

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

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Transcript of Proceedings

and

Testimony before the Commission  
sitting at the  
Radisson Hotel at  
Saskatoon, Saskatchewan

\*\*\*\*\*

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Volume 157

Inquiry Proceedings



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EUGENE WILLIAMS, SWORN

- BY MR. HODSON

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Transcript of Proceedings

(Reconvened at 1:00 p.m.)

COMMISSIONER MacCALLUM: Good afternoon.

ALL COUNSEL: Good afternoon, My Lord.

MR. HODSON: The next witness, Mr.

Commissioner, is Mr. Eugene Williams, and I would ask him to come forward and be sworn in, please.

EUGENE WILLIAMS, sworn:

BY MR. HODSON:

Q Good afternoon, Mr. Williams. Thank you very much for agreeing to testify before this Commission.

For the record, I should indicate that Mr. Williams is represented by counsel for Federal Justice, Mr. David Frayer, and Jennifer Cox.

I understand, sir, that you reside in the Ottawa area; is that correct?

A That is correct.

Q And you are 55 years of age; is that correct?

A Yes.

Q And you are a lawyer employed by the federal Department of Justice, and have been for some time; is that correct?

A That's correct, since 1980.

Q And if we could go to document 338010. This is a



1 resume, Mr. Williams, that you provided to the  
2 Commission. If you could call that up, please,  
3 and this is a familiar document to you, sir?

4 A It is.

01:12 5 Q And I believe this is a document that you prepared  
6 for us providing you -- us with an employment and  
7 education summary; is that correct?

8 A That's correct.

9 Q I'm wondering if we could just briefly have you go  
01:12 10 through your legal career, I understand maybe  
11 starting in '74-'75, and that would -- would that  
12 be the Department of Justice, the federal  
13 department, that you articulated with?

14 A Yes.

01:12 15 Q And then, if we could just scroll up, the next  
16 stint would be as a combines officer. Perhaps you  
17 can just give us a brief explanation of what  
18 duties you performed in that capacity?

19 A Correct. Reporting to the then-Director of  
01:12 20 Competition Policy, who was Mr. Robert Bertrand, I  
21 was assigned to assist investigators looking into  
22 allegations of misleading advertising, unlawful  
23 conspiracies, mergers, monopolies, and my initial  
24 and my continuing activity was to assist them in  
01:13 25 their evidence-gathering functions.



1 Q And so would that have involved interviews of  
2 witnesses?

3 A Yes. Under the then-*Combines Investigation Act*  
4 there was provision for hearings before the  
01:13 5 Restrictive Trade Practices Commission, and I  
6 conducted a number of those hearings.

7 Q And, as well, would you have interaction with  
8 police officers, namely RCMP officers, in the  
9 course of those duties as well?

01:13 10 A On one or two occasions, but primarily we dealt  
11 with officers with the Bureau of Competition  
12 Policy.

13 Q And if we can scroll up, 1980 to 1989 you, it's  
14 listed that you were a prosecutor with the federal  
01:13 15 Department of Justice. Can you give us just a  
16 brief overview of types of cases you prosecuted in  
17 your general duties during that time frame?

18 A My prosecution activity dealt with offences under  
19 the, what was then the *Narcotic Control Act*, the  
01:14 20 *Competition Act*, I did tax prosecutions as well,  
21 and prosecutions under various federal statutes.

22 Q And --

23 A But --

24 Q I'm sorry, go ahead?

01:14 25 A But, primarily, our prosecution work was drugs,



1 tax, and, in my particular case, combines.

2 Q And would that be generally in the Ottawa area; is  
3 that correct?

4 A Ottawa and other parts of Ontario, yes.

01:14 5 Q I understand, sir, that -- this is listed until  
6 1989, if we could just go back and maybe call up  
7 those two parts together, please -- it's my  
8 understanding, in 1989, you then became the  
9 Coordinator of the Conviction Review Division or  
01:15 10 group within the Department of Justice; is that  
11 correct?

12 A Yes.

13 Q And, prior to 1989, it's my understanding -- and  
14 please, please clarify if I'm wrong -- that while  
01:15 15 you were a prosecutor from 1980 to 1989, you had  
16 some involvement in dealing with applications to  
17 the Federal Minister under 690 or Section 617, the  
18 predecessor; is that correct?

19 A That is correct. At the time, the headquarters of  
01:15 20 the Department of Justice Criminal Law Section  
21 occupied the same floor as the prosecutors who  
22 worked in the Ottawa region in eastern Ontario.  
23 Mr. Ron Fainstein was then a member of the  
24 Criminal Law Branch, as was I, and, as my  
01:15 25 prosecution experience grew, he drew upon those



1 prosecutors and others in that section to assist  
2 in the assessment of Section 690 or 617 cases, and  
3 from that vantage point I was asked to assess a  
4 number of cases.

01:16 5 Q And then, if we take a look at 1989, it appears  
6 that you became the coordinator, in 1989, of the  
7 Conviction Review Group; is that correct?

8 A Of -- yes. The Conviction Review Group hadn't  
9 officially been anointed at that time, but --

01:16 10 Q You were it?

11 A -- I was it.

12 Q And so would it be correct to say that you would  
13 have basically replaced Mr. Fainstein in that  
14 position?

01:16 15 A Yes.

16 Q So from, let's say, 1986 to 1989 Mr. Fainstein  
17 would have been the Federal Justice lawyer who  
18 oversaw or was the coordinator of the handling of  
19 617 or 690 applications?

01:17 20 A Yes.

21 Q And maybe we can, instead of referring to 617, I  
22 think it was renumbered in about 1988 or '80 --  
23 1988 or thereabouts; is that right?

24 A That's my understanding.

01:17 25 Q Yeah. So we'll just talk about Section 690, and



1 I'm referring to any predecessor sections, if I --  
2 if I -- if the context requires; is that fair?

3 A Yes.

4 Q So from 1986 until 19 -- or let's say through the  
01:17 5 '80s, would it be correct to say that  
6 Mr. Fainstein would have been the person in charge  
7 of the department's handling of Section 690  
8 applications; correct?

9 A Yes.

01:17 10 Q And he would draw upon various lawyers within the  
11 Federal Justice group, including you, from time to  
12 time?

13 A Yes.

14 Q And would it be correct to say that other lawyers,  
01:17 15 as well, would be involved in some aspects of  
16 these cases?

17 A Yes.

18 Q And then in 1989 you replaced him as coordinator  
19 and, through until 1992, you would have been the  
01:18 20 person coordinating conviction review; is that  
21 right?

22 A Yes. Actually, it went on until 1998.

23 Q Until 1998. But for the time period that we're  
24 considering here in the David Milgaard  
01:18 25 applications you would have been, basically for



1           that time period, the lawyer with the federal  
2           Department of Justice who would be in charge of  
3           coordinating the department's initial work on  
4           these applications?

01:18 5           A           Yes.

6           Q           And we'll deal a bit later with who you reported  
7           to, but you would be the point person?

8           A           Yes.

9           Q           It's my understanding, as point person, you would  
01:18 10          look after the marshalling-in of these  
11          applications and the delegation out to whoever you  
12          felt appropriate to assist; is that fair?

13          A           Yes.

14          Q           And so, from time to time, other lawyers in the  
01:18 15          department might be assigned an application by  
16          you?

17          A           Correct. I'd ask them to do it and they would  
18          agree.

19          Q           Right. And in the case of David Milgaard's first  
01:18 20          application, and indeed possibly the second  
21          application, you would have been the lawyer who  
22          would have been assigned carriage of the file, is  
23          that correct, on the first application?

24          A           When the first application came in I asked my  
01:19 25          colleague, Mr. Fainstein, to assume carriage of



1           it. Circumstances didn't permit him to take it on  
2           at the time and I took it on.

3           Q       And was that due to Mr. Fainstein's involvement as  
4           counsel before the Supreme Court on other matters;  
5           is that right?

6           A       Yes. He had, at the time, a full practice  
7           appearing as counsel before the Supreme Court.

8           Q       And so you became the lawyer, and would that be  
9           fair to say, that -- the lawyer that handled both  
01:19 10          applications for David Milgaard?

11          A       Yes.

12          Q       And then if we can scroll up, and I think you did  
13          that until 1998 in that capacity, and then from  
14          1998 until the present time you were FPS Director;  
01:20 15          can you tell us what that is?

16          A       The Federal Prosecution Service has a number of  
17          offices or -- across Canada, and -- let me back  
18          up.

19                               The Department of Justice has  
01:20 20          regional offices, among the sections of the  
21          regional offices is the prosecution group, and the  
22          prosecution group is headed up by a director who  
23          reports to the Assistant Deputy Attorney General  
24          in Ottawa at headquarters. There is an office in  
01:20 25          Ottawa, and it's currently comprised of



1 approximately 28-29 prosecutors, and I took on the  
2 responsibility of managing the activities of that  
3 prosecution group in Ottawa.

4 Q And --

01:20 5 A I -- I held that position until very recently, in  
6 January of this year, when I moved to  
7 headquarters, 2006.

8 Q And so what is your current title, then, with  
9 federal --

01:21 10 A My current title is Counsel. My particular area  
11 of responsibility is, is white collar crime, and  
12 my job there is to assist in the coordination of  
13 advice to IMET teams, Integrated Marketing  
14 Enforcement Teams, which is an initiative that the  
01:21 15 government has embarked upon to address a concern  
16 about maintaining the integrity of our capital  
17 markets. So offences like insider trading or  
18 capital markets frauds are investigated by teams  
19 comprised of RCMP officers, forensic accountants,  
01:21 20 assisted by lawyers.

21 Q Okay. That's fine with that document.

22 Before we get into your evidence  
23 with respect to the David Milgaard matters I'd  
24 like to just make a couple of comments on the  
01:22 25 record regarding the scope of my questioning, and



1           these are directed as much to you, Mr. Williams,  
2           as well as to the Commissioner and other parties.

3                           On June 1 of 2006 the  
4           Commissioner ruled on the constitutional  
01:22 5           limitations that apply with respect to evidence  
6           that may touch on federal matters, and basically  
7           the guideline there is that, in our questions of  
8           you and other witnesses, we are not to get into  
9           matters that would be considered the operation and  
01:22 10          management of the Department of Justice. And I  
11          propose to question you primarily on what you and  
12          others did in connection with David Milgaard's  
13          applications under Section 690, I will ask you  
14          about how Section 690 was applied to his  
01:22 15          applications and the processes that was utilized  
16          with respect to his application and utilized by  
17          your department to review, and unless I state  
18          otherwise, Mr. Williams, I would ask you to assume  
19          that any question I have relating to Section 690,  
01:23 20          its application or the process, that I am really  
21          trying to inquire into those matters as it relates  
22          to David Milgaard's applications. And I will try  
23          to make sure I focus my question on that, but if I  
24          ask you a question about how did Section 690 work  
01:23 25          in 1989, what I am really getting at is how did it



1 work with respect to David Milgaard.

2 And with respect -- and that's  
3 understood, is it?

4 A Yes, it is.

01:23 5 Q And it may be sometimes difficult to know where  
6 this line, constitutional line, is drawn between  
7 appropriate questions and operation and  
8 management, and my job is to inquire into  
9 everything that's relevant, so my intent is to get  
01:23 10 as close to the line as I possibly can without  
11 going over the line. I've had many discussions  
12 with Mr. Frayer and Ms. Cox about this, and they  
13 have been cooperative with me in trying to work  
14 out where this line is. In my discussions with  
01:24 15 Mr. Frayer I think, if I go over the line and he  
16 thinks that I am in an area that I ought not to be  
17 in, it's a significant matter, I've asked him to  
18 let me know and object; if it's an insignificant  
19 matter we can deal with it off the record and come  
01:24 20 back and clarify it. So I just want to point out  
21 that, Mr. Commissioner, that we will try, through  
22 cooperation between Mr. Frayer and I, to make sure  
23 that we are on the proper course.

24 The second area that I wish to  
01:24 25 raise just on the record for the benefit of



1           counsel and you, Mr. Commissioner, is this issue  
2           of solicitor/client privilege that's been asserted  
3           by the federal Minister. There are documents and  
4           communications between the department and amongst  
01:24 5           the department and the Minister relating to legal  
6           advice, and that has been asserted by the Minister  
7           through their counsel in a letter April 14th to  
8           the Commission. There may well be some issues  
9           that arise, and it may well be that issues are  
01:25 10          taken with respect to the scope of the privilege  
11          claimed by the Federal Minister, and in particular  
12          whether it's as broad as asserted by the Minister.  
13          I have had discussions with their counsel and I  
14          will proceed with my questions. Obviously, the  
01:25 15          privilege is being asserted, and I will try, at  
16          least in the initial few days here, to identify on  
17          the record the evidentiary basis for the  
18          privileged information, and try and get a better  
19          idea of exactly what it is that privilege is  
01:25 20          claimed for, and why. And, Mr. Commissioner,  
21          before I am complete with Mr. Williams, we will  
22          have either resolved all of the privilege issues  
23          or put forward a process to have that resolved.  
24          And, as well, I appreciate that the parties may  
01:25 25          also have some submissions on that, but for the



1 time being I think we'll proceed. If we get into  
2 an area that is privileged, Mr. Williams, that  
3 you're aware is privileged, please advise me, and  
4 we'll identify that on the record and we may come  
01:26 5 back to that.

6 If we could start off, I  
7 prepared an outline, 338012, and this is an  
8 outline that I propose to utilize at least in the  
9 first part of my examination. I provided it to  
01:26 10 counsel, we've already covered the background and  
11 employment history. I'll just quickly go through  
12 parts of this, Mr. Williams.

13 I want to go through Section 690  
14 of the code and its application, as well -- and  
01:26 15 some tests, as well the process, some questions  
16 there. If we can go to the next page. And the  
17 process you utilized. We'll then spend some time  
18 trying to identify what privilege is being claimed  
19 for. And then the next page. Then I plan on  
01:27 20 doing a chronological review, basically going  
21 through the work that you did in response to the  
22 application. Go to the next page. I will, once  
23 we get into the chronology, be asking you from  
24 time to time what your conclusions were or the  
01:27 25 significance you placed on certain information you



1 gathered. If we can go to the next page. We'll  
2 then touch on, I'm going to ask you some questions  
3 about the significance, if any, information you  
4 didn't receive, what that might have played with,  
01:27 5 what role that might have played, and then as well  
6 some discussions about the media, documents  
7 provided, the October 1 meeting with counsel for  
8 Mr. Milgaard, and then lastly this gets us through  
9 to the end of the first application.

01:28 10 So if we can go back to page 1  
11 of that, please, what I want to deal with next is  
12 I want to have you explain for us Section 690 and  
13 how it was applied to the applications submitted  
14 by David Milgaard back in 1988 and again in 1991,  
01:28 15 and if we can call up the section, 335464, please,  
16 and we've looked at this before, Mr. Williams, and  
17 maybe we can start off, and can you tell us or  
18 comment on the significance of the original  
19 conviction of David Milgaard and the fact that his  
01:29 20 appeals had been dismissed by the Court of Appeal  
21 and leave to appeal dismissed by the Supreme Court  
22 of Canada? Can you just comment on that?

23 A Certainly. The section is framed with a couple of  
24 assumptions, and one is that those who are  
01:29 25 eligible to apply, apply as convicted persons, it



1 assumes that they have been convicted of an  
2 indictable offence, that they have exhausted all  
3 of their appellate remedies and that they come to  
4 the Minister of Justice seeking an extraordinary  
01:29 5 remedy. The section presumes, shall we say, that  
6 there was regularity in the conviction. It seeks  
7 not to supersede or become another Court of  
8 Appeal, but it is a, kind of a safety net that  
9 permits those who believe that they've been  
01:30 10 wrongly convicted from getting another opportunity  
11 to have their case adjudicated by the courts.

12 If you look at the remedies  
13 contained in all of paragraphs (a), (b) and (c),  
14 you see that it contemplates a return of the  
01:30 15 matter back to the court in 690(a) by way of a new  
16 trial, in 690(b) by way of an appeal to the Court  
17 of Appeal, and in 690(c) by way of a reference of  
18 a question back to an appellate court.

19 Q Okay. And so just on this issue of regularity,  
01:31 20 would it be correct to say that the premise or the  
21 starting point under a Section 690 application, or  
22 under Mr. Milgaard's application, would be the  
23 premise that he was properly convicted and guilty  
24 of the offence?

01:31 25 A Yes.



1 Q And I think what you said is that it was a safety  
2 net. Would it be also correct to say that  
3 notwithstanding the fact that he was presumed to  
4 have been properly convicted, and I think you said  
01:31 5 the regularity of proceedings, the section was  
6 designed to deal with, as a safety net in the  
7 event that a mistake had been made; is that fair?

8 A Yes. It recognizes that there could be errors and  
9 it was parliament's approach to dealing with  
01:31 10 situations in which someone having gone through  
11 the judicial process still having had their  
12 convictions maintained, this was a way of having  
13 that reviewed again.

14 Q And you talked about the remedies, and I think as  
01:32 15 you pointed out, the minister would have three --  
16 well, let me say, let me go through this. Two  
17 essential remedies; one, the minister could direct  
18 a new trial, correct, could send it back and say  
19 Mr. Milgaard, you can have a new trial?

01:32 20 A Yes.

21 Q Secondly, it could say, Mr. Milgaard, you can go  
22 back to the Saskatchewan Court of Appeal and have  
23 another chance at arguing an appeal before that  
24 court; is that correct?

