

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

Transcript of Proceedings

and

Testimony before the Commission
sitting at the
Delta Bessborough Hotel at
Saskatoon, Saskatchewan

On Wednesday, September 6th, 2006

Volume 178

Inquiry Proceedings



Commission Staff:

Mr. Douglas C. Hodson, Commission Counsel
Ms. Candace D. Congram, Executive Director
Ms. Sandra Boswell, Document Manager
Ms. Kara Isabelle, Document Assistant

Support Staff:

Ms. Irene Beitel, Clerk to the Commission
Ms. Karen Hinz, CSR, and Official Q.B. Court Reporters
Mr. Don Meyer, RPR, CSR, CRR, CBC,
Mr. Hugh Esson, Security Officer
Mr. Jay Boechler, Inland Audio Technician



Appearances :

Ms. Lana Krogan-Stevely, for Government of Saskatchewan

Ms. Catherine Knox, for Mr. T.D.R. (Bobs) Caldwell

Mr. Garrett Wilson, Q.C., for Mr. Serge Kujawa

Mr. Rick Elson, Esq., for the Saskatoon Police Service

Mr. Chris Boychuk, Esq., for Mr. Eddie Karst

Mr. Bruce Gibson, Esq., for the RCMP

Mr. David Frayer, Q.C., for Minister of Justice

(Canada), The Hon. Vic Toews

Mr. Marshall Hopkins, Esq., for Justice Calvin Tallis

(Retired)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF PROCEEDINGS

DESCRIPTION:

PAGE:

MURRAY SAWATSKY, CONTINUED

- BY MR. HODSON 36948

- BY MR. ELSON 37013

- BY MR. GIBSON 37064

DONALD MURRAY BROWN, sworn

- BY MR. HODSON 37086



1 Transcript of Proceedings

2 (Reconvened at 9:02 a.m.)

3 COMMISSIONER MacCALLUM: Good morning.

4 ALL COUNSEL: Good morning.

5 MURRAY SAWATSKY, continued:

6 BY MR. HODSON:

7 Q Good morning, Mr. Sawatsky. Yesterday when we
8 adjourned we were talking about some changes
9 between policing in 1969 compared to today and I
09:02 10 think you provided us with a snapshot of what some
11 of those changes were, you talked about
12 advancements in techniques, you referred to the
13 major case management, you talked about
14 advancements in forensics and as well with
09:02 15 computers and technology and we talked a bit about
16 the training requirements.

17 I would like to now just go
18 through and identify for the record some of the
19 pieces of legislation, regulation and manuals that
09:02 20 are in place in Saskatchewan currently that govern
21 policing. If we can go to 338634 and this is a
22 set of documents that we've put together. We can
23 go to the next page. And these, for the benefit
24 of counsel, these documents are all now a part of
09:03 25 CaseVault and are now on the record. I only



1 propose to go through a few of them. The Police
2 Act, 1990, and that would be the provincial
3 legislation that governs policing in the province;
4 is that correct?

09:03 5 A That's correct.

6 Q And then the next eight tabs are various
7 regulations that have been enacted under the
8 Police Act; correct?

9 A That's correct.

09:03 10 Q And then the last, which we'll spend a bit of time
11 on, is the policy manual for Saskatchewan
12 municipal police services; is that right?

13 A That's correct.

14 Q If we could go to the Police Act, go to page
09:03 15 338645, please, and just section 12, I think you
16 referred to earlier the power, this is where the
17 Police Commission would have the power to make
18 regulations regarding minimum standards, police
19 training, code of conduct, etcetera, for police
09:04 20 officers?

21 A That's correct.

22 Q And so this is the statutory basis upon which the
23 Police Commission exercises its powers to put in
24 place training and standard guidelines, etcetera?

09:04 25 A That's correct.



1 Q And the second provision, if we can go to 338651,
2 section 19 talks about the duties of the Police
3 Commission and we see reference here in paragraph
4 (d) to operate the Saskatchewan Police College and
09:04 5 provide for the training of members, and so that's
6 the statutory basis that the Commission derives
7 its power to train and educate police officers; is
8 that correct?

9 A That's correct.

09:05 10 Q There are only a couple of the regulations I
11 propose to bring up. If we could go to 338727,
12 please, and these are the training, police
13 training regulations. If we can go to the next
14 page, 729. Pardon me -- yeah, two pages over, and
09:05 15 I think you alluded to this earlier, this is
16 section 5 that talks about the training courses
17 provided by the college, and that's the
18 Saskatchewan Police College; correct?

19 A That's correct.

09:05 20 Q And so this is the -- you talked yesterday about
21 operational investigators course, senior
22 constables development course and on the next page
23 a number of other courses, and would these be the
24 courses then that would train police officers in
09:05 25 the province to conduct homicide investigations,



1 for example?

2 A That's correct.

3 Q And would this include the major case management
4 technique or --

09:06 5 A No, that's taught at the Canadian Police College
6 in Ottawa.

7 Q And then if we can go ahead to 338798 -- 799,
8 pardon me -- and these are the report form and
9 filing system regulations. I don't propose to go
09:06 10 through them other than to identify that they are
11 there.

12 You talked yesterday, Mr.

13 Sawatsky, about sort of the exchange and flow of
14 information not only between, or within a police
09:06 15 agency, let's take the Saskatoon Police Service,
16 for example, and in addition to that, their flow
17 of information with other police agencies such as,
18 for example, the Regina Police Service and/or the
19 RCMP, and I want to spend just a bit of time on
09:07 20 that to get your insight as to what the current
21 status is and whether there are any areas that you
22 feel could be improved upon, and let's start
23 firstly within a police agency in Saskatchewan and
24 let's take the Saskatoon Police Service. For
09:07 25 major crimes I think you told us the major case



1 management technique would be in place?

2 A Yes, it would.

3 Q And is that a system then that would provide for,
4 I think you told us yesterday, a project
09:07 5 coordinator or -- I'm sorry, what was the title?

6 A Yeah, well, the terminology used for those
7 positions varies, but generally speaking you have
8 a case coordinator and then a file manager, so you
9 have a senior experienced investigator who
09:07 10 oversees the entire file and then quite often
11 there's a number of case managers or
12 administrative people below that position that
13 deal with file material and assist through the
14 coordination of the file.

09:08 15 Q So the way that that system works, I think you
16 told us, or at least the purpose is, is that one
17 or more individuals will be all knowing about
18 what's happening on the file?

19 A That's correct, and they won't, generally
09:08 20 speaking, won't be involved in the investigation
21 itself, their job is simply to manage the file.

22 Q And so if one group of investigators comes back
23 and says we think there's information that
24 suggests suspect A is a person of interest,
09:08 25 another group comes back with information that



1 suggests to the contrary, it's this coordinator
2 that puts it all together and decides what action
3 plan happens; is that correct?

4 A That's correct.

09:08 5 Q When we looked at the Mackie summary, you are
6 familiar with that document, and we talked about
7 that, what role if any would that type of document
8 play in major case management?

9 A That very well is the type of document that could
09:08 10 be generated by the file manager or the case
11 manager in a situation like that. The person in
12 that position is a supervisor, oversees the file
13 and very often, from what he or she sees as they
14 are coordinating, putting the file together, may
09:09 15 give direction such as that to a team of
16 investigators or to the whole group, and I think I
17 spoke yesterday fairly extensively about the fact
18 that those types of plans are very common in
19 police files now that operational planning, where
09:09 20 they talk about resources required, number of
21 officers required to do the investigation,
22 techniques that we use, whether it's going to be,
23 you know, wire taps, undercover operations, those
24 sorts of things, and very often, like, as I
09:09 25 mentioned, speak to costs, so that's not uncommon



1 at all in this, for that type of information to be
2 in a file.

09:09 3 Q And just on that, an operational plan, would that
4 include a situation where an officer or officers
5 sit down and think this is perhaps how the crime
6 was committed and this is perhaps how this
7 individual may be responsible and we should
8 investigate the following areas to see if we can
9 gather evidence to substantiate our beliefs; is
09:09 10 that --

11 A Yes.

12 Q Or eliminate them?

13 A Or eliminate them, yes.

14 Q Back on this -- just on -- within a provincial
09:10 15 police agency then, as far as the flow of
16 information, would all information then gathered
17 in relation to the investigation be brought to the
18 attention of this coordinator then; is that --

19 A Yes, everything coming into the file goes through
09:10 20 the coordinator and then all investigations
21 completed or action taken on any tasks that have
22 been assigned come back through the coordinator,
23 so the coordinator sees the flow of information
24 both ways. Anything coming into the file, he or
09:10 25 she would read that and assign that for



1 investigation or put it away to the file if it's
2 only an information piece and then if it's
3 assigned to a team of investigators to
4 investigate, the results would come back to the
09:10 5 coordinator who would then assess those results
6 and make a decision as to whether additional
7 action is required or the action required has been
8 completed and then it can form part of the file.

9 Q And would individual officers involved on the
09:10 10 matter be able to access then what other officers
11 have found?

12 A Yes, generally speaking they can, if they needed
13 to know what -- if they were preparing to do an
14 interview, for example, or to investigate a task
09:11 15 they have been given, they would be able to go
16 into the file and pull out various pieces that
17 they feel they would need to prepare for that.
18 I'll use our file as an example, what the
19 investigators would do in our file is look at
09:11 20 previous statements, look at transcripts from the
21 Supreme Court, look at things that other witnesses
22 have said and then prepare themselves so that they
23 can go out and do an interview, so that
24 information would be available to the entire group
09:11 25 of investigators.



1 Q And what about police officers' notebooks, where
2 do they fit in as far as capturing that
3 information in the system?

4 A Well, the system that's generally in place now is
09:11 5 police officers' notebooks are all handed in at
6 the end of the investigation and they form part of
7 the file so that it can be disclosed and I think
8 that's, you know, perhaps the other thing that we
9 maybe didn't talk about yesterday, was the fact
09:11 10 that the way the file is prepared, it can be
11 disclosed in its entirety to a defence once a
12 charge has been laid and along with that goes
13 investigators' notes, diagrams, sketches, whatever
14 has been created in completing that investigation.

09:12 15 Q And is it your understanding then, Mr. Sawatsky,
16 that where an investigation using the major case
17 management system has then gone to prosecution,
18 that the information database, if I can call it
19 that, or the information gathered by the police is
09:12 20 what's turned over to the prosecutor and either in
21 whole or in part provided to defence counsel?

22 A Yes, and of course disclosure is the
23 responsibility of the Crown, but when the police
24 prepare their case, they prepare it so that
09:12 25 everything can be provided to the Crown so that



1 decisions can be made on disclosure from there.

2 Q And so is it your understanding that then the
3 general practice is that the complete major case
4 management file then is turned over to the Crown
09:12 5 as opposed to selected parts of it or does that --

6 A Yes, I believe that's the practice.

7 Q Now let's talk about where more than one police
8 agency is involved, and let's take the RCMP, if
9 they are called in to assist the Saskatoon City
09:13 10 Police, and the Commissioner asked you some
11 questions about this yesterday, can you tell us in
12 today's world how -- what we would see on a
13 Saskatoon City Police file, using the major case
14 management system, where the RCMP would provide
09:13 15 assistance in the investigation by way of paper or
16 reports?

17 A Yeah, in a situation like that what would
18 generally happen is that if the RCMP were asked or
19 tasked to do something, there would be a task
09:13 20 created and a file entry made just the same for
21 any other task, they would go out and complete
22 that and then would provide that back to the file
23 manager. If, on the other hand, it could be
24 something self generated, in other words, some
09:13 25 piece of information picked up by the RCMP,



1 world in the RCMP because they've just started
2 within the last couple of years the PROS system,
3 that's an acronym, P-R-O-S, I think it stands for
4 police reporting operational system or something
09:15 5 like that. What that is is it's a national
6 platform that is accessible to all RCMP
7 detachments and, for example, an investigator in
8 Newfoundland could get information from a file in
9 B.C., so that to enable that person to do their
09:15 10 investigation or their inquiries. Some municipal
11 police services are using that system and, or at
12 least have the database so that they can access
13 it, but it's not something that all municipal
14 police agencies in this province have readily, you
09:15 15 know, in their offices.

16 Q And what would be the advantages of having that
17 system for a municipal police force in this
18 province?

19 A Well it would certainly be -- it would enable
09:15 20 investigations to be conducted a lot more
21 efficiently, in my view, because it would allow,
22 for example, an investigator in Regina to have
23 better access to a file that he may be assisting
24 Saskatoon on, it would allow the investigator to
09:15 25 update him or herself, get the information



1 required, and then conduct the, whatever inquiries
2 or interviews are necessary.

3 Q And that's because the platform is the same? I'm
4 not sure I follow that.

09:16 5 A No, I don't believe it is. For example,
6 there's -- an investigator in Regina can't access
7 a file that they have in Saskatoon, there is no
8 common platform, or I don't know what the proper
9 technological term is, but there is no common
09:16 10 computer program that allows them, an investigator
11 sitting at his or her desk in Regina, to look at
12 information on a file in Saskatoon --

13 Q I see.

14 A -- unless they have Saskatoon's computer system.
09:16 15 And I know that there is more and more sharing of
16 systems amongst, of the police agencies, but what
17 probably would be more efficient would be a common
18 platform that they all could access.

19 Q And so are you telling us that this is a
09:16 20 technology issue and that, right now, police force
21 A can go to police force B and say "give me
22 access" and that's generally granted?

23 A Yes.

24 Q And what you're talking about is a technological
09:16 25 change that would allow police force A to go



1 directly into police force B's database without
2 having to go person to person?

09:17 3 A That's correct. And there are, nationally there
4 are examples of that, you know. In B.C., in the
5 lower mainland, they have, I think it's called
6 B.C. Prime, where, you know, all the police
7 services that are municipal and RCMP have a common
8 platform where they can share information. I know
9 they have it in Toronto, in the Toronto area,
10 where -- the heavily populated area, and I read
11 something here, about two weeks ago, that Alberta
12 is going into something like that as well, they
13 are spending about \$100 million to create a common
14 database for all police agencies in the Province
09:17 15 of Alberta.

16 Q Okay.

17 COMMISSIONER MacCALLUM: Even on unrelated
18 files?

09:17 19 A My Lord, I'm just not sure how far that goes, but
20 I think yes, because quite often you don't know.
21 A very minor occurrence, for example a barking
22 dog, may be evidence of somebody being in the area
23 and it may be something that assists an
24 investigator down the road, so I would think that
09:17 25 you would want access to even, you know, very



1 minor pieces of information.

2 MR. HODSON: And if you have a --

3 COMMISSIONER MacCALLUM: Excuse me, but
4 would that not entail a sacrifice of autonomy as
09:18 5 between different police forces?

6 A I'm not sure that police forces really have a
7 concern about that any more. I know that used to
8 be something that police forces had a lot of
9 concern with, autonomy, I'm not sure that that's a
09:18 10 problem, at least we don't see it in Saskatchewan,
11 there's a pretty easy sharing in this province
12 amongst agencies.

13 COMMISSIONER MacCALLUM: But, I mean,
14 sharing is one thing, of relevant information,
09:18 15 but simply access to the RCMP files in F
16 Division, for example, by any municipal police
17 force for any reason, that's quite another
18 matter, is it not?

19 A Well and I guess, you know, not sort of being a
09:18 20 techno person, but I guess you could put various
21 levels of access into that, you know, where you
22 are allowed to see certain things and not other
23 things. I know they do that in the intelligence
24 community. For example the RCMP, through Criminal
09:18 25 Intelligence Services Canada, has a databank for



1 intelligence, and various agencies have levels of
2 access to that, so an agency may not have full
3 access but may have partial access to get what
4 they need to do their work, and I would suppose
09:19 5 this could be established, you know, along similar
6 lines.

7 COMMISSIONER MacCALLUM: At the moment
8 there's nothing official though?

9 A No, there isn't.

09:19 10 COMMISSIONER MacCALLUM: Thanks. Sorry,
11 Mr. Hodson.

12 BY MR. HODSON:

13 Q No. If you could, just with the knowledge that
14 you have that you gained in the course of the '92
09:19 15 to '94 investigation and look back at 1969-1970,
16 is there anything that jumps out, when we talk
17 about the reporting systems, that you think might
18 have been of assistance back at the time of the
19 original investigation?

09:19 20 A When we looked at that investigation, of course
21 that was on our minds, and I don't recall that
22 there was anything in that investigation that
23 appeared not to be followed up on or, you know,
24 got dropped by the wayside and wasn't
09:19 25 investigated. So I don't know that, under the



1 major case management system, that that file would
2 have been handled much differently. Certainly,
3 the management of the file would have been
4 different, but there didn't appear to be any leads
09:20 5 that had been missed or anything that should have
6 been followed up that wasn't that we could see in
7 our examination.

8 Q Might it have been the case that, if the file had
9 been reported on as they are reported on now, that
09:20 10 someone 20 years later, in looking back at the
11 file and saying "okay, what did the police do and
12 why", that the current system might give a better
13 insight?

14 A I think the current system probably would give a
09:20 15 better insight, because I think the tendency now
16 is to, of investigators is to be perhaps a bit
17 more thorough in note-taking, that statements now
18 tend to be recorded either orally or both orally
19 and through the use of video, so there'd likely be
09:20 20 more of the original investigation available under
21 today's way of doing business.

22 Q For example, let me give you a couple of
23 situations. The one, we've heard a fair bit of
24 evidence that -- about whether or not or the
09:20 25 extent to which the Saskatoon City Police linked



1 what we now know to be the Fisher rapes to the
2 Gail Miller murder, and we've had a chance to look
3 at some Saskatoon City Police documents, we've
4 heard evidence I think primarily from Mr. Penkala
09:21 5 that indicated that early on the police did in
6 fact think that the perpetrator of Gail Miller's
7 murder may be the same or was the same person as
8 the one who has committed the rapes, and I think
9 that was the conclusion of your investigation as
09:21 10 well?

11 A That's correct, yes.

12 Q And I think if that had been an issue raised as to
13 whether or not they had, in the major case
14 management system is that something where, on the
09:21 15 police file, you would expect to see some
16 narrative that says "lookit, this is our thinking
17 at the time, we're now going in this direction",
18 and so that people looking back at the report have
19 a better sense of what was going through the
09:21 20 operating minds of the investigation?

21 A You know, there is a possibility that there would
22 be more extensive detail about that, you know,
23 because I mean we do know from our examination
24 that they did make the link early on and then
09:22 25 discounted that when they sort of felt that the



1 suspect and the evidence wasn't taking them there.
2 So whether there would be more extensive
3 documentation, I'm not certain, but it's likely
4 there could be.

09:22 5 Q And when looking at the 1969 RCMP reports, you're
6 familiar with those, the ras -- I think there was
7 the three reports?

8 A Yes, I am.

9 Q I think we've heard some evidence to suggest that
09:22 10 those reports were done for a different purpose,
11 they were reporting up to RCMP superiors; correct?

12 A That's correct, yes.

13 Q And, therefore, maybe were more in a narrative or
14 more outlining thought processes and plans and
09:22 15 things of that nature than the Saskatoon City
16 Police investigation reports; would you agree with
17 that observation?

18 A Yes, I think that's a fair observation, and I got
19 a sense that the RCMP reports were trying to
09:22 20 satisfy superiors as to what, sort of, the
21 theories were out there whereas perhaps the
22 Saskatoon police files aren't as detailed in that
23 area.

24 Q I think we heard some evidence that the Saskatoon
09:23 25 police investigation reports were simply that,



1 reporting on what they -- what an officer or
2 officers had done, and that someone else would
3 look at it. And I guess the point I'm trying to
4 get at is today, with the major case management
09:23 5 file, would we expect to see the file coordinator
6 have, on the file, some overview of what they
7 looked at in the investigation and why they did
8 certain things?

9 A Yes, I'd suggest that's very common in files now.

09:23 10 Q And then what about, let's take a look at the
11 Regina Police dealings with Albert Cadrain, and
12 you're familiar with that issue, as to what
13 happened to Albert Cadrain in February of 1969?

14 A Yes, I am.

09:23 15 Q Are you able to comment on what, with today's
16 system, whether that -- how that might impact on
17 that exchange and what happened back in '69?

18 A I think, in today's system, there is a very good
19 chance that that report that was generated at the
09:24 20 time -- and, you know, we know that Albert was
21 asked, you know, some very general questions about
22 the murder itself, and being that it was in the
23 area that Albert lived -- I'm satisfied that,
24 today, a copy of that report would likely have
09:24 25 been sent to Saskatoon. Regina would likely, you



1 know, have purged or destroyed it after a period
2 of time because it, you know, it was an assistance
3 file or whatever, but it would be permanent in a
4 major case management file, it would be there, and
09:24 5 be there for the duration of the file.

6 Q If you can go to 338817. And this is a Policy
7 Manual for Saskatchewan Municipal Police Services,
8 and I believe this is a document that -- if we can
9 go to page 819 please -- is April 2004. Can you
09:24 10 just give us a bit of background as to what this
11 manual, who prepared it, what its purpose is, and
12 how it's applied?

13 A Yes. What you saw was in the Act. *The Police*
14 *Act, 1990*, as we looked at it before, requires
09:25 15 that the Commission have a policy and procedures
16 manual. This manual was updated in 2004 from an
17 existing manual, the format was changed a bit but
18 it was updated and it was also put on a web site,
19 on the Saskatchewan Police Commission web site,
09:25 20 publicly. And what it is is it's a very sort of
21 over-arching umbrella-type policy for municipal
22 police services, in other words it puts out a
23 policy and then a statement of standards that all
24 municipal police services are required to meet,
09:25 25 and it covers the areas of investigation and



1 operations as we've talked -- as we've discussed.

2 Q Okay. If we could go to page 33887 -- well,
3 actually, just go to the next page. We looked at
4 part 2, Operations, go to the next page,
09:26 5 Investigation. This would be the section, then,
6 that would provide the standards, then, to be
7 followed in Saskatchewan in investigations?

8 A That's correct.

9 Q And then, as well, forensic identification,
09:26 10 evidence and exhibits. If we could just go to
11 338872, and this is the Investigation section, go
12 to page 874. And so can you explain what this,
13 what this policy is intended to do?

14 A Yes. This is the Saskatchewan Police Commission's
09:26 15 policy for the conducting of major case or serious
16 investigations, and it places some requirements on
17 municipal police services with regards to their
18 ability to collect, store, analyse and retrieve
19 intelligence with respect to criminal activity,
09:26 20 and it also talks about municipal police services,
21 the requirement for municipal police services to
22 use a case management system for serious and
23 complex investigations, which would be the major
24 case management system.

09:27 25 Q And so is this the manual that puts in place the



1 requirement, for example for homicide
2 investigators in the Saskatoon Police Service, to
3 utilize the major case management technique?

09:27 4 A That's correct. And you'll see, underneath, the
5 policy is a list of standards that, again, it's a
6 requirement that all municipal police services
7 meet those standards.

09:27 8 Q And if we can just scroll down, here you talk
9 about qualifications and training necessary to
10 investigate criminal offences, and would that be
11 what you talked about as far as the Canadian
12 Police College and the Saskatchewan Police
13 College?

14 A Yes.

09:27 15 Q Can you --

16 A And any other courses that the police service may
17 wish to send its members on that perhaps aren't
18 provided by the Saskatchewan Police College or the
19 Canadian Police College.

09:27 20 Q And here it's for the coordination and interaction
21 between work areas of the police service in order
22 to conduct criminal investigations, and we've
23 heard some evidence about suggestions that back in
24 1969 the morality division of the Saskatoon Police
09:28 25 Service may or may not have had cooperative



1 dealings with the homicide investigation -- I
2 didn't phrase that very well -- but some issue was
3 taken as to whether or not information was shared
4 as freely as it could have been between morality
09:28 5 investigating the rapes and homicide investigating
6 the murders. Can you comment on what your current
7 knowledge is as to how police forces in
8 Saskatchewan deal with those two divisions and
9 what this standard is aimed at addressing?

09:28 10 A Yeah. I think that the police have come a long
11 ways in sort of debunking that whole business
12 about, you know, the senior investigators being
13 sort of the elite and were kind of off doing their
14 own thing, and now I think it's very common for,
09:28 15 you know, members on patrol or junior people who
16 perhaps have information to simply provide that
17 information and have access to what happened with
18 it and whether or not it's been worked on, whether
19 or not it contributed to the file, and to be able
09:29 20 to follow up on that. So I think the
21 information-sharing within the police services has
22 improved greatly.

23 Q And so today, based on what you know of the
24 standards in place in Saskatchewan, would you have
09:29 25 any concerns about whether or not -- and forgive



1 me if I'm using the wrong terminology -- but
2 whether the department responsible for
3 investigating homicides would be able to have free
4 flow of information with whatever unit is
09:29 5 investigating sexual assaults?

6 A I know it's very common, within police agencies
7 now, where, you know, bulletins will be provided
8 throughout the police service, you know,
9 requesting information, those sorts of things, to
09:29 10 encourage a free flow of information. So that,
11 for an example, a young investigator or a young
12 constable on patrol may not recognize the
13 significance of some information, but if there's
14 processes in place where regular bulletins go out
09:30 15 or there's requests for updates or requests for
16 information, then that gives the opportunity for
17 that information to be provided, and that's a
18 common technique that's used now.

19 Q And would technology, can you explain a bit how
09:30 20 technology would facilitate the flow of
21 information within a police force, between
22 different investigative units?

23 A Well it -- generally speaking, quite often the
24 major case management and the file itself is a
09:30 25 little higher level of restriction than the normal



1 database for all the complaints coming in, but
2 anyone with a need to know or anyone working on
3 the file would have full access to the major case
4 management file and what's going on.

09:30 5 Q But as far as, for example if a homicide
6 investigator wanted to find out what files the
7 sexual assault unit or group may have been
8 investigating, can you give us some idea, in
9 today's world, how that happens and how that might
09:31 10 compare to how it happened 37 years ago?

11 A Yeah. In today's world they would simply be able
12 to access that information on the database and
13 read through it and, you know, retrieve whatever
14 they felt would be of value to their investigation
09:31 15 through the files. So the files would be
16 accessible by all members of the police service.

17 Q Comment on the last bullet here on this page, to
18 ensure that complete and unedited case files are
19 maintained, what -- can you tell us what that is
09:31 20 intended to address?

21 A That's to ensure that files are maintained for the
22 proper period as outlined in the regulations, and
23 that all material is kept, not just edited
24 versions or summaries.

09:31 25 Q And then, if we can go to the next page, I want



1 you to comment. This talks about protecting the
2 integrity of investigations and to prevent
3 unauthorized access to confidential information,
4 and there is two points I want to raise here. One
09:31 5 is the, sort of the impact or effect of privacy
6 legislation, if I can call it that, the freedom of
7 information, the legislation that precludes
8 publication of confidential information; is that
9 an issue that police forces now have to deal with
09:32 10 that they did not have to deal with back in 1969?

11 A Yes, it is.

12 Q And I don't want to, I don't propose to get into
13 it in great detail, but is it correct that -- and
14 I'm not sure what date that the legislation came
09:32 15 in, but let's say prior to 1990 there was no legal
16 restriction on providing information, confidential
17 information about an individual, address, phone
18 number, etcetera, in the course of police
19 conducting their business; correct?

09:32 20 A That's correct.

21 Q If there was a legitimate reason to do so?

22 A Right.

23 Q And is it fair to say that, in today's world, an
24 extra step has to be taken to ensure that privacy
09:32 25 legislation is complied with in the disclosure of



1 private information?

2 A Yes. But I think all privacy acts, pretty well
3 across Canada, provide a provision that
4 information can be shared amongst police or
09:33 5 investigative agencies for the purpose of
6 investigation, for a common purpose.

7 Q Yeah, I appreciate that point. And I'm sorry, I
8 wasn't intending -- let me clarify that, I wasn't
9 talking about amongst and between police
09:33 10 officers, --

11 A Okay.

12 Q -- but thanks for clarifying that. But as far as
13 inter-police use there is no restriction from
14 privacy legislation, to your knowledge, that would
09:33 15 preclude the police from sharing information?

16 A No.

17 Q And I was thinking more about disclosing it to --
18 when the Crown discloses it to defence or
19 discloses it to the media, or whether a convicted
09:33 20 person is gathering information for pursuing a
21 wrongful conviction claim, that there are privacy
22 issues that come into play about disclosure of
23 information; is that fair?

24 A That's fair.

09:33 25 Q Okay. And I guess the second comment about



1 preventing unauthorized access to confidential
2 information, can you comment just briefly on,
3 we've heard the notion of -- and it's got various
4 terms -- open-box disclosure, and I'm not asking
09:34 5 you to comment on what happens between the Crown
6 and defence counsel, but from a police officer's
7 perspective are there some areas of an
8 investigation that might, in the view of the
9 police, require more protection or more
09:34 10 confidentiality than others, in other words
11 informants, information that might put witnesses
12 at risk, things of that nature? Can you just
13 comment generally on that, where -- and maybe I
14 can put it this way: Would the police go out and
09:34 15 take their major case management file, once a
16 prosecution is laid, and just put it on a web site
17 and say "here you go, public, it's there for
18 everybody"?

19 A No.

09:34 20 Q And why not? Can you just comment on what --
21 what -- what is there there to protect from the
22 police interest?

23 A Well, certainly, there is the things you
24 mentioned, you know, victims, witnesses,
09:35 25 confidential information that, if it got public,



1 could risk -- could jeopardize a person, so
2 certainly you have those concerns.

3 When you do an investigation
4 and you come up with material like that, or
09:35 5 evidence that some witness is at risk or
6 something, I mean that's always provided to the
7 Crown, it's always discussed with the prosecutor,
8 and then, you know, the Crown has to make a
9 decision as to how much of that is disclosed to
09:35 10 defence.

11 Q And if we can just scroll down here under the
12 authorities, then, this would be the Canadian
13 Police College courses, and would these be the
14 courses that you would expect most, if not all, of
09:35 15 the senior homicide investigators to have taken?

16 A Yes. And those are just sort of the obvious ones,
17 because I think a lot of them would have taken,
18 you know, more courses in addition to that.

19 Q And if we can then go to the next page, please.
09:36 20 We talked about this yesterday, a bit about crime
21 scene management, and I think you indicated that
22 today, particularly in light of DNA evidence, that
23 crime scenes are approached differently by the
24 police now than, for example, 37 years ago?

09:36 25 A Yes. I think identification officers, who are



1 generally the specialists at crime scenes,
2 certainly have a far better working knowledge of
3 how to access exhibits, how to pick up substances
4 so that they are not contaminated or damaged so
09:36 5 that they can be presented to the lab, and in some
6 cases lab personnel are even called to the scene
7 of crime to assist identification specialists in
8 taking exhibits.

9 Q If we can go to the next page, this talks about
09:36 10 officers' notebooks, and I know in this Inquiry we
11 have received some notebooks from back in 1969 and
12 not others, and we've heard various different
13 reasons as to why some were retained and not
14 others. Can you give us your comment? It
09:37 15 appears, here, that the policy espoused by the
16 Police Commission is that notebooks be retained
17 for a minimum of seven years?

18 A Yes.

19 Q And would the police notebooks, then, are they to
09:37 20 be the -- are they the property of the police
21 force or of the officer; is that still an issue?

22 A I think -- I don't think it's an issue any more.
23 I know it was for some time. I think generally,
24 now, it's pretty much accepted that the notebook
09:37 25 is the property of the police service. And I will



1 add that, although the Commission policy is retain
2 for a minimum of seven years, in major case
3 management it's common practice, and I think
4 across the board, that the notebooks are turned in
09:37 5 and form part of the investigative file and are
6 retained a lot longer, retained for the full
7 period of the file. So, you know, this is just in
8 a general sense there, you know, the average
9 officer out there working patrol every day, the
09:38 10 requirement is that that notebook be saved for a
11 minimum of seven years. Police services can
12 create their own policy where they keep it longer,
13 or where they keep notebooks longer or they have
14 some other practice, but the minimum requirement
09:38 15 of the Commission is that seven years.

16 Q And so, if we looked at a homicide investigation
17 from a year ago, we would expect to find either
18 scanned copies or the actual notebooks of every
19 officer who worked on the file?

09:38 20 A I think you are likely to find the notebook
21 itself, yes.

22 Q The notebook itself? And then can you comment on,
23 I think the retention of records is also covered
24 under *The Police Act* as well as far as the length
09:38 25 of time under which a police force must retain,



1 for example, a concluded homicide file?

2 A Yes.

3 Q And I believe that's indefinite?

4 A I believe it is too. We could go to the
09:39 5 regulation, I believe it is.

6 Q And can you comment on that, the -- is there a
7 reason that the police do not keep every file
8 indefinitely?

9 A I think simply, you know, you -- they wouldn't be
09:39 10 able to store all the files. Certainly now, with
11 information being available on databases and
12 things, I think you'll find that a lot of
13 information that police have even on minor
14 offences will be kept indefinitely, as long as
09:39 15 they are able to retain it on CDs or backup drives
16 or whatever.

17 Q If we can actually go to 338805. And we'll see
18 here, just let's talk about the sexual assault
19 files, the Larry Fisher '68-'69 files, currently
09:39 20 it says that, if we could scroll down under sub
21 (3), it refers to offences under sexual assault.
22 If we can go to the next page, and under sub (4),
23 a police service that has not solved a case of an
24 offence mentioned in subsection (3) is to keep the
09:40 25 file indefinitely, where it has solved a case it



1 is to keep its file for 10 years from the
2 conclusion of the case. And so currently, under
3 the existing regulations today, is it correct that
4 the, for example the 1968 rape files, as they were
09:40 5 called then, relating to Larry Fisher, is it 1978,
6 the ten-year period, then after that there would
7 be no requirement to keep the files? I'm not sure
8 if these provisions were in place at the time, I
9 think they came in in '82?

