

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
Sheraton Cavalier Hotel at
Saskatoon, Saskatchewan

On Thursday, September 14th, 2006

Volume 183

Inquiry Proceedings



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1 Transcript of Proceedings

2 (Reconvened at 9:00 a.m.)

3 COMMISSIONER MacCALLUM: Good morning.

4 ALL COUNSEL: Good morning.

5 MURRAY BROWN, continued:

6 BY MR. HODSON:

7 Q Good morning, Mr. Brown. I just want to clear up
8 a matter yesterday. Just call up a couple
9 documents. The first is 026935. And this was the
09:05 10 letter of April 20th, 1992 from Mr. Wolch to
11 Mr. Mitchell, and in the course of my questioning
12 yesterday, if we can call up 164797, I had asked
13 you a bit about a letter back.

14 And, Mr. Commissioner, I'll
09:06 15 just identify these for the record. This was the
16 document that, if we can go to the second page,
17 has the April 30th, 1992, and I think you advised
18 that that may be a function of the word processing
19 system, the dates?

09:06 20 A Well, it -- given that these are prepared on a
21 template and that there's only -- the date entry
22 is automated, it should have been the same date
23 throughout. I have no idea how you could end up
24 with a -- one date on the front page and a
09:06 25 different one on the second page. That's just



1 strange.

2 Q If we can go to 33 -- and I asked you about this
3 letter and you had some, I think your answers were
4 some of this language was not yours. And if we
09:07 5 can go to 334791, what I am trying to do is to
6 identify what I think is the letter that actually
7 went back to Mr. Wolch, and this is your fax to
8 Mr. Fainstein of May 8th, 1992 and it says:

9 "Ron - this just went out to H.W. this
09:07 10 afternoon."

11 "Re: Milgaard

12 This went by mail to Wolch today, May 8
13 ..."

14 And if we can go to the next page, next page,
09:07 15 this is a May 8th letter, and you will see it
16 starts off saying:

17 "I have reviewed and

18 considered the issues raised in your
19 letter of April 20, 1992 and the
09:07 20 material you have provided to me. In
21 your letter you requested two things:
22 first that I order ...",

23 etcetera. And then the next page you'll see --
24 scroll down please -- there the letter without
09:07 25 the prepared by and a blind carbon copy, and can



1 we -- and I have had a chance to review this with
2 you this morning briefly, Mr. Brown. But can you
3 confirm, it appears that the May 8th letter, this
4 document here is the actual reply that went out
09:08 5 and the other documents would have been drafts,
6 internal drafts; is that a fair inference for
7 that?

8 A Yes, that's the case, if I sent it out to Ron
9 Fainstein it would have been because I was aware
09:08 10 that the minister's office had just sent that out.

11 Q If we can go back to the previous page, please.
12 And presumably, if there had been a letter that
13 went out to Mr. Wolch on April 22nd or April 30th,
14 can we assume that that would have been referred
09:08 15 to in this letter, and that the opening remarks
16 responding to that letter would indicate that this
17 is the first and only reply back?

18 A That's the only reply, yes.

19 Q Yes. If we can go to 033150. And this is a
09:09 20 letter March 9th, 1993 to a Mr. Samir Kulkarni,
21 and if we can just go to the last page, this
22 letter is signed by you as director of appeals, or
23 on your behalf; is that correct?

24 A Yes.

09:09 25 Q Go back to the first page. And it appears on the



1 file that, or at least on the documents we have,
2 that from time to time you would be writing to
3 members of the public who wrote in relating to the
4 Supreme Court decision or the David Milgaard
09:09 5 matter; is that fair?

6 A Well I prepared responses for the minister, for
7 the deputy minister, and if somebody wrote
8 directly to me then I would prepare the
9 response --

09:09 10 Q Okay.

11 A -- and send it out in my own name.

12 Q And just generally can you -- I don't have copies,
13 and I'm not sure that we need to get them, of the
14 letters that came in from members of the public --
09:10 15 but, generally, what were the types of issues that
16 were being raised in letters being sent in that
17 you saw? This is 1993, '94 and '95, that time
18 frame?

19 A Well, they generally reflected the concerns being
09:10 20 raised by the Milgaard people and reported in the
21 newspapers that were still reporting on that
22 matter, and they would, you know, typically
23 contain things like, well, the Court hadn't done a
24 complete review or had limited what they would
09:10 25 look at, and things like that.



1 Q And if we can go to page 152, please. You note
2 here, you say:

3 "As a personal aside, I
4 suspect the Court's decision was much
09:10 5 influenced by sympathy for Mr. Milgaard
6 as a person; a sympathy which I share.
7 If a sixteen year old committed a
8 similar crime today, he would be subject
9 to prosecution under the Young
09:11 10 Offender's Act. The maximum penalty for
11 murder, if tried as a young offender, is
12 three years in jail and two years of
13 intensive probation supervision. If
14 raised to adult court, the maximum
09:11 15 penalty is ten years. When the Supreme
16 Court sat to hear this reference, Mr.
17 Milgaard had already been in jail for
18 almost twenty-three years. What's more,
19 because of continuing mental health and
09:11 20 behaviour problems, the chance of the
21 Parole Board taking a chance and
22 releasing him on parole, was not great.
23 In short, he had already served two to
24 four times what someone convicted of a
09:11 25 similar crime today would serve and the



1 prospect of parole was not good. In my
2 opinion this consideration was very much
3 in the minds of the judges. Indeed, it
4 became clear even before the hearing
09:11 5 started that whatever David Milgaard was
6 or was not able to prove, he would
7 likely be freed from jail unless we
8 could prove there was a very good reason
9 to keep him locked up. That's why a new
09:12 10 trial was ordered when the Court knew
11 very well no new trial was possible.
12 That's why they effectively directed the
13 Attorney General of Saskatchewan not to
14 even try to run a new trial. And that's
09:12 15 why they direct the federal Minister to
16 pardon Mr. Milgaard if we ignored their
17 broad hint, ran a new trial and got a
18 conviction. The court knew that with
19 all this there is no way the province
09:12 20 would run a new trial. I am satisfied
21 that in the final analysis, the Supreme
22 Court judges were satisfied he was
23 guilty of Gail Miller's murder. Reading
24 between the lines of the judgement,
09:12 25 that's the only conclusion I can come



1 to. On the other hand, I'm sure Mr.
2 Asper will give you a different
3 interpretation of the judgement and I
4 urge you to seek his views."

09:12 5 Would that fairly reflect your views at the time,
6 Mr. Brown, that part that I read to you?

7 A Yes.

8 Q And is there anything there that you wish to
9 elaborate on?

09:12 10 A Umm, no, it -- as I said, once we saw the -- or
11 once we met with the Court there was some
12 indication that there was some sympathy for David
13 Milgaard. The test or the options set out at the
14 end of February, I think, made it clear that they
09:13 15 had considerable sympathy for him, otherwise you
16 wouldn't have had that last option put out there,
17 and I can certainly understand that and, as I said
18 in the letter, I share that view. Whatever the
19 public interest is in obtaining justice, or
09:13 20 whatever they choose to call locking someone up
21 like that, going into jail at the age of 16, a
22 good-looking boy like David Milgaard, boy,
23 that's -- that's more than punishment enough after
24 22 years in there.

09:13 25 Q If we can go to 033051. And, again, this is a



1 letter May 20th, 1993. The last page, we don't
2 need to go to it, but prepared -- it says the
3 minister's letter prepared by Murray Brown. If we
4 can go to page 053, and just this comment, and I
09:14 5 wanted to ask you to elaborate on it. The letter
6 states:

7 "Sixth, I should caution you
8 with respect to what the Court meant
9 when it said there is new evidence that
09:14 10 'could reasonably be expected to have
11 affected the verdict'. This should not
12 be read as meaning the Supreme Court
13 thought the inevitable result of
14 considering that new evidence would be a
09:14 15 finding of not guilty. Had they meant
16 that, they would have suggested a
17 verdict of acquittal be entered. All
18 they mean in this instance is that the
19 jury would have to consider this new
09:14 20 evidence when deliberating on their
21 verdict. In this regard, however, I
22 again note the court also concludes
23 there is still enough evidence to
24 warrant a guilty verdict."

09:15 25 And would this have been your words or your



1 sentiment at the time?

2 A Well, that's my reflection of what the Supreme
3 Court thought. I personally, for what it was
4 worth, wasn't sure that you had much -- or that we
09:15 5 would have been able to prove a case at that
6 point.

7 Q Just as far as this question, though, about when
8 the Court says:

9 "... that 'could reasonably be expected
09:15 10 to have affected the verdict' ...",

11 I take it what you are saying is that if the
12 Court was of the view that -- what they viewed
13 was it would affect the verdict and that the new
14 evidence would result in an acquittal, they would
09:15 15 have said so?

16 A Well, if they were of the view that the only
17 result that you could get out of a new trial was a
18 verdict of not guilty, they would have suggested
19 the minister set aside the conviction and enter an
09:15 20 acquittal.

21 Q And so the fact that they ordered a new trial,
22 even in light of the fact that there was this new
23 evidence, suggested that it was still open for --

24 A Their view was it was still a contest, yes.

09:16 25 Q 033451. And, again, this is a letter from the



1 minister, the back page shows it's prepared by
2 Murray Brown, and this is a letter responding to a
3 letter to Dwayne Lingenfelter from a, someone from
4 Ontario, and the letter starts out:

09:16 5 "At the outset, let me point
6 out that the 'facts' disclosed by the
7 television program you've referred to
8 have very little resemblance to the
9 evidence produced before the Supreme
09:16 10 Court. You may have noticed that there
11 was no attempt made to present any other
12 point of view. There was a good reason
13 for that. When the other evidence was
14 presented and the hard questions asked
09:16 15 during the Supreme Court hearing, Mr.
16 Milgaard's arguments were shown to be
17 baseless and his claim to innocence
18 could not stand up to careful
19 examination."

09:17 20 And do you recall, was there some -- we've heard
21 evidence that I think in late, or at some point
22 in 1993 I think there was a documentary produced
23 by Global, if I'm not mistaken, about the matter;
24 is that what you are referring to there or do you
09:17 25 recall?



1 A Umm, I don't recall, but yes, that could be, I'll
2 accept that as the case.

3 Q If we can go to the last page. It says:

4 "There is a great deal of

09:17 5 mis-information concerning this case and
6 the television show you mentioned was
7 largely designed to spread those
8 distorted facts. I trust this letter
9 and the judgement will provide you with
09:17 10 more accurate information and answer
11 some of your questions."

12 And so again, May of 1994, can you tell us what
13 was happening, as far as you were aware, in the,
14 I guess in the public campaign or in the media
09:17 15 campaign; do you recall?

16 A Well the, yeah, the media campaign was still on to
17 try and push the government into ordering some
18 kind of inquiry. I expect that television show,
19 if it was on Global, was certainly part of that
09:18 20 since I -- I don't know how much of global Izzy
21 Asper would have owned at that point, but he
22 certainly had a substantial chunk.

23 Q There was also a reference, I think, to an earlier
24 CBC television program, as well, in one of the
09:18 25 letters?



1 A Well I believe the *Fifth Estate*, prior to the
2 reference, had done something. I don't recall
3 anything after, though they may have, I don't
4 know. In the minds of the news media, it was
09:18 5 still very much an issue, but the only place that
6 seemed to be getting a lot of traction was
7 Ontario, the minister was getting a fair amount of
8 correspondence from people in Ontario.

9 Q Go to 289661. And I want to turn to the DNA
09:19 10 matters, and I think you've told us that after the
11 reference it was your understanding that the
12 Federal Justice officials, and in particular
13 Mr. Fainstein, was -- had taken control of the
14 Gail Miller clothing and exhibits with a view to
09:19 15 conducting further DNA testing when science would
16 allow it?

17 A That's correct, yes.

18 Q And then in, I believe the record reflects that in
19 early 1995 he was contacted by counsel for David
09:19 20 Milgaard, around the time of the Guy Paul Morin
21 DNA results, with a request to look at the issue
22 again; does that -- do you recall being made aware
23 of that or --

24 A Umm, yes, that sounds -- '95 sounds about right,
09:19 25 when it started, and I think it took some time



1 after that to resolve.

2 Q Right. And so here, I think, is the January 27
3 letter from Mr. Fainstein to you sending a copy of
4 the lab report from April 6th of '92. And then if
09:20 5 we can go to 289652, so the doc. ID is 651, go to
6 page 652. And this is a March 30, 1995 letter
7 from Ron Fainstein to counsel for Mr. Milgaard,
8 counsel for Mr. Fisher, and to you, and it's got a
9 copy of a letter from Dr. Fourney of the RCMP Lab
09:20 10 which I'll go to in a moment, and it says:

11 "We are prepared to proceed
12 with STR testing as Dr. Fourney
13 suggests, provided that we,
14 Saskatchewan, and David Milgaard can all
09:20 15 agree with this proposition, and to any
16 necessary details."

17 And is it fair to say that starting in early
18 1995, March, that the Federal Justice officials
19 were prepared to proceed with DNA testing
09:21 20 provided there was agreement from David
21 Milgaard's counsel and from Saskatchewan and from
22 the Federal Justice officials as far as how to go
23 about doing it?

24 A Yes.

09:21 25 Q And, in your view, why was that agreement



1 necessary?

2 A Well, in my view, it wasn't. Had they simply
3 wanted to proceed, they could have, but I think
4 they were being cautious about the -- trying to
09:21 5 get the Milgaard group on side so that they,
6 whatever the results, they wouldn't be critical.
7 Obviously, they wouldn't be critical if it showed
8 Larry Fisher, but if it was inconclusive or showed
9 David Milgaard I suspect they were probably
09:21 10 concerned that there would be criticisms, "well,
11 you didn't ask us about how to do this".

12 Q And so that was your understanding as to why the
13 consent of Mr. Milgaard was being sought for the
14 testing process?

09:21 15 A Yes.

16 Q And what about Mr. Fisher; do you recall
17 whether -- sort of where he fit in as far as what
18 was needed from him?

19 A Well I mean, again, I'm assuming that they were
09:22 20 going to them so that there would be no criticism
21 of what they did. Certainly, my view at that time
22 was the samples were properly in the possession of
23 the Federal Government, they already had the
24 authority to test them for the purpose of
09:22 25 determining whether the DNA on the clothing could



1 be matched to either Larry Fisher or David
2 Milgaard, they didn't need that consent.

3 Q If we assume that in March of 1995, Mr. Brown,
4 that DNA science, DNA testing procedures, was at
09:22 5 the point where proper and valid DNA testing could
6 have been done on Gail Miller's clothing in March
7 of 1995, if Gail Miller's exhibits had been with
8 the Court of Queen's Bench, and if Saskatchewan
9 Justice had been made aware, in March of 1995,
09:23 10 that DNA testing, science had advanced and that
11 testing could be done, can you tell us what steps
12 you would have taken and, in particular, whether
13 you would have sought consent of parties or simply
14 proceeded?

09:23 15 A I expect that -- well, if we had access to those
16 samples, and those were not part of the Milgaard
17 prosecution exhibits, the samples of Larry Fisher
18 and David Milgaard's blood, I think it was --
19 those weren't part of it so we would have to get
09:23 20 that in order to do any comparisons. But I would
21 have been prepared simply to ask the Regina crime
22 lab if they could do a DNA workup on the clothing,
23 check it all for any potential analysable
24 material, and then do an analysis of that
09:23 25 material.



1 Q And do you think you would have had any difficulty
2 getting a warrant, or seizing, or somehow getting
3 the blood that Mr. Milgaard had -- and Mr. Fisher
4 provided to the Supreme Court?

09:24 5 A No, I don't think so.

6 Q And, assuming you would have had that material,
7 would you have gone out and sought consent of Mr.
8 Milgaard or Mr. Fisher to the process, or would
9 you simply have received it?

09:24 10 A I would simply have informed them that this was
11 going on. Even at that point, I would have done
12 them the courtesy of asking if they had any
13 comments they wished to make, but it would have
14 been a courtesy, I would have proceeded with that
09:24 15 one way or another.

16 Q Now I am going to go through some correspondence
17 here, but from March of 1995, we know it wasn't
18 until almost 2 1/2 years later that the testing
19 was done. What's your understanding, generally,
09:24 20 of why the testing took until July of 1997?

21 A Well, it's my understanding that Dr. Ron Fourney
22 of the Regina -- of the RCMP crime service, crime
23 lab service, was suggesting testing by one method,
24 I believe the Milgaards were proposing testing by
09:25 25 another method. It was my view that, given what



1 had gone on in the past, I wasn't prepared to
2 accept anything that came from the Milgaard camp,
3 and if Dr. Fourney said that STR was the way to
4 go, that was what I was going to consent to.

09:25 5 Q And why would you not accept anything coming from
6 the Milgaard camp?

7 A I just didn't trust them any more on anything.

8 Q And why?

9 A Well, because of the Breckenridge stunt and the
09:25 10 lies and half truths that they had been spreading
11 since the Supreme Court decision had come out, and
12 even I suppose the, what went on before that.

13 Q What is your understanding as to whether, what
14 type of testing was ultimately done in England,
09:26 15 was it the type that Mr. Fourney had suggested in
16 March of 1995?

17 A I believe that was the case, yes. I don't know
18 for sure, but I know I was prepared to trust what
19 Ron Fourney said, I wasn't prepared to trust
09:26 20 anything coming from the Milgaard group.

21 Q If we can go to page 654, please, and this is the
22 Ron Fourney memo to Mr. Fainstein, March 16th,
23 1995, and this is what Mr. Fainstein sent to
24 counsel for Mr. Milgaard, counsel for Mr. Fisher
09:26 25 and the province, and I'll just go through parts



1 of this. And what did you know of Mr. Fourney at
2 the time? He was the section head, biology,
3 research and development, with the Central
4 Forensic Laboratory of the RCMP in Ottawa.

09:27 5 A Well, I mean, at that point we had no reason to
6 doubt that the RCMP had done competent analysis of
7 the original exhibits and that there was only a
8 very tiny spec of material left. The point of
9 waiting these years had been to ensure that the
09:27 10 science which was developing very rapidly at that
11 point developed to the point where meaningful
12 results could be obtained from that very small
13 spec, if anything, and I trusted Ron Fourney's
14 opinion in that respect. We had no reason to
09:27 15 mistrust the RCMP.

16 Q It says here:

17 "The majority of exhibit material has
18 been consumed by the original
19 serological analysis and the failed DNA
09:27 20 analysis conducted by Dr. Rex Ferris.
21 To my knowledge no biological extracted
22 samples were returned by Rex Ferris.
23 The original exhibit materials were,
24 however, returned to the court. As was
09:28 25 the practice of the day, no swabs were



1 retained during the original autopsy."

2 What was your understanding of the manner in
3 which Dr. Ferris' DNA efforts in the late '80s
4 affected the work that was being pursued in 1995?

09:28 5 A Well, it's my understanding that he reported
6 finding a patch of human tissue material on the
7 panties I believe it was and then he cut that
8 patch out so that he could do his analysis on it
9 and whatever he did by way of analysis, it's my
09:28 10 understanding that that sample was destroyed, and
11 that, based on -- I'm guessing -- he's going on
12 the basis of what Pat Alain had discovered or
13 thought she had discovered, that there was no
14 other material available other than one tiny spot
09:29 15 left.

16 Q Do you recollect having any understanding as to
17 whether Dr. Ferris had checked any of the other
18 Gail Miller articles for human tissue?

19 A Well, no, I don't specifically recall reading
09:29 20 anything like that, but I would assume that if he
21 found a spot, he probably did a fair amount of
22 checking, that would be the -- what would
23 ordinarily be done, you wouldn't usually just sort
24 of stop the first time you found something to look
09:29 25 at.



1 Q And so as far as Gail Miller's dress, what was
2 your understanding in 1995 as to whether he had
3 checked that for semen?

4 A I would have presumed that he would have checked
09:29 5 all of the clothing exhibits that he was given and
6 found something only on the panties.

7 COMMISSIONER MacCALLUM: That's Ferris?

8 A That's Ferris, yes.

9 BY MR. HODSON:

09:30 10 Q And the next paragraph says:

11 "After Mrs. Pat Alain of the RCMP CFL
12 examined the exhibits in 1992, it was
13 apparent that one semen stain of
14 approximately 1 cm x 1 cm was still
09:30 15 present on Gail Miller's panties."

16 Let me pause there. What was your understanding
17 of what Pat Alain did in 1992 as far as examining
18 Gail Miller's garments and the exhibits for
19 possible human tissue?

09:30 20 A Well, again, we trusted her to do a thorough
21 examination of all the exhibits, that's why she
22 was given everything, and when she came back and
23 reported that there was only one tiny stain left,
24 I made the assumption, and I think the rest of us
09:30 25 made the assumption, that she had checked



1 everything.

2 Q And so that would have included Gail Miller's
3 dress?

4 A The dress, the coat, the stockings, everything.

09:30 5 Q And then Mr. Fourney writes:

6 "Essentially, a portion of the
7 contaminated DNA extract and half of the
8 remaining unextracted semen stain on
9 Gail Miller's panties are the only
09:31 10 potentially significant items among the
11 exhibits in the possession of Mrs. Pat
12 Alain."

13 And again, is that information then that
14 Saskatchewan Justice would have relied upon?

09:31 15 A Yes.

16 Q And we know in July of 1997 that when the garments
17 were tested, you are aware that a rather large
18 semen stain was located on Gail Miller's dress by
19 the English scientist?

09:31 20 A Yes. When the exhibits were returned there was --
21 oh, on the dress, yes. He basically was asked to
22 examine all of the clothing for the presence of
23 any analysable material and he did that.

24 Q And I believe his report reflects that he found a
09:32 25 semen stain on the dress that allowed him to



1 extract DNA to match Larry Fisher's profile?

2 A Well, ultimately the evidence that he returned for
3 the purpose of the Fisher prosecution indicated
4 that he found numerous sites of material that
09:32 5 could be analysed for --

6 Q And did you -- did that surprise you?

7 A Yes, it certainly did.

8 Q And did you make any inquiries to determine how
9 that happened or could have happened?

09:32 10 A Well, I know I recall speaking to Ron Fainstein
11 about it and I think at that time both the federal
12 government and the RCMP were a little up in the
13 air as to how that happened.

14 Q Did you ever find out how it happened?

09:32 15 A Well, other than obviously whatever process of
16 investigation Pat Alain used, it was not
17 appropriate, and I know in speaking to two
18 serologists who headed up sections of crime labs
19 in different parts of the country, they indicated
09:33 20 that they were very surprised when the RCMP picked
21 Pat Alain to do the analysis because she had been
22 an administrator at that point for a number of
23 years and been an administrator during the time
24 that the DNA technology had started to surface and
09:33 25 started to develop, so that she really had no



1 hands-on experience in dealing with it.

2 Q If we can go to the next page, I'll try not to get
3 into these various DNA testing techniques, Mr.
4 Brown, because I'm afraid I will be lost rather
09:33 5 quickly, but --

6 A Well, you'll find me wandering behind you.

7 Q I'm afraid you might be slightly ahead of me, but
8 here they are talking about the Polymarker or DQ
9 Alpha PCR DNA test used in the Jessop case, and
09:34 10 Dr. Fourney is talking about:

11 "...the power of discrimination afforded
12 by the DQ alpha or Polymarker tests is
13 poor, and may in fact result in shared
14 patterns between the victim and the
09:34 15 assailant. These tests are not used by
16 the RCMP forensic laboratories.

17 My recommendation would be to
18 use PCR-based short tandem repeat
19 analysis (STRs). This is the approach
09:34 20 taken by both the RCMP and Forensic
21 Science Service (United Kingdom) for
22 future PCR analysis. This test allows
23 for better interpretation of mixed
24 biological samples and works extremely
09:34 25 well on old and/or badly degraded



1 biological exhibits. The power of
2 discrimination using STRs is much
3 greater, enabling a more forensically
4 significant interpretation of the DNA
09:34 5 pattern existing in the general
6 population.

7 I would recommend that both
8 the victim and David Milgaard's
9 PCR-based DNA pattern be established
09:35 10 from the outset, using the known samples
11 which are not limiting in the amount of
12 DNA available. This would permit a more
13 informed and prudent choice of the best
14 set of STRs that could identify
09:35 15 differences in their respective DNA
16 patterns."

17 And it's my understanding, at least from
18 reviewing the documents, that the RCMP were
19 recommending a PCR-based short tandem repeat
09:35 20 analysis as the type of DNA testing to undertake
21 and David Milgaard, through his counsel, and an
22 expert that they had retained, were suggesting a
23 different type of test, either the Polymarker or
24 the DQ Alpha PCR test, the test that had been
09:35 25 used in the Guy Paul Morin case. Is that



1 generally correct?

2 A That's correct, yes.

3 Q And the RCMP had issues with the type of DNA
4 testing suggested by counsel and the expert for
09:36 5 Mr. Milgaard; is that fair, about whether or not,
6 given the limited quantity, it would be the best
7 type of test to use, and that was the debate that
8 carried on for a while?

9 A Yes.

09:36 10 Q And it was ultimately the PCR-based short tandem
11 repeat analysis that was conducted in England; is
12 that correct?

13 A That's my understanding, yes.

14 Q That gave rise to the results. And here --

09:36 15 COMMISSIONER MacCALLUM: The same one that
16 was recommended by Fourney; right?

17 A Yes, that's correct.

18 COMMISSIONER MacCALLUM: Yeah.

19 BY MR. HODSON:

09:36 20 Q And they talk here:

21 "Currently, few laboratories are
22 proficient in STR DNA analysis since it
23 is such a new procedure. Although our
24 laboratory is now conducting its first
09:36 25 STR casework on a pilot project basis,



1 the most experienced forensic laboratory
2 in this field would be the Forensic
3 Science Services in the United Kingdom.
4 To date they have completed several
09:36 5 hundred cases using the STR approach
6 which has become their routine method of
7 choice for forensic DNA analysis. As a
8 special operating agency of the British
9 Government, they conduct casework
09:37 10 analysis for both the defence and the
11 prosecution on a fee-for-service basis.
12 They have investigated and used the STR
13 approach in such high profile cases as
14 the conclusive DNA identification of the
09:37 15 Czar Nicholas and Russian royal family
16 and the identification of victims of the
17 Waco incident..."

18 And is it fair to conclude from this that at
19 least in 1995, the English lab, the Forensic
09:37 20 Science Services, was the -- if not the top, one
21 of the top labs in the world that was conducting
22 this DNA type, this STR DNA analysis?

23 A Well, I expect there were probably competent labs
24 in the United States too, but that -- I'm guessing
09:37 25 Ron Fourney had contacts with the people in the



1 Forensic Service in England and that was where he
2 chose to recommend we send the materials, and yes,
3 there's no question that they had been doing a
4 fair amount of that work by that time.

09:38 5 Q If I could call up 033297, just to go
6 chronologically. So that letter is March 30th,
7 and actually this is a bit earlier, this is March
8 14th, so at the same time the DNA discussions are
9 in place. This is a letter from Mr. Wolch to Ned
09:38 10 Shillington who was the Attorney General and
11 minister at the time stating:

12 "A public inquiry is needed not only
13 because a miscarriage of justice has
14 occurred (as found by the Supreme Court
09:38 15 of Canada) but also because there is a
16 strong body of credible evidence
17 indicating that this miscarriage of
18 justice was caused by the wrongful acts
19 and omissions of certain crown attorneys
09:38 20 and police officers involved in the
21 prosecution of Mr. Milgaard."

22 And there's handwriting on the side, "wrong
23 wrong". Is that your writing?

24 A Yes, that would be mine.

09:38 25 Q And I take it that means that you disagree with



1 what was suggested there?

2 A Yes.

3 Q Go to the next page, it says:

4 "In light of all the information and
5 evidence in the hands of the prosecution
6 at the time of Mr. Milgaard's appeals,
7 there can be no doubt that the
8 prosecutors breached the duty of
9 disclosure which they owed to Mr.
10 Milgaard."

11 In your view, sir, was that an issue that was
12 canvassed and determined by the Supreme Court in
13 the reference?

14 A Well, the Supreme Court decision deals with it, it
15 was put before them, it was argued before them,
16 yes.

17 Q 033293, this would be the letter back to Mr.
18 Wolch:

19 "First, the Supreme Court did
20 not find there had been a miscarriage of
21 justice. Nor did it find that either
22 the police or prosecution had acted
23 improperly.

24 Second, the evidence you
25 allege points dramatically to wrong



1 doing on the part of two Crown attorneys
2 does no such thing. The Supreme Court
3 heard that evidence and could not come
4 to the conclusion you argue.

09:40 5 Third, there has now been
6 three inquiries into this case: one
7 conducted by the Federal Department of
8 Justice; a second conducted by the
9 Supreme Court, and a third conducted by
09:40 10 the R.C.M. Police. None of these
11 inquiries - all of which your client
12 participated in - produced any evidence
13 to support your theory that David
14 Milgaard was wrongly convicted. A
09:40 15 further inquiry is not warranted and
16 will not be ordered."

17 And again, that would have been the position of
18 Saskatchewan Justice at the time?

19 A Oh, yes, and it had been the position for some
09:40 20 time. What prompted this exchange was Robert
21 Mitchell, I believe, had to step down from the
22 Attorney General's position because during a radio
23 interview he named a young offender and so there
24 had to be an investigation into that because on
09:41 25 its face that's a violation of the act. Ned



1 Shillington, who was a member of the government,
2 was appointed the Attorney General and I'm
3 guessing that the Wolch and Asper and Milgaard
4 group thought that new minister, another try
09:41 5 wouldn't hurt.

