

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

Transcript of Oral Submissions

before the Commission
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Inquiry Proceedings

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Mr. Alexander Pringle, Q.C., **for** Justice Calvin Tallis
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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

MR. HODSON: Good morning,

Mr. Commissioner. This morning we will have the oral submissions for, by counsel for the parties. Just for the record, all counsel have filed written submissions, counsel were given an opportunity to provide written rebuttal submissions, some counsel have done that, we have sent out guidelines to all the parties for the oral submissions, you have set the order. Each counsel is provided with 30 minutes to provide their submissions and our clerk, Ms. Beitel, will advise counsel when their 30 minutes is completed and perhaps a warning shortly before that.

I'll just read into the record the order. It will be counsel for David Milgaard, Joyce Milgaard, David Asper, T.D.R. Caldwell, Serge Kujawa, Eddie Karst, Calvin Tallis, Eugene Williams, Saskatoon Police Service, RCMP, Larry Fisher, AIDWYC, Justice Canada and Saskatchewan Justice, and with that I'll ask Mr. Wolch to come forward.

1 COMMISSIONER MacCALLUM: Just before you
2 do, Mr. Wolch, just a couple of introductory
3 remarks.

4 Thank you very much, counsel,
5 for your written arguments, I found them to be
6 comprehensive and, for the most part, to the
7 point. The guidelines asked that you confine
8 your arguments to your own client's interests. A
9 few have strayed from that into areas which bear
10 some resemblance to your client's interests, but
11 perhaps only in a very general sense. Please do
12 not repeat that error. What I want to hear from
13 you is for you to plead your own client's case.

14 You have 30 minutes, this
15 will be strictly observed. You will see a five
16 minute warning from Ms. Beitel and if you are
17 still talking at 30 minutes when the sign goes
18 up, you are expected to stop even in mid
19 sentence. If it can happen to the present leader
20 of the opposition, it can happen to you.

21 I will not interrupt your
22 presentation unless I fail to understand
23 something. If you see me write anything down, it
24 means that it is something I had not thought of.
25 If I fail to write anything down, that does not

1 signify agreement with what you are saying. The
2 arguments are being reported and will be studied
3 in verbatim form.

4 Mr. Wolch, please.

5 **ORAL SUBMISSION**

6 **BY MR. WOLCH**

7 MR. WOLCH: Thank you, Mr. Commissioner.

8 Mr. Commissioner, when David
9 Milgaard was 16 years of age he had a job with an
10 employer who liked him, he had no criminal
11 record, he had no history of violence. He turned
12 himself in to the authorities and from that day
13 forward he always maintained his innocence even
14 though it was to his disadvantage to do so at
15 times when he was in custody and he always told
16 the truth. The fact is there wasn't all that
17 much to tell because there was nothing really to
18 explain, we know now at least no involvement,
19 there was nothing that happened, there was
20 nothing to really talk about other than an
21 innocuous morning in his life.

22 He always offered samples at
23 any time, do you want blood, do you want hair,
24 whatever you want I'll give it as fast as you
25 want it. He co-operated fully with his counsel,

1 an excellent counsel who he could talk to, they
2 got along well. As David says, he was like a
3 father figure, he had good counsel, and he
4 availed himself of every court process, every
5 avenue of appeal, yet he suffered the worst
6 miscarriage of justice in Canadian history.

7 How can that be? For 23
8 years he languished in jail. His time in jail
9 was difficult as any innocent person would
10 particularly find, it was horrific what happened
11 in the jail, labeled a murderer, labeled a
12 rapist. For almost 30 years the real killer went
13 free.

14 In 1992 the Supreme Court
15 recommended the quashing of the conviction and
16 that is the only time in history it's ever done
17 that. Even though David was presumed to be
18 innocent in law, he was in a state of limbo aided
19 by the comments of the Minister of Justice for
20 the province who said he believed in David's
21 guilt and the Federal Minister and former prime
22 minister who wrote a book in which he hinted that
23 David was guilty, so even though he's an
24 unconvicted man, he is still, in the authority's
25 mind, guilty, even though they know everything

1 about the case with the exception of the DNA.

2 When the DNA results came
3 through, it didn't really change the facts.
4 David was always innocent, Fisher was always
5 guilty. The DNA didn't make either one innocent
6 or guilty, they were always one innocent, one
7 guilty. At that time the Federal Minister
8 apologized and commended the Milgaards for how
9 they reacted through the entire process. The
10 provincial minister, to his credit, put forward
11 an encompassing compensation plan which included
12 this very inquiry, that as part of the overall
13 picture the compensation required, not just the
14 monetary portion, but telling David how could
15 this happen to you, and from David's point of
16 view, very important, how can you prevent it or
17 how can we prevent it from happening to somebody
18 else, so the compensation was not just money, it
19 was answers to these perplexing questions which
20 are in your hands, particularly at the conclusion
21 of these submissions.

22 Well, how did it happen?
23 It's interesting that at the very beginning the
24 authorities had it right; that is, they suspected
25 the man who turned out to be Fisher, they had

1 every reason to suspect him and we canvassed that
2 at this inquiry, but they had it right regarding
3 the unknown Larry Fisher who somehow slipped
4 through the cracks and no one seemed to get to
5 him at the Cadrain house or check his alibi,
6 being at work, or even identify Linda Fisher at
7 that time, so with that background, Albert
8 Cadrain comes into the picture and provides a
9 suspect.

10 The problem with Albert
11 Cadrain is that he was not properly scrutinized;
12 that is, what happened in Regina was never really
13 looked at, he's allowed to say he learned of
14 everything when he got home, he talks about not
15 doing dope the night before which is not true,
16 and as his stories get wilder and wilder with the
17 Mafia and virgins in bathtubs, nobody seems to
18 say "wait a minute, what's going on here," and at
19 the same time the other three kids give
20 exceptionally consistent stories without any
21 chance to collaborate and that seems to be given
22 no credence that how could these three kids be so
23 identical in their stories and yet they wouldn't
24 be true.

25 Then we get to what we call

1 the Mackie summary which followed. Now, it's
2 interesting, we didn't even know until we got to
3 this inquiry that it was written or authored by
4 Officer Mackie. The Supreme Court, there was no
5 knowledge of who wrote the report and it was only
6 here that it was discovered that it was by
7 Officer Mackie, and it is not a fair recitation
8 of the facts, of the known facts as we point out
9 in our brief, and it is not a summary because it
10 predicts what's going to be said, and it contains
11 facts that the other two kids have not even
12 adopted at that point in time. What's worse is
13 it creates a let's go out and get this story
14 whether it's polygraph or hypnosis, an enthusiasm
15 to get that particular story. What is troubling
16 about it is the lack of documentation about it;
17 that is, we have reports of other facets of the
18 investigation, but precious little about what
19 happened on those crucial days. Even though we
20 know it was recorded or eavesdropped through from
21 the next room, there is so little as to what
22 occurred between Roberts and the kids, and the
23 police force cannot put the blame directly on
24 Roberts because they must have known what was
25 going on through the eavesdropping, as to what

1 was transpiring, and it gets worse because you
2 have the dovetailing of the stories, Wilson
3 changing his story the next day to dovetail with
4 what John is saying so she can give her statement
5 the next day. So there has to be, as Roberts
6 pointed out, making sure there's no
7 discrepancies, and that's not how statements
8 should be taken. Discrepancies show untruth.
9 You don't try and correct them by having somebody
10 change their story.

11 Furthermore, there's no real
12 scrutiny given. I mean, John's statement by
13 itself, given under tremendous stress, being
14 shown blood-stained clothing, etcetera, etcetera,
15 I now remember, I now remember, I now remember
16 prevails in that statement. Like, why or how do
17 you forget seeing a murder. And then as the
18 years go by and you look at it and you say how
19 can anybody see a murder, forget about a murder
20 and behave okay, go to Calgary, remember a
21 murder, forget a murder, tell your friend,
22 forget, remember, forget, remember, it's just
23 nonsense, and yet no one seems to have looked at
24 that in a really careful manner and say what's
25 going on here, and how can being shown an autopsy

1 picture refresh a memory, and besides which the
2 story makes no sense with the stabbing through
3 the coat and not the dress, it makes no sense at
4 all. There's no scrutinizing of it. How could
5 nobody see this? How could nobody be around?
6 Where are those two men who pushed the car out?
7 None of that is there. There's no real scrutiny
8 of it. And yet that is the foundation for the
9 matter that then goes to the prosecutor, Mr.
10 Caldwell, and Mr. Caldwell adopts without
11 critique or criticism the theory that this is
12 what occurred, Nichol John did see a murder, and
13 it is our submission that Mr. Caldwell had
14 complete tunnel vision and with that tunnel
15 vision saw fit not to make appropriate disclosure
16 to Mr. Tallis.

17 We highlight it in our brief
18 and I won't go through it all, but can anyone
19 argue that (v4)---- (v4)---, a woman being
20 attacked within yards of the same time frame
21 would not be relevant to the defence? That the
22 Merrimans at the very scene of where this alleged
23 offence occurred would not be disclosed?
24 Mrs. Gallucci would not be, the roommates that
25 make the Avenue N theory impossible, keeping in

1 mind it has to be Avenue N, it can't be Avenue O
2 because that wouldn't fit with Gallucci or Mr.
3 Diewolf, so it had to be on N, so -- and then of
4 course the assault victims that would have
5 directed one to Larry Fisher in the end, there's
6 all that non-disclosure, serious non-disclosure.
7 And it's not an explanation to say I gave it to a
8 writer more than 10 years later or I gave some
9 documents to the Department of Justice many, many
10 years later. The key was Mr. Tallis, Mr. Tallis
11 told you what he would have made of that
12 information, a competent lawyer like he would
13 have shredded the Crown's case with that
14 disclosure. It's quite clear.

15 And throughout this inquiry
16 we have, on Mr. Caldwell's behalf, constant
17 complaining about his reputation, about the fact
18 that he actually did give Wilson's statement to
19 Mr. Tallis or that he gave disclosure later to
20 whoever may have asked, but the fact is the
21 crucial disclosure which I just itemized and
22 which is in our brief was not given to
23 Mr. Tallis. There's no debate it's relevant,
24 there's no debate it's probative, there's no
25 debate it's crucial. Was Mr. Caldwell trying to

1 convict an innocent man? Absolutely not. He
2 believed he had the right person, there's no
3 question. It has never been suggested that
4 anybody was trying to frame an innocent person,
5 it's they went on a tunnel and they went down
6 that tunnel and did not deviate from going down
7 that tunnel, and that is exemplified when one
8 looks at the letters to the Parole Board which
9 highlight a history that David didn't have and
10 give Nichol John's story as if it was gospel and
11 presented in the court.

12 Then you have the misleading
13 of the Miller family, which I'm not emphasizing
14 that as a point, but how it shows his frame of
15 mind and that it's a difficult combination when
16 you have an ego that's proud of his case and you
17 are going down a tunnel, it's an ego trip down a
18 tunnel is really what it is and that's the fact
19 of it. It doesn't make him a bad man, it makes
20 him a man who was wrong in what he did.

21 Regarding Detective Karst, he
22 should have known there was a real problem in the
23 case when Wilson changed his story or embellished
24 his story, whatever the word is, to dovetail with
25 Nichol John. I won't go through that, I'm

1 confident you know what I'm talking about, and
2 when he arrested Fisher he had to have understood
3 he was arresting the original suspect and later
4 on it's impossible to forget when you are
5 interviewed by the media that you had arrested
6 one of the worst villains in Saskatchewan
7 history. He should have conveyed that
8 information to his superiors in detail that this
9 is the man who was suspected in the Milgaard case
10 and that wasn't done.

11 I must say, to his credit, he
12 has always been willing to have the matter
13 re-opened and, unlike many others, he was willing
14 to have it looked at, and throughout this hearing
15 it's clear that he regrets what happened to David
16 Milgaard and that is appreciated from him.

17 Regarding Mr. Kujawa, no
18 doubt he had both files. His handling of Fisher
19 was extremely questionable, not a day in jail for
20 these horrific crimes. He says in a memo that
21 the statements may not have been voluntary.
22 There's not a hint anywhere as to why they would
23 not be voluntary. Detective Karst hardly
24 questioned the man and got answers. There's two
25 statements from Fisher and surely if you think

1 something is not voluntary, it's a prosecutor's
2 duty to inform the police as to why you come to
3 that conclusion; that is, so they won't do it
4 again, whatever it might be. Keeping further in
5 mind that back in those days you almost had to
6 have a video of the police harming somebody to
7 get a statement excluded. The test was easily
8 applied, so few statements were excluded back
9 then. You didn't have to give the right to
10 counsel. So without a documentary record and
11 Detective Karst's evidence, it's pretty hard to
12 understand why you would declare this was a not
13 voluntary confession, but with Mr. Kujawa, it is
14 disappointing that the pride seems to be taken in
15 not reading police reports and in fact at the end
16 he was hard pressed to even accept DNA or
17 scientific evidence and throughout the years he
18 would resort not to answers to these questions,
19 but to name calling. David is a kook, the
20 lawyers are prostitutes, that is the type of name
21 calling, as opposed to explaining the course of
22 conduct, and the most significant of all, a lack
23 of understanding of similar act evidence, so that
24 it's very conceivable that he understood the
25 connection but misunderstood the law, that in

1 terms of the similar act, he doesn't appear to
2 understand it today, and we had him on tape
3 calling the Supreme Court silly for their
4 understanding of the law.

5 Now, in the brief he
6 criticizes Mr. Asper for not having been
7 experienced when he undertook this case, keeping
8 in mind that in virtually every one of these
9 cases young people carry the ball given they seem
10 to have the enthusiasm, the energy and perhaps
11 the less billable time, but having said that, Mr.
12 Asper understood the law, Mr. Kujawa didn't, and
13 Mr. Asper was on the right track, Mr. Kujawa
14 wasn't.

15 I turn then to the Department
16 of Justice. One requires fresh evidence
17 basically to get them moving. It has to be new,
18 a bombshell, whatever one wants to call it.
19 There has been talk that the application was
20 piecemeal, keeping in mind that the crucial
21 evidence, that is, Wilson's recantation and
22 Fisher's disclosure, came after the application
23 was made. It had to come later. It wasn't known
24 at the time. The only thing piecemeal is that
25 you can't re-argue the case, you can't argue that

1 Wilson and John weren't telling the truth without
2 having something to say to prove it, and if you
3 fall into the trap of arguing it, you are met
4 with you are re-arguing the case, the jury heard
5 it. It's not a piecemeal approach, it's a
6 considered approach by many counsel that you have
7 to put in the new evidence and then, then the
8 other will be looked at, but if you initiate
9 looking at the older evidence, you are going to
10 be turned down even quicker. It's clear that Mr.
11 Williams' approach was being exceptionally
12 critical of what was being put in and accepting
13 of what was there and upholding the conviction.

14 The Department of Justice is
15 a frustrating body. I think it can be shown here
16 how frustrating they are. They have every memo
17 that David wrote or Joyce talked to or whatever,
18 they are all disclosed, and they won't disclose.
19 They want to be cleared of anything and not
20 judged. They don't want to provide anything.
21 What we have we got by accident. What is the big
22 secret of what one publicly-funded lawyer tells
23 another publicly-funded lawyer in the Department
24 of Justice? What's there to hide? How did Kim
25 Campbell decide that Nichol John had testified at

1 a preliminary hearing to what she saw, a murder,
2 where did it come from? What memos did they have
3 in there? What did Justice McIntyre have? We
4 don't have it. If they frustrate you here, you
5 can imagine, if they are prepared to frustrate
6 this Commission, what they would do to an
7 applicant, and that is the problem, and what they
8 are in government is masters of spin. They come
9 before you here to suggest that the system
10 worked, that somehow it got to the Supreme Court
11 because they considered it and sent it there.

12 Well, on that point,
13 Mr. Commissioner, you need only look at the memo
14 that Doug Rutherford wrote, which is document
15 010010, and I know you are familiar with it, that
16 memo in plain English says the only reason it's
17 going to the Supreme Court is because the public
18 is misinformed by the media and we have to set it
19 straight. That's the only reason. Mr. Williams,
20 even with that reason, did not want it to go to
21 the Supreme Court, he wanted it finished. The
22 memo says madam minister, you are right, but
23 those people in the media have fired up the
24 public and we have to show them that David is
25 guilty. That's what that memo says. To now say

1 that the system worked is ridiculous.

2 And I suppose much can be
3 realized about how they approached this case,
4 that Mr. Williams still thinks Nichol John saw
5 something, even today he's of that mindset, and
6 in fact that whole investigation, if their main
7 goal was to revive Nichol John's memory, not a
8 critical look at the Mackie summary or what
9 happened there, all focused on reviving her
10 memory.

11 I turn then to the RCMP
12 briefly. It's our position that Officer Pearson
13 did a good job. He worked hard, he was on the
14 right track and he appears to be, in his own
15 mind, heading for Fisher. After 1992 the
16 authorities had everything imaginable, they had
17 the Supreme Court record, they had everything but
18 the DNA, and along came Mr. Breckenridge who was
19 one of the ways of getting this matter re-opened.
20 Imagine the frustration, David is in limbo, the
21 highest officials are saying he is guilty, the
22 real killer is out there, and the Milgaard forces
23 were very clear in saying there's the man who did
24 it, there was no maybe yes, maybe no, it was
25 absolutely clear, and Breckenridge was much like

1 step of the way. Mr. Kujawa, at some point,
2 said -- I don't intend to quote him exactly --
3 but 'the system is more important than the
4 individual'.

5 With respect, Mr.
6 Commissioner, I would suggest that you can only
7 judge the system by how it treats the individual,
8 and that for the system to work, no matter how
9 good the system is, everyone must do their job
10 properly. Tunnel vision, indifference, and blind
11 loyalty to the system are recipes for disaster.
12 It was the work of amateurs, accepted by the
13 public, who were informed by a vigilant media,
14 that freed an innocent man and convicted a guilty
15 one.

16 Historically, sir, there have
17 been a number of inquiries. There's been the
18 *Marshall* wherein one of the judges, Justice
19 *Evans*, is currently the Honorary President, I
20 believe, at AIDWYC, there was *Morin*, there was
21 *Sophonow*, *Parsons*. Of note, in *Sophonow* and
22 *Parsons*, the two judges actually sat on the
23 *Milgaard* reference.

24 You'll note also, in case
25 law, that the Supreme Court has referred to the

1 *Milgaard* case. In redefining reasonable doubt
2 they referred to *David Milgaard*. In talking
3 about capital punishment in the realm of
4 extradition they referred to *David Milgaard* as to
5 one of the reasons for their decision.

6 These inquiries before you,
7 sir, have developed, educated, and caused change
8 in the system to some degree. Each one is built
9 on the other. And I submit, sir, that you are in
10 the position, now, where the ball has been handed
11 to you by your fellow jurists to carry on the
12 work that they have started and to go forward
13 with what they have done.

14 And, as was promised to David
15 *Milgaard*, hopefully, sir -- and we believe you
16 will -- tell him, advise him how this happened,
17 and that it should never happen to anybody else.

18 I thank you.

19 COMMISSIONER MacCALLUM: Thank you, Mr.
20 Wolch.

21 **BY MS. McLEAN**

22 MS. McLEAN: Good morning, Mr.
23 Commissioner.

24 On behalf of Joyce *Milgaard*,
25 I have to say at the outset that we certainly

1 agree with the submissions of Mr. Wolch, and I'll
2 try not to repeat on them.

3 Mrs. Milgaard's perspective
4 comes at it from a systemic viewpoint and, also,
5 as a founding director of the Association in
6 Defence of the Wrongly Convicted, and my
7 submissions today will, I hope, just touch on the
8 systemic needs for change here, and what happened
9 with David.

10 In 1969, when her son was
11 arrested, she believed in the system, she
12 believed that justice would prevail, that courts
13 are there to try the case, to release the
14 innocent and convict the guilty. 1970, with her
15 son in jail, she still believed it and the appeal
16 failed. 1971, she still believed it, and the
17 Supreme Court of Canada failed to release her
18 son. 1977 David was eligible for parole and by
19 1980 he had still not been given it. It's her
20 position that by 1980 it had proven to be a
21 mistaken belief in the system, that it would
22 correct miscarriages of justice, subsequent
23 events have borne that out.

24 In my submission, David was
25 convicted because the system allowed authorities

1 to take an easy route all along. It starts in
2 May of 1969, there is a frustrated investigation,
3 there is a horrific unsolved crime, and that is
4 exactly the situation that is ripe for wrongful
5 conviction. We have seen that time and time and
6 time again.

7 It's a laudable desire to
8 solve a horrific crime and I can understand, we
9 can all understand, the pressure that must be on
10 investigators, whether external or internal. But
11 it is much better to have an unsolved crime than
12 a wrongful conviction.

13 The easy route in May 1969
14 was to create what is known now as the Mackie
15 summary, a document that distorts the evidence,
16 targets one person, eliminates all reference to
17 anything exculpatory.

18 The conduct with Ron Wilson
19 and Nichol John by the police, certainly by
20 Roberts, perhaps by others -- and, again, it's an
21 absence of a record that allows us to say what
22 happened -- but they clearly, clearly lied. And
23 that is demonstrable, now, with the DNA evidence,
24 it was always obvious by virtue of the content of
25 those statements in May.

1 Now if you present a group of
2 senior investigators, senior officers, people
3 that are not thoroughly versed in all the
4 intricacies of the case, if you present that
5 group of officers with a document that falsifies
6 evidence, omits the exculpatory evidence, targets
7 one person, it's the easy route to decide who's
8 the best target. And it's easier for prosecutors
9 to accept the police theory than it is to
10 question it, and that's something that really
11 needs to change.

12 The problems with the Crown
13 case were legion in 1969, 1970, and every year
14 after that, until 1992 when David got out of
15 jail.

16 By contrast, the easy way to
17 conviction creates an almost insurmountable route
18 for the wrongly convicted, and for those that are
19 trying to help them. There is nothing easy about
20 trying to undo the conviction. You can't get a
21 fresh look at the case. "The jury heard that
22 argument". But if you think for a moment that
23 the person might be innocent, then the jury got
24 it wrong, so why is there a need to rely on only
25 fresh evidence? The jury heard the argument and

1 very likely got it wrong, and in this case we
2 know they did.

3 Then we have the burden on an
4 untrained accused, fam -- or I should say
5 convicted, not accused -- who is sitting in jail,
6 family, friends, supporters. They are supposed
7 to marshall a case that can displace the
8 conviction, and they are supposed to do it with
9 no training, no resources, no assistance, and
10 with no idea of where to look. And that's the
11 situation that Joyce Milgaard found herself in in
12 1980. And to David's everlasting good fortune --
13 sad as it is to have to call this good fortune --
14 his case attracted the interest, the attention,
15 the sympathies of the Canadian public, certain
16 lawyers, members of the media, who were willing
17 to look at the whole case and say "there is
18 something wrong here."

19 Thirdly, people that are
20 trying to undo a wrongful conviction are going up
21 against trained professionals who view their task
22 as testing the adequacy of new information that's
23 presented to them. Now my submission, of course,
24 testing the adequacy of the information is the
25 Court's job, not the Minister of Justice,

1 certainly not her employees. To make matters
2 worse, these people in those positions are
3 allowed, and encouraged in fact, to operate on
4 the assumption or the presumption that the jury
5 got it right, in other words that there is
6 factual guilt by virtue of the conviction. And
7 that is creating a complete catch-22 situation,
8 "please convince me you are not guilty, I've been
9 convinced that you are guilty because the jury
10 found you guilty, and nothing you can say is
11 going to rebut that presumption."

12 The problem persisted, in
13 this case, through the Supreme Court of Canada,
14 it persisted through the RCMP investigation where
15 Inspector Sawatsky has admitted to us that he
16 presumed at the outset of his investigation that
17 David Milgaard was guilty. That is the
18 investigation that led to the conclusion that the
19 Mackie summary was good police work. That had to
20 have been done without any analysis of the
21 document itself. That particular theory or idea
22 carries through to this Inquiry, where people in
23 positions of authority were quite prepared to
24 look at that document and call it good police
25 work, "it's just a summary of the evidence. It's

1 typical that we make a plan, an investigative
2 plan, to see where we're going". And that may
3 very well be, but that investigative plan has got
4 to contain the truth. And that people today are
5 still willing to look at that document and accept
6 it on its face as good police work, and typical
7 of the way a good investigation is run, is very
8 telling and very, very troubling.

9 And we've heard a lot through
10 this Inquiry about DNA, and that we now know
11 David is innocent, but as Mr. Wolch has said, and
12 as we have repeatedly said, David was always
13 innocent. It is symptomatic of a very serious
14 problem when somebody who is factually innocent
15 cannot get to Court.

16 And my concern,
17 Mrs. Milgaard's concern, AIDWYC's concern too, is
18 that DNA cannot be the new bar. David got very
19 lucky that there were vast quantities of DNA
20 evidence available in this case. That may not
21 have been the case. That is not the case in
22 many, many other cases. It requires, usually,
23 there to be a sexual component to the murder to
24 get DNA evidence that will exclude somebody of
25 having been involved in it. What is somebody to

1 do if that evidence is not available? And that's
2 the real need for change here. You should not
3 have to prove, scientifically, you are factually
4 innocent in order to have a Court hearing.