09:40 10 A These provisions --

11 Q Yes?

12 A -- came in after the amendment of *The Police Act*
13 in 1990.

14 Q 1990?

09:40 15 A Yeah.

16 Q I think we saw some evidence that a ten-year
17 period existed under a different form, I think, in
18 the early '80s?

19 A That could be. I'm not aware of that but that
09:41 20 could be.

21 Q As far as today, though, if the Saskatoon City
22 Police Service concluded a sexual assault file
23 today the requirement would be that, in ten years,
24 they could discard that file?

09:41 25 A That's correct.



1 Q And, again, what would be the reason that -- and
2 maybe you've answered this. Would the reason for
3 not retaining it beyond ten years be space or
4 physical --

09:41 5 A It could very well be. I do say that there is
6 another twist there because now, of course with
7 VICLAS, all of that information that would have
8 been gleaned from that file with regards to the
9 victimization and the offender would have been put
09:41 10 into the VICLAS databank, and that is an -- would
11 be kept indefinitely. So even though the file
12 itself may be destroyed and, you know, one could
13 discuss whether that ten-year retention period is
14 correct and maybe it's something the Commission
09:41 15 may want to look at, but certainly we know that
16 the information about the victimization of the
17 offender would be an indefinite -- would be stored
18 indefinitely in the VICLAS file.

19 Q And, again in your experience, do you see any
09:42 20 reason to have concerns about the ten-year time
21 limit for concluded sexual assault files?

22 A I, no, I don't. But, certainly, I think that's
23 something that, if there's -- if this Commission
24 comes up with a view that that's not appropriate,
09:42 25 I know that the Saskatchewan Police Commission



1 would be interested in hearing that.

2 Q Yeah. And I think what, we've heard evidence from
3 a number of people that it would have been of
4 benefit to have those files, and as you are aware
09:42 5 there were allegations made that the files were
6 deliberately destroyed as part of a coverup;
7 you're aware of those allegations having been
8 made --

9 A I am, yes.

09:42 10 Q -- quite some time ago?

11 A Yes, I am.

12 Q And so again from that perspective, just so that I
13 understand it, would the only, I guess the only
14 counter-argument be that the police have many
09:42 15 files and you've got to draw a line somewhere on
16 concluded cases?

17 A Yes.

18 Q And, obviously, it appears the legislators made a
19 distinction between solved and unsolved, and that
09:43 20 unsolved cases are to be maintained indefinitely,
21 and that is presumably because they are unsolved;
22 is that --

23 A That's correct. And the other thing I would like
24 to add is I think that, as we see more and more of
09:43 25 these cases, you know, put into electronic format,



1 that the retention periods would probably be
2 longer in most cases, but this is the requirement
3 as it is today.

4 Q If we can just go, I want to call up another
09:43 5 document, 338941. And just before we leave this
6 manual is it, can you tell us, is the process to
7 review, revise, and improve the regulations, the
8 manual, is that -- can you tell us a bit about
9 what happens with the Police Commission and the
09:43 10 Canadian Police College and policing generally,
11 how improvements are made?

12 A Yeah. I think both the Saskatchewan Police
13 College and the Canadian Police College, I know
14 they continue to update their curriculum,
09:44 15 particularly with new developments in technology
16 and, you know, Court decisions, and those sorts of
17 things require that, you know, training be
18 revisited regularly and updated. The Police
19 Commission manual is a document that -- it's a
09:44 20 living document and it's updated regularly for the
21 same reasons, and sometimes because the police
22 community come in and suggest changes to
23 procedures for any number of reasons, the
24 Commission itself may also be involved in the
09:44 25 matter where it has an opportunity to look at the



1 manual and decides that there is some updating
2 required. And regulations, the Commission amends
3 regulations probably two or three times a year,
4 you know, to keep them updated and, you know, and
09:44 5 current.

6 Q And would the Saskatchewan Police Commission and
7 police officers in forces and services in
8 Saskatchewan benefit, then, from changes and
9 improvements in other provincial jurisdictions and
09:45 10 with the RCMP?

11 A Yes.

12 Q And --

13 A Yes, very much so.

14 Q And, for example, I'm aware of the, I think it was
09:45 15 in 1996, Judge Campbell in the Bernardo Inquiry
16 made a number of recommendations relating to major
17 case management, and I believe the Canadian Police
18 College was involved in implementing some of
19 those; is that correct?

09:45 20 A That's correct.

21 Q And so that where other provinces encounter issues
22 in policing and implement change, is it your
23 experience that those changes become implemented
24 in Saskatchewan in some form or another where
09:45 25 appropriate?



1 A Yes, because of course the investigators here use
2 the, access the Canadian Police College, so any
3 changes that are done there are certainly
4 accessible here, and the Saskatchewan Police
09:46 5 College is continually updating its curriculum as
6 well to reflect, as I've said, changes, court
7 decisions, recommendations.

8 Q If we can go to 338941, and this is just a list
9 that we prepared to just walk through some of the
09:46 10 systemic issues and get your comment on, and I
11 think you've had a chance to look through this
12 document, Mr. Sawatsky; is that correct?

13 A Yes, I have.

14 Q And it's not intended to be a definitive list or
09:46 15 to be anything other than a guide for me to ask
16 you some questions, but as far as investigative
17 techniques and procedures, can you comment
18 generally about whether the manner in which police
19 investigate and interview, or investigation
09:46 20 techniques and procedures have changed from 1969
21 to the present?

22 A Well, I think it's safe to say that, you know, the
23 way the police do their business continues to
24 improve. I think I mentioned that things like
09:47 25 tape recorded statements, video recorded



1 statements, video recording from accused, audio
2 tapes from accused are certainly improvements. I
3 think various techniques are taught now so that
4 police officers are perhaps better equipped to
09:47 5 conduct partial and thorough interviews than ever
6 before. Major case management has been a big
7 assistance to the police. Certainly VICLAS and
8 the manner in which that works or interacts with
9 police investigations is huge. Coroners and
09:47 10 forensic pathology, and I mentioned yesterday that
11 the province hired a forensic pathologist last
12 year, we'll be hiring another one next year, for
13 better evidence of the crime scene and of the
14 victim, you know, through good, thorough forensic
09:47 15 examination by a pathologist, so I think there's a
16 number, there's a huge number of changes that have
17 happened over -- since 1969.

18 Q Now, I think we've talked about the first two
19 bullets already. Let's just talk about witness
09:48 20 interview techniques. How do police officers in
21 Saskatchewan learn how to interview witnesses,
22 where and how are they taught and is there a
23 standard in place as to what to do and what not to
24 do in interviewing witnesses?

09:48 25 A I don't think there's necessarily a standard in



1 place. There's certainly things that -- there's a
2 code of conduct that governs, you know, what I
3 guess would happen to police officers who perhaps
4 go too far with a witness and do things that are
09:48 5 certainly inappropriate, but recruits are taught
6 in recruit training how to conduct interviews, how
7 to take a pure version statement, how to approach
8 witnesses, how to approach accuseds, and then
9 there's a number of courses that police officers
09:48 10 are taught throughout their careers where the
11 techniques of interviewing are refined and built
12 upon what they've already been, what skills the
13 investigators already have, so certainly there's
14 an ongoing career development when it comes to
09:49 15 conducting interviews.

16 COMMISSIONER MacCALLUM: What's a pure
17 version statement?

18 A A purse version statement is where you simply sit
19 down and allow the witness or the accused to just
09:49 20 tell you everything without interrupting, without
21 asking questions until the person has exhausted
22 fully as much of their memory as they can and then
23 you ask questions based on what they've told you
24 or what other information you are trying to
09:49 25 provide, and certainly it's the best way to try



1 and get everything from a witness or an accused
2 without any influence.

3 COMMISSIONER MacCALLUM: Uh-huh, okay.

4 BY MR. HODSON:

09:49 5 Q We heard I think from you and other witnesses as
6 well, Mr. Sawatsky, that in many cases witnesses
7 are not completely forthcoming when initially
8 talked to by the police for various reasons, both
9 innocent and sinister reasons; is that correct?

09:49 10 A That's correct.

11 Q And I think you also said that rarely do you get,
12 particularly from people who may have been
13 witnesses or involved in some way, you know, not
14 the innocent bystander, but rarely do you get the
09:50 15 full story on the first interview; is that
16 basically your evidence?

17 A Yes.

18 Q And would you agree that some police officers
19 are -- I mean, that interviewing is a skill and
09:50 20 that some police officers may be better at it,
21 getting information and interviewing than others?

22 A Yes.

23 Q And that over time perhaps that's a skill that's
24 honed by officers?

09:50 25 A Yes, through training and various -- and through



1 experience.

2 Q And so if we can look at the two I guess sort of
3 competing issues there, the one is you are saying,
4 I think you've told us, that you can't simply
09:50 5 accept the first words out of a witness' mouth as
6 being the truth and the complete truth in some
7 cases; is that fair?

8 A Yes, and you certainly try to test and corroborate
9 what they tell you through other independent
09:50 10 means, either through other witnesses or through
11 evidence that you have.

12 Q And then the officer would use his or her skills
13 in continuing to interview that witness to try and
14 find a way to get the complete story and the
09:51 15 truthful story from the witness; is that fair?

16 A Correct, that's fair.

17 Q And I guess that's the challenge always as to what
18 is truth and what is not coming out?

19 A Yes.

09:51 20 Q And I take it that the objective of an interviewer
21 would be to get the complete truth and not leave
22 out things, and not get mistruths or lies?

23 A Yes.

24 Q And can you tell us what, and we went down this
09:51 25 path a bit earlier, but where is the line for an



1 officer in pressing a witness then to try and get
2 more -- how does an officer, an interviewer ensure
3 that by pushing a witness they don't end up
4 getting matters that are not true, is it a
09:51 5 judgment call?

6 A I think to a degree, and I think sometimes there
7 may be the fact that you withhold a key piece of
8 information that you don't -- even if you are
9 suggesting to a witness that you perhaps know
09:52 10 something, that you are in a position that another
11 witness has told you something or you know from
12 the investigation, you know a particular piece of
13 evidence that you're getting the witness to try
14 and confirm, you may put that to the witness and
09:52 15 see whether they confirm it or not, but generally
16 speaking, you hold back, there's some key piece of
17 evidence that you know only an accused or a
18 witness would know and you quite often hold that
19 as a key piece of information and if that person
09:52 20 tells you that, then you know that they are
21 telling you the truth because they would have no
22 way of knowing that other than if they had, were
23 in possession of that knowledge.

24 Q And I take it the objective in getting a full and
09:52 25 complete statement is that it will somehow be



1 used, or that witness' evidence will be used in
2 court?

3 A That's correct.

4 Q And would one of the guiding principles be then to
09:52 5 ensure that the officer's conduct does not
6 prejudice or preclude the ability of that evidence
7 to be used in court?

8 A Yes.

9 Q And so was that sometimes what guides interviewers
09:53 10 as to what they can and can't do based on what has
11 been rejected by the courts in other cases?

12 A Very much so, yeah.

13 Q And if we go down to this second point here about
14 audio/video recording of interviews and
09:53 15 statements, would you agree that if the entire
16 interaction between an interviewer and a witness
17 was captured on audio and/or video tape, that
18 there's the ability of the court or defence
19 counsel or third party to take whatever issue they
09:53 20 want with the interviewing technique; in other
21 words, it's not left to speculation and so --

22 A That's correct.

23 Q And would you agree that from an interviewer's
24 perspective, an officer, that it may be to his or
09:53 25 her benefit to have the entire interview taped so



1 that later any suggestion of improper questioning
2 could be dealt with by what actually happened?

3 A Yes.

4 Q And so if we can move to this point, what is
09:53 5 your -- what is the current practice as far as
6 the -- are all statements audio and video recorded
7 in major crimes?

8 A No, in major crimes, I believe that exclusively in
9 major crimes they are just about all video or
09:54 10 audio taped, but in police work in general, you
11 know, for many of the minor offences or lesser
12 serious offences, a very good chance that they
13 aren't audio or video recorded, but certainly
14 captured, written down and taken down, you know,
09:54 15 in written form.

16 Q If the Gail Miller murder was investigated today,
17 based on your knowledge of what the practices and
18 standards are for policing in Saskatchewan, would
19 you expect that the interviews between the police,
09:54 20 the RCMP or Saskatoon City Police and Nichol John,
21 Ron Wilson and Albert Cadrain would be captured on
22 audio and/or video?

23 A Yes.

24 Q That would be your expectation?

09:54 25 A Yes.



1 Q And also the interview by Inspector Roberts, is
2 that something that, based on today's standards,
3 would be video taped?

4 A Yes, polygraph examinations have been audio and
09:55 5 video taped for years and years.

6 Q And in some respects would that provide a bit of a
7 check for an investigator knowing that his or her
8 questions are being taped as far as making sure --
9 and I'm talking about just crossing the line --
09:55 10 and I think what you are telling us is that it's
11 hard to define exactly where the line is; is that
12 correct?

13 A It is when it comes to questioning. I mean,
14 certainly we know there's a number of things that
09:55 15 are over the line, you know, physical violence and
16 things like that, certainly that's crossing the
17 line, but when it comes to suggestions and to
18 discussing with the witness what, you know, you
19 know, yeah, it's sometimes hard to sort of put the
09:55 20 line in a sort of rock solid, put it in a certain
21 spot, so certainly audio and video recording
22 provides the court with the best opportunity to
23 assess what was said and make a determination as
24 to the credibility of the witness based on that.

09:56 25 Q Just go down to the term tunnel vision, and if we



1 can just scroll down to the bottom, this was
2 defined in the Morin Inquiry as:

3 "The single-minded and overly-narrow
4 focus on a particular investigative or
09:56 5 prosecutorial theory, so as to
6 unreasonably colour the evaluation of
7 information received and one's conduct
8 in response to that information."

9 And again, you are familiar with the term tunnel
09:56 10 vision, Mr. Sawatsky?

11 A Yes, I am.

12 Q And this is one definition of it. Do you take any
13 issue with this being one aspect of tunnel vision?

14 A No, I don't.

09:56 15 Q Can you tell us what -- what is done, I mean, as
16 far as training of officers, educating of
17 officers, to deal with this issue of tunnel
18 vision, or do you acknowledge that tunnel vision
19 is something that police may from time to time
09:56 20 have?

21 A Yes.

22 Q And what are your -- just elaborate on how that
23 comes about or what might prompt the police to
24 have tunnel vision?

09:57 25 A I think they may focus incorrectly on a certain



1 suspect as being the person responsible and as
2 they gather the evidence perhaps they overlook
3 things that may tend to show the person is
4 innocent.

09:57 5 Q And so what can be done or what is being done to
6 prevent tunnel vision?

7 A Well, I think there's a number of things.
8 Certainly, as I talked about before, disclosure I
9 think is huge, but the police investigation
09:57 10 itself, I think the whole use of major case
11 management is something that sort of, the way it's
12 used, discourages tunnel vision from forming, you
13 have teams of investigators assigned to various
14 tasks, you have one person that is not involved in
09:57 15 the investigation sort of reviewing the file
16 assigning tasks and sort of capturing all the
17 information. Hopefully, you know, that person is
18 a senior, experienced investigator who, you know,
19 understands that there needs to be proof on both
09:58 20 sides, so I think just the way major case
21 management is set up. I think also police are
22 trained much better, the interviewing techniques
23 help to get, help them to elicit, you know, good
24 statements as opposed to statements where they
09:58 25 perhaps influenced the witnesses, and I think



1 police themselves are perhaps more aware than ever
2 before that there have been a number of wrongful
3 convictions.

09:58 4 Q And so what -- can you tell us what would be part
5 of an officer, a police officer's training then,
6 is that something that is dealt with in their
7 training, this idea of tunnel vision, wrongful
8 conviction and awareness about that?

09:58 9 A I'm not sure how much is talked about with regard
10 to wrongful conviction, but certainly I'm sure
11 that investigators are taught, that tunnel vision
12 is discussed and, you know, objectivity, keeping
13 an open mind, evaluating the evidence
14 appropriately. I'm sure there's, or I know
09:59 15 there's lots of discussions on that during
16 investigators' courses.

17 Q And just go back to the top, I think we've talked
18 about VICLAS, major case management. DNA as an
19 investigative tool, if the Gail Miller murder
09:59 20 investigation was undertaken today, would you
21 agree that DNA would have played a significant
22 role in that investigation?

23 A Yes, it certainly has changed things.

24 Q And to state the obvious, in a sexual
09:59 25 assault/murder, would it be fair to say that the



1 first thing that likely would have been checked
2 would have been to find human material from the
3 perpetrator on the garments or on the body of Gail
4 Miller?

09:59 5 A Yes.

6 Q And that that would have been at least used
7 initially to eliminate possible suspects, but
8 possibly also to identify the perpetrator?

9 A Yes.

10:00 10 Q We talked a bit, and I think we've touched on this
11 with major case management, I think you told us
12 that in major case management that basically, or
13 everything is turned over to the prosecutor and
14 then they determine what needs to go to defence
10:00 15 counsel?

16 A That's correct, and the other point there is that
17 in most major cases, prosecutions is consulted
18 during the investigation as opposed to the end and
19 often a prosecutor participates, you know, with
10:00 20 the investigative team by providing advice, by
21 assisting with advice on legal or -- legal issues
22 that the investigators may encounter.

23 Q And then on polygraph, I think we've touched on
24 this, you indicated that where polygraph is
10:00 25 conducted, that the standard or the practice



1 requires that that be video taped; is that
2 correct?

3 A Yes.

4 Q And retention of records relating to polygraph
10:01 5 examinations, you've told us that that would have
6 been very helpful to you in looking at what
7 happened between Inspector Roberts and Mr. Wilson;
8 is that correct?

9 A Yes, it would have been.

10:01 10 Q And today those records are required to be
11 maintained?

12 A Today those records are kept through audio and
13 video, yes.

14 Q And as well the polygraph charts?

10:01 15 A Yes.

16 Q And has polygraph evolved over the years? We've
17 heard I think from Mike Robinson that polygraph is
18 an investigative tool, it allows you to
19 scientifically provide some evidence as to whether
10:01 20 a witness is being truthful, but he also said that
21 it is a tool that can be used as an interrogator
22 in questioning a witness. Would you agree with
23 that?

24 A Yes.

10:01 25 Q And is that -- can you comment on what the



1 practices are today as to how polygraph is used by
2 police investigators?

3 A I think the philosophy is a little bit different
4 now than perhaps it was many years ago. I think
10:01 5 when polygraph first came on the scene and
6 examiners were trained in New York at Dick
7 Arthur's school, the philosophy was to try and get
8 confessions, to interrogate for confessions. Over
9 the last number of years, probably 20 years ago or
10:02 10 more now, the modified zone of comparison test
11 evolved, and you mentioned the SKY test early on,
12 that they went away -- polygraph, the profession
13 went away from that, they went to the modified
14 zone of comparison test, and I think the
10:02 15 fundamental belief of polygraph examiners now is
16 that their requirement is to provide an
17 investigative lead to investigators; in other
18 words, to try and make a determination of
19 truthfulness or deception and provide that, that
10:02 20 an interrogation is something that comes after
21 that, after you've been able to assist the
22 investigator, so where perhaps many, many years
23 ago polygraph was used as a bit of a means to an
24 end and a bit of a -- there was more emphasis
10:02 25 placed on the interrogation than there was on



1 providing, you know, good results to the
2 investigator, I think that has changed now.

3 Q And I think we heard from Mr. Robinson about the
4 fact that even putting a witness through a
10:03 5 polygraph can in some cases, before you even get
6 to the polygraph, cause the witness to provide
7 information that he or she didn't provide before?

8 A Yes, there's no doubt that there's a psychological
9 edge there.

10:03 10 Q And so just again, in looking at the polygraph of
11 Ron Wilson in May of 1969, are you able to, and I
12 appreciate that your evidence earlier about not
13 seeing the charts and not getting much from Mr.
14 Wilson when you sought it, are you able to comment
10:03 15 at all on whether the polygraph process that was
16 utilized in 1969 is different than what is
17 utilized today?

18 A Yes, and I certainly don't want to suggest that
19 I'm saying that the examiner at that time did
10:03 20 anything wrong, that was the technique that was in
21 practice and used at the time. The technique
22 that's in practice and used today is different.
23 As I mentioned, they use the modified zone of
24 comparison test now and questions about knowledge
10:04 25 are not mixed in with the questions of did you



1 commit the crime, that they are run in a separate
2 series, and I think the profession is of the view
3 that that leads to more accuracy.

4 Q And so are you telling us that since 1969 there
10:04 5 has been a shift in how polygraph is used by
6 police officers?

7 A Well, certainly since the mid '70s there's been a
8 shift. You know, I'm not so sure if it happened
9 in 1969, but I do know that it started to happen
10:04 10 in the '70s.

11 Q And I think you've told us you did polygraph work
12 for a number of years?

13 A Yes, I did.

14 Q And you mentioned, is it the Backster School that
10:04 15 had initial training, I think that's where
16 Inspector Roberts -- was the methodology?

17 A I think Inspector Roberts likely went to the Dick
18 Arthur's school in New York.

19 Q Or the Dick Arthur's, I'm sorry.

10:04 20 A And the polygraph course in Canada now is taught
21 at the Canadian Police College, but it's very much
22 derived from Mr. Backster's.

23 Q I'm sorry, I've got the names mixed up. Let me
24 back up. I think you told us that it was the Dick
10:05 25 Arthur School of Polygraph that was the old style



1 technique; is it fair to put it that way?

2 A Yes.

3 Q And that the Backster School methodology is what's
4 now used and that's a different approach to
10:05 5 polygraph; is that correct?

6 A That's correct.

7 COMMISSIONER MacCALLUM: Excuse me, Mr.
8 Hodson. I just didn't quite follow something,
9 sir. You suggested that a different technique
10:05 10 would be used today than was used in 1969 which
11 at the time focused on getting confessions as a
12 product of the polygraph exam, but of course Mr.
13 Roberts wasn't interviewing murder suspects, he
14 was interviewing witnesses who he was told hadn't
10:05 15 given all the truth, or at least that was his
16 suspicion, so what would be different today if
17 you found yourself in a situation that Mr.
18 Roberts was in?

19 A Well, My Lord, today it would simply be a
10:06 20 different technique that would be used, you would
21 run a modified zone of comparison test where you
22 would first eliminate suspicions around whether
23 the persons you were witnessing were actually
24 involved in the murder itself and then your second
10:06 25 series of questions would be about knowledge and



1 involvement --

2 COMMISSIONER MacCALLUM: Right.

3 A -- where you would then ask questions about that,
4 so you would be able to distinguish perhaps better
10:06 5 as to what extent someone was involved, and as I
6 indicated, I wasn't suggesting that, you know,
7 there was anything wrong with the technique Mr.
8 Roberts used.

9 COMMISSIONER MacCALLUM: Well, essentially
10:06 10 that's what Mr. Roberts did, isn't it, as far as
11 we know, from his Supreme Court testimony?

12 A Well, I think the polygraph profession itself sort
13 of felt that the SKY test, the suspicion,
14 knowledge and you, perhaps may mix issues in
10:06 15 person's minds, because if you ask them first off
16 do you suspect anybody, do you have any knowledge
17 or did you do it, you could end up with mixed
18 readings, and I think the reason they went away
19 from that is that very reason, is they felt that
10:07 20 it's more accurate for analysis purposes to ask a
21 series of questions based on direct involvement
22 and then a series of questions based on indirect
23 involvement that you could get clearer charts from
24 doing it that way.

10:07 25 COMMISSIONER MacCALLUM: Yes.



1 A So although that was the technique at the time,
2 it's certainly the best they had. I think I was
3 just trying to suggest that I think the profession
4 has evolved to where it's, they are better able to
10:07 5 be more accurate now on direct involvement or
6 indirect involvement.

7 COMMISSIONER MacCALLUM: And as a
8 polygraph, a polygraphist, would you treat a
9 murder suspect differently than a witness?

10:07 10 A You know, it's unusual to test witnesses, it's not
11 common to test witnesses.

12 COMMISSIONER MacCALLUM: Right, yeah.

13 A And I know from my experience when an investigator
14 doubted a witness, you know, I would usually
10:07 15 suggest, well, why don't we simply test the
16 accused because if you have an accused and the
17 accused is truthful, then you know where you stand
18 with the witness, so, you know, it's something
19 that was always a question to me here why the
10:08 20 accused wasn't done here rather than the
21 witnesses, but the investigators, that's a
22 decision they made, and certainly you can test
23 witnesses on a polygraph, I've done it myself, but
24 the ideal is to test the accused.

10:08 25 BY MR. HODSON:



1 Q And just on that, I think what Mr. Roberts said at
2 the Supreme Court when he testified in 1992 was to
3 the effect that he was informed that Mr. Milgaard
4 was the suspect, that Ron Wilson and Nichol John
10:08 5 had information, or the police believed they had
6 not disclosed full information, that they were
7 withholding information that was relevant to the
8 murder, and I believe in Mr. Roberts' testimony he
9 said that when he interviewed Wilson he initially
10:08 10 said I don't think you are telling me everything.
11 Do you recall that being generally what his
12 evidence was?

13 A Yes, I recall that, and I also recall that from
14 our interview of him, that I think he told us
10:08 15 pretty much the same thing.

16 Q And then he went on to say do you suspect, do you
17 know, did you, and I think Mr. Roberts' evidence
18 was to the effect that he was going in there
19 trying to get from Ron Wilson what he believed to
10:09 20 be the truth, but evidence incriminating David
21 Milgaard. Was that the sense you got from
22 Inspector Roberts?

23 A Yes, and I think if you look back at that summary,
24 that document sort of suggests that that's the
10:09 25 approach that the investigative team in that



1 investigation chose to go with.

2 Q And so just on that approach, in -- and again,
3 would a polygraph operator going in and saying,
4 going in with the intention of getting
10:09 5 incriminating evidence from Mr. Wilson, I suppose
6 that's not a confession, but that would be
7 incriminating evidence from a witness; is that
8 right?

9 A Yes.

10:09 10 Q And that -- am I to take your earlier comments
11 that the SKY technique which was used at the time
12 was disbanded later by polygraph operators for a
13 number of reasons, including that it was not felt
14 to be the best method in dealing with witnesses
10:10 15 and/or suspects?

16 A Yes, and I think at the time it was the best they
17 had, but as the profession evolved, they
18 recognized that there was, they could get clearer
19 charts if they dealt with the issue of direct
10:10 20 involvement and indirect involvement separately,
21 in separate sets of charts.

22 Q And so again, I think what Mr. Roberts' evidence
23 was, to the effect that when he ran the polygraph,
24 he found that Mr. Wilson was being deceptive on I
10:10 25 think two questions and I think one of them may



1 have been do you know or do you suspect and then
2 went back to question, and would that be -- again,
3 that would be using the polygraph as an
4 investigative tool; in other words, going back and
10:10 5 saying okay, it says here you lied, so what are
6 you not telling me?

7 A That's correct, that's exactly how you would use
8 it.

9 Q And again, is that something that has changed, the
10:10 10 practice today, as far as using the polygraph in
11 that method?

12 A No, the same, it's the same practice today, once
13 you form an opinion based on your charts, then you
14 confront the person with what your charts have
10:10 15 told you.

16 Q And so if you have Mr. Wilson in a polygraph
17 saying I don't know who killed Gail Miller and I
18 don't have any information to suggest that David
19 Milgaard did it and that was determined to be
10:11 20 deceptive, then are you telling us it would be
21 appropriate for an investigator to go back and
22 confront Mr. Wilson with that and say lookit, this
23 says here you are not telling us the truth?

24 A That's correct.

10:11 25 Q If we can go to the next page, I think we've



1 covered these issues, the uniform reporting
2 system, retention of records, inter-departmental
3 and inter-agency co-operation and pre and
4 post-investigation access to files and records by
10:11 5 police and civilians, and I think you've touched
6 on that, that certainly the files would be, the
7 regulations require the files to be maintained, to
8 be provided to the prosecution for criminal
9 proceeding, that beyond that, and I'm thinking
10:12 10 let's talk about a person who claims to be
11 wrongfully convicted in a murder case, those files
12 would be kept and would be available to be
13 accessed through appropriate channels; is that
14 correct?

10:12 15 A Yes.

16 Q And post-conviction investigation/information, we
17 talked about this back in June about the Linda
18 Fisher information and how that would be dealt
19 with by the police today, and let's just talk a
10:12 20 bit further about that. After a conviction is
21 obtained, the appeal has expired, the file is
22 concluded, I think you told us that when
23 information comes into the police that may suggest
24 that someone else committed the crime, as was the
10:12 25 case here in 1980 when Linda Fisher went in, and



1 maybe you could just elaborate a bit further as to
2 what system is in place right now that would deal
3 with new information about a solved murder case.
4 I don't want to talk about sort of lesser
10:13 5 offences, but let's just focus on a homicide case.

6 A I would suggest that if that information came in
7 today, that it would probably be sent, or would be
8 sent to the investigative team, and if the file
9 had been concluded, the file would simply be
10:13 10 re-opened and then that lead would be assigned to
11 an investigator or a team of investigators to go
12 out and follow up and make an assessment of the
13 witness, so it would likely result in a
14 re-interview and some follow-up if the
10:13 15 investigators determined that was appropriate.

16 Q And I think you told us in June that a senior
17 officer would have to sign off in some way on this
18 matter; in other words -- here's the question.
19 What would ensure today that it doesn't simply,
10:13 20 and I'm not suggesting this happened, but simply
21 doesn't sit on a file; in other words, here's a
22 statement, it goes on a file, what is in place
23 today to ensure that is followed up?

24 A I think just what I suggested, that it would go
10:13 25 right to the investigative unit, the investigative



1 unit would re-open the file, the senior
2 investigator or the file manager would then make
3 determinations on that investigation and would
4 sign off in the end to ensure that the appropriate
10:14 5 amount of attention had been paid to that
6 particular piece of information.

7 Q And you would still have to rely upon the judgment
8 of a police officer or police officers as to
9 whether or not anything further should be done
10:14 10 with it; is that correct?

11 A Yes.

12 Q This wrongful conviction awareness, can you
13 comment at all, again just based on your
14 experience and your current position, as to
10:14 15 whether today if an allegation was brought forward
16 that, or information was brought forward that said
17 lookit, the wrong person got convicted, even
18 though the proceedings are done the wrong person
19 got convicted, here's information that either,
10:14 20 (a), suggests the conviction is wrong, or (b),
21 here's the real perpetrator, can you comment at
22 all as to, just again based on your observation
23 about whether the awareness of the police to the
24 potential for wrongful conviction has changed
10:15 25 compared to what you saw when you started your



1 career in the '70s?

2 A I would suggest that the police are certainly more
3 aware than they've ever been before, and I think
4 the Crown as well are more aware than they've ever
10:15 5 been about wrongful convictions, and certainly a
6 piece of information coming in today I think would
7 be examined very carefully, would probably be
8 referred back to the investigative file and be
9 compared with whatever information is available
10:15 10 there and, you know, that it would be investigated
11 fully.

12 Q And would you agree that one of the factors might
13 well be the publicity that David Milgaard's case
14 and the attention it received over the years about
10:15 15 wrongful conviction, that that might be a factor,
16 and others, where the police are now more
17 cognizant of the fact that mistakes can be made
18 and wrongful convictions can occur?

19 A Yes, yes, I would agree with that.

10:15 20 Q I think those are all of my questions, Mr.
21 Sawatsky. I believe Mr. Elson and Mr. Gibson have
22 questions, I'm not sure if you want to start now,
23 or do you want to break?

24 COMMISSIONER MacCALLUM: Well, we can
10:16 25 break, start in 15 minutes.



1 (Adjourned at 10:16 a.m.)

2 (Reconvened at 10:43 a.m.)

3 COMMISSIONER MacCALLUM: Yes?

4 BY MR. ELSON:

10:44 5 Q Thank you, Mr. Commissioner.

6 Mr. Sawatsky, my name is
7 Richard Elson, I'm counsel for the Saskatoon
8 Police Service. I just wanted to ask a number of
9 questions that I prepared earlier, over the
10:44 10 weekend, but I had also wanted to ask some
11 questions partly in follow-up to the questions Mr.
12 Wolch asked of you yesterday.

13 You'll recall that Mr. Wolch
14 asked you questions yesterday related to some of
10:44 15 the comments or conclusions made by the Supreme
16 Court of Canada after the reference and, as I
17 understand it, perhaps to correct a news broadcast
18 that I heard this morning, your investigation and
19 your report was done after the Supreme Court of
10:44 20 Canada reference; is that correct?

21 A Yes, that's correct.

22 Q So you have the benefit of the conclusions made by
23 the Supreme Court of Canada in the reference in
24 the course of the investigation conducted by you
10:45 25 and your colleagues; is that correct?



1 A That's correct.

2 Q So when you looked at the comments that Mr. Wolch
3 put to you yesterday, namely that there was new
4 evidence capable of belief and as a consequence of
10:45 5 that, among other things, Mr. Milgaard should
6 receive a new trial, you were aware of all of that
7 at the time that the investigation was done?

8 A Yes.

9 Q Now, when one is looking at evidence that might be
10:45 10 capable of belief or evidence that is new -- and I
11 appreciate you are not a lawyer -- but would you
12 agree with me that that is essentially pointing to
13 the prospect of such evidence raising a reasonable
14 doubt as to David Milgaard's guilt?

10:45 15 A That's, that's exactly my understanding of what
16 the Supreme Court was saying.

