q   So there is models or precedent for such an

6   approach to be taken; yes?

7   A   Yes, in the sense that the IPCC, which is also a

8   non-departmental public body, has a specific remit

9   in relation to the oversight or investigation of

03:33 10   complaints of police misconduct, is also given

11   this sort of umbrella role of contributing to the

12   better quality of policing --

13   Q   And in terms --

14   A   -- in the United Kingdom.

03:33 15   Q   And in terms of ensuring that the expertise of the

16   CCRC, in terms of cases of wrongful conviction,

17   that having a formal structure would ensure that

18   that expertise gets distributed through the

19   system, and you don't think that that's a bad

03:33 20   idea; do you?

21   A   No, I don't.

22   Q   No? Okay. I thank you very much for your

23   patience, Mr. Commissioner. Those are my

24   questions.

03:34 25   BY MS. McLEAN:

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1   Q   Good afternoon. I'm going to keep moving this

2   mike until it hits the ground. Thanks.

3   Good afternoon, sir. Joanne

4   McLean is my name, I represent Joyce Milgaard, for

03:35 5   the record, the mother of David Milgaard. And I

6   should also indicate for the record we've met

7   before, at the *Morin Inquiry* back in 1997, when

8   you testified there.

9   Now, at that time, the

03:35 10 Criminal Cases Review Commission had really just

11   started going?

12   A   Yes.

13   Q   And you didn't have much of a track record but an

14   awful lot of good wishes?

03:35 15 A   That's right.

16   Q   But now some, now that there is a bit of a track

17   record, what I want to do is revisit some of the

18   advantages that an investigative body such as the

19   CCRC would have had, particularly in this case,

03:35 20   which would have helped or been of some assistance

21   to Mrs. Milgaard in her efforts to free her son.

22   A   Uh-huh.

23   Q   And, also, to help this Commission make some

24   recommendations to free others, and it's in that

03:35 25   context that I'd ask the questions.

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 1    A      Uh-huh.

 2    Q      And I should also advise you that in 1998 there

 3           was some solicitation by the Department of

 4           Justice, Minister of Justice, for potential

 5           reforms to what was then 690 of the Criminal Code,

 6           and as part of that process Mrs. Milgaard

 7           testified at the Standing Committee into -- the

 8           Standing Committee on Justice and Human Rights

 9           that was --

10    A      Uh-uh.

11    Q      -- dealing with the proposed legislation, and one

12           of the things that they ended up concluding was

13           that they would await the recommendations of this

14           Inquiry before really trying to tackle serious

15           reforms beyond what was proposed and what has now

16           become 696.1.

17    A      Uh-huh.

18    Q      And we've also had evidence and acknowledgements

19           that 696.1, as it now stands, is very little

20           beyond a codification of the procedures that were

21           in place in Section 690; do you understand that?

22    A      Yes.

23    Q      Okay.  Now Mrs. Milgaard was in the position where

24           she was a newcomer to the justice system and, like

25           a lot of people, was of the belief that the system
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1   would free the innocent.

2   *A*   Uh-huh.

3   **Q**   There was very little done in the way of activism

4   or attempts to go beyond the system until 1980,

03:37   5   and it was a matter of David exhausting his

6   appeals to the Court of Appeal, and to have his

7   application to the Supreme Court dismissed. In

8   1980 he had escaped from a temporary release, and

9   in the course of being apprehended some months

03:37 10   later, he was shot in the back. At that point, so

11   it's 1980, is when Mrs. Milgaard's campaign really

12   comes to life to get him out.

13   Now at that time, 1980, she

14   had, and the family had, and David had, nothing

03:37 15   but his knowledge and his assertions that he was

16   utterly innocent, their observations of the trial

17   and the evidence that had come forward at the

18   trial, and their analysis of the impossibility of

19   some of the evidence that was led at the trial.

03:38 20   The concern is 'how do we get David Milgaard out

21   of jail'. So if they'd come to a body such as the

22   CCRC in 1980, asserting nothing but "I'm innocent,

23   the witnesses lied", and that that is some

24   knowledge that David would have had because the

03:38 25   witnesses that I'm referring to here, Nichol John

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1		and Ron Wilson, --
2	*A*	Uh-huh?
3	Q	-- are people who were with him --
4	*A*	Uh-huh.
03:38 5	Q	-- who gave, nonetheless, incriminating evidence
6		against him at the trial, so he knows that they
7		lied.
8	*A*	Yes.
9	Q	Okay. So, in those circumstances, what would the
03:38 10		Commission be able to do or what would they have
11		done?
12	*A*	Well I am -- I would imagine that the application
13		from Joyce Milgaard on behalf of her son -- as I
14		understand it you're saying she was unrepresented
03:39 15		at that particular time?
16	Q	Yes.
17	*A*	She had no legal assistance at all?
18	Q	Assume that to be the case.
19	*A*	Right. Well she, presumably, would have completed
03:39 20		one of our application forms and set out, as best
21		she could, what the nature of the application was
22		and, on the circumstances as you've described
23		them, the application form would presumably have
24		been along the lines of "my son has been -- is in
03:39 25		prison, having been convicted of a murder which he

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1   did not commit", would probably explain something

2   about the circumstances giving rise to that

3   conviction, and given that the application form

4   specifically invites an applicant to say "what do

03:39   5   you think went wrong in your case" I would imagine

6   that the summary on the application form would

7   make specific reference to the fact that "one of

8   the reasons why my son was convicted of this

9   offence was because the -- his two friends, Nichol

03:40   10   John and Ronald Wilson who were with him on the

11   morning that the murder was committed, gave

12   evidence to the jury which is simply untrue." I

13   imagine that that would be the core of the

14   application.

03:40   15 Q   What steps would the Commission then take to

16   investigate that case?

17 A   Well, we would be put on notice that the applicant

18   was -- the applicant's mother is saying my son is

19   innocent and that there are at least two witnesses

03:40   20   in the trial who have given false evidence. At

21   that stage, and just sort of thinking back to what

22   the Commissioner was saying earlier about

23   documentation coming in, there may be no

24   documentation at all accompanying that

03:41   25   application.

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1   **Q**   Uh-huh.

2   *A*   So we would immediately embark on the process of

3   gathering in documentation which would tell us

4   about the criminal proceedings to date.

03:41   5   **Q**   And would that include the police files from the

6   Saskatoon police?

7   *A*   In the circumstances of this case. I mean, I

8   appreciate that I'm answering this question with

9   more knowledge of the case than I would actually

03:41 10   have had if this application was being received,

11   but imagine that I was the screening member of

12   this particular application; in other words, I was

13   looking at this application to see where do we go

14   from here, so I would -- by the time I came to

03:42 15   screen this application, I would expect to have

16   the Court of Appeal file, so I would know what the

17   issues were in the appeal, but more importantly,

18   of course, I would have the judge's summing up to

19   the jury which is a very good starting point to

03:42 20   get some idea as to what the case was about, what

21   the evidence was and what the issues were, but I

22   would also, of course, see from the Court of

23   Appeal file that there had been an issue at trial

24   which was dealt with at the first appeal around

03:42 25   Nichol John's evidence and I would instantly see,

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1   based on the nature of the application, that

2   witnesses had lied, that I find a situation where

3   when Nichol John gets into the witness box, she

4   gives evidence in which she's effectively saying I

03:42   5   don't remember anything, but has previously made a

6   statement in which apparently she witnessed David

7   Milgaard committing the murder, so already I would

8   be beginning to get some idea, some feel for what

9   the -- what was inside this case which was

03:43   10   relating to what I had been told in the

11   application and I think the likelihood is that if

12   I had been the Commission member who was screening

13   this application, I would immediately be saying

14   this is a case which is going to require an

03:43   15   extensive investigation. There is an allegation

16   that witnesses lied, there's already an indication

17   from the Court of Appeal file that there are

18   concerns around how a witness' evidence was

19   obtained and gets into a statement in one form and

03:43   20   then she turns up at court and says I can't

21   remember anything, so without a shadow of a doubt,

22   I think, I would then be saying, as part of the

23   screening process, this case needs a full review,

24   which means there is bound to be a lapse of time

03:44   25   before a case review manager is assigned to it and

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1   the investigation starts, but in the meantime, we

2   must obtain the police files and the Crown

3   prosecution service files.

4   Q   Okay. And in this particular case when you obtain

03:44 5   those files, at least the initial files from the

6   Saskatoon police, upon reading them, and I'm not

7   so concerned about the time that it might take to

8   do this --

9   A   Let's just assume that that's happened, yes.

03:44 10   Q   Yes. -- upon reading them, you would certainly

11   learn from those files that there was also

12   involvement of the RCMP in Saskatoon, the Calgary

13   Police Service --

14   A   Uh-huh.

03:44 15   Q   -- and the Regina police?

16   A   Right.

17   Q   And that there was also obviously some involvement

18   with the head of the prosecution service in Regina

19   as well as Saskatoon?

03:45 20   A   Yes.

21   Q   And you would obtain all of those files as part of

22   being prepared to review the case in its entirety;

23   would you not?

24   A   Well, that I think would be something which would

03:45 25   happen downstream.

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1   Q   Yeah.

2   A   Because at the state I'm asking for the police

3   files, that's to get what I think is the core

4   material in which will enable the case review

03:45   5   manager to start an effective process of review

6   and get the case plan going, so the involvement of

7   -- and of course this is peculiar to your own sort

8   of structure over here which doesn't particularly

9   apply for me.

03:45   10   Q   Yes.

11   A   But putting myself in the situation of doing this

12   in Canada, I'm the case review manager, I look at

13   the police files which have been obtained which

14   will be from the Saskatoon police directly

03:45   15   connected with the investigation. As case review

16   manager, I will see that there are other police

17   forces, both the federal force and other

18   provincial forces who have had a hand in this, I

19   would be interested to look at them too.

03:46   20   Q   Yes, that's why I prefaced it with I'm not so

21   concerned about how much time it would take, but

22   ultimately as part of doing the full investigation

23   of the case, what you would want to have is the

24   files of all of the police services that were

03:46   25   involved?

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1   *A*   Yes.

2   **Q**   And all of the Crown prosecuting offices that were

3   involved?

4   *A*   Yes.