01:32 25 A Yes.



1 Q And that might give rise to an acquittal,  
2 upholding the conviction or perhaps a new trial?

3 A Yes.

4 Q And would that be a remedy that would be designed  
01:32 5 for fresh evidence or new evidence where the Court  
6 of Appeal might be asked to consider that?

7 A Yes.

8 Q That would be one example. And (c), am I correct  
9 that the reference to the court for its opinion on  
01:32 10 any question that the minister desires assistance,  
11 would that be proper to characterize that as the  
12 minister's ability to go to the court and say  
13 lookit, court, help me out, I'm trying to decide  
14 whether I should give (a) or I should give (b) or  
01:33 15 I should dismiss the application, I need your  
16 assistance on the following questions?

17 A Yes.

18 Q And so not a remedy in and of itself, but a  
19 mechanism for the minister to get assistance from  
01:33 20 the court to assist the minister in granting a  
21 remedy of (a) or (b)?

22 A To the Court of Appeal.

23 Q Yes.

24 A And as it later turns out, there are -- there's  
01:33 25 one other one and that's a reference to the



1 Supreme Court as we found out.

2 Q Right, which would be under the Supreme Court Act,  
3 and we'll touch on that a bit later.

4 A Yes.

01:33 5 Q But essentially the remedies that the minister  
6 could give are a new trial, a new appeal or  
7 dismiss the application, other than the Supreme  
8 Court?

9 A And other than the referral to a Court of Appeal  
01:33 10 for advice, yes, those were the three remedies.

11 Q And the advice itself, though, wouldn't give a  
12 remedy to the accused, it would rather be  
13 information that the minister could use to give a  
14 remedy; is that fair?

01:34 15 A That's fair.

16 Q And would it be correct to say that in law, that  
17 let's just take a look at the Attorney General of  
18 Saskatchewan with respect to David Milgaard's  
19 conviction, that as far as the ability to re-open  
01:34 20 the investigation of Gail Miller's death, for  
21 example, that with the conviction, and I  
22 appreciate this maybe isn't your decision, but  
23 just follow me through on this, that in order to  
24 undo the conviction of David Milgaard, the only  
01:34 25 way to do so would be through Section 690 or



1 perhaps the pardon provision which I will talk  
2 about a bit later; is that correct?

3 A Yes.

4 Q And so if, for example, under (a), if the Federal  
01:34 5 Minister ordered a new trial, presumably the  
6 Attorney General of Saskatchewan could re-open the  
7 investigation into the death of Gail Miller  
8 preparatory to proceeding with the prosecution of  
9 Mr. Milgaard?

01:35 10 A Yes.

11 Q Or someone else for that matter, and so the  
12 Section 690 would be a mechanism that might allow  
13 the conviction to be set aside for the provincial  
14 Attorney General to re-open the investigation?

01:35 15 A Yes.

16 Q Now, is it correct to say as well that there's no  
17 remedy under Section 690 for the minister to  
18 declare innocence of Mr. Milgaard or an applicant,  
19 there's not --

01:35 20 A Not under 690 itself.

21 Q And my understanding is that under Section 748,  
22 the minister has the ability, through the Governor  
23 in Council, to grant a free pardon; is that  
24 correct?

01:35 25 A Under 748 the minister may apply to the cabinet



1 colleagues and Governor in Council recommending a  
2 free pardon and that could be one of the results  
3 of a Section 690 application where, for example,  
4 evidence was discovered that showed conclusively  
01:36 5 that the applicant was factually innocent, then  
6 the minister could make such an application under  
7 Section 748.

8 Q And would it be correct to say that other than the  
9 pardon provision, would the minister's role under  
01:36 10 Section 690 be to adjudicate the guilt or  
11 innocence of Mr. Milgaard, the applicant?

12 A No.

13 Q And why not?

14 A The section contemplates that issues of innocence  
01:36 15 or guilt is left to the courts. If you examine  
16 each of the options or remedial options, you find  
17 that it involves a referral back to the courts for  
18 adjudication, whether by way of a new trial,  
19 whether by way of a reference to the Court of  
01:36 20 Appeal as if it were a fresh appeal, or by way of  
21 sending it back to the Court of Appeal for an  
22 opinion, all of the remedies involving innocence  
23 or guilt are sent back to the courts because  
24 that's the function of the courts.

01:37 25 Q And so am I correct that, would it be fair to



1 describe Section 690 then as a mechanism for a  
2 convicted person to get his case back before the  
3 courts to have his guilt or innocence  
4 re-adjudicated by the courts?

01:37 5 A Correct.

6 Q And so that as far as the minister's role in that,  
7 it would be -- the Section 690 is a mechanism that  
8 allows the minister to decide whether or not a  
9 convicted person should have an opportunity to go  
01:37 10 back to the trial or appeal court to have the  
11 issue of guilt or innocence really determined?

12 A Correct.

13 Q But not the minister herself determining the guilt  
14 or innocence; is that correct?

01:37 15 A That's correct.

16 Q As well is it correct to say that there's no  
17 remedy available under Section 690 to investigate  
18 or cause to be investigated to see whether or not  
19 a person has been wrongfully convicted?

01:38 20 A That's not the role of the minister or the role of  
21 the investigators.

22 Q And whose role would that be then in this  
23 scenario?

24 A The applicant has the responsibility to bring to  
01:38 25 the minister's attention the grounds for the



1 request and the basis for the assertion that there  
2 has been wrongful conviction. Once you take into  
3 account our constitutional framework, and by that  
4 I mean this, most offences prosecuted under the  
01:38 5 auspices of the provincial attorneys general,  
6 there are 10 provinces and two, now three  
7 territories, most of the *Criminal Code* offences  
8 are not prosecuted by our office except in the  
9 Northwest Yukon and Nunavut Territories. The  
01:39 10 minister has no way of knowing the details of any  
11 particular conviction, it is up to the person who  
12 has been convicted who is, we feel, that they are  
13 in a position to identify what went wrong at trial  
14 and to bring that to the minister's attention.  
01:39 15 When that occurs, then it's our responsibility to  
16 gather the facts and to advise the minister as to  
17 whether the grounds advanced could form the basis  
18 of one of the remedies under Section 690.

19 Q Okay. We'll just talk a bit about this reference,  
01:39 20 and I appreciate your comment that in addition to  
21 690(c), the reference to the Court of Appeal,  
22 there is also the power under the Supreme Court  
23 Act for a similar reference from the minister to  
24 the Supreme Court; is that right?

01:39 25 A That's right.



1 Q And if we can just assume for the moment that two  
2 things, one, the Supreme Court in this case was  
3 doing precisely what a Court of Appeal would have  
4 done under Section 690 and that perhaps the reason  
01:40 5 it went to the Supreme Court, I think we've seen  
6 some evidence it may have had to do with the fact  
7 that Mr. Tallis was on the Saskatchewan Court of  
8 Appeal and other reasons, but if we assume for the  
9 purpose of this question that the Supreme Court  
01:40 10 Act reference advice and a Court of Appeal  
11 reference advice under 690(c) are similar, would  
12 it be correct to say that when the minister sends  
13 a matter to the court for a reference, in effect  
14 the minister is asking the court to basically step  
01:40 15 into her shoes and look at matters and give  
16 advice; in other words, what the court is looking  
17 at mirrors what the minister would look at under  
18 an application. Is that a fair way of putting it?

19 A Yes. I would add that the court is sometimes  
01:40 20 asked to assume some of the roles that maybe  
21 senior departmental officials might assume in  
22 that, in the provision of advice as to how to deal  
23 with a particular application.

24 Q And might one example be in this case that, and  
01:41 25 we'll see this a bit later, the issue of how does



1 the minister deal with Nichol John and the fact  
2 that she gave a statement in 1969, she didn't  
3 repeat parts of it at trial and later has some  
4 issues about memory recall, that that might be an  
01:41 5 area where the minister might say to the court I  
6 would like your help, court, give me advice on how  
7 I as the minister should deal with these facts and  
8 this information in considering a remedy under  
9 Section 690; would that be an example?

01:41 10 A Yes.

11 Q And not to say, to off-load tough questions, but  
12 to go to the court where the court might be able  
13 to assist the minister with advice?

14 A Correct. Ultimately the decision rests with the  
01:42 15 minister.

16 Q Right. And so the minister can say tell me,  
17 court, what you think about this information and  
18 give me your advice, and then ultimately the  
19 minister exercises her discretion under the  
01:42 20 section?

21 A Correct.

22 Q So if we've got -- we've got the front end, you've  
23 told us, is that it's a presumed guilty person in  
24 the case of Mr. Milgaard, it's presumed that the  
01:42 25 conviction was done with regularity. The remedy



1 we've looked at is essentially a chance to go back  
2 to the court to have the issue of guilt or  
3 innocence re-adjudicated either by trial or  
4 appeal; correct?

01:42 5 A Yes.

6 Q Can you tell us, what does it take to get from the  
7 front end to the remedy, what is the test or the  
8 criteria that's applied or was applied by the  
9 minister in David Milgaard's case, and I'll maybe  
01:42 10 just go back to the outline if we could, 338012,  
11 and have you comment, and again these are my  
12 words, Mr. Williams, that I put forward here, but  
13 if you could just comment on -- and I've got a few  
14 other documents that I'll show you in a moment,  
01:43 15 I'll show you the minister's letter of February  
16 27th, '91 and as well another internal document  
17 that talks about Section 690, but maybe you can  
18 just start by elaborating and telling us what the  
19 test would be under Section 690 and the criteria  
01:43 20 that must be met to get a remedy.

21 A At the time the ministers were prepared to grant a  
22 remedy where the evidence brought forward  
23 established a reasonable basis to conclude that a  
24 miscarriage of justice likely occurred. That was,  
01:43 25 let's say, the word or the attempt to articulate



1 what the standard was. Certainly as you pointed  
2 out in your, in your outline, if there were doubts  
3 concerning the correctness of the conviction,  
4 those doubts had to reach a certain threshold and  
01:44 5 it was that if you had a factual foundation where  
6 it was probably, more probable than not that there  
7 was a miscarriage of justice, you didn't have to  
8 prove that you were innocent or probably innocent,  
9 but you had to establish that there was something  
01:44 10 that was significant that could have affected the  
11 outcome had it been known; for example, fresh  
12 evidence, new scientific advances that may now  
13 cause a court to look at evidence from a  
14 completely different perspective and which might  
01:44 15 signal either that the evidence didn't have the  
16 strength that it was given at trial or may be now  
17 exculpatory or inculpatory. DNA is a huge example  
18 of advancement in science which could be the basis  
19 for a successful return of a case back to the  
01:45 20 courts.

21 Q Now let's just focus on (a), a reasonable basis to  
22 conclude that a miscarriage of justice had likely  
23 occurred. Where did that language come from?  
24 It's not in the section. Is there some genesis of  
01:45 25 this as the test?



1 A I think historically, or before my arrival,  
2 ministers of justice had taken a stand or had felt  
3 that a reasonable -- that that was an appropriate  
4 standard to use for dealing with new applications.

01:45 5 Q And if I would have phoned you in 1986 and said  
6 I'm a lawyer for a person who alleges wrongful  
7 conviction, can you tell me what the test is  
8 applied by the minister under Section 690 or 617,  
9 is that what you would have told him?

01:46 10 A I would have said, Mr. Hodson, what you need to do  
11 is to bring some information or evidence before  
12 the minister which is new, which was not argued at  
13 trial, which signals or which could form a basis  
14 for believing that your client was wrongly  
01:46 15 convicted. It may be in the form of new evidence,  
16 it may be in the form of new scientific advances  
17 that helps to interpret some of the evidence at  
18 trial. It may be that there's a recanting  
19 witness, it may be that there's a completely new  
01:46 20 witness.

21 Q What about procedural or evidentiary flaws, would  
22 that be something that if, for example, it's  
23 brought, that there's a miscarriage of justice  
24 because information was not disclosed or there was  
01:47 25 a flaw in the procedure that was not dealt with by



1 the appellate courts?

2 A That would also satisfy the threshold that there  
3 was a miscarriage, because miscarriage doesn't,  
4 wasn't restricted to the outcome, it also involved  
01:47 5 the process.

6 Q So if I came to you and said lookit, I cannot  
7 prove my client's innocence at all, what I can  
8 prove is that there was a flaw in the process that  
9 convicted him or her and I can prove that it's  
01:47 10 likely this person was wrongfully convicted  
11 because -- he shouldn't have been because of the  
12 process?

13 A If the flaw was significant so that it might have  
14 had an impact on the outcome, yes, certainly no  
01:47 15 trial is perfect and there are flaws that occur  
16 during the course of a trial, but --

17 Q Let me give you an absurd example. If a juror had  
18 been paid, for example, that here is evidence that  
19 suggests and that was not brought to the attention  
01:48 20 of an appellate court, that would be new and would  
21 establish there was a miscarriage of justice  
22 regardless of the guilt or innocence of the  
23 applicant?

24 A Yes.

01:48 25 Q And that would be something that would be a basis



1 to grant a remedy; is that fair?

2 A Yes.

3 Q And so is it fair to characterize this miscarriage  
4 of justice as something that would have likely  
01:48 5 affected the verdict?

6 A Yes.

7 Q And whether it's guilt or innocence, procedure or  
8 evidence, disclosure, non-disclosure, anything  
9 that likely would have affected the verdict?

01:48 10 A Yes.

11 Q And when you talk about new, is it fair to say  
12 that the reason that new is required is because  
13 the remedy is to send it back to the court and  
14 that you are not going to send something back to  
01:48 15 the court to consider something that's already  
16 considered; is that a simple way of putting it?

17 A Yes.

18 Q So in other words, if the court already dealt  
19 with, for example, if someone says lookit, based  
01:49 20 on reading the record I don't think David Milgaard  
21 should have been convicted based on this evidence,  
22 the remedy is to say send it back to court to have  
23 that issue re-adjudicated, would the answer be  
24 lookit, it's already been done, we're not going to  
01:49 25 send it back?



1 A Questions of innocence or guilt, questions of  
2 credibility, those are questions for the trier of  
3 fact. If it's been done and there's nothing new  
4 to consider, there's no point.

01:49 5 Q Would it be correct to say that the requirement  
6 for new information is somewhat related to the  
7 types of remedies the minister can give; in other  
8 words, sending it back to the trier of fact?

9 A Yes.

01:49 10 Q And then so let's talk a bit about, I think  
11 we've -- actually, maybe if we can call up 001529,  
12 and this is the minister's letter to Mr. Wolch  
13 February 27, 1991, I just want to go through parts  
14 of this with you, and:

01:50 15 "Section 690 of the *Criminal Code*  
16 provides that the Minister of Justice  
17 may direct a new trial if after inquiry  
18 the Minister is satisfied that in the  
19 circumstances a new trial is justified;  
01:50 20 similarly, the Minister of Justice may  
21 refer the case to an appellate court for  
22 hearing."

23 And I think we've talked about those being the  
24 two remedies; correct?

01:50 25 A Yes.



1 Q And:

2 "The purpose of this procedure is to  
3 permit a review of cases where new  
4 evidence or information raising doubts  
01:50 5 concerning the correctness of a  
6 conviction has arisen after the full  
7 judicial process, including appeals, has  
8 been exhausted. I wish to emphasize  
9 that it is not the function of the  
01:50 10 Minister of Justice to retry the case.  
11 The remedy is an extraordinary one, as  
12 the normal judicial process is designed  
13 to ensure that no miscarriage of justice  
14 has occurred. Ministers of Justice  
01:51 15 traditionally have declined to act where  
16 the basis upon which the application has  
17 been brought relates to matters or  
18 issues which were considered by the jury  
19 at trial. For instance, relief is  
01:51 20 commonly declined where the applicant  
21 points to the unsavoury character of a  
22 witness when that issue was placed  
23 squarely before the jury. Ministers of  
24 Justice have in the past intervened and  
01:51 25 referred the case to the courts where it



1                   can be demonstrated that a reasonable  
2                   basis exists to conclude that a  
3                   miscarriage of justice has likely  
4                   occurred."

01:51 5                   And I think that's the latter language that you  
6                   referred to, is that correct, as the test?

7           A           That is correct.

8           Q           And if we try and relate that to this raising  
9                   doubts concerning the correctness of a conviction  
01:51 10                   after the full process, would they be different  
11                   ways of saying the same thing in your view?

12          A           If I understand your question to be whether the  
13                   test set out in the last line that you read is a  
14                   re-articulation of the preceding?

01:51 15          Q           Yes.

16          A           Yes, that's my understanding.

17          Q           So in other words, the correctness of the -- if  
18                   it's likely that the result would have been  
19                   different with this new and significant  
01:52 20                   information, then there's been a miscarriage of  
21                   justice?

22          A           Yes.

23          Q           There is also a document --

24          A           If I can just rephrase that?

01:52 25          Q           Sure.



1 A I would say yes, that that would provide a basis  
2 to conclude that there was a miscarriage of  
3 justice, thus entitling the applicant to a remedy.  
4 It would then go back to the Court of Appeal, the  
01:52 5 court would either affirm or not.

6 Q Right, okay. If we could go to 004426, and I  
7 believe this is a document, if we can just go to  
8 the next page, April 2, 1991, if we can just go  
9 back to the first page. Can you tell us what this  
01:52 10 document is?