17 Q Did you perceive -- and Mr. Wolch was suggesting
18 to you yesterday that the Supreme Court of Canada,
19 by referring to the 'new evidence capable of
10:46 20 belief', that it was pointing to the guilt of Mr.
21 Fisher as that evidence; did you perceive that the
22 Supreme Court of Canada was coming to some
23 conclusion as to the probable guilt of Mr. Fisher
24 for the murder of Gail Miller?

10:46 25 A No, that's not how I took it. How I took it was



1 the Supreme Court was suggesting that there was
2 new evidence that, in the event of a new trial,
3 put to a jury could result in a finding of not
4 guilty. But that, I never took it that the
10:46 5 Supreme Court was suggesting that Mr. Fisher was
6 guilty.

7 Q And you understood, then, that such new evidence
8 could result in acquittal for Mr. Milgaard, an
9 acquittal would result simply by the raising of a
10:47 10 reasonable doubt as to his guilt?

11 A Correct.

12 Q And you understood it was not necessary to prove
13 Mr. Fisher's guilt in order to raise a reasonable
14 doubt as to Mr. Milgaard's guilt?

10:47 15 A Yes, I agree with that.

16 Q And was that the perspective that you employed in
17 conducting the investigation that you did in 1993
18 and 1994?

19 A Yes, I think that's a fair statement.

10:47 20 Q Also, Mr. Wolch yesterday asked you questions with
21 respect to the McCrank/Fraser report, and I'm
22 sorry, when I was listing documents that I wanted
23 brought up I neglected to include that document, I
24 believe it is document number 032805. And
10:47 25 specifically, if we could zero in on 81, and I



1 believe it is the questions relating to the Mackie
2 report or the Mackie summary, as Mr. Hodson refers
3 to it. And, specifically, Mr. Wolch was
4 challenging the conclusion that the Mackie summary
10:48 5 indicated that the police were on the right track,
6 and his suggestion was -- and I bear in mind your
7 comments yesterday that it's somewhat unfair to
8 consider what we know now in the context of what
9 was understood and what was investigated in 1993,
10:48 10 and I don't mean to be unfair to you in the
11 question -- but Mr. Wolch put it to you yesterday
12 that, given what we know now, the Mackie summary
13 was not on the right track. If we were to look
14 into the context of what we knew in 1993, and
10:48 15 again what was known in 1969 at the time the
16 Mackie summary was prepared, what is your opinion
17 as to whether or not the comments made in the
18 Mackie summary were, if not on the right track,
19 reasonable?

10:49 20 A I think they were reasonable based on what they
21 had at the time, and I think I indicated yesterday
22 that, you know, our investigation was to determine
23 whether or not there was evidence here that there
24 was some wrongdoing and there certainly in my
10:49 25 view, from that document, was no evidence of any



1 wrongdoing. In fact, I think I've commented in my
2 evidence that it could be viewed as good planning
3 and a supervisor assessing what evidence was
4 available and simply saying "here's what we need
10:49 5 to do, here are our next steps", I think it's a
6 common thing.

7 **Q** In that context, in answering Mr. Hodson's
8 questions, you indicated that it was, and is, a
9 part of good major case management for a police
10:49 10 officer in charge of case management to prepare a
11 theory of a case, to prepare a possible theory of
12 a case, and I understood your evidence -- and
13 please correct me if I'm wrong -- I understood
14 your evidence to be that one might present a
10:50 15 theory of a case, in the course of case
16 management, very similar to that which was
17 prepared in the Mackie summary; is -- was that
18 your evidence?

19 **A** Yes.

10:50 20 **Q** Would you agree with me that there are occasions
21 when an officer engaged in major case management,
22 with the appropriate training in that task, may
23 create a theory, which theory is subsequently
24 found to be wrong, which theory is subsequently
10:50 25 found not to be borne out by the evidence; that



1 does occur from time to time, does it not?

2 A Yes, it does.

3 Q By virtue of the fact that it is ultimately
4 determined that that theory, developed in a case
10:50 5 management context, is wrong, does it being wrong
6 of necessity make it unreasonable?

7 A I would suggest no.

8 Q Why not?

9 A Well I think when they put together the summary,
10:51 10 or speaking hypothetically, you would put it
11 together with your best belief at the time. As
12 you go out and conduct your investigation you may
13 find that that theory doesn't hold water, that
14 that was not the proper course of action to
10:51 15 follow, that those leads weren't -- didn't take
16 you to where you thought they would, and you would
17 have to re-evaluate your position and then suggest
18 that perhaps that was not the right theory.

19 Q If we were to have a specific example that has
10:51 20 been made known to us in the last number of weeks,
21 the *JonBenet Ramsey* case in the United States, the
22 district attorney's office in Boulder, Colorado
23 went to the extraordinary steps of bringing Mr.
24 Karr from Thailand and having him charged with the
10:51 25 offence of -- with the offence of murder with



1 respect to JonBenet Ramsey. It has since been
2 determined, as a result of DNA analysis, that --
3 and also, as I understand, determined that Mr.
4 Karr was not in Boulder, Colorado at the time the
10:51 5 murder had taken place, it has now been determined
6 that was wrong. Does that, of necessity, make the
7 decision to bring Mr. Karr back to Colorado from
8 Thailand, and to take the steps that were done,
9 necessarily unreasonable?

10:52 10 A Well I, I don't have much knowledge on that, but
11 on the surface it would seem to me that it's
12 appropriate to bring him back so that you can
13 investigate fully and make a determination, and
14 that's -- I think is what I think you are
10:52 15 suggesting is what they did, and that doesn't seem
16 unreasonable.

17 Q Now when one is looking at the conclusions in the
18 report that was prepared in the context of the
19 allegations made by Mr. Wolch and his colleagues,
10:52 20 one of the allegations that is made is that the
21 police had made a connection between what is
22 described as the Fisher rapes -- I'll refer to
23 them as the Riversdale rapes -- but that they had
24 made the connection between the rapes for which
10:52 25 Mr. Fisher was ultimately found guilty and the



1 Gail Miller murder, and you have testified, and
2 indeed, there was evidence to the effect that
3 indeed, that Saskatoon City Police, as they were
4 then known, did investigate a connection in 1969,
10:53 5 and indeed I take it you are aware that the
6 possibility of a connection had been disclosed
7 publicly, namely in three newspaper articles in
8 the Saskatoon *StarPhoenix*?

9 A I was aware of that, yes.

10:53 10 Q Despite the fact that the connection was being
11 investigated, and despite the fact that the
12 Saskatoon City Police had come out publicly with
13 the possibility of a connection, you indicate in
14 your report, and I quote, that it did not mean
10:53 15 there was "an unalterable link" formed in the
16 minds of investigators. And you used that term
17 "unalterable link", I wanted to ask you a question
18 about that term in the context of what has been
19 defined as tunnel vision.

10:54 20 COMMISSIONER MacCALLUM: Do you have where
21 that quote came from?

22 MR. ELSON: Yes, I do. It came from the
23 report 023220, and I believe that's the,
24 actually, page number 023220 in the second-last
10:54 25 paragraph.



1 COMMISSIONER MacCALLUM: Okay. Does
2 anybody have the doc. ID?

3 MR. HODSON: 023167.

4 MR. ELSON: I'm sorry?

10:54 5 MR. HODSON: 023167.

6 COMMISSIONER MacCALLUM: Thanks, Mr.
7 Hodson.

8 BY MR. ELSON:

9 Q I'm trying to find where the phrase --
10 "unalterable link" appears in the second-last
11 paragraph in the second-last line. I take it that
12 what you were focusing on was although it was
13 being investigated, although there was a
14 possibility of a connection, and although the city
10:55 15 police had taken the extraordinary step of
16 publicly announcing that they were investigating a
17 connection, they had not formed tunnel vision in
18 their mind, they had not fixed on that theory;
19 would that be a fair interpretation of your
10:55 20 conclusion?

21 A I think that's a fair interpretation, and what
22 that indicates to me is that their minds were wide
23 open to any possibility at that point, and that
24 they never changed their minds about that until
10:55 25 they developed evidence that they believed was



1 leading them in the direction of David Milgaard.

2 Q And the fact that on March the 2nd of 1969, after
3 having first heard from Mr. Cadrain, that the
4 Saskatoon City Police were prepared to consider
10:55 5 David Milgaard as a suspect is further evidence
6 that there was no tunnel vision created and
7 ultimately, indeed, the charge that there was no
8 tunnel vision in terms of fixing on
9 identification?

10:55 10 A Yes.

11 Q The definition of tunnel vision that has been
12 referred to in the document Mr. Hodson put to you
13 this morning, 338941, a definition taken from the
14 conclusions in the *Morin Inquiry*, that has a
10:56 15 fairly formal definition of tunnel vision, and
16 that is.

17 "... the single-minded and overly narrow
18 focus on a particular investigative or
19 prosecutorial theory so as to
10:56 20 unreasonably colour the evaluation of
21 information received and one's conduct
22 in response to that information."

23 We have a less-formal definition presented to us
24 at this Commission of Inquiry by Professor Kim
10:56 25 Rossmo. First of all, Mr. Sawatsky, are you



1 familiar with Mr. Rossmo?

2 A Only remotely, I'm aware who he is, yes.

3 Q And you were aware that, prior to his taking an
4 academic position in the United States, he had
10:56 5 been a police officer with the Vancouver Police
6 Service?

7 A Yes.

8 Q And, from Mr. Rossmo's testimony on April the 26th
9 of 2006 he indicated, and I quote, that:

10:57 10 "Tunnel vision is where you
11 start eliminating options by focusing
12 only on what is your particular theory
13 or viewpoint.",

14 which is perhaps a less sophisticated description
10:57 15 of the definition from the *Morin Inquiry*. Would
16 you agree with either of those definitions, which
17 I suggest are somewhat interchangeable with each
18 other?

19 A Yes, I -- it would seem to me that that captures
10:57 20 what my view of tunnel vision would be.

21 Q Now, in the context of what occurred after March
22 the 2nd, 2006 (sic), it has been suggested that
23 there was tunnel vision from the point in time
24 that David Milgaard became a suspect, namely on
10:57 25 that weekend, that first weekend in March of 2006



1 (sic). From your investigation, had you concluded
2 or had you found that the Saskatoon City Police
3 was considering theories other than David Milgaard
4 between March 2nd of 2006 (sic) and roughly May 25
10:58 5 -- sorry -- March 2nd of 1969 --

6 A That helps.

7 Q -- and May 23 of 1969 when the statements were
8 received from Mr. Wilson and Ms. John?

9 A Yes, I'm aware that they were investigating and
10:58 10 looking at other possibilities.

11 Q Particularly when we look -- and I draw this only
12 as an example -- investigation report number 16664
13 (sic) by Detective Karst dated April 18th of 1969.

14 COMMISSIONER MacCALLUM: Is that a
10:58 15 transcript quote?

16 MR. ELSON: No, this is an investigation
17 report.

18 COMMISSIONER MacCALLUM: 10, oh, sorry.

19 BY MR. ELSON:

10:59 20 Q It is 106664. For some strange reason the hard
21 copy I have is easier to read, that's a little
22 easier now. In that particular investigation
23 report Detective Karst was investigating a Richard
24 McKee and specifically refers to an investigation
10:59 25 of Mr. McKee on March 28th, 1969, and the reason,



1 if we want, if we refer to the investigation
2 report, that Mr. McKee was being interviewed was
3 that he fit the description of the composite photo
4 described in one of the rape cases. And then
10:59 5 Detective Karst goes on to say:

6 "... however his alibi appeared to stand
7 up and he was also taken to the Red
8 Cross where a sample of his blood was
9 taken and found to be of 'O' type, which
10:59 10 would eliminate him in this murder
11 file."

12 Would you agree with me that Detective Karst, who
13 was deeply involved in the investigation of the
14 Gail Miller case by March 28th of 1969, the fact
11:00 15 that he was investigating an individual who may
16 have been identified in one of the earlier rape
17 cases, is a further example that, at least until
18 the charges were laid against Mr. Milgaard, there
19 was no evidence, real evidence of tunnel vision,
11:00 20 in the investigation of the Gail Miller murder?

21 A Yes, I do agree.

22 Q In referring to another investigation report also
23 dated April 18th, 1969 and again authored by
24 Detective Karst, number 106661, in that
11:00 25 investigation report Detective Karst refers to an



1 interview with Nichol John I believe on April 14
2 of 1969 at Regina in which he receives
3 information. And specifically if we look at the
4 bottom of the third paragraph Detective Karst, I
11:01 5 believe if we go from here, beginning with "this
6 girl". I'm not very good with the screen, as Mr.
7 Hodson is, Mr. Karst indicates:

8 "This girl did however state that she
9 felt Milgaard was capable of an offence
11:01 10 of this nature and admitted having
11 sexual relations with him at different
12 times and that he was more of the animal
13 nature than you would expect of a
14 human."

11:01 15 In the context of having received that statement,
16 though, on the next page, 6662, in the paragraph
17 beginning with the word "although", despite
18 having referred -- received the unfavourable
19 comment about Mr. Milgaard from Ms. John,
11:02 20 Detective Karst goes on to say in that paragraph:

21 "Although there are many
22 unanswered questions with regards to
23 Milgaard's activities on that particular
24 morning, if one is to believe the girl,
11:02 25 NicholJohn, and it appears that she is



1 very convincing with her story, then
2 there is no way in which Milgaard can be
3 connected with this crime."

4 Again, in the context of tunnel vision, what, if
11:02 5 any, comment do you have about Detective Karst's
6 comment in that particular section of the
7 investigation report?

8 A Well I would certainly suggest that that doesn't
9 suggest tunnel vision at all with regards to Mr.
11:02 10 Milgaard, that he is suggesting there that it's --
11 that Mr. Milgaard is not connected to the crime.

12 Q Even if one were to say, as has been alleged, that
13 there was evidence of tunnel vision at some point
14 in the focus of the investigation on Mr. Milgaard,
11:03 15 does the presence of tunnel vision, if found to be
16 the case, suggest an absence of good faith on the
17 part of the investigators involved?

18 A No.

19 Q Could you --

11:03 20 A I guess it's kind of a strange thing because if
21 you have tunnel vision, to use that term, and
22 you're right it's different, much different than
23 if you have tunnel vision and you're wrong, isn't
24 it. So if it's done in good faith here, as you
11:03 25 are suggesting that they focused in good faith on



1 Mr. Milgaard, then that doesn't suggest tunnel
2 vision.

3 Q Now it has also been suggested that the Saskatoon
4 City Police, as they were then known at the time,
11:03 5 should have focused more on the connection or the
6 possible connection of Larry Fisher to this
7 particular crime, and in particular I believe in
8 the interview that you had had with Mr. Wolch and
9 Mr. Rodin and I believe Mr. Bruce prior to going
11:04 10 on to the substance of your investigation, I
11 believe Mr. Wolch had referred you to the
12 statement of Ms. Gallucci who had identified a
13 gentleman with a yellow hard hat who had taken the
14 bus, according to her recollection, roughly at the
11:04 15 same time as Gail Miller had taken the bus on
16 various occasions. Do you recall having had a
17 look at the report of Ms. Gallucci and identifying
18 this person with the yellow hard hat?

19 A Yes, I do recall that. I might need to refresh
11:04 20 myself here but, if my recall is correct, that I
21 think we were satisfied that that perhaps could
22 have been Larry Fisher, and I think there is also
23 evidence that he was interviewed by a police
24 officer subsequent to the Miller murder at the bus
11:05 25 stop or very near the bus stop.



1 Q If we could refer to -- and, again, my apologies
2 to the staff -- investigation report number
3 106234, a report by Detective Maurice Bennett
4 dated February 6th, 1969. If we were to go to the
5 bottom of that page, the paragraph beginning "also
6 interviewed", in that particular investigation
7 report where Mr., Detective Bennett took
8 information from Mary Gallucci, as she was then
9 known, and part-way down that paragraph it says:

10 "She has seen her ...",

11 namely the nurse:

12 "... on the same bus before but does not
13 think seen on Wed. There was also a
14 young man get on the bus with ...",

15 the wording is misplaced:

16 "... who was a construction worker
17 wearing blue jeans and a hard hat,
18 possibly yellow."

19 Detective Bennett, now Mr. Bennett, testified
20 before this Commission of Inquiry and indicated
21 that that investigation report would simply have
22 been sent downtown and, subsequent to that, he
23 was not instructed to follow up the particular
24 identification with respect of a hard hat. Would
25 you agree with me that in 1969, given that police



1 services, particularly the Saskatoon City Police,
2 did not have the kind of computer technology you
3 talked about yesterday in answering Mr. Hodson's
4 questions, that in order to review the material
11:06 5 received there would have to be a police officer
6 back at the office acting as a reader, collating
7 the investigation reports and going through the
8 material to find common threads; would you agree
9 that that would have been the only tool that
11:07 10 would have been available in 1969?

11 A Yes, and I believe that was commonly done.

12 Q And would you agree with me that whoever that
13 reader would be, being a mere mortal and perhaps
14 being somewhat fallible, that it was not perhaps
11:07 15 unusual that an information -- that a particular
16 piece of information, such as a reference to a
17 yellow hard hat, might very well have been
18 overlooked or regarded as insignificant?

19 A Yes, that's possible, and I think that's what I
11:07 20 was trying to emphasize with Mr. Hodson. The
21 advancement of major case management has lessened
22 the possibility of that happened -- happening now,
23 but certainly back in 1969 what you suggest is
24 correct.

11:08 25 Q Now if we could have Detective McCorrison's



1 investigation report of February 3rd, which I
2 believe is number 106212, brought up. And I'm
3 sorry, Mr. Hodson, perhaps you might help me, I
4 can't remember exactly where Detective McCorrison
5 interviewed Mr. Fisher?

11:08

6 MR. HODSON: Next page.

7 MR. ELSON: Next page?

8 MR. HODSON: A third of the way down.

9 BY MR. ELSON:

11:08

10 Q Yes. 6:49 a.m., there is an entry 6:49 a.m.,
11 followed by an entry at 6:52 a.m. We have
12 Detective Bennett's investigation report and we
13 have Detective McCorrison's investigation report,
14 the common individual item there with respect to
15 the interview of Mr. Fisher and Mr. -- Detective
16 Bennett's comments is the reference to the yellow
17 hard hat. Given that there was no computer
18 technology in 1969 can you understand how, in good
19 faith, that one fact, if significant, could have
20 been overlooked or may very well have been
21 regarded as insignificant, that someone might not
22 have been matching those two investigation
23 reports?

11:09

24 A Yes.

11:09

25 Q In today's, if this had occurred today, if



1 Detective Bennett had received information from
2 Mary Gallucci today that identified somebody in a
3 yellow hard hat and that investigation report were
4 brought back to the police service and whoever was
11:09 5 in charge of collating and reviewing the
6 investigation reports, would you agree with me
7 that that, what that person could do then is
8 retrieve any information that refers to a yellow
9 hard hat and, in doing so, Detective McCorrison's
11:10 10 investigation report would then be brought to the
11 fore?

12 A That's correct.

13 Q It would not depend on a police officer reviewing
14 all of the investigation reports and trying to
11:10 15 remember all of the information that has been
16 gleaned from those reports?

17 A Correct. In fact, to go a step further, I think
18 that in today's climate it is very likely that
19 that would come to the coordinator, who would
11:10 20 assign someone to specifically go and investigate
21 that.

22 COMMISSIONER MacCALLUM: But still, sir,
23 somebody would have to see the significance in
24 "yellow hard hat" before --

11:10 25 A The connection would have to be made.



1 COMMISSIONER MacCALLUM: Yeah. So there
2 really isn't any difference between the computer
3 access to such information and the manual access
4 to it unless, you know, somebody made a -- saw a
5 significance in "yellow hard hat"?

11:10
6 A Well, My Lord, I guess in my own thoughts here is
7 that if I were the file manager and a piece of
8 paper came across my desk that somebody had been
9 seen at the bus stop with a yellow hard hat, I
10 would flag that immediately and feed it into the
11 system to be investigated.

12 COMMISSIONER MacCALLUM: Uh-huh.

13 A And then, of course, if there is any other reports
14 in there when the investigator looked at it and
15 ran that particular piece of information, any
16 other material in the case management file that
17 had similar description would also pop out for the
18 investigator to follow up on.

19 So I think what I am trying to
11:11 20 suggest to you is that that piece of material may
21 be looked at differently in the context of major
22 case management because you assign any little
23 piece of information like that, you assign it to
24 an investigator or a team of investigators to
11:11 25 follow up on.



1 MR. ELSON: Mr. Commissioner, perhaps if I
2 could pursue that point just a little bit?

3 COMMISSIONER MacCALLUM: Yes, please. I'm
4 just having trouble understanding, Mr. Elson, why
11:11 5 every little piece of information would suddenly
6 have significance in a computer system.

7 BY MR. ELSON:

8 Q If we were to go back to Detective McCorrison's
9 report, and again assume that it's 2006, Detective
11:12 10 McCorrison prepares that type of information,
11 when that information goes into the case
12 management file it is also entered into a computer
13 database; is that not correct?

14 A Yes.

11:12 15 Q And when the coordinator then receives Detective
16 Bennett's report, in reviewing Detective Bennett's
17 report the only non-technological function of that
18 coordinator is to review that report and say
19 "maybe the yellow hard hat is of significance, I
11:12 20 am going to enter the yellow hard hat reference",
21 because -- and would you agree with me that
22 Detective Bennett saying a person with a yellow
23 hard hat taking the bus at the same time would
24 have been of some significance?

11:12 25 A Yes, it was something that came from a witness,



1 and certainly that would be entered in.

2 Q And you would expect a reasonable coordinator to
3 perhaps follow up on that information if one could
4 follow up on it easily?

11:13 5 A Yes, I'm suggesting that it likely would be
6 followed up on in today's way of managing files.

7 Q And one of the reasons that it would be followed
8 up on is because it's easy to do; would you agree
9 with that?

11:13 10 A Yes.

11 Q In 1969 it was much harder to do; would you agree
12 with that?

13 A Yes. I think the way they put the reports
14 together, etcetera, and the way the paper flowed
11:13 15 would make it more difficult back then than it is
16 now.

17 Q In 1969 the coordinator would say, would look at
18 that entry with respect to the yellow hard hat and
19 ask himself or herself -- unfortunately, probably
11:13 20 himself -- but ask himself whether or not this
21 information is significant, but at the same time
22 that coordinator knows that in order for me to
23 understand whether or not it's significant I have
24 to go through every one of these investigation
11:14 25 reports and find some evidence with respect to a



1 yellow hard hat; in other words the retrieval
2 process in 1969 was significantly more difficult
3 than it is today?

4 A Yes.

11:14 5 Q And because the retrieval process is significantly
6 more, was significantly more difficult in 1969
7 than it is today, it would perhaps be less likely
8 to be followed up upon?

9 A Yes, I think that's a fair assessment.

11:14 10 Q And more likely to be overlooked?

11 A Yes.

12 Q I'm not sure, Mr. Commissioner, whether that --

13 COMMISSIONER MacCALLUM: Yes, thanks, Mr.
14 Elson.

11:14 15 BY MR. ELSON:

16 Q Now, a bit of a rhetorical question, but I'm going
17 to ask it anyway, in your experience as a police
18 officer, have you ever had presented to you
19 evidence which is of arguable credibility, and
11:15 20 what I mean by that is it's not obviously
21 believable, but it's not frivolous or vexatious
22 either, it's arguably credible, but somebody
23 presents evidence to you of arguable credibility
24 tending to suggest that someone convicted of an
11:15 25 offence and serving time for that offence may not



1 be guilty of that particular offence. Has that
2 ever occurred to you in your police experience?

3 A I don't recall having that experience.

4 Q And specifically I'm comparing this to the
11:16 5 experience that Inspector Wagner had when he
6 received the statement from Linda Fisher in 1980.
7 Would you agree with me that that was an
8 extraordinary thing, that would not -- that's not
9 a very common occurrence in a police officer's
11:16 10 career?

11 A No, it's not a very common occurrence.

12 Q Would you agree with me that in 1980 at least, and
13 perhaps even since, there was no police force in
14 Canada, whether a municipal police force or the
11:16 15 Royal Canadian Mounted Police, that had any
16 specific policy for dealing with such an
17 extraordinary incident or circumstance?

18 A No, I think it would be pretty well up to the
19 investigator to assess that, the value of that and
11:16 20 do some follow-up depending on the assessment.

21 Q Now, in this case we've heard the evidence of
22 Inspector Wagner, as he then was, where he had
23 come to the conclusion that the evidence was, and
24 I'm using my words, not his, arguable credibility;
11:17 25 in other words, he didn't discount it, he thought



1 it might very well be believable, and it was his
2 evidence that the matter was referred to Detective
3 Parker and Detective Parker, as you observed in
4 your report, has no recollection of having
11:17 5 received it. When you say that the investigator
6 should assess it, in light of the fact that
7 Detective Parker was very directly involved in the
8 investigation of Gail Miller's murder, is it your
9 view that he was the one that was the most
11:17 10 appropriate to assess it given that he was still
11 on the force in 1980 and had been involved in that
12 investigation in 1969?

13 A Yes, I would suggest that, you know, it would go
14 back to the investigators who were responsible to
11:17 15 look at and make an assessment as to its value and
16 whether there's some follow-up or some further
17 action that is required as a result of that.

18 Q In light of the description of the knife by Linda
19 Fisher as namely a wooden-handled knife with
11:18 20 rivets and a smooth blade four inches long, a
21 description that did not properly or correctly
22 compare with what was believed to be the murder
23 weapon in 1969, what is your opinion as to
24 detective -- and assuming Detective Parker was
11:18 25 made aware of Linda Fisher's statement as



1 Inspector Wagner says, was it unreasonable for
2 Detective Parker not to have followed up on Linda
3 Fisher's statement?

4 A I can see that he, if he did look at it, and I
11:18 5 recall what we said in our report, that he may
6 very well have looked at it and simply discounted
7 it as not being evidence of anything.

8 Q Would it in your opinion have been unreasonable
9 for him to have discounted it given that the
11:18 10 descriptions of the knives were at odds?

11 A No.

12 COMMISSIONER MacCALLUM: It would not have
13 been unreasonable, is that your answer?

14 A It would not have been unreasonable. I think just
11:19 15 to add to that, I think there was more to the
16 assessment, though, than simply the fact that the
17 knives were different, at least in our
18 investigation we examined that, you know, more
19 thoroughly than that, and as we came to the
11:19 20 conclusion that we simply, that Linda Fisher was
21 simply, you know, unreliable.

22 BY MR. ELSON:

23 Q And I appreciate your answer, and I was only using
24 one of the examples as to why Detective Parker may
11:19 25 have discounted it, assuming that Inspector



1 Wagner's evidence is to be accepted, namely, that
2 he did notify Detective Parker.

3 I also want to ask you
4 questions with respect to the notification of
5 victims. I believe your testimony, and I've
6 forgotten your biography, forgive me, Mr.
7 Sawatsky, but I believe your evidence was that you
8 became a police officer sometime shortly after, I
9 believe in the early 1970s?

10:11:20 10 A That's correct, 1969.

11 Q What was your knowledge of the practice of police
12 forces across the country with respect to
13 notifying victims of the disposition of their
14 cases?

10:11:20 15 A Back then it was rare, you know, unless there was
16 a trial or some way that the victim had, you know,
17 of knowing what the results were, it was rare for
18 the police to sort of knock on their door at the
19 end of an investigation and say, you know, here's
10:11:20 20 the results of our investigation.

21 Q Now, in this particular case you are aware that
22 Mr. Fisher confessed to these offences in
23 Winnipeg, there was no trial, none of the victims
24 were subpoenaed to testify in court. Under those
10:11:20 25 circumstances would you, given the time, have



1 expected the police to notify the victims of the
2 fact that Mr. Fisher had confessed and had pled
3 guilty, given that they are not subpoenaed, they
4 are not called to court and there's no further
11:21 5 contact made of them since Mr. Fisher's
6 confession?

7 A If the police had known, and I think again because
8 there was no specific policy, it comes down to the
9 investigator, him or herself who may have thought
11:21 10 I would like to let the victim know. On the other
11 hand, there was no policy requiring it, so it
12 doesn't surprise me if the victims weren't
13 notified.

14 Q You would agree with me that at least in the last
11:21 15 decade, and perhaps earlier, there has been
16 significant developments in that respect, not only
17 with police services in Saskatchewan, but across
18 the country?

19 A I would agree with that.

11:21 20 Q And you would agree with me that there have been
21 victim liaison units that have been established
22 within municipal police forces including the
23 Saskatoon Police Service?

24 A Yes.

11:21 25 Q Even under the unusual circumstances that had



1 occurred with respect to Mr. Fisher, him
2 pleading -- confessing in another jurisdiction and
3 pleading guilty, no need for the victims to be
4 contacted and subpoenaed to come to court and
11:22 5 testify, would you agree with me that it would be
6 virtually certain that these victims would have
7 been notified of the disposition of the case if it
8 occurred today?

9 A Yes, if the police became aware of it, and I'm
11:22 10 satisfied they likely would, I'm pretty satisfied
11 that the victims would be made aware.

12 Q Now, in terms of the interaction with witnesses,
13 there's a bit of a general question I have in this
14 respect. You'll recall that there was some
11:23 15 questioning of Mr. Cadrain, I believe, at the
16 preliminary inquiry, and subsequently Mr.
17 Milgaard's trial, with respect to him having been
18 questioned in Regina after he had been arrested
19 for vacancy. I believe you've reviewed the
11:23 20 transcripts of the preliminary inquiry and Mr.
21 Milgaard's trial?

22 A Yes.

23 Q And would you agree with me that that appears to
24 be the first place that there's anything in
11:23 25 writing about Mr. Cadrain having been questioned



1 in Regina about a murder in Saskatoon?

2 A Yes, I agree with that.

3 Q Mr. Commissioner, there's a reference in the book
4 *When Justice Fails* by Carl Karp and Cecil Rosner
11:24 5 and I just wanted to have page 50 of that book
6 placed on the overhead. First of all, I take it
7 you are aware of this book?

8 A I believe -- I'm not sure that I read it in
9 detail, but I know I've gone through it.

11:24 10 Q I believe it was written -- the date is on the
11 front, I've forgotten, but I believe it was
12 written before the Supreme Court of Canada
13 reference and would have been written while Mr.
14 Milgaard was still in custody. Page 50, beginning
11:24 15 after the space, the authors say, and I quote:

16 "It didn't take long for Saskatoon
17 police to discover that a group of
18 teenagers had left the Cadrain house for
19 points west on the same day as Gail
11:25 20 Miller's murder. It was one of hundreds
21 of pieces of information that surfaced
22 in the days following the slaying. It
23 was a tenuous lead at best. There was
24 nothing to suggest those teenagers had
11:25 25 anything to do with the murder, but it



1 was worth checking out."

2 Before I go on, what evidence, if any, did you
3 uncover in the course of your investigation that
4 the Saskatoon police had any idea of four
11:25 5 teenagers leaving Saskatoon in a vehicle; namely,
6 Mr. Milgaard, Mr. Wilson, Ms. John and
7 Mr. Cadrain?

8 A There was no evidence until Mr. Cadrain came
9 forward.

11:25 10 Q The next paragraph goes on to say:

11 "Investigators had little trouble
12 locating Albert Cadrain. He and his
13 friends had spent a few days driving
14 almost aimlessly around Alberta. They
11:25 15 all returned to Regina around February
16 5. Soon after that Cadrain was arrested
17 on a charge of vacancy and sentenced to
18 a week in jail. When Saskatoon police
19 learned he was in Regina, they asked the
11:26 20 local police department to question him
21 about his activities on January 31. He
22 was brought into an interview room,
23 where a number of officers asked him to
24 strip naked. They thoroughly inspected
11:26 25 his clothes and conducted a full body



1 search. Then they began to grill him
2 about any involvement he might have with
3 the murder."

4 What evidence if any, Mr. Sawatsky, were you able
11:26 5 to uncover during the course of your
6 investigation that the Saskatoon City Police, as
7 they were then known, had any contact with the
8 Regina City Police and had made a specific
9 request that the Regina City Police interview
11:26 10 Albert Cadrain?

11 A We found no evidence of that.

12 Q Indeed, and to repeat my question earlier, the
13 only evidence of any questioning by the Regina
14 police has come from Albert Cadrain himself and
11:26 15 came up in the course of questioning at the
16 preliminary inquiry and the trial of David
17 Milgaard; is that correct?

18 A That's correct.

19 Q And would you agree with me that at best the
11:27 20 evidence Mr. Cadrain gave with respect to the
21 interview by the Regina police was very vague?

22 A Yes.

23 Q When we look at the allegations --

24 COMMISSIONER MacCALLUM: Do you have a doc.
11:27 25 number for that book? I think we have one



1 somewhere.

2 MR. ELSON: I'm not sure. I know it has
3 been referred to before.

4 MS. BOSWELL: 331550.

11:27 5 COMMISSIONER MacCALLUM: 331553?

6 MS. BOSWELL: 550.

7 MR. ELSON: Thank you.

8 COMMISSIONER MacCALLUM: So I could get to
9 the same page by adding 50 to it presumably, more
10 or less?

11 MR. ELSON: Presumably.

12 MS. BOSWELL: 331576 is the page.

13 COMMISSIONER MacCALLUM: Oh, thanks,
14 331576. Okay.

11:27 15 BY MR. ELSON:

16 Q I just want to talk about the quality of the
17 allegations that were being made. Given that the
18 only evidence was this comment from Mr. Cadrain
19 himself, and as you inquired there was no
11:28 20 investigation report prepared by the Regina City
21 Police, no statement obtained from Mr. Cadrain by
22 the Regina City Police and indeed at the time you
23 conducted the investigation, the Regina city
24 police officers involved had no recollection of
11:28 25 having discussed this matter with Mr. Cadrain, so



1 the only evidence we have is this vague assertion
2 from Mr. Cadrain, and yet very specific
3 allegations put in writing specifically put in a
4 book. Was this typical of the kind of allegations
11:28 5 that were being made around the time you and your
6 colleagues were conducting the investigation; in
7 other words, and perhaps I'm being somewhat
8 subjective and editorial in making my comments,
9 fairly extensive conclusions drawn from very
11:28 10 little evidence?

