

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

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Transcript of Proceedings

and

Testimony before the Commission  
sitting at the  
Sheraton Cavalier Hotel at  
Saskatoon, Saskatchewan

\*\*\*\*\*

On Tuesday, August 16th, 2005

Volume 57

Inquiry Proceedings



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The Hon. Irwin Cotler  
*Mr. Alexander Pringle, Q.C.,* **for** Justice Calvin Tallis  
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**INDEX OF PROCEEDINGS**

<b><u>DESCRIPTION:</u></b>	<b><u>PAGE:</u></b>
<b><u>BRUCE IVAN PAYNTER, CONTINUED</u></b>	
- BY MR. HARDY	11030
- BY MS. KNOX	11224
- BY MR. GIBSON	11234
- BY MR. ELSON	11239
- BY MR. WOLCH	11242
<b><u>JOHN ALDEN WOOD, SWORN</u></b>	
- BY MR. HODSON	11245



Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Morning.

ALL COUNSEL: Morning.

BRUCE IVAN PAYNTER, continued:

BY MR. HARDY:

Q Morning, Mr. Paynter.

A Morning.

Q We'll continue from where we left off yesterday.

09:00 10 Just to recap, we discussed -- we were taking a  
11 look at your notes, and perhaps I'll bring that  
12 page of notes up on the screen again, please. And  
13 we have been talking about the entries and the  
14 abbreviations you were using, and perhaps just to  
09:01 15 summarize, we talked about some of your testing  
16 methods for the detection of seminal fluid, and  
17 correct me if I'm wrong, but I understood it was  
18 essentially a three-step process; you would  
19 initially visually inspect an article, if you  
09:01 20 suspected a seminal stain you would move on to  
21 what is known as an acid phosphatase test?

A That is correct.

Q And perhaps I'll pause there just for a moment,  
24 because I don't know if this became clear  
09:01 25 yesterday, but that would involve actually cutting



1 out a piece of the material where you suspected a  
2 stain?

3 A Yes, it did.

09:01

4 Q And then conducting the chemical test that you  
5 described for us yesterday?

6 A That's right.

7 Q Okay. And, where you received a positive result  
8 on that test, you would go on to microscopically  
9 examine the --

09:01

10 A The extract.

11 Q -- actual article or the extraction from the  
12 material?

13 A The extract from the material that I had cut out.

09:02

14 Q Okay. And we also touched briefly on the issue of  
15 detecting blood, and for the most part, as we made  
16 our way through your notes, it would appear that  
17 you did not test most of the items for the  
18 presence of blood. We had made our way to item H,  
19 which was the knife blade, and had been discussing  
20 that, and in particular the notation 'positive  
21 Hemo', and again correct me if I'm wrong, but I  
22 understood that to be the haemochromogen test?

09:02

23 A Yes, that would be the test that would positively  
24 identify the stain as containing blood.

09:02

25 Q Okay. And is that positively indicating human



1 blood or, simply, positively indicating the  
2 presence of blood?

3 A That would just indicate blood.

4 Q And, therefore, is that where the AH positive  
09:02 5 beside that entry comes into the picture? You had  
6 described that, I believe, to us as a test that  
7 was used for purposes of determining that a  
8 substance was of human origin?

9 A That is correct, yes.

09:03 10 Q Okay. And just briefly, if we could go back to  
11 the first page of these notes, please, we had  
12 already talked about the pair of panties -- and  
13 we'll take a look at the entry which we discussed  
14 there yesterday -- and if we could go back to your  
09:03 15 original notes for a moment, and that would be  
16 document ID 082386, and I note item B, again the  
17 pair of pink panties, it's an identical entry,  
18 although I note on your original notes that over  
19 on the right-hand margin here we see, again, the  
09:03 20 'positive AH'?

21 A Yes.

22 Q And would I be correct, then, in concluding that,  
23 after you had received the positive acid  
24 phosphatase test and positive microscopic  
09:04 25 examination, that you also conducted the AH test



1 that you have described for us?

2 A Yes, I would run the same human determination test  
3 that I ran on the blood samples, even though the  
4 microscopic examination wasn't sufficient for me  
09:04 5 to say that it was human seminal fluid, I still  
6 would run the other tests as a confirmation.

7 Q Okay. And I think, then, you've already answered  
8 this question, but the AH test that you have been  
9 describing for us, then, could be conducted on a  
09:04 10 blood sample or on a semen sample; is that  
11 correct?

12 A Yes, you used the same tests for both materials.

13 Q Okay. And I continue to say AH, I think you told  
14 us the name, what is that an abbreviation for?

09:04 15 A Well, we just referred to it as an antihuman test.

16 Q Okay. And if we could go back, then, to the more  
17 legible version of the notes, doc 082377, and  
18 again the second page please. I would like to  
19 talk to you now about the next two entries,  
09:05 20 Mr. Paynter, they are referred to as I1 and I2 and  
21 described as:

22 "Sample of liquid (received frozen in  
23 plastic vial",

24 and we've heard in evidence already that these  
09:05 25 two items were items that were actually retrieved





1 by Lieutenant Penkala from the scene, from the  
2 scene of the crime, two frozen substances that he  
3 had retrieved on February 4th. And perhaps, just  
4 for reference sake, we'll look at document  
09:05 5 006262. This is the report respecting that  
6 attendance that I am speaking of, and you will  
7 note there that Lieutenant Penkala talks of  
8 searching in the snow at the area, locating two  
9 frozen lumps yellowish in colour with hair frozen  
09:06 10 into the lumps, indicates that they were retained  
11 in a frozen state and that the exhibit would be  
12 submitted to the Crime Detection Laboratory at a  
13 later date, see the date at the top being  
14 February 4th. If we could go back to the notes,  
09:06 15 please. So speaking of those two items,  
16 Mr. Paynter, and looking at those entries, do you  
17 recall the receipt of those two vials?

18 A Yes I do.

19 Q And can you share with us your recollection of  
09:06 20 those two vials and, in particular, the substance  
21 in those two vials?

22 A The vials would be probably what was used then as,  
23 we referred to as pill vials, plastic vials with a  
24 snap-on cap that was commonly -- you would get  
09:07 25 from a drug store with pills in them. And in each



1 one, the one referred to as I2 I remember had a  
2 larger amount of material in it than I -- the I1  
3 had more material in it than I2. They were both,  
4 I believe, frozen at the time. Umm, it has been  
09:07 5 referred to as being pale yellowish in colour, and  
6 as I recall that was the closest colour that you  
7 could come to as saying it was pale yellow, it  
8 would be very pale, it was not a bright yellow  
9 colour, a very pale-ish yellow colour.

09:07 10 Q And did that apply to both of the vials, then, the  
11 substance in both of the vials?

12 A I believe it did at that time.

13 Q And I believe Lieutenant Penkala referred to the  
14 presence of hair; do you recall hair being present  
09:07 15 in one of the vials?

16 A I don't recall hair being in it, but I do remember  
17 that I believe I gave it to somebody else who  
18 would be examining it for hair, but I don't  
19 recall, myself, as anything else being in it.

09:08 20 Q And I won't bring up the actual report, I'll refer  
21 to the document ID, it's 105544, a report by a  
22 Victor Molchanko; do you recall Mr. Molchanko?

23 A Yes I do.

24 Q And would he have been in the hair and fibre  
09:08 25 section?



1 A Yes he was.

2 Q And I believe he reports that in fact he had  
3 received these vials from you and had located hair  
4 in one of them, and I take it you wouldn't dispute  
09:08 5 that conclusion?

6 A No. There is a note on the bottom of this page,  
7 that is up at the present, that I gave the  
8 exhibits to Corporal Molchanko on the 17th of  
9 March, 1969.

09:08 10 Q And would that not be something, then, that you  
11 would note in your notes at the time, the presence  
12 of hair in one of those vials?

13 A I did not make a note of it, no.

14 Q Okay. And can you give us any sense about how  
09:08 15 much fluid was in each of these samples?

16 A As I said, I believe I1 had a bit more than I2,  
17 but it would be a very small amount anyway,  
18 probably -- I1 might have had two or three  
19 millilitres of it and I2 would have probably had  
09:09 20 less.

21 Q And I think you indicated to us you do recall that  
22 you received these in a frozen state?

23 A Yes I did.

24 Q And if we look at your entry, and again we'll  
09:09 25 maybe focus on I1, it goes on to again indicate



1           some abbreviations, some of which we've spoken of,  
2           but if you could please explain to me the meaning  
3           of those entries?

4           A       Well, again, I ran the acid phosphatase test,  
09:09 5           which was positive on I1 but not on I2. I did a  
6           microscopic examination of some of the fluid in  
7           I1, it was positive for human seminal -- for human  
8           spermatozoa, therefore human seminal fluid. I ran  
9           an antihuman test on I believe both, but it's not  
09:10 10          on the notes there, umm, on the second one, and it  
11          was negative for human material in I2. On I1 I  
12          also ran a test for blood grouping substances  
13          present in the sample, that is to say a certain  
14          percentage of the population will secrete their  
09:10 15          blood grouping factors or substances in their  
16          other body fluids, they are known as 'secretors',  
17          and in this case I found a positive result for  
18          blood grouping substance A but not for blood  
19          grouping substance B. This would indicate to me  
09:11 20          that the probable donor of the seminal fluid was  
21          from a person probably of group A blood group.

22          Q       And that last portion that you have been  
23          describing to us, this is the reference, then,  
24          that you are making there, positive for A  
09:11 25          substance?



1 A That is correct.

2 Q And you've talked about A substance being A  
3 grouping factor?

4 A A, we referred to it as a, a number of different  
09:11 5 ways; A substance, A antigen as in blood grouping  
6 antigens, yeah. But that would be what I was  
7 referring to, yes.

8 Q And let's talk about that just for a moment. I  
9 take it that that, then, is a component of blood?

09:11 10 A Yes, it is.

11 Q And you have explained to us, though, that in  
12 secretors that component is also found in other  
13 bodily substances?

14 A I believe that is correct, yes.

09:11 15 Q So using some examples, if a person was of type B  
16 blood and was a secretor, I take it you would find  
17 the B antigens in other bodily substances from  
18 that individual?

19 A That is correct.

09:12 20 Q And --

21 A And in this case I could not rule out a person  
22 being AB, even though I found A and no B does not  
23 mean that there was no B there, it means that I  
24 did not find any B there.

09:12 25 Q Okay.



1 A It could have been destroyed, it might have been  
2 weaker, or various reasons.

3 Q Okay. So that in a type AB person -- and, again,  
4 I believe we're using the international grouping  
09:12 5 system terminology -- in a group AB person, then,  
6 you would find both A and B antigens?

7 A You would expect to find them both.

8 Q If they were a secretor?

9 A If they were a secretor.

09:12 10 Q Okay. And carrying through with the obvious,  
11 though, if they were a non-secretor then, when you  
12 tested the other bodily substances, I take it you  
13 would not find A antigens if it was a type A  
14 person?

09:13 15 A That is correct. And that would be the reason why  
16 I wouldn't -- we would never have identified a  
17 stain as being blood group O, because there would  
18 be neither A or B antigens there, and therefore we  
19 would not know whether it was a group O or whether  
09:13 20 it was a non-secretor.

21 Q Okay. We'll talk about that a little bit more  
22 shortly. And when you talk about other bodily  
23 fluids, what fluids are we talking about that  
24 these A antigens in this instance would be  
09:13 25 detected in, if the individual was a secretor?



1 A Well mainly in our work we referred to it usually  
2 in, just in seminal fluid or saliva.

3 Q And what about perspiration for example?

4 A It could be in perspiration as well, yes.

09:13 5 Q Urine?

6 A Umm, I can't really say whether it would be or  
7 not, but if it was I would suspect it would be  
8 very weak, it would probably be a carryover from  
9 some other fluid.

09:14 10 Q And just for a moment, you indicated that the AH  
11 test was conducted in relation to item I1, is that  
12 correct from your recollection?

13 A Umm, it's not in the notes there, but I cannot  
14 fathom why it would not have been done.

09:14 15 Q Okay.

16 A I see no reason why I didn't.

17 Q And in fairness if we turn to your original notes  
18 please, again back to document 082386, and if we  
19 turn to page 2 of that document we see I1 at the  
09:14 20 top of the page and I note, again on the  
21 right-hand column, the 'positive AH'?

22 A That is correct.

23 Q Would that indicate for us, then, that in fact  
24 that test was conducted in relation to that  
09:14 25 substance?



1 A That is what that would indicate, yes.

2 Q Okay. If we could go back, please, to the more  
3 legible notes, same page, and can you explain for  
4 me why this test was done, and in particular I'm  
09:15 5 talking about the test for the presence of A  
6 antigens in both of these samples?

7 A The reason it would be done would be to try to  
8 narrow down the field of possible donors for that  
9 seminal fluid sample. I should add that it was  
09:15 10 not a routine test that we did on every case  
11 because it was more involved and, for the reasons  
12 that I explained, is that you could not get as  
13 positive an answer from that as you could from the  
14 blood grouping because there was no backup test to  
09:15 15 confirm what you found or didn't find.

16 Q Okay. So -- but it was, am I hearing you  
17 correctly, an investigative tool, so to speak,  
18 that could be used?

19 A It would be an investigative tool, help for the  
09:15 20 investigator, yes.

21 Q In other words, if we had a substance which was  
22 determined to be seminal fluid, you could narrow  
23 down the population of donors from all male  
24 persons to those persons, for example, that were  
09:16 25 of type A blood where A antigens had been found in





1 the fluid?

2 A I would never have said that it was definitely  
3 from a person of group A, but that would be the  
4 area that they probably should be looking, yes.

09:16 5 Q Okay. And had you been asked to conduct this test  
6 or was this a test that you decided to do on your  
7 own; can you recall?

8 A I do not recall. I do suspect, however, that it  
9 probably came up in a discussion with the  
09:16 10 investigator and I probably said I would try it  
11 for them, but I do not recall any conversation of  
12 such at this time.

13 Q And I guess it would be guessing, but perhaps  
14 we'll go down that road a little bit. What would  
09:16 15 be the nature of that discussion if a discussion  
16 took place with an investigator?

17 A He would probably have asked me if there was  
18 anything else I could have done to narrow it down  
19 and my reply would probably have been that this  
09:17 20 test was available, I would try it for them, but I  
21 would not positively commit to the results because  
22 of the lack of a confirmation test.

23 Q And when you are speaking of the lack of the  
24 confirmation test, is it solely for the reason  
09:17 25 that you started to describe for us, that the



1 presence of the A antigen could mean that it was  
2 from a type A person or a type AB person?

3 A No, it goes further than that in that in blood  
4 samples, blood stains we could test for both  
09:17 5 antigens and antibodies. If you have the A  
6 antigen, you don't have A antibodies. If you have  
7 the B antigen, you don't have B antibodies, but  
8 you have the reverse, and as I mentioned  
9 yesterday, the two tests for blood we could  
09:18 10 confirm whether one was present, the other one  
11 wasn't, whereas with this we could not test for  
12 any antibodies, so we had the one test for the  
13 substance and that test to be a positive actually  
14 gave no reaction in the sample, there was nothing,  
09:18 15 no positive result. If you added the substances  
16 together and if nothing happened, then you assume  
17 that the A antigen was there.

18 Q Okay. And I don't want to get us too confused on  
19 this, but let's talk about blood in contrast then.  
09:18 20 I think what I'm hearing you say is that with  
21 blood, and we'll take again a type A person, that  
22 that individual's blood will have the presence of  
23 A antigens?

24 A Yes.

09:18 25 Q And B antibodies?



1 A Yes.

2 Q Similarly, a B type person will be B antigens and  
3 A antibodies?

4 A That is correct.

09:18 5 Q And in the instance of testing for blood, there's  
6 some significance to the presence of the  
7 antibodies which allows you to conduct the second  
8 test in detecting blood that actually gives you a  
9 positive result?

09:19 10 A In testing for blood on a stain that I was going  
11 to call group A, I first had to find the A  
12 antigen, but I also had to find the B antibody  
13 before I would declare that was a group A stain.

14 Q Okay. And so if we carry that over then to the  
09:19 15 examination of a seminal stain, and you are  
16 telling us that the presence of A antigens would  
17 suggest to you that it was a type A person, you  
18 couldn't confirm that necessarily because B  
19 antibodies, assuming it was a type A person, would  
09:19 20 not be present in the other bodily fluids of the  
21 individual if he was a secretor?

22 A That is correct.

23 Q Okay. But nonetheless, that was a test that could  
24 be conducted that gave a conclusive positive  
09:20 25 result for the presence of A antigens; is that



1 correct?

2 A It gave a result that would indicate that A  
3 antigens were there, but like I said, when I added  
4 the second, it would be actually adding A blood  
09:20 5 cells to the sample and there would be no reaction  
6 in the final stage; that is, the A blood cells  
7 would not clump together like they would have if  
8 there was no A substance there, but there was no  
9 reaction, then I concluded that it was probably an  
09:20 10 A substance there.

11 Q Okay. And we're going to look at your report in a  
12 moment and actually look at your conclusions, and  
13 again those will speak for themselves, and I take  
14 it then with respect to the second sample I2,  
09:21 15 quite clearly you detected no seminal fluid in  
16 that substance?

17 A I found nothing of any significance in that  
18 substance and I have no idea what it contained.

19 Q And I take it whatever it was, it was not of human  
09:21 20 origin either?

21 A That is correct.

22 Q The last two items referred on that page of notes  
23 I don't believe fell within your area. And if we  
24 turn to your report then that I assume arose from  
09:21 25 these tests, if we could look, please, at document



1 084976. I'll let you take a look at that for a  
2 moment. Do you recognize that form of report?

3 A Yes, I do.

4 Q That would be your standard form of report?

09:21 5 A That was our standard form that we would send the  
6 results of our examination back to the  
7 investigating department.

8 Q And a couple of things I'll point out to you. I  
9 note the entry 138-69, what would that be  
09:22 10 indicating?

11 A That was our file number at the laboratory for the  
12 case.

13 Q Okay. I note the date being March 12th, 1969. If  
14 we go back, I understand the items were submitted  
09:22 15 on February 7th, so we've got a little over a  
16 month between then and the time that this report  
17 is produced. Would that have been standard in  
18 terms of the time lapse?

19 A That may have been average at that time, maybe on  
09:22 20 the low side of average at that time because we  
21 were short staffed and, as I mentioned yesterday,  
22 I had quite a bit of territory to cover, but that  
23 would probably be average.

24 Q And when you say perhaps on the low side, do you  
09:22 25 mean --



1 A It may have taken longer.

2 Q It could have taken longer. And does that tell  
3 you or can you tell us when in fact the testing  
4 would have been done then on those items?

09:23 5 A I believe if you go back to the original notes,  
6 there may be a date on it that would indicate I  
7 believe I started on the 9th of March or something  
8 I think I recall seeing in the left-hand corner.

9 Q We can go back to those, I don't think it would be  
09:23 10 March the -- or perhaps it would be, let's go back  
11 to the notes, it's doc ID 082386. Those are your  
12 original notes?

13 A Uh-huh.

14 Q Is there anything on there that would indicate to  
15 you --

16 A On the very top left corner you'll see a six dash  
17 three dash, and it's probably 69, so that would  
18 indicate the 6th of March, 1969 would be the date  
19 that I actually started looking at the exhibits.

