

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

\*\*\*\*\*

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

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On Thursday, January 27th, 2005

Volume 10

Inquiry Proceedings



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**Appearances:**

*Mr. Hersh Wolch, Q.C.,*            **for** Mr. David Milgaard  
*Mrs. Joyce Milgaard,*           **appearing** without counsel  
*Ms. Lana Krogan,*                **for** Government of Saskatchewan  
*Ms. Catherine Knox,*           **for** Mr. T.D.R. (Bobs) Caldwell  
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    and *Ms. Rochelle Wempe,*  
*Mr. Brian A. Beresh, Esq.,*     **for** Mr. Larry Fisher



INDEX OF PROCEEDINGS

<u>DESCRIPTION:</u>	<u>PAGE:</u>
<u>HARRY EDMUND EMSON (CONTINUED)</u>	
BY MR. BERESH	1373
BY MR. ELSON	1427
BY MR. GIBSON	1448
BY MS. KNOX	1461
BY MR. HODSON	1488
BY COMMISSIONER MACCALLUM	1492



INDEX OF EXHIBITS

<u>NO:</u>	<u>DESCRIPTION:</u>	<u>PAGE:</u>
--> <u>EXHIBIT P-3:</u>		
	TWO LARGE PHOTOGRAPHS OF AUTOPSY (BATES ID NUMBERS 241975 & 241973).	1426
--> <u>EXHIBIT P-4:</u>		
	KNIFE BLADE AND EVIDENCE BAG.	1491



Transcript of Proceedings

(Reconvened at 10:04 a.m.)

COMMISSIONER MacCALLUM: Mr. Beresh?

MR. BERESH: Thank you, Mr. Commissioner.

I hope not to be too long with this witness.

HARRY EDMUND EMSON (continued), previously sworn:

BY MR. BERESH:

Q My name is Brian Beresh, and I represent Mr. Fisher, and I'm pleased to see you have returned. After yesterday, I thought we might have to get a warrant to bring you here, but I'm pleased that you are here.

A I didn't know that I had an option.

Q But we appreciate your co-operation.

Many things, of course, have changed since 1969, you told us that yesterday, in terms of investigation, in terms of roles individuals played; is that fair?

A Yes.

Q All right. In 1969 I think Mr. Wolch was a Crown prosecutor, now he has come to the light side, so there have been many changes, and this morning I want to ask you some questions in a specific area and then some questions of a more general nature, if I can, please.



1                   And, first of all, it involves  
2                   some evidence you touched on yesterday. And just  
3                   to assist your memory, I would like to see  
4                   document 066732, please. You will recall  
10:05 5                   yesterday, Doctor, that we spoke of the apparent  
6                   injury above the deceased's left breast?

7           A           Yes.

8           Q           And I have drawn a circle around it. My only  
9                   question regarding that is that appears to be an  
10:05 10                  injury of some recency, is that fair, and by  
11                  "recency" I mean prior to death?

12          A           Yes.

13          Q           Okay. And --

14          A           Let me qualify that. It could have been, I think,  
10:06 15                  inflicted at the time of or just after death.

16          Q           Fair enough. But my understanding from my  
17                  pathological knowledge, which is extensive I  
18                  should tell you, is that bruising doesn't often  
19                  occur for very long after death; is that fair?

10:06 20          A           I'm sorry, I don't understand that, you mean  
21                  bruising doesn't remain after death or is not  
22                  caused after death?

23          Q           It is not caused, that shortly, if an injury is  
24                  inflicted at a point after death, there are some  
10:06 25                  instances where we could expect no bruising at



1 all; is that fair?

2 A There would be none, or very little, because if  
3 the circulation has stopped there is no supply of  
4 red cells.

10:06 5 Q Exactly. So, although we don't know, this is  
6 likely to have been caused before death or shortly  
7 after death; is that fair?

8 A Before, at, or around the time of death I would  
9 say.

10:06 10 Q It had been my understanding that there were some  
11 enhanced photographs of this injury, but none  
12 could be found this morning, so dealing with this;  
13 this injury appears to be circular in nature?

14 A Semicircular.

10:07 15 Q Semicircular. And I take it, although we don't  
16 know what may have caused it, it may have been  
17 caused by an object struck against that part of  
18 the body; is that fair?

19 A It could have been.

10:07 20 Q For example, I think of something round like a  
21 flashlight or a round stick, something like that?

22 A Something of that contour, but it does not show  
23 the whole circumference of such an object.

24 Q Yes, but that might be explained by the fact that  
10:07 25 the round circumference came into contact at



1 something of an angle with the body; is that fair?

2 A There are a number of hypotheses you can suggest  
3 about that.

4 Q Okay. While we have this photograph up, and you  
10:07 5 were asked this at length yesterday whether or not  
6 the assailant was right-handed or left-handed,  
7 isn't it correct, sir, that in order for us to  
8 make any scientific conclusions, or what we in law  
9 what we might call concrete inferences, you would  
10:08 10 have to know a number of potential factors such as  
11 how the knife was held by the assailant; is that  
12 right?

13 A I think the interpretation of injuries, in terms  
14 of the handedness of the assailant, is always  
10:08 15 difficult, never certain, and sometimes almost  
16 impossible.

17 Q That's --

18 A That you can only draw inferences, because unless  
19 you have other evidence as to the relative  
10:08 20 positions of the assailant and the victim at the  
21 time of infliction of the injury, then you have to  
22 make an inference.

23 Q Well --

24 A And the inference we were making here, if I  
10:08 25 recollect, is that these were two people facing



1 each other in an upright position.

2 Q But we do know some concrete facts about the  
3 injuries, don't we, and one is if we assume it was  
4 a single-bladed knife --

10:09 5 A I'm sorry?

6 Q If we assume it was a single-sided knife, --

7 A Single edged?

8 Q -- edged knife, we do know what edge -- what the  
9 cutting edge is, don't we, if we look at the  
10:09 10 injury?

11 A Only the cutting edge could have cut.

12 Q Of course. The cutting edge has a V to it, and we  
13 notice that in a number of injuries sustained by  
14 various individuals, is that fair?

10:09 15 A The cutting edge has to be slightly angled, but it  
16 can be very, a very narrow angle.

17 Q Absolutely.

18 A And to be sharpened to a side, a cutting edge, if  
19 that's what I understand you mean?

10:09 20 Q Yes.

21 A Okay.

22 Q But the problem, if we know that, is that we don't  
23 know how the knife was held, whether the cutting  
24 edge was to the assailant's right side or to the  
10:09 25 left side; is that fair?



1 A Short of a statement or an eyewitness, I don't  
2 think we ever know that.

3 Q Fair enough. And I take it -- so what you are  
4 telling us is, in the end, we can't conclude  
10:10 5 whether the assailant was right-handed in this  
6 case or left-handed?

7 A We can only suggest possibilities.

8 Q That's right. And one possibility is it may have  
9 been a left-handed individual?

10:10 10 A Yes, that --

11 Q Yes?

12 A -- is always a possibility.

13 Q Yes. Next, sir, the injuries, all of the injuries  
14 would have, with the potential exception of the  
10:10 15 slashes on the neck, caused the deceased to be in  
16 pain; is that correct?

17 A In pain?

18 Q In pain?

19 A Oh yes.

10:10 20 Q Okay. And I can take you to the transcript  
21 portion if you need to, but at the Fisher  
22 preliminary, Fisher trial, you said that these  
23 would be very painful injuries; is that a fair  
24 description?

10:10 25 A I think so.



1 Q Okay. And I take it they would, it would be of  
2 such a magnitude that the normal individual might  
3 find it difficult to refrain from screaming out as  
4 a natural reaction; is that fair?

10:11 5 A Depends on whether the individual was conscious at  
6 the time or not.

7 Q That's fair. Let's assume consciousness.

8 A Assuming consciousness --

9 Q Isn't it correct that we would expect that  
10:11 10 somebody who receives those injuries, which do not  
11 immediately cause death, would cause such pain  
12 that the natural reaction would be to scream  
13 out --

14 A Yes.

10:11 15 Q -- in pain?

16 A Yes, I think so.

17 Q Okay. I just want to clarify, for his Lordship's  
18 information, none of the injuries themselves, or  
19 them self, would have rendered the deceased  
10:11 20 unconscious upon immediate contact?

21 A No.

22 Q Is that fair?

23 A No, the, none of the injuries would have caused  
24 unconsciousness until the bleeding into the chest  
10:11 25 cavity had occurred.



1 Q Okay. Which you said would be about 15 minutes,  
2 potentially?

3 A It's, again, a very difficult estimate, but that  
4 would be my estimate.

10:12 5 Q Okay. And then during that 15 minutes, although  
6 you said that the deceased might be able to  
7 stumble, probably wouldn't be able to walk  
8 upright, that individual would not be unconscious  
9 and would have the ability to call out for help or  
10:12 10 scream potentially; is that fair?

11 A We have to take other circumstances into account,  
12 that if this injury was sustained outside on a  
13 minus 40 morning, then we always have that  
14 temperature to consider, and any reaction which  
10:12 15 one might consider normal say in this room or  
16 outside on a warm day might be totally different  
17 under those circumstances.

18 Q Fair enough. But, with respect, yesterday you  
19 said death due to exposure would be about 15  
10:12 20 minutes, death due to the most major injury would  
21 be about 15 minutes. My question is this. If the  
22 individual is conscious for the first few minutes,  
23 that individual would have the ability to cry out,  
24 call for help, scream in pain?

10:13 25 A I think so.



1 Q Okay. Sir, are you telling us that the police  
2 never displayed for you or reported to you on  
3 their findings vis-a-vis the injury to the  
4 clothing, and in particular I'm interested in  
10:13 5 apparent cut marks in the coat?

6 A These, to my recollection, these were never  
7 discussed with me.

8 Q Okay. And I take it, for what it's worth, you  
9 might have had an opinion about the case  
10:13 10 generally, or about that piece of evidence  
11 specifically, had you been consulted?

12 A If I had been consulted we could have discussed  
13 the relationship of the lesions in the clothes to  
14 the injuries on the body, and as I stated  
10:14 15 yesterday, in the depths of the wound in the lung  
16 there were fibres, suggesting that this injury had  
17 -- this wound had also passed through a garment.  
18 But I have no recollection of the lesions in the  
19 clothes being discussed with me at any point.

10:14 20 Q You are aware of Dr. Graham Dowling, who is the  
21 Chief Medical Examiner in Alberta, officed in  
22 Edmonton; are you, sir?

23 A I know him. I have a great respect for him. I  
24 only know him professionally and I don't know him  
10:14 25 well.



1 Q Are you aware of a practice by pathologists,  
2 long-standing practice I suggest, of actually  
3 laying clothes out at an autopsy, either prior to  
4 incision or internal examination or subsequent,  
10:15 5 sir?

6 A My memory of this is that I -- we have done it on  
7 occasion, but this practice has passed, and I  
8 think it has probably passed because the  
9 examination of the clothing by the forensic  
10:15 10 laboratory has become far more sophisticated.

11 Q Fair enough. But, in 1969, were you aware that it  
12 was a practice of some pathologists?

13 A We -- if I had been asked to do it, we would, yes.  
14 But it's -- my opinion is that, once the clothing  
10:15 15 has been removed from the body and handed to the  
16 police, it becomes their responsibility as an  
17 exhibit, and it is their decision as to how it is  
18 approached. I could have made a suggestion at  
19 this point, but I was not in possession of any  
10:15 20 information that suggested it might be relevant.

21 Q Okay. Doctor, while we have this photograph up,  
22 it appears that the marks to the side of the neck  
23 are -- appears to be gratuitous violence; is that  
24 what your observation is?

10:16 25 A It's not a term I would use, no. "Gratuitous" is



1 free and not expecting reward. I don't consider  
2 those falling in that category, with no reason,  
3 possibly. But I have seen similar marks in  
4 perhaps two or three homicides during my life  
10:16 5 where there has been a sexual element, and they  
6 have always suggested to me the desire to inflict  
7 possibly pain, to demean, to diminish, almost  
8 hatred, as opposed to the desire to kill.

9 Q It appears to be a unique type of signature; do  
10:17 10 you agree with that?

11 A No, it's not unique, "unique" means unique to one  
12 situation.

13 Q Okay.

14 A It's uncommon, but it may be part of a specific  
10:17 15 pattern.

16 Q Were you involved in other homicides in this city  
17 where you saw that type of patterning, sir?

18 A Oh yes, I have seen one or two, but very few.

19 Q When that occurred, did you report those findings  
10:17 20 to anyone?

21 A Well I remember one case, which was actually a  
22 homosexual homicide in which the sexual element  
23 was very prominent from the very beginning, and  
24 these fell into that category.

10:17 25 I think one has to remember, I



1           have been told, though I'm not an expert, that  
2           rape is a crime not of sexual desire, but of  
3           hatred.

4           **Q**       My question was, when you encountered those two  
10:17 5           other cases, did you write to the chief of police  
6           saying "I found this similarity in these three  
7           instances"?

8           **A**       No.

9           **Q**       Okay. Can I take you, please, to document 313838.  
10:18 10           In the next volume? I'm looking for page 108 and  
11           I'm not seeing it there, could we try document  
12           238473 please, 238473. Page 108, please, and if  
13           we can highlight this portion, please. Starting  
14           at line 23 -- sorry, could we start at line 16? I  
10:20 15           think we have it now.

16                                Doctor, let me read this to  
17           you -- you have it before you, do you, Doctor, you  
18           have it before you?

19           **A**       I have 472 I think. The numbers are obscured at  
10:21 20           the bottom.

21           **Q**       Thank you. Question, line 15:

22                                "Q    Okay, I appreciate that, sir. In your  
23                                examination, sir, of the body, you've  
24                                told us about injuries you detected, but  
10:21 25                                you did examine the entire body



1 obviously?

2 A Yes."

3 I take it, sir, in answering that question, you  
4 knew I was referring to the body of Gail Miller?

10:21 5 A If this is an examination -- I don't know what  
6 this is taken from.

7 Q This is the trial of Mr. Fisher, sir.

8 A Then that would be the examination of Gail Miller.

9 Q Thank you. Line 20:

10:21 10 "Q Okay. And you examined the vaginal area  
11 of the body obviously?

12 A Yes.

13 Q First of all, I want to deal with the  
14 body generally, away from consideration  
10:21 15 of the latter. It's my understanding  
16 that there were no skin tears or bruises  
17 found on the inner -- do we call it the  
18 inner thigh, sir?

19 A No.

10:21 20 Q Sorry, I asked two questions. My fault.

21 A Sorry.

22 Q Do we call this the inner thigh here?

23 A Yes.

24 Q Here?"

10:21 25 There was a demonstration of that.



1 "A Yes, that is your inner thigh.

2 Q Thank you. You found no bruising, no  
3 tear, no injury in that location,  
4 correct?

10:22 5 A No.

6 Q You found no injury, as I understand, to  
7 the knees or the shins?

8 A No.

9 Q Have you heard of finger pad bruising?

10:22 10 A No. It's probably in the text book, but  
11 it's not a term I'm familiar with.

12 Q Okay. That's where I get it from. So  
13 finger pad bruising, as I understand,  
14 is injury caused by the fingers when you  
15 attempt to separate someone's legs, and  
16 it's called finger pad because -- for  
17 obvious reasons. Knowing that, sir,  
18 looking at your autopsy report, you  
19 found no finger pad bruising at all?

10:22 20 A We didn't find anything like that.

21 Q Sir, you found, according to your  
22 autopsy report, no redness, bruising or  
23 subtle tearing to the large or small  
24 lips of the vaginal opening?

10:23 25 A Of the vulva?



1 Q Correct.

2 A No.

3 Q You found no bruising or the tearing at  
4 the end of the vaginal opening which is  
10:23 5 closer to the anus?

6 A No.

7 Q You found no such injuries at the  
8 opposite end of the vaginal opening?

9 A No.

10:23 10 Q In your science, sir, you used the word  
11 petechiae?

12 A Yes."

13 And then it's spelled.

14 "Q Would you tell the court what petechiae  
10:23 15 is, before we get into the questions."  
16 And then you describe it as the rupturing of very  
17 small blood vessels. Question, line 24:

18 "Q According to your autopsy report which  
19 I've looked at thoroughly, you found no  
10:23 20 petechiae --

21 A No.

22 Q -- Abrasions, bruises, or lacerations to  
23 the wall of the vagina?

24 A No.

10:23 25 Q You found no redness, petechiae,



1 abrasions, bruises, or lacerations at  
2 the opening of the womb?

3 A I think we have to modify here. The  
4 opening of the womb, which is what we  
10:24 5 call the cervix, I think I recorded as  
6 reddish, and there is a note that it  
7 showed a certain degree of inflammation,  
8 that is not uncommon in woman at all.  
9 But I have a note that there was, I have  
10:24 10 chronic cervicitis, which is a technical  
11 term for inflammation of the neck of the  
12 womb, and the -- here we are; the cervix  
13 showed a small erosion. Well, that is  
14 almost a little ulcer. It's nothing  
10:24 15 unusual about this, it's very, very  
16 common."

17 And then you were asked the question:

18 "Q So you found none of these indicators of  
19 sexual assault which one might expect to  
10:24 20 find in some cases?"

21 Your answer:

22 A We found none of those indicators of  
23 sexual assault, but the question of  
24 expecting them is another matter."

10:24 25 And I appreciate your answer. I take it, sir,



1           though, that in fairness, we might expect some of  
2           those indicators to be present where unexpected,  
3           forced, sudden intercourse takes place; is that  
4           fair?

10:25 5           A           I think I said yesterday that it is unusual to  
6           find significant injury from penial intercourse in  
7           a woman in the mature sexual years even when this  
8           is non-consensual rape. It does occur, but it's  
9           unusual.

10:25 10          Q           My question was this though, we might expect to  
11          find it in the circumstances I described; isn't  
12          that correct?

13          A           Which circumstances?

14          Q           Circumstances where it's sudden, unexpected?

10:25 15          A           No, I have to say that in my experience, which is  
16          not large, and in the textbooks the occurrence of  
17          injury in a woman in her mature sexual years, and  
18          particularly a woman who is sexually experienced,  
19          from penial intercourse is not common.

10:25 20          Q           But what we have also here, Doctor, is no bruising  
21          to the inner thigh, no indication of any force  
22          being used in that area; isn't that correct?

23          A           No, we don't.

24          Q           Right. Doctor, you were asked yesterday about the  
10:26 25          life of spermatozoa and you will recall at the



1 trial of Mr. Fisher -- same document, please, page  
2 129 -- that I had, as most criminal lawyers like  
3 to present, particularly before a jury, the  
4 authority of *Phipps and Fisher's Medical Legal*  
5 *Investigation of Death*, and you recall your  
6 acknowledgement that that was an acknowledged  
7 authority used by pathologists?

8 A Yes.

9 Q And I had brought your attention to the paragraph  
10 which is now found in this transcript, lines 9  
11 through 18, and the specific reference, My Lord,  
12 was page 790 where the authors made the following  
13 observation:

14 "Decomposition of the body does not preclude  
15 the finding of identifiable spermatozoa and  
16 embalming of the body helps preserve it.  
17 Intact spermatozoa, i.e., tails, are rarely  
18 found in a vagina later than 72 hours after  
19 coitus."

20 Just so we're clear, I take it that at least some  
21 experts are of the opinion that the range for  
22 deposit of the sperm might be, at the outset, 72  
23 hours; is that correct?

24 A I think it varies according to what happens to the  
25 person after intercourse. I have found



1 spermatozoa heads in a partly decomposed body a  
2 week after death when presumptively the death  
3 occurred just around the time or following the  
4 instant of intercourse and the death and the  
5 cooling of the body tend to preserve these. What  
6 destroys spermatozoa in the vagina are the general  
7 warmth of the body and the extreme acidity of the  
8 vaginal medium in the adult woman, so that all  
9 these circumstances are exceedingly variable.

10:28

10:28

10 Q That's not my question though, Doctor, with  
11 respect. My question is that there is a body of  
12 science within which at least some acknowledged  
13 experts believe that it could be up to 72 hours  
14 before; isn't that correct?

10:28

15 A In the living body?

16 Q Yes.

17 A I think that's a very long estimate, but if some  
18 experts have found it and recorded it, then we  
19 have to accept it.

10:28

20 Q In addition, sir, Doctor, you will recall that I  
21 put to you at Mr. Fisher's trial, which is found  
22 at 238498 --

23 COMMISSIONER MacCALLUM: Just a minute, Mr.  
24 Beresh. Was your question based on that quote  
10:29 25 there from page 790?



1 MR. BERESH: Yes.

2 COMMISSIONER MacCALLUM: It's not clear to  
3 me there whether they are talking -- whether the  
4 i.e. reference refers to a living body or a dead  
5 person.

10:29

6 BY MR. BERESH:

7 Q Fair enough. Let's clarify that with the witness.  
8 Thank you, My Lord. Doctor, I take it His  
9 Lordship is right, as we read this it's not clear,  
10 because of reference to decomposition, but this  
11 appears to suggest that even where death occurs,  
12 that we could find it up to 70 -- there is a  
13 belief that it could have been deposited 72 hours  
14 before death?

10:29

15 A As I have said, I have found identifiable  
16 spermatozoa in a partly decomposed body a week  
17 after death. In this quote the author is not  
18 making it clear whether he refers to an embalmed  
19 or a not embalmed body, and embalming of course  
20 will preserve spermatozoa as it preserves  
21 everything else. It's not a very clear statement  
22 in the text.

10:29

10:30

23 Q Well, I take it, though, there are differing  
24 opinions in this area?

10:30

25 A Yes, there are different opinions and there are



1 different records of possibilities. 72 hours in a  
2 dead body is quite -- I think quite reasonable.  
3 72 hours in a living body I would find very  
4 difficult.

10:30 5 Q So 72 hours in a dead body is not unreasonable?

6 A No, it's not.

7 Q Okay. And I take it that there wasn't, in 1969,  
8 and there probably isn't now, an ability,  
9 scientific ability to date deposit of seminal  
10:30 10 fluid or spermatozoa?

11 A Yes.

12 Q That is, if we took a sample scientifically, we  
13 couldn't tell when that ejaculate entered the  
14 female?

10:31 15 A Not other than from circumstantial evidence and  
16 the degree of loss of the spermatozoa. One might  
17 hypothesize from that.

18 Q Yes. That was going to be my next question. The  
19 way you described it yesterday, I take it that the  
10:31 20 disappearance of the spermatozoa is an evolving  
21 process; is that fair to say?

22 A Yes. It doesn't occur all at once, it's a process  
23 with a time frame.

24 Q So the percentage of or amount of spermatozoa  
10:31 25 might assist us in terms of timing for deposit?



1 A It may suggest, yes. It's one of the things you  
2 have to take into account.

3 Q Fair enough. And in this case there was no  
4 attempt, and I'm not being critical, there was no  
10:31 5 attempt to quantify spermatozoa?

6 A I don't know how you would.

7 Q Okay.

8 A Because you don't know how many there were in the  
9 initial ejaculate and the number in an ejaculate  
10:32 10 varies very considerably.

11 Q Okay. I take it that after normal sexual  
12 intercourse, that we might expect to find seminal  
13 fluid on undergarments that come into contact with  
14 the pubic area; is that fair?

10:32 15 A Yes.

16 Q Okay. Did you ever -- were you ever told that  
17 subsequent to this the police found or claimed to  
18 have found seminal fluid on the panties of  
19 Ms. Miller?

10:32 20 A I have no recollection, sir.

21 Q Just so we're clear, when you saw the body, the  
22 undergarments were not in their normal position on  
23 the body, but around the ankle or legs; is that  
24 correct?

10:33 25 A My record is number 6, a pair of panties which



1                   were around one ankle.

2           **Q**           So they were not around her waist --

3           **A**           No.

4           **Q**           -- in contact with the pubic area of her body were  
5           they?

10:33

6           **A**           No.

7           **Q**           I see. Doctor, I just want to clarify. Yesterday  
8           you were shown a photograph of a knife and as I  
9           recall it had a maroon handle, and my number is  
10           073509, and if we could highlight -- that's pretty  
11           neat. Is this, I wasn't sure, is this the knife  
12           that you were shown by the police before you  
13           proffered the opinion that it may have caused the  
14           injuries or was consistent with an object that  
15           would cause the injuries?

10:34

16           **A**           My memory is that at some time subsequent to the  
17           autopsy I was shown a knife, which appears to be  
18           identical to this one, and asked if this was  
19           capable of causing the injuries and I said yes.

10:34

20           **Q**           Okay. Now, I apologize that I have to draw on  
21           your memory. Do you recall if it was taken to you  
22           at your office, if you went to the police station  
23           or where was the physical location where you  
24           looked at the object?

10:34

25           **A**           I have no memory of having been asked to go to the



1 police station at all. I would presume that this  
2 was brought to me and at that time I would presume  
3 it was brought to St. Paul's.

4 Q Okay. And do you recall whether it was brought to  
5 you in something -- presumably it was in some sort  
6 of container, but do you recall whether you took  
7 it out, looked at it, that sort of thing?

8 A No, I have no memory of this, of whether it was  
9 contained or whether I handled it. I presume we  
10 measured it because we could do that whether it  
11 was enclosed in plastic or not, but I have no  
12 memory of the actual process.

13 Q Okay. And do you have any memory as to whether or  
14 not the measure that we see in this photograph is  
15 your measure or someone else's measure or a  
16 measure that was stuck on, for example, a plastic  
17 bag?

18 A It's a very simple measure. I don't think it was  
19 one from our laboratory because --

20 Q Can we highlight that at all? SPHML, St. Paul's  
21 Hospital Medical Lab?

22 A Medical legal autopsy number 07-69.

23 Q So does that help us?

24 A That's our reference number, but I don't think  
25 this was a laboratory measure because we would not



1 usually have used one which was only marked in  
2 centimetres.

3 Q Is it an actual measure, can you tell is it a  
4 measure or is it, say, a piece of tape that has  
10:36 5 that measure on that that it could be stuck onto?

6 A I can't tell.

7 Q Okay. But would the police -- so does this come  
8 from St. Paul's, apparently, this object?

9 A This object? I don't know.

10:36 10 Q Okay. Would the police in 1969 normally have had  
11 objects like this from the hospital?

12 A Would they have had rulers from the hospital?

13 Q That's right.

14 A In the course of an autopsy we would have used  
10:36 15 rulers then which were most probably part of the  
16 laboratory equipment. Now very often the police  
17 produce rulers which are part of their equipment  
18 and standardized, but then I think they would have  
19 been our rulers.

10:36 20 Q Okay.

21 A So where this little bit of measurement came from  
22 I really have no idea.

23 Q Fair enough. If we can go back to the full photo.

24 A It's marked in centimetres and presumably this is  
10:37 25 accurate.



1 Q Fair enough. Do you know when you saw the knife  
2 whether or not it was as it appears to be, that  
3 is, intact?

4 A Yes, I was shown an intact knife. I was never  
5 shown a partial knife.

6 Q You were never shown a blade of anything, never  
7 shown a handle, it was an intact knife?

8 A To my recollection I was -- the only knife I have  
9 been shown was intact.

10 Q Thank you, sir.

11 A And my memory is exactly of that one.

12 Q Thank you. And I take it -- I was too young to  
13 remember this, so in 1969 this would be sort of a  
14 common household paring knife by all appearances?

15 A That's what it appears to be. I wouldn't have it  
16 in my kitchen, but --

17 Q Fair enough. And I won't pursue why, but we'll  
18 leave that to speculation. I take it it's the  
19 sort of object that could be purchased at any sort  
20 of corner store or hardware store in 1969?

21 A It's a cheap little knife.

22 Q Okay. Easily obtainable?

23 A I would presume so.

24 Q Presumably something we might find in thousands of  
25 households; is that fair?



1 A That's not in my area, but I would presume you  
2 might find this in a lot of houses.

3 Q Thank you very much. And just so we're clear,  
4 that is the only weapon ever shown to you in this  
10:38 5 case --

6 A To my recollection.

7 Q -- since 1969?

8 A Yes.

9 Q I want to turn quickly to another area if we can,  
10:38 10 sir. If we could have the transcript again, the  
11 document number is 23844, but it's at page 103,  
12 please. The person assisting you that day I think  
13 you said before was a mortician as opposed to  
14 someone you called an assistant?

10:39 15 A I'm sorry, could you say that again?

16 Q Sure. My understanding from your evidence in  
17 previous proceedings is that the individual who  
18 assisted you at the autopsy you described as a  
19 mortician as opposed to someone who might be an  
10:39 20 assistant?

21 A This is a term generally applied here. The term  
22 pathologist's assistant is not a definable one,  
23 but has been used variably for somebody with  
24 rather more training and rather extended  
10:39 25 expertise, but it's not a strict definition.



1 Q Fair enough.

2 A The term I used, the term I would use now is a  
3 mortician.

4 Q Fair enough, and I only ask that to put this in  
10:39 5 context. I was asking you at the Fisher trial  
6 about that very issue and you gave the answer at  
7 about line 9, and I'm not overly interested in the  
8 answer, but the next question was:

9 "Q And you say the clothing was handed or  
10:40 10 were handed to --"

11 It says Pentella, but that would be Penkala;  
12 correct?

13 A Yes.

14 Q And just so we're clear again, you understood by  
10:40 15 the question the reference was to Gail Miller's  
16 clothing at the autopsy?

17 A Yes.

18 Q And you say that's what my records show?

19 A The following specimens were taken and handed to  
10:40 20 Lieutenant Penkala, the clothing removed from the  
21 body.

22 Q And you were good enough to tell us yesterday that  
23 you would make some hand notes before you started  
24 the autopsy, some board notes in the middle and  
10:40 25 then subsequently some hand notes, so presumably



1           this was recorded in some fashion which allowed  
2           you to place it into your report; is that correct?

3           A       This is something I try to be careful about, as to  
4           what specimens the police received, though now  
10:41 5           that the number of police attending an autopsy has  
6           increased so much, nowadays I'm not always  
7           specific or clear as to which one of them has the  
8           responsibility for them.

9           Q       Fair enough. I'm just saying --

10:41 10          A       At this case where there were only two police  
11          then, then I know they went to Mr. Penkala.

12          Q       And my next question at the Fisher trial was:

13                "Q    Your records don't show they were handed  
14                to Kleiv?"

10:41 15          A       No."

16          A       The record states specifically these were handed  
17          to Lieutenant Penkala.

18          Q       Okay. Now, you'll recall at Mr. Fisher's trial  
19          that you were shown some photographs of the  
10:41 20          autopsy that had been enhanced or enlarged. Do  
21          you remember that, sir?

22          A       I remember being shown photographs of the autopsy,  
23          but I don't know how they had been technically  
24          treated.

10:41 25          Q       Okay. On the original autopsy photos it was not



1 very clear what was on the floor of the examiner's  
2 suite. Do you recall that, sir?

3 A No, but I didn't take them and I don't recollect  
4 just what was clear in them. You would have to  
10:42 5 show me the photos.

6 Q Fair enough. Let's let Mr. Commissioner look at  
7 them or -- if we could have document 066729,  
8 please. That was the document that I was  
9 interested in and it wasn't clear as to what was  
10:43 10 below the gurney or table, is that correct, and  
11 I'm interested in this area right here, please.

12 A There's something down there, but I don't know  
13 what it is.

14 Q It's hard to tell what it is. You recall at Mr.  
10:43 15 Fisher's trial being shown what had been marked at  
16 that trial as Exhibit D-3, which I believe is  
17 document 241975, and I have the original,  
18 Mr. Commissioner, if the witness might look at it.

19 COMMISSIONER MacCALLUM: What's the page  
10:43 20 number again?

21 MR. BERESH: 241975, My Lord.

22 COMMISSIONER MacCALLUM: Thank you.

23 BY MR. BERESH:

24 Q You recall seeing that exhibit, do you, at the  
10:44 25 trial, sir?



1 A No, I don't recall seeing it at the trial.

2 Q Fair enough.

3 A I may have been shown it. May I comment that the  
4 print I have here is a great deal clearer than the  
10:44 5 screen.

6 Q Yes, certainly, the screen is not all that clear.  
7 If we can go then to document 241973, and just so  
8 we confirm, the last document you saw is obviously  
9 of the medical examiner's suite, sir?

10:44 10 A I'm sorry?

11 Q The last photo you looked at is in fact --

12 A It's a corner of the mortuary at St. Paul's  
13 Hospital and it is now as it was then.

14 Q Again, sir, in relation to this document that you  
10:44 15 are looking at, it's clearer in the copy you have  
16 than it is on our screen?

17 A The print is certainly clearer than the screen.

18 Q Okay. You would agree, sir, that what it depicts  
19 are the clothing or items of clothing removed from  
10:45 20 Gail Miller's body?

21 A That's what it appears to show, yes.

22 Q Okay. You will recall, sir, testifying that the  
23 normal practice for the police was for you or your  
24 office to supply what you called a garbage bag or  
10:45 25 a box for the removal of items taken at autopsy in



1 1969; is that correct?

2 A I think so. I think that at that time the police  
3 were not provided with formal kits in any way and  
4 we had bags and boxes around the laboratory which  
10:45 5 we used to give to them if there was anything to  
6 be taken away.

7 Q Can we then go quickly, please, if we can, to  
8 document 238470. I'm interested -- you were asked  
9 the question of what occurred, and I'm interested,  
10:46 10 I don't think I take this out of context by taking  
11 that portion of your answer, it was in relation to  
12 how the exhibits were removed, and at line 6 your  
13 answer was:

14 "A Now, I have no record and I cannot  
10:46 15 remember whether the police turned up  
16 with the kit or not, and I hypothesized  
17 a garbage bag because that was what  
18 commonly happened. If the police  
19 records show a kit --"

10:46 20 Et cetera, and I take it that was correct, that  
21 the common practice was for them to show up with  
22 a garbage bag?

23 A I don't know what the common practice was in '69.  
24 I don't think we had formalized or in any way  
10:47 25 formalized this question of containers. We used



1           what was handy.

2           **Q**       Fair enough.  But it's clear if we look at the  
3                    Gail Miller clothing, it was not individually  
4                    bagged as it was removed from the body?

10:47 5           **A**       No.

6           **Q**       Okay.  If we can then go quickly, please, to  
7                    document 246207, page 482.  246207, please.  It's  
8                    this dry Saskatchewan air, My Lord.  I'm suffering  
9                    from the same thing.

10:48 10           COMMISSIONER MacCALLUM:  I don't know if  
11                    I'm reassured, Mr. Beresh, by that or not.

12           MR. BERESH:  Back one page, please, to page  
13                    482.

14           COMMISSIONER MacCALLUM:  Mr. Beresh, I  
10:49 15                    thought you wanted 246207?

16           MR. BERESH:  I did, 246207.

17           COMMISSIONER MacCALLUM:  He needs the  
18                    beginning number.

19           MR. BERESH:  That is the number.

10:49 20           MR. HODSON:  Try 246198.

21           BY MR. BERESH:

22           **Q**       If you can highlight starting at question 207.  
23                    Doctor, just to put this in context, this was the  
24                    evidence of Detective Kleiv at Mr. Fisher's  
10:51 25                    preliminary inquiry.  Crown Prosecutor Sinclair



1 asked this question, question 207:

2 "Q All right. Can you describe that  
3 process?

4 A The process of seizing the clothing?

10:51 5 Q Yes, please?"

6 Now this was in the context of seizing the  
7 closing at the autopsy where you were present:

8 "A The pathologist's assistant removes the  
9 clothing and each item is placed in a  
10:51 10 plastic bag. We -- the Identification  
11 Officer who is in attendance, in this  
12 case it was myself, and Lieutenant  
13 Penkala -- the items are placed in  
14 plastic bags. And then after the  
10:52 15 autopsy is completed they are taken to  
16 the -- to the Identification Section of  
17 the police station and -- for further  
18 examination and so on."

19 Given what we see in the photograph, given what  
10:52 20 you have indicated, would you agree with me, sir,  
21 that that was not common practice in 1969, that  
22 is to individually bag items of clothing at an  
23 autopsy?

24 A It was -- it was obviously not done in the case  
10:52 25 under examination.



1 Q Doctor, you said it was common to put them in a  
2 garbage bag, and I didn't gather, from that, that  
3 we were talking about individual plastic bags?

4 A Umm, it's -- to the best of my recollection, we  
10:52 5 would usually have put them in one bag.

6 Q Yes.

7 A I do not remember a practice of individual  
8 bagging, but if Mr. Kleiv does, then it was his  
9 responsibility, primarily, to receive the  
10:53 10 exhibits, and he may have done this.

11 I had examined the body with the  
12 clothing on, and made my description, and, after  
13 that, the removal of the clothing was a matter  
14 between my mortician and --

10:53 15 Q But --

16 A -- the police representative.

17 Q But, Doctor, it's not quite that simple. The  
18 photographs betray that suggestion; don't you  
19 agree?

10:53 20 A The photographs in this case show that the  
21 clothing was in a pile on the floor.

22 Q Yeah. Now just let me ask this, you weren't  
23 asked, but my understanding -- and I'm not sure of  
24 the source -- was that in 1969 there were about  
10:53 25 three homicide cases in Saskatoon; does that



1 accord with your recollection, you, of course,  
2 having done the autopsies --

3 A I have absolutely no recollection.

4 COMMISSIONER MacCALLUM: Wait a minute,  
10:53 5 please. Please refrain from answering, Doctor,  
6 until the question is finished. The reporters  
7 are going to quit on us.