11 A I think that's certainly a fair assessment of a
12 number of the allegations we were given, that very
13 little -- there had been very little attempt to
14 either verify them or see whether there's any
11:29 15 substance to them before we were given those
16 allegations.

17 Q And you would agree with me that there were a
18 number of inferences and conclusions drawn in
19 those two paragraphs I read to you that have not
11:29 20 been borne out in any way, shape or form in any of
21 the evidence you've reviewed?

22 A That's correct.

23 Q Now, I want to turn to Ron Wilson for a moment,
24 and if I could have the statement that Mr. Wilson
11:29 25 gave to Mr. Henderson, which is 017096, that's the



1 document number, and the specific page I would ask
2 to be brought to the screen is 098. This is Mr.
3 Wilson's written statement given to Paul
4 Henderson, I believe given on June the 4th of
11:30 5 19 -- sorry, is it '90 or '91? If we could go to
6 the first page. Sorry, the last page, I think the
7 date is on the last page. Yes, June 4th of 1990.
8 If we could go back to 098. I take it you've seen
9 this statement?

11:30 10 A Yes, I have.

11 Q And you saw this statement in the course of your
12 investigation?

13 A Yes, I did.

14 Q Mr. Wilson then says:

11:30 15 "I am now certain that I was manipulated
16 by police into lying and later giving
17 false testimony against Milgaard."

18 I would ask you to compare that then to the next
19 document that I would like to have brought up;
11:31 20 namely, 154640, which is the transcript of the
21 interview with Professor Boyd and then Ph.D.
22 student Rossmo, and if specifically we can refer
23 to page 661. Sorry, page 660. If we could zero
24 in on this paragraph. In answering -- by the
11:32 25 way, first of all, did you have occasion in the



1 course of your investigation to see this
2 document?

3 A I'm quite certain that we had that document and
4 that I saw it.

11:32 5 Q And Mr. Wilson, in answering one of the questions
6 put to him by Professor Rossmo and Mr. -- or
7 pardon me, Professor Boyd and Mr. Rossmo, says,
8 and I quote:

9 "I was talking to Kim earlier today.

11:32 10 They..."

11 Referring to the police I believe,

12 "...all treated me nice. What I tried
13 to get across to Williams, which I never
14 could, was that, like when you're
11:32 15 watching TV ...you've got that bad cop
16 who wants to beat this out of you and
17 stuff...it doesn't happen that way.

18 Like I had...later on in my dealings,
19 bad cops. But these guys were nice. I
11:32 20 think, now that I look back on it...
21 being nice gets them further ahead than
22 being nasty to you."

23 And you would agree with me, and I'm only taking
24 this as an example, that Mr. Wilson did not have
11:33 25 anything particularly negative to say about the



1 manner in which he was treated by the officers of
2 the Saskatoon City Police in 1969 in his
3 interview with Mr. Rossmo and Mr. Boyd?

4 A Yes, I agree with you.

11:33 5 Q But that was significantly different from the
6 impression he gave in answering Mr. Henderson's
7 questions in 1990; you would agree with that?

8 A I agree with that.

9 COMMISSIONER MacCALLUM: Is there any
11:33 10 indication when he spoke to Rossmo and Boyd?

11 MR. ELSON: Oh, I'm sorry, that would have
12 been on October the 7th of 1991.

13 COMMISSIONER MacCALLUM: Okay, thank you.

14 BY MR. ELSON:

11:33 15 Q Let me put to you a reason for the discrepancy
16 between Mr. Wilson's comments. If we were to
17 assume that Mr. Wilson's recantation is generally
18 to be believed --

19 COMMISSIONER MacCALLUM: Is?

11:33 20 BY MR. ELSON:

21 Q Is to be believed, that if we were to assume that
22 his recantation generally is genuine, perhaps not
23 the specifics, but generally genuine, that he
24 didn't see what he described in his testimony at
11:34 25 the Milgaard trial or in what he described to



1 Detective Karst after his interaction with
2 Inspector Roberts, that June of 1990 is the first
3 time that Mr. Wilson has an opportunity to come
4 clean and to recant and he has to give an
11:34 5 explanation for his conduct and the only
6 explanation he can give is an excuse, namely, the
7 police manipulated him, but that a year and a half
8 later in 1991 he has reconciled himself to the
9 fact that what he did in 1969 was irresponsible,
11:34 10 wrong and that he has no one to blame for his
11 irresponsibility or his wrongful conduct than
12 himself, given your, and I appreciate limited
13 interaction with Mr. Wilson, and given your review
14 of the material you received, how far off do you
11:35 15 believe that scenario is if one were to assume the
16 recantation was generally correct?

17 A Oh, we certainly looked at that recantation and
18 analysed it as thoroughly as we possibly could and
19 some of the -- some of the things that he recanted
11:35 20 we know are factual, so not only did he recant
21 things that aren't corroborated, but he also
22 recanted things that are corroborated, so I think
23 when we looked at that recantation, we were sort
24 of left with a lot of questions around whether it
11:35 25 could be believed, you know, and we could rely on



1 it to any degree. I'm not sure if I'm answering
2 your question here.

3 Q Which is the reason I'm getting at. In other
4 words, there were individual facts, as you've
11:35 5 pointed out, that he recanted which were
6 corroborated by other evidence, but if we were to
7 look at the fact -- if we were to look at the
8 essence and the substance of his recantation,
9 namely, that David Milgaard wasn't gone as long as
11:36 10 he had earlier suggested and that he had not
11 admitted having committed a murder, if we were to
12 look at those substantial aspects and look at the
13 explanation for why he may have recanted, or why
14 he said what he did in 1969 -- let me put the
11:36 15 proposition to you.

16 Mr. Wilson, this is my own
17 subjective view, struck me as a fairly feckless
18 and irresponsible and fairly weak individual. In
19 that context, is it unreasonable to assume that by
11:36 20 1991 he's reconciled himself to the fact that the
21 only explanation for him having implicated Mr.
22 Milgaard wrongfully in 1969 is that he just didn't
23 care and he acknowledges that in 1991, but in
24 1990, the first time he has to admit this to
11:37 25 anybody, he has to find an explanation and the



1 Saskatoon City Police become the scapegoat for
2 that explanation? Is there anything in your
3 respectful view that would be wrong or unfair
4 about that conclusion I've just put to you?

11:37 5 A I think your conclusion is certainly possible.

6 Q And I believe you had commented in your report or
7 in your conclusions about Mr. Wilson being a
8 fairly weak individual; is that fair?

9 A I'm not sure if we used those terms, but yes, I
11:37 10 think that's a fair assessment.

11 COMMISSIONER MacCALLUM: So, Mr. Elson,
12 just so I get this straight, you are suggesting
13 that the recantation given to Henderson could
14 have been true, or was true let's say, but the
11:38 15 reason for it, given for making it was not true
16 and that by 1991 he had come around to the real
17 reason which was his own weakness?

18 MR. ELSON: Basically what I'm putting to
19 the witness, and perhaps not putting it well, is
11:38 20 the conclusion Mr. Rossmo arrived at in the
21 assessment of Mr. Wilson's evidence because that,
22 if you might recall, was indeed Mr. Rossmo's
23 reconciliation in answering Mr. Hardy's questions
24 as to -- in other words, Mr. Wilson felt that he
11:38 25 had to give an explanation --



1 COMMISSIONER MacCALLUM: Oh, sure.

2 MR. ELSON: -- for why he testified
3 incorrectly, and why he wrongfully implicated Mr.
4 Milgaard in 1990 when he had the first
11:38 5 opportunity to do it, he blamed the Saskatoon
6 City Police for the fact that he wrongfully
7 implicated Mr. Milgaard.

8 COMMISSIONER MacCALLUM: Uh-huh.

9 MR. ELSON: In 1991 it was Mr. Rossmo's
11:38 10 view, having seen him and having observed that
11 interview, that Mr. Wilson had finally reconciled
12 himself to the fact that he alone was responsible
13 for having implicated Mr. Milgaard.

14 COMMISSIONER MacCALLUM: Uh-huh.

11:39 15 BY MR. ELSON:

16 Q And I put that, that was Mr. Rossmo's view and
17 that was Mr. Rossmo's assessment for the
18 difference between Mr. Wilson's version to Mr.
19 Henderson and the version that he gave to Mr. Boyd
11:39 20 and Mr. Rossmo. Again, my comment, how
21 unreasonable do you feel that Mr. Rossmo's
22 conclusions are in the assessment of Mr. Wilson in
23 that respect?

24 A That's certainly possible.

11:39 25 Q I was going to ask you more questions about this,



1 but I don't think I will.

2 In 1969, when you first became
3 a police officer, I just want to ask some general
4 questions about it, would you agree with me that
5 there was some literature available to police
6 officers generally involved in major crime
7 investigation that dealt with the issue of
8 interviewing and/or interrogating suspects or
9 witnesses, and specifically the literature I'm
10 referring to is literature by Professor Inbau,
11 I-N-B-A-U, and a Mr. John Reid from the United
12 States. Are you familiar with any of the
13 literature that would have existed in the late
14 1960s or early '70s by those particular authors?

11:39 5
6
7
8
9
10
11
12
13
14
11:40 15 A The first name I don't know. Mr. Reid I know
16 quite well, his material. I was not aware of his
17 material, although it may have been in use, I was
18 not aware of his material probably until maybe the
19 late '70s or early '80s. I don't know when it
11:40 20 came into use. I'm not taking any issue with the
21 fact that it may have been available earlier than
22 I became aware of it certainly.

23 Q Would you agree with me that -- were you generally
24 familiar with the literature that existed in the
11:40 25 late 1960s and '70s on the topic of taking



1 statements from either suspects or witnesses?

2 A I'm not sure that I was. I think I, you know,
3 certainly in training had been, you know, told how
4 to conduct interviews and then certainly that was
11:40 5 reinforced throughout my field training and then
6 in my own investigations, but I don't think I
7 became really alive to just, you know, what was
8 out there until I sort of started doing more
9 investigative work as opposed to patrol-type work.

11:41 10 Q Now, Mr. Reid, I understand Mr. Reid is now
11 deceased. I believe he had a business in Chicago,
12 Illinois that was, in part, charged with the
13 responsibility of providing continuing education
14 for both prosecutors and police officers and the
11:41 15 technique of interviewing both suspects and
16 witness?

17 A Yes, Mr. Reid I think is a recognized expert.

18 Q Were you familiar with the technique of dealing
19 with uncooperative witnesses who are not suspects,
11:42 20 of suggesting to them that they may very well have
21 been responsible for the crime; in other words, a
22 technique that an interviewer might use in dealing
23 with a witness not believed to be a suspect, but
24 who was otherwise uncooperative and not
11:42 25 particularly forthcoming in providing information?



1 Are you aware of that technique?

2 A Yes, I'm aware that that's done by police.

3 Q All right. And that would have been a technique
4 that would not have uncommonly been used in 1969?

11:42 5 A No, I think it was probably commonly used.

6 Q And would you agree that it is commonly used
7 today?

8 A Yes, it likely is.

9 Q It may be suggested by some that it is
11:42 10 inappropriate to use that technique where the
11 interviewer has no evidence to suggest that this
12 uncooperative, unforthcoming witness is not a
13 suspect. What would your view on that be?

14 A I don't think that's improper, to suggest to
11:43 15 someone, to make a suggestion that, you know, you
16 are not being forthcoming with me, is it because
17 you are responsible for this, because you did it,
18 I think that's a common technique used, one I've
19 likely used myself.

11:43 20 Q There was another technique that I've heard
21 described and that is again when one is dealing
22 with the, a witness, not a suspect, who is
23 uncooperative and not forthcoming, where the
24 person says, and if we're talking about a victim
11:43 25 of an assault or a victim of a homicide, where the



1 person says what if this was your wife or what if
2 this was your sister. How appropriate or
3 inappropriate might that technique be in trying to
4 extract information from an uncooperative witness
11:43 5 who again is not a suspect?

6 A That's a common technique that's used.

7 Q And would you agree with me that that would have
8 been a common technique used in 1969 and is still
9 a common technique used today?

11:44 10 A I would suggest it was likely used in '69 and I'm
11 certain that it's used today.

12 Q Now, before I -- and Mr. Gibson may be happy to
13 know I'm almost at the end. You talked about the
14 major case management course at the Canadian
11:44 15 Police College and just so that we can bring
16 matters up to date, it's my understanding from the
17 Canadian Police College web site that there have
18 been changes in the major case management case, or
19 the major case management course I should say, and
11:44 20 that the major case management course has now
21 essentially been broken up into two, one described
22 major case management team commander and the other
23 described major crime investigative techniques.
24 Are you aware of the fact that they are now
11:45 25 different?



1 A Now that you tell me that, I was aware. It's
2 something that never popped into my mind as we
3 were discussing this earlier, but yes, I was aware
4 of that change being made.

11:45 5 Q And just so that we can go through and understand
6 what those changes are, it's my understanding that
7 the first of those programs, one has to take it
8 and one has to complete it as a prerequisite,
9 namely, major crime investigative techniques, one
11:45 10 has to complete that course before one can go into
11 major case management team commander; is that
12 correct?

13 A Yes, I don't dispute that.

14 Q And one has to go through a period of experience,
11:45 15 after having completed the major crime
16 investigative techniques course, before one can
17 enter the program for major case management team
18 commander; is that correct?

19 A I haven't researched it, but I am, I would suggest
11:45 20 it makes sense that, to qualify, they would want
21 certain prerequisites.

22 Q From the course calendar of the Canadian Police
23 College, under the heading Purpose of the Course,
24 in identifying the major case management team
11:46 25 commander course it says, and I quote -- and this



1 is from the web site, Mr. Commissioner, and I'm
2 not sure whether or not we can -- would include
3 the course description on the system or not, but
4 it says, and I quote:

11:46 5 "The scale and complexity of
6 major cases place extraordinary
7 managerial demands on those charged with
8 their direction. And the day to day
9 experiences of most criminal
11:46 10 investigators do not equip them to meet
11 these managerial challenges. The recent
12 history of major case investigations
13 attests to the inadequacy of relying on
14 experience alone to provide the
11:46 15 requisite skills."

16 Would you agree with that final comment, namely
17 that it is inadequate for police officers charged
18 with the responsibility of investigating major
19 crimes to rely on experience alone in providing
11:46 20 them with the necessary skills?

21 A I would suggest there's probably some truth in
22 that. It may be a bit overstated, you know, to
23 satisfy the requirements for the course, but
24 anything like that is certainly helpful to senior
11:47 25 investigators.



1 Q In 1969, basically a detective, certainly with the
2 Saskatoon City Police Service, was relying
3 essentially on his or her own experience; is that
4 correct?

11:47 5 A Yes.

6 Q And one did not have the facility or the
7 assistance of a major case management course?

8 A That's correct.

9 Q Roughly how many, in a -- I'm not sure whether
11:47 10 you're aware of how many police officers with the
11 Saskatoon Police Service today have major case
12 management training in the form that it used to
13 exist prior to it being divided into two?

14 A I don't know.

11:47 15 Q I --

16 A But I know that the police services in this
17 province access that training on a priority basis
18 and certainly, you know, are in line to get it as
19 soon as it becomes available.

11:48 20 Q All right. If I were to suggest to you that there
21 are roughly 20 police officers with the Saskatoon
22 Police Service who specifically have the major
23 case management training would that surprise you?

24 A No, it wouldn't.

11:48 25 Q And the final question I wanted to ask you, in



1 1969, with respect to polygraph evidence,
2 polygraph evidence was relatively new at that
3 time; would you agree with that?

4 A Yes.

11:48 5 Q And most municipal police forces, and the
6 Saskatoon City Police would not have been alone in
7 this respect, were relatively unfamiliar with the
8 science and the reliability of polygraph evidence;
9 is that correct?

11:49 10 A Yes, it was very new to policing in 1969,
11 particularly in Canada.

12 Q Would there have been a deference that police
13 officers would have given to a polygrapher in how
14 that polygrapher were to conduct an analysis?

11:49 15 A I would suggest yes because, you know, that
16 person, you view that person as an expert and you
17 would certainly, you know, give deference, as you
18 have suggested, to that person.

19 Q In my understanding from Mr. Robinson, who had
11:49 20 testified earlier, that the RCMP in Saskatchewan
21 did not have a polygrapher until roughly 1972; is
22 that your recollection as well?

23 A I think that's accurate. I don't think the RCMP
24 had any examiners until 1970 or 1971 and I think
11:49 25 the first was in Vancouver.



1 Q And prior to 1972 there would have been no member
2 of a municipal police force with polygraph
3 training in Saskatchewan?

4 A No, I'm not aware of that, I don't think there
11:49 5 would have been any.

6 Q If I were to suggest to you that in Western Canada
7 in 1969 Inspector Art Roberts was really the only
8 polygrapher available to a municipal police
9 service such as the Saskatoon City Police, would
11:50 10 you have any facts within your knowledge to
11 disagree with that?

12 A No.

13 Q So effectively, if I can put it in a vernacular,
14 Detective Roberts was the only business in town,
11:50 15 so to speak, that was going to be able to provide
16 polygraph evidence for the Saskatoon City Police?

17 A That's correct, a fair statement, yes.

18 Q They really didn't have any choice if there was
19 going to be a polygrapher?

11:50 20 A Yes.

21 Q Thank you, Mr. Sawatsky, I have no further
22 questions.

23 MR. GIBSON: Mr. Commissioner, if we
24 stagger the lunch hour by about ten minutes, I
11:50 25 believe I can finish with Mr. Sawatsky.



1 COMMISSIONER MacCALLUM: That will be fine,
2 sir.

3 MR. GIBSON: So, if that's acceptable, I'll
4 carry on then.

11:50 5 COMMISSIONER MacCALLUM: Yes.

6 Mr. Esson, please feel free
7 to go, I know you have an appointment.

8 **BY MR. GIBSON:**

9 **Q** For the record, Mr. Sawatsky, my name is Bruce
11:51 10 Gibson, I act for the RCMP.

11 A number of areas have been
12 covered already, and I'll try not to belabour
13 those, but there are a few points that I do want
14 to touch upon, some of them dealing with some
11:51 15 systemic issues, and some areas that have been
16 covered already.

17 You were asked a number of
18 times about types of questioning, where to draw
19 the line with witnesses, etcetera. I'd like to
11:51 20 just ask you if you know of any differences in
21 interview techniques when approaching witnesses
22 that may have been used in 1969 that were not or
23 are not as in vogue today as they may have been in
24 1969? For example, back in 1969, would it have
11:51 25 been fairly common to have the good-cop/bad-cop



1 type of scenario?

2 A I think that was a very common type of
3 investigative technique, both with sort of
4 witnesses who were difficult and accuseds, and I
11:52 5 don't think that that is practiced so much any
6 more, although I'm sure that it is practiced by
7 some, and I'm sure it still works.

8 Q And may it have been more common, back in 1969,
9 for a police officer, when interviewing a suspect,
11:52 10 to perhaps display some anger when dealing with
11 someone who is being somewhat reluctant?

12 A Yes.

13 Q And --

14 A Frustration, anger, yes, that wouldn't be
11:52 15 uncommon.

16 Q And if we talk about interview techniques today
17 would it be fair to say that police officers now,
18 when they go out to interview someone, try to use
19 themes for dealing with a witness as to reasons
11:52 20 why that witness should tell the truth and be
21 forthright, forthcoming, rather, with evidence?

22 A Yes.

23 Q And can you think about what some of those themes
24 are, why a person should cooperate with police?

11:53 25 A I think a number of themes. You could be



1 appealing to their moral judgement, the fact that,
2 you know, this is wrong and, you know, every
3 citizen has the responsibility to provide police
4 with information, you know, various things to try
11:53 5 and convince them that it's in their best
6 interests or that they have a duty or a
7 responsibility or should be telling you what they
8 know.

9 Q I think one of the questions the Commissioner had
11:53 10 a while back was where do you draw the line when
11 dealing with a reluctant witness, and you did
12 touch on it I believe either earlier today or
13 yesterday, where you said you certainly can't have
14 threats of violence when you are dealing with
11:53 15 somebody; that would inappropriate to threaten?

16 A That would be crossing the line in my view, yes.

17 Q Yeah. What about false promises; is that another
18 thing that would be inappropriate?

19 A Well, you know, it's so difficult to sort of be
11:54 20 rigid because when you're in that situation quite
21 often you use techniques to try and elicit the
22 information you want, so it perhaps may not be in
23 that situation. But, you know, I think what's
24 important is that, you know, the final test of an
11:54 25 officer's conduct is in the courtroom, and whether



1 things that the officer said or did in a
2 particular investigation, you know, there's --
3 certainly the courts have remedies for that.

4 So I would suggest that in
11:54 5 some cases it may not be inappropriate, you know,
6 that police have a duty to investigate and solve
7 crime, that it's mandated in the *Code* and *The*
8 *Police Act*, and the public expects that they will
9 solve crime, and sometimes they push fairly hard
11:54 10 to try and get statements from witnesses and
11 accuseds.

12 COMMISSIONER MacCALLUM: Is it appropriate,
13 then, to make a distinction, Mr. Gibson, about
14 questioning of witnesses as opposed to
11:54 15 accuseds -- or suspects, I mean?

16 MR. GIBSON: That's exactly the next
17 question I have --

18 COMMISSIONER MacCALLUM: Okay.

19 MR. GIBSON: -- and I'm going to get to
11:55 20 that, Mr. Commissioner.

21 BY MR. GIBSON:

22 Q When you are dealing with a witness versus dealing
23 with a suspect, and is there a difference in how
24 you approach a witness? For example, they are not
11:55 25 being suspected of that crime whatsoever, is there



1 a danger in giving false information to that
2 individual?

3 A Well certainly your approach, as I tried to
4 suggest before, your first approach is to try and
11:55 5 simply elicit a statement from them, a pure
6 version of a statement. As it becomes more
7 difficult, then you may suggest things to that
8 witness that you perhaps know are true in an
9 attempt to show that witness that you already know
11:55 10 some things, so why wouldn't this person just
11 simply tell you that. You know, you may suggest
12 something that maybe isn't true because you are
13 hoping that they will provide you with what you
14 are after. I think the key to that quite often is
11:55 15 having some piece or pieces of information that
16 you know that you withhold and don't provide the
17 witness.

18 Q And --

19 A You try to corroborate what the witness says, you
11:56 20 have other facts that are known to you that you
21 perhaps may put to them, to the witness.

22 Q Does that help at all, Mr. Commissioner?

23 COMMISSIONER MacCALLUM: Thanks, yeah.

24 BY MR. GIBSON:

11:56 25 Q One of the questions that was asked by the



1 Commissioner earlier was why would you be looking
2 at physical and forensic evidence during the 1993
3 investigation into police misconduct and
4 prosecutorial wrongdoing, and if I could just look
11:56 5 at the report, please, document 023167, and then
6 just if we could go to pages 35 and 36 of that,
7 starting at 35, please. And this is a portion
8 that addresses the issues that were provided by
9 the Milgaards and others, and if we could look at
11:57 10 number 58 there, one of the issues was:

11 "If Milgaard was not in the vicinity,
12 then there was no opportunity, and as
13 well, under cross examination, Wilson
14 agreed that the boys had not been
11:57 15 separated. This is consistent with
16 David's evidence."

17 So, in light of the concern with respect to what
18 had occurred at the vicinity, did you feel that
19 it was necessary to try and become familiar with
11:57 20 the evidence at the scene in order to try to
21 understand whether they had been in the vicinity?

22 A Yes. And I think, Mr. Gibson, just the sort of
23 general allegation that there had been misconduct,
24 we needed to satisfy ourselves that there was --
11:57 25 that the exhibits were -- that there was nothing



1 inappropriate with the way, manner, in which
2 exhibits were handled.

3 Q And would there have been an analysis looking at
4 whether there had been any fabrication of evidence
11:57 5 or planting of evidence; is that the kind of thing
6 you would also be concerned about?

7 A We certainly would be looking for any evidence of
8 that.

9 Q And if we could just go to the next page of this
11:58 10 document, please, and number 63. Again, I believe
11 that ties in with the things we're talking about
12 here, and that's the issue of becoming stuck and
13 separated and time frames and that, so it would
14 have been necessary for you to look at the
11:58 15 physical evidence in order to satisfy yourself on
16 that type of background as well?

17 A Yes, yes.

18 Q Okay. You were asked by Mr. Wolch how a person
19 could end up giving false evidence if it wasn't
11:58 20 from police deliberately feeding them information
21 on theories, and I know Mr. Elson went through
22 that with you a little bit today. Is it possible
23 to have a witness lie without police misconduct?

24 A Yes.

11:58 25 Q And have you ever come across a situation where a



1 person may be motivated by such things as a
2 reward?

3 A Yes, that's certainly possible.

4 Q And what about a situation where an individual may
5 try to curry favour with police in the hope of
6 having reduced charges on some outstanding charge?

7 A Yes, that could be. Could be a grudge, there
8 could be a number of reasons why somebody would
9 lie, as a witness, about an accused.

10 Q What about a situation where, I know there was
11 some discussion specifically with respect to Mr.
12 Wilson perhaps being a somewhat weak individual,
13 what about a situation where a person is an addict
14 and requires, you know, access to drugs on a
15 regular basis and is being detained by police;
16 have you ever seen a situation where a person
17 might give police what they think they want from
18 that individual in order to just get away from the
19 police so that they can just not be, not in
20 custody any more, but being questioned any more?

21 A I'm not, I don't have a personal recollection of
22 something like that happening to me, but certainly
23 what you say is plausible.

24 Q And I suppose one that's been talked about, as
25 well, is if a person is concerned, "well, hold it,



1 I was at that scene as well, perhaps they are
2 going to start looking at me, maybe the best
3 defence is a good offence", and start pointing the
4 fingers towards someone else; have you seen
12:00 5 situations like that?

6 A Yes, I think that's, I think that's fairly common,
7 you know, when you have co-accuseds or you have
8 witnesses who may have been involved to some
9 degree in the crime.

12:00 10 Q Now you have mentioned a number of times that Mr.
11 Wilson was not necessarily all that cooperative
12 with the RCMP during the Flicker investigation?

13 A That's correct.

14 Q And, if Mr. Wilson is the one that was alleging
12:00 15 some police misconduct by the Saskatoon City
16 Police, did that surprise you somewhat that he
17 didn't want to actually sit down and speak with
18 the RCMP? Here was his opportunity to say "these
19 people wronged me and I would like you to look at
12:01 20 that"; did that surprise you that he didn't want
21 to sit down with you?

22 A Well I think, to answer your question, as I look
23 back on it I -- when we started the investigation
24 I thought that Mr. Wilson would be just waiting
12:01 25 for us to come and see him, because of course he



1 did have this new information, so yes, I was
2 surprised that he was sort of unavailable and
3 uncooperative.

4 Q And Mr. Elson took you through the statement from
12:01 5 Mr. Wilson that was obtained by Mr. Henderson and
6 of course, in there, he makes reference to the
7 fact that he was pressured by police. Did that
8 fact, that he didn't want to come and sit with
9 you, impact on your view of the veracity of his
12:01 10 statement?

11 A I think that, Mr. Gibson, and also that when we
12 looked at the recantation, there are a number of
13 things within the recantation that we know have
14 been corroborated so, certainly, the recantation
12:02 15 itself is suspect, the manner in which it was
16 written, you know, is suspect, so I had some
17 concerns, a number of concerns, about the
18 recantation.

19 Q What about some of the other reasons that we've
12:02 20 spoken about, just in the last couple of minutes
21 here, about why a person might lie to police? Did
22 it ever cross your mind that perhaps he didn't
23 want to be queried in a fairly straightforward way
24 about what actually occurred with respect to the
12:02 25 statement that he gave and whether, in fact, there



1 was any police pressure?

2 A Umm, I don't specifically recall that, but it's
3 certainly possible to -- for one to think that
4 way.

12:02 5 Q Now you indicated, yesterday, that you had no idea
6 as to why Wilson and John lied to police, and of
7 course this morning we've gone through some of
8 those, Mr. Elson as well as myself. Is it fair to
9 say that, when you say you had no idea why they
12:03 10 lied, that you, in essence, had no evidence and
11 you discovered no evidence why those individuals
12 lied to police? Again, your investigation was
13 with respect to whether there had been wrongdoing
14 by police and whether criminal charges would be
12:03 15 laid, but when you say "no idea as to how that
16 occurred" I guess what you are saying is -- again,
17 correct me if I'm wrong -- was there any
18 evidence that points --

19 A No, there was no evidence, and I think to suggest
12:03 20 would be pure speculation on my part. We had no
21 evidence as to why they had changed their stories
22 or why they had said one thing and then were now
23 saying another.

24 Q And, again, Mr. Wilson would not sit down for an
12:03 25 interview with you?



1 A That's correct.

2 Q And you've mentioned a number of times that Ms.
3 John's evidence was problematic in that she either
4 would not or could not remember?

12:04 5 A Yes.

6 Q And the standard that you had to meet was
7 reasonable and probable grounds, correct, --

8 A Yes.

9 Q -- in order to proffer those criminal charges on
12:04 10 the very reason for the investigation?

11 A That's correct.

12 Q Did it ever impact on your thinking, if Mr. Wilson
13 had been pressured by police, why he may have
14 voluntarily come forth with the evidence related
15 to the motel re-enactment; did that ever cross
12:04 16 your mind?

17 A Well, like I said, there was a number of things in
18 the recantation that we know happened and were
19 corroborated in other means. Certainly, we were
12:04 20 never able to interview Mr. Wilson satisfactorily,
21 you know, we did talk to him a couple times on the
22 phone but never really had a satisfactory
23 interview with him, so those things sort of
24 remained unexplained at the end of our
12:04 25 investigation.



1 Q And I believe you've given evidence that the
2 Saskatoon Police Service file had been retained
3 after many, many years; correct?

4 A Yes.

12:05 5 Q And if there had been pressure, or if there had
6 been some concern about this matter being cooked
7 in some way, would it have surprised you that the
8 files would still be around? I mean, if someone
9 was trying to cover up something, is it not easier
12:05 10 to just not have the files, because those could
11 very easily have been destroyed for legitimate
12 retention-period reasons by that point?

13 A Yes, certainly they could have gotten rid of the
14 file, and we would have had nothing to work with
12:05 15 from a record perspective from the Saskatoon
16 police.

17 COMMISSIONER MacCALLUM: I'm not just sure
18 I got your answer to the first question, which
19 was sort of along the same lines. Did it occur
12:05 20 to you that, if Wilson had been pressured, why,
21 then, would he be voluntarily coming forward with
22 the motel re-enactment; was that something you
23 took into account?

24 A I don't recall that specifically, My Lord, that I
12:06 25 took that into account. I think I was more, what



1 I more took into account was what aspects of his
2 recantation were true and what aspects weren't.

3 COMMISSIONER MacCALLUM: Was that what you
4 meant, Mr. -- by your question, Mr. Gibson?

12:06 5 MR. GIBSON: Yes.

6 COMMISSIONER MacCALLUM: Okay.

7 MR. GIBSON: That's fair, thank you.

8 BY MR. GIBSON:

9 Q You were asked yesterday by Mr. Wolch if you could
12:06 10 explain how the crime had occurred. You mentioned
11 that there were a number of theories that were
12 being bandied about and you were asked, "well what
13 was your theory", and whether there was one that
14 you could specifically rely upon, and you said,
12:06 15 well, you know, you were exploring many avenues
16 and there were many theories that could be
17 investigated. If we could just go to the report
18 023167, and at pages 13 to 15 of that report, and
19 at the outset there is a bit of a background
12:07 20 portion to the report, if we could just call that
21 portion up. And it outlines events that we have
22 gone through numerous times at this Inquiry, and I
23 won't belabour them, but it does indicate there
24 that the outline is taken from the *Canadian*
12:07 25 *Criminal Cases* report of the trial, and that is



1 something that was listed in the report.

2 COMMISSIONER MacCALLUM: Is this Alberta
3 Justice, I'm sorry?

4 MR. GIBSON: This, I'm sorry, this is the
12:07 5 RCMP report.

6 COMMISSIONER MacCALLUM: Oh, it is.

7 MR. GIBSON: The Flicker report, yes, page
8 13 of document number 023167.

9 COMMISSIONER MacCALLUM: Yes, thank you.

12:07 10 BY MR. GIBSON:

11 Q And I'm not gonna go through the next couple of
12 pages, but that outlines the trial evidence. I
13 know that your investigation was on police and
14 prosecutorial misconduct but, at the end of your
12:07 15 investigation, you looked at many things. Was
16 there any evidence that you located that disproved
17 the facts that were outlined at trial and are
18 listed in the background report?

19 A No.

12:08 20 Q And so, if I was to ask you as to a possible
21 theory as to how the crime could have occurred,
22 you obviously were aware of the evidence that went
23 in at trial?