09:23 20 Q And would that be your evidence then for us today  
21 as the likely date?

22 A That would be the day, but it would carry on for  
23 perhaps several days, or it may have been  
24 interrupted by something and I would have to come  
09:24 25 back to it, but between the 6th of March and the



1 date of that report would be the time period that  
2 the examination was conducted.

3 Q Okay. So again a bit of a lapse of time between  
4 the actual receipt of the items and the tests  
09:24 5 being conducted?

6 A Oh, yes.

7 Q And would that cause any concern for purposes of  
8 your testing procedures and ultimately the  
9 results?

09:24 10 A No, it wouldn't.

11 Q Okay. If we can go back to your report, please,  
12 084976, we'll see under the first heading general  
13 simply an indication of the items received, we've  
14 gone through those. I see the second heading  
09:24 15 being purpose, to conduct a serological  
16 examination on the exhibits noted. I believe all  
17 of them are listed other than J and K. Move to  
18 the next page. Under the heading data, Exhibit G,  
19 which we know to be the victim's blood, was  
09:25 20 examined to determine its blood group. Exhibit H,  
21 which we know to be the knife blade, was examined  
22 for the presence of blood, and number 3, those  
23 exhibits listed were examined for the presence of  
24 human seminal fluid. And then if we move to  
09:25 25 conclusions, you see number 1:



1 "Exhibit G, one liquid blood sample was  
2 found to be of Group "O"."

3 I take it there would be no reason to dispute  
4 that conclusion today, Mr. Paynter?

09:25 5 A None by me.

6 Q Number 2:

7 "Human blood of Group "O" was found on  
8 Exhibit: H - one knife blade."

9 Again, similarly no reason to dispute that  
09:25 10 conclusion today?

11 A Again, not by myself.

12 Q Number 3:

13 "Human seminal fluid, highly probably  
14 from a "secretor" of Group "A" was found  
09:26 15 in Exhibit: I1 - sample of liquid."

16 And again in your own words, can you describe or  
17 explain that conclusion to us?

18 A Well, that is stopping one step short of saying it  
19 did come from a person of secretor group A and I  
09:26 20 believe I've already explained why I would not go  
21 that far.

22 Q Okay. But you felt comfortable I take it with the  
23 language then that you used, that it was highly  
24 probably from a secretor of group A?

09:26 25 A Yes, I was.





1 Q And that's on the basis that you've described for  
2 us thus far?

3 A That is correct.

4 Q I note that in your remarks you provide a  
09:26 5 definition of secretor, perhaps we'll read that,  
6 with reference to paragraph 3 of the conclusions:

7 "A secretor may be defined as a person  
8 who secretes their ABO blood grouping  
9 substances (antigens) in their other  
09:27 10 body fluids. Approximately 80 percent  
11 of the population comes under this  
12 category. As approximately 40 percent  
13 of the population is group A and 80  
14 percent of these are secretors, about 32  
09:27 15 percent of the population would be  
16 secretors of group A."

17 And this was accurate information that you were  
18 providing at that time, Mr. Paynter?

19 A That was the best of my knowledge at that time,  
09:27 20 yes.

21 Q And was that information that you needed to  
22 research at the time or would that be something  
23 that you would simply know in your work at the  
24 time?

09:27 25 A At that time in my work it would be something that



1 I would know, it was something I had learned or  
2 had been told of previous to that time.

3 Q Am I correct that you told us earlier on that this  
4 was not a routine test so to speak though, testing  
09:27 5 for the presence of antigens in seminal fluid?

6 A I would say we did not do it on very many cases at  
7 that time, no.

8 Q Okay. If we go back to the conclusions, number 4  
9 indicates:

09:28 10 "Human seminal fluid was found on

11 Exhibit: B - one pair of pink panties."

12 And again no reason to dispute that conclusion.

13 I take it, Mr. Paynter, that that stain was not  
14 tested for the presence of antigens?

09:28 15 A No, I would say it wasn't.

16 Q Could it have been tested for the presence of  
17 antigens?

18 A When you say could have, yes, it could have. It  
19 would not be a test that I would do under any  
09:28 20 circumstances because of the fact that the area  
21 where it was located would definitely be mixed  
22 stain and I would not know what or where I was  
23 testing it.

24 Q And when you say mixed stain, what do you mean?

09:29 25 A There would be blood present, probably vaginal



1 fluid, various other bodily fluids of that nature,  
2 and therefore I would not have conducted a test  
3 for antigens on a stain on clothing in that area.

4 Q Okay. But let's talk just hypothetically for a  
09:29 5 moment. If you had a stain on a piece of clothing  
6 which you had determined to be seminal fluid, and  
7 let's assume for a moment that it was pure seminal  
8 fluid, could that stain have been tested for the  
9 presence of antigens in 1969?

09:29 10 A You are speaking hypothetically? Yes, it could.

11 Q Okay. And for purposes of this particular item  
12 being the panties, though, you've described for us  
13 the reasons then why you would not have conducted  
14 that test?

09:29 15 A Those would be my reasons at the time and still  
16 would be, yes.

17 Q And again though, going back to my hypothetical  
18 for a moment, if indeed you did have a pure  
19 seminal stain and could test for the presence of  
09:30 20 antigens and in fact your tests detected the  
21 presence of A antigens, I take it that would be  
22 consistent with your tests conducted on vial 11?

23 A It would be consistent with a test, it would be  
24 the same test and the results or the conclusions  
09:30 25 would be the same, that is highly probable.



1 Q Okay. If we look at number 5 conclusion, it  
2 indicates no seminal fluid was found on the  
3 exhibits listed, and I believe we've covered that  
4 in some detail. So if we take ourselves to the  
09:30 5 date of this report, Mr. Paynter, then, and we're  
6 looking at March 12th following your testing  
7 conducted on March 6th, would it be fair to say  
8 then that your testing results suggested that the  
9 donor of the semen, again relating to I1, the  
09:31 10 sample of liquid, was very likely an A secretor?

11 A Yes, I would agree with that.

12 Q And so it would be fair to say at this point,  
13 looking at it from an investigative standpoint  
14 then, that the population of suspects could  
09:31 15 potentially be narrowed down to the 32 percent of  
16 the population that's described in your remarks?

17 A 32 percent of the male population.

18 Q Right. Would that be fair to say?

19 A Yes, it would.

09:31 20 Q And if we follow through with your notes, I  
21 believe they indicate that you received another  
22 set of items on April the 21st and we'll look at  
23 those notes in a moment. Perhaps first we'll look  
24 at a letter from Mr. Penkala and that document is  
09:32 25 009259. Again we see the date of the letter April



1 21st, this time it's directed to a Mr. Kerr, not  
2 Mr. Huber, and Mr. Kerr replaced Mr. Huber in that  
3 position that you described for us previously?

4 A Yes, he had.

09:32 5 Q It goes on to indicate that a number of items were  
6 received by identification, or from Identification  
7 Officer Lorne Grant, and again briefly:

8 "Exhibit P - a wallet.

9 Exhibit Q - victim's sweater.

09:33 10 Exhibit R - sample of blue wool blanket.

11 Exhibit S - a blue wool touque.

12 Exhibit T - a sample of blood (suspect).

13 Exhibit U - sample of saliva (2 pieces  
14 of cloth).

09:33 15 Exhibit V - control sample of head hair  
16 (suspect)."

17 And perhaps for reference, relating to Exhibits T  
18 and U, the sample of blood and the sample of  
19 saliva, if you could turn for a moment, please,  
09:33 20 to document 031373, perhaps we could focus in on  
21 the top half of the page, you'll see it's a  
22 report by Lieutenant Penkala dated April 18th. I  
23 won't read it all to you, but it seems to confirm  
24 that the exhibits we referred to, in particular  
09:34 25 Exhibit T and Exhibit U, the sample of blood and



1 the sample of saliva, came from David Milgaard,  
2 note the saliva samples in paragraph 3 as well as  
3 the blood sample in paragraph 2, and he indicates  
4 that those will be forwarded on to the Crime  
09:35 5 Detection Lab for establishing the agglutinogens,  
6 and the agglutinogens, I'll pause there for a  
7 moment, not to further confuse the picture, but  
8 is that -- I'll ask you, what does that term  
9 mean?

09:35 10 A Where is it on the --

11 Q I'm sorry, it's right here, agglutinogens.

12 A I'm not sure whether that would be referring to  
13 the antigens or the antibodies, but I suspect the  
14 antigens.

09:35 15 Q Okay. But in scientific terms, what does  
16 agglutinogens mean?

17 A Well, if it's referring to the saliva samples, it  
18 would have to be the antigens, antigens, the blood  
19 grouping antigens.

09:36 20 Q The blood grouping substance?

21 A That's correct.

22 Q Okay. And if we can go back then to the letter,  
23 009259, and I note at the heading purpose, I won't  
24 read those first two to you, but I don't believe  
09:36 25 those fell within your area; would that be



1 correct? It's talking about some fingerprint  
2 examinations on the wallet and I believe some  
3 fibre tests.

09:36 4 A They would not be mine if it was for fibres or  
5 fingerprinting.

6 Q If we turn to the next page, please, focus in on  
7 number 3, indicates:

8 "Examine Exhibit S (blue wool touque)  
9 for the presence of human blood and if  
09:36 10 present establish blood group."

11 Again, that would be your area, Mr. Paynter?

12 A That would.

13 Q And number 4:

14 "Examine Exhibit T (blood sample) to  
09:37 15 establish A.B.O. blood grouping in  
16 connection with this file, particularly  
17 previous Exhibit I (liquid sample)."

18 And number 5:

19 "Examine Exhibit U (saliva sample) to  
09:37 20 establish A.B.O. agglutinogens in  
21 connection with this file, particularly  
22 previous Exhibit I (liquid sample). One  
23 control sample of cloth is being  
24 forwarded for test purposes if  
09:37 25 required."



1 And with respect to those two entries, number 4  
2 and 5, those would be matters that fell within  
3 your area of expertise, Mr. Paynter?

4 A Yes.

09:37 5 Q And can you share with us your thought in terms of  
6 the language used here, how might these results be  
7 related to previous Exhibit I, and again I'm  
8 talking about number 4 and 5 relating to the blood  
9 sample and the saliva sample?

09:38 10 A Well, the blood sample would be to determine the  
11 blood group to see if it was the same blood  
12 grouping, or the same antigens, which would be the  
13 same blood group as the liquid in Exhibit I, that  
14 is, did it contain blood group antigens A or blood  
09:38 15 of group A, and on Exhibit U, the saliva sample,  
16 the purpose would be to determine or try and  
17 determine whether or not there was blood group  
18 antigens in this individual's saliva which would  
19 be referring to whether or not he was a secretor.

09:38 20 Q Okay. Then if I can summarize that just for a  
21 moment, with respect to entry 4 then, the blood  
22 sample, a determination that the individual was of  
23 type A blood then would be consistent with that  
24 individual being the donor of the semen located in  
09:39 25 item I1?





1 A That would bring it down to, be consistent with  
2 and bring it down to the 40 percent of the  
3 population that were group A.

4 Q Okay. And similarly a person with blood type AB,  
09:39 5 if that was the determination on that blood  
6 sample --

7 A Yes.

8 Q -- would also perhaps be consistent with your  
9 findings on I1?

09:39 10 A It could fit into the same group and as group AB  
11 was very small, approximately 4 or 5 percent, that  
12 would add a few more to the overall picture.

13 Q Okay. But if the person had been determined to be  
14 type B or type O, that would be inconsistent then  
09:39 15 with that individual being the donor of the semen  
16 in I1?

17 A That is correct.

18 Q Okay. And then if we talk about number 5, the  
19 saliva sample, if in fact the tests revealed the  
09:40 20 presence of A antigens within that sample, that  
21 again would be consistent with that individual  
22 being the donor of the semen found in I1?

23 A It would be consistent with and further reduce the  
24 group to approximately 32 percent of the male  
09:40 25 population, yes.



1 Q Okay. So let's take a look at your notes that  
2 followed from the receipt of those items, if we  
3 could go to again the legible page, please, 082379  
4 would be the page number from that document we  
09:40 5 were working from. Again, it just notes the items  
6 received from Identification Officer Lorne Grant  
7 on April 21st and we'll pass by items P, Q and R,  
8 those are not in your area, and look at item S  
9 referring to the blue toque, and could you  
09:41 10 describe for us, please, the significance of your  
11 entries?

12 A On the outside of the toque there was a stain that  
13 was found to be human blood and from looking at  
14 the notes I would say it was of sufficient size  
09:41 15 that I would attempt to do a grouping on it, but  
16 was not successful. On the inside there was a  
17 smaller stain where I found it to be human blood,  
18 but the size was such that I made no attempt to do  
19 any grouping.

09:41 20 Q Okay. So again we see the positive for the hemo  
21 on the right-hand side, that's the test you  
22 described for us, the hemochromogen test which  
23 tells you that blood was present, the positive for  
24 the AH which tells us that human blood was  
09:42 25 present?



1 A That is correct.

2 Q But you are telling us that there was insufficient  
3 quantity to actually type the blood located on  
4 that item?

09:42 5 A There was not sufficient to obtain a grouping.

6 Q If we move down to the next item, item T, again  
7 that's the liquid blood sample from David  
8 Milgaard, and I guess that's self-explanatory, you  
9 found it to be type A?

09:42 10 A Yes.

11 Q Then if we move to U1 and U2, those are the saliva  
12 samples, and can you tell us the significance of  
13 your entries following each of those?

14 A Both samples were tested, or a portion of the  
09:42 15 cloth sample was tested for blood group antigens,  
16 both A and B, and I found neither one in the  
17 saliva samples.

18 Q And can you briefly tell us what the name of that  
19 test then you would have employed was?

09:43 20 A It would be exactly the same as half of the test  
21 conducted on human blood stains to look for the A  
22 antigens; that is, you add a blood grouping serum  
23 obtained from Ortho Diagnostics to a portion of  
24 the stain. If that blood grouping material was  
09:43 25 absorbed by material from the stain and not there



1           when you tested for it, that would indicate that  
2           there was that particular blood grouping antigen  
3           present in the saliva stain.

4           Q           Is there a name for that test?

09:43 5           A           I believe we referred to it as an absorption  
6           inhibition test. That's the best of my  
7           recollection at this time.

8           Q           And was that a standard test then conducted in  
9           1969 for these purposes?

09:44 10          A           We used it every day on blood grouping and, as I  
11          mentioned, occasionally on seminal fluid, but not  
12          as a routine examination.

13          Q           Would it be something that you had regularly done  
14          in relation to a saliva sample, for example?

09:44 15          A           Not a great number, but it had been done, yes.

16          Q           Okay. And I don't know if you can help us any  
17          further on that, was it uncommon, very uncommon?

18          A           Somewhere between the two.

09:44 19          Q           Okay. We'll refer to some numbers later on and  
20          maybe that will help us a little bit further on  
21          that point. So can you tell us what the  
22          significance of these results then were in  
23          relation to I1?

09:45 24          A           There's two ways you can look at it. If I found  
25          no antigens because there were no antigens ever



1 present, that would probably mean that the donor  
2 of that, and again I say probably, could not have  
3 been the contributor of the seminal fluid. If I  
4 found no antigens because they had been destroyed  
09:45 5 somewhere between the time they were given and the  
6 time I tested it by various means or improper  
7 storage or whatever, which I have since been told  
8 is probably the case, but at that time I was not  
9 aware of that, then it would be completely  
09:45 10 insignificant.

11 Q Okay. Well we'll circle back to this a couple of  
12 times, but you've referenced the destruction of  
13 antigens in a bodily fluid, and was that  
14 something -- or a possibility that you were aware  
09:46 15 of in 1969?

16 A Oh, I would be aware of the fact that any  
17 biological fluid could be destroyed fairly easily.  
18 At that time I believe I would have probably told  
19 the investigator that the best way to obtain these  
09:46 20 samples would be on a piece of cloth and allow it  
21 to dry before I did anything else. Since, I  
22 have -- that time I have been made aware that that  
23 was not the best way.

24 Q Okay, and I note we will touch on that. But,  
09:46 25 again, I want to try and capture a sense of your



1 knowledge in 1969. And if we consider I1 in  
2 particular, and the fact that you -- your tests  
3 indicated that A antigens were present, were you  
4 aware in 1969, when testing a bodily fluid such as  
09:47 5 seminal stain -- seminal fluid, that antigens that  
6 would originally be present in that substance, for  
7 example from a secretor, could be destroyed and  
8 therefore not detected when later tested?

9 A Umm, yes. That is why my report would never say  
09:47 10 it was, because of the fact that they could have  
11 been there and have been destroyed, I could only  
12 report 'this is what I found today'.

13 Q Okay. And that's the reason for the two  
14 explanations for the significance of your findings  
09:47 15 in relation to U1 and U2, then, that you have just  
16 shared with us?

17 A Yes.

18 Q Okay. Let's take a look at your report that  
19 followed from these tests, that document is ID  
09:47 20 324690, and again it's the same form of report  
21 that we looked at previously. Note the date being  
22 April 23rd, 1969. I take it these tests and your  
23 reporting took place fairly quickly, I think the  
24 items were received on April 21st, so this  
09:48 25 turnaround would have been considered as a fairly



1 quick turnaround at that time?

2 A Fairly quick.

3 Q Okay. And if we look again at the items we've  
4 noted under the General heading, move down to  
09:48 5 Purpose:

6 "To conduct a serological examination on  
7 Exhibits S, T, U1 and U2."

8 You indicate that:

9 "Exhibit T was examined to determine its  
09:48 10 blood group."

11 "Exhibit S was examined for the presence  
12 of blood."

13 "Exhibits U1 and U2 were examined for  
14 the presence of antigens of blood group  
09:49 15 A and B."

16 Moving to the next page, look at your

17 Conclusions:

18 "Exhibit T, ...",

19 being:

09:49 20 "... one liquid blood sample, ..."

21 David Milgaard's blood:

22 "... was found to be of group A.

23 2. Human blood of indeterminate group was  
24 found on exhibit:

09:49 25 S - one blue toque."



1 And:

2 "3. No antigens of blood groups A or B were  
3 found on Exhibits U1 or U2."

4 And based on what we reviewed in your notes would  
09:49 5 you agree that those were accurate conclusions  
6 that you were offering here, Mr. Paynter?

7 A They were.

8 Q Okay. And I note, in number 3, you don't offer a  
9 conclusion of any sort that the donor was probably  
09:49 10 a non-secretor or anything of that nature?

11 A No. You will note that none were found. If you  
12 went to the extreme on that, and really wanted to  
13 go out on a limb, you would assume that, if  
14 everything was working properly, that would be  
09:50 15 from a group O. But, again, you could not test  
16 for group O antigens at that time so it was -- it  
17 means nothing.

18 Q And would it be fair to say then, again sort of  
19 summarizing where we're at stopping in time here  
09:50 20 at April 23rd, that at this point in time your  
21 tests, test results, suggested that David Milgaard  
22 was not the donor of the semen found in I1?

23 A Umm, I would say that I had found nothing to  
24 indicate that he was and, as well, if all the  
09:51 25 tests were as appeared to be, that he probably





1           wasn't.