03:46 5   **Q**   And in the allegation of the witnesses lied, an

6   area of prime concern would be the circumstances

7   of taking the statements from the witnesses?

8   *A*   Yes.

9   **Q**   So again, with what you know now that you wouldn't

03:46 10   have known at the outset, you would have learned

11   from the, from those files things that were known

12   to various police officers and which became known

13   to the Milgaard family in about 1992 about the

14   police questioning, and that's specifically, and

03:47 15   this may be more than you understand about the

16   evidence, the witnesses, Nichol John and Ron

17   Wilson, were questioned by an outside police

18   officer purportedly with the aid of a polygraph

19   and the evidence concerning what really happened

03:47 20   according to that officer was given in 1992 and it

21   included things like showing these two witnesses,

22   who were 16 and 17, bloody clothing from the

23   victim.

24   *A*   Uh-huh.

03:47 25   **Q**   Autopsy pictures, putting the witnesses together

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1		and discussing with them his theories about what
2		happened.
3	A	Uh-huh.
4	Q	And also you would have learned I guess in a
5		preliminary investigation of the type of
6		questioning, you would have learned that Nichol
7		John, who was 16, had been brought to the
8		Saskatoon Police Service and had been left
9		overnight in a police cell before her interview
10		with Inspector Roberts --
11	A	Uh-huh.
12	Q	-- and before she gave any incriminating
13		statements. And Mrs. Milgaard, in her efforts
14		later, discovered that the matron of the jail had
15		some comments to make about Nichol John's
16		condition --
17	A	Uh-huh.
18	Q	-- and apparent trauma at her night in jail.
19		Those are the kind of things that might really
20		cause some concerns about whether or not accurate,
21		reliable statements were obtained from these
22		witnesses?
23	A	Well, I would have thought so and -- because they
24		are clearly factors which surround the eventual
25		statement which Nichol John made, and having

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1   explored those circumstances and I hope -- it's

2   difficult not to sort of confuse hindsight

3   evidence into the fact that there you are, you

4   don't actually know anything to start off with and

03:49 5   you've got to build up the pictures as you go on,

6   but I would certainly hope that the investigation

7   which the Commission undertook sort of building up

8   the picture would lead it fairly rapidly through

9   the police files and through inquiries which would

03:49 10   then be made around the documentation and people

11   who were concerned with the interviewing of that

12   particular witness, that we would build up the

13   picture which you've just outlined, and once we

14   had that picture, then, if I was the case review

03:50 15   manager or considering the fruits of what I was

16   finding, I would be saying to myself at that

17   stage, well, there are obvious concerns here

18   around how the evidence was taken from this

19   witness and the circumstances in which it was

03:50 20   taken. I know for a fact that when she came to

21   give evidence at trial she said she couldn't

22   remember anything which is going to raise the

23   question, as it would have done had the jury been

24   considering this to the fullest extent, when she

03:50 25   says she can't remember, is that a deliberate lie

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1   or is it that she genuinely can't remember, in

2   which case how does it come about that she has

3   made a statement in which she asserts that she

4   witnessed the murder, and we're beginning to -- we

03:50   5   would be beginning to build up a picture around

6   the taking of that statement which, with a young

7   and vulnerable person with the sort of

8   circumstances you are describing are likely to

9   raise concerns in the mind of a case review

03:51   10   manager at the Commission who is investigating the

11   case, and one of the things which I think would be

12   immediately concerning is the next step in the

13   investigation, would be to find out how much of

14   this information which we've now discovered was

03:51   15   not only known at the time, but given that these

16   are matters on which those responsible for

17   defending David Milgaard would have been quite

18   entitled to cross-examine about when dealing with

19   the matter of Nichol John's credibility, how much

03:51   20   did they know at the time of the trial, so that

21   would be an essential question I think which we

22   would be wanting to answer.

23   Q   If I can just jump ahead, light years, Nichol John

24   testified not only that she didn't remember events

03:52   25   that were outlined in the statement, she also

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1   testified that she didn't remember giving parts of

2   the statement, and what was done by the justice

3   officials that were investigating this file many

4   years later was attempts to obtain from Nichol

03:52 5   John her recollection of the statement under

6   hypnosis. Do you think there would have been some

7   merit or some serious interest given to trying to

8   obtain her memory of the questioning itself?

9   A   I do find that very difficult to answer because

03:52 10   the concepts, the concepts of either putting

11   people under hypnosis or applying polygraph tests

12   is so alien to me, we simply don't do it, that my

13   initial reaction is that if I was an investigator

14   at the Commission looking at this, I wouldn't be

03:53 15   thinking in terms of putting witnesses under

16   hypnosis.

17   Q   Okay.

18   A   But that is simply because of my lack of

19   experience of doing that and the fact that we

03:53 20   don't do it in general. I think that on occasions

21   where the police as an investigative method have

22   sought to sort of go along the lines of putting

23   witnesses under hypnosis, they usually come to --

24   they are usually viewed with a fair amount of

03:53 25   disfavour, so I find it very difficult to answer

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1   that question.

2   Q   Okay.

3   A   From my own experience, I wouldn't be thinking of

4   putting witnesses under hypnosis.

03:53 5   Q   Nor would I, and I would hope nobody would now.

6   A   And I also made the point of course earlier when

7   dealing sort of generically with the way the

8   Commission goes about its work, we wouldn't be

9   rushing to interview witnesses years after the

03:54 10   event about recollections of the events until we

11   got a very solid basis on which to do that.

12   Q   If we can leave hypnosis out of it then --

13   A   Thank you.

14   Q   -- would you think there's as much reason to be

03:54 15   concerned about her lack of memory of the

16   questioning as there is about her purported lack

17   of memory of witnessing a murder?

18   A   Yes.

19   Q   And the approach to resolving this would certainly

03:54 20   consist of more than asking the police officers if

21   they had done anything wrong, you would be

22   investigating looking for documentation and

23   looking for records?

24   A   Yes.

03:54 25   Q   One of the things that you would have found in

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1   that file, sir, is a document that was disclosed

2   in 1991 or 1992. Could I have 006799, please.

3   This is referred to as the Mackie summary and I

4   don't know if this is a document -- have you been

03:55 5   shown this document in your preparation at all,

6   sir?

7 A   I don't believe so.

8   MR. HODSON: I don't believe that was

9   provided to him, no.

03:55 10   BY MS. McLEAN:

11 Q   Okay. Last page, please, and I'm not going to ask

12   you to read it or to follow it factually, I simply

13   want to indicate to you that it's a five page

14   document, the last page of which is a summary of a

03:55 15   mixture of facts and of police theories.

16 A   This is a document you say which came into

17   existence in 1991?

18 Q   As far as the representatives of Mr. Milgaard are

19   concerned it was in the police files.

03:55 20 A   All right, but it was a document which had been

21   prepared by the police at the time of the

22   investigation?

23 Q   Yes.

24 A   Thank you.

03:55 25 Q   To the best of our abilities to date it, it was

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1   prepared approximately one week before the

2   statements of Nichol John and Ron Wilson.

3 A Yeah.

4 Q The inculpatory statements of Nichol John and Ron

5   Wilson.

6   COMMISSIONER MacCALLUM: Just a minute,

7   please.

8   MS. KNOX: Mr. Commissioner, I rise without

9   discussion with any other counsel for the

10   parties, but we have a general, I think a general

11   sense among some of us that of the propriety of

12   engaging this witness in commenting on these

13   documents given, you know, the purpose for which

14   his attendance was called at the inquiry, and I'm

15   not able to articulate in a full sense what the

16   concerns are, but we haven't yet even established

17   a full factual basis as to when all of the pages

18   of this document were put into place and to

19   present it to this witness in this fashion and

20   ask for his comment on it, it seems to me to

21   serve no useful function for the purposes of the

22   job of the analysis that you have to do at this

23   inquiry.

24   I don't know if other counsel

25   wish to speak to it, but generally behind me and

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1   in front of me we have a grave sense of unease as

2   to the path that we're going down here, the

3   purpose for which we're going down it and whether

4   this is an appropriate use or area to take this

03:57   5   witness into and I state that for the record.

6   COMMISSIONER MacCALLUM: Thank you. Do you

7   have any comment about that?

8   MS. McLEAN: Well, I simply, for starters,

9   haven't asked the witness to comment on it. The

03:57   10   date we have established in my submission was

11   clearly before the statements had been made by

12   Ron Wilson and Nichol John and the evidence of

13   the RCMP officers that testified were to the

14   effect that they had used this document in a

03:57   15   meeting when deciding who should be the suspect.

16   What I wanted to ask this witness is for his

17   comment on what effect that kind of document

18   would have on his assessment of the statements.

19   COMMISSIONER MacCALLUM: As a Commissioner

03:57   20   you mean?

21   MS. McLEAN: Yes.

22   COMMISSIONER MacCALLUM: Of the CCRC?

23   MS. McLEAN: Yes, if it would have

24   triggered any inquiries or any concerns.

03:57   25   COMMISSIONER MacCALLUM: Well, I have the

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1   perception that the witness has a very keen

2   appreciation of the purpose for which he is here

3   and if he doesn't think it's a question he's

4   competent to answer, he'll surely tell you, so go

03:58   5   ahead and ask.

6   MS. McLEAN: I'm sure he will.

7   BY MS. McLEAN:

8   Q   And the other factual thing I should tell you,

9   sir, is that both Nichol John and Ron Wilson had

03:58   10   given statements to the police, as had David

11   Milgaard, in the very early stages of the

12   investigation, the three of them had been

13   questioned separately and essentially said the

14   same thing, that they came, they left, nothing

03:58   15   happened, and then we have the Mackie summary here

16   that emerges sometime prior to the second

17   statement.

18   What my question to you would

19   be, if you found a document of this nature that

03:58   20   essentially predicted what the witnesses said in

21   their second statements, would that trigger some

22   inquiries or concerns?

23 A   Well, I think I can best answer that by taking

24   into account what I know is the purpose behind

03:59   25   your question and also having regard to the

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1   comment which was made a moment ago, that the

2   general area of concern which has been flagged up

3   from the initial investigation, from the initial

4   application through the initial stages of the

03:59   5   Commission's investigation and ongoing as the

6   Commission's investigation progresses is that

7   there are issues which the Commission should

8   investigate around the, not only the evidence

9   which was actually given at trial, but also the

03:59   10   circumstances in which this evidence was obtained,

11   and the Commission would know from what it had

12   already discovered, that both or all -- I think

13   this document also included -- is it Shorty

14   Cadrain, was that his name?

04:00   15   Q   That's his nickname. Is formal name is Albert.