5 And that is the problem,
6 also, with having people in positions of
7 authority with the Department of Justice, trained
8 prosecutors, evaluating your case. Those are the
9 people that required scientific, conclusive
10 evidence of factual innocence before they would
11 accept that he was possibly innocent.

12 And what we have had
13 demonstrated here repeatedly is a real need for
14 an independent investigation of claims of
15 innocence, claims of wrongful conviction. It's
16 the type of thing that AIDWYC does, it's the type
17 of thing that the Criminal Cases Review
18 Commission does. In that regard, Mr. Kyle's
19 evidence was very, very helpful in understanding
20 how David's case would have been looked at if
21 he'd just knocked on the door of the Criminal
22 Cases Review Commission and said "I'm innocent,
23 my friends lied". And the approach that they
24 would have taken is far more consistent with
25 "well what if he is innocent? Okay, if he is

1 killer. The Milgaards should not have had to
2 solve this crime, but worse yet, when they solved
3 it, it didn't do any good, it still wasn't enough
4 to get the case referred to Court. Only the
5 public outcry did that.

6 And the other thing that
7 we've, I think, learned, demonstrated, and made
8 perfectly obvious through this Inquiry and
9 through the evidence that's been heard, is there
10 is a huge need for education within all facets of
11 the justice system as to how wrongful convictions
12 happen, how they can be avoided, the symptomology
13 of the wrongful conviction, and the need to avoid
14 walking down the tunnel, no matter how tempting
15 it may be. The 'professionals' are the ones that
16 need to be trained against tunnel vision. The
17 families of the wrongly convicted do not need to
18 be trained against tunnel vision, they shouldn't
19 be having to investigate it in the first place.

20 We've made a number of
21 recommendations, it's certainly not the volume of
22 the recommendations that we could have made, it
23 was an attempt to be as brief as humanly
24 possible.

25 There's been a lot of

1 evidence heard from various experts in the field,
2 Drs. Rossmo and Boyd, Mr. Pearson, in particular
3 Mr. Kyle, Mr. Brown, a number of people had some
4 very good ideas for what should be done, what can
5 be done. And I would respectfully submit on
6 behalf of the Milgaard family, Joyce in
7 particular, that you give very serious
8 consideration to any recommendation that has been
9 made throughout the hearings and make any
10 recommendations that you see fit to make this
11 system a better one for people that are put in
12 the position of David and his family. Thank you.

13 COMMISSIONER MacCALLUM: Thank you,
14 Ms. McLean.

15 **BY MR. SOROCHAN**

16 MR. SOROCHAN: Mr. Commissioner, my name is
17 Don Sorochan, I'm appearing on behalf of David
18 Asper. I have filed written materials, as you've
19 noted.

20 Mr. Asper's involvement with
21 the *Milgaard* case began in 1986 when he was
22 initially an articling student, and subsequently
23 a lawyer, at Mr. Wolch's firm. He continues to
24 be committed to the issues of the wrongfully
25 convicted. I think he announced, while he was on

1 the witness stand here, that he would be taking a
2 leave of absence from his role as a leader in one
3 of Canada's most -- foremost businesses, the
4 CanWest network and CanWest publications, and he
5 is taking a master's program at the University of
6 Toronto focusing on wrong convictions. So it's
7 clear that that fateful day when he was an
8 articling student and had the boxes of materials
9 put on his desk that led to, ultimately, the
10 Supreme Court of Canada reference, that was a day
11 that remains important to Mr. Asper, and he has
12 devoted a lot of his time and a lot of his
13 energies to matters that concern the wrongfully
14 convicted.

15 When I tell people that I'm
16 the counsel for David Asper at this Inquiry they
17 tell me "well what does he need a lawyer for?"
18 He acted on behalf of Mr. Milgaard, he made
19 representations, he made representations that,
20 along with Mr. Wolch and the others on the team,
21 resulted in the liberation of David Milgaard.
22 During his involvement as counsel -- I suppose
23 this is the answer to the question "why does he
24 need a lawyer" -- his involvement went beyond the
25 strictly legal forums.

1 to who had responsibility for the legal services
2 that would -- that Mr. Milgaard required to press
3 his case. And you heard from Mr. Asper, as well,
4 that he and Mrs. Milgaard and journalists and
5 others played many investigative roles that he
6 would have preferred had been played by trained
7 investigators, and indeed, there's been much
8 criticism here of the people that performed those
9 roles by counsel for police agencies saying,
10 "well you should have left it to the police".
11 But the police agencies were not an option, they
12 weren't available until Sergeant Pearson came
13 into the picture to assist in getting to the
14 ultimate truth that was here all along, and that
15 was that David Milgaard was innocent.

16 So in the performance of his
17 role as counsel, another answer to why he needs a
18 lawyer I guess, is it was his duty to raise
19 issues that touched upon and, possibly directly
20 and substantially, affected others, and those
21 others are basically the bulk of the people in
22 this room. They are here to say that their
23 clients had no, or at least had no -- to limit
24 the involvement of their clients in this train
25 wreck on the railroad of Canadian justice. It

1 wasn't their responsibility, you've heard from
2 many of them, and they, like Mr. Asper, are doing
3 their duty in making those submissions to you.
4 But in responding and defending their clients,
5 they have criticized Mr. Asper for doing his
6 duty, and raising issues that ultimately led to
7 the release of Mr. Milgaard. And we're not quite
8 sure where Mr. Asper should have held back, and
9 if he had held back, whether David Milgaard would
10 still be in prison.

11 In my respectful submission
12 Mr. Asper, in all of his performance of duty as
13 counsel, acted appropriately, and if there were
14 criticisms to be made, it was in accordance with
15 his duty as counsel to make those criticisms.

16 Now that is not to say that
17 in all cases everything that David Asper said was
18 correct at the time. He gave evidence, Mr.
19 Hodson I think told me, or maybe he said it even
20 here in the record, that Mr. Asper was the
21 designated Milgaard witness because Mr. Wolch had
22 managed to find himself a counsel table, and so
23 many of the questions relating to the conduct of
24 the proceedings as they went along fell upon
25 Mr. -- the questioning of Mr. Asper, so he

1 touched upon just about every aspect of the case
2 that was -- because every aspect of the case was
3 at one time argued in the process with the
4 minister and in the subsequent reference.

5 Now what are we to make of
6 all of this, the criticism of police, the
7 criticism of prosecutors, both as -- both in the
8 process that led up to the Supreme Court of
9 Canada reference and, indeed, perhaps even in
10 this Inquiry? In my respectful submission you
11 should put this Inquiry into the context of all
12 the other inquiries that have taken place into
13 wrongful convictions in Canada, and not just in
14 Canada but around the world, because when you do
15 that you take the personalities out of it and
16 you'll see that there are certain recurring
17 themes that take place in these commissions of
18 inquiry. And it's probably easier for us to sit
19 here in Canada and look at what took place in
20 Perth, Australia in the remarkably similar case
21 of Mr. Mallard, a hippie in Perth, Mr. Milgaard a
22 hippie in Saskatoon. Hippies weren't
23 particularly popular in Saskatoon in the day, in
24 the days that we're concerned with here, and,
25 evidently they weren't particularly popular in

1 Perth, Australia when Mr. Mallard found himself
2 to be wrongfully charged with a murder. And when
3 you take yourself away from the immediacy and the
4 personalities that are involved you will see that
5 there are these recurring problems that take
6 place, and they have been identified in other
7 commissions of inquiry, they are the tunnel
8 vision, there is problems with forensics, and
9 sometimes, sometimes there are problems with the
10 way the police conduct themselves in
11 investigations.

12 The case of Mr. Mallard, just
13 to use that as the analogy, involved forensics,
14 it involved a palm print that showed who the true
15 killer is. Here we had semen, here we have
16 possibly blood that pointed to who the true
17 killer was. In both cases the significance of
18 that finger pointing to the true killer were left
19 unnoticed for years and so we can, without
20 blaming anybody here, we can take a look and see
21 what happened in other jurisdictions and, as I
22 say, take the personalities out of it, but look
23 at the principles involved.

24 But what Mr. Asper did in
25 making his submissions was he focused on a number

1 of valid criticisms, on issues of disclosure,
2 some of them are still highlighted in the
3 submissions to you from the Milgaard brief, he
4 focused on issues of forensics, and it has been
5 said that there were criticisms of police, there
6 were criticisms of prosecutors that were
7 unacceptable. I submit to you that in the
8 evidence that you've heard from Mr. Milgaard --
9 sorry, from Mr. Asper as he went forward, there
10 was always a reason for why he made the points
11 that he did at the particular time.

12 Now, I said before that there
13 have been cases internationally where there have
14 been police abuse. In the cases in England
15 relating to the IRA bombings, several of them
16 were found to have been the result of evidence
17 being cooked up by the police. How do you prove
18 that? It's not something you prove like -- like,
19 the innocence is not established as it was here
20 by the DNA test. In that case it was established
21 when police officers who had been responsible, or
22 a police officer felt better of it and came
23 forward and told the truth.

24 Now, I'm not bringing that up
25 to say there was any misconduct of the police

1 here, I'm bringing that up to say that in the
2 context of defence counsel advancing criticisms,
3 they are not in the position where they should
4 believe that everything was regular. There was
5 ample history, ample experience internationally
6 and in Canada that suggests the contrary. It is
7 the duty of counsel to move forward and advance
8 their case on behalf of their clients and in my
9 submissions to you, I responded to some of the
10 positions taken by the parties here that are
11 critical of Mr. Asper.

12 First of all, it seems to me
13 it was the early days where he was accused of
14 being from Manitoba, which seems to be a bad
15 thing, didn't bother me from being from British
16 Columbia. He was accused of being young. If he
17 hadn't been young, he probably wouldn't have had
18 the time or the energy to fight through all of
19 the obstacles that were put in his way to achieve
20 justice for Mr. Milgaard. But being young or
21 being from Manitoba is not neither here nor
22 there, what he did was analyse the case and point
23 out problems that he perceived and made those
24 submissions, and in my submission to you at page
25 341032, I say it's important for this Commission

1 to do no harm to those who honestly undertake to
2 advocate vigorously for those who may be
3 wrongfully convicted. In doing his or her duty,
4 the advocate is bound to challenge powerful
5 societal forces, the police, prosecutors,
6 government and even the judiciary. Nothing
7 should be done by this Commission which might
8 deter advocates from taking on such duties in the
9 future. There are already enough obstacles that
10 the wrongfully convicted face and enough personal
11 and professional sacrifices that advocates who
12 take on such cases make. Criticism of the
13 advocacy with the benefit of 20/20 hindsight
14 should not occur.

15 So as I said, Mr. Asper has
16 acknowledged that he may have been wrong about
17 some things, he may have been flamboyant in his
18 advocacy at times, but no more so than some
19 prosecutors are before a jury. His advocacy was
20 not just done in good faith, but as the case
21 unraveled and more facts became known and other
22 facts became known and, indeed, for example,
23 like, the extent of prosecutorial lack of
24 disclosure, Mr. Asper was actually correct to an
25 extent far beyond what he said at the time, and

1 the examples of disclosure that in our respectful
2 submission should have been made at the time
3 under the standards at the time given what we now
4 know at this inquiry are set forth in Mr. Wolch's
5 submissions on behalf of Mr. Milgaard.

6 It should be noted, as I have
7 submitted in my material, that it has been a long
8 recognition, that advocates are not to be
9 criticized for what they do on behalf of their
10 clients. As long ago as 1883, Master of the
11 Rolls Brett, in *Munster versus Lamb*, said:

12 "A counsel's position is one of the
13 utmost difficulty. It is not to speak
14 of that which he knows, he is not called
15 upon to consider whether the facts with
16 which he is dealing are true or false,
17 what he has to do is argue as best he
18 can."

19 And that is what Mr. Asper did in this case, and
20 in my submissions I outline some further
21 authority for basically that same proposition.

22 In the Law Society of Upper
23 Canada in the *Clark* case, it was said that the
24 lawyer's duty to resolutely advance every
25 argument the lawyer thinks will help the client's

1 case is of fundamental importance to the proper
2 functioning of our judicial system.

3 Now -- and some of the folks
4 here said, their counsel has said that their
5 clients had hurt feelings because they were
6 criticized. I merely point out that the basis
7 and the evidence that supported Mr. Asper's
8 decisions as he was advancing them was stronger
9 than the case they had against David Milgaard and
10 the angst that they suffered by being the comment
11 of an advocate performing his duty was nothing
12 compared to the many years in prison that Mr.
13 Milgaard suffered and they shouldn't get so
14 sensitive about it.

15 As has been said in a case of
16 the Privy Council -- I'm sorry, this is
17 Mr. Justice Cory in the Supreme Court of Canada:

18 "Courts are bound to be the subject of
19 comment and criticism, not all will be
20 sweetly reasoned, but the courts are not
21 fragile flowers that will wither in the
22 hot heat of controversy."

23 So in my submissions, I point out that a lot of
24 the issues about criticism flow from the
25 Breckenridge allegations and Mr. Asper testified

1 that he gave little credence to the Breckenridge
2 allegations. In fact, the evidence shows that he
3 hired an investigator to look into them and
4 before the results of that investigation were
5 known, as I recall the evidence, he was no longer
6 on the team and so the Breckenridge allegations
7 went forward without involvement from Mr. Asper
8 and in my submissions I outline the details of
9 that involvement.

10 He has testified about the
11 challenges facing the wrongfully convicted and
12 those are all set out in the written materials, I
13 won't duplicate them or repeat them here. I have
14 raised one issue in the reply materials and that
15 relates to the forensic issue.

16 I think that this Commission
17 has tried its utmost to get to the bottom of the
18 forensic issue with respect to DNA and that's
19 because the DNA was the technique, the forensic
20 technique that exonerated David Milgaard, but
21 right from early days, as you will recall,
22 Mr. Commissioner, I have raised the issue as to
23 whether less sophisticated techniques of blood
24 mapping might have led to the exoneration earlier
25 and there has been, in my respectful submission,

1 I've talked to Mr. Hodson about this, this
2 inquiry has not spent the same amount of focus on
3 the issue of the serology as to whether either
4 through the blood that was found on the glove or
5 the examination of other seminal stains, there
6 could have been blood mapping done earlier that
7 would have identified the true killer or at least
8 exonerated Mr. Milgaard.

9 I believe that it is still
10 open for this Commission to receive an
11 independent report that may answer that. I don't
12 know what the answer is, I presented some
13 scientific literature to counsel that shows that
14 as early as 1969 there was an article in the
15 literature that suggested that by further dealing
16 with other groups other than the typical
17 classification groups, the blood that we've heard
18 about, that you could narrow down the individual
19 from a stain of blood or other bodily fluids. To
20 what extent that could be done with dried
21 material such as the seminal stain is a matter
22 that I submit we require some further information
23 on and I think that, from my understanding, Mr.
24 Hodson may receive such a report.

25 I urge you, Mr. Commissioner,

1 as I said before, when you write your report I
2 take no issue, nor does Mr. Asper, about
3 correcting things where he was wrong and to that
4 effect, what he said may have touched upon the
5 reputation of others, it's completely appropriate
6 to do so.

7 What I do suggest to you is
8 that there should be no criticism of an advocate
9 doing his duty, because if you do criticize
10 advocates doing their duty you may put an
11 impediment up to others who may have to do that
12 duty in the future and, as you will have heard
13 from all the testimony you heard before you, it
14 was a long road, a hard road, an emotional road
15 that led to David Milgaard's being liberated and
16 no such impediment should be put up.

17 Thank you.

18 COMMISSIONER MacCALLUM: Thank you, Mr.
19 Sorochan.

20 MR. HODSON: Do you want me to address that
21 last point on the blood issue?

22 After receiving Mr.
23 Sorochan's submission, we did follow up with
24 Dr. Butt who had provided us a report and this
25 issue was addressed in the evidence of Elizabeth

1 Charland who was an RCMP analyst and she provided
2 a report that was put into evidence in early
3 October dealing with what the RCMP lab could do
4 or would do and I think her answer was that,
5 basically to the effect that based on RCMP
6 protocol and their lab at the time, no testing
7 could be done or nothing helpful could come from
8 that stain on the glove. I think Mr. Sorochan's
9 point is what about beyond the RCMP lab, so we
10 are making inquiries to see if we can find a
11 serologist who can add further information to
12 address that point and that is in progress. If
13 we get a follow-up report, I'll certainly
14 circulate it to counsel and, where appropriate,
15 parties can make written comments on it. I don't
16 think it's something that requires us to come
17 back, so just for the record, I am in the process
18 of following that one up.

19 COMMISSIONER MacCALLUM: Thank you very
20 much, Mr. Hodson. Who is the next speaker, Mr.
21 Hodson?

22 MR. HODSON: Ms. Knox.

23 COMMISSIONER MacCALLUM: Ms. Knox. At the
24 conclusion of Ms. Knox's remarks we'll take 15
25 minutes.

1 **BY MS. KNOX**

2 MS. KNOX: Mr. Commissioner, for the
3 record, my name is Catherine Knox and I am here
4 with Robert Kennedy as counsel for T.D.R.
5 Caldwell, the trial prosecutor.

6 Mr. Commissioner, the mandate
7 that you were given in this inquiry is perhaps
8 best described as fourfold and in the submissions
9 prepared on behalf of Mr. Caldwell, I attempted
10 to restrict the issues addressed to the conduct
11 of the trial as that was the primary place that
12 the record shows that he played a role and for
13 purposes of these submissions I will make a
14 similar effort to restrict my remarks to his role
15 within that category.

16 There were many allegations
17 made about him over the course of many years that
18 suggested that he had an involvement in the trial
19 process and the continuing maintained conviction
20 of David Milgaard that went beyond what the
21 evidence has shown. He conducted the trial and
22 at the conclusion of the trial the appellate work
23 was taken over as was the usual practice by the
24 office of the Attorney General and handled
25 through that office.

1 Despite suggestions that he
2 had involvement in or knowledge of the criminal
3 activity of Larry Fisher from 1970 forward, our
4 submission is that, and the record, we submit,
5 clearly shows that he did not, he had a
6 peripheral involvement in the sense that he
7 received a telephone call asking for information
8 from his office about this gentleman. There was
9 none. He referred it to the Saskatoon City
10 Police Service and Deputy Chief Corey responded
11 directly to Mr. MacKay in Regina about it and
12 that was the sole and only place where his name
13 appears connected in any way with Larry Fisher.

14 Mr. Commissioner, there have
15 been many times during the preparation for and
16 the course of this inquiry where the steps
17 between what the record showed through the
18 documents that were made available to all of us
19 from various sources by staff in preparation for
20 the inquiry and during the course of the inquiry
21 and what was said previous to the inquiry and
22 during the inquiry about what the evidence was
23 and in some respects there were times when I'm
24 sure others in the room, as did I, did a literal
25 shake of our head because assertions being made

1 were so different from the reality as shown by
2 the record and by the testimony.

3 Mr. Commissioner, this
4 morning when the submissions were started and Mr.
5 Wolch did his opening comments, I, for a moment,
6 did a shake of my head again. He made the
7 statement that it has never been suggested by
8 anyone, or it has never been suggested that
9 anyone was trying to frame an innocent man. I
10 have flashes of the CaseVault database going
11 through my head and the most screaming of the
12 ones that came to mind for me was a press
13 conference done by Jim McCloskey, and I think it
14 was the summer of 1992, and the headlines in the
15 newspapers that followed it were the very
16 language "frame-up" featured prominently in the
17 story that he gave, in the press conference he
18 gave and in the headline, and we have to be
19 mindful that all of the information that he drew
20 or that Centurion Ministries drew to make that
21 assertion and that allegation came through the
22 efforts and sources of Joyce Milgaard, David
23 Asper and others connected to them. It has long
24 been asserted, and many times accused, that Mr.
25 Caldwell was a party to knowingly engaging in

1 framing and convicting a man who was innocent.

2 Mrs. Milgaard in her evidence
3 at points in time retracted on that and said that
4 she believed the trial was fair, but the public
5 media that was called upon to do much of the work
6 of this case was repeatedly given information to
7 suggest that my client had engaged in knowingly
8 framing an innocent man or, alternatively, after
9 he was convicted he came to know that he was
10 innocent and he became complicit in covering it
11 up. Those are the allegations that have dogged
12 this process for many years and to hear it said
13 today that that has never been suggested is, as I
14 said, causing a flashback of many pieces of
15 information in the record that clearly contradict
16 it. Were this inquiry and were this process
17 about finding out what happened, absent the veil
18 of all of the allegations and accusations that
19 have been made against others that have been
20 shown not to be correct, the task that the
21 Attorney General in Saskatchewan assigned to you,
22 I would suggest, would be a far simpler one. The
23 unfortunate reality of the veil and the cloud of
24 allegation, accusation and suspicion that was
25 created over the years against my client and

1 others very much impact on what happened in terms
2 of any efforts to review or to look at or re-open
3 the investigation of David Milgaard I suggest has
4 been put forth in the brief that I and others
5 have filed with you.

6 In his submission, his
7 written submission, it was stated on behalf of
8 Mr. Asper that my client, like others, who have
9 had wrongful allegations made against them, have
10 a right to expect that the record should be
11 corrected. That is followed by the caveat that
12 in your correction of the record as it relates to
13 them and to my client specifically, you should be
14 sure that you level criticism at those who
15 incorrectly stated the record and we take
16 substantial issue with that as we have done in
17 our brief.

18 Mr. Commissioner, nobody
19 could stand in front of you and suggest that the
20 cause and the absolute priority of, number 1,
21 preventing wrongful convictions should be the
22 single focus or the primary focus of this
23 inquiry, and where wrongful convictions have
24 happened, that every effort should be expended to
25 ensure that they are corrected, no one takes

1 issue with those suggestions. That's mother,
2 that's apple pie and it is what we, as a society,
3 want our justice system to represent. We all
4 have a vested duty when we partake in this system
5 as citizens or as professionals who play parts in
6 the criminal justice system to want to know, to
7 want to believe that persons who are convicted of
8 any crime are truly guilty of those crimes. None
9 of us want to believe, none of us should have to
10 believe that there are, in our system, wrongful
11 convictions, but in fact those do happen.

12 The task that you have with
13 respect to the wrongful conviction of David
14 Milgaard is to look at what happened to him and
15 as we suggested in our brief, it is to look at
16 him and what happened to him in the context of
17 the practices and knowledge of 1969. Mr.
18 Caldwell was operating in a criminal justice
19 system in 1969 that is very different from the
20 criminal justice system that we operate in in
21 2006, going shortly into 2007. To judge his
22 conduct, we ask that you judge him by the
23 practices and standards of 1969. We ask that you
24 look at the evidence he gave in this inquiry. We
25 ask that you look at the record that he kept in

1 his file and we ask that you look at his conduct
2 through the course of the trial. He made
3 mistakes, he stood before you or sat before you
4 and acknowledged that he made mistakes. You have
5 to look at the circumstances and the context
6 within which the mistakes were made. What has
7 been done by others in respect to him is to
8 continue to accuse him of doing acts in 1969 and
9 continuing acts post 1969 and David Milgaard's
10 conviction in January of 1970 that I would
11 suggest to you put a characterization and a spin
12 on them that is inaccurate, it's unfair and it is
13 not borne out by the evidence.

14 As an example, in the
15 brief filed on behalf of Mr. Milgaard and Joyce
16 Milgaard, the initial brief, it was said at
17 paragraph 50 that if Mr. Caldwell had expended a
18 fraction of the time that he spent, after David
19 Milgaard's conviction, critically looking at the
20 case against Mr. Milgaard as he did in attempting
21 to maintain his conviction and blowing his own
22 horn, that Mr. Milgaard might have been freed
23 years before. Mr. Commissioner, this is not a
24 fair characterization of what Mr. Caldwell did
25 post the conviction of David Milgaard, it is not

1 a fair characterization of anything that he did
2 in this whole case.

3 Reading the brief and the
4 reply that was filed on behalf of Mr. Milgaard
5 was one of the times when I shook my head many
6 times because assertions made in it and
7 statements made in it are the same kinds of
8 statements that were being made previous to
9 January, 2005 when evidence started being heard
10 in this hearing room and the records started
11 being examined with respect to what existed
12 surrounding the circumstances of this conviction
13 and events post conviction.

14 Mr. Caldwell, I would submit
15 to you, is a man who acted with honour and with
16 integrity throughout the course of this process,
17 but he is a man, and men, as I said, make
18 mistakes. They were mistakes that were made in
19 honest good faith and some of them may have
20 contributed to the wrongful conviction. To have
21 him characterized, however, as somebody who was
22 caught up in blowing his own horn or was seeking
23 some self-aggrandizement and that that led to the
24 continued conviction of David Milgaard is
25 absolutely contradictory to the record.

1 You are familiar with the
2 record, and I will touch on some of the
3 highlights only to illustrate why I make this
4 statement, and why I ask you to consider how
5 unfairly the brief done and comments such as this
6 characterized his conduct and his actions in
7 respect to David Milgaard.