2           **Q**       Okay. And for example, and I'll refer you to one  
3                   of the investigator's comments in and around the  
4                   time, it's document 250597, it's a report by a  
09:51 5                   Corporal Rasmussen of the RCMP, if we could turn  
6                   to page 250606, please. And just to get a date,  
7                   maybe we'll go 250605 for a moment, the last date  
8                   noted is March 20th. I think these reports  
9                   generally flow forward. If we can go back to 606  
09:51 10                  and you will note at the end of this paragraph  
11                  here, Mr. Paynter, if we could perhaps focus on  
12                  that portion, the last sentence indicates:

13                               "Milgaard was found to be of Group "A"  
14                               however, is not a secretor and has also  
09:52 15                               been eliminated as a possible suspect."

16                  Would it likely be based upon the test results  
17                  that you had offered forward to this point in  
18                  time, that we've been speaking of, that the  
19                  investigator made that comment?

09:52 20               **A**       It would be based on those tests but, again, he  
21                   did not read what I had written in order to make  
22                   that comment.

23               **Q**       Okay. And, again, we can -- of course he will, in  
24                   fact he will be testifying shortly, and we can't  
09:52 25                   speak for him.



1 COMMISSIONER MacCALLUM: What was the  
2 number of that again, I'm sorry Mr. Hardy?

3 MR. HARDY: The document is 250597, it's a  
4 report of Corporal Rasmussen that we previously  
09:52 5 identified.

6 BY MR. HARDY:

7 Q But it wouldn't surprise you, Mr. Paynter, if the  
8 investigators were interpreting the results in the  
9 manner that I have suggested?

09:53 10 A It wouldn't surprise me, no.

11 Q Okay. If we follow through with your notes we  
12 come to another entry dated June 3rd respecting  
13 the receipt of some items, and if we could turn to  
14 a letter from Mr. Penkala, please, it's document  
09:53 15 ID 105534, note the date is June 2nd, again  
16 directed to Mr. Kerr. If we could call out the  
17 body of the letter, please, it indicates:

18 "The following exhibits are being  
19 re-submitted at the request of Staff  
09:53 20 Sergeant B. Paynter of your laboratory.  
21 Exhibit I - two plastic vials of unknown  
22 yellowish substance.  
23 Exhibit U - sample of saliva (2 pieces  
24 of cloth)."

09:54 25 Do you recall the resubmission of those items,



1 Mr. Paynter?

2 A I recall getting them back, yes.

3 Q And it notes, and we'll follow through with this,  
4 but it notes that these have been resubmitted at  
09:54 5 your request. Can you give us an idea of

6 whether -- how that language might have arose --  
7 arisen; do you recall making a request for the  
8 items to be returned to you for further testing?

9 A I don't recall it exactly. I could give you a  
09:54 10 hypothetical of, probably, what happened.

11 Q Maybe share that with us, please?

12 A Umm, it was not uncommon to be in touch with the  
13 investigators, and we would probably be discussing  
14 my probable results from my report. I knew that  
09:54 15 they did have a suspect in the case, and I would  
16 probably be aware that my results did not agree  
17 with what they thought the suspect was or who the  
18 suspect was, and I may have suggested to them that  
19 they send them back and I would repeat the tests  
09:55 20 to confirm whether or not -- to do it again to  
21 make sure that I was right the first time.

22 Q Okay. And you don't have a specific recollection,  
23 then, of that, that's --

24 A I don't recall the conversation but I would be  
09:55 25 very -- I would suspect that that was probably the



1           general tone of the conversation.

2           **Q**       Okay. And I'm going to refer to a couple of other  
3           documents which perhaps will inform this issue a  
4           bit further. I refer you to a letter again from  
09:55 5           Lieutenant Penkala, the document ID is 324697, a  
6           letter dated June the 3rd. You will indicate, or  
7           you will note that although it's addressed to  
8           Mr. Kerr, it's to your attention, and if we could  
9           call out the body of the letter, please, it  
09:56 10          indicates:

11                        "Further in connection with our  
12                        discussion of May 30th, 1969, I have  
13                        contacted Dr. H. Emson, Pathologist, St.  
14                        Paul's Hospital, Saskatoon, who has  
09:56 15                        submitted his suggestions on the matter  
16                        of blood grouping of a semen specimen,  
17                        Exhibit I.

18                                I am forwarding you copies of  
19                                Dr. Emson's letter to me for your  
09:56 20                                information. Dr. Emson has advised me  
21                                that he will gladly assist you in anyway  
22                                he can in connection with this, and that  
23                                you may contact him direct at the St.  
24                                Paul's Hospital in Saskatoon."

09:56 25          So it appears that you had a discussion with



1 Lieutenant Penkala on May 30th, shortly before  
2 the resubmission of those items, and, again, you  
3 don't have a specific recollection of that  
4 discussion?

09:56 5 A No I don't.

6 Q And we'll turn to Dr. Emson's letter that he  
7 apparently has enclosed with this correspondence,  
8 it's document ID 324695, you will note the date of  
9 the letter being June the 2nd directed to  
09:57 10 Lieutenant Penkala. If you will bear with me I  
11 want to make my way through this letter. If we  
12 could call out the first paragraph, please, Dr.  
13 Emson writes:

14 "I write in response to your telephone  
09:57 15 inquiry of today's and earlier dates.  
16 As I understand it, the problem you pose  
17 is as follows. A specimen of semen  
18 found at the scene of a rape-murder has  
19 been identified as coming from a person  
09:57 20 with blood group A, of secretor status.  
21 In other words, this person as well as  
22 possessing the group A antigen on the  
23 red cells of his blood, also secretes  
24 this antigen in body fluids. This is a  
09:57 25 well known phenomenon and will occur in



1 approximately 80% of persons of blood  
2 group A.

3 I understand further that a  
4 suspect in this case has been blood  
09:57 5 grouped and found to be blood group A,  
6 but tests of his saliva for secretion of  
7 the antigen A have been negative,  
8 putting him into the non-secretor class.

9 This is certainly an apparent  
09:58 10 anomaly."

11 And I'll pause there for a moment, and I guess  
12 you can only speak from your perspective, but  
13 would this observation properly be described as  
14 an anomaly from a scientific perspective?

09:58 15 A Umm, I really don't know how to answer that.

16 Q I guess, if we think of an anomaly as an  
17 irregularity, am I correct it would only be an  
18 anomaly if in fact the conclusion had perhaps been  
19 drawn that the suspect was, in fact, the  
09:58 20 assailant?

21 A If the suspect was the assailant, if the suspect  
22 was a non-secretor and the contributor was a  
23 secretor, that would be what he described as an  
24 anomaly.

09:59 25 Q Unless, in fact, the suspect was not the



1           assailant?

2           A           Well, yes, if he wasn't the assailant then  
3                        wouldn't --

4           Q           Okay.

09:59 5           A           Then it becomes a moot question.

6           Q           Okay. And, if we read further on in that letter,  
7                        Dr. Emson states:

8                                "However, there is one answer that  
9                                occurs to me as a possibility. The  
09:59 10                              specimen of semen had been frozen and  
11                              thawed several times before it was  
12                              examined for the group A antigen."

13           I'll pause there for a moment. Are you aware of  
14           whether or not that substance had been frozen and  
09:59 15           thawed a number of times before it had arrived at  
16           your laboratory?

17           A           No, I wasn't.

18           Q           Okay.

19           A           I believe it was still frozen when I received it,  
10:00 20           whether it had been thawed in between or not, I  
21           have no idea.

22           Q           And I think we have heard some evidence that  
23                        perhaps Lieutenant Penkala delivered the substance  
24                        to Dr. Emson for some testing, at least on a  
10:00 25           portion of it, prior to delivering it to the Crime



1           Detection Laboratory; were you aware of that,  
2           assuming that in fact was the case?

3           A           I don't think I was aware of it.

4           Q           Okay. I'll just read on in that letter, it

10:00 5           continues speaking of the freezing and thawing  
6           process:

7                        "This process will certainly disrupt red  
8                        cells and frequently disrupt other cells  
9                        of the body. This may result in the  
10:00 10                      release of group A antigen held within  
11                      the cells of a non-secretor person, and  
12                      not normally secreted into the body  
13                      fluids. It is a possibility that such a  
14                      process involving disruption of body  
10:00 15                      cells, might release enough of the group  
16                      A antigen into semen which had been  
17                      frozen and thawed a number of times to  
18                      give a positive test for the A antigen.

19                                I have looked up this problem  
10:01 20                              in the references available to me and  
21                              can find no indication that it has been  
22                              considered this way before. There are  
23                              several possible lines of approach."

24                              I'll pause there for a moment, does that  
10:01 25                              discussion relating to the freezing and thawing





1 refresh your memory at all as to possible  
2 discussions that may have taken place with you  
3 prior to the resubmission?

4 A No, it doesn't.

10:01 5 Q Okay. Do you recall considering this possibility?

6 A Nope.

7 Q Okay. So you -- I take it there is no  
8 recollection of conducting any sort of tests of  
9 this nature to determine --

10:01 10 A No.

11 Q -- this theory? Okay. I --

12 A I would say no tests were conducted to test that  
13 theory.

14 Q Okay. I'll read on. Dr. Emson states, at the  
10:01 15 bottom of the page:

16 "It is possible that there may be  
17 persons with anomalies of secretion, in  
18 that group A substance is present in one  
19 body fluid but not another. However I  
10:01 20 know of no recorded case."

21 So assuming, perhaps, that Dr. Emson is  
22 suggesting perhaps there are secretors who would  
23 only secrete their antigens in their semen but  
24 not their saliva, for example, do you recall  
10:02 25 considering that possibility?



1 A I would say that I probably did not consider that  
2 possibility.

3 Q What would you think of that, based upon, or what  
4 would you think of that theory based upon your  
10:02 5 knowledge at the time?

6 A I would have no thoughts on that matter, I would  
7 be -- not be aware of that ever happening or  
8 whether or not it could happen.

9 Q Would you have any further comment on the  
10:02 10 plausibility of that possibility?

11 A No, I wouldn't.

12 Q Turn to the next page, top paragraph, Dr. Emson  
13 offers some suggestions. Number one suggests  
14 again that perhaps a test could be conducted  
10:02 15 relating to his freezing and thawing theory. I  
16 think you've told us that you have no recollection  
17 of considering or carrying through with that sort  
18 of test?

19 A No, I did not, I don't recall any consideration of  
10:03 20 it.

21 Q Okay. And then the second entry indicates, or he  
22 suggests that perhaps another department more  
23 expert in the field perhaps should be contacted;  
24 do you recall making inquiries of any other  
10:03 25 resource in considering this issue?



1 A Not that I recall.

2 Q And does any of this, at all, refresh your memory  
3 as to discussions that may have taken place with  
4 Lieutenant Penkala or others prior to the  
10:03 5 resubmission or in the course of the resubmission  
6 of those items?

7 A No, it doesn't. As I recall, I can only give you  
8 what I would suggest was a possible tone of the  
9 conversation that I would have had with Inspector  
10:03 10 Penkala -- or Lieutenant Penkala.

11 Q Okay, so let's take a look at your notes relating  
12 to the resubmission of those items, and it's page  
13 082380. We'll see that, again, the items  
14 submitted on June 3rd, 1969, you will see the  
10:04 15 reference to I1 and I2 again, and relating to I1  
16 you will see you have an entry there it's a  
17 positive heme; can you tell us what that entry  
18 means, please?

19 A That is a screening test that we used on suspect  
10:04 20 stains or suspect samples of -- or exhibits where  
21 we suspected the stain or whatever may contain  
22 blood. It is a, we refer to as a presumptive  
23 test, much the same for blood as the acid  
24 phosphatase would be considered for seminal fluid.  
10:04 25 Okay. It did not identify something as being



1 positively blood but it was a very good indication  
2 that blood was present. In this case, that gave a  
3 positive test, indicating a strong possibility to  
4 me that blood was present in that sample of  
5 liquid.

10:05

6 Q And what was the name of that test?

7 A That test was a very simple screening test we  
8 obtained from a commercial source, plastic strips  
9 with an embedded chemical on the end, these were  
10 referred to as hemostix and these would be used --  
11 the prime purpose was for hospital laboratories  
12 where they would check urine samples for the  
13 presence of blood. For them, that was good  
14 enough, it would indicate blood to them. We did  
15 not consider it a positive, completely positive  
16 confirmation test, but a strong indication that  
17 blood was present.

10:05

10:05

18 Q Okay.

19 A And we would use it on stains that we obtained.

10:05

20 Q And just help me understand; so I take it this is  
21 a, a stick, whatever the --

22 A It was a little plastic strip about 2 1/2, 3  
23 inches long and a quarter of an inch wide, with a  
24 chemical embedded on one end of it, an area of  
25 probably a half an inch long.

10:06



1 Q And you indicated its intended purpose, or usual  
2 purpose, was for testing for blood in urine?

3 A That was the reason they were sold commercially,  
4 yes.

10:06 5 Q Okay. And I take it, then, you would -- the  
6 process would be, in that instance, dipping the  
7 strip --

8 A Into the sample.

9 Q -- into the urine sample?

10:06 10 A That is correct.

11 Q But you had used this test in other circumstances  
12 for purposes of detecting the presence of blood?

13 A We used it as a screening test, to check a suspect  
14 stain to see if we would go further to confirm  
10:06 15 that it was blood.

16 Q And would that be only on liquid blood or would  
17 that be on dried stains as well?

18 A That would be on dried stains as well. We could  
19 either dampen the stick and touch it to the  
10:07 20 suspect stain, or dampen the stain and put the  
21 stick on it, as long as it was damp and they came  
22 in contact with each other there would be an  
23 immediate very intense blue colour change.

24 Q And was this a reliable test, from your  
10:07 25 experience, in terms of detecting blood in a



1 substance?

2 A I had no problems with it myself. As I say, it  
3 was a screening test, it wasn't a confirmation  
4 test.

10:07 5 Q And I note that Dr. Emson didn't indicate this  
6 possibility in his letter; do you recall whose  
7 thought it was to conduct this particular test on  
8 item 11?

9 A Probably mine.

10:07 10 Q And just tell me about the thought process  
11 again -- or perhaps you haven't yet -- but tell me  
12 about the thought process that you would have had  
13 in terms of deciding to conduct this test in these  
14 circumstances?

10:08 15 A Well I was aware of the fact that they had a  
16 suspect that, if my first results were positive  
17 instead of probable, that their suspect was not  
18 the one that had contributed the seminal fluid.  
19 So I was actually checking to see if there was  
10:08 20 some other reason why I would find the A antigens  
21 in this sample of liquid, and one of the reasons  
22 would be if that liquid sample was contaminated  
23 with blood, and from this test it was my  
24 conclusion that there was probably enough blood in  
10:08 25 that liquid sample, even though it was not



1           apparently visible, i.e. a big colour change in  
2           the blood, in the liquid itself, that there was  
3           enough blood in that sample of liquid to probably  
4           contaminate my earlier test results and,  
10:09 5           therefore, render the whole thing inconclusive.

6           Q       And I think I have followed you, and maybe I'm  
7           dwelling on this longer than I need to, but,  
8           again, the positive indication of blood, am I  
9           correct, would give an altern -- alternate reason  
10:09 10          as to the presence of A antigens as originally  
11          detected?

12          A       That is correct. If there was blood from the  
13          person that contributed the seminal fluid, and if  
14          that person was an A, then there would be A  
10:09 15          antigens there. It could be A antigens there from  
16          his blood as well, so I have no idea where I was  
17          finding the A antigens from, was it blood or was  
18          it seminal fluid.

19          Q       Okay. Notwithstanding the fact that he was a  
10:09 20          non-secretor then, using that again perhaps in  
21          hypothetical terms, it would give an explanation  
22          as to why you would have detected A antigens in  
23          that substance?

24          A       If the contributor was a non-secretor, there would  
10:10 25          still be A antigen present in his blood, which



1           could have caused the reaction I found in my first  
2           test.

3           **Q**       Okay. And were you able to do anything further,  
4           past the screening test as you have referred to  
10:10 5           it, to determine whether or not, in fact, it was  
6           blood present?

7           **A**       No. In order to conduct a confirmation test we  
8           had to be able to build up a stain from that  
9           liquid, and by that I mean we would take a small  
10:10 10           drop, we would place it on a slide, allow it to  
11           evaporate, and it was a matter of a concentration  
12           of it until we had a stain that would be enough  
13           material in it that, when we added the chemicals  
14           for the haemochromogen test, there would be enough  
10:10 15           stain there to cause the reaction and build the  
16           crystals. In this case, I was not able to do  
17           that.

18           **Q**       So the second confirming test would be the  
19           haemochromogen test?

10:11 20           **A**       That is correct.

21           **Q**       Okay. And there wasn't sufficient quantity to  
22           conduct that test in this instance?

23           **A**       That is correct.

24           **Q**       Okay. And did you test again for the presence of  
10:11 25           antigens?





1 A I see no indication of it, here, that I did.

2 Q And the entry is identical on your original notes.

3 And with respect to item I2 you indicate 'not  
4 examined'; I take it you did nothing with I2 then?

10:11 5 A No, it indicates here that it was a smaller sample  
6 when I received it, it indicated here that there  
7 wasn't enough for a test, it had dried up, and in  
8 view of my results the first time I made no  
9 further examination of I2.

10:11 10 Q Could you have done the hemostix test with I2?

11 A Yes, I could have.

12 Q And at that time, though, you didn't think that  
13 that would be --

14 A I could see --

10:12 15 Q -- something that was necessary?

16 A I could see no point in it if there was nothing in  
17 there of significant value anyway.

18 Q And would the fact that you had previously tested  
19 and found that the substance was of non-human  
10:12 20 origin be significant in terms of that decision?

21 A Again, I don't believe I said that it was of  
22 non-human origin, I -- or I may have said it  
23 wasn't of human origin or nothing of human origin  
24 was found, but again, I couldn't eliminate it as  
10:12 25 being human origin. Maybe there was not enough



1           there for the test to be positive.

2           **Q**       You are talking about your original AH test --

3           **A**       Yes.

4           **Q**       -- on I2?

10:12 5           **A**       It gave a negative result, negative results, does  
6           that mean it's negative or does that mean there is  
7           not enough there to do the test or have been  
8           destroyed.

9           **Q**       Okay. So those would be the two possibilities?

10:13 10          **A**       That is correct.

11          **Q**       And if we move down, then, to U1 and U2, you  
12          identify saliva sample on cloth, and positive for  
13          saliva follows both; can you tell us what those  
14          entries mean?

10:13 15          **A**       I would be doing that test -- as you are aware, or  
16          you may not be aware, but the exhibit was a piece  
17          of, a small piece of plain white cloth. Looking  
18          at it you could not see any stain on it, so I ran  
19          a test for an enzyme in saliva, that enzyme being  
10:13 20          known as amylase, to determine whether or not I  
21          was indeed testing an area that contained saliva,  
22          and this would indicate that there was saliva on  
23          the cloth. So that would rule out the possibility  
24          that I found no antigen because there was no  
10:13 25          saliva, --



1 Q Okay.

2 A -- there was saliva there.

3 Q Okay. Could you have tested, or did you test,  
4 these samples of cloth for the presence of  
10:14 5 antigens?

6 A I --

7 Q Sorry, you've already answered that question for  
8 us. Did you test, again, for the presence or  
9 non-presence of antigens?

10:14 10 A It doesn't indicate so in the notes, and I have no  
11 recollection of doing it again.