11 A That document is part of a briefing that would be  
12 provided to new ministers which essentially sets  
13 out the provisions of 690, what the parameters  
14 are, and where it fits in in terms of other  
01:53 15 administrative or other executive clemency  
16 provisions contained in the *Criminal Code*. You'll  
17 see that it initially paraphrases Section 690 in  
18 terms of setting out what the remedies are, it  
19 sets out the test --

01:53 20 Q Right, the second paragraph is the --

21 A -- in the second paragraph, --

22 Q Yes?

23 A -- in the paragraph, and it uses the term:

24 " 'where the applicant demonstrates that  
01:53 25 a reasonable basis exists to conclude



1                   that a miscarriage of justice has likely  
2                   occurred.'"

3                   That doesn't mean proof of a miscarriage of  
4                   justice, but just proof that there is a reason to  
01:53 5                   think that.

6           Q           And the "reasonable likelihood", I think you said,  
7                   would be more likely than not, a preponderance of  
8                   evidence?

9           A           Yes. And it goes on to signal what the Minister  
01:54 10                   wrote on February 27th, that this is not a  
11                   procedure in which ministerial opinion  
12                   substitutes, is a substitute for judicial opinion.  
13                   It then goes on to discuss, in the next  
14                   paragraphs, where this relates in relation to  
01:54 15                   Section 749, what was then 749 and 750 of the  
16                   Code -- I think, because of changes, amendments to  
17                   the Code, it's now 748 and 49 -- and that provides  
18                   for another form of executive clemency in which  
19                   someone can apply, any Minister of the Crown can  
01:54 20                   sponsor an application for a free pardon, and  
21                   ordinarily that is considered by  
22                   Governor-in-Council. If it relates to a matter  
23                   that's been before the courts and they have  
24                   exhausted their remedies, quite frequently it  
01:55 25                   would be referred to our group to examine, but



1 that's not necessary. Where, for example, the  
2 Provincial Attorney General, as a result of its  
3 inquiries, discovers that someone was wrongly  
4 convicted, and that was brought to the attention  
01:55 5 of a Minister, then that could be the basis of a  
6 free pardon under 749.

7 Q Okay. And then again, if we could just go to the  
8 next page under Procedure, it says:

9 "We receive about 30 applications for  
01:55 10 the Minister's intervention under one or  
11 more of these provisions every year."

12 And that would be, I think we're going to try and  
13 get some annual reports and put them on the  
14 record a bit later, but that would be a good  
01:55 15 estimate of the number of applications, and that  
16 would be 690 and the pardon provisions?

17 A Primarily 690.

18 Q Right. And:

19 "They are dealt with conscientiously, in  
01:56 20 the knowledge that they represent the  
21 last available review to rectify a  
22 miscarriage of justice."

23 And you'd agree with that?

24 A Yes.

01:56 25 Q And then it says:



1 "The cases are fully investigated, often  
2 with the assistance of the Provincial  
3 Crown, and the police."

4 Would that be the original prosecutor, or just  
01:56 5 generally the Attorney General's office, can you  
6 elaborate on what that --

7 A It could be either. Sometimes it's -- it was  
8 both, and the reason would depend on what the  
9 issues were that had been raised in the  
01:56 10 application and, secondly, where the file is  
11 located. And what I mean by that is this.  
12 There -- in this application the prosecution began  
13 in Saskatoon, and it was taken up on appeal to  
14 Regina, some of the file material was here, some  
01:57 15 of the file material was in Regina. Depending on  
16 the issues, you may want to discuss aspects of the  
17 case with the prosecuting counsel in terms of the  
18 theory of the case, you may be looking for  
19 materials that may still reside on a file in the  
01:57 20 jurisdiction in which the prosecution emanated,  
21 because sometimes when a case goes up on appeal it  
22 goes up on appeal not in relation to the facts at  
23 trial but in relation to an alleged error of law  
24 that has -- that is not so bound up with the  
01:57 25 facts.



1                   And in this particular case, in  
2                   Milgaard's case, it dealt with the way and the  
3                   procedure for dealing with a witness whose  
4                   pretrial statement -- who did not adopt a pretrial  
01:58 5                   statement when testifying. That was the main  
6                   legal issue that was dealt with. A number of  
7                   factual matters unrelated to that might still be  
8                   with the original prosecutor. When I received the  
9                   file, some of the grounds advanced signaled to me  
01:58 10                  that it was appropriate to contact the provincial  
11                  Crown and also to contact the, not only the  
12                  provincial Crown prosecutor who dealt with the  
13                  trial but, also, the appellate section.

14                  Q           Okay. And so, again, this goes on to say:  
01:58 15                                "A full report is prepared by an  
16                                official in the Criminal Prosecutions  
17                                Section, and endorsed by the Senior  
18                                General Counsel and the Assistant Deputy  
19                                Attorney General (Criminal Law) before  
01:58 20                                it is submitted to the Minister."

21                  And we'll deal with this in more detail a bit  
22                  later, but that would have been the role you  
23                  played in the David Milgaard applications, is  
24                  that correct, being the official that prepared  
01:59 25                  the full report?



1 A Yes.

2 Q And:

3 "The Minister then determines whether to  
4 intervene under section 690 or to  
01:59 5 recommend the intervention of the  
6 Governor in Council ...";

7 correct?

8 A Yes.

9 Q And so ultimately, as we saw in the section, the  
01:59 10 Minister has a discretion to exercise a  
11 prerogative for mercy; correct?

12 A Yes.

13 Q "Traditionally, the Minister has  
14 intervened rarely and only in compelling  
01:59 15 circumstances which suggest that there  
16 has been a miscarriage of justice.  
17 Section 690 prerogatives have been  
18 exercised only 15 times in the last 18  
19 years."

01:59 20 And it goes on to talk about some specific cases.  
21 And, again, would that be an accurate reflection  
22 of the number of remedies granted under that  
23 section?

24 A Yes.

01:59 25 Q So 19 -- this is in 1991, so this would go back to



1 about 1975 -- am I -- sorry, 1973?

2 A Yes.

3 Q So from 1973 to 1991 there were 15 remedies  
4 granted under Section 690; is that correct?

02:00 5 A Yes.

6 Q And again, Mr. Commissioner, we're gonna -- we're  
7 in the process of gathering information from  
8 annual reports that talk about the number of  
9 applications.

02:00 10 Now with this document, this was  
11 a briefing note for the Minister, and if we go  
12 back to the first page, please, would that be  
13 that -- the definition "Secret", is that something  
14 that's put on, could you explain what that means  
02:00 15 within the Department of Justice?

16 A Today it would be called Protected B, but it  
17 simply signals that this is a matter of advice for  
18 the Minister, and those types of things we usually  
19 categorize as "Secret".

02:00 20 Q And would that -- for example advice, legal  
21 advice, things of that nature?

22 A Yes.

23 Q Now if we can go back to December of 1988, or even  
24 let's go back to 1986, where would -- for example,  
02:00 25 Mr. Milgaard and/or his counsel, can you identify



1 for us, based on your knowledge, what sources  
2 might exist to learn -- to get more information  
3 about the test that would be applied by the  
4 Minister under Section 690?

02:01 5 A I think the obvious one would be to contact  
6 counsel who was responsible for coordinating 690  
7 applications, that would be Mr. Fainstein. There  
8 may be some information in the annual report for  
9 the Department of Justice but I think my, in my  
02:01 10 experience when counsel contemplated a, making a  
11 690 application and they needed some advice or  
12 tips, they would call the department and their  
13 calls would be referred to me.

14 Q And so, again, the section we saw, the section  
02:01 15 says what it says, and elaboration on how the  
16 section is applied by the Minister would be  
17 obtained from counsel; is that fair?

18 A Yes.

19 Q And did you ever have any objection, on this  
02:02 20 application, from advising counsel for  
21 Mr. Milgaard about the test that was being applied  
22 under that section?

23 A Did I personally?

24 Q Yes? Would you have had any -- do you recall  
02:02 25 any -- let's go back prior to the application



1 being filed.

2 A Yes.

3 Q Do you recall any discussions you had with Mr.  
4 Asper or Mr. Wolch about what was required under  
02:02 5 Section 690?

6 A Not personally, no.

7 Q And --

8 A I was aware that there were some discussions with  
9 one of our counsel.

02:02 10 Q And was that Mr. Fainstein?

11 A It was.

12 Q And did you -- were you aware that Mr. Fainstein  
13 and Mr. Wolch had had some discussions prior to  
14 the application being filed?

02:02 15 A That's the information I received from  
16 Mr. Fainstein.

17 Q Okay. And do you know whether -- again, and we'll  
18 hear from Mr. Fainstein later -- but are you aware  
19 as to whether those discussions related to the  
02:02 20 test applied under Section 690, or do you know?

21 A I don't know, but I would assume so, because  
22 usually those were the types of questions that  
23 were put to me by counsel contemplating a 690  
24 application; "what do I need, what types of  
02:03 25 materials, and what is the threshold that I have



1 to overcome?"

2 Q And my understanding is that you replaced  
3 Mr. Fainstein in 1989, so prior to December 28,  
4 1988, prior to the application being filed  
02:03 5 Mr. Fainstein would have been the contact person  
6 at the department to find out the test, the  
7 threshold, and what types of materials are needed?

8 A Certainly, Mr. Fainstein would be the main person,  
9 yes.

02:03 10 Q Just one other matter. When we talked about this  
11 miscarriage of justice under Section 690, the test  
12 being guilt or innocence, and I understand as well  
13 that there may be cases where, for example,  
14 someone is convicted -- and I'm not talking about  
02:03 15 Mr. Milgaard's case -- but where someone is  
16 convicted of first degree murder instead of second  
17 degree murder or manslaughter; would that be,  
18 also, a situation where there might be a  
19 miscarriage of justice that could be established?

02:04 20 A Yes.

21 Q And so the remedy might be to send it back to  
22 trial or the appeal court to have the issue of  
23 guilt or inno -- of guilt, whether it's first  
24 degree, second degree, or manslaughter,  
02:04 25 determined?



1 A Correct.

2 Q So, in that scenario, proof of innocence obviously  
3 would not be required?

4 A Proof of factual innocence would not be required.

02:04 5 Q And let's talk, you talk about "factual  
6 innocence", what -- what -- in dealing under  
7 Section 690, was factual innocence a factor, or  
8 legal innocence; can you elaborate on that?

9 A When I talk of "factual innocence", it signals  
02:04 10 that someone did not do the act, or did not do any  
11 of the things that the code sets out as, call it  
12 the *actus reus*, for an offence. When I talk of  
13 legal innocence I'm referring to a situation in  
14 which someone is convicted of an offence for which  
02:04 15 the evidence does not support. So if someone is  
16 convicted of first degree murder and the evidence,  
17 taken at its highest, will only support a  
18 conviction for manslaughter, then that is a  
19 miscarriage of justice.

02:05 20 Q And similarly, if someone is convicted of murder,  
21 for example, and that person can't prove factual  
22 innocence, but a review or new information  
23 suggests that that person should not have been  
24 convicted of murder, would that be a miscarriage  
02:05 25 of justice then?



1 A Yes.

2 Q In other words -- and I think you would agree that  
3 the criminal justice system, and the determination  
4 of guilt or innocence, is the determination of  
02:05 5 guilt or -- and/or legal innocence, is that fair,  
6 as opposed to factual guilt or factual innocence?

7 A Yes.

8 Q If we could just go back to the outline, please,  
9 338012, and talk about the onus. And do I  
02:05 10 understand your evidence here that, under Section  
11 690, that it would be incumbent upon the convicted  
12 person or his counsel to do the following; to  
13 number one review and investigate the matter  
14 initially, that -- let me rephrase that. A  
02:06 15 convicted person can't come to you and say  
16 "lookit, I'd like you to investigate, I'm  
17 innocent, I don't know what went wrong but would  
18 you people please go and investigate this and find  
19 out why I was wrongfully convicted"?

02:06 20 A We would say to that person "that is not the role  
21 of the department or of the Minister". Certainly,  
22 if you've been through the process, sat in on your  
23 trial, heard the evidence, you're in the best  
24 position to identify to us what it is you say  
02:06 25 constitutes wrongful -- or what the errors were



1 and why they constitute a miscarriage of justice.

2 Q And what you are telling us, then, it would be  
3 incumbent upon Mr. Milgaard and/or his counsel to  
4 identify, first of all identify the new and  
02:07 5 significant grounds that might provide a basis for  
6 a remedy under Section 690?

7 A Yes.

8 Q In other words that would be, in your view that  
9 would be their job, to say "well here's what's  
02:07 10 new, here's what's significant, and here's why the  
11 Minister should intervene"?

12 A That's correct.

13 Q And it's not a case of them coming to you and  
14 saying "you look at it, or let's jointly look at  
02:07 15 it and figure out whether there were some grounds  
16 for a miscarriage of justice"?

17 A That's correct. And I think, if you take a look  
18 at the application as filed, the application  
19 identified, specifically, two grounds and set  
02:07 20 forward an argument as to why those grounds met  
21 the threshold.

22 Q And, secondly, would it be correct to say that, as  
23 well, the applicant in this case, Mr. Milgaard or  
24 his counsel, would then, at least according to  
02:08 25 what you've told us, it would be his



1 responsibility to put forward to the Minister  
2 whatever evidence they felt necessary to establish  
3 a likelihood that a miscarriage of justice had  
4 occurred?

02:08 5 A Yes.

6 Q And so the applicant's responsibility would be to  
7 put together whatever evidence they felt was  
8 appropriate to establish the grounds that they put  
9 forward?

02:08 10 A Yes.

11 Q If we can then just scroll down and talk about  
12 process, now, and I want to understand and have  
13 you explain to us the role of the Department of  
14 Justice. Let me start off; was your role, were  
02:08 15 you legal counsel to the Minister of Justice,  
16 would that be an accurate description of your  
17 role?

18 A Yes.

19 Q And you were effectively -- I'll use the "her", I  
02:08 20 appreciate I think that Doug Lewis was initially  
21 the Minister but ultimately it would have been Kim  
22 Campbell, I think maybe Joe Clark was even at the  
23 start for a short time -- but, in any event, would  
24 it be fair to say that you were the Minister's  
02:09 25 lawyer and your job was to assist the Minister in



1 her discharging her duties under 690?

2 A That's how I saw my role.

3 Q And can you tell us, again just generally, you --  
4 what was your task with respect to David  
02:09 5 Milgaard's applications under Section 690?

6 A The first task was to examine the application and  
7 to do what we would now call a prescreen, and that  
8 is to examine the grounds advanced, and without  
9 making any decision as to whether or not the  
02:09 10 grounds could be made out but just assume that the  
11 grounds were made out, and the question you would  
12 direct your mind to is "would these grounds, if  
13 established, provide the Minister with a basis for  
14 granting the remedy". If the answer to that were  
02:09 15 "yes", then you would continue on to the next  
16 step.

17 Q Okay. So step one -- and you performed that  
18 preliminary screening with respect to David  
19 Milgaard's first application; is that correct?

02:10 20 A That's correct.

21 Q And did the application pass the initial screening  
22 test?

23 A Yes.

24 Q Would it be correct to infer, from that, that if  
02:10 25 Mr. Milgaard had been able to establish -- been



1           able to establish that what was in the application  
2           regarding Deborah Hall's evidence, that that, if  
3           proven, would have been the basis for the Minister  
4           to grant a remedy?

02:10 5           A           If we had collected information that supported the  
6           factual assertions?

7           Q           Yes.

8           A           Yes.

9           Q           Let me put it a different way, I asked that  
02:10 10          poorly. If the assertion made by Deborah Hall --  
11          ground number one, I think, was "Deborah Hall says  
12          Melnyk and Lapchuk lied at trial", I mean I'm  
13          boiling it down a bit; is that a fair --

14          A           Yes.

02:10 15          Q           If that had been established then can we infer,  
16          from the fact that it passed the initial  
17          screening, that that would have been the type of  
18          evidence that would have provided the basis for  
19          the Minister to grant a remedy?

02:11 20          A           Yes.

21          Q           Similarly with respect to Dr. Ferris' report, if  
22          that ground had been established, was that the  
23          type of evidence that would have provided the  
24          Minister with a basis to grant the remedy?

02:11 25          A           Yes.



1 Q And would that prescreening have been done fairly  
2 early on?

3 A Within two weeks of the receipt or three weeks of  
4 the receipt of the application.

02:11 5 Q And is that something that you would communicate  
6 back to Mr. Wolch or Mr. Asper; do you recall?

7 A I wouldn't tell them that it had passed. If --  
8 let me frame it this way. If an application does  
9 not pass the prescreening, a letter is drafted  
02:11 10 that initially informs the applicant that it's  
11 been dismissed for the following reason, it does  
12 not provide the Minister with a basis to grant the  
13 remedy.

14 In this case, having examined  
02:12 15 the grounds and made the determination that it  
16 could provide such a remedy, I looked at the  
17 balance of the material and found that I needed to  
18 get additional information so a -- and when I say  
19 I needed to get additional information the  
02:12 20 application was not complete because the trial  
21 transcripts and the appellate records did not  
22 accompany the written brief, and in the light of  
23 the grounds that had been raised, namely that  
24 Melnyk and Lapchuk lied when they testified about  
02:12 25 the re-enactment, I needed to take a look at the



1 trial transcript to see what it is they said and  
2 how that compared with what Deborah Hall was  
3 saying, and I also needed to look at the import of  
4 that evidence in relation to the body of evidence  
02:13 5 that was led at trial. I didn't know, when I read  
6 the application, just what significance was the  
7 re-enactment evidence in relation to the entire  
8 body of evidence tend -- led by the Crown to prove  
9 Milgaard's guilt.