8 BY MR. BERESH:

9 Q Thank you, My Lord. My understanding, in 1969, is  
10:54 10 that there were not many homicides?

11 A I cannot remember.

12 Q But was there another pathologist, other than  
13 yourself, in -- operating in Saskatoon?

14 A Oh yes. There were three hospitals with  
10:54 15 three pathology -- with pathology staff in the  
16 three hospitals, and the hospitals to which the  
17 Coroner sent a body for examination was variable,  
18 and still is. It is very much a matter of the  
19 Coroner's decision as to where he or she wants a  
10:54 20 body sent. So there were other pathologists in  
21 practice, and examinations would be done at the  
22 other two hospitals, and I do not know the total  
23 and I do not know the proportions.

24 Q Fair enough. But I understood, yesterday, that in  
10:54 25 1969 there was a division of hospital autopsies



1 and forensic autopsies; did I understand that  
2 correctly?

3 A There is, and there was and still is this  
4 distinction between autopsies done, which we  
10:54 5 usually call autopsy -- hospital autopsies for  
6 shorthand -- which are done on a permit from the  
7 next of kin, which were a much greater proportion  
8 in 1969 and which are very few now; and the  
9 hospital -- the autopsies done on the Coroner's  
10:55 10 order under the *Coroner's Act*, which are now the  
11 majority.

12 Q But my question is this; would you do the bulk of  
13 forensic autopsies in 1969?

14 A I cannot tell you.

10:55 15 Q Okay.

16 A I do not know what was done at the other  
17 hospitals, I only know what I did.

18 Q But I take it a matter of common sense, this is a  
19 death, it's going to be the most serious of  
10:55 20 investigations; isn't that fair? And everyone  
21 knew that in 1969; didn't they?

22 A I'm sorry, the -- this particular case?

23 Q Yes?

24 A Well this particular case was an obvious homicide,  
10:55 25 and it was virtually on the doorstep of St.



1 Paul's, so that is where the body went.

2 Q Okay. Doctor, I want to take you quickly then, if  
3 I can, to document 313602 please, page 400. Here  
4 again, Detective Kleiv was testifying at Mr.  
10:56 5 Fisher's trial, and we're interested in line 24  
6 onward onto the next page. Question by  
7 Mr. Sinclair:

8 "Q Now was the clothing worn by the victim  
9 . . . ,"

10:56 10 thank you:

11 "... seized at some point by yourself?"

12 A Yes.

13 Q At what point was it seized?

14 A The clothing was seized at the autopsy  
10:56 15 during the time of the autopsy. After  
16 photographs were taken then we -- then  
17 the -- then the clothing items were  
18 seized.

19 Q Okay. And can you indicate, sir,  
10:57 20 whether or not or how that seizure took  
21 place at that time, what you recall  
22 about that?

23 A Generally the procedure is that the  
24 pathologist's assistant removes the  
10:57 25 clothing from the body and hand it to



1 the identification officer, and the  
2 identification officer places each  
3 item in a separate bag. And so this  
4 is the usual procedure. But I can't  
10:57 5 specifically remember doing this  
6 because it's a matter of routine and  
7 it's not always written down."

8 I take it, sir, that that answer is incorrect, it  
9 was not matter of police routine to individually  
10:57 10 bag items; is that correct, sir?

11 A Are you asking me?

12 Q Yes?

13 A I don't know.

14 Q In your presence, sir, it was -- in 1969, it was  
10:57 15 --

16 A In this particular case, it was obviously not  
17 done, but I have no recollection of other cases.

18 Q Well, but sir, if it was a routine practice, and  
19 this was a homicide, --

10:58 20 A Then. --

21 Q -- why would it not be done?

22 A Then it should have been done, but I didn't  
23 specifically watch the police at each case to see  
24 what they were doing.

10:58 25 Q I appreciate that, Doctor, but you just said to us



1           it was common practice to get a garbage bag, put  
2           the clothes in, and take it away, and that's what  
3           appears to have happened in this case; isn't that  
4           correct?

10:58 5           A           That's my recollection, but it's not Mr. Kleiv's,  
6           and as it was his responsibility to receive the  
7           clothing when it was being seized as an exhibit,  
8           then I think he probably knows more about it than  
9           I do.

10          Q           Well --

11          A           I had finished, at that point, with the clothing.

12          Q           But sir, with respect, your notes say Kleiv wasn't  
13           involved, you gave them to Penkala?

14          A           That's what my notes say.

10:58 15          Q           Yes. And presumably, if your note is correct,  
16           when you gave them to Penkala, he put them on the  
17           floor in a pile; is that right?

18          A           I don't know. They are on the floor in a pile,  
19           and somebody put them there, but I'm not making  
10:59 20           inferences as to what happened after the clothing  
21           was removed from the body.

22          Q           Sir, you were asked yesterday about attending the  
23           scene, and I appreciate your answer. My question,  
24           though, moves a little further, and it's this.  
10:59 25           Would you not agree that at least videotaping a



1 scene by the police and providing it to a  
2 pathologist before, during or after autopsy, would  
3 be of assistance --

4 A I --

10:59 5 Q -- in a criminal investigation?

6 A I can think of cases in which it might have been  
7 of assistance, but actually most of these are not  
8 criminal cases, they are cases of deaths in  
9 peculiar circumstances like those of epileptics.  
10:59 10 I am searching my memory for a case in which it  
11 might have been helpful for me to see a scene, and  
12 there are a few, but not the majority. I  
13 generally get a good description, and can ask  
14 questions, and the information gained from being  
11:00 15 at a scene, I think in the majority of cases,  
16 would not help me very much.

17 Q Well, would it have assisted if you had had a  
18 videotape of the *Dalton case*, sir; or would it  
19 have assisted the individuals initially involved  
11:00 20 --

21 A In the *Dalton* --

22 Q -- from a scientific point of view? Yes.

23 A In the *Dalton case*?

24 Q Yes.

11:00 25 A The *Dalton case* turned completely on the



1 interpretation of neck injuries and the autopsy  
2 was, I understand, properly done. It was one of  
3 these cases, in which I have been involved quite  
4 often, where the findings are clear but their  
11:00 5 interpretation is a matter of opinion. I don't --  
6 the account given by Mr. Dalton of his wife's  
7 death, certainly if there had been a videotape of  
8 that it would have been of great help, but after  
9 she was removed to hospital there was an hour and  
11:00 10 a half's resuscitation, and that is liable to  
11 obscure anybody's findings.

12 Q No question about that. I'm talking about the  
13 case where the individual is clearly deceased, no  
14 resuscitation will be of any assistance, don't you  
11:01 15 agree that it ought to be mandatory to videotape  
16 the scene?

17 A I'm not agreeing that anything ought to be  
18 mandatory. I'm not in charge of things.

19 Q Just to make it clear, sir, I take it the police  
11:01 20 in this case never came back to you with any  
21 exhibits after autopsy and asked you for a  
22 secondary opinion or comment at all?

23 A The only exhibits that they brought to me after  
24 the autopsy was the seminal material found in the  
11:01 25 snow.



1 Q Okay. And did you advise them that, if it was  
2 seminal fluid, it could not be dated in terms of a  
3 deposit there?

4 A I may have said that, but it's -- a thing which is  
11:01 5 frozen is, in general, difficult to date.

6 Q Yes, okay. Finally I just want to deal with some  
7 quick matters, My Lord, and conclude here, if you  
8 will bear with me. You were asked some questions  
9 yesterday, and with respect to Mr. Lockyer's  
11:02 10 questions, my view goes beyond that in terms of  
11 how this Commission might assist justice in this  
12 province and Canada in the next 20 years, not -- I  
13 don't want to talk about fine tuning, tuning the  
14 wheels, that might have been suggested to you  
11:02 15 yesterday. I just want to go through, quickly, a  
16 list of major causes for miscarriages of justice,  
17 and I want to deal with the scientific portion,  
18 which relates to you.

19 Obviously I take it we agree,  
11:02 20 even as lay people without any professional  
21 experience, that inadequate investigations can  
22 lead to a wrongful conviction?

23 A Certainly.

24 Q Okay. Tunnel vision, what we know is a tunnel  
11:02 25 vision by investigators, can lead to that?



1 A That was certainly the case in *Dalton*.

2 Q And I take it, clearly, that that includes bias,  
3 racial bias, other types of bias, which come into  
4 play; fair?

11:03 5 A That's a general, a general opinion on most  
6 anything.

7 Q Clearly a malicious prosecution, number 3 is what  
8 I have on my list, could lead to a wrongful  
9 conviction?

11:03 10 A Yes.

11 Q Yes. Improper science; is that fair?

12 A Improper science?

13 Q Yeah, what I call junk science, and the example I  
14 have is recovered memory syndrome which played  
11:03 15 itself out in our court rooms for a number of  
16 years and then was found to be nothing more than  
17 junk science?

18 A I certainly agree with you on the recalled memory  
19 syndrome, but most of the science which we apply  
11:03 20 in cases like this is capable of being expressed  
21 in numerical terms, and if you are measuring  
22 something, however you -- whatever it is you  
23 measure and however you measure it, it is much  
24 more difficult to introduce or to accept junk.

11:04 25 Q Well, but we do agree with this, that people with



1 forceful personalities who wear the cloak of an  
2 expert can certainly take the day in a trial for  
3 either side?

4 A You are bringing in, now, the adversarial system  
11:04 5 of justice, and I don't particularly want to get  
6 into discussing that, but the -- in this system it  
7 is the credibility attached to any witness, and  
8 his or her conviction of the jury or judge, which  
9 is important.

11:04 10 And, quite obviously, it's no  
11 good being an inarticulate genius. One of the  
12 things that you need -- and I'm speaking now in  
13 forensic pathology -- is the capability of giving  
14 convincing evidence in court, and of standing up  
11:05 15 to cross-examination, and these are not part of  
16 medical training.

17 Q I appreciate that, Doctor, but I'm talking more  
18 about those experts who might try on trial  
19 balloons like we saw with the memory syndrome  
11:05 20 situation, and my only question is, unless the  
21 science is pure, it can lead to a wrongful  
22 conviction; don't you agree?

23 A Certainly, if science is inaccurate, it can  
24 contribute to a wrongful conviction. I hope that  
11:05 25 the science of pathology -- insofar as it is a



1 science -- but in pathology we have seen that  
2 there is a matter of fact, of what you  
3 demonstrate, and a matter of opinion as to how it  
4 was caused, and these have, carefully, to be  
5 distinguished.

11:05

6 Q I appreciate that, Doctor, but isn't the real  
7 problem the matter of interpretation? You touched  
8 on it yesterday. Back in 1959, 1960s,  
9 pathologists were estimating time of death based  
10 upon stomach contents --

11:06

11 A Yes.

12 Q -- and we now know that that science is not an  
13 accurate science, it's not fact?

14 A This, in fact, led to the very spectacular  
15 wrongful conviction of Mr. Truscott.

11:06

16 Q Of course. So what I am saying is the scientific  
17 information has to be honest, and by that I don't  
18 mean it being untoward, and the interpretation has  
19 to be honest and not favour one side or the other;  
20 don't you agree?

11:06

21 A Certainly. And it's, as I tried to make it very  
22 forcefully, my point yesterday, I am not a witness  
23 for one side or the other, I am a witness for the  
24 court, and I would far prefer it if the  
25 adversarial system permitted me to be called as a

11:06



1 witness for the court, and not called by one side  
2 or the other.

3 Q Well I have a suggestion this morning as to how  
4 that might occur, if Mr. Commissioner decides in  
5 the end to recommend this, but let me go through  
6 my list of what I suggest is a fairly complete  
7 list of reasons for wrongful conviction.

8 Dishonest witnesses; we don't  
9 disagree about that?

10 A I'm sorry?

11 Q Dishonest witnesses can cause a wrongful  
12 conviction?

13 A I hope all witnesses are honest and the  
14 conviction, in the end, is the -- due to the  
15 relative weight placed on their evidence.

16 Q I think you have answered that. Reliance upon  
17 informants, we know, is a reason for wrongful  
18 convictions?

19 A Reliance upon?

20 Q On informants who have something benefit to gain  
21 from giving false evidence?

22 A I have no personal knowledge of that, but one  
23 would presume it's there.

24 Q Okay. The other I have on my list, and I'll just  
25 read them to you; mistaken identity, false



1 confessions, lack of experience, and lack of  
2 critical analysis. Would you agree that those can  
3 be factors which would lead to a wrongful  
4 conviction?

11:07 5 A Now you went very quickly there, sir. The first  
6 two, I think, are outside my province. The last  
7 two, could you repeat them?

8 Q Lack of experience, and I'm thinking about lack of  
9 experience in the system itself?

11:07 10 A Well that's a problem one is always faced with,  
11 and the problem one is faced with in Saskatchewan  
12 is that we are a small -- I was going to say poor,  
13 but I'm told now that we're not a poor province  
14 though it doesn't feel that way -- and, in some  
11:08 15 ways, Saskatoon is approaching the end of the line  
16 and we're trying, here, to deploy, with very  
17 limited resources, expertise equivalent to the  
18 large centres of Canada and the U.S.

19 Q Right.

11:08 20 A And this will always, I think here it will remain  
21 a problem and has to be factored into every  
22 consideration, that certainly we are -- we may  
23 have people who are inexperienced, or young, or  
24 both, in a very serious situation, and it is not  
11:08 25 always practical to call for help from outside.



1 Q Well, but my suggestion, Doctor, is that there is  
2 actually a fairly easy answer. The machinery for  
3 putting it into place is more difficult. And the  
4 easy answer is that there has to be some critical  
11:08 5 analysis, a skepticism, about evidence collected;  
6 don't you agree, sir?

7 A I think there is always that, but one -- one  
8 should view evidence, always, with a dispassionate  
9 and possibly critical eye. I am more concerned,  
11:09 10 personally, with the availability of expertise and  
11 review.

12 Q Well let --

13 COMMISSIONER MacCALLUM: Mr. Beresh, are  
14 you questioning this witness with respect to his  
11:09 15 own work, or --

16 MR. BERESH: Yes.

17 COMMISSIONER MacCALLUM: -- just being  
18 general?

19 MR. BERESH: And this is my last series of  
11:09 20 questions, My Lord, we're leading right to his  
21 area of expertise.

22 COMMISSIONER MacCALLUM: Okay.

23 BY MR. BERESH:

24 Q Doctor, I'm proposing a model, and I just want  
11:09 25 your comment on it only insofar as your expertise



1 is involved. And my question, I guess, is this.  
2 Isn't the problem that police forces face -- and  
3 they are not to be faulted for this -- isn't the  
4 problem that they face that most of their work is  
5 enforcement, --

6 A I --

7 Q -- much of it, of course, is investigation, and  
8 there's, of course, overlap. Now, if His Lordship  
9 was to propose the establishment of an independent  
10 review body for major crimes, which review body  
11 would be independent of the police force, which  
12 would review evidence collected by the  
13 prosecution, by yourself -- I have you in the area  
14 of experts -- and then provide an objective or  
15 critical assessment to the prosecution; wouldn't  
16 that overcome a lot of the problems that we've  
17 talked about over the last two days, sir?

18 A I don't know. It's another layer. From my point  
19 of view, the possibility of this is an independent  
20 review panel of forensic pathologists, and I have  
21 suggested this on occasion; that certainly, in  
22 review of possible miscarriages of justice, that  
23 rather than going sampling for itinerant experts,  
24 that a national panel, perhaps of Chief Medical  
25 Examiners and Chief Coroners, would be a very



1           useful body in this respect.

2           **Q**       Well my model takes that into account, because I  
3                    suggested the independent review body, once having  
4                    received a pathologist's report, would have access  
11:11 5                    to other experts?

6           **A**       And you are suggesting that this applies in every  
7                    major case and not in major cases that come under  
8                    question?

9           **Q**       In major -- well, we could decide, it would be  
11:11 10                   hard to decide what's major cases. Parliament  
11                    decided which are indictable offences, which are  
12                    summary conviction; in major cases, an independent  
13                    review, an independent assessment. Because  
14                    yesterday, when you talked about "I'm a piece of  
11:12 15                   the puzzle", it struck me that a piece of the  
16                    puzzle is missing, and this is the piece that may  
17                    be missing?

18           **A**       I can't really comment on this on such short re --  
19                    short viewing. The only thing it would appear to  
11:12 20                    me is to establish yet another layer in the  
21                    process, and yet another possible source of delay,  
22                    and as I am now dealing with cases coming into  
23                    Queen's Bench which have taken three years to get  
24                    there, I'm not anxious to be dealing with any  
11:12 25                    further delay in this process.



1 Q No.

2 A This would imply to me, also, a degree of  
3 expedition in the processes of law which I have  
4 not encountered.

11:12 5 Q I appreciate that. I guess my suggestion, as it  
6 relates to you, is this would take into account  
7 and give an independent body the right to contact  
8 another pathologist where there is any question  
9 about the pathologist's report, findings, and,  
11:13 10 most importantly, interpretation?

11 A I have no objection to that, and I think it might  
12 be quite useful, but I do have to emphasize that I  
13 think the majority of forensic pathology in Canada  
14 is well done at the primary level.

11:13 15 Q Thank you, Doctor, for your patience and --

16 COMMISSIONER MacCALLUM: We'll --

17 MR. BERESH: My Lord, I'm not sure if you  
18 established a process for marking of physical  
19 exhibits here?

11:13 20 COMMISSIONER MacCALLUM: All documentary  
21 evidence is in and serves as an exhibit without  
22 being formally identified as such.

23 MR. BERESH: Thank you. I would ask for an  
24 exception to that because of what the witness has  
11:13 25 said about the two photographs, they are better



1 in real life than they are on the screen, and I  
2 am asking that they either collectively or  
3 separately be marked as exhibits at this Judicial  
4 Inquiry, please.

11:14 5 COMMISSIONER MacCALLUM: Mr. Hodson?

6 MR. HODSON: Yes. Both of these  
7 photographs are, in fact, exhibits that we  
8 obtained this morning from the courthouse, they  
9 were exhibits in the Fisher matter, so they are  
11:14 10 similar in nature to the knife handle and the  
11 toque, so it might be appropriate that, the fact  
12 that they were exhibits in these proceedings,  
13 they be marked here. We do have copies of these  
14 that are Bates stamped, and in our document  
11:14 15 system, but I have no trouble marking these as  
16 separate exhibits.

17 MR. BERESH: Thank you, My Lord.

18 COMMISSIONER MacCALLUM: Madam Clerk, are  
19 we at Exhibit 3?

11:14 20 MR. HODSON: Together or separate?

21 MR. BERESH: They can be together, sir.  
22 The more distant shot should be the first, and  
23 then the close-up should be the second, please.

24 COMMISSIONER MacCALLUM: Was it Exhibit 3?  
11:14 25 Two photos, Exhibit 3.



1 MR. BERESH: Thank you, My Lord.

2 COMMISSIONER MacCALLUM: And understand,  
3 everybody present, that marking the exhibits  
4 formally, by that word, applies only to items of  
11:15 5 real evidence. This is perhaps an exception, but  
6 given for the reasons expressed by Mr. Beresh.

7 MR. BERESH: Might I suggest that Madam  
8 Clerk also mark, on the exhibit stamp, the number  
9 where we would find it electronically for ease of  
11:15 10 reference, Mr. Commissioner?

11 MR. HODSON: And, as well, both of those  
12 photographs are part of the publication ban.

13 COMMISSIONER MacCALLUM: They are.

14 MR. HODSON: And one last concern,  
11:15 15 Mr. Beresh. Your notes, here, that you showed to  
16 Dr. Emson, will be provided a number and put in  
17 as an exhibit as well?

18 MR. BERESH: Yes, thank you.

19 COMMISSIONER MacCALLUM: All right.

20 -->EXHIBIT P-3:

21 TWO LARGE PHOTOGRAPHS OF AUTOPSY

22 (BATES ID NUMBERS 241975 & 241973).

23 MR. BERESH: Thank you, Mr. Commissioner.

24 COMMISSIONER MacCALLUM: 15 minutes,  
11:15 25 please.



1 (Adjourned at 11:15 a.m.)

2 (Reconvened at 11:33 a.m.)

3 COMMISSIONER MacCALLUM: Yes, Mr. Elson?

4 MR. ELSON: Thank you, Mr. Commissioner.

11:32 5 **BY MR. ELSON:**

6 **Q** Dr. Emson, in the questioning yesterday you  
7 indicated that you had not been apprised, in 1969  
8 or 1970, as to the antigen secretor status of  
9 David Milgaard; is that correct?

11:33 10 **A** I don't think I ever have been.

11 **Q** And, in fact, you have not been advised since the  
12 trial in 1970 as to Mr. Milgaard's antigen  
13 secretor status; is that correct?

14 **A** Umm, no, I haven't. I have read bits of evidence  
11:33 15 here or there but I have never been informed.

16 **Q** Now, as I understood your evidence yesterday, you  
17 indicated that, if one were to take a sample of  
18 bodily fluid, say for example saliva; and if one  
19 were to test that saliva and discover no antigens;  
11:33 20 and let's assume also that this is a group A or a  
21 type A blood patient; if there were no antigens in  
22 the saliva, as I understood your evidence -- and  
23 correct me if I'm wrong -- that is not conclusive  
24 evidence that the person in question is not an  
11:33 25 antigen secretor? If no antigens were found in



1 the saliva, the person is known to be group A but  
2 there are no antigens found in the saliva, that is  
3 not conclusive evidence that the person is a  
4 non-secretor?

11:34 5 A Well this is not my field of expertise, but no, I  
6 would not do that. If I knew the person to be  
7 group A on blood grouping, and if the A antigen  
8 was not expressed in saliva, I would presume he  
9 was a non-secretor.

11:34 10 Q All right. My understanding is that there are --  
11 and I understood your evidence yesterday, and I  
12 stand to be corrected -- but I understood your  
13 evidence yesterday that it is conceivable that you  
14 could have a group A antigen secretor, but not  
11:34 15 secrete antigens within saliva, but perhaps  
16 secrete antigens in other bodily fluids?

17 A I didn't say that, and I -- the answer is I don't  
18 know. If you want to go into this you need an  
19 immunohematologist, not me.

11:34 20 Q I see. Now, in 1992, were you ever advised of a  
21 test done on David Milgaard which demonstrated  
22 that, in fact, he was an A antigen secretor?

23 A No.

24 Q You have never been advised of that?

11:35 25 A I have never had this question discussed with me



1 before, before this hearing.

2 Q Now I also want to deal with the practice in 1969  
3 compared to the practice today. I believe your  
4 testimony was that you are still performing  
11:35 5 autopsies, albeit not today, but in 2005?

6 A I'm not performing them today for obvious reasons,  
7 but I am currently, when not otherwise preempted,  
8 engaged in performing autopsies.

9 Q Now, and that would also include, obviously,  
11:35 10 autopsies with respect to patients or persons who  
11 appear to be victims of homicide?

12 A Like Monday.

13 Q Now in 1969 -- My Friend Mr. Beresh has identified  
14 a pile of clothing on the floor and, in fairness,  
11:36 15 you identified that as well in one of the  
16 photographs that's been presented to you this  
17 morning -- you indicated that, in 1969, there were  
18 not as many police officers in the room during an  
19 autopsy as there are currently; is that correct?

11:36 20 A Yes.

21 Q How many police officers, generally, are there in  
22 the autopsy suite when an autopsy is done now,  
23 again assuming a homicide victim or an apparent  
24 homicide victim?

11:36 25 A It's variable, but I would say there would be a



1 minimum of three, and a maximum of quite a lot.

2 Q Now if we were also to assume that that homicide  
3 victim appeared concurrently, also, to be a victim  
4 of sexual assault, would the sexual assault kit be  
5 in use in conducting the examination of the body  
6 and the postmortem?

7 A Yes.

8 Q Was that, to your recollection, sexual assault kit  
9 in use in 1969 at the time of Gail Miller's  
10 autopsy?

11 A No, it was not, not to my recollection, and it was  
12 certainly not deployed at Gail Miller's autopsy.

13 I don't know if it existed. The development of  
14 the sexual assault kit was a gradual process, from  
15 us putting together one on very empirical grounds,  
16 to our welcoming of an almost national kit devised  
17 by a number of people which I think is now in use.

18 Q Within, and as I understand it, the sexual assault  
19 kit includes what is described as a forensic  
20 evidence record which is to be completed both by  
21 either the physician, in the case of a live  
22 patient, or the pathologist, in the case of  
23 deceased patient, and the police officer. Are you  
24 aware of that particular record?

25 A Yes. I think I've had to take part in it from



1 time to time, though as I have said, homicides  
2 involving sexual assault are rare in my  
3 experience. I've had very few.

4 Q Now, it's my understanding that the practice  
11:38 5 presently in the case of a homicide victim,  
6 whether or not there is or is not a sexual assault  
7 associated with it, is that the police officers in  
8 attendance from the identification branch of the  
9 police service would have individual bags for each  
11:38 10 individual item of clothing; is that correct?

11 A That was certainly what was done on Monday, the  
12 police attended with a role of green plastic bags  
13 from which they tore one as they needed it and  
14 they are very equipped in these now.

11:38 15 Q And part of the equipment would also include  
16 gloves; is that correct?

17 A We usually supply the gloves I think, but they've  
18 certainly got them and I can't say for sure  
19 whether they are wearing ours or theirs.

11:39 20 Q In any event, at the time an item of clothing from  
21 a homicide victim is handed either by the  
22 pathologist or by the technician to the police  
23 officer, it would be handed to an identification  
24 police officer with a gloved hand; is that  
11:39 25 correct?



1 A Are you saying the gloved hand is that of the  
2 officer or of the --

3 Q That of the officer.

4 A The handing person would have a glove on. I  
11:39 5 haven't specifically observed the officers.

6 Q All right. If I were to suggest to you that the  
7 police officers typically do wear gloves when they  
8 receive clothing either from the pathologist or  
9 the technician and that they change their gloves  
11:39 10 with each individual garment, would you have any  
11 facts within your knowledge tending to suggest  
12 that that's not true?

13 A No. I think that accounts for perfection and  
14 should be approached. Whether it's fulfilled or  
11:39 15 not I don't know.

16 Q Are you aware as to whether or not that indeed was  
17 the practice with respect to gloved identification  
18 officers in 1969?

19 A In retrospect, I would say almost certainly not.

11:40 20 Q As part of the sexual assault kit, it would now be  
21 routine for the vaginal contents, if there are  
22 any, to be collected; is that correct?

23 A Yes.

24 Q And that would be no less routine than taking  
11:40 25 fingernail scrapings in 1969 as you've testified



1           yesterday?

2           A        I presume so. The sexual assault kit lays down a  
3           protocol of things to be done and specimens to be  
4           collected. It is not always possible in such a  
11:40 5           protocol to get everything that is listed, but  
6           these are the things one tries to get.

7           Q        And it's my understanding that in the protocol  
8           there is a requirement that the pubic hair be  
9           examined for semen-like material; is that correct?

11:40 10          A        I have no specific knowledge, but that sounds  
11          reasonable.

12          Q        And also that the pubic hair is combed again for  
13          any foreign articles?

14          A        That is certainly done.

11:41 15          Q        And a pubic hair sample is always maintained?

16          A        Yes.

17          Q        And a vaginal swab is maintained?

18          A        The -- I presume that the vaginal contents are  
19          taken by swab. There may be cases in which there  
11:41 20          is more fluid and -- such as this one -- in which  
21          one can get a sample by pipette.

22          Q        And you just answered my next question. And then  
23          there also would be a motility check that would be  
24          done --

11:41 25                                    COMMISSIONER MacCALLUM: Excuse me, Mr.



1 Elson. Did you say, Doctor, that the swab is not  
2 taken if the vaginal content -- or fluid, I mean,  
3 is available?

4 A What I would try to get, Your Lordship, would  
11:41 5 depend on the amount of vaginal fluid. If the  
6 vagina is only moist, then one can take a swab,  
7 but if there is a pool of fluid, then you can pick  
8 it up in a pipette with a little rubber bulb and  
9 obviously this is more satisfactory.

11:42 10 BY MR. ELSON:

11 Q You've already testified as to the motility check  
12 that was done in Gail Miller's case in 1969. That  
13 is also currently required by the sexual assault  
14 kit; is that correct?

11:42 15 A I presume so. As I say, I have not performed an  
16 autopsy on a victim of sexual assault for quite a  
17 long time, but I would presume that this would be  
18 done as a matter of routine.

19 Q And then also as a matter of routine there would  
11:42 20 be rectal and anal swabs; is that correct?

21 A Oh, yes.

22 COMMISSIONER MacCALLUM: Nowadays?

23 BY MR. HODSON:

24 Q Nowadays, yes. I'm also confining my questions  
11:42 25 with respect to the sexual assault kit to the



1 examination of the genital area and the rectal  
2 area. There is also, as I understand it,  
3 examination that is done of the oral area; is that  
4 correct?

11:42 5 A Yes.

6 Q Now, yesterday, Doctor, and I'm not sure, and I  
7 apologize, I hope this doesn't offend you, but you  
8 made reference to Watson and Crick discovering the  
9 double helix and I wasn't sure that I caught your  
11:43 10 evidence with respect to when it was that DNA was  
11 discovered.

12 A I can't remember when it was.

13 Q If I were to put to you that it was in 1953, would  
14 you --

11:43 15 A Oh, no, it was much longer after that, but a  
16 simple -- it's probably in everybody's computer  
17 who knows how to use one.

18 Q And that's what I endeavoured to do last night  
19 when I went home, is to double check that. It was  
11:43 20 my understanding that it's 1953, but you are the  
21 witness. Your recollection was that it was  
22 somewhat later than that?

23 A Well, if it would have been 1953, then in 1969 we  
24 would have known about it and been chasing DNA.

11:43 25 Q My understanding, Dr. Emson, and please correct me



1 if you have any understanding that is different  
2 from what I am about to put to you, is that  
3 although DNA was discovered in 1953, it was not  
4 used for forensic purposes until it was used in  
11:44 5 the case in Leicester, England in 1988.

6 A You may well be right, and this is what I was  
7 going to try and modify my answer, that there is a  
8 difference between discovering the structure of  
9 DNA and being able to use it in forensic  
11:44 10 investigation, and I think the key in forensic  
11 investigation was the capability of replicating  
12 the DNA, of increasing its content, increasing its  
13 amount by biochemical techniques. Now, one -- I  
14 have to distinguish carefully here between  
11:44 15 knowledge of the structure, which may well have  
16 been '53, and the capability to use this knowledge  
17 which may well have been much later, and I'm sorry  
18 if I haven't been clear on that.

19 Q That's fine, and I wanted to make sure I had that  
11:45 20 understanding. Do you have any recollection of  
21 the first occasion in the world in which DNA was  
22 used for forensic purposes?

23 A No, I don't.

24 Q Now, Doctor, you indicated yesterday as well that  
11:45 25 in 1969 there wasn't the degree of specialization



1 in matters such as sexual assault, major crimes or  
2 identification as there is today. I believe that  
3 was your evidence?

4 A Well, I'm not familiar with the matters of police  
11:45 5 organization, but certainly as the amount of  
6 knowledge has increased exponentially, so has the  
7 specialization of the people necessary to use it,  
8 and this is applied to the police equally as to  
9 everybody else.

11:45 10 Q And that leads to my next question. In 1969 when  
11 this autopsy was performed, and you indicated that  
12 Lieutenant Penkala was in the autopsy suite as  
13 well as Officer Kleiv, what knowledge did you have  
14 at that time as to the training or expertise of  
11:46 15 either Lieutenant Penkala or Officer Kleiv?

16 A The same as I have now, none.

17 COMMISSIONER MacCALLUM: None?

18 A None. I don't know how police officers are  
19 trained, Your Lordship.

11:46 20 COMMISSIONER MacCALLUM: Oh, your knowledge  
21 was none, okay. You didn't know about their  
22 qualifications?

23 A No, I don't know about the training or  
24 qualifications of police officers.

11:46 25 BY MR. ELSON:



1 Q So if a bodily substance was removed from a  
2 homicide victim, among the three people in the  
3 room, yourself, Lieutenant Penkala and Officer  
4 Kleiv, you would agree with me that you were the  
5 best person to make an assessment as to the value  
6 of that bodily substance in determining who the  
7 possible assailant might be?

8 A Not necessarily. I would not, I think, at that  
9 time, have been very knowledgeable about the  
10 capabilities of the forensic laboratories. It was  
11 stated yesterday that had the vaginal specimen  
12 been saved, it would have been very useful to the  
13 person investigating in Regina. I didn't know  
14 this, or I presume I didn't know this or else it  
15 would have been saved. There's no note in this  
16 stating -- there's no note in this material saying  
17 what we knew at the time and I can only go by  
18 inference, that because something was not done, it  
19 was because either we were not -- we were not  
20 informed or knowledgeable that it could be done or  
21 that we didn't know it was going to be useful. I  
22 think my attitude now has changed to the opposite  
23 pole, that you should save everything because it  
24 may come in useful even if you don't know at the  
25 time you save it what it's going to be useful for,



1 but that is an opinion gained by a lifetime of  
2 sometimes hard experience.

3 Q I appreciate that. Now, Mr. Lockyer yesterday  
4 cross-examined you at some length with respect to  
11:48 5 wrongful convictions which occur as a result of,  
6 and I will use his words, "bad pathology". Now,  
7 in this particular case the only -- you've  
8 acknowledged that your evidence at the Milgaard  
9 trial that it was common for blood to be found  
11:48 10 within spermatozoa was wrong and that Dr.  
11 Markesteyn was correct and that you were wrong.  
12 That was your evidence yesterday; is that correct?

13 A Yes, that is my -- I was of the wrong opinion at  
14 the original trial and I had to vary that opinion  
11:48 15 as I became more knowledgeable, and incidentally,  
16 may I go back to your use of the term  
17 cross-examination? Is this in fact a  
18 cross-examination?

19 Q Technically yes, as I understand it.

11:49 20 A Oh.

21 Q Now --

22 A Well, Your Lordship, I --

23 COMMISSIONER MacCALLUM: What are you  
24 referring to, the one today or the one yesterday?

11:49 25 A Both. My experience with cross-examination is



1           that it's customary at a trial. I was not aware  
2           of the passing of the examination, of a Commission  
3           of this type, and whereas the term -- I would just  
4           like to be sure of the terminology, that this is  
11:49 5           in fact a cross-examination and what preceded it  
6           was an examination-in-chief.

7                         COMMISSIONER MacCALLUM: And one can gain  
8           only some guidance from trial practice here, sir.  
9           This is a public inquiry with obvious differences  
11:49 10          and Commission Counsel, who in a trial setting  
11          would be cross-examining, is not cross-examining  
12          here because his position is a neutral one, he's  
13          here simply to present the evidence without  
14          commentary. Yesterday we listened to some  
11:49 15          cross-examination which contained editorial  
16          content and we listened to some more of that this  
17          morning. I believe those questions were put to  
18          you, sir, in recognition of your undoubted  
19          expertise in the field of pathology. I listened  
11:50 20          to it for that reason. I promise you that I  
21          won't be as lenient as time goes on with other  
22          witnesses, particularly if they are not experts  
23          like you are.

24          A           Thank you, Your Lordship.

25                         BY MR. ELSON:



1 Q I wasn't sure whether, Dr. Emson, you were  
2 thinking that my cross-examination was not  
3 particularly cross, but in any event, I will  
4 continue.

11:50 5 In the reference that

6 Mr. Lockyer made yesterday, again he made the  
7 reference to wrongful convictions occurring from  
8 bad pathology, and forgive me for being trite for  
9 a moment, but I take it that you would agree that  
11:50 10 in the field of forensic pathology there can be  
11 two very competent, very qualified forensic  
12 pathologists who can disagree on the  
13 interpretation of findings and the disagreement on  
14 the interpretation of findings does not make, or  
11:51 15 does not mean that one of those forensic  
16 pathologists is practicing bad pathology and the  
17 other necessarily practicing good pathology.  
18 Would you agree with that as a proposition?

19 A Firstly, I am quite familiar with the phenomenon  
11:51 20 of different interpretations from the same  
21 accepted findings. My last two cases where I have  
22 appeared in other provinces have dealt with this.  
23 The question as to whether this necessarily admits  
24 the incompetence of the pathologist, no, it  
11:51 25 doesn't. There may quite valid ly be different



1           interpretations of the same set of facts and then  
2           it's a question of the pathologist being able to  
3           produce supporting material to support his or her  
4           opinion and whether this in fact convinces the  
11:52 5           court or not.

6           **Q**       Now, yesterday also Mr. Lockyer raised other cases  
7           of wrongful conviction, only one of which you were  
8           familiar with, and that would be the *Dalton* case,  
9           and that was because you were a consultant  
11:52 10          forensic pathologist in that case; is that  
11          correct?

12          **A**       Yes.

13          **Q**       And as I understand it, in the *Dalton* case, as  
14          would be the case in most wrongful convictions  
11:52 15          attributable to pathology, the finding as to the  
16          cause of death is the one -- or the conclusion,  
17          rather, I should say, as to the cause of death is  
18          the thing that is the subject of most of the  
19          criticism, and that was the case in *Dalton*, the  
11:52 20          pathologist made a wrong conclusion with respect  
21          to the facts he had found?

22          **A**       In the *Dalton* case it turned upon the  
23          interpretation of injuries to the neck and about  
24          the larynx, the voice box, but if I am to comment  
11:53 25          on that case, I have to say that for some legal



1 reason, with which I'm not informed, the  
2 re-examination of the case only started when  
3 Mr. Dalton had done eight years after his  
4 conviction, but if the pathology evidence had been  
11:53 5 properly examined and presented at his initial  
6 trial we would have been able to say what we said  
7 eight years later, that there was nothing much  
8 that occurred in the interval. This is why I was  
9 rather dubious about the pathologist in *Dalton*  
11:53 10 because it didn't appear to me that it had been  
11 properly examined at the initial trial.