12 Q And why wouldn't you conduct that test again?

13 A Umm, no reason, other than perhaps I had faith in  
14 my first results.

10:14 15 Q Okay. And, again, that's something I want to try  
16 to -- try to get to as we move along here. Was  
17 the assumption then, on your part at this point in  
18 time, that those initial results were conclusive  
19 insofar as concluding that the individual was a  
10:14 20 non-secretor, or the donor was a non-secretor, Mr.  
21 Milgaard?

22 A Insofar as I was aware of the limits on the  
23 testing.

24 Q I mean I'm just thinking through, and you've  
10:15 25 talked to us about discussions that were taking



1 place and theories that were being put forward,  
2 and it's easy for us to look from this standpoint  
3 but I would think that perhaps one thought would  
4 be 'maybe we should re-test the secretor status of  
10:15 5 this individual'. I am just wondering if that  
6 thought process had crossed your mind at that  
7 time?

8 A I can't recall whether it did or not.

9 Q Okay. You don't recall asking for or considering  
10:15 10 asking for another sample, for example, or another  
11 saliva sample?

12 A No, I don't believe I did, but again, I can't  
13 recall that.

14 Q Okay. If we move down the page we see an item  
10:15 15 that actually wasn't referenced in the one letter  
16 from Mr. Penkala -- or Lieutenant Penkala that we  
17 were looking at, W, one pair of men's undershorts.  
18 And if we could go briefly, just to give some  
19 context to that entry, to document 031386, please.  
10:16 20 You will see it's a report by Lieutenant Penkala.  
21 If we just look at the last paragraph, he notes  
22 that a pair of white undershorts were accepted  
23 from Mr. Milgaard and retained as an exhibit, and  
24 that they would be delivered to the Crime  
10:16 25 Detection Laboratory. If we can take a look at



1 the next page of that document, please -- it's not  
2 as clear -- we have a letter dated June the 3rd,  
3 again to Mr. Kerr from Lieutenant Penkala,  
4 indicating:

10:16 5 "The following exhibit is being  
6 personally delivered ...",  
7 "Exhibit W - one (1) pair of men's white  
8 shorts (soiled)."

9 And perhaps we could call out the Purpose portion  
10:17 10 of that, please. It indicates:

11 "Examine Exhibit W ... for presence of  
12 seminal stains and if present conduct  
13 analysis to determine blood group."

14 And how would you interpret that request,  
10:17 15 Mr. Paynter, in 1969?

16 A In 1969 we normally would not examine the male  
17 clothing in a suspected sexual offence for seminal  
18 fluid because it would be my understanding that it  
19 would not be uncommon to find it whether or not  
10:17 20 that person was involved in any sexual offence.  
21 However, in this case I was asked to do it and I  
22 believe I did look for seminal fluid.

23 Q Was he, by his language here, was he asking you as  
24 well to check for the presence of antigens or  
10:17 25 would you have interpreted his request in that



1 manner?

2 A Yes, he was, in that question there, or that  
3 statement there he would be.

4 Q And why might this test be important, again if we  
10:18 5 put it in context with findings that had been made  
6 to this point in time?

7 A Based on what I had already done, I did not think  
8 that this would have added anything to it. If I,  
9 as you note it says in the previous paragraph, the  
10:18 10 exhibit was fairly well soiled, or was soiled, and  
11 when you are doing a stain where the results are  
12 based on a negative result to do your  
13 interpretation, I would not be very inclined to do  
14 that test on something that was obviously mixed  
10:19 15 with a bunch of other material.

16 Q And again you are talking about the test for the  
17 presence of --

18 A For the test for antigens.

19 Q Antigens, okay. And I cut off that last  
10:19 20 paragraph, I think we dealt with that, he  
21 indicates that the exhibit relates to Exhibits I  
22 and U. If we go back to your notes then, page  
23 082380, and again item W, we see again the BLD not  
24 examined, I think you explained that to us.  
10:19 25 Seminal fluid, positive phos, positive micro. So



1           you detected seminal fluid by the acid phosphatase  
2           test and you also identified human spermatozoa by  
3           microscopic examination; would that be accurate?

4           A           That would be.

10:20 5           Q           And by your notes would I be correct in concluding  
6           that you did not test for the presence of  
7           antigens?

8           A           Looking at my notes, I would assume that was the  
9           case, yes.

10:20 10          Q           Just looking at your original notes for a moment,  
11          and again would this be a discretionary call on  
12          your part? It would appear that Lieutenant  
13          Penkala was asking for that test to be conducted  
14          and you've given us some reasons why you would not  
15          be inclined to conduct the test. Would that be  
16          just a decision you had made at that time?

17          A           It would be a decision that I made myself, yes. I  
18          was basically in control of any tests I had done  
19          on any exhibits. It would be my discretion  
10:20 20          whether or not I would do it.

21          Q           Okay. And could a seminal stain on those pair of  
22          shorts, and here we might start to talk  
23          hypotheticals again, but could a seminal stain on  
24          that pair of undershorts have been tested for the  
10:21 25          presence of antigens?



1 A You could test the stain for antigens. I would  
2 not be comfortable with any result based on the  
3 condition of the, what appears to be the exhibit.

4 Q Okay. Assuming though you had a pure seminal  
10:21 5 stain on that item, that test could be conducted?

6 A Yes, it could.

7 Q And in Mr. Milgaard's case, if that result, if  
8 that test had been conducted and the result was  
9 consistent with the tests that had been originally  
10:21 10 conducted on the saliva, you would not expect to  
11 find any antigens on those undershorts?

12 A As I've often said, I never went into any test  
13 with any expectations of what I would find, but in  
14 an hypothetical case, that would be correct.

10:22 15 Q Okay. Follow through then and look at your report  
16 that followed from that testing, if we turn to  
17 document ID 105559, same form of report that we  
18 previously looked at, and I note the date is  
19 August the 12th, again some lapse of time from, I  
10:22 20 take it, the time that the tests were conducted.  
21 Just again taking a look at your original notes,  
22 bear with me, your original notes seem to indicate  
23 that you actually conducted those tests on July  
24 29th, 1969, which again I guess would be sometime  
10:23 25 after the receipt of those items on June the 3rd,





1 and you would know much better than I, Mr.  
2 Paynter, would that compromise your ability to  
3 test those items, again accepting that the tests  
4 were conducted on July 29th, 1969 and the items  
10:23 5 had been received on June 3rd, and it's nothing on  
6 this document, I'm sorry, I hope I'm not confusing  
7 you, I've gone back to your original notes to try  
8 and get a sense of when you actually conducted the  
9 tests on the resubmitted items. It appears it was  
10:23 10 on July the 29th.

11 A And when does it say I received them?

12 Q On June the 3rd.

13 A That's not what it says in the report. I wonder  
14 if I can go back to the original.

10:23 15 Q Sure, your original notes, it's page 082389.

16 A We seem to be talking about two different things  
17 here, in that the ones on this note I received  
18 from Ident Officer Kleiv which may or may not have  
19 been another time. Go back to the report.

10:24 20 Q That's doc 105559. You are right, there is some  
21 confusion there. Look at the first list, I think  
22 it's number 2 that we're discussing.

23 A These exhibits were not received by myself from  
24 Ident Officer Kleiv. I was away from the  
10:25 25 laboratory when these were brought in by Constable



1 Dan Dyck of the Regina City Police and a Ms.  
2 Vinnick had taken them from him and retained them  
3 until I returned to the laboratory late in July.  
4 Ms. Vinnick at that time was an understudy in our  
10:25 5 section and she was able to take these exhibits,  
6 she would make no examination, she retained them  
7 until I came back from wherever I was at the time  
8 and then I would take them over, so this is a  
9 different -- oh, you are talking at the bottom. I  
10:25 10 was reading the top paragraph. I was in the  
11 wrong paragraph.

12 Q Yeah, I think they are in the report here, and  
13 again I don't know if the dates referenced there  
14 can --

10:25 15 A No, I was starting at the top. You are already  
16 halfway down the page.

17 Q So the items we've been discussing, again it seems  
18 to confirm received from Kleiv on June 3rd?

19 A Yes.

10:25 20 Q And then again you've had a chance to look at your  
21 original notes with respect to the testing on  
22 those items, indicated the testing was done on  
23 July the 29th, and would that be possible, that  
24 that amount of time had lapsed between the time of  
10:26 25 the receipt of the items and the testing?



1 A If I recall, that year I had -- well, for the year  
2 before that I had not been able to take holidays  
3 and when they came up that year I was able to take  
4 an extended holiday and I believe I was away for  
10:26 5 approximately six weeks and that would be the  
6 reason why she had the exhibits for that length of  
7 time.

8 Q If we can just go back to the, I guess we're  
9 there, at the report, and again we note those  
10:26 10 items under general, in particular here that we've  
11 been discussing, and if we move to the next page,  
12 we see the purpose, to conduct a serological  
13 examination of several items, and we'll deal with  
14 those other items in a little bit, but for our  
10:26 15 purposes relating to I1, I2, and U2 and W, you  
16 indicate I1 was examined for the presence of  
17 blood, W was examined for the presence of seminal  
18 fluid, and I2, U1 and U2 were not examined. I'll  
19 pause there for a moment. Would that be  
10:27 20 consistent with your notes particularly relating  
21 to U1 and U2? I think your notes might have  
22 indicated that they were tested for the presence  
23 of saliva. Sorry, Mr. Paynter, I'm just looking  
24 at --

10:27 25 A Is this the first submission or the second



1 submission?

2 Q This is the second submission we're dealing with.

3 A The first submission would be in another report  
4 where they tested for saliva. The second time it  
10:27 5 would not be, it was not retested or examined.

6 Q Okay.

7 COMMISSIONER MacCALLUM: Just before we  
8 break, I think the question which gave rise to  
9 all this was that two month interval, there was  
10:27 10 apparently a two month interval between receipt  
11 and testing and did that interval cause you any  
12 concern.

13 A No, it didn't, it wasn't uncommon at that time for  
14 an interval like that.

10:28 15 COMMISSIONER MacCALLUM: No, the interval  
16 wasn't that uncommon, but what effect might it  
17 have had on the samples; anything?

18 A If they were properly dried as far as the blood  
19 samples and seminal fluid samples were concerned,  
10:28 20 I would have no concern.

21 COMMISSIONER MacCALLUM: All right. So a  
22 sample of blood or semen, for example, in its  
23 dried form, so long as it wasn't subject to any  
24 mechanical degradation, would stay --

10:28 25 A Would stay for a considerable length of time.



1 COMMISSIONER MacCALLUM: In its present  
2 state. And to test said samples, you put them in  
3 a solution I take it.

4 A That's correct.

10:28 5 COMMISSIONER MacCALLUM: With some  
6 non-reactive solvent?

7 A Yes.

8 COMMISSIONER MacCALLUM: Water in this case  
9 would it be?

10:28 10 A It may have been water in some cases or it may  
11 have been a saline solution that has the same  
12 saline content that your body fluid has.

13 COMMISSIONER MacCALLUM: Yes.

14 A So the blood cells in water will break up  
10:28 15 immediately, whereas in the saline solution they  
16 will remain intact.

17 COMMISSIONER MacCALLUM: Okay.

18 A So we use a saline solution. It's a very weak  
19 salt water solution.

10:28 20 COMMISSIONER MacCALLUM: Uh-huh. And then  
21 that's transferred to a slide and allowed to dry?

22 A A slide. Depending on the test, it may be done in  
23 a test tube or on a slide.

24 COMMISSIONER MacCALLUM: Okay. And then  
10:29 25 you recover the same granular material that was



1 on the medium where the sample was deposited?

2 A I would then work with the extract that the  
3 granular was taken from.

4 COMMISSIONER MacCALLUM: Is that okay now  
10:29 5 for our break?

6 MR. HARDY: Yeah, thank you, Mr.  
7 Commissioner. Sure, we can break now.

8 *(Adjourned at 10:30 a.m.)*

9 *(Reconvened at 10:46 a.m.)*

10:46 10 BY MR. HARDY:

11 Q Again if we could bring up Mr. Paynter's report,  
12 105559, second page. Mr. Paynter, before the  
13 break we were talking about item 3 under the  
14 heading data and it had indicated Exhibits I2, U1  
10:47 15 and U2 were not examined. I was just attempting  
16 to clarify that with you and perhaps we could go  
17 back to your notes again for a moment, page  
18 082380, and again these notes refer to the receipt  
19 of those items the second time on June 3rd, and I  
10:47 20 think you confirmed for us that you had conducted  
21 testing on U1 and U2 which told you that there was  
22 saliva present on those items?

23 A Notes on this particular spot indicate that I  
24 found a constituent of saliva on them which  
10:48 25 indicated to me that saliva was on the samples of



1 cloth.

2 Q Okay. And just back to that page on the report  
3 then, the only aspect I was attempting to point  
4 out, it would seem then that perhaps contrary to  
10:48 5 what you've indicated in number 3 here, that U1  
6 and U2 were in fact examined?

7 A If this report is the one from that particular  
8 examination, then that would be the case, yes.

9 Q Okay. And I think we saw on the first page that  
10:48 10 it was related to those items submitted on June  
11 the 3rd. And maybe we'll move down to conclusions  
12 then, and if you look at number 1 --

13 COMMISSIONER MacCALLUM: Excuse me, they  
14 were examined in fact, but just for saliva?

10:48 15 A At this particular time they were examined to  
16 determine whether it was actually saliva.

17 COMMISSIONER MacCALLUM: But the next step  
18 wasn't taken?

19 A No.

10:48 20 COMMISSIONER MacCALLUM: No. Sorry, Mr.  
21 Hardy.

22 BY MR. HARDY:

23 Q No, that's fine, thank you, Mr. Commissioner. And  
24 under the heading conclusions, number 1:

10:49 25 "A positive result was obtained with the



1 presumptive test for blood in Exhibit:

2 I1 - one sample of liquid."

3 And can you explain for us, please, the language  
4 that you've used here in this conclusion?

10:49 5 A Well, I explained the test a few minutes ago of  
6 how I tested it with the hemostix and that would  
7 be how I would, were the conclusions I obtained  
8 from that test. It's a presumptive test, that is,  
9 you can presume there is blood there, but there  
10:49 10 was not enough to confirm the haemoglobin  
11 confirmation.

12 Q And is it possible that you had received that  
13 positive result without blood being present?

14 A There are reports of various, some other materials  
10:49 15 that will cause the false positive with those,  
16 with that test. My experience, that it's very  
17 limited, the other materials that would, and the  
18 other materials that would cause, there are some  
19 other materials I know would cause the hemostix to  
10:50 20 go more of a greenish colour than a blue colour  
21 which was blood, but no, there are other materials  
22 that would give a false positive.

23 Q And in 1969 what would your knowledge be of what  
24 these other materials were?

10:50 25 A At that time we usually considered there were





1 certain green vegetables, the one we most often  
2 referred to was horseradish, and we often said  
3 that leather could, although in my experience I  
4 never had any problems with stains on leather with  
10:50 5 it, but green vegetables were usually referred to  
6 as being a possible source of false positives.

7 Q And just so, if we follow that through then, we  
8 use the hemostix test that you've been referring  
9 to, the strip that you've been talking of, you put  
10:51 10 it into a substance, you receive a positive  
11 reaction?

12 A Yes, it would turn blue immediately.

13 Q And you are telling me that you would receive that  
14 exact same positive reaction if blood was present  
10:51 15 and if blood was not present, but one of those  
16 other substances was present?

17 A I can't at this time tell you what the reaction  
18 would be with other materials. Some of them I did  
19 test, I don't recall what the results were, but I  
10:51 20 cannot say with any certainty at this time how it  
21 would react. I know there were times when we did  
22 get a greenish blue result with certain materials,  
23 but I can't remember what they were, but it was  
24 such that in my own mind with the experience I had  
10:51 25 at that time that I would know that it wasn't



1 working right for blood.

2 Q And the possibility of that false positive, is  
3 that the reason that you've used the language you  
4 have here, and I'm thinking in particular of the  
10:52 5 word presumptive?

6 A That is correct.

7 Q No other reason?

8 A None. We couldn't confirm that it was blood, so  
9 we presume it could be blood there.

10:52 10 Q And again as you've previously explained to us,  
11 you could not go on to conduct the hemochromogen  
12 test then to confirm it was blood?

13 A I could not.

14 Q Were there any further tests at all within your  
10:52 15 knowledge at that time which could indicate to you  
16 whether that substance was blood or something  
17 else?

18 A Not that I can recall, unless it's written in my  
19 notes someplace. I can't recall anything.

10:52 20 Q No, I haven't seen anything in your notes. Could  
21 the blood that was present, if we presume it was  
22 blood, be typed?

23 A No, there was not sufficient -- I would not even  
24 attempt a typing if there wasn't enough to say it  
10:53 25 was blood. That would be the next step, would be



1 to say it was blood before I would type it. It  
2 could interfere with any typing test if there was  
3 some there, but it would not produce reliable  
4 results that I would be happy with.

10:53 5 Q And I want to speak for a moment about the  
6 hemostix test again in a hypothetical scenario.  
7 If you were to use that test and if you had pure  
8 semen and you had determined the presence of A  
9 antigens and you used the hemostix test, could  
10:53 10 that situation give rise to a positive result on  
11 the hemostix test?

12 A I can think of no occasion or reason why it would.  
13 I would not expect it to.

14 Q And this will sound simplistic, but it's not the  
10:54 15 presence then of the A antigens which we know to  
16 be a component of A blood that gives the positive  
17 result on the hemostix test?

18 A No, I believe it comes from the haemoglobin  
19 itself.

10:54 20 Q Okay. And have I heard you correctly that the  
21 reaction with respect to this hemostix test is  
22 variable potentially, and let me give you an  
23 example. Let's say we know that blood is present.  
24 You are looking for a change of colour in the  
10:54 25 strip that you've been speaking to us about?



1 A Yes.

2 Q And if it's a number of substances all of which we  
3 know have blood in them ahead of time and we apply  
4 that test to all of the samples, are we going to  
10:55 5 see the same colour reaction in every one of those  
6 tests?

7 A Yes.

8 Q And is there a different colour perhaps when it's  
9 one of those other substances that you've spoken  
10:55 10 to us about?

11 A All I can say at this time is that with blood it  
12 was a deep blue, instant reaction. Sometimes we  
13 would get a very slow reaction and not be as deep  
14 a blue, it would be more of a greenish-blue  
10:55 15 colour, and in those cases I would not be, I would  
16 not indicate that it was even positive presumptive  
17 test for blood, I wouldn't know what it was.

18 Q And what was the colour through your experience  
19 that you had seen when it was one of these other  
10:55 20 substances that was present, either sample you  
21 were testing?

22 A I can't recall that, but it would be a shade of  
23 blue, but whether it would be a greenish blue or  
24 whether it would be blue I can't --

10:56 25 Q I guess what I'm asking is was there any way for



1 you to determine a difference between the two  
2 situations, one being the substance having blood  
3 present, the other being a sample with one of  
4 those other materials such as horseradish extract  
10:56 5 that you've spoken to us about?

6 A I would say there would be no conclusive way, or  
7 enough of a difference that you could say it was  
8 one or the other, no. It might be enough to make  
9 me suspicious, but it would not be enough that I  
10:56 10 could be conclusive on it.

11 Q And what would be the nature of the difference  
12 that would make you suspicious?

13 A A difference in the shade of the colour perhaps  
14 from a blue to a greenish blue, slower reacting.

10:56 15 Q And being blood at the darker end of the scale, if  
16 I could put it that way?