6 Q You mention Mr. Asper. I think his evidence was
7 at this time he had left the practice of law, I
8 think in '92. Do you recall --

9 A I know he left sometime after the second -- or the
09:41 10 reference, but I don't recall exactly when.

11 Q And I think his evidence was that after I think
12 the reference, pretty much in the fall of '92, he
13 was no longer with the law firm of Wolch Pinx
14 Tapper and no longer directly involved in the
09:41 15 efforts. Would you agree with that? Would you
16 take issue with that?

17 A Yeah, I wouldn't take issue with that. As I say,
18 I know he left. I don't know when.

19 Q Just to talk for a moment about the RCMP
09:42 20 investigation, we've heard extensive evidence
21 about that, and I think in 1994 the RCMP reported
22 back to the Alberta deputy and then to the
23 province that they uncovered no evidence of a
24 criminal wrongdoing and no information to suggest
09:42 25 that a further -- or the wording was no



1 information to suggest that David Milgaard was
2 innocent and no information to suggest that
3 someone else committed the crime, including Larry
4 Fisher, and I'm paraphrasing a bit, but once that
09:42 5 report was received back, did you, Saskatchewan
6 Justice, consider re-opening the investigation
7 into the death of Gail Miller or was it a case of
8 a non-decision?

9 A It was a non-decision, there had just been a new
09:42 10 investigation into the death of Gail Miller.

11 Q And if the RCMP had come back in 1994 and in the
12 course of their investigation of criminal
13 wrongdoing and obstruction of justice had come
14 back to the province and said in the course of our
09:43 15 investigation we've uncovered facts or evidence
16 that would suggest Larry Fisher may be the
17 perpetrator or would suggest that the
18 investigation into the death of Gail Miller should
19 be re-opened, is that something that Saskatchewan
09:43 20 Justice would have acted upon favourably?

21 A Oh, yes. When you send something out for advice,
22 you are pretty much bound to follow the advice
23 that comes in, and we respected the RCMP's
24 investigative capacity and certainly respected the
09:43 25 capacity of the Alberta lawyers to provide sound



1 advice. If they had suggested there was something
2 to look at, yes, that would certainly have set the
3 fox lose amongst the chickens.

4 Q 289651, back on the DNA issue, this is an April 7,
09:44 5 1995 letter to Mr. Fainstein getting back, you
6 write:

7 "In the interest of exhausting any
8 reasonable avenue of inquiry that may
9 settle this matter one way or the other,
09:44 10 we will of course agree to having the
11 DNA analysis recommended by Dr. Fourney
12 - the PCR based STR analysis - done at
13 this time. For the reasons contained in
14 his letter of the 16th of March to you,
09:44 15 we will not agree to the analysis being
16 done using either the Polymarker or DQ
17 Alpha PCR analysis. It seems to us that
18 if we are going to use up what little
19 sample material is left, we should use a
09:44 20 test method most likely to produce
21 results capable of the clearest possible
22 interpretation."

23 And that would have been Saskatchewan Justice's
24 position at the time?

09:44 25 A Yes.



1 Q And was that one of the concerns, and I think it
2 was identified in Mr. Fourney's letter, that the
3 DQ Alpha or the Polymarker analysis might have at
4 least in his view used up material, limited
09:45 5 material?

6 A It would have likely taken all of the material.

7 COMMISSIONER MacCALLUM: Is there any
8 difference between Mr. Fourney and Dr. Fournier
9 or is somebody spelling it different?

09:45 10 A I think it's being spelled differently. I think
11 his name is Fourney, Ronald Fourney.

12 COMMISSIONER MacCALLUM: Okay.

13 MR. HODSON: Actually, I can just -- yeah,
14 he's got a Ph.D. It's spelled F-O-U-R-N-E-Y, and
09:45 15 is it pronounced Fournier?

16 COMMISSIONER MacCALLUM: No.

17 A That's my understanding of how it was pronounced,
18 Fournier.

19 COMMISSIONER MacCALLUM: Fourney, E-Y, is
09:45 20 pronounced Fourney. Fournier is a different
21 name. I was concerned it was two different
22 people.

23 MR. HODSON: It's the same person.

24 A It's the same person, yes, however his name is
09:45 25 pronounced.



1 COMMISSIONER MacCALLUM: Okay.

2 BY MR. HODSON:

3 Q And at this point, then, are you relying on the
4 RCMP and, in particular, Dr. Fourney's advice?

09:45 5 A Yes, principally his, but I seem to recall we had
6 a prosecution colleague in Canada at that time who
7 had done some work with DNA and may even have run
8 a prosecution by that point using DNA and I recall
9 discussing with him what he thought basically of
09:46 10 the letter that we received from Ron Fainstein
11 with Dr. Fourney's advice, and he agreed with Dr.
12 Fourney that the best way to go was PCR, or the
13 STR rather.

14 Q Go to 033291 --

09:46 15 A But he also -- I should also point out that he
16 also recommended that before you do any of that,
17 you have whoever is going to do the analysis do a
18 very thorough examination of the clothing to find
19 out whether there is anything else there.

09:47 20 Q And was that something you would have passed on to
21 Federal Justice officials?

22 A Yes. Well, I certainly told them that it was our
23 view that the clothing should be re-examined from
24 the get-go to make sure there was nothing else
09:47 25 there.



1 Q This is an April 27th, 1995 letter from Mr. Wolch
2 back to Mr. Shillington. I'll get your comment on
3 a couple of points here. He writes:

4 "At the commencement of the Supreme
09:47 5 Court hearing, the court indicated that
6 they will not hear evidence of police or
7 prosecutorial misconduct and it was not
8 their mandate to do so."

9 Do you agree with that statement?

09:47 10 A No, that's false.

11 Q "They made the same point regarding Larry
12 Fisher when they said that regardless of
13 what the evidence is, they would make no
14 findings as to his guilt or innocence."

09:47 15 Do you agree with that?

16 A I frankly don't recall anything being said in that
17 respect, and certainly they were open to point the
18 finger at Larry Fisher if they thought that's
19 where it properly pointed.

09:48 20 Q It says:

21 "Because prosecutorial misconduct would
22 not be looked into, the prosecutors were
23 not even called to testify in the
24 Supreme Court."

09:48 25 And is that your understanding of the reason that



1 the prosecutors were not called to testify before
2 the Supreme Court?

3 A No. I suspect the reason they weren't called was
4 because Mr. Wolch and Mr. Asper knew very well
09:48 5 they weren't going to get anything out of them.

6 Q And it says:

7 "It is the factual finding by the
8 Supreme Court that the prosecutors had
9 the crucial evidence prior to David
09:48 10 Milgaard's appeal in 1970 which gave
11 rise to the conclusion that maintaining
12 the conviction would be miscarriage of
13 justice. It does by implication lead to
14 no other conclusion but misconduct."

09:48 15 Do you agree with that?

16 A No.

17 Q Go to 230505. This is April 22nd, 1996, again on
18 the DNA issue, a letter from Mr. Fainstein, and I
19 believe Mr. Lockyer at this time became counsel
09:49 20 for David Milgaard with respect to the DNA issues;
21 is that correct?

22 A I believe so, yes.

23 Q And if we can go to the next page, Dr. Fourney
24 goes through some of the earlier correspondence,
09:49 25 refers to your letter, and says:



1 "In December, 1995 Mr. Milgaard's
2 counsel secured a submission from Dr. Ed
3 Blake, advocating, *inter alia*, the
4 consumption --"

09:50 5 Actually, let me just pause for a minute. So
6 this is April 22, 1996, so it appears from your
7 April 7th letter, 1995, that the next contact
8 would be a year later. Does that sound right?

9 A Well, there was a substantial amount of sort of
09:50 10 telephone calls going back and forth at that point
11 between Ron Fainstein and myself, so while there
12 may not have been letters, there was certainly
13 contact.

14 Q So just for the time line, if we can scroll up, it
09:50 15 appears at least in Dr. Fournery's summary, April
16 7th, your letter says yes, we'll agree to go PCR
17 based STR, but not Polymarker or DQ Alpha. Then:

18 "In December, 1995 Mr.
19 Milgaard's counsel secured a submission
09:51 20 from Dr. Ed Blake, advocating, *inter*
21 *alia*, the consumption of a portion of
22 the remaining questioned material in
23 screening for spermatozoa followed by
24 quantitation of DNA, and, if only one
09:51 25 test is possible, that it should employ



1 the combined DQ-Alpha/Polymarker system.

2 The report I enclose from
3 Dr. Fournery questions the necessity of
4 sacrificing part of the very limited
09:51 5 sample to screening for spermatozoa and
6 substantiates his view that if there is
7 sufficient DNA, the test of choice is
8 STRs. As I understand it, STR multiplex
9 testing is: More highly discriminatory
09:51 10 than DQ/PM; better with mixed samples;
11 and excellent with old and degraded
12 material."

13 So does that fairly set out, at least at this
14 time, the two views, one by David Milgaard's
09:51 15 counsel and expert and the other by the RCMP, as
16 to the competing methods?

17 A I believe so, yes.

18 Q And then the Federal Justice, Mr. Fainstein says:

19 "In accordance with Dr. Fournery's
09:52 20 recommendations, this Department is
21 prepared to proceed as follows:
22 1) To have DNA testing done by the
23 Forensic Science Service..."

24 British government,

09:52 25 2) To pay the fees of the Forensic



1 Science Service, and also to cover the
2 reasonable fees and expenses of an
3 expert representing Mr. Milgaard to
4 attend and observe the process;
09:52 5 3) To have what remains of Gail
6 Miller's clothing examined once again,
7 to determine whether any area apart from
8 the "presumptive semen stain" described
9 by Dr. Fourney, or Gail Miller's blood
09:52 10 stains, should also be the subject of
11 DNA testing.

12 4) To test: the so-far unextracted
13 half of the presumptive semen stain on
14 the panties...

09:52 15 And then:

16 5) First, DNA from the "questioned"
17 samples is to be quantified. If no
18 quantifiable DNA is found, that ends the
19 matter. If there is at least one
09:52 20 nanogram of material, STR testing is to
21 be done. If more material remains after
22 STR multiplex testing is completed,
23 DQ-Alpha might also be tried. If there
24 is .2 nanograms or more of DNA, but not
09:53 25 enough for multiplex STRs, DQ-Alpha can



1 be done."

2 And then it goes on. It would appear that this
3 is what was put forward by the feds, that we will
4 send everything to the lab in England, we will
09:53 5 pay for Mr. Milgaard to have an expert there to
6 observe, but we will do STR method first and only
7 if there's enough left will we do the DQ Alpha.
8 Is that a fair reading of that? Is that your
9 understanding?

09:53 10 A That's correct.

11 Q And at the bottom he says:

12 "I understand that DQ/PM..."

13 Which is DQ-Alpha/Polymarker,

14 "...is a specialty of Dr. Blake's, and
09:53 15 that he has no experience with STRs. If
16 Mr. Lockyer feels he requires someone
17 else to advise him on the circumstances,
18 Dr. Fourney can give him the names of
19 half a dozen or more experts in the
09:54 20 field."

21 And was that your understanding, that different
22 scientists had different views about the types of
23 methods based on what they had used?

24 A Well, yes, apparently Dr. Blake had one view and
09:54 25 Dr. Fourney had another.



1 Q 230498, you write to Mr. Fainstein:

2 "As before, we remain very interested in
3 having this testing done. If there is a
4 realistic chance of settling this issue
09:54 5 one way or the other, we are anxious to
6 see this proceed. However, given the
7 difficulties encountered with earlier
8 testing done by Dr. Ferris, we are now
9 rather cautious about how such testing
09:54 10 proceeds. I restate our position as
11 being in favour of using the most
12 discriminating test process available.
13 The letter of Dr. Fourney and the
14 attachments thereto, clearly indicate
09:55 15 that the STR process is the desirable
16 one. While the DQ-Alpha test may
17 provide results with less DNA material,
18 the results won't mean much if they are
19 not sufficiently discriminatory to
09:55 20 answer the questions we want answered.
21 While confusing results may be
22 satisfactory to the Milgaards, they are
23 not to us. Again, in my view and based
24 on what I have read in the materials
09:55 25 you've sent, the STR process is the only



1 one that is reasonably likely to produce
2 useful results if the same are available
3 at all."

4 I want you to comment on a couple of things.

09:55 5 What were you referring to about the difficulties
6 encountered with the earlier testing done by Dr.
7 Ferris?

8 A Well, certainly at the point of the reference in
9 the Supreme Court, not only was Dr. Ferris not
09:55 10 exactly being forthcoming about what he had done
11 or how he had done it, but he wasn't even prepared
12 to provide the federal investigators with whatever
13 product the testing produced. The DNA testing at
14 that time produced something called an autorad and
09:56 15 he was not prepared to provide any of that
16 material and, as a result, I was very suspicious
17 of the process -- the people and the processes
18 used by the Milgaard people to get this work done.

19 Q And what were you referring to here about saying:
09:56 20 "While confusing results may be
21 satisfactory to the Milgaards, they are
22 not to us."

23 A Well when you look at the way they were
24 interpreting the Supreme Court decision, which on
09:56 25 its face I thought was pretty clear with respect



1 to what they said, and totally misinterpreting
2 those words, if the tests did not come back
3 clearly suggesting that David Milgaard was
4 absolutely not involved in this incident, I
09:56 5 expected that you would get the same kind of spin
6 and misinformation generated by the Milgaard camp,
7 and this time they would be waving what they
8 claimed was a scientific report that exonerated
9 David when it had no such effect.

09:57 10 Q If we can scroll down to the bottom, please, you
11 also, you say:

12 "Reluctantly, we are
13 agreeable to having these tests done at
14 the Forensic Science Services, British
09:57 15 Home Office."

16 And then go on to say:

17 "In 20 years of experience with the RCMP
18 laboratory services, I have never known
19 them to be anything about scrupulously
09:57 20 fair and neutral in their scientific
21 work and Court presentations.

22 Additionally, if these tests must be
23 done outside the RCMP facilities, given
24 the problems that resulted from having
09:57 25 the exhibits examined by a private



1 laboratory in British Columbia, I do not
2 want to see them turned over to another
3 private laboratory working only in the
4 Milgaard's interests."

09:57 5 Again, was that referring to Dr. Ferris?

6 A Yes.

7 Q And the concerns you just stated?

8 A Yes.

9 Q And you say:

09:57 10 "A re-examination of Gail
11 Miller's clothing is probably not a bad
12 idea. However, I would prefer to see
13 that re-examination done by a government
14 laboratory. I do not want to see the
09:58 15 exhibits sent outside of Canada nor do I
16 want to see the examination done without
17 the scrutiny of someone we trust. If
18 they must go outside this country to be
19 re-examined then I would prefer if an
09:58 20 RCMP scientist went with them to observe
21 the testing. Again, my caution relates
22 to the problems encountered with the
23 initial testing done in British
24 Columbia."

09:58 25 Can you elaborate on what your -- what were your



1 concerns about letting the clothing go to an
2 outside third party?

3 A Well, again, I mean when the clothing went to Rex
4 Ferris, at that point I had no concern about it,
09:58 5 but after the difficulty the federal investigators
6 encountered getting any information back from Rex
7 Ferris as to what he had done, and what the
8 results had looked like, I simply didn't trust the
9 notion that we were going to put these back into
09:58 10 the hands of someone who may be a partisan for the
11 Milgaard family.

12 Q If we can go to 026014. And this is a letter of
13 May 29th, 1996 from Mr. Lockyer back to
14 Mr. Fainstein, and this is the letter responding
09:59 15 to what Mr. Fainstein has put forward -- and we'll
16 certainly hear from Mr. Fainstein on these
17 matters -- but Mr. Lockyer makes a comment here
18 about your letter and says:

19 "May I say that I found parts of Mr.
09:59 20 Brown's letter to be disturbing.

21 'Confusing results' are not, as he
22 suggests, satisfactory to Mr. Milgaard.
23 To date, I have refrained from
24 questioning the motives of the
09:59 25 Department of Justice or Saskatchewan



1 Justice, and have assumed that we all
2 share a common goal of obtaining a DNA
3 result in this case. It is a shame that
4 Mr. Brown does not do Mr. Milgaard the
09:59 5 same courtesy, bearing in mind that it
6 is Mr. Milgaard who has instigated this
7 latest attempt at securing a DNA
8 result."

9 And your comment to those -- to that statement?

10:00 10 A Well Mr. Lockyer, at that point, was a bit of a
11 Johnny-come-lately to this campaign, and I suggest
12 he probably didn't know them as well as I did.
13 Based on what we had seen coming out of the
14 Milgaard camp since prior to the turn-down of the
10:00 15 first application, what followed that and what had
16 followed the Supreme Court's decision, there was
17 no reason for me to trust anything coming from Mr.
18 Milgaard's camp or to believe that, if the results
19 from the DNA testing were in any way disappointing
10:00 20 to them, that they would not misrepresent those
21 results to the best of their ability.

22 Q If you can go to 268750. Actually, sir, let me
23 just pause there. I think, again I don't want to
24 get into this in too much detail, but it appears
10:01 25 from this letter that Mr. Lockyer is going back



1 with a different -- if we can go to page 019 and
2 the introduction, here, of a Dr. Wayne acting as
3 arbitrator -- and I think he was involved in the
4 *Morin* case -- but in other words a different -- I
10:01 5 think, down at the bottom, I think the general
6 statement is that once it's determined then the
7 scientists will decide which of the two methods,
8 and Dr. Wayne will have the ultimate decision about
9 whether it's DQ Polymarker or STR, and then is
10:01 10 that -- and then the next page -- and if there is
11 a disagreement then it can go to the Chief Justice
12 of the Ontario Court of Appeal, and so that was
13 generally what was put back to the Federal
14 Government by Mr. Milgaard's counsel?

10:02 15 A Yes.

16 Q And so I take it that they did not agree to the
17 procedure recommended by Mr. Fainstein?

18 A Yes.

19 Q 268750. And this is an October 24, '96 fax from
10:02 20 Mr. Fainstein, it says:

21 "Here is the draft agreement that I'm
22 proposing to send to Mr. Lockyer."

23 And that:

24 "Mr. Dehm should contact Jean Roney
25 ...",



1 to get the exhibits. If we can go to the next
2 page, it looks like now the framework has been
3 agreed that the work will be done by Dr. Jack
4 Ballantyne and a lab in Long Island, New York,
10:02 5 and that Dr. Ed Blake will attend. Who and how
6 did Dr. Ballantyne and the Long Island lab come
7 into the picture; do you know?

8 A I don't recall. It was my understanding
9 throughout the process that they were going to the
10:03 10 British lab. Where the Suffolk County Crime Lab
11 in Long Island came into the picture, I wasn't
12 sure.

13 Q And 032491. This is your letter to the Court of
14 October 24, 1996, appears to be requesting the
10:03 15 exhibits for the purposes of sending -- giving
16 them to Dr. Fourney and sending them to the --

17 A Long Island.

18 Q -- Long Island lab, so it appears in October of
19 1996 that there had been a proposal or some plan
10:03 20 to now send them to Long Island?

21 A Yes.

22 Q And it appears that the STR versus DQ Alpha was
23 still a live issue as to how these things would be
24 done?

10:04 25 A Yes.



1 Q Go to 289563. Now we're into March of '97, I
2 think the record reflects that they did not go to
3 Long Island; do you know why?

4 A I -- I don't know. I might have known then, I
10:04 5 don't recall now.

6 Q And --

7 COMMISSIONER MacCALLUM: We're now into
8 March of which year?

9 MR. HODSON: March of '97.

10:04 10 COMMISSIONER MacCALLUM: Okay.

11 BY MR. HODSON:

12 Q And there's an agreement here, if we can go to the
13 next page, it now looks like we're back to
14 England, and it says here from Mr. Fainstein that
10:04 15 Dr. Blake is going to attend and the testing is
16 going to be done in conjunction with the joint
17 meeting of the California Association of
18 Criminologists. And:

19 "Dr. Werrett of the ...",

10:05 20 English lab:

21 "... has advised me that it shouldn't be
22 a problem for the work in this case to
23 be done in conjunction with Dr. Blake's
24 trip to that conference.",

10:05 25 and Federal Justice would pay the cost. Go to



1 the next page. It appears the proposed
2 agreement, we'll hear more from doctor (sic)
3 Fainstein, but essentially this is the new
4 agreement that now is going to see materials go
5 to England; is that correct?

10:05

6 A That's correct.

7 Q And if we can go to 289554, go to the next page,
8 next page, this appears to be the agreement, the
9 *Agreed Procedure For Examination and DNA Testing*
10 *with respect to the Murder of Gail Miller*, and
11 it's a four-page agreement. If we can go to the
12 last page, signed by Murray Brown on behalf of
13 Saskatchewan Justice, April 28th, 1997; is that
14 correct?

10:06

15 A Yes.

16 Q Now, as far as what transpired, I've gone through
17 at least some of the correspondence from January
18 1995 until April 1997. It appears Saskatchewan
19 Justice's position was, I think what you have told
20 us, a couple things; one, whoever is going to look
21 at the clothing, you wanted to make sure that
22 there was -- that your concerns were addressed;
23 and two, as far as how the DNA testing would be
24 done, you were relying upon Dr. Fourney and his
25 advice as to that; is that fair?

10:06

10:06

10:06



1 A That's correct.

2 Q And did you have any concerns with sending the
3 clothing to the lab in England, where it
4 ultimately went, to have them do the testing that
10:07 5 they did?

6 A No.

7 Q Go to 032431. I think this is a -- and the next
8 page, just go to the next page, May 14th, '97.
9 No, 032431A. Actually, just go back to the first
10:08 10 page then, and here -- I will need to go to the
11 second page, so if you can still find it. This is
12 a May 14th, 1997, and it appears to be a briefing
13 note that you would have prepared?

14 A I --

10:08 15 Q When I get to the second page I'll show your name
16 on it, but --

17 A Yes, likely.

18 Q And it says:

19 "Why has it taken so long to
10:08 20 get the DNA testing underway in this
21 matter?"

22 And you indicate that:

23 "Further, after extensive and time
24 consuming negotiations with Mr.

10:08 25 Milgaard's lawyers, the parties involved



1 have finally reached an agreement to
2 test the remaining sample at one of the
3 Forensic Science Service laboratories in
4 England and on the process to be
10:08 5 followed."

6 And scroll down. You state:

7 "After approximately two and
8 a half years of prolonged negotiations
9 with Mr. Milgaard's lawyers, agreements
10:08 10 have been reached on how and where to
11 test the last known biological sample
12 connected to the 1969 murder of Gail
13 Miller in Saskatoon. These negotiations
14 dragged on because Mr. Milgaard's
10:09 15 lawyers had insisted on a process for
16 testing that RCMP scientists feared
17 would more likely result in the
18 destruction of the sample without any
19 meaningful testing being done. They
10:09 20 also could not agree where the testing
21 would be done and kept changing their
22 minds on which laboratory was or was not
23 acceptable."

24 And, again, is that an accurate statement of your
10:09 25 understanding of what transpired in those



1 negotiations?

2 A Yes, that would have summed up my knowledge at the
3 time.

4 Q And it says:

10:09 5 "It has now been agreed that
6 the testing will be done in England at
7 one of the Home Office Forensic Science
8 Service Laboratories. Further,
9 scientists from that laboratory will be
10:09 10 the ones to determine the best way to
11 proceed. Dr. Edward Blake, on behalf of
12 the Milgaards and Dr. Ronald Fourney, on
13 behalf of the RCMP, will be in
14 attendance when the testing is done to
10:09 15 observe the process used and the results
16 produced, if any.

17 At this point it is not sure
18 that any results will be produced by
19 this process. Previous testing done
10:10 20 when the exhibits were released to the
21 Milgaards prior to the Supreme Court
22 Reference, destroyed all the known
23 biological samples without producing any
24 results that we know of. The scientist
10:10 25 who did the testing, Dr. Rex Ferris,



1 They will no doubt as well, make it
2 clear that the reason we delayed things
3 was to further our obstruction of
4 justice in the case. They will also
10:11 5 re-iterate their claim that the Supreme
6 Court found David to be innocent, which
7 of course, is not true."

8 And can you comment on that last statement?

9 A Which, the --

10:11 10 Q Sorry, just the last, about the being blamed for
11 the delay. What is your --

12 A Oh, they were already blaming, I think, the
13 provincial justice agency for delay, saying that
14 we didn't want -- the testing hadn't happened
10:11 15 because we didn't want to have it done.

16 Q And was it your view, based on your dealings in
17 this matter, that testing could have been done in
18 1995 at the lab in England?

19 A That's -- that was what Dr. Fourney suggested was
10:11 20 possible, yes.

21 Q And what was your understanding, then, of the
22 reason it wasn't done in 1995?

23 A Well --

24 Q And let me back up. We know what testing was done
10:12 25 in July of 1997 in the England lab; was there any



1 reason that testing could not have been done in
2 1995 when proposed by Dr. Fourney?

3 A Well I -- you know, again, I'm not a scientist in
4 that area, but it's my understanding that it could
10:12 5 have been done in 1995.

6 Q Putting aside any issues relating to the
7 advancement of science, if you assume in 1995 the
8 science was at the same --

9 A Yes, it could have been done.

10:12 10 Q -- was capable -- putting aside the science issue,
11 are you aware of any reason why the testing that
12 was done in July of 1997 at the English lab could
13 not have been done in 1995?

14 A No.

10:12 15 Q Did you have any desire to -- did Saskatchewan
16 Justice have any desire to delay the testing?

17 A No, I wasn't interested in delaying it, but I
18 wasn't interested in having it done in a way that
19 would either destroy the sample and produce no
10:13 20 usable results or give us less than the best
21 opportunity to come up with something from it, and
22 that's -- based on Dr. Fourney's advice, it seemed
23 to me that the method being proposed by the
24 Milgaards was the wrong way to go.

10:13 25 Q Go to 032417. And this is a May 22nd, 1997 news



1 story from the *Toronto Daily Star*, just read parts
2 of it. It's got your name on it, looks like
3 someone sent it to you, it says:

4 "Ottawa's decision to test David
10:13 5 Milgaard's guilt or innocence with new
6 DNA tests doesn't mean the federal
7 government is backing the Vancouver
8 man's quest for vindication, Justice
9 Minister Allan Rock says.

10:13 10 Rock said yesterday he did
11 not believe Milgaard's mother, Joyce,
12 accurately conveyed the tone of a
13 meeting she had with him and Jean
14 Chrétien in the Prime Minister's office
10:14 15 last summer.

16 Joyce Milgaard has said
17 Chrétien told her he believed her son
18 was innocent, but that Rock needed
19 convincing.

10:14 20 'My opinion on this matter
21 has been totally irrelevant,' Rock said
22 while campaigning here with Chrétien.

23 'I don't think I've ever
24 expressed an opinion about his
10:14 25 innocence.



1 'I don't really comment on
2 what happened in private meetings'."

3 And do you recall, Mr. Brown, the circumstances
4 of this, or why a copy was sent to you, or what
10:14 5 this related to?

6 A I suspect it was simply sent to me as a matter of
7 interest. The L.A.W. is -- are the initials of
8 Lisa Anne Wood, who was the communications
9 director in the department at that time. She
10:14 10 likely got ahold of that and forwarded it to me
11 because I was involved in the discussions.

12 Q 032381. And this is a July 2nd, 1997 letter from
13 you to Mr. Fainstein -- scroll down -- about
14 search warrants, and it appears from the record
10:15 15 that in early July 1997 an issue arose about
16 whether or not Mr. Fisher's blood could be legally
17 used for the upcoming test and whether a warrant
18 was needed, and it appears that you gave some of
19 your views to the Federal Justice officials about
10:15 20 this; is that fair?

21 A Umm, yes.

22 Q If we can go to 329957. This is, I'm not sure
23 this document is on CaseVault, Mr. Commissioner,
24 it's reported in various media outlets, but I
10:16 25 think this is a statement of the minister. Can



1 you tell us when and how you became aware of the
2 -- this is July 18th at 2:00 in the afternoon and
3 I think the DNA results came out that morning.
4 Can you recall, Mr. Brown, how you became aware of
5 the DNA results and what steps Saskatchewan
6 Justice and the minister took on that day?

10:16 7 A Umm, yes. I received a call from Ron Fainstein
8 that morning indicating what the results were from
9 England. John White, who I believe was the deputy
10:16 10 minister at the time, and I immediately met with
11 the Attorney General, who was John Nilson by then.
12 I discussed the results and my interpretation of
13 that with John Nilson. We had a call from the
14 Premier and his deputy minister and I spoke to the
10:17 15 Premier with respect to my views on what these
16 meant.

17 Q And what were your views?

18 A Well notwithstanding -- I know that -- I knew that
19 there were some people that had a two-offender,
10:17 20 two-assault theory. It was my view that whoever
21 raped Gail Miller was the most likely person to
22 have killed her as well. That once you put Larry
23 Fisher into the mix, in my view, you take David
24 Milgaard out of it. At the very, very least, had
10:17 25 Larry Fisher been known as the assailant who raped



1 Gail Miller in 1969, the police would have had no
2 interest in David Milgaard. Any investigation of
3 Mr. Cadrain's allegations that he had blood on him
4 would likely have led nowhere. Had he been, for
10:18 5 some reason, charged with that kind of information
6 there is no possible way you could convince a jury
7 that he was guilty beyond a reasonable -- David
8 Milgaard was guilty beyond a reasonable doubt of
9 the murder of Gail Miller, and any -- any
10:18 10 conviction would -- a Court of Appeal, I'm
11 absolutely confident, would overturn it as being
12 unsafe.

13 Q And so what was your --

14 A And that was the advice I gave to the Premier. My
10:18 15 advice was this establishes David Milgaard is
16 innocent, not just that we can't prove the case,
17 but that he is innocent, he did not kill Gail
18 Miller.