12 Q I appreciate that. My point of it is, though, is  
13 that where pathologists get into trouble in these  
14 issues of wrongful conviction is making a finding  
11:53 15 as to a cause of death suggesting criminal  
16 activity when in fact the cause of death occurred  
17 from nothing innocuous?

18 A There are other cases. There is the -- I'm not  
19 good on the names of cases that I haven't  
11:53 20 participated in, but I remember one where injuries  
21 inflicted by a dog were misinterpreted and that is  
22 the sort of thing that can happen, or where a  
23 person dying from a fall down the stair was  
24 misinterpreted as being homicide rather than  
11:54 25 accident. These are the sort of things that



1           happen.

2           **Q**       Now, if we were to look at the comments that have  
3                    been made by others with respect to the autopsy  
4                    and the testimony at trial, Dr. Ferris, as we  
11:54 5                    heard yesterday in the evidence presented to you  
6                    by my friend Mr. Hodson, expressed criticism about  
7                    how long Gail Miller would have lived after she  
8                    had been stabbed in the lung. Now, Dr. Emson, in  
9                    your opinion how would the length of time it took  
11:54 10                   Gail Miller to die after her lung was pierced with  
11                    a knife, how could that in any way assist in  
12                    distinguishing one assailant from another  
13                    assailant?

14           **A**       That would depend entirely on the circumstantial  
11:55 15                    evidence of which I'm not informed.

16           **Q**       Secondly, Dr. Ferris expresses a criticism in  
17                    which he suggests that the deceased was probably  
18                    alive at the time of the rape, and in fairness to  
19                    you, sir, you've indicated, as you've always done,  
11:55 20                    that you have no conclusive opinion one way or the  
21                    other on that matter; is that correct?

22           **A**       I think that the rape might have occurred before,  
23                    at the time of or shortly after death and I have  
24                    no way of distinguishing it.

11:55 25           **Q**       How would the evidence of the victim being alive



1 at the time of the rape assist in distinguishing  
2 one possible assailant from another possible  
3 assailant?

4 A That, as I said, depends entirely on the  
11:55 5 circumstantial evidence, as to where these people  
6 might have been. I don't know that.

7 Q Now thirdly, Dr. Ferris expressed some criticism  
8 of your conclusion you expressed earlier about the  
9 presence of menstrual blood.

11:56 10 A Dr. Ferris was quite wrong there. My report says  
11 that the endometrium, the lining of the uterus was  
12 on the verge of menstruation, and I believe then  
13 and I believe now that there may have been a  
14 slight preliminary loss of blood from that before  
11:56 15 the onset of full menstruation. It didn't appear  
16 from what I saw from Dr. Ferris' comments that he  
17 had in fact read that bit about the microscopic  
18 examination of the endometrium.

19 Q Be that as it may, if we were to assume for a  
11:56 20 moment, and I appreciate you disagree with Dr.  
21 Ferris, if we were to assume for a moment that  
22 he's right, how would the presence or not of  
23 menstrual blood assist in distinguishing again one  
24 possible assailant from another possible  
11:56 25 assailant?



1 A Well, it would only complicate the matters if  
2 there was a question of grouping the semen with  
3 regard to its blood antigens.

4 Q And again, you had testified yesterday that in  
11:57 5 your opinion, had that been done, it would have  
6 been very difficult to interpret; is that correct?

7 A Yes, and I think there was another document  
8 produced which established the same opinion, but I  
9 have learned since then that as a matter of  
11:57 10 defensive pathology one should always do a test  
11 and then explain why it means nothing rather than  
12 not do it because it's not going to mean anything.  
13 It's always better to have done something and then  
14 try to explain it.

11:57 15 Q Now, also yesterday Mr. Lockyer in his questioning  
16 implied some criticism of you for the fact that  
17 you had not intervened earlier, notably at the  
18 time or sometime before the Supreme Court  
19 reference, to express your suspicion that the rape  
11:57 20 had occurred somewhere other than in the open.  
21 You'll recall that being put to you yesterday?

22 A I recall Mr. Lockyer's comments very well and I do  
23 not know how, in the present organization of the  
24 legal system, I might reasonably have intervened  
11:58 25 on what was only a suspicion in a case which



1           everybody, more people had more evidence than I  
2           had.

3           **Q**       Let me be perhaps a little bit more basic. How  
4           necessary is it for someone to have qualifications  
11:58 5           in forensic pathology in order to express an  
6           opinion which contains the suspicion that the rape  
7           had occurred other than in the open?

8           **A**       I don't think it requires anything other than  
9           knowledge of what a minus 40 morning feels like,  
11:58 10           and most of us here have got that.

11           **Q**       Now, Mr. Lockyer also put to you something  
12           yesterday which he suggested as a statement of  
13           fact, and again I am using his words, not mine.

14                    COMMISSIONER MacCALLUM: I'm going to ask  
11:58 15           you just to -- I just want to catch up to you  
16           here.

17                    MR. ELSON: I'm sorry.

18                    COMMISSIONER MacCALLUM: Okay, Mr. Elson,  
19           repeat that, please?

11:59 20           BY MR. ELSON:

21           **Q**       Yesterday, Dr. Emson, Mr. Lockyer put something to  
22           you which he described as a statement of fact, and  
23           I am using his words, not mine, when he said to  
24           you that it was essential for the Crown to show  
12:00 25           that the rape occurred in the open in order to,



1 and again I use Mr. Lockyer's words, "To pin it on  
2 David Milgaard." Now, that's the lead-in to my  
3 question, Dr. Emson. You testified in the Larry  
4 Fisher trial; is that correct?

12:00 5 A Yes.

6 Q And were you advised by Crown counsel in that case  
7 as to the Crown's theory against Mr. Fisher? I'm  
8 not suggesting you should have been, but were you  
9 advised by Crown counsel as to the theory of the  
10 entire case against Mr. Fisher?

11 A No.

12 Q Do you have any knowledge as to how essential it  
13 was to show that the rape occurred other than in  
14 the open or in the open in the case against Larry  
15 Fisher in order to pin it on Larry Fisher?

16 A My knowledge of the case was that the attribution  
17 of the homicide to Mr. Fisher was virtually  
18 dependent on the DNA evidence.

19 Q And that it mattered not whether the rape had  
12:01 20 occurred in the open or indoors or in a car?

21 A I was not aware of that aspect of it.

22 MR. ELSON: Thank you, Dr. Emson. I have  
23 no further questions.

24 **BY MR. GIBSON:**

12:01 25 Q The good news, Dr. Emson, is we're starting to run



1 out of lawyers, so you shouldn't be up there much  
2 longer. The bad news is I do have a few  
3 questions. My name is Bruce Gibson, I act for the  
4 RCMP, and unfortunately I'm going to have to visit  
12:01 5 a few areas that you've been over again and I  
6 apologize for that.

7 If I could have document 001256  
8 up, please, and if we could go to 263 in that.  
9 Now, Doctor, this is a letter that was written  
12:02 10 by -- and if we can go to the bottom, I think it's  
11 Dr. --

12 A This is from Dr. Markesteyn.

13 Q Markesteyn. And you went over that the other day  
14 with Mr. Lockyer I believe.

12:02 15 COMMISSIONER MacCALLUM: Written by  
16 Markesteyn was it?

17 BY MR. GIBSON:

18 Q Yes, it is. If I could have 263, please, of that,  
19 and there's his name there at the bottom. One of  
12:02 20 the things that was put to you, it might have been  
21 by Mr. Hodson -- could I get that enlarged along  
22 the side there, and it's this passage right here:  
23 "If, to everyone's satisfaction, it was  
24 established that the origin of the yellowish  
12:02 25 patch was unadulterated, uncontaminated



1 human semen, then the presence of the A  
2 antigen in this specimen clearly, from a  
3 serological point of view, could not be Mr.  
4 Milgaard's."

12:03 5 And at that point in time Mr. Milgaard was seen  
6 as a non-secretor. Would you agree with that  
7 statement? I believe you did agree with it the  
8 other day.

9 A If at that time Mr. Milgaard was known or  
12:03 10 considered to be a non-secretor, then it is my  
11 information that the absence of an A antigen from  
12 the specimen, the presence of the A antigen in the  
13 specimen indicated that the semen was not from Mr.  
14 Milgaard.

15 Q Okay.

16 A Now, here again I'm being exhaustively examined on  
17 an area in which I am not an expert and I can only  
18 suggest that if this is a vital part of the  
19 Commission's evidence, that an immunohematologist  
12:03 20 should be called because I have only very basic  
21 knowledge of these things.

22 Q Yes, and I'm just trying to be fair with you,  
23 Doctor, because you were asked and went over those  
24 questions, and I know that you have given evidence  
12:04 25 on that point, but I believe in your testimony



1           yesterday, and Mr. Elson just went over it with  
2           you, that you said that an A-type secretor may at  
3           times not secrete an A antigen?

4           A           I don't think I said that and I don't know if it's  
12:04 5           correct. My presumption would be that if you were  
6           an A secretor, you always secreted A.

7           Q           What I'm going to do then is I'll put up another  
8           document here and if I could get to 278893. I  
9           don't believe you've seen that document before.  
12:05 10           If we could just enlarge that. It's a memorandum  
11           from a Cathy MacMillan with the RCMP biology  
12           section to the subdivision in Regina and we'll  
13           look at paragraph 5. I'm just going to read this  
14           to you, Doctor, and see whether that jives with  
12:05 15           your understanding:

16                    "It is my understanding, the lab did not  
17                    conclude that David Milgaard was a  
18                    non-secretor. The lab did; however,  
19                    conclude that Milgaard's saliva did not  
12:05 20                    contain any detectable antigens. This does  
21                    not mean that Milgaard is a non-secretor.  
22                    Several situations can arise whereby  
23                    antigens might not be detected. They are as  
24                    follows:

12:05 25                    (i) insufficient quantity of sample to



1 analyze,

2 (ii) the concentration of the antigen was  
3 low."

4 And if I could just go to the next page, finally:

12:05 5 "(iii) finally, sample degradation."

6 So all I'm trying to put to you, Doctor, is does  
7 that make sense to you in that there may be other  
8 reasons why a person could in fact be an A-type  
9 secretor but for some reason a particular sample  
12:06 10 may not show that?

11 A That seems to me to be a very proper and  
12 scientific explanation.

13 Q Thank you. Because there was a bit of confusion  
14 on that point, so I did want to spend a bit of  
12:06 15 time with that.

16 A No, as I said, I'm not an expert, but presuming  
17 this person to be an expert, that is a very proper  
18 expression of expertise and certainly the reasons  
19 given are quite comprehensive.

12:06 20 Q Thank you. If we could go back to the first part  
21 of that document, just on the previous page,  
22 please. If you could highlight that.

23 "On January 28th, 1992, I analyzed a saliva  
24 sample from D. Milgaard. Further, on May  
12:07 25 12, 192 I analyzed a buccal swab from L.



1 Fisher. Detectable quantities of A antigen  
2 were found in each sample. Therefore, in  
3 response to question number 1, D. Milgaard  
4 and L. Fisher are both blood type A."

12:07 5 Number 2:

6 "An individual who is classified as a  
7 secretor has detectable quantities of their  
8 blood group antigens, i.e., (A, B or H) in  
9 their saliva, semen (or vaginal fluid) or  
12:07 10 other body fluids."

11 Number 3:

12 "Larry Fisher is a secretor."

13 Number 4:

14 "David Milgaard is a secretor."

12:07 15 So the document states that the two men who have  
16 now been convicted of killing Gail Miller both  
17 have blood A type, or both blood A type  
18 secretors, and what I want to know, Doctor, is to  
19 your knowledge would there have been any other  
12:07 20 tests available in 1969 that could have somehow  
21 differentiated their seminal fluid or blood from  
22 a particular sample that may have been found at  
23 the crime scene? I mean, going back to 1969 what  
24 science was available? If you end up with two  
12:08 25 individuals that are both A blood type secretors,



1 is there anything else to your knowledge that  
2 could have been done to differentiate those from  
3 a known sample?

12:08 4 A Well, as I said, and I'll repeat, I'm not an  
5 expert on this. The only other antigen I can  
6 think of is the D antigen, D for Delta, but it was  
7 certainly well known in blood transfusion practice  
8 at that time, but whether the D antigen is  
9 secreted or not I do not know, and there has never  
12:08 10 been any mention of it, so I would rather presume  
11 it isn't secreted, but that again is a question.  
12 That -- there were various other antigens known at  
13 that time and just precisely what they were I  
14 cannot say, but the pertinent point would be were  
12:08 15 any of these other antigens in fact subject to  
16 expression in secretor status and I don't know  
17 that either.

18 Q And again I believe you've given us evidence that  
19 tests were limited back in 1969 as to what you  
12:09 20 could do with any kind of fluid?

21 A I was not then and never have been an  
22 immunohematologist and I'm not informed as to what  
23 tests were then available.

24 Q Now, you were asked a number of times about why  
12:09 25 you discarded the vaginal sample taken from Ms.



1 Miller and I believe you replied along the lines  
2 that you didn't think that the blood would be of  
3 any scientific use?

4 A I can only presume, in the absence of any record,  
12:09 5 that the reason that that sample was discarded was  
6 because between us we felt there was no further  
7 use for it.

8 Q All right.

9 A I am now informed that there might in fact have  
12:09 10 been a further use for it and I have radically  
11 altered my opinion since then partly as a result  
12 of this type of examination, that what one should  
13 do is save everything and then decide whether it's  
14 useful or not. The other point about saving  
12:10 15 everything is of course you don't know what tests  
16 are going to become available in the future, as we  
17 did not know in 1969 that DNA would become  
18 available as a practical test, and there's a very  
19 good argument for saving everything, though it  
12:10 20 does lead to problems of storage.

21 Q Okay. Now Dr. Emson, you have testified that, I  
22 think it was a number of days later, I think  
23 February 4th or later of 1969, that the Saskatoon  
24 Police brought in to you some other samples that  
12:10 25 were taken from a snowbank near the body?



1 A I have no written record of this, but my memory is  
2 that Lieutenant Penkala brought in this frozen  
3 snow, we thawed it, examined it, and I found that  
4 it contained mammalian-type spermatozoa.

12:11 5 Lieutenant Penkala then took the specimen, I did  
6 nothing further, and, as it has not been produced,  
7 I assumed I did not make a written report on this.

8 Q Now were you aware that that sample was forwarded  
9 on to the RCMP?

12:11 10 A Not until this Commission.

11 Q Okay. And you mentioned that you weren't  
12 necessarily aware of what testing may or may not  
13 have been available at the crime lab?

14 A I'm not aware of that now, I'm not informed as to  
12:11 15 what their gamut of testing availability is.

16 Q So again, you know, for the purpose of what this  
17 inquiry, I guess, is all about, and making  
18 recommendations; is there any ongoing dialogue  
19 between pathologists and the crime lab people?

12:11 20 A Well, first of all, I think I'm not informed as to  
21 RCMP organization, but from personal experience  
22 over the last year I know that virtually all the  
23 chemical analyses are being done in Halifax, and  
24 virtually all the photographic reproduction is  
12:12 25 being done in Ottawa, I don't know if we still



1 have a crime lab in Regina. It would be very nice  
2 if the pathologists were informed as to what the  
3 availabilities from the RCM Crime Lab are, and  
4 particularly as to the nature of the specimens and  
12:12 5 the containers which are best to use, but we do  
6 not get communications of this nature.

7 Q Okay. Now, Dr. Emson, do you have -- was there  
8 any discussion -- and, again, I may know this  
9 answer but I guess I would want to hear it from  
12:12 10 you -- was there any discussion between yourself  
11 and the city police members that assisted you at  
12 the autopsy and then came later on with the sample  
13 from the snowbank, as to why the snowbank sample  
14 was, I guess, gathered and sent on to the RCMP for  
12:12 15 analysis, whereas the one from the autopsy was not  
16 retained and was not forwarded on; is there  
17 anything that you can help us --

18 A I was not told that the snowbank sample was being  
19 sent on.

12:13 20 Q So I guess the short answer is you have no idea as  
21 to why they may not have suggested to you to  
22 retain the sample during the autopsy, but yet were  
23 gathering other samples from near the body and  
24 sending them on?

12:13 25 A Possibly the police members had been informed,



1           subsequent to the autopsy, that the specimen  
2           should have been kept. I don't know.

3           **Q**       One other final point I want to cover with you.  
4           Again, you were shown an Email yesterday by  
12:13 5           Mr. Lockyer between a Ronald Fainstein and a Dave  
6           Werrett with respect to -- maybe we can just put  
7           that document up, it's 33006.

8                        COMMISSIONER MacCALLUM: I didn't get the  
9           number; 033006?

12:14 10                   MR. GIBSON: Right. If you could go to the  
11           last page of that, I think it's 008 -- sorry, I  
12           guess the second-last page, 008. Thank you.

13                    COMMISSIONER MacCALLUM: And this is  
14           Fainstein's memo to who?

12:14 15                   MR. GIBSON: To Werrett, to a Dr. Werrett.

16           BY MR. GIBSON:

17           **Q**       And I take it, Dr. Emson, that you don't know Ron  
18           Fainstein; or do you?

19           **A**       No.

12:14 20           **Q**       Okay. And so you have never had any discussion  
21           with him concerning this memo or the thoughts in  
22           it?

23           **A**       Not to my knowledge.

24           **Q**       Okay. And the only reason I raise it is that I  
12:14 25           guess it was put to you for another reason, but



1 the point that was singled out here, if we could  
2 have just this portion highlighted. And it talks  
3 about Mr. Fainstein saying:

4 "I believe that she was raped in a car, then  
12:15 5 pulled on her coat without taking the time  
6 to put her arms back through the sleeves of  
7 her dress, tried to flee down a laneway,  
8 then was caught and stabbed by her  
9 assailant. This would also explain why she  
12:15 10 was stabbed through her coat, but not  
11 through her dress."

12 And I think that that was put to you, again in  
13 Mr. Lockyer's words, it was put to you as that  
14 that was a matter of fact and you acknowledged  
12:15 15 that it was a matter of fact. I guess, if we  
16 could just clarify, would it be -- would I be  
17 correct in assuming that you were simply saying  
18 it is a matter of fact that that was contained in  
19 that memorandum?

12:15 20 A It is a matter of fact that this paragraph is in  
21 the memorandum.

22 Q Yes.

23 A It is a matter of opinion as to the events  
24 described.

12:15 25 Q Exactly. I mean it does say "I believe" in that



1 sentence, so it's a hypothesis with respect to the  
2 crime, and --

3 A It describes a hypothesis, which appears to be  
4 valid, but it's one of a number possible.

12:16 5 Q And, as you are well aware, there are a number of  
6 hypotheses and a number of pieces of evidence that  
7 went into making various determinations along the  
8 line in this case; correct?

9 A I do not accept this statement as a matter of  
12:16 10 fact, the statement is a matter of opinion.

11 Q Thank you very much.

12 MR. BOYCHUK: Mr. Commissioner, I have no  
13 questions for this witness.

14 COMMISSIONER MacCALLUM: Thank you. Ms.  
12:16 15 Krogan?

16 MS. KROGAN: No questions.

17 COMMISSIONER MacCALLUM: Ms. Knox?

18 MS. KNOX: Mr. Commissioner, I do have some  
19 questions, I expect to be more than a few  
12:16 20 minutes, so this might be an appropriate point to  
21 break.

22 COMMISSIONER MacCALLUM: Well, if you're  
23 ready to go, I don't want to waste time, but if  
24 you're not, then we can break.

12:17 25 MS. KNOX: Mr. Commissioner, there is some



1 information that I made a phone call to look to  
2 have retrieved for me during the morning break,  
3 and that won't be available at my office until I  
4 return there so --

12:17 5 COMMISSIONER MacCALLUM: We'll break now,  
6 then, until 2:00.

7 *(Adjourned at 12:17 p.m.)*

8 *(Reconvened at 2:00 p.m.)*

9 COMMISSIONER MacCALLUM: Good afternoon.

02:00 10 Ms. Knox?

11 **BY MS. KNOX:**

12 **Q** Good afternoon, Dr. Emson. My name is Catherine  
13 Knox and I am counsel for Mr. Caldwell, and I  
14 won't keep you a long time. And I apologize that  
15 I had to bring you back after lunch, but I was  
16 relying on technology to get me some materials so  
17 that I could have my hands on it to go where I  
18 need to go this afternoon.

19 Now you have indicated -- and  
02:01 20 I'll summarize, and if I summarize unfairly I have  
21 no doubt that you will correct me -- but I'm just  
22 going to try to summarize. The essence of your  
23 evidence is that you completed the autopsy in,  
24 arising from this homicide on January 31st, 1969,  
02:01 25 and with the exception of an occasion when the



1 police came with some snow samples that you  
2 examined for them, or melted for them but did no  
3 testing on, and the time when they brought the  
4 knife that you have looked at in the exhibits this  
02:01 5 morning, I gather you don't recall having any  
6 other contact with or discussions with the police  
7 about this incident, or the mechanics of death, or  
8 anything of that nature?

9 A I have no specific recollection. It is quite  
02:01 10 possible that I may have had some communication  
11 with Mr. Penkala or Mr. Kleiv, but I have no  
12 specific recollection of that.

13 Q Okay. Now you have indicated throughout your  
14 evidence some aspects of the nature of the  
02:02 15 relationship, or the role that you would play in a  
16 case of this type then and now, and I guess I'm  
17 not real clear. But, apart from this case, would  
18 there be other occasions where, routinely, you  
19 would have contact with officers such as  
02:02 20 Lieutenant Penkala and Officer Kleiv and -- about  
21 a different matter, but that you might get into  
22 discussing what's happening on this particular  
23 case?

24 A Umm, I'm sorry, I don't quite understand the  
02:02 25 question, but if you mean are there cases in which



1           there might be something of an ongoing  
2           relationship between myself and the police  
3           representatives, there might. Normally, I should  
4           say usually, by the end of the autopsy we have got  
02:02 5           what we feel we need --

6           **Q**       Uh-huh?

7           **A**       -- and the next time I see the police  
8           representatives may be in court. But, on  
9           occasion, I think they may come back to me with  
02:03 10          further questions or possibly more information.

11          **Q**       Yeah. I'm not thinking, though, just of occasions  
12          when they would come with further questions or  
13          more information, like when they came with the  
14          snow lumps or the knife, but just in general  
02:03 15          conversation that would be a commonality you would  
16          have with those police officers at that time, in  
17          1969, that being the occurrence of a murder within  
18          your city, which would have been a fairly rare  
19          occurrence back in those days; am I correct in  
02:03 20          that?

21          **A**       In that we had continuing communication?

22          **Q**       Not continuing, but that --

23          **A**       Intermittent?

24          **Q**       Not intimate.

02:03 25          **A**       Intermittent.



1 Q Oh, intermittent, yes. So would you agree that  
2 possibly there would have been intermittent --

3 A Yes, certainly. The investigation is a continuing  
4 affair, and if, after the autopsy procedure, the  
02:03 5 police feel I may be able to contribute more, they  
6 will come back, and I think they quite often do.

7 Q Uh-huh. And even during the course of events like  
8 the preliminary inquiry when you attend at the  
9 courthouse, the trial when you attend at the  
02:04 10 courthouse, it wouldn't be uncommon for there just  
11 to be general discussion between you and the  
12 police officers, the investigators, about the  
13 reason you are there, what's happening with the  
14 case. That would be normal human communication,  
02:04 15 as I recall it, between professionals; wouldn't  
16 you agree?

17 A I don't think, I don't think it is permitted that  
18 we discuss each other's evidence in court before  
19 it is given, because commonly I am excluded from  
02:04 20 court until my evidence is heard. Now this varies  
21 from time to time and place to place, but it's  
22 difficult to define. I think, before the case  
23 gets to court, certainly we may exchange  
24 information --

02:04 25 Q Uh-huh?



1 A -- and opinions. When the case is called to court  
2 it is my understanding that it is not proper for  
3 witnesses to discuss evidence between themselves  
4 until this evidence has been given to the court.

02:05 5 Q Yeah, and I'm not suggesting that there would be a  
6 discussion of what you are going to say or what  
7 they are going to say, but just a general  
8 acknowledgment of why you are there and, you know,  
9 the facts?

02:05 10 A There might be.

11 Q Yeah.

12 A There might be.

13 Q That would be --

14 A We have continual relationships which approach on  
02:05 15 friendship from time to time.

16 Q And the same with the Crown, there would be some  
17 discussions pre and post --

18 A Certainly with the Crown, which under the  
19 adversarial system usually calls me, and with  
02:05 20 Crown counsel and the prosecutor assigned to the  
21 case there is customarily a pretrial conference.

22 Q And, sir, did anyone, either in the policing  
23 authority or the Crown office, at any time prior  
24 to you giving testimony at the preliminary inquiry  
02:05 25 in 1969, ever suggest to you how you should



1 testify, or that there were certain areas that  
2 were off limits, or in any way try to colour,  
3 corner, or curtail your testimony or your opinion?

02:06 4 A They did not, and I would have remembered it, and  
5 so would they if they tried to do so.

6 Q I suspect they would. And, sir, post-preliminary  
7 inquiry, and prior to testifying at the trial in  
8 January of 1970, did anybody, any policing  
9 authority or anybody from the Crown office, in any  
02:06 10 manner, attempt to engage in a similar exercise  
11 with you; in other words, control what you would  
12 say or what your opinions were and would continue  
13 to be?

14 A No.

02:06 15 Q Okay.

16 A If they had, I would have remembered it, and so  
17 would they.

18 Q And, sir, post the trial, and up until the point  
19 in time -- I think -- when were you first  
02:06 20 contacted, do you remember, about this case after  
21 the trial had concluded in 1970?

22 A I can't remember.

23 Q Do you remember --

24 A It's been a case which has remained in the media,  
02:06 25 --



1 Q Uh-huh?

2 A -- and I have no recollection of specific contact  
3 from anybody, certainly I wasn't -- I wasn't  
4 called to the Supreme Court hearing --

02:07 5 Q Uh-huh?

6 A -- and my -- the formal communication between the  
7 conviction of Mr. Milgaard and his release, and  
8 the charge of Mr. Fisher, formal communication, I  
9 can't remember any.

02:07 10 Q Did, in your role as Coroner and in the role that  
11 you play --

12 A I'm not a Coroner, I'm a pathologist.

13 Q I'm sorry. In your role as a pathologist, and in  
14 the role that you played in this case, have you  
02:07 15 been contacted by anyone, whether it be with  
16 respect to the Supreme Court of Canada  
17 proceedings, whether it be by Mrs. Milgaard as she  
18 contacted various parties in her quest to  
19 establish her son's innocence; was there any  
02:07 20 restriction on you from communicating with them  
21 and, indeed, would you have refused to communicate  
22 with them?

23 A No restriction was placed upon me. Nobody, to my  
24 recollection, ever attempted to communicate with  
02:08 25 me. If they had done so, I would have had to



1           treat such communication with my customary  
2           wariness.

3           **Q**       But you wouldn't have refused to talk to them, I  
4           take it?

02:08 5           **A**       I don't know, depending what they wanted me to  
6           talk to them about.

7           **Q**       Okay. Am I correct in understanding that, at some  
8           point in time, you discussed with Dr. Ferris the  
9           work that he was doing on the file, and indeed  
02:08 10          perhaps with Dr. Markesteyn as well, who were  
11          assisting the advocates on behalf of Mr. Milgaard  
12          to establish his innocence?

13          **A**       I might have done. I have no specific  
14          recollection of it, but I know Dr. Markesteyn  
02:08 15          quite well and Dr. Ferris peripherally, we're both  
16          members of a small professional group, and my  
17          contacts with Dr. Markesteyn have continued up to  
18          the present day. I don't even know where Dr.  
19          Ferris is, or whether he is still alive, but there  
02:08 20          may well have been communications between us, but  
21          I have no record of them.

22          **Q**       Okay. Given that Dr. Markesteyn and Dr. Ferris  
23          would be in a slightly different category than a  
24          civilian, such as Mrs. Milgaard, if they, as  
25          professional colleagues from other parts of the



1 country, had called you and wanted to discuss,  
2 with you, your expert opinion in the *Milgaard*  
3 case, would you have felt it appropriate and  
4 proper that you do so?

02:09 5 A Umm, after Mr. Milgaard's conviction, yes. After  
6 the questions started to arise and he had been  
7 released, and there was the interim and then Mr.  
8 Fisher being charged, I might have queried the  
9 propriety of doing so in case I was called in a  
02:09 10 new trial. But certainly, in the years between  
11 1970 and was it 1985 or so, I would have talked to  
12 them as professionals.

13 Q Okay. And up until the point in time when it  
14 became a possibility of another suspect, and  
02:09 15 specifically Mr. Fisher, would there have been any  
16 time when you would have declined to engage in  
17 discussion with them or to test with them the  
18 merits of your opinion evidence?

19 A I don't think so. They are professional  
02:10 20 colleagues and we're used -- we're used to  
21 exchange of opinions and, indeed, were asked for  
22 opinions. I've been in contact, for instance,  
23 with the Chief Medical Examiner for Alberta over  
24 things like this, and it's quite common for  
02:10 25 members of a small group to ask for opinion or



1 comment on ongoing cases.

2 Q Is it not, I won't say common, but not uncommon  
3 that sometimes the members of that small group can  
4 have different opinions, as was alluded to by  
02:10 5 Mr. Beresh this morning, about the same set of  
6 facts?

7 A It happens. How do I phrase this. It happens,  
8 but it is not common, because I think experienced  
9 forensic pathologists in general do not disagree  
02:10 10 often on the interpretation of evidence, but it  
11 does happen.

12 Q On that point I'm just going to diverge for a  
13 moment. Yesterday, when you were being  
14 cross-examined by Mr. Lockyer, you made reference,  
02:11 15 and reference was made this morning in your  
16 reference to a case where you offered expert  
17 opinion in Newfoundland, the *Dalton case*?

18 A Yes.

19 Q And I'm not looking to cause problems or to trap  
02:11 20 you, I just want to set out some of the background  
21 to that, if I may, and if you know it. Now, am I  
22 correct in my understanding that you were first  
23 consulted in the *Dalton case* in 1997?

24 A I couldn't give you the precise data except by  
02:11 25 careful checking of it. It was late in the year



1 in November and it may well have been '97.

2 Q And it was --

3 A It probably was because we finally got into the  
4 retrial in the year 2000. There had been various  
02:11 5 postponements, the judge had gotten sick and the  
6 trial had started again, and things like that.

7 Q I'm going to suggest to you that there was an  
8 affidavit filed in the Newfoundland Court of  
9 Appeal in this matter in November of 1997 from  
02:12 10 you?

11 A Yes, that's probably correct, because what  
12 happened was I was asked for my opinion and, based  
13 on that, Mr. Kennedy came to Saskatchewan from  
14 Newfoundland and he -- now, these are the  
02:12 15 technicalities of the law and I may not understand  
16 them well, but that the case had to go to the  
17 Newfoundland Court of Appeal and my evidence had  
18 to go in the form of an affidavit, so he assisted  
19 me in casting what I had found in the form of an  
02:12 20 affidavit. This went to the Newfoundland Court of  
21 Appeal. Based on this, and possibly other  
22 evidence, the Court of Appeal ordered a new trial,  
23 and I think that was scheduled to start the next  
24 year in '98. It started, the judge got sick, it  
02:12 25 was decided to restart it again, which was



1           probably '99, and then I finally got there in the  
2           year 2000.

3           **Q**       In fact, the acquittal was entered on the 24th of  
4           June, 2000, so your memory is very good.

02:13 5           **A**       Yes. Well, at that time I was in England, my wife  
6           was exceedingly ill with cancer and dying and I  
7           flew from England to Newfoundland for the retrial.

8           **Q**       Okay. And, Doctor, with respect to your earlier  
9           comment to me that pathologists, you as a small  
02:13 10          group of professionals, wouldn't necessarily often  
11          disagree; were you aware that in addition to your  
12          evidence called on behalf of the defence at that  
13          second trial, or retrial after the mistrial due to  
14          the judge's illness, there were four other defence  
02:13 15          experts who were pathologists?

16          **A**       I did -- Mr. Kennedy did tell me about this and  
17          tell me who they were, and one of them -- now,  
18          there was a, another pathologist had appeared for  
19          the Crown. I'm trying to remember his name.  
02:13 20          DeMayo, one of the DeMayos had appeared for the  
21          Crown, and I believe Mr. Kennedy had consulted  
22          other forensic pathologists in Canada and Britain,  
23          but I cannot, for the moment, remember who it was.

24          **Q**       I'm going to suggest to you that in total there  
02:14 25          were seven pathologists called at trial and every



1 one of them had a different opinion as to the  
2 mechanics of the injury that caused the death of  
3 Mrs. Dalton, Five thought accident, two thought  
4 homicide, but the actual mechanics of the injury  
5 all seven of you had differing opinions on?

02:14

6 A I don't remember hearing that. I don't think  
7 there was -- I don't think there can have been a  
8 serious discrepancy of opinion between all those  
9 people or else there wouldn't have been an  
10 acquittal.

02:14

11 Q There was an acquittal?

12 A Yes.

13 Q And I don't intend to go at great length to that,  
14 the record is there, available to be checked, but  
15 I want to go back for a moment to the evidence  
16 yesterday, and Mr. Lockyer suggested to you that  
17 Mr. Dalton had spent eight years in jail because  
18 of bad pathology; do you remember him suggesting  
19 that to you, or words to that effect?

02:14

20 A I remember him suggesting that, yes, and I am very  
21 reluctant to appear, to disparage or denigrate  
22 professional colleagues in a public session, but I  
23 have to say that is one valid interpretation of  
24 what happened to Dalton. Not only was the  
25 pathology evidence for the Crown at the original

02:15



1 hearing incorrect, the interpretation, in my  
2 opinion, with his subsequent acquittal, apparently  
3 this was justified, it was incorrect, but there  
4 was also very inadequate pathology for the defence  
02:15 5 at the original hearing.

6 Q And there was, in fact, a defence pathologist at  
7 the original trial, there were two pathologists?

8 A Yes, there was, and my feeling was at that time,  
9 and still is, if, at the original trial, the  
02:16 10 defence had gone to one or more experienced  
11 Canadian pathologists such as myself, then in  
12 practice, then there would very likely have been  
13 an acquittal at the original trial. I don't think  
14 the original trial in *Dalton* was handled well at  
02:16 15 all from the pathology point of view.

16 Q And from the pathology point of view, although  
17 Mr. Lockyer characterized yesterday that  
18 Mr. Dalton spent eight years in jail because of  
19 bad pathology, you are aware in fact, through Mr.  
02:16 20 Kennedy, that one of the major reasons for the  
21 long period of time for him remaining in jail --  
22 well, there were two reasons, one was that his  
23 counsel, who was not Mr. Kennedy at trial, did not  
24 apply for bail for him following his conviction in  
02:16 25 1989, and in fact his counsel didn't pursue his



1 appeal for many years and it was only when he  
2 became frustrated and Mr. Kennedy took over in  
3 1997 that it moved forward.

4 A Well, I was aware of the delay, but I've never  
5 until now been informed of the reasons for it.

6 Q Okay. But you knew from Mr. Kennedy that he was  
7 new counsel, or relatively new counsel?

8 A Oh, yes, that Mr. Kennedy reactivated the case in  
9 essence, but I was not aware until you told me as  
10 to why there had been that long delay, which  
11 appeared to me to be unusual and unjustified.

12 Q And in fact are you aware that that is the issue  
13 that's more the subject of inquiry of Mr. Justice  
14 Lamer in the inquiry that Mr. Lockyer referred you  
15 to than to pathological evidence itself, it was  
16 the long delay in perfecting the appeal?

17 A Well, if you could say that the original  
18 conviction was due to bad pathology, you could say  
19 that subsequent appeal and acquittal was due to  
20 bad law.

21 Q Yes, that would appear to be certainly one of the  
22 conclusions that's open to Mr. Justice Lamer to  
23 draw. Now, sir, I just have one other area that I  
24 want to touch on with you, and I bring this only  
25 because there were a number of questions that were



1 put to you with respect to the use of DNA evidence  
2 in criminal law, and it was your belief that it  
3 was sometime after 1969, it certainly wasn't  
4 available in 1969?

02:18 5 A DNA?

6 Q Yes.

7 A No, it wasn't, or else we would have used it. And  
8 I have, I know that it became practicable, and  
9 when it was put to me that the double helical  
02:18 10 structure was described in '53, this is quite  
11 possible. I had to rephrase that. And what made  
12 DNA available were technical scientific advances  
13 in what is termed replication; in other words,  
14 greatly increasing the amount of DNA from an  
02:18 15 original minute sample to an amount that could be  
16 handled by a laboratory and used, and it was that  
17 technique, I think, that made it possible to use  
18 DNA in legal -- in forensic pathology situations.

19 Q Doctor, I'm going to suggest to you that in those  
02:18 20 assumptions, that you are quite correct.

21 Mr. Commissioner, what I was  
22 looking for over the lunch hour when I asked for  
23 some time was a paper that I was familiar with  
24 through other work that I do that traced the  
02:19 25 history of the introduction and use of DNA



1           technology in criminal proceedings. I have -- we  
2           had a slight technical problem at my office over  
3           lunch, because I had to get it faxed, the internet  
4           was down and there were some pages of it still to  
02:19 5           come, and copies are coming for all counsel, but I  
6           have enough that I can lead the witness through  
7           his evidence and put the information that he  
8           suspected, I think fairly accurately, on the  
9           record with your indulgence, and then we will file  
02:19 10          the document itself.