24 A Yes, I could suggest the theory that was put to
12:08 25 the jury.



1 Q Now, of course, the Flicker investigation occurred
2 23 years later and you did conclude that there was
3 no evidence of police and prosecutorial
4 misconduct, and because you had looked at so many
12:08 5 other aspects you also made a comment with respect
6 to whether the evidence pointed more towards David
7 Milgaard or more towards Larry Fisher, and I
8 suppose it's fair to say that when you're
9 investigating something 23 years later it's pretty
12:09 10 hard to find new evidence on such a cold case, but
11 there clearly was a number of pieces of evidence
12 still pointing towards David Milgaard; correct?

13 A That's correct.

14 Q And your views have been rather steadfast in that
12:09 15 there was a good deal of evidence still pointing
16 towards Mr. Milgaard, and I'm just going to list
17 those off briefly and wrap up here. My
18 understanding is that the '93 investigation found
19 evidence that Nichol John had said, in the witness
12:09 20 room, "I don't know why he didn't just kill me
21 too, I saw the whole thing"; you were aware of
22 that?

23 A I am aware of that, yes.

24 Q You were aware of Mr. Milgaard admitting to having
12:09 25 thrown a compact out and he didn't know where it



1 had come from?

2 A Admitting that to Mr. Tallis, yes.

3 Q You were aware that Ms. Nichol John's parents
4 indicated that she was scared?

12:09 5 A Yes.

6 COMMISSIONER MacCALLUM: Sorry, what was
7 that again?

8 MR. GIBSON: Ms. Nichol John's parents had
9 indicated to investigators that Ms. John was
10 scared and somewhat frightened of Mr. Milgaard.

11 COMMISSIONER MacCALLUM: Oh, okay.

12 BY MR. GIBSON:

13 Q That Barb Wispinski indicated that Nichol John saw
14 something and was scared; you were aware of that
12:10 15 point?

16 A Yes, I was aware of that.

17 Q Mr. Milgaard admitted to having a knife?

18 A Yes, again to Mr. Tallis.

19 Q You were aware, of course, that they were in the
12:10 20 vicinity of the crime?

21 A Yes.

22 Q That both Albert and Ken Cadrain indicated they
23 saw blood on Mr. Milgaard's clothing?

24 A Yes, I was aware of that.

12:10 25 Q That Sharon Williams and Nichol John indicated



1 that Mr. Milgaard had forced sex upon them?

2 A Yes, I was aware of that.

3 Q That Nichol John recognized the funeral home?

4 A Yes.

12:10 5 Q That Mr. Milgaard's father had made a statement to
6 the effect that he was not surprised when police
7 came out to see him and had suspected something
8 like this might happen?

9 A I -- I was aware of that as well.

12:11 10 Q Again, not hard evidence, but something that may
11 raise one's suspicions. Mr. Milgaard had admitted
12 that they spoke to a lady that morning?

13 A Yes, I was aware of that.

14 Q And that Mr. Milgaard told Mr. Tallis that he had
12:11 15 a view to robbing this lady?

16 A Yes, I was aware of that.

17 Q And again, although your investigation was not
18 focused on that particular aspect, that was the
19 information that you were able to gather in
12:11 20 regards to whether the evidence pointed more
21 towards Mr. Milgaard or more towards Mr. Fisher?

22 A That's correct.

23 Q And, correct me if I'm wrong, the only evidence
24 that you had with respect to Mr. Fisher was a
12:11 25 suspicion that he could be connected to the other



1 rapes, but again, no hard and fast evidence to
2 link him to that?

3 A Correct.

4 Q A suspicion raised by his former wife about him
12:12 5 coming home that morning and her describing a
6 missing knife that changed a number of times when
7 you spoke with her over time?

8 A That's correct.

9 Q And, of course, the thing that actually linked him
12:12 10 to the crime, and I would submit end up in his
11 conviction, was the DNA, which you did not have?

12 A That's correct.

13 Q Those are all the questions I have, Mr. Sawatsky,
14 thank you. I don't know if there's any final
12:12 15 comment that you would like to wrap up with, I
16 know you spent many days on the stand, but I thank
17 you.

18 MR. HODSON: I do not have any further
19 questions.

12:12 20 COMMISSIONER MacCALLUM: Just a second.

21 Mr. Sawatsky, let me ask you
22 this, the answer might be obvious, but I think I
23 should ask anyway. The allegations made by Mr.
24 Wolch, specifically, of the Milgaard group go
12:13 25 beyond simple mistake or mistaken judgement or



1 even impropriety, they suggest conduct which you
2 categorized as criminal, fabrication of evidence,
3 coercion of witnesses. Is there any -- assuming
4 that, for the sake of argument, that that
5 occurred and that there are unscrupulous police
6 officers who would do such things, is there any
7 systemic answer to that, that you can think of?

12:13 8 A I can't. But I can tell you that, at least from
9 the policing side, that the police have become
10 very, very good at investigating misconduct within
11 their ranks, that they are governed by codes of
12 conduct, that there is public oversight of the
13 actions of police, that certainly their actions
14 are -- you know, there is a complaint process
15 where people who feel that they have been
16 improperly treated by the police can make a
17 complaint, and certainly I guess the final test of
18 police officers' conduct is the courtroom, where
19 the courts have been very good in providing police
12:14 20 with what they expect of them in conducting
21 investigations. So, on the police side, I'm
22 certainly aware that, you know, there is a
23 complaint process, there's civilian oversight, and
24 the police, you know -- and in Saskatchewan the
12:14 25 Public Complaints Commission investigates the



1 conduct of police.

2 COMMISSIONER MacCALLUM: Yes. What
3 prompted my question, sir, was the -- it had to
4 do with the method of taking interviews and
12:14 5 recording what was said completely by way of
6 audio or video means and -- but it occurred to me
7 that if you had an unscrupulous policeman who
8 wanted to fabricate evidence by coercing a
9 witness, he would hardly do it in the glare of
12:14 10 television or he wouldn't film himself doing it,
11 he would threaten the witness beforehand that
12 "we're going to take a statement from you now and
13 here's what I want you to say" and then he'd turn
14 the camera on?

12:15 15 A Yes.

16 COMMISSIONER MacCALLUM: Isn't that right?
17 So how, I mean, we just don't have any answer to
18 that kind of conduct on a systemic basis, do we,
19 unless it's to ensure that we have upright
12:15 20 policemen?

21 A Exactly.

22 COMMISSIONER MacCALLUM: I suppose some --
23 what steps are in place, what means are in place
24 to ensure that we do get good candidates for
12:15 25 police forces.



1 A Certainly Mr. Hodson talked about the regulations,
2 and the recruiting regulations govern municipal
3 police in the province, and the RCMP has its own
4 recruiting process and certainly requires that
12:15 5 extensive background checks be done, you know,
6 polygraph examination is used on candidates and
7 there are a number of balances and checks in the
8 regulations that would assist the police. Many
9 municipal police services go beyond the
12:16 10 requirements of the regulations and actually have
11 additional screening criteria that they use, so
12 certainly I think police services are conscious to
13 try and recruit, you know, the very best
14 candidates to be police officers and hopefully
12:16 15 that would minimize, you know, the chances of
16 getting, you know, someone who would be corrupt.

17 COMMISSIONER MacCALLUM: Yes, thanks.

18 MR. HODSON: I have no further questions.
19 Thank you very much, Mr. Sawatsky.

12:16 20 COMMISSIONER MacCALLUM: I'll just ask
21 counsel at large, anything arising from what I've
22 just raised? Okay.

23 Mr. Sawatsky, thank you very
24 much for attending and giving us this evidence.

12:16 25 A Thank you, My Lord. I hope I've been helpful.



1 COMMISSIONER MacCALLUM: Thank you.

2 MR. HODSON: 1:45? It's 12:15, or 1:30?

3 COMMISSIONER MacCALLUM: 1:30 is fine.

4 MR. HODSON: 1:30.

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

6 (*Reconvened at 1:31 p.m.*)

7 MR. HODSON: Good afternoon. The next
8 witness is Mr. Murray Brown.

9 **DONALD MURRAY BROWN, sworn:**

01:32 10 **BY MR. HODSON:**

11 Q Good afternoon, Mr. Brown. Thank you very much
12 for agreeing to testify. For the record, I
13 believe you are represented by Ms. Lana Krogan; is
14 that correct?

01:32 15 A That's correct.

16 Q And you currently reside in Regina, Saskatchewan?

17 A That's correct.

18 Q And you are currently the director of public
19 prosecutions for the Department of Justice,
01:32 20 Government of Saskatchewan?

21 A That's right.

22 Q Can you outline briefly your duties and
23 responsibilities currently as the director of
24 public prosecutions?

01:32 25 A Well, it's the general supervision of the



1 prosecution service in Saskatchewan. We have
2 about 90 lawyers, give or take a few, contract
3 employees, about 60 support staff, a budget of
4 around \$12 million and a case load that's fairly
01:33 5 substantial given the crime dynamics in this
6 province. Managing all of that, staying within
7 budget, is pretty much what occupies my whole
8 time.

9 Q And as director of public prosecutions, would it
01:33 10 be your responsibility then to be involved in
11 decision making about prosecutions in
12 Saskatchewan?

13 A Yes.

14 Q And I appreciate that day-to-day decisions about
01:33 15 laying charges, staying charges, things of that
16 nature, would be done by prosecutors who work in
17 your department?

18 A Yes, subject to the fact that if there's a
19 difficult decision and one of the regional offices
01:33 20 wants some input on it, they will send it to us
21 and we will usually meet and discuss it, the
22 lawyers in head office.

23 Q And how long have you held the position, your
24 current position?

01:33 25 A Since 2003 formally.



1 Q And I understand prior to that you were acting
2 director for a while?

3 A I was the acting director on a full-time basis for
4 about two years while the incumbent director at
01:34 5 that time, Richard Quinney, was ill and disabled,
6 so he was out of the office for most of that time
7 and I filled in for him. Prior to that I was the
8 occasional acting director, filled in on vacations
9 and stuff like that for a number of years.

01:34 10 Q So let's just go back. I understand you commenced
11 employment with the Department of Justice in 1975;
12 is that correct?

13 A That's correct, I articulated with Saskatchewan --
14 well, it was the Department of the Attorney
01:34 15 General in those days.

16 Q And while we're at it, as far as these terms, it's
17 currently the Department of Justice; is that
18 correct, that's the proper --

19 A Department of Justice and Department of Attorney
01:34 20 General.

21 Q And we've seen reference to Saskatchewan Justice.
22 Is that often what your department is referred to?

23 A It's usually what they use, yes.

24 Q And the office of the Attorney General, maybe you
01:34 25 could just comment on the distinction, if any,



1 between the various names attributed to your
2 department or your group, I'm thinking the
3 Department of Justice, Saskatchewan Justice, the
4 Attorney General, the Minister of Justice, the
01:35 5 Government of Saskatchewan. For our purposes,
6 unless you say otherwise, is it safe for us to
7 view them all as one similar group as far as how
8 that group dealt with the Gail Miller/David
9 Milgaard matter?

01:35 10 A Yes.

11 Q And so if -- perhaps we can do it this way. If I
12 use Saskatchewan Justice and it should more
13 properly be the Attorney General or some other
14 name, if you could let me know, but if we can
01:35 15 proceed on the basis that decisions relating to
16 this matter were primarily made by members of the
17 Department of Justice?

18 A That's correct, yes.

19 Q So if you could just take us through from 1975 to
01:35 20 date, the positions you held with the department,
21 and I'm in particular focusing on the 1980 to 1997
22 period when -- I want to find out what positions
23 you held when various things were happening in the
24 David Milgaard case.

01:36 25 A Well, in 1975 to 1976 I articulated with the



1 Department of the Attorney General. I took a
2 position as a Crown prosecutor in the Regina
3 office doing trial prosecutions in 1976. I was
4 there until about 1981, though when I moved to
01:36 5 head office I took some trial files with me, so I
6 continued to pop up in the trial courts until 1984
7 I think. During the time I was in head office the
8 first job I got was reviewing the reports from the
9 fee for service and agents of the Attorney
01:36 10 General. Whenever a case was completed in those
11 days, the agent had to file a completed case
12 report and those were reviewed by head office. I
13 did that, I provided general legal advice to
14 agents in the field, to the police, I did the
01:37 15 occasional appeal at that point. I was also
16 beginning to teach at the Saskatchewan Police
17 College. The Saskatchewan Department of Justice
18 provides the criminal law instruction for all of
19 the courses at the Saskatchewan Police College.

01:37 20 Q And so this would be -- we heard from Mr. Sawatsky
21 this morning, this would be the training that's
22 provided to police officers?

23 A To municipal police officers, yes.

24 Q And what, just briefly, what types of courses were
01:37 25 you involved in teaching the police?



1 A Well, the basic recruit class, criminal law class.
2 There would also be fraud investigator's class,
3 arson investigator's class, general senior
4 constable's classes, we would generally do the
01:37 5 evidence law, any new changes to the *Criminal*
6 *Code*, and of course once the Charter of Rights
7 came along, we would include that as well.

8 Q So again back in 1980, do you recall who the
9 director of public prosecutions was at that time?

01:38 10 COMMISSIONER MacCALLUM: What year, I'm
11 sorry?

12 MR. HODSON: 1980.

13 COMMISSIONER MacCALLUM: '80.

14 A When I started, it was Eugene Ewaschuk. I think
01:38 15 he had left by then and it would have been Del
16 Perras in 1980.

17 BY MR. HODSON:

18 Q And then do you recall, just maybe going through
19 the '80s, who the director of public prosecutions
01:38 20 would have been during that decade?

21 A I believe Del Perras was there until about 1983,
22 Ken MacKay took over after that, Ellen Gunn took
23 over from him in 1987. She was appointed to the
24 bench in 1991 and Richard Quinney took over from
01:39 25 her until his illness.



1 Q And when was his illness when you became the
2 acting director?

3 A I believe it started in 2001.

4 Q And so just back to your career, I think in the
01:39 5 early '80s you would have been -- from 1980 on you
6 would have been in the head office; is that right?

7 A I was in the head office, yeah.

8 Q And would you be reporting to the director of
9 public prosecutions then?

01:39 10 A Yes.

11 Q And would you have a fairly significant working
12 relationship then with the director of public
13 prosecutions as to what was going on and issues
14 facing the director from time to time?

01:39 15 A Oh, yes. It was a small office, there would have
16 been four, sometimes five lawyers in that office,
17 that's all.

18 Q And so are you in a position to tell us what were,
19 again to the extent that you have a recollection,
01:39 20 but what were the practices and procedures
21 employed by the director and the department during
22 the '80s?

23 A Yes.

24 Q So from -- what did you do after 1984, was there a
01:40 25 change in your position through the '80s?



1 A More of an evolution. Once Ken MacKay became the
2 director of prosecutions, it limited his ability
3 to carry a full work load of appeals and he had
4 been our senior appeal counsel up to then, so I
01:40 5 took on a fair amount of the appeal work at that
6 point.

7 Q When we get into -- let's go ahead to the 1988 to
8 1992 time period where the David Milgaard matter
9 would have taken the attention of, or had the
01:40 10 attention of Saskatchewan Justice in a number of
11 different areas; is that correct?

12 A That's right.

13 Q Were you -- was there a lawyer designated to deal
14 with these matters and, if so, was that you?

01:40 15 A When the department -- when Ellen Gunn was
16 originally advised that this application had been
17 sent in, she asked me to take a look at the case,
18 get our file together and take a look at it, so I
19 did that.

01:41 20 Q So this would be December, '88, the first
21 application to the minister?

22 A It was in '88 or '89.

23 Q Right. So she would have -- are you telling us
24 she designated you to take a look at the matter?

01:41 25 A Yes.



1 Q And then over the course of 1989, 1990 until the
2 minister's decision in February of 1991, would you
3 have been at least one of the individuals with
4 Saskatchewan Justice who would have been involved
01:41 5 in the matter to the extent that Saskatchewan
6 Justice was involved?

7 A Pretty much, subject to she had some telephone
8 conversations with officials in Ottawa that I was
9 not privy to, but other than that, yes.

01:41 10 Q And then, and we'll go through this in detail
11 later, but then once the second application came
12 about in August of 1991 and the Supreme Court
13 reference ordered in November of 1991, did you
14 take on a more significant role for Saskatchewan
01:42 15 Justice?

16 A Well, certainly as you advance past that August
17 date, it became more and more apparent that there
18 had to be something done with this file, even the
19 Federal Justice people were of the view that some
01:42 20 kind of reference or return to the courts or a
21 Commission of some sort was necessary to deal with
22 the thing and it was pretty clear that was going
23 to be mine.

24 Q That was your area, and you appeared, we'll hear
01:42 25 about this later, but you appeared as counsel with



1 Mr. Eric Neufeld before the Supreme Court?

2 A That's correct.

3 Q Mr. Brown, the Commission's Terms of Reference, or
4 part of them, ask the Commission to seek to
01:42 5 determine whether the investigation into the death
6 of Gail Miller should have been re-opened based on
7 information subsequently received by the
8 Saskatchewan Department of Justice and the police.

9 Can you tell us whose responsibility, and I'm
01:42 10 talking which office as opposed to a person, but
11 whose responsibility would it be to determine
12 whether the investigation into Gail Miller's death
13 should have been re-opened?

14 A That would be the director of public prosecutions'
01:43 15 responsibility.

16 Q And would that be something that the director
17 would get advice from other counsel as well within
18 the department, is it the decision of an
19 individual or of an office or --

01:43 20 A No, it would be the office that would make, would
21 consult with her and she would have made the
22 decision.

23 Q Okay. What about the decision --

24 COMMISSIONER MacCALLUM: Her being Ellen
01:43 25 Gunn?



1 A Ellen Gunn, yes, at that point, up until December
2 of 1991.

3 BY MR. HODSON:

4 Q And then after that it would have been
01:43 5 Mr. Quinney?

6 A That's right.

7 Q Until 2000. And let's talk about when Mr. Quinney
8 was the director of public prosecutions. What was
9 your, and let's take it from 1991 through until
01:43 10 1997 when the investigation was re-opened, did you
11 have a -- what was your role in the
12 decision-making process of the director of public
13 prosecutions as it related to this matter?

14 A Well, because I had had the most contact with the
01:44 15 file, I would say that Richard Quinney relied on
16 my knowledge and my advice pretty heavily with
17 respect to the advice he then passed on to the
18 minister.

19 Q And as far as the -- would the director of public
01:44 20 prosecutions also be the office or the individual
21 who would be responsible to decide whether charges
22 should be stayed in any given matter, and in
23 particular the David Milgaard prosecution?

24 A Yes.

01:44 25 Q Can you tell us, what would be the role of the



1 Minister of Justice or the Attorney General --
2 which I believe is usually or always the same
3 person; is that correct?

4 A Yes, it's always the same person.

01:45 5 Q -- as far as the Attorney General's direct
6 involvement in the decision to re-open the
7 investigation into the death of Gail Miller?

8 A Well, because this had become a cause célèbre in
9 the news media, and what ends up in the news media
01:45 10 ends up in the legislature and is invariably of
11 interest in the politicians, the Minister of
12 Justice was being kept informed as to these
13 proceedings, but it was advice in the form of
14 information. The decision to do something was
01:45 15 left to us and Bob Mitchell, who was the minister
16 throughout the significant portion of this time,
17 really played no part in sort of independently
18 deciding what was going to happen.

19 Q Now, I understand, I think you indicated you
01:45 20 started in 1975. I understand, sir, that you did
21 have an opportunity, wearing a different hat other
22 than a member of the Department of Justice, to
23 attend to part of the David Milgaard trial; is
24 that correct?

01:46 25 A Yes. I was a student here in Saskatoon in 1970



1 and I was taking a criminology class and one of
2 the things the professor encouraged us to do was
3 go down and watch the courts in action and since
4 this case was on, I went down and I watched some
01:46 5 of that, and I watched the Nichol John day.

6 Q And if I may, what is your recollection of that
7 day or that appearance? You saw her evidence in
8 its entirety or do you recall?

9 A No. I was there when they were going over the
01:46 10 issue of how to cross-examine her on her previous
11 statement. I mean, they were talking about
12 something to do with the Evidence Act which didn't
13 make any sense to me, I didn't know what they were
14 talking about, but I did watch the
01:46 15 cross-examination of Nichol John.

16 Q By Mr. Caldwell?

17 A By Mr. Caldwell, yeah.

18 Q And by Mr. Tallis?

19 A Yes, I think I saw that as well.

01:47 20 Q And do you have a -- anything stand out by way of
21 recollection as to what you observed with respect
22 to her evidence and the questioning?

23 A Well, her appearance was certainly a very
24 emotional one, she was distraught through much of
01:47 25 the time she was testifying. Certainly the



1 impression that I was left with, and I suspect
2 most of the people in the courtroom were left
3 with, was that she was lying to protect her friend
4 and that she had seen something.

01:47 5 Q And was that an observation you made at the time
6 then back when you observed this?

7 A Yes.

8 COMMISSIONER MacCALLUM: And her friend
9 being?

01:47 10 A David Milgaard.

11 BY MR. HODSON:

12 Q I would like to call up 338947. This is an
13 outline, Mr. Brown, that I've prepared, and I am
14 likely going to be amending it a bit as we go on,
01:48 15 but just sort of to give me a guide as to what we
16 go through, and the first, background, I think we
17 have covered.

18 The second item that I want to
19 spend a bit of time with you on is just to have
01:48 20 you go through for us the role of Saskatchewan
21 Justice and the role of Federal Justice in this
22 matter, and I appreciate these are matters
23 primarily of law, but I think it would be helpful
24 as we get into more of your evidence just to get
01:48 25 an understanding from you on the record as to what



1 it was Saskatchewan Justice did and didn't do or
2 could and couldn't do and what Federal Justice did
3 and could do and couldn't do, and let's just start
4 with the first item, and that's the provincial
01:48 5 jurisdiction regarding the investigation into the
6 death of Gail Miller and the prosecution of David
7 Milgaard and Larry Fisher, and I don't think
8 there's any dispute about any of this, but first,
9 the police investigation into the death of Gail
01:49 10 Miller is a provincial jurisdiction; is that
11 correct, in the sense that it's a matter that
12 falls under the constitutional power of the
13 province, policing and investigation and the
14 administration of criminal justice?

01:49 15 A Generally, yes. Specifically in terms of
16 directing police forces, the Attorney General does
17 not have a lot of authority in that respect.

18 Q And so on that point, I think in this case the
19 Saskatoon City Police Service, and when I say they
01:49 20 are under provincial jurisdiction, I did not
21 intend to say they were under your direction, but
22 it's a matter of which is of provincial concern as
23 far as legislation; is that a fair way to put it?

24 A That's correct, yes.

01:49 25 Q And they do their own thing and take their own



1 direction, but it's a matter that if there is
2 legislation, it's to be provincial legislation?

3 A That's correct.

4 Q And next the prosecution of David Milgaard and
01:50 5 Larry Fisher, those would be matters of the
6 province's, the Attorney General of Saskatchewan's
7 responsibility, being responsible for the
8 administration of criminal justice; is that
9 correct?

01:50 10 A That's correct.

11 Q Now, (c), can you confirm that there's no legal
12 ability for Saskatchewan Justice to set aside a
13 wrongful conviction?

14 A That's correct.

01:50 15 Q And so once David Milgaard's proceedings before
16 the Supreme Court of Canada were concluded in
17 1971, I understand, and I would ask you to
18 confirm, that there was no basis for Saskatchewan
19 Justice to take any steps to undo that conviction
01:50 20 or set it aside, that they couldn't on their own?

21 A Well, legally, no, we could not do that.

22 Q And there's been some suggestion in some of the
23 materials about going back to the Court of Appeal
24 with fresh evidence, things of that nature, and am
01:50 25 I correct that legally that's not, that was not



1 available to Mr. Milgaard unless his conviction
2 was set aside by the Federal Minister?

3 A That's correct. I believe on one occasion when it
4 was really convenient to do so, I managed to
01:51 5 convince the Court of Appeal that they had the
6 authority to re-open something, but I really don't
7 think the Court of Appeal, once they've dealt with
8 a matter and the decision is final, have the
9 ability to revisit in that sort of sense.

01:51 10 Q And so as far as the legal ability, but we'll
11 touch on this a bit later, I take it that there
12 are things Saskatchewan Justice can do to assist
13 or to cause or to seek to have the Federal
14 Minister set aside the conviction; is that
01:51 15 correct?

16 A Oh, yes.

17 Q But as far as the ability itself, that's a matter
18 that the Federal Minister has the sole right to
19 do; is that correct?

01:51 20 A If we were brought information indicating that
21 somebody had been wrongly convicted, we too would
22 have to go to the Federal Minister of Justice to
23 have the conviction set aside.

24 Q Right. And then the next point, (d), is it
01:52 25 correct to say that practically speaking, that



1 Saskatchewan Justice could not prosecute Larry
2 Fisher for the murder of Gail Miller in the face
3 of a conviction on the record against David
4 Milgaard?

01:52 5 A I don't think there's a legal impediment, but it
6 would be pretty difficult to proceed in that
7 fashion. It wouldn't be hard I think to raise a
8 reasonable doubt, for counsel to bring in the
9 existing conviction.

01:52 10 Q And so for practical purposes, are you telling us
11 that in order to prosecute Larry Fisher,
12 practically speaking the Federal Minister has to
13 set aside David Milgaard's conviction first?

14 A That's right.

01:52 15 Q If we can then go and take a look at the federal
16 jurisdiction with respect to this matter, (a), the
17 Federal Minister review under Section 690, it's
18 now section 696, I wouldn't mind your comment on
19 once a conviction has been entered in this case,
01:53 20 let's go to 1989, 1990, in the face of a
21 conviction would it be Saskatchewan Justice's
22 responsibility or a provincial matter to
23 reinvestigate the death of Gail Miller?

24 A If we were supplied with credible information that
01:53 25 we believed raised some questions, we could, yes,



1 have the matter reinvestigated.

2 Q And what about -- I would like your comment on,
3 and we'll get into this in a bit more detail, in
4 the application considered by the Federal Minister
01:53 5 in the first application, we've heard evidence
6 from Eugene Williams and Sergeant Rick Pearson
7 that one aspect of the Federal Minister's review
8 was to have the RCMP investigate the ground that
9 said Larry Fisher is the killer of Gail Miller and
01:54 10 the police investigated that. I think Mr. Pearson
11 and Mr. Williams' evidence was that it wasn't
12 formally a criminal investigation as would be done
13 by the province or a police force, but rather a
14 limited engagement, if I can call it that, or an
01:54 15 assist to investigate that. Does that accord with
16 your investigation of what happened?

17 A Well, they certainly didn't make it clear that it
18 would be a limited engagement. They would simply
19 use the word investigate and that's what we would
01:54 20 expect them to be doing.

21 Q And so let me ask you that, what was Saskatchewan
22 Justice's understanding of the extent to which the
23 RCMP investigated Larry Fisher as the perpetrator
24 of the Gail Miller murder as part of the
01:54 25 consideration of the first application?



1 A It was our assumption that they would have done a
2 proper investigation to determine whether there
3 was any real evidence linking Larry Fisher to that
4 murder.

01:55 5 Q And so it would be similar in nature to what you
6 would expect that a provincial police force
7 investigating it for the purposes of laying a
8 charge against Mr. Fisher would do?

9 A Yes.

01:55 10 Q And just your comment on, and I appreciate your
11 earlier answer where you said that although
12 policing was a provincial concern, Saskatchewan
13 Justice didn't direct them as to how to do their
14 job; correct?

01:55 15 A That's right.

16 Q But if there had been no conviction against David
17 Milgaard and in 1990 information came to light
18 that Larry Fisher was the perpetrator, presumably
19 that would be investigated by the Saskatoon City
01:55 20 Police and they would then go to Saskatchewan
21 Justice if there was a basis for a charge; is that
22 correct, or the RCMP -- or a police force under
23 provincial jurisdiction?

24 A Ah, there is no formal pre-charge approval policy
01:56 25 in Saskatchewan, never has been. If they were



1 convinced that they had enough evidence to lay a
2 charge, they would have done it. The only time
3 they would come to us is if they were doubtful
4 or --

01:55 5 Q And, from the perspective of Saskatchewan Justice,
6 is there a concern that, as part of the Section
7 690 process as it then was, that Federal Justice
8 lawyers and the RCMP investigated Larry Fisher as
9 the perpetrator of Gail Miller? Would you agree
01:56 10 that that, but for the Section 690 process, that
11 would be a matter done under provincial -- that
12 that's a matter of the administration of criminal
13 justice?

14 A Yes.

01:56 15 Q Do you follow my question?

16 A Yes.

17 Q And did you have concerns that they, as part of
18 the work they were doing, were doing something
19 that, but for the Section 690, would be done
01:56 20 within the administration of criminal justice?

21 A No, I wasn't concerned that they were taking over
22 our role, this was being done in the context of an
23 application for the exercise of the prerogative of
24 mercy and that's legitimately their function.

01:57 25 Q And if Mr. Williams would have contacted, or



1 someone from Federal Justice contacted you in 1990
2 and said that "in the course of investigating this
3 application for Mr. Milgaard we have a new
4 allegation that says Larry Fisher is the
01:57 5 perpetrator, would you, Saskatchewan Justice,
6 arrange to have a provincial police force
7 investigate this matter as an administration of
8 criminal justice and get back to us at the
9 conclusion of the investigation and let us know
01:57 10 whether there is any basis to that?"

11 A We would have referred it to the police with a
12 request that they investigate it.

13 Q And so again, as between the -- between that
14 scenario and the scenario that happened, are you
01:57 15 telling us that either one is satisfactory from
16 the province's perspective?

17 A Satisfactory with the understanding that we
18 thought this was a complete investigation of the
19 Larry Fisher allegations.

01:58 20 Q And so that as long as a police force did a
21 complete investigation of Larry Fisher as the
22 perpetrator from the province's perspective,
23 whether it's the Saskatoon City Police or the RCMP
24 assisting Mr. Williams, it didn't matter which?

01:58 25 A No.



1 Q And just on that, on that point, it would seem,
2 Mr. Brown, that in every or virtually every
3 application to the minister, federal minister,
4 whether it be under 690 or 696 where a wrongfully
01:58 5 convicted person is alleging -- or a person is
6 alleging wrongful conviction, that one of the
7 bases is "I didn't do the crime, someone else
8 did", would you agree, other than between
9 manslaughter and murder and some of those
01:58 10 distinctions, but most cases are "you've got the
11 wrong person"; correct?

12 A Yeah.

13 Q And wouldn't mind your comment on the following;
14 that in investigating that, and we saw it in the
01:59 15 David Milgaard application, that it necessarily
16 appears to put the federal minister or the
17 justice, Federal Justice officials, in the
18 position of investigating a crime; would you
19 agree?

01:59 20 A Yes.

21 Q A matter that would normally be done by a
22 provincial police force, if I can call it that?

23 A That's correct.

24 Q And, again, does that -- I wouldn't mind your
01:59 25 comment as to whether that's something that is of



1 concern, or was of concern, to you?

2 A No, it wasn't of concern, because we were of the
3 view that the Federal Government people did a very
4 thorough job when they investigated these claims.
01:59 5 If they came up with anything they would share it
6 with us eventually so, no, it wasn't a huge
7 concern that they were trampling in our garden.

8 Q And I suppose would you then, "you" being the
9 province, then be put in the position of relying
02:00 10 upon the conclusions they reached in the
11 application?

12 A Well, we're not forced to rely on them, we would
13 choose to rely on them on the basis that we
14 trusted them.

02:00 15 Q Okay. So, in other words, when -- and we'll deal
16 with this in more detail -- but when the Federal
17 Minister rejected the first application on
18 February 27th, 1991 I believe the province relied
19 upon that decision and did not go and re-open the
02:00 20 investigation itself; is that correct?

21 A That's correct.

22 Q And would that be because of, amongst other
23 things, what you believed the Federal Minister and
24 her officials had done?

02:00 25 A Yes.



1 Q If we can just scroll down to number 3), and I
2 want to just talk generally about what steps the
3 Attorney General of Saskatchewan or Saskatchewan
4 Justice may take in post-conviction matters. I'm
02:01 5 not talking specifically in the *David Milgaard*
6 case, I just want to go through and have you tell
7 us what things Saskatchewan Justice could do or
8 has done in other cases. The first one I have is:

9 "provide access to information and
02:01 10 files",

11 and I've listed:

12 "prosecutor, police and witnesses".

13 Can you tell us what Saskatchewan Justice, or the
14 Attorney General, is capable of doing in
02:01 15 providing access to this information to a person
16 alleging wrongful conviction?

17 A Well, if you are talking about to the person who
18 is alleging wrongful conviction, certainly in 1990
19 there were no restrictions on providing somebody,
02:01 20 a third party, with access to those files. There
21 are restrictions now because of *Freedom and*
22 *Information and Protection of Privacy Act*, and on
23 a few occasions I have had to use the exemption
24 permitting law enforcement sort of a general
02:02 25 access to prosecution files to sort of take a



1 very, very broad view of what law enforcement is
2 and allow lawyers to look at files that were
3 otherwise -- would have been protected.

02:02 4 Q Okay. So that I have your evidence correct, in
5 about 1990 there became legislation that -- or
6 around --

7 A '90, I think it was '92 or '93, it was one of the
8 first acts of the NDP government.

02:02 9 Q Okay. So around '92-'93 there became legislation
10 that required Saskatchewan Justice to go through
11 steps before it disclosed certain information and
12 may have precluded certain confidential
13 information from being disclosed?

14 A Yes.

02:02 15 Q Apart from that restriction, or I think what you
16 are telling us, prior to that Act there was no
17 restriction about providing information on
18 prosecutor or police files to third parties; is
19 that correct?