19 Q And was that advice, then, taken by the Attorney
10:18 20 General?

21 A Well, yes. The Attorney General, I don't think,
22 really needed to have it explained to him that
23 much because he was fairly familiar with the case.
24 The Premier, on the other hand, had not been doing
10:19 25 much in the way of following that, he had other



1 things on his mind, but I explained that to him
2 and all he said was "and you're satisfied that's
3 the case", I said "yes", and then he said, "well
4 then I'm satisfied too".

10:19 5 Q And so it appears that afternoon -- do you know if
6 you would have had a fax copy of the DNA results,
7 or was it simply Mr. Fainstein's --

8 A Umm, we got something faxed to us from the lab, I
9 believe, within a couple of days. It was -- at
10:19 10 that point we were simply operating on the basis
11 of what we'd been told by Mr. Fainstein, and I
12 believe I actually spoke to the scientist who did
13 the results and -- or did the tests in England.

14 Q And here, at least, and this is reported widely in
10:20 15 the media, based on the DNA testing report:

16 "... that the semen, the subject matter
17 of the test, could not have originated
18 from David Milgaard.

19 Based on this report, it
10:20 20 appears that a wrong of the most serious
21 kind has been done to Mr. Milgaard by
22 our Justice System.

23 For this we owe him and his
24 family the most heartfelt apology -- and
10:20 25 that is the main thing I want to say



1 today.

2 There is no doubt that this
3 wrongful conviction will require
4 compensation. We are immediately
10:20 5 beginning a process to provide that
6 compensation.

7 The police investigation into
8 this case was reopened this morning."

9 And can you comment on that, do you know, what is
10:20 10 your recollection? This was a Friday, I believe,
11 July 18th?

12 A Yes, could be.

13 Q Do you know what --

14 MR. ELSON: Yes, it was a Friday.

10:20 15 BY MR. HODSON:

16 Q It was a Friday. Do you know what the statement
17 was referring to about the police investigation?

18 A Well, I believe that statement was produced in the
19 minister's office, it -- I had nothing to do with
10:21 20 it.

21 Q Perhaps I can call up 032991, and this might
22 assist. This is your letter of July 18th to the
23 Chief of Police in Saskatoon, to Deputy Chief
24 Doell. It says:

10:21 25 "After considering the



1 matter, it is my opinion that there
2 exists reasonable and probably grounds
3 to believe that Larry Fisher committed
4 the murder of Gail Miller. On the basis
10:21 5 of this there appears to be reason to
6 arrest him and charge him with
7 non-capital murder."

8 What, is it possible that that was the reference
9 about the re-opening in the sense of your request
10:21 10 to the Saskatoon City Police?

11 A Well, no. What I was going to say is that memo
12 was, the previous memo was prepared in the
13 minister's office, and when I left him that
14 morning I told him that the first thing I was
10:21 15 going to do was call the Saskatoon City Police and
16 tell them that the investigation had to be
17 re-opened, that there now was evidence upon which
18 Larry Fisher could be charged and convicted.

19 Q And did that happen?

10:22 20 A I did. I called the chief of police in Saskatoon,
21 he -- my recollection is that that was Dave Scott
22 at the time, and he was away at some meeting, and
23 Norm Doell, who was the deputy, was the one I
24 actually spoke to.

10:22 25 Q And what was the nature of that discussion; what



1 do you recall?

2 A Well, I think it's fair to say that the Saskatoon
3 Police Service was in shock, they were just having
4 a hard time dealing with those results and they
10:22 5 wanted to see the documents from England that
6 established what I had told them, and I followed
7 the conversation up with the letter expecting that
8 on Monday Chief Scott would be getting back into
9 the office and would call me.

10:22 10 Q If we can call up 077486. This is a letter back,
11 or a letter to the minister July 21, 1997, which I
12 think is the Monday following. It says:

13 "In light of the developments
14 surrounding this file, we are requesting
10:23 15 that the Department of Justice appoint
16 another agency to investigate the death
17 of Gail Miller.

18 This Police Service is in
19 favour of such an agency being appointed
10:23 20 and will co-operate and provide
21 assistance to every extent possible,
22 including providing access to the
23 original file."

24 And do you recall what gave rise to this request
10:23 25 or how this came about?



1 A Well I don't know whether, at that point, there
2 was any pressure applied to them by anyone in the
3 Attorney General's office, but it was very quickly
4 becoming apparent that the Saskatoon Police
10:24 5 Service might have some difficulty reinvestigating
6 this since there seemed to be considerable
7 reluctance to accepting the results, so the RCMP
8 were the logical choice at that point.

9 And I, as well I think at that
10:24 10 point the media interest in Larry Fisher, who I
11 think was living in Saskatoon at the time, became
12 intense and he indicated that he was likely going
13 to be leaving town and doing what many
14 Saskatchewan residents do, move to Alberta, where,
10:24 15 I don't know, he thought he would have a better
16 chance of avoiding the news media.

17 Q I think we did see some media articles that he
18 did, that weekend, move or leave to Calgary. I
19 stand to be corrected on that, but --

10:24 20 A That could be. And the RCMP were the only ones
21 that were then in a position to sort of follow him
22 around.

23 Q If we can call up 077486. I'm sorry, go to the
24 next page, sorry, 487. And this looks to be a
10:25 25 letter of the same date from the Minister of



1 Justice and Attorney General to the Assistant
2 Commissioner of the RCMP asking that:

3 "... I request the services of the Royal
4 Canadian Mounted Police to investigate
10:25 5 the allegations that Larry Fisher may be
6 responsible for the death of Gail
7 Miller.

8 I can understand why the
9 Saskatoon City Police Service would want
10:25 10 to distance itself from this
11 investigation. Their request for the
12 services of your force is a reasonable
13 one.

14 Therefore, I ask that you
10:25 15 authorize the RCMP to take on this
16 investigation. Public Prosecutions will
17 very soon name a prosecution team to
18 provide legal advice to your officers.
19 They will be in direct contact with
10:25 20 Inspector Murray Sawatsky in this
21 regard."

22 And I think it was later changed from Inspector
23 Sawatsky to another member. So is it fair to
24 say, from this, that on Monday, July 21, 1997,
10:26 25 the RCMP effectively re-opened the investigation



1 into the death of Gail Miller?

2 A Yes.

3 MR. HODSON: Mr. Commissioner, I see it's
4 almost 10:30. I believe I am finished, but maybe
10:26 5 if we could break now and I will just
6 double-check and canvass parties for further
7 examination.

8 COMMISSIONER MacCALLUM: Yes, sure.

9 *(Adjourned at 10:26 a.m.)*

10:47 10 *(Reconvened at 10:47 a.m.)*

11 MR. HODSON: Mr. Commissioner, I think the
12 parties who have identified they wish to examine
13 Mr. Brown are Ms. McLean will be first, followed
14 by Mr. Wolch and then I believe Mr. Gibson has
10:47 15 some questions, Ms. Cox has some questions,
16 Ms. Knox, I'm not sure which order, and Mr. Elson
17 says no, or likely no, Mr. Boychuk no, Mr. Watson
18 no. So I think we'll proceed on that basis.

19 COMMISSIONER MacCALLUM: Mr. Marshall, no?
10:47 20 Sorry, Mr. Hopkins. Mr. Hopkins, no?

21 MR. HODSON: I'm sorry, Mr. Hopkins, do you
22 have any questions?

23 MR. HOPKINS: No.

24 MS. McLEAN: Mr. Commissioner, when I
10:48 25 agreed to go first, I was accepting Mr. Hodson's



1 estimate that he would be finished at about 9:30
2 this morning. I have a flight at 2:15, I need to
3 be at the airport at 1:15, so I can't be back
4 this afternoon. I'm going to ask if I'm not
10:48 5 finished, if we can perhaps sit a little later
6 than 12 o'clock so that I can get done?

7 COMMISSIONER MacCALLUM: We'll sit until
8 12:30.

9 MS. McLEAN: I'm hoping it won't take that
10:48 10 long, but it may.

11 COMMISSIONER MacCALLUM: All right.

12 **BY MS. McLEAN:**

13 **Q** Mr. Brown, my name is Joanne McLean, I represent
14 Joyce Milgaard and I'm also here on behalf of
10:48 15 AIDWYC, AIDWYC is the Association in Defence of
16 the Wrongly Convicted.

17 **A** Yes.

18 **Q** Some of the questions that I will ask you are
19 factual in nature, but primarily my goals here are
10:48 20 to talk about systemic type of issues, so it may
21 seem directed to the facts of this case, but it's
22 more a systemic approach that I want to take to
23 it. Okay?

24 **A** Yes, that's fine.

10:49 25 **Q** One thing I want to talk about first is what's



1 been called the Mackie summary, and you know the
2 document that I'm talking about there?

3 A Yes.

4 Q And you've described it as something that, it's a
10:49 5 summary of the evidence that the police had to
6 date and that it caused you no concern at all, you
7 thought it was just a summary of the evidence?

8 A Yes. I just took it to be the kind of summary
9 that you occasionally see on a police file made
10:49 10 during the course of longish investigation when
11 they are trying to figure out where they go next,
12 what they do next.

13 Q And had you ever compared that document and the
14 contents of that document to what the police
10:49 15 actually had on file at that time?

16 A You mean go back to the page references that they
17 mentioned?

18 Q Yes.

19 A No, I don't believe I ever did that.

10:49 20 Q And I take it then you also did not go back to
21 other pages that may not have been referenced in
22 the document; is that fair?

23 A That's right, yes.

24 Q Okay. So your --

10:50 25 A Well, except to the extent that I did, as I



1 recall, read the police report that was on Bobs
2 Caldwell's file when we got that in 1990 I
3 believe.

4 Q And by that are you referring to the Ullrich
10:50 5 report prior to the preliminary hearing?

6 A No, no, in those days, generally speaking, what we
7 got was the continuation report.

8 Q You are speaking of the report that Mr. Caldwell
9 prepared at the conclusion of proceedings; is
10:50 10 that --

11 A No, no. No, no. There were something like five
12 or six binders of materials that were a police
13 report, a continuation report that starts sort of
14 with the finding of the body and ends with the
10:50 15 arrest of David Milgaard.

16 Q Uh-huh.

17 A That was on the file. Now, that -- generally
18 speaking, that is the continuation report. It
19 wouldn't normally be the entire police file.

10:51 20 Q Uh-huh.

21 A But that -- in those days that's what we got.

22 Q All right. So at some time you would have read
23 all or some of that document?

24 A Oh, I would have read all of that, yes.

10:51 25 Q And did you do any comparison of the things in



1 that document to the Mackie summary document?

2 A No. In going through the Mackie summary, it
3 seemed to me to reasonably track the case.
4 Nothing sort of jumped out at me as being wrong or
10:51 5 false.

6 Q Okay. I want to look at that document in respect
7 of a number of examples. One of them is about the
8 toque. Now, do you remember that there was a blue
9 toque found in the vicinity of the Cadrain
10:52 10 residence sometime in April?

11 A Yes, in somebody's yard I think, somebody's back
12 yard, wasn't that it?

13 Q Yes.

14 A Yes.

10:52 15 Q A neighbour --

16 A Yeah, sometime around there.

17 Q A neighbour of the Cadrain family had found it in
18 the winter, had kept it and had given it to the
19 police in April.

10:52 20 A Yes.

21 Q You recall that? And Mr. Karst wrote a report
22 about that when he picked it up in April. Could I
23 have 009254, please. If you could blow up this
24 section. This is a report written on April 18th
10:52 25 by Mr. Karst and he's speaking of an interview



1 that he had with Nichol John on the 14th of April
2 of 1969, and I should tell you that as far as I'm
3 aware, there is absolutely no further record of
4 this interview with Ms. John, there was no
10:53 5 statement taken from her and there's nothing
6 further in writing about it. Okay?

7 A Okay.

8 Q And what he's got down here is a description of
9 David's clothing on January the 31st of 1969?

10:53 10 A Yes.

11 Q And in about the middle of that paragraph that's
12 blown up, right here, it says:

13 "She also stated he was wearing a dark
14 colored toque when in Regina."

10:53 15 A Yes.

16 Q "However she did not recall seeing this
17 toque again. This being of interest as
18 a toque had been found by myself in the
19 yard directly north on..."

20 Well, it says on, but,

21 "...of Cadrain residence which had red
22 substance on it..."

23 Which has been sent to the lab for testing. Now
24 if we can go to 006799, please, at page -- sorry,
10:54 25 at page 803 of that document, under the heading



1 Summary it's written:

2 "Nichol John says Milgaard wore a dark
3 touque which she has not seen since Jan.
4 31st."

10:54 5 And just above that it says:

6 "Wallet and touque are in car and when
7 Milgaard gets keys from Wilson at
8 Cadrains ... he disposes of the touque
9 and the wallet at this time."

10:55 10 Now, you understood that to be an allegation that
11 it's the toque that was found near the Cadrain
12 house?

13 A Yes, I suspect that's the case.

14 Q All right. And that the wallet is Gail Miller's
10:55 15 wallet which was also found in the vicinity of the
16 Cadrain house?

17 A That would be the theory, yes.

18 Q Do you see any mention in there that Nichol John
19 says that he wore a dark toque which she has not
10:55 20 seen since Regina in there?

21 A That's correct.

22 Q It creates the impression that he had been wearing
23 it on January the 31st in Saskatoon?

24 A That's correct, yes.

10:55 25 Q And if you go to page 006800 of the same document,



1 we have what purports to be an account of Nichol
2 John's statement of March the 1st of 1969:

3 "Came to Saskatoon January 31 with Ron
4 Wilson, David Milgaard, in Wilson's..."
10:55 5 Car. She certainly says that.

6 "- Milgaard wore brown suede jacket with
7 lighter color knit cuffs, collar and
8 stripes on front."

9 And the next line is:

10:56 10 "Dark color touque - which she has not
11 seen since."

12 A Yes.

13 Q Again, that's creating the impression that Mr.
14 Milgaard was wearing a dark coloured toque in
10:56 15 Saskatoon which hadn't been seen since that day?

16 A That's right.

17 Q Now, in fact, sir, if you look at -- I'm not going
18 to ask for it up, but if anybody wants it, it's
19 document 178559 at page 178560, the Nichol John
10:56 20 statement of March the 11th of '69, which this
21 purports to be a summary of here, does contain a
22 clothing description of David Milgaard's clothes.
23 It does not mention a toque at all. All right?

24 A Okay.

10:56 25 Q So that -- the information about the toque seems



1 to have only been able to have come from this
2 interview that I showed you at the beginning from
3 April the 14th where she talks about the Regina
4 toque. Yes?

10:57 5 A Well, and perhaps a misunderstanding of what she
6 said. I mean, I don't know, I didn't write the
7 summary.

8 Q Uh-huh.

9 A It could be that whoever took that took it to mean
10:57 10 that she hasn't seen it since that day, not that
11 she hadn't seen it since leaving Regina.

12 Q Even though that's what Mr. Karst has recorded?

13 A Well, she said that he was wearing it in Regina
14 and she hasn't seen it since.

10:57 15 Q Yeah.

16 A As I say, I mean, that may be a misinterpretation
17 of, or this might be a misinterpretation of what
18 Mr. Karst required, the notion that the toque
19 somehow got up to Saskatoon.

10:57 20 COMMISSIONER MacCALLUM: Just touch the
21 screen where you are looking.

22 A This part here.

23 COMMISSIONER MacCALLUM: Yes.

24 A The suggestion that the toque ended up in
10:57 25 Saskatoon may be a misinterpretation of what



1 Nichol John said or it may -- I mean, maybe that's
2 what she meant, I don't know.

3 COMMISSIONER MacCALLUM: Where does it
4 say -- oh, hasn't seen it since January the 31st,
10:58 5 that's the --

6 A That's correct.

7 COMMISSIONER MacCALLUM: Yeah.

8 A But I think came to Saskatoon with Wilson, I would
9 suggest that that summary would suggest she was
10:58 10 implying that he had the toque, or they are
11 implying she said he had the toque in Saskatoon.

12 COMMISSIONER MacCALLUM: Okay.

13 BY MS. McLEAN:

14 Q For what it's worth, on May the 24th Nichol John
10:58 15 gave a statement to the police, certainly false in
16 respect of seeing David Milgaard commit the
17 offence, but at that time she said that David was
18 wearing the clothing as she has previously
19 described:

10:58 20 "...black snow boots, long green tooke
21 with other colors possible Red and blue.
22 I think I would know this tooke if I saw
23 it again. Ron's Brother has mitts like
24 it, the mitts matched the tooke."

10:59 25 And that's at page 065359, the document is



1 065356.

2 Another thing that's in the
3 Mackie summary is -- sorry, I just want to pull
4 the summary -- in respect of Simon Doell. Do you
10:59 5 remember that name, sir?

6 A Not particularly, no.

7 Q Page number -- it's the Mackie summary, the page
8 number is 006799. Simon Doell was somebody who
9 worked at the same hospital as Gail Miller. He
10:59 10 was spoken to by the police on February the 4th of
11 1969 and what's been written in the summary in
12 respect of him is down at the bottom here.

13 A Yes.

14 Q He:

11:00 15 "- Rides the bus to work and is certain
16 Gail Miller caught bus at Avenue N and
17 20th Street.

18 - Miller told him she was getting ride
19 to work when asked about not being on
11:00 20 bus."

21 That's all that's in there in respect of the bus
22 that Gail Miller caught and that's all that's in
23 there in respect of Simon Doell.

24 A Yes.

11:00 25 Q So if we go to document 075909, this is



1 the -- sorry, 075900, and then move to the second
2 page of that, 901, please. This is the report
3 prepared by Constable H.M. Dimmitt in respect of
4 his conversations with -- his conversation,
11:01 5 rather, with Simon Doell. It took place on
6 February the 4th of 1969 and it starts right here.
7 It says that he and another constable attended and
8 interviewed Simon Doell. It says:

9 "He moved out previous to the murder."

11:01 10 There's no mention of that in the Mackie summary
11 is there?

12 A Not that I'm aware of, no.

13 Q He states that on occasions he had been riding the
14 bus:

11:01 15 "...and when Miss Miller got on the bus
16 she always on corner of Ave. N and 20th
17 St. directly across from the Funeral
18 Home. He states that he missed her on
19 the bus a couple of times and upon
11:02 20 asking her how she was getting to work
21 she stated that she was getting a ride
22 to work, however she did not elaborate
23 on this remark."

24 No formal statement is taken from Mr. Doell and
11:02 25 this information that he had been, he had moved



1 out sometime prior to the murder never makes its
2 way into the file, does it, into this summary
3 rather?

4 A No.

11:02 5 Q The first time that Simon Doell actually gives a
6 formal statement is on March the 21st of 1992 and
7 that's after, I think it's after all of the
8 evidence called at the reference. The document is
9 044252, and keep going please, I want paragraph 2
11:03 10 of this document. Yup. Simon Doell says that he
11 lived at one time on Avenue R, he may have lived
12 there for six months or so in 1968, and at some
13 time during the fall of 1968 he moved. The last
14 line:

11:03 15 "I had not been living on the west side
16 of Saskatoon for at least a couple of
17 months prior to the murder of a
18 Saskatoon nurse in 1969."

19 Move to the next page, please, paragraph 3:

11:03 20 "While living on Avenue R I would
21 occasionally take the bus to work ...
22 would normally leave for work around
23 7:00 a.m. although my recollection is
24 vague on this point."

11:04 25 Paragraph 4:



1 "I did not know Gail Miller by name, but
2 would see a nurse from time to time on
3 the bus, several months earlier and
4 would recognize the face as being
11:04 5 someone who I would see at my place of
6 work, being the City Hospital."

7 Paragraph 5:

8 "I can only say it was a nurse in
9 general sense that took the bus, but not
11:04 10 specifically Gail Miller."

11 Paragraph 6:

12 "If there was more than one nurse who
13 took the bus along 20th Street, I would
14 not be able to have identified which one
11:04 15 of them would have been Gail Miller."

16 The next paragraph simply says that he was never
17 asked to provide a written statement or testify
18 at the preliminary inquiry or the trial. That
19 puts a slightly different cast on Simon Doell as
11:04 20 he is in the Mackie summary; does it not?

21 A Well, I'm -- he said she took -- that the woman
22 took the bus at Avenue N. What's the date of this
23 affidavit? It's 1992 isn't it?

24 Q Yes.

11:05 25 A 20 some years later he's not sure of what he was



1 thinking. I mean, it is what it is and its value
2 is whatever its value is. I don't think it was
3 hugely important to us whether she caught it at O
4 or N. It's a block apart.

11:05 5 Q I'm not really interested in whether it was hugely
6 important to you, sir, I'm talking about at the
7 time that this Mackie summary was prepared.

8 A Well, at the time the summary was prepared, I
9 assume they had what he told them back then.

11:05 10 Q Uh-huh.

11 A And if I recall correctly, that was she took the
12 bus at Avenue N.

13 Q And that he hadn't lived there for months?

14 A Yes.

11:05 15 Q So any information he was giving about busses
16 would have to go back into the fall of 1968?

17 A It would have been fairly stale, yes.

18 Q And that information doesn't make its way into the
19 summary does it?

11:06 20 A No.

21 Q Could we have document 218223, please, and then
22 within that I want 218228. Now, Mr. Doell's
23 evidence or his sighting of a nurse on the bus
24 that got on at Avenue N, that was important to the
11:06 25 theory that the Wilson vehicle had been traveling



1 down Avenue N and they had encountered Gail Miller
2 wasn't it?

3 A That was the Crown's theory, yes.

4 Q Yeah.

11:06 5 A And then the alley by the funeral home on N and so
6 on.

7 Q And are you aware that that evidence wasn't in
8 fact called at the trial, any evidence that she
9 took Avenue N?

11:07 10 A That they were traveling down Avenue N?

11 COMMISSIONER MacCALLUM: Sorry, wait a
12 second, you're talking over one another. What
13 was the question, please?

14 BY MS. McLEAN:

11:07 15 Q Are you aware that there was no evidence called at
16 the trial that Ms. Miller took Avenue N?

17 A Well, again, Ms. McLean, it has been a long time
18 since I read that transcript.

19 Q Uh-huh.

11:07 20 A I can't honestly say whether I was aware of that
21 or not.

22 Q Okay. These are some items that -- this document
23 actually is the submissions on behalf of David
24 Milgaard at the Supreme Court and there is a list
11:07 25 of items that were not disclosed to defence



1 counsel at trial. Just running through them
2 quickly, item (a), Miss Gallucci is somebody that
3 said she saw a nurse coming from the direction of
4 Gail Miller's house and taking the bus at Avenue O
11:08 5 and 20th Street at 10 to seven, that would be the
6 time that Gail Miller normally takes the bus to
7 get to work. The next one, Anne Friesen gave a
8 police statement that Gail Miller walked south on
9 Avenue O to the 20th Street bus stop. (c), Betty
11:08 10 Hundt, another of Gail Miller's roommates -- over
11 to the next page, please -- gave a statement to
12 the police that she believes that Gail Miller
13 walked south, O to 20th Street and the bus stop,
14 and none of those things made their way into the
11:08 15 Mackie summary either did they?

16 A No.

17 Q Okay. The next paragraph talks about the Crown's
18 theory that the car was stuck on Avenue N, again,
19 a complaint on behalf of Mr. Milgaard that these
11:09 20 numerous items were not disclosed to defence
21 counsel at trial and it's essentially a
22 chronological list of people who had dealings in
23 the vicinity of Avenue N or Avenue O and saw
24 nothing unusual, nothing to suggest that there was
11:09 25 a car stuck in the vicinity of where the murder of



1 Gail Miller took place. Just moving down here,
2 please -- next page -- one of the most important
3 ones of course is item (h), between 6:50 to 6:55
4 a.m. Mr. and Mrs. Merriman, who lived directly
11:10 5 opposite the funeral parlour, were looking out the
6 window watching for a cab, they saw nothing.
7 Continue down, please, and the next. So we use
8 letters (a) through (x) and over a time period
9 that ends at 7:05 a.m., none of those items were
11:10 10 disclosed to defence counsel at David Milgaard's
11 trial, and can you confirm that those items also
12 do not appear in the Mackie summary?

13 A Well, yes, as far as I can tell they don't appear
14 in the Mackie summary.

11:10 15 Q Mackie summary again, please, page -- well, the
16 first page, 006800. Sorry, it's the second page
17 of the document. Again, purports to be from the
18 statement of Nichol John on March the 11th of
19 1969, it says:

11:11 20 "- Admits seeing nurse (looked like
21 nurse) near funeral home. Asked
22 directions."

23 And I can advise you, sir, that that does not
24 appear in any way, shape or form in the March
11:11 25 11th statement of Nichol John and I have not been



1 able to find it in any other interview of Nichol
2 John prior to May 23rd, 24th.

3 A All right. Okay, what is -- my screen cuts off
4 the top of that.

11:11 5 Q I'm sorry.

6 A Can you just kind of scroll up?

7 Q Push it back.

8 A No, no. Okay, Nichol John. Okay. I was
9 wondering whose statement it was. It didn't show
11:11 10 on the screen.

11 Q We've been wondering too because it's not in her
12 statement.

13 A I didn't say the summary was accurate.

14 Q Okay. And page --

11:12 15 A And, you know, I should point out that since we
16 had the police report, the summary was really of
17 no interest to me other than there it is.

18 Q Uh-huh. And page 803 of the same document, and
19 this is under the heading *Summary*, but it's more
11:12 20 theory I guess:

21 "- On seeing nurse (Miller) she was
22 approached on pretence of getting
23 directions with a view to stealing her
24 purse."

11:12 25 And prior to this, the creation of this document,



1 we're not aware of anybody involved in this case
2 saying that they had seen a nurse in the vicinity
3 of Avenue N.

4 On the same document we have
11:13 5 a mention of -- sorry. Yeah. We have on this
6 document also, in addition to some evidence that
7 is not accurately reported, evidence which is
8 missing and, I would suggest, has a great deal of
9 significance to the case, but on the first page
11:13 10 we have the (V1)- rape, its location, a
11 description, a comparison of the (V1)- rape to
12 the Miller file, that Miss (V1)- had been shown a
13 photo spread and had picked Milgaard and another.
14 Without going back to the document, she actually
11:14 15 says in there that she isn't sure where she had
16 seen either of the two gentlemen that she had
17 picked out, but she thought they looked familiar,
18 and then again we've got the blood group of her
19 and that the attacker is an A group secretor.
11:14 20 Now, this offence is one that Larry Fisher pled
21 guilty to and it's one of a group of offences he
22 pled guilty to. There's no mention of the other
23 sex offences that were committed by Mr. Fisher in
24 and around this same time period and which the
11:14 25 police were originally investigating as linked to



1 the Miller murder is there?

2 A No.

3 Q Okay. Do you think if somebody looked at this
4 document in totality as a summary of the evidence,
11:15 5 they could get a skewed idea of what the case was
6 against David?

7 A Oh, yes, yes, and that, frankly, doesn't come as a
8 huge surprise.

9 Q All right.

11:15 10 A Have you ever seen something called can say
11 statements? They usually amount to might says and
12 they tend to provide a fairly inaccurate view of
13 what's on the evidence and my view is that they
14 are really improper for disclosure because they
11:15 15 are misleading.

16 Q And they would mislead anybody that was trying to
17 decide who would be a good suspect in the case
18 perhaps?

19 A If -- well, in terms of misleading anybody, they
11:15 20 wouldn't be produced for investigation purposes,
21 they are produced as part of the brief for the
22 Crown, and if they are handed to defence counsel
23 who takes a quick look at them to try and assess
24 the strength of the Crown's case, say, for a bail
11:16 25 hearing application or something like that, they



1 are going to be dang misleading.

2 Q I don't mean to interrupt you, sir. Are you
3 speaking of will-says or might-says? I'm talking
4 about this document.

11:16 5 A Yeah, we call them can-says.

6 Q Yeah. I'm talking about this document, not about
7 can-says?

8 A No, no, I appreciate that. But you are suggesting
9 that, because this is inaccurate, that has some
11:16 10 sinister meaning. I'm saying, well, you are going
11 to have to do a little more than show inaccuracies
12 to prove that this was somehow a sinister plan for
13 the conviction of David Milgaard.

14 Q My suggestion, sir, was that this document, if
11:16 15 relied upon to decide who would be the best
16 suspect in the case, might be misleading?

17 A Oh, no, no question about that.

18 Q No question that it might be misleading; right?

19 A Yes.

11:16 20 Q Okay. And you don't know this, but this
21 document -- well, you may know it now but you
22 certainly didn't know it -- 061373. This is a
23 letter that you wrote to Mr. Sawatsky on September
24 the 9th of '93 and you turned over, at that time,
11:17 25 --



1 A Oh yes.

2 Q -- a portion of the department's file that had
3 been found in the office. You indicated you have
4 no idea:

11:17 5 "Why it was there ...",

6 you:

7 "... personally disclaim any knowledge
8 of it as the file contains material I
9 have never seen before."

11:17 10 And:

11 "... please pass this on to your
12 investigators for their consideration."

13 And it's my understanding that, in amongst those
14 documents that you turned over to Mr. Sawatsky in
11:17 15 1993, were reports prepared by the RCMP who were
16 assisting with the investigation in 1969?

17 A Umm, yes, I -- Inspector Riddell, I think?

18 Q Riddell is one of them, yeah, Rasmussen.

19 A Yes.

11:17 20 Q And in those reports, we've only heard about them
21 in the Inquiry because they were therefore not
22 available for David's lawyers on the preparation
23 of their application, they weren't available to
24 the Department of Justice in their investigation,
11:18 25 they weren't available at the Supreme Court of



1 Canada, they were available at this Inquiry, and
2 we've heard evidence that the police, including a
3 number of members of Saskatoon fairly high up the
4 food chain, if I can call it that, and some of the
11:18 5 senior officers that were involved from the RCMP
6 in the investigation, had a meeting on May the
7 16th of 1969, and that this document was used in
8 that meeting to decide on who would be a good
9 suspect to concentrate on in the case; are you
11:18 10 aware of that?