02:13 10 Q Yeah. And let me give you an example, and again,  
11 would there be some situations where a witness  
12 says "lookit, so and so lied at the trial", but  
13 that the lie would be insignificant with respect  
14 to the verdict; --

02:13 15 A Yes.

16 Q -- would that be fair? So that for example if  
17 they -- and, again, to take an absurd example --  
18 that the witnesses said they stopped in Rosetown  
19 after they left Saskatoon to get food and in fact  
02:13 20 it was Kindersley, that that might be something  
21 that you would say, "well, unless it leads to  
22 other lies that might be something that, even  
23 though it's not true, doesn't affect the verdict"?

24 A It has no bearing on the issues at trial.

25 Q So that would be one of your tasks, is -- would it



1 be correct to say that one of your tasks would be  
2 to investigate the accuracy and completeness of  
3 the evidence put forward with respect to the  
4 grounds?

02:14 5 A Yes.

6 Q And if we can just scroll down, and I'll come back  
7 to the roles of other people in a moment -- no,  
8 just go back, please. And I've tried, and these  
9 are my words and I want to know if you can  
02:14 10 elaborate on this, but if we try and identify what  
11 tasks you would take as the investigator, let me  
12 start off; would you be conducting the  
13 investigation as the lawyer for the Minister?

14 A Yes.

02:14 15 Q And you'd be doing all of this to assist the  
16 Minister in exercising her discretion under  
17 Section 690; is that correct?

18 A That's correct.

19 Q So, number one, I have got a review of the facts  
02:14 20 relevant to the grounds advanced in the  
21 application; is that -- that would be one of your  
22 tasks?

23 A Yes.

24 Q And that would be to, I guess, understand the case  
02:15 25 and the facts of the case to figure out where



1           these grounds fit in; is that -- and I think you  
2           told us a bit about that?

3           A           Yes, that's correct.

4           Q           And similarly with Dr. Ferris, you would take a  
02:15 5           look at how that evidence, and what other evidence  
6           existed, to see how the Dr. Ferris ground fits in  
7           with the facts at trial; is that correct?

8           A           That's correct.

9           Q           And then:

02:15 10                    "b) An examination and assessment of any new  
11                    evidence or information",  
12           and that would be, would it be fair to describe  
13           it as testing the accuracy and completeness of  
14           the new information?

02:15 15           A           Yes.

16           Q           And so, in other words, they put forward "here's  
17           Deborah Hall's affidavit", your job for the  
18           Minister would be to go out and test it to make  
19           sure number one that it's accurate, and number  
02:15 20           two, that it's complete; is that fair?

21           A           That's fair.

22           Q           And why would you do that?

23           A           That's part of the job. And the fact is that the  
24           applicant has had the benefit of a trial, has had  
02:16 25           the matter dealt with by a Court of Appeal, and



1 has had the case reviewed by the highest Court in  
2 the country; before you recommend to the Minister  
3 that you turn the entire judicial process and the  
4 criminal procedure for adjudicating guilt or  
02:16 5 innocence, turn it back on its head, you would  
6 certainly want to have a factual basis for doing  
7 so.

8 Q Would it -- would your task be to ensure that the  
9 factual basis that supports the ground put forward  
02:16 10 had been tested on behalf of the Minister?

11 A That's correct.

12 Q If we can then go to the next paragraph --

13 A And what I mean by "tested", when you take a look  
14 at a statement or an affidavit, you -- you --  
02:17 15 sometimes it is so complete and compelling that  
16 there are very few questions left to be answered.  
17 Other statements give rise to, it just prompts  
18 questions, and it's our duty to explore those  
19 questions. We're not there to defeat the  
02:17 20 application, we're simply there to find out more  
21 about the circumstances under which it came into  
22 being, and to compare and contrast and to clarify,  
23 if there are differences in the recollections of  
24 people some years after the event, why those are.

02:18 25 Q And then as well under:



1 "c) Assessing the extent to which the  
2 evidence and information gathered is or  
3 may be relevant to the criteria  
4 considered by the Minister under section  
02:18 5 690 of the Criminal Code",

6 and am I correct that that; would that accurately  
7 describe one of your tasks then?

8 A Yes.

9 Q And is that, could you maybe just elaborate a bit  
02:18 10 on that then, please?

11 A In this application the initial grounds revolved  
12 around Deborah Hall's affidavit and Dr. Ferris'  
13 opinion about the use of the, call it the  
14 serological evidence, for lack of a better term.  
02:18 15 Once we interviewed Deborah Hall, the next step  
16 would be for me to summarize the results of the  
17 interview, highlight for the Minister the points  
18 of departure between the information now provided  
19 by Ms. Hall and that provided by the witnesses at  
02:19 20 trial, provide the Minister with advice as to the  
21 significance of those points of departure so that  
22 the Minister can make an assessment.

23 Q But would it be --

24 A All right.

02:19 25 Q And, again, when we talk about:



1                    "... relevant to the criteria considered  
2                    by the Minister under ... 690 ...",

02:19

3                    I think that would be the phrase "a reasonable  
4                    basis exists to conclude that a miscarriage of  
5                    justice had likely occurred"?

6                    A                Correct.

7                    Q                So --

02:19

8                    A                We're there to zero in on those portions of the  
9                    new information that might have affected the  
10                    outcome of the trial.

11                    Q                And so, for example, let's just talk: So when you  
12                    assess this new information you get the  
13                    information, you review it, you test it for  
14                    accuracy and completeness and do whatever  
15                    investigation you think appropriate to do that  
16                    testing; is that correct?

02:20

17                    A                Yes.

02:20

18                    Q                And then, once done, you take a look at whatever,  
19                    whatever you've accumulated in that process, and  
20                    determine whether or not the information, the  
21                    extent to which it provides a reasonable basis to  
22                    conclude that a miscarriage of justice likely  
23                    occurred; is that --

24                    A                That's right.

02:20

25                    Q                In other words you related it to the criteria that



1 the Minister needs to look at in order to grant a  
2 remedy?

3 A That's part of the job, yes.

4 Q Yeah. And so that, if you had gone through this  
02:20 5 process and concluded that Deborah Hall and her  
6 evidence, you accepted it as being truthful, in  
7 other words that George Lapchuk and Craig Melnyk  
8 had lied about the incident in the motel room and  
9 that you concluded that it didn't happen at all  
02:21 10 and they had lied about it, that might be  
11 something that you could assess and say "well,  
12 that's information that I have now established,  
13 I've accepted, and it is a reasonable basis to  
14 conclude that a miscarriage of justice had likely  
02:21 15 occurred, and that might be a basis to let Mr.  
16 Milgaard have a new trial"; is that --

17 A Or some other remedy, yes.

18 Q Or some other remedy?

19 A Yes.

02:21 20 Q Is there anything else -- and we'll touch on this  
21 later, I don't want to limit you -- but is there  
22 anything else, again in just trying to get an  
23 understanding of the nature and purpose of the  
24 investigation, that you would undertake on behalf  
02:21 25 of the Minister?



1 A Our job is to test or to examine the facts that  
2 were advanced; one, to ensure that it was  
3 accurate, and two, if there are any matters that  
4 required clarification, to clarify them. Next our  
02:22 5 job was to summarize that and based on a summary  
6 and on the information collected, to provide  
7 advice to the minister with respect to whether the  
8 grounds advanced and whether the information  
9 collected either signaled support for or not for  
02:22 10 the granting of a remedy. We took the role very,  
11 very seriously and we endeavoured to do it as  
12 quickly as we could, but as thoroughly as we  
13 could, because we recognize the importance of this  
14 particular procedure to someone who is sitting in  
02:22 15 a jail convicted of an offence.

16 Q If we could just go ahead to page 015 of this  
17 outline, and just down at the bottom, if we could  
18 get the next page, get this at the top and the  
19 next page right at the bottom. Sorry, actually  
02:24 20 just go back to 015 and then are you able to get  
21 the next page either beside it or underneath it?  
22 Actually, just go side by side, if you can do  
23 that, please, with the next page, and call up  
24 those two parts, please. This is a bit later on  
02:25 25 and I want to ask you to comment on your, I think



1           what you described your role, please correct me if  
2           I'm wrong, that after testing the information for  
3           accuracy, completeness, you then went on to assess  
4           whether or not it was the type of information I  
02:25 5           think that might be the basis for a remedy under  
6           Section 690; is that correct?

7           A           That's correct.

8           Q           And so would it be fair to say that once you've  
9           completed your review, you would conduct an  
02:25 10           assessment to identify whether the grounds  
11           advanced in the application, whether those  
12           facts -- or determine the significance of those  
13           facts in relation to the criteria to be considered  
14           by the minister under Section 690, and in  
02:26 15           particular, to try and categorize the new  
16           information into one of these four categories, and  
17           I suppose the first one is that the information,  
18           if the new grounds that had put forward is  
19           information that you assess that might support the  
02:26 20           conviction of David Milgaard, that might be  
21           information that you provide to the minister that  
22           would be relevant for her consideration; is that  
23           fair?

24           A           That's fair.

02:26 25           Q           And again, if you had gone out in the course of



1           investigating a ground and discovered that there  
2           was information that may have -- and let's talk  
3           about the Nichol John statement -- would that be  
4           one area where you might, after the trial, go out  
02:26 5           and investigate and find out information that may  
6           not have been available at trial that might  
7           actually be inculpatory?

8           A           Or exculpatory.

9           Q           Or exculpatory. So if it's exculpatory or  
02:27 10           inculpatory, if it's relevant for the minister's  
11           consideration, that would be something you would  
12           provide to her?

13          A           Yes.

14          Q           And secondly, if it was after your assessment  
02:27 15           information that did provide some basis to  
16           conclude that a miscarriage of justice may have  
17           occurred, that would be a conclusion that you  
18           would pass on to the minister?

19          A           That would be -- I would provide the minister with  
02:27 20           the evidence that signaled that that, there was a  
21           basis to conclude a miscarriage of justice may  
22           have occurred.

23          Q           For example, here's some information, I've tested  
24           it and this is the type of information that might  
02:27 25           tend to show a miscarriage of justice had likely



1 occurred?

2 A Yes.

3 Q And it would be up to the minister to decide to  
4 take in all these factors and make her decision?

02:27 5 A Yes.

6 Q But your job was to assess the evidence and signal  
7 whether it was the type of information that might  
8 lead to a remedy under the section; is that a fair  
9 way to put it?

02:27 10 A Yes.

11 Q And so three, the evidence that you gather might  
12 be neutral or of no assistance with respect to one  
13 or two, that might be an outcome?

14 A Correct.

02:28 15 Q And four, it might be information that requires  
16 you to go and gather further information; is  
17 that --

18 A Yes.

19 Q So would that fairly summarize the four categories  
02:28 20 of where you might put the evidence once you've  
21 gathered it, tested it and assessed it?

22 A Yes.

23 Q And I don't want to oversimplify your task, but  
24 would that be sort of the net outcome of what you  
02:28 25 were doing, is to try and go investigate, test and



1           then for the benefit of the minister try and put  
2           this evidence into where it fit in this matrix?

3           A           That was the anticipated outcome.

4           Q           Okay. Go back to page 2, please, of the outline.

02:28 5           Actually, sorry, to page 1, and I want to just  
6           talk about the people who were involved in the  
7           Department of Justice. It's my understanding  
8           that, and let's talk about 1988 or 1989 through  
9           until 1992. It's my understanding that your  
02:29 10          direct superior at the time was William Corbett;  
11          is that right?

12          A           That's correct.

13          Q           And he was the director of criminal law, that was  
14          his title at the time?

02:29 15          A           Yes.

16          Q           So is it correct to say that, and we'll hear a bit  
17          later about departmental reports, that once you  
18          did your investigation and prepared a report,  
19          that, and I appreciate that there's some privilege  
02:29 20          issues here, I'm just trying to identify who was  
21          involved and where it went, but that ultimately  
22          your work would lead to a departmental report that  
23          would go up the ladder in the Department of  
24          Justice and then from the department as a  
02:29 25          departmental report over to the office of the



1 minister?

2 A That's correct.

3 Q And so you, once your report was done, you would  
4 send it up the ladder to Mr. Corbett?

02:30 5 A Yes.

6 Q And then above Mr. Corbett was a fellow by the  
7 name of Bruce MacFarlane who was the assistance  
8 deputy minister of criminal law?

9 A He was the assistant deputy attorney general.

02:30 10 Q Sorry, assistant deputy attorney general. And so  
11 again without getting into the details of what was  
12 discussed between them, the report would go from  
13 Mr. Corbett and then up another rung of the ladder  
14 to Mr. MacFarlane for his review; is that --

02:30 15 A That's correct.

16 Q And then Mr. MacFarlane reported to the associate  
17 deputy minister; is that right?

18 A Yes.

19 Q To Doug Rutherford?

02:30 20 A That's right.

21 Q And then Doug Rutherford reported to the deputy  
22 minister John Tait?

23 A Yes.

24 Q So once it went through to Mr. Tait, the  
02:30 25 department would then send a report to the



1 minister?

2 A Correct.

3 Q Now -- and again, without getting into the nature  
4 of any discussions, did you only report to Mr.  
02:31 5 Corbett or did you have contact with his  
6 superiors; namely, Mr. MacFarlane, Mr. Rutherford,  
7 the deputy minister in the course of your  
8 investigation?

9 A At what point in time.

02:31 10 Q Well, let's talk about on the first application.

11 A Well, on the first application, most of my  
12 involvement would be at, shall we say, the primary  
13 level, and that's with Mr. Corbett in the sense  
14 that following my initial screening, I decided  
02:31 15 that certain investigative steps needed to be  
16 taken, so for administrative reasons I would  
17 require the approval of Mr. Corbett to expend  
18 funds for travel, for testing, for, shall we say,  
19 investigative-related work, and as a result I  
02:32 20 would brief up or prepare a briefing to him saying  
21 this is what I'm proposing to do and this is how I  
22 propose to do it, and by the way, it's going to  
23 cost X number of dollars, I need your approval to  
24 sanction these steps, so in that way Mr. Corbett  
02:32 25 was directly apprised of, shall we say, some of



1 the investigative steps that I took.

2 During the course of the  
3 inquiries, there were certain complaints made  
4 about my behaviour which went directly to Mr.  
02:32 5 MacFarlane and during that period of time he would  
6 say I understand this is the case, what have you  
7 to say, and I would be certainly dealing with him  
8 initially.

9 As the inquiries, shall we say,  
02:32 10 grew and the time extended as a result of a number  
11 of published reports about the case, it certainly  
12 did attract the attention of Mr. MacFarlane. As a  
13 result, he took a more active role in terms of  
14 informing himself as to what steps we had taken  
02:33 15 and where we were going and what the anticipated  
16 time of completion was.

17 Q And so would it be correct to say that at least in  
18 the first application there would be discussions  
19 from time to time between you and those superior  
02:33 20 to Mr. Corbett about updates about what was  
21 happening?

22 A Yes.

23 Q But as far as your reporting, your reporting would  
24 be to Mr. Corbett and then up and then he would  
02:33 25 report up the ladder?



1 A Yes.

2 Q If we can just go back, I want to just touch on a  
3 few other things about the investigation  
4 undertaken by you. Would it be -- if I can just  
02:33 5 call up the minister's letter again, 001529, go to  
6 the next page, please, and the minister in her  
7 letter talks about the role of the Department of  
8 Justice and says:

9 "When conducting an investigation into  
02:34 10 the matter, and later advising the  
11 Minister of Justice, the Department of  
12 Justice has as its duty an objective  
13 discovery of the facts, including an  
14 impartial examination of any new  
02:34 15 evidence that may become available. The  
16 approach taken during the investigation  
17 is not adversarial in nature, rather, it  
18 takes the form of an impartial inquiry  
19 into the full circumstances of the  
02:34 20 case."

21 And again, would that be an accurate statement of  
22 what you understood your role to be at the time?

23 A Yes.

24 Q And I suppose if your assessment of the evidence  
02:34 25 disagreed with the assessment of the evidence of



1 the applicant, that might give rise to some  
2 adversarial -- I'm not sure if adversarialness is  
3 a word, but adversity?

4 A Yes.

02:35 5 Q And so was your job to impartially assess it but  
6 not necessarily agree or disagree?

7 A My job wasn't to argue with the applicant, my job  
8 was to collect the information.

9 Q I want to talk, again if we can just go back to  
02:35 10 the outline, would the -- again, just on your  
11 investigation, when you talk about investigating  
12 the facts, what role would the grounds put forward  
13 in the application play in the scope of your  
14 investigation?

02:35 15 A It would be the focal point of the investigation  
16 and certainly when you are taking a look at a case  
17 like that, you are zeroing in on the grounds  
18 advanced. That is particularly the case when you  
19 have an application from counsel of the experience  
02:36 20 in criminal law as occurred in this case, counsel  
21 has had an opportunity to review the material, the  
22 trial and appellate record, to distill from all of  
23 that the grounds that they have identified after  
24 fully researching it.

02:36 25 When we receive applications



1           like that, we take that as our starting point and  
2           if, during the course of focusing on those grounds  
3           we come up with additional materials that signal  
4           that they either may be, or may be inculpatory or  
02:37 5           exculpatory, then we explore that as well, but  
6           where you have experienced criminal counsel  
7           advancing an application, you take it that the  
8           reason they have highlighted this ground or that  
9           ground is because those are the grounds that  
02:37 10          exist.