02:03 20 A No. I mean, at that time, we didn't even
21 recognize the solicitor/client privilege that
22 would have existed between the police and --

23 Q So if we go --

24 A -- the prosecution.

02:03 25 Q If we go back then, during the 1980s, then, would



1 you tell us would Saskatchewan Justice, upon
2 request of counsel for a person alleging wrongful
3 conviction, provide access to the prosecutor's
4 file?

02:03 5 A Yes.

6 Q Unrestricted access?

7 A Yes.

8 Q Would you assist in obtaining access to the police
9 files or seek to assist in getting access to the
02:03 10 police files?

11 A Yes.

12 Q And in your career, Mr. Brown, have there been
13 cases where prosecutor files have been provided to
14 convicted people or to their counsel?

02:03 15 A Yes.

16 Q And as far as police files, can you tell us, if I
17 came to you in 1980 and said "I represent someone
18 who is wrongfully convicted, I would like to get
19 access to the Saskatoon City Police file so that I
02:04 20 can find out what happened and find out grounds,
21 would you assist me in making a request to the
22 police to allow me access"; how would Saskatchewan
23 Justice have responded to that request?

24 A If they could produce some even sort of marginal
02:04 25 basis for doing it we would have assisted them in



1 that.

2 Q And when you say "marginal basis" would it be
3 enough to say that "my client asserts that he is
4 innocent, that he was wrongfully convicted, and we
02:04 5 have reason to believe, for example, that the
6 evidence of these three people, there is something
7 suspect, I would like to look at the police
8 files"; is that --

9 A That's -- that's enough.

02:04 10 Q And in your experience in dealing with police
11 agencies, when Saskatchewan Justice has gone to
12 them with a request, have you been able to secure
13 access to their files?

14 A I don't recall an instance where we were turned
02:05 15 down. I -- I certainly recall a few instances
16 where the RCMP were fairly concerned about access,
17 but we were able to talk them into it, and that
18 went ahead.

19 Q And then let's talk about b), the:

02:05 20 "review and investigate alleged
21 miscarriage of justice".

22 can you tell us, and again let's focus on
23 1980's-early 1990s, what steps would your
24 department have taken to investigate an alleged
02:05 25 miscarriage of justice? And we're talking in the



1 face of a conviction and no application to the
2 federal minister under Section 690.

3 A Well again, if you bring us an allegation with
4 some substance to it, other than simply saying "I
02:05 5 think I was wrongfully convicted", we would have
6 investigated it. It would have been referred to
7 the police for an investigation if there were
8 allegations, say, of new evidence or something
9 like that, and yes, we would have taken it
02:06 10 seriously.

11 Q In the course of your involvement at the Supreme
12 Court reference I think you became very familiar
13 with the various grounds put forward on behalf of
14 David Milgaard; is that correct?

02:06 15 A Yes.

16 Q If we go back and take a look at the two grounds
17 put forward in the initial application to the
18 minister in December 1988, the first one being the
19 Deborah Hall information, if Saskatchewan Justice
02:06 20 was approached saying "at trial, George Lapchuk
21 and Craig Melnyk lied, and here's Deborah Hall's
22 information to say that they lied, they fabricated
23 this evidence about the hotel room incident", can
24 you tell us what, if anything, Saskatchewan
02:06 25 Justice might have done in the face of that



1 request?

2 A Well, if it had been given to me, I would have
3 pulled the file, pulled the David Milgaard file,
4 read the transcript portions dealing with Melnyk
02:06 5 and Lapchuk's evidence, if I thought it was of any
6 degree of importance I would have referred it to
7 the police for an investigation.

8 Q And when you say "any degree of importance" are
9 you suggesting that the alleged lie has to be
02:07 10 something significant; is that --

11 A It's something that has to bear on the verdict,
12 yeah. Not, you know, necessarily greatly, but it
13 has to have some consequence.

14 Q And that's --

02:07 15 A If you are basically talking about an atmospheric
16 witness who really does little in the way of
17 proving the person is guilty --

18 Q And in this case the motel room incident, would
19 you agree, would have been significant evidence?

02:07 20 A Absolutely.

21 Q And so again, if the information brought forward
22 was that Melnyk and Lapchuk lied at trial and this
23 incident didn't happen and they fabricated it, is
24 that something that would be significant enough
02:07 25 for you to investigate?



1 A Yes, absolutely.

2 Q And who and how would you do that?

3 A It would have been sent -- generally, it's going
4 to go to the police agency with responsibility for
02:08 5 that particular case, so it would have been sent
6 to the Saskatoon Police Service.

7 Q Now what if the allegation -- or not the
8 allegation -- but what if the circumstances, and
9 perhaps the allegation, is that somehow the
02:08 10 Saskatoon City Police were complicit in that
11 evidence being fabricated; how do you then deal
12 with it?

13 A It can be sent to another police agency, generally
14 that would be the RCMP, although recently we have
02:08 15 been calling on other municipal police forces to
16 investigate within the province as well.

17 Q So you could have gone, for example, to the Regina
18 Police service?

19 A Yes.

02:08 20 Q Or the RCMP?

21 A Umm, well we could have, in those days we wouldn't
22 have gone to the municipal police services, that's
23 a practice that's just developed, it would have
24 been the RCMP we would have requested.

02:08 25 Q And what if the circumstances and/or allegation



1 are such that it's suggested that the Crown was
2 somehow complicit in the wrongdoing that gave rise
3 to this false evidence or alleged false evidence;
4 how would you deal with that?

02:09 5 A Well, again, it has to be investigated by
6 somebody, the RCMP are the people who would do
7 that, but the review of their findings would then
8 go either to a member of the private bar, in those
9 days, or nowadays out of province to another
02:09 10 Justice Department for a review.

11 Q So, in that scenario, you could envision that the
12 RCMP might investigate the Deborah Hall
13 allegation, and if the Crown, the Saskatchewan
14 Justice, was alleged to have been complicit in the
02:09 15 matter, you could have or would have arranged for
16 either another provincial justice department or a
17 private lawyer to review the findings; is that
18 correct?

19 A That's correct.

02:09 20 Q And would that be something that's an unusual
21 procedure, that -- or have these matters happened
22 before where you go out and investigate,
23 post-conviction, these types of allegations?

24 A It's not a usual kind of thing, in my career maybe
02:10 25 four times besides the David Milgaard matter, that



1 stuff has been brought to us and we've
2 requested or I've requested the police to look
3 into it.

4 Q And why would you look into it when you've got a
02:10 5 conviction on the record?

6 A Well it's -- I mean we're not in the business of
7 wrongfully convicting people, if there's been a
8 mistake made, we want to know about it.

9 Q And let's talk about the Dr. Ferris, which is the
02:10 10 second piece of -- or the second ground, and I
11 think you are familiar with Dr. Ferris' report --

12 A Yes.

13 Q -- and the essence of his opinion? And again, if
14 that had been brought forward to you in the 1980s,
02:10 15 to Saskatchewan Justice as "here's new forensic
16 information, or information that suggests or that
17 proves David Milgaard is innocent", can you tell
18 us how you would have dealt with that request?

19 A Well, again, that would have been sent to the
02:11 20 appropriate police agency to look into his
21 suggestions.

22 Now there are some things on
23 the face of that report that we might not have
24 requested an investigation, because those were
02:11 25 basically inferences that Rex Ferris was drawing



1 from the evidence, inferences that the jury was
2 perfectly capable of drawing. For example, the
3 notion that there might not have been enough time
4 to commit the offence, well I mean that was argued
02:11 5 with the jury, the jury were left with that
6 question, and they decided otherwise.

7 Q And are you able to -- you talked about something,
8 about what would prompt Saskatchewan Justice to
9 look into a matter, and I think you said as long
02:11 10 as it had some merit to it; is that correct?

11 A Yes.

12 Q And was significant, may have affected the verdict
13 in some way; correct?

14 A Yes.

02:12 15 Q If it was a case of re-arguing what was argued
16 before the jury can you tell us how you would
17 respond to that type of -- in other words "go
18 reinvestigate this because we think the jury got
19 it wrong, no new information, but we just think
02:12 20 it's wrong"?

21 A I might refer that kind of case to the police, but
22 if it's simply a matter of "I don't like the
23 jury's verdict, I want another shot at it", that's
24 not likely going to get a reference to the police,
02:12 25 subject perhaps to one thing.



1 that certainly goes to the fairness of trial.

2 Q And back, are you talking post-*Stinchcombe*, is
3 that --

4 A Post-*Stinchcombe*, yes.

02:14 5 Q Pre-*Stinchcombe*, in the '80s, if someone would
6 have come forward and said "lookit, I have now
7 learned some information that wasn't disclosed to
8 me and it might have affected the verdict, would
9 you people investigate this?"

02:14 10 A We would investigate to determine whether there's
11 any substance to the evidence. Obviously, if we
12 find there is, it's not really within our power to
13 do anything, it would have to go to the Federal
14 Government.

02:14 15 Q And then point c), I've got:
16 "arrange for and conduct forensic
17 testing";

18 can you tell us whether -- or what has
19 Saskatchewan Justice, and is Saskatchewan
02:14 20 Justice, prepared to do to assist a person who
21 has been convicted, and appeals exhausted, to
22 look at getting further forensic testing done
23 where there is an allegation of a wrongful
24 conviction.

02:15 25 A Well again, if they bring in some evidence or some



1 suggestion that either they have got new
2 information and they -- or new exhibits they want
3 tested or they have got -- or they want, you know,
4 current scientific testing done on old exhibits,
02:15 5 if there's, again, even a small reason to do it
6 we'll do that.

7 Q There has been evidence that in 1987 and 1988 Dr.
8 Ferris was engaged by David Milgaard's counsel to
9 review the Gail Miller exhibits; you're aware of
02:15 10 that?

11 A Yes. We were, I think, involved in getting them
12 released from the Court.

13 Q If a request had been made to Saskatchewan Justice
14 at that time, 1987-1988, to the effect that "Mr.
02:15 15 Milgaard says he's wrongfully convicted and that
16 Gail Miller's clothing may contain physical
17 evidence from the perpetrator and that DNA
18 testing", which I think was just at the forefront
19 at that point, "was available, would you please
02:16 20 arrange to have these tested"; can you tell us
21 under what circumstances might Saskatchewan
22 Justice have proceeded with testing Gail Miller's
23 clothing?

24 A Well the first thing I would want to do is check
02:16 25 with the RCMP crime lab people to determine



1 whether there is any useful forensic testing that
2 can be done with those clothes. If they told me
3 there was, then they would be off.

4 Q And so that would include DNA testing, if that was
02:16 5 available?

6 A If that was available, yes.

7 Q And so again, notwithstanding that there is a
8 conviction in place and no application pending to
9 the Federal Minister, was there any reason that
02:16 10 Saskatchewan Justice would not proceed with the
11 request to have Gail Miller's clothing tested for
12 DNA?

13 A Well you can't sort of come to us, as a defence
14 counsel recently did, hand over an exhibit or hand
02:16 15 over an item and say "test this, get the RCMP to
16 test this". You have to show that it's relevant
17 to the case, it's relevant to your client's claim,
18 it likely has some evidentiary value. But if you
19 can show all those things, and certainly the Gail
02:17 20 Miller garments would have been relevant, we would
21 have sent them off for testing, if that was -- if
22 the RCMP had assured us that that was likely to be
23 available and fruitful.

24 Q And again, just on the grounds, you say it's not
02:17 25 sufficient just to say "here, test it", but would



1 it be sufficient to say that "at the time that Mr.
2 Milgaard was convicted DNA science was not in
3 existence, there may well be semen on Gail
4 Miller's clothing from the perpetrator and a DNA
02:17 5 test may establish Mr. Milgaard was not
6 responsible, and we say he's not responsible,
7 here's why, and this evidence will assist"; would
8 that be the type of thing --

9 A That would have been sufficient with the DNA work
02:17 10 because, certainly, that's a very, very, very
11 powerful new tool.

12 Q And, as far as the people you rely on, would
13 you -- you indicated the RCMP lab; is that who you
14 would go to first?

02:18 15 A That's who we would go. That's the only source we
16 have to get that kind of work done.

17 Q And, if the work had to be done out of the
18 country, is that something you would consider as
19 well if the RCMP came back and said "lookit, the
02:18 20 testing can be done in location X, and it may be
21 credible"?

22 A Well, we would certainly consider it. It adds a
23 new concern, and that's the financial one, I do
24 not have a budget for that. We can get the RCMP
02:18 25 to do testing under the general agreement with the



1 province for testing and for laboratory services,
2 but I have no such agreement with the Forensic
3 Service of Great Britain or with the FBI, or
4 anything like that. What we can do in those kinds
02:18 5 of cases is use the RCMP to use their good name to
6 connect with the FBI or Forensic Service in
7 England.

8 Q And then item d) is:

9 "request police to investigate other
02:19 10 suspects"

11 And, again, the premise here is that there is no
12 application to the Federal Minister, but if a
13 convicted person comes to you and says "I didn't
14 do it, I now have information to suggest that
02:19 15 some other person did it, would you please go
16 investigate that person for the crime because,
17 once you find out that that person did it, that
18 will exonerate me"; how would you respond to that
19 type of request?

02:19 20 A Send it to the police. I've done that on a number
21 of occasions. That's probably the most common
22 kind of request that we get.

23 Q And that is from a convicted person?

24 A Yes.

02:19 25 Q And again, when you say you sent it to the police,



1 would it be "please investigate this" or "here's
2 information"; can you elaborate?

3 A Well we would send whatever information we have
4 got with the request that they check into that and
02:20 5 report back.

6 Q And again, if there were concerns about the police
7 force that had been involved in investigating the
8 convicted person being involved in investigating
9 another suspect, would you consider sending it to
02:20 10 the RCMP or another police force, and does that
11 come up?

12 A Umm, yes, that has come up, and we have -- with
13 the RCMP it's a little more difficult to get in
14 another force, although of recent date they have
02:20 15 been willing to accept observers from municipal
16 police forces to accompany their officers when
17 they do investigations on internal affairs-type
18 matters. If it was an RCMP investigation
19 originally we would probably go through the
02:20 20 headquarters division, through the chief
21 superintendent in charge of criminal operations,
22 and request that a major crimes officer or
23 somebody from another detachment take that matter
24 on.

02:21 25 Q And, again, let's just look at the Saskatoon City



1 Police for a moment. Have you had requests where
2 people have asked for a different police force to
3 investigate the new suspect because the existing
4 police force is the one that caused them to be
02:21 5 convicted, in other words that they want -- that
6 they are not -- that they are concerned that they
7 are not going to get a fresh set of eyes look at
8 it?

9 A No. The only time that's happened is when there
02:21 10 have been suggestions that the original police
11 investigator had misconducted himself.

12 COMMISSIONER MacCALLUM: So just a
13 suggestion of a conflict of interest wouldn't do
14 it?

02:21 15 A No. Regrettably, we have a system in
16 Saskatchewan, and indeed right across the country,
17 where complaints against police officers are
18 routinely investigated by other police officers,
19 and that's -- would seem like a conflict of
02:21 20 interest, but that doesn't seem to be something
21 that's a huge concern.

22 We do our best to try and
23 ensure that those things are looked at in as
24 thorough and as neutral a fashion as possible, but
02:22 25 at the end of the day if you have a complaint



1 against, say, a Prince Albert police service
2 officer, it's likely to be investigated by a
3 Prince Albert police service officer.

4 BY MR. HODSON:

02:22 5 Q And let me put it a bit more direct here, that if
6 the concern -- and let's take David Milgaard's
7 case, and I think we heard this evidence from I
8 believe Mr. Asper or Mrs. Milgaard, that if the
9 Saskatoon City Police are going to be involved in
02:22 10 investigating, for example, Larry Fisher as a
11 suspect in 1980, if it turns out that the
12 investigation shows that Mr. Fisher is the
13 perpetrator that means, arguably, the
14 investigation they did in 1969 may not have been
02:22 15 correct; would you agree with that general
16 proposition?

17 A Yes.

18 Q Yeah. And so that there may not be -- there may
19 be concerns that the police investigating Larry
02:23 20 Fisher may have a vested interest in the outcome
21 because, if they find out that he is the
22 perpetrator, it may adversely reflect their
23 previous work. And is that something that -- how
24 would you deal with that concern being expressed?

02:23 25 A Well let me start by saying that, in 32 years in



1 this business, I have yet to run across a police
2 officer who I would even remotely think would try
3 to cover up a mistake in the sense that they would
4 leave somebody hanging out in jail simply to avoid
02:23 5 adverse publicity. I did not give any credit, and
6 neither did anyone else in the justice system give
7 any credit, to the notion that the Saskatoon City
8 Police would cover this up or that Bobs Caldwell
9 would cover this up. That's not the business
02:23 10 we're in. And, certainly, the police and
11 Caldwell, and all the rest of us, know very well
12 that if we've got the wrong person the first time
13 around, it's left the bad guy on the street, and
14 certainly with this case that's a wonderful
02:24 15 illustration of what happens when you leave the
16 bad guy on the street. So I just do not believe
17 that any police officer would attempt to cover up
18 a mistake like that.

19 Q And so are you telling us, then, in the 1980s or
02:24 20 early '90s you would have gone out to the
21 Saskatoon City Police and say "here's information
22 that suggests Mr. Fisher may be the perpetrator,
23 please investigate, because if he is the bad guy",
24 as you say, "we've got the wrong guy in jail and
02:24 25 we've got the bad guy out on the street"?



1 A Yes.

2 Q And you would have confidence that the police, the
3 Saskatoon City Police, would properly investigate
4 that?

02:24 5 A I, at that point I would have had confidence that
6 they would have looked at that in a serious
7 fashion and reported their findings to us.

8 Q You say, or pardon me, under item (e), approach
9 the Federal Justice Department under Section 690.
02:25 10 Can you tell us, I think you've told us that
11 although you can assist a convicted person in
12 gathering information and/or investigating, can
13 you tell us what steps you could or would take
14 Saskatchewan Justice as far as approaching the
02:25 15 Federal Minister under Section 690 as it then was?

16 A Well, if we had uncovered something or the police
17 in Saskatchewan had uncovered something that
18 suggests that a miscarriage of justice may have
19 occurred, we would communicate minister to
02:26 20 minister, to the Federal Minister indicating
21 that's the case, send along whatever information
22 we have, and very likely at that point, if we've
23 done this, we're concerned about a miscarriage, we
24 would make a recommendation that it be returned to
02:26 25 the courts.



1 Q And so that's something that you could have done
2 and something you do today as far as now it's
3 under section 696?

4 A Yes.

02:26 5 Q Go to the next -- so let's just talk about two,
6 the ability to re-open an investigation in the
7 face of a conviction -- go to the next page -- and
8 again this is my outline, but is a request
9 necessary or can the Attorney General re-open the
02:26 10 investigation on its own volition, and the point I
11 want you to address, is the Attorney General
12 proactive or reactive in dealing with re-opening
13 investigations where a conviction is in place and
14 the appeal periods have expired?

02:27 15 A Well, I'm not sure what you mean by proactive or
16 reactive. We're not going to do it unless
17 something comes to our attention to indicate
18 there's a need to.

19 Q And, yeah, I guess that was my question. Do you
02:27 20 need either a piece of information to come to your
21 attention or a request by the convicted person
22 before Saskatchewan Justice would take steps, as
23 we've talked about, to investigate matters?

24 A Yes, generally speaking, with one caveat, and that
02:27 25 is that on a few occasions when we've been doing



1 appeals against conviction, we've come across
2 stuff usually in the transcript or the police have
3 brought us additional information that causes us
4 to deal with it in a particular fashion.

02:27 5 Q But once a conviction is entered and the court
6 proceedings are concluded, are you telling us that
7 Saskatchewan Justice would not have a system in
8 place to sort of continue to investigate those
9 matters?

02:28 10 A No, there's no such system. I'm not aware of
11 anyone in Canada that has that.

12 Q And so it's dependent upon a request being made by
13 somebody to look into the matter; is that fair?

14 A That's right.

02:28 15 Q Or a piece of information of a significant nature
16 coming to your attention?

17 A Yes.

18 Q I think (b) we've touched on and I think you've
19 told us, and please correct me if I'm wrong,
02:28 20 that --

21 COMMISSIONER MacCALLUM: Excuse me, Mr.
22 Hodson. Is it your answer then that you don't
23 have a system of automatic review on convictions?

24 A That's correct.

02:28 25 COMMISSIONER MacCALLUM: Yes. I suppose



1 you wouldn't see the need for that?

2 A No. As I say, I'm not aware of any jurisdiction
3 that systematically reviews convictions.

4 BY MR. HODSON:

02:28 5 Q And in fairness, do you depend upon the convicted
6 person and/or his counsel to bring the matter to
7 your attention?

8 A Yes, yes.

9 Q And in your experience, does that give, I guess,
02:29 10 you some comfort that if there is a miscarriage of
11 justice that has occurred, the convicted person
12 has a vested interest in bringing it forward to
13 the attention of the authorities?

14 A Yes.

02:29 15 Q And so that as far as falling between the cracks,
16 do you depend upon the convicted person to make
17 sure that post conviction a miscarriage of justice
18 does not fall between the cracks?

19 A Yes.

02:29 20 Q The reliance on the Section 690 process, and I
21 think you've told us this, that Saskatchewan
22 Justice, you don't need an application to the
23 minister under 690 or now 696 before you
24 investigate?

02:29 25 A No, no.



1 Q And (c), the test, and I think we've touched on
2 that, is there any, and I -- would you agree it's
3 likely a subjective, in some respects a subjective
4 review of what's been brought forward to your
02:30 5 attention or to another lawyer in your office?

6 A Oh, yes. I mean, I may not see something as
7 consequential that someone else sees as some
8 significance.

9 Q We have seen certainly in some of the evidence
02:30 10 here as to what the test was applied by the
11 minister under Section 690, we've heard reference
12 to unsafe verdicts, miscarriage of justice. Are
13 there any -- can you enlighten us at all on what
14 would be the test that Saskatchewan Justice would
02:30 15 apply before it would take steps to investigate
16 something brought forward by a convicted person?

17 A Well, I suppose there's two things, there's first
18 an issue of the process, has the conviction been
19 obtained in a fair fashion, did the person get due
02:30 20 process, and second, if you are going to be
21 alleging that there's new evidence or something
22 like that, then we need to see what it is and we
23 have to be of the view that it has some impact, or
24 likely to have some impact on the verdict. It
02:31 25 doesn't -- that's not -- I don't want to give the



1 impression that that's a high threshold, it
2 doesn't have to be sort of earth-shattering
3 evidence that destroys the whole thing, it's more
4 like there's some evidence that a judge could
02:31 5 consider or a jury could consider.

6 Q I think we've heard the term bombshell. Are you
7 telling us --

8 A No, we don't need bombshells.

9 Q And so something that is new and something that
02:31 10 might -- can you tell us in relation to how your
11 threshold might relate to what the Federal
12 Minister's threshold is under then 690, would they
13 be similar, would yours be a lesser threshold?

14 A We probably have a lesser threshold simply because
02:32 15 at that point we're not looking at having to
16 overturn a conviction and send the matter back to
17 trial, we're just investigating at that point.
18 When it gets to the minister, well, the minister
19 then has to deal with the issue of upsetting a
02:32 20 court decision and, frankly, that's something they
21 take fairly seriously. If you've gone through the
22 process, the process has been fair, there is a
23 finality to it, and the Minister of Justice
24 federally will not re-open cases unless there is a
02:32 25 substantial reason for doing so.



1 Q If we can go down to item number IV here, identify
2 key dates relating to the re-opening of the
3 investigation into Gail Miller's death, and I want
4 to just touch on these, Mr. Brown, and I want to
02:32 5 tell you my purpose first. The Commission's Terms
6 of Reference, as I stated earlier, require the
7 Commission to seek to determine whether the
8 investigation into Gail Miller's death should have
9 been re-opened based on information that was
02:33 10 subsequently received by the police and
11 Saskatchewan Justice and I've tried to identify
12 possible dates where the re-opening might have
13 been considered, and I want to go through these
14 with you just so that we have some key dates and
02:33 15 have you tell me whether or not there was a formal
16 decision made by Saskatchewan Justice not to
17 re-open or whether it was a non-decision, and
18 maybe we can just shed some light as to when the
19 key dates were. Do you understand where I'm
02:33 20 trying to go?

21 A Yeah.

22 Q So the first one is prior to December 28, 1988,
23 which was the date of the first application to the
24 minister, was Saskatchewan Justice requested by
02:33 25 David Milgaard or his counsel to do anything with



1 respect to this matter prior to that date?

2 A Not that I'm aware of, not that I've been able to
3 discover.

4 Q And so is it your evidence that there would be no
02:33 5 formal decision to re-open at that point?

6 A Yes. Oh, absolutely.

7 Q So then if we can go ahead to February 27th, 1991,
8 and that's when Minister Kim Campbell dismissed
9 the first application under Section 690, and then
02:34 10 I think in the months that followed Saskatchewan
11 Justice was involved I think in the consideration
12 of her decision at a minimum; is that fair?

13 A Yes, there was a considerable amount of publicity
14 and a number of people writing into the minister
02:34 15 constantly requesting some relief for him, so we
16 were looking at what was there and advising the
17 minister and providing the minister with draft
18 correspondence.

19 Q And as far as the -- I think you would agree that
02:34 20 Saskatchewan Justice did not re-open the
21 investigation into Gail Miller's death following
22 Kim Campbell's February 27th letter; is that
23 correct?

24 A That's correct.

02:34 25 Q And I'm wondering, do we infer from that that



1 there was actually a decision made not to re-open
2 or was it a non-decision?

3 A It would be more like a non-decision, there's no
4 reason to re-open.

02:35 5 Q Okay. So we'll touch on that a bit later, but
6 let's move to number 3, and this would be April
7 14th, 1992 after the Supreme Court reference
8 decision and I think in the days that followed,
9 did Saskatchewan Justice at that time make a
02:35 10 decision as far as re-opening the investigation
11 into the death of Gail Miller?

12 A We decided at that point that there was no basis
13 to either call an inquiry or further the
14 investigation into this case.

02:35 15 Q And would it be correct to say that around April
16 14th, I'm not talking specifically, but that day
17 and following in the next number of weeks or
18 months, would that have been the first occasion
19 when Saskatchewan Justice formally considered
02:35 20 whether to re-open the investigation and concluded
21 that it shouldn't?

22 A Yes.

23 Q And then I have the, number 4, the Michael
24 Breckenridge allegations in September of 1992 and
02:36 25 the RCMP investigation. Was that -- and I'll deal



1 with that with you a bit later, but was there a
2 decision there, did Saskatchewan Justice
3 reconsider its decision to re-open the
4 investigation either at the time the allegations
02:36 5 were made by Mr. Breckenridge or when the RCMP
6 report came back?

7 A Well, certainly public prosecutions didn't make a
8 decision to re-open any investigation when the
9 allegations were first made.

02:36 10 Q Sorry, you are talking about the Breckenridge
11 allegation?

12 A That's correct.

13 Q Yeah.

14 A The investigation that was undertaken then was
02:36 15 actually, I suspect, undertaken at the direction
16 of the deputy minister because public
17 prosecutions' advice was that these allegations
18 were so obviously wrong and incredible that the
19 investigation should focus just on them and it
02:37 20 came as a bit of a surprise to us that the RCMP
21 proposed to do a whole reinvestigation of the
22 case.

23 Q So are you telling us that when the Michael
24 Breckenridge allegations came to light, that did
02:37 25 not prompt Saskatchewan Justice to reconsider its



1 decision about re-opening the Gail Miller
2 investigation; is that correct?

02:37 3 A Well, I'm not entirely sure because, as I say, the
4 advice from Richard Quinney and the advice that I
5 was giving Richard Quinney was make the
6 investigation specific to the Breckenridge
7 allegations. Somewhere along the line the deputy
8 minister's office or the RCMP, a decision was made
9 to, in effect, re-open that whole case and
02:37 10 reinvestigate the death of Gail Miller.

11 Q And so I think we've heard evidence from Mr.
12 Sawatsky about the scope of that investigation and
13 I think his evidence was that even though the
14 purpose was to look at criminal wrongdoing, in
02:38 15 effect they gathered the same information they
16 likely would have gathered if they had re-opened
17 the investigation into the death of Gail Miller.
18 Would that agree with your understanding of what
19 they did?

02:38 20 A Yes. When we saw that investigation report,
21 that's exactly what they did.

22 Q And so let's -- I'm just trying to identify
23 decision dates. So is it fair to say that once
24 the RCMP report came back in 1994, that there
02:38 25 was -- was there a decision point -- I'm trying to



1 identify when Saskatchewan Justice would have
2 consciously and formally sat down and said okay,
3 should we or should we not re-open the
4 investigation into the death of Gail Miller.

02:38 5 You've told us around April 14th was the first
6 occasion. Was there another occasion that that
7 happened prior to the DNA results?

8 A Well, certainly once the RCMP Flicker report
9 became available, we were of the view that there
02:39 10 was no substance whatsoever to the Breckenridge
11 allegations, that indeed there was even more
12 evidence that David Milgaard was probably
13 responsible for that murder and there was no
14 reason to re-open or to call an inquiry.

02:39 15 Q And then -- so it may have been, number 4 might be
16 somewhat like number 2, it was a non-decision, it
17 wasn't -- it wasn't re-opened and --

18 A That's correct, yes.

19 Q Okay. And then the last one, number 5, would be
02:39 20 when the DNA results came in July of 1997 and I
21 think at that point Saskatchewan Justice did
22 direct that the investigation be re-opened; is
23 that correct?

24 A That's correct.

02:39 25 Q And so as far as our key decision dates when we go



1 through, it appears that, and April 14th, I don't
2 mean to signify that date, that's the date that
3 the decision --

4 A Around there.

02:40 5 Q Around that time period -- that would have been
6 the primary decision time for when Saskatchewan
7 Justice considered the re-opening of the
8 investigation; is that correct?

9 A That's correct.

02:40 10 MR. HODSON: This is probably an
11 appropriate time to break for the afternoon,
12 Mr. Commissioner.

13 *(Adjourned at 2:40 p.m.)*

14 *(Reconvened at 3:05 p.m.)*

03:05 15 BY MR. HODSON:

16 Q If we can go back to 338947, please, this is the
17 outline, go to the next page. We had finished up
18 on these key dates, Mr. Brown, just to give you
19 and the Commissioner and the parties a quick idea
03:06 20 of where I propose to go. I intend to go through
21 chronologically your involvement, or Saskatchewan
22 Justice's dealings with this matter, mindful of
23 the one provision of our Terms of Reference,
24 namely, to identify the information that
03:06 25 Saskatchewan Justice had at various times related



1 to the re-opening, and so as we go through it I'll
2 be asking you questions about that. We'll go
3 through the 1980 period which is fairly brief,
4 then the first application -- if we can go to the
03:06 5 next page -- and then try and break it down to the
6 February 27th minister's decision and I'll try and
7 have you identify for us what information you had
8 at the time and your considerations. Next, the
9 second application -- next page -- the reference
03:07 10 to the Supreme Court. I'll then touch on the
11 conduct of the Supreme Court reference -- next
12 page -- the decision itself, followed by what
13 steps were taken by Saskatchewan Justice following
14 the decision and then finish up with the
03:07 15 Breckenridge/Flicker investigation and DNA
16 testing. So that is my plan, Mr. Brown.

17 If we could go to 219408,
18 please, and this is a letter dated December 31,
19 1980 from Deputy Chief Corey of the Saskatoon
03:07 20 police to the Chief of Police John Gibbon. I just
21 want to go through parts of this. We've heard
22 evidence about this document that -- I'll just
23 read you this part for the record and then I'll
24 have a question for you. This is a letter
03:07 25 indicating that a representative of the Milgaards,



1 namely, a fellow by the name of Chris O'Brien, had
2 tried to contact the police around the end of
3 December, 1980, believed looking for police files,
4 requested permission to interview, and then if we
03:08 5 could go to 331961, and this is a letter from the
6 chief of police to Gary Young, and you are
7 familiar with who Gary Young is, Mr. Brown?

8 A Yes, I know him.

9 Q And so this is a letter -- at the time Mr. Young
03:08 10 represented David Milgaard and Joyce Milgaard and
11 he had made a request to the Saskatoon City Police
12 for permission to interview police officers and to
13 have access to the complete police file, and the
14 chief writes him back saying he cannot agree to
03:08 15 such a request and then goes on to say:

16 "If there is some justification for
17 re-examining this conviction I feel that
18 the reasons for that must be presented
19 to the Attorney General's Department and
03:09 20 if necessary we will certainly be
21 prepared to discuss our file with a
22 representative of the Attorney General's
23 Department and, of course, have our
24 members interviewed by a representative
03:09 25 of the Attorney General's Department.



1 If the Attorney General sees fit to
2 acquaint you with the information he has
3 at his disposal, then I would have no
4 objection to that. In the meantime, I
03:09 5 can only advise you I am not prepared to
6 have our file made available to yourself
7 or members of the Milgaard family..."

8 And again, would you have been aware of this
9 request or do you know if Saskatchewan Justice
03:09 10 was aware of this request in 1980?

11 A I certainly don't know whether we were, and I have
12 to say I haven't seen anything in my review of our
13 file that indicates we were.

14 Q Yeah. Mr. Young's evidence, I should have pointed
03:09 15 at this, Mr. Young's evidence was that he did not
16 contact the Attorney General of Saskatchewan and
17 he had intended to do so and was relieved of his
18 duties I think a couple of months after that and
19 so his evidence is that he did not contact
03:10 20 Saskatchewan Justice or the Attorney General
21 directly, and I think you are telling us that is
22 consistent with your knowledge; is that correct?