8 After the trial was over Mr.
9 Caldwell maintained a full file in respect to
10 this prosecution. At any point in time, when
11 anyone asked for access to his file or to see the
12 file, he freely gave it to them. He offered it
13 to Gary Young when he was contacted by him in
14 1981, he offered it and gave it to Peter
15 Carlyle-Gordge when he was contacted by him in
16 1983, he offered it to and freely gave it to the
17 CBC when they came looking in 1986-1987. He made
18 a request that the exhibits in respect to the
19 Milgaard trial be kept intact because he didn't
20 want them destroyed.

21 It has been suggested that he
22 was a man acting for self-aggrandizement. What
23 that suggestion does is miss the reality of what
24 his actions speak to. His actions speak to his
25 honesty, they speak to his integrity, they speak

1 to the willingness, the absolute willingness and
2 openness of a man, a professional, to have
3 anybody who wanted to come knocking at his door,
4 to take a complete and absolute look at the work
5 that he did and the work product that he had to
6 do it from.

7 To suggest that
8 self-aggrandizement was his motivation is to
9 ignore that truth, absolute truth, and absolute
10 integrity were the hallmark of the work that he
11 did on behalf of the Crown in 1969-1970. To
12 suggest that self-aggrandizement by him was the
13 cause of there being available the evidence that
14 exonerated David Milgaard, ultimately, and proved
15 him to be factually innocent is to be, as I said,
16 a total mischaracterization of his actions. To
17 suggest that his zeal to maintain a conviction
18 led to the continued incarceration of David
19 Milgaard is equally, I would submit to you,
20 wrong, and not borne out by the record,
21 absolutely not borne out by the record. To
22 suggest that, although he has been vilified and
23 accused of things that were known or should have
24 been known, absolutely known to be wrong, and to
25 say that nobody should be called to account for

1 that, is to be very unfair.

2 One of the illustrations that
3 best exemplify where he was knowingly falsely
4 accused, negligently falsely accused at its very
5 best, is the Ron Wilson statement. It's been
6 suggested in the briefs that, if you looked at
7 the transcript of the cross-examination of Ron
8 Wilson at the preliminary inquiry and trial of
9 David Milgaard, you couldn't be sure that Mr.
10 Caldwell had given his original statement to Mr.
11 Tallis. There were many ways and many places
12 that counsel, before they embarked on that
13 campaign of character assassination of Mr.
14 Caldwell and others, could have been sure that
15 they had the record straight, but none was more
16 simple than to read the transcript of the
17 preliminary inquiry in its entirety. You will
18 recall, and it was an exhibit that I had drawn up
19 and it is a public record at this Inquiry, that
20 in the sentences that preceded the commencement
21 of the examination of Albert Cadrain at the
22 preliminary inquiry Mr. Caldwell made a statement
23 on the record, and the statement that he made on
24 the record was that he had given to Mr. Tallis
25 the two statements of Albert Cadrain, the two

1 statements of Nichol John, and the three
2 statements he referred to March -- May 23rd and
3 May 24th as being combined, to Mr. Tallis.

4 In the story that made the
5 public media and received great play when Mr.
6 Asper and Mr. Watson, Mr. Ken Watson, did a
7 public release to the *Winnipeg Free Press* after
8 the statements of Ron Wilson were sent, Mr. Asper
9 made the statement that he had the transcript of
10 the preliminary inquiry and he had the transcript
11 of the trial, and that that statement had never
12 been disclosed. He did have the transcripts, and
13 included in the transcript was the reference that
14 I just gave to you. He also had, in the
15 materials that Mrs. Milgaard had, the original
16 statement. You'll recall that, in speaking with
17 Ron Wilson in January 1981, she said to him "I
18 have your original statement". She had gotten
19 it, through Gary Young, from Mr. Tallis' file.
20 She even had a copy of the statement in the
21 materials that she provided to her counsel in
22 1986. They had the materials. Mr. Asper, Mr.
23 Wolch and others did not go to Mr. Tallis, they
24 did not go to Mr. Caldwell, they didn't take any
25 of the steps that prudent counsel would and

1 should have taken as part of their
2 representations of David Milgaard. If they had
3 taken that step there was much available to them
4 to show them that he had -- that Mr. Tallis had
5 the statement. But even in the absence of having
6 done basic counsel work, I would suggest, they
7 had available to them all of the information that
8 they needed to be sure that they were accurately
9 stating the record.

10 When they misstated the
11 record and Mrs. Milgaard called them on it the
12 next day, he and the reporter Dan Lett, and said
13 "you're wrong, he had it, look", and she's
14 reading portions of the transcript to them, they
15 continued to let that sit out there for years and
16 years and years uncorrected. They didn't correct
17 it when they went to the Supreme Court of Canada,
18 even, some months later, because there are
19 discussions in the Supreme Court of Canada as to
20 whether the original Ron Wilson statement had
21 been released to Mr. Tallis.

22 That's an example of where
23 things were done that were wrong, and they were
24 known to be wrong, and the consequences for
25 others were those felt by Mr. Caldwell. That's

1 an example of the kind of information that you
2 have before you in the record of this Inquiry,
3 and that's an example of what you have to
4 consider when you are asked, on behalf of Mr.
5 Asper, to be sure that you do not do anything
6 that judges the actions of a man who
7 self-described himself as going to war. He
8 didn't describe himself as an advocate, he
9 described himself as a man who was going to war
10 and who identified the enemies and who, in
11 effect, set out on a campaign to take the enemies
12 down, because anybody who had a view different
13 from his, or different from the interests of
14 David Milgaard, was the enemy. That's not the
15 role of an advocate. That's the role and conduct
16 of a zealot. And zealots cannot cloak themselves
17 in the protection of advocacy and say "my conduct
18 is above comment", I would suggest to you Mr.
19 Commissioner, and that is something for you to
20 address.

21 I would suggest to you that
22 much of the commentary contained in the brief
23 filed on behalf of Mr. Milgaard and on behalf of
24 Mrs. Milgaard, which ignores much of the
25 evidentiary record and much of the evidence

1 before you in terms of the documentary record,
2 continue to be the kind of rhetoric and the kind
3 of characterizations that border into being a --
4 not the work of advocacy but the work of
5 zealotry. And this is a process where zealotry
6 has no place, certainly when it comes out of the
7 mouths of counsel.

8 One of the criticisms made in
9 the submissions of -- or the reply to submissions
10 with respect to the brief filed on Mr. -- on
11 behalf of Mr. Caldwell, is that we stepped back
12 from making or taking the time and expending the
13 resources to make recommendations with respect to
14 the findings that you should make, or the
15 determinations you should make, arising from the
16 Inquiry. And as I was listening to Mr. Sorochan
17 it occurred to me that there is one
18 recommendation that I would, in fact, ask that
19 you consider.

20 He referred to the fact that
21 Mr. Asper was identified as the counsel, or the
22 spokesperson for the Milgaard position with
23 respect to legal issues here, because Mr. Wolch
24 had found counsel table and he wasn't available
25 to be called as a witness. Mr. Commissioner, in

1 looking at the entirety of what happened here, in
2 looking at the circumstances that led to the
3 wrongful conviction, and in particular in looking
4 at the efforts to re-open, I ask that you give
5 some consideration to a recommendation that
6 someone involved in the intimate role as counsel,
7 such as Mr. Wolch was involved in here, perhaps
8 not be in a position, at a public inquiry such as
9 this, where they are counsel, because their
10 resources and their knowledge would best be
11 served being available as a witness to the
12 process to allow for informed information to be
13 received.

14 There was one point during
15 the course of this Inquiry where I recall you
16 cautioned Mr. Wolch that he was coming perilously
17 close to making himself a witness in the
18 proceeding. There were many times when there
19 were discussions, occasionally or on the record I
20 believe but among counsel, where it was felt that
21 the best position would have been as a witness
22 rather than as counsel, and in looking at
23 recommendations to the Attorney General for
24 future, God forbid that they happen, inquiries of
25 this sort where we determine that there have been

1 wrongful convictions, that is a recommendation
2 that I would suggest that you give some
3 consideration to in terms of the conclusions you
4 reach and the advice that you give to the
5 minister in this regard.

6 Those, essentially, Mr.
7 Commissioner, are the comments that I want to
8 make.

9 I, as all of you know, and
10 like most in the room, I can go on at great
11 length about evidentiary issues and differences
12 in what has been submitted in submissions,
13 particularly on behalf of Mr. Milgaard, and
14 through her counsel for Mrs. Milgaard, but the
15 record is before you and you, like all of us,
16 have sat through the testimony, you know the
17 issues well, you know the evidentiary record
18 well, and you have the benefit of experienced
19 counsel to assist you in guiding you through
20 issues that arise.

21 I want to conclude by making
22 one request for purposes of the record, and this
23 would fall under the category of a technical
24 request. When I filed my original brief, at
25 paragraph 79 of the brief I made reference to the

1 evidence of Dr. Markesteyn, and testimony that
2 Corporal Molchanko had given. I characterized it
3 as having occurred at the preliminary inquiry and
4 referenced the pages of which Corporal
5 Molchanko's testimony at the preliminary inquiry
6 were not provided to Dr. Markesteyn, and these
7 were the parts about the finding of the pubic
8 hair samples in the snow, semen samples found in
9 the snow. I realized, after I was rereading my
10 brief for purposes of reply, that I had made a
11 mistake in characterizing the portion of
12 transcript that I showed to Dr. Markesteyn in
13 which he indicated that, had he seen it, he would
14 not have put forth the possibility or the
15 possible theory that there was dog urine found in
16 the snow, and that in fact what I had shown him
17 was a portion of the evidence from a voir dire at
18 the trial.

19 I prepared a corrected
20 version of my paragraph 79 and provided it to
21 Commission Counsel with a request that the brief
22 that is made part of the public database have the
23 corrected page in, inserted with the corrected
24 paragraph 79, and that is the only correction,
25 and I ask leave of you, Mr. Commissioner, to ask

1 Commission's staff to do that, so that a proper,
2 a correctly-stated paragraph 79 forms the public
3 record, rather than a mistaken entry that I had
4 regarding it being a voir dire from the
5 preliminary inquiry.

6 COMMISSIONER MacCALLUM: Very well.

7 MS. KNOX: And that is the conclusion of
8 the submissions I make on behalf of Mr. Caldwell
9 except to thank you and Commission Counsel for
10 the way in which he was treated by the
11 Commission, the very fair and open way that he
12 was dealt with by all the staff, as was I, and
13 for that we express our appreciation.

14 COMMISSIONER MacCALLUM: Thank you,
15 Ms. Knox. 15 minutes.

16 *(Adjourned at 10:40 a.m.)*

17 *(Reconvened at 11:01 a.m.)*

18 COMMISSIONER MacCALLUM: Mr. Wilson?

19 **BY MR. WILSON**

20 MR. WILSON: Mr. Commissioner, my name is
21 Garrett Wilson, and with Jay Watson I represent
22 Serge Kujawa.

23 I'd like to take a moment at
24 the outset, sir, to echo some of the comments
25 made by Ms. Knox about the conduct of this

1 Inquiry. My client and I wish to express our
2 appreciation for the thoroughness and the
3 professionalism and even-handed exhaustive
4 conduct of Mr. Hodson and his co-counsel in
5 ferreting out more than 35 years of history.

6 I wish to go further than
7 that, the physical arrangements and others looked
8 after by Ms. Congram sometimes have been
9 frustrating but always excellent; the steady hand
10 of our reporters here, known to me for many
11 years, as usual; and particularly Sandy Boswell
12 and her staff on that document control system, my
13 first experience with anything of that nature,
14 and it's been outstanding. And all of these
15 people have, without fail, been exceedingly
16 pleasant and helpful.

17 I'd like to say, with respect
18 to that document control system, that I remarked
19 one morning, as I was setting up my computer,
20 that if, when I was in law school years ago,
21 anyone had suggested that I would be engaged in
22 such futuristic tools, I would have retorted that
23 they were reading too much Flash Gordon. Someone
24 piped up "and who was Flash Gordon?" In respect
25 to the questioner, I think he did know who Flash

1 Gordon was.

2 Most of the parties who have
3 come before you, sir, have done their sincere
4 best to assist in the process of ferreting out
5 the truth from those events, many of which took
6 place more than a generation ago. I am going to
7 contend, however, that, with respect to some of
8 the parties before you, there was an obvious
9 effort to vindicate their own conduct in the
10 affair, and of course I speak of the Milgaard
11 group headed by Mr. Wolch.

12 Again, as stated by Ms. Knox,
13 it's been frustrating to listen to allegations of
14 misconduct that are repeated, and repeated, and
15 repeated before this Inquiry began, throughout
16 this Inquiry, and again in the submissions, that
17 are completely contradicted by the evidence that
18 has come before you.

19 I'm going to use just one
20 example, I know you're -- the Commissioner is
21 more familiar with the material here than I, but
22 one example is the allegation that my client, Mr.
23 Kujawa, when handling the Milgaard appeal in the
24 Court of Appeal, was in possession of the entire
25 prosecution file which contained numerous

1 references to the sexual assaults committed by
2 the Saskatoon serial rapist, not then identified
3 by name, although the victims were named.

4 There is not a scintilla of
5 evidence anywhere to support that statement, and
6 there is much evidence to the contrary, that the
7 appeal file that Mr. Kujawa had contained the
8 trial transcript and the notice of appeal and
9 nothing more. He did not have, he did not have
10 the prosecution file, and any part of the police
11 reports, witness statements.

12 In our brief submission to
13 you we pointed out, on that aspect, that in the
14 civil trial the examination for discovery of Mr.
15 Kujawa conducted some ten years ago attempted
16 valiantly to identify that Mr. Kujawa actually
17 did have the prosecution file, and that failed.

18 Averting to the facts seems
19 to be an offence here, because a rebuttal came
20 from the Milgaard files which says that:

21 "Counsel for Mr. Kujawa continues to
22 hurl invective at any available Milgaard
23 target, including civil counsel on
24 discovery on the civil suit filed by
25 David Milgaard."

1 My dictionary says 'invective' is abusive
2 rhetoric. The abusive rhetoric complained of in
3 the examination for discovery of the civil action
4 brought by David Milgaard against Mr. Kujawa et
5 al., a determined effort was made by Milgaard's
6 counsel to establish that the Milgaard appeal
7 file would have included the prosecution file
8 with the police reports of the Fisher offences,
9 without success.

10 Now I'm not sensitive to the
11 criticism of employing abusive rhetoric. I raise
12 that only, sir, as an example of the material
13 coming from the Milgaard group, which I suggest
14 practically destroys the credibility of their
15 entire submission. The allegations that were
16 made against Mr. Kujawa started in the 1990s,
17 long after he had left the Department of Justice
18 and had no contact with the file, and in the
19 shotgun approach that was used by the Milgaard
20 interests in developing the media attention to
21 their situation they would make the most
22 outlandish and outrageous accusations, and they
23 did with respect to my client. Practically all
24 of those have been since debunked, but they don't
25 disappear from the material, they don't disappear

1 from the submissions, they don't disappear from
2 the position, which makes it very difficult for
3 us to proceed as if we had been engaged here for
4 two years in the pursuit of truth, because not
5 all of us were.

6 Among the accusations
7 directed against Mr. Kujawa was that he failed to
8 recognize, when the Fisher file and the Milgaard
9 file were highlighted, that the Fisher evidence
10 might have been used on the Milgaard trial. His
11 initial reaction to that was that that similar
12 fact was not admissible, not an unreasonable
13 position to take because, in that, he was
14 supported by a good deal of prominent legal
15 authority.

16 However, when Mr. Wolch came
17 into possession of the initial letter from
18 Michael Breckenridge in March of 1992, he took
19 the position that that was not admissible in the
20 Supreme Court of Canada, failed to disclose it to
21 the provincial justice, Saskatchewan Justice, or
22 Federal Justice, and preserved it. And of course
23 we know why he preserved it, because it was going
24 to be used for a larger purpose later.

25 A comment this morning by Mr.

1 Wolch, "after 1992 the authorities had
2 everything" -- and that's a complete quote -- I
3 refer in response to that, Mr. Commissioner, to
4 the document 337731 in this Inquiry. It's
5 entitled, it's a document that was prepared by
6 Commission Counsel, and it's entitled *Witnesses*
7 *Contacted & Interviewed by Joyce Milgaard and/or*
8 *Chris O'Brian, Peter Carlyle-Gordge and Paul*
9 *Henderson*, and there is a list of all of them,
10 and it was a four-page list, a five-page list,
11 and it identifies:

12 "Was the Substance of the Interview
13 Disclosed or Produced to Authorities
14 Prior to or During the Supreme Court
15 Reference?",

16 and a list of all of the items, and on the first
17 page, "no, no, no, no, no, no". In fact Mr.
18 Commissioner, as I'm sure you're well aware, this
19 document discloses over 40 items of evidence that
20 had been compiled by the Milgaards that were not
21 disclosed to Saskatchewan Justice, Federal
22 Justice, the Supreme Court of Canada in 19 -- and
23 it happened well after 1992.

24 Serge Kujawa was the director
25 of public prosecutions in 1970 and 1971, he left

1 that position in 1974 and went on up the
2 hierarchy in the Department of Justice, and in
3 November of 1989 he retired. He was induced to
4 enter politics by the then-leader in the NDP
5 opposition in Saskatchewan, Roy Romanow, who had
6 been Attorney General during much of Serge
7 Kujawa's time in the department. Mr. Romanow was
8 running on a law and order platform, I think it
9 was let's open the books and jail the crooks in
10 fact, and he wanted Mr. Kujawa's stature as part
11 of his program and platform and team. Mr. Kujawa
12 would be the first to admit that he was
13 ill-suited for the occupation of politician. He
14 served one term and didn't put himself forward
15 again. It was the position he was in, however,
16 when the allegations came about his conduct
17 during the handling of the Milgaard and Fisher
18 files, and he responded, and as he admitted on
19 the stand here, unfortunately inappropriately,
20 little knowing that he was providing further
21 fodder for the Milgaard interests, who were
22 seeking only media highlights, and Serge Kujawa
23 played somewhat into their hands and wound up
24 with accusations made about a file that he had
25 had no contact with since December of 1971, some

1 20 years earlier; was no longer with the
2 department, was not speaking on behalf of the
3 department, had no responsibility for the
4 position of the department with respect to the
5 files whatsoever, and thus he found himself
6 embroiled in such a way as to be a party here,
7 because he was accused of inappropriate conduct
8 in the position of director of public
9 prosecutions of the Province of Saskatchewan.

10 I'm not going to refer any
11 further to the detail of this Inquiry, Mr.
12 Commissioner. I want to say something
13 personally, though.

14 I'm in my 52nd year as a
15 member of the bar of Saskatchewan. That is not a
16 statistic that I intended to achieve, and it's
17 not one that I intend to extend, but I ask for a
18 craven indulgence this morning.

19 I fully understand the
20 distinction between counsel and witness. With
21 respect, sir, that is not a distinction that has
22 always been rigidly maintained during these
23 proceedings. But I am a contemporary of many of
24 the people whose reputations have been brought
25 into question in this Inquiry, not only Mr.

1 Kujawa and Mr. Caldwell, to whom -- whom I
2 introduced to the business of prosecution, Mr.
3 Tallis, Mr. Justice Lysyk. I know and knew these
4 men and I know and represent to you this morning,
5 sir, that they hold to values of a caliber
6 somewhat distinct from some of those that have
7 been exposed before you in this Inquiry.

8 That they could be accused of
9 taking cheap advantage of anyone is bad enough;
10 that they could be accused of deliberate
11 deception in the conduct of their
12 responsibilities as member of the justice system
13 of Saskatchewan is horrendous, monstrous.

14 Most of them came from a
15 rural background, Mr. Justice Tallis from a farm
16 at Borden, Mr. Justice Lysyk from a little
17 community called Khedive that just about doesn't
18 exist any more, Mr. Kujawa and his immigrant
19 family arrived on a bush farm in St. Walburg in
20 1929 just in time to experience the great
21 depression. Like Mr. Justice Tallis, he first
22 taught school in a one-room school. They were
23 tempered, in their early years, by adversity of a
24 sort that is not known today, and they did, as I
25 said, adhere to a set of values that I hope is

1 not less known today. Their conduct was
2 honourable throughout.

3 In the case of Mr. Kujawa, I
4 would like to say only this; that many years ago,
5 when he was director of public prosecutions, he
6 and I were involved -- and I was the defence
7 counsel -- he and I were involved in a couple of
8 cases of great sensitivity, there was much
9 pressure on both of us, and the slightest
10 relaxation of Mr. Kujawa's principles would have
11 relieved much of that pressure. That was
12 unquestionable, no question, none of that. His
13 adherence to his integrity and his principles
14 were absolute. And I ask you, today, only to
15 remove from his honour the blot that was so
16 inappropriately and wrongfully applied to it.
17 Thank you.

18 COMMISSIONER MacCALLUM: Thank you, Mr.
19 Wilson.

20 Who is next, please?

21 **BY MR. FOX**

22 MR. FOX: Morning, Mr. Commissioner. I'm
23 Aaron Fox appearing on behalf of Eddie Karst.
24 I'll try and keep my comments brief.

25 I mentioned in the written

1 submission that we had filed in this matter the
2 difficult task you face in sort of moving
3 yourself back to 1969 and 1970 and trying to get
4 a clear picture of the judicial system as it
5 existed then, police investigative procedures as
6 it existed then, the relationship that went on
7 between all of the different parties and
8 witnesses that we've heard here, and it is --
9 it's a time, when we think back, certainly DNA
10 was things of science fiction at that point in
11 time, fax machines didn't exist at that time,
12 Emails didn't exist.

13 We were, I think early in
14 this Inquiry, we were talking about whether we
15 could remember if Xerox machines existed then,
16 and I think we decided they probably did, we were
17 just getting there. But the way we can move
18 around information and assemble information today
19 is just so dramatically different from what
20 existed at that time, and I think you have to
21 keep that in mind to some extent when we talk
22 about who knew what, and whether or not that
23 information was readily moved around.

24 I think Ms. Knox in her brief
25 talked about were we aware of things like serial

1 rapists, that's probably a term that I don't
2 think existed in 1969, I think I would agree with
3 her when she suggested that, and again certainly
4 in 1969 the existence of Larry Fisher or someone
5 who was considered a serial rapist when we look
6 at the media reports and so on that existed,
7 frankly, that wasn't in the public's mind.
8 Justice Tallis, a very experienced criminal
9 defence lawyer and active member in the community
10 who made inquiries in 1969 and '70 as he was
11 defending David Milgaard just didn't come across
12 that and I think we have to keep that in mind.

13 And I think as well we have
14 to keep in mind our attitude towards jury
15 verdicts. We've seen now so many examples,
16 not -- and when I say so many, that sounds like
17 it happens every day, but we've seen examples
18 where cases where we thought were iron-clad, both
19 the United States and Canada, where clearly the
20 person convicted was appropriately convicted, was
21 guilty of the offence, we've discovered that for
22 various reasons, and primarily now because of DNA
23 evidence, that that wasn't the case. That wasn't
24 the thought process that was very active, I
25 submit, in 1969, '70. I think the evidence would

1 I want to comment just
2 briefly a little bit about Mr. Karst's role in
3 these proceedings, or sorry, in the investigation
4 of the Gail Miller murder. I comment in my brief
5 about the fact that he's been referred to at
6 various times as the lead investigator and that
7 is, with the greatest respect, a clear misnomer.
8 Gail Miller was murdered on January 31st, 1969.
9 Mr. Karst had virtually no involvement in the
10 investigation until Albert Cadrain wandered into
11 the Saskatoon police station on March 2nd, 1969,
12 almost a month later. Certainly if he was viewed
13 as a good investigator, and it seems as though he
14 was, nobody thought it was important that this
15 good investigator be brought into the
16 investigation of the death of Gail Miller,
17 admittedly an horrendous offence that had
18 occurred, and it's almost somewhat fortuitous
19 that he became involved. He wandered in, spoke
20 to the local staff sergeant who referred him to
21 Lieutenant Short according to report, conducted a
22 short questioning of Mr. Cadrain, and then simply
23 directed that Eddie Karst take a statement from
24 him which he did and that began Mr. Karst's
25 involvement on the file.

1 His role is discussed in the
2 brief and I won't go into it, but we see in terms
3 of the pecking order of the sort of hierarchy of
4 the Saskatoon Police Service, he was considerably
5 down the list, both in terms of rank and
6 seniority. Was he a good investigator? We've
7 heard repeatedly that he was, but certainly he
8 wasn't the officer in charge, he wasn't the lead
9 investigator and he wasn't the officer calling
10 the shots so to speak.

11 The comment was made by My
12 Learned Friend Mr. Wolch this morning that
13 Detective Karst should have known of the real
14 problems with the case as a result of his
15 investigation and, with the greatest respect, I
16 think if you read his reports, and the three
17 primary reports that he filed, the March report
18 and the April 18th report and the May 25th
19 report, he was aware of the problems, he set out
20 a number of those problems in his report: The
21 fact that Ron Wilson was saying there was no
22 blood and now is saying that he did see blood;
23 the fact that Nichol John appeared to be a
24 credible witness and said that David Milgaard
25 simply wasn't gone for a long enough period of

1 time; the concerns he had with some of the
2 statements Albert Cadrain had made, he saw those
3 concerns. He put them in his report and for
4 anyone who is going to look at this file in terms
5 of deciding where the investigation should go or
6 should there be a charge laid, those were laid
7 out in that report. There isn't much more he can
8 do than that. Somebody above him will make a
9 decision what should be done with it.