11 A Umm, I was aware that they had talked to some RCMP
12 members and I believe, actually, Regina City
13 Police members had something to do with the file
14 as well. I don't recall specifically what the
11:19 15 discussions were about, but there had been
16 discussions, I know that.

17 Q And that, at the conclusion of that meeting, it
18 was decided that David Milgaard was the best
19 suspect and that he'd be the one that they focused
11:19 20 on. So at that time of that meeting, on May the
21 16th, 1969, Nichol John and Ron Wilson had been
22 saying essentially the same thing for all of
23 March, all of April, and about two weeks or so in
24 May.

11:19 25 In respect of Ron Wilson, he



1 said he arrived in town at 5:00 or 6:00 a.m., went
2 looking for the Cadrain house, had the incident
3 that could -- at the Danchuks, went to the Cadrain
4 house, David was never out of his sight, never saw
11:20 5 a knife, never knew anything about the murder
6 until questioned on March the 2nd.

7 And Nichol John, as of March
8 -- as of May the 16th, was saying that they
9 arrived in town about 6:30 to 7:30 a.m., they went
11:20 10 looking for the Cadrain house, she remembered
11 going to the motel looking for a map of how to get
12 to Pleasant Hill, she remembered the Danchuks, and
13 that they were never separated.

14 And, at the time, David was
11:20 15 saying essentially the same thing that he's said
16 for the last 40 years, that they had come to
17 Saskatoon, been various places, left, no murder,
18 nothing funny.

19 A Yes.

11:20 20 Q Right? Now, within eight days of this document
21 being used at the meeting, Mr. Wilson has changed
22 his story. Could we have 065360?

23 COMMISSIONER MacCALLUM: "This document",
24 you mean the Mackie summary, not the Riddell
11:21 25 report?



1 MS. McLEAN: Yes, sorry, I do mean that.

2 COMMISSIONER MacCALLUM: Yeah.

3 MS. McLEAN: The Mackie summary referred to
4 at the meeting, referred to in the Riddell
11:21 5 reports.

6 BY MS. McLEAN:

7 Q Okay. This is a typed version of the May 24th
8 statement and the May 23rd statement of Ron
9 Wilson. Can we go to the next page, please? It's
11:21 10 in reverse order. Mr. Wilson says that they
11 spoke:

12 "... to a young lady in a dark coat
13 about directions ...",

14 that's new:

11:22 15 "... in the area where the police showed
16 me the all night cafe."

17 That's new, the police showed him something.

18 "She said she didn't know where Piece
19 Hill was and when we left Milgaard said
11:22 20 she was a stupid bitch."

21 He, David:

22 "... was the only one that had spoke to
23 her."

24 And then we have:

11:22 25 "I should also mention that on the way



1 to Saskatoon we discussed pulling B. &
2 E's, rolling someone or purse snatching
3 for money. I don't really remember if
4 this girl was carrying a purse."

11:22 5 Do you see the juxtaposition of talking to the
6 woman and purse snatching there?

7 A Yes.

8 Q And if we go to Nichol John's statement, 065356,
9 and it's at 357. This is Nichol John May the
11:23 10 24th:

11 "The next thing I recall is
12 seeing Dave in the alley on the right
13 side of the car. He had a hold of the
14 same girl we spoke to a minute before.
11:23 15 I saw him grab her purse. I saw her
16 grab for her purse again."

17 It says "her", but I presume she means 'him',
18 maybe it doesn't.

19 A No, she:

11:23 20 "... saw her grab for her purse again."

21 Q Someone -- saw her reach again:

22 "... her purse again. Dave reached into
23 one of his pockets and pulled out the
24 knife."

11:23 25 And if we go to the Mackie summary, on the last



1 page of it please:

2 "- On seeing the nurse (Miller) she was
3 approached on pretence of getting
4 directions with a view to stealing her
11:24 5 purse."

6 And then, further down, we have the:

7 "- Purse thrown in garbage ...",
8 and that's in fact where it had been found, we
9 have Milgaard removing the wallet and that he may
11:24 10 have put the purse in the garbage after Wilson
11 had looked in it, or maybe most -- both of them
12 had been involved in the theft of the purse, and
13 that:

14 "... Milgaard intent on rape assaults
11:24 15 and murders Gail Miller.",

16 or that:

17 "Wilson has purse, goes through it and
18 puts it in the garbage can while waiting
19 on Milgaard who he is aware is raping
11:25 20 Miller."

21 So the statements of Nichol John and Ronald
22 Wilson obtained on May 23rd and 24th, 1969 quite
23 closely parallel what Mr. Mackie has theorized?

24 A Some of it does, yes.

11:25 25 Q Okay.



1 A I mean there's nothing about the last part you
2 were reading there, bottom line, Mr. Wilson didn't
3 put himself in it.

4 Q No he didn't, but he has given evidence that the
11:25 5 police were telling him it was either him or
6 David, so --

7 A Well --

8 Q -- there may be some support for that?

9 A That's -- that's his evidence.

11:25 10 Q Yes. 065356, Nichol John's statement:

11 "After we got to Saskatoon we
12 drove around for about 10 or 15 minutes.
13 Then we talked to this girl. This was
14 in the area where Sgt. Mackie drove me
11:26 15 around."

16 "We started to drive away and
17 only went about half a block when we got
18 stuck. We ended up stuck at the
19 entrance to the alley behind the funeral
11:26 20 home."

21 And we can see that Mr. Mackie wrote about that
22 at page 006803 of the Mackie summary. We have:

23 "- On seeing the nurse ... she was
24 approached on pretence of getting
11:27 25 directions ...",



1 "- This would be around funeral home
2 which would coincide with statements of
3 Nichol John - Dieworld seeing lights in
4 alley - Doell saying Miller took bus at
11:27 5 Avenue N."

6 Is this of some concern, given that we now know
7 that Nichol John did not see David Milgaard
8 attack anybody?

9 A Well, what do you mean "of some concern?"
11:27 10 Obviously, the statements of Wilson and John are
11 of some concern once the DNA -- which in my view,
12 again, exonerates David --

13 Q Uh-huh?

14 A So, yeah, I mean obviously Nichol John and Ron
11:28 15 Wilson -- well, Ron Wilson certainly was lying.
16 Nichol John was lying when she said she saw David
17 Milgaard doing something. I'm still of two minds,
18 frankly, whether she saw anything or whether she
19 saw somebody attacking Gail Miller. I don't know.
11:28 20 I am sure it wasn't David Milgaard she saw
21 attacking him -- or her.

22 Q Nichol's statement as well -- sorry, maybe I'll do
23 the prediction first:

24 "- Wilson appears to be driver of car,
11:29 25 therefore, Milgaard would leave car to



1 get purse - having seen Miller closer
2 his sex drive takes over and he forces
3 her down alley to where she is found.
4 - Nichol John knows or suspects results
11:29 5 and leaves car. Runs west ... and is
6 the girl seen by Indyh at St. Mary
7 Church. At this point she changes her
8 mind about saying anything and goes
9 north on Avenue 'O' where she meets car
11:29 10 again."

11 I don't think there's another reference but. If
12 you could scroll down, that seems to be all there
13 is there about that.

14 And then if we go to Nichol
11:29 15 John's statement, 065356, at 357:

16 "The next I recall is him
17 taking her around the corner of the
18 alley. I think I ran after that. I
19 think I ran in the direction Ron had
11:30 20 gone. I recall running down the street.
21 I don't recall seeing anyone. The next
22 thing I knew I was sitting in the car
23 again. I don't know how I got back to
24 the car."

11:30 25 You see how closely that follows what Mr. Mackie



1 suggested might have happened?

2 A Yes.

3 Q Following along from where we were, Nichol John
4 says:

11:30 5 "I seem to recall seeing Dave
6 putting a purse into a garbage can. I
7 don't remember which time it was or
8 where I was when I saw this.

9 I recall there were two
11:30 10 garbage cans. The one on the left had
11 the lid tipped. I don't recall which
12 one he put it in.

13 The next I remember is
14 sitting in the car. I don't remember
11:31 15 Ron being in the car or coming back."
16 And Mr. Wilson's statement -- sorry, I'm missing
17 one page here, oh, you've got it, perfect. Umm,
18 next page, next page, it's page 2 of the May 23rd
19 statement. Ronald Wilson says:

11:32 20 "At Calgary we went to the
21 bus depot, that is Dave and I."

22 Scrolling down a little bit:

23 "This is when Dave told me he hit a girl
24 in Saskatoon, or maybe he said he did a
11:32 25 girl in in Saskatoon. I don't remember



1 for sure which. He told me he grabbed
2 her purse and she fought and he said he
3 jabbed her with a knife a few times, and
4 said he put her purse in a trash can.
11:32 5 He said he thought she'd be alright."

6 And that, again, is something that had appeared
7 in the Mackie summary and cannot possibly be
8 true; can it?

9 A Umm, which, the discussions in Calgary?

11:33 10 Q Yeah?

11 A Well, no, I would assume that's not the case.

12 Q Well, it can't possibly --

13 A If Ron Wilson made this up then, no, those
14 conversations couldn't have occurred.

11:33 15 Q Now these statements are really recantations of
16 the first statements; are they not?

17 A Oh, yes.

18 Q And these were taken during a period of time that
19 the -- Nichol John was 16 years old, Ron Wilson
11:33 20 was 17, I believe, and they'd been taken from
21 their homes in Regina --

22 A Something like that, yes.

23 Q -- to Saskatoon --

24 A Oh yes.

11:33 25 Q -- without parental involvement; are you aware of



1 that?

2 A Yes, I would assume that was -- well, certainly
3 the parents didn't -- there was nobody
4 accompanying them, I don't know whether their
11:33 5 parents were aware that they had gone to Regina
6 (sic) or not.

7 Q They'd been held overnight in police cells?

8 A That's correct.

9 Q In respect of Nichol John, more than one night,
11:34 10 driven around the murder scene?

11 A That, to my knowledge that's the case, yes.

12 Q There is no accounting in any records we have been
13 able to establish as to how long they were
14 questioned, or what they were specifically asked,
11:34 15 or how long they were in the individual company of
16 police officers?

17 A That's correct, yes.

18 Q But we know, at least, that Ms. John was driven
19 from Regina, which is how many hours drive?

11:34 20 A 2 1/2, three.

21 Q Okay. Same with Mr. Wilson, driven separately?

22 A Yes.

23 Q They had sessions with Mr. Roberts on the 23rd of
24 May that lasted for hours, according to the
11:34 25 evidence of Mr. Roberts at the Supreme Court?



1 A Yes.

2 Q And that Ms. John and Mr. Wilson had been put
3 together by Mr. Roberts, and evidence discussed
4 with both of them, on the admission of
11:35 5 Mr. Roberts?

6 A Well, I don't specifically recall that, --

7 Q Okay.

8 A -- but if that's in his transcript of evidence I
9 wouldn't deny that, no.

11:35 10 Q Okay. And that there had been another, another
11 session after that for Mr. Wilson with the police
12 on May the 23rd which results in taking a
13 statement from him, the May 23rd statement, and
14 then he is taken over to swear to the statement
11:35 15 that he had just given.

16 Ms. John apparently is put
17 back in the police cells with no accounting for
18 why she wasn't questioned or why a statement would
19 not be taken from her, given that she is supposed
11:35 20 to have told Mr. Roberts that she remembered
21 seeing a murder, and she's then taken --

22 A Well, yeah, I'm -- you know, you are giving me
23 details. I don't recall this from the Court, but
24 if that's what's on the record, then I accept that
11:36 25 as what the evidence was.



1 Q Okay. And then the next morning of May 24th, Mr.
2 Wilson gives an amended statement where he
3 remembers now that he had left the car and come
4 back to the car after the murder, and then Nichol
11:36 5 John gives her statement and swears to it. And,
6 for all of that, we've got police reports that are
7 prepared some days after, there is no transcript
8 of the tape recordings that were made of the
9 conversations that took place with these people on
11:36 10 May the 21st, 22nd, 23rd, or 24th, no records of
11 the encounters with Mr. Roberts, no availability
12 of the tape recordings that were made, no memory
13 on behalf of the police officers that may or may
14 not have been listening to that, we've heard
11:37 15 evidence at the Inquiry about what was done in
16 that respect. In those circumstances, do you see
17 some reason to be very, very concerned about how
18 the recantations took place?

19 A Well, yes, we were interested in the way those
11:37 20 statements were produced but, at the end of the
21 day, Mr. Wolch had the opportunity to produce what
22 evidence there was, and to argue that, --

23 Q Uh-huh?

24 A -- and our job was to test the evidence that was
11:37 25 put forward and make whatever arguments we thought



1 were applicable to it.

2 **Q** Uh-huh. Now you've said several times that Mr.
3 Wolch, or counsel for Mr. Milgaard had the
4 opportunity to present evidence, present
11:37 5 allegations -- or present evidence to support
6 allegations of wrongdoing and didn't do so. Like,
7 what evidence would you expect somebody in David
8 Milgaard's position to be able to produce, given
9 the circumstances that --

11:38 10 **A** Well, I mean, he had the prospect of calling other
11 police officers and the two prosecutors and he
12 didn't do that.

13 **Q** Okay. What evidence --

14 **A** He was making allegations that they had
11:38 15 misconducted themselves during the investigation,
16 and that the prosecutors had covered up when they
17 obviously knew David Milgaard was innocent and
18 Larry Fisher was guilty, he didn't call evidence
19 on that.

11:38 20 **Q** Yeah. As I indicated to you, I'm trying to stay
21 in a -- in more of a systemic framework. What
22 evidence, if we have statements of people like
23 Nichol John and Ron Wilson that underwent this
24 transformative process that went from being "we
11:38 25 came, we saw, nothing happened" to being



1 statements of "I saw him commit the murder, I
2 heard him confess to the murder, I know where
3 things were put that nobody else but the murderer
4 would know"; if a person in David Milgaard's
11:39 5 position, not David Milgaard, what would you
6 expect them to be able to call as evidence when
7 there are no reports, no notes, no tape
8 recordings, and no memories?

9 A Oh, I --

11:39 10 Q What could they bring to Court?

11 A Ms. McLean, you are absolutely right, after a
12 certain number of years it's going to be very --
13 the task David Milgaard faced --

14 Q Yeah.

11:39 15 A -- was a difficult one. Now he claimed he had
16 some evidence, some new evidence, but set that
17 aside for a moment.

18 Q Uh-huh?

19 A If all he is saying is, you know, "things weren't
11:39 20 fair, people were -- the witnesses lied, the jury
21 got it wrong" --

22 Q Uh-huh?

23 A -- the short answer is it's going to be very
24 difficult for him to convince anybody, on the
11:40 25 basis of that, that there's been a miscarriage



1 and, frankly, it's not likely going to happen.

2 Q I mean if the witnesses, like for example
3 Mr. Karst was called as a witness at the Supreme
4 Court, he was asked by the Attorney General,
11:40 5 counsel for the Attorney General of Saskatchewan
6 or for the Province of Saskatchewan, if he had
7 done anything improper in the questioning of the
8 witnesses and he denied it, there's really -- and
9 I'm not suggesting, for the purposes of this
11:40 10 question, that Mr. Karst personally did anything
11 in taking those statements necessarily -- but in
12 the absence of anything that could support it
13 aren't you just stuck with Mr. Karst's answer?

14 A Umm --

11:40 15 Q And, again, I'm talking systemically, I'm not
16 talking --

17 A Well actually, Ms. McLean, systemically there is
18 other evidence you can bring, and the evidence
19 would be "this is what happened then", call a
11:41 20 police officer from today and say "okay, now how
21 would you deal with these witnesses today".

22 Q Uh-huh?

23 A And the answer is going to be "a whole lot
24 different than they were dealt with then".

11:41 25 Q Uh-huh?



1 A You could not grab a pair of 16-year-olds out of
2 Regina, jerk them up here, hold them in police
3 cells and interrogate them the way that was done
4 in 1969, that simply wouldn't be permitted today.
11:41 5 What's more, there would be some expectation that
6 a record of that conversation -- those
7 conversations would exist, whether it's a tape, --

8 Q Uh-huh?

9 A -- like video tape or video disk --

11:41 10 Q Uh-huh?

11 A -- or a transcript, or something, --

12 Q Uh-huh?

13 A -- or, at the very least, detailed notes.

14 Q Uh-huh?

11:41 15 A I mean --

16 Q And how -- sorry?

17 A The problem is David Milgaard was stuck with
18 dealing with what happened back then.

19 Q Yeah.

11:41 20 A They might have called evidence to suggest "well,
21 this would be done different now" and "why would
22 you do it different", "well, because it may
23 produce skewed results".

24 Q Yeah. But how would that help in proving or
11:42 25 establishing that, in this particular case, it did



1 produce a wrongful conviction or a miscarriage of
2 justice?

3 A Well, because it then gives you some basis to
4 argue that look, even though the police officers
11:42 5 were following the practice at the time, everybody
6 knows that nowadays that just wouldn't be an
7 appropriate way to go about getting these
8 interviews, and while they may not have known that
9 then, it provides a basis to argue that the
11:42 10 information obtained was not reliable.

11 Q And would you expect that the prosecution side, or
12 the people that have been tasked with upholding
13 the conviction, would argue that that is no
14 evidence, that it was, in fact, a correct and --

11:42 15 A Well, I mean, that's a submission we would make.
16 But the point is, if you are trying to get the
17 best case you can --

18 Q Uh-huh?

19 A -- for David Milgaard before the Supreme Court,
11:43 20 why wouldn't you want to put that kind of evidence
21 in? It seems to be -- it's certainly something
22 that's solid and reliable in the sense that
23 everything else they seemed to be calling was
24 exploding on them.

11:43 25 Q Uh-huh?



1 A And that, at least, provides a means of saying
2 "well you know, look, there is a question about
3 the reliability of what was produced by the
4 investigation, not saying anybody acted
11:43 5 improperly, but certainly nowadays we wouldn't do
6 things that way".

7 Q You were -- you were concerned, I think, about the
8 statement that Mr. Wilson had given to Mr.
9 Henderson and, with respect to that, I mean you
11:44 10 are concerned about the absence of Mr. Henderson's
11 tapes --

12 A Yes.

13 Q -- and you wanted to listen to them so that you
14 could see if he'd done anything improper during
11:44 15 his interview?

16 A Well we just, particularly after seeing Mr. Wilson
17 in the Supreme Court, I mean we were interested to
18 hear how his recantations came about. He just, I
19 mean his -- you've no doubt read the transcript
11:44 20 and, to put it bluntly, he was a mess, and we were
21 sort of curious as to what Paul Henderson did to
22 produce what appears to be a fairly coherent
23 recantation.

24 Q Uh-huh. Did you wonder the same way about the --
11:45 25 what may have been done with Nichol John and Ron



1 Wilson in 1969 to stand their statements on their
2 heads?

3 A Yes.

4 Q Did you make inquiries as to where those tapes had
11:45 5 gone and why they hadn't been kept?

6 A Well we, yes, we inquired as to whether there were
7 transcripts or whether there might be the tapes
8 left, and the answer was there was none of that
9 left.

10 Q And was this just idle curiosity with respect to
11 Mr. Henderson, or were you looking to suggest that
12 he had done something improper to transform --

13 A I --

14 Q -- Ron back to what he had said in 1969, in May?

11:45 15 A We wanted to see --

16 Q I --

17 A No, it was more than idle curiosity, we wanted to
18 see how that was produced.

19 Q And --

11:45 20 A And --

21 Q With a view to making an allegation that Mr.
22 Henderson had done something improper?

23 A Well, that, I mean, there may have been
24 cross-examination with respect to that if he was
11:46 25 produced as a witness or the tapes were brought



1 in, yes.

2 Q Uh-huh. And what could Mr. Henderson have done to
3 Mr. Wilson to cause him to recount falsely in your
4 view?

11:46 5 A Well, Ms. McLean, if you saw Ron Wilson's
6 performance in the Supreme Court, if Paul
7 Henderson had followed him around often, long
8 enough making the suggestion long enough, he would
9 have admitted he killed John Kennedy. Ron Wilson
11:46 10 was just the kind of person that could be led
11 around fairly easily and influenced very easily.

12 Q And in part you got that evidence from talk -- you
13 got that information from talking to police
14 officers that had known him in 1969 in Regina?

11:47 15 A Well, yes. When he was fairly young he was -- I
16 mean, their view was that he would be somebody
17 that would be easily influenced by someone he
18 liked or he thought highly of like David Milgaard.

19 Q Uh-huh.

11:47 20 A Although again, when you look at the preliminary
21 hearing and the trial transcripts, my recollection
22 is he wasn't anywhere near as problematic as a
23 witness in terms of being able to stick to what he
24 was saying in '69 and '70 as he was in '92, which
11:47 25 isn't surprising.



1 Q Uh-huh. But the opinions came from officers that
2 had known him in 1969 and '70 in Regina; correct?

3 A Yes. Well -- and I don't know exactly when he
4 left, but it was sometime I think in the 1970s, so
11:48 5 they had known him for some time. He used to hang
6 around with one of the motorcycle groups there.

7 Q So Mr. Henderson couldn't put him in jail and
8 couldn't, you know, really beat him up or give him
9 any kind of rewards. He could offer him a charge
11:48 10 of perjury if he recanted I suppose, and that's
11 something that was certainly considered with
12 respect to Mr. Wilson wasn't it?

13 A Well, after the Supreme Court's observations, yes.

14 Q Uh-huh.

11:48 15 A Although we didn't consider that. I mean, that
16 occurred in Ontario, so that was their problem.

17 Q He can't put him in custody and, according to Mr.
18 Henderson's interviews with the media, he said he
19 spent about eight hours of gentle prodding before
11:48 20 Mr. Wilson recanted. Mr. Wilson has given
21 evidence that his conscience was bothering him.
22 Do you think that's realistic, that his conscience
23 would be bothering him?

24 A It took a long time for it to happen.

11:49 25 Q Uh-huh.



1 A A long, long time for it to happen.

2 Q And yet Mr. Wilson did in fact and in law in
3 reality testify falsely at David Milgaard's trial?

4 A Yes, that appears obvious.

11:49 5 Q And that evidence that he gave was effectively a
6 recantation of his earlier statements; yes?

7 A The March or whenever they were, yes.

8 Q Yeah. And you told us the other day that there's
9 numerous reasons why a witness recants, only one
11:49 10 of which is that they didn't tell the truth the
11 first time. Do you remember saying that?

12 A Yes.

13 Q And from a systemic point of view, one of the
14 problems that we have with wrongful convictions is
11:50 15 when somebody is recanting evidence that was
16 favourable to the prosecution?

17 A Yes.

18 Q That's the sort of attitude, if I can call it
19 that, that we get back, that they are not
11:50 20 recanting because they didn't tell the truth the
21 first time, they are recanting because of some
22 pressure or some reward or some benefit that they
23 are going to get, and what I want to ask you is if
24 the same sort of thinking applies or should apply
11:50 25 to recantation s that are of the order of Ron



1 Wilson's and Nichol John's in 1969 where they
2 recant an exculpatory statement and turn it into
3 an inculpatory --

4 A Well, Ms. McLean --

11:50 5 Q If I could finish the question, please. One of
6 the responses that we get is that they didn't tell
7 the truth to the police, their recanting is the
8 truth. Do you see how the way you look at what
9 they say changes depending on what they are
11:51 10 recanting?

11 A Well, the way I look at recantations is they raise
12 a question. The first question is why has the
13 person changed their mind.

14 Q Uh-huh.

11:51 15 A Now, I'm not prepared to accept the notion that we
16 always accept that the person has now decided to
17 tell the truth or that if they recant something
18 favourable to Crown they are now lying, I mean,
19 those are possibilities, but if a witness recants
11:51 20 what they've said, I want to know why, and on a
21 number of occasions when I've dealt with that as
22 an appeal lawyer, the first thing I did when I got
23 a recantation was send the police out to discover
24 if there is any evidence of why this has happened,
11:52 25 because, I mean, it may well be true, but I'm also



1 aware of the fact that the people we deal with on
2 a day-to-day basis, it's very often difficult to
3 sort out what's true and what isn't, let me put it
4 that way.

11:52 5 **Q** Okay. With respect to this case and Ron Wilson
6 and Nichol John, we actually can do pretty well on
7 what they said that was untrue, at least with
8 certain specifics. In the face of absolute
9 innocence on the DNA, is it troubling that Nichol
11:52 10 John and Ron Wilson managed to insert into their
11 statements on May 23rd and May 24th things that
12 they could not possibly know?

13 **A** Well --

14 **Q** In general?

11:53 15 **A** I mean, if you are suggesting that the police
16 discussed the evidence with them or their theories
17 with them, I suspect that's right and that's where
18 a lot of that -- I mean, even assuming that they
19 had got stuck by the funeral home or in that area
11:53 20 as even Wilson still maintained, there was detail
21 in there that had to have come from the police
22 investigation up to that point. I mean, they
23 wouldn't know, for example, about things in
24 garbage cans.

11:53 25 **Q** Yeah. And this was used at trial really to



1 support the theory that David Milgaard did it and
2 that Nichol John witnessed it?

3 A Oh, absolutely. Those little pieces of evidence
4 were seen as corroboration.

11:53 5 Q So we've got Mr. Roberts showing Nichol John Gail
6 Miller's coat and then --

7 A I think he did more than that, didn't he throw it
8 at her?

9 Q He did a number of things, but I'm referring only
11:54 10 to her statement which doesn't contain the actual
11 interactions with Mr. Roberts, but her statement
12 says "on May 23rd Mr. Roberts showed me a coat.
13 This coat, as I recall, is identical to one worn
14 by the girl we spoke to and Dave attacked."

11:54 15 Can't possibly be true, she couldn't have
16 identified a coat like that, she didn't see Gail
17 Miller, she didn't see Dave attack anybody.

18 A Well, exactly.

19 Q And then we have David Milgaard is -- you probably
11:54 20 don't remember, but Nichol John certainly would at
21 that time -- David Milgaard was left handed, still
22 is. Dr. Emson did the autopsy report on Gail
23 Miller and wrote a report that said that the
24 attacker is right handed, as is Larry Fisher, and
11:55 25 as is the attacker on all the related rapes , and



1 then we have Nichol John saying I don't know which
2 pocket he got the knife from, the knife was in his
3 right hand. Does that suggest somebody told her
4 to say that he used his right hand?

11:55 5 A Well, I would assume that she would have to get
6 that from somewhere, although it's curious that
7 the police would be that specific.

8 Q Uh-huh. Nichol John and Ron Wilson both, the
9 knife that David is alleged to have had in the
11:55 10 car, according to Nichol, "this knife was a
11 kitchen knife used to peel potatoes and things
12 like that, it had a maroon handle. This knife was
13 the same as one of a group of knives that I was
14 shown by Mr. Roberts," and then Mr. Wilson says in
11:56 15 his statement, this is his May 23rd statement:

16 "Also today Mr. Roberts showed me 5
17 small knives at the Cavalier Hotel and I
18 picked out a brown bone handled one
19 which I had seen Milgaard with somewhere
11:56 20 between Regina and Saskatoon. He may
21 have got this knife from the Champs
22 Hotel where we ate that day. I don't
23 know just where I had seen this knife on
24 him but I remember it or one like it."

11:56 25 Now, given that these two did not see David



1 Milgaard kill Gail Miller, given that Gail Miller
2 was killed with a paring knife that exactly
3 matches the descriptions given and exactly
4 matches what was picked out in this knife lineup
11:56 5 with Mr. Roberts, they had to have been given
6 that information too didn't they?

7 A And there's no question, but that the police took
8 them on a tour of the scene, --

9 Q Uh-huh.

11:57 10 A -- would likely have pointed out the various
11 things to them. We knew a long time ago that they
12 showed them the knives --

13 Q Uh-huh.

14 A -- so yes, there's no question the police gave
11:57 15 them that information, and that's -- I go back to
16 what I said before, if you were going to ask a
17 current police officer, current investigator would
18 you do these kinds of things, I sure as heck hope
19 the answer is no.

11:57 20 Q Uh-huh. Or approve of it being done?

21 A Yes.

22 Q So essentially what has happened in this case is
23 somebody who is completely innocent, that these
24 witnesses have somehow given statements that
11:57 25 incorporate information that they were given by



1 police?

2 A Yes.

3 Q And there is absolutely no explanation as to why
4 they did that?

11:57 5 A Well, there's no -- well, as to why they did it?
6 No. As to how they got the information, I think
7 that is on the file.

8 Q It was obviously said to them?

9 A Well, there's references to being driven around
11:58 10 and stuff like that.

11 Q I mean, the information had to have been fed to
12 them, but why did they incorporate it?

13 A Well, I mean, that's a good question, why did they
14 decide to put David into it.

11:58 15 Q Uh-huh.

16 A I mean, was it as, what's his name, Mr. Wilson
17 said, that the police were giving him you or him,
18 or was it just that they found the pressure being
19 put on them by the police too much to bear, I
11:58 20 don't know, but there's something there that would
21 have tripped them over into doing it. Unless
22 somebody can point me at some evidence that
23 establishes that the police deliberately framed
24 David Milgaard when they knew he was innocent, I'm
11:58 25 not prepared to accept that.



1 Q What about if they --

2 A I am prepared to accept, however, that their
3 actions led these witnesses to getting information
4 that they could use to come up with statements
11:59 5 that put David Milgaard into it as the guilty
6 party. Why I don't know.

7 Q I'm not suggesting that anybody framed David
8 Milgaard believing him to be innocent on May the
9 23rd and 24th, 1969.

11:59 10 A Well, your client has, that's an allegation Joyce
11 Milgaard had made on a number of occasions.