11          **Q**       So let's take, for example, in this application,  
12                   and we'll go to the document a bit later, in the  
13                   original application, December 28, 1988, there was  
14                   no mention of the evidence of Ron Wilson or his  
02:37 15                  treatment by the police as a ground for a  
16                  miscarriage of justice; agreed?

17          **A**        Agreed.

18          **Q**        And are you telling us that the fact that that was  
19                   not included in the application would signal  
02:37 20                  something to you about whether or not that was or  
21                  should be a ground to be considered to determine a  
22                  miscarriage of justice?

23          **A**        It would be off my list.

24          **Q**        Off your list because it was not included in the  
02:38 25                  application?



1 A Because it was not included.

2 Q And would you be assuming that if it had merit,  
3 that counsel who reviewed the matter would have  
4 put it in the application; is that your evidence?

02:38 5 A Yes, if it had merit or if they had information to  
6 support it as a ground, then I would expect that  
7 it would be included.

8 Q Would you characterize your role then in  
9 investigating the application in this case to be  
02:38 10 more reactive than proactive?

11 A Yes.

12 Q And reactive in the sense that you would be  
13 investigating both the grounds and the information  
14 that you had been provided?

02:38 15 A Correct.

16 Q And I think you said as well that if you came  
17 across something in the course of the work you  
18 were doing investigating the specific grounds --

19 A We would be proactive.

02:38 20 Q You would be proactive on that?

21 A Yeah. One of the things -- we're not, we weren't  
22 totally "reactive" because one of the things that  
23 occurred to me fairly early on once I had had a  
24 chance to read the transcript was that based on  
02:39 25 what I then understood the Crown's theory of the



1 case to be, I felt that DNA would be a way of  
2 coming up with some information that would  
3 conclusively settle the question of guilt or  
4 innocence, so I explored that.

02:39 5 Q And we'll see that in some of the documents, that  
6 that would be to determine whether any of Gail  
7 Miller's clothing might give rise to some samples  
8 that could do some DNA testing?

9 A Yes. I don't want to go ahead of you --

02:39 10 Q No, you go right ahead. No, no, you go right  
11 ahead, please.

12 A The submission was David Milgaard was innocent,  
13 that Dr. Ferris and the scientific evidence  
14 advanced would exclude David Milgaard as the  
02:40 15 killer because his medical condition as a  
16 non-secretor was in conflict with the physical  
17 evidence that had been collected and to the extent  
18 that they were able to determine that whoever  
19 deposited the semen was a secretor, that excluded  
02:40 20 him. Once I had reviewed the materials and  
21 recognized that the Crown's theory was that  
22 whoever sexually assaulted Gail Miller was her  
23 killer, the assumption was that having seen or  
24 observed that they had collected her underclothing  
02:40 25 and it had seminal fluid on it, what occurred to



1 me was get that tested. If the tests -- if the  
2 test results revealed that David Milgaard was not  
3 the donor of that semen, that would be the end of  
4 it and that would be consistent with the Crown's  
02:41 5 theory, whoever assaulted her also killed her, so  
6 having learned of the Crown's theory, I explored  
7 whether I could get my hands on court exhibits.  
8 Then I learned that it had already been examined  
9 and tested and that there was hardly anything left  
02:41 10 of a substantial chunk of that, but the test  
11 results were not conclusive.

12 Q So what would be different with that area of  
13 inquiry versus saying, well, why don't I go talk  
14 to Ron Wilson and Albert Cadrain?

02:42 15 A Albert Cadrain and Ron Wilson did not provide eye  
16 witness testimony, their evidence formed part of  
17 the circumstantial matrix of evidence that the  
18 jury used to convict David Milgaard. However,  
19 where you have a victim who was sexually assaulted  
02:42 20 and stabbed and the evidence was that, as I  
21 recall, the sperm was non-motile but still alive  
22 signaling that it had been deposited within 10 or  
23 12 hours of the autopsy, it signaled that the  
24 donor of that was the killer. It made sense  
02:42 25 because this would be a link, a clear link



1 establishing either innocence or guilt.

2 Q Okay.

3 A And my job is to find the truth, so whether I  
4 spoke with Wilson on Albert Cadrain, the outcome  
02:43 5 of that would not be as conclusive as the outcome  
6 of a DNA test.

7 Q Just back on that, this proactive/reactive, if the  
8 application had indicated "by the way, we think  
9 Ron Wilson lied at trial and Albert Cadrain lied  
02:43 10 at trial and they were influenced by the police  
11 and that's a ground and here's the evidence why,"  
12 would that then be a signal to you to go out and  
13 investigate that?

14 A Yes.

02:43 15 Q And therefore the absence of that ground being in  
16 the application, are you saying that that's a  
17 signal not to go check?

18 A As I recall, the trial transcripts was well over a  
19 thousand pages and there were a number of issues  
02:43 20 to be focused. We look at the things that the  
21 applicant raises.

22 MR. HODSON: This is probably an  
23 appropriate spot to break for the afternoon.

24 (Adjourned at 2:44 p.m.)

03:06 25 (Reconvened at 3:06 p.m.)



1 BY MR. HODSON:

2 Q Just carrying on our discussion about your role in  
3 testing the application and examining the  
4 evidence, I think you said you tested for accuracy  
03:07 5 and completeness. Would part of that function as  
6 well be to test the credibility of that evidence  
7 as a ground to be considered by the minister?

8 A I guess indirectly in the sense that if we're  
9 testing it for accuracy, there may be elements of  
03:07 10 credibility that will surface.

11 Q And so again the issue of credibility, would there  
12 be a distinction between credibility of the  
13 evidence for the purposes of guilt or innocence at  
14 trial versus credibility as a ground to be  
03:07 15 considered by the minister?

16 A I'm not certain I appreciate the difference.  
17 Credibility as a ground to be considered at trial  
18 is, as I understand it, it's usually taken in the  
19 context of what portion of a witness' testimony,  
03:07 20 whether in part or in whole, you accept. In  
21 relation to a 690 application, we would look at  
22 credibility, is it credible. Someone can honestly  
23 believe in what they are saying and may say it's  
24 mistaken because their perception doesn't accord  
03:08 25 with other facts that are objectively ascertained



1 to be correct.

2 Q Let me go back to an example I gave earlier, and  
3 an absurd example about if, and this does not  
4 relate to the David Milgaard case, but if one of  
03:08 5 the grounds put forward was that a juror had been  
6 bribed, for example, and you had the evidence of a  
7 person that said I participated in that and you  
8 examined that person and concluded that that  
9 evidence was not credible, would that be the type  
03:08 10 of thing that you as the minister's counsel would,  
11 in assessing whether that information falls into  
12 the category being a ground for the minister to  
13 consider, exercise some assessment of credibility  
14 of the information?

03:09 15 A In answer to that question as phrased, yes, with  
16 this explanation, my job would be to signal to the  
17 minister, "minister, this witness has said this;  
18 however, in assessing what the witness says, you  
19 should know the following facts which are, have  
03:09 20 been discovered, which seems to detract from the  
21 accuracy of what the witness has said, it's up to  
22 you, minister, to decide".

23 Q Would it be correct to say, then, your task is not  
24 to assess credibility, but rather gather the facts  
03:09 25 to put forward to the minister to allow the



1 minister to assess credibility?

2 A Correct.

3 Q Go back to the outline, please.

4 A If I can add one thing?

03:09 5 Q Yes, please.

6 A And to make recommendations about credibility, but  
7 not to make the decision on credibility.

8 Q And so to indicate that based on my assessment  
9 here's what I think about --

03:10 10 A That could happen.

11 Q Go back to the outline, please, I want to just  
12 talk about -- go to the next page, 2, please, I  
13 think we may have covered this, but we'll just go  
14 through it. The general process, and again we'll  
03:10 15 get into the specifics, Mr. Williams, but again  
16 the general process you would utilize, I think  
17 step 1 would be to review the trial and appellate  
18 record; is that right?

19 A That's right.

03:10 20 Q And then next, what about Crown prosecutor and  
21 defence counsel in this case, would that be a  
22 normal task undertaken, would be to talk to the  
23 participants in the trial process?

24 A It wouldn't be unusual to talk to either the  
03:10 25 prosecutor or defence counsel. A lot would depend



1 on the issues that are raised.

2 Q And what do you mean by that?

3 A For example, among the file materials I seem to  
4 recall getting, I think it was just a partial of  
5 what the closing address was, I wasn't certain  
6 about it, so I spoke with -- I spoke with Bobs  
7 Caldwell to get the notes on the closing address.

8 It seemed to me that I was fairly clear on what  
9 the theory of the defence was, so I didn't speak  
10 initially to Mr. Tallis, but again, sometimes you

11 are driven to speak to the Crown and to the  
12 defence by the issues that are raised on the  
13 application. It's not unusual to speak either to  
14 the Crown prosecutor or to defence, particularly  
15 where counsel advancing the application was not  
16 the trial defence counsel.

17 Q Oh, I see, so different counsel?

18 A Yeah.

19 Q So -- and we've seen reference to the Crown  
20 theory. Would that be something that you would  
21 try to distill either from the record or from the  
22 Crown prosecutor, the theory of -- the Crown's  
23 theory?

24 A In this case, yes, primarily because of the Ferris  
25 report. I believe in the opening the position of



1 the Crown in this case in relation to the, I'll  
2 call it the serological evidence, was much  
3 different from the summation of the Crown at the  
4 end and as a result, having read the trial  
03:12 5 transcripts, and particularly the evidence of  
6 Paynter, I seem to recall that he was questioned  
7 by the trial judge about the potential for  
8 contamination and the results that could be made  
9 or the conclusions that he or the jury could drawn  
03:13 10 when you added contamination into the mix.

11 Now, having heard what, or  
12 having read what Paynter had to say, I then wanted  
13 to find out what impact that would have on the  
14 Crown's theory because sometimes you start a trial  
03:13 15 thinking that your evidence is going to go in a  
16 certain way and it doesn't and then you have to  
17 make adjustments to your theory to conform with  
18 the evidence, so I needed to know what impact that  
19 would have had in terms of what can you now say  
03:13 20 about this semen now that Paynter said he can't  
21 really tell whether it was "A" or whether it was  
22 contaminated with vegetable or something else, and  
23 what do you now say about the value of this in  
24 terms of linking it to David Milgaard, because  
03:14 25 initially I think the Crown's theory was that it



1 was, you could link David Milgaard to that semen  
2 because blood from him found its way into the  
3 semen and thus accounted for his -- thus accounted  
4 for the presence of the "A" antigen.

03:12 5 Q Right. And I think that the evidence from trial  
6 from Mr. Paynter was that, in response to the  
7 question from the judge that there was no  
8 evidence, the presumptive test didn't show blood  
9 for sure, nor was there any evidence of blood in  
03:14 10 the semen, and I think in Mr. Caldwell's closing  
11 address, I think his position with the jury was  
12 that it neither is linked nor does it exclude him?

13 A Yes.

14 Q And so that would be something that you would go  
03:14 15 to Mr. Caldwell and say "because it relates to Dr.  
16 Ferris' report tell me how the Crown's theory  
17 evolved through the trial"?

18 A Yes.

19 Q And, again, we'll talk about that, your dealings  
03:14 20 with Mr. Caldwell, in a bit more detail later.  
21 We've talked, I think, about d) and e),  
22 investigating the specific grounds and  
23 supporting evidence and the matters not raised,  
24 and I think you've talked about that.

03:15 25 If you could go down to number



1 5, please. And, Mr. Williams, again, can you tell  
2 us whether the steps that you undertook in  
3 response to David Milgaard's applications under  
4 Section 690 were in accordance with the policies,  
03:15 5 practices, and procedures in place in the  
6 Department of Justice at the time?

7 A Yes.

8 Q And so, in other words, you dealt with this matter  
9 in a like fashion as other matters that were being  
03:15 10 dealt with by the department?

11 A Yes.

12 Q Okay. The reporting process, if we can scroll  
13 down to number 6, and again I think we've talked  
14 about that and we'll deal with this a bit more. I  
03:15 15 think what you told us your investigation, once  
16 completed, would be reported up the ladder in the  
17 Department of Justice, and then a departmental  
18 report would go over to the Minister or the office  
19 of the Minister?

03:16 20 A Yes.

21 Q And that would be a departmental report as opposed  
22 to a Eugene Williams report; is that correct?

23 A Yes.

24 Q If we can then go down, and I want to just  
03:16 25 identify for the record this privilege claim, so



1           that we're on common ground here. The -- and I've  
2           taken this from the April 14th, 2006 letter from  
3           Minister's counsel, and I think if you could just  
4           confirm for us that the Minister -- and I think  
03:16 5           we're agreed, Mr. Williams, it's the Minister's  
6           privilege as opposed to your privilege; correct?

7           A           Yes.

8           Q           Yeah. And so the Minister has asserted privilege  
9           with respect to:

03:16 10                   "... draft letters, memos, handwritten  
11                   working notes or reports in response to  
12                   Mr. Milgaard's section 690 applications  
13                   ...",

14           other than what has been already provided to the  
03:16 15           Commission; correct?

16           A           That's my understanding, yes.

17           Q           And, secondly, I've summarized a number of the  
18           grounds here, but I think essentially:

19                   "All memoranda or oral communication  
03:17 20                   amongst or between any of Eugene  
21                   Williams, William Corbett, Bruce  
22                   MacFarlane, Douglas Rutherford, Deputy  
23                   Minister John Tait and the Minister,  
24                   which provide advice (legal or  
03:17 25                   strategic) on David Milgaard's ...



1 applications ... or the ... process

2 ...",

3 and I believe the Minister has asserted privilege  
4 with respect to those oral and written

03:17 5 communications other than to the extent to which  
6 they have shown up in the Commission database; is  
7 that correct?

8 A Yes.

9 Q And as well:

03:17 10 "Communications or media material  
11 (briefing notes) prepared (or reviewed)  
12 by Eugene Williams and other members of  
13 the Department for the Minister ...",  
14 I think the Minister has asserted privilege with  
03:17 15 respect to those as well; --

16 A Yes.

17 Q -- correct? And them next page:

18 "Correspondence and oral communication  
19 between Douglas Rutherford and/or Bruce  
03:18 20 MacFarlane and William McIntyre ...",  
21 and we certainly have evidence on the record that  
22 retired Supreme Court Justice, The Honourable  
23 William McIntyre, was consulted for advice, and  
24 it appears the communications to and from him are  
03:18 25 being -- there is a privilege claim; is that



1 correct?

2 A Yes.

3 Q And would the primary contact with Mr. McIntyre,  
4 as far as the Department of Justice is concerned,  
03:18 5 would that have been Mr. Rutherford and  
6 Mr. MacFarlane?

7 A I believe it was Mr. Rutherford, but between the  
8 two, yes.

9 Q As opposed to you?

03:18 10 A Yes. That's not to say I didn't have contact with  
11 Mr. McIntyre, but --

12 Q Okay, sure.

13 A -- acting under instructions of either  
14 Mr. Rutherford or Mr. MacFarlane.

03:18 15 Q Under instructions from who?

16 A Either Mr. Rutherford or MacFarlane.

17 Q Okay. So those would be the two people who would  
18 have had the primary contact with him?

19 A That's my understanding, yes.

03:19 20 Q And, again, just generally, as far as discussions  
21 between you and other counsel in the Department of  
22 Justice, is -- presumably would there be  
23 discussions, as your report moved up the ladder,  
24 discussions back and forth about the report and  
03:19 25 advice to be provided to the Minister; would that



1 be the case?

2 A Yes.

3 Q And would there be a significant amount of  
4 communication? Are you able to give us some  
03:19 5 magnitude of what took place by -- and without  
6 getting into the details of any of it?

7 A Well, as we came close to completing the report  
8 there would be discussions about the significance  
9 of various bits of information and its legal  
03:19 10 ramification, there would be discussions about the  
11 completeness of the investigation, things that  
12 needed to be done or questions that arose or  
13 whether or not certain facts needed to be  
14 clarified, there would be advice given as to the  
03:20 15 significance or the assessment of this --

16 Q And are either --

17 A -- fact or that fact.

18 Q And are you able to confirm for us that, as far as  
19 the Department of Justice lawyers, you would have  
03:20 20 been the only lawyer that had direct contact with  
21 witnesses? I mean, as far as the investigative  
22 phase of it, I don't think there's anything in the  
23 record to suggest that any other lawyers had any  
24 involvement; are you able to confirm that by your  
03:20 25 recollection?



1 A By my recollection, I was the only departmental  
2 lawyer who interviewed witnesses and participated  
3 in the preparation of the material. Of course I  
4 have the assistance of RCMP officers and, in  
03:21 5 particular, Sergeant Pearson.

6 Q Right. Okay. If we could call up 337474, please.  
7 This is a document dated April 23, 1992 called  
8 Chronology of Events, and I understand this is a  
9 document that you would have prepared in April of  
03:21 10 '92; is that correct?

11 A That's correct.

12 Q And do you recall what the purpose of this was?

13 A The purpose was to provide a listing of what we  
14 had done, in part to answer suggestions that were  
03:21 15 publicly distributed or were widely disseminated,  
16 that the department had sat on the application for  
17 a considerable period of time, and I believe the  
18 chronology coincided with the Minister's  
19 announcement of, I think, a remedy on application  
03:22 20 number 2.