10 The rapist theory in terms of
11 whether or not the perpetrator of the murder of
12 Gail Miller was also the person who had committed
13 two rapes and an indecent assault previously was
14 examined by the Saskatoon Police Service, but by
15 March 2nd, 1969, by the time Eddie Karst became
16 involved, that theory didn't appear to be going
17 anywhere, and certainly at no point in time does
18 it appear as though he was tasked to become
19 actively involved with it.

20 David Milgaard was charged
21 because of the statements that were given and the
22 eventual testimony that was given by Albert
23 Cadrain, Ron Wilson, Nichol John and a number of
24 other circumstantial coincidences, if I might
25 suggest, that pointed to the possibility that

1 David Milgaard had perpetrated this offence. He
2 was convicted at trial because of the evidence
3 and the testimony of Albert Cadrain, Ron Wilson
4 and Nichol John and then the evidence of Lapchuk
5 and Melnyk which showed up to some extent at the
6 last minute.

7 Were the problems obvious
8 with the statements as were described by Mr.
9 Wolch? Yeah, I think there were a number of
10 obvious problems, but those obvious problems all
11 were there when this matter went before the jury,
12 and again, as a police officer, they are laid out
13 there, somebody adjudicating the matter in terms
14 of deciding if there should be a prosecution,
15 somebody adjudicating the matter in terms of
16 whether there should be a conviction will look at
17 those problems and decide whether or not that
18 supports a conviction.

19 Had those people recanted at
20 this point in time? Albert Cadrain has said many
21 things after the trial, but he never ever
22 recanted any -- his claim that he saw blood on
23 David Milgaard. Nichol John has never moved from
24 the position that she took at the trial. Even
25 here before the inquiry, although she can't say

1 what she saw that day, if anything, she still
2 seems to be of the view that she saw something.
3 I'm not suggesting it has anything to do with
4 David Milgaard, but has she recanted? No.

5 The evidence of Ron Wilson,
6 by his own admission a self-confessed liar, the
7 Supreme Court testimony shows how he moved from
8 one position to the other depending on what he
9 thought should be said. David Milgaard's letters
10 to his counsel and to his friend Mr. Shannon who
11 was helping him describes what he thought of Ron
12 Wilson and how easily he could be bought or his
13 evidence changed or swayed. I was struck at the
14 inquiry by Mr. Pringle's cross-examination of Ron
15 Wilson where he brought out the subtleties that
16 appeared in Mr. Wilson's statements that
17 suggested it wasn't just a planted "yes, I saw
18 him do it," but subtleties about little facts and
19 details he, by his own admission, gratuitously
20 threw in there, all of which suggested that he
21 was credible and would have had an impression
22 before the jury as well. Do those problems fall
23 in the lap of Eddie Karst? No, with the greatest
24 respect, they do not. He identified the problems
25 with Mr. Wilson's testimony, but there's nothing

1 more beyond that that he could do.

2 After the trial the matter
3 was closed, in his mind it was closed. That
4 doesn't mean that if something came up that was
5 abundantly obvious that was there that suggested
6 someone else was involved he would ignore it, but
7 in his mind he wasn't looking for anybody else to
8 be involved in the murder of Gail Miller. In his
9 mind that had been determined.

10 Larry Fisher was referred to
11 here as, this morning as the worst villain in
12 Saskatchewan history. Larry Fisher committed
13 some horrendous offences, there is no doubt about
14 it, and in looking back on it, I'm not sure how
15 many people we have in Saskatchewan history that
16 committed worse offences in terms of a series of
17 offences, but in 1969 and 1970 it doesn't appear
18 to be the situation that that was recognized by
19 the public or otherwise. From Detective Karst's
20 perspective, Larry Fisher was a rapist. The
21 person who was responsible for the death of Gail
22 Miller was a murderer and he, rightly or wrongly,
23 didn't associate the two.

24 Detective Karst was sent to
25 Winnipeg, paragraph 47 of My Learned Friend Mr.

1 Inspector Wood, all of those superior officers
2 were well aware of the theory. In fact, they
3 were aware of the theory far more than Eddie
4 Karst was, they were the ones that were involved
5 in investigating it at the outset. Inspector
6 Nordstrom, head of morality, was involved in
7 gathering the Fisher statements, Deputy Chief
8 Corey was involved in putting together the
9 information about those offences. The superiors
10 had all of the information and certainly were
11 well aware that Larry Fisher was confessing to
12 these offences. I'm not sure what more you would
13 expect Inspector Karst to do at that point, or
14 Detective Karst to do at that point in time.

15 At the end of the day it
16 appeared as though there were four possible
17 suggestions of wrongdoing by Detective Karst made
18 over the years and a number of them I appreciate
19 that, I'm glad to see have been abandoned. One
20 was perhaps a suggestion that Detective Karst
21 allowed an innocent man to be knowingly convicted
22 of an offence and that suggestion appears to have
23 been abandoned and I'm appreciative of that.

24 The second suggestion was
25 that at the time of the investigation he

1 developed tunnel vision as regards the
2 involvement of David Milgaard and ignored the
3 involvement of others. Really, My Lord,
4 Mr. Commissioner, you are going to have to decide
5 whether that was the case. There's no question
6 that at least in terms of the investigation and
7 the portion of the investigation that he was
8 tasked with, it primarily focused on David
9 Milgaard, but to suggest or to say, well, you
10 should have determined that the rapist must have
11 committed this offence ignored the fact that
12 Albert Cadrain came in and said David Milgaard
13 had blood on himself. He was present, he had an
14 opportunity to commit the offence and the other
15 corroborating evidence that went with that, that
16 still had to be sorted out, and you'll see in
17 Detective Karst's reports a number of times where
18 he has said we have to go back and speak to
19 Cadrain, we have to go back and speak to other
20 people to get these issues sorted out. He
21 recognized the inconsistencies that were there,
22 but they didn't go away just because you said
23 that the rapist must have committed the offence.

24 I'm not sure if there was a
25 direct suggestion that he knew Larry Fisher

1 killed Gail Miller, I think that's been accepted,
2 that that was not the case, but the suggestion is
3 made that he should have seen the possible
4 connection. First of all, on the issue of
5 whether or not he would have known or even
6 thought about it and was trying to cover up the
7 fact that Larry Fisher may have been involved,
8 with the greatest respect his conduct throughout
9 in terms of one co-operating and speaking to
10 anyone, press or otherwise, about the matter, and
11 his acknowledgement throughout that he was quite
12 prepared to have the file reviewed or an inquiry
13 or whatever do not support that contention. My
14 Learned Friend in his brief indicated at
15 paragraph 43, the reply brief, no one was
16 interested in re-opening his case even after the
17 Supreme Court decision.

18 With respect, if you look at
19 the interviews, and I quoted at length the
20 interview with Dan Lett of Eddie Karst in our
21 submission, in 1991, prior to any DNA evidence,
22 prior to anything going to the Supreme Court, he
23 made it clear that he had no objection to an
24 inquiry and he thought there would be some
25 benefit in bringing these people together who now

1 appeared to be changing their stories, sitting
2 them down and finding out exactly what they do
3 have to say. If they've changed their story, why
4 is that, and if they didn't tell the truth, why
5 didn't they tell the truth, and it's ironic
6 because that was his position in 1991 and it's
7 the very task, Mr. Commissioner, that you've been
8 asked to deal with here in this particular
9 inquiry.

10 I appreciate My Learned
11 Friend's comments this morning that, and his
12 acknowledgement that Detective Karst did
13 co-operate throughout in terms of dealing with
14 anyone or speaking to anyone, and again I think
15 that suggests that clearly is someone with
16 nothing to hide.

17 Should have he made the
18 possible connection? He didn't. Simply, he
19 didn't. When we refer to the statement that
20 Joyce Milgaard made, Mrs. Milgaard made to
21 Inspector Sawatsky that she similarly didn't make
22 the connection in 1983 when they stumbled across
23 Mr. Fisher, and they did, they had the
24 information about Mr. Fisher. Mr. Merchant's
25 letter, which is referred to in our brief which

1 was sent to Empire Skip Tracing refers to Larry
2 Fisher residing at the Cadrain residence in the
3 basement and presently being incarcerated on rape
4 charges, all of that information was there. Our
5 purpose in raising that isn't to suggest that
6 Joyce Milgaard and the people working for her
7 should have made the connection, that's not it at
8 all. I very much appreciate the comments that
9 were made by counsel for Mrs. Milgaard about they
10 were amateurs, this was a mother who was trying
11 to find whatever she could that would help
12 establish the innocence of her son which she
13 always believed in. Very, very difficult to
14 criticize someone working hard on that particular
15 task. We're not suggesting that she had the
16 expertise or the knowledge that she should have
17 automatically made the connection, but at a
18 period in time when she firmly believed her son
19 hadn't committed the offence and therefore
20 someone else had committed it, she had the
21 information about Larry Fisher and they didn't
22 make the connection, and our point simply is that
23 it illustrates that what looks now and is
24 suggested now to be such an obvious connection
25 wasn't always that way and certainly wasn't that

1 way for Detective Karst in 1970.

2 The two final comments I want
3 to make in my submissions, Mr. Commissioner, is
4 one, at the end of Detective Karst's testimony he
5 was asked by Mr. Lockyer if he regretted what had
6 taken place and his involvement in the conviction
7 of David Milgaard and he indicated very clearly
8 that he did and we repeat that today.

9 He was asked if he would
10 apologize and indicated no, he didn't think he
11 had done anything wrong, and the point simply is
12 should have he observed something more, should
13 have he seen the frailties more clearly, should
14 have he seen the possibility of a link of Larry
15 Fisher. As he indicated in his testimony, "maybe
16 I should have, and maybe if there was an
17 overseer," if you recall his suggestion when
18 asked if there was any recommendations, if there
19 was some independent third party who could look
20 at a case, especially a case that's built largely
21 an circumstantial evidence, maybe that would be a
22 solution to try and deal with that problem. He
23 acknowledged the difficulties that arose with
24 that and for that he regrets what took place and
25 he certainly regrets the suffering that David

1 Milgaard and his family went through as a result
2 of his conviction, but he didn't intentionally do
3 anything wrong. Throughout he fulfilled his
4 duties as best as he thought he could and for
5 that there is nothing to apologize for. The
6 regret and the possibility that he should have
7 connected something that he didn't connect, there
8 is an apology for that. The suggestion that he
9 intentionally did something wrong, you can't
10 apologize for something you didn't do.

11 I conclude, Mr. Commissioner,
12 just on behalf of Eddie Karst, Chris Boychuk, who
13 has a spectator's seat at our table today, I
14 wanted to thank the Commission Counsel for their
15 assistance throughout and the excellent work they
16 did. Commission staff, many of whom aren't here
17 today and some who are, but just for their
18 co-operation and patience in dealing with us
19 throughout. Counsel for all the parties who have
20 been courteous throughout dealing with, at times,
21 a very difficult issue and thank you to you,
22 Mr. Commissioner, as well for your patience in
23 dealing with all of us throughout this lengthy
24 inquiry. Thank you.

25 COMMISSIONER MacCALLUM: Thank you,

1 Mr. Fox. Mr. Pringle? Following Mr. Pringle's
2 remarks we will take a one hour lunch break.

3 **BY MR. PRINGLE**

4 MR. PRINGLE: Mr. Commissioner, I am Alex
5 Pringle, I represent Calvin Tallis.

6 Mr. Commissioner, the defence
7 that Mr. Tallis provided David Milgaard was put
8 under a microscope at this inquiry. Mr. Tallis
9 testified during eight days of this inquiry and
10 provided a detailed and comprehensive explanation
11 of his efforts as trial counsel on behalf of
12 David Milgaard. After he provided this account,
13 he was not really challenged in cross-examination
14 and I've looked through the written briefs, there
15 is really no criticism of his efforts at trial in
16 the written briefs. It appears that the evidence
17 that he provided has certainly cleared the air
18 with respect to his efforts for David Milgaard
19 and I submit that certainly after you hear that
20 evidence, you can conclude quite easily that he
21 provided a thorough, subtle and tactically sound
22 defence of David Milgaard in the face of many
23 unusual obstacles. Whatever went wrong with this
24 trial cannot be attributed in any way to
25 Mr. Tallis.

1 It was interesting to go back
2 and look at this trial and I think it was quite
3 illuminating to see first of all the
4 correspondence that occurred between Mr. Tallis
5 and Mr. Caldwell. Mr. Tallis' requests for
6 disclosure, having practiced almost as far back
7 as the time of this trial, started practicing
8 criminal law in 1973, I can tell you that that
9 second letter from Mr. Tallis was ahead of its
10 time. Counsel were not citing English law
11 requesting such full disclosure in their letters
12 to Crown counsel in those days for the most part,
13 Mr. Tallis was certainly pushing the envelope
14 with respect to that request, so there certainly
15 can't be any fault attributed to him in not
16 exercising due diligence in trying to get
17 disclosure.

18 Also, it was very fortunate
19 that some of Mr. Tallis' files surfaced at this
20 inquiry, particularly some of the memos that he
21 prepared, or at least, you know, one or two of
22 the memos he prepared and a part of another memo.
23 These memos show how diligent he was in trying to
24 prepare for this trial by going out to the scene,
25 carefully noting information that could come up

1 at trial. He provided evidence that in preparing
2 for this trial there might have been as many as
3 50 of these memorandums. Just from the ones that
4 we could see, it clearly demonstrates how
5 thorough and how concerned he was in defending
6 David Milgaard. He was trying to do the best
7 possible job and he wasn't leaving anything, any
8 stone unturned and time was not an issue, he was
9 going to spend as much time as he possibly could
10 preparing for this case and these memos
11 demonstrate that.

12 Also through documents that
13 the Commission obtained we now have record that
14 he saw David Milgaard on three occasions when he
15 was in jail, we know that he saw David on other
16 occasions, he clearly spent more than an adequate
17 amount of time with his client, he arranged for a
18 special interview room in the courthouse both at
19 the preliminary inquiry and trial, he had his
20 secretary attend to take notes during the
21 preliminary hearing and trial, he funded a second
22 counsel, Legal Aid would not give him permission
23 for it, but he funded a second counsel to sit
24 with him at the trial. Mr. Tallis was using
25 every resource that he had available to defend

1 David on charges that, the charges that he was
2 facing.

3 Now, the issue arises, we've
4 heard evidence of the competence of Mr. Tallis,
5 that he at the time was, if not the leading,
6 certainly one of the leading criminal counsel in
7 Saskatchewan. How could an innocent man be
8 convicted when he is being defended by somebody
9 who is working so hard for the defence and was a
10 defence counsel who is so competent. Well, by
11 putting this trial under a microscope we have a
12 very good idea as to how that now happened. Of
13 course, at the time people are reacting to the
14 situation as it arises. In hindsight, though, we
15 can see things that occurred that give us some
16 explanation as to how this very unfortunate
17 conviction occurred and, in my view, and I think
18 it's important to say this, there was a lot of --
19 there was a constellation of circumstances that
20 arose at this trial that made it a very difficult
21 case to defend and I'm just going to go through
22 some of these, I've dealt with them in my
23 argument, but I think it's important just to keep
24 this in mind.

25 First of all, with respect to

1 Wilson and John giving incriminating evidence,
2 there was really, you know, you look at it from
3 the defence point of view, it was really -- it
4 was difficult to discern a motive as to why they
5 would want to implicate what appeared to be their
6 friend David Milgaard. The only possible
7 explanation was, the only possible thing you
8 could work with is that the police somehow
9 manipulated them into giving this testimony that
10 implicated David Milgaard. As it turned out,
11 Nichol John did not come through, and I'll talk
12 about that in a minute, but Wilson did, and we've
13 got to go back to 1970 and just think what
14 society was like.

15 We read in the paper every
16 day now, not every day, but in a lot of days we
17 read about police corruption or police
18 misconduct, but back in 1970 the police had,
19 there wasn't all that criticism of the police and
20 it would have been very, very difficult to
21 advance a theory by the defence that the police
22 had manipulated these witnesses into giving false
23 testimony, and Mr. Tallis had been really
24 forceful in that regard, he certainly tried. If
25 you look at his cross-examination, he tried to

1 develop that theory, but if you argued it
2 forcefully, you probably, and one of the things
3 that a defence counsel always wants to maintain
4 before a jury is credibility, credibility of the
5 defence counsel himself or herself, you could
6 lose it back in the 1970s, because in those days
7 I think there was much more implicit trust of the
8 police by the populace than perhaps there is
9 these days.

10 A second factor in this trial
11 that made it very, very difficult is Mr. Wilson
12 himself, his evidence, and Mr. Fox referred to
13 that today, the subtlety of a young witness who
14 wasn't coming out and saying I saw David kill her
15 or David admitted to killing her, he gave much
16 more subtle evidence, and I think just that
17 Mr. Tallis was correct in describing him as a
18 treacherous witness. You know, a young person
19 like that giving evidence that was more
20 circumstantial than direct, that's very ingenious
21 false testimony and it's much more difficult to
22 break it down.

23 Now, Wilson testified that
24 oh, I could have been -- you know, a good
25 cross-examination could have caused me to turn

1 around and admit the truth. That was clearly
2 untrue, another untruth by him, because he was
3 committed to this story back in 1970 at the time
4 of the trial and he was so committed that the
5 version that he provided had this degree of
6 subtlety and he maintained it both through the
7 preliminary inquiry and trial. He was an
8 extremely difficult witness to cross-examine.

9 And another difficulty here
10 in this trial, looking at it from Mr. Tallis'
11 perspective, is that both Wilson and John knew
12 about one particular factor; that is, the purse
13 in the garbage can, that they wouldn't have known
14 if they hadn't seen something or had received an
15 admission from David Milgaard, and that piece of
16 evidence, particularly from Wilson who said that
17 Milgaard admitted putting a purse in the garbage
18 can, corroborated his account, and the only way
19 you could really attack that is if you were able
20 to successfully argue that the police told him
21 that, provided him that information, and as I
22 recall, Mr. Tallis tried to go down that road,
23 but as I've said earlier, it's a very difficult
24 road to go down in the early 1970s.

25 So we've got Wilson providing

1 direct evidence that he killed, David killed Gail
2 Miller, no motive really, no clear motive why he
3 would lie, and then we've got Lapchuk and Melnyk
4 coming at the last minute providing the same
5 basic information and admission, you've got three
6 witnesses in total who are directly implicating
7 David Milgaard, and once again there was no clear
8 motive to detract from the credibility of Lapchuk
9 and Melnyk. And if you look at it from Tallis'
10 point of view, he gets these witnesses at the
11 last minute, he doesn't have the opportunity to
12 cross-examine them at a preliminary inquiry,
13 which is the normal situation, they are coming
14 forth at the last minute, and yet I submit he did
15 a good job with these witnesses, but it still was
16 very, very difficult.

17 And then to add to the whole
18 situation, you've got a situation where Nichol
19 John did not come through for the Crown, and one
20 would think normally that would be a good thing
21 for the defence, that she did not come through,
22 she did not provide the same testimony as she did
23 in her May 23rd statement, but in this trial, and
24 if you talked to criminal lawyers that do trials
25 where there is adverse witnesses, a lot of times

1 it's more devastating if the witness does not
2 admit the previous statement and they are -- if
3 they are allowed to be cross-examined on that
4 previous statement, because it looks like the
5 witness is either afraid of the accused or is
6 trying to help the accused, and it -- and even
7 though, you know, in this case a jury is being
8 told to disregard the statement because the
9 witness didn't adopt it, there's tremendous
10 prejudice that occurs. You can just feel it in
11 the courtroom if you're in one of those 9(1) or
12 9(2) situations, you can feel the prejudice. And
13 Mr. Tallis, at the time of this trial, was a very
14 experienced trial counsel, we have the
15 transcript, but I submit the transcript doesn't
16 give you a feel for the court room. He provided
17 you with his view of what happened at the time in
18 his evidence, and I -- he described it as a
19 devastating turning point at that point of the
20 trial, and he was there. And I submit that it
21 was, because even though she did not adopt that
22 evidence, and even if the jury followed the
23 instruction that the judge gave when she was
24 giving her evidence -- not in his charge because
25 there was nothing in the charge, but when he gave

1 -- when she gave the evidence, even if she -- if
2 they were able to understand that, which many of
3 the commentators who have looked at this subject
4 have said, you know, "you'd have to be a lawyer
5 to understand the instruction that you can only
6 use a statement for credibility and not for the
7 truth of its contents", a lot of lay people might
8 have difficulty with that instruction even if
9 they are trying to follow it -- but even if they
10 did understand it and apply it properly, it still
11 would boost the credibility of Wilson, that's
12 having that statement before the jury would boost
13 the credibility of Wilson for what he is saying.

14 And sir, I know this is
15 difficult, this is a difficult argument, but I do
16 make it, and that is it's a difficult argument to
17 make to judges because you charge juries, but
18 there is increasing research that has been
19 conducted in jurisdictions where they can study
20 jury verdicts by interviewing jurors, which we
21 can't do in Canada, there's increasing research
22 and findings that indicate that, when judges tell
23 jurors to disregard evidence, it has the opposite
24 effect. And I've cited some of those studies in
25 my argument, it's hard to believe them, but there

1 is that research out there and it's hard to
2 believe. You would think that jurors would try
3 to follow the judge's instructions, but perhaps
4 it's just subconscious that it happens. But this
5 9(2) application just, it seriously, it increased
6 the difficulty of this trial several fold.

7 And another aspect, and a
8 couple other aspects of it that increased the
9 difficulty for Mr. Tallis is not -- well, first
10 of all, is the fact that he was not allowed the
11 voir dire where he could have tried to establish
12 the circumstances in which this statement was
13 obtained from Nichol John, and perhaps if he had
14 had that opportunity to cross-examine in the
15 absence of the jury he might have been able to go
16 down the road of trying to determine what impact
17 Inspector Roberts had, how he was able to turn
18 this witness around and, you know, this
19 cross-examination might have created some very
20 serious concerns about putting that statement
21 before the jury in view of the influence that
22 Inspector Roberts could have improperly placed
23 upon this witness.

24 Secondly, because we didn't
25 have the voir dire, everything is sort of

1 happening impromptu in front of the jury. And by
2 that I mean there's this first prejudice that
3 justice -- Mr. Tallis wasn't allowed the right to
4 cross-examine and try to establish that the
5 statement shouldn't be put before the jury, but
6 then the prejudice to the Milgaard defence was
7 further exacerbated by the fact that the judge,
8 basically without hearing argument, indicated
9 that Ms. John was a hostile witness.

10 Now I've been through these,
11 these type of situations, and it's always done in
12 the absence of the jury. You determine, first of
13 all, whether the witness is adverse under 9(2),
14 and if the Crown wants to go the step further to
15 get the witness labelled hostile under 9(1), they
16 have -- this is all done in the absence of the
17 jury, and for good reason, you don't want the
18 judge telling the jury the witness is hostile and
19 making that finding right in front of the jury,
20 because it further reinforces that the witness is
21 lying when the witness says the testimony that
22 they are providing at trial, as compared to the
23 statement, and it reinforces the truth of the
24 statement in the jurors' eyes.

25 The third problem here with

1 respect to the voir dire is the judge's
2 intervention with the witness. And Mr. Tallis
3 has given me licence to make arguments in this
4 case, he has been -- you know, he hasn't -- he
5 has indicated I can make arguments that I feel
6 appropriate. He had a great deal of respect for
7 Chief Justice Bence. This is an argument that
8 I'm making, is that Chief Justice Bence went too
9 far in questioning that witness in front of the
10 jury. He also, by the manner of his questions,
11 reinforced the idea that this statement was the
12 truth, and not what the witness was saying on the
13 witness stand, and unfortunately it had -- that,
14 that whole process, the way this 9(2) application
15 occurred, had a very significant impact upon the
16 defence. It made this trial extremely difficult.

17 Another thing that made the
18 trial difficult, as has been discussed at length
19 here today, and that is the disclosure problems
20 that occurred in this case. Mr. Tallis was
21 defending this case with his hands tied behind
22 his back in many ways. He did not get a lot of
23 the disclosure that would have assisted him in
24 defending this case, and I submit that if he'd
25 received a lot of the -- received this

1 disclosure, there could very well have been a
2 different result at this trial.

3 We've talked about the
4 evidence of sexual assaults, I'm not going to go
5 into the details of that, they have been outlined
6 in the arguments and already have been discussed
7 here today. But I'd like to make the point that
8 that evidence, if Tallis had had it available,
9 the similarity, if he could prove that David
10 Milgaard was somewhere else even for one or two
11 of those, it would have destroyed the Crown's
12 theory with respect to Gail Miller because of the
13 similarity in the modus operandi. There is
14 enough similarity in the modus operandi that
15 would have created a reasonable doubt and, you
16 know, when we look at the dates of some of these
17 occurrences, David Milgaard was elsewhere, and he
18 could have called that evidence. And there's
19 been some, some indication throughout the course
20 of this Inquiry that perhaps that similar act
21 evidence or that evidence of another perpetrator
22 could not have been admitted. I submit, I have
23 provided authorities in my argument, it clearly
24 would have been admitted.