12 Q Believing him to be innocent is the part I take
13 issue with, sir. What's your response to a
14 suggestion that the police manipulated these
11:59 15 witnesses and this evidence because they thought
16 David Milgaard was the person, because -- in other
17 words, because they thought he was guilty.

18 A No, I don't accept the notion that they attempted
19 to get witnesses to give false evidence against
12:00 20 David Milgaard.

21 Q That they attempted to get the witnesses to give
22 evidence that was false but that the police
23 believed to be true.

24 A Well, okay, there's no question the police -- as I
12:00 25 say, there's no question the police showed these



1 witnesses what they had and they may well have
2 directed their questioning in such a way that they
3 were asking, well, how do you explain this, how do
4 you explain that.

12:00 5 Q Uh-huh.

6 A And that would certainly end up, I suppose, if you
7 have sort of weak-minded witnesses who are
8 prepared to lie and have decided that that's the
9 only way to get out of this, you may well have a
12:00 10 situation where doing that is going to give them
11 the opportunity to incorporate that extra
12 information into their statements.

13 Q A couple of things just briefly. You testified on
14 September the 12th about Mr. Caldwell's note about
12:01 15 Nichol John saying something at the preliminary
16 hearing. Do you remember that?

17 A It was during the preliminary hearing. I believe
18 she was waiting in a witness room or something
19 with another witness.

12:01 20 Q Okay. Could I have document 003847, please, and
21 this was the note Mr. Caldwell had, it says:
22 "Mrs. Miller, Mary Marcoux, Albert
23 Cadrain all heard N. John say, "I don't
24 know why he didn't kill me too - I was
12:02 25 right there & ..."



1 Seen it all?

2 A Saw it all.

3 Q "...but I'm not going to say nothing."

4 And Mr. Caldwell testified here October the 4th of
12:02 5 2005, and the page number is 16098, please, Mr.
6 Caldwell's evidence after he reads the note
7 allowed, he says that there was, in the waiting
8 room --

9 "...there was, I believe, a witness
12:02 10 waiting room involved in this and I
11 believe possibly Peggy Miller was also
12 present, but that isn't revealed in this
13 note. I went by this room and one or
14 other of those three told me this
12:02 15 indicating that all three of them heard
16 it and I wrote it down as promptly as
17 possible on whatever I had available."

18 So he doesn't know who said this to him; right?

19 A Oh, who reported it, right.

12:03 20 Q He doesn't know for sure who is there; right?

21 A Right.

22 Q Now, what were you going to ask Mr. Caldwell at
23 the Supreme Court about this if he testified?

24 A I was just going to put the note to him and say
12:03 25 where did this come from, how did it come about.



1 Q And you wanted to ask him about a statement he
2 didn't hear made to people he couldn't identify
3 who had never been interviewed about it?

4 A Well, it certainly wouldn't have been the only bit
12:03 5 of hearsay that had been put into evidence at the
6 Supreme Court.

7 Q But that would be the purpose, is to put it in as
8 hearsay?

9 A Well, I would have asked him if, you know, if he
12:03 10 recognized the note and that would go in for
11 whatever good it did in evaluating whatever Nichol
12 John had left with the Supreme Court.

13 Q Was Nichol John asked about it?

14 A I don't recall.

12:04 15 Q The answer is no.

16 A Okay.

17 COMMISSIONER MacCALLUM: When?

18 MS. McLEAN: In the Supreme Court, sir.

19 COMMISSIONER MacCALLUM: Okay.

12:04 20 A If you say no, then I take that as right.

21 MS. McLEAN:

22 Q Do you think if you wanted to put that evidence
23 before the court, that the most appropriate way to
24 start with is to ask Nichol John if she said that?

12:04 25 A Well, at that point I don't know that we were



1 thinking about that note in particular. It was
2 something that was written by Bobs Caldwell and if
3 it was going to go in, it would go in through him.

12:04 4 Q Okay. Or that any of those people should be
5 interviewed to find out whether or not they
6 supported that claim?

7 A No, I didn't consider that at that point.

12:05 8 Q Okay. The other thing that you said a number of
9 times in your evidence, and this is about the
10 chicken soup and the heater thing, you said a
11 number of times that this was an absolute alibi
12 for the time of the murder if true?

13 A If true.

14 Q Because it would put David at a time and a
15 location when he couldn't possibly have done it?

16 A Well, it would have put him well on the other side
17 of the river at around seven o'clock when the
18 murder occurred, you know, within five or 10
19 minutes thereof.

12:05 20 Q Yeah.

21 A It wouldn't have been possible for them to drive
22 from there to where the murder occurred.

23 Q If seven o'clock is accurate?

24 A Well, if the seven o'clock or 10 to seven sort of
12:05 25 time frame is accurate, yes.



1 Q So if you rely on David's timing as given in 1992
2 about the uneventful day in 1969, you come up with
3 seven or 10 to seven, but if you use Ron Wilson's
4 evidence and his statements, they arrived in town
12:06 5 about 5:30, 6:30?

6 A Yes.

7 Q Nichol John's evidence, they arrived in town about
8 6:30?

9 A Okay.

12:06 10 Q The police theories in 1969, that the kids had
11 this huge amount of unaccounted for time on their
12 original stories because they had arrived so
13 early. If they had actually arrived early in
14 town, this would be no alibi at all would it?

12:06 15 A Well, except that -- I mean, I lived in Saskatoon
16 at that time and I was familiar with the area that
17 they are talking about and there wouldn't have
18 been a garage open at 6:30. The earliest anything
19 opened would be just before the sort of business
12:06 20 traffic started at around seven.

21 Q Or maybe someplace might have been just opening or
22 your memory may not be complete of 1969?

23 A Well, that could be, but I have to say that the
24 places I was aware of wouldn't have been open.

12:07 25 Q Yeah.



1 A And they were the only garages near the entrance
2 to a bridge on that side of the river.

3 Q And you recall that when Mr. Rasmussen, the motel
4 fella, where they went to the Trav-a-leer Motel to
12:07 5 get the map, he said that that was shortly after
6 he opened up at seven o'clock?

7 A Yes.

8 Q That was the alibi that was offered by David
9 Milgaard at all times wasn't it?

12:07 10 A Yes.

11 Q Okay. And the treatment of that in the argument
12 of the Saskatoon government was that Mr. Rasmussen
13 was wrong about his timing and it could have been
14 much later than seven o'clock?

12:07 15 A Well, I mean, shortly after seven, I mean, is
16 shortly after seven a minute after seven, 10
17 minutes after seven, 15 minutes after seven? I
18 don't know. And he didn't either as I recall.

19 Q So the argument that's made, and we don't need to
12:08 20 bring it up, it's document 206801, it's page 29 of
21 that document, and it's actually number 206833,
22 this is the argument put forward by Saskatchewan
23 at the end of the reference, that Mr. Rasmussen
24 was first asked to recall the events on June 12th
12:08 25 and he opened up at seven and they came in shortly



1 after, and the argument here is what shortly after
2 means is open to considerable interpretation given
3 the passage of some four and a half months.

4 "...it is open to the reasonable
12:08 5 interpretation that this was the first
6 event of the day after opening..."

7 That stood out in his mind; therefore, he puts it
8 happening early in the workday. That's the same
9 kind of thing that would have happened if this
12:09 10 had been offered -- if the chicken soup had been
11 offered as an alibi isn't it?

12 A Well, the significant difference is that that
13 comes from across the river.

14 Q Uh-huh.

12:09 15 A And to get from someplace across the river into
16 Pleasant Hill would have been a considerably
17 different drive than going from where they were to
18 the motel.

19 Q The other thing about this --

12:09 20 A Particularly since they didn't know much about
21 where they were in Saskatoon.

22 Q Now, this casting of the chicken soup as an alibi
23 is something that's being done by Saskatchewan,
24 it's not done by Mr. Milgaard. Do you realize
12:09 25 that?



1 A Well, why did he bring it up?

2 Q He brought it up because it was -- well, as to why
3 he brought it up who knows, but his evidence was
4 that his concern was about the garage, the chicken
12:09 5 soup guy, because it would clarify where they came
6 in.

7 A Well, his evidence was that he gave that
8 information to Justice Tallis so he could check it
9 out and produce it at trial and Justice Tallis
12:10 10 didn't do that.

11 Q Not as an alibi, sir, that's my point.

12 A Well, what else would you call it?

13 Q Well, he called it giving an explanation, a
14 correct explanation as to what part of the city
12:10 15 they came in, that they came in at a place that
16 was not near the murder scene, they came in where
17 there was --

18 A Except that that amounts to an alibi doesn't it?

19 Q An alibi for the time of the murder?

12:10 20 A If that's put before the court, doesn't that
21 amount to an alibi?

22 Q It amounts to a way they came into the city that
23 contradicts the theories that were being put
24 forward and the places that they were, it has
12:10 25 nothing to do with the timing.



1 A Well --

2 Q If he could --

3 COMMISSIONER MacCALLUM: Excuse me, I'm
4 just wondering where that evidence comes from.

12:10 5 MS. McLEAN: David Milgaard at the Supreme
6 Court, 013092.

7 COMMISSIONER MacCALLUM: Yes.

8 MS. McLEAN: And it starts at approximately
9 013258 and runs through to 261.

12:11 10 COMMISSIONER MacCALLUM: Oh, just a minute
11 now, it starts at where? So the document is
12 031092?

13 MS. McLEAN: Yes.

14 COMMISSIONER MacCALLUM: And the testimony
12:11 15 is at?

16 MS. McLEAN: 013258 and runs through to
17 261. I may be out a little bit on that, I had
18 some CaseVault problems last night. And then
19 also this is --

12:11 20 COMMISSIONER MacCALLUM: I would like to
21 see it pulled up, please.

22 MR. HODSON: We're going to try. The
23 number again, Joanne?

24 MS McLEAN: The main document number is
12:12 25 013092.



1 MR. HODSON: Which page?

2 MS. McLEAN: 013258. This was really --
3 the answer here.

4 MR. HODSON: Are you waiting for us?

12:13 5 COMMISSIONER MacCALLUM: Have you read
6 that?

7 A I've read that portion, yes.

8 COMMISSIONER MacCALLUM: Scroll down,
9 please. Next page? Well, Mr. Brown, if you want
12:14 10 to see more, just ask for it.

11 A No, I'll accept that David Milgaard thought that
12 that may contradict the witnesses, but I'm still
13 of the view that that provided him with a pretty
14 substantial alibi and he would have to know that.

12:15 15 BY MS. McLEAN:

16 Q Okay. Moving on, you've also indicated, and this
17 is not something that you, I would expect you to
18 know, sir, because it wasn't available to you, but
19 you've made a suggestion that this was a recent
12:15 20 fabrication at the time of the Supreme Court, and
21 given your views on it being an alibi and given
22 the evidence that you knew, I'm not challenging
23 you saying that, but factually January the 22nd of
24 1981, the document is 155260 at pages, I don't
12:15 25 need to bring it up, but just for reference, pages



1 155261, 262, 264 and 270, and that's a taped
2 conversation that the participants are Joyce
3 Milgaard, Peter Carlyle-Gordge, David Milgaard and
4 Gary Young, his lawyer, in 1981, and there is also
12:16 5 048235 and that is a --

6 COMMISSIONER MacCALLUM: When was this
7 conversation, please?

8 MS. McLEAN: January 22nd of '81.

9 COMMISSIONER MacCALLUM: Okay.

10 BY MS. McLEAN:

11 Q And there is a letter to Ron Wilson, perhaps we
12 should bring this one up, it's 048235. I can't
13 give a date on it, it's a letter from David to Ron
14 Wilson indicating that he was before the parole
12:16 15 board last June, he's got two more years before
16 full parole, so perhaps this document could be
17 dated that way. But he says:

18 "I want you to go to a lawyer
19 of your choice and put this thing right.

12:16 20 You can do so without getting yourself
21 in trouble. You will also probably end
22 up with the 10,000, still up for grabs,
23 I do not give a shit about the money."

24 And that is a reference to the \$10,000 reward
12:16 25 offered by the Milgaard family, which was at the



1 end of 1980, so we can say this letter was
2 written after that, but I'd have to go back
3 through the evidence to find out when the reward
4 money was used up. So it's sometime after 1980
12:17 5 and before 1990, which is when Ron Wilson did
6 recant?

7 A Well, yeah, I would assume he would have been
8 eligible to apply for parole after ten years --

9 Q Yeah?

12:17 10 A -- so you are looking '79-'80, something,
11 earliest.

12 Q Yeah. I mean it's after '80 and before '90. And
13 then he goes down here, asking Mr. Wilson to put
14 things right:

12:17 15 "Think back to early morning Saskatoon,
16 the boulivarded road that we really came
17 in on... remember an old lady we saw
18 probably headed for a bus, we turned
19 around in the intersection and cruised
12:17 20 by... I am not sure if we stopped or
21 not... we then kept on until we had some
22 soup at a garage before we crosses ...",
23 should be 'crossed':

24 "... a bridge and went downtown and then
12:17 25 on to Cadrains. We never killed anyone,



1 I never killed anyone. It is all in
2 your mind just like it is in mine; I
3 want you to tell it like it was."

4 Okay. So that's just, just for your information,
12:18 5 so that it isn't a fabrication in 1982; okay?

6 A Okay.

7 Q Systemically, this entire proceeding -- that can
8 go now -- this entire procedure for David Milgaard
9 did not work terribly well, if you think about the
12:18 10 end result or the desirous result to be completely
11 cleared, the Court process didn't work that well;
12 did it?

13 A That's an understatement, yes.

14 Q Okay. And do you think there might be some merit
12:18 15 in having a board or a body that's completely
16 independent of the adversarial and the Court
17 process to have a look at cases in their entirety
18 rather than this --

19 A Well, certainly, referring it to the courts, in my
12:19 20 view, probably is a difficult process because the
21 only model we have for working in the courts is an
22 adversarial one, --

23 Q Uh-huh?

24 A -- and that necessarily assumes that one person is
12:19 25 going to argue "yes", the other person is going to



1 argue "no", and that --

2 Q Uh-huh?

3 A I mean, aside from this case, there have been
4 other cases I've looked at where that's probably
12:19 5 not a particularly good model to use. Now, you
6 know, past that what you use for a test for
7 re-opening cases, you know, we can argue about
8 that for a long time, but I think you are right,
9 the adversarial model is not a particularly good
10 one.

11 COMMISSIONER MacCALLUM: But the first part
12 of the process didn't involve an adversarial
13 model, supposedly, --

14 A Well --

12:20 15 COMMISSIONER MacCALLUM: -- it involved
16 a -- under 690 it involved a department of the
17 government investigating? Is that what you are
18 referring to, or are you referring to both
19 stages?

12:20 20 MS. McLEAN: Both stages. I'm certainly
21 not taking the position that the section 690
22 process is not adversarial.

23 COMMISSIONER MacCALLUM: Well what was the
24 purpose of your suggestion, then, to suggest that
12:20 25 a board do the investigating --



1 MS. McLEAN: Yes.

2 COMMISSIONER MacCALLUM: -- or a board do
3 the remedy part of it?

4 MS. McLEAN: The investigation, as in the
5 Criminal Cases Review Commission, an independent
6 board.

7 COMMISSIONER MacCALLUM: But you seem to be
8 talking about the Court?

9 A Yeah, I'm talking about a Court process, for
10 12:20 example what's going on in the *Truscott* case now,
11 or what happened in this case.

12 Or even -- you know, we say
13 the 690 process wasn't an adversarial one, well
14 with the greatest of respect, when you start
15 12:20 calling people incompetent and stupid and all the
16 rest of it, you do turn it into an adversarial
17 process. That kind of response just, in my view,
18 is not helpful, it doesn't help an applicant get
19 their thing through.

12:21 20 But if you're suggesting that
21 there should be a body that does investigations,
22 or that the minister's group should have more
23 investigatory resources, I think you are
24 absolutely right.

12:21 25 One of the concerns we had



1 when we went to Ottawa and looked at this was it
2 had taken a long time to get to this point, and
3 the reason for that became pretty clear when --
4 the first time we stepped into Eugene Williams'
12:21 5 office. He literally had boxes of files stacked
6 around the periphery of his office, and it seemed
7 to -- seemed to us that the resources just weren't
8 there to be doing a timely job.

9 COMMISSIONER MacCALLUM: He had too much to
12:21 10 do on other things, you mean?

11 A Yes. Well he was, it's my understanding that he
12 was the principal investigator for this group and
13 for the 690 references.

14 BY MS. McLEAN:

12:21 15 Q So what we had in 1991 at the end of the first
16 application, by February 27th of '91, by the first
17 dismissal, we've got that -- we've got
18 recantations that are made in 1969 in the
19 circumstances we have been through earlier with
12:22 20 the police, and then we've got a recantation of
21 one of those statements, we've got all of the
22 Fisher stuff including that he favours nurses that
23 ride on busses in his neighbourhood, we've got a
24 failure to act on Linda Fisher, a failure to act
12:22 25 in any way -- and I mean her statement in 1980 to



1 the police -- a failure to act in any way to his
2 confessions to similar rapes in the neighbourhood,
3 non-disclosure of evidence that was fatal to the
4 Crown's theory, and at the end of that it's not
12:22 5 enough to get Mr. Milgaard into Court for a
6 hearing.

7 Do you -- my suggestion would
8 be, if you have an independent body that is
9 divorced from the prosecutorial arm of the
12:23 10 government, it could look at all of the case and
11 come to a conclusion that perhaps we have had the
12 wrong person in jail for 23 years and the real
13 killer is walking around?

14 A Oh, I --

12:23 15 Q Isn't that more likely to happen?

16 A -- I don't sort of object to the notion that it's
17 probably better to have some -- I mean, you know,
18 federal Department of Justice/provincial
19 Department of Justice, I said before that at the
12:23 20 end of the day the public really doesn't separate
21 the two departments, it's 'the administration of
22 justice', and what was going on was causing
23 concerns for both our operations.

24 Q Uh-huh?

12:24 25 A Yeah, I -- and, I mean, we're dealing here with a



1 murder, but suppose you are dealing with somebody
2 convicted of some drug operation, how does the
3 Federal Government look at that, because they are
4 the very people being investigated? And that was
12:24 5 part of my concern as well, with us being involved
6 in the Supreme Court, we were being
7 investigated, --

8 Q Uh-huh?

9 A -- and it just struck me as strange that the
12:24 10 province, the system that's being investigated,
11 should also be part of what was now the
12 investigation.

13 Q And then you've got situations where you don't
14 have lawyers that are gonna pull in the media on
12:24 15 everything, you don't have DNA; like, those people
16 need to have somewhere that they can go?

17 A Oh, they do, but at the same time I suspect, you
18 know, if you've got a circumstantial case and you
19 don't have new evidence, where does -- where does
12:24 20 an independent review body get you?

21 Q Well maybe they --

22 A There's got to be something to start with, I
23 think.

24 Q Or a review body that will go and get the
12:25 25 evidence?



1 A Oh, oh no, absolutely.

2 Q Yeah.

3 A Your review body is useless if it doesn't have the
4 ability to investigate.

12:25 5 Q Briefly, you asked about the -- you asked the
6 other day about the Linda Fisher statement in 1980
7 that did not come to the attention of the
8 authorities, other than the police in Saskatoon?

9 A It -- I -- our information was that --

12:25 10 Q Yup?

11 A -- it was received and put on a file.

12 Q Yup. And that's information you found out long
13 afterwards, it's not information you received in
14 1980, is it?

12:25 15 A No, that's right, --

16 Q Yeah.

17 A -- it was brought out later.

18 Q So you would at least, I imagine, support a
19 recommendation that the police, at the very, very
12:25 20 least, advise the Crown attorney of the new
21 developments in the case?

22 A Well, advise us or --

23 Q Somebody?

24 A -- routinely look into that kind of thing, because
12:26 25 I think the failure there was nobody did anything



1 with it, it just lay there.

2 Q And then you have also told us --

3 COMMISSIONER MacCALLUM: Now just a minute.

4 MS. McLEAN: Sorry.

12:26 5 COMMISSIONER MacCALLUM: Now we've heard
6 other evidence, admittedly hearsay evidence, that
7 the file was assigned by Inspector Wagner, who
8 took the statement to constable -- or Detective
9 Parker, who was involved in the investigation,
12:26 10 and that that person, by reason of the fact that
11 the description of the knife did not fit the
12 murder weapon, dismissed it at that stage as
13 being a complaint worthy of following up. That's
14 the best sort of conclusion one can draw from the
12:26 15 available evidence, although I concede that the
16 available evidence is anything but direct.

17 A Yes.

18 BY MS. McLEAN:

19 Q And you've told us the difficulties that the
12:26 20 Saskatoon police had in 1997, even after DNA they
21 had a very difficult time because there had been
22 so much time and belief invested in this case;
23 right?

24 A Yes.

12:27 25 Q Do you think that the investigating police force



1 is the appropriate force to be looking into new
2 developments, or should it be another --

3 A No, for the very same reason that I don't think
4 the Department of Justice that's being
12:27 5 investigated should be involved in looking into
6 it. Either you get a neutral, fresh set of eyes
7 on it, or you run into problems where people are
8 going to, as happened with the knife, say "well,
9 in my view this amounts to nothing because the
12:27 10 description doesn't matter".

11 Q Uh-huh.

12 A I, with respect Mr. Commissioner, I still take
13 that as meaning they did nothing about it. At the
14 very least, someone should have inquired as to who
12:27 15 Larry Fisher was, where he was at the time, and I
16 mean there is a number of things that could have
17 been done to follow that up. Did they know, for
18 example, that when Linda Fisher came in, did they
19 know that they were living in the very same place
12:28 20 that the Cadraings had lived? That should have
21 raised some suspicion, because one of the key
22 pieces of evidence against David Milgaard was
23 finding her wallet nearby.

24 Q In the last little bit you were asked, towards the
12:28 25 end of your examination-in-chief today you were



1 asked about the letters that you wrote to the
2 police -- well, the letters that you wrote to the
3 chief of police about the DNA results, and that's
4 the one you said there's reasonable and probable
12:28 5 grounds to believe Larry Fisher committed the
6 murder, and then you've told us about the
7 difficulty that Saskatoon police had in dealing
8 with the new reality, --

9 A Yes.

12:28 10 Q -- if I can call it that?

11 A Yes.

12 Q And these would be police officers in 1997, some
13 28 years after the offence?

14 A 28 years after the offence, and after three or
12:29 15 more years -- well, no, three years, what am I
16 saying --

17 Q Yeah?

18 A -- of being told by the Milgaard people that they
19 were corrupt, that they had conspired. That
12:29 20 publicity campaign at that point, I think, came
21 back to bite them because --

22 Q Okay. My question --

23 A -- because --

24 Q Sorry?

12:29 25 A -- because the police at that point, I think,



1 didn't just have sort of an intellectual
2 investment, they had an emotional one.

3 Q And my question really was not going to have
4 anything to do with that, it was going to be that,
12:29 5 in that 28 years, these aren't the same police
6 officers that were involved in the case in 1969
7 and '70?

8 A Oh, I don't think there were any of them that were
9 still there.

12:29 10 Q And the response is coming from people that
11 weren't involved in the case and it's almost like
12 an institutional protection of reputation or of
13 the institution itself; right?

14 A Well, possibly. They were people who would have
12:30 15 known the folks involved --

16 Q Uh-huh.

17 A -- and who would take considerable umbrage at the
18 kind of personal attacks that were being leveled
19 against them.

12:30 20 Q If we can go to 077503. This is the newspaper
21 account of Mr. Fisher leaving Saskatchewan,
22 leaving Saskatoon, it's dated July the 25th, has
23 packed up and left late Wednesday night, so that
24 would be the night before, he has been implicated
12:30 25 in the DNA testing, and then we have the line



1 here:

2 "But police did not arrest
3 Fisher, though they spoke with him last
4 Friday."

12:31 5 And then we have the RCMP involved in the new
6 investigation in Miller's death, and Mr. Fisher
7 is then arrested by the RCMP in Calgary, I think
8 on the 27th but I'm not positive?

9 A It would have been shortly after he left here.

12:31 10 Q Yeah. So you've got him, you get the results on
11 Friday morning, Friday night he's talking to the
12 police, and I believe there's actually been media
13 coverage that he went in to the police station,
14 and this is somebody --

12:31 15 A That could be, I don't know.

16 Q -- who is a serial rapist, who lived in the
17 Cadrain house, who favours nurses, rides busses,
18 and he matches the DNA profile?

19 A Yes.

12:31 20 Q And the Saskatoon police sent him home?

21 A Well, as I say, they -- they were of the view,
22 when I spoke to them that morning, that just being
23 told what the results were wasn't adequate, that,
24 in their view, there was no reason to believe he
12:32 25 was guilty, which caused me considerable concern



1 because, as far as I was concerned, --

2 **Q** Uh-huh?

3 **A** -- we were now in a -- I didn't mistrust the
4 information I got from England or from the Federal
12:32 5 Government, I -- as I said, I spoke to the man
6 that did the testing.

7 **Q** Uh-huh?

8 **A** I anticipated the paperwork would be there
9 momentarily, and in my view the case was there.

12:32 10 And indeed, when you look at what was ultimately
11 presented at trial, there was nothing new between
12 the 18th and 27th, or whenever it was, that he was
13 arrested, although I do know the RCMP did make
14 inquiries of his neighbours and his -- and a woman
12:33 15 he was living with and things like that, I -- I
16 didn't know why it was taking this long.

17 **Q** I mean it was your view he should have been off
18 the streets on July the 18th; was it not?

19 **A** That's right.

12:33 20 **Q** Thank you. Those are all my questions.

21 COMMISSIONER MacCALLUM: 1:30 then.

22 *(Adjourned at 12:33 p.m.)*

23 *(Reconvened at 1:30 p.m.)*

24 **BY MR. WOLCH:**

01:31 25 **Q** Mr. Brown, for the record I'm Hersh Wolch, counsel



1 for David Milgaard.

2 A What a surprise.

3 Q Nice to see you again. You indicated, and I think
4 it might have even been this morning, what I
01:31 5 sensed was sympathy for what David had endured as
6 a 16-year-old boy going into a penitentiary, I
7 think the words you used was 'a good-looking boy
8 going into the pen', and then during all those
9 years in jail?

01:31 10 A Yes, well, you read the records from the
11 Correctional Service of Canada during the Supreme
12 Court reference.

13 Q Okay. Well, without going through them in any
14 detail, you realized that he had been attacked, he
01:31 15 had been violated, he had been shot, he'd been
16 misdiagnosed, he'd -- it's a horrific story where,
17 at times, he declared himself not to be human so
18 he could endure the -- what was going on in there,
19 a terrible story?

01:32 20 A Yes.

21 Q And when you were dealing with him at the Supreme
22 Court level, did you have that degree of sympathy
23 then, or has it really come from your
24 understanding that he's innocent?

01:32 25 A No. Umm, certainly when we were dealing with him



1 in the Supreme Court, while he -- there were
2 certain aspects of what he did and said that
3 didn't make him terribly sympathetic. There is no
4 question that we knew, then, the sort of horrors
01:32 5 that he had to deal with in jail, and no, that
6 makes him sympathetic.

7 Q Now you referred to the fact that -- and we may
8 disagree over time -- but you referred to the fact
9 that he may not have been believed, or he was not
01:33 10 credible, or matters of that nature. And I take
11 it you know even that Steven Truscott, you know,
12 was specifically found not to be truthful. How
13 does somebody, here a 16-year-old, there a
14 14-year-old who was facing execution, how does
01:33 15 somebody, all those years later, come into Court
16 and have their credibility assessed? That is,
17 what can you look at or how much do you think
18 should be allowed, leeway, for somebody who has
19 been through that kind of experience?

01:33 20 A Well, Mr. Wolch, if David Milgaard had come into
21 Court and said "you know, it's been 22 years, I
22 have been going through hell, I have no
23 recollection of what I told Justice Tallis except
24 that I told him the truth", --

01:34 25 Q Well --



1 A -- and then Justice Tallis comes in and gives a
2 list of things that David told him, David would
3 look far more credible than if he comes into Court
4 and says "I told him this, I told him that, I told
01:34 5 him the next thing, he didn't do any of these
6 things for me", and then Justice Tallis comes in
7 and says "well, no, that's not quite the case".

8 Q Well, but could -- would not a number of items be
9 a matter of perception; that is, whether he was
01:34 10 visited many times in jail or not, his perception
11 and Justice Tallis' perception might very easily
12 differ, thinking back? By that I mean Justice
13 Tallis might be going a bit on what his normal
14 practice is, David might not know how many times a
01:34 15 lawyer would visit a client, they may have
16 different perceptions on things that hardly, I
17 think, would suggest, is very important in a
18 credibility assessment?

19 A Well except as I recollect, Mr. Wolch, David
01:35 20 Milgaard's evidence essentially was that he wasn't
21 getting to see Tallis very much at all, that
22 Justice Tallis was largely ignoring him, I think
23 they blamed that on the notion that he was being
24 funded by Legal Aid and therefore wasn't putting
01:35 25 much effort into the case, that was the -- it



1 wasn't a matter of whether it was, you know, two
2 times, three times, ten times, it -- the issue was
3 whether or not there was much attention being paid
4 to it.

01:35 5 **Q** Well, even a decision to testify could be a matter
6 of perception? That is, to David, his lawyer
7 recommending he not testify, at 16 years of age,
8 might have looked like a direction or --

9 **A** Well --

01:35 10 **Q** That is it could be a matter of perception? I
11 don't know what else it might be.

12 **A** Well, except that David Milgaard was perfectly
13 clear that he told Justice Tallis he wanted to
14 testify and he didn't get called, and that
01:36 15 certainly wasn't Justice Tallis' perception.