17 A Dark blue and very quick.

18 Q And if it's one of the other substances perhaps,  
19 although I hear what you are saying, it could not  
10:57 20 be conclusive, but perhaps it would be a lighter  
21 shade of colour that you would see, bluish or  
22 greenish?

23 A I have seen bluish-green reactions. Whether it  
24 was another substance or whether it was some other  
10:57 25 reason, I can't say at this time. I can only say



1           that for me to think that it was blood to carry on  
2           further, it would be a deep blue, instantaneous  
3           reaction.

4           Q       And do you recall what the colour was in terms of  
10:57 5           the reaction in this particular instance?

6           A       I don't recall seeing it, but from looking at my  
7           notes and the conclusion that I gave, I would  
8           assume it was an instantaneous blue reaction.

9           Q       But because of the possibility of the other, we  
10:57 10           see the language that you've used; would that be  
11           correct?

12          A       That is correct.

13          Q       And then if we move on to conclusion number 2,  
14           simply indicate -- actually, that applies to a  
10:57 15           matter we'll speak of in a moment. Number 3  
16           indicates human seminal fluid found on item W, the  
17           pair of men's undershorts, and again I think we've  
18           confirmed that you did not test that item for  
19           antigens; correct?

10:58 20          A       Correct.

21          Q       Do you recall or is there a way that we could  
22           determine whether or not you tested that item for  
23           the presence of blood?

24          A       If you look in the notes, it's probably there, but  
10:58 25           I do not believe I did.



1 Q And we can refer to the page, you've indicated BLD  
2 not examined?

3 A Then I did not look for blood on that exhibit.

4 Q Would that have been possible to conduct a test,  
10:58 5 to look for blood on that item?

6 A Oh, yes, always possible to do it.

7 Q Would it be the hemostix test that you would  
8 initially apply?

9 A It would depend on the nature of the stains. A  
10:58 10 lot of stains you didn't have to do that, you go  
11 straight to the confirmation test because you know  
12 from the nature of the stain that that's what it  
13 was. Some stains you would do the hemostix, some  
14 you wouldn't bother because you just do a  
10:59 15 confirmation.

16 Q So you would either move directly to the  
17 hemochromogen test that you described for us or if  
18 you weren't certain, you might actually use the  
19 hemostix test?

10:59 20 A That is correct.

21 Q And that wasn't done in this particular case then?

22 A I believe not.

23 Q And do you recall whether there was any follow-up  
24 after you submitted this report from Lieutenant  
10:59 25 Penkala relating to the fact that you didn't



1 indicate one way or the other whether antigens  
2 were present on those undershorts?

3 A I don't recall any. I was with or in Saskatoon or  
4 they were in Regina on a fairly regular basis and  
10:59 5 we may have discussed it. We may have discussed  
6 it several times, but I can't recall it at this  
7 time.

8 Q And if he had put it to you at that time, would  
9 your response be similar to that that you  
10:59 10 previously shared with us in terms of not being  
11 inclined to conduct that sort of test?

12 A It would be.

13 Q Okay. So if we continue on reviewing through your  
14 notes am I correct, Mr. Paynter -- and we can only  
11:00 15 go from your recollection I guess -- that a number  
16 of other tests were conducted by yourself on a  
17 number of other items that arose through the  
18 course of this investigation?

19 A I believe I received a number of other exhibits  
11:01 20 that we haven't talked about, yes.

21 Q Okay, and I think your notes would confirm that,  
22 and I'm not going to review all of them in detail,  
23 but there is a reference, for example, to some  
24 testing that was done on a blood sample that had  
11:01 25 been obtained from Ron Wilson. Do you recall,





1 first of all, do you recall knowing of Ron Wilson  
2 at the time, or hearing that name?

3 A I have heard the name.

4 Q Do you recall conducting a blood test in relation  
11:01 5 to a sample that had been obtained from Mr.  
6 Wilson?

7 A I believe it's in my notes that I did.

8 Q Do you recall any discussions with anybody  
9 surrounding the submission of that item for  
11:01 10 testing or what the thought process might have  
11 been relating to that submission?

12 A Not without something to jog my memory.

13 Q Okay. Perhaps we can reference a couple of  
14 documents briefly, the first one being 042742, we  
11:02 15 note it's a report by Constable Dyck of the Regina  
16 City Police dated April 30th and he refers to  
17 obtaining a sample of blood from Mr. Wilson.  
18 Perhaps we could focus in on the last two  
19 paragraphs. A saliva sample was obtained as well,  
11:02 20 and he indicates that those items were delivered  
21 to the crime lab on April the 30th, and I  
22 believe -- yes, it indicates April 30th, and:

23 "... at that time turned over to ...

24 Bruce Paynter the two envelopes and  
11:02 25 their contents, verbally advising him of



1                   the request of the Saskatoon City Police  
2                   of which he already was aware."

3                   Does that refresh your memory at all in terms of  
4                   the receipt of those items or the discussion that  
11:03 5                   may have occurred surrounding those submissions?

6           A           It doesn't bring back anything other than the fact  
7                   that I got the exhibits from Constable Dyck.

8           Q           Okay. And if we refer to page 082385 in your  
9                   notes, then, we see the indication of the receipt  
11:03 10                   of those items, the date is unclear there but I  
11                   believe the report indicated April 30th, and I see  
12                   you tested the liquid blood sample with what  
13                   result?

14          A           Group B.

11:03 15          Q           And you did not examine the saliva sample?

16          A           I did not.

17          Q           Do you know why you did not examine the saliva  
18                   sample?

19          A           Determining that the blood sample was group B  
11:04 20                   would be enough to eliminate him as the suspect  
21                   who was contributing to the questionable seminal  
22                   fluid.

23          Q           Okay. And there is a report that follows from  
24                   that simply concluding, as we see on your notes --  
11:04 25                   and maybe for reference, we don't need to turn to



1 it, 105558 -- and there are some items referred to  
2 in your notes as well, Mr. Paynter. And I'm not  
3 going to refer to them directly, but there were  
4 some items found by a Constable Bagwell in Regina,  
11:04 5 and in particular it was a blue seat cover and a  
6 pair of pants, and his report indicates those were  
7 located on May 7th and I believe that some  
8 identification of Mr. Milgaard had been found in  
9 the pants. And we'll hear evidence on that and  
11:04 10 other respects, and already have heard some  
11 evidence, but I'll note the documents for  
12 reference; the preceding investigator --  
13 investigation report is 042757, and the resulting  
14 lab report that you conducted was 009390 -- that's  
11:05 15 the page, actually, of the document number which  
16 is 009374.

17 And I would like to turn your  
18 attention next to a portion of your notes that  
19 refers to the receipt of a number of items on July  
11:05 20 29th, 1969, and that's page 082382 of your notes,  
21 and you will see, briefly, that a number of items  
22 are listed there. And we'll go to the preceding  
23 letter, or I should say investigation report, to  
24 give this some context, and that's page 009282 of  
11:06 25 009281, please. Note the date of this particular



1 Regina City Police Department report, again by  
2 Constable Dyck, is May 30th relating to the murder  
3 of Gail Miller. And you will note in the body,  
4 and perhaps I'll summarize some of it for you, it  
11:06 5 would appear that they had located Ron Wilson's  
6 vehicle, a 1958 Pontiac sedan, it indicates at one  
7 time owned by Ronald Wilson, which had been sold  
8 by public auction on May 3rd, 1969 to a George  
9 Fedor. And then in the next paragraph it  
11:06 10 indicates that:

11 "According to Fedor, who was just  
12 beginning to demolish the vehicle for  
13 parts, the only article he could  
14 definitely recall being removed from  
11:07 15 this vehicle since he purchased it was a  
16 tube of lipstick from the glove  
17 compartment."

18 If we go down to paragraph 3, it indicates the  
19 following items were located and retained by the  
11:07 20 writer; 1, a glove compartment; 2, a pair of  
21 ladies dark blue wool gloves; 3, a pair of men's  
22 black oxfords; 4, a paper bag containing men's  
23 shorts found in the trunk; 5, a maroon men's  
24 housecoat; 6, one black razor case, Phillishave;  
11:07 25 refers to a piece of paper -- and 7, a piece of



1 paper; plastic in 8; number 9, one pair of men's  
2 trousers grey in colour; and number 10, the  
3 complete front seat from the automobile which had  
4 a large number of stains some of which had  
11:08 5 appearances of dried blood. It goes on to  
6 indicate that he attended at the crime laboratory  
7 to deliver the items and in paragraph number 5,  
8 again just for reference, it looks like a  
9 telephone conversation took place with Ron Wilson  
11:08 10 and at that time he was asked about the above  
11 articles and advised that the grey trousers  
12 belonged to Milgaard, the black oxfords and  
13 shorts he believed were Cadrain's.

14 If we go back to your notes  
11:08 15 relating to those items, again page 082382 -- and  
16 I'm going to summarize some of this, Mr. Paynter,  
17 but please correct me if I'm wrong -- looks like  
18 he took a look at the complete front car seat --  
19 you looked at the seat for blood, found no areas;  
20 seminal fluid, looks like you did some specific  
21 tests beyond just physical inspection; the acid  
22 phosphatase test, which was negative in the two  
23 areas that you selected. Would I be accurate in  
24 summarizing those findings in that manner?

11:09 25 A Yes, you would.



1 Q And, again, I note blood no areas; would that be a  
2 visual inspection or what sort of determination  
3 would that be?

4 A At this time I would think that it was a visual  
11:09 5 inspection, at which time I would have a bottle of  
6 hemostix and a bottle of water in my hands and  
7 testing certain areas as I went along, if I got a  
8 negative reaction I would discontinue on that  
9 stain and carry on.

11:09 10 Q Okay.

11 A So I would suspect, where they referred to dark  
12 stains, those areas would have been tested with  
13 hemostix with negative results.

14 Q Okay. And moving on, BB, the pair of grey pants,  
11:09 15 blood no areas, seminal fluid -- again, looks like  
16 a couple of areas were selected for acid  
17 phosphatase testing with negative results; would  
18 that be accurate?

19 A It would be accurate with the same qualification  
11:10 20 that I mentioned on the previous exhibit, that I  
21 may have tested areas, but they were negative.

22 Q For blood are you talking?

23 A For blood, yes.

24 Q Okay. And moving down, CC, wine coloured  
11:10 25 housecoat, blood no areas, seminal fluid no areas;



1 DD, pair of blue gloves, blood no areas, and there  
2 you indicate several areas negative heme; what is  
3 that telling us?

4 A That's, again, I tested them with hemostix and  
11:10 5 they showed up negative.

6 Q And is it possible, then, that perhaps the  
7 hemostix wasn't used in the other instances?

8 A It's possible, yes, but they could -- they -- I  
9 would suspect they probably were but it's possible  
11:10 10 that they weren't.

11 Q Okay. And item EE, one pair of men's undershorts,  
12 and you indicate blood, no areas, seminal fluid  
13 front near waistband, positive phos, positive  
14 micro. And I think we've covered what that tells  
11:11 15 us, then, that you suspected an area, that it was  
16 positive on the acid phosphatase test, --

17 A Yes.

18 Q -- and positive on the microscopic examination --

19 A Yes.

11:11 20 Q -- for spermatozoa, and you indicate appears A;  
21 what would that be indicating?

22 A I -- here, that would appear that I may have  
23 tested it for A antigens, or A and B antigens, and  
24 it was -- appeared to be positive for A although  
11:11 25 it was -- would be a weak reaction which I could



1 not confirm.

2 Q Okay. And again, I don't want to confirm this,  
3 but you talk about weak reaction; would it be,  
4 then, a different reaction than, for example, you  
11:11 5 had seen in I1 when you had initially tested for  
6 antigens in that substance?

7 A The file, the test in that case would be adding  
8 known blood cells, if there was no -- the reaction  
9 that you would expect they were looking for would  
11:12 10 be whether or not those cells would be clumping  
11 together in bunches or groups, maybe even severely  
12 clumping into one big group, 'weak' -- or it would  
13 just go, the reaction would vary from no clumping  
14 to one large clump, and this would appear to be  
11:12 15 somewhere in between.

16 Q Okay. So if you were asked for a conclusion on  
17 that aspect, based upon your notes and your best  
18 recollection, what would you conclude with respect  
19 to the presence or non-presence of A antigens?

11:12 20 A Looking at what I have there I would conclude that  
21 it may or may not have been from a secretor group  
22 A, probably leaning towards the side that it was  
23 from group A.

24 Q Okay.

11:12 25 A A group.





1 Q And not a matter, likely, you can speak to,  
2 Mr. Paynter, I think the suggestion had been made  
3 by Mr. Wilson, according to the report, that the  
4 shorts he believed were Cadrain's, and if it was  
11:13 5 known at the time that Cadrain was of type O, and  
6 that whatever the substance was, was on that, that  
7 was on those shorts were from Cadrain, you  
8 wouldn't expect to find A antigens; would that be  
9 correct?

11:13 10 A If it was a pure seminal fluid stain.

11 Q Right. And in fact, if it was any fluid from Mr.  
12 Cadrain, you wouldn't expect to find A antigens?

13 A Mr. Cadrain would not have contributed A antigens  
14 if he was a group O.

11:13 15 Q Okay. And then just continuing forward, FF, one  
16 pair of black shoes, blood no areas, seminal fluid  
17 no areas. Next page, similarly with the  
18 Phillishave box and the cardboard container, being  
19 the glove compartment.

11:14 20 If we move to your report, and  
21 it's a report that we referred to previously, it's  
22 document 105559, and again those items that we've  
23 just referred to are listed there on the first  
24 page under General, and if we move to the next  
11:14 25 page relative to these items, your Conclusions you



1 offer, being that no blood was found, no blood was  
2 found on the exhibits noted; and number 3, human  
3 seminal fluid was found on EE, again, those being  
4 the pair of men's undershorts, and I note that you  
11:15 5 make no mention of the presence of A antigens;  
6 would that be consistent?

7 A That would indicate to me that I was not  
8 completely satisfied from the tests, where I  
9 mentioned in the other part where it appears A, I  
11:15 10 was not satisfied to the point where I would make  
11 a commitment that it was A.

12 Q And that would be standard in terms of your  
13 reporting, although you may indicate something of  
14 that nature in your notes, if you were not --

11:15 15 A It was an indication to myself. The notes were  
16 for myself, not for -- they didn't go to the  
17 contributing agency or anybody else, it was  
18 something that I had made for my own information.

19 Q Okay. And then the last conclusion, number 4,  
11:15 20 being no seminal fluid found on the items that we  
21 talked about.

22 And there's one page of your  
23 notes, original notes, that we haven't covered  
24 yet, Mr. Paynter, and that's page 082381. Perhaps  
11:16 25 we can go to that now, please. It speaks of an



1 exhibit being received from a Corporal MacDonald  
2 on January 16th, 1970, being:

3 "One pair of wine coloured Trousers in  
4 brown paper bag  
5 legs cut off above  
6 appear To have been washed Since last  
7 worn",

8 and then your testing results. And just to give  
9 this some context, we have a statement that was  
10 taken on January 14th, 1970 from a Maurice  
11 Cerato, if we could turn to document 045986,  
12 please. Just call out the -- that portion,  
13 please. Just read a short bit of this statement.  
14 He indicates, beginning here Mr. Paynter, again  
15 this is Mr. Cerato:

16 "After Dave came back from his Saskatoon  
17 trip in the winter of 1969 he met me  
18 back in Regina, then we worked our way  
19 back to Winnipeg where we stayed for  
20 quite a while. While in Winnipeg I  
21 bought a pr. of wine trousers from David  
22 for .15 cents. This was in the motel  
23 room where we stayed. He was fooling  
24 around with his clothes and he brought  
25 out this pair pants and asked if I



1                   wanted to buy them. Later I noticed  
2                   there was what certainly looked like  
3                   blood around the crotch of this pants so  
4                   they were drycleaned the next day. I  
5                   believe David told me he had lent  
6                   someone these pants and that's how they  
7                   came back."

8                   And if we go back to your notes, 082381, what do  
9                   those notes tell you about the tests that were  
11:17 10                  conducted on these trousers?

11           A           Well it tells me I didn't find any blood to start  
12                   with. 'It appears they have been washed since  
13                   last worn', it would be -- whether that would wipe  
14                   out any obvious stains, because I -- I tested  
11:18 15                  areas with the hemostix, and whether it be visible  
16                   stains or not I don't know, but looking at the  
17                   clothes they did appear to be washed.

18           Q           And can you help us understand what the effect of  
19                   washing a blood stain would do to a subsequent  
11:18 20                  test for blood?

21           A           I always answered that question by qualifying it  
22                   with 'it depends on the quality the wash', it  
23                   could spread the blood around, or it could remove  
24                   it completely, or anywhere in between.

11:18 25           Q           So there would be circumstances where you would



1 find blood in instances where an item had been  
2 washed previously?

3 A Yes.

4 Q In any event, your testing revealed that there  
5 were no areas, and you had done several random  
6 hemostix test which, again, came up negative for  
7 the presence of blood on that item?

8 A That's correct, I found no areas where I could  
9 even suspect were blood.

10 Q And just for reference sake I'll refer to your  
11 report, we don't need to turn to it, it's 009403,  
12 relating to that item.

13 And I believe, Mr. Paynter, that  
14 covers all of the matters that are referred to in  
15 your notes, and I'm wondering, do you recall doing  
16 any testing in connection with the Gail Miller  
17 murder investigation in relation to a couple of  
18 rape cases out of Saskatoon that were considered  
19 to perhaps be investigatively linked?

20 A I do not recall any other specific cases of any  
21 nature that I could even hazard a guess as to who  
22 or what it might be. There would be no doubt that  
23 I would receive a number of cases from the  
24 Saskatoon City Police that year and any other year  
25 that I was involved in this work, but any relation



1 to this case or any other case, I would not be  
2 aware of any connection.

3 Q Okay. But no recollection, then, of being advised  
4 of the consideration of a couple of other rape  
11:20 5 cases in connection with the Gail Miller murder  
6 investigation and actually receiving items from  
7 those other cases for purposes of testing?

8 A None whatsoever.

9 Q Okay. And to be fair we'll refer to some  
11:20 10 documents and I'll take you through this,  
11 Mr. Paynter, and we'll see if it refreshes your  
12 memory at all. Firstly, if we could take a look  
13 at document 324671 dated March 18th, 1969, again  
14 directed to Mr. Kerr, I do note that it's a couple  
11:21 15 of different occurrence numbers, not the 641/69  
16 that we have seen on the Gail Miller murder  
17 investigation documents. The reference is alleged  
18 rape, (V2) (V2)- (V2)----- and (V1)--- (V1)-; do  
19 those names sound familiar at all, Mr. Paynter?

11:21 20 A No, they don't.

21 Q Okay. And, just following through, it would  
22 appear that you received some exhibits from  
23 Lieutenant Short, or that the lab received some  
24 exhibits from Lieutenant Short, Exhibit A being a  
11:21 25 glass slide containing a vaginal smear of (V2)



1 (V2)- (V2)-----; Exhibit B being one pair of  
2 lady's green panties, her mother documents it's  
3 been confirmed that that would be an item relating  
4 to (V1)--- (V1)-; Exhibit C being one lady's blue  
11:21 5 plaid lined jacket, fur collar, bearing stain on  
6 inside lining, and again from other evidence  
7 that's been confirmed to have been from or related  
8 to (V1)--- (V1)-; and then I see the Purpose  
9 being:

11:22 10 "Examine Exhibits A (slide), B (ladies  
11 panties) and C (ladies jacket) for the  
12 presence of human semen and if present  
13 attempted to establish ABO  
14 agglutinogens."