21 Q Okay. So this would be around, I think April 14th  
22 was the Supreme Court decision, so around that  
23 time frame you would have put this together,  
24 presumably from your file and your recollection,  
03:22 25 to try and give some dates and a chronology?



1 A Yeah, I believe it was prepared with reference to  
2 the materials on file.

3 Q And can you verify for us that it was -- to the --  
4 and I mean it doesn't include every step that was  
03:22 5 taken, but to the extent that it does, that it  
6 would be accurate?

7 A Yes.

8 Q And I want to just go through a couple of these to  
9 shed some light on the timing. I think obviously  
03:23 10 the application, which we'll talk about, December  
11 28, 1988 and then May 8, 1989:

12 "The trial and appellate record were  
13 sent by counsel for Milgaard."

14 What in that time frame, between the time that  
03:23 15 you received the application and you received the  
16 trial and appellate record, would you have  
17 undertaken any investigative steps with respect  
18 to the application other than the preliminary  
19 assessment you told us about?

03:23 20 A The preliminary assessment was conducted between  
21 December 28th and February 16th.

22 Q Oh, I see, there. Okay, yes.

23 A And that in the -- on -- or in the letter dated  
24 February 16th, 1989 Mr. Milgaard's counsel was  
03:23 25 asked to provide the trial and appellate record,



1 forensic reports, and a waiver of solicitor/client  
2 privilege. Between the 16th and May 8th, one of  
3 the things I may have done was do some research in  
4 relation to the scientific material presented, I'm  
03:24 5 not certain if I did it at that time or later;  
6 secondly, to identify someone who can assist us in  
7 interpreting Dr. Ferris' report. Those were the,  
8 basically, the types of things I would do at that  
9 time, following just reading the -- and trying to  
03:24 10 understand the submissions.

11 Q And would you, if the trial and appellate record  
12 had been provided with the application, would you  
13 have undertaken a review of that prior to when you  
14 actually did; did that make a deference in your  
03:24 15 timing?

16 A Certainly.

17 Q In what respect?

18 A While I could read Deborah Hall's affidavit and  
19 understand her complaint about the testimony of  
03:24 20 Melnyk and Lapchuk, until such time as I'd read  
21 Melnyk and Lapchuk's testimony in the context of  
22 all of the evidence offered at trial, I couldn't  
23 really make an assessment of just how important it  
24 was or was not in relation to the jury coming to a  
03:25 25 conclusion about guilt or innocence.



1 Q If we could just scroll down -- actually, go to  
2 the next page, please. Actually, sorry, go back  
3 to the previous page and I'll just touch on these.  
4 I'll go through these in much more detail, but it  
03:25 5 appears that the forensic report of Ms. Alain was  
6 obtained in August 8, 1989?

7 A Yes.

8 Q And if we can just go back to the full page,  
9 please, the DNA testing you followed up on  
03:25 10 September 8, 1989; correct?

11 A Yes.

12 Q And then the next page, interviews were conducted  
13 of Deborah Hall, Justice Tallis, Nichol John, and  
14 Dr. Emson. And then, if we can call that out, it  
03:26 15 says:

16 *"(A preliminary Departmental report was*  
17 *prepared in November/December, 1989. It*  
18 *was not pursued due to the events*  
19 *described below.)"*

20 Is that correct?

21 A Yes.

22 Q And it's my understanding that preparation of the  
23 departmental report by you to send up the ladder  
24 in the department would signal that you had  
03:26 25 completed your review and assessment subject to



1           what your superiors might raise; is that fair?

2           A           Yes.

3           Q           And so can we take from this document that, in  
4           November/December 1989, you would have completed  
03:26 5           your assessment of the first application and  
6           drafted, or started to draft, the departmental  
7           report?

8           A           Yes, in relation to the initial two grounds,  
9           namely surrounding Deborah Hall and Dr. Ferris.

03:26 10          Q           And then it says:

11                           *"... it was not pursued due to the*  
12                           *events described below."*

13          And we see the January 23rd letter and, as well,  
14          the February 28th, 1990 Larry Fisher information,  
03:27 15          and so is it correct to say that the information  
16          regarding Larry Fisher came in while your  
17          departmental report may have been making its way  
18          up the ladder?

19          A           Yes.

03:27 20          Q           And it appears from this document that you went  
21          back to, not necessarily square one, but you went  
22          back to add a new ground to the matters you were  
23          investigating; is that fair?

24          A           Correct. Before -- before the report made its  
03:27 25          final journey, I believe on January 10th we had



1           contacted counsel for the applicant and asked  
2           counsel just to confirm that there was nothing  
3           else for us to look at in relation to the  
4           application, there were no other grounds being  
03:27 5           submitted. We got a response indicating that  
6           there were some things that they would like to  
7           pursue, but would ask whether we could provide  
8           funding for it, and we could not.

9           **Q**       And so after that, but for the information on  
03:28 10           Larry Fisher, presumably the report would have  
11           gone up the ladder and the Minister would have  
12           made a decision at some point based on the two  
13           grounds in the initial application; is that fair?

14           **A**       That's correct.

03:28 15           **Q**       And then, if we could scroll down, this talks  
16           about -- and we'll get into this in far more  
17           detail -- Sergeant Pearson or the RCMP were  
18           engaged. If we can go to the next page, it looks  
19           like:

03:28 20                    *"In April 1990, the departmental report*  
21                    *to the Minister was once again prepared*  
22                    *in draft, but was abandoned due to the*  
23                    *events described below.)"*;

24           is that right?

03:28 25           **A**       Yes.



1 Q And was there some -- and we'll deal with this in  
2 more detail -- but was there some pressure, Mr.  
3 Williams, to get the report done and up through  
4 the department and to the Minister, and I'm  
03:28 5 talking pressure from the applicant?

6 A Yes.

7 Q And so, here, would -- it appears that, in April  
8 of 1990, your process started again to get the  
9 report, which presumably would have dealt with the  
03:29 10 new information from Mr. Fisher?

11 A Yes.

12 Q And that due to the events described below, if we  
13 can scroll down, I think this is where we get into  
14 Dr. Markesteyn and, as well, the Wilson  
03:29 15 recantation. Is it fair to say that, again, you  
16 went back, not to square one, but went back to  
17 consider new grounds?

18 A That's correct.

19 Q And then if we can go to the next page -- and  
03:29 20 we'll cover these matters in detail later, I'm  
21 just trying to get the chronology -- if we can go  
22 to the next page, looks like September 10th, 1990:

23 "Final written submissions received from  
24 counsel for Milgaard."

03:29 25 and then the October 1, 1990 meeting, which we'll



1 talk about a bit later, and I think that would  
2 have been where information was shared with Mr.  
3 Wolch and Mr. Asper after you had completed your  
4 investigation; is that right?

03:30 5 A That's correct.

6 Q And then we see here some dates, the first half of  
7 October 1990 the report to the Minister was  
8 prepared, October 17, 1990 to November 5, 1990:

9 "Senior departmental officials reviewed  
03:30 10 the investigation and the report."

11 And again, I don't wish to delve into privileged  
12 matters, but would that, when you say "senior  
13 departmental officials", would that be Corbett,  
14 MacFarlane, Rutherford and -- and Rutherford?

03:30 15 A Yes.

16 Q And then November 6th, 1990 the report is referred  
17 to the Deputy Minister, and this is when Mr., or  
18 The Honourable Mr. McIntyre came into the picture;  
19 is that correct?

03:30 20 A That's correct.

21 Q And then these dates of his engagement, November  
22 14, 1990 and then about 2 1/2, 3 months there  
23 where he reviewed the case, his advice was  
24 provided on February 7, 1991; is that correct?

03:31 25 A Correct.



1 Q And then the next page, just at the top, the  
2 report and recommendations went to the Minister,  
3 and then on February 27th the Minister's decision  
4 came out; is that correct?

03:31 5 A That's correct.

6 Q Now I also understand, in there, that there is a  
7 step involving -- and I don't want to get into the  
8 details of this -- but the Privacy Commissioner.  
9 Was there a step, as well, that caused or took  
03:31 10 some time to deal with privacy issues?

11 A Yes. In light of the fact that the application  
12 had received such wide press, such widespread  
13 publicity, the Minister wished to make it public.  
14 Most applications, or the results of applications,  
03:32 15 are not publicized, they are provided to the  
16 applicant only. However, a decision was taken to  
17 make this one public, and as a result we had to  
18 conform with the provisions of the *Privacy Act*.  
19 And that in -- that meant providing the Privacy  
03:32 20 Commissioner with a copy of the decision,  
21 providing a justification for releasing personal  
22 information about individuals within the report,  
23 and getting the permission of the Privacy  
24 Commissioner to make that release.

03:32 25 Q And if we could scroll down, I think this then



1 deals with the second application, and here  
2 September 5, 1991:

3 "Departmental agent appointed to review  
4 the second application ...";

03:33 5 was that you initially?

6 A That was me.

7 Q And then if we can just scroll down, next page,  
8 please. There is a November 11th meeting with  
9 counsel for Mr. Milgaard, and I think those people  
03:33 10 are Douglas Rutherford, Bruce MacFarlane, and  
11 Eugene Williams; is that right?

12 A That's correct.

13 Q With Mr. Wolch and Mr. Asper?

14 A Yes.

03:33 15 Q And am I right that, on the second application, we  
16 now see it was referred to the Supreme Court  
17 November 28th, 1991; was there the same type of  
18 investigation and departmental report on the  
19 second applications as the first?

03:33 20 A No, there wasn't.

21 Q And was there -- let's talk about the  
22 investigation. Again just generally, we'll deal  
23 with this more specifically, but was there an  
24 investigation conducted of the second application?

03:33 25 A There was a limited investigation conducted of the



1 second application in the sense that, between the  
2 conclusion of the first and second application, we  
3 became aware of additional information relating to  
4 some of the, if you might call it, Fisher victims,  
03:34 5 some of the rape victims, certain file material  
6 that we were led to believe did not exist was  
7 recovered or uncovered; and then, secondly, one or  
8 two of the individuals identified in the Centurion  
9 Ministries report, which formed the basis of the  
03:34 10 second application, were interviewed to determine  
11 the accuracy and to get some details about what  
12 was now being reported, because -- because we now  
13 had received some of the file materials and a  
14 comparison of what was in Centurion compared to  
03:35 15 what had been provided to the investigators at the  
16 time of the offence, it did not match, so we  
17 wanted to clarify some of that information.

18 But there wasn't, I would say  
19 there wasn't a full review of all of the, of all  
03:35 20 of those witnesses, because we were contemplating  
21 referring this to the Supreme Court or to a Court  
22 of Appeal and, as part of that process, we felt  
23 that the Court might then more fully explore that  
24 information.

03:35 25 Q Yeah. Would it be -- are you telling us that at



1           some period shortly after the second application  
2           was filed, maybe within weeks or a month or so,  
3           that a decision was either made or contemplated  
4           that the matter would be sent to a Court for  
03:35 5           advice to the Minister?

6           A        Yes, that was one of the options that was actively  
7           considered.

8           Q        And that the efforts on your parts, and perhaps  
9           others, may have been geared as much towards that  
03:36 10           process as opposed to investigating the  
11           application for purposes of considering whether a  
12           remedy under a) or b) would be provided?

13          A        Correct.

14          Q        And we'll deal with that in a bit more detail.

03:36 15           Okay. If we could go to, I now want to start to  
16           go through, in a chronological order, your  
17           dealings on this matter. If we could start with  
18           333272, please. And I think, Mr. Williams, this  
19           would be the first document that was sent on  
03:36 20           behalf of David Milgaard to the federal Minister  
21           signaling intention, an intention on the part of  
22           Mr. Milgaard to seek a remedy under Section 690 --  
23           although it doesn't say 690 -- but I think raising  
24           with the federal Minister that he was seeking  
03:37 25           help; is that a fair way to put it?



1 A Yes.

2 Q And so, to your knowledge, this would have been  
3 the first contact made by Mr. Milgaard to the  
4 federal Minister?

03:37 5 A In January of 1986, yes.

6 Q Yes. And so -- and we've been through this  
7 before, but again, he writes to the Minister  
8 saying that he's -- he talks about the *Fifth*  
9 *Estate* program:

03:37 10 "... it is possible to show beyond any  
11 reasonable doubt that I am innocent."

12 Now, just on this point, would it be -- again, I  
13 take it that under Section 690 an application  
14 directly from a convicted person without counsel  
03:37 15 would be -- could be taken up by the Minister and  
16 investigated; is that fair?

17 A Yes.

18 Q And so that, if Mr. Milgaard or Mrs. Milgaard  
19 simply wrote to you and said "we want relief,  
03:38 20 here's a box of my materials and here's why", that  
21 that's something that the federal Minister,  
22 through the Department of Justice, would  
23 investigate as well?

24 A Yes.

03:38 25 Q And where legal counsel were not involved, would



1           you take a different approach, if --

2           A        If I'd received such a letter I would probably  
3                   write back and say "can you tell us, please, why  
4                   it is you say you're innocent, and what it is  
03:38 5                   about the trial that was wrong that resulted in  
6                   your conviction when in fact you're innocent, what  
7                   were the errors that you would like to identify,  
8                   what is the new evidence that you have uncovered  
9                   that signaled that a remedy is appropriate".

03:38 10                                Because I'd also take the time,  
11                   in any correspondence with an applicant who is  
12                   unrepresented, to set out in some detail what the  
13                   grounds are for making an application and what's  
14                   some of the threshold material that needs to be,  
03:39 15                   that needs to accompany the application, should  
16                   contain.

17           Q        And in a case where, if an inmate or someone on  
18                   behalf of a convicted person, we'd -- we've heard  
19                   some evidence about the requirement of -- to  
03:39 20                   provide a copy of the trial record; is that  
21                   something that's mandatory or is it something  
22                   that, if the convicted person cannot obtain the  
23                   trial record, are other -- can other steps be  
24                   taken?

03:39 25           A        Other steps can be taken. Particularly with



1 unrepresented persons, that's often a problem,  
2 because if someone is writing from a penitentiary  
3 the chances are they don't have the trial and  
4 appellate record with them, and one of the things  
03:39 5 we would do is firstly ascertain whether or not  
6 there was an appeal.

7 Q Because, if there was an appeal, there was likely  
8 a transcript prepared?

9 A There was likely a transcript prepared, and if the  
03:40 10 prisoner didn't have it, the Crown would, so you  
11 would get it from the Crown.

12 Q And again, if a convicted person was not able, did  
13 not have the record and did not have the resources  
14 to pay to get a copy of the record?

03:40 15 A No, if there were not an appeal, there -- most  
16 provincial courts have in their rules some  
17 provision for getting an application for leave to  
18 appeal, and even though you're out of time, in an  
19 appropriate set of circumstances with the  
03:40 20 approval, with the consent of the Crown, courts of  
21 appeal have consented to an appeal when merited.  
22 And I have personal experience in which, let's say  
23 eight, ten, 12 years had elapsed between the  
24 conviction and the discovery of new evidence, no  
03:40 25 appeal had been taken from the conviction, and our



1 advice was, once we had done certain  
2 investigations contact was made with the Attorney  
3 General, there was an application for leave to  
4 appeal on consent, the Court heard it, the  
03:41 5 conviction was quashed.

6 Q So again, in a case where the convicted person has  
7 the transcript either in his possession or his  
8 lawyer's possession, it would be your practice to  
9 request a copy of it from them?

03:41 10 A Yes.

11 Q And in cases where the convicted person or his  
12 counsel does not have the transcript or record  
13 were there -- would there be avenues where you  
14 would go get the transcript yourself as opposed to  
03:41 15 requiring the convicted person to do so?

16 A If a transcript had been prepared, yes.

17 Q If it had been prepared?

18 A We would get it, yes.

19 Q If we can go to 333261. And this is February 21,  
03:42 20 1986, so a few weeks later, and it looks like  
21 Mr. Fainstein is writing to Henry; do you know who  
22 Henry Brown is or was?

23 A At the time Henry Brown was a Minister -- he  
24 worked in the Minister's office, was one of the  
03:42 25 executive assistants to the Minister.



1 Q And so it would appear that Mr. Fainstein is  
2 trying to identify what case David Milgaard was  
3 referring to, his letter did not signify any  
4 information about the conviction. Is it fair to  
03:42 5 conclude that, after the letter went to  
6 Mr. Crosbie, that the Department of Justice  
7 investigated to see, to get the particulars of the  
8 Milgaard conviction or the case?

9 A Yes.

03:42 10 Q And then if we can go to 333262. And we'll hear  
11 from Mr. Fainstein on this, but it appears that  
12 Mr. Fainstein would have prepared a letter to go  
13 from the Minister back to Mr. Milgaard; is that  
14 correct?

03:42 15 A Yes.

16 Q And I'll, I'll go to the actual letter in a  
17 moment. Then 333264. It would appear that  
18 Mr. Fainstein, on the basis of David Milgaard's  
19 letter to John Crosbie January 28, 1986, opened a  
03:43 20 new file for Mr. Milgaard in anticipation of  
21 receiving an application under Section 617; is  
22 that correct?

23 A That's correct.

24 Q And would this be the file, then, that ultimately  
03:43 25 became yours in and around December 28, 1988 when



1 the application was filed?

2 A Yes.

3 Q If we can go to 333268, please. And I believe  
4 this is the letter sent by Henry Brown, Executive  
03:43 5 Assistant, to Mr. Milgaard responding to the  
6 letter to John Crosbie. And then if we can scroll  
7 down, and again this would be -- would this be the  
8 language then used by the department at the time  
9 about what's required in the most compelling  
03:44 10 circumstances which suggests that there has been a  
11 miscarriage of justice?