16 **Q** Do you have any comment on the notion that the
17 wrongly convicted, at least at that time and I
18 think it still is the case, must waive privilege?

19 **A** Well, they don't have to waive privilege with
01:36 20 respect to counsel unless you are making
21 allegations of impropriety by -- against your
22 counsel, and then I think the law says you, in
23 effect, have waived privilege.

24 **Q** No, I'm suggesting that David had waived it long
01:36 25 before, for Justice, in order for --



1 A In order for them to discuss --

2 Q Yes.

3 A Yeah.

4 Q But they insisted --

01:36 5 A Yeah.

6 Q -- that he waive his right to privilege so they
7 could talk to Justice Tallis?

8 A I, quite frankly, Mr. Wolch, I don't have a huge
9 problem with that. At that stage of the game the
01:36 10 Crown has proven beyond a reasonable doubt that
11 the person is guilty, if they want to now come
12 forward and say "I'm not guilty, I have never said
13 I was guilty", I think all sources of legitimate
14 inquiry should be open, and that includes "well,
01:37 15 okay, we want to talk to your counsel and find out
16 why you ran the defence you did."

17 Q Okay. So what -- so but in other words, though,
18 would you not recognize that could erode the basic
19 principle, because any accused would have --
01:37 20 should be warned "lookit, if you are wrongly
21 convicted, whatever you tell me now will not be
22 confidential in the future"?

23 A Well, I suppose if you care to take up that
24 thought at that stage of the proceedings, then of
01:37 25 course you can certainly warn the client. But



1 again, though, your point is do I think that's
2 right? I see nothing wrong with handling it that
3 way.

4 Q No, I'm asking you this because the Commission
01:37 5 will be making recommendations on many things, and
6 one of the things that I find troubling is the
7 notion that the wrongfully convicted have to waive
8 privilege in order to put forward their 690 claim,
9 and I just wanted to get your views on that?

01:38 10 A Well there really isn't any other way, I suppose,
11 to determine why the matter was -- why the defence
12 was conducted in the way it was, and in
13 particular, in a case like David Milgaard's, why
14 he didn't take the stand, why he wasn't called.
01:38 15 He didn't have a significant criminal record at
16 that time.

17 Q He had no criminal record.

18 A I thought there was one youth conviction or
19 something. But, I mean, it was nothing.

01:38 20 Q No, you are right. And you think the idea of why
21 he didn't testify is a proper consideration?

22 A Yes.

23 Q And as far -- leaving aside Tallis, let us assume
24 David Milgaard did what you recommended or
01:38 25 suggested would be a different approach; is there



1 any way a Court can say "we believe you, you're
2 innocent", realistically?

3 A You mean just on the basis of his statement alone?

4 Q Well he walks into Court and he says "I didn't do
01:39 5 it, I told the police the truth at the very
6 outset, nothing is changed, I'm innocent", and you
7 ask no questions because there isn't much to ask
8 about that, and it's over on that portion; can a
9 Court then say "we believe you, you're free"?

01:39 10 A Well, I suspect it's unlikely that, just on that
11 basis, they would be inclined to make that kind of
12 assessment.

13 Q But I'm looking at this particular case and, in
14 many respects, I would suggest David Milgaard's
01:39 15 evidence on a reference or a 690 is really of
16 minimal importance?

17 COMMISSIONER MacCALLUM: Well, I thought
18 you were talking about the trial, Mr. Wolch?

19 MR. WOLCH: I meant that, yes.

01:39 20 COMMISSIONER MacCALLUM: You meant section
21 690?

22 MR. WOLCH: Both. I will be more specific.
23 Thank you.

24 BY MR. WOLCH:

01:40 25 Q Okay. Coming into the Supreme Court, okay, David



1 Milgaard puts on the record "I'm innocent, I'm
2 innocent". Now, I mean, surely credibility
3 findings cannot be made on that, there's nothing
4 to -- you have to look at the rest of the case,
01:40 5 that's --

6 A Well that's precisely right, Mr. Wolch, you have
7 to look at the rest of the case plus whatever
8 David Milgaard says.

9 Q But what I am saying is it's impossible to expect
01:40 10 an assertion of innocence, even if unchallenged by
11 cross-examination, to have the trier of fact say
12 "yes, we just accept you are innocent"?

13 A Well, and to that extent, Mr. Wolch, you are
14 right. A mere bald statement that "I'm innocent"
01:40 15 doesn't give anybody anything to go on. That's
16 why there has to be other evidence, other
17 examination or cross-examination of that witness,
18 and a comparison of what that witness says with
19 other witnesses.

01:40 20 Q Yes, but that's what I am getting at, is that the
21 witness himself, the accused himself, can't carry
22 the day by himself, there's got to be something
23 somewhere else, either discredit the Crown's case
24 or bring in new evidence?

01:41 25 A Yes, generally speaking, that would be correct.



1 Q Okay. And when you think back to it now, and you
2 can -- you know David is innocent, can you see the
3 difficulty that when he's first spoken to, whether
4 it's six weeks or so after the murder, he has to
01:41 5 remember a morning which really would have been of
6 little or no significance to him; would that be
7 correct?

8 A Yes.

9 Q Details of which there is no reason to
01:41 10 particularly remember?

11 A Well if -- if you come back to the notion that
12 he's innocent, yes.

13 Q Yes, I mean --

14 A That casts a light on, very differently, on all of
01:42 15 these things.

16 Q A very different light on it. But it doesn't
17 change the truth though?

18 A No.

19 Q Okay. And now, 23 years later, he's trying to
01:42 20 remember what happened on that morning, it's
21 basically a fairly impossible task, isn't it?

22 A Well, and as I recall, when we were pushing him,
23 or when Eric Neufeld was pushing him on that, the
24 Chief Justice noted for the record that while he
01:42 25 may not remember the details of the day, he



1 remembers he didn't kill anyone.

2 Q Exactly.

3 A Well --

4 Q Exactly, that's what he does remember

01:42 5 specifically. But doesn't it, at some point in
6 time, just become a memory test, like what can I
7 remember from my statement, what can I remember
8 from my other statement?

9 A Well except, Mr. Wolch, that's -- 20 some years
01:42 10 after an event like that, it becomes a memory test
11 for every witness, including the accused. I don't
12 know how you avoid that.

13 Q Right. Okay. I want to turn to a different
14 topic, and one that you referred to quite a few
01:43 15 times, and that is the media --

16 A Uh-huh.

17 Q -- and the role, the role of the media. Now you
18 are familiar with the basic principles about the
19 freedom of the press, the Charter of Rights for
01:43 20 the media, the importance of the media in a
21 democratic society; I don't have to go through
22 that at great length, do I?

23 A No.

24 Q And it's fair to say that Crown/police use the
01:43 25 media extensively?



1 A Umm, yes, that's true.

2 Q I mean there are media representatives, media
3 agents, I think even some police officers are
4 trained to be the liaison with the media?

01:44 5 A That's correct.

6 Q So use of the media in the criminal justice system
7 is not really limited to one side or the other,
8 and it's fairly --

9 A No.

01:44 10 Q -- fairly commonly used?

11 A Exactly, yes.

12 Q And most people using the media prefer to have
13 favourable spins put on what they say?

14 A Well, most people using the media are obviously
01:44 15 interested in getting their message out, yes.

16 Q Yeah. And now I'm a little interested in
17 analysing it in the sense that you seem to be
18 saying that what occurred here in the media was
19 wrong or unfair, or whatever adjective it is, but
01:44 20 at the same time, without the media, there would
21 be a horrible injustice in this particular case?

22 A Well, no, what I said was some of what was going
23 on in the media was outrageous, and clearly it
24 was. The statements that Mrs. Milgaard and David
01:45 25 Asper were -- and you were making with respect to



1 the value of some of the evidence were clearly
2 misleading. When it became time to start making
3 outrageous accusations against people in order to
4 generate some public concern favourable to your
01:45 5 cause, I would consider that to be inappropriate.

6 But with respect to the news
7 media, since the mid-'80s, with the consolidation
8 of the various news agencies that we've had,
9 there's been a steady decline in the number of
01:45 10 people in those agencies doing the reporting, and
11 we're at a point now where news media people
12 pretty much have to take what they are given by
13 people like you and me, and they run with it.
14 There is no opportunity for them to check it.

01:45 15 Q Well --

16 A And your camp certainly took advantage of that.

17 Q Well, let's analyse it a little more. The media
18 in this case reported the case extensively;
19 correct?

01:46 20 A Parts of it, yes.

21 Q And the media uncovered a fair bit of the
22 evidence. I'll be more specific if you like.

23 A Yeah. I'm not aware of how much they uncovered.

24 Q Well, the Larry Fisher convictions, the CBC went
01:46 25 out and found them, things like that?



1 A Well, okay.

2 Q And in fact it could be argued that the media
3 coverage perhaps caused the Larry Fisher name to
4 be brought to the Milgaard's attention?

01:47 5 A Well, except I understand Joyce Milgaard had it
6 sometime earlier than that, in the '80s.

7 Q But not as a suspect in the case or anything like
8 that, or the convictions?

9 A Well, that's fine, yes.

01:47 10 Q Okay. Now, in terms of what was being put into
11 the media by the Milgaard camp, the main assertion
12 was that David was innocent?

13 A Well, yes, that and the proof you raised to show
14 that was the evidence you had obtained from what's
01:47 15 her name, Deborah Hall.

16 Q Well, let's --

17 A And so on, and, quite frankly, misrepresented a
18 great deal of what was there.

19 Q Okay. Well, let's step back a bit. I'll get into
01:47 20 that, but I just want to get the broader picture
21 and we'll get more specific. David was innocent
22 was being put out there and a little later Fisher
23 was guilty was being put out through the media?

24 A Yes.

01:48 25 Q And both of those assertions are true?



1 A As it turns out, yes.

2 Q Well, they always were true.

3 A Well, we know they are true now, yes.

4 Q Now, you chose Deborah Hall. Deborah Hall put a
01:48 5 different interpretation on the motel room
6 incident; correct?

7 A Yes.

8 Q And --

9 A But she did not say it did not happen or that --
01:48 10 well, she didn't deny it happened.

11 Q Well, we know now if it did happen it was not a
12 serious confession?

13 A We know that now, yes.

14 Q So it may be that she was correct?

01:48 15 A No, I don't -- the affidavit you filed was not
16 correct.

17 Q Well, if she's wrong, she's wrong. An affidavit
18 is not created by the lawyers, it's what the
19 person says; is it not?

01:49 20 A Well, that's true, but if you are going to put
21 forward her statement as to what happened, you put
22 forward a full statement, because with very little
23 effort the federal government was able to discover
24 that, well, that's not quite what she had to say.

01:49 25 Q That's perfectly fine, but the job of the counsel



1 is not to put words in the person's mouth or in
2 their affidavit, it's their words.

3 A No, but if you are presenting somebody as a
4 credible witness saying these people lied, you
01:49 5 would want to have a reasonably complete account
6 from that person.

7 Q Well, now we know they very well may have lied.

8 A No, we don't.

9 Q Well, surely the lie is not that it was said, but
01:49 10 a lie can be an interpretation; that is, I took
11 him seriously or I didn't could be lie.

12 A Well, if they took him seriously, they took him
13 seriously. Why would that be a lie?

14 Q Well, because I'm suggesting to you that when you
01:50 15 look at it now in light of David's innocence, if
16 they took him seriously, they stayed and partied,
17 they left him alone with a girl and they never
18 changed in their attitude towards him, one might
19 think they heard it and didn't take it seriously
01:50 20 and now are saying they took it seriously.

21 A Well, I think they said they took it seriously in
22 1970 when they testified.

23 Q And that's the lie.

24 A Well, I don't know that you've got any evidence of
01:50 25 that.



1 Q Well --

2 A They certainly said at the Supreme Court that they
3 continued to think it was serious.

4 Q Well, these are guys who have been charged with
01:50 5 murder, everything else, these are not the most
6 credible of people.

7 A No, that was before the court as well, that they
8 weren't the most credible of people.

9 Q And Melnyk got the lightest sentence for a robbery
01:50 10 at that time in Saskatoon history a few days
11 later.

12 A That was before the court.

13 Q Yeah.

14 A That doesn't mean, though, that they were lying
01:51 15 when they say, well, we took it seriously.

16 Q But they may be?

17 A Well, yes, they might have been.

18 Q Okay. That's all I'm asking, they could be --

19 A There wasn't any evidence of it, but, I mean --

01:51 20 Q Well, just inference, and now we have more to go
21 on and we have --

22 A No, you don't have any more to go on, what you
23 have is David Milgaard is innocent, but that
24 doesn't mean that didn't happen and it doesn't
01:51 25 mean that they didn't see it as inculpatory.



1 Q Well, you had a witness named Edwards who said
2 they confessed to her they lied.

3 A Well, excuse me, you had a witness named Edwards
4 who said that.

01:51 5 Q You had a chance to cross-examine her.

6 A Frankly, as far as we were concerned, nothing she
7 said, other than her name, was credible.

8 Q Okay. So I still want to talk about the
9 allegations that you find so disturbing, and the
01:52 10 gist of another allegation was a lack of
11 disclosure; correct?

12 A Yes.

13 Q And there was a significant lack of disclosure?

14 A And I didn't say that that was the allegations
01:52 15 that were disturbing.

16 Q Okay.

17 A The allegations that were disturbing were the
18 remarks you were making about the Federal Justice
19 officials with respect to the fact that they were
01:52 20 obviously not paying any attention to what you
21 were saying, were not investigating and so on when
22 you knew very well that wasn't true.

23 Q Well, with all due respect, Mr. Brown, that's one
24 of the allegations here as being true.

01:52 25 A Which, that they weren't investigated?



1 Q They did a terrible job is one of the allegations
2 here.

3 A That may be your evidence, it's not mine. They
4 were investigating at the time, you people were
01:52 5 bringing them your evidence a piece at a time and
6 every time you did that it meant the process would
7 restart, they would have to go out and investigate
8 that new piece of evidence and fit it into the
9 whole package that they were preparing for the
01:53 10 minister.

11 Q Well, at the end of the day Kim Campbell made the
12 wrong decision didn't she?

13 A Well, in light of what she knew then or what she
14 would know now?

01:53 15 Q What she knew then. She had Larry Fisher, she
16 had --

17 A No, no, I disagree, and I would think the Supreme
18 Court disagrees with you too.

19 Q The Supreme Court disagrees?

01:53 20 A They didn't find David Milgaard was innocent and
21 that's what you were asking her to find.

22 Q Well, with all due respect, she was being asked to
23 refer the matter to a court.

24 A Because she should find that your evidence proved
01:53 25 David Milgaard was innocent?



1 Q Absolutely not. I'll show you the press clippings
2 from Mr. MacFarlane.

3 A Well, that's not my view of it, Mr. Wolch.

4 Q Perhaps we should leave, you know, the Department
01:53 5 of Justice -- they can answer it if we can get
6 around the privilege or something, but let's leave
7 that for a moment. I'm concerned with what really
8 bothered you in the allegations.

9 A Well, the allegations -- well, when you got past
01:54 10 that, then there were allegations of corruption
11 and cover-up that you were putting out through Mr.
12 McCloskey, that provincial government officials
13 obviously covered this up because they knew they
14 got the wrong person.

01:54 15 Q You are talking about Fisher now?

16 A Yes.

17 Q Okay. Well, the allegation was that Fisher was
18 handled very strangely, as the Supreme Court said,
19 it came to light in 1970, and that the allegation
01:54 20 was that it wasn't disclosed.

21 A No, no, that's not the allegations that I'm
22 concerned about.

23 Q Yeah.

24 A The allegations that were being made was that the
01:54 25 inference to be drawn from all of this was



1 corruption.

2 Q The inference was to be drawn that it was
3 deliberately not disclosed.

4 A No, that it was corruptly not disclosed, that was
01:54 5 the allegation that McCloskey and Joyce Milgaard
6 were making.

7 Q McCloskey, okay. But the thrust of it was it
8 should have been disclosed, it wasn't, there's
9 something wrong.

01:54 10 A Well, that was ultimately what was argued in the
11 Supreme Court, you didn't argue that officials
12 were all that corrupt, although you raised issues,
13 as I recall, suggesting that everybody had to have
14 known that this would be absolute proof that David
01:55 15 Milgaard was innocent and that Larry Fisher was
16 guilty and that it was then, there was a decision
17 made not to tell people.

18 Q Well, let's go back. (V1)--- (V1)- was in the
19 Miller file?

01:55 20 A Yes.

21 Q Okay. David was still before the courts when
22 Fisher got arrested?

23 A Yes.

24 Q Okay. Mr. Kujawa had both files?

01:55 25 A Well, he had portions of both files.



1 Q Okay.

2 A The appeal record on David Milgaard would not
3 include the police file or anything even close to
4 that.

01:56 5 Q Okay. Mr. Karst, who took the significant
6 statements in the Milgaard case, took the
7 confessions from Fisher?

8 A That's correct.

9 Q Fisher was dealt with in Regina?

01:56 10 A Yes.

11 Q The victims weren't notified?

12 A That's right.

13 Q The public wasn't notified?

14 A Well, I mean, I don't know whether there were news
01:56 15 stories with respect to Larry Fisher or not, but
16 certainly there was no effort to sort of announce
17 that.

18 Q Putting all that together, isn't that cause for
19 concern?

01:56 20 A It may be enough to make someone wonder why that
21 happened that way, but that's not what you were
22 doing, Mr. Wolch, you weren't asking why did that
23 happen, you people went a step further and said
24 that's proof of corruption, that's proof of
01:56 25 cover-up.



1 Q Cover-up, yes. The word corruption I don't
2 believe was used, but we can argue later about
3 that. Cover-up, it certainly was covered up, but
4 whether or not it was covered up deliberately or
01:57 5 not we don't know.

6 A No, no, I disagree.

7 Q All right. Larry Fisher was one of the worst, at
8 that time, worst sex offenders perhaps in
9 Saskatchewan history?

01:57 10 A That's probably fair, yes.

11 Q Now, isn't that the kind of case, when he gets
12 arrested, people know about it?

13 A Well, yes and no. If you look at the way news was
14 dealt with in the criminal justice process in
01:57 15 those days, the notion that we would be putting
16 out press releases was just -- I mean, we didn't
17 do that.

18 Q Well, there was a warning in the paper about Larry
19 Fisher unnamed before he was caught?

01:57 20 A Yes.

21 Q I mean, the women of Saskatoon are worried this
22 guy is out there.

23 A Yes.

24 Q Wouldn't it be natural to put in the paper, look,
01:58 25 we caught him?



1 A Well, if they remembered to do that, that would
2 certainly have been I suppose a good thing, but --
3 the fact that somebody doesn't remember to do that
4 is not in itself some sort of indication of
01:58 5 sinister --

6 Q No, okay, but would you concede that to an
7 observer, particularly one who 100 percent
8 believes the wrong guy is in jail, when an
9 observer looks at that, suspicion at least would
01:58 10 flow?

11 A I would concede that you would be, you know, well
12 within your, I suppose, reason to say, well,
13 that's very curious, why did this happen, but
14 that's a bit different than saying, oh, well,
01:58 15 there was a conscious cover-up here, because
16 that -- you know, you say you didn't use the word
17 corruption. Well, not perhaps directly, but a
18 cover-up is corruption, a cover-up is an
19 obstruction of justice.

01:58 20 Q Well, it is quite, quite strange, is it not, that
21 perhaps the worst serial rapist in Saskatchewan
22 history didn't even get into the paper when he was
23 caught and convicted?

24 A Well, again, we didn't issue press releases to the
01:59 25 news media saying, you know, X will be in court



1 today, come and watch, you didn't do that in those
2 days, and to be honest with you, we still don't do
3 that.

4 **Q** Would you have expected him to get some time for
01:59 5 committing the Saskatoon offences?

6 **A** In Saskatchewan, since he came here with a 13 year
7 sentence out of Manitoba, no.

8 **Q** Even though Manitoba wrote a letter --

9 **A** To be perfectly honest with you, even today.

01:59 10 **Q** Even though Manitoba wrote a letter saying your
11 offences were not considered in the 13 years?

12 **A** Oh, the court here, the Court of Appeal here and
13 the Queen's Bench are going to look at the
14 totality and it wouldn't matter whether the
01:59 15 offences were considered in Manitoba or not, we
16 had, at that time, a considerably more lenient
17 sentencing regime.

18 **Q** Well, except in this case the prosecutor
19 recommended it.

02:00 20 **A** Well, because he knew what the courts would
21 probably go with.

22 **Q** Well, what's the harm in trying to get the worst
23 rapist a little more time for what he did?

24 **A** Well, Mr. Wolch, when prosecutors go before the
02:00 25 court you'll appreciate they do it day in and day



1 out. You don't go in and make submissions that
2 you know the court is not going to accept, you
3 have to have some credibility with the court, and
4 you do that by recommending sentences that you
02:00 5 know the Court of Appeal is likely to uphold.

6 Q Okay. So --

7 A And 13 -- you know, you say he's the worst there
8 is. Yes, that's probably true, but from that time
9 period show me somebody who got even close to that
02:00 10 for rape in this province, even multiple rapes.
11 It just wasn't happening.

12 Q I could show you several, but -- would you agree
13 with me, though, that it wasn't just those who
14 were firmly convinced of Milgaard's innocence who
02:01 15 saw something strange about the handling of
16 Fisher, it was people in the legal community,
17 people in the community?

18 A Well, people who were reading the news reports
19 that were coming from your camp, yes.

02:01 20 Q Well --

21 A You were the ones who were saying this is evidence
22 of a cover-up.

23 Q Well, let's look at 004366, this is an article in
24 '91 by Dave Yanko in *The StarPhoenix*, and this is
02:02 25 on the issue we're talking about, and here we



1 have :

2 "At least one longtime
3 Saskatoon lawyer believes the handling
4 of the case was "extremely unusual,"
02:02 5 considering Fisher's vicious sexual
6 assaults and the public interest in
7 seeing justice done.

8 "Surely you'd have thought
9 that the police department and justice
02:02 10 system would want to ensure the
11 community was made aware that the person
12 responsible for those crimes had been
13 apprehended, dealt with and sentenced,"
14 says Silas Halyk, whose been practising
02:02 15 law for about 30 years.

16 "That, to me, is extremely
17 unusual and it makes you wonder why they
18 wouldn't want it to be known at the
19 time," Halyk added."

02:02 20 A And I agreed with you already, that yes, it would
21 raise concerns.

22 Q Sure.

23 A It would make people interested to know why that
24 had happened, but it doesn't reasonably follow
02:02 25 then that you start making accusations of



1 corruption and cover-up.

2 Q Let's go further into the article if I could.

3 Could you put the whole article back? It's not
4 like you weren't given a chance to respond, if I
02:03 5 can go here:

6 "I know they're making a
7 great deal of this," says Brown. "The
8 fact of the matter is, there was no
9 mechanism, even today, to routinely
02:03 10 notify victims of crime that the person
11 who did the crime has been convicted."

12 Most victims find out
13 what's happening when they're called as
14 witnesses, he said.

02:03 15 On the assertion that
16 Saskatoon detectives continued to
17 investigate Fisher's crimes after he
18 confessed to them in Winnipeg, Brown
19 says, "I don't doubt that for a moment."

02:03 20 "You can't count on a
21 confession to be admissible."

22 Now, did you understand that after the
23 confession, that the police went out and tried to
24 solidify their case?

02:03 25 A No, I wasn't aware of that.



1 Q But your comment sort of suggests that doesn't it?

2 A Well, that's -- no, that was your assertion, or
3 their assertion, that --

4 Q No, Brown said --

02:04 5 A And, yeah, I don't know that they did, but I
6 wouldn't be surprised if they did. I mean --

7 Q That's your quotation, not mine.

8 A -- why wouldn't you.

9 Q No.

02:04 10 "I don't doubt that for a moment."

11 "You can't count on a
12 confession to be admissible."

13 It seems to me what you are saying there is that
14 rather than rely on the confession, police would
02:04 15 continue to investigate.

16 A That's what I would have expected them to do, yes.

17 Q But the facts of this case, those who were
18 investigating didn't know about the confession.

19 A Well, you mean Ed Karst? Ed Karst knew about the
02:04 20 confession.

21 Q No, no, the other officers in Saskatoon.

22 A Oh.

23 Q They apparently weren't told.

24 A No, I don't know anything about that.

02:04 25 Q Okay, get back to the full page, just -- I'm



1 sorry, just one little bit here first. You don't
2 have to bring it up, we can see it.

3 "Brown recalls a note on
4 Kujawa's file suggesting there was a
02:05 5 question on whether the confession was
6 voluntary."

7 Did you recall that?

8 A Well, I don't recall it now, but if it says it
9 there, then I'll accept that I must have said that
02:05 10 to Dave Yanko.

11 Q Do you recall making any inquiries as to what
12 might have been wrong with Larry Fisher's
13 confession?

14 A Well, no, it just, this is a confession and you've
02:05 15 got a pretty tough row to hoe if your case is
16 based entirely on a confession.

17 Q No, but this is more than that, this is suggesting
18 there is a problem with the confession.

19 A Oh, no, I don't know whether there was. I just
02:05 20 noticed the confession, question mark.

21 Q Okay. So you would have checked on the file at
22 that time?

23 A Yeah. I checked on what we would have had there
24 and it would have been, I'm guessing, just the
02:06 25 head office file on that, and I don't think -- I



1 don't think there were police reports on that at
2 that point, I think all we would have had was
3 maybe a summary from the police.

02:06 4 Q Would you have gone to Mr. Kujawa and said look,
5 there's a note here saying that this confession is
6 problematic, why?

7 A I did, and his response was he didn't remember.

02:06 8 Q Perhaps it's not a question, but while we're here,
9 I do note the comment from Mr. Fisher's lawyer,
10 that he has doubts about the reasonable -- he has
11 a reasonable doubt about Milgaard's guilt, that
12 does seem a bit odd, but that's not a question, I
13 just noticed that, it caught my attention. Okay,
14 so that's one of the issues that was being raised
02:07 15 in the media.

16 It was also being raised that
17 Linda Fisher hadn't been disclosed; correct?

18 A Well, that was correct, yes.

19 Q Yeah.

02:07 20 A It hadn't been disclosed to us either.

21 Q Well, true, but it's still an allegation or --

22 A Yes.

23 Q -- a problem with the system or whatever?

24 A Yeah.

02:07 25 Q And then what got a lot of play was Wilson's



1 recantation, or his second recantation as
2 Ms. McLean points out?

3 A Yes.

02:07 4 Q That got a lot of play, but the gist of it is that
5 he had ample reason to recant?

6 A Well, ultimately, yes, that became apparent.

7 Q Okay, but that got a lot of play in the media?

8 A Well, yeah, his statement to Centurion Ministries,
9 yes.

02:08 10 Q Did it upset you at all that it was getting play?

11 A No. I mean, if you've got evidence of something
12 and you want to announce it in the press, that's
13 fair. If we're not astute enough to decide we
14 better comment on things as quickly as they come
02:08 15 out, then -- and we're foolish enough to leave the
16 field to you, then we suffer that.

17 Q Okay, but --

18 A But there's a difference between stating we've got
19 this evidence, we've got this evidence, we've got
02:08 20 this evidence and then making the inference that
21 all of this shows corruption and therefore this
22 matter needs to be re-opened.

23 Q Okay. But Wilson was saying that he was whatever
24 into giving the statement, he had said that,
02:08 25 whatever you want to call it, manipulation,



1 coercion, whatever?

2 A Manipulated, coerced or whatever it was.

3 Q That was his words; right?

4 A Yes.

02:08 5 Q And if in fact, and we know he did, if he lied,
6 then there has to be some reason why he implicated
7 David, and the Commission will have to look at
8 that, but there must be some reason?

9 A Oh, I agree.

10 Q Right?

11 A Yeah.

12 Q And those who believe that David is innocent can
13 clearly assert that the only reason he would have
14 lied would have been through manipulation and
02:09 15 coercion as he says, it's a logical conclusion?

16 A Well, he was saying that.

17 Q Yeah, but you accepted it. If you believe he
18 lied, accepting that isn't very difficult?

19 A No.

02:09 20 Q Right?

21 A I would agree there's got to be a reason.

22 Q Right.

23 A Coercion is one reason, one possibility.

24 Q And the assertion was that Nichol John's statement
02:09 25 made no sense, just made no sense?



1 A That was an assertion, yes.

2 Q Right. And to relate that to some sort of police
3 inducement or whatever you want to call it would
4 not be a huge leap, it's just the conclusion that
02:10 5 may or may not be right?

6 A It's one of the possible explanations and
7 certainly I would even go so far as to say one
8 that would come to mind first.

9 Q Yeah. And in terms of the disclosure, again, here
02:10 10 we have Ms. (V4)--- phoning up and saying hey, I
11 got attacked that morning. Now, you and I can
12 debate for a long time the value of her evidence,
13 but would you agree with me it is something that
14 should be disclosed?

02:10 15 A Well, certainly now that would be the case. Back
16 then, if the prosecutor looked at that and thought
17 this really doesn't relate to much, there's no way
18 I can see defence counsel using it, then the law
19 was that it wouldn't have to be disclosed.

02:10 20 Q Well, let's go back. The law then was what,
21 *LeMay*, the duty to disclose anything that may
22 assist the defence?

23 A No, *LeMay* was later.

24 Q I thought that was in the '50s.

02:11 25 A No, there's *Boucher*, the *Queen and Boucher*.



1 Q Okay.

2 A The *King and Boucher*, which would say, yes, that
3 if there is, if we're aware of inculpatory, or
4 exculpatory evidence, we have a duty to call that
02:11 5 or to make it available.

6 Q Right.

7 A But then that, you know, that then requires that
8 the Crown prosecutor determine whether he sees
9 that as useful, as exculpatory.