11                           And Dr. Emson, having said all  
12           that, because of my sense of when DNA came into  
13           vogue was consistent with yours I did some  
14           research and I found that, in fact, you are  
02:19 15          correct. You said this morning that you believed,  
16           or yesterday, that DNA evidence was first  
17           introduced in England, and if I could refer  
18           counsel -- or have Mr. Hodson perhaps bring up the  
19           cover page of this paper that I refer to -- ah, I  
02:20 20          now have copies that counsel can circulate to  
21           others which should be full copies. The document  
22           to which I'm going to refer you is titled From  
23           *Pitchfork to Terceira: A Decade of DNA Evidence*  
24           in the Criminal Courtroom, and the cover page will  
02:20 25          show that this was a paper presented at a



1           symposium on DNA Forensic Evidence in October,  
2           1998 and subsequently published, or to be  
3           published in the Manitoba Law Journal in December,  
4           1998. I believe that I have copies that are now  
02:20 5           being circulated to various counsel in their full  
6           content.

7           A        If I may ask, I would be very grateful if I might  
8           receive a copy of that paper myself?

9           Q        Would you like to take five minutes to look at it  
02:20 10           before I proceed with the questions?

11          A        No, I think you can go through it, but I would  
12          like one for my file.

13          Q        Absolutely, I will ensure that you have one.

14          A        Thank you very much. If you feel I should read  
02:20 15          it, I will, but I'm perfectly content to have you  
16          lead me through it.

17                    MS. KNOX: Perhaps, Mr. Commissioner, in  
18                    fairness to the witness, if we gave him five or  
19                    10 minutes to do a quick review, that might make  
02:21 20                    the questions a little more comfortable.

21                    COMMISSION MacCALLUM: Okay, Doctor, what's  
22                    your preference?

23          A        I would like to read it, but I don't think  
24          probably it's necessary, but if you can give me 10  
02:21 25          minutes I'll look through it.



1 COMMISSIONER MacCALLUM: I certainly can.

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

3 (Reconvened at 2:31 p.m.)

4 BY MS. KNOX:

02:31 5 Q Dr. Emson, I appreciate you haven't read the paper  
6 in its entirety, and if it's any comfort to you I  
7 don't intend to take you through it in its  
8 entirety, there are just a few points I wish to  
9 address with you.

02:31 10 And first off you will agree  
11 with me, having had an opportunity to review it,  
12 that, as I stated earlier, your thoughts in terms  
13 of the -- as to the timing of the use of DNA  
14 evidence in Canada is probably quite correct, and  
02:32 15 that in fact the record, according to this paper,  
16 shows that the first time DNA evidence, or DNA  
17 typing was introduced into a criminal courtroom in  
18 Canada, was in 1988. And I refer you to the top  
19 of page 5 of that document using the pages -- the  
02:32 20 numbers on the bottom of the pages.

21 A Yes. This is *R v Parent*.

22 Q Yes, a -- and, Mr. Commissioner, the *R v Parent*  
23 case is reported 46 *Canadian Criminal Cases Third*  
24 *Series at page 414*. It was a case in the Alberta  
02:32 25 court, Court of Queen's Bench, I believe.



1                   And then, again appreciating  
2                   that you have had very little time to go through  
3                   it, you will recognize, looking at page 6, that,  
4                   again, the evidence earlier of yours was correct  
5                   that the first introduction was in England  
6                   sometime in the mid-'80s. I'm referring to the  
7                   top of page 6.

8           A           Yes, this is *R v Pitchfork*.

9           Q           Yeah, the 1983, 1986. And if I could refer you,  
10           then, to -- I'll skip the American stuff and refer  
11           you to page 10. Would you agree with me that this  
12           appears to confirm that *Parent* was the first case,  
13           and then the pages hereafter trace a chronology of  
14           gradual accep -- introduction and acceptance of  
15           DNA evidence in courts in Canada. And if we go to  
16           page 11 it identifies some murder cases, and one  
17           that was nationally, if not internationally  
18           familiar to all of us, was the Miramichi murders  
19           in New Brunswick where it was used in the case of  
20           Alain Legere to link him to a number of unsolved  
21           murders in that area?

22           A           Yes.

23           Q           Okay. And, Doctor, restating the obvious I guess,  
24           in 1969, when you were looking at the body of Gail  
25           Miller and you were doing the autopsy, would it be



1 correct for me to assume that you never imagined  
2 that science would take us where we were by 1990  
3 -- 1988 when the *Parent* case was being dealt with  
4 in Alberta and the Legere murders were being  
5 investigated in New Brunswick in 1991?

02:34

6 A Yes. That is almost the story of my life, because  
7 in 50 years in pathology what we do now was not  
8 even science fiction when I started, it was not  
9 dreamed of, it was not in the bounds of human  
10 possibility, and all through my life I have seen  
11 and dreamed of science fiction, and science  
12 fiction become true and practical.

02:34

13 Q And in the field of forensic pathology, what was  
14 science fiction for you in 1969 would equally have  
15 been science fiction for -- not even science  
16 fiction, I believe that you said, for police and  
17 prosecutors of the day in decisions that they made  
18 and determinations they made about the conduct of  
19 the investigation and the prosecution in the Gail  
20 Miller case?

02:34

21 A It was not dreamed of.

22 Q Thank you. And, Doctor, I earlier asked you  
23 whether you recalled having any discussions or  
24 contact with other persons during the, post the  
25 Milgaard trial in 1970, and in fairness to you my

02:35

02:35



1 attention has been drawn to a number of documents  
2 that are before the Inquiry, and I want to draw  
3 your attention to them.

4 If I could have brought up  
02:35 5 document 025929. Doctor, I'll give you a quick --  
6 a minute to do a quick read of this, but I'm  
7 referring you to a story that I understand was  
8 from the *StarPhoenix* dated in their edition June  
9 7th, 1990.

02:35 10 A Yes.

11 Q And, there, the reporter in question documented  
12 that you declined to comment on the content of Dr.  
13 Markesteyn's opinions with respect to the Gail  
14 Miller death in 1990?

02:36 15 A I don't customarily enter into disputes via the  
16 media with colleagues on cases like this, it's not  
17 a productive enterprise.

18 Q Okay. Reading the article it would appear, or at  
19 least my interpretation of it -- and I'm not sure  
02:36 20 if it's your interpretation -- it doesn't appear,  
21 there, to be any indication that you had discussed  
22 the matter with Dr. Markesteyn either, much less  
23 with the press, as you declined to do there; would  
24 you agree with that?

02:36 25 A I can't recollect, but if Dr. Markesteyn had



1 called me or written me about the case with a,  
2 what appeared to me to be a reasonable approach --  
3 and he is an eminent pathologist and a former  
4 Chief Medical Examiner for Manitoba, we have been  
02:36 5 associated for many years -- I would certainly  
6 have treated any approach from him with serious  
7 consideration. But not something like this via  
8 the media.

9 Q Okay. Am I correct, in going back in my history  
02:37 10 again -- and pretty soon you are going to figure  
11 out I'm from Newfoundland -- but that Dr.  
12 Markesteyn was the second expert opinion affidavit  
13 offered in the Court of Appeal in *Dalton*?

14 A Do I know that?

02:37 15 Q Yeah?

16 A No.

17 Q Okay. Now I wonder --

18 A I may have been given this information at some  
19 time but I haven't retained it.

02:37 20 Q Okay.

21 A Because I don't know now doesn't mean I haven't  
22 been told it some time.

23 Q But, in the past, you and he have collaborated and  
24 had similar opinions on forensic cases?

02:37 25 A And we have had differing opinions too.



1 Q And differing opinions, yes. I now want to call  
2 up 002483. And sir, for the record, this is a  
3 memo from a Mr. Eugene Williams that I believe  
4 counsel, Commission Counsel, drew to your  
02:37 5 attention yesterday dated June 12th, 1990, and I  
6 want to direct your attention to page 2 of that --  
7 sorry, no, page 3, which would be 002485. And in  
8 reviewing the transcript from yesterday's evidence  
9 I -- I -- my impression was that you are not sure,  
02:38 10 now, whether you talked to Mr. Williams, who was a  
11 lawyer at Federal Justice who was conducting a  
12 review or an investigation with respect to an  
13 application for mercy by Mr. Milgaard in the late  
14 '80s and early '90s, but there appears to be some  
02:38 15 suggestion here that you may have had an interview  
16 with this --

17 A I might have had.

18 Q Okay. If you had been contacted, as this document  
19 appears to suggest, as part of an official review  
02:38 20 being conducted by Federal Justice of the  
21 circumstances of the conviction, are -- would you  
22 have co-operated, as you appear to have done with  
23 Mr. --

24 A Of course I would have done.

02:38 25 Q -- Williams?



1 A What I should have done was kept better files on  
2 what I did.

3 Q And just a final document to draw to your  
4 attention, sir, and this is document 040497. And  
02:39 5 I'm not sure if you were referred to this one  
6 yesterday or not, because I was --

7 A Yes, I have seen this before.

8 Q Okay. So you are familiar with this paper by Neil  
9 Boyd and Kim Rossmo from the School of Criminology  
02:39 10 at Simon Fraser?

11 A I'm not familiar with it, I have seen that title  
12 page before, and presumably I have had reference  
13 to some of the contents.

14 Q Yeah. Do you recall if you were ever contacted by  
02:39 15 Mr. Rossmo and Mr. Boyd? And I'm asking you to  
16 recall, today, an interview that might have been  
17 done as early as 1989, but certainly --

18 A No, I don't recall.

19 Q Okay. I'm going to refer you, if I could have  
02:39 20 brought up page 040507 -- I'm sorry, the page I  
21 need, I'm mistaken in that one, it's 040513. If I  
22 could direct your attention to the very, the  
23 footnote, the second footnote, 29, at the bottom  
24 of that page.

02:38 25 A Well, if it says he had a personal communication



1 with me, he did have a -- I believe him.

2 Q But you have no independent memory of it?

3 A No, I don't. I don't want to re-emphasize this,  
4 but it's isolated events 14 years ago and perhaps  
02:38 5 I should have kept a note, but I didn't.

6 Q And, Dr. Emson, please don't misunderstand the  
7 reason I raise these questions with you. What I'm  
8 going to suggest to you is that where there are  
9 indications on the record as to whether you were  
02:38 10 co-operative with those who attempted to contact  
11 you in the years since 1970, with the exception of  
12 the press, it appears that you may have made  
13 yourself, and indeed made yourself available to  
14 talk with them and offer your expert opinion as  
02:39 15 solicited from you, whether it was from a  
16 criminologist, a lawyer from federal justice or  
17 whoever may be in contact with you where you  
18 deemed it appropriate to talk to them.

19 A Certainly, and I would even endeavour to  
02:39 20 co-operate with the media on the occasions when I  
21 feel it's appropriate, but I don't want to carry  
22 on or try to carry on a scientific debate on  
23 evidence with reference to another person through  
24 the media. That's not proper.

02:39 25 Q Okay. And, Dr. Emson, just a final question, and



1 I may be repeating myself, but I asked you about  
2 after the trial, or after the preliminary inquiry  
3 whether anybody attempted, from police or  
4 prosecutions, to influence your opinion or to keep  
02:39 5 a lid on your discussions about this case. Did  
6 anybody at any time when this matter became the  
7 subject of great public debate in the late '80s,  
8 and certainly through the '90s, particularly from  
9 the Government of Saskatchewan and the criminal  
02:40 10 prosecution service, in any manner attempt to  
11 contact you or in any way coopt you in terms of  
12 making opinions or offering opinions that would be  
13 beneficial to them to the detriment of the process  
14 or to Mr. Milgaard?

02:40 15 A This has never happened to me in my life and if it  
16 had I should remember it. It will not happen to  
17 me now because my reputation in this province, and  
18 perhaps elsewhere, is well known. I do not, and  
19 would not, ever respond to such and I might, if  
02:40 20 such an approach were made, consider it proper to  
21 draw it to the attention of any authorities I  
22 might feel should be informed.

23 Q And from all that, Doctor, I take it nobody tried  
24 to get you to do anything wrong in this process?

02:40 25 A No.



1 MS. KNOX: Thank you.

2 COMMISSIONER MacCALLUM: There was one more  
3 on the list there. Mr. Watson, any questions?

4 MR. WATSON: No questions.

02:41 5 COMMISSIONER MacCALLUM: Thank you. Any  
6 redirect then?

7 **BY MR. HODSON:**

8 **Q** Just a couple of questions of redirect, Mr. Emson.  
9 Mr. Elson asked you some questions about -- and  
02:41 10 sorry to bring up the secretor issue again, but it  
11 arose from one of my questions and if I could just  
12 clarify this, and I think I asked you yesterday  
13 that back in 1969, if you tested the bodily fluids  
14 of an individual such as saliva and it did not  
02:41 15 contain, that sample did not contain the A  
16 antigen, I believe I asked you, and I believe you  
17 said, that that doesn't necessarily mean that that  
18 person is a non-secretor, it may be that that  
19 sample didn't contain the A antigen. Is that  
02:41 20 correct?

21 **A** Well, we've had specific evidence today, and I  
22 can't quote back, where an expert from the  
23 laboratory in Regina gave a list of reasons as to  
24 why the body fluids of a secretor might not  
02:42 25 contain detectable amounts of antigen, so that



1           yes, the supplies, the bodily fluids of a secretor  
2           may not always contain detectable amounts of the  
3           antigen expressed.

4           **Q**       Right. And so the point, and I think you made it  
02:42 5           yesterday, and I just wish to clarify it in light  
6           of questions asked subsequent, is that again back  
7           in 1969 if there was a bodily fluid sample that  
8           did not detect an A antigen on a test, that you  
9           could not conclude conclusively that that person  
02:42 10          was a non-secretor?

11          **A**       It would suggest that they were a non-secretor,  
12          but it's not conclusive.

13          **Q**       Okay. Secondly, a number of counsel in referring  
14          to the vaginal contents from the autopsy in 1969 I  
02:43 15          believe, and it may have been unintentional, but a  
16          number of them said words to the effect that you  
17          discarded it, and I believe your evidence was, and  
18          I just wish to have you clarify, that in the  
19          course of the process of the autopsy the vaginal  
02:43 20          contents were not saved, but I don't believe, sir,  
21          your evidence was that you personally discarded  
22          it. Is that correct?

23          **A**       We've no evidence or memory as to how and by whom  
24          it was discarded, but if we take the chain of  
02:43 25          events, it was acquired by me, it was examined by



1 me for spermatozoa and demonstrated them in the  
2 absence of motility and it was not further saved  
3 and therefore I must take the responsibility for  
4 discarding it. My assumption is that the decision  
02:43 5 to discard it was taken after consultation with  
6 the police representatives, but I am not in any  
7 way trying to push off the responsibility for this  
8 upon them. It would presumably have been a  
9 consensual decision, but the specimen was in my  
02:44 10 hands and it was my responsibility.

11 Q But you are not able to say whether you personally  
12 physically discarded it?

13 A No.

14 Q Lastly, I did show you a photograph of a knife and  
02:44 15 I believe your evidence was, and Mr. Beresh asked  
16 you some questions, that you looked at not a knife  
17 blade, but a complete intact knife; is that  
18 correct?

19 A The only knife I was ever shown was consistent and  
02:44 20 similar and perhaps identical to the one in the  
21 picture which was an intact knife. I was never  
22 shown a fragmented knife.

23 Q I'm going to show you, sir -- we have marked as an  
24 exhibit the knife handle which is, the knife  
02:44 25 handle has been marked as Exhibit P-1 and,



1 Mr. Commissioner, I do have the knife blade that  
2 we've obtained from the Court of Queen's Bench  
3 that I would ask be marked as an exhibit in this  
4 proceeding. I think it will be P --

02:45 5 COMMISSIONER MacCALLUM: Four.

6 CLERK: Four.

7 -->EXHIBIT P-4:

8 KNIFE BLADE AND EVIDENCE BAG.

9 BY MR. HODSON:

02:45 10 Q And then I will show both the handle and the knife  
11 blade to you, Dr. Emson, and just ask a couple  
12 things when you are looking at it; A, whether you  
13 are able to say that this was the knife that you  
14 looked at in 1969, or whether it's similar to what  
02:45 15 you looked at. Do you know, sir, is that similar  
16 to the knife you would have viewed in 1969?

17 A Yes. The two components re-assembled are very  
18 similar to the one I saw before.

19 Q And the knife that you saw in 1969, was it a  
02:46 20 broken knife or --

21 A It was a whole knife.

22 Q Pardon me?

23 A It was not broken, it was intact.

24 MR. HODSON: Thank you, Dr. Emson. Those  
02:46 25 are all my questions.



1 **BY COMMISSIONER MacCALLUM:**

2 **Q** Thanks. Dr. Emson, Ms. Knox asked you a question  
3 along these lines: If Mrs. Milgaard had contacted  
4 you, would you have spoken to her, and I think  
02:46 5 your reply was yes, with some degree of caution.  
6 Did she contact you at any time following her  
7 son's conviction until his release from prison?

8 **A** Not to my recollection, Your Lordship.

9 **Q** Anybody on behalf of her or her son?

02:46 10 **A** Not that I can recollect.

11 COMMISSIONER MacCALLUM: Thanks. Anything  
12 arising from that, counsel? All right. Thank  
13 you very much, Dr. Emson, you are excused and we  
14 very much appreciate your evidence.

02:47 15 **A** Thank you, Your Lordship. I may return to my  
16 normal place of residence and work?

17 COMMISSIONER MacCALLUM: Yes, as long as we  
18 don't have to go with you.

19 MR. HODSON: Mr. Commissioner, that is all  
02:47 20 the evidence for today. I think we are adjourned  
21 and set to go on February the 7th is our next  
22 sittings.

23 COMMISSIONER MacCALLUM: So this matter  
24 then is adjourned to February 7th at 10 a.m. and  
02:47 25 it's across the street at what hotel?



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MR. HODSON: The Sheraton Hotel.

COMMISSIONER MacCALLUM: Sheraton Hotel.

MR. HODSON: Thank you.

COMMISSIONER MacCALLUM: Thanks very much.

*(Adjourned at 2:50 p.m.)*



1        **OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATE:**

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

8  
9  
10  
11  
12        \_\_\_\_\_, CSR

13        Karen Hinz, CSR

14        Official Queen's Bench Court Reporter

15  
16  
17        \_\_\_\_\_, CSR

18        Donald G. Meyer, RPR, CSR

19        Official Queen's Bench Court Reporter  
20  
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22  
23  
24  
25



	1491:19 <b>1970</b> - 1427:8, 1427:12, 1466:8, 1466:21, 1469:11, 1481:25, 1486:11 <b>1983</b> - 1480:9 <b>1985</b> - 1469:11 <b>1986</b> - 1480:9 <b>1988</b> - 1436:5, 1479:18, 1481:3 <b>1989</b> - 1474:25, 1485:17 <b>1990</b> - 1481:2, 1482:9, 1482:14, 1484:5 <b>1991</b> - 1481:5 <b>1992</b> - 1428:20, 1452:23 <b>1997</b> - 1470:23, 1471:9, 1475:3 <b>1998</b> - 1478:2, 1478:4	1480:3, 1480:7	1428:20, 1428:24, 1448:6, 1448:9 <b>advocates</b> - 1468:11 <b>affair</b> - 1464:4 <b>affidavit</b> - 1471:8, 1471:18, 1471:20, 1483:12 <b>afternoon</b> - 1461:9, 1461:12, 1461:18 <b>Agioritis</b> - 1369:4 <b>ago</b> - 1486:4 <b>agree</b> - 1383:10, 1403:18, 1406:20, 1407:19, 1412:25, 1414:15, 1415:19, 1416:18, 1416:25, 1417:22, 1418:20, 1420:2, 1421:6, 1438:4, 1441:9, 1441:18, 1450:6, 1450:7, 1464:1, 1464:16, 1479:10, 1480:11, 1482:24 <b>agreeing</b> - 1414:17 <b>air</b> - 1405:8 <b>Alain</b> - 1480:20 <b>albeit</b> - 1429:5 <b>Alberta</b> - 1381:21, 1469:23, 1479:24, 1481:4 <b>alive</b> - 1444:18, 1444:25, 1468:19 <b>allowed</b> - 1401:1 <b>alluded</b> - 1470:4 <b>almost</b> - 1376:15, 1383:7, 1388:14, 1430:16, 1432:19, 1481:6 <b>altered</b> - 1455:11 <b>American</b> - 1480:10 <b>amount</b> - 1393:24, 1434:5, 1436:13, 1437:5, 1476:14, 1476:15 <b>amounts</b> - 1488:25, 1489:2 <b>anal</b> - 1434:20 <b>analyses</b> - 1456:23 <b>analysis</b> - 1420:2, 1421:5, 1457:15 <b>analyze</b> - 1452:1 <b>analyzed</b> - 1452:23, 1452:25 <b>angle</b> - 1376:1, 1377:16 <b>angled</b> - 1377:15 <b>ankle</b> - 1394:23, 1395:1 <b>answer</b> - 1388:21, 1388:25, 1400:6, 1400:8, 1404:11, 1404:13, 1411:8, 1412:23, 1421:2, 1421:4, 1428:17, 1436:7, 1457:9, 1457:20 <b>answered</b> - 1419:16, 1433:22 <b>answering</b> - 1385:3, 1408:5 <b>antigen</b> - 1427:8, 1427:12, 1427:25, 1428:7, 1428:14, 1428:22, 1450:2, 1450:11, 1450:12, 1451:3, 1452:2, 1453:1, 1454:5, 1454:6, 1454:8, 1488:16, 1488:19, 1488:25, 1489:3, 1489:8 <b>antigens</b> - 1427:19, 1427:21, 1427:25, 1428:2, 1428:15, 1428:16, 1446:3, 1451:20, 1451:23, 1453:8, 1454:12, 1454:15 <b>anus</b> - 1387:5 <b>anxious</b> - 1423:24 <b>apart</b> - 1462:17 <b>apologize</b> - 1395:20, 1435:7, 1449:6, 1461:14 <b>apparent</b> - 1374:5,	1381:5, 1429:23 <b>Appeal</b> - 1471:9, 1471:17, 1471:21, 1471:22, 1483:13 <b>appeal</b> - 1475:1, 1475:16, 1475:19 <b>appear</b> - 1423:19, 1429:11, 1443:10, 1445:15, 1473:21, 1475:21, 1482:18, 1482:20, 1484:22 <b>appearances</b> - 1398:14 <b>Appearances</b> - 1370:1 <b>appeared</b> - 1430:3, 1441:22, 1472:18, 1472:20, 1475:11, 1483:2 <b>appearing</b> - 1370:3 <b>application</b> - 1484:13 <b>applied</b> - 1399:21, 1437:8 <b>applies</b> - 1423:6, 1426:4 <b>apply</b> - 1416:19, 1474:24 <b>appreciate</b> - 1373:14, 1384:22, 1388:25, 1411:25, 1412:23, 1417:17, 1418:6, 1424:5, 1439:3, 1443:12, 1445:20, 1479:5, 1492:14 <b>appreciating</b> - 1480:1 <b>apprised</b> - 1427:7 <b>approach</b> - 1465:14, 1483:2, 1483:6, 1487:20 <b>approached</b> - 1382:18, 1432:14 <b>approaching</b> - 1420:15 <b>appropriate</b> - 1425:11, 1460:20, 1469:3, 1486:18, 1486:21 <b>area</b> - 1373:23, 1385:10, 1389:22, 1392:24, 1394:14, 1395:4, 1399:1, 1399:9, 1402:11, 1421:21, 1422:13, 1435:1, 1435:2, 1435:3, 1450:17, 1475:23, 1480:21 <b>areas</b> - 1449:5, 1466:1 <b>argument</b> - 1455:19 <b>arise</b> - 1451:22, 1469:6 <b>arising</b> - 1461:24, 1492:12 <b>arms</b> - 1459:6 <b>arose</b> - 1488:11 <b>article</b> - 1482:18 <b>articles</b> - 1433:13 <b>aspect</b> - 1448:21 <b>aspects</b> - 1462:14 <b>assailant</b> - 1376:6, 1376:11, 1376:14, 1376:20, 1378:5, 1438:7, 1444:12, 1444:13, 1445:2, 1445:3, 1445:24, 1445:25, 1459:9 <b>assailant's</b> - 1377:24 <b>assault</b> - 1388:19, 1388:23, 1430:4, 1430:8, 1430:14, 1430:18, 1431:2, 1431:6, 1432:20, 1433:2, 1434:13, 1434:16, 1434:25, 1437:1 <b>assembled</b> - 1491:17 <b>assessment</b> - 1422:15, 1423:13, 1438:5 <b>assigned</b> - 1465:20 <b>assist</b> - 1374:3, 1393:25, 1415:11, 1444:11, 1445:1, 1445:23 <b>assistance</b> - 1413:3, 1413:7, 1414:14 <b>Assistant</b> - 1369:3, 1369:4, 1369:5, 1369:8,
'53 - 1436:16, 1476:10 '69 - 1404:23 '80s - 1484:14, 1487:7 '90s - 1484:14, 1487:8 '97 - 1471:1 '98 - 1471:24 '99 - 1472:1		<b>7</b>		
<b>0</b>		<b>70</b> - 1392:12 <b>72</b> - 1390:18, 1390:22, 1391:13, 1392:13, 1393:1, 1393:3, 1393:5 <b>790</b> - 1390:12, 1391:25 <b>7th</b> - 1482:9, 1492:21, 1492:24		
<b>001256</b> - 1449:7 <b>002483</b> - 1484:2 <b>002485</b> - 1484:7 <b>008</b> - 1458:11, 1458:12 <b>025929</b> - 1482:5 <b>033006</b> - 1458:9 <b>040497</b> - 1485:4 <b>040507</b> - 1485:20 <b>040513</b> - 1485:21 <b>066729</b> - 1402:7 <b>066732</b> - 1374:4 <b>07-69</b> - 1396:22 <b>073509</b> - 1395:10	<b>2</b>	<b>9</b>		
<b>1</b>	<b>2</b> - 1453:5, 1484:6 <b>20</b> - 1385:9, 1415:12 <b>2000</b> - 1471:4, 1472:2, 1472:4 <b>2005</b> - 1368:22, 1429:5 <b>207</b> - 1405:22, 1406:1 <b>23</b> - 1384:14 <b>23844</b> - 1399:11 <b>238470</b> - 1404:8 <b>238473</b> - 1384:12 <b>238498</b> - 1391:22 <b>24</b> - 1387:17, 1410:5 <b>241973</b> - 1372:5, 1403:7, 1426:22 <b>241975</b> - 1372:5, 1402:17, 1402:21, 1426:22 <b>246198</b> - 1405:20 <b>246207</b> - 1405:7, 1405:15, 1405:16 <b>24th</b> - 1472:3 <b>263</b> - 1449:8, 1449:18 <b>278893</b> - 1451:8 <b>27th</b> - 1368:22 <b>28th</b> - 1452:23 <b>29</b> - 1485:23 <b>2:00</b> - 1461:6, 1461:8 <b>2:20</b> - 1479:2 <b>2:31</b> - 1479:3 <b>2:50</b> - 1493:5	<b>9</b> - 1390:10, 1400:7	<b>A</b>	
1 - 1453:3 10 - 1368:23, 1478:19, 1478:24, 1480:11, 1492:24 103 - 1399:11 108 - 1384:10, 1384:12 10:04 - 1373:2 11 - 1480:16 11:15 - 1427:1 11:33 - 1427:2 12 - 1452:25 129 - 1390:2 12:17 - 1461:7 12th - 1484:5 1373 - 1371:4 14 - 1486:4 1426 - 1372:4 1427 - 1371:5 1448 - 1371:6 1461 - 1371:7 1488 - 1371:8 1491 - 1372:7 1492 - 1371:9 15 - 1380:1, 1380:5, 1380:19, 1380:21, 1384:21, 1426:24 16 - 1384:14 18 - 1390:11 192 - 1452:25 1953 - 1435:13, 1435:20, 1435:23, 1436:3 1959 - 1418:8 1960s - 1418:8 1969 - 1373:16, 1373:20, 1382:11, 1393:7, 1397:10, 1398:13, 1398:20, 1399:7, 1404:1, 1406:21, 1407:24, 1408:9, 1408:25, 1409:8, 1409:13, 1409:21, 1411:14, 1427:7, 1429:2, 1429:13, 1429:17, 1430:9, 1432:18, 1432:25, 1434:12, 1435:23, 1436:25, 1437:10, 1453:20, 1453:23, 1454:19, 1455:17, 1455:23, 1461:24, 1463:17, 1465:25, 1476:3, 1476:4, 1480:24, 1481:14, 1488:13, 1489:7, 1489:14, 1491:14, 1491:16,	<b>3</b>	<b>A-type</b> - 1451:2, 1452:8 <b>ability</b> - 1380:9, 1380:23, 1393:8, 1393:9, 1494:7 <b>able</b> - 1380:6, 1380:7, 1436:9, 1442:2, 1443:6, 1464:5, 1490:11, 1491:13 <b>Abrasions</b> - 1387:22 <b>abrasions</b> - 1388:1 <b>absence</b> - 1450:11, 1455:4, 1490:2 <b>absolutely</b> - 1408:3 <b>Absolutely</b> - 1377:17, 1478:13 <b>accep</b> - 1480:14 <b>accept</b> - 1391:19, 1416:24, 1460:9 <b>acceptance</b> - 1480:14 <b>accepted</b> - 1441:21 <b>access</b> - 1423:4 <b>accident</b> - 1443:25, 1473:3 <b>accord</b> - 1408:1 <b>according</b> - 1386:21, 1390:24, 1479:15 <b>Accordingly</b> - 1387:18 <b>account</b> - 1380:11, 1394:2, 1414:6, 1423:2, 1424:6 <b>accounts</b> - 1432:13 <b>accurate</b> - 1397:25, 1418:13 <b>accurately</b> - 1477:8 <b>acidity</b> - 1391:7 <b>acknowledged</b> - 1390:6, 1391:12, 1439:8, 1459:14 <b>acknowledgement</b> - 1390:6 <b>acknowledgment</b> - 1465:8 <b>acquired</b> - 1489:25 <b>acquittal</b> - 1472:3, 1473:10, 1473:11, 1474:2, 1474:13, 1475:19 <b>act</b> - 1449:3 <b>Act</b> - 1409:10 <b>activity</b> - 1443:16 <b>actual</b> - 1396:12, 1397:3, 1473:4 <b>addition</b> - 1391:20, 1472:11 <b>address</b> - 1479:9 <b>adjourned</b> - 1492:20, 1492:24 <b>Adjourned</b> - 1427:1, 1461:7, 1479:2, 1493:5 <b>admits</b> - 1441:23 <b>adult</b> - 1391:8 <b>advances</b> - 1476:12 <b>adversarial</b> - 1417:4, 1418:25, 1465:19 <b>advise</b> - 1415:1 <b>advised</b> - 1427:11,		
	<b>4</b>			
	<b>4</b> - 1453:13 <b>40</b> - 1380:13, 1447:9 <b>400</b> - 1410:3 <b>414</b> - 1479:24 <b>46</b> - 1479:23 <b>472</b> - 1384:19 <b>482</b> - 1405:7, 1405:13 <b>4th</b> - 1455:23			
	<b>5</b>			
	<b>5</b> - 1451:13, 1479:19 <b>50</b> - 1481:7			
	<b>6</b>			
	<b>6</b> - 1394:25, 1404:12,			