23 A That's correct, yes.

24 Q And again, is the type of what's set out in chief,
03:10 25 as he then was, Chief of Police Gibbon, is this



1 consistent with what your understanding would be
2 at the time as to how the police and the Attorney
3 General would deal with requests to look at a
4 police file?

03:10 5 A Well, I suspect probably, yes. It would be very
6 unlikely that in those days the police would
7 simply open their files to anyone. They would do
8 so if we requested that, but they wouldn't simply
9 allow open-box access to their files.

03:10 10 Q But again, if the request, that Mr. Young had made
11 the request to Saskatchewan Justice saying here
12 are the reasons why I want to look at the file,
13 would you, Saskatchewan Justice, arrange for me to
14 have access to the police file, I think you told
03:11 15 us earlier that that's something that you had done
16 and would do --

17 A Yes.

18 Q -- if requested?

19 A Yes.

03:11 20 Q And again, is there anything in Chief Gibbon's
21 letter in 1981 that would cause you concern about
22 whether or not, had the request been made by Mr.
23 Young, whether you would have been able to gain
24 access to those police files for him?

03:11 25 A No. He seems to suggest that he would be prepared



1 to share their files with us and then allow us to
2 disclose whatever we thought was appropriate to
3 disclose.

4 Q And that would be consistent with what your
03:11 5 understanding was as to how Saskatchewan Justice
6 operated at the time?

7 A Yes.

8 Q Now 331926, this is just a telephone note, and I'm
9 not sure that you've ever seen this, and we've had
03:12 10 evidence from -- this is February, 1981 -- from
11 Mr. Young that he had a telephone call with Mr.
12 Caldwell, the prosecutor, and Mr. Caldwell's
13 evidence -- Mr. Young's evidence is that Mr.
14 Caldwell said he was prepared to share his file
03:12 15 and go over it with him, with Mr. Young, Mr.
16 Caldwell's evidence is that in addition to that he
17 has a recollection of actually providing the file
18 to Mr. Young, but again, let's talk about the
19 prosecutor's file. Would this be consistent then
03:12 20 with what your understanding was of the
21 Saskatchewan Justice practice in 1981, that a
22 request by defence counsel for a convicted person
23 asking to go through the prosecutor's file, that's
24 something that would be considered and if there
03:12 25 was a reason would be granted?



1 A Well, certainly with the head office operation,
2 that would have been the case. Whether individual
3 offices might have allowed that, I don't know.
4 Apparently Mr. Caldwell was prepared to allow
03:13 5 anyone to look at that file. What we would do if
6 there was a problem is we would get the file into
7 head office and the person could come there and
8 look at it.

9 Q And so I think Mr. Caldwell's evidence was that
03:13 10 around this time the prosecution file would be at
11 the Saskatoon office of Saskatchewan Justice; is
12 that correct, as opposed to the head office?

13 A What is the date on this?

14 Q 1981, February, '81.

03:13 15 A Well, strictly speaking, by that point it should
16 have been shipped off to the Central Records
17 storage for the Government of Saskatchewan. Most
18 files would have been by then, they are not
19 usually retained in the office for 10 years, but
03:13 20 Bobs Caldwell's file was in his office and it was
21 in his office when I went looking for it.

22 Q And what year was that?

23 A 1989, 1990, something like that.

24 Q And so again we've talked about the police files.

03:14 25 As far as the prosecutor's file, if in 1981 head



1 office, as you call it, Saskatchewan Justice had
2 been asked by Mr. Young to provide access to the
3 prosecutor's file, is that something that you
4 believe you would have arranged for him?

03:14 5 A Yes.

6 Q And now go back to -- if you can call up 000002,
7 please, and this is the first application to the
8 Federal Minister, December 28th, 1988, so prior to
9 this filing, we talked about Mr. Young's dealings
03:15 10 with Mr. Caldwell. You are now familiar with
11 Linda Fisher's going into the Saskatoon City
12 Police in August, 1980; is that correct? You are
13 familiar with that incident or --

14 A Yes, I am.

03:15 15 Q And did you become aware of that in the course of
16 your work with, on the Supreme Court reference; is
17 that correct?

18 A Yes.

19 Q Prior to that, do you know if that information was
03:15 20 brought to the attention of anybody at
21 Saskatchewan Justice?

22 A There is nothing on any of our files to indicate
23 that.

24 Q And the evidence we've heard from the police, we
03:15 25 haven't heard any evidence, I don't think, that



1 suggests that it was brought to the attention of
2 Saskatchewan Justice, but if it had been, are you
3 able to comment on what steps Saskatchewan Justice
4 might have taken in connection with that, and her
03:15 5 statement was August 28th, 1980 indicating that
6 she had beliefs that her husband Larry Fisher had
7 killed Gail Miller.

8 A Well, certainly we would have asked the police to
9 look into that, go and get a proper statement from
03:16 10 her, find out the basis for her belief, who if any
11 she told of that sort of thing. At that time it
12 may well also have led the police to look at the
13 current legal problems that Larry Fisher was
14 facing and of course he was, that was about the
03:16 15 time of the (V10) (V10)- incident in North
16 Battleford.

17 Q Right. And I think that was March of 1980 if I'm
18 not mistaken, was the assault, and I think he was
19 in custody and going through the court system at
03:16 20 that time; is that correct?

21 A I believe so, yes.

22 Q And so again that might have been something that,
23 from Saskatchewan Justice's perspective, it had
24 been brought to your attention, you would have
03:16 25 turned it over to the police then to investigate?



1 A Yes.

2 Q This letter to The Honourable Joe Clark, I take it
3 you are now familiar with the application and at
4 one point in the reference case would have been
03:17 5 familiar with what's in the application document?

6 A Yes, that's correct.

7 Q Do you know when Saskatchewan Justice first
8 received a copy of this application?

9 A No, I don't. I frankly don't recall seeing it
03:17 10 until the reference process started.

11 Q And just so that -- the reference process would be
12 November, 1991, and maybe we'll just canvass this
13 for a bit. In November, 1991 a reference was
14 ordered to the Supreme Court of Canada; correct?

03:17 15 A That's correct.

16 Q At which point the Attorney General of
17 Saskatchewan was asked to be a party in the
18 reference; is that correct?

19 A Well, before it was ordered, but yes.

03:17 20 Q Before it was ordered, sorry. So before the
21 reference was ordered, you were invited to be a
22 party at the reference?

23 A Invited is I suppose the right word, yeah.

24 Q Is there a different word that you would use to
03:18 25 describe how you came to be involved?



1 A I think we were just basically told "and you'll be
2 doing this".

3 Q And who told you that?

4 A That came from the Federal Justice Department.

03:18 5 Q And what did they tell you you would be doing at
6 the reference?

7 A It would be our role to present evidence to
8 cross-examine witnesses.

9 Q And to defend the conviction of David Milgaard?

03:18 10 A Yes, essentially to try the evidence that was
11 being put forward to suggest that the conviction
12 was wrongful.

13 Q And so just so we're clear, to be the adversary of
14 David Milgaard before the Supreme Court?

03:18 15 A Yes, that's correct.

16 Q And that's a role that the Attorney General then
17 undertook?

18 A Yes.

19 Q And in the course of participating in the
03:18 20 reference, it's my understanding that the Attorney
21 General would have received a significant volume
22 of documents related to the case; is that fair?

23 A Yes, a great deal of material.

24 Q And I'll cover this in more detail later, but I
03:18 25 think in the course when we go through some of the



1 questions, when you say we got information later,
2 is it likely that the information came as a result
3 of the reference process?

4 A Yes, that's correct.

03:18 5 Q And so that's maybe where you think Saskatchewan
6 Justice would have gotten a copy of this for the
7 first time?

8 A I think so, yes. I'm certain -- I don't have a
9 recollection of reading it before the reference
03:19 10 was ordered.

11 Q And there does not appear to -- and I could not
12 find any, and I may be wrong on this -- I couldn't
13 find any record of the Federal Justice minister or
14 the Department of Justice sending a letter to
03:19 15 Saskatchewan saying "here's the application,
16 here's what we're doing". Does that accord with
17 your recollection, that there wasn't a formal
18 notification with "here's a copy of it and we'll
19 keep you advised"?

03:19 20 A Umm, my recollection is that there was some, there
21 was a few telephone conversations between Ellen
22 Gunn and somebody in Federal Justice, perhaps
23 Brian Barrington-Foote who was the Deputy Minister
24 at the time in Saskatchewan, with respect to the
03:19 25 scope of the reference.



1 Q Oh, I'm --

2 A We --

3 Q Oh, I'm sorry, I'm back on, sorry, December 28th,
4 1988?

03:20 5 A Oh. No, there was -- I think we got information
6 or were simply told that "this has come in" --

7 Q Okay.

8 A -- at some point.

9 Q That was my point, is that when the application
03:20 10 was made is it correct to say that -- or you tell
11 me what role, if any, did Saskatchewan Justice
12 play in the --

13 A Well --

14 Q -- first application?

03:20 15 A Well, I mean, the usual role is to -- we're
16 informed that this has happened, that they will at
17 some point want to see our files, 'gather them
18 up'.

19 Q And then, apart from that, did Saskatchewan
03:20 20 Justice play any role in the work that the Federal
21 Minister and the federal Justice Department did in
22 reviewing and considering the application?

23 A We supplied the files we had, and that was it.

24 Q Now did you -- and when I say "you" I'm, and I
03:21 25 should have put this on the record, when I say



1 "you" I'm usually referring to Saskatchewan
2 Justice or the province -- did you understand that
3 you were, that the province or Saskatchewan
4 Justice was effectively a subject or a target of
03:21 5 the investigation or the application?

6 A I don't think that was part of the original
7 application, I -- in the sense that I don't think
8 there were initially complaints about corruption
9 or coverup or --

03:21 10 Q Right.

11 A -- conspiracy, but it evolved to people doing
12 that.

13 Q Yeah. Let me just touch on a couple of points,
14 and we've talked about these, the Deborah Hall --
03:21 15 I think the application was based initially on the
16 Deborah Hall affidavit and the Ferris Report; is
17 that correct?

18 A That's correct.

19 Q And the Deborah Hall affidavit was essentially
03:21 20 that Melnyk and Lapchuk lied at trial?

21 A Yes.

22 Q And I suppose that might be viewed as did,
23 somehow, the prosecutor and/or the police who
24 investigated this matter, were they involved in
03:22 25 putting forward false evidence; would that be in



1 that sense, when I say 'a target of the
2 investigation'?

3 A Well I suppose you could spin it into that. That
4 certainly wasn't my understanding at that time.
03:22 5 It was that Melnyk and Lapchuk lied. I didn't
6 read, into that, any suggestion that either the
7 police or the prosecutor were a party to that.

8 Q Okay. So is it fair to say that later on, in the
9 course of the first application, that more
03:22 10 specific allegations were made with respect to the
11 conduct of Saskatchewan Justice personnel?

12 A Yes.

13 Q And, as well, misconduct of police; is that
14 correct?

03:22 15 A Yes.

16 Q Now would you agree -- I think you told us this --
17 but if a remedy were granted by the Federal
18 Minister that would necessarily engage
19 Saskatchewan Justice in one of two ways, correct,
03:23 20 a trial and/or an appeal?

21 A Well, a trial or an appeal. I suppose,
22 theoretically, there is also the possibility that
23 the Federal Minister can give a conditional or
24 absolute pardon, --

03:23 25 Q Right.



1 A -- in which case we have nothing to do.

2 Q Fair enough. But if two of the three remedies
3 under 690 as it then existed, I think one was a
4 reference to a Court for advice, but the other two
03:23 5 grounds were to have a new trial and, secondly, to
6 allow the applicant to go back to the Court of
7 Appeal?

8 A Court of Appeal, right.

9 Q And, in both of those two situations, Saskatchewan
03:23 10 Justice would be re-engaged in the Court process;
11 correct?

12 A That's correct.

13 Q So in other words, if the conviction is set aside,
14 you would be called upon to prosecute again or
03:23 15 take whatever steps deemed appropriate?

16 A Yes.

17 Q Do you recall, I think you told us earlier that
18 Ellen Gunn, once this application was received,
19 asked you to review the matter; is that right?
03:24 20 I'm sorry if that -- or to review the file?

21 A Review the file, review our file, yes.

22 Q And so that would have been done at some point
23 after this application was received, --

24 A Oh yes.

03:24 25 Q -- after the federal minister -- I'm sorry?



1 A I'm thinking 1989, sometime then.

2 Q And just so that I'm clear on this, the
3 Saskatchewan Justice would have been made aware by
4 a phone call from Federal Justice that "an
03:24 5 application has been received and we're
6 investigating"?

7 A A phone call or letter. If you haven't found a
8 letter then I'm guessing it was a phone call.

9 Q Yeah, I haven't been able to locate it, I may have
03:24 10 missed it, but I don't think there is a formal
11 letter. And so as far as taking this application,
12 let's talk about 1989 before you are involved in
13 the Supreme Court reference, let's just focus on
14 the time period before Kim Campbell's February
03:25 15 27th, '91 decision; did you sit down and go
16 through this application in detail and study it
17 and do anything with it?

18 A No.

19 Q In fact I think your evidence is you probably
03:25 20 didn't even have it; is that --

21 A I don't recall seeing it at that point.

22 Q Would you have been aware, generally, about what
23 the grounds were in the application? Are you able
24 to shed any light as to when and how you would
03:25 25 have been made aware of that?



1 A I can recall that, when I was reviewing the
2 transcript of the trial, I was simply asked to
3 look at it and see whether there was anything that
4 jumped out at me. Umm, I don't recall knowing the
03:25 5 Deborah Hall allegations or the Rex Ferris report
6 at that point.

7 Q Do you know on what source, was it through the
8 media you became aware of that, or was it from
9 federal --

03:26 10 A I -- my recollection is that I learned those
11 details through the news media.

12 Q And I'll take you through some of those. You said
13 you were asked to review the transcript, what, can
14 you tell us what was your reaction having read
03:26 15 through the transcript; did anything jump out at
16 you?

17 A Well the Nichol John process, the 9(2) *Canada*
18 *Evidence Act* process, at that point I understood
19 the significance of it and the fact that there was
03:26 20 an error made and I, to be honest with you, was a
21 little curious that the Court of Appeal didn't see
22 a whole lot of problem with it because I -- maybe
23 it was because I was there and I heard what she
24 was saying and what was being read to her, it just
03:26 25 seemed to me to have a lot more significance than



1 what the Court of Appeal thought it had.

2 Q And "significance" in what sense; that it was
3 damaging to Mr. Milgaard's position?

4 A It was -- it was probably damaging, yes.

03:27 5 Q And did you have concerns that -- and I think we
6 have been through this -- the Court of Appeal
7 identified that the judge did not follow the
8 correct procedure under Section 9(2); correct?

9 A Yes.

03:27 10 Q And in particular, and we heard evidence from Mr.
11 Tallis on this, that he was deprived of the
12 opportunity to have a voir dire to test the
13 circumstances under which Nichol John gave the
14 statement; is that what you are referring to?

03:27 15 A Yes.

16 Q And what Mr. Tallis told us is that if the jury
17 had been excluded, and the proper procedure
18 followed, he would have questioned Nichol John in
19 a different manner than he did about the
03:27 20 circumstances of the statement because the jury
21 wouldn't be present, and that he would also seek
22 to have Inspector Roberts and Mr. Mackie and
23 perhaps other police officers testify about how it
24 was that her statement came to be, and was similar
03:28 25 to the concern -- or did you -- what was your



1 concern in what the Court of Appeal seemed to have
2 minimized?

3 A Well, mostly I -- it goes back, I suppose, to my
4 having been there to hear the evidence originally.
03:28 5 My concern was they ended up hearing her original
6 statement, which she did not adopt, and they
7 shouldn't have heard that. That, again, my
8 impression when I heard it was, well, she's lying
9 now to cover up for her friend.

03:28 10 Q When you say "they shouldn't have heard that" why
11 do you say that?

12 A Well in my view, if the procedure had been done
13 properly, it would have been done in a voir dire
14 and, regardless of what Justice Tallis would or
03:28 15 would not have been able to cross-examine on or
16 call evidence on, the statement that she gave,
17 that's very damaging in terms of what she says to
18 David Milgaard's interest, wouldn't have gone
19 before the jury.

03:29 20 Q And that's --

21 A It would have been her "I don't remember, I
22 forget" that's left before the jury.

23 Q And so are you, in a voir dire, are you assuming
24 that the trial judge would have then said "I'm not
03:29 25 going to let you cross-examine under 9(1) with



1 this statement"? I'm wondering what would have
2 kept it out?

3 A Well if she's, if she's not prepared to adopt what
4 she says, I'm -- my impression of the law at that
03:29 5 point was the judge probably wouldn't have allowed
6 that because all she was saying, as I recall, was
7 that she recalled talking to the police but she
8 didn't recall what she said.

9 Q Okay. So, again, your reaction when you read
03:29 10 through the transcript, and I think you said that
11 was informed by your recollection of being there,
12 is that number one an error had been made at trial
13 which the Court of Appeal identified, --

14 A Yup.

03:29 15 Q -- correct; and, secondly, that the jury heard
16 Nichol John's statement, and your view was that,
17 had the law been properly applied, they should not
18 have heard the statement --

19 A That's correct.

03:30 20 Q -- from --

21 COMMISSIONER MacCALLUM: Is that still your
22 view, sir?

23 A Which, that it shouldn't have been heard?

24 COMMISSIONER MacCALLUM: Yes?

03:30 25 A Umm, yes, I -- it shouldn't, it shouldn't have



1 gone before the jury.

2 COMMISSIONER MacCALLUM: Not even under
3 Section 9 subsection (1)?

4 A Well, now maybe I have a peculiar view of this,
03:30 5 but -- and maybe it's coloured by this case,
6 because I don't think you can tell a jury -- well,
7 you can tell a jury to ignore it, but I don't
8 think it's going to happen. Quite frankly, if --

9 COMMISSIONER MacCALLUM: Sorry, that's what
03:30 10 Mr. Yanko said too in the *StarPhoenix* soon after
11 the trial.

12 A Yeah, well, and I suspect that's right.

13 COMMISSIONER MacCALLUM: I mean to say,
14 sir, that's the law, though, and even at common
03:30 15 law the -- there could be inquiry into one's --
16 by way of cross-examination into an adverse
17 witness, and it's certainly a risk, but I suppose
18 you could say that there is a public interest
19 which supercedes it because it's in the public
03:31 20 interest not to allow witnesses to turn against
21 the Crown because of the danger of interference
22 with them by interested parties, bribery, threats
23 and so on?

24 A Well, and certainly with the new rules with
03:31 25 respect to hearsay, --



1 COMMISSIONER MacCALLUM: Yes.

2 A -- and KGB, and cases like that, I think you
3 probably are in a better position to have her say
4 "I don't remember this", frankly, --

03:31 5 COMMISSIONER MacCALLUM: Well, yes.

6 A -- providing it's properly taken, than you were
7 back then.

8 COMMISSIONER MacCALLUM: That's certainly
9 true. But of course the jury was warned by the
03:31 10 judge and, I think, Mr. Caldwell as to the proper
11 use of such declarations, and are we not being
12 paternalistic when we say the jury couldn't
13 ignore it? I mean the judges are trusted to
14 disabuse their minds of inadmissible evidence
03:32 15 when they hear voir dieres and then sit on the
16 case proper as a judge alone?

17 A Well --

18 COMMISSIONER MacCALLUM: It strikes me that
19 we should either have trust in the jury system or
03:32 20 get rid of it. I'm sorry to take this discussion
21 this far afield.

22 A Well, is that either/or, because you'll get my
23 view on that too.

24 COMMISSIONER MacCALLUM: Well, please do.

03:32 25 MR. HODSON: We're all lawyers, Mr. Brown.



1 COMMISSIONER MacCALLUM: That's --

2 A Just to continue with respect to the -- when I was
3 going through the transcript, while that part
4 raised some concerns, for me the evidence of
03:32 5 Melnyk and Lapchuk was incredibly damaging to
6 David Milgaard and it seemed to me to be that was
7 the steamroller. Whatever problems there may have
8 been at that point, and perhaps this is a
9 prosecutor's view of admissions by the accused,
03:33 10 that would have been very powerful in front of a
11 jury.

12 BY MR. HODSON:

13 Q And that being because they are his words and his
14 actions?

03:33 15 A His words, his actions.

16 COMMISSIONER MacCALLUM: But you are not
17 suggesting there was anything wrong with that?

18 A No, no, no, no, no, oh no.

19 BY MR. HODSON:

03:33 20 Q But again, when you reviewed the transcript, I
21 think two things stood out; one was the Nichol
22 John and how her statement was dealt with,
23 correct?

24 A Yeah.

03:33 25 Q And the second was the significance of the



1 evidence of Melnyk and Lapchuk; is that correct?

2 A That's correct.

3 Q Was there anything else that stood out, when you
4 reviewed it, as being significant or that caused
03:33 5 you any concern?

6 A I can't think of anything, no.

7 Q Okay. Just back on the 9(2) and the Nichol John
8 evidence, you had told us earlier that when you
9 were present in Court you observed her evidence,
03:33 10 and I think you told us that you, in your mind,
11 concluded that -- or your observation was that she
12 was lying when she said she didn't remember
13 because she was trying to help a friend; is that
14 right?

03:34 15 A That's right.

16 Q And did that inform your view when you looked at
17 the transcript 20 years later and looked at this
18 ruling and said "how might this have affected the
19 trial"?

03:34 20 A I suspect probably it did because, as I said, that
21 was a very emotional sort of appearance in Court,
22 there was crying and there was yelling and there
23 was all kinds of stuff going on, and it's not
24 something you readily forget.

03:34 25 Q And I take it, in your case, it's something that's



1 stuck with you in later years?

2 A Yes, absolutely.

3 Q Just on this idea of the 9(2) or the sub -- or
4 Section 9 and Nichol John's evidence, you
03:34 5 indicated the jury shouldn't have heard it. Would
6 that be because the circumstances under which the
7 statement were given ought to have been sufficient
8 to keep it out, in other words that her testimony
9 at the time before the Court under oath as to the
03:35 10 circumstances of the statement were not sufficient
11 to have it used to cross-examine her?

12 A My view is that that practice is a back-door way
13 to get in that evidence, and as the Commissioner
14 has pointed out, juries can be instructed to
03:35 15 ignore it but I have, frankly, far more trust in a
16 trial judge being able to ignore it than I do a
17 jury being able to ignore it.

18 Q And what about --

19 A It's just, it's just too powerful, and in this
03:35 20 circumstance it was extremely powerful.

21 Q And do you draw a distinction between a case where
22 a witness -- let's talk about inconsistent
23 statements -- where, in the case of Nichol John,
24 it was an initial statement that said "I witnessed
03:35 25 the murder", and then at trial "I don't remember



1 what happened", so the inconsistency is that she
2 remembered in -- on May 24th, 1969, she didn't
3 remember in January 1970; is that fair?

4 A Yes.

03:36 5 Q And in other cases, I think, that have commented
6 on Section 9(2), it's a case where a witness will
7 say initially "I saw A commit the crime" and then
8 at trial say "I saw B commit the crime", so in
9 other words the inconsistency affects someone
03:36 10 else. And I'm wondering if, just on the Nichol
11 John situation, where the only -- let me put it to
12 you this way: If her earlier statement is being
13 put to her to attack her credibility, if the jury
14 accepts that and says "okay, she's lying when she
03:36 15 says she forgets", the only other piece of
16 evidence before the Court, subject to the judge's
17 instructions about what she might remember, is the
18 statement; correct?

19 A That's right.

03:37 20 Q And is that a risk then, that if we compare that
21 to the second example where you are going to a
22 witness and trying to discredit the new evidence
23 of B you are trying to undo the damage to B by
24 saying "before you said A", that there's not the
03:37 25 same jeopardy to an accused?



1 A Well yeah, certainly if the witness has changed
2 his mind and is now giving a different story
3 implicating a different person, the jeopardy to
4 the accused is different.

03:37 5 In the Nichol John situation
6 you were going to get before the Court a statement
7 directly implicating David Milgaard that she could
8 not be cross-examined on because, of course, she
9 didn't remember anything, and that, it seems to
03:38 10 me, was very prejudicial.

11 Q And so when you looked at this in 1989, if you had
12 looked at that matter before the Court of Appeal
13 had ruled on it, is that something you would have
14 said, "lookit, this is something that jumps out as
03:38 15 being a problem"?

16 A Umm, absent, if the Melnyk and Lapchuk evidence
17 had not been there it would have had, in my view,
18 more consequence than it did.

19 Q And what did the Melnyk/Lapchuk evidence do, in
03:38 20 your mind, to the Nichol John situation?

21 A It's the evidence from David Milgaard's own mouth
22 that he raped and murdered this woman.

23 Q And so that would mean --

24 A It pretty much cancels out the impact of the
03:38 25 Nichol John evidence.



1 Q And so then, when you looked at what the Court of
2 Appeal did with Section 9(2), I think what you
3 said is they recognized that the trial judge
4 didn't apply it properly but said it was not a
03:39 5 reviewable -- or whatever the language was -- it
6 was not sufficient to give rise to --

7 A There was no substantial miscarriage of justice.

8 Q Yes. And was that something you had concerns
9 about or --

03:39 10 A No, after reading the Melnyk and Lapchuk evidence,
11 I would have come to that conclusion too.

12 Q If we can go to 000008. And this is of the
13 application, and this is from what was filed with
14 the Federal Minister December 1988, and it is
03:39 15 written by Mr. Wolch:

16 "It is submitted that the
17 strongest pieces of evidence tying David
18 Milgaard to the offence was the evidence
19 of the witnesses Melnyk and Lapchuk,
03:39 20 ...";

21 would you agree with that statement?

22 A Yes.

23 Q And you would share that view, that that was the
24 most prejudicial or incriminating evidence, based
03:39 25 on your review?



1 A Well that and, even at its worst, I believe Ron
2 Wilson's evidence put them in the area. Those two
3 pieces of evidence were the most damaging.

4 Q And then this sentence goes on to say:

03:40 5 "... and the evidence of the forensic
6 expert which purported to tie David
7 Milgaard to the offence by showing a
8 person with David Milgaard's blood type
9 had been responsible for the crime."

03:40 10 Can you tell us, when you went through the
11 transcript, what was your understanding or take
12 about the significance, if any, of the frozen
13 semen and the blood secretor issue?

14 A Well it struck me as presented in a rather
03:40 15 confusing fashion but, at the end of the day, I
16 don't think I read that as being particularly
17 damaging to David Milgaard.

18 Q And why is that?

19 A Well, partly because it was presented in a muddled
03:40 20 kind of fashion, but if I recall correctly I
21 thought Justice Tallis dealt with it.

22 Q Mr. Tallis' evidence before the Commission was to
23 the effect that this frozen semen was, in his
24 view, exculpatory, and evidence that he sought,
03:41 25 and in fact his address to the jury suggested --



1 A Yes.

2 Q -- that tended to exculpate Mr. Milgaard; did you
3 have that sense in reading it?

4 A At this point all I can really say is my
03:41 5 recollection is that it didn't hurt David
6 Milgaard.

7 Q Okay. Now I think we've heard evidence that
8 the -- Mr. Tallis' closing address to the jury was
9 not transcribed until 1992, so that when you
03:41 10 reviewed --

11 A That's right, yeah.

12 Q -- the record you would not have had the benefit
13 of what he said; --

14 A That's correct.

03:41 15 Q -- is that correct? If we can just go to the next
16 page of this application, and I appreciate your
17 evidence, Mr. Brown, that you don't think you saw
18 this until the Supreme Court reference, but the
19 two grounds put forward in the application:

03:41 20 "(1) Debra Hall, who was not called at
21 trial, has provided an affidavit
22 contradicting the evidence of Melnyk and
23 Lapchuk."

24 And is that something that you, at some point in
03:42 25 1989 or 1990, became aware was one of the grounds



1 put forward by David Milgaard?

2 A At some point I recall something out of the news
3 media about a, the Deborah Hall affidavit
4 exonerating David Milgaard or proving witness
03:42 5 lied, or something like that.

6 Q And based on your read of the transcript, if
7 Deborah Hall's evidence was accepted as being
8 truthful, that being that Craig Melnyk and George
9 Lapchuk lied about the motel room incident, and in
03:42 10 particular lied when they said David Milgaard
11 re-enacted the crime and lied when they said he
12 admitted killing or stabbing her, or whatever
13 words were attributed to her, if that had been
14 established as fact can you tell us, again from
03:42 15 Saskatchewan Justice's perspective, is that
16 something that would have caused you concern
17 regarding the safety of the verdict?

18 A Yes, absolutely.

19 Q And, secondly, the ground was:

03:43 20 "Advances in scientific technology have
21 allowed the applicant to discredit the
22 forensic evidence called at his trial
23 and to provide evidence that exculpates
24 him as the perpetrator of the crime."

03:43 25 Was it your sense, in reading the transcript, as



1 to whether or not the frozen semen was presented
2 at trial as linking David Milgaard to the crime,
3 or what was your sense as to whether it
4 incriminated him, I think you said earlier you
03:43 5 didn't think it did him any harm?

6 A Yeah. My sense was, as I say, all I can recall is
7 I don't think the forensic evidence did -- my
8 recollection is I don't think it did him any harm.

9 Q And did you become aware then, at some point in
03:43 10 1989, that I guess the second ground was that,
11 based on a report by Dr. Ferris, that he was
12 saying forensic evidence proved that David
13 Milgaard was innocent?

14 A I'm not sure when I became aware of that specific
03:44 15 statement. Certainly, there was a statement or
16 something in the news media that a forensic
17 scientist, Rex Ferris, had delivered a report
18 indicating that David Milgaard was innocent.

19 Q And do you recall at what point you would have
03:44 20 reviewed the Dr. Ferris report or looked into that
21 in any detail?

22 A Well, again, I suspect probably not much before
23 the reference because I don't recall seeing that
24 information before the reference was made. Now it
03:44 25 may have been there but I just -- I don't recall



1 it.

2 Q If we can go to 000043, please. And this is a
3 page from Deborah Hall's affidavit that we have
4 been through, this is part of the application, and
03:45 5 there is a couple sections here where she sets out
6 her version, at this time, of what Mr. Melnyk and
7 Mr. Lapchuk said. And she says I remember him
8 saying:

9 "... 'oh yeah right' ...",

03:45 10 and then further on down describes, or says that:

11 "Craig Melnyk and George

12 Lapchuk both lied when they stated in

13 their evidence at trial that David

14 Milgaard re-enacted the murder ..."

03:45 15 And again, even though you didn't get a copy of
16 the application until much later, did you,
17 Saskatchewan Justice, become aware that, at some
18 point before Kim Campbell rendered her decision
19 on February 27th, 1991, did you become aware that
03:46 20 one of the grounds was that Deborah Hall was
21 saying Melnyk and Lapchuk lied at trial about the
22 re-enactment and the admission?

23 A Oh yes, it seems to me the Ferris stuff and the
24 Deborah Hall stuff was the basis of the original
03:46 25 application, and the news media were trumpeting



1 that fairly early on, so we would have been aware
2 of it well before February of '91.

3 Q Through the media?

4 A Yes.

03:46 5 Q And would there be any reason, once you became
6 aware of this generally, about these allegations,
7 to do anything on your own, I mean to do your own
8 investigation while the federal application was
9 pending?

03:46 10 A At that point the Federal Government was looking
11 into these. If we had thought about doing a
12 separate investigation I expect we would have
13 concluded there isn't much more we can do other
14 than get in the way of whatever the Federal
03:47 15 Government is doing.

16 Q And so are you telling us that, notwithstanding
17 the fact that these allegations are made that have
18 a bearing on provincial interests, the
19 administration of criminal justice, that you
03:47 20 allowed the Federal Justice department to do their
21 work under Section 690; --

22 A Yes.

23 Q -- is that fair?

24 A Yes, that's correct.

03:47 25 Q Now would you have become aware, and you've



1 mentioned it a couple times, that in late 1989 and
2 certainly into 1990 and onward David Milgaard's
3 case started to attract significant media
4 attention?

03:47 5 A Oh yes.

6 Q And did Saskatchewan Justice formally monitor and
7 review what was reported in the media about David
8 Milgaard's case around this time?

9 A Umm, yes, the -- Ellen Gunn, who was the Director,
03:47 10 was involved in doing some of that. We also had a
11 press clipping service that supplied us, on a
12 daily basis, with whatever news stories there were
13 concerning Justice or Justice-related matters, and
14 certainly the Milgaard material would have been a
03:48 15 big part of that.

16 Q And would Saskatchewan Justice have had an
17 interest, then, in reviewing what was being
18 reported in the media about the *David Milgaard*
19 case?

03:48 20 A We were certainly keeping track of it at that
21 point, yes.

22 Q And why?

23 A Umm, it simply relates to our business, our
24 people, and the fact that sooner or later, if
03:48 25 there is something to this, the Federal Government



1 is going to be coming back to us for something.

2 Q And did you have concerns about allegations being
3 made in the media about the Crown or Saskatchewan
4 Justice's involvement in the original prosecution;
03:48 5 would that have been a matter of concern?

6 A Umm, that wasn't initially involved, I don't
7 think. My sense is that the issue of a prosecutor
8 covering up or failing to disclose, or what have
9 you, was I wouldn't say exclusively after February
03:49 10 of '91 but it wasn't -- it wasn't '88-'89 kind of
11 thing, it was --

12 Q A bit later?

13 A -- as things sort of moved on and the Milgaards
14 weren't getting what they wanted.

03:49 15 Q And so, again, I think -- and I'll take you
16 through some of the media articles -- I think
17 primarily late '89 and starting into 1990, and
18 just to give you a benchmark, I think it was May
19 of 1990 that information came to light about Larry
03:49 20 Fisher, Albert Cadrain, Ron Wilson, in the months
21 that followed, so around that time frame would
22 Saskatchewan Justice have been monitoring and
23 reviewing media articles about the *David Milgaard*
24 case?