16   A   Albert Cadrain, but Nichol John and Ronald Wilson,

17   we would know that they had originally made

18   statements saying we didn't see anything happening

19   which had somehow translated it at a later stage

04:00   20   to, in the case of Ronald Wilson and Nichol John

21   certainly, we witnessed something and incriminated

22   David Milgaard.

23   Q   Okay, if I could just --

24   A   So our investigation would be around the

04:00   25   circumstances, how does it come about that you get

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1   from one position to another, and my own concerns

2   would be raised by references to hypnosis or

3   polygraph for reasons I've already mentioned, but

4   the suggestion that -- what emerges from this

04:00   5   document is the suggestion we haven't got the

6   story that we think they ought to be telling, so

7   let's have them all together and see if we can get

8   them to tell a true story. I mean, this is a

9   document which I think would undoubtedly be

04:01   10   relevant to the Commission's consideration and

11   investigation of the issue generally of Nichol

12   John and Ronald Wilson as witnesses who

13   contributed to the conviction of David Milgaard.

14   Q   Okay. If I could interject one correction to what

04:01   15   you said, there is not a transformation in the

16   statement of Albert Cadrain.

17   A   No, I'm sorry.

18   Q   His had been --

19   A   Yes, I appreciate that, but he wasn't -- I don't

04:01   20   think he was, in any event, suggested that he

21   would have been in a position to see anything.

22   Q   In terms of the murder?

23   A   Again, I think we're getting into difficulties

24   with the point which was raised because I'm being

04:01   25   asked to make comments about a situation about

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1   which I have limited factual information, but in

2   terms of the fact that clearly the reliability and

3   truthfulness of evidence which was given at trial

4   by these two witnesses, which on any view must

04:02 5   have been, certainly so far as Ron Wilson was

6   concerned, and there were issues around the way in

7   which Nichol's evidence was -- came to the

8   attention of the jury, therefore, there are

9   general concerns, that would be a significant

04:02 10   issue for the Commission to investigate, and this

11   document I hope would be one which sparked

12   interest and attention in the mind of whoever was

13   investigating that there was, that this was an

14   aspect which would need to be looked into.

04:02 15 Q   Okay. If we could have page 1 of the same

16   document, sir. At the beginning of this document

17   there is a reference to a (V1)- rape, (V1)- being

18   the surname of what we now know to be one of Larry

19   Fisher's victims.

04:02 20 A   Uh-huh.

21 Q   And then there are references to the Miller file

22   being Gail Miller, that Miss (V1)- had been shown

23   an identification, photographs, that her attacker

24   was a A group secretor, which is the same group as

04:03 25   David Milgaard and, as it happens, Larry Fisher.

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1   A   Uh-huh.

2   Q   Would seeing those trigger some investigation or

3   ought it to trigger some investigation as to

4   whether or not there is another suspect out there?

04:03   5   There appears to be some kind of linking between

6   the murder and another rape.

7   A   Well, it would be difficult to say on simply

8   reading that knowing exactly what it imported, but

9   I think that in this -- if the Commission were

04:03 10   investigating this particular case, then

11   references such as this would spark inquiry,

12   what's this about, what are we talking about here.

13   Q   And other documents that you would have found in

14   the file, sir, would contain the reports of the

04:04 15   RCMP officers who were involved in assisting in

16   the case and those documents turned up here at the

17   inquiry in 2005 outlining theories that the same

18   person who had been committing rapes in Saskatoon

19   had been responsible for the murder?

04:04 20   A   Uh-huh.

21   Q   There would have been documents authored in 1969

22   by various Saskatoon officers -- well, at least

23   one in particular, maybe more, connecting the

24   murder to the rapes. Would that kind of thing

04:04 25   trigger an inquiry by the Commission into the

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1   potential existence of another suspect for the

2   murder?

3   A   I would think the answer to that would be yes

4   because the Commission would be anxious to know to

04:05 5   what extent, given the fact that the police, the

6   information which is being derived from the police

7   documentation is that there were, the

8   consideration was being given to other suspects

9   which is not in itself an unusual occurrence.

04:05 10   Indeed the requirements on the police when they

11   are investigating criminal offences is to pursue

12   all reasonable lines of inquiry and if they don't,

13   they run the risk of being criticized for being

14   too closed in their investigation, but the issue

04:05 15   for the Commission would be whether there is

16   sufficient substance in any belief or

17   investigation into other suspects which would have

18   potentially given rise to the ability of the

19   prosecution to discharge the standard of proof

04:06 20   required of them and, in particular, whether

21   information about these other suspects had been

22   disclosed to the defence at the time.

23   Q   And you also would have seen in there a statement

24   from Linda Fisher that had come in 1980, one

04:06 25   officer had assigned it for follow-up and no

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1   follow-up had been done. Would there be some

2   follow-up by the Commission into the allegations

3   of Linda Fisher that her ex-husband was a likely

4   candidate for the murder given his predilection

04:06   5   for rape and the location where they lived at the

6   time of the murder?

7   A   Well, I think the Commission's initial reaction to

8   seeing that would be the question who is Larry

9   Fisher, what's all this about.

04:07   10   Q   And there would have been some inquiries made as

11   to who is Larry Fisher and --

12   A   -- what is all this about, yes, and depending on

13   what all that reveals, well, as I say, being

14   careful not to confuse, sort of overlay this with

04:07   15   hindsight, the answer to that question on inquiry

16   might be that the Commission is satisfied that

17   actually there's no significance to it whatsoever,

18   in which case it would be dropped as a line of

19   investigation on any view.

04:07   20   Alternatively, the Commission

21   might come to the view this appears to have a

22   degree of significance and so we want to find out

23   more about all of this and evaluate the strength

24   of the suggestion that Larry Fisher is an

04:07   25   alternative suspect and then again say, well, if

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1   this is the information which there was about him

2   and we think that it may have had a significance

3   in terms of introducing another suspect into the

4   proceedings as a means of inducing doubt as to

04:08   5   whether David was responsible were the defence in

6   a position to do that; in other words, did they

7   know about it.

8   Q   And you might have found also in the file other

9   documents that were not disclosed to the defence

04:08   10   that related to people that were in a position to

11   see the location at which David Milgaard

12   supposedly accosted Gail Miller but did not, and

13   also evidence from, or statements from witnesses

14   that made a Crown theory at trial all but

04:08   15   impossible, that kind of thing that could have

16   been used to attack Crown theories at trial is

17   something that would be of great interest?

18   A   Well, of great interest to the Commission in any

19   case, and this would be no different, would be to

04:09   20   have in mind the obligations on the prosecution in

21   relation to disclosure of unused material, and if

22   you have a situation where, on the prosecution

23   case that an event happened where if there were

24   other people around at the relevant time they

04:09   25   would have seen something and there are statements

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1   from people who were there at the relevant time

2   who didn't see anything, then that is evidence

3   which tends to undermine the prosecution case, is

4   therefore disclosable under the *Criminal Procedure*

04:09 5   *and Investigations Act* of 1996, and so if it

6   wasn't disclosed, then that would be an issue

7   which the Commission would then have to take

8   account of and evaluate in terms of whether that

9   non-disclosure was material to the safety of the

04:10 10   conviction.

11 Q   Okay.

12 A   But again, you are asking there, we have now moved

13   in a sense away from the potential unreliability

14   and concerns around the witnesses Nichol John and

04:10 15   Ronald Wilson into the general responsibilities of

16   the prosecution in relation to disclosure by used

17   material, and in a case of this nature,

18   particularly which has been a complex

19   investigation, undoubtedly one of the issues which

04:10 20   would be identified clearly on the case plan is

21   check compliance with disclosure, of disclosure

22   obligations.

23 Q   And this would be something that comes to you, or

24   comes to the person who is reviewing the case on

04:10 25   behalf of the Commissioner, it's not something

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1   that is asserted necessarily by the applicant?

2   A   I daresay that in -- I don't, I make no comment

3   about Joyce Milgaard's ability to express herself

4   in this case, but for many applicants they would

04:10 5   be unlikely to be able to articulate, and we --

6   "would you please check that the prosecution had

7   complied with their disclosure obligations".

8   I mean it is -- since we know,

9   as I indicate in the article which I did for the

04:11 10   *Drake Law Review*, that non-disclosure of material

11   which should have been disclosed was a very

12   significant factor in the reason why Judith Ward

13   was wrongly convicted, and that our experience in

14   the Commission is that failure to comply with

04:11 15   disclosure obligations, either by design or by

16   mistake, remains a problem in cases where wrongful

17   conviction is alleged, it is also -- it is, I

18   would say, axiomatic in a review of a case of this

19   nature that the prosecution would be interested to

04:11 20   make -- I'm sorry -- that the Commission would be

21   interested to make sure that it was aware of all

22   of the material that was available to the

23   prosecuting authorities, and insofar as it was

24   material which wasn't relied on by the Crown, that

04:12 25   it had been properly disclosed.

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1   Q   And unlike the applicant, who has to go and ferret

2   out information themselves, this would be

3   information that you could obtain sort of, if not

4   all at once, you can have your package together

04:12 5   before beginning to really evaluate the strength

6   of the case in terms of a referral?

7   A   Yes.

8   Q   Could I have 000002, please. What Joyce Milgaard

9   actually did in 1981 was go to a lawyer, and

04:12 10 subsequently to a second lawyer, and she was

11   eventually told that, in effect, "what you need to

12   have to get your case re-opened is a bombshell,

13   you need to have something that you can drop on

14   the Department of Justice that will cause the case

04:13 15 to be re-opened, otherwise you're stuck", and

16   thereafter what Mrs. Milgaard did was her own

17   investigation, assisted at times by lawyers, at

18   times by journalists, one in particular, and

19   eventually wound up at the offices of Mr. Wolch

04:13 20 who has represented David since 1986.