<p>1369:9  <b>assistant</b> - 1399:14, 1399:20, 1399:22, 1406:8, 1410:24  <b>assisted</b> - 1399:18, 1413:17, 1413:19, 1457:11, 1471:18  <b>assisting</b> - 1399:12, 1468:11  <b>associated</b> - 1431:7, 1483:5  <b>assume</b> - 1377:3, 1377:6, 1379:7, 1427:20, 1430:2, 1445:19, 1445:21, 1481:1  <b>assumed</b> - 1456:7  <b>Assuming</b> - 1379:8  <b>assuming</b> - 1429:23, 1459:17  <b>assumption</b> - 1490:4  <b>assumptions</b> - 1476:20  <b>attached</b> - 1417:7  <b>attempt</b> - 1386:15, 1394:4, 1394:5, 1466:10, 1487:10  <b>attempted</b> - 1467:24, 1486:10, 1487:3  <b>attend</b> - 1464:8, 1464:9  <b>attendance</b> - 1406:11, 1431:8  <b>attended</b> - 1431:12  <b>attending</b> - 1401:5, 1412:22  <b>attention</b> - 1390:9, 1482:1, 1482:3, 1484:5, 1484:6, 1485:4, 1485:22, 1487:21  <b>attitude</b> - 1438:22  <b>attributable</b> - 1442:15  <b>attribution</b> - 1448:16  <b>Audio</b> - 1369:16  <b>author</b> - 1392:17  <b>authorities</b> - 1487:21  <b>authority</b> - 1390:4, 1390:7, 1465:23, 1466:9  <b>authors</b> - 1390:12  <b>autopsies</b> - 1408:2, 1408:25, 1409:1, 1409:4, 1409:5, 1409:9, 1409:13, 1429:5, 1429:8, 1429:10  <b>autopsy</b> - 1382:3, 1386:18, 1386:22, 1387:18, 1395:17, 1396:22, 1397:14, 1399:18, 1400:16, 1400:24, 1401:5, 1401:20, 1401:22, 1401:25, 1403:25, 1406:7, 1406:15, 1406:23, 1409:5, 1410:14, 1410:15, 1413:2, 1414:1, 1414:21, 1414:24, 1429:19, 1429:22, 1430:10, 1430:12, 1434:16, 1437:11, 1437:12, 1444:3, 1457:12, 1457:15, 1457:22, 1458:1, 1461:23, 1463:4, 1464:4, 1480:25, 1489:14, 1489:19  <b>Autopsy</b> - 1372:4, 1426:21  <b>availabilities</b> - 1457:3  <b>availability</b> - 1421:10, 1456:15  <b>available</b> - 1434:3, 1453:20, 1453:24, 1454:23, 1455:16, 1455:18, 1456:13, 1461:3, 1473:14, 1476:4, 1476:12, 1486:13</p>	<p><b>aware</b> - 1381:20, 1382:1, 1382:11, 1430:24, 1432:16, 1440:1, 1448:21, 1456:8, 1456:12, 1456:14, 1460:5, 1472:11, 1474:19, 1475:4, 1475:9, 1475:12</p> <p style="text-align: center;"><b>B</b></p> <p><b>background</b> - 1470:20  <b>bad</b> - 1439:6, 1441:8, 1441:16, 1449:2, 1473:18, 1474:19, 1475:18, 1475:20  <b>Bag</b> - 1372:7, 1491:8  <b>bag</b> - 1396:17, 1403:24, 1404:17, 1404:22, 1406:10, 1406:22, 1407:2, 1407:5, 1411:3, 1411:10, 1412:1  <b>bagged</b> - 1405:4  <b>bagging</b> - 1407:8  <b>bags</b> - 1404:4, 1406:14, 1407:3, 1431:9, 1431:12  <b>bail</b> - 1474:24  <b>balloons</b> - 1417:19  <b>ban</b> - 1426:12  <b>based</b> - 1391:24, 1418:9, 1471:12  <b>Based</b> - 1471:21  <b>basic</b> - 1447:3, 1450:20  <b>Bates</b> - 1372:5, 1425:14, 1426:22  <b>bear</b> - 1415:8  <b>became</b> - 1439:15, 1469:14, 1475:2, 1476:8, 1487:6  <b>become</b> - 1382:10, 1455:16, 1455:17, 1481:12  <b>becomes</b> - 1382:16  <b>beginning</b> - 1383:23, 1405:18  <b>behalf</b> - 1468:11, 1472:12, 1492:9  <b>Beitel</b> - 1369:12  <b>belief</b> - 1392:13, 1476:2  <b>below</b> - 1402:10  <b>Bench</b> - 1423:23, 1479:25, 1491:2, 1494:1, 1494:3, 1494:14, 1494:19  <b>beneficial</b> - 1487:13  <b>benefit</b> - 1419:20  <b>Beresh</b> - 1370:11, 1371:4, 1373:3, 1373:4, 1373:7, 1373:8, 1391:24, 1392:1, 1392:6, 1402:21, 1402:23, 1405:11, 1405:12, 1405:14, 1405:16, 1405:19, 1405:21, 1408:8, 1421:13, 1421:16, 1421:19, 1421:23, 1424:17, 1424:23, 1425:17, 1425:21, 1426:1, 1426:6, 1426:7, 1426:15, 1426:18, 1426:23, 1429:13, 1470:5, 1490:15  <b>Bessborough</b> - 1368:17  <b>best</b> - 1407:4, 1438:5, 1457:5, 1494:6  <b>betray</b> - 1407:18  <b>better</b> - 1424:25, 1446:13, 1485:1  <b>between</b> - 1407:14, 1409:4, 1436:8, 1436:14, 1455:6, 1456:19, 1457:10, 1458:5, 1463:2, 1464:11, 1464:15, 1465:3, 1467:6, 1468:20, 1469:10, 1473:8</p>	<p><b>beyond</b> - 1415:10  <b>bias</b> - 1416:2, 1416:3  <b>biochemical</b> - 1436:13  <b>biology</b> - 1451:11  <b>bit</b> - 1397:21, 1445:17, 1447:3, 1452:13, 1452:14  <b>bits</b> - 1427:14  <b>Blade</b> - 1372:7, 1491:8  <b>blade</b> - 1398:6, 1490:17, 1491:1, 1491:11  <b>bladed</b> - 1377:4  <b>bleeding</b> - 1379:24  <b>blood</b> - 1387:17, 1427:21, 1428:7, 1439:9, 1445:9, 1445:14, 1445:23, 1446:3, 1453:4, 1453:8, 1453:17, 1453:21, 1453:25, 1454:7, 1455:2  <b>board</b> - 1400:24  <b>Bobs</b> - 1370:5  <b>bodily</b> - 1427:18, 1428:16, 1438:1, 1438:6, 1488:13, 1489:1, 1489:7  <b>body</b> - 1375:18, 1376:1, 1381:14, 1382:15, 1384:23, 1384:25, 1385:4, 1385:11, 1385:14, 1390:14, 1390:16, 1391:1, 1391:5, 1391:7, 1391:11, 1391:15, 1392:4, 1392:16, 1392:19, 1393:2, 1393:3, 1393:5, 1394:21, 1394:23, 1395:4, 1400:21, 1403:20, 1405:4, 1407:11, 1408:17, 1408:20, 1410:1, 1410:25, 1412:21, 1422:10, 1423:1, 1423:3, 1424:7, 1430:5, 1453:10, 1455:25, 1457:23, 1480:24, 1488:24  <b>book</b> - 1386:10  <b>Boswell</b> - 1369:7  <b>bottom</b> - 1384:20, 1449:10, 1449:19, 1479:20, 1485:23  <b>bounds</b> - 1481:9  <b>box</b> - 1403:25, 1442:24  <b>boxes</b> - 1404:4  <b>Boychuk</b> - 1370:8, 1460:12  <b>Boyd</b> - 1485:9, 1485:15  <b>branch</b> - 1431:8  <b>break</b> - 1460:21, 1460:24, 1461:2, 1461:5  <b>breast</b> - 1374:6  <b>Brian</b> - 1370:11, 1373:8  <b>bring</b> - 1373:11, 1461:15, 1475:24, 1477:18, 1488:10  <b>bringing</b> - 1417:4  <b>Britain</b> - 1472:22  <b>broken</b> - 1491:20, 1491:23  <b>brought</b> - 1390:9, 1396:2, 1396:3, 1396:4, 1414:23, 1455:24, 1456:2, 1462:3, 1482:4, 1485:20  <b>Bruce</b> - 1370:9, 1449:3  <b>bruises</b> - 1385:16, 1387:22, 1388:1  <b>bruising</b> - 1374:18, 1374:21, 1374:25, 1386:2, 1386:9, 1386:13, 1386:19, 1386:22, 1387:3, 1389:20  <b>Brunswick</b> - 1480:19, 1481:5  <b>buccal</b> - 1452:25  <b>bulb</b> - 1434:8  <b>bulk</b> - 1409:12</p>	<p style="text-align: center;"><b>C</b></p> <p><b>Caldwell</b> - 1370:5, 1461:13  <b>Canada</b> - 1415:12, 1420:18, 1424:13, 1467:16, 1472:22, 1479:14, 1479:18, 1480:15  <b>Canadian</b> - 1474:11, 1479:23  <b>cancer</b> - 1472:6  <b>Candace</b> - 1369:6  <b>cannot</b> - 1404:14, 1408:11, 1409:14, 1454:14, 1472:23  <b>capabilities</b> - 1438:10  <b>capability</b> - 1417:13, 1436:11, 1436:16  <b>capable</b> - 1395:19, 1416:20  <b>car</b> - 1448:20, 1459:4  <b>careful</b> - 1401:3, 1470:25  <b>carefully</b> - 1418:4, 1436:14  <b>carry</b> - 1486:21, 1486:22  <b>case</b> - 1378:6, 1381:9, 1383:21, 1394:3, 1399:5, 1401:10, 1406:12, 1406:24, 1407:20, 1409:22, 1409:24, 1411:16, 1411:23, 1412:3, 1413:10, 1413:18, 1413:23, 1413:25, 1414:13, 1414:20, 1416:1, 1423:7, 1430:21, 1430:22, 1431:5, 1434:12, 1436:5, 1439:7, 1442:8, 1442:10, 1442:13, 1442:14, 1442:19, 1442:22, 1442:25, 1443:2, 1446:25, 1448:6, 1448:10, 1448:14, 1448:16, 1460:8, 1462:16, 1462:17, 1462:23, 1464:14, 1464:22, 1465:1, 1465:21, 1466:20, 1466:24, 1467:14, 1469:3, 1469:9, 1470:16, 1470:17, 1470:23, 1471:16, 1475:8, 1479:23, 1479:24, 1480:12, 1480:19, 1481:3, 1481:20, 1483:1, 1487:5  <b>cases</b> - 1384:5, 1388:20, 1407:25, 1411:17, 1413:6, 1413:8, 1413:15, 1414:3, 1416:20, 1423:7, 1423:10, 1423:12, 1423:22, 1433:19, 1441:21, 1442:6, 1443:18, 1443:19, 1462:25, 1470:1, 1480:16, 1482:16, 1483:24  <b>Cases</b> - 1479:23  <b>casting</b> - 1471:19  <b>catch</b> - 1447:15  <b>category</b> - 1383:2, 1383:24, 1468:23  <b>Catherine</b> - 1370:5, 1461:12  <b>Cathy</b> - 1451:11  <b>caught</b> - 1435:9, 1459:8  <b>caused</b> - 1374:22, 1374:23, 1375:6, 1375:16, 1375:17, 1378:15, 1379:23, 1386:14, 1395:13, 1418:4, 1473:2  <b>causes</b> - 1415:16  <b>causing</b> - 1395:19  <b>caution</b> - 1492:5  <b>cavity</b> - 1379:25</p>	<p><b>cells</b> - 1375:4  <b>centimetres</b> - 1397:2, 1397:24  <b>centres</b> - 1420:18  <b>certain</b> - 1376:15, 1388:7, 1466:1  <b>certainly</b> - 1403:6, 1403:17, 1414:7, 1416:1, 1416:18, 1417:2, 1420:22, 1422:21, 1430:12, 1431:11, 1431:18, 1432:19, 1433:14, 1437:5, 1452:18, 1454:7, 1464:3, 1464:23, 1467:3, 1469:10, 1475:21, 1476:3, 1479:1, 1483:5, 1485:17, 1487:8  <b>Certainly</b> - 1415:23, 1417:23, 1418:21, 1465:18, 1486:19  <b>Certificate</b> - 1494:1  <b>certify</b> - 1494:4  <b>cervicitis</b> - 1388:10  <b>cervix</b> - 1388:5, 1388:12  <b>cetera</b> - 1404:20  <b>chain</b> - 1489:24  <b>change</b> - 1432:9  <b>changed</b> - 1373:16, 1438:22  <b>changes</b> - 1373:22  <b>characterized</b> - 1474:17  <b>charge</b> - 1414:18, 1467:8  <b>charged</b> - 1469:8  <b>chasing</b> - 1435:24  <b>cheap</b> - 1398:21  <b>check</b> - 1433:23, 1434:11, 1435:19  <b>checked</b> - 1473:14  <b>checking</b> - 1470:25  <b>chemical</b> - 1456:23  <b>Cheryl</b> - 1369:9  <b>chest</b> - 1379:24  <b>chief</b> - 1384:5, 1440:6  <b>Chief</b> - 1381:21, 1422:24, 1422:25, 1469:23, 1483:4  <b>Chris</b> - 1369:5, 1370:8  <b>chronic</b> - 1388:10  <b>chronology</b> - 1480:13  <b>circle</b> - 1374:8  <b>circular</b> - 1375:13  <b>circulate</b> - 1477:20  <b>circulated</b> - 1478:5  <b>circulation</b> - 1375:3  <b>circumference</b> - 1375:23, 1375:25  <b>Circumstances</b> - 1389:14  <b>circumstances</b> - 1380:11, 1380:17, 1389:11, 1389:13, 1391:9, 1413:9, 1484:21  <b>circumstantial</b> - 1393:15, 1444:14, 1445:5  <b>city</b> - 1383:16, 1457:11, 1463:18  <b>civilian</b> - 1468:24  <b>claimed</b> - 1394:17  <b>clarify</b> - 1379:17, 1392:7, 1395:7, 1459:16, 1488:12, 1489:5, 1489:18  <b>classified</b> - 1453:6  <b>clear</b> - 1390:20, 1392:2, 1392:9, 1392:18, 1392:21, 1394:21, 1399:3, 1400:14, 1401:7, 1402:1, 1402:4, 1402:9, 1403:6, 1405:2, 1414:4, 1414:19, 1436:18, 1462:17  <b>clearer</b> - 1403:4, 1403:15, 1403:17  <b>clearly</b> - 1414:13,</p>
---	---	--	--	--



<p>1416:2, 1450:2  <b>Clearly</b> - 1416:7  <b>Clerk</b> - 1369:12, 1425:18, 1426:8, 1491:6  <b>cloak</b> - 1417:1  <b>close</b> - 1425:23  <b>close-up</b> - 1425:23  <b>closer</b> - 1387:5  <b>closing</b> - 1406:7  <b>clothes</b> - 1381:13, 1381:19, 1382:3, 1412:2  <b>clothing</b> - 1381:4, 1382:9, 1382:14, 1400:9, 1400:16, 1400:20, 1403:19, 1405:3, 1406:4, 1406:9, 1406:22, 1407:12, 1407:13, 1407:21, 1410:8, 1410:14, 1410:17, 1410:25, 1412:7, 1412:11, 1412:20, 1429:14, 1431:10, 1431:20, 1432:8  <b>co</b> - 1373:14, 1484:22, 1486:10, 1486:20  <b>co-operate</b> - 1486:20  <b>co-operated</b> - 1484:22  <b>co-operation</b> - 1373:14  <b>co-operative</b> - 1486:10  <b>coat</b> - 1381:5, 1459:5, 1459:10  <b>coitus</b> - 1390:19  <b>collaborated</b> - 1483:23  <b>colleagues</b> - 1468:25, 1469:20, 1473:22, 1482:16  <b>collected</b> - 1421:5, 1422:12, 1432:22, 1433:4  <b>collectively</b> - 1425:2  <b>colour</b> - 1466:2  <b>combed</b> - 1433:12  <b>comfort</b> - 1479:6  <b>comfortable</b> - 1478:20  <b>coming</b> - 1423:22, 1477:5  <b>comment</b> - 1403:3, 1414:22, 1421:25, 1423:18, 1442:24, 1470:1, 1472:9, 1482:12  <b>commentary</b> - 1440:14  <b>comments</b> - 1444:2, 1445:16, 1446:22  <b>Commission</b> - 1368:2, 1368:15, 1369:1, 1369:2, 1369:3, 1369:4, 1369:5, 1369:12, 1415:11, 1440:2, 1440:10, 1456:10, 1478:21, 1484:4  <b>Commission's</b> - 1450:19  <b>Commissioner</b> - 1371:9, 1373:3, 1373:4, 1391:23, 1392:2, 1402:6, 1402:18, 1402:19, 1402:22, 1405:10, 1405:14, 1405:17, 1408:4, 1419:4, 1421:13, 1421:17, 1421:22, 1424:16, 1424:20, 1425:5, 1425:18, 1425:24, 1426:2, 1426:10, 1426:13, 1426:19, 1426:23, 1426:24, 1427:3, 1427:4, 1433:25, 1434:22, 1437:17, 1437:20, 1439:23, 1440:7, 1447:14, 1447:18, 1449:15, 1458:8, 1458:13, 1460:12, 1460:14, 1460:17, 1460:18, 1460:22, 1460:25, 1461:5, 1461:9, 1476:21, 1478:17, 1479:1, 1479:22, 1488:2, 1488:5, 1491:1, 1491:5, 1492:1,</p>	<p>1492:11, 1492:17, 1492:19, 1492:23, 1493:2, 1493:4  <b>common</b> - 1388:16, 1389:19, 1398:14, 1404:21, 1404:23, 1406:21, 1407:1, 1409:18, 1412:1, 1439:9, 1469:24, 1470:2, 1470:8  <b>commonality</b> - 1463:15  <b>commonly</b> - 1404:18, 1464:19  <b>communicate</b> - 1467:21, 1467:24  <b>communicating</b> - 1467:20  <b>communication</b> - 1462:10, 1463:21, 1464:14, 1467:6, 1467:8, 1468:1, 1485:25  <b>communications</b> - 1457:6, 1468:20  <b>compared</b> - 1429:3  <b>competent</b> - 1441:11  <b>complete</b> - 1419:6, 1490:17  <b>completed</b> - 1406:15, 1430:20, 1461:23  <b>completely</b> - 1413:25  <b>complicate</b> - 1446:1  <b>components</b> - 1491:17  <b>comprehensive</b> - 1452:19  <b>computer</b> - 1435:16  <b>conceivable</b> - 1428:13  <b>concentration</b> - 1452:2  <b>concern</b> - 1426:14  <b>concerned</b> - 1421:9  <b>concerning</b> - 1458:21  <b>conclude</b> - 1378:4, 1415:7, 1451:17, 1451:19, 1489:9  <b>concluded</b> - 1466:21  <b>conclusion</b> - 1442:16, 1442:20, 1445:8  <b>conclusions</b> - 1376:8, 1475:22  <b>conclusive</b> - 1427:23, 1428:3, 1444:20, 1489:12  <b>conclusively</b> - 1489:9  <b>concrete</b> - 1376:9, 1377:2  <b>concurrently</b> - 1430:3  <b>conduct</b> - 1481:18  <b>conducted</b> - 1484:20  <b>conducting</b> - 1430:5, 1484:11  <b>conference</b> - 1465:21  <b>confessions</b> - 1420:1  <b>confining</b> - 1434:24  <b>confirm</b> - 1403:8, 1480:12  <b>confusion</b> - 1452:13  <b>Congram</b> - 1369:6  <b>conscious</b> - 1379:5, 1380:22  <b>consciousness</b> - 1379:7, 1379:8  <b>consensual</b> - 1389:8, 1490:9  <b>consider</b> - 1380:14, 1380:15, 1383:1, 1487:20  <b>considerably</b> - 1394:10  <b>consideration</b> - 1385:14, 1420:22, 1483:7  <b>considered</b> - 1450:10  <b>consistent</b> - 1395:14, 1477:13, 1490:19  <b>consultant</b> - 1442:9  <b>consultation</b> - 1490:5</p>	<p><b>consulted</b> - 1381:11, 1381:12, 1470:23, 1472:21  <b>contact</b> - 1375:25, 1379:20, 1394:13, 1395:4, 1424:7, 1462:6, 1462:19, 1467:2, 1469:22, 1481:24, 1486:10, 1486:17, 1487:11, 1492:6  <b>contacted</b> - 1466:20, 1467:15, 1467:18, 1484:18, 1485:14, 1492:3  <b>contacts</b> - 1468:17  <b>contain</b> - 1451:20, 1488:15, 1488:19, 1488:25, 1489:2, 1494:5  <b>contained</b> - 1396:9, 1440:15, 1456:4, 1459:18  <b>container</b> - 1396:6  <b>containers</b> - 1404:25, 1457:5  <b>contains</b> - 1447:6  <b>content</b> - 1434:2, 1436:12, 1440:16, 1478:6, 1478:15, 1482:12  <b>contents</b> - 1418:10, 1432:21, 1433:18, 1485:13, 1489:14, 1489:20  <b>context</b> - 1400:5, 1404:10, 1405:23, 1406:6  <b>continual</b> - 1465:14  <b>continue</b> - 1441:4, 1466:12  <b>continued</b> - 1373:6, 1468:17  <b>Continued</b> - 1371:3  <b>continuing</b> - 1463:21, 1463:22, 1464:3  <b>contour</b> - 1375:22  <b>contribute</b> - 1417:24, 1464:5  <b>control</b> - 1466:11  <b>conversation</b> - 1463:15  <b>convicted</b> - 1453:16  <b>conviction</b> - 1415:22, 1416:9, 1417:8, 1417:22, 1417:24, 1418:15, 1419:7, 1419:12, 1419:14, 1420:4, 1423:12, 1442:7, 1443:4, 1443:14, 1467:7, 1469:5, 1474:24, 1475:18, 1484:21, 1492:7  <b>Conviction</b> - 1368:4  <b>convictions</b> - 1419:18, 1439:5, 1441:7, 1442:14  <b>convinces</b> - 1442:4  <b>convincing</b> - 1417:14  <b>cooling</b> - 1391:5  <b>coopt</b> - 1487:11  <b>copies</b> - 1425:13, 1477:5, 1477:20, 1477:21, 1478:4  <b>copy</b> - 1403:15, 1478:8  <b>corner</b> - 1398:20, 1403:12, 1466:3  <b>Coroner</b> - 1408:17, 1467:10, 1467:12  <b>Coroner's</b> - 1408:19, 1409:9, 1409:10  <b>Coroners</b> - 1422:25  <b>Correct</b> - 1387:1  <b>correct</b> - 1376:7, 1378:16, 1379:9, 1386:4, 1389:12, 1389:22, 1390:23, 1391:14, 1394:24, 1400:12, 1401:2, 1402:10, 1404:1, 1404:20, 1411:10, 1412:4, 1412:15, 1427:9, 1427:13, 1427:23,</p>	<p>1429:19, 1431:10, 1431:16, 1431:25, 1432:22, 1433:9, 1434:14, 1434:20, 1435:4, 1435:25, 1439:11, 1439:12, 1442:11, 1444:21, 1446:6, 1448:4, 1451:5, 1459:17, 1460:8, 1461:21, 1463:19, 1468:7, 1470:22, 1471:11, 1476:20, 1477:15, 1479:14, 1480:4, 1481:1, 1483:9, 1488:20, 1489:22, 1490:18, 1494:5  <b>corrected</b> - 1428:12  <b>correctly</b> - 1409:2  <b>counsel</b> - 1370:3, 1448:6, 1448:9, 1461:13, 1465:20, 1474:23, 1474:25, 1475:7, 1477:5, 1477:18, 1477:20, 1478:5, 1484:4, 1489:13, 1492:12  <b>Counsel</b> - 1369:2, 1369:3, 1369:4, 1369:5, 1440:10, 1484:4  <b>country</b> - 1469:1  <b>couple</b> - 1488:8, 1491:11  <b>course</b> - 1373:15, 1377:12, 1392:19, 1397:14, 1408:1, 1418:16, 1422:7, 1422:8, 1455:15, 1464:7, 1484:24, 1489:19  <b>court</b> - 1387:14, 1416:15, 1417:14, 1418:24, 1419:1, 1442:5, 1463:8, 1464:18, 1464:20, 1464:23, 1465:1, 1465:4, 1479:25  <b>Court</b> - 1369:13, 1446:18, 1467:4, 1467:16, 1471:8, 1471:17, 1471:20, 1471:22, 1479:25, 1483:13, 1491:2, 1494:1, 1494:3, 1494:14, 1494:19  <b>courthouse</b> - 1425:8, 1464:9, 1464:10  <b>Courtroom</b> - 1477:24  <b>courtroom</b> - 1479:17  <b>courts</b> - 1480:15  <b>cover</b> - 1458:3, 1477:19, 1477:24  <b>credibility</b> - 1417:7  <b>Crick</b> - 1435:8  <b>Crime</b> - 1457:3  <b>crime</b> - 1384:2, 1453:23, 1456:13, 1456:19, 1457:1, 1460:2  <b>crimes</b> - 1422:10, 1437:1  <b>criminal</b> - 1390:2, 1413:5, 1413:8, 1443:15, 1476:2, 1477:1, 1479:17, 1487:9  <b>Criminal</b> - 1477:24, 1479:23  <b>criminologist</b> - 1486:16  <b>Criminology</b> - 1485:9  <b>critical</b> - 1394:4, 1420:2, 1421:4, 1421:9, 1422:15  <b>criticism</b> - 1442:19, 1444:6, 1444:16, 1445:7, 1446:16  <b>cross</b> - 1417:15, 1439:4, 1439:17, 1439:18, 1439:25, 1440:5, 1440:11, 1440:15, 1441:2, 1441:3, 1470:14  <b>cross-examination</b> - 1417:15, 1439:17, 1439:18, 1439:25, 1440:5, 1440:15, 1441:2  <b>cross-examined</b> -</p>	<p>1439:4, 1470:14  <b>cross-examining</b> - 1440:11  <b>Crown</b> - 1373:20, 1405:25, 1447:24, 1448:6, 1448:9, 1465:16, 1465:18, 1465:20, 1465:23, 1466:9, 1472:19, 1472:21, 1473:25  <b>Crown's</b> - 1448:7  <b>cry</b> - 1380:23  <b>Csr</b> - 1369:13, 1369:14, 1494:2, 1494:12, 1494:13, 1494:17, 1494:18  <b>curtail</b> - 1466:3  <b>customarily</b> - 1465:21, 1482:15  <b>customary</b> - 1440:1, 1468:1  <b>cut</b> - 1377:11, 1381:5  <b>cutting</b> - 1377:9, 1377:11, 1377:12, 1377:15, 1377:18, 1377:23</p>
<b>D</b>				
<p><b>D-3</b> - 1402:16  <b>Dalton</b> - 1413:18, 1413:21, 1413:23, 1413:25, 1414:6, 1416:1, 1442:8, 1442:13, 1442:19, 1442:22, 1443:3, 1443:9, 1470:17, 1470:23, 1473:3, 1473:17, 1473:24, 1474:14, 1474:18, 1483:13  <b>data</b> - 1470:24  <b>date</b> - 1393:9, 1415:5  <b>dated</b> - 1415:2, 1482:8, 1484:5  <b>Dave</b> - 1458:5  <b>David</b> - 1368:4, 1370:2, 1427:9, 1428:21, 1448:2, 1451:17, 1453:14  <b>days</b> - 1422:17, 1455:22, 1463:19  <b>dead</b> - 1392:4, 1393:2, 1393:5  <b>deal</b> - 1385:13, 1403:4, 1415:6, 1415:17, 1429:2  <b>dealing</b> - 1375:12, 1423:22, 1423:24  <b>dealt</b> - 1441:22, 1481:3  <b>death</b> - 1374:11, 1374:15, 1374:19, 1374:21, 1374:22, 1374:24, 1375:6, 1375:7, 1375:8, 1379:11, 1380:19, 1380:20, 1391:2, 1391:4, 1392:11, 1392:14, 1392:17, 1409:19, 1414:7, 1418:9, 1442:16, 1442:17, 1443:15, 1443:16, 1444:23, 1462:7, 1473:2, 1482:14  <b>Death</b> - 1390:5  <b>deaths</b> - 1413:8  <b>debate</b> - 1486:22, 1487:7  <b>Decade</b> - 1477:23  <b>deceased</b> - 1378:15, 1379:19, 1380:6, 1414:13, 1430:23, 1444:17  <b>deceased's</b> - 1374:6  <b>December</b> - 1478:3  <b>decide</b> - 1423:9, 1423:10, 1455:13  <b>decided</b> - 1423:11, 1471:25  <b>decides</b> - 1419:4</p>				



<p><b>decision</b> - 1382:17, 1408:19, 1490:4, 1490:9  <b>decisions</b> - 1481:17  <b>declined</b> - 1469:16, 1482:12, 1482:23  <b>decomposed</b> - 1391:1, 1392:16  <b>decomposition</b> - 1392:10  <b>Decomposition</b> - 1390:14  <b>deemed</b> - 1486:18  <b>defence</b> - 1472:12, 1472:14, 1474:4, 1474:6, 1474:10  <b>defensive</b> - 1446:10  <b>definable</b> - 1399:22  <b>define</b> - 1464:22  <b>definition</b> - 1399:25  <b>degradation</b> - 1452:5  <b>degree</b> - 1388:7, 1393:16, 1424:2, 1436:25, 1492:5  <b>delay</b> - 1423:21, 1423:25, 1475:4, 1475:10, 1475:16  <b>Delta</b> - 1454:6  <b>Demayo</b> - 1472:20  <b>Demayos</b> - 1472:20  <b>demean</b> - 1383:7  <b>demonstrate</b> - 1418:3  <b>demonstrated</b> - 1428:21, 1490:1  <b>demonstration</b> - 1385:25  <b>denigrate</b> - 1473:21  <b>dependent</b> - 1448:18  <b>depicts</b> - 1403:18  <b>deploy</b> - 1420:16  <b>deployed</b> - 1430:12  <b>deposit</b> - 1390:22, 1393:9, 1393:25, 1415:3  <b>deposited</b> - 1392:13  <b>depths</b> - 1381:15  <b>describe</b> - 1387:16, 1406:2  <b>described</b> - 1389:11, 1393:19, 1399:18, 1430:19, 1447:22, 1459:24, 1476:10  <b>describes</b> - 1460:3  <b>Description</b> - 1371:2, 1372:2  <b>description</b> - 1378:24, 1407:12, 1413:13  <b>desire</b> - 1383:6, 1383:8, 1384:2  <b>destroys</b> - 1391:6  <b>detect</b> - 1489:8  <b>detectable</b> - 1451:20, 1453:7, 1488:25, 1489:2  <b>Detectable</b> - 1453:1  <b>detected</b> - 1384:24, 1451:23  <b>Detective</b> - 1405:24, 1410:4  <b>determinations</b> - 1460:7, 1481:18  <b>determining</b> - 1438:6  <b>detriment</b> - 1487:13  <b>development</b> - 1430:13  <b>devised</b> - 1430:16  <b>dialogue</b> - 1456:18  <b>die</b> - 1444:10  <b>difference</b> - 1436:8  <b>differences</b> - 1440:9  <b>different</b> - 1380:16, 1392:25, 1393:1, 1436:1, 1441:20, 1441:25, 1462:21, 1468:23, 1470:4,</p>	<p>1473:1  <b>differentiate</b> - 1454:2  <b>differentiated</b> - 1453:21  <b>differing</b> - 1392:23, 1473:5, 1483:25, 1484:1  <b>difficult</b> - 1376:15, 1379:3, 1380:3, 1393:4, 1415:5, 1416:24, 1421:3, 1446:6, 1464:22  <b>diminish</b> - 1383:7  <b>direct</b> - 1484:6, 1485:22  <b>Director/media</b> - 1369:6  <b>disagree</b> - 1419:9, 1441:12, 1445:20, 1470:9, 1472:11  <b>disagreement</b> - 1441:13  <b>disappearance</b> - 1393:20  <b>discard</b> - 1490:5  <b>discarded</b> - 1454:25, 1455:5, 1489:17, 1489:21, 1489:24, 1490:12  <b>discarding</b> - 1490:4  <b>discover</b> - 1427:19  <b>discovered</b> - 1435:11, 1436:3  <b>discovering</b> - 1435:8, 1436:8  <b>discrepancy</b> - 1473:8  <b>discuss</b> - 1464:18, 1465:3, 1469:1  <b>discussed</b> - 1381:7, 1381:12, 1381:19, 1428:25, 1468:8, 1482:21  <b>discussing</b> - 1417:6, 1462:22  <b>discussion</b> - 1457:8, 1457:10, 1458:20, 1464:11, 1465:6, 1469:17  <b>discussions</b> - 1462:6, 1465:17, 1481:23, 1487:5  <b>Dishonest</b> - 1419:8, 1419:11  <b>disparage</b> - 1473:21  <b>dispassionate</b> - 1421:8  <b>displayed</b> - 1381:2  <b>disputes</b> - 1482:15  <b>distant</b> - 1425:22  <b>distinction</b> - 1409:4  <b>distinguish</b> - 1436:14  <b>distinguished</b> - 1418:5  <b>distinguishing</b> - 1444:12, 1444:24, 1445:1, 1445:23  <b>diverge</b> - 1470:12  <b>division</b> - 1408:25  <b>Dna</b> - 1435:10, 1435:24, 1436:3, 1436:9, 1436:12, 1436:21, 1448:18, 1455:17, 1476:1, 1476:5, 1476:12, 1476:14, 1476:18, 1476:25, 1477:12, 1477:16, 1477:23, 1478:1, 1479:13, 1479:16, 1480:15  <b>Doctor</b> - 1374:5, 1382:21, 1384:16, 1384:17, 1389:20, 1389:24, 1391:10, 1391:20, 1392:8, 1395:7, 1405:23, 1407:1, 1407:17, 1408:5, 1410:2, 1411:25, 1417:17, 1418:6, 1421:1, 1421:24, 1424:15, 1434:1, 1435:6, 1436:24, 1449:9, 1450:23, 1451:14, 1452:6, 1453:18, 1472:8, 1476:19, 1478:21, 1480:23, 1481:22, 1482:5, 1487:23  <b>Document</b> - 1369:7,</p>	<p>1369:8, 1369:9  <b>document</b> - 1374:4, 1384:9, 1384:11, 1390:1, 1399:11, 1402:7, 1402:8, 1402:17, 1403:7, 1403:8, 1403:14, 1404:8, 1405:7, 1410:3, 1425:14, 1446:7, 1449:7, 1451:8, 1451:9, 1452:21, 1453:15, 1458:7, 1477:10, 1477:21, 1479:19, 1482:5, 1484:18, 1485:3, 1485:4  <b>documentary</b> - 1424:20  <b>documented</b> - 1482:11  <b>documents</b> - 1482:1  <b>dog</b> - 1443:21  <b>Donald</b> - 1369:14, 1494:2, 1494:18  <b>done</b> - 1382:6, 1406:24, 1407:10, 1408:2, 1408:21, 1409:4, 1409:6, 1409:9, 1409:16, 1411:17, 1411:21, 1411:22, 1414:2, 1424:14, 1428:21, 1429:22, 1431:11, 1433:3, 1433:14, 1433:24, 1434:12, 1434:18, 1435:3, 1438:18, 1438:20, 1443:3, 1444:19, 1446:5, 1446:13, 1454:2, 1456:23, 1456:25, 1467:25, 1468:13, 1484:22, 1484:24, 1485:1, 1485:17  <b>doorstep</b> - 1409:25  <b>double</b> - 1435:9, 1435:19, 1476:9  <b>doubt</b> - 1461:21  <b>Douglas</b> - 1369:2  <b>Dowling</b> - 1381:20  <b>down</b> - 1402:12, 1411:7, 1433:2, 1443:23, 1459:7, 1477:4  <b>Dr</b> - 1381:20, 1426:16, 1427:6, 1435:25, 1439:10, 1441:1, 1444:4, 1444:8, 1444:16, 1445:7, 1445:10, 1445:16, 1445:20, 1447:21, 1448:3, 1448:22, 1448:25, 1449:11, 1449:12, 1455:21, 1457:7, 1458:15, 1458:17, 1461:12, 1468:8, 1468:10, 1468:14, 1468:15, 1468:17, 1468:18, 1468:22, 1477:11, 1479:5, 1482:12, 1482:22, 1482:25, 1483:11, 1486:6, 1486:25, 1491:11, 1491:24, 1492:2, 1492:13  <b>draw</b> - 1376:18, 1395:20, 1475:23, 1482:2, 1485:3, 1487:21  <b>drawn</b> - 1374:8, 1482:1  <b>dreamed</b> - 1481:9, 1481:11, 1481:21  <b>dress</b> - 1459:7, 1459:11  <b>drew</b> - 1484:4  <b>dry</b> - 1405:8  <b>dubious</b> - 1443:9  <b>due</b> - 1380:19, 1380:20, 1419:14, 1472:13, 1475:18, 1475:19  <b>during</b> - 1380:5, 1383:4, 1410:15, 1413:2, 1429:18, 1457:22, 1461:2, 1464:7, 1481:24  <b>dying</b> - 1443:23, 1472:6</p>	<p><b>early</b> - 1484:14, 1485:17  <b>ease</b> - 1426:9  <b>Easily</b> - 1398:22  <b>easy</b> - 1421:2, 1421:4  <b>Eddie</b> - 1370:8  <b>edge</b> - 1377:8, 1377:9, 1377:11, 1377:12, 1377:15, 1377:18, 1377:24  <b>edged</b> - 1377:7, 1377:8  <b>edition</b> - 1482:8  <b>editorial</b> - 1440:15  <b>Edmonton</b> - 1381:22  <b>Edmund</b> - 1371:3, 1373:6  <b>Edward</b> - 1368:7  <b>effect</b> - 1473:19, 1489:16  <b>eight</b> - 1443:3, 1443:7, 1473:17, 1474:18  <b>either</b> - 1382:3, 1417:3, 1425:2, 1430:21, 1431:21, 1432:8, 1437:15, 1438:19, 1454:17, 1465:22, 1482:22  <b>ejaculate</b> - 1393:13, 1394:9  <b>electronically</b> - 1426:9  <b>element</b> - 1383:5, 1383:22  <b>Ellerman</b> - 1369:9  <b>elsewhere</b> - 1487:18  <b>Elson</b> - 1370:7, 1371:5, 1427:3, 1427:4, 1427:5, 1434:1, 1434:10, 1437:25, 1440:25, 1447:17, 1447:18, 1447:20, 1448:22, 1451:1, 1488:9  <b>Email</b> - 1458:4  <b>embalmed</b> - 1392:18, 1392:19  <b>embalming</b> - 1390:16, 1392:19  <b>eminent</b> - 1483:3  <b>emphasize</b> - 1424:12, 1486:3  <b>empirical</b> - 1430:15  <b>Emson</b> - 1371:3, 1373:6, 1426:16, 1427:6, 1435:25, 1441:1, 1444:8, 1447:21, 1448:3, 1448:22, 1448:25, 1455:21, 1457:7, 1458:17, 1461:12, 1477:11, 1479:5, 1486:6, 1486:25, 1488:8, 1491:11, 1491:24, 1492:2, 1492:13  <b>enclosed</b> - 1396:11  <b>encountered</b> - 1384:4, 1424:4  <b>end</b> - 1378:4, 1387:4, 1387:8, 1419:5, 1419:14, 1420:15, 1453:24, 1463:4  <b>endeavour</b> - 1486:19  <b>endeavoured</b> - 1435:18  <b>endometrium</b> - 1445:11, 1445:18  <b>enforcement</b> - 1422:5  <b>engage</b> - 1466:10, 1469:16  <b>engaged</b> - 1429:8  <b>England</b> - 1436:5, 1472:5, 1472:7, 1477:17, 1480:5  <b>enhanced</b> - 1375:11, 1401:20  <b>enlarge</b> - 1451:10  <b>enlarged</b> - 1401:20, 1449:21  <b>ensure</b> - 1478:13  <b>enter</b> - 1482:15  <b>entered</b> - 1393:13,</p>	<p>1472:3  <b>enterprise</b> - 1482:17  <b>entire</b> - 1384:25, 1448:10  <b>entirely</b> - 1444:14, 1445:4  <b>entirety</b> - 1479:6, 1479:8  <b>epileptics</b> - 1413:9  <b>equally</b> - 1437:8, 1481:14  <b>equipment</b> - 1397:16, 1397:17, 1431:15  <b>equipped</b> - 1431:14  <b>equivalent</b> - 1420:17  <b>erosion</b> - 1388:13  <b>Esq</b> - 1369:3, 1369:4, 1369:5, 1370:6, 1370:7, 1370:8, 1370:9, 1370:11  <b>essence</b> - 1461:22, 1475:9  <b>essential</b> - 1447:24, 1448:12  <b>establish</b> - 1423:20, 1467:19, 1468:12  <b>established</b> - 1424:18, 1446:8, 1449:24  <b>establishment</b> - 1422:9  <b>estimate</b> - 1380:3, 1380:4, 1391:17  <b>estimating</b> - 1418:9  <b>Et</b> - 1404:20  <b>Eugene</b> - 1484:3  <b>event</b> - 1431:20, 1441:3  <b>events</b> - 1459:23, 1464:7, 1486:4, 1489:25  <b>Evidence</b> - 1372:7, 1477:23, 1478:1, 1491:8  <b>evidence</b> - 1374:2, 1376:19, 1381:10, 1393:15, 1399:16, 1405:24, 1417:14, 1419:15, 1419:21, 1421:5, 1421:8, 1422:12, 1424:21, 1426:5, 1427:14, 1427:16, 1427:22, 1427:24, 1428:3, 1428:11, 1428:13, 1430:20, 1435:10, 1437:3, 1439:8, 1439:12, 1440:13, 1443:4, 1444:5, 1444:15, 1444:25, 1445:5, 1447:1, 1448:18, 1450:19, 1450:24, 1454:18, 1460:6, 1461:23, 1462:14, 1464:18, 1464:20, 1465:3, 1465:4, 1469:18, 1470:10, 1471:17, 1471:22, 1472:12, 1473:15, 1473:25, 1475:15, 1476:1, 1477:7, 1477:16, 1479:14, 1479:16, 1480:4, 1480:15, 1484:8, 1486:23, 1488:21, 1489:17, 1489:21, 1489:23, 1490:15, 1492:14, 1492:20  <b>evolving</b> - 1393:20  <b>exactly</b> - 1398:11  <b>Exactly</b> - 1375:5, 1459:25  <b>examination</b> - 1382:4, 1382:9, 1384:23, 1385:5, 1385:8, 1406:18, 1406:25, 1408:17, 1417:15, 1430:5, 1435:1, 1435:3, 1439:17, 1439:18, 1439:25, 1440:2, 1440:5, 1440:6, 1440:15, 1441:2, 1443:2, 1445:18, 1455:12  <b>examination-in-chief</b> - 1440:6  <b>examinations</b> - 1408:21  <b>examine</b> - 1384:25</p>
<b>E</b>				