11:22 15 And would you interpret that -- how would you  
16 interpret that request, Mr. Paynter?

17 A That request is just he wanted me to look at those  
18 exhibits for seminal fluid at that stage.

19 Q What about the reference to establishing ABO  
11:22 20 agglutinogens?

21 A That would be -- he included that in there, yes.  
22 Whether or not I would do it would be another  
23 matter, but it is in, the request is in there.

24 Q And how would you interpret that aspect of the  
11:22 25 request?



1 A Literally what it says, he wanted me to look at it  
2 for seminal fluid, and if I found some to see if I  
3 could find any AB antigens in there.

4 Q Okay. And then under the Remarks section:

11:23 5 "This examination may be investigatively  
6 related to previous examinations  
7 conducted by your Laboratory in  
8 connection with Exhibit I (sample of  
9 liquid)."

11:23 10 It indicates:

11 "See your report #138-69, March 12,  
12 1969."

13 I think you previously identified for us that the  
14 testing you were doing on the Gail Miller case  
11:23 15 was on file 138-69, and does any of this refresh  
16 your memory as to some testing you may have done  
17 in connection with these cases and the Gail  
18 Miller case?

19 A No it doesn't.

11:23 20 Q And can you give us an indication of how -- what  
21 you would think would be the investigative link  
22 that is being referred to, particularly in the  
23 Remarks section?

24 A Well, I can't give you any indication at this  
11:23 25 time. From reading that I would assume that they





1 were checking to see if the same person was  
2 involved in the two or three different offences,  
3 but that's just from reading this report, not from  
4 any knowledge or any recollection of any  
11:24 5 conversation I had, which at that time I probably  
6 did have a conversation with them but I don't  
7 recall it.

8 Q Okay. And your determination in terms of the Gail  
9 Miller murder investigation, your report, original  
11:24 10 report I believe was dated March 12th, so you  
11 would have reported on the findings of the A  
12 antigens in I1 by the time of this letter?

13 A Yes, I would have.

14 Q Okay. And also offered your observations on the  
11:24 15 secretor aspect in relation to that original  
16 report?

17 A That would be correct.

18 Q Okay. If I turn your attention, then, to a report  
19 following from the letter we just looked at,  
11:24 20 324672, please. And, again, we see the occurrence  
21 numbers at the top, a lab file number which is a  
22 different lab file number, and reference to (V2)  
23 (V2)- (V2)----- and (V1)--- (V1)-. And if we move  
24 down the page, under General it indicates the  
11:25 25 exhibits you've received, Purpose:



1 "To conduct a serological examination on  
2 Exhibits A, B and C."

3 Then, if we can review your Conclusions:

4 "Human seminal fluid was found on:-

11:25 5 Exhibit A: Two smears on the microscope  
6 slides.

7 Exhibit B: One pair of blue panties.

8 Exhibit C: One plaid jacket."

9 Are those your initials at the bottom of that  
11:25 10 page?

11 A Yes, they are.

12 Q And if we move to the next page, Conclusions  
13 continued:

14 "Agglutinogens of Type "A" were found in  
11:25 15 the stained areas tested on:-

16 Exhibit B: One pair of blue panties.

17 Exhibit C: One plaid jacket."

18 And would that have been the same testing method  
19 that you've discussed with us already in terms of  
11:26 20 the detection of those agglutinogens?

21 A It would be.

22 Q Is that telling us, again, that A antigens were  
23 found in those stained areas?

24 A A antigens were found in the areas tested, yes.

11:26 25 Q Okay. And then, if we go down to the Remarks



1 section, number 1 you indicate:

2 "With reference to Paragraph 2 of the  
3 Conclusions, this indicates that some  
4 portions of the stained areas were  
11:26 5 produced by a person of Group "A",  
6 however, there is no way of knowing  
7 whether this portion was the seminal  
8 fluid, blood, or both."

9 What, in effect, are you saying in that  
11:26 10 paragraph, Mr. Paynter?

11 A It says I don't know where I was getting the A  
12 antigen from, whether it was the blood on the  
13 exhibits or whether it was the seminal fluid on  
14 the exhibits, or both.

11:27 15 Q And you don't recall looking at this particular  
16 exhibit, or these particular exhibits, I assume?

17 A I don't recall anything about the exhibits other  
18 than I obviously examined them.

19 Q Okay. And if we continue on, number 2:

11:27 20 "No attempt could be made to determine  
21 the presence of agglutinin on Exhibit  
22 A, as a smear on slides does not provide  
23 enough sample for the tests."

24 And then just the first sentence in number 3:

11:27 25 "The above results would become more



1                   significant, however, if it were known  
2                   whether or not (V1)--- (V1)- was a Group  
3                   "A" secretor."

4                   And I'm wondering about that last comment; why  
11:27 5                   would the tests become more significant if that  
6                   was known?

7           A           Well if she was a group A secretor I could be  
8                   testing -- or even if she was a group A, her  
9                   blood, that would indicate it could very well be  
11:27 10                   grouping her, not the contributor.

11           Q           Okay. Notwithstanding the detection of a seminal  
12                   stain or semen on those items; is that correct?

13           A           That is correct. If there was -- it indicates  
14                   from up above that there was blood there as well  
11:28 15                   as seminal fluid, and so I would have no way of  
16                   knowing, if she was a group O it be would become  
17                   significant again.

18           Q           Okay.

19           A           Or a group B.

11:28 20           Q           And I think you've already said this, but bear  
21                   with me, I'm trying to make my way through this.  
22                   So indeed, if she was group A, the presence of the  
23                   A antigens could be explained by that fact alone?

24           A           That's correct.

11:28 25           Q           Whether it was in her blood on those items or any



1 other bodily fluid?

2 A Any bodily fluid.

3 Q Okay. And that's why you indicate that the tests  
4 might become more significant if that was  
11:28 5 determined?

6 A Yes, it would be.

7 Q And if she wasn't found to be a group A secretor  
8 what conclusions could you offer in that  
9 circumstance?

11:29 10 A That I would have to assume that, that most  
11 probably the A antigens came from whoever was  
12 responsible for the, even the seminal fluid that  
13 was found there.

14 Q The donor of the semen?

11:29 15 A Yes.

16 Q Okay. Now you go on to give some instructions in  
17 relation to the obtaining of some samples. You  
18 indicate:

19 "In order to determine this, it is  
11:29 20 suggested that a blood sample and saliva  
21 sample from this person be submitted for  
22 examination. The saliva sample could be  
23 best obtained by having Miss (V1)- chew  
24 lightly on a piece of clean cloth (such  
11:29 25 as the corner of a clean handkerchief)



1 for a few seconds, mark the area, then  
2 allow this to dry at room temperature  
3 before submitting to the Laboratory."

4 And that would be consistent with your knowledge  
11:29 5 in relation to that test and how it should be  
6 properly conducted at that time?

7 A That was my knowledge at that time.

8 Q If we follow through for reference sake, have a  
9 look at an investigation report, it's 004102.  
11:30 10 It's a report by Bev Cressman, it's on the Gail  
11 Miller matter, see the occurrence number in the  
12 top right-hand corner, dated April 15th, and a  
13 date is referenced there of a visit with Miss  
14 (V1)- on April 7th. If we move down the page to  
11:30 15 about middle of the page, this portion here he  
16 indicates a saliva test sample was taken from Miss  
17 (V1)-, a little further down it indicates a blood  
18 sample in a -- was also taken, and then if we look  
19 at the next page, 004103, it simply indicates that  
11:30 20 those samples would be sent to the crime lab.

21 If we follow through, there is a  
22 further report at page 009386 of 009374 -- that's  
23 not the version I was looking at but we can use  
24 this one. You will see the date of the report  
11:31 25 being April the 11th, and again the reference to



1 (V2) (V2)- (V2)-----, (V1)--- (V1)-; indicates  
2 General in relation to the receipt of those items,  
3 the liquid blood sample and the saliva sample;  
4 Purpose, to conduct a serological examination on  
11:31 5 those exhibits. You indicate that those tests  
6 were conducted and in your Conclusions you note,  
7 number 1:

8 "Exhibit D, one liquid blood sample, was  
9 found to be of Group "O"."

11:32 10 And what would that be telling us, Mr. Paynter?

11 A It tells us that whoever we got that blood sample  
12 from was a person with group O in the ABO blood  
13 grouping system.

14 Q So we assume from the previous report then that  
11:31 15 this leads to the conclusion that (V1)--- (V1)-  
16 would be of type O blood?

17 A If that was her blood sample, yes.

18 Q Okay. And then the second conclusion:

19 "No agglutinogens of blood groups A and  
11:31 20 B were found in Exhibit:  
21 E - one saliva sample."

22 And the significance of that would be what, Mr.  
23 Paynter?

24 A Well, first off there would be no agglutinogens  
11:32 25 from her in the stains, but secondly, I found none



1           there or in the saliva.

2           **Q**       And you say there would be no antigens and that's  
3           because she's type O blood?

4           **A**       She's type O, there would be none in the stain  
11:32 5           material originating from her.

6           **Q**       So based upon the previous test, what was the  
7           significance of these conclusions?

8           **A**       The only definite conclusion that you could have  
9           was that the human seminal fluid was there, again  
11:32 10           because of the lack of a confirmation test. It's  
11           a probable I believe that it was probably from a  
12           person, the seminal fluid would be from a person  
13           of group A, but again without the confirmation  
14           test, you cannot state black and white that it was  
11:33 15           that way.

16           **Q**       Would you use the phrase that you used previously,  
17           could you indicate that it was highly probably  
18           from a secretor of group A?

19           **A**       I could use that phrase, yes.

11:33 20           **Q**       And you would be comfortable with using that based  
21           upon these conclusions noted here?

22           **A**       Yes, I would, as long as you don't change the  
23           interpretation to make it positive further down  
24           the road.

11:33 25           **Q**       And would it be fair to say then that this testing





1 and the testing conducted in the context of the  
2 Miller investigation would suggest that the donor  
3 or donors of semen in both cases were type A  
4 secretors?

11:33 5 A They probably were.

6 Q Okay. And after we've reviewed all of those  
7 materials, does any of that refresh your memory as  
8 to this particular aspect that you were involved  
9 in?

11:34 10 A None whatsoever.

11 Q Now, I understand, Mr. Paynter, that you were  
12 called to testify at the preliminary hearing and  
13 trial of David Milgaard?

14 A I was.

11:34 15 Q I'm going to take a look at your trial testimony  
16 in particular in a moment. Do you recall any  
17 preparations prior to trial with anybody,  
18 including the prosecutor or defence counsel for  
19 that matter?

11:34 20 A I don't recall any, and if there were, it would be  
21 very brief. Fairly often there was no  
22 consultation before at all. Whether there was in  
23 this case I can't say at this time.

24 Q And this is entirely based upon my own  
11:34 25 assumptions, but given that there was some



1 science, so to speak, to wade through here, is it  
2 likely in that type of circumstance that some  
3 discussions would have taken place ahead of time?

4 A It's more likely that we were familiar with each  
11:35 5 other, we knew each other and in that case there  
6 probably wouldn't be any major discussion.

7 Q And did you have a working relationship then with  
8 Mr. Caldwell at that time?

9 A Oh, yes, we were quite familiar with each other.

11:35 10 Q And would consult in preparation prior to your  
11 testimony on occasion?

12 A I would put it on the rare side.

13 Q And I'm just going to refer you to a couple of  
14 documents, the first one being document 006929,  
11:35 15 and this one, just for the sake of reference, I  
16 don't think you will be able to speak to it, Mr.  
17 Paynter, these are some notes that have been, or  
18 we anticipate will be identified as notes of the  
19 prosecutor Mr. Caldwell in preparation for trial.  
11:35 20 If we make our way through to page 006934 of those  
21 notes, just a couple of entries that mention your  
22 name, I'm not sure that we'll gain any  
23 significance from it at this point, but you'll see  
24 at the top, 44, I believe it says:

11:36 25 "Paynter re breakdown within group. A-1



1 - A-2 - etc.

2 Paynter couldn't determine the blood  
3 group of the blood found in the seminal  
4 fluid."

11:36 5 Moving down:

6 "Checked seminal fluid for antigens -  
7 found them - but couldn't say if they  
8 were from blood or secreting into  
9 seminal fluid. Get this straightened  
11:36 10 out!!!! (with Paynter)."

11 And again just for reference sake, I believe it's  
12 the next page of that same document, near the  
13 bottom, you see item number 53 indicates:

14 "Paynter, Emson, re freeze & thaw sperm  
11:36 15 - re effect on antigens pre-trial."

16 I'm going to refer you to another document which  
17 is document ID 045917.

18 COMMISSIONER MacCALLUM: Could I have the  
19 document ID for that 934, the one you just  
11:37 20 finished referring to?

21 MR. HARDY: It is 006929.

22 COMMISSIONER MacCALLUM: Thanks.

23 BY MR. HARDY:

24 Q And again we anticipate that this will be  
11:37 25 identified as some notes of the prosecutor Mr.



1 Caldwell. It looks like the date is January 14th,  
2 1970 which would have been I guess the Wednesday  
3 prior to the commencement of the trial, and I'm  
4 going to read through those and we'll see if we  
11:37 5 can identify this at all. It notes Paynter at the  
6 top and continues on:

7 "A "secretor" is a person that has his  
8 blood antigens - or blood grouping  
9 substances - in his other body fluids -  
11:37 10 perspiration, seminal fluid, saliva,  
11 tears. About 80 percent of people are  
12 secretors. This means you should be  
13 able to find out their blood group from  
14 these bodily fluids."

11:38 15 And would that be an accurate piece of  
16 information noted there as best you would know in  
17 1969?

18 A Yes, it would.

19 Q And if we follow through:

11:38 20 "P --"

21 I take it for Paynter,

22 "-- checked the two frozen lumps, found  
23 one I1 to contain spermatozoa, and since  
24 it was a clear, pale yellowish liquid  
11:38 25 when thawed, made no attempt to examine



1 it for blood as such. At this time he  
2 did proceed to check it to see if he  
3 could find any blood group antigens in  
4 it. He found "A" antigens in the  
11:38 5 liquid, which would indicate the fluid  
6 was probably from a group A person who  
7 would be a secretor."

8 And again, would that be accurate information as  
9 best you knew it in 1969?

11:38 10 A Yes.

11 Q If we read on:

12 "At a later date, he examined the same  
13 sample in which he had found seminal  
14 fluid, this time examining for the  
11:39 15 presence of blood, and got a positive  
16 presumptive test for blood in the  
17 sample."

18 And again that would be accurate, Mr. Paynter?

19 A Yes.

11:39 20 Q And the last paragraph stating:

21 "The presence of blood as such in the  
22 sample should account for the presence  
23 of antigens in the seminal fluid if a  
24 non-secretor, and since he found "A"  
11:39 25 antigens only, it indicates the blood



1                   would be from a group A person. Because  
2                   of the presence of "A" antigens, it  
3                   cannot be Gail Miller's blood which is  
4                   type "O".

11:39 5                   And would you agree with that last summary, Mr.  
6                   Paynter, in terms of accuracy?

7           A           I wouldn't use the word should.

8           Q           Sorry, should where?

9           A           In the first, "The presence of blood as such in  
11:39 10           the sample should --" I don't think I would use  
11           the word should.

12          Q           Or would, I can't tell what that says there.

13          A           Would.

14          Q           Would perhaps.

11:40 15          A           I might use the word could, it's possible.

16          Q           Okay.

17          A           And it indicates that from a group A person.  
18                   Yeah, I think I would agree with the rest of it.

19          Q           Okay. I want to talk about that last paragraph a  
11:40 20           little bit further, and I'm sure not suggesting  
21           that this arose from a discussion with you or  
22           otherwise, I don't think we heard evidence to  
23           state one way or the other. Does this refresh  
24           your memory at all as to any discussions that took  
11:40 25           place with Mr. Caldwell?



1 A It does not refresh any memory and if the date of  
2 this was a few days before the trial, I would  
3 doubt if it came from any discussion with me.

4 Q And going back to that last paragraph again, just  
11:40 5 give me a moment, I'm going to look at it again, I  
6 guess I'm most curious about the last sentence, it  
7 indicates:

8 "Because of the presence of "A"  
9 antigens, it cannot be Gail Miller's  
11:41 10 blood which is type "O"."

11 I'm not sure that from what you've told us thus  
12 far I could draw that conclusion. Would that be  
13 an accurate statement?

14 A Could you repeat that?

11:41 15 Q I'm just wondering about the accuracy of that last  
16 sentence:

17 "Because of the presence of "A"  
18 antigens, it cannot be Gail Miller's  
19 blood which is type "O"."

11:41 20 A It wouldn't be Gail Miller's blood that  
21 contributed the A antigen.

22 Q Okay. So just bear with me. We've got a sample  
23 of fluid, I1, which has tested positive for  
24 seminal fluid, and you've detected the presence of  
11:42 25 A antigens and you later, upon testing, determine



1 the presence of blood, and I'm wondering about the  
2 possibility that the semen would be from a type A  
3 secretor and that the positive hemostix test could  
4 be from a type O individual. Is that a  
5 possibility?

11:42

6 A That's a possibility, yes.

7 Q So the two aren't mutually exclusive then, so to  
8 speak? I mean, you could have both, you could  
9 have semen from a type A secretor present which  
10 would speak to the presence of A antigens and the  
11 hemostix test nonetheless could come back positive  
12 notwithstanding it was actually type O blood that  
13 was present?

11:42

14 A That would be correct, yes.

11:42

15 Q Okay. And in fact any blood would give that  
16 reaction, it could be a type B person, similarly  
17 you would receive the positive reaction in that  
18 circumstance?

19 A It could be any blood, animal or human.

11:43

20 Q So I take it then likely you disagree with that  
21 last sentence that says it could not be Gail  
22 Miller's blood which is type O?

23 A I wouldn't say that it -- no, it couldn't  
24 eliminate her as being her blood.

11:43

25 Q So your test results would be just as consistent





1 if it was determined that the blood, if it was  
2 blood that was detected in that sample, was in  
3 fact blood from Gail Miller, you would have  
4 received the exact same results?

11:43 5 A I would have got exactly the same results.

6 Q I would like to turn to your trial testimony now,  
7 Mr. Paynter, I'm going to refer you to some  
8 portions and ask for your comment on those  
9 portions, and the document ID is 041925, and  
11:44 10 actually I'm going to pause there for a moment to  
11 touch on something that I hadn't referred to  
12 earlier. Have you had a chance to review the  
13 autopsy report that was conducted in relation to  
14 this matter do you recall?

11:44 15 A I don't believe I reviewed it as such, no.

16 Q And were you aware at the time that there was  
17 what's referred to as a vaginal aspirate, a sample  
18 of fluid I take it taken from the vagina during  
19 the autopsy which had been tested?

11:44 20 A I cannot say whether I was aware of it at that  
21 time or not. I became aware of it sometime  
22 because I know of it now, but when I became aware  
23 of it, I have no idea.