12 A Yes.

13 Q And then, again if we can scroll down, it talks  
14 about:

03:44 15 "... you may make an application to the  
16 Minister for relief. The following must  
17 be sent to the Minister: a brief fully  
18 detailing why you say that there was an  
19 injustice, copies of transcripts of the  
03:44 20 preliminary hearing and trial, copies of  
21 any judgements and reasons for judgement  
22 that were issued in your case, copies of  
23 any written arguments filed by the Crown  
24 and defence."

03:44 25 So I take it this would have been the practice,



1 at the time, as to what was required by a person  
2 making an application under that section?

3 A Yes. You should also be aware of the first  
4 sentence in that paragraph.

03:45 5 Q Okay, you have not exhausted the court process?

6 A Yes.

7 Q So in other words, if there are -- if all appeals  
8 were not taken, then what did that mean?

9 A Simply if there had not been an appeal, and we're  
03:45 10 not talking specifically about the Milgaard  
11 application because Mr. Fainstein by then knew  
12 that an appeal had been taken, but this was part  
13 of the message that we would give to someone  
14 unrepresented by counsel, if you have not  
03:45 15 exhausted the court process, please do so because  
16 the 690 process is not a substitute for the normal  
17 appellate process designed to deal with  
18 allegations of wrongful conviction.

19 Q And, for example, if Mr. Milgaard had not applied  
03:46 20 for leave to the Supreme Court of Canada back in  
21 1971, then is it fair to say you might have gone  
22 back and said lookit, even though 20 years has  
23 elapsed, or 17 years has elapsed, you may wish to  
24 pursue that remedy?

03:46 25 A Yes.



1 Q In other words, apply to the --

2 A Yeah. That's one of the tricky ones because leave  
3 applications to the Supreme Court, it's got to be  
4 a matter of national significance, otherwise -- or  
03:46 5 a very important question, otherwise you are not  
6 going to get it, so most of the time if someone  
7 had applied to the Court of Appeal, had been  
8 turned down and didn't go further, we would, for  
9 all intents and purposes, say you've exhausted  
03:46 10 your remedies, because unless the issue was huge,  
11 we knew that it would be a pro forma application  
12 to the Supreme Court because the court is not  
13 going to look at it.

14 Q So again, if it had been a case where Mr. Milgaard  
03:47 15 had not appealed to the Saskatchewan Court of  
16 Appeal, that might be a case where you would go  
17 back and say lookit, go to the Court of Appeal  
18 with fresh evidence and get leave to bring an  
19 appeal, something of that nature?

03:47 20 A Yes, and the reason was simply this, if you look  
21 at the remedies that the minister was authorized  
22 to give by Section 690, two of those three  
23 remedies contemplated a return of the case to the  
24 courts, to the Court of Appeal.

03:47 25 Q So you are saying go there first rather than



1 asking us to send you back there?

2 A Yes.

3 Q Go to 333266, and this is a letter from Mr.  
4 Milgaard back to Mr. Crosbie and -- actually, just  
03:48 5 scroll up a bit, please, two lines, first full  
6 paragraph, and he says:

7 "I am aware of how to proceed legally  
8 and have a reputable solicitor, Mr.  
9 Hersh Wolch presently retained. What I  
03:48 10 wish to make clear ..."

11 And then goes on to talk about the Parole Board.  
12 So would it be fair to say that at least from the  
13 Department of Justice file, that as of April of  
14 1986 you would have been aware that Mr. Milgaard  
03:48 15 had counsel, Mr. Wolch, assisting him in his  
16 application?

17 A Yes.

18 Q And as far as -- are you able to shed any light on  
19 this comment, "I am aware of how to proceed  
03:48 20 legally"? Again, would that have been something  
21 that you would have placed any reliance on?

22 A Well, when an applicant comes back and indicates  
23 that they have counsel and that -- we basically  
24 assume that counsel either knows what to do or has  
03:49 25 the capacity to find out what to do in terms of



1 the 690 application and has certainly more  
2 resources than someone incarcerated in a  
3 penitentiary in terms of assembling the materials  
4 required to complete an application.

03:49 5 Q Now, from this date, April of 1986, through until  
6 December of 1988, and I touched on this earlier, I  
7 think you told us you would not have had any  
8 discussions directly with Mr. Wolch or Mr. Asper;  
9 is that correct?

03:49 10 A That's correct.

11 Q But you believe that Mr. Fainstein and perhaps  
12 others may have had discussions about what might  
13 be required for Section 690?

14 A I believe so based on my discussion on, a  
03:50 15 discussion with Mr. Fainstein.

16 Q And what was the -- what did Mr. Fainstein tell  
17 you?

18 A That he had been speaking with Mr. Wolch about the  
19 690 and had advised him of the requirements and  
03:50 20 the types of things that applicants generally  
21 needed to do or to submit to complete an  
22 application.

23 Q And were you informed that this discussion took  
24 place before the application? Not the discussion  
03:50 25 with you and Mr. Fainstein, but was the discussion



1           between Mr. Fainstein and Mr. Wolch to your  
2           information, was that before they filed the  
3           application?

03:50 4           A           That was my understanding, that the discussion  
5           took place before the application was received.

03:51 6           Q           If we could call up 000002, and this is the letter  
7           to Joe Clark who I think was the minister at the  
8           time, and attached to the letter is the  
9           application which we'll go through parts of that,  
10          and I think your evidence was that I think you  
11          sought, you asked Mr. Fainstein if he was able  
12          to -- and actually, let me just call up 333285, I  
13          think this is your January 20, 1989 memo to Mr.  
14          Fainstein?

03:51 15          A           That is correct. I, by then, had assumed the role  
16          of coordinating 690 applications. Having received  
17          the application brought on behalf of David  
18          Milgaard, I asked Mr. Fainstein, in light of what  
19          I understood was his prior contact with the  
03:52 20          applicant's counsel, whether he would take this  
21          case on. I had taken an initial look at it, had  
22          done the prescreening, I note the case raises some  
23          interesting issues, and asked him to prepare a  
24          report, and as part of the initial screening  
03:52 25          process I looked at the application to see whether



1 it was complete having regard to the issues raised  
2 and I drafted an initial letter designed to  
3 request what was the information missing from the  
4 application, I asked the -- what we would do is we  
03:52 5 would draft a letter for the signature of either  
6 Henry Brown or whoever was the minister's  
7 assistant at that time requesting -- if, for  
8 example, the trial transcript was missing, send us  
9 a copy of the trial transcript, etcetera,  
03:53 10 etcetera, indicating that the application had then  
11 been referred to the department for its  
12 examination and comment and recommendation, so I  
13 received it, I sent it over to Mr. Fainstein and I  
14 said lookit, here's the initial draft, I think  
03:53 15 it's -- I think it's a go and here's my assessment  
16 of the things that are required, you can take a  
17 look at it.

18 Q Would it be correct to conclude that by January  
19 20, 1989, which is the date of this memo, that you  
03:53 20 had completed your initial screening and  
21 determined that the grounds, if proven, were  
22 sufficient to provide the basis for a remedy under  
23 Section 690?

24 A Yes.

03:53 25 Q And if we can go back to 000002, that would be



1           your preliminary screening, would be on the basis  
2           of reviewing the application document itself and  
3           likely nothing else; is that fair?

4           A           That's what I had, yes.

03:54 5           Q           So you have the letter, and then if we can go to  
6           the third page, the application, and then there  
7           was some attachments, some evidence, things of  
8           that nature, this is a familiar document to you,  
9           is it, sir?

03:54 10          A           Yes.

11          Q           If we can just go back to the letter, page 1, you  
12          have -- 000002, please. Do you recall sort of an  
13          initial reaction to -- sorry, my screen is off.  
14          Just bear with me for a moment. There we go. Do  
03:55 15          you recall any initial reaction having, that you  
16          formed having looked at it? I mean, your memo to  
17          Mr. Fainstein says some interesting points.

18          A           It looked promising for a remedy in the sense that  
19          if what was alleged could be established, then  
03:55 20          this could be added to the 15 others that had been  
21          granted a successful remedy over the last 18  
22          years.

23          Q           Can you tell us the significance that you would  
24          place on the application document itself, being  
03:56 25          the letter and the application?



1 A That is the item that prompts us to focus our  
2 attention when we read a transcript, because if  
3 you have a trial, you are looking at over a  
4 thousand to 12 to 13, 1,400 pages of material,  
03:56 5 yes, you are going to read so that you get  
6 background context, but you read different parts  
7 of the transcript with different intensity, and so  
8 in relation to the application, you would  
9 certainly want to zero in on the testimony of -- I  
03:56 10 think it was Paynter, I'm not sure if it was  
11 Sergeant Paynter, but --

12 Q Yes.

13 A And you would also want to zero in on the  
14 testimony of Melnyk and Lapchuk, but you would  
03:57 15 also have to look at the three main, I would say,  
16 Crown witnesses, because Melnyk and Lapchuk's  
17 evidence is in support of circumstantial evidence  
18 provided by Cadrain, Wilson and Nichol John, or  
19 Demyen.

03:57 20 Q And so let me just follow up on that for a moment.  
21 If -- and let's exclude Nichol John who I think is  
22 referred to in the letter. If you had gone  
23 through and found that based on your assessment  
24 that either the Deborah Hall evidence and/or the  
03:57 25 Dr. Ferris evidence was accurate and complete and



1 provided the basis for a remedy under Section 690,  
2 do I understand that rather than going in and  
3 saying "okay, well, if what they say is true, how  
4 did Wilson, John and Cadrain come up with this  
03:57 5 circumstantial evidence," is it correct to say  
6 that that's something you would send back to the  
7 court to figure out?

8 A That's something that the minister might be  
9 prompted to send back to the courts. We could  
03:58 10 recommend -- we could recommend to the minister,  
11 lookit, minister, there's something about this  
12 evidence that was led that is, wasn't known,  
13 Deborah Hall wasn't known at the time, and what  
14 she now says seems to run counter to some very  
03:58 15 significant evidence that was raised in support of  
16 the conviction. Melnyk and Lapchuk's evidence,  
17 it's hard to gauge it, but essentially that's one  
18 of the few bits of evidence in which you have some  
19 form of admission by David Milgaard, if it can be  
03:58 20 characterized like that, and where we now have a  
21 witness that comes and provides cogent evidence  
22 that calls into question its reliability, maybe  
23 that's something that you want to have a good look  
24 at and make a decision on.

03:59 25 Q So again back -- the point I'm trying to get at is



1 are you telling us that Mr. Milgaard did not have  
2 to explain away the Wilson, John, Cadrain evidence  
3 in order to get a remedy under Section 690?

4 A Correct.

03:59 5 Q So in other words, he could say lookit, Deborah  
6 Hall says Melnyk and Lapchuk lied, I want to go  
7 back and have my guilt re-adjudicated and have an  
8 opportunity to put the Deborah Hall evidence  
9 before the court and let the court weigh how the  
03:59 10 Deborah Hall evidence might impact on everything  
11 else?

12 A Yes.

13 Q So in other words, the convicted person does not  
14 have to answer every piece of incriminating  
03:59 15 evidence to get a Section 690 remedy?

16 A Correct. I mean, reasonable doubt at the trial  
17 level doesn't have to be in relation to each  
18 aspect of the Crown's incriminating evidence, it  
19 just has to be reasonable doubt.

04:00 20 Q And so there might be a miscarriage of justice  
21 because the court did not hear the evidence of  
22 Deborah Hall and that might have affected, a  
23 reasonable likelihood that it might have affected  
24 the verdict?

04:00 25 A Yes.



1 Q And then similarly with respect to the Dr. Ferris  
2 evidence and ground, would the same apply there,  
3 if it was new evidence that had not been  
4 understood or not been before the jury that,  
04:00 5 according to Dr. Ferris, proved Mr. Milgaard's  
6 innocence, then again would it not be incumbent  
7 upon Mr. Milgaard to explain away the other  
8 incriminating evidence, this would be enough if it  
9 was verified as being accurate and complete, that  
04:00 10 might give rise to a remedy?

11 A Yes.

12 Q And the remedy being going back to the court, my  
13 earlier question was the minister would then let  
14 the court sort out how it was that this new  
04:00 15 evidence meshes with the other incriminating  
16 evidence?

17 A Yes, and the reason is that the court process has  
18 the structure to have a full adjudication of the  
19 contested facts.

04:01 20 Q And so your job wouldn't be to say okay, well,  
21 this is all well and good, but I got Nichol John  
22 and I got Cadrain, I got Wilson, I believe that  
23 stuff more than I believe this stuff; therefore,  
24 no remedy?

04:01 25 A Not if you could make out one of the grounds that



1           were advanced.

2           **Q**       If we can go to the next page, the application  
3           talks about the Nichol John evidence, if we can  
4           call that out, please, it says:

04:01 5                        "In preparing the Application we have  
6                        deliberately attempted to be as concise  
7                        as possible and at the same time present  
8                        the matter in an objective fashion. We  
9                        are certainly prepared to elaborate on  
04:01 10                      any point of concern or answer any query  
11                      that may arise or that we have perhaps  
12                      not foreseen. For example, the witness  
13                      Nicole John, whose statement gave rise  
14                      to what is now known in our Courts as  
04:02 15                      the Milgaard application, gave a  
16                      statement that was prejudicial to David  
17                      Milgaard. We are in a position to  
18                      factually demonstrate the errors in that  
19                      statement and that it cannot possibly be  
04:02 20                      true, but we have not done that because  
21                      Nicole John testified in court that the  
22                      statement was not true."

23                      Can you tell us, how did you view this initial  
24                      application and, in particular, was the Nichol  
04:02 25                      John -- was that a ground or wasn't it of the



1 application, and if so, how did you perceive it?

2 A Well, when I first took a look at it, I wasn't  
3 certain what to make of it, it was a tease,  
4 because although it wasn't advanced as a ground  
04:02 5 for the application, it was certainly -- it was  
6 certainly highlighted in the body of the letter,  
7 but what I found curious was the contention that  
8 Nichol John testified in court that the statement  
9 was not true. Later on when I read the, read her  
04:03 10 testimony, I may have taken a slightly different  
11 approach to Nichol John's testimony about that  
12 statement.

13 Q And what was your understanding of what she  
14 testified at trial about regarding the truth of  
04:03 15 the May 24th, '69 statement?

16 A Nichol John testified that the parts of the  
17 statement that she remembered she told the truth,  
18 she had no recall about other parts, and the other  
19 parts were the ones that were mostly incriminating  
04:03 20 of David Milgaard and it surrounded the events  
21 that took place after they encountered a woman in  
22 the early morning hours of January 31st, 1969,  
23 asked the woman for directions, then -- she  
24 remembered that, but she remembered, her memory  
04:04 25 stopped after the car got stuck in the alley way



1 and both Ron Wilson and David Milgaard exited the  
2 car and went in different directions, after that  
3 her memory just disappeared, and that was the  
4 whole basis of the Milgaard application that was  
04:04 5 argued before the Supreme Court.

6 Q And so what you've described for us in going to  
7 look at the record, the trial record and reading  
8 Nichol John's evidence, would that be a case where  
9 you go and take the information in the application  
04:04 10 and try and see how what's alleged fits in with  
11 the trial record?

12 A Yes.

13 Q And is it correct to say that when you did that,  
14 you disagreed with the suggestion in the  
04:04 15 application about the fact that Nichol John  
16 testified in court that the statement was not  
17 true?

18 A Yes. I had a different take on it.

19 Q And what significance if any did you place on  
04:05 20 that?

21 A Well, it occurred to me that if circumstances  
22 permitted, I should take a look at Nichol John.

23 Q And I think we'll see later on that you did  
24 interview Nichol John; correct?

04:05 25 A Yes.



1 Q And would that have been related to the fact that  
2 what was put forward in the application here, I  
3 think your word was a bit of a tease, but putting  
4 forward that lookit, even though she in court said  
04:05 5 the statement isn't true, we can demonstrate that  
6 the statement is not true?

7 A Yes.

8 Q And so you would have investigated -- you would  
9 have interviewed her to try and assess what was  
04:05 10 put forward in the application; is that correct?

11 A Yeah. What was curious was we were prepared to  
12 elaborate on any point of concern that may arise  
13 and an example of that was Nichol John, but Nichol  
14 John was discussed and we were in a position to  
04:06 15 factually demonstrate the errors of that statement  
16 and that it cannot possibly be true, okay, it  
17 can't -- whatever was in that statement is now  
18 being suggested to us couldn't possibly be true,  
19 and what's more, Ms. John testified that it wasn't  
04:06 20 true.

21 Q And again let's just go to the first part, that  
22 the suggestion that what is in the statement but  
23 not evidence, direct evidence before the court,  
24 the fact that they could demonstrate that it's not  
04:06 25 factually possible, assume that to be the case,



1 would that be something that would give rise to a  
2 remedy? In other words, even though it wasn't  
3 evidence against Mr. Milgaard --

4 A It could possibly, yes.

04:06 5 Q In what way?

6 A Well, I couldn't ignore the fact that Nichol  
7 John's evidence, what she was prepared to admit to  
8 in terms of adopting portions of her statement  
9 formed part of the, I call it the fabric of  
04:07 10 circumstantial evidence that the Crown used to  
11 convict. She was an important witness.