21   There was an application made

22   to the Minister of Justice under what is now 696,

23   was 690, and at the time of the application was

24   617, and that's the application to the Minister of

04:13 25   Justice for consideration of the application. And

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1   the first thing I wanted to point out is in the --

2   could I have, please, the second page -- sorry, it

3   must have been on the first -- yes, sorry. There

4   is an indication in the letter which accompanies

04:14   5   the application that this application is being

6   made on a scientific basis, and it's evidence that

7   was obtained by one Dr. Ferris, and attached to

8   the application is the report of Dr. Ferris. Now,

9   if that was received by the Commission, that would

04:14   10   be reviewed by consultation with expert witnesses?

11 A   Yes.

12 Q   And if we have the second page of it, please,

13   there's an indication in the letter that:

14   "In preparing the

04:15   15   Application, we have deliberately

16   attempted to be as concise as possible

17   and at the same time present the matter

18   in an objective fashion."

19   It goes on to say that, as an example of

20   questions that their counsel is prepared to

21   answer:

22   "... the witness, Nicole John, whose

23   statement gave rise to what is now known

24   in our courts as a Milgaard application,

04:15   25   gave a statement that was prejudicial to

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1   David Milgaard. We are in a position to

2   factually demonstrate the errors in that

3   statement and that it cannot possibly be

4   true, but we have not done that because

04:15   5   Nicole John testified in Court that the

6   statement was not true."

7   That, in itself, is a little bit fuzzy. She

8   didn't adopt the statement, she didn't formally

9   deny it, because she was taking the position she

04:15   10   didn't remember. Okay?

11   But would the assertion by

12   counsel that her statement, given to the police

13   on the second occasion, was factually impossible,

14   could not possibly be true; would that trigger

04:16   15   some inquiries or investigations by the

16   Commission?

17   A   Yeah, well, the content -- the circumstance in

18   which this letter is written, of course, is

19   counsel effectively being in the position of the

04:16   20   case review manager in the Commission, because

21   here the -- as I understand it what is being

22   suggested in this application is to the Minister

23   of Justice saying "minister, I'd like you to

24   consider this application and decide whether it

04:16   25   affords you grounds for sending the case back for

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1   a further hearing"?

2   Q   Yeah.

3   A   So, in actual fact, what Mr. Wolch is doing in the

4   course of this letter is saying "I am" -- or, by

04:17 5   analogy, he is presenting an application to the

6   minister, as the decision-maker, in much the same

7   way as the case review manager would present an

8   investigated case to decision-making members for a

9   decision at the Commission.

04:17 10   But assuming that this was a

11   letter by Mr. Wolch to the Commission saying "I'm

12   representing David Milgaard and I've looked into

13   this case, and one of the issues which I think is

14   significant here is that there are errors in

04:17 15   Nichol's statement which can't possibly be true",

16   and I would expect that if the application was

17   being supported by counsel such as Mr. Wolch that

18   assertion would be amplified and explained, what,

19   what -- why it is thought that that is to be the

04:18 20   case, then that would become an issue drawn to the

21   Commission's attention by legal counsel

22   representing Mr. Milgaard which we would then

23   consider it would be appropriate to investigate.

24   And indeed, when I was talking

04:18 25   yesterday about applications who are

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1   represented -- applicants who are represented when

2   they come to the Commission, the Commission is

3   greatly assisted if an application is supported by

4   counsel who is able to draw attention to issues

04:18   5   such as this because it means that we are already,

6   you know, we hit the ground running, if I can put

7   it that way, in terms of issues which may well be

8   significant.

9   Now, of course, we may

04:18   10   disagree with counsel. I mean, I'm not saying we

11   would in this case, because it seems to me that,

12   given that a significant feature of this case

13   generally is around the credibility of Nichol John

14   and a suggestion that there are things she said

04:19   15   which can't possibly be true, it's un -- it would

16   be difficult to dismiss those without some further

17   investigation. But there may be circumstances in

18   which lawyers acting for an applicant raise an

19   issue and say "we think this is significant" and

04:19   20   we may immediately say "we don't think it is".

21   COMMISSIONER MacCALLUM: But you also said

22   that you would expect counsel to amplify it, what

23   he said there, in other words give the reasons

24   for --

04:19   25 A   Well, all that's being suggested here is that

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1   there are aspects, there are errors in the

2   statement that can't possibly be true. I mean I

3   would imagine, looking behind this document, that

4   counsel would articulate what aspects of the

04:19 5   statement are said to be untrue. I mean, I don't

6   know.

7   COMMISSIONER MacCALLUM: But, if he didn't

8   articulate that, would the Commission take any

9   further investigative steps?

04:19 10   A   Well we would probably write back to Mr. Wolch in

11   these circumstances and say "please, could you

12   help us by amplifying those aspects of the

13   statement which you say can't possibly be true,

14   and why you say that's the case, so that we can

04:20 15   know the context of where the investigation should

16   be going".

17   BY MS. McLEAN:

18   Q   Yes. And that, Mr. Commissioner, is the

19   invitation that's put in the letter. It says

04:20 20   that:

21   "In preparing the

22   Application, we have deliberately

23   attempted to be as concise as possible

24   ...",

04:20 25   and:

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1   "We are certainly prepared to elaborate

2   on any point of concern or answer any

3   query that may arise or that we have

4   perhaps not foreseen. For example, ...

04:20   5   Nichol John ..."

6   A   Uh-huh. But, as I was saying, we agreed between

7   us earlier this letter was written in the context

8   of -- this was effectively the document on which

9   Mr. Wolch was hoping, on his client's behalf, that

04:20 10   the minister would make a decision to refer.

11   Q   Not this document, the accompanying --

12   A   The accompanying application.

13   Q   Yes.

14   A   Yes, absolutely, the accompanying application.

04:21 15   Q   And --

16   A   Whereas we are looking at it in a slightly

17   different context, that this is -- the

18   accompanying application to this letter was, in

19   fact, the application to the Commission, "please,

04:21 20   would you investigate this case and then, in due

21   course, make a decision on it?"

22   Q   Yes.

23   A   So the bit, if you like, the intended added value

24   of the Commission is that the Commission would be

04:21 25   taking this forward in an investigative sense in

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1   addition to making a decision on a referral.

2   Q   Yes.

3   A   And that, I think, is the essential point.

4   Q   Okay. Now in the CCRC regime it costs nothing but

04:21 5   a stamp to get your application in?

6   A   It's --

7   Q   Unless it's dropped off?

8   A   Essentially, yes.

9   Q   So in the, in this system that was in place in

04:22 10   Canada, and still is, the applicant has to rely on

11   either their own work, their own efforts and their

12   time and expense in, you know, trying to contact

13   witnesses, which you've said may actually

14   undermine an effective investigation, long

04:22 15   distance phone calls --

16   A   It can do so in some cases, yes.

17   Q   -- long distance phone calls, travel, paying

18   experts, assembling all the information; then they

19   also could be open to accusations that they have

04:22 20   been putting in their application piecemeal, one

21   bit at a time, as it's discovered? You appreciate

22   that's a weakness of the do-it-yourself system?

23   A   I'm -- I'll -- if you say it is I'm sure that's

24   probably right, yes.

04:22 25   Q   Well, an applicant investigating their own case

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1   certainly doesn't have the luxury of sitting down

2   and examining every single piece of available

3   information and assembling a cogent argument for

4   presentation when their goal is to get somebody

04:23 5   out of jail ASAP. It may very well be that they

6   submit what appears to be significant as and when

7   they receive it?

8   A   I think you certainly -- I -- the comment I'd make

9   on that is that the, given the sort of preparatory

04:23 10   work that the Commission does in terms of finding

11   out about how we've got to where we are at the

12   point where the application is made, and then

13   looking at the sorts of issues which arise in the

14   application, it is much easier for the Commission

04:23 15   to take a strategic overview of the case and the

16   issues which require investigation, investigating,

17   than it would be for an individual applicant to do

18   the same.

19   Q   Whereas an individual applicant would simply be

04:24 20   saying "here's some evidence, here's some new

21   stuff, overturn my conviction, let me out, send me

22   back to the Court", rather than trying to

23   assemble, necessarily, every single conceivable

24   thing that they -- could be said about the case?

04:24 25   A   It would be far more difficult, it's far more

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1   difficult for an applicant, even with legal

2   advice, to take the sort of strategic overview of

3   investigating a possible wrongful conviction.

4   Q   And, in terms of investigating the case, the

04:24   5   applicant sometimes has the luxury of lawyers that

6   will work for either pro bono or for very little

7   money, --

8   A   Uh-huh.

9   Q   -- or has to go to advocacy groups such as

04:24   10   AIDWYC, --

11   A   Uh-huh.

12   Q   -- Centurion Ministries is one in the United

13   States that does similar work, I think Justice was

14   doing some in the U.K. --

04:24   15   A   Yes.

16   Q   -- before the CCRC?

17   A   Yes.

18   Q   And I mean the group Justice, not the concept

19   justice.

04:25   20   A   Yes, the group Justice, yes.

21   Q   And, by nature of having to gather the information

22   and assist the applicant in putting forward the

23   arguments to a decision-maker, lawyers or advocacy

24   groups could be vulnerable to an accusation that

04:25   25   they are partisan?

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1   A   Well yes, they certainly could, they certainly

2   could be. But I think, actually, the real

3   disadvantage is not so much about whether they are

4   partisan or not, although I accept that that is a

04:25   5   possibility, but it is the difficulty which they

6   have, particularly if the case is complex and

7   there are a large number of issues, the

8   investigation of which could take a number of

9   different approaches. The -- it's this, the

04:25 10   difficulty of obtaining, of having the strategic

11   overview which is necessary, I think that's the

12   biggest problem.

13   Q   And one of the things that did in fact happen here

14   which -- so where the Centurion Ministries was

04:26 15   involved in obtaining the second recantation of

16   Ron Wilson, where he reverted back to his original

17   statement --

18   A   Uh-huh.

19   Q   -- that nothing inculpatory had been said or done

04:26 20   by David in relation to the murder, and that was

21   viewed by people in authority as having been

22   suspicious and there were questions raised as to

23   whether or not Mr. Wilson had received more than

24   religion for his recantation?

04:26 25   A   Yes.

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1   Q   And even an investigation, as late as 1993-1994,

2   as to whether or not Joyce Milgaard had paid him

3   to recant?

4   A   Yes.

04:26   5   Q   That is something that could not be said if the

6   investigation was being done by an independent

7   body and not by people who are necessarily either

8   the applicant, related to the applicant, or an

9   advocacy group acting on behalf of the applicant?