25 And there's another reason

1 for that, and that is that it's easier to get
2 exculpatory evidence admitted than it is to get
3 incriminating evidence admitted. If you look at
4 the area of solicitor/client privilege, the
5 defence can sometimes get solicitor/client
6 privilege into evidence that exculpates an
7 accused because of that very factor, the rules of
8 evidence are looser when you've got evidence that
9 will exculpate somebody, and it's clear, I
10 submit, that this evidence would have been
11 admitted.

12 And in fact, even when it was
13 used for an incriminating purpose in the Fisher
14 trial, some of that evidence was admitted against
15 Fisher because of its similarity.

16 The -- there's other
17 witnesses that would have been of some assistance
18 to Mr. Tallis, we've -- you've, you're aware of
19 them, the Merrimans, the Gallucci, other
20 witnesses like that, but another part of the
21 disclosure that would have been very helpful --
22 and I wish to, I wish to indicate that when we're
23 talking disclosure the rules of disclosure were
24 different back in 1969 and 1970, and I'm not
25 arguing any blame should be assigned here, but

1 I'm just saying that the rules were different,
2 and per -- as Mr. Caldwell has acknowledged, he
3 made an error in judgement. But I'm just saying
4 that if Mr. Tallis had received that disclosure,
5 the result could very well, and likely would have
6 been, different, and the fact that he didn't have
7 it made this trial much more difficult for him.

8 And another example is the
9 police reports. If he had received these police
10 reports, there is a gold mine of information in
11 them that could have been used for very fertile
12 cross-examination of Wilson, John, and other --
13 Cadrain, other witnesses, if he'd had access to
14 them. We can see that now, now that we've got
15 all these police reports, and one thing that
16 really struck me in looking at them was the way
17 the police reports dealt with the May 23rd
18 statements. There is really a vacuum of
19 information there, and we do know there is a
20 bunch of police officers in the next hotel room,
21 and we see that Chartier and the other fellow
22 were there. They are in the next room. Why are
23 they all there? There is very little in the way
24 of police reports as to how that statement with
25 Roberts unfolded, whereas there's lots of detail

1 as to how everything else unfolded, and if Mr.
2 Tallis had seen that lack of information it would
3 have made it much clearer to him that -- and it
4 was clear anyways but it would have made it even
5 clearer -- that that was a problem with the
6 Crown's case, Inspector Roberts, and it's -- I
7 find it very surprising, to say the least, that
8 we don't have that audio tape or that that audio
9 tape, apparently, has disappeared.

10 Now I'd just like to talk
11 about a couple of systemic things here in my last
12 couple of minutes, sir. I've mentioned, first of
13 all, the retention of exhibits. There is a
14 recommendation there, the -- you know, it's
15 something I think you should consider. Some of
16 the -- if there were recommendations with respect
17 to legislation some of it would have to be
18 provincial legislation, that's why I talk about
19 uniform laws.

20 I can indicate to you that
21 the Law Society of Manitoba has a specific
22 provision that deals with lawyers' files being
23 kept where there is a possibility of a wrongful
24 conviction. It's the only Law Society piece of
25 legislation I could find dealing with that.

1 The -- I think it's
2 important, though, that we can see from this case
3 that lawyers' files, Crown prosecutors' files, be
4 retained, as well as exhibits, for lengthy
5 periods of time.

6 With respect to the Court of
7 Appeal and its power to review wrongful
8 convictions, this case is a good example of why
9 some consideration should be given to a wider
10 power of review. I have read the *Biniaris* case
11 on several occasions, and they seem to reaffirm
12 the *Yebe* test, and yet at other times you
13 come -- you reach the conclusion that perhaps the
14 test of review is a lurking doubt with
15 articulable reasons. I submit that the test
16 should be the latter, but it's not clear from
17 that decision, in my opinion, it should be the
18 latter. Some would argue that it should be just
19 a lurking doubt type of review, but the whole
20 trend right now to criminal justice is that you
21 have to give reasons, trial judges have to give
22 reasons. I submit Court of Appeal judges should
23 have to give reasons for a lurking doubt, but I
24 submit the test should be a lurking doubt with
25 reasons.

1 The -- we've also talked
2 about the -- some consideration being given to
3 judge-alone trials, and I say this for a number
4 of reasons. First of all, it's allowed for the
5 vast majority of criminal offences, you can
6 have -- the defence can have a judge-alone trial.
7 Why not for other offences such as the 4 -- the
8 offences involving murder and other offences?
9 There is a provision in the *Criminal Code* where,
10 for cases where there is election, the Attorney
11 General or the Minister of Justice of a province
12 can insist on a judge and jury trial for other
13 offences other than the 469 offences, but the
14 major problem is with respect to offences like
15 murder where the Crown has a specific provision
16 that requires a judge and jury offence, and I
17 submit that that has to be reviewed.

18 You and think of the *Pickton*
19 trial starting today; wouldn't that be a better
20 trial for everybody if that was a judge-alone
21 trial? We wouldn't have a jury being tied up all
22 this period of time, there's probably lots have
23 technical evidence, shouldn't the defence have
24 the right to be able to ask for a judge when
25 there are cases of significant pretrial publicity

1 where you can't get a change of venue out of the
2 province, or where there's expert evidence? The
3 Supreme Court of Canada has expressed concerns
4 about the fact that juries may have difficulty
5 with some forms of expert evidence; wouldn't it
6 be better if the defence could ask for a
7 judge-alone trial in cases where there's
8 complicated expert evidence? Wouldn't it be
9 better for a judge-alone trial where -- in
10 situations where you know there's going to be
11 admonitions to the jury to disregard evidence,
12 considering the type of research that's been
13 conducted? Why -- why can't defence have a
14 judge-alone trial when you can with, you know,
15 with summary conviction offences, which are also
16 criminal offences and which have serious
17 repercussions.

18 I'll say one last thing,
19 because I'm up, time is up here, but on 9(2) of
20 the *Canada Evidence Act* there is -- the way the
21 discretion has operated to date is that you have
22 to show that the witness -- it's not the witness'
23 statement, that the statement was not voluntary
24 or was obtained as a result of duress or
25 oppression. I'm submitting that trial judges

1 should have a discretion to exclude that type of
2 cross-examination on a previous statement when
3 the prejudice will exceed the probative value.
4 There are some cases where you'll realize, as a
5 trial judge, that this witness is not going to be
6 affected by the cross-examination, and all that
7 you're gonna get if you allow that
8 cross-examination before the jury is having the
9 prejudice of having that statement before the
10 jury, and there's little chance that the witness
11 is gonna swing around. And in those type of
12 situations I submit that the statement should not
13 go before the jury, that the judge should simply
14 have the discretion to exclude that type of
15 cross-examination, which I submitted created a
16 very significant problem at this trial.

17 Thank you, sir.

18 COMMISSIONER MacCALLUM: Thank you, Mr.
19 Pringle.

20 One hour will take us to
21 1:15.

22 *(Adjourned at 12:11 p.m.)*

23 *(Reconvened at 1:16 p.m.)*

24 COMMISSIONER MacCALLUM: Mr. McLeod?

25 **BY MR. McLEOD**

1 MR. McLEOD: Good afternoon, Mr.
2 Commissioner. For the record, I'm Ken McLeod,
3 I'm counsel for Eugene Williams.

4 Sir, I would simply want to
5 take the opportunity this afternoon to, I hope,
6 briefly focus on three primary points that Mr.
7 Williams wanted to, I suppose, ask the Commission
8 to draw from all of the evidence that it's heard
9 insofar as it affects him and his activities with
10 respect to the 690 application made by David
11 Milgaard.

12 You may have noted that in
13 the written legal submissions submitted on behalf
14 of Mr. Williams there was an absence, in a sense,
15 of direct commentary on some of the legal
16 jurisdictional and mandate issues that this
17 Commission may have to grapple with in
18 determining the shape of any report. That is not
19 because Mr. Williams is disinterested in those
20 matters but because, in part, he felt it best to
21 leave those issues to other parties and other
22 counsel, but perhaps more importantly because his
23 view was that the narrative of events that he was
24 engaged in will necessarily, regardless of where
25 the legal line on the question of mandate or

1 jurisdiction might be drawn, regardless of that,
2 the events that he was engaged in will,
3 naturally, be scrutinized by the Commission. So,
4 in a sense, he was not as concerned about the
5 legal issues. His primary concern as a witness
6 in these proceedings, as a participant in the
7 events that gave rise to these proceedings, was
8 that the factual background, the factual
9 narrative, be thoroughly and completely canvassed
10 before the Inquiry. And I think, on that point,
11 it would be the first main point of -- that I am
12 making this afternoon on Mr. Williams' behalf, on
13 that point his view is that there has been full
14 opportunity given to all parties to complete that
15 record, and he simply asks that any
16 recommendations or conclusions that the
17 Commission might draw be fully cognizant of that
18 record and the complete course of activities that
19 he was involved in.

20 The second point that I
21 wanted to make this afternoon on Mr. Williams'
22 behalf relates to the nature of the 690 process
23 at large and, perhaps more particularly, the
24 nature of counsel's role in the conviction review
25 process. And we've heard Mr. Williams and others

1 testify about that, about both what has happened
2 in this particular case, and both with respect to
3 their understandings of what ought to happen or,
4 ideally, what the case might be.

5 As I say, there are two
6 features of my comments here, sir, the first
7 relates to the process itself, and the second
8 counsel's role in it. We've heard Mr. Williams
9 testify as to the former, and in his view the
10 process was a mechanism that would objectively
11 and comprehensively review facts leading to
12 answering the question of whether or not a
13 wrongful conviction had in fact occurred.

14 My Learned Friend Mr. Wolch
15 focused on the question of fresh evidence, but I
16 would suggest that one aspect of the submissions
17 that we have not heard a lot about on this point
18 relates to the other arm or component of the
19 conviction review process, and that is the
20 question of procedure, so in other words if the
21 original trial procedure was called into
22 question, that became another available basis for
23 the assertion of a wrongful conviction. And, as
24 I appreciate the various submissions made by a
25 number of my friends, it may not have been an

1 issue with respect to Mr. Milgaard's case, but it
2 does, as I say, represent, as I say, another arm
3 of the conviction review process that Mr.
4 Williams testified about.

5 One of the questions that has
6 arisen, or perhaps comments that has been made
7 with respect to counsel's role, that is counsel
8 like Mr. Williams who was charged with the
9 responsibility of investigating a potential
10 wrongful conviction, related to not just the
11 counsel's role in the gathering of information,
12 but in assessing that information. And I would
13 suggest, as we've heard from Mr. Williams and
14 others, that the process, however it might be
15 constructed, necessarily involves both a
16 quantitative angle, that is gathering
17 information, and a qualitative one, that is
18 making some kind of assessment. And whether the
19 test in assessing whether a wrongful conviction
20 has occurred is, as historically has been the
21 case in Canada, whether the evidence is
22 reasonably capable of belief, or whether, I think
23 as articulated in the United Kingdom, the test is
24 about whether there is a real possibility of a
25 miscarriage of justice; on either view one must,

1 at the stage before a decision is made to refer a
2 case to a Court or to grant some other sort of
3 remedy, one must necessarily have regards to the
4 credibility of the evidence that goes to the
5 wrongful conviction. And that assessment, as I
6 say, is necessarily present in order to determine
7 that there is, in a sense, an air of reality to
8 the application. And that was one of the points
9 that, I think, concerns were raised from some
10 quarters with respect to the conduct of counsel
11 looking at a potential wrongful conviction.

12 Mr. Williams spoke about that
13 in his testimony as I think variously, but I
14 think including probing, he had to probe some of
15 the evidence, and just as I believe it was My
16 Learned Friend Mr. Wolch earlier today indicated,
17 there needs to be an assessment, in a sense, of
18 the credibility of certain witnesses like Albert
19 Cadrain, in this case he would be one, so would
20 Ronald Wilson, so any of the others who gave
21 evidence, so that at the review stage, that is
22 before a recommendation is made by the minister,
23 there necessarily needs to be that assessment to
24 determine whether or not the evidence is, call
25 it, 'reasonably capable of belief'. And that, of

1 course, is the phrase that the Supreme Court of
2 Canada used in its reference decision when it
3 concluded that there not only -- there was the
4 possibility of a wrongful conviction because
5 there was evidence, and again the words of the
6 Supreme Court, 'reasonably capable of belief',
7 thus necessarily implying an element of
8 assessment of credibility at the stage of
9 investigation.

10 And the other aspect of the
11 second point, sir, relates to the role of
12 counsel, and you will recall Mr. Williams'
13 evidence that, in his view, the process was
14 non-adversarial, and ought to have been that way.
15 That flows from the fact that, in the case of an
16 application for a remedy because of an alleged
17 wrongful conviction, there is no lease between
18 the conviction review group, the Crown, and the
19 applicant. Unlike almost any other kind of
20 application or Court or judicial proceeding where
21 there is a lease, where there are parties on
22 opposite sides, in this case that is not the
23 situation, and that is what I would describe as a
24 theme or a message that Mr. Williams attempted to
25 convey on numerous occasions in different

1 contexts throughout his testimony.

2 He described the process as
3 one that relies on cooperation between the
4 parties, and the extent to which that cooperation
5 is available improves the prospect of a thorough
6 and complete investigation. This actually ties
7 into one of the recommendations that Mr. Pringle
8 was advocating for just before the lunch break,
9 sir. He indicated that it may be useful -- and
10 I'm perhaps not capturing what he said very
11 well -- but useful if counsel, where there was a
12 possibility of a wrongful conviction, would be
13 bound or obliged to maintain their files for some
14 period of time, and I think you'd probably find
15 that Mr. Williams would very much concur with
16 that. You'll recall his evidence about his
17 ability to conduct the investigation, to assess
18 credibility, to assess the evidence that was
19 coming to him, to question witnesses, and, in
20 particular, for questioning witnesses like Ronald
21 Wilson. His view was that the more information
22 he had, the more effective his examination of
23 those witnesses would be, and so I think from
24 that perspective, the 690 process is one that
25 would be advanced by requirements that counsel,

1 where there is the prospect of such an
2 application, keep all records, because if those
3 are in turn made fully available to investigating
4 counsel, then the prospects of a complete
5 investigation are that much enhanced.

6 This phrase that I'm about to
7 offer to the Commission is something that Mr.
8 Williams passed on to me in the course of our
9 discussions before today's hearing and not,
10 unfortunately, before I had filed written
11 submissions on behalf of Mr. Williams. Overall,
12 he described the successful process of a review
13 of a wrongful conviction or allegation of a
14 miscarriage of justice as turning on, and here
15 are his words, "The responsible participation of
16 all parties." And I wish I had been able to
17 offer that in our written submissions because
18 that, in my respectful submission, sir, captures,
19 at least from the perspective of the review time,
20 the nature of the process and, in a sense, the
21 content of it, because if you have the
22 responsible participation of everyone involved,
23 the chances of getting a complete record and a
24 proper assessment of the situation are that much
25 improved.

1 The third and final main
2 point that I wish to address this afternoon, sir,
3 relates to the nature of the record before the
4 Commission, and as this pertains particularly to
5 Eugene Williams, there are two facets to that
6 record if I can put it this way. The first is
7 the documentary record of events and activities
8 and as that relates to Mr. Williams, much of that
9 is contained in various memoranda, letters, other
10 materials, there is a very extensive, call it
11 paper record of Mr. Williams' activities or
12 activities of his colleagues or Sergeant Pearson,
13 other people that he worked with during the
14 course of the conviction review process.

15 The second feature or arm of
16 the records before this Commission as it relates
17 to Mr. Williams is primarily his evidence. I
18 believe, I'm sure that Mr. Hodson has a better
19 number than I do, but I believe that Mr.
20 Williams' testimony took place over close to 10
21 or 11 days of hearing, so, sir, you have a very
22 extensive, a very comprehensive record of that
23 part of the history of Mr. Milgaard's
24 proceedings; indeed, you have a full record of
25 all of it now, but with respect to Mr. Williams,

1 an examination of both of those arms of the
2 record will, in my respectful submission, lead
3 you to two important conclusions.

4 The first is that all of his
5 activities and the activities of the others that
6 he worked with in the course of the review
7 process were undertaken most thoroughly,
8 comprehensively and objectively and that one can
9 look at the paper record to conclude that. One
10 can also look at or, if we can, step back and
11 hear from Mr. Williams himself, and you recall
12 his testimony, sir, and I submit that in the
13 course of his testimony he very much reflected
14 the nature of his approach to his work; thorough,
15 careful, objective and fair minded.

16 With respect to the nature of
17 his work, and this relates to more of the
18 documentary record that is before you now, I
19 think we will find, certainly as lawyers who look
20 at Mr. Williams' work, that he sets a very good
21 example for us all in terms of how to fully and
22 properly document matters. His record keeping
23 was extensive, it was complete and it was fair.

24 The final facet of my
25 comments on this point, sir, are in relation to

1 what that record shows Mr. Williams did in a
2 larger sense. If we went piece by piece through
3 the record, I would suggest, sir, and of course I
4 have no intention of doing that today, but I
5 would suggest that you will find that every time
6 there was a request, every time there was a new
7 piece of information, every time there was an
8 inquiry of Mr. Williams, his response was
9 immediate and appropriate and that each piece of
10 information that came his way was thoroughly
11 investigated and pursued and that he, in the end,
12 captured everything that came his way.

13 If we go back to Mr.
14 Williams' description of the process as to how it
15 ought to work; that is, through the responsible
16 participation of all parties, I think we could
17 pretty quickly and easily conclude that Mr.
18 Williams' participation in the matter was indeed
19 fully responsible.

20 Mr. Commissioner, those are
21 my comments. I do want to close by expressing
22 Mr. Williams' gratitude to, and my own, to
23 Commission Counsel, Commission staff and
24 yourself, Mr. Commissioner. As you know, Mr.
25 Williams was obliged to retain counsel at a

1 latter part of the proceedings and he and his
2 counsel, as I were, benefited greatly from the
3 assistance offered by Commission Counsel and
4 staff and indeed as well as counsel for a number
5 of the other parties who helped us get up to
6 speed on certain things.

7 With that, sir, thank you
8 very much. Those are my submissions.

9 COMMISSIONER MacCALLUM: Thank you,
10 Mr. McLeod.

11 **BY MR. ELSON**

12 MR. ELSON: Mr. Commissioner, you now will
13 have the opportunity to hear from some of the
14 counsel on behalf of the institutional parties
15 with standing before this Commission of Inquiry
16 and I have the pleasure of being the first to
17 make my submission on behalf of the Saskatoon
18 Police Service.

19 Mr. Commissioner, if I could
20 just briefly make a reference to the written
21 submission that we filed on behalf of the
22 Service, I began our remarks in that submission
23 by making one point particularly clear and I want
24 to emphasize that publicly today, and that was to
25 state that the Saskatoon Police Service fully

1 accepts that David Milgaard is and always was
2 innocent of the murder of Gail Miller. In this
3 respect, Mr. Commissioner, Mr. Milgaard's
4 innocence is accepted, not because of any
5 declaration made by the Government of
6 Saskatchewan, and not even because it is the
7 premise upon which this Commission of Inquiry is
8 based, rather, it is accepted by the service
9 because it is a simple fact.

10 What I did not express in our
11 written submission is something I was asked by
12 Chief Weighill several months ago to express in
13 these public remarks, and that is an apology. On
14 behalf of the Saskatoon Police Service, I am
15 instructed to apologize to Mr. David Milgaard and
16 to his family. I regret that neither Mr.
17 Milgaard nor his mother are here today. My
18 apology is extended for the fact that Mr.
19 Milgaard was wrongfully convicted of an offence
20 he did not commit and the Saskatoon Police
21 Service very much regrets the suffering that Mr.
22 Milgaard and his family have suffered or have
23 experienced for this miscarriage of justice.
24 This apology is also expressed to the extent the
25 Saskatoon Police Service played a role in that

1 wrongful conviction.

2 Having said this,
3 Mr. Commissioner, and in keeping with recent
4 legislation that is presently before the
5 legislature in Saskatchewan in the form of the
6 Apology Act, I am also instructed to make it
7 clear what an apology is and what it is not in
8 this context.

9 In this context this apology
10 is not an admission of malfeasance, nor is it an
11 admission of improper conduct or even an
12 admission of unreasonable conduct on the part of
13 the Service or its predecessor organization then
14 known as the Saskatoon City Police, and I will
15 elaborate on those points in a moment.

16 Mr. Commissioner, on the
17 first day of the formal hearings before you back
18 in January of 2005 I was given the opportunity to
19 make an opening statement and in that statement,
20 on behalf of the Saskatoon Police Service, there
21 were three pledges. To refresh our memories,
22 they were that the Saskatoon Police Service
23 pledged its full co-operation with all aspects of
24 the Commission's investigation. The service also
25 pledged that it would approach all aspects of

1 this inquiry, including any findings or
2 recommendations you should make, objectively and
3 with an open mind, and finally, Mr. Commissioner,
4 the Service also pledged that if this Commission
5 should determine that any aspect of police
6 practice relative to the investigation of this
7 event was inadequate or flawed in any way and it
8 should be determined on the evidence that such
9 inadequacies or flaws still prevail in one form
10 or another, it is the full intention of the
11 Saskatoon Police Service, now under the authority
12 of Chief Weighill, to act on whatever
13 recommendations will be made by the Commission in
14 regard to those practices.

15 Mr. Commissioner, it is our
16 respectful submission that to the extent those
17 pledges can be met to this stage in the inquiry,
18 they have been met. To the extent they cannot
19 yet be met, given the stage we are at, I am
20 instructed simply to re-affirm them.

21 Mr. Commissioner, in
22 reviewing the evidence received before this
23 Commission, and in keeping with our client's
24 application for standing, which I had occasion to
25 review before today, it is apparent that the

1 nature of the interests the Saskatoon Police
2 Service has in these proceedings is somewhat
3 unique. In many respects it is different from
4 the interests of the other parties with standing.
5 Some of the parties with standing are individuals
6 and their conduct has come under review.
7 Implicitly the skills, the ability and very
8 regrettably the integrity of those individuals
9 has come under review as well. As such, those
10 individuals have a very personal stake in the
11 outcome of these proceedings.

12 However, as an institution,
13 the Saskatoon Police Service does not have the
14 same personal stake. Rather, the most important
15 interest the Saskatoon Police Service has,
16 generally speaking, is to attain and to maintain
17 the confidence of the people of Saskatoon and
18 those who visit our community, and it is in those
19 regards that that general interest becomes
20 specific in the context of these proceedings. I
21 would submit as well, Mr. Commissioner, that even
22 if compared with the other institutional parties
23 who have standing before this inquiry who also
24 have an interest in maintaining public
25 confidence, and in this regard I refer to the

1 RCMP, the Minister of Justice and the Department
2 of Justice for Saskatchewan, even when we compare
3 those institutions, the circumstances between
4 those institutions and the service is still, to
5 some extent, different. The evidence we have
6 heard is that the conduct under review with
7 respect to those institutions is significantly
8 more current than it is with respect to the
9 Saskatoon Police Service. The evidence we have
10 heard shows that none of the former Saskatoon
11 police officers who testified before this
12 Commission are current members of the service.
13 In effect, the Saskatoon Police Service found
14 itself having to review its distant history and
15 the conduct of former members, some of whom had
16 varying perspectives, not only with respect to
17 the operation and the conduct of this particular
18 investigation, but also with respect to the
19 operation of the Saskatoon Police Service as it
20 then existed itself.

21 When our office was first
22 retained by the Saskatoon Police Service with
23 respect to the proceedings before this inquiry,
24 both our client and our office were mindful of
25 the rather unique interest our client had.

1 Therefore, in this inquiry's review of police
2 conduct we came to an understanding, and I think
3 it's important for me to convey that
4 understanding today.

5 To the extent conduct of the
6 Saskatoon City Police, as it was then known,
7 reasonably conformed to the police practices and
8 standards of the day based on evidence reasonably
9 received to identify and to describe those
10 standards and practice, it was our instruction
11 that such conduct was to be defended. However,
12 if it was persuasively shown on the presentation
13 of fair evidence that the conduct of former
14 Saskatoon police officers demonstrated bad faith
15 or if it demonstrated that the conduct of police
16 officers failed to conform in any reasonable way
17 with the practices and standards of the day and
18 it was also shown that such bad faith or failure
19 caused or contributed to the wrongful conviction
20 of Mr. Milgaard or even to the continuance of
21 that conviction in an unfair way, such conduct
22 was not to be defended, and it was for this
23 reason, Mr. Commissioner, and you will recall
24 that from time to time when police officers were
25 cross-examined they were asked about a letter

1 that they had received from our office and
2 through those questioning, or that questioning,
3 evidence was presented to the effect that we had
4 written to each of the former Saskatoon police
5 officers involved and we advised them of the fact
6 that our office should not be regarded as their
7 counsel for the proceedings before this inquiry,
8 and that to the extent they might require
9 counsel, they would be obliged to seek that
10 counsel on their own or to seek standing as
11 parties in their own right.

12 Now, Mr. Commissioner, with
13 that context, and despite the acceptance of Mr.
14 Milgaard's innocence as I've stated it both here
15 and in our written submission, I have to say that
16 it is the position of the Saskatoon Police
17 Service, having reviewed the evidence, that there
18 is no evidence or, at its worst, certainly no
19 persuasive evidence upon which it could fairly be
20 concluded that any of the officers involved in
21 the investigation of Gail Miller's murder acted
22 in bad faith.