<p><b>examined</b> - 1385:10, 1407:11, 1433:9, 1439:4, 1443:5, 1443:11, 1450:16, 1456:3, 1462:2, 1470:14, 1489:25  <b>Examiner</b> - 1381:21, 1469:23, 1483:4  <b>examiner's</b> - 1402:1, 1403:9  <b>Examiners</b> - 1422:25  <b>examining</b> - 1440:11  <b>example</b> - 1375:20, 1396:16, 1416:13, 1427:18  <b>exceedingly</b> - 1391:9, 1472:6  <b>except</b> - 1470:24  <b>exception</b> - 1378:14, 1424:24, 1426:5, 1461:25, 1486:11  <b>exchange</b> - 1464:23, 1469:21  <b>excluded</b> - 1464:19  <b>Excuse</b> - 1433:25  <b>excused</b> - 1492:13  <b>Executive</b> - 1369:6  <b>exercise</b> - 1466:10  <b>exhaustively</b> - 1450:16  <b>Exhibit</b> - 1372:3, 1372:6, 1402:16, 1425:19, 1425:24, 1425:25, 1426:20, 1490:25, 1491:7  <b>exhibit</b> - 1382:17, 1402:24, 1412:7, 1424:21, 1426:8, 1426:17, 1490:24, 1491:3  <b>exhibits</b> - 1404:12, 1407:10, 1414:21, 1414:23, 1424:19, 1425:3, 1425:7, 1425:9, 1425:12, 1425:16, 1426:3, 1462:4  <b>Exhibits</b> - 1372:1  <b>existed</b> - 1430:13  <b>expect</b> - 1374:25, 1379:9, 1388:19, 1389:1, 1389:10, 1394:12, 1460:19  <b>expecting</b> - 1383:1, 1388:24  <b>expedition</b> - 1424:3  <b>experience</b> - 1389:15, 1415:21, 1420:1, 1420:8, 1420:9, 1431:3, 1439:2, 1439:25, 1456:21  <b>experienced</b> - 1389:18, 1470:8, 1474:10  <b>expert</b> - 1384:1, 1417:2, 1450:17, 1452:16, 1452:17, 1454:5, 1469:2, 1470:16, 1483:12, 1486:14, 1488:22  <b>expertise</b> - 1399:25, 1420:17, 1421:10, 1421:21, 1421:25, 1428:5, 1437:14, 1440:19, 1452:18  <b>experts</b> - 1390:21, 1391:13, 1391:18, 1417:18, 1422:14, 1422:23, 1423:5, 1440:22, 1472:15  <b>explain</b> - 1446:11, 1446:14, 1459:9  <b>explained</b> - 1375:24  <b>explanation</b> - 1452:12  <b>exponentially</b> - 1437:6  <b>exposure</b> - 1380:19  <b>express</b> - 1446:19, 1447:5  <b>expressed</b> - 1416:20,</p>	<p>1426:6, 1428:8, 1444:6, 1445:7, 1445:8, 1489:3  <b>expresses</b> - 1444:16  <b>expression</b> - 1452:18, 1454:16  <b>extended</b> - 1399:24  <b>extensive</b> - 1374:17  <b>extreme</b> - 1391:7  <b>eye</b> - 1421:9  <b>eyewitness</b> - 1378:1</p>	<p>1468:8, 1468:15, 1468:19, 1468:22  <b>Ferris</b>- 1445:16  <b>few</b> - 1380:22, 1383:18, 1409:8, 1413:12, 1431:3, 1449:2, 1449:5, 1460:19, 1479:8  <b>fibres</b> - 1381:16  <b>fiction</b> - 1481:8, 1481:11, 1481:12, 1481:14, 1481:15, 1481:16  <b>field</b> - 1428:5, 1440:19, 1441:10, 1481:13  <b>figure</b> - 1483:10  <b>file</b> - 1468:9, 1477:9, 1478:12  <b>filed</b> - 1471:8  <b>files</b> - 1485:1  <b>final</b> - 1458:3, 1485:3, 1486:25  <b>Finally</b>- 1415:6  <b>finally</b> - 1452:4, 1452:5, 1471:3, 1472:1  <b>findings</b> - 1381:3, 1383:19, 1414:4, 1414:11, 1424:9, 1441:13, 1441:14, 1441:21  <b>fine</b> - 1415:13, 1436:19  <b>finger</b> - 1386:9, 1386:13, 1386:16, 1386:19  <b>ingernail</b> - 1432:25  <b>fingers</b> - 1386:14  <b>finished</b> - 1408:6, 1412:11  <b>first</b> - 1374:1, 1380:22, 1420:5, 1425:22, 1436:21, 1452:20, 1456:20, 1466:19, 1470:22, 1477:16, 1479:10, 1479:16, 1480:5, 1480:12  <b>First</b>- 1385:13  <b>Firstly</b>- 1441:19  <b>Fisher</b>- 1370:11, 1373:9, 1378:21, 1378:22, 1385:7, 1390:1, 1400:5, 1401:12, 1425:9, 1448:4, 1448:7, 1448:10, 1448:15, 1448:17, 1453:1, 1453:4, 1453:12, 1467:8, 1469:8, 1469:15  <b>Fisher's</b>- 1390:4, 1391:21, 1401:18, 1402:15, 1405:24, 1410:5  <b>Fitzpatrick</b>- 1369:16  <b>five</b> - 1478:9, 1478:18  <b>Five</b>- 1473:3  <b>flashlight</b> - 1375:21  <b>flee</b> - 1459:7  <b>flew</b> - 1472:7  <b>floor</b> - 1402:1, 1407:21, 1412:17, 1412:18, 1429:14  <b>fluid</b> - 1393:10, 1394:13, 1394:18, 1415:2, 1427:18, 1433:20, 1434:2, 1434:5, 1434:7, 1453:9, 1453:21, 1454:20, 1489:7  <b>fluids</b> - 1428:16, 1453:10, 1488:13, 1488:24, 1489:1  <b>following</b> - 1390:12, 1391:3, 1400:19, 1474:24, 1484:20  <b>follows</b> - 1451:24  <b>footnote</b> - 1485:23  <b>force</b> - 1389:21, 1422:11  <b>forced</b> - 1389:3  <b>forceful</b> - 1417:1  <b>forcefully</b> - 1418:22</p>	<p><b>forces</b> - 1422:2  <b>foregoing</b> - 1494:4  <b>foreign</b> - 1433:13  <b>forensic</b> - 1382:9, 1409:1, 1409:13, 1417:13, 1422:20, 1424:13, 1430:19, 1436:4, 1436:9, 1436:10, 1436:22, 1438:10, 1441:10, 1441:11, 1441:15, 1442:10, 1447:5, 1470:9, 1472:22, 1476:18, 1481:13, 1483:24  <b>Forensic</b>- 1478:1  <b>forgive</b> - 1441:8  <b>form</b> - 1471:18, 1471:19  <b>formal</b> - 1404:3, 1467:6, 1467:8  <b>formalized</b> - 1404:24, 1404:25  <b>formally</b> - 1424:22, 1426:4  <b>former</b> - 1483:3  <b>forward</b> - 1475:3  <b>forwarded</b> - 1456:8, 1457:16  <b>Four</b>- 1491:5, 1491:6  <b>four</b> - 1472:14  <b>fragmented</b> - 1490:22  <b>frame</b> - 1393:23  <b>Fraser</b>- 1485:10  <b>free</b> - 1383:1  <b>friend</b> - 1444:6  <b>Friend</b>- 1429:13  <b>friendship</b> - 1465:15  <b>frozen</b> - 1415:5, 1456:2  <b>frustrated</b> - 1475:2  <b>fulfilled</b> - 1432:14  <b>full</b> - 1397:23, 1445:15, 1477:21, 1478:5  <b>future</b> - 1455:16</p>	<p><b>glove</b> - 1432:4  <b>gloved</b> - 1431:24, 1432:1, 1432:17  <b>gloves</b> - 1431:16, 1431:17, 1432:7, 1432:9  <b>Government</b>- 1370:4, 1487:9  <b>gradual</b> - 1430:14, 1480:14  <b>Graham</b> - 1381:20  <b>grateful</b> - 1478:7  <b>gratuitous</b> - 1382:23  <b>Gratuitous</b> - 1382:25  <b>great</b> - 1381:23, 1403:4, 1414:8, 1473:13, 1487:7  <b>greater</b> - 1409:7  <b>greatly</b> - 1476:14  <b>green</b> - 1431:12  <b>grounds</b> - 1430:15  <b>group</b> - 1427:20, 1428:1, 1428:7, 1428:14, 1453:8, 1468:16, 1469:25, 1470:3, 1472:10  <b>grouping</b> - 1428:7, 1446:2  <b>guess</b> - 1422:1, 1424:5, 1456:17, 1457:9, 1457:14, 1457:20, 1458:12, 1458:25, 1459:15, 1462:16, 1480:23  <b>guidance</b> - 1440:8  <b>gurney</b> - 1402:10</p>
<b>F</b>		<b>G</b>		
<p><b>face</b> - 1422:2, 1422:4  <b>faced</b> - 1420:10, 1420:11  <b>facing</b> - 1376:25  <b>fact</b> - 1375:24, 1403:11, 1418:2, 1418:13, 1418:14, 1425:7, 1425:11, 1427:11, 1428:22, 1439:17, 1440:5, 1442:4, 1443:16, 1445:17, 1446:16, 1447:13, 1447:22, 1452:8, 1454:15, 1455:9, 1459:14, 1459:15, 1459:18, 1459:20, 1460:10, 1472:3, 1474:6, 1474:19, 1474:25, 1475:12, 1477:14, 1479:15  <b>factored</b> - 1420:21  <b>factors</b> - 1376:10, 1420:3  <b>facts</b> - 1377:2, 1432:11, 1442:1, 1442:21, 1465:9, 1470:6  <b>Fainstein</b>- 1458:5, 1458:18, 1459:3  <b>Fainstein's</b>- 1458:14  <b>Fair</b>- 1374:16, 1378:3, 1380:18, 1382:11, 1392:7, 1394:3, 1397:23, 1398:1, 1398:17, 1400:1, 1400:4, 1401:9, 1402:6, 1403:2, 1405:2, 1408:24  <b>fair</b> - 1373:18, 1374:10, 1374:19, 1375:1, 1375:7, 1375:18, 1376:1, 1377:14, 1377:25, 1378:23, 1379:4, 1379:7, 1379:22, 1380:10, 1389:4, 1393:21, 1394:14, 1398:25, 1409:20, 1416:4, 1416:11, 1450:22  <b>fairly</b> - 1419:6, 1421:2, 1463:18, 1477:8  <b>fairness</b> - 1389:1, 1429:14, 1444:18, 1478:18, 1481:25  <b>fall</b> - 1443:23  <b>falling</b> - 1383:2  <b>false</b> - 1419:21, 1419:25  <b>familiar</b> - 1386:11, 1437:4, 1441:19, 1442:8, 1476:23, 1480:18, 1485:8, 1485:11  <b>far</b> - 1382:10, 1418:24  <b>fashion</b> - 1401:1  <b>fault</b> - 1385:20  <b>faulted</b> - 1422:3  <b>favour</b> - 1418:19  <b>faxed</b> - 1477:3  <b>February</b>- 1455:23, 1492:21, 1492:24  <b>Federal</b>- 1484:11, 1484:20  <b>federal</b> - 1486:16  <b>fell</b> - 1383:24  <b>felt</b> - 1455:6, 1469:3  <b>female</b> - 1393:14  <b>Ferris</b>- 1444:4, 1444:16, 1445:7, 1445:10, 1445:21,</p>	<p><b>hair</b> - 1433:8, 1433:12, 1433:15  <b>half's</b> - 1414:10  <b>Halifax</b> - 1456:23  <b>hand</b> - 1400:23, 1400:25, 1410:25, 1431:24, 1432:1  <b>handed</b> - 1376:6, 1378:5, 1378:6, 1378:9, 1382:15, 1400:9, 1400:10, 1400:19, 1401:13, 1401:16, 1431:21, 1431:23  <b>handedness</b> - 1376:14  <b>handing</b> - 1432:4  <b>handle</b> - 1395:9, 1398:7, 1425:10, 1490:24, 1490:25, 1491:10  <b>handled</b> - 1396:9, 1474:14, 1476:16  <b>hands</b> - 1461:17, 1490:10  <b>handy</b> - 1405:1  <b>hard</b> - 1402:14, 1423:10, 1439:2  <b>hardware</b> - 1398:20  <b>Hardy</b> - 1369:3  <b>Harry</b> - 1371:3, 1373:6  <b>hatred</b> - 1383:8, 1384:3  <b>heads</b> - 1391:1  <b>hear</b> - 1457:9  <b>heard</b> - 1386:9, 1444:5, 1464:20  <b>hearing</b> - 1429:1, 1467:4, 1473:6, 1474:1, 1474:5  <b>held</b> - 1376:11, 1377:23  <b>helical</b> - 1476:9  <b>helix</b> - 1435:9  <b>help</b> - 1380:9, 1380:24, 1396:23, 1413:16, 1414:8, 1420:25, 1457:17  <b>helpful</b> - 1413:11  <b>helps</b> - 1390:16  <b>hereafter</b> - 1480:13  <b>hereby</b> - 1494:4</p>	<b>H</b>		
<p><b>examined</b> - 1385:10, 1407:11, 1433:9, 1439:4, 1443:5, 1443:11, 1450:16, 1456:3, 1462:2, 1470:14, 1489:25  <b>Examiner</b> - 1381:21, 1469:23, 1483:4  <b>examiner's</b> - 1402:1, 1403:9  <b>Examiners</b> - 1422:25  <b>examining</b> - 1440:11  <b>example</b> - 1375:20, 1396:16, 1416:13, 1427:18  <b>exceedingly</b> - 1391:9, 1472:6  <b>except</b> - 1470:24  <b>exception</b> - 1378:14, 1424:24, 1426:5, 1461:25, 1486:11  <b>exchange</b> - 1464:23, 1469:21  <b>excluded</b> - 1464:19  <b>Excuse</b> - 1433:25  <b>excused</b> - 1492:13  <b>Executive</b> - 1369:6  <b>exercise</b> - 1466:10  <b>exhaustively</b> - 1450:16  <b>Exhibit</b> - 1372:3, 1372:6, 1402:16, 1425:19, 1425:24, 1425:25, 1426:20, 1490:25, 1491:7  <b>exhibit</b> - 1382:17, 1402:24, 1412:7, 1424:21, 1426:8, 1426:17, 1490:24, 1491:3  <b>exhibits</b> - 1404:12, 1407:10, 1414:21, 1414:23, 1424:19, 1425:3, 1425:7, 1425:9, 1425:12, 1425:16, 1426:3, 1462:4  <b>Exhibits</b> - 1372:1  <b>existed</b> - 1430:13  <b>expect</b> - 1374:25, 1379:9, 1388:19, 1389:1, 1389:10, 1394:12, 1460:19  <b>expecting</b> - 1383:1, 1388:24  <b>expedition</b> - 1424:3  <b>experience</b> - 1389:15, 1415:21, 1420:1, 1420:8, 1420:9, 1431:3, 1439:2, 1439:25, 1456:21  <b>experienced</b> - 1389:18, 1470:8, 1474:10  <b>expert</b> - 1384:1, 1417:2, 1450:17, 1452:16, 1452:17, 1454:5, 1469:2, 1470:16, 1483:12, 1486:14, 1488:22  <b>expertise</b> - 1399:25, 1420:17, 1421:10, 1421:21, 1421:25, 1428:5, 1437:14, 1440:19, 1452:18  <b>experts</b> - 1390:21, 1391:13, 1391:18, 1417:18, 1422:14, 1422:23, 1423:5, 1440:22, 1472:15  <b>explain</b> - 1446:11, 1446:14, 1459:9  <b>explained</b> - 1375:24  <b>explanation</b> - 1452:12  <b>exponentially</b> - 1437:6  <b>exposure</b> - 1380:19  <b>express</b> - 1446:19, 1447:5  <b>expressed</b> - 1416:20,</p>	<p>1426:6, 1428:8, 1444:6, 1445:7, 1445:8, 1489:3  <b>expresses</b> - 1444:16  <b>expression</b> - 1452:18, 1454:16  <b>extended</b> - 1399:24  <b>extensive</b> - 1374:17  <b>extreme</b> - 1391:7  <b>eye</b> - 1421:9  <b>eyewitness</b> - 1378:1</p>	<p>1468:8, 1468:15, 1468:19, 1468:22  <b>Ferris</b>- 1445:16  <b>few</b> - 1380:22, 1383:18, 1409:8, 1413:12, 1431:3, 1449:2, 1449:5, 1460:19, 1479:8  <b>fibres</b> - 1381:16  <b>fiction</b> - 1481:8, 1481:11, 1481:12, 1481:14, 1481:15, 1481:16  <b>field</b> - 1428:5, 1440:19, 1441:10, 1481:13  <b>figure</b> - 1483:10  <b>file</b> - 1468:9, 1477:9, 1478:12  <b>filed</b> - 1471:8  <b>files</b> - 1485:1  <b>final</b> - 1458:3, 1485:3, 1486:25  <b>Finally</b>- 1415:6  <b>finally</b> - 1452:4, 1452:5, 1471:3, 1472:1  <b>findings</b> - 1381:3, 1383:19, 1414:4, 1414:11, 1424:9, 1441:13, 1441:14, 1441:21  <b>fine</b> - 1415:13, 1436:19  <b>finger</b> - 1386:9, 1386:13, 1386:16, 1386:19  <b>ingernail</b> - 1432:25  <b>fingers</b> - 1386:14  <b>finished</b> - 1408:6, 1412:11  <b>first</b> - 1374:1, 1380:22, 1420:5, 1425:22, 1436:21, 1452:20, 1456:20, 1466:19, 1470:22, 1477:16, 1479:10, 1479:16, 1480:5, 1480:12  <b>First</b>- 1385:13  <b>Firstly</b>- 1441:19  <b>Fisher</b>- 1370:11, 1373:9, 1378:21, 1378:22, 1385:7, 1390:1, 1400:5, 1401:12, 1425:9, 1448:4, 1448:7, 1448:10, 1448:15, 1448:17, 1453:1, 1453:4, 1453:12, 1467:8, 1469:8, 1469:15  <b>Fisher's</b>- 1390:4, 1391:21, 1401:18, 1402:15, 1405:24, 1410:5  <b>Fitzpatrick</b>- 1369:16  <b>five</b> - 1478:9, 1478:18  <b>Five</b>- 1473:3  <b>flashlight</b> - 1375:21  <b>flee</b> - 1459:7  <b>flew</b> - 1472:7  <b>floor</b> - 1402:1, 1407:21, 1412:17, 1412:18, 1429:14  <b>fluid</b> - 1393:10, 1394:13, 1394:18, 1415:2, 1427:18, 1433:20, 1434:2, 1434:5, 1434:7, 1453:9, 1453:21, 1454:20, 1489:7  <b>fluids</b> - 1428:16, 1453:10, 1488:13, 1488:24, 1489:1  <b>following</b> - 1390:12, 1391:3, 1400:19, 1474:24, 1484:20  <b>follows</b> - 1451:24  <b>footnote</b> - 1485:23  <b>force</b> - 1389:21, 1422:11  <b>forced</b> - 1389:3  <b>forceful</b> - 1417:1  <b>forcefully</b> - 1418:22</p>	<p><b>forces</b> - 1422:2  <b>foregoing</b> - 1494:4  <b>foreign</b> - 1433:13  <b>forensic</b> - 1382:9, 1409:1, 1409:13, 1417:13, 1422:20, 1424:13, 1430:19, 1436:4, 1436:9, 1436:10, 1436:22, 1438:10, 1441:10, 1441:11, 1441:15, 1442:10, 1447:5, 1470:9, 1472:22, 1476:18, 1481:13, 1483:24  <b>Forensic</b>- 1478:1  <b>forgive</b> - 1441:8  <b>form</b> - 1471:18, 1471:19  <b>formal</b> - 1404:3, 1467:6, 1467:8  <b>formalized</b> - 1404:24, 1404:25  <b>formally</b> - 1424:22, 1426:4  <b>former</b> - 1483:3  <b>forward</b> - 1475:3  <b>forwarded</b> - 1456:8, 1457:16  <b>Four</b>- 1491:5, 1491:6  <b>four</b> - 1472:14  <b>fragmented</b> - 1490:22  <b>frame</b> - 1393:23  <b>Fraser</b>- 1485:10  <b>free</b> - 1383:1  <b>friend</b> - 1444:6  <b>Friend</b>- 1429:13  <b>friendship</b> - 1465:15  <b>frozen</b> - 1415:5, 1456:2  <b>frustrated</b> - 1475:2  <b>fulfilled</b> - 1432:14  <b>full</b> - 1397:23, 1445:15, 1477:21, 1478:5  <b>future</b> - 1455:16</p>	<p><b>glove</b> - 1432:4  <b>gloved</b> - 1431:24, 1432:1, 1432:17  <b>gloves</b> - 1431:16, 1431:17, 1432:7, 1432:9  <b>Government</b>- 1370:4, 1487:9  <b>gradual</b> - 1430:14, 1480:14  <b>Graham</b> - 1381:20  <b>grateful</b> - 1478:7  <b>gratuitous</b> - 1382:23  <b>Gratuitous</b> - 1382:25  <b>great</b> - 1381:23, 1403:4, 1414:8, 1473:13, 1487:7  <b>greater</b> - 1409:7  <b>greatly</b> - 1476:14  <b>green</b> - 1431:12  <b>grounds</b> - 1430:15  <b>group</b> - 1427:20, 1428:1, 1428:7, 1428:14, 1453:8, 1468:16, 1469:25, 1470:3, 1472:10  <b>grouping</b> - 1428:7, 1446:2  <b>guess</b> - 1422:1, 1424:5, 1456:17, 1457:9, 1457:14, 1457:20, 1458:12, 1458:25, 1459:15, 1462:16, 1480:23  <b>guidance</b> - 1440:8  <b>gurney</b> - 1402:10</p>



<p><b>herein</b> - 1494:6  <b>Hersh</b> - 1370:2  <b>highlight</b> - 1384:13, 1395:10, 1396:20, 1405:22, 1452:22  <b>highlighted</b> - 1459:2  <b>Hinz</b> - 1369:13, 1494:2, 1494:13  <b>history</b> - 1476:25, 1483:9  <b>Hodson</b> - 1369:2, 1371:8, 1405:20, 1425:5, 1425:6, 1425:20, 1426:11, 1426:14, 1434:23, 1444:6, 1449:21, 1477:18, 1488:7, 1491:9, 1491:24, 1492:19, 1493:1, 1493:3  <b>home</b> - 1435:19  <b>homicide</b> - 1383:22, 1407:25, 1409:24, 1411:19, 1429:11, 1429:23, 1429:24, 1430:2, 1431:5, 1431:21, 1438:2, 1443:24, 1448:17, 1461:24, 1473:4  <b>homicides</b> - 1383:4, 1383:16, 1408:10, 1431:1  <b>homosexual</b> - 1383:22  <b>honest</b> - 1418:17, 1418:19, 1419:13  <b>Honourable</b> - 1368:6  <b>hope</b> - 1373:5, 1417:24, 1419:13, 1435:7  <b>Hospital</b> - 1396:21, 1403:13  <b>hospital</b> - 1397:11, 1397:12, 1408:25, 1409:5, 1409:9, 1414:9  <b>hospitals</b> - 1408:14, 1408:16, 1408:22, 1409:17  <b>hotel</b> - 1492:25  <b>Hotel</b> - 1368:17, 1493:1, 1493:2  <b>hour</b> - 1414:9, 1476:22  <b>hours</b> - 1390:18, 1390:23, 1391:13, 1392:13, 1393:1, 1393:3, 1393:5  <b>household</b> - 1398:14  <b>households</b> - 1398:25  <b>houses</b> - 1399:2  <b>human</b> - 1450:1, 1464:14, 1481:9  <b>hypotheses</b> - 1376:2, 1460:6  <b>hypothesis</b> - 1460:1, 1460:3  <b>hypothesize</b> - 1393:17  <b>hypothesized</b> - 1404:16</p>	<p><b>ill</b> - 1472:6  <b>illness</b> - 1472:14  <b>imagined</b> - 1481:1  <b>immediate</b> - 1379:20  <b>immediately</b> - 1379:11  <b>immunohematologist</b> - 1428:19, 1450:19, 1454:22  <b>implied</b> - 1446:16  <b>imply</b> - 1424:2  <b>important</b> - 1417:9  <b>importantly</b> - 1424:10  <b>impossible</b> - 1376:16  <b>impression</b> - 1484:9  <b>Improper</b> - 1416:11, 1416:12  <b>inaccurate</b> - 1417:23  <b>inadequate</b> - 1415:21, 1474:4  <b>inarticulate</b> - 1417:11  <b>incident</b> - 1462:7  <b>incidentally</b> - 1439:15  <b>incision</b> - 1382:4  <b>include</b> - 1429:9, 1431:15  <b>includes</b> - 1416:2, 1430:19  <b>incompetence</b> - 1441:24  <b>incorrect</b> - 1411:8, 1474:1, 1474:3  <b>increased</b> - 1401:6, 1437:6  <b>increasing</b> - 1436:12, 1476:14  <b>indeed</b> - 1432:16, 1467:21, 1468:9, 1469:21, 1486:13  <b>independent</b> - 1422:9, 1422:11, 1422:19, 1423:3, 1423:12, 1423:13, 1424:7, 1486:2  <b>Index</b> - 1371:1, 1372:1  <b>indicate</b> - 1410:19  <b>indicated</b> - 1406:20, 1427:7, 1427:17, 1429:17, 1436:24, 1437:11, 1444:19, 1450:13, 1461:19, 1462:13  <b>indication</b> - 1389:21, 1482:21  <b>indications</b> - 1486:9  <b>indicators</b> - 1388:18, 1388:22, 1389:2  <b>indictable</b> - 1423:11  <b>individual</b> - 1378:9, 1379:2, 1379:5, 1380:8, 1380:22, 1380:23, 1399:17, 1407:3, 1407:7, 1414:13, 1431:9, 1431:10, 1432:10, 1453:6, 1488:14  <b>individually</b> - 1405:3, 1406:22, 1411:9  <b>individuals</b> - 1373:18, 1377:14, 1413:19, 1453:25  <b>indoors</b> - 1448:20  <b>indulgence</b> - 1477:9  <b>inexperienced</b> - 1420:23  <b>inference</b> - 1376:22, 1376:24, 1438:18  <b>inferences</b> - 1376:9, 1376:18, 1412:20  <b>inflammation</b> - 1388:7, 1388:11  <b>inflict</b> - 1383:6  <b>inflicted</b> - 1374:15, 1374:24, 1443:21  <b>infliction</b> - 1376:21  <b>influence</b> - 1487:4  <b>informants</b> - 1419:17,</p>	<p>1419:20  <b>information</b> - 1379:18, 1382:20, 1413:14, 1418:17, 1450:11, 1461:1, 1463:10, 1463:13, 1464:24, 1477:7, 1483:18  <b>informed</b> - 1427:15, 1438:20, 1443:1, 1444:15, 1454:22, 1455:9, 1456:14, 1456:20, 1457:2, 1457:25, 1475:5, 1487:22  <b>initial</b> - 1394:9, 1443:5, 1443:11  <b>injuries</b> - 1376:13, 1377:3, 1377:13, 1378:13, 1378:23, 1379:10, 1379:18, 1379:23, 1381:14, 1384:24, 1387:7, 1395:14, 1395:15, 1395:19, 1414:1, 1442:23, 1443:20  <b>injury</b> - 1374:6, 1374:10, 1374:23, 1375:11, 1375:13, 1376:21, 1377:10, 1380:12, 1380:20, 1381:3, 1381:16, 1386:3, 1386:6, 1386:14, 1389:6, 1389:17, 1473:2, 1473:4  <b>Inland</b> - 1369:16  <b>inner</b> - 1385:17, 1385:18, 1385:22, 1386:1, 1389:21  <b>innocence</b> - 1467:19, 1468:12  <b>innocuous</b> - 1443:17  <b>inquiry</b> - 1405:25, 1440:9, 1456:17, 1464:8, 1465:24, 1466:7, 1475:13, 1475:14, 1487:2  <b>Inquiry</b> - 1368:2, 1368:24, 1425:4, 1482:2  <b>insofar</b> - 1417:25, 1421:25  <b>instance</b> - 1469:22  <b>instances</b> - 1374:25, 1384:7  <b>instant</b> - 1391:4  <b>insufficient</b> - 1451:25  <b>intact</b> - 1398:3, 1398:4, 1398:7, 1398:9, 1490:17, 1490:21, 1491:23  <b>Intact</b> - 1390:17  <b>intend</b> - 1473:13, 1479:7  <b>intercourse</b> - 1389:3, 1389:6, 1389:19, 1390:25, 1391:4, 1394:12  <b>interested</b> - 1381:4, 1400:7, 1402:9, 1402:11, 1404:8, 1404:9, 1410:5  <b>interim</b> - 1469:7  <b>Intermittent</b> - 1463:23, 1463:25  <b>intermittent</b> - 1464:1, 1464:2  <b>internal</b> - 1382:4  <b>internationally</b> - 1480:17  <b>internet</b> - 1477:3  <b>interpret</b> - 1446:6  <b>interpretation</b> - 1376:13, 1414:1, 1414:5, 1418:7, 1418:18, 1424:10, 1441:13, 1441:14, 1442:23, 1470:10, 1473:23, 1474:1, 1482:19, 1482:20  <b>interpretations</b> - 1441:20, 1442:1  <b>interval</b> - 1443:8  <b>intervened</b> - 1446:17, 1446:24</p>	<p><b>interview</b> - 1484:15, 1485:16  <b>intimate</b> - 1463:24  <b>introduce</b> - 1416:24  <b>introduced</b> - 1477:17, 1479:17  <b>introduction</b> - 1476:25, 1480:5, 1480:14  <b>investigated</b> - 1481:5  <b>investigating</b> - 1438:13  <b>investigation</b> - 1373:17, 1413:5, 1422:7, 1436:10, 1436:11, 1464:3, 1481:19, 1484:12  <b>Investigation</b> - 1390:5  <b>investigations</b> - 1409:20, 1415:21  <b>investigators</b> - 1415:25, 1464:12  <b>involved</b> - 1383:16, 1412:13, 1413:19, 1414:3, 1422:1  <b>involves</b> - 1374:1  <b>involving</b> - 1431:2  <b>Irene</b> - 1369:12  <b>Isabelle</b> - 1369:8  <b>isolated</b> - 1486:4  <b>issue</b> - 1400:6, 1475:12, 1488:10  <b>issues</b> - 1443:14  <b>item</b> - 1406:9, 1411:3, 1431:10, 1431:20  <b>items</b> - 1403:19, 1403:25, 1406:13, 1406:22, 1410:17, 1411:10, 1426:4  <b>itinerant</b> - 1422:23  <b>itself</b> - 1416:15, 1420:9, 1475:15, 1477:10</p> <p style="text-align: center;"><b>J</b></p> <p><b>jail</b> - 1473:17, 1474:18, 1474:21  <b>January</b> - 1368:22, 1452:23, 1461:24, 1466:8  <b>Jay</b> - 1370:6  <b>Jerry</b> - 1369:15  <b>jives</b> - 1451:14  <b>John</b> - 1369:4  <b>Jordan</b> - 1369:3  <b>Journal</b> - 1478:3  <b>Joyce</b> - 1370:3  <b>judge</b> - 1417:8, 1471:5, 1471:24  <b>judge's</b> - 1472:14  <b>Judicial</b> - 1425:3  <b>June</b> - 1472:4, 1482:8, 1484:5  <b>junk</b> - 1416:13, 1416:17, 1416:24  <b>jury</b> - 1390:3, 1417:8  <b>Justice</b> - 1368:6, 1475:13, 1475:22, 1484:11, 1484:20  <b>justice</b> - 1415:11, 1415:16, 1417:5, 1422:22, 1486:16  <b>justified</b> - 1474:3</p> <p style="text-align: center;"><b>K</b></p> <p><b>Kara</b> - 1369:8  <b>Karen</b> - 1369:13, 1494:2, 1494:13  <b>Karst</b> - 1370:8  <b>keep</b> - 1461:14, 1487:4  <b>Kennedy</b> - 1471:13, 1472:16, 1472:21, 1474:20, 1474:23, 1475:2,</p>	<p>1475:6, 1475:8  <b>kept</b> - 1458:2, 1485:1, 1486:5  <b>key</b> - 1436:10  <b>kill</b> - 1383:8  <b>killing</b> - 1453:16  <b>Kim</b> - 1485:9  <b>kin</b> - 1409:7  <b>kind</b> - 1454:20  <b>kit</b> - 1404:16, 1404:19, 1430:4, 1430:8, 1430:14, 1430:16, 1430:19, 1432:20, 1433:2, 1434:14, 1434:25  <b>kitchen</b> - 1398:16  <b>kits</b> - 1404:3  <b>Kleiv</b> - 1401:14, 1405:24, 1407:8, 1410:4, 1412:12, 1437:13, 1437:15, 1438:4, 1462:11, 1462:20  <b>Kleiv's</b> - 1412:5  <b>knees</b> - 1386:7  <b>Knife</b> - 1372:7, 1491:8  <b>knife</b> - 1376:11, 1377:4, 1377:6, 1377:8, 1377:23, 1395:8, 1395:11, 1395:17, 1398:1, 1398:4, 1398:5, 1398:7, 1398:8, 1398:14, 1398:21, 1425:10, 1444:11, 1462:4, 1463:14, 1490:14, 1490:16, 1490:17, 1490:19, 1490:21, 1490:22, 1490:24, 1491:1, 1491:10, 1491:13, 1491:16, 1491:19, 1491:20, 1491:21  <b>Knowing</b> - 1386:17  <b>knowledge</b> - 1374:17, 1419:22, 1432:11, 1433:10, 1436:15, 1436:16, 1437:6, 1437:13, 1437:20, 1447:9, 1448:12, 1448:16, 1450:21, 1453:19, 1454:1, 1458:23, 1494:6  <b>knowledgeable</b> - 1438:9, 1438:20, 1439:15  <b>known</b> - 1428:1, 1435:24, 1450:9, 1454:3, 1454:7, 1454:12, 1487:18  <b>knows</b> - 1412:8, 1435:17  <b>Knox</b> - 1370:5, 1371:7, 1460:17, 1460:18, 1460:25, 1461:10, 1461:11, 1461:13, 1478:17, 1479:4, 1488:1, 1492:2  <b>Krogan</b> - 1370:4, 1460:15, 1460:16  <b>Kujawa</b> - 1370:6</p> <p style="text-align: center;"><b>L</b></p> <p><b>lab</b> - 1451:16, 1451:18, 1456:13, 1456:19, 1457:1  <b>Lab</b> - 1396:21, 1457:3  <b>laboratories</b> - 1438:10  <b>laboratory</b> - 1382:10, 1396:19, 1396:25, 1397:16, 1404:4, 1476:16, 1488:23  <b>lacerations</b> - 1387:22, 1388:1  <b>lack</b> - 1420:1, 1420:8  <b>Lack</b> - 1420:8  <b>Lamer</b> - 1475:14, 1475:22  <b>Lana</b> - 1370:4  <b>laneway</b> - 1459:7  <b>large</b> - 1386:23, 1389:16,</p>
---	--	--	---	---