24 Q And would there have been value for purposes of  
11:45 25 what you were doing in receiving that item for



1 purposes of testing?

2 A As far as determining whether or not there was  
3 seminal fluid there, I could say no more. If I  
4 had done the antigen check for it, that would have  
11:45 5 been perhaps of more value because of the location  
6 of that sample versus the location of the sample  
7 from the snowbank, because the location of the  
8 aspirate is much more significant than something  
9 found in the area.

11:45 10 Q And that includes, for your purposes, in the  
11 testing realm so to speak?

12 A It makes no difference to me in my testing, but  
13 for court purposes it would be quite more  
14 significant. The continuity on the sample of the  
11:45 15 aspirate, there was no doubt about where and who  
16 had it, whereas the sample from the snowbank,  
17 there could be some question on continuity.

18 Q And could you as well have done blood testing,  
19 hemostix testing, etcetera, with the sample from  
11:46 20 the vaginal aspirate?

21 A Oh, yes.

22 Q Do you recall any discussion about that aspirate  
23 and the non-availability of that item for testing  
24 at the time?

11:46 25 A No, I don't.



1 Q Back to your trial testimony, start at page  
2 041930, starting at about that portion, and  
3 briefly you are indicating at this point some of  
4 your academic qualifications, you indicate:

11:46 5 "A I entered our laboratory system in 1959  
6 at Ottawa, Ontario; and from that point  
7 attended Carlton University where I  
8 obtained a Bachelor of Science degree,  
9 majoring in chemistry.

11:47 10 Q And have you had any other academic  
11 training in the way of degrees in your  
12 field?

13 A No sir.

14 Q And once you got that degree, what did  
11:47 15 you do, Staff?

16 A I obtained the degree in 1964 and I  
17 was transferred to the Regina  
18 laboratory in September of that year;  
19 and was an understudy in the serology  
11:47 20 section for the remainder of 1964.

21 Q And what did you do then?

22 A Since the beginning of 1965 I have  
23 been doing case work and giving  
24 evidence in the courts; I have given  
11:47 25 evidence in the courts in the Yukon



1 and Northwest Territories and the  
2 provinces of Alberta, Saskatchewan,  
3 Manitoba and Nova Scotia."

4 And that would be an accurate summary of your  
11:47 5 training and experience at the time, Mr. Paynter?

6 A I would say so.

7 Q I refer you next to page 041932, start here,  
8 please:

9 "Q And during the period from 1965 till the  
11:48 10 present have you in fact analysed a  
11 number of liquid blood samples?

12 A Yes I have, sir.

13 Q Could you give us an approximation of  
14 how many?

11:48 15 A I could not say, sir; it would be  
16 within the two or three hundred range  
17 probably but I could not give a  
18 definite number.

19 Q During that period have you examined  
11:48 20 stains for the presence of blood and in  
21 some cases to go on in grouping - to  
22 determine whether it was human blood and  
23 sometimes go on and group the blood?

24 A Yes I have, sir.

11:48 25 Q And what numbers would this run into?



1 A Again I could not give a figure but  
2 this would be a few thousand.

3 Q And have you examined stains for the  
4 presence of human seminal fluid and/or  
11:48 5 spermatozoa during that period?

6 A Yes sir.

7 Q And in what range of numbers of such  
8 examinations?

9 A Again I could not give a figure but  
11:48 10 again it would be well over a  
11 thousand."

12 And would this basically be accurate information  
13 that you were providing at that time, Mr.  
14 Paynter?

11:49 15 A I believe so.

16 Q And so with those numbers in mind, could you give  
17 us an idea of on how many occasions over the same  
18 time period you would have checked for secretor  
19 status, so to speak, checked for A antigens in  
11:49 20 another bodily fluid?

21 A I have no idea at all on that.

22 Q Could you give us an estimate?

23 A No.

24 Q Would it be less than a hundred? Help me out.

11:49 25 A I can't help you on that at all.



1 Q You've told us previously that it was not a  
2 routine test; is that correct?

3 A That is correct.

4 Q But you can't go beyond that in terms of placing a  
11:49 5 number with these standards in mind?

6 A No, I can't.

7 Q Okay. If we turn our attention to page 041935,  
8 start there, please, he's speaking of the two  
9 vials of frozen substance here, and again this is  
11:50 10 Mr. Caldwell examining:

11 "Q And I believe you examined the item  
12 which is I believe P.13 for  
13 identification - the two what are now  
14 two empty vials?

11:50 15 A Yes I did, sir.

16 Q Now, when you received the vials what  
17 were the contents - in what form were  
18 they?

19 A The vials when I received them  
11:50 20 contained a liquid. This was a pale  
21 yellowish or clearish liquid.

22 Q I see; and was this true of both vials?

23 A That is correct, sir."

24 And does that description that you've indicated  
11:50 25 there fit with your recollection today of the



1 appearance of the contents of those vials, Mr.  
2 Paynter?

3 A Colour wise it does. I can't say whether it was  
4 still frozen or whether it was liquid when I  
11:50 5 received it, but colour wise it would, yes.

6 Q Okay. And I noted that, I think your notes maybe  
7 referred to receiving them in a frozen state.

8 A Yes.

9 Q And you can't recall that for purposes of today?

11:51 10 A I can't recall that.

11 Q But you are comfortable with the description in  
12 terms of the colour noted?

13 A Yes, I am.

14 Q And if we read forward from that point:

11:51 15 "Q Now, I'd like to pause at that point,  
16 Staff, before going into what you did  
17 with the vials and ask you whether your  
18 training and knowledge and experience  
19 includes some knowledge of the matter of  
11:51 20 the secretion of blood antigens into the  
21 bodily fluids of some persons?

22 A Yes sir.

23 Q Now, is there a name to describe the  
24 class of those persons, Staff?

11:51 25 A Persons who secrete their blood group



1 antigens in their other body fluids  
2 are known as secretors."

3 The Court then has some questions for you:

4 "Q Who secrete their what?

11:51 5 A Their blood group substances or  
6 antigens.

7 Q Did you say or?

8 A They are usually called antigens.

9 Q Yes - they're known as secretors?

11:52 10 A The persons are known as secretors,  
11 yes, My Lord."

12 Mr. Caldwell continues:

13 "Q And I take it antigens is one and the  
14 same thing as blood group substances?

11:52 15 A Yes, I use the two interchangeably."

16 The judge then had some further questions for  
17 you:

18 "Q Well, just explain that, will you please  
19 for my benefit and the benefit of the  
11:52 20 jury - what is a secretor in plain  
21 language, what does he do?

22 A A person who is group A blood will  
23 have the same group A substance in his  
24 other body fluids - in saliva,  
11:52 25 perspiration, tears, seminal fluid -





1 the same antigens as he does in his  
2 blood.

3 Q In other words, he doesn't have blood  
4 there, he has the antigens?

11:52 5 A He just has the antigens the same as  
6 are in the blood, yes sir. A person  
7 who is a non-secretor will not have  
8 these antigens in their other body  
9 fluids but they will be in the blood."

11:52 10 Next page at the top:

11 "Q Well, I take it that antigens is just  
12 one portion of the blood?

13 A Yes, sir."

14 Mr. Caldwell then continues:

11:53 15 "Q And when you speak of antigens in this  
16 sense, Staff, I take it you are speaking  
17 of them as opposed to whole blood?

18 A Yes sir. This is just a portion - a  
19 chemical in the blood that is used in  
11:53 20 the grouping under the A-B-O blood  
21 grouping system in this case.

22 Antigens can be other substances  
23 besides the "A" antigen. Many  
24 substances can be classified as  
11:53 25 antigens but in this instance I am



1                   referring to the blood group "A"  
2                   antigens."

3                   And would this be an accurate summary of  
4                   information, I should say would this be accurate  
11:53 5                   information that you were providing on this  
6                   occasion, Mr. Paynter?

7           A           I believe at the time it was accurate and I still  
8           believe it is, yes.

9           Q           I'll move you forward in the transcript to page  
11:53 10           041938 and I'll start mid page, Mr. Caldwell is  
11           examining:

12                   "Q   As I understand you, Staff --"

13                   And he's still speaking of secretors:

14                   "Q   As I understand you, Staff, in the case  
11:54 15                   of a secretor from what you say you  
16                   should be able to ascertain his blood  
17                   group from one of those bodily fluids?

18           A           Yes sir.

19           Q           Alright now, when you checked the two  
11:54 20           vials which form P.13 for  
21           identification, on the first time in  
22           which you examined them, Staff, what  
23           examination did you make of the vials?

24           A           The first examination was to examine  
11:54 25           the contents of the vials for the



1 presence of human seminal fluid.

2 Q And I take it this would be in  
3 accordance with what you had been asked  
4 to do?

11:54 5 A That is correct, sir.

6 Q And what did you find in that respect?

7 A In one of the vials which was marked  
8 when I received it as I-1, I found  
9 human seminal fluid. In the other  
10 vial I found no seminal fluid.

11 Q Now, at the time of that initial  
12 examination did you examine for anything  
13 more than the presence or absence of  
14 human seminal fluid?

11:55 15 A Yes sir. I was asked to check the  
16 contents of the vials for the presence  
17 of any blood grouping substances - the  
18 "A" antigen or the "B" antigen."

19 And again maybe we've done our best on this  
11:55 20 already, Mr. Paynter, but do you recall today  
21 whether you were requested to conduct that test  
22 or whether you conducted that test on your own  
23 accord?

24 A I believe if we go back, it was in the request  
11:55 25 that came from the Saskatoon City Police to do



1 that.

2 Q And we can go back, maybe you'll take my word for  
3 it, on February 7th the request was made to  
4 examine I1 for the presence of seminal fluid, but  
11:56 5 at least in the documents we've reviewed I don't  
6 believe the request was made to check for the  
7 presence of antigens, and I'm not sure if you can  
8 help us any further today, but I did want you to  
9 revisit that issue in your mind and see if you can  
11:56 10 recall again, as I say, whether or not perhaps you  
11 had done that test by your own decision or whether  
12 in fact someone had asked you to do the test?

13 A I can't recall.

14 Q Okay. But it would be possible that you might  
11:56 15 undertake this test on your own?

16 A I would doubt it.

17 MR. HARDY: Okay. Mr. Commissioner, I  
18 know we're just before noon, perhaps this would  
19 be a good time to break.

11:56 20 COMMISSIONER MacCALLUM: Sure.

21 *(Adjourned at 11:56 a.m.)*

22 *(Reconvened at 1:30 p.m.)*

23 BY MR. HODSON:

24 Q Good afternoon, Mr. Paynter.

01:30 25 A Good afternoon.



1 Q If we could go back to the trial transcript,  
2 please, I believe we were at page 041940. Focus  
3 in starting at this portion here, Mr. Paynter,  
4 Mr. Caldwell is examining here:

01:31 5 "Q Now I'm sorry, Staff, but your second  
6 examination ...",

7 and I'm sorry, again we're speaking of item I1,  
8 the vial of substance. Back to the transcript:

9 "Q Now I'm sorry, Staff, but your second  
01:31 10 examination as part of the initial one I  
11 think you said ..?

12 A .. is an examination for the presence  
13 of these antigens and I found "A"  
14 antigens present in the sample of  
01:31 15 liquid.

16 Q And was that in the same one in which  
17 you found the seminal fluid?

18 A Yes, sir; it was the vial that was  
19 marked I-1 when I received it.

01:31 20 THE COURT:

21 Q Just a minute please; so that you  
22 conclude from that then that he had "A"  
23 blood grouping, did you?

24 A There is another problem in grouping  
01:32 25 the other bodily fluids, My Lord. In



1 the blood group the persons that have  
2 "A" antigens and no "B" antigens would  
3 have "B" antibodies. And in grouping  
4 blood we also check for these  
01:32 5 antibodies before we will determine  
6 what the blood group was. But the  
7 other body fluids, there's no  
8 antibodies to check for. And this  
9 creates the problem in stains or  
10 materials such as this as we do not  
11 know if there was a "B" antigen  
12 present and it was destroyed or if  
13 there was never any "B" antigen there.

14 Q So you couldn't tell whether it was "A"  
01:32 15 or "B" then?

16 A All I can say is that I found "A"  
17 antigen, so it would be from a Group  
18 "A" or a Group "A-B".

19 Q A Group "A" or a Group "A-B"?

01:32 20 A Yes.

21 Q Not "B"?

22 A Not "B", no sir."

23 And this would be accurate information that you  
24 were providing, Mr. Paynter?

01:32 25 A Yes sir.



1 Q And, again, I take it from your answers here that  
2 you are allowing for the possibility that B  
3 antigens, using the example that was discussed  
4 here, could be present in a seminal sample but  
01:33 5 could be destroyed such that it would not later be  
6 detected?

7 A That would be correct, yes.

8 Q And again, we discussed this previously, but in  
9 terms of your understanding in 1969 what did --  
01:33 10 what circumstances did you understand, at that  
11 time, could that occur in? And I'm sorry, I'm  
12 garbling that a bit, but I'm wondering how did you  
13 understand, at that point in time, that B  
14 antigens, again using that example, could be  
01:33 15 destroyed?

16 A Just from degradation of the material. I don't  
17 know if contamination, as such, would do it or  
18 not. I would be -- I would not consider that B  
19 would be destroyed any faster than A but, again,  
01:34 20 you could not say that it was there or wasn't  
21 there.

22 Q So nonetheless, in terms of your mindset at that  
23 time, you allowed for the possibility, whether it  
24 be A antigens or B antigens in a substance of that  
01:34 25 nature, that they could be destroyed?



1 A You had to allow for that possibility.

2 Q Okay. And if we turn to the next page, please,  
3 041942 starting at the bottom of the page:

4 "Q And I believe the situation is that you  
5 later received them back again?"

01:34

6 Again, we're talking about the vials and the  
7 saliva samples:

8 "A Yes sir. I again received the same  
9 vials from Ident. Officer Kleiv of the  
10 Saskatoon City Police at our laboratory  
11 on the 3rd of June 1969.

01:34

12 Q Now, was there any contents in the vials  
13 at this stage?

14 A In the one that was marked as I-1  
15 there was still liquid in the vial.  
16 The other one the liquid appeared to  
17 have dried leaving a stain in the  
18 vial.

01:35

19 Q I see; and did you examine I-1 again?

01:35

20 A I did.

21 Q Now, on this occasion what did you  
22 examine for?

23 A On this occasion examination was to  
24 determine if there was any blood  
25 present in the liquid.

01:35





1 Q And just to be clear, Staff, I take it  
2 you're speaking now of blood as opposed  
3 to any constituent of blood?

4 A As opposed to antigens, yes sir; this  
01:35 5 would be blood."

6 Continue on from there:

7 "Q Now, did this involve a different  
8 technique than you had used previously?

9 A Yes, it did.

01:35 10 Q And what was the result of this second  
11 examination?

12 A If I may explain the test. This test  
13 is one used by hospitals to test for  
14 blood in urine and they find that it  
01:36 15 is specific for their purpose in  
16 testing for blood in this liquid. I  
17 have used this test and tested it with  
18 several substances and I found that it  
19 will give a false positive reaction  
01:36 20 with certain green vegetables and with  
21 leather.

22 Q What do you mean by a false positive  
23 reaction?

24 A It will give a positive result - the  
01:35 25 same result with these substances as



1 it will with blood.

2 Q Have you found it will give a false  
3 positive reaction with other substances  
4 than those two?

01:35 5 A No, I haven't, sir.

6 Q And I take it you've tried it with  
7 others from what you say?

8 A Yes, we've tried it with many  
9 substances."

01:35 10 I'll pause there for a moment. Is that accurate  
11 information that you provided at that time,  
12 Mr. Paynter, as best that you can recall?

13 A Best as I can recall, yes, it is.

14 Q And I'll continue on, the Court had some questions  
01:35 15 at that point:

16 "Q In other words, it's something from the  
17 vegetables that's there and not blood  
18 and mistaken for blood, is that what you  
19 mean?

01:36 20 A No sir; I'm saying that the test -  
21 when tested against other substances -  
22 a few other substances will give a  
23 false positive and for that reason I  
24 cannot positively say that a substance  
01:36 25 is blood from using this test alone.



1 Q It's not much good then, is it?

2 A Well, we use it as a screening test to  
3 eliminate stains and then if it is  
4 positive we attempt to do a further  
01:36 5 test to positively identify it as  
6 blood if there is sufficient there."

7 And Mr. Caldwell then continues:

8 "Q But those are the two subjects if you  
9 will on which you found it to give a  
01:36 10 false reading so to speak?

11 A That is correct.

12 Q And have you found it did give a false  
13 reading with any other substances you  
14 have tested?

01:36 15 A No sir."

16 And, again, would that be accurate information  
17 that you were providing at that time,  
18 Mr. Paynter?

19 A I believe so, sir, yes.

01:36 20 Q And, again, your explanation here; this is why you  
21 would have originally described the test result as  
22 presumptive, and I'm talking about the blood in  
23 the I1 sample?

24 A Yeah, that would be the reason.

01:37 25 Q Okay. If we continue on at the bottom of the



1 page:

2 "Q Now, when you on the second occasion  
3 tested the contents for the presence of  
4 blood as such, what result did you  
01:37 5 obtain?

6 A I obtained a positive result for blood  
7 with this test.

8 Q And is that the extent of what your  
9 finding showed you?

01:37 10 A Yes, sir; there was insufficient blood  
11 in this sample - or coloring in this  
12 sample that I was able to attempt any  
13 confirmation tests to absolutely prove  
14 that there was blood present."

01:37 15 The Court then has a question:

16 "Q It turned out to be useless then, didn't  
17 it?

18 A Chemically I could not say that it was  
19 definitely blood there."

01:37 20 And that was, again, accurate information that  
21 you were providing at that time, Mr. Paynter?

22 A I believe it was, yes.

23 Q I turn your attention to the next page, 041946,  
24 there is a bit of an exchange between the Court  
01:38 25 and counsel included here, but for reference sake



1 I'm going to read this, Mr. Paynter. And if we  
2 could start here please, it's Mr. Caldwell asking  
3 the question:

4 "... All right now, if indeed there was  
01:38 5 blood as such - I'm asking about this  
6 time - in the sample at the time you  
7 checked for blood as such ..

8 THE COURT: .. excuse me, but there was no  
9 blood.

01:38 10 MR. CALDWELL: Well, My Lord ..

11 THE COURT: .. you just can't ask  
12 hypothetical questions like that unless  
13 you're prepared to prove that there was  
14 blood there. If you can't prove that  
01:38 15 there was blood there through some  
16 witness or other I won't allow you to  
17 pursue it.

18 MR. CALDWELL: Well, I'd like to pursue  
19 what the result of that test indicated  
01:39 20 at any rate, and perhaps ..

21 THE COURT: .. Well, it was positive for  
22 blood but he has already said that that  
23 might be false because of the other  
24 factors that he mentioned and he said  
01:39 25 that there wasn't enough to make a



1 positive identification as to whether it  
2 was a false positive or not a false  
3 positive.

4 MR. CALDWELL: I understood the ..

5 MR. TALLIS: .. excuse me, if I may  
6 interject here. He even went further,  
7 My Lord, and said chemically I would not  
8 say it was blood."

9 Do you have a recollection, at all, of that  
01:39 10 exchange during the trial?

11 A A recollection? Without reading it, no, I don't.

12 Q Okay. But to your last point there, again, that  
13 would be accurate information that you were  
14 providing and probably the best information you  
01:39 15 could provide at that point?