04:27   10   A   I think, broadly speaking, that has to be right.

11   Q   And, also, the decision-maker, to the extent that

12   those kinds of skeptical views are held by people

13   advising the decision-maker, you're in a position

14   where the person who's making a decision about

04:27   15   whether or not to refer a case back to the Court

16   of Appeal is potentially being influenced by the

17   opinions of people that are adverse to the

18   decision to send it back?

19   A   Umm, yes, that's right, and which was a point that

04:27   20   we developed a moment ago when Mr. Roy was

21   standing where you are, but yes.

22   Q   And in terms of acting in a reactive or a

23   proactive fashion, Mr. Roy was asking you some

24   questions about going out to let potential

04:28   25   applicants know about what you do and what you can

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1   do, it's very difficult for an applicant to even

2   know what to do without some sort of a proactive

3   approach on behalf of people that have the power

4   to refer a case; is it not?

04:28 5   A   Yes.

6   Q   And, if a person had no involvement whatsoever in

7   the crime they would have very, very little

8   information to contribute and, potentially, very

9   little idea about where to go to produce the

04:28 10   evidence that's needed to get back into a Court?

11   A   I would think so.

12   Q   And that leads to things like you said, where they

13   may get the idea that they need to get a

14   recantation, they may run around attempting to

04:28 15   find out if the witnesses will change their story

16   and tell the truth?

17   A   As they see it, yes.

18   Q   And you've given evidence already of how that

19   could actually backfire or result in not getting

04:29 20   information that actually is helpful to a --

21   A   Well, yes, because you are potentially -- I mean

22   if, at the end of the road, the willingness of the

23   Court of Appeal to receive fresh evidence is going

24   to depend on an assessment of whether the witness'

04:29 25   evidence is capable of belief, then uncontrolled

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1   interviews with that witness, particularly if it's

2   done in circumstances which give rise to the

3   suggestion or possibility that some form of

4   improper or partisan, or even worse, payment has

04:29 5   been made to that witness to give that evidence,

6   you are potentially adding to the burden of

7   establishing that witness is capable of belief if

8   the Court of Appeal is going to receive it.

9   Q   Or you might even, in some cases you might have

04:30 10   the situation where the interviews by well-meaning

11   lawyers or well-meaning journalists or

12   well-meaning family members might damage an

13   effective interview, they may, by asking the wrong

14   questions or by providing information, they may

04:30 15   damage a witness' recollections that are of value?

16 A   That is certainly true, and they also might have

17   caused damage to the witness' willingness to

18   participate in the investigation thereafter,

19   because the witness may be irritated by having

04:30 20   been interviewed in a way that they -- in a manner

21   that they don't like and don't appreciate, and are

22   not very happy to find a case review manager from

23   the Commission then asking to interview them as

24   well.

04:30 25 Q   Another thing that happens if you force the

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	1		applicant to get their own expert, or scientific
	2		evidence, is that they may become quite wedded to
	3		the opinion offered by the expert and be resistant
	4		to any attacks upon it; --
04:31	5	A	Yes.
	6	Q	-- correct?
	7	A	Yes.
	8	Q	And if the issue is taken out of the hands of the
	9		applicant by having an independent body seek
04:31	10		scientific or other expert opinion and, where
	11		necessary, multiple opinions, there can be a lot
	12		more confidence by the applicant in the opinions
	13		that are ultimately rendered; could there not?
	14	A	Well, that should be the case, yes. Of course, if
04:31	15		the expert opinions which are obtained by the
	16		Commission are adverse to the applicant, then he
	17		may not feel quite so keen about them, but --
	18	Q	He may not like them, but they wouldn't be in
	19		opposition to an expert opinion he had obtained on
04:31	20		his own?
	21	A	Absolutely.
	22	Q	So you might feel very different about it if you
	23		had an expert opinion and then somebody later,
	24		like a year later, told you it was wrong --
04:31	25	A	Yes.

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1   Q   -- or dismissed it --

2   A   Yes.

3   Q   -- when you had every reason to believe in what an

4   expert had told you?

04:32 5   A   Yes.

6   Q   And then another thing that happens with somebody

7   trying to gather enough evidence to put before a

8   decision-maker is a failure to deliver enough to

9   them. How do you know when enough is enough? And

04:32 10   we saw that, in the application that Mr. Wolch

11   made, that application put forward medical

12   evidence which was said to settle the issue

13   scientifically, --

14   A   Yes.

04:32 15   Q   -- and in light of that it was submitted that

16   there is other things we can put forward, there

17   are arguments we can make, we don't know if we

18   should do them?

19   A   Uh-huh.

04:32 20   Q   So that's an issue for somebody that's making an

21   application and gathering their own evidence and

22   putting it before the fact-finder; how much is

23   enough?

24   A   Yes, that's right.

04:32 25   And, of course, one of the

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1   aspects of the Commission is that although the

2   separation, there is a clear separation between

3   the investigation and the decision-making, if a

4   case is put to the decision-making committee for

04:33   5   decision and the committee thinks that there is

6   not a basis on which to refer the case, but it is

7   perfectly at liberty, and indeed does and should,

8   look to see whether there are aspects of the

9   investigation which have been already carried out

04:33   10   which it, the decision-making committee, thinks

11   could have been done to greater effect, or there

12   are things which should have been done which

13   haven't, or matters of that nature, or it can

14   suggest, if one takes Mr. Wolch's letter saying

04:33   15   "we've got things we might have looked at that we

16   haven't", then the decision-making committee has

17   the opportunity of discussing, with the case

18   review manager, whether there should be some sort

19   of further investigation and the case brought back

04:34   20   to the decision-making committee at a later stage.

21   So there remains, although there is a separation

22   of function, the decision can -- the

23   decision-making committee is not going to say,

24   when presented with a case for decision, "sorry,

04:34   25   we're not going to refer this case and that's it,

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1   even though we can see that there might be other

2   aspects of investigation which can be carried

3   out".

4 Q The other thing that was discovered in course of,

04:34 5   I guess in the course of publicity about this

6   case, was the Fisher connection, which was known

7   to the representatives of David Milgaard in 1990,

8   and that's the discovery of the Linda Fisher

9   evidence and the telephone call to counsel for

04:34 10   David Milgaard indicating Larry Fisher's

11   identification, and that took place in February of

12   1990 as far as the phone call is concerned.

13 A Uh-huh.

14 Q If that evidence had, instead, been discovered by

04:35 15   an independent body within the files, the police

16   files or the prosecution files, that would

17   certainly take away any attack or any argument

18   that was suspicious of the motives of people in

19   coming forward with that information; do you

04:35 20   understand me?

21 A Umm, well, not really. I mean what -- what -- I

22   can understand the fact that it came very late.

23 Q Okay. If Linda Fisher is coming forward in

24   1980, --

04:35 25 A Yes.

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 1   Q      -- ten years after the murder, --

 2   A      Yes.

 3   Q      -- saying "I suspect my husband" --

 4   A      Yes.

 5   Q      -- "he's a serial rapist", --

 6   A      Yes.

 7   Q      -- "we live down the street, I think David

 8          Milgaard is innocent", --

 9   A      Uh-huh.

10   Q      -- and that evidence is discovered for the first

11          time by the applicant --

12   A      Uh-huh.

13   Q      -- in 1990 --

14   A      Yes.

15   Q      -- or later and is put forward, and that's

16          investigated by an adverse party --

17   A      Uh-huh.

18   Q      -- like Department of Justice and it's assessed as

19          "what took her so long to come forward", the ten

20          years, --

21   A      Uh-huh.

22   Q      -- and then the Sidney Wilson telephone call takes

23          place in February of 1990 to Mr. Wolch's office,

24          and it's an anonymous phone call by somebody

25          giving a false name who indicates that "Larry
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1   Fisher is your guy", --

2   A   Uh-huh.

3   Q   -- and there is a lot of investigation by the

4   authorities as to "who is this Sidney Wilson and

04:36 5   why is he coming forward now"; so my question is

6   if that information had, instead of being

7   communicated to defence counsel, if that had

8   instead been discovered by an independent body

9   within the files there may not be so many

04:37 10   questions about "why is this person coming forward

11   now", because you'd have the information in there

12   about the serial rapes, about the connection of

13   the rapes to the murder, and you may look at it

14   more as valuable evidence rather than a tactic

04:37 15   that is being put forward to get somebody out of

16   jail?

17   A   Well, understanding the way in which you put that,

18   the underlying proposition is that, as part of a

19   review by a body such as the Commission, the

04:37 20   existence of that information in police files

21   would have been discovered at the time of the

22   Commission's investigation, it wouldn't have lain

23   undiscovered until some years later when that, the

24   existence of that information is drawn to the

04:37 25   attention of Mr. Milgaard's lawyers by whatever

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1   means.

2   So the motivation for drawing

3   how that information came to be communicated to

4   Mr. Milgaard's lawyers would be irrelevant,

04:38   5   because it simply wouldn't have happened, and the

6   question for the Commission would be "well, there

7   is that information in the police files, what

8   significance does it have to the safety of the

9   conviction and what investigation should be

04:38   10   carried out in relation to it".

11   Q   Okay. One of the criticisms that was bandied

12   about in the early days of the CCRC, and has been

13   raised as a criticism of switching to that kind of

14   a system here, is that it would create just

04:38   15   another level of appeal or create a body that is

16   substituting their judgement for jury judgement,

17   the jury's verdict. How would you respond to

18   criticisms or questions of that nature as a member

19   of the Commission?

04:39   20   A   Well, I don't think that particular criticism, if

21   made, has a great deal of force because the

22   Commission isn't there to substitute its opinion

23   for that of the jury. It is made quite clear in

24   the statute which sets up the Commission that the

04:39   25   basis for referring a case, letting a case through

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1   the gateway and getting it back to the Court of

2   Appeal, is dependant on there being something new

3   which, almost by definition, means it wasn't

4   considered by the jury. So it's not substituting

04:39   5   the Commission's view for that of the jury, it is

6   a matter of the Commission evaluating the impact

7   of the new information which the Commission

8   receives and asking itself whether there is a real

9   possibility of the Court of Appeal finding that

04:39   10   that information, far from being a substitute for

11   the jury verdict, is something which can

12   legitimately be said to have an impact on whether

13   the jury would have reached the verdict that they

14   did had they been aware of that new information.