<p>1420:18  <b>Large</b>- 1372:4, 1426:21  <b>Larry</b>- 1370:11, 1448:3, 1448:14, 1448:15, 1453:12  <b>larynx</b> - 1442:24  <b>last</b> - 1403:8, 1403:11, 1420:6, 1421:19, 1422:17, 1426:14, 1435:18, 1441:21, 1456:22, 1458:11, 1458:12  <b>Lastly</b>- 1490:14  <b>late</b> - 1470:25, 1484:13, 1487:7  <b>latter</b> - 1385:15  <b>law</b> - 1376:8, 1424:3, 1471:15, 1475:20, 1476:2  <b>Law</b>- 1478:3  <b>lawyer</b> - 1484:11, 1486:16  <b>lawyers</b> - 1390:2, 1449:1  <b>lay</b> - 1415:20  <b>layer</b> - 1422:18, 1423:20  <b>laying</b> - 1382:3  <b>lays</b> - 1433:2  <b>lead</b> - 1415:22, 1415:25, 1416:8, 1417:21, 1420:3, 1448:2, 1455:20, 1477:6, 1478:16  <b>lead-in</b> - 1448:2  <b>leading</b> - 1421:20  <b>leads</b> - 1437:10  <b>learned</b> - 1446:9  <b>least</b> - 1390:20, 1391:12, 1412:25, 1482:19  <b>leave</b> - 1398:18  <b>led</b> - 1418:14  <b>left</b> - 1374:6, 1376:6, 1377:25, 1378:6, 1378:9  <b>left-handed</b> - 1376:6, 1378:6, 1378:9  <b>legal</b> - 1396:22, 1442:25, 1446:24, 1476:18  <b>Legal</b>- 1390:4  <b>Legere</b>- 1480:20, 1481:4  <b>legs</b> - 1386:15, 1394:23  <b>Leicester</b>- 1436:5  <b>length</b> - 1376:5, 1439:4, 1444:9, 1473:13  <b>lenient</b> - 1440:21  <b>lesions</b> - 1381:13, 1381:18  <b>less</b> - 1432:24, 1482:22  <b>letter</b> - 1449:9  <b>level</b> - 1424:14  <b>liable</b> - 1414:10  <b>Liaison</b>- 1369:6  <b>lid</b> - 1487:5  <b>Lieutenant</b>- 1400:20, 1401:17, 1406:12, 1437:12, 1437:15, 1438:3, 1456:2, 1456:5, 1462:20  <b>life</b> - 1383:4, 1389:25, 1425:1, 1481:6, 1481:10, 1487:15  <b>lifetime</b> - 1439:1  <b>light</b> - 1373:21, 1489:5  <b>likely</b> - 1375:6, 1474:12  <b>limited</b> - 1420:17, 1454:19  <b>limits</b> - 1466:2  <b>line</b> - 1384:14, 1384:21, 1387:17, 1400:7, 1404:12, 1410:5, 1420:15, 1460:8  <b>Line</b>- 1385:9  <b>lines</b> - 1390:10, 1455:1, 1492:3  <b>lining</b> - 1445:11  <b>link</b> - 1480:20  <b>lips</b> - 1386:24</p>	<p><b>list</b> - 1415:16, 1416:8, 1419:6, 1419:7, 1419:24, 1488:3, 1488:23  <b>listed</b> - 1433:5  <b>listened</b> - 1440:14, 1440:16, 1440:19  <b>live</b> - 1430:21  <b>lived</b> - 1444:7  <b>living</b> - 1391:15, 1392:4, 1393:3  <b>location</b> - 1386:3, 1395:23  <b>Lockyer</b>- 1439:3, 1441:6, 1442:6, 1446:15, 1447:11, 1447:21, 1449:14, 1458:5, 1470:14, 1473:16, 1474:17, 1475:14  <b>Lockyer's</b>- 1415:9, 1446:22, 1448:1, 1459:13  <b>long-standing</b> - 1382:2  <b>look</b> - 1377:9, 1402:6, 1402:18, 1405:2, 1444:2, 1451:13, 1461:1, 1478:9, 1478:25  <b>looked</b> - 1387:19, 1395:24, 1396:7, 1403:11, 1462:4, 1490:16, 1491:14, 1491:15  <b>looking</b> - 1384:10, 1386:18, 1403:15, 1470:19, 1476:22, 1480:3, 1480:24, 1491:12  <b>Lord</b>- 1390:11, 1392:8, 1402:21, 1405:8, 1408:9, 1415:7, 1421:20, 1424:17, 1425:17, 1426:1  <b>Lordship</b>- 1392:9, 1422:8, 1434:4, 1437:19, 1439:22, 1440:24, 1492:8, 1492:15  <b>Lordship's</b>- 1379:17  <b>loss</b> - 1393:16, 1445:14  <b>low</b> - 1452:3  <b>lumps</b> - 1463:14  <b>lunch</b> - 1461:15, 1476:22, 1477:3  <b>lung</b> - 1381:15, 1444:8, 1444:10  <b>ly</b> - 1441:25</p>	<p>1415:16, 1422:10, 1423:7, 1423:9, 1423:10, 1423:12, 1437:1, 1474:20  <b>majority</b> - 1409:11, 1413:12, 1413:15, 1424:13  <b>malicious</b> - 1416:7  <b>mammalian</b> - 1456:4  <b>mammalian-type</b> - 1456:4  <b>Manager</b> - 1369:7  <b>mandatory</b> - 1414:15, 1414:18  <b>Manitoba</b> - 1478:3, 1483:4  <b>manner</b> - 1466:10, 1487:10  <b>mark</b> - 1426:8  <b>marked</b> - 1397:1, 1397:24, 1402:15, 1425:3, 1425:13, 1490:23, 1490:25, 1491:3  <b>Markesteyn</b> - 1439:11, 1449:12, 1449:13, 1449:16, 1468:10, 1468:14, 1468:17, 1468:22, 1482:22, 1482:25, 1483:12  <b>Markesteyn's</b> - 1482:13  <b>marking</b> - 1424:18, 1425:15, 1426:3  <b>marks</b> - 1381:5, 1382:22, 1383:3  <b>maroon</b> - 1395:9  <b>material</b> - 1414:24, 1433:9, 1438:16, 1442:3  <b>materials</b> - 1461:16  <b>matter</b> - 1388:24, 1407:13, 1408:18, 1409:18, 1411:6, 1411:9, 1414:5, 1418:2, 1418:3, 1418:7, 1425:9, 1434:18, 1434:19, 1444:21, 1446:9, 1459:14, 1459:15, 1459:18, 1459:20, 1459:23, 1460:9, 1460:10, 1462:21, 1471:9, 1482:22, 1487:6, 1492:23  <b>mattered</b> - 1448:19  <b>matters</b> - 1415:7, 1437:1, 1437:4, 1446:1  <b>mature</b> - 1389:7, 1389:17  <b>maximum</b> - 1430:1  <b>mean</b> - 1374:11, 1374:20, 1377:19, 1418:18, 1434:2, 1441:15, 1446:12, 1451:21, 1453:23, 1459:25, 1462:25, 1483:21, 1488:17  <b>means</b> - 1383:11, 1446:11  <b>measure</b> - 1396:14, 1396:15, 1396:16, 1396:18, 1396:25, 1397:3, 1397:4, 1397:5, 1416:23  <b>measured</b> - 1396:10  <b>measurement</b> - 1397:21  <b>measuring</b> - 1416:21  <b>mechanics</b> - 1462:7, 1473:2, 1473:4  <b>media</b> - 1466:24, 1482:16, 1483:8, 1486:20, 1486:24  <b>medical</b> - 1403:9, 1417:16  <b>Medical</b> - 1381:21, 1390:4, 1396:21, 1396:22, 1422:24, 1469:23, 1483:4</p>	<p><b>medium</b> - 1391:8  <b>melted</b> - 1462:2  <b>members</b> - 1457:11, 1457:25, 1468:16, 1469:25, 1470:3  <b>memo</b> - 1458:14, 1458:21, 1484:3  <b>memorandum</b> - 1451:10, 1459:19, 1459:21  <b>memory</b> - 1374:3, 1382:6, 1395:16, 1395:21, 1395:25, 1396:8, 1396:12, 1396:13, 1398:11, 1413:10, 1416:14, 1416:18, 1417:19, 1456:1, 1472:4, 1486:2, 1489:23  <b>men</b> - 1453:15  <b>menstrual</b> - 1445:9, 1445:23  <b>menstruation</b> - 1445:12, 1445:15  <b>mention</b> - 1454:10  <b>mentioned</b> - 1456:11  <b>mercy</b> - 1484:13  <b>merits</b> - 1469:18  <b>Meyer</b> - 1369:14, 1494:2, 1494:18  <b>microscopic</b> - 1445:17  <b>mid-'80s</b> - 1480:6  <b>middle</b> - 1400:24  <b>might</b> - 1373:10, 1375:24, 1376:9, 1379:2, 1380:6, 1380:15, 1380:16, 1381:9, 1382:20, 1388:19, 1389:1, 1389:10, 1390:22, 1393:16, 1393:25, 1394:12, 1398:24, 1399:2, 1399:19, 1402:18, 1413:6, 1413:11, 1415:11, 1415:14, 1417:18, 1419:4, 1424:11, 1425:11, 1438:7, 1444:22, 1445:6, 1446:24, 1449:20, 1451:23, 1455:9, 1460:20, 1462:21, 1463:1, 1463:3, 1465:10, 1465:12, 1468:13, 1469:8, 1478:7, 1478:19, 1484:17, 1485:16, 1487:19, 1487:22, 1488:24  <b>Might</b> - 1426:7  <b>Milgaard</b> - 1368:4, 1370:2, 1370:3, 1427:9, 1428:21, 1439:8, 1448:2, 1450:5, 1450:9, 1450:14, 1451:17, 1451:21, 1452:24, 1453:3, 1453:14, 1467:7, 1467:17, 1468:11, 1468:24, 1469:2, 1481:25, 1484:13, 1487:14, 1492:3  <b>Milgaard's</b> - 1427:12, 1450:4, 1451:19, 1469:5  <b>Miller</b> - 1385:4, 1385:8, 1394:19, 1405:3, 1444:7, 1444:10, 1453:16, 1455:1, 1480:25, 1481:20, 1482:14  <b>Miller's</b> - 1400:15, 1403:20, 1430:9, 1430:12, 1434:12  <b>mine</b> - 1447:13, 1447:23  <b>minimum</b> - 1430:1  <b>minus</b> - 1380:13, 1447:9  <b>minute</b> - 1391:23, 1408:4, 1476:15, 1482:6  <b>minutes</b> - 1380:1, 1380:5, 1380:20, 1380:21, 1380:22, 1426:24, 1460:20, 1478:9, 1478:19, 1478:25  <b>Miramichi</b> - 1480:18</p>	<p><b>miscarriages</b> - 1415:16, 1422:22  <b>misinterpreted</b> - 1443:21, 1443:24  <b>missing</b> - 1423:16, 1423:17  <b>mistaken</b> - 1419:25, 1485:21  <b>mistrial</b> - 1472:13  <b>misunderstand</b> - 1486:6  <b>model</b> - 1421:24, 1423:2  <b>modify</b> - 1388:3, 1436:7  <b>moist</b> - 1434:6  <b>moment</b> - 1441:9, 1445:20, 1445:21, 1470:13, 1472:23, 1473:15  <b>Monday</b> - 1429:12, 1431:11  <b>morning</b> - 1373:22, 1375:12, 1380:13, 1419:3, 1425:8, 1429:17, 1440:17, 1447:9, 1461:2, 1462:5, 1470:5, 1470:15, 1477:15  <b>mortician</b> - 1399:13, 1399:19, 1400:3, 1407:14  <b>mortuary</b> - 1403:12  <b>most</b> - 1380:20, 1390:2, 1397:15, 1409:19, 1413:7, 1416:5, 1416:19, 1422:4, 1424:10, 1442:14, 1442:18, 1447:10  <b>motility</b> - 1433:23, 1434:11, 1490:2  <b>moved</b> - 1475:3  <b>moves</b> - 1412:24  <b>murder</b> - 1463:17, 1480:16  <b>murders</b> - 1480:18, 1480:21, 1481:4  <b>must</b> - 1490:3</p>
<b>M</b>				
	<p><b>Maccallum</b> - 1368:7, 1371:9, 1373:3, 1391:23, 1392:2, 1402:19, 1402:22, 1405:10, 1405:14, 1405:17, 1408:4, 1421:13, 1421:17, 1421:22, 1424:16, 1424:20, 1425:5, 1425:18, 1425:24, 1426:2, 1426:13, 1426:19, 1426:24, 1427:3, 1433:25, 1434:22, 1437:17, 1437:20, 1439:23, 1440:7, 1447:14, 1447:18, 1449:15, 1458:8, 1458:13, 1460:14, 1460:17, 1460:22, 1461:5, 1461:9, 1478:21, 1479:1, 1488:2, 1488:5, 1491:5, 1492:1, 1492:11, 1492:17, 1492:23, 1493:2, 1493:4  <b>machinery</b> - 1421:2  <b>Macmillan</b> - 1451:11  <b>Madam</b> - 1425:18, 1426:7  <b>magnitude</b> - 1379:2  <b>maintained</b> - 1433:15, 1433:17  <b>major</b> - 1380:20,</p>			
<b>N</b>				
			<p><b>name</b> - 1373:8, 1449:3, 1449:19, 1461:12, 1472:19  <b>names</b> - 1443:19  <b>narrow</b> - 1377:16  <b>national</b> - 1422:24, 1430:16  <b>nationally</b> - 1480:17  <b>natural</b> - 1379:4, 1379:12  <b>nature</b> - 1373:24, 1375:13, 1425:10, 1457:4, 1457:6, 1462:8, 1462:14  <b>near</b> - 1455:25, 1457:23  <b>neat</b> - 1395:11  <b>necessarily</b> - 1438:8, 1441:17, 1441:23, 1456:12, 1472:10, 1488:17  <b>necessary</b> - 1437:7, 1447:4, 1478:24  <b>neck</b> - 1378:15, 1382:22, 1388:11, 1414:1, 1442:23  <b>need</b> - 1378:21, 1417:12, 1428:18, 1461:18, 1463:5, 1485:21  <b>needed</b> - 1431:13  <b>needs</b> - 1405:17  <b>Neil</b> - 1485:8  <b>neutral</b> - 1440:12  <b>never</b> - 1376:15, 1381:2, 1381:6, 1398:4, 1398:6, 1414:20, 1427:15, 1428:24, 1428:25, 1454:9, 1454:21, 1458:20, 1475:4, 1481:1, 1487:15, 1490:21</p>	



<p><b>new</b> - 1469:10, 1471:22, 1475:7  <b>New</b> - 1480:19, 1481:5  <b>Newfoundland</b> - 1470:17, 1471:8, 1471:14, 1471:17, 1471:20, 1472:7, 1483:11  <b>news</b> - 1448:25, 1449:2  <b>Next</b> - 1378:13  <b>next</b> - 1384:10, 1393:18, 1400:8, 1401:12, 1409:7, 1410:6, 1415:12, 1433:22, 1437:10, 1452:4, 1463:7, 1471:23, 1492:21  <b>nice</b> - 1457:1  <b>night</b> - 1435:18  <b>Nobody</b> - 1467:23  <b>nobody</b> - 1487:23  <b>non</b> - 1389:8, 1428:4, 1428:9, 1450:6, 1450:10, 1451:18, 1451:21, 1488:18, 1489:10, 1489:11  <b>non-consensual</b> - 1389:8  <b>non-secretor</b> - 1428:4, 1428:9, 1450:6, 1450:10, 1451:18, 1451:21, 1488:18, 1489:10, 1489:11  <b>None</b> - 1437:17, 1437:18  <b>none</b> - 1375:2, 1375:11, 1379:18, 1379:23, 1388:18, 1388:22, 1437:16, 1437:21  <b>normal</b> - 1379:2, 1380:15, 1394:11, 1394:22, 1403:23, 1464:14, 1492:16  <b>Normally</b> - 1463:3  <b>normally</b> - 1397:10  <b>notably</b> - 1446:17  <b>note</b> - 1388:6, 1388:9, 1412:15, 1438:15, 1438:16, 1486:5  <b>notes</b> - 1400:23, 1400:24, 1400:25, 1412:12, 1412:14, 1426:15, 1494:6  <b>nothing</b> - 1388:14, 1416:16, 1443:7, 1443:17, 1446:11, 1456:6  <b>notice</b> - 1377:13  <b>November</b> - 1471:1, 1471:9  <b>nowadays</b> - 1401:6  <b>Nowadays</b> - 1434:22, 1434:24  <b>Number</b> - 1453:5, 1453:11, 1453:13  <b>number</b> - 1376:2, 1376:10, 1377:13, 1394:9, 1394:25, 1395:9, 1396:22, 1396:24, 1399:11, 1401:5, 1402:20, 1405:18, 1405:19, 1416:7, 1416:15, 1426:8, 1426:16, 1430:17, 1453:3, 1454:24, 1455:22, 1458:9, 1460:4, 1460:5, 1460:6, 1475:25, 1480:20, 1482:1, 1489:13, 1489:16  <b>numbers</b> - 1384:19, 1479:20  <b>Numbers</b> - 1372:5, 1426:22  <b>numerical</b> - 1416:21</p>	<p>1375:23, 1395:14, 1395:24, 1397:8, 1397:9, 1398:19  <b>objection</b> - 1424:11  <b>objective</b> - 1422:14  <b>objects</b> - 1397:11  <b>obscure</b> - 1414:11  <b>obscured</b> - 1384:19  <b>observation</b> - 1382:24, 1390:13  <b>observed</b> - 1432:5  <b>obtainable</b> - 1398:22  <b>obtained</b> - 1425:8, 1491:2  <b>obvious</b> - 1386:17, 1409:24, 1429:6, 1440:9, 1480:23  <b>Obviously</b> - 1415:19  <b>obviously</b> - 1385:1, 1385:11, 1403:8, 1406:24, 1411:16, 1417:10, 1429:9, 1434:9  <b>occasion</b> - 1382:7, 1422:21, 1436:21, 1461:25, 1463:9  <b>occasions</b> - 1462:18, 1463:11, 1486:20  <b>occur</b> - 1374:19, 1389:8, 1393:22, 1419:4, 1439:5  <b>occurred</b> - 1379:25, 1383:19, 1391:3, 1404:9, 1443:8, 1443:16, 1444:22, 1446:20, 1447:7, 1447:25, 1448:13, 1448:20  <b>occurrence</b> - 1389:16, 1463:17, 1463:19  <b>occurring</b> - 1441:7  <b>occurs</b> - 1392:11  <b>October</b> - 1478:1  <b>offences</b> - 1423:11  <b>offend</b> - 1435:7  <b>offer</b> - 1486:14  <b>offered</b> - 1470:16, 1483:13  <b>offering</b> - 1487:12  <b>office</b> - 1395:22, 1403:24, 1461:3, 1465:23, 1466:9, 1477:2  <b>officed</b> - 1381:21  <b>Officer</b> - 1369:15, 1406:11, 1437:13, 1437:15, 1438:3, 1462:20  <b>officer</b> - 1411:1, 1411:2, 1430:23, 1431:23, 1431:24, 1432:2, 1432:3  <b>officers</b> - 1429:18, 1429:21, 1431:7, 1432:5, 1432:7, 1432:18, 1437:18, 1437:24, 1462:19, 1463:16, 1464:12  <b>Official</b> - 1369:13, 1494:1, 1494:3, 1494:14, 1494:19  <b>official</b> - 1484:19  <b>often</b> - 1374:18, 1397:16, 1414:4, 1464:6, 1470:10, 1472:10  <b>once</b> - 1382:14, 1393:22, 1423:3  <b>one</b> - 1377:3, 1378:8, 1380:15, 1383:11, 1383:18, 1383:21, 1383:25, 1388:19, 1394:1, 1395:1, 1395:18, 1396:19, 1397:1, 1398:11, 1399:22, 1401:7, 1405:12, 1407:5, 1414:2, 1418:19, 1418:23, 1419:1, 1419:22, 1420:10, 1420:11, 1421:7, 1426:14, 1427:17, 1427:18,</p>	<p>1429:15, 1430:15, 1431:13, 1433:6, 1433:20, 1433:21, 1434:6, 1435:17, 1436:13, 1439:24, 1440:7, 1440:12, 1441:15, 1442:7, 1442:16, 1443:20, 1444:12, 1444:20, 1445:2, 1445:23, 1446:10, 1455:12, 1457:15, 1460:4, 1472:17, 1472:20, 1473:1, 1473:23, 1474:10, 1474:20, 1474:22, 1475:21, 1475:23, 1478:12, 1478:13, 1480:16, 1485:5, 1485:21, 1488:2, 1488:11, 1490:20, 1491:18  <b>One</b> - 1393:16, 1417:11, 1449:19, 1458:3  <b>ongoing</b> - 1456:18, 1463:1, 1470:1  <b>onset</b> - 1445:15  <b>onward</b> - 1410:6  <b>open</b> - 1446:20, 1447:7, 1447:25, 1448:14, 1448:20, 1475:22  <b>opening</b> - 1386:24, 1387:4, 1387:8, 1388:2, 1388:4  <b>operate</b> - 1486:20  <b>operated</b> - 1484:22  <b>operating</b> - 1408:13  <b>operation</b> - 1373:14  <b>operative</b> - 1486:10  <b>opinion</b> - 1381:9, 1382:14, 1390:21, 1395:13, 1414:5, 1414:22, 1416:5, 1418:3, 1439:1, 1439:13, 1439:14, 1442:4, 1444:9, 1444:20, 1446:5, 1446:8, 1447:6, 1455:11, 1459:23, 1460:10, 1466:3, 1469:2, 1469:18, 1469:25, 1470:17, 1471:12, 1473:1, 1473:8, 1474:2, 1483:12, 1486:14, 1487:4  <b>opinions</b> - 1392:24, 1392:25, 1465:1, 1466:12, 1469:21, 1469:22, 1470:4, 1473:5, 1482:13, 1483:24, 1483:25, 1484:1, 1487:12  <b>opportunity</b> - 1479:11  <b>opposed</b> - 1383:8, 1399:13, 1399:19  <b>opposite</b> - 1387:8, 1438:22  <b>option</b> - 1373:13  <b>oral</b> - 1435:3  <b>order</b> - 1376:7, 1409:10, 1447:5, 1447:25, 1448:15  <b>ordered</b> - 1471:22  <b>organization</b> - 1437:5, 1446:23, 1456:21  <b>origin</b> - 1449:24  <b>original</b> - 1401:25, 1402:17, 1439:14, 1473:25, 1474:5, 1474:7, 1474:9, 1474:13, 1474:14, 1475:17, 1476:15  <b>otherwise</b> - 1429:7  <b>Ottawa</b> - 1456:25  <b>ought</b> - 1414:15, 1414:17  <b>outset</b> - 1390:22  <b>outside</b> - 1380:12, 1380:16, 1420:6, 1420:25  <b>overcome</b> - 1422:16  <b>overlap</b> - 1422:8  <b>overly</b> - 1400:7  <b>own</b> - 1421:15</p>	<p style="text-align: center;"><b>P</b></p> <p><b>P-1</b> - 1490:25  <b>P-3</b> - 1372:3, 1426:20  <b>P-4</b> - 1372:6, 1491:7  <b>pad</b> - 1386:9, 1386:13, 1386:16, 1386:19  <b>Page</b> - 1371:2, 1372:2, 1384:12  <b>page</b> - 1384:10, 1390:1, 1390:12, 1391:25, 1399:11, 1402:19, 1405:7, 1405:12, 1410:3, 1410:6, 1452:4, 1452:21, 1458:11, 1458:12, 1477:19, 1477:24, 1479:19, 1479:24, 1480:3, 1480:7, 1480:11, 1480:16, 1484:6, 1484:7, 1485:12, 1485:20, 1485:24  <b>pages</b> - 1477:4, 1479:19, 1479:20, 1480:13, 1494:4  <b>pain</b> - 1378:16, 1378:17, 1378:18, 1379:11, 1379:15, 1380:24, 1383:7  <b>painful</b> - 1378:23  <b>pair</b> - 1394:25  <b>panel</b> - 1422:20, 1422:24  <b>panties</b> - 1394:18, 1394:25  <b>paper</b> - 1476:23, 1477:19, 1477:25, 1478:8, 1479:5, 1479:15, 1485:8  <b>paragraph</b> - 1390:9, 1451:13, 1459:20  <b>Pardon</b> - 1491:22  <b>Parent</b> - 1479:21, 1479:22, 1480:12, 1481:3  <b>paring</b> - 1398:14  <b>Parliament</b> - 1423:10  <b>part</b> - 1375:17, 1383:14, 1397:15, 1397:17, 1417:15, 1426:12, 1430:25, 1431:15, 1432:20, 1450:18, 1452:20, 1484:19  <b>partial</b> - 1398:5  <b>participated</b> - 1443:20  <b>particular</b> - 1381:4, 1409:22, 1409:24, 1411:16, 1430:24, 1439:7, 1452:9, 1453:22, 1462:22  <b>particularly</b> - 1389:18, 1390:3, 1417:5, 1440:22, 1441:3, 1457:4, 1487:8  <b>parties</b> - 1467:18  <b>partly</b> - 1391:1, 1392:16, 1455:11  <b>parts</b> - 1468:25  <b>passage</b> - 1449:22  <b>passed</b> - 1381:17, 1382:7, 1382:8  <b>passing</b> - 1440:2  <b>past</b> - 1483:23  <b>patch</b> - 1449:25  <b>pathological</b> - 1374:17, 1475:15  <b>pathologist</b> - 1408:12, 1413:2, 1424:8, 1430:22, 1431:22, 1432:8, 1441:24, 1442:2, 1442:10, 1442:20, 1443:9, 1467:12, 1467:13, 1472:18, 1474:6, 1483:3  <b>pathologist's</b> - 1399:22, 1406:8, 1410:24, 1423:4, 1424:9  <b>pathologists</b> - 1382:1, 1382:12, 1390:7, 1408:20, 1418:9, 1422:20, 1441:12,</p>	<p>1441:16, 1443:13, 1456:19, 1457:2, 1470:9, 1472:9, 1472:15, 1472:22, 1472:25, 1474:7, 1474:11  <b>pathology</b> - 1408:15, 1417:13, 1417:25, 1418:1, 1424:13, 1439:6, 1440:19, 1441:8, 1441:10, 1441:16, 1441:17, 1442:15, 1443:4, 1446:10, 1447:5, 1473:18, 1473:25, 1474:4, 1474:15, 1474:16, 1474:19, 1475:18, 1476:18, 1481:7, 1481:13  <b>patience</b> - 1424:15  <b>patient</b> - 1427:21, 1430:22, 1430:23  <b>patients</b> - 1429:10  <b>pattern</b> - 1383:15  <b>patterning</b> - 1383:17  <b>Paul's</b> - 1396:3, 1396:20, 1397:8, 1403:12, 1410:1  <b>peculiar</b> - 1413:9  <b>penial</b> - 1389:6, 1389:19  <b>Penkala</b> - 1400:11, 1400:20, 1401:11, 1401:17, 1406:13, 1412:13, 1412:16, 1437:12, 1437:15, 1438:3, 1456:2, 1456:5, 1462:11, 1462:20  <b>Pentella</b> - 1400:11  <b>people</b> - 1376:25, 1415:20, 1416:25, 1420:23, 1430:17, 1437:7, 1438:2, 1445:5, 1447:1, 1456:19, 1473:9  <b>percentage</b> - 1393:24  <b>perfecting</b> - 1475:16  <b>perfection</b> - 1432:13  <b>perfectly</b> - 1478:15  <b>performed</b> - 1434:15, 1437:11  <b>performing</b> - 1429:4, 1429:6, 1429:8  <b>Perhaps</b> - 1478:17  <b>perhaps</b> - 1383:4, 1422:24, 1426:5, 1428:15, 1447:3, 1468:10, 1477:18, 1486:4, 1487:18, 1490:20  <b>period</b> - 1474:21  <b>peripherally</b> - 1468:15  <b>permit</b> - 1409:6  <b>permitted</b> - 1418:25, 1464:17  <b>person</b> - 1390:25, 1392:5, 1399:12, 1427:24, 1428:1, 1428:3, 1428:6, 1432:4, 1438:5, 1438:13, 1443:23, 1452:8, 1452:17, 1466:23, 1488:18, 1489:9  <b>personal</b> - 1419:22, 1456:21, 1485:25  <b>personalities</b> - 1417:1  <b>personally</b> - 1421:10, 1489:21, 1490:11  <b>persons</b> - 1429:10, 1481:24  <b>pertinent</b> - 1454:14  <b>petechiae</b> - 1387:11, 1387:14, 1387:20, 1387:25  <b>phenomenon</b> - 1441:19  <b>Phipps</b> - 1390:4  <b>phone</b> - 1461:1  <b>photo</b> - 1397:23, 1403:11  <b>photograph</b> - 1376:4, 1382:21, 1395:8, 1396:14, 1406:19, 1490:14</p>
<p style="text-align: center;"><b>O</b></p> <p><b>object</b> - 1375:17,</p>				



<p><b>photographic</b> - 1456:24  <b>Photographs</b> - 1372:4, 1426:21  <b>photographs</b> - 1375:11, 1401:19, 1401:22, 1407:18, 1407:20, 1410:16, 1424:25, 1425:7, 1426:12, 1429:16  <b>photos</b> - 1401:25, 1402:5, 1425:25  <b>phrase</b> - 1470:7  <b>physical</b> - 1395:23, 1424:18  <b>physically</b> - 1490:12  <b>physician</b> - 1430:21  <b>pick</b> - 1434:7  <b>picture</b> - 1490:21  <b>piece</b> - 1381:10, 1397:4, 1423:14, 1423:15, 1423:16  <b>pieces</b> - 1460:6  <b>pierced</b> - 1444:10  <b>pile</b> - 1407:21, 1412:17, 1412:18, 1429:14  <b>pin</b> - 1448:1, 1448:15  <b>pipette</b> - 1433:21, 1434:8  <b>Pitchfork</b> - 1477:23, 1480:8  <b>place</b> - 1389:3, 1401:2, 1410:21, 1421:3, 1464:21, 1492:16  <b>placed</b> - 1406:9, 1406:13, 1419:15, 1467:23  <b>places</b> - 1411:2  <b>plastic</b> - 1396:11, 1396:16, 1406:10, 1406:14, 1407:3, 1431:12  <b>play</b> - 1416:4, 1462:15, 1467:11  <b>played</b> - 1373:18, 1416:14, 1467:14  <b>pleased</b> - 1373:9, 1373:11  <b>Pm</b> - 1461:7, 1461:8, 1479:2, 1479:3, 1493:5  <b>point</b> - 1374:24, 1381:19, 1382:19, 1410:11, 1410:13, 1412:11, 1413:22, 1418:22, 1422:18, 1443:12, 1450:3, 1450:5, 1450:25, 1452:14, 1454:14, 1455:14, 1458:3, 1459:1, 1460:20, 1466:18, 1468:8, 1469:13, 1470:12, 1474:15, 1474:16, 1489:4  <b>points</b> - 1479:8  <b>pole</b> - 1438:23  <b>Police</b> - 1370:7, 1455:24  <b>police</b> - 1381:1, 1382:16, 1384:5, 1394:17, 1395:12, 1395:22, 1396:1, 1397:7, 1397:10, 1397:16, 1401:4, 1401:5, 1401:10, 1403:23, 1404:2, 1404:15, 1404:18, 1406:17, 1407:16, 1411:9, 1411:23, 1413:1, 1414:19, 1422:2, 1422:11, 1429:18, 1429:21, 1430:23, 1431:7, 1431:9, 1431:12, 1431:22, 1431:24, 1432:7, 1437:4, 1437:8, 1437:18, 1437:24, 1457:11, 1457:25, 1462:1, 1462:6, 1463:2, 1463:7, 1463:16, 1464:5, 1464:12, 1481:16, 1487:3, 1490:6  <b>policing</b> - 1465:22, 1466:8  <b>pool</b> - 1434:7</p>	<p><b>poor</b> - 1420:12, 1420:13  <b>portion</b> - 1378:21, 1384:13, 1404:11, 1415:17, 1459:2  <b>position</b> - 1377:1, 1394:22, 1440:12  <b>positions</b> - 1376:20  <b>possession</b> - 1382:19  <b>possibilities</b> - 1378:7, 1393:1  <b>possibility</b> - 1378:8, 1378:12, 1422:19, 1469:14, 1481:10  <b>possible</b> - 1422:22, 1423:21, 1433:4, 1438:7, 1445:2, 1445:24, 1460:4, 1462:10, 1476:11, 1476:17  <b>Possibly</b> - 1457:25  <b>possibly</b> - 1383:3, 1383:7, 1421:9, 1463:10, 1464:2, 1471:21  <b>post</b> - 1465:17, 1466:6, 1466:18, 1481:24  <b>post-preliminary</b> - 1466:6  <b>postmortem</b> - 1430:6  <b>postponements</b> - 1471:5  <b>potential</b> - 1376:10, 1378:14  <b>potentially</b> - 1380:2, 1380:10  <b>practicable</b> - 1476:8  <b>practical</b> - 1420:25, 1455:18, 1481:12  <b>practice</b> - 1382:1, 1382:2, 1382:7, 1382:12, 1403:23, 1404:21, 1404:23, 1406:21, 1407:7, 1408:21, 1411:18, 1412:1, 1429:2, 1429:3, 1431:4, 1432:17, 1440:8, 1454:7, 1474:12  <b>practicing</b> - 1441:16, 1441:17  <b>pre</b> - 1465:17  <b>preceded</b> - 1440:5  <b>precise</b> - 1470:24  <b>precisely</b> - 1454:13  <b>preclude</b> - 1390:14  <b>preempted</b> - 1429:7  <b>prefer</b> - 1418:24  <b>preference</b> - 1478:22  <b>preliminary</b> - 1378:22, 1405:25, 1445:14, 1464:8, 1465:24, 1466:6, 1487:2  <b>presence</b> - 1411:14, 1445:9, 1445:22, 1450:1, 1450:12  <b>present</b> - 1389:2, 1390:3, 1406:7, 1426:3, 1440:13, 1446:23, 1468:18  <b>presented</b> - 1429:16, 1443:5, 1444:5, 1477:25  <b>presently</b> - 1431:5  <b>preserve</b> - 1390:16, 1391:5, 1392:20  <b>preserves</b> - 1392:20  <b>press</b> - 1482:23, 1486:12  <b>presumably</b> - 1396:5, 1397:24, 1400:25, 1412:15, 1485:12, 1490:8  <b>Presumably</b> - 1398:24  <b>presume</b> - 1396:1, 1396:2, 1396:9, 1398:23, 1399:1, 1419:23, 1428:8, 1433:2, 1433:18, 1434:15, 1434:17, 1438:14, 1454:10, 1455:4</p>	<p><b>presuming</b> - 1452:16  <b>presumption</b> - 1451:5  <b>presumptively</b> - 1391:2  <b>pretrial</b> - 1465:21  <b>pretty</b> - 1395:10, 1483:10  <b>previous</b> - 1399:17, 1452:21  <b>previously</b> - 1373:6  <b>primarily</b> - 1407:9  <b>primary</b> - 1424:14  <b>print</b> - 1403:4, 1403:17  <b>prison</b> - 1492:7  <b>problem</b> - 1377:22, 1418:7, 1420:10, 1420:11, 1420:21, 1422:2, 1422:4, 1477:2  <b>problems</b> - 1422:16, 1455:20, 1470:19  <b>procedure</b> - 1410:23, 1411:4, 1464:4  <b>proceed</b> - 1478:10  <b>proceeding</b> - 1491:4  <b>Proceedings</b> - 1368:13, 1368:24, 1371:1, 1373:1  <b>proceedings</b> - 1399:17, 1425:12, 1467:17, 1477:1  <b>process</b> - 1393:21, 1393:22, 1396:12, 1406:3, 1406:4, 1423:21, 1423:25, 1424:18, 1430:14, 1487:13, 1487:24, 1489:19  <b>processes</b> - 1424:3  <b>produce</b> - 1397:17, 1442:3  <b>produced</b> - 1446:8, 1456:6  <b>productive</b> - 1482:17  <b>professional</b> - 1415:20, 1468:16, 1468:25, 1469:19, 1473:22  <b>professionally</b> - 1381:24  <b>professionals</b> - 1464:15, 1469:12, 1472:10  <b>proffered</b> - 1395:13  <b>prominent</b> - 1383:23  <b>promise</b> - 1440:20  <b>proper</b> - 1452:11, 1452:17, 1465:2, 1469:4, 1486:24, 1487:20  <b>properly</b> - 1414:2, 1443:5, 1443:11  <b>proportion</b> - 1409:7  <b>proportions</b> - 1408:23  <b>propose</b> - 1422:9  <b>proposing</b> - 1421:24  <b>proposition</b> - 1441:18  <b>propriety</b> - 1469:9  <b>prosecution</b> - 1416:7, 1422:13, 1422:15, 1481:19, 1487:10  <b>prosecutions</b> - 1487:4  <b>Prosecutor</b> - 1405:25  <b>prosecutor</b> - 1373:21, 1465:20  <b>prosecutors</b> - 1481:17  <b>protocol</b> - 1433:3, 1433:5, 1433:7  <b>provide</b> - 1422:14  <b>provided</b> - 1404:3, 1426:16  <b>providing</b> - 1413:1  <b>Province</b> - 1494:3  <b>province</b> - 1415:12, 1420:6, 1420:13, 1487:17  <b>provinces</b> - 1441:22  <b>pubic</b> - 1394:14, 1395:4, 1433:8, 1433:12, 1433:15  <b>public</b> - 1440:9, 1473:22,</p>	<p>1487:7  <b>publication</b> - 1426:12  <b>published</b> - 1478:2, 1478:3  <b>pulled</b> - 1459:5  <b>purchased</b> - 1398:19  <b>pure</b> - 1417:21  <b>purpose</b> - 1456:16  <b>purposes</b> - 1436:4, 1436:22  <b>pursue</b> - 1398:17, 1474:25  <b>push</b> - 1490:7  <b>put</b> - 1391:21, 1400:4, 1405:23, 1407:1, 1407:5, 1412:1, 1412:16, 1412:19, 1426:16, 1435:13, 1436:2, 1440:17, 1446:21, 1447:11, 1447:21, 1449:20, 1451:7, 1452:6, 1458:6, 1458:25, 1459:6, 1459:12, 1459:13, 1476:1, 1476:9, 1477:7  <b>putting</b> - 1421:3, 1430:15  <b>puzzle</b> - 1423:15, 1423:16</p> <p style="text-align: center;"><b>Q</b></p> <p><b>Qb</b> - 1369:13  <b>Qc</b> - 1370:2  <b>qualifications</b> - 1437:22, 1437:24, 1447:4  <b>qualified</b> - 1441:11  <b>qualify</b> - 1374:14  <b>quantify</b> - 1394:5  <b>quantities</b> - 1453:1, 1453:7  <b>quantity</b> - 1451:25  <b>Queen's</b> - 1423:23, 1479:25, 1491:2, 1494:1, 1494:3, 1494:14, 1494:19  <b>queried</b> - 1469:8  <b>quest</b> - 1467:18  <b>questioning</b> - 1421:14, 1427:6, 1446:15  <b>questions</b> - 1373:23, 1373:24, 1385:20, 1387:15, 1413:14, 1415:8, 1415:10, 1421:20, 1434:24, 1440:17, 1448:23, 1449:3, 1450:24, 1460:13, 1460:16, 1460:19, 1463:10, 1463:12, 1469:6, 1475:25, 1478:10, 1478:20, 1486:7, 1488:3, 1488:4, 1488:8, 1488:9, 1488:11, 1489:6, 1490:16, 1491:25  <b>quick</b> - 1415:7, 1478:19, 1482:5, 1482:6  <b>quickly</b> - 1399:9, 1404:7, 1405:6, 1410:2, 1415:15, 1420:5  <b>quit</b> - 1408:7  <b>quite</b> - 1393:2, 1407:17, 1414:3, 1417:10, 1424:12, 1430:1, 1434:16, 1441:19, 1441:25, 1445:10, 1452:19, 1462:9, 1462:24, 1464:6, 1468:15, 1469:24, 1476:10, 1476:20, 1479:14  <b>quote</b> - 1391:24, 1392:17, 1488:22</p> <p style="text-align: center;"><b>R</b></p> <p><b>racial</b> - 1416:3</p>	<p><b>radically</b> - 1455:10  <b>raise</b> - 1458:24, 1486:7  <b>raised</b> - 1442:6  <b>range</b> - 1390:21  <b>rape</b> - 1384:2, 1389:8, 1444:18, 1444:22, 1445:1, 1446:19, 1447:6, 1447:25, 1448:13, 1448:19  <b>raped</b> - 1459:4  <b>rare</b> - 1431:2, 1463:18  <b>rarely</b> - 1390:17  <b>rather</b> - 1399:24, 1422:23, 1442:17, 1443:9, 1443:24, 1446:11, 1454:10  <b>Rcm</b> - 1457:3  <b>Rcmp</b> - 1370:9, 1449:4, 1451:11, 1456:9, 1456:21, 1457:14  <b>re</b> - 1423:18, 1443:2, 1486:3, 1491:17  <b>re-assembled</b> - 1491:17  <b>re-emphasize</b> - 1486:3  <b>re-examination</b> - 1443:2  <b>reaction</b> - 1379:4, 1379:12, 1380:14  <b>reactivated</b> - 1475:8  <b>read</b> - 1384:16, 1392:9, 1419:25, 1427:14, 1445:17, 1451:13, 1478:14, 1478:23, 1479:5, 1482:6  <b>Reading</b> - 1482:18  <b>ready</b> - 1460:23  <b>real</b> - 1418:6, 1425:1, 1426:5, 1462:17  <b>really</b> - 1397:22, 1423:18  <b>reason</b> - 1383:2, 1419:17, 1440:20, 1443:1, 1452:9, 1455:5, 1458:24, 1458:25, 1464:13, 1486:7  <b>reasonable</b> - 1393:2, 1433:11, 1483:2  <b>reasonably</b> - 1446:24  <b>reasons</b> - 1386:17, 1419:7, 1426:6, 1429:6, 1452:8, 1452:18, 1474:20, 1474:22, 1475:5, 1488:23  <b>reassured</b> - 1405:11  <b>recalled</b> - 1416:18, 1481:23  <b>receive</b> - 1407:9, 1412:6, 1432:8, 1478:8  <b>received</b> - 1401:4, 1423:4  <b>receives</b> - 1379:10  <b>recency</b> - 1374:10, 1374:11  <b>recognition</b> - 1440:18  <b>recognize</b> - 1480:3  <b>recollect</b> - 1376:25, 1402:3, 1482:25, 1492:10  <b>recollection</b> - 1381:6, 1381:18, 1394:20, 1398:8, 1399:6, 1407:4, 1408:1, 1408:3, 1411:17, 1412:5, 1430:8, 1430:11, 1435:21, 1436:20, 1462:9, 1462:12, 1467:2, 1467:24, 1468:14, 1492:8  <b>recommend</b> - 1419:5  <b>recommendations</b> - 1456:18  <b>Reconvened</b> - 1373:2, 1427:2, 1461:8, 1479:3  <b>record</b> - 1394:25, 1401:16, 1404:14, 1430:20, 1430:24, 1455:4, 1456:1, 1468:21, 1473:14, 1477:9, 1479:15, 1484:2,</p>
--	---	---	--	--