03:50 25 A Oh yes.



1 Q And would the reports in the media be information
2 that was received by Saskatchewan Justice at the
3 time that would have been information that would
4 form part of the information that Saskatchewan
03:50 5 Justice had when it considered whether or not to
6 re-open the investigation into Gail Miller's
7 death?

8 A Yes.

9 Q And generally speaking, would it be correct to say
03:50 10 that if we look at what was alleged in the media,
11 1989, 1990, 1991, up until your involvement in the
12 reference case, which came about I think in
13 November of 1991, would you have investigated or
14 followed up to try and get information to see what
03:51 15 the significance or the merit of what was in the
16 media reports, and I'm just talking generally? I
17 plan on going through these with you, but --

18 A Yes. I know that Ellen Gunn was having
19 conversations with some of the federal officials,
03:51 20 I had a few conversations with Eugene Williams.
21 They would generally advise us sort of where they
22 were in terms of this application because of
23 course one of the allegations was they were
24 dragging their feet and weren't investigating and
03:51 25 they would, without going into a lot of detail,



1 say that, you know, we've done this, we've looked
2 at that, there doesn't appear to be anything to
3 this.

4 Q And so are you telling us that to the extent that
03:52 5 there -- and there were some allegations that were
6 pretty significant in the media throughout the
7 first application; is that fair?

8 A That's right.

9 Q And so there would have been from time to time
03:52 10 discussions with federal officials, are you
11 telling us, to get some comfort to the province
12 that what is alleged in the media may not be
13 accurate?

14 A I think that was the byproduct of the
03:52 15 conversations we had with the Federal Justice
16 people. Our principal interest, or at least my
17 principal interest when I spoke to Eugene Williams
18 was basically knowing where this was, getting some
19 comfort that in fact they were actively
03:52 20 investigating and the process was in hand.

21 Q And so when you became involved in the Supreme
22 Court reference proceedings starting in November,
23 1991, did you personally, and I guess Saskatchewan
24 Justice as well through Mr. Neufeld and others,
03:52 25 become -- or gain more information that allowed



1 you to assess what had been reported previously in
2 the media?

3 A Oh, yes, we essentially got most of the contents
4 of their investigative file.

03:53 5 Q The Federal Justice?

6 A That's right.

7 Q So in other words, in November, December, 1991 and
8 into 1992, was Saskatchewan Justice able to then,
9 through the information it received in the
03:53 10 reference, do its own review or investigation to
11 determine whether what had been alleged in the
12 media was accurate?

13 A Yes.

14 Q And again I'll touch on this in more detail later,
03:53 15 but presumably then in April of 1992 when you made
16 the, the province made the decision not to re-open
17 the investigation into Gail Miller's death, by
18 that time Saskatchewan Justice would have had more
19 information than it had in 1990 and 1991 about
03:53 20 those allegations; is that fair?

21 A Oh, absolutely, yes.

22 Q And that in 1992, April, 1992, when Saskatchewan
23 Justice made its decision, the information it had
24 was not only what was in the media, but what had
03:54 25 been investigated by others and what was learned



1 at the Supreme Court?

2 A That's right.

3 Q If we can talk, I want to now just talk about the
4 first application, so 1989, 1990 up until February
03:54 5 28th, 1991. Do you recall, did Saskatchewan
6 Justice have any concerns with the fact that the
7 media, either that Mr. Milgaard's supporters were
8 putting forward the grounds of his application or
9 his allegations in the media, did you have any
03:54 10 concern with that or the fact that the media was
11 reporting on it?

12 A Well, you give the news media a good story, of
13 course they are going to report on it. My concern
14 with the way they were presenting this was my
03:55 15 experience with good defence counsel was if they
16 had something that was real gold, they brought it
17 to you, they didn't take it to the news media and
18 try and spin it and give them their view of, give
19 the news media their view of what it amounted to,
03:55 20 they would bring it to us directly and let us deal
21 with it, let us discover that in fact it's genuine
22 and it's good, so that, frankly, raised some
23 concerns immediately.

24 Second, if you read those
03:55 25 media reports, what they tell you is "Mr. Asper



1 says, "Mrs. Milgaard says," there's nothing in
2 there in terms of, or very little in terms of real
3 investigative reporting, nobody going out to
4 confirm anything and, frankly, my view of that is
03:56 5 it's not really worth a whole lot of value.

6 Q You said, your earlier words were that it
7 caused -- the fact that it was in the media, and I
8 believe not brought to, you said to your attention
9 or to the authorities, that that caused you a
03:56 10 concern initially. Can you elaborate on that?
11 What do you mean?

12 A Well, it makes me suspicious. If you are not
13 going to bring it to me directly and let me see
14 exactly what you've got, it makes me suspicious
03:56 15 that maybe you don't have what you are claiming to
16 have.

17 Q Now, at this point, though, when you say brought
18 it to you, Saskatchewan Justice wasn't directly
19 involved in this process?

03:56 20 A That's correct.

21 Q And are you saying that if it was, in your words,
22 gold, you would have thought that they would have
23 brought it to Saskatchewan Justice in any event,
24 notwithstanding the fact that Federal Justice was
03:56 25 investigating it?



1 A Well, yes. I mean, at the end of the day they
2 know that if they are successful it's coming back
3 to us anyway, and even with respect to the federal
4 government, as I understand it, the process tended
03:57 5 to be news conference first, federal government
6 second, and that's -- again, that causes me some
7 concern.

8 Q And concern in what way, about --

9 A Well, yeah, if what they've got is substantial
03:57 10 information that's going to be of real assistance
11 to their case, you don't take it to the news media
12 first, you take it to the people who can do you
13 the most good.

14 Q Being whom?

03:57 15 A Being the Federal Minister's officials.

16 Q So are you telling us that that, that the manner
17 in which they were providing information not only
18 to you, but to Federal Justice, caused you a
19 concern?

03:57 20 A Yes.

21 Q And what if anything did it cause Saskatchewan
22 Justice to think about the credibility and
23 reliability of what was being reported in the
24 media?

03:57 25 A Well, it seemed to be certainly sensational and



1 quoted in, or given to the news media in the form
2 of sensational headlines as opposed to simply
3 giving them the straight goods and saying here's,
4 you know, here's the document, this is what she
03:58 5 said, that and, as it turned out, it seemed like
6 they were trickling the information out, you know,
7 the first thing they gave out was the Deborah Hall
8 and the Rex Ferris stuff, then they would trickle
9 out a little more information, maybe Wilson or
03:58 10 whatever it was, and that seemed to me to be more
11 aimed at a publicity game than really providing us
12 with information.

13 COMMISSIONER MacCALLUM: When you say they,
14 you are referring to the Milgaard group?

03:59 15 A The Milgaard group, yes.

16 COMMISSIONER MacCALLUM: Okay.

17 A Than really providing us with information upon
18 which you could sort of sit down and review this
19 conviction properly.

03:59 20 BY MR. HODSON:

21 Q And did your, these observations that you are
22 telling us about, did they influence Saskatchewan
23 Justice's review of the information later on and,
24 in particular, in April of 1992 when you
03:59 25 considered, based on the information you had,



1 whether the investigation into Gail Miller's death
2 should have been re-opened?

3 A Well, certainly by then we had seen all of this
4 stuff trotted before the Supreme Court, it had
03:59 5 been fully explored and exposed, and by then, to
6 be perfectly honest with you, I would think the
7 Milgaard camp didn't have a lot of credibility
8 left with us and that is bound to have some impact
9 on how you deal with what they are saying and what
04:00 10 we're going to do. I think though, frankly, that
11 the decision not to re-open was based more on what
12 we learned at the Supreme Court, the lack of
13 substance to their allegations, and the Supreme
14 Court decision than the nonsense that went on
04:00 15 ahead of that.

16 Q And what are you referring to by nonsense?

17 A The news media campaign that was waged by the
18 Milgaard camp, an effective campaign I would say,
19 but not one that for our purposes instills a lot
04:00 20 of trust.

21 Q And what do you mean, effective in what way?

22 A Forced the minister's hand.

23 Q You are talking the Federal Minister?

24 A The Federal Minister's hand when there wasn't
04:00 25 going to be any remedy granted.



1 Q And so you are talking about the second
2 application and the reference to the Supreme
3 Court?

4 A That's right.

04:00 5 Q And so it was your view that the media campaign
6 may have been a significant factor, if not the
7 factor, that resulted in the Supreme Court
8 reference being held?

9 A Yes.

04:01 10 Q And that in rise gave at least a remedy in the
11 sense that Mr. Milgaard's conviction was set
12 aside?

13 A Well, yes, he ended up free.

14 Q However, I take it your view of what the Supreme
04:01 15 Court determined, that what they found in their
16 decision, I believe we see in some documents, your
17 view that their conclusions weren't favourable to
18 Mr. Milgaard; is that fair?

19 A That's fair, yes.

04:01 20 Q And when you said the media campaign was not, I
21 can't recall your words, but something to the
22 effect not suitable or good for your purposes,
23 what did you mean by that?

24 A Well, when people are arguing their case in the
04:01 25 news media, it just doesn't instill confidence in



1 Justice Department officials that they've got a
2 particularly good case, that the information
3 they've got is solid and substantial. If they had
4 that, as I say, our experience is you get that
04:02 5 directly, you don't have to pull it out of the
6 newspaper.

7 Q And do you think that coloured or prejudiced the
8 view Saskatchewan Justice took of the information
9 that was provided by and on behalf of David
04:02 10 Milgaard?

11 A Oh, I think that's probably true. We certainly
12 wouldn't accept anything we would have read in the
13 newspapers or heard on television without
14 substantially checking it out.

04:02 15 Q Did it cause you -- are you telling us it caused
16 you to be more suspicious and doubtful of
17 information provided by them because of your
18 experience?

19 A Certainly as things progressed and the campaign
04:02 20 became sharper and directed at people and stuff
21 like that, yes, it did, because certainly we had
22 all worked with Serge Kujawa and Bobs Caldwell, we
23 knew them to be the types who would not get
24 themselves involved in cover-ups and conspiracies,
04:03 25 we worked with the Saskatoon Police Service, we



1 didn't believe the things that were being said
2 about them.

3 Q And what effect, if any, did that have on how you
4 looked at other information provided by their
04:03 5 group to you?

6 A The honest answer is I think that prejudices your
7 view and it's hard to get past that sometimes.

8 Q If we could go to 025909, and I won't take you
9 through all of the media articles, Mr. Brown, I
04:03 10 just propose to touch on some of the key ones.
11 This is August 5, 1989, it's a report in the
12 *Saturday Free Press* by a fellow named Dan Lett.
13 Is that a writer --

14 COMMISSIONER MacCALLUM: I'm sorry, I can't
04:04 15 read that number.

16 BY MR. HODSON:

17 Q Oh, 025909, and I believe this is the first
18 article, that there may have been one back in
19 1980, but I think this is the first article in
04:04 20 1989. Did you become aware of who Dan Lett was,
21 was he someone who wrote about the matters
22 frequently?

23 A I eventually became aware of who Dan Lett was. He
24 appeared to have some connection with David Asper
04:04 25 for certain in Winnipeg. Other than that, I



1 didn't know him from anybody.

2 Q And this is a story August 5, 1989, and go to the
3 next page, and we have been through this passage
4 with other witnesses, but this is a -- I'm not
04:04 5 sure what the correct term is, byline or
6 sub-headline, *Proves innocence*:

7 "According to Ferris's report, in which
8 he re-examined extensively the trial
9 transcripts and physical evidence, the
04:05 10 semen sample was incorrectly analysed by
11 RCMP pathologists and in fact proves
12 Milgaard's innocence."

13 And again, is this, I believe this is an article
14 that came from government records. Was this
04:05 15 something you would have been familiar with?

16 A I might have read that. I don't know.

17 Q And again, is it fair to say that if it was part
18 of the Government of Saskatchewan's media
19 clippings, that it would be something that would
04:05 20 be read by someone else?

21 A Somebody would have read it, yes. Very likely
22 Ellen Gunn, if not me.

23 Q And would you agree that if what is reported here
24 is true, that if Ferris' report does prove David
04:05 25 Milgaard's innocence, that that would be something



1 of significance to Saskatchewan Justice regardless
2 of whether there's an ongoing Section 690 review?

3 A Yes, that would be the case.

4 Q And are you able to tell us whether or not

04:06 5 Saskatchewan Justice would have followed up with,
6 in light of this information, and I appreciate
7 that there's many, many articles, but just
8 generally speaking, what was your, or Saskatchewan
9 Justice's approach during the first application
04:06 10 when media reports would put forward statements
11 like this that would, if true, suggest, number
12 one, a miscarriage of justice, and two, possible
13 misconduct on the part of either police and/or
14 Crown officials?

04:06 15 A Well, we were satisfied that the federal
16 government was doing whatever we would ultimately
17 do with it and that is investigate the matter
18 thoroughly. At that point, having us charge in
19 and potentially interrupt that process, didn't
04:07 20 seem to make much sense. They would be doing it
21 anyway.

22 Q If -- let me ask it this way. If there had been
23 no Section 690 application filed --

24 A Well, that's a very different matter.

04:07 25 Q Yeah -- and this article appeared in the



1 newspaper, can you tell us what steps Saskatchewan
2 Justice would have taken?

3 A Well, we would want to know -- well, we would want
4 Rex Ferris' report and we would want to have it
04:07 5 examined by the police, by the RCMP.

6 Q And so can I take it from that answer, Mr. Brown,
7 that while the first application was pending
8 before the Federal Minister, that when matters
9 such as this appeared in the media suggesting a
04:07 10 miscarriage of justice and/or misconduct on the
11 part of Crown and/or police, that you would have
12 deferred to the Federal Justice Department and
13 allowed them to complete their investigation?

14 A Yes.

04:07 15 Q As opposed to going off on your own?

16 A That's correct.

17 Q And had there not been a Section 690 application
18 pending, this is the type of information that
19 would have caused Saskatchewan Justice to
04:08 20 investigate, at least investigate the allegations;
21 is that fair?

22 A Yes, either Deborah Hall's statement alone or this
23 alone would have been enough.

24 Q Or perhaps even re-open the investigation into the
04:08 25 death of Gail Miller; is that a possibility as



1 well?

2 A Well, the first thing I think we would do is we
3 would look at specifically the new evidence being
4 put forward and if it turns out that it has some
04:08 5 apparent credibility, then yes, that's the next
6 logical step.

7 Q Can you tell us what --

8 COMMISSIONER MacCALLUM: Just excuse me for
9 half a sec. I just wanted to, for the sake of
04:08 10 our record, differentiate between the Hall
11 affidavit and the Hall statement she gave to
12 Williams arising from the affidavit, so you meant
13 to say her affidavit?

14 A Her affidavit, yes.

04:08 15 COMMISSIONER MacCALLUM: Thank you.

16 BY MR. HODSON:

17 Q And so just so we're clear, I think you are saying
18 that Saskatchewan Justice, and these are my words,
19 not yours, but took some comfort that everything
04:09 20 that was being alleged in the media was being
21 investigated by Federal Justice officials in the
22 context of the Section 690 application and
23 therefore Saskatchewan Justice did not have to do
24 their own investigation; is that a fair way to put
04:09 25 it?



1 A That's correct, yes.

2 Q And but for the Section 690 application,
3 Saskatchewan Justice would have investigated what
4 had been put forward in the media?

04:09 5 A Yes.

6 Q Can I get your comment on, and again I alluded to
7 this earlier, Saskatchewan Justice is, and I guess
8 coupled with the police, provincial police, are
9 the ones responsible for investigating and
04:09 10 apprehending perpetrators of a crime; correct?

11 A That's right.

12 Q And so here, can you comment on the fact that, and
13 you alluded to it earlier, that if the wrong
14 person has been convicted, then the guilty party,
04:09 15 person is still out there; correct?

16 A That's right.

17 Q And so here in this article it says *Proves*
18 *innocence* and goes on to talk about that, and that
19 if that is indeed correct, then that means the
04:10 20 person who killed Gail Miller is still out there,
21 which is -- is it fair to say that's a provincial
22 concern?

23 A Yes, that would be correct.

24 Q So how do you deal with that, in that out in the
04:10 25 media it's saying lookit, here's everything, and



1 we'll see this a bit later when we get into media
2 articles that not only identify another
3 perpetrator, but then actually name Larry Fisher
4 and have reports that say he is the person who
04:10 5 killed Gail Miller, and just your comment on that,
6 as to whether that changed things for Saskatchewan
7 Justice when these allegations were now lookit,
8 here is the real killer and it's the province's
9 responsibility and/or -- I don't mean to say
04:10 10 Saskatchewan Justice, but either the police and/or
11 Saskatchewan Justice who are the parties that
12 would be responsible for investigating and
13 prosecuting that?

14 A Well, I mean, again, whether it's just a Rex
04:11 15 Ferris kind of thing or whether it's the naming of
16 Larry Fisher, at the end of the day we were
17 satisfied that the federal government is going to
18 investigate all of this information, do the very
19 same thing we would do and there was no need for
04:11 20 us to conduct a redundant investigation.

21 Q And so when we get into those allegations, if the
22 public is saying okay, I've read in the media that
23 a forensic report proves David Milgaard's
24 innocence, I've now read that Larry Fisher is the
04:11 25 real killer, why are you not out investigating and



1 prosecuting him. Is the answer, well, these are
2 all allegations that are being reviewed by the
3 Federal Justice Department and we're going to wait
4 for their decision before we decide whether to
04:11 5 take any action?

6 A Well, they are being investigated -- there's more
7 to it than just being reviewed, they are being
8 investigated, and I have confidence that if the
9 Federal Justice Department came across something
04:12 10 that in fact indicated Larry Fisher was the guilty
11 party, they would have notified us immediately and
12 not waited until the minister was ready to do her
13 complete response.

14 Q And so is it fair to say that you trusted the
04:12 15 system that was in place and, in particular, the
16 role of Federal Justice, the role of the Federal
17 Department of Justice in the Section 690 review
18 process to investigate these matters?

19 A Yes.

04:12 20 Q If we can go to 004715, and actually, if we can
21 just go back to that article, sorry, the previous
22 one, and I think you've told us that if true, this
23 information that's cited here in the article about
24 Ferris' report proving David Milgaard's innocence,
04:13 25 if this information were true, namely, what the



1 Ferris report says and proves, would that provide
2 a basis for Saskatchewan Justice to re-open the
3 investigation into the death of Gail Miller?

4 A Yes, if it were true.

04:13 5 Q And I think you told us that at this time
6 Saskatchewan Justice did not take any steps to
7 follow up on this information because you were
8 waiting for Federal Justice to do their review, or
9 to complete their investigation; is that correct?

04:13 10 A That is correct.

11 Q Did you later learn, and in particular around the
12 time of the Supreme Court reference preparation,
13 more information about the merits of this
14 allegation?

04:13 15 A Oh, yes, yes.

16 Q And can you tell us, once more information was
17 obtained about this allegation, what conclusions
18 did Saskatchewan Justice reach with respect to the
19 credibility and reliability of this information as
04:13 20 a basis to re-open the investigation into the
21 death of Gail Miller?

22 A Well, I assume you are referring to all of the
23 information?

24 Q I'm just talking about the Ferris report.

04:14 25 A Oh, just the Ferris report. The information I



1 believe we got with respect to the Ferris report
2 was that a good deal of it was over reaching in
3 the sense that he was commenting on stuff that he
4 really had no particular qualifications to comment
04:14 5 on, drawing inferences essentially that the jury
6 was urged to draw by Justice Tallis and chose not
7 to do it, things like, you know, there's not
8 enough time for this and so on, and I know there
9 was a considerable concern with the completeness,
04:14 10 shall I say, of Dr. Ferris' responses to the
11 federal investigators, they were trying to
12 determine what he did vis-a-vis the DNA, what
13 results he obtained, and he would never sort of
14 answer them directly or completely, so there was
04:15 15 some considerable suspicion with respect to
16 everything Ferris did.

17 Q What about this issue, and I think where this
18 article stems from is his suggestion that based on
19 the examination of the frozen semen, that that
04:15 20 would exclude David Milgaard as the donor of the
21 semen and that the Crown put the semen forward as,
22 (a), belonging to the perpetrator, and (b), coming
23 from David Milgaard, what about that? I think
24 that was the allegation that was repeated most
04:15 25 often in the media, that on the basis of the fact



1 that David Milgaard was a non-secretor, or that
2 was the evidence at trial, that the frozen semen
3 could not have come from him.

4 A My recollection of what we got from the federal
04:15 5 government prior to the reference was that their
6 work or the RCMP work with respect to that or the
7 opinion that they received with respect to that
8 indicated that that wasn't true, that it did not
9 exonerate David Milgaard.

04:15 10 Q Okay. And so am I correct that when it came time
11 for Saskatchewan Justice to consider re-opening
12 the investigation into the death of Gail Miller,
13 did Saskatchewan Justice put any weight or
14 credibility on the Dr. Ferris report and, in
04:16 15 particular, his assertion as reported here, that
16 it proved David Milgaard's innocence?

17 A No, none.

18 Q If we can go to 004715, this is an October 19th,
19 1989 *StarPhoenix* article, and this relates to a
04:16 20 story about '*Unstable*' juror may have convicted
21 *wrong man in 1970*, and it's a fellow by the name
22 of Fernley Cooney, and there's a report here where
23 he said "he was mentally unstable during the
24 trial" and went on to talk a bit further about
04:16 25 what happened. Do you have any recollection of



1 this information and any significance Saskatchewan
2 Justice may have placed on it?

3 A No. I've seen the report since. I don't recall
4 hearing about a Fernley Cooney or a concern with
04:17 5 the jury.

6 Q I don't believe -- the evidence at least the
7 Commission has heard, I don't believe beyond this
8 article, I think Eugene Williams' evidence was
9 that he was concerned about violating the *Criminal*
04:17 10 *Code* and that's why he did not follow up with him.

11 A Yeah.

12 Q And I don't believe there's any evidence at the
13 reference on that. Do you have any recollection
14 of this?

04:17 15 A Oh, no, there certainly wasn't at the reference.

16 Q Go to 220222, please, and this is an October 22,
17 1989 article by Dan Lett, and if we can actually
18 just rotate it here so we can read it. This is --
19 and this deals with the Deborah Hall motel room
04:18 20 information and I'll just go through parts of it,
21 Mr. Brown, and ask you some questions, it says:

22 "A police statement from a witness who
23 directly refuted damning testimony given
24 at the 1969 murder trial of David
04:18 25 Milgaard has been released by the



1 federal Justice Department 20 years
2 after he was convicted."

3 And then if we can just go back to -- I need to
4 go there, please -- and here it goes on to say
04:18 5 about:

6 "Asper said it also raises serious
7 questions about whether two witnesses
8 who gave damning evidence at the trial
9 were lying."

04:18 10 And that's referring to Melnyk and Lapchuk, and
11 it says here, the statement -- sorry, if we can
12 just scroll down, the statement -- and this is
13 referring to I think the Ute Frank statement:

14 "The statement, released last week,
04:18 15 contradicts testimony from two men who
16 say they saw Milgaard re-enact the
17 murder in a Regina hotel room.

18 Asper said the statement was
19 taken by Saskatoon police in Jan. 1970
04:19 20 from Ute Frank, an acquaintance of
21 Milgaard, who was one of several people
22 in the hotel room in May, 1969."

23 And if we can just go to the right-hand side,
24 please, flip it over, and here:

04:19 25 "Both men came forward with the evidence



1 just two weeks before the trial -- after
2 they were arrested and charged with
3 various offences, including fraud and
4 armed robbery.

04:19 5 Milgaard denied the event
6 ever took place, but it wasn't until
7 1986 that Asper said he was able to
8 secure an affidavit from Deborah Hall, a
9 Saskatoon hairdresser who was also in
04:19 10 his hotel room."

11 And:

12 "Hall swore that Milgaard did not
13 re-enact the murder, but even though
14 police knew she was in the room, she was
04:19 15 never interviewed, Asper said.

16 Asper said Hall's affidavit
17 had no corroboration until earlier this
18 month, when the Justice Department
19 released Ute Frank's statement taken at
04:20 20 the same time as those from Lapchuk and
21 Melnyk."

22 If we can scroll down:

23 "Frank made no mention in her statement
24 of Milgaard re-enacting the murder. She
04:20 25 said, "I recall asking Milgaard if he



1 killed that nurse they were talking
2 about and he just looked at me and
3 smiled oddly."

4 Asper said either of the
04:20 5 statements from the two women, if used
6 at the trial, could have successfully
7 refuted Lapchuk's and Melnyk's
8 testimony, which was considered very
9 powerful and persuasive.

04:20 10 Asper said he's puzzled why
11 the police would take the statement and
12 is unsure about whether Milgaard's
13 counsel even knew the statement
14 existed."

04:20 15 Now are you able to tell us whether this is
16 information, this article would have been
17 reviewed by somebody at Saskatchewan Justice at
18 the time, I think is your --

19 A I would assume so, yes.

04:20 20 Q And, again, do you have any recollection of this,
21 at the time, causing Saskatchewan Justice any
22 concern, or was it same answer as before, you
23 would have allowed -- or presumed Federal Justice
24 would review it?

04:20 25 A Well, certainly, we would have been inclined to



1 leave it with Federal Justice. The only
2 recollection I have of this is that, whether it
3 was me who spoke to somebody at the Federal
4 Government or Ellen Gunn, that we were told "well,
04:21 5 that's not exactly what Ute Frank said", that
6 "there is no evidence that contradicts Melnyk and
7 Lapchuk".

8 Q Okay. So that would have been -- was that at some
9 point before the minister's decision in February
04:21 10 '90?

11 A I think so, yes.

12 Q Sorry, and we know from the record that Mr.
13 Williams interviewed Deborah Hall in November of
14 1989, and I take it during the Supreme Court
04:21 15 reference you would have become aware of the
16 transcript of his examination of her under oath
17 where she, I think, gave additional information
18 about her recollection of the motel room as
19 compared to what was in her affidavit?

04:21 20 A That's correct.

21 Q And so you think, at some point prior to the
22 minister's decision, you would have been made
23 aware that she did not contradict Melnyk and
24 Lapchuk's evidence; is that --

04:22 25 A That's correct.



1 Q And again, just if we could sort of go back to the
2 full page, if the information in this newspaper
3 article were true would this information provide a
4 basis for Saskatchewan Justice to re-open the
04:22 5 investigation into the death of Gail Miller?

6 A Well certainly, if you had evidence that
7 discounted Melnyk and Lapchuk's account of what
8 happened, again my advice would have been that
9 that was very significant and would have warranted
04:22 10 further investigation by the police.

11 Q And did you later learn, and in particular at
12 this, in your preparations for and conduct of the
13 Supreme Court reference, more information about
14 the merits of the matters raised in this newspaper
04:22 15 article?

16 A Yes, well, we got the statements that were taken
17 by the federal Department of Justice.

18 Q And once this more information was obtained about
19 the allegations in this article what conclusions
04:23 20 did Saskatchewan Justice reach with respect to the
21 credibility and reliability of this information as
22 a basis to re-open the investigation into the
23 death of Gail Miller?

24 A It did not provide a basis to re-open an
04:23 25 investigation.



1 Q And why not?

2 A Because it's my recollection, certainly with
3 respect to Deborah Hall, but I also have that same
4 recollection with respect to Ute Frank's
04:23 5 statement, was that in fact she does not
6 contradict, or neither one of them contradicted
7 what Melnyk and Lapchuk said, and in fact Deborah
8 Hall, once a more expansive statement was taken
9 from her, tended to confirm it. She just viewed
04:23 10 it as a joke.

11 Q And on that point, that she perceived it as a joke
12 whereas Melnyk and Lapchuk may not have, was that
13 of significance? Or tell me what significance, if
14 any, did that have in your view of that as being a
04:23 15 ground to re-open the investigation into Gail
16 Miller?

17 A Well it means that the incident happened, that
18 David said and did those things, she didn't take
19 it seriously but that's her interpretation.

04:24 20 Q And does that change the fact that Melnyk and
21 Lapchuk had a different interpretation?

22 A No. I mean presume -- I don't recall but I
23 suspect again, when Tallis cross-examined him, I
24 suspect that that was where he was going. I seem
04:24 25 to recall that the suggestion was that this was



1 just a joke or some crude remark by David.

2 Q Mr. Tallis' evidence before the Commission, and I
3 believe the record at trial reflects this, that he
4 did not ask Mr. Melnyk and Lapchuk directly --

04:24 5 A Okay.

6 Q -- about whether it was a joke because he had
7 interviewed Ute Frank just prior and, based on
8 what Ute Frank told him about the motel room
9 incident, he did not want to ask the question
04:24 10 because of his concern about what the answer might
11 be, or words to that effect. I think that was his
12 evidence, and Mr. Tallis indicated that Ute Frank,
13 in many respects, corroborated what Mr. Melnyk and
14 Mr. Lapchuk said.

04:25 15 A Well, I will defer to his recollection, I -- I
16 haven't read that transcript in a long time, but
17 --

18 Q But, again, as far as in April of 1992 then, as
19 far as Saskatchewan Justice's decision to re-open
04:25 20 the investigation into the death of Gail Miller,
21 did the allegations relating to the motel room
22 incident that we've just witnessed in this article
23 and later, not only in the media but as well there
24 was an affidavit filed and other direct
04:25 25 information, in fact these witnesses were called



1 to the Supreme Court; is that correct?

2 A That's right, yes.

3 Q And so is it your evidence that the motel room
4 incident, and any allegations relating to that,
04:25 5 did not provide a basis for Saskatchewan Justice
6 to re-open the investigation into Gail Miller's
7 death?

8 A That's correct.

9 Q If we can go to 004817. And this is an article,
04:26 10 it's not stated on here Mr. Commissioner, but it's
11 January 23, 1990, *Milgaard tastes freedom, word on*
12 *review 'imminent'*. And it says here:

13 "The department, although it
14 has issued no statement on Milgaard's
04:26 15 case, has told his lawyers a verdict on
16 the new evidence is 'imminent'."

17 And then if I --

18 COMMISSIONER MacCALLUM: I'm sorry, again I
19 have to ask for the doc. ID, I can't read it.

04:26 20 MR. HODSON: 004816 is the doc. ID and this
21 is page 817.

22 COMMISSIONER MacCALLUM: Thanks.

23 BY MR. HODSON:

24 Q And then if we can go to the next page, being
04:26 25 004816, and this appears to be a note attached to



1 the article:

2 "Murray - would you phone Fed Justice &
3 check on status of this",
4 presumably that's Ellen Gunn; is that correct?

04:27 5 A That's her writing, yes.

6 Q And her writing here:

7 "2 to 3 weeks before any decision made
8 ...",

9 A That's my writing.

04:27 10 Q "... according to Gene Williams."

11 A Yes.

12 Q And can we take it, from that, that in light of
13 what was in the newspaper article Ellen Gunn asked
14 you to phone Federal Justice to find out where
04:27 15 they were at and you reported back "2 to 3 weeks
16 away"?

17 A Yes.

18 Q Do you recall whether Mr., in your discussions
19 with Mr. Williams before Kim Campbell's decision
04:27 20 was rendered, did he share with you any
21 information about what the minister was going to
22 decide or might decide?

23 A No. No. The only time we ever got into any
24 discussions about what might happen was after the
04:27 25 first application had been rejected and we were



1 moving into the fall in 1991. At that point there
2 was discussions about what kind of reference there
3 might be, if there was a reference, and there
4 seemed to be a consensus that something had to be
04:28 5 done.

6 COMMISSIONER MacCALLUM: Well maybe I
7 misunderstood you a little while ago, I thought I
8 heard you say that you were having
9 conversations -- "you" meaning your officials or
04:28 10 Ellen Gunn -- with Justice officials and got the
11 impression that there wasn't much to the
12 application?

13 A Umm, at that -- yes. They weren't -- the one
14 thing the Federal Justice officials never told us
04:28 15 was what their advice to the minister was going to
16 be. They told us from time to time what they had
17 discovered, but they never told us what the advice
18 was, and they never told us what the minister was
19 going to do until, again, the fall of '91 when it
04:28 20 was obvious something had to be done by way of a
21 public airing, a public reference.

22 BY MR. HODSON:

23 Q And so, prior to February 27, 1991 and receiving
24 the -- a copy of Kim Campbell's letter, was
04:29 25 Saskatchewan Justice aware of what she was going



1 to decide?

2 A I think it's fair to say that we were reasonably
3 confident that the application was going to be
4 rejected, but that was based on having obtained
04:29 5 these little snippets of information throughout
6 the past two years with respect to what they had
7 been finding in terms of the specifics that were
8 being alleged by the Milgaard people.

9 Q And, if a remedy were to be granted, would you
04:29 10 have expected a call in advance because the matter
11 would be going back into the Saskatchewan courts?

12 A There would have been a courtesy call in advance,
13 yes.

14 Q And so is it your evidence that prior to February
04:29 15 27, 1991, then, that there was no formal
16 indication to Saskatchewan Justice about what the
17 minister had decided or would decide?

18 A I'm not aware of anything. I certainly didn't get
19 that information.

04:30 20 Q I see it's 4:30, probably an appropriate spot to
21 break.

22 (Adjourned at 4:30 p.m.)
23
24
25



OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATES:

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

_____, CSR

Karen Hinz, CSR

Official Queen's Bench Court Reporter

_____, RPR, CSR, CRR, CBC

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

Official Queen's Bench Court Reporter