04:40   15   Q   And that may also involve a reassessment of some

16   evidence that was obviously accepted by the jury,

17   and whether or not it would be necessarily

18   accepted by them now, given the fresh arguments or

19   the fresh evidence?

04:40   20   A   Yes.

21   Q   And I don't have the numbers in front of me, but

22   when the CCRC started, you inherited an awful lot

23   of files from the Home Office?

24   A   279 I believe, or 280 are the figures, but it was

04:40   25   around the 280 mark.

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1   Q   And some of those were applications that had been

2   sitting there for some time. Now, did you also

3   get in the early days, or maybe even now still,

4   submissions of cases that had been previously

04:41   5   denied by the Home Office?

6   A   I think the answer to that is, to that question is

7   yes, but I have no idea how many.

8   Q   Okay. So if you only think of it, then I don't

9   think you can answer my next question, which was

04:41 10   that some of them were subsequently referred by

11   the CCRC to the Court of Appeal --

12   A   I'm sorry --

13   Q   -- and you do not know the answer to that?

14   A   I do not know the answer to that. I would be

04:41 15   guessing.

16   Q   I believe it appears in the annual reports, but I

17   don't have them.

18   A   Excellent. If they do, then they are a matter of

19   public record and can easily be consulted. I

04:41 20   mean, I wouldn't be surprised if that were the

21   case, but I can't say for certain one way or the

22   other.

23   Q   And some of them -- well, some of the referrals

24   were cases that had previously been in the Court

04:42 25   of Appeal though, you can definitely answer that

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 1                  one, Bentley?

 2        A        Been in the Court of Appeal?

 3        Q        Previously.  It's, in effect, a resubmission to

 4                 the Court of Appeal.

 5        A        Well, yes, because of qualifying conditions there

 6                 should have been a previous unsuccessful appeal.

 7        Q        I don't know where my head was at that moment.

 8                        COMMISSIONER MacCALLUM:  You mean

 9                 previously been in the Court of Appeal after

10                 trial but not as a part of the review process?

11                        MS. McLEAN:  Yes.

12                        COMMISSIONER MacCALLUM:  Okay.

13            BY MS. McLEAN:

14        Q        So as a bottom line, do you agree with me that a

15                 system that says you do all the work and we might

16                 react to it cannot possibly be seen as being fair?

17        A        Well, my experience with the Commission is that a

18                 body which takes a proactive view to investigation

19                 is the more likely to identify cases where there

20                 has been a wrongful conviction.

21        Q        And more likely to be seen as fair?

22        A        I think that's --

23        Q        As a fair process?

24        A        Yes.

25        Q        And once you've passed the threshold in the CCRC,
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1   once you pass the threshold that there's a real

2   possibility that the Court of Appeal would allow

3   the case, it's not discretionary any more, is it,

4   you must refer it?

04:43   5   A   We have a discretion whether or not to refer a

6   case even though there is a real possibility, and

7   somewhere in the Commission's documentation,

8   getting back to Mr. Roy's questioning, there is a

9   formal memorandum on the exercise of the

04:43   10   Commission's discretion in those circumstances,

11   but all things being equal, the finding of a real

12   possibility that a conviction will be found to be

13   unsafe will result in a referral.

14   Q   What sort of circumstances would give rise to a

04:44   15   finding that there's a real possibility that the

16   Court of Appeal will find it to be unsafe and then

17   not have the case be referred to the Court of

18   Appeal?

19   A   I think the Commission's policy in relation to the

04:44   20   exercise of its discretion is founded largely on

21   the question that whether -- sorry, I'm being

22   attacked by some insect here -- whether or

23   not there -- whether there is the absence of any

24   tangible benefit either to the applicant or more

04:44   25   likely to the applicant's surviving family, or an

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1   absence of tangible benefit to the criminal

2   justice system, so the circumstances in which the

3   Commission is likely to exercise its discretion

4   not to refer is where there is no surviving

04:45 5   applicant; in other words, the applicant is dead

6   and the application is being made by someone on

7   his behalf.

8 Q Who may well have an interest in an acquittal?

9 A Who may have an interest in acquittal, but if it's

04:45 10   a very remote interest and the case doesn't itself

11   raise any issue of significance to the wider

12   benefit of the criminal justice system, then that

13   would be a circumstance in which the Commission

14   might exercise its discretion not to refer.

04:45 15 Q Or perhaps, I don't want to call them trivial

16   offences, but certainly less serious offences

17   where a sentence has already been served?

18 A Well, if you have a surviving applicant, the fact

19   that he had a conviction at all may be very

04:46 20   damaging to him --

21 Q Uh-huh.

22 A -- or her, so simply because they've served a

23   sentence or haven't, or didn't receive a custodial

24   sentence at all wouldn't necessarily be a reason

04:46 25   for exercising the discretion not to refer.

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1   Certainly if the application was an appeal against

2   sentence only and the sentence had been served in

3   its entirety, we might take the view that, and

4   certainly I think the Court of Appeal would be

04:46   5   highly critical if we started sending cases down

6   where there was absolutely nothing of any

7   practical significance to the applicant.

8   I know that we, I mean, I was

9   thinking while you've been asking about this, we

04:46 10   did have a case in which the convicted person was

11   long dead, that the application to us was made by

12   two very, the last two very elderly surviving

13   members of the family, and we're talking about a

14   case which goes back half a century or more I

04:47 15   think, and I believe that it was one of the rare

16   cases in which the Royal Prerogative of Mercy had

17   already been exercised by the Home Secretary and a

18   considerable amount of monetary compensation paid

19   to the two elderly survivors. We took the view

04:47 20   that given the fact of the pardon, which to all

21   intents and purposes has the same effect in

22   proclaiming that person's innocence of the offence

23   of which he had been convicted, coupled with the

24   fact that there appeared to be no tangible benefit

04:47 25   to the criminal justice system or to these elderly

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1   surviving relatives in having the conviction

2   quashed in the Court of Appeal as opposed to

3   having been the subject of pardon, coupled with

4   the fact that a considerable sum had been paid by

04:48 5   way of compensation, that we would exercise our

6   discretion not to refer that case.

7   Q   In the case of a surviving applicant, the

8   applicant himself or herself is alive, --

9   A   Yes.

04:48 10   Q   -- is there, are there circumstances in which

11   having met that threshold, that the court is,

12   there's a reasonable prospect that the Court of

13   Appeal will find it to be an unsafe conviction,

14   are there circumstances where that would not be

04:48 15   referred by the Commission?

16   A   I can't think of any, no.

17   Q   Assuming that the applicant is alive?

18   A   Yeah, because there has to be a benefit to an

19   applicant who is alive in having a conviction

04:48 20   which has been obtained wrongfully taken away from

21   the record.

22   Q   Has to be a benefit?

23   A   I think so.

24   MS. McLEAN: Thank you, sir. Those are all

04:49 25   my questions.

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1   MR. ELSON: Mr. Commissioner, I appreciate

2   the hour and I trust that this witness has to get

3   back and I hope not to be too long.

4   COMMISSIONER MacCALLUM: It's 10 to five is

04:49 5   it?

6   MR. ELSON: I believe it is.

7   COMMISSIONER MacCALLUM: Okay, thanks.

8   MR. ELSON: I shouldn't be very long,

9   there's just two matters I want to pick up on.

04:49 10   COMMISSIONER MacCALLUM: That's fine.

11   Anybody need a break before we continue? No?

12   MR. ELSON: I don't know whether the

13   witness needs a break at all.

14   COMMISSIONER MacCALLUM: Are you okay, Mr.

04:49 15   Kyle?

16   A   I'm fine at the moment. I'll shout if I think I

17   need one.

18   COMMISSIONER MacCALLUM: Please do, yes.

19   **BY MR. ELSON:**

04:49 20   Q   Mr. Kyle, my name is Richard Elson and I am the

21   counsel for the Saskatoon Police Service in this

22   matter. I simply wanted to cover two areas.

23   The first is with respect to

24   the *Drake Law Review* article, and I don't think we

04:49 25   need to put it up, but I was particularly

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1   intrigued by your distinction between wrongful

2   convictions arising as a result of systemic

3   reasons as compared to wrongful convictions

4   arising as a result of idiosyncratic reasons.

04:50 5   A   Uh-huh.

6   Q   And I couldn't help but think that, and it's a

7   phrase that I've often used in court in other

8   context, notably in civil context, and that is

9   that sometimes bad things happen notwithstanding

04:50 10   the reasonable efforts of reasonable people, and I

11   take it that included in the idiosyncratic reasons

12   that you've identified, there are circumstances in

13   which the investigators, the prosectors, the

14   system of justice functioned, the individuals

04:50 15   within that system of justice acted reasonably

16   having regard to the information they had, but

17   notwithstanding the functioning of the system and

18   the reasonableness of people's conduct, wrongful

19   convictions still occurred. Is that a fair

04:50 20   assessment as one of the examples in which a

21   wrongful conviction can occur for idiosyncratic

22   reasons?

23   A   Yes.

24   Q   So in that respect, when you were answering Mr.

04:51 25   Hodson's questions and you said that in those

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1   cases of idiosyncratic reasons mistakes are made,

2   those mistakes could be errors of judgment that

3   occurred despite the exercise of reasonable care;

4   for example, in the case of police investigators?

04:51 5   A   Undoubtedly, and one of the areas where I think

6   that is undoubtedly a valid observation and

7   remains so is in relation to the exercise of

8   judgment by the disclosure officer in relation to

9   identifying material which the police have

04:51 10   gathered in the course of the investigation which

11   is potentially disclosable to the defence and

12   should therefore be drawn to the prosecuting

13   authority for that purpose. If -- it is and

14   remains quite possible for the disclosure officer

04:51 15   to reach a wrong but nonetheless genuinely held

16   judgment about that, and therefore the effect of

17   that will be that material which should be

18   disclosed isn't and maybe if there's an

19   application to the Commission, the Commission will

04:52 20   then discover that because the Commission will

21   look at all that material and will be able to have

22   it, do a gap analysis, if you like, of what

23   material was held and what was disclosed and see

24   what wasn't, and if significant material which

04:52 25   should have been disclosed wasn't, that may well

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1   be the result of an honest but erroneous judgment

2   by the disclosure officer.