<p>1486:9  <b>recorded</b> - 1388:5, 1391:18, 1401:1  <b>records</b> - 1393:1, 1400:18, 1401:13, 1404:19  <b>recovered</b> - 1416:14  <b>rectal</b> - 1434:20, 1435:1  <b>red</b> - 1375:4  <b>reddish</b> - 1388:6  <b>redirect</b> - 1488:6, 1488:8  <b>redness</b> - 1386:22, 1387:25  <b>refer</b> - 1477:17, 1477:19, 1477:22, 1479:18, 1480:9, 1480:10, 1485:19  <b>reference</b> - 1390:11, 1392:4, 1392:10, 1396:24, 1400:15, 1426:10, 1435:8, 1441:5, 1441:7, 1446:19, 1470:14, 1470:15, 1470:16, 1485:12, 1486:23  <b>referred</b> - 1475:14, 1485:5  <b>referring</b> - 1385:4, 1439:24, 1480:6, 1482:7, 1489:13  <b>refers</b> - 1392:4, 1392:18  <b>refrain</b> - 1379:3, 1408:5  <b>refused</b> - 1467:21, 1468:3  <b>regard</b> - 1446:3  <b>regarding</b> - 1374:9  <b>Regina</b> - 1438:13, 1451:12, 1457:1, 1488:23  <b>relates</b> - 1415:18, 1424:6  <b>relation</b> - 1403:14, 1404:11  <b>relationship</b> - 1381:13, 1462:15, 1463:2  <b>relationships</b> - 1465:14  <b>relative</b> - 1376:19, 1419:15  <b>relatively</b> - 1475:7  <b>release</b> - 1467:7, 1492:7  <b>released</b> - 1469:7  <b>relevant</b> - 1382:20  <b>Reliance</b> - 1419:16, 1419:19  <b>reluctant</b> - 1473:21  <b>relying</b> - 1461:16  <b>remain</b> - 1374:21, 1420:20  <b>remained</b> - 1466:24  <b>remaining</b> - 1474:21  <b>remember</b> - 1383:21, 1383:25, 1398:13, 1401:21, 1401:22, 1404:15, 1407:7, 1408:11, 1411:5, 1435:12, 1443:20, 1466:20, 1466:22, 1466:23, 1467:9, 1472:19, 1472:23, 1473:6, 1473:18, 1473:20, 1487:16  <b>remembered</b> - 1466:4, 1466:16  <b>removal</b> - 1403:25, 1407:13  <b>removed</b> - 1382:15, 1400:20, 1403:19, 1404:12, 1405:4, 1412:21, 1414:9, 1438:1  <b>removes</b> - 1406:8, 1410:24  <b>rendered</b> - 1379:19  <b>repeat</b> - 1420:7, 1447:19, 1454:4  <b>repeating</b> - 1487:1  <b>rephrase</b> - 1476:11</p>	<p><b>replicating</b> - 1436:11  <b>replication</b> - 1476:13  <b>replied</b> - 1455:1  <b>reply</b> - 1492:5  <b>report</b> - 1383:19, 1386:18, 1386:22, 1387:18, 1401:2, 1423:4, 1424:9, 1445:10, 1456:7  <b>reported</b> - 1381:2, 1479:23  <b>Reporter-</b> 1494:14, 1494:19  <b>reporter</b> - 1482:11  <b>reporters</b> - 1408:6  <b>Reporters-</b> 1369:13, 1494:3  <b>Reporters'-</b> 1494:1  <b>represent</b> - 1373:8  <b>representative</b> - 1407:16  <b>representatives</b> - 1463:3, 1463:8, 1490:6  <b>reproduction</b> - 1456:24  <b>reputation</b> - 1487:17  <b>required</b> - 1434:13  <b>requirement</b> - 1433:8  <b>requires</b> - 1447:8  <b>research</b> - 1477:14  <b>residence</b> - 1492:16  <b>resources</b> - 1420:17  <b>respect</b> - 1380:18, 1381:23, 1391:11, 1412:12, 1415:9, 1421:14, 1423:1, 1429:10, 1432:17, 1434:25, 1435:10, 1439:4, 1442:20, 1444:3, 1458:6, 1460:1, 1467:16, 1472:8, 1476:1, 1482:13, 1484:12  <b>respond</b> - 1487:19  <b>response</b> - 1453:3  <b>responsibility</b> - 1382:16, 1401:8, 1407:9, 1412:6, 1490:3, 1490:7, 1490:10  <b>restart</b> - 1471:25  <b>restating</b> - 1480:23  <b>restriction</b> - 1467:20, 1467:23  <b>result</b> - 1439:5, 1455:11  <b>resuscitation</b> - 1414:10, 1414:14  <b>retain</b> - 1457:22  <b>retained</b> - 1457:16, 1483:19  <b>retrial</b> - 1471:4, 1472:7, 1472:13  <b>retrieved</b> - 1461:2  <b>retrospect</b> - 1432:19  <b>return</b> - 1461:4, 1492:15  <b>returned</b> - 1373:9  <b>review</b> - 1421:11, 1422:10, 1422:12, 1422:20, 1422:22, 1423:3, 1423:13, 1478:19, 1479:11, 1484:12, 1484:19  <b>reviewing</b> - 1484:8  <b>reward</b> - 1383:1  <b>Rick-</b> 1370:7  <b>right-handed</b> - 1376:6, 1378:5  <b>Rochelle-</b> 1370:10  <b>role</b> - 1431:12, 1462:15, 1467:10, 1467:13, 1467:14  <b>roles</b> - 1373:17  <b>Ron-</b> 1458:17  <b>Ronald-</b> 1458:5  <b>room</b> - 1380:15, 1429:18, 1438:3  <b>rooms</b> - 1416:15  <b>Rossmo-</b> 1485:9,</p>	<p>1485:15  <b>round</b> - 1375:20, 1375:21, 1375:25  <b>routine</b> - 1411:6, 1411:9, 1411:18, 1432:21, 1432:24, 1434:18, 1434:19  <b>routinely</b> - 1462:18  <b>Rpr-</b> 1369:14, 1494:2, 1494:18  <b>rubber</b> - 1434:8  <b>rulers</b> - 1397:12, 1397:15, 1397:17, 1397:19  <b>run</b> - 1448:25  <b>rupturing</b> - 1387:16</p> <p style="text-align: center;"><b>S</b></p> <p><b>saliva</b> - 1427:18, 1427:19, 1427:22, 1428:1, 1428:2, 1428:8, 1428:15, 1451:19, 1452:23, 1453:9, 1488:14  <b>sample</b> - 1393:12, 1427:17, 1433:15, 1433:21, 1451:25, 1452:5, 1452:9, 1452:24, 1453:2, 1453:22, 1454:3, 1454:25, 1455:5, 1456:8, 1457:12, 1457:13, 1457:18, 1457:22, 1476:15, 1488:15, 1488:19, 1489:7  <b>samples</b> - 1455:24, 1457:23, 1462:1  <b>sampling</b> - 1422:23  <b>Sandra</b> - 1369:7  <b>Saskatchewan</b> - 1368:18, 1370:4, 1405:8, 1420:11, 1471:13, 1487:9, 1494:4  <b>Saskatoon</b> - 1368:18, 1370:7, 1407:25, 1408:13, 1420:15, 1455:23  <b>satisfaction</b> - 1449:23  <b>satisfactory</b> - 1434:9  <b>save</b> - 1438:23, 1438:25, 1455:13  <b>saved</b> - 1438:12, 1438:15, 1489:20, 1490:2  <b>saving</b> - 1455:14, 1455:19  <b>saw</b> - 1383:17, 1394:21, 1398:1, 1403:8, 1417:19, 1445:16, 1491:18, 1491:19  <b>scene</b> - 1412:23, 1413:1, 1413:11, 1413:15, 1414:16, 1453:23  <b>scheduled</b> - 1471:23  <b>School-</b> 1485:9  <b>science</b> - 1387:10, 1391:12, 1416:11, 1416:12, 1416:13, 1416:17, 1416:19, 1417:21, 1417:23, 1417:25, 1418:1, 1418:12, 1418:13, 1453:24, 1481:2, 1481:8, 1481:11, 1481:14, 1481:15  <b>scientific</b> - 1376:8, 1393:9, 1413:22, 1415:17, 1418:16, 1452:12, 1455:3, 1476:12, 1486:22  <b>scientifically</b> - 1393:12  <b>scrapings</b> - 1432:25  <b>scream</b> - 1379:12, 1380:10, 1380:24  <b>screaming</b> - 1379:3  <b>screen</b> - 1403:5, 1403:6,</p>	<p>1403:16, 1403:17, 1425:1  <b>searching</b> - 1413:10  <b>second</b> - 1425:23, 1458:12, 1472:13, 1483:12, 1485:23  <b>second-last</b> - 1458:12  <b>secondary</b> - 1414:22  <b>Secondly</b> - 1444:16, 1489:13  <b>secrete</b> - 1428:15, 1428:16, 1451:3  <b>secreted</b> - 1451:6, 1454:9, 1454:11  <b>secretor</b> - 1427:8, 1427:13, 1427:25, 1428:4, 1428:9, 1428:14, 1428:22, 1450:6, 1450:10, 1451:2, 1451:6, 1451:18, 1451:21, 1452:9, 1453:7, 1453:12, 1453:14, 1454:16, 1488:10, 1488:18, 1488:24, 1489:1, 1489:10, 1489:11  <b>secretors</b> - 1453:18, 1453:25  <b>Section</b> - 1406:16  <b>section</b> - 1451:12  <b>Security</b> - 1369:15  <b>see</b> - 1373:9, 1374:3, 1395:7, 1396:14, 1406:19, 1411:23, 1413:11, 1428:20, 1451:14, 1463:7  <b>seeing</b> - 1384:11, 1402:24, 1403:1  <b>seized</b> - 1410:11, 1410:13, 1410:14, 1410:18, 1412:7  <b>seizing</b> - 1406:4, 1406:6  <b>seizure</b> - 1410:20  <b>self</b> - 1379:19  <b>semen</b> - 1433:9, 1446:2, 1450:1, 1450:13, 1453:9  <b>semen-like</b> - 1433:9  <b>Semicircular</b> - 1375:14, 1375:15  <b>seminal</b> - 1393:9, 1394:12, 1394:18, 1414:24, 1415:2, 1453:21  <b>sending</b> - 1457:24  <b>sense</b> - 1409:18, 1452:7, 1477:12  <b>sent</b> - 1408:17, 1408:20, 1457:14, 1457:19  <b>sentence</b> - 1460:1  <b>separate</b> - 1386:15, 1411:3, 1425:16, 1425:20  <b>separately</b> - 1425:3  <b>Serge</b> - 1370:6  <b>series</b> - 1421:19  <b>Series</b> - 1479:24  <b>serious</b> - 1409:19, 1420:24, 1473:8, 1483:6  <b>serological</b> - 1450:3  <b>serves</b> - 1424:21  <b>Service</b> - 1370:7  <b>service</b> - 1431:9, 1487:10  <b>session</b> - 1473:22  <b>set</b> - 1442:1, 1470:5, 1470:20, 1492:21  <b>setting</b> - 1440:10  <b>seven</b> - 1472:25, 1473:5  <b>Several</b> - 1451:22  <b>sexual</b> - 1383:5, 1383:22, 1384:2, 1388:19, 1388:23, 1389:7, 1389:17, 1394:11, 1430:4, 1430:8, 1430:14, 1430:18, 1431:2, 1431:6, 1432:20, 1433:2, 1434:13, 1434:16,</p>	<p>1434:25, 1437:1  <b>sexually</b> - 1389:18  <b>sharpened</b> - 1377:18  <b>Sheraton</b> - 1493:1, 1493:2  <b>shins</b> - 1386:7  <b>Short</b> - 1378:1  <b>short</b> - 1423:18, 1423:19, 1457:20  <b>shorthand</b> - 1409:6, 1494:5  <b>shortly</b> - 1374:23, 1375:6, 1444:23  <b>shot</b> - 1425:22  <b>show</b> - 1375:22, 1400:18, 1401:13, 1402:5, 1403:21, 1404:19, 1404:21, 1407:20, 1447:24, 1448:13, 1452:10, 1477:25, 1490:14, 1490:23, 1491:10  <b>showed</b> - 1388:7, 1388:13, 1426:15  <b>shown</b> - 1395:8, 1395:12, 1395:17, 1398:4, 1398:5, 1398:6, 1398:7, 1398:9, 1399:4, 1401:19, 1401:22, 1402:15, 1403:3, 1458:4, 1490:19, 1490:22  <b>shows</b> - 1479:16  <b>sick</b> - 1471:5, 1471:24  <b>side</b> - 1373:21, 1377:18, 1377:24, 1377:25, 1382:22, 1417:3, 1418:19, 1418:23, 1419:1, 1449:22  <b>sided</b> - 1377:6  <b>signature</b> - 1383:9  <b>significant</b> - 1389:6  <b>similar</b> - 1383:3, 1425:10, 1466:10, 1483:24, 1490:20, 1491:14, 1491:15, 1491:18  <b>similarity</b> - 1384:6  <b>Simon</b> - 1485:10  <b>simple</b> - 1396:18, 1407:17, 1435:16  <b>simply</b> - 1440:13, 1459:17  <b>Sinclair</b> - 1405:25, 1410:7  <b>single</b> - 1377:4, 1377:6  <b>Single</b> - 1377:7  <b>single-bladed</b> - 1377:4  <b>single-sided</b> - 1377:6  <b>singled</b> - 1459:1  <b>sitting</b> - 1368:16  <b>sittings</b> - 1492:22  <b>situation</b> - 1383:12, 1417:20, 1420:24  <b>situations</b> - 1451:22, 1476:18  <b>skepticism</b> - 1421:5  <b>skill</b> - 1494:6  <b>skin</b> - 1385:16  <b>skip</b> - 1480:10  <b>slashes</b> - 1378:15  <b>sleeves</b> - 1459:6  <b>slight</b> - 1445:14, 1477:2  <b>slightly</b> - 1377:15, 1468:23  <b>small</b> - 1386:23, 1387:17, 1388:13, 1420:12, 1468:16, 1469:25, 1470:3, 1472:9  <b>snow</b> - 1414:25, 1456:3, 1462:1, 1463:14  <b>snowbank</b> - 1455:25, 1457:13, 1457:18</p>
---	--	--	--	--



<p><b>solicited</b> - 1486:15  <b>someone</b> - 1396:15, 1399:14, 1399:19, 1447:4  <b>sometime</b> - 1446:18, 1476:3, 1480:6  <b>sometimes</b> - 1376:15, 1439:2, 1470:3  <b>somewhat</b> - 1435:22  <b>somewhere</b> - 1446:20  <b>son</b> - 1492:9  <b>son's</b> - 1467:19, 1492:7  <b>soon</b> - 1483:10  <b>sophisticated</b> - 1382:10  <b>Sorry</b> - 1385:20, 1385:21  <b>sorry</b> - 1374:20, 1377:5, 1384:14, 1399:15, 1403:10, 1409:22, 1419:10, 1436:17, 1447:17, 1458:11, 1462:24, 1467:13, 1484:7, 1485:20, 1488:10  <b>sort</b> - 1396:5, 1396:7, 1398:13, 1398:19, 1443:22, 1443:25  <b>sounds</b> - 1433:10  <b>source</b> - 1407:24, 1423:21  <b>speaking</b> - 1417:12  <b>specialization</b> - 1436:25, 1437:7  <b>specific</b> - 1373:23, 1383:14, 1390:11, 1401:7, 1433:10, 1462:9, 1462:12, 1467:2, 1468:13, 1488:21  <b>specifically</b> - 1381:11, 1401:16, 1411:5, 1411:23, 1432:5, 1469:15  <b>specimen</b> - 1438:11, 1450:2, 1450:12, 1450:13, 1456:5, 1458:1, 1490:9  <b>specimens</b> - 1400:19, 1401:4, 1433:3, 1457:4  <b>spectacular</b> - 1418:14  <b>speculation</b> - 1398:18  <b>spelled</b> - 1387:13  <b>spend</b> - 1452:14  <b>spent</b> - 1473:17, 1474:18  <b>sperm</b> - 1390:22  <b>spermatozoa</b> - 1389:25, 1390:15, 1390:17, 1391:1, 1391:6, 1392:16, 1392:20, 1393:10, 1393:16, 1393:20, 1393:24, 1394:5, 1439:10, 1456:4, 1490:1  <b>Sphml</b> - 1396:20  <b>spoken</b> - 1492:4  <b>St</b> - 1396:3, 1396:20, 1397:8, 1403:12, 1409:25  <b>stabbed</b> - 1444:8, 1459:8, 1459:10  <b>staff</b> - 1408:15  <b>Staff</b> - 1369:1, 1369:11  <b>stair</b> - 1443:23  <b>stamp</b> - 1426:8  <b>stamped</b> - 1425:14  <b>stand</b> - 1428:12  <b>standardized</b> - 1397:18  <b>standing</b> - 1382:2, 1417:14  <b>Starphoenix</b> - 1482:8  <b>start</b> - 1384:14, 1471:23  <b>started</b> - 1400:23, 1443:2, 1469:6, 1471:6, 1471:24, 1481:8  <b>starting</b> - 1405:22, 1448:25  <b>Starting</b> - 1384:13  <b>statement</b> - 1378:1, 1392:21, 1447:12, 1447:22, 1450:7, 1460:9,</p>	<p>1460:10  <b>states</b> - 1401:16, 1453:15  <b>stating</b> - 1438:16  <b>station</b> - 1395:22, 1396:1, 1406:17  <b>status</b> - 1427:8, 1427:13, 1454:16  <b>stick</b> - 1375:21  <b>still</b> - 1408:18, 1409:3, 1429:4, 1456:25, 1468:19, 1474:9, 1477:4  <b>stomach</b> - 1418:10  <b>stopped</b> - 1375:3  <b>storage</b> - 1455:20  <b>store</b> - 1398:20  <b>story</b> - 1481:6, 1482:7  <b>street</b> - 1492:25  <b>strict</b> - 1399:25  <b>struck</b> - 1375:17, 1423:15  <b>structure</b> - 1436:8, 1436:15, 1476:10  <b>stuck</b> - 1396:16, 1397:5  <b>stuff</b> - 1480:10  <b>stumble</b> - 1380:7  <b>subdivision</b> - 1451:12  <b>subject</b> - 1442:18, 1454:15, 1475:13, 1487:7  <b>subsequent</b> - 1382:4, 1394:17, 1395:16, 1458:1, 1474:2, 1475:19, 1489:6  <b>subsequently</b> - 1400:25, 1478:2  <b>substance</b> - 1438:1, 1438:6  <b>subtle</b> - 1386:23  <b>sudden</b> - 1389:3, 1389:14  <b>suffering</b> - 1405:8  <b>suggest</b> - 1376:2, 1378:7, 1382:2, 1392:11, 1394:1, 1419:6, 1426:7, 1432:6, 1432:11, 1450:18, 1465:25, 1471:7, 1472:24, 1476:19, 1484:19, 1486:8, 1489:11  <b>suggested</b> - 1382:20, 1383:6, 1415:14, 1422:21, 1423:3, 1447:12, 1457:21, 1473:16  <b>suggesting</b> - 1381:16, 1423:6, 1443:15, 1448:8, 1465:5, 1473:18, 1473:20  <b>suggestion</b> - 1382:18, 1407:18, 1419:3, 1421:1, 1424:5, 1484:15  <b>suggests</b> - 1444:17  <b>suite</b> - 1402:2, 1403:9, 1429:22, 1437:12  <b>summarize</b> - 1461:20, 1461:22  <b>summary</b> - 1423:12  <b>supplies</b> - 1489:1  <b>supply</b> - 1375:3, 1403:24, 1431:17  <b>Support</b> - 1369:11  <b>support</b> - 1442:3  <b>supporting</b> - 1442:3  <b>Supreme</b> - 1446:18, 1467:4, 1467:16  <b>suspect</b> - 1466:6, 1469:14  <b>suspected</b> - 1477:8  <b>suspicion</b> - 1446:19, 1446:25, 1447:6  <b>sustained</b> - 1377:13, 1380:12  <b>swab</b> - 1433:17, 1433:19, 1434:1, 1434:6,</p>	<p>1452:25  <b>swabs</b> - 1434:20  <b>sworn</b> - 1373:6  <b>symposium</b> - 1478:1  <b>syndrome</b> - 1416:14, 1416:19, 1417:19  <b>system</b> - 1417:4, 1417:6, 1418:25, 1420:9, 1425:15, 1446:24, 1465:19</p> <p style="text-align: center;"><b>T</b></p> <p><b>table</b> - 1402:10  <b>tails</b> - 1390:17  <b>talks</b> - 1459:2  <b>tape</b> - 1397:4  <b>Tdr</b> - 1370:5  <b>tear</b> - 1386:3  <b>tearing</b> - 1386:23, 1387:3  <b>tears</b> - 1385:16  <b>technical</b> - 1388:10, 1476:12, 1477:2  <b>technicalities</b> - 1471:15  <b>Technically</b> - 1439:19  <b>technically</b> - 1401:23  <b>Technician</b> - 1369:16  <b>technician</b> - 1431:22, 1432:9  <b>technique</b> - 1476:17  <b>techniques</b> - 1436:13  <b>technology</b> - 1461:16, 1477:1  <b>temperature</b> - 1380:14  <b>tend</b> - 1391:5  <b>tending</b> - 1432:11  <b>Terceira</b> - 1477:23  <b>term</b> - 1382:25, 1386:11, 1388:11, 1399:21, 1400:2, 1439:16, 1440:3  <b>termed</b> - 1476:13  <b>terminology</b> - 1440:4  <b>terms</b> - 1373:17, 1376:13, 1393:25, 1415:2, 1415:10, 1416:21, 1479:12, 1487:11  <b>test</b> - 1427:19, 1428:21, 1446:10, 1455:18, 1469:17, 1489:8  <b>tested</b> - 1488:13  <b>testified</b> - 1432:25, 1434:11, 1446:4, 1448:3, 1455:21  <b>testify</b> - 1466:1  <b>testifying</b> - 1403:22, 1410:4, 1466:7  <b>Testimony</b> - 1368:15  <b>testimony</b> - 1429:4, 1444:4, 1450:25, 1465:24, 1466:3  <b>testing</b> - 1456:12, 1456:15, 1462:3  <b>tests</b> - 1453:20, 1454:19, 1454:23, 1455:15  <b>text</b> - 1386:10, 1392:22  <b>textbooks</b> - 1389:16  <b>thawed</b> - 1456:3  <b>theirs</b> - 1431:19  <b>themselves</b> - 1379:18, 1465:3  <b>theory</b> - 1448:7, 1448:9  <b>therefore</b> - 1490:3  <b>Therefore</b> - 1453:2  <b>they've</b> - 1431:17  <b>thigh</b> - 1385:18, 1385:22, 1386:1, 1389:21  <b>thinking</b> - 1420:8, 1441:2, 1463:11  <b>Third</b> - 1479:23  <b>thirdly</b> - 1445:7</p>	<p><b>thoroughly</b> - 1387:19  <b>thoughts</b> - 1458:21, 1479:12  <b>thousands</b> - 1398:24  <b>three</b> - 1383:4, 1384:6, 1407:25, 1408:14, 1408:15, 1408:16, 1423:23, 1430:1, 1438:2  <b>throughout</b> - 1462:13  <b>Thursday</b> - 1368:22  <b>timing</b> - 1393:25, 1479:13  <b>title</b> - 1485:11  <b>titled</b> - 1477:22  <b>today</b> - 1429:3, 1429:5, 1429:6, 1437:2, 1439:24, 1485:16, 1488:21, 1492:20  <b>Together</b> - 1425:20  <b>together</b> - 1425:21, 1430:15  <b>Tony</b> - 1369:16  <b>took</b> - 1393:12, 1396:6, 1410:20, 1444:9, 1456:5, 1475:2  <b>top</b> - 1479:18, 1480:7  <b>toque</b> - 1425:11  <b>tore</b> - 1431:13  <b>total</b> - 1408:22, 1472:24  <b>totally</b> - 1380:16  <b>touch</b> - 1475:24  <b>touched</b> - 1374:2, 1418:7  <b>trace</b> - 1480:13  <b>traced</b> - 1476:24  <b>trained</b> - 1437:19  <b>training</b> - 1399:24, 1417:16, 1437:14, 1437:23  <b>Transcript</b> - 1368:13, 1373:1  <b>transcript</b> - 1378:20, 1390:10, 1399:10, 1484:8  <b>transcription</b> - 1494:5  <b>transfusion</b> - 1454:7  <b>trap</b> - 1470:19  <b>treat</b> - 1468:1  <b>treated</b> - 1401:24, 1483:6  <b>trial</b> - 1378:22, 1385:7, 1390:1, 1391:21, 1400:5, 1401:12, 1401:18, 1402:15, 1402:16, 1402:25, 1403:1, 1410:5, 1417:2, 1417:18, 1427:12, 1439:9, 1439:14, 1440:1, 1440:8, 1440:10, 1443:6, 1443:11, 1444:4, 1448:4, 1464:9, 1466:7, 1466:18, 1466:21, 1469:10, 1471:6, 1471:22, 1472:13, 1472:25, 1474:7, 1474:9, 1474:13, 1474:14, 1474:23, 1481:25, 1487:2  <b>tried</b> - 1418:21, 1459:7, 1466:5, 1487:23  <b>tries</b> - 1433:6  <b>trite</b> - 1441:8  <b>trouble</b> - 1425:15, 1443:13  <b>true</b> - 1432:12, 1481:12, 1494:5  <b>Truscott</b> - 1418:15  <b>Try</b> - 1405:20  <b>try</b> - 1384:11, 1401:3, 1417:18, 1434:4, 1436:7, 1446:14, 1461:22, 1466:2, 1486:22  <b>trying</b> - 1420:16, 1450:22, 1452:6, 1472:19,</p>	<p>1490:7  <b>tuning</b> - 1415:13  <b>Tunnel</b> - 1415:24  <b>tunnel</b> - 1415:24  <b>turn</b> - 1399:9  <b>turned</b> - 1404:15, 1413:25, 1442:22  <b>two</b> - 1376:25, 1383:4, 1383:18, 1384:4, 1385:20, 1401:10, 1408:22, 1420:6, 1420:7, 1422:17, 1424:25, 1441:11, 1441:21, 1453:15, 1453:24, 1473:3, 1474:7, 1474:22, 1491:17  <b>Two</b> - 1372:4, 1425:25, 1426:21  <b>type</b> - 1383:9, 1383:17, 1427:21, 1440:3, 1451:2, 1452:8, 1453:4, 1453:17, 1453:25, 1455:12, 1456:4, 1462:16  <b>types</b> - 1416:3  <b>typically</b> - 1432:7  <b>typing</b> - 1479:17</p> <p style="text-align: center;"><b>U</b></p> <p><b>ulcer</b> - 1388:14  <b>Umm</b> - 1407:4, 1427:14, 1462:24, 1469:5  <b>unadulterated</b> - 1449:25  <b>uncommon</b> - 1383:14, 1388:8, 1464:10, 1470:2  <b>unconscious</b> - 1379:20, 1380:8  <b>unconsciousness</b> - 1379:24  <b>uncontaminated</b> - 1449:25  <b>under</b> - 1380:17, 1406:25, 1409:10, 1423:7, 1465:18  <b>undergarments</b> - 1394:13, 1394:22  <b>understood</b> - 1400:14, 1408:24, 1427:16, 1427:22, 1428:11, 1428:12  <b>undoubted</b> - 1440:18  <b>unexpected</b> - 1389:2, 1389:14  <b>unfairly</b> - 1461:20  <b>unfortunately</b> - 1449:4  <b>unintentional</b> - 1489:15  <b>unique</b> - 1383:9, 1383:11  <b>unjustified</b> - 1475:11  <b>unless</b> - 1376:18, 1417:20  <b>unreasonable</b> - 1393:5  <b>unsolved</b> - 1480:20  <b>untoward</b> - 1418:18  <b>unusual</b> - 1388:15, 1389:5, 1389:9, 1475:11  <b>up</b> - 1376:4, 1382:21, 1391:13, 1392:12, 1404:15, 1404:21, 1417:14, 1425:23, 1434:8, 1447:15, 1449:1, 1449:8, 1451:7, 1453:24, 1458:7, 1466:18, 1468:17, 1469:13, 1477:18, 1482:4, 1484:2, 1485:20, 1488:10  <b>upright</b> - 1377:1, 1380:8  <b>useful</b> - 1423:1, 1424:12, 1438:12, 1438:21, 1438:24, 1438:25, 1455:14  <b>usual</b> - 1411:4  <b>uterus</b> - 1445:11</p>
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<p style="text-align: center;"><b>V</b></p> <p><b>vagina</b> - 1387:23, 1390:18, 1391:6, 1434:6  <b>vaginal</b> - 1385:10, 1386:24, 1387:4, 1387:8, 1391:8, 1432:21, 1433:17, 1433:18, 1434:2, 1434:5, 1438:11, 1453:9, 1454:25, 1489:14, 1489:19  <b>valid</b> - 1441:25, 1460:4, 1473:23  <b>value</b> - 1438:5  <b>variable</b> - 1391:9, 1408:17, 1429:25  <b>variably</b> - 1399:23  <b>varies</b> - 1390:24, 1394:10, 1464:20  <b>various</b> - 1377:14, 1454:12, 1460:7, 1467:18, 1471:4, 1478:5  <b>vary</b> - 1439:14  <b>Veeman</b> - 1369:5  <b>verge</b> - 1445:12  <b>vessels</b> - 1387:17  <b>via</b> - 1482:15, 1483:7  <b>victim</b> - 1376:20, 1410:8, 1429:23, 1429:24, 1430:3, 1431:5, 1431:21, 1434:16, 1438:2, 1444:25  <b>victims</b> - 1429:11  <b>videotape</b> - 1413:18, 1414:7, 1414:15  <b>videotaping</b> - 1412:25  <b>view</b> - 1413:22, 1415:10, 1421:8, 1422:19, 1450:3, 1474:15, 1474:16  <b>viewed</b> - 1491:16  <b>viewing</b> - 1423:19  <b>violence</b> - 1382:23  <b>virtually</b> - 1409:25, 1448:17, 1456:22, 1456:24  <b>vis</b> - 1381:3  <b>vis-a-vis</b> - 1381:3  <b>vision</b> - 1415:24, 1415:25  <b>visit</b> - 1449:4  <b>vital</b> - 1450:18  <b>vogue</b> - 1477:13  <b>voice</b> - 1442:24  <b>volume</b> - 1384:10  <b>Volume</b> - 1368:23  <b>vulva</b> - 1386:25</p>	<p>1458:15  <b>wheels</b> - 1415:14  <b>whereas</b> - 1440:3, 1457:15  <b>whereby</b> - 1451:22  <b>whole</b> - 1375:23, 1491:21  <b>wife</b> - 1472:5  <b>wife's</b> - 1414:6  <b>Wilde</b> - 1369:15  <b>Williams</b> - 1484:3, 1484:10, 1484:25  <b>wish</b> - 1479:8, 1489:5, 1489:18  <b>witness</b> - 1373:5, 1392:7, 1402:18, 1417:7, 1418:22, 1418:23, 1419:1, 1421:14, 1424:24, 1435:21, 1460:13, 1477:6, 1478:18  <b>witnesses</b> - 1419:8, 1419:11, 1419:13, 1440:22, 1465:3  <b>Wolch</b> - 1370:2, 1373:20  <b>woman</b> - 1388:8, 1389:7, 1389:17, 1389:18, 1391:8  <b>womb</b> - 1388:2, 1388:4, 1388:12  <b>wonder</b> - 1483:17  <b>word</b> - 1387:10, 1426:4  <b>words</b> - 1439:6, 1447:13, 1447:23, 1448:1, 1459:13, 1466:11, 1473:19, 1476:13, 1489:16  <b>world</b> - 1436:21  <b>worn</b> - 1410:8  <b>worth</b> - 1381:8  <b>wound</b> - 1381:15, 1381:17  <b>write</b> - 1384:5  <b>Written</b> - 1449:15  <b>written</b> - 1411:7, 1449:9, 1456:1, 1456:7, 1483:1  <b>wrongful</b> - 1415:22, 1416:8, 1417:21, 1417:24, 1418:15, 1419:7, 1419:11, 1419:17, 1420:3, 1439:5, 1441:7, 1442:7, 1442:14, 1443:14  <b>Wrongful</b> - 1368:3</p>	<p>1440:14, 1447:21, 1470:13  <b>yesterday's</b> - 1484:8  <b>young</b> - 1398:12, 1420:23  <b>yourself</b> - 1408:13, 1410:11, 1422:13, 1438:3, 1457:10, 1486:13</p>
<p style="text-align: center;"><b>W</b></p> <p><b>wait</b> - 1395:2  <b>Wait</b> - 1408:4  <b>walk</b> - 1380:7  <b>wall</b> - 1387:23  <b>wants</b> - 1408:19  <b>wariness</b> - 1468:2  <b>warm</b> - 1380:16  <b>warmth</b> - 1391:7  <b>warrant</b> - 1373:11  <b>waste</b> - 1460:23  <b>watch</b> - 1411:23  <b>Watson</b> - 1370:6, 1435:8, 1488:3, 1488:4  <b>ways</b> - 1420:15  <b>weapon</b> - 1399:4  <b>wear</b> - 1417:1, 1432:7  <b>wearing</b> - 1431:19  <b>week</b> - 1391:2, 1392:16  <b>weight</b> - 1419:15  <b>welcoming</b> - 1430:16  <b>Wempe</b> - 1370:10  <b>Werrett</b> - 1458:6,</p>	<p style="text-align: center;"><b>Y</b></p> <p><b>year</b> - 1456:22, 1470:25, 1471:4, 1471:24, 1472:2  <b>years</b> - 1389:7, 1389:17, 1415:12, 1416:16, 1423:23, 1443:3, 1443:7, 1469:10, 1473:17, 1474:18, 1475:1, 1481:7, 1483:5, 1486:4, 1486:11  <b>yellowish</b> - 1449:24  <b>yesterday</b> - 1373:10, 1373:16, 1374:2, 1374:5, 1376:5, 1380:18, 1381:15, 1389:5, 1389:24, 1393:19, 1400:22, 1408:24, 1412:22, 1415:9, 1415:15, 1418:8, 1418:22, 1423:14, 1427:6, 1427:16, 1428:11, 1428:13, 1433:1, 1435:6, 1436:24, 1438:11, 1439:3, 1439:12, 1439:24, 1441:6, 1442:6, 1444:5, 1446:4, 1446:15, 1446:21, 1447:12, 1451:1, 1458:4, 1473:16, 1474:17, 1477:16, 1484:5, 1485:6, 1488:12, 1489:5  <b>Yesterday</b> - 1395:7,</p>	