23 Further, there is no evidence
24 or no persuasive evidence to the effect that
25 these officers failed to conform reasonably to

1 the prevailing standards and practices such that
2 their conduct caused or contributed to the
3 conviction or such that their conduct contributed
4 or caused the continuation of that wrongful
5 conviction.

6 Mr. Commissioner, there is,
7 regrettably, a conventional wisdom among other
8 observers of this case, and indeed other wrongful
9 convictions, that a wrongful conviction of any
10 kind cannot occur unless someone with official
11 responsibility acted either maliciously or
12 unreasonably in the fulfillment of that official
13 responsibility or unless there was some other
14 systemic breakdown in the administration of
15 justice, and I submit, Mr. Commissioner, that
16 this conventional wisdom, if I can call it that,
17 holds almost as if the result is to be taken to
18 speak for itself.

19 However, I would submit that
20 the proponents of this conventional wisdom ignore
21 the facts as Mr. Kyle otherwise told us that they
22 were; namely, that wrongful convictions can and
23 do occur and that they can and do occur despite
24 the honest and reasonable efforts of honest and
25 reasonable people. Errors in judgment can and do

1 occur and we have heard that phrase today.

2 While those of us who are
3 engaged in one form or another in the
4 administration of justice are obliged to strive
5 to do everything we possibly can to avoid
6 potentially disastrous errors in judgment and the
7 consequences that fall therefrom, the reality,
8 frankly, is that our administration of justice
9 has been created and is operated by mere
10 fallible, mortal human beings and, as such, it
11 can never truly be perfect.

12 Therefore, we would submit
13 that the real question is whether there was
14 persuasive evidence or any evidence that has been
15 presented before you by individuals with the
16 appropriate qualifications and expertise to
17 express opinions on the subject, to express
18 opinions as to whether what was done was not done
19 reasonably or whether or not it was motivated by
20 bad faith and that there was no other explanation
21 other than that it was motivated by bad faith.

22 In this regard, Mr.
23 Commissioner, there have been criticisms of the
24 conduct of the Saskatoon Police Service and I
25 have referred to those criticisms in our written

1 submission and it is neither appropriate nor
2 necessary that I do so at this time, but I would
3 submit to you, Mr. Commissioner, as I did in our
4 written submission, that when one examines the
5 evidentiary basis to support these criticisms,
6 they are, in many respects, lacking, and the main
7 reason I submit that they are lacking is because
8 there is no evidence, they are simply not based
9 on the opinion evidence of individuals with the
10 kind of training and qualifications that we would
11 expect.

12 In a court of law if somebody
13 is holding a professional to a certain standard
14 of practice, there has to be evidence presented
15 with respect to what that standard of practice is
16 so that the trier of fact is able to make an
17 assessment as to whether or not the conduct that
18 is being reviewed met the benchmark reflected in
19 that standard, and with the greatest of respect
20 to My Friends Mr. Wolch and Ms. McLean, that
21 evidence has not been presented despite their
22 able submissions, and I will only draw upon a few
23 examples, notably three.

24 In the Milgaard's written
25 submission, the submission on behalf of David and

1 Joyce Milgaard, there are significant references
2 to the Mackie summary, and indeed we heard those
3 today. There was also the related criticism
4 about the fact that Ron Wilson and Nichol John
5 were given a tour of the crime scene and there
6 was also a criticism, somewhat obliquely
7 mentioned today, but more specifically mentioned
8 in the written submission, to the effect that in
9 1969 the Saskatoon police were somehow negligent
10 in having failed to pursue Mr. Fisher
11 aggressively at that time, but when we look at
12 the evidence that was received before this
13 inquiry, none of the independent police experts
14 who testified were able to say, for example, in
15 the Mackie summary, that the preparation of that
16 document represented an improper investigative
17 technique or that it was otherwise, and to use
18 Ms. McLean's phrase, bad police work. None of
19 those experts testified that giving a witness a
20 tour of the crime scene, short of telling the
21 witness the known details of the case, was
22 otherwise improper, and none of those experts
23 were able to say that it was negligent for the --
24 that somehow the Saskatoon Police Service was
25 negligent for having failed to pursue Mr. Fisher

1 in 1969.

2 Now, I anticipate that the
3 comeback one would expect from that is the old
4 sod that somehow there's a blue wall that exists
5 out there and that as members of that blue wall
6 police officers stick together and defend the
7 conduct of each other. With the greatest of
8 respect, I have never seen that blue wall, but
9 more significantly, that comeback would ignore
10 the fact that portions of that blue wall were
11 co-operating with the Milgaards, and specifically
12 I refer to two witnesses who testified before
13 this inquiry, Lorne Huff and Tom Vanin.

14 Lorne Huff, as the evidence
15 will show, was a former Winnipeg police officer,
16 Fort Garry police officer specifically. The
17 evidence is clear that he was someone well known
18 to the Milgaards and very well known to Mr.
19 Wolch. I believe in the introductory remarks in
20 the cross-examination there was something about
21 Mr. Wolch having to pay a few of Mr. Huff's
22 bills.

23 In Volume 69 of the
24 cross-examine, Volume 69 of the transcript, the
25 official transcript, reflects the

1 cross-examination conducted by Mr. Wolch on
2 September 13th, 2005, specifically at pages
3 13,745 to 13,753, and in that cross-examination
4 Mr. Wolch, quite fairly, asked Mr. Huff questions
5 about police practices. He asked questions about
6 what he would have expected from the Saskatoon
7 police in connection with the Fisher
8 investigation. He also, quite fairly and
9 appropriately, asked Mr. Huff questions about the
10 standards and the practice and the conduct of a
11 polygraph. Conspicuously, Mr. Commissioner,
12 Mr. Huff was not asked about preparing a document
13 such as the Mackie summary. He was not asked
14 about the kind of considerations that would go
15 into preparing a document that sets out a police
16 theory to be used for the purposes of
17 investigation, nor was Mr. Huff asked any
18 questions or specifically asked to express an
19 opinion on the propriety or not of taking a
20 witness to tour the crime scene, nor was he asked
21 any questions with respect to whether or not it
22 was negligent for the police officers involved in
23 the investigation of the Gail Miller murder to
24 aggressively pursue Larry Fisher once it was
25 known that Larry Fisher was somebody wearing a

1 hard hat who could be found at the bus stop at
2 the corner of Avenue O and 20th Street.

3 Tom Vanin, a former Saskatoon
4 police officer, the evidence is clear that he too
5 was close to the Milgaards. Indeed, Mr. Vanin
6 had testified that he was of the opinion from the
7 outset of this investigation that Mr. Milgaard
8 was innocent of Gail Miller's murder. In Volume
9 111 of the transcripts, January 24th, 2006, Mr.
10 Wolch was not here that day, he was ill I
11 believe, and Ms. McLean purportedly, and in fact
12 expressly, cross-examined Mr. Vanin on behalf of
13 both herself and on behalf of Mr. Wolch.
14 Conspicuously again no questions about the Mackie
15 summary, no questions about the propriety of
16 touring the crime scene and no questions about
17 whether or not it was wrong or negligent for the
18 Saskatoon police not to have pursued Mr. Fisher,
19 and yet all three of those criticisms appear in
20 the written submissions and, indeed, to some
21 extent, have been referred to here today.

22 Mr. Commissioner, given the
23 closeness of Mr. Huff and Mr. Vanin to the
24 Milgaards and the closeness that they obviously
25 had to Mr. Wolch and to Mr. Asper, it seems

1 reasonable to infer that if police conduct was a
2 matter to be reviewed, that the opinion of
3 Mr. Huff and Mr. Vanin would have been asked. If
4 they were not asked before this Commission of
5 Inquiry as to what their opinion was of those
6 police practices, it is only reasonable to
7 conclude that the questioner would not have liked
8 the answers received because the answers received
9 would not have been favourable to the proposition
10 being advanced.

11 As already has been mentioned
12 by both Ms. Knox and Mr. Fox, there have been a
13 number of criticisms directed at the conduct of,
14 and in Ms. Knox's case her client, Mr. Caldwell,
15 and in Mr. Fox's case his client, Mr. Karst.
16 There have been a number of criticisms also
17 directed with respect to police conduct for which
18 there is no hard or persuasive factual evidence,
19 and again, a number of the comments have been
20 referred to, I stand by the remarks that we have
21 made in our written submission, but I cannot help
22 but also go back to the concerns and to the
23 proposition that has been advanced, and indeed
24 advanced again today, by Mr. Wolch with respect
25 to victim four, and I respect her privacy and I

1 do not refer to her by name, but victim four was
2 the individual who gave evidence to the effect
3 that she had been attacked precisely at 7:07 a.m.
4 on the morning of Gail Miller's murder and from
5 her evidence it is apparent that she would have
6 been attacked on Avenue H, I believe between 21st
7 and 22nd.

8 The submissions that have
9 been made on behalf of the Milgaards continues to
10 press the proposition that Larry Fisher, whom we
11 now know to be the killer of Gail Miller, must
12 also have attacked victim four, ignoring the fact
13 that the time frame within which Ms. Miller would
14 have been murdered had to have been between 6:45
15 a.m. and 7:00 a.m., and also ignoring the fact
16 that victim four identified the time of the
17 event, of her attack as being at 7:07 in the
18 morning, and despite the fact that where that
19 attack occurred was six and a half blocks away
20 from where Ms. Miller was murdered, not, to quote
21 My Friend today, within yards. There is simply
22 no factual evidence to support the proposition
23 that the perpetrator of those two offences were
24 the same person. The only basis upon which that
25 conclusion could be drawn in the context of Mr.

1 Fisher is if somehow Mr. Fisher had an
2 automobile, and yet the evidence is very clear
3 that while from time to time he did have an
4 automobile available to him, he did not have an
5 automobile on that particular day.

6 There has also been criticism
7 of the fact that the police believed Mr. Cadrain.
8 With the greatest of respect, and I don't mean to
9 repeat the comments that Mr. Fox has made because
10 he has made them very ably, but Mr. Cadrain's
11 story was challenged, and challenged
12 aggressively, not just by Mr. Karst, but it was
13 challenged in the discussion of Mr. Cadrain's
14 story, in the discussion among other police
15 officers with respect to Mr. Cadrain's story.
16 There were some significant reasons to doubt it,
17 but the importance of Mr. Cadrain's information
18 given in March of 1969 was not so much its
19 evidence proving Mr. Milgaard's guilt, because
20 certainly that evidence alone at trial was not
21 enough to result in the conviction, and it
22 couldn't reasonably have resulted in the
23 conviction, but the significance of the story was
24 that it was a chain in the investigative link,
25 and it was a -- and even if that story was

1 utterly untrue, its value may very well have
2 been, and indeed was, as a chain in the
3 investigative link conducted by the Saskatoon
4 police which led to the evidence of Mr. Wilson
5 and Ms. John.

6 Now it may have led to that
7 evidence irrespective, and obviously the evidence
8 that those witnesses gave we now know not to be
9 true, but its value was not in its persuasiveness
10 in demonstrating Mr. Milgaard's guilt, rather,
11 its value was simply a link to other evidence
12 presented.

13 There has also been
14 criticism, and this is the significant
15 criticism -- and, again, I don't mean to repeat
16 Mr. Fisher's comments -- but the criticism for
17 having planted the story from the Mackie summary
18 with Mr. Wilson and Ms. John such that the story
19 came out in their statements. With the greatest
20 of respect, Mr. Commissioner, that is pure
21 speculation. Neither Mr. Wilson nor Ms. John
22 have said that the story was planted. As
23 aggressively as Mr. Wilson was questioned before
24 this Inquiry, he never ever said that. Indeed,
25 the evidence and the conclusion I think we can

1 draw from Mr. Wilson is that he was, as
2 Mr. Rossmo appeared to describe him, that
3 feckless, irresponsible individual who was just
4 keen to get these police officers off his back
5 for whatever reason, and that in the long run he
6 simply didn't care what was going to happen to
7 his friend and colleague, Mr. Milgaard.

8 Mr. Commissioner, I don't
9 mean to go through all of the other individual
10 items of evidence because I've referred to them
11 to a large extent in our written submission, and
12 indeed other counsel have already made the
13 remarks, and I, in particular, join with the
14 comments and the remarks made by Mr. Fox on
15 behalf of his client, Mr. Karst.

16 Finally, with respect to
17 recommendations, Mr. Commissioner, the Saskatoon
18 Police Service make no submissions on
19 recommendations that you may be inclined to make.
20 In our written submissions we did make comments
21 to you, sir, with respect to the systemic and
22 institutional changes which have taken place
23 since 1969, and it is not necessary for me to
24 repeat a description of those changes.

25 Having said that, for the

1 purpose of my remarks today, the Saskatoon Police
2 Service reaffirms its commitment to the spirit
3 and to the operation of *The Police Act*, to the
4 operation of the Saskatoon Police Commission, and
5 to the regulations and policies that have been
6 enacted under *The Police Act* by the Police
7 Commission. The Saskatoon Police Service also
8 reaffirms its commitment to the educational
9 programs, and to the continuing educational
10 programs, of the Saskatchewan Police College as
11 well as of the Canadian Police College.

12 And Mr. Commissioner, if
13 you'll bear with me, the one remark I wanted to
14 make, and forgive me for repeating this directly
15 out of our submission, I had already referred to
16 Mr. Kyle's comments, namely that wrongful
17 convictions can occur despite reasonable conduct
18 of honest and reasonable individuals, and I had
19 indicated, and I just briefly quote from my
20 submission, that:

21 "... Mr. Kyle's comments underscore two
22 stark realities. The first reality
23 ...",

24 which has formed the main thesis of my remarks:

25 "... is that the eventual proof of a

1 wrongful conviction cannot, without
2 more, stand as proof of official
3 malfeasance."

4 And:

5 "The second reality is that the process
6 of determining the truth is not always
7 easy and it can result in circumstances
8 where just and civilized societies
9 inadvertently punish the innocent or
10 exonerate the guilty. While
11 acknowledging these realities, it does
12 not obviate the need for civilized
13 societies to improve techniques and
14 procedures which will provide for more
15 accurate investigations, better
16 considerations of evidence and verdicts
17 that will stand the tests of both time
18 and scrutiny."

19 Mr. Commissioner, on behalf of
20 the Saskatoon Police Service, on behalf of my
21 colleagues John Beckman and Pat Loran, I would
22 like to thank you, sir, and Commission's staff.
23 I would also like to thank Commission Counsel and
24 all of the staff in the Commission counsel
25 office, as well as my colleagues, who have

1 appeared as counsel before this Inquiry. I thank
2 you very much for your courtesy today and I, we,
3 the Saskatoon Police Service looks forward to
4 receipt of your report. Thank you, sir.

5 COMMISSIONER MacCALLUM: Thank you, Mr.
6 Elson.

7 **BY MR. GIBSON**

8 MR. GIBSON: Mr. Commissioner, for the
9 record my name the Bruce Gibson, I represent the
10 RCMP.

11 At the outset, I'd like to
12 echo some of my colleagues' comments with respect
13 to thanking all of the counsel that have appeared
14 before the Inquiry, Commission Counsel, and all
15 of the staff that have assisted us greatly in
16 this process. Very much appreciated.

17 Before I get started I'd like
18 to take care of one housekeeping matter. I do
19 note that in the RCMP supplemental submissions at
20 page 7, paragraph 21, the year referenced there
21 should be 1986 and not 1996, and I will provide
22 Commission Counsel with a corrected page. That
23 was my oversight.

24 I'm mindful of the 30-minute
25 time frame. I certainly will not take that time.

1 I have filed submissions and supplementary
2 submissions on behalf of the RCMP. I will not
3 repeat those, of course. I do want to address
4 some of the particular pieces of evidence that
5 have been raised in some of the reply
6 submissions, and that is what my focus will be
7 upon.

8 In particular, I'd like to
9 offer a few comments with respect to the reply
10 that has been filed by counsel for David Asper.

11 Counsel offers a number of
12 submissions with respect to forensic evidence
13 that was presented at this Inquiry. At page 8 of
14 those submissions counsel concedes that, whatever
15 deficiencies may be argued in the forensic
16 evidence, there is no suggestion that anyone
17 acted improperly, and that certainly is
18 appreciated, that comment. However, without
19 evidence, counsel goes on to suggest that some of
20 the forensic evidence that has been heard at this
21 Inquiry should somehow be discounted due to the
22 fact that a number of the witnesses were involved
23 in the actual forensic work along the line.

24 With respect, there is no
25 reason to question the honesty or accuracy of the

1 current scientific evidence that was presented at
2 this Inquiry by Staff Sergeant Paynter,
3 Ms. Patricia Alain, and Ms. Ann Elizabeth
4 Charland with the RCMP, and for that matter, Drs.
5 Ferris and Markesteyn on behalf of the Milgaard
6 effort, and I guess just regular witnesses in
7 this process.

8 Counsel questions whether
9 forensic serological testing could have excluded
10 David Milgaard and implicated Larry Fisher as the
11 true killer. That's at page 9 of their reply
12 submissions. Although counsel references a
13 number of pieces of forensic literature that he
14 asserts suggests the possibility that further
15 testing could have been conducted, clearly, such
16 assertions are mere speculation and address this
17 complex question in a vacuum. The evidence of
18 the RCMP forensic scientists specifically
19 addresses what could realistically be expected
20 based upon the status and level of the
21 deterioration of the exhibits when they were
22 examined. The RCMP cooperated with Commission
23 Counsel in an effort to produce, in the most
24 efficient manner, evidence that would assist this
25 Commission. Specific questions were posed by

1 Commission Counsel for Ms. Charland to address,
2 she answered the queries raised by Commission
3 Counsel, and was available if Commission Counsel
4 felt her responses were either inadequate or
5 evasive. No further questioning was put forth by
6 Commission Counsel to Ms. Charland.

7 The RCMP has never opposed
8 the calling of any witness to clarify any matter
9 before the Commission of Inquiry. With respect,
10 it is submitted that there has been ample
11 scientific evidence presented before the
12 Commission that has addressed Mr. Asper's
13 concerns throughout the various time frames
14 involved. Specifically, the evidence of Staff
15 Sergeant Paynter indicated that in 1969, had
16 further seminal fluid be found on the clothing
17 items, it would have not added anything further
18 to the body of evidence. It is submitted that
19 Mr. Asper's counsel is being unfair when he
20 asserts that Ms. Charland was somehow less than
21 objective in her report because she did not
22 detect large semen stains on the dress and coat
23 when she examined them. It should be made very
24 clear that Ms. Charland was only involved in
25 gathering forensic evidence for the prosecution

1 of Larry Fisher. By the time the samples had
2 been forwarded to her, the referenced staining
3 had already been identified and analysed by
4 Mr. Michael Barber with Forensic Science Services
5 in England. Clearly, she knew what stains had
6 been found. This is explained at page 1 of her
7 report, document 339765.

8 The complete report of
9 Ms. Charland has been filed with the Inquiry. As
10 referenced, Commission Counsel posed several
11 questions to Ms. Charland asking her to offer her
12 opinion as to what scientific steps may have been
13 undertaken. It is submitted that Ms. Charland's
14 report is fair and balanced in that she indicates
15 what testing likely would have been available and
16 undertaken. Clearly, Ms. Charland was not able
17 to time travel and examine the exhibits to
18 determine what state of deterioration may have
19 existed at various stages. Commission counsel
20 was fair-minded in his questions, and
21 Ms. Charland avoided unfounded speculation and
22 was balanced in her response. Furthermore, it
23 would not have been helpful to this Inquiry to
24 have her provide expert opinion evidence about
25 forensic organizations and testing that she had

1 no experience working in or with.

2 With respect to Mr. Asper's
3 specific questions relating to assumptions about
4 the substance on the glove being blood, counsel
5 belabours the point that the language used by
6 Ms. Charland in her response is somehow
7 misleading or not answering the specific
8 question. He bemoans the fact that Ms. Charland
9 states that the sample would not have been typed
10 had it been found in 1969 when the issue he
11 asserts is could it have been typed if that stain
12 on the glove had been found in 1969.

13 With respect, counsel appears
14 to miss the point. Simply put, the sample would
15 not have been tested in 1969 because, as her
16 report indicates, the poor quality of the sample
17 and the limitations of the typing techniques
18 would not have allowed for testing with any
19 prospects of any accurate results being obtained.
20 She specifically states that in her report.

21 Mr. Commissioner, it should
22 be noted that the glove in question was never
23 submitted for analysis to the RCMP until November
24 of 1997.

25 It is also worth nothing that

1 Dr. James Ferris, who was retained by the
2 Milgaard effort, agreed that, once Staff Sergeant
3 Paynter identified the sample as coming from an A
4 blood type secretor, that no further or different
5 procedures were available in 1969 to conduct any
6 more precise testing had further samples been
7 located.

8 Even if samples could have
9 been analysed to show that they never came from
10 David Milgaard in 1969, the argument would still
11 have existed that they could have originated from
12 a consensual partner, and the question would
13 still have been around as to who killed Gail
14 Miller. Thank goodness for the specificity of
15 DNA testing.

16 To reiterate, the RCMP has
17 never opposed the calling of any scientific
18 evidence. I understand that Mr. Hodson is
19 following up with Dr. Butt. We welcome his
20 report, if there's any assistance that can be
21 offered by the RCMP on follow-up on that we
22 certainly are available, and may offer some
23 further clarification if it's warranted.

24 I'd like, now, to offer just
25 a few comments with respect to the reply that has

1 been filed by counsel for Joyce and David
2 Milgaard.

3 At paragraph 23 of the reply
4 counsel is critical of the Saskatchewan
5 Government's position and, indirectly, the RCMP
6 that there was no evidence as of 1994 linking
7 Larry Fisher to the murder of Gail Miller. Mr.
8 Milgaard's counsel references what they call
9 ample evidence establishing a link. This
10 consists of the statements of Linda Fisher, the
11 fact that Mr. Fisher lived in the Cadrain house,
12 and similar-fact evidence. Counsel acknowledges
13 that Staff Sergeant Pearson with the RCMP saw Mr.
14 Fisher as a good suspect, but unfortunately that
15 is all any police officer could do in the 1990s
16 was consider Mr. Fisher as a suspect, until the
17 advancement in DNA testing. Although the
18 statements of Linda Fisher raised suspicion they
19 did not provide any evidence linking Larry Fisher
20 to any crime. Furthermore, there was evidence
21 before this Inquiry where Ms. Fisher described
22 her missing paring knife, but it was not the same
23 knife that was found at the murder scene. The
24 fact that Mr. Fisher lived in the basement of the
25 Cadrain house, again, is very suspicious but does

1 not establish any evidentiary link of Fisher to
2 the Miller murder. Similar-fact evidence and
3 analysis is a matter of opinion, as we've heard
4 from Dr. Rossmo.

5 The RCMP report, which is
6 part of the material that has been filed here,
7 the report of Inspector Kate Lines and Ron
8 MacKay, is different than Dr. Rossmo's analysis.
9 The degree of violence exhibited in the Miller
10 murder put it in a much different category than
11 any of the Fisher assaults surrounding the Miller
12 incident. That was the main point in Mr.
13 MacKay's report. The evidence of experienced
14 prosecutor Murray Brown was that you could not
15 proffer charges against Larry Fisher simply on
16 the basis of similar-fact evidence as a
17 reasonable doubt could easily be raised by
18 defence counsel. There was also the question of
19 double jeopardy if charges had been proffered
20 earlier against Mr. Fisher. Double jeopardy
21 could have attached, and this would have led to
22 no prosecution later on of Mr. Fisher, even with
23 DNA evidence. So police and prosecutors, in
24 those circumstances, had to be very, very
25 careful.

1 With respect, it is wrong to
2 assert that the RCMP officers involved in the
3 Flicker investigation were not suspicious of
4 Larry Fisher. These officers had the benefit of
5 the work undertaken by Staff Sergeant Pearson who
6 held that suspicion. The propensity for Larry
7 Fisher to commit sexual assaults, and his
8 proximity to the area the morning of the Miller
9 murder and sexual assault, would cause anyone to
10 have suspicions of Larry Fisher. Once again,
11 however, suspicion does not translate into
12 evidence establishing reasonable and probable
13 grounds to proffer criminal charges.

14 At paragraph 39 of the
15 Milgaard reply, counsel states that various
16 authorities had a chance to solve the crime
17 sooner, but they failed. Counsel references the
18 fact that the case was not re-investigated by the
19 RCMP and they simply accepted the 1969 statements
20 of Mr. Wilson and Ms. John implicating David
21 Milgaard in the crime.

22 Counsel is accurate that the
23 RCMP was not tasked with reinvestigating the
24 murder of Gail Miller. In 1993, the Flicker
25 investigation was focused on criminal wrongdoing

1 by police and prosecutors. The evidence of
2 Inspector Sawatsky, and the Flicker report
3 itself, clearly demonstrates that the job of the
4 RCMP was to conduct the particular criminal
5 investigation, and in the event that any further
6 information was uncovered inculcating or
7 exculpating David Milgaard or Larry Fisher, that
8 was to be recorded and followed up upon. That
9 was done.