02:11 10 Q Right.

11 A And, I mean, that's the whole point of
12 *Stinchcombe*, is that I'm not supposed to make
13 those calls because obviously I don't know your
14 case.

02:11 15 Q Okay. I thought *Stinchcombe* said that was always
16 a bother, just re-confirming it.

17 A Well, no, *Stinchcombe* goes a good deal further
18 than that.

19 Q All right.

02:11 20 A The law never was anything relevant, it was
21 anything exculpatory.

22 Q Well --

23 A And the law previously clearly put it on the
24 shoulders of the prosecutor to determine whether
02:12 25 or not you felt that was exculpatory and useful,



1 but *Stinchcombe* I think properly states that it
2 shouldn't be made.

3 Q Well, the police had told Ms. (V4)--- that likely
4 the same man committed both offences?

02:12 5 A Well, that's their supposition.

6 Q No, but that's just a fact.

7 A Yeah.

8 Q And on the facts of the case, it's hard to imagine
9 a scenario where the Crown can say that David
02:12 10 Milgaard attacked (V4)---?

11 A Yes, but the problem, though, as well is that on
12 the facts of the case, it would be difficult to
13 say the person who attacked Gail Miller then had
14 time to go over to where (V4)--- was and attack
02:12 15 her too.

16 Q Well, it's 800 yards away.

17 A Well, that's 800 yards in the winter.

18 Q Well, how long -- well, we know how long it will
19 take there, but the bottom line is somebody likely
02:13 20 attacked Ms. (V4)---. You don't believe her to be
21 untruthful do you?

22 A Oh, no, no, I certainly accept that she was
23 molested that morning. It's the validity of her
24 identification of Larry Fisher as the perpetrator
02:13 25 20 years later.



1 Q She described him physically basically accurately,
2 five foot two to four, a hundred and -- or stocky
3 build rather?

4 A To be honest with you, I don't recall what it was.

02:13 5 Q No, I understand that, but that's my memory of it,
6 I haven't looked it up for a while, but --

7 A Yeah.

8 Q But it couldn't be David, I mean, the description
9 is totally off.

02:13 10 A Well, that could be.

11 Q Height and build are totally off. But in any
12 event, you know the argument about the railway
13 track leading to the Cadrain house, etcetera,
14 etcetera?

02:13 15 A Past there, that neighbourhood, yes.

16 Q Yeah. And in terms of time, whether the attacker
17 could get there or David Milgaard could get to the
18 Travelodge, or across town, it's almost the same
19 thing isn't it?

02:14 20 A Well, except my recollection is that (V4)---
21 (V4)--- was pretty specific about when she was
22 attacked and it resulted in there being a bit of a
23 window there of I think 22 minutes for the attack
24 on Gail Miller and then the attack on (V4)----
02:14 25 (V4)---. Now, that's my recollection. I haven't



1 looked at the evidence.

2 Q I believe the common wisdom is that Gail Miller
3 was attacked somewhere probably between 20 to and
4 a quarter to, is probably the time.

02:14 5 A Well, I would recall it being a little later than
6 that. I thought the sort of earliest we got her
7 out of the house was 6:45.

8 Q No, 6:35, but we'll get to that, I'm going to
9 bring that up. But in any event, assuming --
02:14 10 well, the attack would take what, five minutes
11 maybe, if that?

12 A I, frankly, can't conceive of an attack like that
13 at 40 below, five minutes, 10 minutes, any time.

14 Q It's got to be real quick?

02:15 15 A But it would be relatively quick.

16 Q Okay. (V4)---- (V4)--- has 7:07 as a time,
17 keeping in mind is that the last time she looked
18 at her watch, is her watch synchronized, you've
19 got to allow a little bit of leeway, we're talking
02:15 20 a fair bit of time?

21 A Well, as I say, if your recollection is that she
22 left at 7:35 and we were able to establish that,
23 that provides a fair amount of time.

24 Q Okay, I'll come back to it. It's either 7, it's
02:15 25 either 35 or 40, but we'll get back to that.



1 COMMISSIONER MacCALLUM: 6:35.

2 MR. WOLCH: 6:35?

3 COMMISSIONER MacCALLUM: No, he said 7.

4 A Oh, I'm sorry, I mean 6:45.

5 BY MR. WOLCH:

6 Q Sure.

7 A Because she had the 7:00 bus, I think.

8 Q It's hard, it's 40 below, I mean it strikes one as
9 kind of impossible to fathom; you've got David
02:15 10 Milgaard raping and killing, you've got Larry
11 Fisher, the rapist, waiting at a bus stop, and
12 you've got a third guy attacking (V4)---- (V4)---,
13 you've got three sexual predators within 800 yards
14 at 40 below? I mean that's kind of bizarre.

02:16 15 A Well yeah, okay, that's bizarre.

16 Q So it --

17 A Doesn't mean it couldn't have happened.

18 Q Well, at 40 below there aren't too many guys
19 running around attacking women?

02:16 20 A One wouldn't think so.

21 Q It's hard to imagine two in the same morning,
22 within 800 yards, by two different guys?

23 A Well, yes, and it's hard to imagine even the Gail
24 Miller incident at that time of the morning, at
02:16 25 that temperature, I mean I --



1 Q I understand that.

2 A It's outrageous.

3 Q What I am getting at is that -- and we can go into
4 a debate, and I don't want to at this point in
02:16 5 time, and I don't think you do either -- but I'm
6 having a hard time fathoming why counsel for
7 Milgaard shouldn't have that information to engage
8 in that debate?

9 A Well, and --

02:16 10 Q That's what I find troubling.

11 A And my point now, Mr. Wolch, is that today you
12 would get that.

13 Q I'm suggesting --

14 A And --

02:17 15 Q I'm sorry?

16 A But back in 1969-1970, I don't see that as
17 something that is likely to be discloseable, and I
18 think the Supreme Court agreed.

19 Q Well, we'll talk about that in a few minutes.

02:17 20 COMMISSIONER MacCALLUM: You mean the
21 information you refer to as the (V4)--- --

22 A The (V4)---, yes.

23 BY MR. WOLCH:

24 Q Yes. Okay. Another matter being raised at some
02:17 25 point, at least, was the lack of disclosure on the



1 -- of the people in the neighbourhood. Merrimans
2 is the one name that comes to mind the most, but
3 do you not agree that that's -- should have been
4 disclosed?

02:17 5 A Well, Merrimans were the people waiting for the
6 taxi?

7 Q Yeah. At the very spot, necessarily, that had to
8 have seen --

9 A Well, yes, my view would be, even back then,
02:18 10 you've got evidence of people saying that they
11 were sort of looking out the window at that spot
12 and didn't see anything. That would be, yes,
13 something that should have been disclosed, in my
14 view, even using the old *Boucher* test.

02:18 15 Q And, let me tell you, I fully accept that you had
16 not had the RCMP reports at your disposal until
17 you found them, I'm not suggesting that you
18 withheld anything, but those reports would have
19 been very valuable to Mr. Tallis and to counsel in
02:18 20 the Supreme Court; would they not?

21 A Well I -- I mean it's certainly something you can
22 use to challenge the statements of the witnesses,
23 yes.

24 Q But, more than that, they had the RCMP theories?

02:19 25 COMMISSIONER MacCALLUM: You are relating



1 to -- you're talking about Riddell and Rasmussen?

2 A Yes.

3 MR. WOLCH: Yes, sir.

4 COMMISSIONER MacCALLUM: Okay.

02:19 5 BY MR. WOLCH:

6 Q The theory about the same guy doing it, we have --
7 Penkala had that too, but -- the theory that the
8 same person committed the Gail Miller murder, and
9 they were right, but --

02:19 10 A Yes.

11 Q Okay. But --

12 A And originally, I think if you go back to the
13 early part of the continuation report on the
14 Miller murder, I believe the police did have at
02:19 15 least one or two other sexual assaults in there
16 that they were thinking may be linked.

17 Q Yeah. My point, though, is that the assertion in
18 the Supreme Court that Larry Fisher was the guilty
19 party would have been bolstered by the Court
02:20 20 knowing that that was the very same theory the
21 initial investigators had?

22 A Well, they had the police investigation report in
23 the Supreme Court, --

24 Q No --

02:20 25 A -- that was part of the materials filed, was it



1 not?

2 Q No, not Rasmussen's report.

3 A Oh, no, right.

4 Q We've only got that here.

02:20 5 A Right, no, those RCMP ones, that's correct. I
6 don't think --

7 Q They are very specific, we have seen them many
8 times, --

9 A Yeah.

02:20 10 Q -- but they are very specific and they are very
11 much focused, they include (V4)--- in there too,
12 but they are very much focused on, well, Larry
13 Fisher really?

14 A Yeah.

02:20 15 Q You know, they don't know him then, but they
16 focused on him?

17 A Yeah, the person committing, yes.

18 Q Yeah. So what I am saying is -- and once again
19 I'm emphasizing I'm not suggesting it was
02:20 20 withheld -- but what I am saying is it would have
21 been valuable to be able to say to the Supreme
22 Court "look, the initial investigators were on the
23 right track, it's not that we have this crazy
24 theory about Larry Fisher, look, they thought that
02:21 25 back then"; it would have helped?



1 A Well, it was further evidence of that, because, as
2 I say, early on in the investigation of the Miller
3 case they were on that track.

4 Q Right. But that's disclosure that should have
02:21 5 been available and, not through anybody's fault,
6 just wasn't available?

7 A Okay.

8 Q Do you agree with that?

9 A Well to the extent, you know, it's something that
02:21 10 you could have put in in that proceeding, I don't
11 know how you would go about getting it into, say,
12 a trial.

13 Q Oh, no, I'm only talking about that proceeding.

14 A But, oh yeah, in front of the Supreme Court that
02:21 15 would be something you could certainly put in.
16 How helpful it would be, I don't know, but it
17 would certainly have been something that would
18 have gone in.

19 Q Dealing with the media, now the media normally is
02:22 20 to report on newsworthy items, as simple as that,
21 and we have investigative reporting as well, of
22 course, but do you know of many instances where
23 the media champions a cause and, if so, is that
24 what you are saying happened here?

02:22 25 A Well, I don't know that it was so much



1 championing. I mean there were a couple of
2 people -- I think Dan Lett and Dave Roberts were
3 certainly, I would suggest, part of the Milgaard
4 team, or saw themselves as that, and that certainly
02:22 5 seemed to be what Dan Lett was saying last October
6 at the Winnipeg conference. But no, it's not a
7 matter of the news media championing, it's a
8 matter of them reporting what's being put out and,
9 as I said, if justice officials are not prepared
02:23 10 to come forward and say "wait a minute, that's
11 wrong, that's not what the report says, here's the
12 report", then we leave you the field, and we can't
13 be critical of the news media for, in effect,
14 producing a one-sided story --

02:23 15 Q Well, no, but --

16 A -- because we're the ones leaving the one side
17 there.

18 Q Okay. But I'm gonna suggest that if, if the
19 newspapers started reporting questions regarding
02:23 20 Paul Bernardo or Clifford Olson, or any of those
21 notorious people, there is no need to respond
22 unless there is something of some merit in what's
23 being said or some ostensible merit on the face of
24 it?

02:23 25 A Well, or there's an obvious lack of merit to



1 what's being said.

2 Q Well I've given you the main allegations, Milgaard
3 is innocent, Fisher is guilty, there's been a lack
4 of disclosure, John is impossible, Wilson is a
02:24 5 liar, Campbell is wrong; I mean those are all
6 right?

7 A Well those -- and that, as I said, is not the
8 thing that concerned us. What concerned us was
9 the inferences that Joyce Milgaard and David and
02:24 10 you were drawing with respect to what people did.
11 The fact that there was no disclosure obviously
12 meant there was an attempt to cover up, the fact
13 that the minister got it wrong meant that her
14 officials either lied to her or misinformed her, I
02:24 15 mean, --

16 Q Well --

17 A -- come on, that's the part that's the concern.

18 Q Well, they are not telling us what they told her
19 even today?

02:24 20 A Well, and I -- if you are saying that that's a
21 criticism of what they did, I would agree.

22 Q You are saying that --

23 A It's my view that that material should have been
24 made public.

02:25 25 Q Yeah, but you are saying what they told her is the



1 truth when you don't even know what they told her,
2 we don't know, and the Commission doesn't know?

3 A No, no, I didn't say that. What I said was you
4 people then said she was lied to, or I mean it
02:25 5 eventually got to the point where she was a
6 co-conspirator, that's the part that's
7 objectionable.

8 Q Well --

9 A You are perfectly entitled to say "look, we don't
02:25 10 know what the minister got", and quite frankly
11 that was a very powerful part of the campaign that
12 came after February of '91, --

13 Q Well what --

14 A -- because when you are not prepared to come out
02:25 15 and say "well I considered this" or "I was told
16 that, here's what my decision is based on", you
17 know, it looks -- it looks difficult.

18 Q That hasn't changed today.

19 A Well, that may be the case, but --

02:25 20 Q Well --

21 A And I would agree that those kinds of things
22 should be made public.

23 Q Okay. If the minister comes to the wrong
24 decision, if -- I mean no one can deny --

02:26 25 A I understand you are perfectly entitled to say



1 "look, she got it wrong, wrong decision", --

2 Q Okay.

3 A -- "wrong result".

4 Q Okay -- she must have been given false
02:26 5 information?

6 A No.

7 Q Well, either she's not very bright or she got
8 false information?

9 A Or she just sees things a little different than
02:26 10 you do.

11 Q But wrong, because Fisher was guilty?

12 A Well, she may be wrong, but that doesn't mean
13 she's been lied to and that doesn't mean she's
14 stupid.

15 Q Well when they won't divulge --

16 A Or a co-conspirator.

17 Q Okay. But the Milgaard camp had no input on
18 McIntyre; correct?

19 A Oh, absolutely.

02:26 20 Q So nobody, even today, knows what he was told?

21 A I agree.

22 Q Okay.

23 A But does that lead you, then, to the necessary
24 conclusion that there's corruption involved, that
02:26 25 people are stupid, that they are lying to him?



1 Q Well, there is something wrong?

2 A No, Mr. Wolch, I just don't accept that.

3 Q What I'm saying is David Milgaard releases
4 privilege to his lawyer --

02:27 5 A Well, once the Supreme Court pushed him --

6 Q No, no, before, to Justice Tallis.

7 A Oh, to Justice Tallis, yes, and Eugene Williams.

8 Q He released privilege --

9 A Yes.

02:27 10 Q -- and we can't even find out what the minister
11 was told?

12 A Well, no. And, Mr. Wolch, there is no point in
13 beating around on this because I agree with you.

14 Q Okay, and I appreciate that.

02:27 15 A That should have been disclosed.

16 Q And still should?

17 A And, as far as I'm concerned, still should, yes.

18 Q Okay. Would you share my experience that --

19 A Well, let me just correct something.

02:27 20 Q Okay.

21 A 'Still should' with the caveat that I suspect the
22 federal privacy legislation now makes that an
23 extremely difficult thing to do. You would get a
24 document that is basically a whole bunch of black
02:28 25 lines.



1 Q Well, okay, I get your point. I won't debate that
2 with you. But would you share my experience, and
3 maybe you disagree, that most reporters, the
4 people who report crime news, Court news, are
02:28 5 intelligent people?

6 A Yeah, well, they obviously have some ability or
7 they wouldn't be able to do that job and --

8 Q But, I mean, they get bashed all the time, "you
9 misquoted me, you got that wrong"?

02:28 10 A Oh yeah.

11 Q They have a difficult task and they are pretty
12 bright people?

13 A Yes, I don't have a problem with that.

14 Q I mean you may not care for Dan Lett that much but
02:28 15 he's certainly a bright guy?

16 A Well, that's your assessment.

17 Q Not yours?

18 A I, well, I thought he was, without putting too
19 fine a point on it, used like a cheap whore in
02:28 20 respect --

21 Q Okay.

22 A -- of disseminating the point of view of the
23 Milgaard camp. Anything you guys said, Dan was
24 more than happy to publish.

02:29 25 Q But, okay, the reporters at the Supreme Court were



1 all top level?

2 A Oh yes.

3 Q I think one of them --

4 A That's why they're there.

02:29 5 Q -- is on the criminal review board now or
6 something?

7 A I have no idea.

8 Q Yeah, I think he was the, became -- he worked for
9 the court. But, in any event, the point I'm
02:29 10 making is that these people are hardly ever going
11 to champion the cause of somebody they think is
12 guilty?

13 A Oh, and Mr. Wolch, I don't for a moment think that
14 these people were out there attempting to create a
02:29 15 miscarriage of justice.

16 Q Well, just the opposite?

17 A I'm sure -- I'm sure they believed that David
18 Milgaard was innocent, and they believed that on
19 the basis of what you were putting out and what
02:29 20 Joyce Milgaard was putting out, and that we
21 weren't responding to.

22 Q Okay. But they believed correctly?

23 A Well, as it turns out, yes. But, on the basis of
24 what they were getting, I disagree that that
02:30 25 supported that conclusion, and the Supreme Court



1 seems to have agreed with that.

2 **Q** Okay. But they were getting -- they understood
3 and believed David to be innocent and Fisher
4 guilty, that --

02:30 5 **A** Well, they were certainly believing what they were
6 being fed at that point. And why wouldn't they,
7 we were not challenging it.

8 **Q** But --

9 **A** And that, of course, is another problem.

02:30 10 **Q** What were you going to challenge; that Wilson was
11 telling the truth?

12 **A** Well, no, no, your -- basically the spin that you
13 were putting on it, that Deborah Hall proves he's
14 innocent. No, no, no, no.

02:30 15 **Q** In fact the main feature was Larry Fisher, was it
16 not, Larry Fisher number one, Ron Wilson number
17 two?

18 **A** Well, no, not the first application.

19 **Q** Well I believe, at the beginning, it developed, it
20 grew, --

21 **A** Yes.

22 **Q** -- and by the time we got to the --

23 **A** Certainly the second application was --

24 **Q** Well, even in the first, Larry Fisher and Ron
02:30 25 Wilson?



1 A Well, he was there, it wasn't -- I didn't see it
2 as developed, that sort of --

3 Q Not in this depth, --

4 A No.

02:30 5 Q -- but it was there?

6 A Yeah.

7 Q But Wilson and Fisher were the main thrust, the
8 rest was a lesser degree, but those were the main
9 thrusts of the --

02:31 10 A Yes.

11 Q What were you going to say in response, your
12 department say "oh oh, no case against Larry
13 Fisher, he's innocent"? What could you say?

14 A No, and I said it wasn't the factual reporting
02:31 15 that was the problem, it was the comments that the
16 -- the editorial comments that you and Joyce
17 Milgaard and David Asper were attaching to that,
18 accusing officials of being corrupt and the
19 minister of being a co-conspirator, --

02:31 20 Q That's --

21 A -- that was the problem.

22 Q That's Campbell?

23 A Campbell.

24 Q Did you have any reaction when the Prime Minister
02:31 25 seemed to jump on board?



1 A No, I -- the only reaction that I had with respect
2 to seeing his meeting with Joyce Milgaard was that
3 he was a heck of a lot smoother than Kim Campbell
4 was.

02:32 5 Q I think her political career supports that. But,
6 okay, so let's turn to the Supreme Court
7 reference. Now what did you understand they were
8 supposed to decide?

9 A Well, my understanding was they were to look to
02:32 10 see whether there was any evidence that David
11 Milgaard had been the subject of a miscarriage of
12 justice.

13 Q Any evidence?

14 A That he would -- that he was -- or I believe the
02:32 15 way it was phrased in one of the questions was
16 whether his continued conviction would be a
17 miscarriage of justice.

18 Q Did you place any particular meaning on the words
19 "continued conviction"?

02:32 20 A Well, yes. I mean that was put there, as I
21 understand it, to cover off the prospect that,
22 even if the Court found that nothing went wrong
23 earlier on, if they were now of the view that
24 there was new evidence, as in what's his name,
02:33 25 Wilson's recantation, then the continued



1 conviction would be a problem, yes.

2 Q Okay. Well what would be your understanding, if
3 the Court came to the conclusion that he was
4 absolutely innocent, what were they supposed to
02:33 5 find?

6 A Well, that his conviction was a miscarriage of
7 justice, they could have advised the minister that
8 --

9 Q That his --

02:33 10 A -- his conviction was a miscarriage of justice.

11 Q Or his continued conviction?

12 A Well, or continued conviction, yes.

13 Q So is there a difference in "continued conviction"
14 and "conviction"?

02:33 15 A Well, I think there is, and I think that's what
16 comes out of the decision of the Supreme Court is
17 that, while they were satisfied that things were
18 done according to the law in 1969-1970, they were
19 also of the view that, by today's standards, the
02:34 20 Larry Fisher evidence should be available to the
21 defence and should be something the defence can
22 take to Court.

23 Q If you use the word "continued conviction", when
24 would the miscarriage kick in?

02:34 25 A Well, I -- "continued conviction", if the



1 conviction continues after the decision of the
2 Supreme Court, then the miscarriage continues.

3 Q Well I'm going to -- I have trouble with that
4 because --

02:34 5 A Well, it's a little bit strange, but yes.

6 Q If it takes two days for the conviction to be
7 quashed we have two days of miscarriage?

8 A Essentially yes, I suppose, if you wanted to
9 interpret it in a very strict, limited fashion.

02:34 10 Q Or isn't a more logical interpretation that there
11 has been a miscarriage and that continuing it is
12 wrong?

13 A No.

14 Q Okay.

02:35 15 A No. I think the language, on its face, is plain,
16 and it was put in there to deal with the situation
17 that, if the Court came to the conclusion that
18 everything had been done alright and there was no
19 evidence of misconduct by anybody, but that for
02:35 20 some reason you now have concerns, then to
21 continue the conviction in light of those concerns
22 would be a miscarriage.

23 Q But, like, why would you have concerns today and
24 not yesterday? Nothing has changed.

02:35 25 A Well, because Ronald Wilson hadn't recanted the



1 statement implicating David Milgaard.

2 Q Okay. But, if his recantation is accurate, then

3 --

4 A Oh, well yeah, okay.

02:35 5 Q I mean it's not like -- it's not like things
6 changed when he recants, things change if he lied
7 at the beginning?

8 A Well, not -- no. Again, I go back to what I have
9 suggested. If the Court finds that, according to
02:36 10 the standards of the day, everything was done
11 properly or there at least is no evidence of
12 improper activity, then it -- it's not a
13 miscarriage of justice at that point according to
14 the -- to that way of thinking. The miscarriage
02:36 15 begins if you are now of the view that there is
16 some concern with some of that evidence or there
17 is new evidence --

18 Q Okay.

19 A -- that should be reconsidered.

02:36 20 Q You have a lot of experience with appeals so I'm
21 going to ask you this question. When a question
22 is posed to the Supreme Court, or any appellate
23 court, --

24 A Yes?

02:36 25 Q -- would you agree that the courts are very



1 specific in answering the question?

2 A Oh, yes, usually.

3 Q That is, they don't go off on tangents and say
4 "well, that's my answer, but let's look at this",
02:37 5 they want to be specific, "you ask me a question,
6 you get an answer"?

7 A Yes.

8 Q They are very tight on that?

9 A Well, when there is a specific question asked,
02:37 10 right.

11 Q Yeah. And, in this particular case, David's guilt
12 or innocence was really the underlying factor in
13 the question?

14 A Yes.

02:37 15 Q And I think you mentioned at some point to
16 Commission Counsel that -- and I think it's in one
17 of your memos as well -- that the Chief Justice
18 said "we're after the truth"?

19 A Yes.

02:37 20 Q "Fairness is our only guide"?

21 A Pretty much, yes.

22 Q Yeah, "We want the truth." Now does that not
23 suggest to you that it isn't that important how
24 evidence was obtained but, more important, is the
02:38 25 evidence true?



1 A Yes.

2 Q So if you could establish, or one might establish
3 the worst police misconduct, but if it doesn't
4 lead to innocence it's irrelevant?

02:38 5 A Well, no, I wouldn't say that Mr. Wolch. I think
6 you get to the point of -- you know, my reading of
7 what the Court said is "the new evidence you've
8 presented doesn't establish he's innocent but it
9 does establish the need for a new trial", and I
02:38 10 would suggest that you have the same situation
11 with respect to process. If you can establish
12 that some part of the process significantly failed
13 then, whether that establishes he is innocent or
14 not, it results in a new trial.

02:38 15 Q No, but I'm saying for -- in any ordinary appeal
16 how statements are obtained, voluntariness, are
17 all very important?

18 A Yes.

19 Q Correct?

02:39 20 A Yes.

21 Q One might argue that in ordinary appeals it's the
22 trial that's on trial. Have you heard that
23 before?

24 A Well, yes, the process and what happened in the
02:39 25 courtroom.



1 Q The process. But a 690 reference is different.
2 Process is not the crucial point?

3 A Well, it's not the crucial point, but it is a
4 point.

02:39 5 Q Right.

6 A I mean, you know, if you could have established as
7 I, the example I used before, that you had two
8 corrupt jurors, that would have resulted, I think,
9 in an order by the Supreme Court that there had to
02:39 10 be a new trial simply because David Milgaard then
11 didn't get a fair trial.

12 Q But if the evidence discloses that somebody is
13 truly guilty, factually guilty, --

14 A Yes?

02:39 15 Q -- is something like an involuntary confession
16 going to have any play in an application for a
17 wrongful conviction?

18 A Well, how do you get to establishing the person is
19 truly innocent? You have --

02:40 20 Q I said the -- no.

21 A I mean those are the bricks you use to build a
22 case.

23 Q The confession is, the confession is "if you go
24 and look, the murder weapon is under the tree",
02:40 25 and they find the murder weapon, but the



1 confession was beaten out of the guy, --

2 A Uh-huh?

3 Q -- will that undo a conviction?

02:40 4 A Well that, I mean that, that's a good question. I

5 don't know.

6 Q Well --

02:40 7 A If the only standard is that we're looking for

8 the, only the issue of 'is that person, can you

9 prove the person is innocent or is he still

10 presumed guilty', if that's what you are saying

11 then the fact that you have an improperly obtained

12 confession, whether it's, you know, beaten out of

13 him or no *Charter* rights or whatever, if -- if the

14 corroborating evidence indicates it's true

02:41 15 presumably the Court, I suppose, could use that,

16 but I don't know that they would.

17 Q You can't, you can't say at that point on a

18 wrongful conviction that "I'm going to re-open

19 it," it was an appeal for sure. There is a big

02:41 20 difference?

21 A No, and I appreciate what you are saying, there is

22 a higher standard at a 690 review.

23 Q Well, totally different issue, totally different

24 issue. But the reference is "is he innocent, is

02:41 25 he guilty, what should we do". An ordinary appeal



1 is totally different, "did he get a fair trial,
2 was there an error in law", that sort of thing?

3 A Well that's, yes, that's true. But, if you look
4 at the test that the Supreme Court applied, they
02:41 5 went beyond just "is he innocent or is he guilty?"

6 Q Well, for example --

7 COMMISSIONER MacCALLUM: Just a minute, let
8 him finish.

9 MR. WOLCH: I thought he was.

02:42 10 COMMISSIONER MacCALLUM: Well --

11 A No, I was, Mr. Commissioner.

12 COMMISSIONER MacCALLUM: What -- well I'd
13 like you not to be. You said "went beyond 'was
14 he innocent or was he guilty'"; what is the
02:42 15 "beyond"?

16 A Well the, for example the fourth option,
17 notwithstanding what they may find, might they do
18 something for him, and in the final decision they
19 said "you haven't established your innocence, you
02:42 20 haven't established you are probably innocent, but
21 you have established there is new evidence that
22 should be put before a Court and you be given the
23 opportunity to face trial with that as a defence".

24 BY MR. WOLCH:

02:42 25 Q Okay. So --



1 A So that, in my view, goes beyond simply saying
2 "are you innocent or are you guilty".

3 Q And you are saying they didn't find a miscarriage?

4 A No, that -- well, that's what the Supreme Court
02:42 5 decision says, they -- that it would be a
6 miscarriage if it continued, if the conviction
7 continued without him being given the chance to
8 put that evidence in.

9 Q And had they found him absolutely innocent they
02:43 10 would have said to continue the conviction would
11 have been a miscarriage?

12 A No, they would have said "David Milgaard is
13 innocent".

14 Q Well okay, we'll examine that, because you said
02:43 15 they answered the questions posed?

16 A Well I -- subject to, I think, they sort of
17 rewrote them a little bit.

18 Q Do you know how many questions were posed to the
19 Supreme Court?

02:43 20 A Not without seeing that reference document in
21 front of me, no.

22 Q Mr. Commissioner, I'm in your hands, I --

23 COMMISSIONER MacCALLUM: Well, if we take a
24 ten-minute break or -- it means we'll get back in
02:43 25 15 minutes, and that --



1 MR. WOLCH: I'm going to suggest that --

2 COMMISSIONER MacCALLUM: -- we'll have a
3 half an hour left.

4 MR. WOLCH: I think, in talking to counsel,
02:44 5 that this witness will not be done today, I think
6 it's pretty well assured, because I think there
7 is two or three after me.

8 COMMISSIONER MacCALLUM: Oh, no, by you or
9 by other?

02:44 10 MR. WOLCH: Well, I will be close. I don't
11 want to unduly rush but I'm happy to take the
12 break at your discretion.