3   Q   And if we could use another example, and perhaps

4   one less formal than that of a disclosure officer,

04:52 5   but a police investigator who is questioning a

6   witness, not a suspect --

7   *A*   Uh-huh.

8   Q   -- for example, if we are -- there are various

9   approaches, and I'm sure in your experience, not

04:52 10   only with the Commission but also as a prosecutor,

11   you were aware of various approaches that a police

12   investigator can take to the questioning of a

13   witness not a suspect, and in part it might depend

14   on -- you would agree with me that in part the

04:53 15   approach taken would depend on the assessment an

16   investigator is making of a given interviewee, if

17   you will?

18   *A*   Yes.

19   Q   So if a police officer makes an assessment of a

04:53 20   potential witness and comes to the conclusion that

21   it would be very appropriate to employ persistent

22   questioning in this witness, that would not

23   necessarily be an unreasonable thing to do, but if

24   the witness were one of those feckless,

04:53 25   irresponsible individuals who was prompted and

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1   provoked by that persistent questioning to

2   implicate an innocent person, that could occur

3   notwithstanding the exercise of totally reasonable

4   care on the part of the investigator. Would you

04:53   5   agree with that?

6   A   It could, yes.

7   Q   Now, I wanted to ask a question that dealt more

8   specifically with the experience of the

9   Commission. I noted from Section 14 of the

04:54   10   *Criminal Appeals Act* that the consideration by the

11   Commission whether or not to order a reference

12   does not, and it's already been observed I believe

13   in the questioning by Mr. Roy, it does not depend

14   on an application by the person convicted, it can

04:54   15   be done in the absence of an application by the

16   person convicted; is that correct?

17   A   Yes.

18   Q   So I take it then that at least in theory perhaps,

19   and you can advise as to whether or not it occurs

04:54   20   in practice, in theory you can have a reference

21   which is prompted as a result of representations

22   from third parties, someone other than the person

23   convicted of the offence?

24   A   Yes, that in theory is right. Perhaps I can just

04:54   25   amplify that a little bit. As you quite correctly

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1   observe, Section 14 of the *Act* allows the

2   Commission to make a reference in the absence of

3   an application, but in practice, of course, before

4   the Commission is in any position to make a

04:55   5   reference, that there has to be some sort of

6   investigation and review, and the real question

7   here is whether the Commission is going to embark

8   on investigations or reviews as a -- talking

9   entirely pragmatically, will the Commission embark

04:55 10   on the investigation and review which might lead

11   to a reference without an application, because

12   even in those cases where the Commission has done

13   that, by the time the Commission is at the point

14   of making a decision to refer the case, it's

04:55 15   almost certain that the affected convicted person

16   will by then know that the Commission is thinking

17   of referring the case, so by the time we get to

18   actually refer the case, the applicant will have

19   said yes, I would like you to do that. I don't

04:56 20   think we ever had a case where the applicant has

21   actually said no, I don't want you to refer my

22   case.

23   Q   I can appreciate that.

24   A   So getting back -- sorry, I --

04:56 25   Q   No, go ahead.

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1   *A*   I was just going to say that the real question for

2   the -- arising out of this is the extent to which

3   the Commission would embark on an investigation

4   and review which is not prompted by the convicted

04:56 5   person themselves and that can happen. The fact

6   that there is concern about the safety of the

7   conviction may be drawn to our attention by, from

8   a source other than the applicant. In fact, the

9   applicant may be completely unaware that there is

04:56 10   some concern about the safety of the conviction

11   and that external third party source, if I put it

12   that way, could indeed include the police, and I

13   can think of at least one case where the impetus

14   which has prompted an investigation, and I can't

04:57 15   remember the precise circumstance or what the

16   nature of the concern was, but it was a concern

17   which had come to the attention of the police in

18   the context of another investigation which the

19   police force concerned considered has a knock-on

04:57 20   effect to the safety of the conviction as somebody

21   who had been convicted, so the police force

22   concerned drew that to the Commission's attention

23   and the Commission then took that forward as an

24   investigation.

04:57 25   Q   I wanted to pursue that avenue in a moment, but

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1   other than police officers, what other third

2   parties have presented information to the

3   Commission which has prompted it to consider the

4   possibility of ordering a reference other than

04:57 5   police officers? Has the Crown, for example,

6   brought information to the Commission?

7   A   Yes. Again, I can't remember specific cases, or I

8   can't entertain what the factual circumstances of

9   the case, but yes, there have been a least one

04:58 10   occasion where the Crown has drawn the

11   Commission's attention to its concern about the

12   safety of the conviction.

13 Q   And prior to the *Criminal Appeal Act*, prior to the

14   Commission coming into existence as set out in the

04:58 15   *Criminal Appeal Act*, what avenues, if any, existed

16   for police officers or Crown prosectors who had

17   received information which may cast some doubt as

18   to the propriety of a prior conviction, what

19   avenues did they have in the past prior to the

04:58 20   enactment of this particular provision of the

21   *Criminal Appeal Act*?

22 A   Well, I can think of two possible avenues, but I

23   have no experience of what actually happened in

24   practice. I mean, I'll think while I'm answering

04:59 25   the question as to when I was in the prosecution

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1   service whether I was ever faced with this

2   situation. Indeed, even as I say I'll think about

3   it I think I've come up with the answer. The

4   avenues were either to approach the Home Office

04:59 5   with a view to the extent to which the Home

6   Secretary might have exercised his part or refer

7   back to the Court of Appeal, or, and I think this

8   is certainly something which I did when I was in

9   the prosecution service, would be to make the

04:59 10   lawyers who represented the convicted person at

11   trial aware of the concern and invite them to take

12   whatever action they thought they ought to on

13   behalf of their client.

14 Q   Now, getting back to the other example in which

04:59 15   you indicated that a police officer, or that the

16   police actually brought information to the

17   attention of the Commission, and I understand that

18   that was not done, or that was done without the

19   applicant, or without the convicted person even

05:00 20   being aware that the police had made that

21   representation; is that correct?

22 A   Yes.

23 Q   We have the situation that you've already heard

24   about, at least in part from the other two counsel

05:00 25   who have cross-examined you, of the circumstance

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1   in which Linda Fisher one day in the summer of

2   1980 walked into the Saskatoon Police Department

3   and gave information to an officer which

4   implicated her husband and, of necessity,

05:00 5   suggested that perhaps David Milgaard was not

6   guilty of the offence in question.

7   A   Yes.

8   Q   We have also heard evidence before this Commission

9   of Inquiry that no one is aware of any police

05:00 10   force, certainly in Canada, that had any policy at

11   that time or indeed since for dealing with the

12   disposition of or how to deal with exculpatory

13   evidence that is brought in well after the person

14   is convicted, been convicted and well after the

05:01 15   appeal period have either been exhausted or have

16   expired. Is there now as a result of the

17   Commission coming into existence in the United

18   Kingdom policies, or are there policies in place

19   for police officers or police departments to refer

05:01 20   such potentially exculpatory evidence to the

21   Commission for its consideration in deciding

22   whether a reference ought to be done?

23   A   I'm not aware of there having been any formal

24   policy adopted by any police force either on its

05:01 25   own or in consultation with the Commission, I'm

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1   simply not aware of there being such a policy, but

2   the -- but the fact that the Commission does exist

3   and is known by the police to exist and has

4   resulted in a matter being referred to the

05:02 5   Commission when it arose in the way I've described

6   perhaps means that the police would recognize the

7   Commission as being a possible source for drawing

8   concerns, drawing concerns of that nature to its

9   attention. I mean, I suppose it's -- it's a bit

05:02 10   of a statement of the obvious to say that the

11   police are only going to do that if they actually

12   do some initial evaluation of what they are told

13   and decide yes, there is something which should be

14   concerning us here.

05:02 15 Q   But the question that arises, and Mr. Roy and I

16   have had discussions about this and I promised him

17   I would ask the question, should there be an

18   obligation on the part of police who receive

19   exculpatory evidence totally by happenstance years

05:02 20   after conceivably that somebody has been convicted

21   and the appeal period has either been expired or

22   exhausted, should there be an obligation to

23   present that to an entity such as the Commission,

24   assuming Canada decides to venture down that road

05:03 25   and create a similar Commission as that which

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1   exists in the United Kingdom, should there be that

2   opportunity in the United Kingdom, for example?

3   A Well, it's an interesting -- that is certainly an

4   interesting proposition and it's not one to which

05:03   5   I've previously directed my mind I have to say,

6   but I think my initial reaction to that is that if

7   somebody is convicted and there is no other basis,

8   which there isn't we'll assume, to get the safety

9   of that conviction reconsidered other than through

05:04 10   the activities of the Commission, then it would

11   seem to me to be a perfectly sensible line to

12   adopt, that if the police, or indeed anybody else,

13   whether it's the prosecution or the police become

14   aware of information which they judge to be, to

05:04 15   have substance to it, that that is a matter which

16   should be drawn to the attention of the

17   Commission.

18   Q All right. Us lawyers sometimes are very good at

19   advocating the cause of the devil, and let me be

05:04 20   the devil's advocate in this instance. The

21   criticism has been made that if one does that, if

22   one lets the police make the assessment of that

23   evidence, because the police were involved in the

24   initial investigation that led to the conviction,

05:04 25   they are going to be careful to protect the

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1   integrity of that first investigation which led to

2   the conviction?

3 A   Uh-huh.

4 Q   And as a consequence of that, their evaluation of

05:05 5   that exculpatory evidence which comes to them by

6   happenstance would be suspect?

7 A   I can see the --

8 Q   By the way, I don't make that criticism, that

9   criticism has been made. What would your response

05:05 10   be to that criticism?

11 A   Well, I suppose one way of overcoming that

12   particular criticism would be just to, if we were

13   moving towards the circumstance of having some

14   sort of understood policy along these lines, would

05:05 15   be to say, well, don't do any judgment here, let

16   the Commission make that judgment.

17   MR. ELSON: Thank you, Mr. Kyle. I have no

18   further questions.

19   COMMISSIONER MacCALLUM: But by denying the

05:05 20   discretion of the officer, of course, who

21   received the complaint, you wouldn't necessarily

22   ward off any desire by him to conceal it, he

23   could simply file it away of course.