10 Counsel's allegation that the
11 RCMP simply accepted Mr. Wilson's statement
12 inculcating David Milgaard is very unfair. Mr.
13 Wilson would not interview with the RCMP in 1993.
14 This was the individual who asserted that, in
15 1969, he had been improperly pressured by
16 Saskatoon police. Even though the RCMP was
17 investigating these very same police officers
18 with the possibility of proffering criminal
19 charges, Mr. Wilson refused to interview with the
20 RCMP.

21 Great efforts were made to
22 try and gain further evidence from Ms. John. She
23 steadfastly refused to assert there was any undue
24 pressure placed upon her by the city police.
25 Simply put, there was nothing more that the RCMP

1 could do. The case was over 20 years old by the
2 time the first RCMP officer started to
3 investigate.

4 I submit the Flicker
5 investigation was very thorough, every avenue was
6 explored, the report is voluminous and was
7 reviewed by experienced counsel with Alberta
8 justice. With respect, counsel appears to have a
9 fundamental lack of understanding as to what
10 police agencies do in criminal investigations.
11 They investigate to uncover evidence. If they
12 cannot find evidence, they do not proffer
13 charges. If they do proffer charges without
14 reasonable and probable grounds to do so, they
15 end up with acquittals and malicious prosecution
16 actions against them. This does not serve the
17 public interest.

18 At paragraph 52 of the
19 Milgaard reply counsel asserts that the RCMP was
20 simply concerned with trying to find flaws in the
21 Milgaard approach, and that following the Supreme
22 Court of Canada reference, they were prepared to
23 leave things in limbo. The Provincial Attorney
24 General decided to not retry David Milgaard for
25 the murder of Gail Miller. That was a decision

1 that never rested with the RCMP.

2 Furthermore, within a few
3 months after the Supreme Court of Canada
4 decision, the referenced criminal investigation
5 was undertaken by the RCMP into police and
6 prosecutorial misconduct. During that extensive
7 investigation, any information that inculpated or
8 exculpated David Milgaard or Larry Fisher was
9 followed up on in detail, and the report reflects
10 that.

11 At paragraph 69 of their
12 reply counsel concludes that the crime was solved
13 by amateurs without resources and they were met
14 with resistance every step of the way. That is
15 untrue. The evidence before this Inquiry clearly
16 shows that Staff Sergeant Pearson of the RCMP had
17 a very good working relationship with David
18 Asper. He testified to that effect, more
19 importantly Mr. Asper testified to that effect,
20 and the record reflects their numerous
21 conversations and discussions about Mr. Fisher
22 and other aspects of the case.

23 Inspector Sawatsky's team met
24 with Hersh Wolch, Joyce Milgaard, Robert Bruce,
25 numerous others, to both understand and catalogue

1 the concerns they raised for investigation.
2 These concerns were distilled down to 68
3 allegations that were thoroughly followed up upon
4 in the Flicker report, and again, that report
5 speaks for itself.

6 The fact there was no direct
7 evidence linking Larry Fisher to the Miller
8 murder, other than the eventually DNA testing, is
9 not the fault of the RCMP. With respect to the
10 entirety of the evidence heard at this lengthy
11 inquiry, there has been nothing revealed that is
12 a direct link to Larry Fisher, other than the DNA
13 evidence. Conjecture, no matter how often it is
14 repeated, is not sufficient for basing criminal
15 charges.

16 Those are my submissions, Mr.
17 Commissioner, and I thank you for this
18 opportunity.

19 COMMISSIONER MacCALLUM: Thank you
20 Mr. Gibson.

21 **BY MR. O'KEEFE**

22 MR. O'KEEFE: Good afternoon, Mr.
23 Commissioner. My name is Eamon O'Keefe and I'm
24 counsel for Larry Fisher.

25 When the Commission first

1 granted standing to Larry Fisher one of the
2 concerns was that there may be parties at the
3 Inquiry who would attempt to avoid responsibility
4 for their own part in David Milgaard's wrongful
5 conviction, or his subsequent period of
6 incarceration, by shifting blame onto Larry
7 Fisher. Thankfully, from Mr. Fisher's
8 perspective, the way the evidence has gone in,
9 and the submissions that my colleagues have
10 filed, have not borne out that concern.

11 As you have reminded us on
12 more than one occasion, Mr. Commissioner, the
13 Terms of Reference of the Inquiry do not include
14 any discussion or investigation of whether Mr.
15 Fisher is responsible for Gail Miller's murder.
16 His conviction speaks for itself. And that
17 leaves two main areas of concern, or two main
18 areas of interest, which relate to Mr. Fisher
19 within the Terms of Reference.

20 The first is the timing and
21 the manner of Mr. Fisher's guilty pleas in Regina
22 to the four Saskatoon attacks that took place
23 around the time of Gail Miller's murder. Mr.
24 Fisher, of course, confessed, shortly after his
25 arrest in Manitoba, to the Winnipeg offences in

1 September of 1970, and it was within a month of
2 that that he confessed, subsequently, to two of
3 the four Saskatoon attacks in October of 1970.
4 Those confessions prompted negotiations and
5 discussions between Mr. Fisher's counsel,
6 Lawrence Greenberg, and the Saskatchewan Attorney
7 General's Department, and those discussions
8 ultimately resulted in Mr. Fisher's guilty plea
9 on December 21st of 1971, or guilty pleas, in
10 Regina to the four offences committed around the
11 time of the Gail Miller murder.

12 Those guilty pleas have come
13 under scrutiny with the suggestion being made,
14 first, that there was some delay in the guilty
15 pleas being entered, and that that delay may have
16 been for the purpose of having the guilty pleas
17 entered after Mr. Milgaard's appeal to the
18 Saskatchewan Court of Appeal had been dealt with;
19 and second, that the location of the guilty pleas
20 was suspicious in that it took place in Regina,
21 or they took place in Regina, rather than in
22 Saskatoon.

23 What's clear from the
24 evidence that the Commission has heard is that
25 neither the delay in the guilty pleas nor the

1 location of the guilty pleas, being in Regina,
2 were done at Mr. Fisher's request. If there was
3 any malicious intent in either delaying the
4 guilty pleas or in having the guilty pleas heard
5 in Regina, Larry Fisher was not a party to that
6 malicious intent.

7 It's clear that Mr. Fisher
8 and his lawyer, Lawrence Greenberg, pushed for an
9 early resolution to his Saskatchewan charges
10 after Mr. Fisher's confessions were made. Serge
11 Kujawa, when he testified, acknowledged that
12 there was no delay from Mr. Fisher's end in the
13 negotiations. Likewise, Mr. Fisher never asked
14 that the guilty pleas be heard somewhere outside
15 of Saskatoon. He testified, and Mr. Greenberg
16 testified, that the details as to the location of
17 the guilty pleas was left up to his counsel and
18 to the Saskatchewan Attorney General's
19 Department. Mr. Greenberg confirmed that he
20 received no instructions from Mr. Fisher to move
21 the guilty pleas anywhere but Saskatoon.

22 The second way in which Mr.
23 Fisher's interest is engaged within the terms of
24 reference involves his failure to accept
25 responsibility for Gail Miller's murder and his

1 silence regarding the murder over the years that
2 Mr. Milgaard was incarcerated, and whether that
3 silence contributed either to Mr. Milgaard's
4 original conviction, or hindered or prevented Mr.
5 Milgaard's efforts to re-open the investigation
6 at a later time.

7 Mr. Fisher has denied
8 responsibility for Gail Miller's murder and
9 continues to deny it up to this date. With that
10 being said, apart from saying "it wasn't me", Mr.
11 Fisher did nothing to implicate David Milgaard or
12 to obstruct David Milgaard's efforts to have the
13 investigation re-opened. Mr. Fisher's first
14 contact with Saskatoon police regarding the Gail
15 Miller murder is the now-famous or infamous
16 meeting he had with Detective McCorrison on
17 February 3rd on the street at 20th Street and
18 Avenue O. Detective McCorrison had inquired of
19 Mr. Fisher as to his whereabouts on the morning
20 of January 31st, he also requested personal
21 details from Mr. Fisher which Mr. Fisher
22 provided, including his name, address, his place
23 of work, and his employer. All of the details
24 that Mr. Fisher provided to Detective McCorrison
25 were true. Mr. Fisher did not hide, he did not

1 move, and he did not deviate from his usual
2 pattern of conduct at that time, using the same
3 bus stop subsequent to his meeting with Detective
4 McCorrison as he had previously, to go to and
5 from work.

6 Mr. Fisher's responses to
7 Detective McCorrison were recorded in Detective
8 McCorrison's report, which was kept on the file
9 relating to the Gail Miller murder. Had any
10 investigation been done of Mr. Fisher's
11 statements to Detective McCorrison, and
12 specifically if Mr. Fisher had not been at work
13 on the morning of January 31st, it would have
14 been a simple matter for follow-up to have been
15 done on that, since Mr. Fisher had given his
16 proper name and address indicating that he lived
17 in the same residence as Albert Cadrain to
18 Detective McCorrison. Mr. Fisher, again, did
19 not do anything to obstruct the Saskatoon City
20 Police in their investigation of the murder when
21 he provided that information.

22 His next involvement with the
23 Saskatoon City Police came in 1970 when he dealt
24 with Detective Karst in Manitoba regarding the
25 attacks on women from 1968 into 1969. He

1 acknowledged his responsibility for them, he
2 subsequently entered guilty pleas to them and
3 importantly, as well, admitted in his statements
4 the modus operandi which would ultimately be
5 seized upon as evidence that he was the killer of
6 Gail Miller. He made no effort to misrepresent
7 that modus operandi at the time, sir.

8 His next involvement as far
9 as questioning regarding the Gail Miller murder
10 investigation went came in the early 1990s when
11 he dealt with Sergeant Pearson. At that time he
12 co-operated with the RCMP. His co-operation was
13 somewhat reluctant it's admitted, sir, he was
14 receiving advice from lawyers at the time, so his
15 reluctance is somewhat understandable. However,
16 he did provide blood, hair, saliva, urine and
17 semen samples to the RCMP, he submitted to a
18 polygraph on July 9th of 1990. During his
19 dealings with the RCMP, he provided statements
20 including a statement to Eugene Williams on July
21 12th of 1990. During his involvement with the
22 RCMP's questioning, he never pointed the RCMP in
23 a different direction or suggested that David
24 Milgaard was in fact Gail Miller's murder. In
25 fact, when discussing the issue with Eugene

1 Williams in the July 12th interview, he conceded
2 that it was appropriate for the authorities to
3 consider him a likely suspect in the murder.

4 At that time there was still
5 some considerable point of view, if I can put it
6 that way, that believed that Mr. Milgaard was
7 responsible for Gail Miller's murder. Whatever
8 belief the authorities had in Mr. Milgaard's
9 guilt at that time, Mr. Fisher did not encourage
10 them in that belief, nor did he ever suggest to
11 them that the Gail Miller murder investigation
12 should not be re-opened.

13 If evidence tending to
14 implicate Mr. Fisher in the murder was overlooked
15 or ignored at any point throughout the
16 investigation or in the years following the
17 investigation into Gail Miller's murder, that
18 oversight was not the result of anything that Mr.
19 Fisher did to conceal the evidence of his
20 involvement.

21 I would like to conclude,
22 sir, by echoing the gratitude that my colleagues
23 have expressed to yourself, to Commission Counsel
24 and to the Commission staff for the
25 professionalism and helpfulness that they've

1 shown throughout these proceedings and also to my
2 colleagues for their assistance. Thank you.

3 COMMISSIONER MacCALLUM: Thank you, Mr.
4 O'Keefe.

5 MR. HODSON: The next -- I'm not sure when
6 you want to break for the afternoon, Mr.
7 Commission. We have AIDWYC, Justice Canada and
8 Saskatchewan Justice. It's 2:30. Preference,
9 Mr. Roy?

10 MR. ROY: I'm in your hands,
11 Mr. Commissioner.

12 COMMISSIONER MacCALLUM: Let's hear one
13 more and then we'll have a break. Thank you. Is
14 that okay, anybody else need -- no.

15 **BY MR. ROY**

16 MR. ROY: Good afternoon, Mr. Commissioner.
17 My name is Julian Roy and I am counsel for the
18 Association in Defence of the Wrongly Convicted
19 in respect of the systemic phase of this inquiry.

20 I want to start at the outset
21 by, on behalf of AIDWYC, expressing our
22 appreciation for being granted standing in this
23 proceeding and being allowed to participate in
24 the manner that we have and we hope that we've
25 been a, we've played a constructive role in your

1 process. I would also like to thank your counsel
2 and your staff who have been more than helpful in
3 terms of accommodating AIDWYC's participation.

4 I want to begin my
5 submissions with making an observation about an
6 irony in the position that I'm taking on behalf
7 of AIDWYC as counsel in this proceeding. Most
8 often you don't hear counsel making a submission
9 that will result in the end of their client and
10 effectively that is what I'm doing today, I am
11 asking that in terms of the heart of the
12 submission that AIDWYC makes, we are respectfully
13 proposing that you recommend the creation of an
14 independent tribunal to review allegations of
15 wrongful conviction and, as you've heard from
16 David Kyle, in terms of the English experience,
17 groups like AIDWYC that were in existence in
18 England have had a much diminished role and
19 that's AIDWYC's fervent hope, that we will also
20 ride off into the sunset and that this work will
21 be done by an independent tribunal.

22 Now, there are three areas
23 that I want to make submissions about today. The
24 first area is with respect to your jurisdiction;
25 in other words, do you have the jurisdiction to

1 make the recommendations that AIDWYC has proposed
2 in their materials.

3 The second area is I want to
4 make some submissions with respect to our
5 jurisprudence in Canada on the meaning of
6 independence, in terms of the independence of a
7 tribunal, because in my respectful submission,
8 that is at the heart of why AIDWYC says that the
9 current system that's in place is not adequate.

10 The third area, if there's
11 time, is I want to make, elaborate on the reasons
12 for the recommendations that AIDWYC has proposed.
13 We've made 14 recommendations, or we propose,
14 respectfully, 14 recommendations for you to
15 consider, Mr. Commissioner, and if there's time,
16 I will make submissions concerning what
17 principles underlie those suggestions.

18 In the last area I may be, if
19 there's time, I may make some specific responses
20 to some issues that have arisen in oral
21 submissions and in the replies of My Friends.

22 Now, with respect to
23 jurisdiction, and that's the first area that I
24 intend to cover, the jurisprudence, in my
25 respectful submission, does require you to walk a

1 rather fine line in terms of what you can and
2 what you can't do and I must say, as I was
3 reading these cases, it gave me nightmares about
4 first year constitutional law in law school
5 because these cases are difficult to read and
6 they are not read very often these days, but in
7 AIDWYC's respectful submissions, that you can
8 stay on the right side of that fine line that I
9 submit exists and that you can make the
10 recommendations that AIDWYC suggests. It's
11 certainly not as simple, in AIDWYC's submission,
12 as the Attorney General of Canada has submitted
13 to you in their written materials, that this is
14 federal law; therefore, this is a provincial
15 Commission and you have no jurisdiction, it's
16 certainly not as simple as that. The case law
17 tells us that we have to adopt a much more
18 nuanced approach than that.

19 Now, the first point on
20 jurisdiction is AIDWYC's submission that if you
21 did see fit to make recommendations in this area,
22 you wouldn't be the first Commission, provincial
23 Commission of Inquiry to do so. In other words,
24 you wouldn't be wading into totally uncharted
25 waters. There's been at least three provincial

1 commissions of inquiry who have made
2 recommendations in various forms of language on
3 the creation of an independent tribunal to
4 consider allegations of wrongful conviction.

5 The first one is the *Marshall*
6 *Inquiry* and our submissions on that, we quote the
7 *Marshall Inquiry* recommendation at page 11 and
8 12, paragraph 25 of our submissions. We've
9 adopted that proposed language in terms of how
10 we've proposed that you make a recommendation and
11 that's that the provincial government consult the
12 federal government on the creation of this body.

13 Now, in the *Morin Inquiry*,
14 Justice Kaufman was a lot more straightforward
15 than that, he actually made a recommendation
16 directly to the Attorney General of Canada, so
17 AIDWYC certainly would also support that type of
18 language in terms of a recommendation.

19 Also Justice Cory, he
20 directed his proposal that there be an
21 independent commission directly to the Government
22 of Canada, so we're in your hands in terms of how
23 that, how, if you sought fit to make such a
24 recommendation, how it would be framed.

25 Now, I want to make some

1 submissions on the case law on jurisdiction and I
2 do that in the context of what your Terms of
3 Reference are. Now, your Terms of Reference
4 provide that you shall report your findings and
5 make such recommendations as you consider
6 advisable in relation to the administration of
7 criminal justice in the Province of Saskatchewan.

8 Now, in AIDWYC's respectful
9 submission, the administration of criminal
10 justice in the province, that language that's in
11 your Terms of Reference, it closely corresponds
12 to the division of powers in the constitution.
13 In other words, Section 92(14) of the
14 Constitution Act provides that the province may
15 make, may exclusively make laws in relation to a
16 number of matters, including 92(14), the
17 administration of justice in the province,
18 including the constitution, maintenance,
19 organization of provincial courts, both of civil
20 and criminal jurisdictions and including
21 procedure in criminal matters in those courts.
22 Rather, civil matters in those courts.

23 It's AIDWYC's respectful
24 submission that when the province granted those
25 Terms of Reference, effectively what they were

1 doing, they chose the language "administration of
2 criminal justice" deliberately to reflect what
3 the province's full jurisdiction was on criminal
4 matters in this province.

5 In *Hickman*, the *Hickman* case,
6 there is actually a definition provided of what
7 the administration of justice is in 92(14) of the
8 Constitution Act and the court was explicit that
9 the administration of justice included the
10 administration of criminal justice, so in other
11 words, the Terms of Reference and the way the
12 province has, or the way the legislature has
13 drafted those, their intent is clear that they
14 intended to give you, Mr. Commissioner, the full
15 scope of what the province's jurisdiction is in
16 relation to criminal justice as you determine
17 what recommendations are appropriate.

18 Now, I make this submission
19 because the Attorney General Canada in their
20 written submissions, they attempt to draw a --
21 they attempt to distinguish the *Hickman* case on
22 the basis of the particular language used in the
23 Terms of Reference for the Marshall Inquiry from
24 your Commission of Inquiry and in my respectful
25 submission, whatever the precise words of those

1 Terms of Reference, you have the full scope of
2 provincial jurisdiction. So in other words, if
3 Nova Scotia can constitute an inquiry that can
4 make recommendations about the conviction review
5 process federally, Saskatchewan also has that
6 same jurisdiction, and in terms of the grant --
7 in terms of the Terms of Reference, they've given
8 you, with respect, the full scope to make those
9 recommendations if you so choose.

10 Now, the Attorney General
11 Canada's submissions that I refer to are at
12 paragraphs 236 through 42 and AIDWYC's submitted
13 reply submissions to that are at paragraph 7 and
14 that area is covered.

15 Now, moving on to *Hickman*,
16 *Hickman* is directly on point, that you can make
17 recommendations in the area of conviction review
18 federally, and the Attorney General Canada
19 virtually admits that in their submissions at
20 paragraph 237, so if AIDWYC is correct in
21 submitting, in interpreting your Terms of
22 Reference, clearly you have the jurisdiction to
23 make these recommendations.

24 If that's not enough, you
25 also have the *Keable* number 1 case from the

1 Supreme Court of Canada and it's one of those
2 cases that both sides on opposite sides of the
3 debate will quote for their purpose, but in my
4 respectful submission, AIDWYC's characterization
5 is the appropriate one.

6 *Keable* number 1, effectively
7 it does create that fine line that I referred to
8 earlier in terms of what you can do and what you
9 can't do and I'll make submissions in terms of
10 *Keable* and what it tells you you can't do first.

11 On the crossing the line,
12 what you cannot do is you cannot detach your
13 inquiry from a valid area of provincial
14 competence and go on a free-ranging inquiry
15 solely into federal matters. *Keable* says you
16 can't do that. It also says, arguably, that you
17 can't engage in some form of performance review
18 of federal officials in the way they conduct
19 their job function, so those are the two things
20 that you can't do according to *Keable* number 1.

21 But what you can do, in my
22 respectful submission, while you were inquiring
23 into valid areas of provincial jurisdiction, if
24 incidentally while you come across, if you come
25 across areas of federal legislation that in your

1 view require improvement, you can say that in
2 your report, and this would be a classic case
3 where that would happen in my respectful
4 submission, because you had to, in the course of
5 inquiring into Mr. Milgaard's wrongful conviction
6 and why it took so long to undo it, in the course
7 of inquiring into that area you were exposed to
8 how the federal agencies considered Mr.
9 Milgaard's application for review and considered
10 how Section 690 at the time operated, so in my
11 respectful submission, while you were validly
12 engaging in inquiry into Mr. Milgaard's wrongful
13 conviction and why it took so long to uncover it,
14 you may have come to the view, and AIDWYC has
15 made submissions that you ought to come to that
16 view, that the federal legislation is inadequate.
17 So in my respectful submission, in terms of your
18 jurisdiction, you are squarely on the right -- to
19 make the recommendations that we suggest, you
20 would be clearly on the right side of that line
21 that *Keable* draws.

22 Now, thankfully that
23 completes my submissions on the case law.

24 I have a less esoteric basis
25 for suggesting that you make recommendations in

1 that area and that is that federal
2 parliamentarians apparently want to hear your
3 views on it, with respect. In the database, and
4 I won't take you line by line through it, we have
5 evidence before you as to the proceedings of the
6 standing committee on justice and human rights
7 federally and at the time that 696 was being
8 considered, the reform of the old Section 690,
9 and again I'm not going to take you line by line
10 through it, but it's evident from that debate
11 that federal parliamentarians wanted to hear what
12 the result would be of this inquiry, that section
13 696 was clearly some form of compromised position
14 in terms of how federal parliamentarians
15 approached it, that it wasn't the final
16 destination for how Canada would deal with this
17 issue of conviction review, that it was something
18 that they accepted because it was the best that
19 was achievable at the time and that really what
20 they wanted to hear from was from you,
21 Mr. Commissioner, on what would be the
22 appropriate system, so in our factum we've
23 alerted you specifically to the passages where
24 that debate take s place, so regardless of the
25 position taken by AG Canada in this proceeding,

1 it's clear that the legislature wants to hear
2 from you.

3 I want to make some brief
4 submissions with respect to the meaning of
5 independence in our jurisprudence and that's the
6 second area, and again it's central to why AIDWYC
7 is of the view that the current process is
8 inadequate.

9 Now, the jurisprudence on the
10 meaning of independence is driven by our Charter
11 of Rights, Section 11(d), and it starts in cases
12 like *Valenti* where it considers what's the nature
13 of independence for a criminal court proceeding,
14 but that, and in terms of how it defines it, it's
15 clear that independence includes more than just
16 actual independence, that independence requires a
17 perception on the part of reasonable people that
18 that tribunal or that court is independent, and
19 if one refers back to three previous provincial
20 commissions of inquiry in terms of how they
21 perceived how independent the Minister of Justice
22 is in reviewing convictions, in my respectful
23 submission the current process with the minister
24 making the determinations is not adequate from
25 the point of view of a reasonable perception.

1 role that implicates liberty and security of the
2 person in the way that it does and AIDWYC has
3 made its submissions in written form as to why
4 the Minister of Justice is not sufficiently
5 independent and I won't repeat those.

6 In terms of the references to
7 the cases, *Valenti*, I would suggest respectfully
8 that you consider paragraphs 22 and 25 of that
9 case, and also with respect to *Canadian Pacific*,
10 I would respectfully suggest that you consider
11 paragraphs 80 and 83 through 85 because they
12 fully encapsulate AIDWYC's position in this
13 regard.

14 Now, AIDWYC's -- I want to
15 move to my third area which is AIDWYC's
16 recommendations and they are contained in
17 paragraph 67, page 30 of AIDWYC's main
18 submission, and the intention of drafting the
19 recommendations in the way that we did is an
20 effort to go beyond a simple recommendation that
21 there be an independent review tribunal. Given
22 the importance of this Commission of Inquiry, and
23 what I mentioned about federal parliamentarians
24 wanting to hear the results of this inquiry,
25 AIDWYC attempted to give a little more detail,

1 put some meat on the bones in terms of what that
2 type of tribunal would look at, and the
3 recommendations are an effort to distill what are
4 the salient features of the English model that
5 AIDWYC thinks are appropriate for the Canadian
6 context.

7 Now, all of the
8 recommendations that we make are animated by a
9 number of basic principles and the first one
10 which I've mentioned is independence. The second
11 is accessibility. The third, fairness. The
12 fourth is a desire to permit reasonable access to
13 the courts.

14 Now, I won't review all of
15 them, but with respect to the recommendation
16 number five in AIDWYC's submissions, AIDWYC makes
17 a submission that the independent tribunal should
18 be statutorily required to confer any alleged
19 wrongful conviction for which there is a real
20 possibility that the conviction would not be
21 upheld by the Court of Appeal. As Mr. Kyle
22 testified, the threshold is really the heart of
23 the matter, that the point of a threshold is that
24 you want to ensure that you capture all the cases
25 of wrongful conviction, that you don't screen

1 them out before they get to court, and what that
2 implies is that there will be cases, if the model
3 is working effectively where a case is referred
4 by an independent tribunal and it's not
5 successful. That's the only way you can ensure
6 that all the cases that are wrongful convictions
7 actually find their way to court and we've made
8 submissions on why we say neither 690 and 696
9 serve that function. In fact, that threshold
10 actually serves to filter out potential cases of
11 wrongful conviction that ought to go to the Court
12 of Appeal.