13 COMMISSIONER MacCALLUM: Yes, okay, we'll
14 take the usual break then. Thank you.

02:44 15 *(Adjourned at 2:44 p.m.)*

16 *(Reconvened at 2:59 p.m.)*

17 BY MR. WOLCH:

18 Q I just want to continue regarding the Supreme
19 Court and what it was about. There seems to be,
02:59 20 you know, some disagreement as to whether they
21 were to look into impropriety or not and what the
22 results would be if they found impropriety, but
23 issues such as -- well, for example, Nichol John
24 at the trial, how she was handled, her statement
02:59 25 getting to the jury, that's something the



1 Commission here I'm sure will be looking at. Was
2 that considered by the Supreme Court?

3 A Well, all of that was on the record. If you are
4 going to ask me what specifically they considered
03:00 5 or didn't consider, the answer is I don't know, I
6 wasn't privy to those considerations, but I can
7 tell you that the original decision, the original
8 appeal decision were all on the record, were all
9 part of that document file.

03:00 10 Q But was the propriety of having her statement
11 before the jury raised by anybody at any time?

12 A I don't recall that being raised, no.

13 Q And did it matter?

14 A Or argued rather.

03:00 15 Q Did it matter in the Supreme Court reference?

16 A I don't know whether it did. It certainly -- if
17 it mattered, nobody bothered to raise it.

18 Q Okay. So when you say the Supreme Court says
19 David got a fair trial, would that mean in your
03:00 20 mind that they approved of how Nichol John's
21 statement was held in front of the jury, or just
22 didn't even consider it?

23 A Well, I would -- well, no, Mr. Wolch, I'm going to
24 assume that if the Supreme Court says that they
03:01 25 think David Milgaard got a fair trial, they turned



1 their mind to that issue and examined the record.
2 I don't imagine they were just shooting from the
3 hip.

4 Q No. Well, you all seem to suggest they were.

03:01 5 A On some earlier occasions I think the Chief
6 Justice was, but when the decision was written, I
7 don't believe that was the case.

8 Q So you are saying that even though nobody raised
9 it, nobody argued it, nobody invited the court to
03:01 10 look at it, that their finding that he got a fair
11 trial meant that everything was appropriate with
12 Nichol John?

13 A Well, I don't see anything in their decision
14 suggesting otherwise. As I said, all of that was
03:01 15 before the court.

16 Q Okay.

17 COMMISSIONER MacCALLUM: Mr. Wolch, would
18 it have been appropriate for them to deal with it
19 if it had been advanced as a ground of appeal?
03:01 20 The Supreme Court refused leave to appeal in the
21 '70s.

22 MR. WOLCH: No, I don't think it would have
23 been.

24 COMMISSIONER MacCALLUM: The matter was *res*
25 *judicata*.



1 BY MR. WOLCH:

2 Q I agree with you, sir, but I'm just saying that
3 the notion of a fair trial has to be looked at
4 with some reservation because some issues weren't,
03:02 5 either not there or were irrelevant to get to the
6 truth that the Supreme Court directed counsel to
7 go to. It doesn't matter --

8 A Again, Mr. Wolch, the decision was before the
9 court. I'm prepared to assume, unless somebody
03:02 10 shows me otherwise, that they made that comment
11 advisedly, and by that I mean they looked at what
12 happened at trial and determined that that was a
13 fair trial. Now, you may take a different view,
14 but that's not in evidence.

03:02 15 Q If the Supreme Court had concluded that the jury
16 should not have heard Nichol John's statement,
17 would that have had any effect?

18 A Well, it might have had an effect, keeping in mind
19 that Nichol John's statement wasn't the only piece
03:03 20 of the evidence.

21 Q No, but --

22 A If the court is going to look at, you know,
23 ultimately whether a trial was fair, my experience
24 is they look at everything.

03:03 25 Q Okay, but the position of the Crown would have



1 been that her statement was partially at least
2 true that she had seen the murder.

3 A Well, I --

4 Q Maybe I should rephrase that if I could. Was that
03:03 5 your position, that she had seen the murder?

6 A Well, my position was her statement was what it
7 was. To be honest with you, at that point I
8 didn't know really what to make of Nichol John.
9 She said she told the police the truth. That
03:03 10 hadn't been sort of refuted. That's what we were
11 left with at the end of the day.

12 Q So whether --

13 A That and the fact that she didn't remember
14 anything.

03:04 15 Q But whether or not the jury should have heard it
16 is irrelevant, especially if you are saying make
17 something out of it, maybe it's true.

18 A Well, no, there's still -- I appreciate that you
19 don't accept the process was any part of the
03:04 20 matter, but I don't accept that.

21 Q Well, let's take a look at 327858.

22 A And apparently the Supreme Court wasn't ignoring
23 it because that's part of fair trial.

24 Q Sorry, 327858. Are you having trouble? I had
03:05 25 trouble finding that actually. If it helps,



1 that's the -- that's it. I think Commission
2 Counsel went through this with you and this is
3 your interview with CBC Radio.

4 A CBC, yes.

03:05 5 Q And the announcer asks you what the Crown will
6 argue and you deal with that, and then if we can
7 turn the page, starting right there:

8 "Well, the job that David Milgaard and
9 his council have is to convince the
03:06 10 court that there has been a miscarriage
11 of justice. In order to do that they
12 have to show that he is innocent,
13 because obviously if the right person
14 was convicted there has been no
03:06 15 miscarriage."

16 Do you think that's actually a correct summary of
17 what had to be done?

18 A Well, that's the unnuanced summary of where it was
19 in terms of providing the news media with
03:06 20 something that was relatively simple. I wasn't
21 about to go into discussions of process and what
22 the reference questions were and so on.

23 Q Okay.

24 "Our job will be to examine the proof
03:06 25 they bring in and check it closely to



1 make sure that it is reliable, and to
2 lead any evidence that indicates the
3 contrary."

4 Is that how you --

03:06 5 A That's what I thought our position was to be in
6 that court.

7 Q Okay, then going down a bit, the announcer says:

8 "To you. I mean the Supreme Court? I
9 guess what I'm getting at here is are
03:07 10 you going to be able to look over the
11 file of Larry Fisher?"

12 Turn the page:

13 "We've got all the file material on
14 Larry Fisher that still exists.

15 Announcer:

16 "Has that changed your case at all?"

17 Brown:

18 "No."

19 Announcer:

03:07 20 "Why not?"

21 Brown:

22 "Well, the difficulty with the Fisher
23 matter Maureen is that quite frankly if
24 I were going to prosecute Mr. Fisher I
03:07 25 would have no evidence I could put



1 before the court.

2 The so called similar fact evidence is
3 so nebulous and so vague that it really
4 amounts to coincident and nothing else.

03:07 5 And if I were prosecuting him a court
6 would not allow me to bring that

7 evidence into trial, and I know his
8 council shares the view, that it's

9 questionable whether it would even be
03:07 10 allowable in his defence evidence in the
11 Milgaard trial."

12 That was a view you held then. Do you still hold
13 that view?

14 A Well, the Supreme Court has indicated that that
03:07 15 view was wrong, so no, I don't continue to hold
16 the view that it was unallowable for his defence.

17 Q Do you still feel it is so nebulous that it's
18 coincidence?

19 A Yes, I still -- I mean, even today, if you were
03:08 20 going to try and prosecute Larry Fisher on that,
21 there's nothing there, or certainly nothing that
22 would do me any good. Now, I know, having said
23 that, that the prosecutors who did prosecute Larry
24 Fisher tried to use some of it, but I suspect that
03:08 25 the whole point of that wasn't so much to prove



1 Larry Fisher was guilty as to give them something
2 to wrap the DNA evidence around so that a jury
3 might better appreciate the facts, but yes, if you
4 are asking me do I still think that doesn't prove
03:08 5 that David Milgaard wasn't responsible back then,
6 again, I thought he got a fair hearing in the
7 Supreme Court and they came to a result that was
8 reasonable based on what was before them.

9 Q Just going down the page:

03:08 10 "And how does that compare to the
11 evidence that you have against David
12 Milgaard, where you now have some of the
13 witnesses who at one time said yes he
14 did it, I found him with blood on his
03:09 15 clothes and now they're recanting?"

16 Just turn the page:

17 "Well, there is one witness that has
18 recanted. The other witnesses are
19 pretty much holding steady..."

03:09 20 And if you just go down the page, please, and
21 turn the page, please. You talk about DNA, and
22 if you could scroll down, and the next page. You
23 answer the question, I won't read the question,
24 you say:

03:09 25 "I rather doubt it. The focus of this



1 inquiry is whether or not David Milgaard
2 is innocent. It's not a public inquiry
3 to determine whether the Administration
4 of Justice is good, bad or indifferent.
03:09 5 The focus is very narrow and it has to
6 do with David Milgaard's status or
7 guilt, his innocence. And really the
8 conduct of the Saskatoon city police
9 doesn't really come into that."

03:10 10 A Well, that, quite frankly, that may have been a
11 bit of an overstatement. I never intended to
12 imply that if you couldn't show the police had
13 misconducted themselves, that David Milgaard
14 wouldn't have got some relief, because it was
03:10 15 always my view that if you were able to produce
16 evidence that particularly say Wilson and John had
17 been beaten into giving their statements or
18 tricked into giving them or whatever, that would
19 have had a substantial impact on the Supreme
03:10 20 Court.

21 Q Okay, but you are saying here the conduct of the
22 Saskatoon City Police is basically not relevant to
23 the inquiry, that's your --

24 A That's what I said, yes.

03:10 25 Q Right.



1 A And I just explained that.

2 Q Okay.

3 COMMISSIONER MacCALLUM: So it was never
4 your position that misconduct could not
03:11 5 demonstrate a miscarriage of justice?

6 A Well, that's right, and even at that point we were
7 anticipating calling police officers.

8 COMMISSIONER MacCALLUM: Yeah.

9 A And hearing from them.

03:11 10 BY MR. WOLCH:

11 Q Okay. But that's your comment at least?

12 A That's the comment, yeah.

13 Q And that's basically consistent with what the
14 Milgaard people were saying afterwards, is that
03:11 15 they were under that impression as well?

16 A Well, yes. I don't know how you would still be
17 under that impression given you examined several
18 police officers, had the opportunity to examine
19 more.

03:11 20 Q Well, but if one starts on the assumption that the
21 conduct doesn't matter --

22 A Well --

23 Q -- as you said --

24 A I said I think that overstates the matter. The
03:11 25 Supreme Court at that point wasn't saying the



1 conduct didn't matter, we were proposing to hear
2 from police officers.

3 Q There was one from Saskatoon; correct?

4 A Well, there were three at that point that were
03:12 5 going to be subpoenaed, Karst, Short, Mackie and
6 Art Roberts, and there would have been no point to
7 calling them if police conduct didn't matter.

8 Q The announcer says:

9 "But, lets say that he is some how
03:12 10 acquitted by the Supreme Court, is there
11 a chance that it will tarnish the
12 imagine of the justice system in
13 Saskatchewan?"

14 And you say:

03:12 15 "Well, as the court noted the first time
16 we met, at some point there maybe some
17 consideration to some other form of
18 inquiry depending on the decision the
19 court makes. But, that's not something
03:12 20 that will come out of this case.

21 The Supreme Court will hear its
22 evidence, it will make its
23 recommendation to the Minister and she
24 will no doubt act on that in due course.

03:12 25 But, this isn't going to be a public



1 inquiry into the conduct of the
2 Saskatoon City Police, or the
3 Saskatchewan Justice Department."

4 And that's pretty specific.

03:13 5 A In terms of the broad conduct of policing and the
6 Saskatchewan prosecution system, that was correct,
7 and certainly the Supreme Court as I recall, the
8 Chief Justice as I recall, made it clear that in
9 fact we weren't interested in that, we were
03:13 10 interested in matters that specifically related to
11 the prosecution of David Milgaard and the
12 gathering of the case against him.

13 Q Okay, but this isn't going to be a public inquiry
14 into the conduct of the Saskatoon City Police or
03:13 15 the Justice Department, it surely applies to the
16 Milgaard case, it's not a -- no one was ever
17 suggesting we're going into a public inquiry about
18 how the police force operates in Melville and
19 Yorkton?

03:13 20 A Well, except that the inquiries that had existed
21 up to that point, as I recall, had looked at sort
22 of how police departments were organized and they
23 were much broader, much fuller, took much more
24 time, and I think that's what the Supreme Court
03:14 25 was concerned about, is we want to look



1 specifically at the matters related to David
2 Milgaard and nothing else.

3 Q But let's go back. Virtually every lawyer knows
4 Supreme Court time is exceptionally valuable?

03:14 5 A Yes.

6 Q And many of the most serious matters in the
7 country, whether it's the break-up of a country or
8 God knows what, can be heard in a day or a half a
9 day or whatever it might be; correct?

03:14 10 A Yes.

11 Q I mean, major, major issues can be heard in half a
12 day or a day, time there is very much guarded and
13 precious.

14 A Yes.

03:14 15 Q And there's not a chance in the world that the
16 court is going to let you ramble on into anything
17 they don't really have to hear.

18 A And that's what they were telling us.

19 Q Get to the point?

03:14 20 A Yes, demonstrate the miscarriage of justice.

21 Q Yeah. And your point was we're not here to look
22 at conduct, we're not here to look at that?

23 A Well, no, no. As I said, that may have been a
24 misstatement because if you take that to include
03:15 25 that we weren't here to look at how the police



1 gathered their evidence or whether Mr. Milgaard
2 was framed or anything like that, I'm sorry, I
3 disagree. The court at no time limited anybody
4 from calling the evidence that would be necessary
03:15 5 to establish that David Milgaard had been the
6 product, his conviction had been the product of
7 misconduct by the police or misconduct by the
8 Crown, I just don't believe that.

9 Q But misconduct doesn't lead to anything.

03:15 10 A Well, excuse me, if the police misconduct themselves
11 and produce statements from witnesses that are not
12 true, you are telling me that leads to nothing in
13 this case?

14 Q The statement has to be false, the conduct doesn't
03:15 15 matter.

16 A Well, you have to -- well, Mr. Wolch --

17 Q Not at this stage. You are in a reference, you
18 are not in a courtroom.

19 A I'm sorry, I disagree.

03:16 20 Q All right. Scroll down, and the next page --
21 that's the end of that. I'll move on then.

22 So you earlier told me that
23 courts of appeal in particular, or any court
24 really, if they are asked a specific question,
03:16 25 they answer the question?



1 A Generally, yes.

2 Q That's what a reference is?

3 A Yes.

03:16

4 Q And do you recall what the question was or how
5 many questions were posed?

6 A No, I don't. I would have to see the document.

7 Q You indicated that the Court of Appeal could have
8 acquitted David -- the Supreme Court I mean?

9 A The Supreme Court?

03:16

10 Q Could have acquitted David?

11 A That they could have said that he was innocent and
12 directed the minister to deal with it accordingly,
13 yes. They could have, in effect, indicated he was
14 innocent.

03:17

15 Q Could they have said you are not guilty?

16 A Well, that's what a finding of innocence would be.

17 Q That wasn't my question. Could they have said you
18 are not guilty, go home, we're done?

03:17

19 A Oh, no, no, they were giving advice to the
20 minister. It was the minister's job to then
21 exercise the --

22 Q They couldn't say you are not guilty in law?

03:17

23 A Well, they could say you are not guilty, but it
24 wasn't up to them at that point, and nor did they
25 have the authority, to then quash the conviction.



1 It had to go back to the minister for that.

2 Q Would it surprise you to know there was only one
3 question posed to the Supreme Court with a
4 follow-up?

03:17 5 A I said, Mr. Wolch, I don't recall, unless you show
6 me the document.

7 Q Okay, let's look at it, 058828. It's not actually
8 a document, but it's incorporated in the judgment,
9 and if you can turn to the next page, please:

03:18 10 "Therefore, his Excellency the Governor
11 General ... on the recommendation ... is
12 pleased ... to submit to the Supreme
13 Court ... for hearing and consideration
14 the following questions:

03:18 15 (a) upon a review and consideration of
16 the judicial record, the Reference Case
17 ... filed ... and such further or other
18 evidence as the Court ... may receive
19 and consider..."

03:18 20 And here are the key words:

21 "...does the continued conviction of
22 David Milgaard in Saskatoon ... for the
23 murder of Gail Miller, in the opinion of
24 the Court, constitute a miscarriage of
03:19 25 justice?"



1 You see the question?

2 A Yes.

3 Q Okay. Going into the Supreme Court, the Milgaard
4 group was saying the answer to (a) should be yes;
03:19 5 correct?

6 A Yes.

7 Q And you were there saying the answer should be no?

8 A That was what we conceived our job to be, subject
9 to the reservation that I put on it before.

03:19 10 Q Okay. And the Supreme Court sided with the
11 Milgaard group and said yes?

12 A Does the continued conviction -- yes. Well, no,
13 what they said was the continued conviction would
14 be a miscarriage.

03:19 15 Q That's the question they answered?

16 A Yes.

17 Q That's the only question. I mean, (b) is a
18 question, but we'll deal with that, but that's the
19 substantive question, that's what Campbell wanted
03:19 20 answered?

21 A And that's what the Supreme Court said, it would
22 be a -- the continued conviction would be a
23 miscarriage if he didn't get the opportunity to do
24 certain things.

03:20 25 Q So the Milgaards won?



1 A Well, you won in the sense that you got the order
2 for the new trial. You didn't get a declaration
3 of innocence which --

4 Q There was no asking for a declaration of
03:20 5 innocence.

6 A Well --

7 Q That's the -- I asked you before, courts answer
8 questions. That's the question.

9 A Well your -- certainly, the complaints that
03:20 10 followed the decision suggested you were expecting
11 a good deal more than that.

12 Q Well, many of the complaints were on your
13 interpretation, but we'll get to that.

14 A Well, I'm talking about your complaints, --

03:20 15 Q Well, we'll deal with it.

16 A -- and Joyce Milgaard's complaints and David
17 Asper's complaints.

18 Q But that is the question?

19 A That's the question, yes.

03:20 20 Q And the answer was "yes"?

21 A Yes.

22 Q Okay. The Court cannot be saying anything more
23 than yes. But:

24 "(b) depending on the answer to the first
03:20 25 question, what remedial action under the



1 *Criminal Code*, if any, is advisable?"

2 In other words, if you find a miscarriage or a
3 con -- as the wording is there -- if you find it,
4 what's the remedy you would recommend to the
03:21 5 minister?

6 A Well, and -- well, thank you for bringing that up,
7 actually, because when you now look at what they
8 decided on, what was it, February of '92 as their
9 options, they went beyond that.

03:21 10 Q Well you -- well, look at that.

11 A Well, they did go beyond that.

12 Q No, they -- what they did --

13 A Where, in the *Criminal Code*, does it say "and we
14 can do anything we think might be fair".

03:21 15 Q You --

16 A Because the final option, the what I referred to
17 as the sympathy option, where is that in the
18 *Criminal Code*?

19 Q Okay. So you are saying they are wrong based on
03:21 20 that?

21 A No, no, I'm saying that they interpreted that a
22 little differently, I think, than what you are.

23 Q I --

24 A You are saying that -- that -- that they could
03:22 25 only answer that question. Well, no, they



1 actually thought they could answer -- give advice
2 that was a little beyond that.

3 Q Well, okay. But they then -- okay, what they are
4 talking about here is (a) is yes, there's going to
03:22 5 be a remedy; (b) is well how do we recommend the
6 remedy? The Court cannot say "innocent", the
7 Court cannot say "guilty", the Court can recommend
8 what the minister should do; isn't that what it's
9 saying, I mean, in plain English?

03:22 10 A Well, yes, they were -- they were asked to
11 recommend the appropriate remedy.

12 Q Okay. And what they did was they established
13 guidelines for choosing the remedy?

14 A Yes.

03:22 15 Q Okay. And if we can just go to the next page.

16 A But you'll note it says:

17 "... remedial action under the *Criminal*
18 *Code* ...".

19 Q Yeah.

03:22 20 A And the sympathy remedy, I don't think, falls
21 under the *Criminal Code*.

22 Q Well, I'm not sure it's called 'sympathy', but --

23 A Well, --

24 Q That's your name, I didn't hear them calling it
03:23 25 that.



1 A -- call it what you want, it's not a remedy that
2 exists under the *Criminal Code*.

3 Q Well, let's look at that. If we can scroll -- I'm
4 sorry, back to the same page, I'm sorry, page 2.

03:23 5 Okay. Here are the guidelines, and this is for
6 (b), in determining remedy. Right where I am down
7 here. It's not for the main question, I want to
8 emphasize that, and you may agree it's not for the
9 main question, it's to how you determine remedy.

03:23 10 And they say:

11 "The continued conviction of ...
12 Milgaard would constitute a miscarriage
13 of justice if, on the basis of the ...
14 record ...",

03:23 15 etcetera:

16 "... this Court in its discretion may
17 receive and consider, the Court is
18 satisfied beyond a reasonable doubt that
19 David Milgaard is innocent of the murder
03:23 20 of Gail Miller. If we were to ...",

21 next page:

22 "... answer the first question put to
23 this Court ... in the affirmative ...",
24 we would advise that David get a free pardon?

03:24 25 A That's, yes, that's a mixture of (a) and (b).



1 Q Okay. So if -- it's not (b).

2 A Well --

3 Q If, under (a), we find innocence beyond a
4 reasonable doubt -- a bit of a novel concept --
03:24 5 but if they find that we recommend, under (b), a
6 free pardon, minister, do it or not, but that's
7 our recommendation?

8 A Yeah.

9 Q You asked for it in (b), you wanted to know, --

03:24 10 A Yes.

11 Q -- they are answering the question.

12 Now they go (b), and it's not
13 a free pardon under (b):

14 "The continued conviction ... would
03:24 15 constitute a miscarriage of justice if
16 ...",

17 continued conviction:

18 "... if, on the basis ...",

19 etcetera:

03:24 20 "... of the ... record ... the Court is
21 satisfied on a preponderance of the
22 evidence that David Milgaard is innocent
23 of the murder of Gail Miller. If we
24 were to answer the first question ... in
03:24 25 the affirmative ... it would be open to



1 David Milgaard to apply to reopen his
2 application for leave to ... the Supreme
3 Court ... with a view to determining
4 whether the conviction should be quashed
03:25 5 and a verdict of acquittal entered, and
6 we would advise the Minister ... to take
7 no steps pending final determination of
8 those proceedings."

9 So, if it's preponderance of evidence, come back
03:25 10 to the Supreme Court on a motion for new
11 evidence?

12 A Yes.

13 Q Right? And the Court can decide what it wants to
14 decide?

03:25 15 A Yes.

16 Q Okay?

17 A I agree.

18 Q So that's (b).

19 A That's what it says.

03:25 20 Q That's if we come to that conclusion.

21 Let's go to (c):

22 "The continued conviction of David
23 Milgaard would constitute a miscarriage
24 of justice ...",

03:25 25 same as the other (a) and (b):



1 "... if there is new evidence put before
2 this Court which is relevant to the
3 issue of David Milgaard's guilt, which
4 is reasonably capable of belief, and
03:25 5 which taken together with the evidence
6 adduced at trial, could reasonably be
7 expected to have affected the verdict."

8 So it's not just a matter of there's new
9 evidence, go have a trial, it's a matter this has
03:26 10 to be --

11 A No, no.

12 Q -- reasonably capable of belief and reasonably
13 expected to affect the verdict?

14 A That's correct, there is a standard imposed.

03:26 15 Q And if we carry on:

16 "If we were to answer the first question
17 put to this Court ... in the affirmative
18 ... we would consider advising the
19 Minister ... to quash the conviction and
03:26 20 to direct a new trial under ... 690 ...
21 In this event it would be open to the
22 Attorney General to enter a stay if a
23 stay were deemed appropriate in view of
24 all the circumstances including the time
03:26 25 served by David Milgaard."



1 So (c), like (a) and (b), is conditional on a
2 positive answer to the main question; correct?

3 A Yes.

4 Q And this one is quash the conviction and direct a
03:27 5 new trial and proceed or not; that's basically
6 what it is?

7 A Yes, okay.

8 Q All right. (a), (b), and (c) are all founded on
9 the same principle that there is a miscarriage of
03:27 10 justice?

11 A Yes.

12 Q So didn't they find a miscarriage of justice?

13 A Well, no. I go by the plain wording of the
14 document, that the miscarriage of justice would
03:27 15 occur, --

16 Q But that's --

17 A -- that's what they said.

18 Q So you are saying that, even if they found him
19 absolutely innocent, they are not finding a
03:27 20 miscarriage of justice?

21 A The judgement says --

22 Q No, no, is that your -- that's your
23 interpretation? If they had said under (a) --

24 A Oh, if they had said that David Milgaard was
03:27 25 innocent --



1 Q Would have been the same?

2 A -- and found that something was wrong, then yes.

3 Q Well, how does it differ? The wording is
4 identical?

03:27 5 A Because -- no. The judgement, Hersh, is that it
6 would be a conviction -- or a --

7 Q (a), (b), or (c)?

8 A Yes.

9 Q So there is no judgement that would call it a
03:28 10 miscarriage, in your opinion?

11 A That's right, they did not find there was a
12 miscarriage.

13 Q No, but they couldn't find one?

14 A Well --

03:28 15 Q (a) is not one, (b) is not one, (c) is not one, in
16 your interpretation?

17 A That -- they may not have been able -- well, even
18 assuming that you are right, that did not stop
19 them from saying that David Milgaard had been
03:28 20 wrongly convicted or that he was subject to a
21 wrongful conviction because of misconduct by the
22 parties, that was always open to them, and it was
23 always open to them to say, quite frankly from the
24 very beginning, that "this has been a miscarriage
03:28 25 of justice since day one and his continued



1 conviction would be a miscarriage".

2 Q But you had told me, before, they answer the
3 questions?

4 A Well they, subject to their interpretation of
03:28 5 them, yes.

6 Q Well let's look at (d).

7 COMMISSIONER MacCALLUM: Mr. Wolch, I think
8 it's time to adjourn, but -- and I don't want to
9 introduce debate, believe me, but if you would
03:29 10 just go back to the first part of the order,
11 there, the Order in Council, if that's what it
12 is. And before you get to (a), (b), and (c) --
13 (a) is the main question, I think you both agree
14 it's a substantive question, and then go down a
03:29 15 little bit. And so the Court then gives
16 guidelines to be followed in responding to the
17 questions to be set out for the parties, one of
18 which, the main one "was there a miscarriage of
19 justice". So (a), (b), and (c), which follow
03:29 20 down there, are not devoted simply to remedy,
21 they are also de -- demonstrate guidelines to be
22 used in deciding whether there was a miscarriage
23 of justice.

24 MR. WOLCH: Yes.

03:29 25 COMMISSIONER MacCALLUM: So are we *ad item*



1 on that?

2 MR. WOLCH: We are. But I do point out
3 that (a) uses the word "continued conviction" --

4 COMMISSIONER MacCALLUM: Yes.

03:29 5 MR. WOLCH: -- in terms of constituting a
6 miscarriage of justice. And, if I may, I realize
7 time is running fast, but I may just draw one
8 thing to your attention very quickly.

9 If we go to paragraph (d),
03:30 10 very quickly, --

11 COMMISSIONER MacCALLUM: Yes?

12 MR. WOLCH: -- just the (d) that Mr. Brown
13 didn't care for -- I thought I saw it there a
14 second ago?

03:30 15 A No, I didn't say I didn't care for it.

16 BY MR. WOLCH:

17 Q Well, you didn't think they had the authority to
18 do it?

19 A I -- I --

20 Q Sorry?

21 A -- frankly thought that that was not an
22 unreasonable kind of consideration.

23 Q No, but I just want to point out one thing for
24 you. If you read (d):

03:30 25 "If the judicial record, the Reference



1 Case ...",

2 etcetera:

3 "... fails to establish a miscarriage of
4 justice as set out in ... (a), (b) or
03:30 5 (c) ...";

6 do you see that?

7 A Yes.

8 Q Which suggests that (a), (b), a positive finding
9 under (a), (b), or (c) is a miscarriage of
03:30 10 justice?

11 A Well, again, what the Supreme Court said was the
12 continued conviction would be a miscarriage.

13 Q But that's the question they were asked?

14 A And that's the answer they gave.

03:31 15 Q But that was the question they were asked.

16 A That it would be a miscarriage.

17 Q They went farther in (d) by saying:

18 "... a miscarriage of justice as set out
19 in ... (a), (b) or (c) ..."?

03:31 20 That's the plain reading.

21 A Well except, Mr. Wolch, then how do you deal with
22 the fact that they say 'got a fair trial, no
23 evidence of misconduct by the police, no evidence
24 of misconduct by the prosecution, adequately
03:31 25 defended, evidence still exists, conviction was



1 proper at the time'; if you were saying that they
2 were finding that there was a miscarriage of
3 justice on what was it based?

4 Q Well, they -- it says it right here. Well, they
03:31 5 say because --

6 A They said the continued conviction, given
7 essentially the Larry Fisher evidence and a few
8 other things, --

9 Q Right?

03:31 10 A -- would be a miscarriage of justice.

11 Q Right.

12 A Not that it was.

13 Q But that's the question they are asked?

14 A Well you, I mean you may interpret it that way, I
03:31 15 don't, and of course I --

16 Q I guess it depends what the Commissioner
17 interprets, but --

18 A It's always open to you to make that argument.

19 Q I see the hour, Mr. Commissioner, so --

03:32 20 COMMISSIONER MacCALLUM: Thank you.

21 MR. HODSON: If I could just indicate, I
22 believe that Mr. Brown will be returning on
23 Monday afternoon to be finished up Monday
24 afternoon, and we have Eugene Williams who will
03:32 25 follow immediately after Mr. Brown for the



1 remainder of Monday, Tuesday, and Wednesday.

2 COMMISSIONER MacCALLUM: Okay.

3 I won't insult you, sir, by
4 explaining the Coventry rule, which I'm sure you
03:32 5 are aware of?

6 A Yes.

7 (Adjourned at 3:32 p.m.)

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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.

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Official Queen's Bench Court Reporter

_____, RPR, CSR, CRR, CBC

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

Official Queen's Bench Court Reporter



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