24 A   And pretend it never --

25   COMMISSIONER MacCALLUM: Yes.

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1   *A*   Well, of course, yes.

2   COMMISSIONER MacCALLUM: Don't the results,

3   sir, have to repose, as we always do, a good deal

4   of confidence in the upright behaviour of our

05:06 5   police forces and their members?

6   *A*   Well, I think -- I'm sure that's right, and I

7   think this is about sort of culture around the

8   operation of the whole criminal justice system as

9   a whole. If -- what I was saying earlier about a

05:06 10   mature and responsible criminal justice system

11   being prepared to acknowledge that mistakes happen

12   and to address them, and the -- and I use the

13   words "mistakes happen" there advisedly, because

14   if you have anyone involved in the process from

05:07 15   investigation through to trial who is deliberately

16   and maliciously out to act in an improper manner,

17   then it doesn't matter what the general culture

18   is, that case is going to cause a particularly

19   idiosyncratic problem, but if the culture is a

05:07 20   healthy one and extends throughout the criminal

21   justice system, then that will extend to the

22   police, and if individual police officers are

23   imbued within that culture with the notion that

24   the system is keen to identify and remedy mistakes

05:07 25   and this isn't about blaming people for what's

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1   gone wrong, then you are more likely to encourage

2   the sort of openness which the questioning which

3   I've just been addressing can happen.

4   COMMISSIONER MacCALLUM: Thanks.

05:07 5   A   But ultimately you are absolutely right, it

6   depends on the willingness of individual police

7   officers in those circumstances to come forward

8   with the information when they get it.

9   COMMISSIONER MacCALLUM: Okay.

10   **BY MS. KNOX:**

11   Q   Thank you. Sir, for the record, my name is

12   Catherine Knox and we have not met other than to

13   see you passing in the hall. Also for the record

14   I want you to be aware that my role at this

05:08 15   inquiry is as counsel for the former trial

16   prosecutor T.D.R. Caldwell.

17   A   Uh-huh.

18   Q   Sir, are you aware that the circumstance or the

19   fact that the Crown was able to establish that

05:08 20   David Milgaard was factually innocent of causing

21   the death of Gail Miller was because the

22   prosecutor, my client, contrary to practices,

23   ordered that the exhibits from the trial be held

24   so that they were available some 28 years after

05:08 25   his conviction?

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1   A   I think the answer to that is in discussions I had

2   with Mr. Hodson in preparation, that proposition

3   you've just made rings a bell.

4   Q   Okay.

05:09 5   A   And of course I accept it as being the case.

6   Q   And indeed the evidence is and the documents, or

7   the exhibits when they were found had a note

8   sitting on them in the court vault that they were

9   not to be destroyed by order of my client, Mr.

05:09 10   Caldwell?

11   A   Yes.

12   Q   Okay. Now, if we could step back for a moment,

13   and I just have a brief few questions, let me

14   reassure you and the Commissioner of that, but if

05:09 15   we could step back for the moment, that the

16   circumstances of this case in part through, in

17   large part through the actions of my client

18   allowed in 1997 that the factual innocence of

19   David Milgaard was established, and you as a

05:09 20   Commission were dealing with an application from

21   somebody in the early -- late '80s, early '90s,

22   where the allegations were or the assertion was

23   I'm innocent, the information to be looked at was

24   the court record and the police investigation, the

05:09 25   evidence of witnesses, how their statements were

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1   obtained and so forth, and that was essentially

2   the application that was presented to your

3   Commission, --

4   A   Uh-huh.

05:10   5   Q   -- but in the course of the necessary

6   investigation that your Commission would have to

7   do as part of the review to determine if the

8   matter would be referred to the Court of Appeal it

9   became -- a number of facts became clear, and I'll

05:10   10   try to list them.

11   Number 1, it quickly became

12   clear that the applicant, advocates on his behalf

13   and his legal counsel were putting forward, either

14   individually or collectively, allegations or

05:10   15   assertions about the conduct of the police and the

16   Crown that were probably false, i.e., they were

17   saying, for example, a witness statement hadn't

18   been disclosed when in fact the records showed

19   that it had; that they were putting forward a

05:10   20   recantation taken from a witness like Ron Wilson

21   by an experienced private investigator, but

22   mysteriously they couldn't produce the audiotape

23   of the interview of him where the recantation

24   occurred; they were putting forward allegations

05:11   25   that the Crown had made key evidence disappear,

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1   i.e., a knife that could have been the murder

2   weapon; they were putting forward scientific

3   evidence and relying on scientific evidence where

4   the records showed a full, factual history had not

05:11   5   been given to their expert, and I'm thinking of

6   stains in a snowbank that an expert said could be

7   dog urine when, in fact, the record showed that

8   there were human pubic hairs in those samples at

9   the time they were found in 1969; might that kind

05:11   10   of misinformation, some of it deliberate, some of

11   it admitted to be knowingly false, some of it

12   maybe negligently managed, cause the possibility

13   that your Commission might not refer for review a

14   matter that should have gone for review?

05:12   15   A   I think all I can say, I can really say in answer

16   to that, is that the decision which the Commission

17   makes whether or not to refer a case is going to

18   depend -- is going to be made at the end of the

19   Commission's investigation. And in the course of

05:12   20   that investigation, no doubt the Commission would

21   be invited to take account in support of the

22   application to suggest that there had been a

23   wrongful conviction, all the matters that you have

24   just described.

25   Q   Uh-huh.

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1   A   Now the mere fact that the Commission came to the

2   conclusion that some of the grounds on which the

3   application had been made were wholly

4   inconceived -- and this is not an uncommon

05:13   5   occurrence, I mean applicants are quite capable of

6   making wild assertions about what they think has

7   gone wrong which are completely without foundation

8   and are found to be so on investigation -- but the

9   fact that an applicant makes assertions which are

05:13   10   wholly unfounded, either because they are totally

11   rash or specifically because they are made

12   specifically with an intent to deceive; if the

13   Commission exposes, during the course of its

14   investigation, that some of the issues which have

05:13   15   been raised are without any foundation at all and,

16   indeed, may be mischievous, it's not actually

17   going to have any impact at all on the question

18   whether or not the question should be referred to

19   the Court of Appeal if, as a result of the

05:13   20   investigation the Commission does carry out, there

21   are sustainable grounds, there are sustainable

22   bases on which to say the real possibility test

23   has been met.

24   So the applicant is not going

05:14   25   to be prejudiced simply because he is wild and

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1   mischievous.

2   Q   Okay. But is it not true, sir, that being wild

3   and mischievous, particularly when some of that

4   mischief comes from learned counsel, could

05:14 5   potentially prejudice an outcome? Pearls of truth

6   can get lost in the mess that need not have been

7   created.

8   A   Well that, that of course, I mean I don't intend

9   to be disrespectful, I think that is almost a

05:14 10   truism, yes.

11   Q   Thank you.

12   MR. WOLCH: Mr. Commissioner, I don't have

13   any questions, but I do wish to object to the

14   framing of the last group of questions where My

05:14 15   Friend has confused what was part of an

16   application to the Department of Justice to what

17   appeared in the media at various times, and it's

18   a complete distortion to suggest that certain

19   questions that My Friend raised were put to the

05:15 20   Department of Justice. Mr. Williams clearly

21   indicated at this Commission that misconduct was

22   not a key in what he was determining, it was

23   Fisher, Wilson, the improbability, etcetera,

24   etcetera. And My Friend is talking here about

05:15 25   supposedly wild accusations, many of which we

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1   still maintain are true.

2   The odd inaccuracy should not

3   be put to this witness without putting the whole

4   picture. If My Friend is going to say, for the

05:15 5   hundredth time, "the statement of Ron Wilson was

6   disclosed", My Friend is not saying all -- the

7   other individual being attacked that morning,

8   she's not putting the eye witnesses to the scene

9   of the offence, supposedly, that wasn't

05:16 10   disclosed. You can't take out one incident and

11   not talk about all the lack of disclosure.

12   But the lack of disclosure

13   was not what was being argued, it was the merits.

14   It's totally distorted. My Friend has taken an

05:16 15   argumentative approach to put forward facts that

16   aren't accurate and distort, and that's what

17   occurred in those questions. They have no -- it

18   doesn't help the Commission at all.

19   COMMISSIONER MacCALLUM: Well what does

05:16 20   help the Commission, I think, is the witness'

21   answer to the effect that, notwithstanding

22   information which might have been less than

23   reliable, the Commission would choose to take the

24   higher ground and allow an application -- or

05:16 25   accept an application to refer on the basis of

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1   the grounds which had been shown to be

2   sustainable.

3   MR. WOLCH: I appreciate that, and I thank

4   you.

05:16 5   COMMISSIONER MacCALLUM: So that's his

6   answer, basically.

7   MR. WOLCH: Thank you.

8   MR. HODSON: I think that is all.

9   If I may thank you, Mr. Kyle,

05:17 10   for travelling here and spending time on the

11   weekend preparing, and your providing evidence

12   before this Commission, thank you very much.

13   A   Okay.

14   COMMISSIONER MacCALLUM: And Mr. Kyle, for

05:17 15   my part, I just want to note that you are the

16   last of the very many viva voce witnesses to

17   appear before us. And I have followed an

18   invariable practice, up to this moment at least,

19   of thanking all witnesses in precisely the same

05:17 20   words so as not to leave any impression that I

21   was accepting one's testimony in preference to

22   another's, but for you I'm going to make an

23   exception, sir. Given the fact that you have

24   come all the way from the United Kingdom and been

05:17 25   so very patient with us, and not wishing at all

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1   to comment in any way upon the weight of the

2   evidence you have given, I would just like to

3   offer you a special note of thanks for all you've

4   done. Thank you, sir.

05:17 5   A   Thanks very much, Mr. Commissioner.

6   And could I just end by saying

7   I have been delighted to have had the opportunity

8   to come and give that evidence to the Commission

9   and I am grateful to you, sir, and everyone here,

05:18 10   being prepared to sit a bit later this evening so

11   that I can complete my evidence today.

12   COMMISSIONER MacCALLUM: Okay. Thank you.

13   MR. HODSON: Thank you.

14   *(Adjourned at 5:18 p.m.)*

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