13 Recommendation seven, the
14 independent tribunal shall be sufficiently funded
15 to conduct its own investigations of any and all
16 allegations of wrongful conviction submitted to
17 it. Essentially AIDWYC is submitting to you that
18 Canada ought to abandon the applicant-driven form
19 of conviction review, where the onus is always on
20 the applicant to gather evidence before they can
21 even get a review commenced, so we are
22 respectfully submitting that any conviction
23 review process in Canada ought to follow the
24 inquisitorial model that we see in England, and
25 we've made our submissions on why we say that's

1 important.

2 Recommendations 9 through 11
3 all relate to fairness and transparency. AIDWYC
4 respectfully submits that there ought to be a
5 rigorous procedure that would govern all
6 applications, so everybody, members of the
7 public, the applicant, the court system, can see
8 how an application is being considered. It
9 doesn't go off into some void somewhere and it's
10 a great mystery to everybody as to how it's being
11 considered. There ought to be consistency and
12 transparency in the way that these applications
13 are considered.

14 Also, recommendation 10
15 ensures that if there's going to be a negative
16 disposition of an application, whether at a
17 preliminary stage or later on, that the applicant
18 always has, before his application is dismissed,
19 full notice of why the application is going to be
20 dismissed, full disclosure, and an opportunity to
21 be heard. Again, that's closely modelled on the
22 English Criminal Cases Review Commission.

23 Recommendation 14 is with
24 respect to the preservation of evidence and I
25 would echo counsel's earlier submission about the

1 Manitoba requirement in their Law Society rules,
2 that evidence be preserved, and I wish I would
3 have thought of that suggested recommendation,
4 but at recommendation 14 of AIDWYC's submission,
5 it would be consistent with that, that there
6 ought to be uniformity and consistency in the way
7 that evidence is preserved for a potential review
8 at a later stage. It seems that in Saskatchewan
9 and in Canada at large there is no uniform system
10 and it's a complete patchwork and it's an
11 accident whether or not we actually have evidence
12 to consider it down the road, so probably, it's
13 beyond the full scope of this inquiry to come up
14 with a detailed code of how that would work, but
15 a recommendation that that ought to be the
16 subject of study and there ought to be a
17 comprehensive regime would be appropriate and
18 disclosed by the evidence in this inquiry.

19 I'm into my miscellaneous
20 submissions now, Mr. Commissioner. Ms. Knox made
21 a submission about choice of, with respect to
22 recommending that counsel who had assisted
23 wrongfully convicted people not represent them at
24 subsequent commissions of inquiry. Respectfully,
25 AIDWYC is of the view that the choice of counsel

1 is a cherished legal right and ought not to be
2 disturbed absent very serious circumstances, and
3 respectfully, we lawyers already have ethical
4 guidelines that would cover what stage they
5 become a witness and ought not to be counsel and
6 there is no need, in AIDWYC's respectful
7 submission, to develop a special rule in the case
8 of the wrongfully convicted.

9 I also want to finally
10 address a matter raised in the Attorney General
11 of Canada's reply and at paragraph 20 of the
12 Attorney General of Canada's reply, My Friend Mr.
13 Frayer quotes a portion of AIDWYC's submission
14 before the Driskell Inquiry, and My Friend makes
15 the following submission at paragraph 20, page 6
16 of his reply:

17 "While it appears from the submissions
18 before this Inquiry that AIDWYC is not
19 at all satisfied with the current
20 conviction review process, as recently
21 as October of 2006, AIDWYC made written
22 submissions at the Commission of Inquiry
23 into certain aspects of the trial and
24 conviction of James Driskell. In their
25 submissions, they spoke of

1 Mr. Driskell's experience with the
2 current process and this is what his
3 counsel had to say about the process at
4 page 54, paragraph 68,
5 'This is not to be critical of the
6 Criminal Conviction Review Group's work
7 on this case. David McNairn, and the
8 CCRG as a whole, did first rate work on
9 his application, discovered many facets
10 of the case that had not been made
11 available to AIDWYC, and worked with
12 commendable speed'."

13 Now, the tenor of AG Canada's submission in this
14 area is that somehow AIDWYC is taking the
15 position before you, Mr. Commissioner, that is
16 inconsistent with the position taken at another
17 Commission of Inquiry.

18 Now, that's a surprising
19 submission to say the least and it's surprising
20 in particular when one considers the two lines
21 that preceded the quote that Mr. Frayer included
22 in his reply where AIDWYC said the following:

23 "The system for uncovering wrongful
24 convictions failed Mr. Driskell.

25 Because of the nature of the ministerial

1 review process he had to wait 11 years
2 until his application was filed by
3 AIDWYC on his behalf."

4 And later on, at paragraph 70, paragraph 72,
5 AIDWYC makes explicit submissions that the
6 Commissioner in the *Driskell* case make a
7 recommendation for an independent review
8 commission.

9 I wanted to ensure that any
10 impression left by the department, the Attorney
11 General of Canada's submissions, was not left
12 with you, Mr. Commissioner, because it's very
13 important that it -- for -- from AIDWYC's point
14 of view that the Commission understand that
15 AIDWYC has consistently taken this position, that
16 we took this position before the *Morin Inquiry*,
17 we took this position in Parliament giving
18 evidence before the Standing Committee on
19 Justice. AIDWYC has consistently taken the
20 position that there ought to be an independent
21 commission to consider wrongful convictions and
22 Mr. Frayer is simply wrong if he meant to suggest
23 otherwise.

24 Now, also flowing from that,
25 I want to assure you, Mr. Commissioner, that,

1 should you agree with AIDWYC that there ought to
2 be -- that you do recommend an independent
3 commission in the manner proposed, that AIDWYC
4 won't change its mind tomorrow, or a month from
5 now, or ten years from now, as to the wisdom of
6 that recommendation; that we will be taking your
7 recommendation, if you choose to make it, and
8 advocating in favour of it in every forum that we
9 are able, and AIDWYC will not stop in that
10 process until we are put out of business in the
11 way that I suggested earlier, and that we're
12 permitted to ride into the sunset.

13 So those are my respectful
14 submissions, Mr. Commissioner, unless you have
15 any questions, and I see the "time is up" sign
16 has just gone up.

17 COMMISSIONER MacCALLUM: Thank you, Mr.
18 Roy.

19 MR. ROY: Thank you.

20 *(Adjourned at 2:58 p.m.)*

21 *(Reconvened at 3:26 p.m.)*

22 COMMISSIONER MacCALLUM: Mr. Frayer?

23 **BY MR. FRAYER**

24 MR. FRAYER: Mr. Commissioner, thank you.
25 David Frayer appearing on behalf of the Justice

1 Minister of Canada.

2 Since the application for
3 standing was granted by you, Mr. Commissioner,
4 back in early March of 2005, the counsel on
5 behalf of the Minister of Justice Canada has
6 played an active and ongoing role in the
7 proceedings of this Inquiry and examined
8 witnesses where it was appropriate to do so, and
9 the role that we played has been reflected in our
10 agreement as certain federal officials testified
11 as to investigative steps taken in the two 690
12 applications, more specifically the first of
13 those; and the subsequent DNA analysis that
14 eventually led to David Milgaard's exoneration
15 and the ultimate conviction of Larry Fisher.

16 We, likewise, produced
17 certain documents and media materials for use at
18 the Inquiry and we took the position that only
19 those documents that were prescribed by
20 privilege, or ultimately constitutional
21 limitations, were not to be turned over to the
22 Inquiry, and a list of such documents on which
23 privilege was claimed was provided to Commission
24 Counsel. And, lastly, we waived privilege,
25 without argument, on some of the documents that

1 were -- found their way into the Inquiry record
2 that were essentially part of the investigative
3 narrative and not subject to privilege or
4 constitutional limitations, those were turned
5 over in order to assist the work of the Inquiry.

6 Now I don't intend to go
7 through our written submissions other than to
8 deal briefly with two issues. The first of those
9 issues is one that became the subject matter of
10 considerable discussion in the proceedings of
11 September the 26th of 2006, and that was our
12 position with respect to the use of certain
13 documents which, in our view, remained
14 constitutionally proscribed in accordance with
15 the ruling of Chief Justice Laing, and it refers
16 specifically to the argument relating to the
17 document to which Mr. Wolch referred in his
18 submission this morning. And if I might take you
19 back to the discussion we had at the time, and I
20 feel it necessary to comment on it again, in the
21 proceedings on September the 26th you'll recall
22 Mr. Wolch expressed some frustration at his
23 inability to make reference to a document that's
24 -- appears on more than one occasion within the
25 record of this Inquiry, that being document

1 152028 or 010010. And Mr. Wolch said:

2 "MR. WOLCH: Mr. Commissioner, I know it's
3 getting very late, but I just want to
4 put on the record that I made reference
5 to a document, it's 152028."

6 Mr. Wolch went on:

7 "I don't want to see, Mr. Commissioner,
8 you come to an erroneous conclusion
9 without this document; --",
10 and he went on further, that's starting at 494,
11 he went on at 495:

12 "MR. WOLCH: And I think that document is
13 crucial to your decision-making and I'm
14 not sure what the position is on this
15 document?"

16 Mr. Hodson, in response at line 13 and following:

17 "I anticipate that at the time we hear
18 submissions, Mr. Commissioner, that
19 there may be various submissions
20 regarding the use, if any, that can be
21 made of this document. But the issue,
22 the judgement of Chief Justice Laing
23 limited questions of Federal Justice
24 officials with respect to advice given
25 and received, that is why I did not

1 question this witness with respect to
2 the document.",
3 'this witness' being Mr. Williams.

4 Then there were further
5 discussions in which you, Mr. Commissioner, at
6 496 directed that you want:

7 "I want you to include those arguments
8 in your written arguments, please, --",
9 Mr. Wolch went on:

10 "MR. WOLCH: I would just like to say, Mr.
11 Commissioner, that I find it difficult
12 that this document was given to
13 Saskatchewan --",

14 and you respond:

15 "COMMISSIONER MacCALLUM: Well there goes
16 the privilege, but the constitutional
17 prerogative, if it applies, does not go
18 with the privilege."

19 And I made an argument in support of the position
20 that that particular document and documents of a
21 similar nature were constitutionally prohibited
22 by the ruling of Justice Laing and, therefore,
23 were not there for the Commission, your
24 consideration, Mr. Commissioner.

25 So I take that position to

1 reinforce it, because our argument is that the
2 decision of Chief Justice Laing not only deals
3 with the proscription of oral advice given and
4 received as between federal officials, but
5 documents in the Inquiry record that deal with
6 such advice given and received. Our position,
7 therefore, is that, since constitutionality
8 cannot be waived, the written documents are
9 likewise proscribed by the judgement of Chief
10 Justice Laing and, as I had indicated, they, with
11 respect, cannot be considered by this Inquiry.

12 Our argument with respect to
13 that issue is found at paragraphs 8 to 17 of our
14 written submission.

15 I'd like to then deal with
16 the systemic issue very briefly and I'd like to
17 go back to, once again, the record of proceedings
18 when Mr. Kyle from the Criminal Cases Review
19 Commission appeared here, and that was on Monday,
20 October the 2nd of 2006, and Mr. Hodson in his
21 introductory remarks at 40,012, lines 17, says:

22 "MR. HODSON: And, just before I start to
23 question Mr. Kyle, I want to touch on
24 some matters related to this
25 Commission's terms of reference."

1 He goes on to say:

2 "Mr. Kyle will be giving
3 evidence about the English Criminal Cases -- the
4 English Criminal Cases Review Commission, of
5 which he was a member for a number of years, --"
6 Then he goes on at 40,013, line 8:

7 "And I think it bears
8 repeating that this Commission does not
9 have, as an express part of its mandate,
10 to review the Section 690 or Section 696
11 provision of the Federal *Criminal Code*,
12 and this Commission has not looked at
13 any Section 690 or 690 case beyond David
14 Milgaard's case, and I don't want to get
15 ahead of ourselves, Mr. Commissioner,
16 but certainly this -- these areas will
17 be the areas of submissions at a later
18 date as far as the extent to which this
19 Commission can get into those matters,
20 but I simply want to put it on the
21 record before Mr. Kyle gives evidence."

22 And Mr. Hodson went on at 40,014, line 10:

23 "I think, to give some
24 context to Mr. Kyle's evidence, not for
25 the purposes of getting into a critical

1 analysis of the differences between the
2 English system and the Canadian system,
3 I can tell you this, that Mr. Kyle is
4 not -- he is familiar with the section
5 690/696 proceedings in Canada, but I
6 think, beyond being generally aware of
7 that, it's not something that he has
8 studied in detail. I have not asked him
9 to study it, I've not asked him to
10 critique it, and he is not in a
11 position, I think, to provide direct
12 comparisons."

13 And then there's some questions relating to some
14 general knowledge he has of the proceedings
15 surrounding David Milgaard, and Mr. Hodson says:

16 "BY MR. HODSON:

17 "Q Now, Mr. Kyle, have I stated things
18 sufficiently correct?"

19 And he says:

20 "A You certainly have."

21 Now our position with respect
22 to the systemic issue and the call for an
23 independent tribunal, which was echoed again not
24 only in the written submissions by -- on behalf
25 of AIDWYC this afternoon, is the following:

1 powers in 1990, he would not have spent months
2 trying to get Ron Wilson and Larry Fisher to
3 speak to him.

4 In summary, with respect to
5 your jurisdiction, I don't take issue with the
6 proposition made that you can make
7 recommendations, but it's clear from a review of
8 *Keable* that you can't go and get the evidence to
9 make them. I'd argue that that's consistent with
10 the position Mr. Hodson took when he stayed away
11 from any evidence relating to the operation of
12 the CCRG based on *Keable*, and I would say in
13 summary that, if you don't have the evidence,
14 then it will be very difficult for you to make
15 any meaningful recommendations based on what you
16 have heard during the course of the Inquiry.

17 So that, in summary, is my
18 very brief comments with respect to the position
19 on -- of the Minister of Justice on those two
20 issues.

21 I would echo the comments, I
22 think I'm the 13th counsel to stand up and make
23 representations to you today, Mr. Commissioner,
24 but I would echo the comments that have been made
25 about the cooperation, the excellent cooperation

1 of the Commission counsel and the Commission
2 staff, and your patience and consideration
3 throughout these very protracted proceedings, for
4 which I offer everybody my thanks. Thank you.

5 COMMISSIONER MacCALLUM: Thank you,
6 Mr. Frayer.

7 **BY MS. KROGAN-STEVELY**

8 MS. KROGAN-STEVELY: Mr. Commissioner, for
9 the record, I identify myself as Lana
10 Krogan-Stevely representing the Province of
11 Saskatchewan.

12 Sir, that Mr. Milgaard spent
13 23 years in jail for an offence he did not commit
14 is certainly a tragedy. The Province of
15 Saskatchewan deeply regrets what occurred to Mr.
16 Milgaard and regrets the difficulties connected
17 to the wrongful conviction that Mr. Milgaard and
18 his family have endured. In briefly addressing
19 this Commission today, it is certainly not
20 Saskatchewan's intention to repeat the
21 submissions contained in our brief. Our position
22 has been presented based upon the evidence heard
23 during the course of the hearing and we rely on
24 the analysis presented therein.

25 In that written submission we

1 reviewed decisions made and actions taken by
2 provincial officials. The relevance of these
3 matters was dependent upon the context out of
4 which they arose; that is, the actions and
5 choices of other parties were important to the
6 extent that they constituted the information
7 Saskatchewan was in possession of and the matters
8 that Saskatchewan responded to. This is the
9 reason the conduct of other parties was included
10 in our submission.

11 Saskatchewan chose not to
12 make recommendations to this Commission because
13 we have specifically sought recommendations from
14 the Commission. The Commission does not need to
15 hear recommendations from Saskatchewan with
16 regard to what recommendations should be made to
17 us.

18 Sir, finally, the Government
19 of Saskatchewan would also like to add its
20 appreciation to the dedication of Commission
21 Counsel and staff and yourself to this complex
22 undertaking.

23 Thank you.

24 COMMISSIONER MacCALLUM: Thank you very
25 much.

1 bar, I feel at times compelled to spring to its
2 defence and this is one of those times. Present
3 counsel are senior, learned in the law and battle
4 scarred, so they have little need of protection
5 by the likes of me. Still, I want to assure the
6 critic in question that all counsel had jobs when
7 they found this one and, with the possible
8 exception of Mr. Roy, who argues for the
9 abolition of his, will return to jobs at rates
10 which do not mean any missed meals. The eloquent
11 and thoughtful arguments presented today satisfy
12 me, at least on the civil standard, that neither
13 time nor money has been wasted.

14 It has been a long and
15 expensive undertaking, but consider the subject.
16 Firstly, the ultimate obscenity of the rape and
17 murder of Gail Miller. Secondly, the wrongful
18 conviction and 23 year incarceration of David
19 Milgaard. Consider the task, 350,000 pages of
20 material, 36 years of resentment and ill will, 14
21 parties whose interests were directly and
22 substantially affected, 133 witnesses, 40,500 and
23 counting pages of transcript produced. Whether
24 or not they knew all that was involved, the
25 previous government committed to this inquiry.

1 Whether or not they knew all that was involved,
2 the present Government of Saskatchewan honoured
3 that commitment and, to their credit, have borne
4 stoically any criticism of mounting costs with no
5 attempt to download such criticism upon the
6 Commission.

7 Why such willingness to go
8 the extra mile? Because, as I see it, the
9 Milgaard affair has cast a long shadow over the
10 administration of justice in this province. To
11 be treated unfairly by the justice system is
12 deeply offensive to the individual. To have been
13 responsible for the wrongful conviction of one of
14 its subjects is the state's worst nightmare.
15 Money spent to maintain or to restore public
16 confidence in the administration of justice is an
17 essential cost, just as is money spent to
18 discover the causes of wrongful conviction and
19 ways to avoid them.

20 All participants have
21 laboured long and hard to conduct this inquiry
22 whatever the world weary and cynical might think.
23 As we began our task almost three years ago, one
24 of the few who could claim expertise was Candace
25 Congram, our executive director. We have relied

1 upon her completely and I fear have at times
2 taken her for granted for her management skills,
3 thoughtfulness and unfailing courtesy. Thank
4 you, Candace. You knew more about this business
5 at the start than the rest of us and you still
6 do.

7 The Saskatchewan bar had a
8 wealth of talent to choose from in choosing
9 Commission Counsel. Doug Hodson's success in
10 this role would have come to no surprise to those
11 who knew him pre 1994. His leadership of a
12 talented staff, his skill as counsel, his
13 astonishing grasp of the case and his diplomacy
14 have led us all through a maze of divisive issues
15 with no fatalities.

16 Assistant counsel, Vanessa
17 Monar-Enweani, Jordan Hardy and John Agioritis,
18 continue to provide daily, dedicated, expert
19 service as they have done from the start. I hope
20 that they have gained as much from the experience
21 as they have taught me. I have asked Doug to
22 thank other staff individually, but I want them
23 all to know that I am grateful for their
24 continuing generous support.

25 And now, My Learned Friends,

1 I will do what I promised, thank you for a job
2 well done. Thank you for the able representation
3 of your clients whose interests you have pressed
4 to their legitimate limits. Thank you for
5 preserving, to the extent possible, in dealing
6 with old grievances, the mutual respect which is
7 the hallmark of your proud profession. Good job.

8 And in the spirit of the
9 season, peace on earth and good will to all women
10 and men.

11 Mr. Hodson has the last word
12 and he should be alerted to the fact that Ms.
13 Beitel will start the stop watch and display the
14 sign.

15 MR. HODSON: I'm starting in reasonably
16 good shape for the first time in two and a half
17 years, my estimate of time has been
18 underestimated, we're done a day early.

19 First, if I could thank other
20 counsel for their kind remarks about Commission
21 staff and on behalf of Commission co-counsel and
22 our staff, thanks for those remarks.

23 It has been a real honour,
24 Mr. Commissioner, to serve as your counsel in
25 this inquiry and I thank you for that

1 appointment. It has been quite a remarkable
2 experience to be involved in a Commission that is
3 dealing with so many important issues. I want to
4 acknowledge and thank the efforts and
5 contributions of a number of people.

6 The first are counsel who are
7 here today for parties with standing. This
8 Commission is inquiring into and did inquire into
9 some very important issues in the Canadian
10 justice system. As well, we looked at a number
11 of issues that are very important for counsel's
12 clients that have standing in this matter. At
13 some times issues were vigorously contested by
14 various parties and that is to be expected, that
15 was their job. Everyone was doing their best to
16 advance and protect their client's interests and
17 I commend counsel for that, but in addition to
18 representing their client's interests, counsel
19 also played an important role in assisting the
20 Commission with their work. Their
21 professionalism, courtesy and accommodation shown
22 to me and my fellow co-counsel was exemplary and
23 as well their clients exhibited the same courtesy
24 and accomodation to me and my co-counsel. All
25 the counsel present made my task much easier,

1 much more pleasant and I can say much more
2 rewarding and I echo your comments that we were
3 very fortunate indeed to have an excellent group
4 of counsel participating in this inquiry.

5 I also want to touch briefly
6 with respect to the witnesses. We had over 125
7 witnesses and I had an opportunity to meet them
8 all and deal with them all and in some cases
9 their counsel. It was remarkable the
10 co-operation that these witnesses showed in
11 participating in this inquiry. Despite having
12 testified on some occasions five or six times
13 previously or participating in other proceedings,
14 the witnesses came forward willingly to do it
15 once again. Despite the fact that for some it
16 was a subject matter that was not pleasant to
17 recount, they all did their duty, they were
18 co-operative and at times a great inconvenience
19 to them, so I certainly appreciate their
20 participation.

21 The media I would like to
22 thank for their participation in covering this
23 event and as well the fairness and courtesy that
24 members of the media have shown to me and
25 co-counsel throughout this matter.

1 You talked about other
2 Commission co-counsel. I would like to
3 specifically mention and thank them, Vanessa
4 Monar-Enweani who has been with us from the
5 start, took maternity leave, had a baby, came
6 back, has been an integral part of this process.
7 Thank you very much, Vanessa, for your role.

8 Jordan Hardy, who is going to
9 get an honorary doctorate in forensic science I
10 think when we're done, participated. Thank you,
11 Jordan, for that help.

12 And lastly, but certainly not
13 least, is John Agioritis, the fellow who I
14 certainly relied upon for the documents, and I
15 think other counsel in this room, although they
16 may not know it, relied on John's expertise as
17 well. These three individuals certainly made my
18 job easier and I think the job for all of us much
19 easier.

20 You mentioned Candace Congram
21 who I would also like to thank for her assistance
22 and expertise in setting us up.

23 Irene Beitel, who
24 notwithstanding the fact that she started twice
25 without me in the room, apart from those two

1 blemishes, and on a third occasion actually we
2 started without a witness and I think I asked a
3 question before I realized we didn't have a
4 witness, but minor blemishes to an otherwise
5 exemplary record, and always pleasant, so thank
6 you, Irene.

7 To our court reporters, Don
8 Meyer and Karen Hinz, who have had to listen
9 primarily to me for two and a half years, thank
10 you very much for doing a great job.

11 To our friends at Inland, Jay
12 is here today, who have helped us on the
13 technical side, thank you for that.

14 Your crack security team,
15 Hugh Esson and Jerry Wilde are not here today,
16 but they've been with us throughout, I pass on my
17 thanks to them.

18 To our office staff, Jodie
19 Kendry and Cheryl Ellerman, who have provided
20 great assistance.

21 And last, but certainly not
22 least, the document managers, and Sandy is here,
23 and if Sandy could stand up at the back, Kara
24 Isabelle, who is not able to join us today, she's
25 in Edmonton, but Sandy and Kara were the document

1 managers, 350,000 pages of documents with new
2 technology. I recall spending some time before
3 we started with contingency plans if the document
4 system failed and it never failed us, and I think
5 I can speak on behalf of all counsel, to Sandy
6 and Kara, thanks for making our job much easier.
7 Their contribution to this process has been
8 significant.

9 And one final note, last but
10 not least, our investigator, Don Crystal, who I
11 think as well is with us at the back, played a
12 tremendous role at the start in contacting and
13 interviewing witnesses.

14 With that, Mr. Commissioner,
15 I think we are adjourned.

16 (Adjourned at 3:55 p.m.)

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1 OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:

2 We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR, CRR,
3 CBC, Official Queen's Bench Court Reporters for the
4 Province of Saskatchewan, hereby certify that the
5 foregoing pages contain a true and correct transcription
6 of our shorthand notes taken herein to the best of my
7 knowledge, skill, and ability.

8
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12 _____, CSR

13 Karen Hinz, CSR

14 Official Queen's Bench Court Reporter

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16 _____, RPR, CSR, CRR, CBC

17 Donald G. Meyer, RPR, CSR, CRR, CBC

18 Official Queen's Bench Court Reporter

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