12 Q And so again, would the fact, though, that -- if I  
13 can call it the incriminating part of the  
14 statement that was not adopted in court, if, for  
04:07 15 example, it could be demonstrated that that was  
16 not factually possible even though it wasn't  
17 direct evidence before the court; in other words,  
18 I think before the court it was read under section  
19 9(2) and 9(1) for the purposes of discrediting  
04:07 20 her, but it wasn't direct evidence, I'm talking  
21 about -- let's talk about the eye witness account.

22 A Yes.

23 Q If it could be demonstrated that that was not  
24 factually possible --

04:08 25 A That could have --



1 Q In light of the fact that it wasn't direct  
2 evidence at trial, I'm trying to understand  
3 whether that might be something that could be a  
4 ground that could give rise to a remedy?

04:08 5 A It could in the context of if what was contained  
6 in the statement could not possibly be true and  
7 you could establish that, then it casts some doubt  
8 or some basis to doubt the evidence that was  
9 adopted by the witness about the contents of the  
04:08 10 statement.

11 Q And --

12 A And to the extent that you've got fresh evidence  
13 that counters what was before the court, that  
14 might be -- that might be a basis to have the case  
04:08 15 re-examined.

16 Q And again, would the basis of saying we can  
17 demonstrate that the contents, the unadopted  
18 comments cannot possibly be true, would that have  
19 to be new information that wasn't available at the  
04:08 20 time of trial; in other words --

21 A Or an examination from a completely different  
22 perspective that hadn't been considered at trial  
23 which had a new element to it, yes.

24 Q And so let's go back, for example, if the ground  
04:09 25 was lookit, we believe that Nichol John made the



1 statement of May 24th under inappropriate  
2 circumstances that were not known at the time of  
3 trial or now known, that might be a ground in and  
4 of itself, and even though she didn't adopt the  
04:09 5 incriminating parts, it played a role in the  
6 trial, it was heard by the jury for credibility  
7 purpose, etcetera, and the new information is to  
8 attack the statement, is that something that would  
9 be --

04:09 10 A That's something we would certainly look at as a  
11 basis for sending it up.

12 Q And again just on this issue of how to deal with  
13 the statement that's not evidence, let me give you  
14 two examples and ask for your comment. If you  
04:10 15 would have gone to Nichol John and said, okay,  
16 tell me about this statement and your evidence at  
17 trial and she would have said, well, lookit, I  
18 lied in my statement to get the police off my back  
19 and I went to court and I just pretended I  
04:10 20 couldn't remember, but really nothing happened, I  
21 didn't want to get in trouble, but I never saw  
22 anything and that was evidence that was provided  
23 to you, would that be the type of information that  
24 might give rise to a remedy under Section 690?

04:10 25 A Yes.



1 Q And conversely, if you would have gone to her  
2 later and said, and she would have said that  
3 lookit, I was trying to help David and that's why  
4 I didn't repeat the adopted evidence at trial but  
04:10 5 my statement is true, conversely that might be  
6 information that would be relevant in the  
7 minister's consideration; is that fair?

8 A Yes.

9 Q And so would it be correct then that one of the  
04:10 10 reasons of going to see Nichol John would be to  
11 try and sort out where her evidence or her  
12 recollection of events in 1990 fit into what  
13 happened at trial?

14 A Yes.

04:11 15 Q Now, what about this -- the letter talks about:

16 "If your officials wish any additional  
17 references or material or wish any  
18 particular issue addressed we are more  
19 than willing to oblige and cooperate in  
04:11 20 any way possible."

21 What was your understanding of that invitation?

22 A This was simply an invitation to us to don't  
23 hesitate to contact them if there's something we  
24 don't understand or if you need clarification on  
04:11 25 any of the issues raised in the application.



1 Q And then if we can scroll down, and Mr. Wolch  
2 says:

3 "The Application is being forwarded  
4 directly to Mr. Fainstein, who we  
04:12 5 understand to be the counsel in the  
6 Department of Justice who is responsible  
7 for the conduct of the applications."

8 And I think you talked earlier that you believed  
9 they had had earlier discussions and maybe that's  
04:12 10 why it was sent directly to Mr. Fainstein?

11 A Yes.

12 Q Go to the next page, please. Again, the remedy,  
13 new trial, or the matter referred to the Court of  
14 Appeal or the Supreme Court of Canada for a  
04:12 15 further appeal, so that would be the two remedies,  
16 send me back to -- give me a new trial or give me  
17 the right to appeal either to the Saskatchewan  
18 Court of Appeal or the Supreme Court of Canada;  
19 correct?

04:12 20 A Yes.

21 Q And in fairness, those were really the only  
22 remedies available; aren't they, other than the  
23 pardon I suppose?

24 A Other than the pardon, yes.

04:12 25 Q And again, I don't propose to -- if we can go to



1 the next page. I don't propose to go through this  
2 in detail, but would you go through and read the  
3 record and compare that to what's put forward here  
4 as the factual basis of the application? Is that  
04:13 5 one of the steps you would have taken?

6 A Yes. That's a summary of the evidence that was at  
7 trial.

8 Q And if we can go to page 09, please, and there's  
9 two grounds put forward:

04:13 10 (1) Debra Hall, who was not called at  
11 trial, has provided an affidavit  
12 contradicting the evidence of Melnyk and  
13 Lapchuk."

14 Was it your understanding of this ground that  
04:13 15 Deborah Hall was saying, or that David Milgaard  
16 was saying, through his counsel, that at trial  
17 Melnyk and Lapchuk made up the incident in the  
18 motel room; namely, Mr. Milgaard's conduct and  
19 his words?

04:13 20 A Yes.

21 Q And that it was a complete fabrication as opposed  
22 to a misinterpretation of the seriousness of  
23 conduct in words?

24 A Yes, that was my understanding of the Hall  
04:14 25 affidavit.



1 Q And so in other words, saying they made up the  
2 story about David Milgaard stabbing a pillow and  
3 uttering the words, confessing or admitting to  
4 committing the crime?

04:14 5 A Correct.

6 Q So again, false evidence of that nature would be  
7 something that would fit in with that, in the  
8 categories under Section 690?

9 A Yes.

04:14 10 Q If we can then go to 000016, and again on the Dr.  
11 Ferris report, we'll deal with that a bit later,  
12 we've been through that many times, but was it  
13 your understanding -- well, here's what's stated  
14 in the application, that:

04:15 15 "The scientific evidence was presented  
16 at his trial but it is submitted that it  
17 was not understood. Perhaps it was too  
18 new an issue for counsel and for the  
19 Judge. The Trial Judge simply ignores  
04:15 20 the issue in his charge to the jury and  
21 more particularly does not point out  
22 that on the evidence given at trial the  
23 evidence exonerated David Milgaard."

24 And just scroll down, that evidence being that:

04:15 25 "(1) David Milgaard was a non-secreter;



1 (2) The sperm sample contained "A"  
2 antigens;

3 (3) There was a foreign substance in  
4 the sperm sample but it could not be  
04:15 5 identified as blood."

6 And I think, in other words what they are saying  
7 is that at trial on the record, due to the fact  
8 that the Crown was saying the frozen semen  
9 belonged to the killer, the fact that the Crown  
04:15 10 led evidence that said David Milgaard was a  
11 non-secretor, the Crown led evidence that the  
12 frozen semen contained A antigens, and the  
13 evidence of the Crown was that unless blood got  
14 into the semen, the semen would have come from an  
04:16 15 A secretor, and there is no evidence of blood in  
16 the semen, nor is there any evidence that David  
17 Milgaard bled into the semen -- and I'm sorry for  
18 giving you all those but that's basically the  
19 basis -- and therefore, on the record, the jury  
04:16 20 should have said --

21 A 'Not guilty', yes.

22 Q And so the application was that it was all on the  
23 record but it just wasn't understood by defence  
24 counsel, and the jury, and the judge?

04:16 25 A Correct.



1 Q And so again, if that were the case that it was  
2 scientific information that wasn't understood at  
3 the time, the newness now is that we now  
4 understand it better and it wasn't understood;  
04:16 5 might that be something that might give rise to a  
6 remedy under Section 690?

7 A Yes.

8 Q If we can go to 000038, please. And this is part  
9 of the application, the affidavit of Deborah Hall,  
04:17 10 and I take it that, in providing evidence in  
11 support of the application, that providing an  
12 affidavit was a form of evidence that was  
13 satisfactory or acceptable to the Minister?

14 A Yes.

04:17 15 Q And then if we can go to 000043. And, again, we  
16 have been through this a number of times but  
17 here's where, in the affidavit, she says:

18 "Craig Melnyk and George Lapchuk both  
19 lied when they stated in their evidence  
04:17 20 at trial that David Milgaard re-enacted  
21 the murder by going through a series of  
22 stabbing motions against the pillow."

23 And that was your understanding, that she was  
24 saying they lied?

04:17 25 A Yes. That -- that -- the use of the word "a lie"



1 is in connection with the re-enactment of a murder  
2 by stabbing, that certainly focused my attention  
3 on those three items.

4 Q And if we can go to 056, and this is the report of  
04:18 5 Dr. Ferris that's attached to the application, if  
6 we can go to 0000 -- or 059. And was it your  
7 understanding that the application was saying  
8 that, at trial, the frozen semen was from the  
9 killer, and it could not have been from David  
04:18 10 Milgaard, so in other words it was positive  
11 evidence that exculpated Mr. Milgaard?

12 A That was the thrust of Dr. Ferris' opinion.

13 Q And we've been through this with Dr. Ferris and  
14 others, and I think what he told us, as is stated  
04:19 15 here, that he had concerns as to the integrity and  
16 continuity of the samples of the alleged semen.  
17 And I think essentially what he says in his  
18 report, and told us, is that the frozen semen  
19 should not have been evidence at all as far as  
04:19 20 guilt or innocence of anybody, it was contaminated  
21 and should have not -- should not have been before  
22 the Court; is that your understanding?

23 A Yes, and he repeated that to me when I spoke with  
24 him.

04:19 25 Q And again, can you tell us at what point in the



1 process did you appreciate the contamination  
2 argument, if I can call it that?

3 A Probably in August of 1989.

4 Q And was that when Patricia Alain had provided you  
04:19 5 with the report?

6 A Yes.

7 Q If we can go to the last page, or to 0062, please.  
8 And this is a paragraph that -- of the report  
9 that's often been referred to, it says:

04:20 10 "On the basis of the evidence  
11 that I have examined, I have no  
12 reasonable doubt that serological  
13 evidence presented at the trial failed  
14 to link David Milgaard with the offence  
04:20 15 and that in fact, could be reasonably  
16 considered to exclude him from being the  
17 perpetrator of the murder."

18 And I take it that conclusion, if supported by  
19 proper facts and assumptions, would be a ground  
04:20 20 that would provide the basis for a remedy under  
21 Section 690?

22 A Yes.

23 Q If we can also scroll down, the next paragraph, it  
24 talks about the DNA testing in this letter. This  
04:20 25 is a letter to Mr. Wolch about:



1                    "... examine the clothing and to attempt  
2                    to retrieve DNA from samples of clothing  
3                    ..."

04:20 4                    Do you have a recollection of being aware of that  
5                    at the time you -- I'll show you later when you  
6                    go to Barry Gaudet with the RCMP about DNA, but  
7                    would you have been aware that Dr. Ferris  
8                    attempted to do some DNA testing on the basis of  
9                    this letter?

04:21 10                  A                    Prior to the letter I, I wasn't aware of that.

11                  Q                    I'm sorry, but this is part of the application?

12                  A                    Yes.

13                  Q                    Is it fair to say that, before you went to Barry  
14                    Gaudet with the RCMP, you would have been aware  
04:21 15                    that Dr. Ferris tried to do some DNA testing?

16                  A                    Yes.

17                  Q                    And, in fact, I think you became aware that in  
18                    order for you to do your DNA testing you found out  
19                    that Dr. Ferris still had the clothing at his lab;  
20                    is that right?

21                  A                    I believe so, yes.

22                  Q                    And that it had to be returned to the Court, I  
23                    think, in -- I think July 4, '89 is when it came  
24                    back, is that -- do you have a recollection of  
04:21 25                    there being some issue as to where the exhibits



1                   were?

2           A           Yes.

3           Q           If we can then go to 004868. And this is a letter  
4                   February 16th, 1989, it's from the Minister, Doug  
04:22 5                   Lewis, to Mr. Wolch, and it appears to be, other  
6                   than a few grammatical changes, similar to the  
7                   draft letter that you had prepared in January '89;  
8                   is that right?

9           A           Yes.

04:22 10          Q           And the process would be you'd draft the initial  
11                   response, send it to the executive assistant to  
12                   the Minister, and ask that it be sent out under  
13                   the Minister's name; correct?

14          A           Yes. There's some intervening steps, but yes.

04:22 15          Q           And then, here:

16                                "Would you please provide the following  
17                                materials, which are essential to the  
18                                assessment of this application:",  
19                   and then scroll down:

04:22 20                                "The entire transcripts of evidence at  
21                                the trial."

22                   Did you conclude that, based on the grounds  
23                   advanced, that you needed to look at the entire  
24                   transcript?

04:22 25          A           Yes.



1 Q And then is it fair to say that the documents  
2 referred to here in Roman numeral III of the RCMP  
3 Crime Detection Laboratory, would be those reports  
4 which were referred to in Dr. Ferris' opinion?

04:23 5 A Yes.

6 Q In other words you would have known Dr. Ferris had  
7 these reports, and am I correct that in order for  
8 you to get someone to look at Dr. Ferris' report,  
9 you wanted to have the same materials he had?

04:23 10 A Correct.

11 Q Go to the next page. Here the Minister says, but  
12 I think this was your original drafting:

13 "You mentioned in the first paragraph on  
14 page 2 of your letter that you are 'in a  
04:23 15 position to factually demonstrate the  
16 errors' in the statement of Nicole John.  
17 Certainly, any information and material  
18 which you have in relation to that would  
19 be of assistance in assessing the merits  
04:23 20 of this application.",

21 and also talks about the solicitor-client  
22 privilege. So, again, would this be where you go  
23 back to them and say: "Lookit, anything you have  
24 on Nichol John, we'd look at"?

04:23 25 A Yes.



1 Q And do I read into that, as well, that any  
2 information in relation to any matter you would  
3 take a look at?

4 A Yes.

04:24 5 Q We see that in some subsequent letters. Did you  
6 write to Mr. Wolch and Mr. Asper inquiring as to  
7 whether they had any further information?

8 A Yes.

9 Q And why would you be doing that?

04:24 10 A I did that to ensure that -- I wanted to avoid a  
11 situation in which we would do an investigation on  
12 two points, advise the Minister, only to be told  
13 later, "well you looked at these two, but there  
14 are these two or three others", and you'd have to  
04:24 15 revisit it.

16 Q Did you have concerns that counsel for David  
17 Milgaard, or David Milgaard, had other grounds  
18 that they had not provided to you?

19 A At the time, no, but when I read -- when I read  
04:24 20 the initial application, as I mentioned, this  
21 looked like a tease, so I wanted to explore that.  
22 I didn't know what they had done up until then,  
23 but Mr. Wolch took the time to raise the issue of  
24 Nichol John in his application letter because he  
04:25 25 deemed it of sufficient import, and consequently I



1 felt that it would be prudent for us to find out  
2 what, if anything, what he had to say about it,  
3 and this would be the opportunity. At the outset,  
4 let's find out, so if I'm going out to do the  
04:25 5 investigation let me know what I've -- how big of  
6 a field I have to plow in order to complete the  
7 task.

8 Q Did you ever consider requesting, or having a  
9 meeting with Mr. Wolch or Mr. Asper to say -- to  
04:25 10 echo what's in the letter, saying "lookit, if  
11 you've got any other information"?

12 A I -- I didn't do so because I thought that the  
13 letter would be sufficient to convey that idea.

14 Q And so you relied upon your request in writing to  
04:26 15 get back whatever information you felt they would  
16 have had?

17 A This is a letter authored by the Minister of  
18 Justice. I'm merely counsel in the department.  
19 If the Minister is asking for it, it seemed to me  
04:26 20 that we'd have a stronger chance of getting it  
21 than if an unknown counsel would get it. I mean,  
22 we drafted it for either the exec or the Minister,  
23 these are the folks to whom the applicant had  
24 written.

04:26 25 Q And then what about the solicitor-client privilege



1 waiver; can you tell me what was the reason for  
2 that request?

3 A Where the applicant's counsel was not trial  
4 counsel there are circumstances in which you may  
04:27 5 want to talk with counsel about some of the trial  
6 tactics, about the information that was shared  
7 between counsel and client, no counsel is going to  
8 talk to you unless you've got a waiver of  
9 solicitor client privilege. So one of the things  
04:27 10 that we routinely did was to obtain a waiver,  
11 because at -- at -- as of that writing I had a  
12 general idea of where the inquiries would go, but  
13 I didn't know specifically whether I would want to  
14 talk to defence counsel, but if -- if -- if I did,  
04:27 15 and it was quite common for us to do so, I knew  
16 that I would need a waiver and, consequently, I  
17 requested one.

18 Q And, again, in the application under Dr. Ferris  
19 there was reference to the fact that defence  
04:28 20 counsel may not have understood the import of the  
21 scientific evidence. Again, was that something  
22 that you would have wanted to canvass with defence  
23 counsel to see whether that was correct?

24 A Yes.

04:28 25 Q I see it's 4:30, probably an appropriate spot to



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break.

(Adjourned at 4:28 p.m.)





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