16 A It was.

17 Q Okay. Just continuing down, Mr. Caldwell  
18 continues:

19 "Q From the results you did get on that  
01:39 20 what could you narrow the item down to  
21 being? From the result you got what  
22 could you narrow down the cause of that  
23 result to?

24 A With this particular test?

01:39 25 THE COURT:



1 Q Yes; what were the various things it  
2 might have been?

3 A It would be blood or an extract from a  
4 leather product or an extract from  
01:40 5 green leafy vegetables such as  
6 lettuce, horseradish and vegetables of  
7 this nature.

8 MR. CALDWELL: Perhaps, My Lord, I could  
9 ask the witness this -

01:40 10 Q If the result you got as I understand  
11 you was caused by any of those causes  
12 what can you say about the effect of  
13 this second or latter test, Staff, on  
14 the result you got in your first test?

01:40 15 A If this test was caused as a result of  
16 blood in the liquid this would  
17 eliminate the necessity of the  
18 antigens being produced by a secretor  
19 that I found in the first test,  
01:40 20 because the antigens could be there as  
21 a result of blood being in the liquid.

22 THE COURT:

23 Q So if it was blood the person might not  
24 have been a secretor?

01:40 25 A That is correct; he would not



1                   necessarily be a secretor if it was  
2                   blood that caused this positive test  
3                   that I obtained."

4                   And, again, that was accurate information that  
01:41 5                   you were providing Mr. Paynter?

6           A           I believe so, yes.

7           Q           And I take it that, if the substance was not  
8                   blood, the conclusion would follow that the donor  
9                   of the semen was an A or AB secretor?

01:41 10           A           Probably was, yes.

11           Q           Unless, of course, it was the false positive that  
12                   we have been speaking of? In other words I guess  
13                   I left out one possibility, that being that if  
14                   it -- if it was a positive test and blood wasn't  
01:41 15                   present it still could have been positive because  
16                   of the, one of the other substances that you have  
17                   spoke to?

18           A           Not the test for the antigen, the test for the  
19                   blood could have been, or the hemostix test could  
01:42 20                   have been positive --

21           Q           Correct.

22           A           -- because of something else.

23           Q           Okay. Okay. I'll turn your attention next to  
24                   page 041949, please. If we can start near the  
01:42 25                   top, right there, it's talking about your





1 examinations for seminal stains. This is  
2 Mr. Caldwell continuing:

3 "Q Now, Staff, did you examine P.6 - the  
4 panties - for the presence of human  
01:42 5 seminal fluid?

6 A Yes I did, sir.

7 Q And with what result?

8 A I found human seminal fluid present at  
9 the back of the crotch area in the  
01:42 10 panties.

11 Q Did you mark the location, Staff, on the  
12 exhibit?

13 A The area outlined in the crotch area -  
14 the black mark - and the hole cut  
01:42 15 inside this area is the area of the  
16 cloth that I used in my test.

17 Q Right; now, Staff, did you examine P.5,  
18 the black coat, P.7 the panty girdle,  
19 P.8 the half slip, P.9 the brassiere,  
01:43 20 P.10 the white uniform dress for the  
21 presence of seminal fluid?

22 A Yes I did, sir.

23 Q And with what results?

24 A I found no seminal fluid on any of  
01:43 25 these items."



1 And, again, that would be accurate information,  
2 Mr. Paynter, that you were providing at that  
3 time?

4 A Yes it would.

01:43 5 Q I turn your attention to page 041954, bottom of  
6 the page, it's just speaking of the saliva samples  
7 from Mr. Milgaard:

8 "Q And I believe you carried on a test on  
9 the item which is P.24 - the two vials  
01:43 10 containing saliva samples?

11 A That is correct, sir.

12 Q And in what form were the samples when  
13 you received them, that is was there any  
14 actual liquid or moisture as such?

01:44 15 A No sir; they were given to me as  
16 saliva stains on pieces of cloth. The  
17 cloth was dry when I received them.

18 Q And what test did you conduct on those  
19 two items?

01:44 20 A These items were tested to determine  
21 if I could find either "A" or "B"  
22 antigens in the saliva on the cloth.

23 Q And did you determine any such antigens?

24 A I found none.

01:44 25 Q And from that, Staff, just from that



1                   alone what would that indicate to you,  
2                   if anything, about the person that  
3                   supplied these samples?

4                   A     This would indicate that the person  
01:44 5                   was a non-secretor."

6                   And that would be accurate information that you  
7                   were providing at that time, Mr. Paynter?

8                   A     At that time, yes.

9                   Q     And I note that you didn't qualify your answer in  
01:44 10                  any respect.  When you look at that, are you  
11                  comfortable with the response you provided, in  
12                  terms of what you knew in 1969 about --

13                  A     From what I knew in 1969 I was quite comfortable  
14                  with it.

01:45 15                 Q     Okay.  I turn your attention to page 041962,  
16                  please, starting here.  This is now on  
17                  cross-examination conducted by Mr. Tallis, he is  
18                  again speaking of the two vials of substance, I1  
19                  and I2, and here he is speaking of I2 in  
01:45 20                  particular.  I'll read a portion to you:

21                         "Q     Now, you told my learned friend in your  
22                                 evidence-in-chief that you tested I  
23                                 think the one marked I-2 for seminal  
24                                 fluid, which forms part of ..?

01:45 25                  A     .. I-2 was tested for seminal fluid,



1 yes.

2 Q .. P.13; and as I understand it that one  
3 vial the substance in there was negative  
4 for seminal fluid?

01:46 5 A That is correct.

6 Q And negative I think you told my learned  
7 friend for human material?

8 A Yes sir.

9 Q Now, I believe you also described it as  
01:46 10 being a yellowish sort of color?

11 A Very pale ..

12 Q .. pale yellow?

13 A .. color liquid, yes sir.

14 Q Now, how much was in that vial when you  
01:46 15 first received it - what quantity?

16 A I could not give an exact amount; it  
17 would possibly be one c.c. or two  
18 c.c.'s - but a small amount of liquid.

19 Q I see. And you could notice the  
01:46 20 coloration of it when you held it up to  
21 the light?

22 A Yes.

23 Q That is you could see it with the naked  
24 eye?

01:46 25 A Yes sir.



1 Q Well now, you made the notation that it  
2 tested negative for human material; did  
3 you go further and test it to determine  
4 what type of material was in there?

01:46 5 A I did not, sir."

6 And could other tests have been performed on that  
7 vial, I2, to determine what substance was in  
8 there?

9 A Not by myself, but maybe some other department  
01:47 10 could have, I'm not sure.

11 Q And why do you say not by yourself?

12 A Well I would be looking for blood or seminal  
13 fluid, and I conducted all the tests I could test  
14 in that matter, and we did not examine for other  
01:47 15 materials.

16 Q Okay. I'm going to read forward from there:

17 "Q I see; and all you can tell us is that  
18 it was this pale yellowy color?

19 A Yes sir.

01:47 20 Q But I take it that the test when you say  
21 the absence of human material - this  
22 would negative body substances including  
23 urine and things like that?

24 A No sir.

01:47 25 Q I see, it wouldn't?



1 A It wouldn't negative urine, no sir.

2 Q Well, when you said human material what  
3 were you referring to?

4 A Blood, seminal fluid, saliva,  
01:47 5 perspiration.

6 Q I see; things like that?

7 A Yes sir.

8 Q So that you just - you are just not able  
9 to from your scientific knowledge - or  
01:48 10 testing because of no testing - say what  
11 was in there when you got it?

12 A That is correct."

13 And that would be accurate information that you  
14 provided at that time, Mr. Paynter?

01:48 15 A I believe so.

16 Q I turn your attention to page 041968. Beginning  
17 at the bottom of the page, the Court had some  
18 questions for you, again relative to 11:

19 "I'm sorry, I'm going to have to  
01:48 20 interrupt you, Mr. Tallis, to clear up a  
21 point on this business of being a  
22 secretor -

23 Q You say at the time you made your report  
24 that in your opinion the seminal fluid  
01:48 25 came from a secretor of group "A"?



1 A Probably came from a secretor of group  
2 "A", I believe it was. I do not have  
3 my report here but ..

4 Q .. just a minute please - that was your  
01:49 5 opinion at any rate - it probably came  
6 from a secretor ..?

7 A .. yes sir.

8 Q .. and that secretor had group "A"  
9 blood?

01:49 10 A Yes sir.

11 Q Alright; and if the substance that you  
12 found there turned out - that is the  
13 free blood, which you thought was free  
14 blood - turned out to be not free blood  
01:49 15 - you understand what I mean? One of  
16 those other substances that you referred  
17 to that came from leafy lettuce and so  
18 on? If it wasn't blood - if it came  
19 from one of those other things, what  
01:49 20 would that do - confirm or ..?

21 A .. this would indicate that it came  
22 from a secretor of group "A" or group  
23 "A-B", yes, sir.

24 Q If it was not blood?

01:49 25 A If the substance that gave me this



1 positive test was not blood?

2 Q But if it was blood ..?

3 A .. if it was not blood I could not say  
4 whether or not it was a secretor  
01:49 5 because ..

6 Q .. and yet you can't tell me or tell the  
7 jury whether it was blood or it wasn't  
8 blood, is that right?

9 A I cannot tell you definitely. In my  
01:50 10 opinion it probably was blood but I  
11 cannot tell you positively.

12 Q It might not have been blood?

13 A There is a chance, yes.

14 Q All right; so that you can't say  
01:50 15 definitely then that the person whose  
16 seminal fluid you examined on this  
17 occasion was a secretor or not a  
18 secretor?

19 A I cannot say, no, sir."

01:50 20 Would this have been accurate information that  
21 you provided at that time, Mr. Paynter?

22 A I believe it was.

23 Q And in your answer to one of the last questions  
24 posed you indicate in your belief or opinion it  
01:50 25 probably was blood, and do you recall on what





1 basis you were saying that?

2 A On the basis, oh, probably on experience.

3 Q From your experience did you say?

4 A That would be what I would assume.

01:50 5 Q And would there be any indicators that you could  
6 share for us that would lead you to that  
7 conclusion?

8 A Nothing that I can think of at the moment, no.

9 Q Okay. And would there have been any way, at that  
01:51 10 time, of determining whether the blood was more  
11 likely from, in this instance, the assailant or  
12 the victim?

13 A No, sir.

14 Q Again, that test simply told you that there was  
01:51 15 blood there, or that it was a positive reaction  
16 for blood?

17 A The only way you could tell them apart would be  
18 through grouping tests and there wasn't enough  
19 there to do it.

01:51 20 Q Okay. I'll turn you to the next page, starting  
21 here, again this is Mr. Tallis on  
22 cross-examination:

23 "Q I see; well let's take it then ...",  
24 he is speaking of blood grouping:

01:51 25 "Q I see; well let's take it then with the



1 "A" group; I understand that in the "A"  
2 group you can break down the "A" group  
3 into a number of sub-groups?

4 A Yes sir.

01:52 5 Q And for example you can break it down  
6 into A-1, A-2 and so forth?

7 A That is correct, sir.

8 Q And I take it then this reflects the  
9 fact that within the "A" group there are  
01:52 10 differences which you can isolate into  
11 sub-groups - if I may use that term?

12 A Yes sir.

13 Q And as I understand it, for example, you  
14 are in the "A" group yourself?

01:52 15 A I am, sir.

16 Q And if you take it down a step further  
17 you are in sub-group A-1?

18 A I am, sir.

19 Q Yes; and this is an illustration to -  
01:52 20 other people might be in the A-2 group?

21 A That's correct, sir.

22 Q Now, when you were doing your blood  
23 grouping in this instance did you do any  
24 sub-grouping?

01:52 25 A No sir."



1           Would that be accurate information that you  
2           provided on that occasion, Mr. Paynter?

3           A           It would.

4           Q           And can you -- does the grouping of blood focus on  
01:53 5           the antigens in the blood; is it that component of  
6           blood that assists you in grouping blood?

7           A           We -- we determined which antigens were present,  
8           yes.

9           Q           And, sorry, you might have to help me along here,  
01:53 10          but if I'm talking about let's say a type A person  
11          having A antigens present, and when you go to  
12          group that blood, what component of the blood is  
13          it that you are looking at in order to group it  
14          and make that determination?

01:53 15          A           If we're talking about a liquid sample you could  
16          do it by testing the, for the A antigens or the B  
17          antigens, in a dried stain we would also check for  
18          antibodies.

19          Q           And perhaps, then, carry that forward. When we  
01:53 20          talk about the subgrouping aspect, again, what  
21          component of the blood are you looking at in order  
22          to subgroup, for example, a type A person into A1  
23          or A2 or A3?

24          A           Well the difference between an A1 and an A2 is  
01:54 25          almost insignificant. It has no effect on



1 anything other than the fact that, to put it very  
2 simplistically, the antigens may be a bit weaker,  
3 and as they decrease in weakness they -- some  
4 organizations or factions have listed it as A1,  
01:54 5 A2, A3 or A4. But for our purposes, and any  
6 purpose that I am aware of, there is no  
7 significance whatsoever in the difference between  
8 the two.

9 Q Okay. And let's use our example here, and again  
01:54 10 we'll refer to I1, you detect A antigens that are  
11 present; would there -- could you have subgrouped  
12 the blood type of that individual by looking at  
13 the A antigens present in the seminal sample?

14 A I have no idea whether I could have or not. We  
01:55 15 used an anti-A product for the anti-A, or for  
16 group A1, which would identify all of the A  
17 groupings; there was one available for dividing  
18 liquid blood samples into A1 or A2, but I do not  
19 know of any available commercially, any sera for  
01:55 20 dividing them any further than that.

21 Q Okay. Now I'm just trying to apply this  
22 information to the present case and see whether it  
23 would have had any use whatsoever at the time, and  
24 maybe I'll just ask the question. Knowing all of  
01:55 25 the information that you know, do you believe that



1 the ability to subgroup blood could have provided  
2 any assistance in the determinations that were to  
3 be made in this particular case?

4 A Again, as far as I know, the subdivision would  
01:56 5 only occur or could only be done, or I was only  
6 aware of it being done in liquid blood samples, so  
7 I would not even try it on a stain or on another  
8 body fluid, and I would be very skeptical of any  
9 results obtained with it trying that test.

01:56 10 Q And I don't want to push this too much further  
11 but, just, I want to make sure I understand. I  
12 can understand your reservations about why you  
13 wouldn't necessarily want to engage upon those  
14 tests, but again, is the ability to subgroup  
01:56 15 blood; does it arise from that component of the  
16 blood that we have been speaking of, and in  
17 particular let's use our example, the A antigens?

18 A To the best of my knowledge, I would say that is  
19 where it is contained or derived from, --

01:56 20 Q Okay.

21 A -- in the antigens.

22 Q But in 1969 you know -- you knew of no instance,  
23 for example, from your experience where an attempt  
24 had been made to subgroup the antigens, for  
01:57 25 example, that had been located in a seminal stain?



1 A Neither seminal stains or blood stains.

2 Q And you can see where I'm going with this thought  
3 process. If in fact that could be done, for  
4 example, and it could be determined that it was a  
01:57 5 subgroup A2 in terms of the seminal sample, and  
6 that your suspect donor was in fact A1, I would  
7 think that that could have some investigative  
8 significance?

9 A If it was possible to do it, but again, I say I  
01:57 10 don't think it was possible to even consider doing  
11 it.

12 Q Okay. Okay. Thanks for bearing with me on that.  
13 We'll turn to page 041975 of the transcript,  
14 beginning at the bottom of the page:

01:58 15 "Q Mr. Paynter, just a few more questions  
16 ...",  
17 this is Mr. Tallis continuing:

18 "Q Mr. Paynter, just a few more questions  
19 with which you can perhaps assist us -  
01:58 20 dealing with this vial labelled I-1  
21 which forms part of P.13 you recall  
22 being asked a number of questions by my  
23 learned friend and myself about this  
24 substance which you couldn't  
01:58 25 scientifically identify and I want to



1 just ask one or two more questions in  
2 connection with that. I take it that a  
3 visual examination of this seminal fluid  
4 did not reveal any reddish color of any  
01:58 5 sort?

6 A No sir, there was no reddish color to  
7 it.

8 Q No reddish color to it; and this  
9 substance if I may use it when you were  
01:58 10 endeavoring to isolate it  
11 scientifically, was a very very minute  
12 quantity, as lay people would think of  
13 it, wasn't it?

14 A The sample of liquid or the substance  
01:58 15 in it?

16 Q The substance in it

17 A It would be a very small amount, yes.

18 Q And if I may get down to terms in which  
19 I think of to illustrate size, it would  
01:59 20 be smaller than a pinhead?

21 A I couldn't say, sir, in that while it  
22 was in the liquid form what the size  
23 of the pure substance would be.

24 Q I see; well, in any event it would be a  
01:59 25 very minute amount?



1 A Yes sir.

2 Q And when we talk in terms of a pinhead  
3 it might be even smaller than that?

4 A It could be. I'll put it this way,  
01:59 5 sir; a pinhead of blood in two or  
6 three c.c.'s of blood would cause the  
7 reaction with no difficulty.

8 Q And a small quantity of blood would  
9 cause coloration that you could see?

01:59 10 A Whether or not a drop the size of a  
11 pinhead would or not, I could not say.

12 Q But a relatively small amount?

13 A It would not take a great deal to  
14 start giving a pinkish colour to the  
01:59 15 liquid.

16 Q That's right; and you had enough to do  
17 with the samples that it's fair to say  
18 you didn't even detect a pinkish color  
19 ..?

02:00 20 A .. I did not suspect any blood in it  
21 when I first received it, sir.

22 Q And when you looked at it even later on  
23 there was no pinkish coloration or  
24 anything like that that the naked eye  
02:00 25 could see?





1 A No sir.

2 Q And I suppose that this examination  
3 would be under good lighting and  
4 whatnot?

02:00 5 A Yes sir."

6 And this was accurate information that you were  
7 providing at that time, Mr. Paynter?

8 A As best as I could recall, it's very accurate,  
9 yes.

02:00 10 Q I refer you to the next page, 041978, starting  
11 here:

12 "Q Now, you also told my learned friend I  
13 think that with reference to the panties  
14 which are here as an exhibit - P.6 - you  
02:01 15 have told us about finding seminal  
16 stains in the crotch; and was there a  
17 fairly substantial area of seminal stain  
18 there?

19 A The stained area is to the rear of the  
02:01 20 crotch area, outlined with the black  
21 and the area cut out. The amount of  
22 the staining material, I could not  
23 say, sir.

24 Q Now, were you able to run any tests on  
02:01 25 the dried seminal stains apart from



1                   ascertaining that it was caused by  
2                   seminal fluid?

3                   A     I did not, sir.

4                   Q     Well, is it possible to test dried  
02:01 5                   seminal stain to take into account this  
6                   secretor and non-secretor aspect?

7                   A     Yes sir.

8                   Q     I see; but I take it that no test was  
9                   made of that area, or was it? Just take  
02:01 10                  a moment to check your notes if you  
11                  please.

12                  A     No sir."

13                  And again I think we previously covered that, Mr.  
14                  Paynter, and that information would be accurate  
02:02 15                  as you provided it here?

16                  A     I think so.

17                  Q     And I'm correct, Mr. Paynter, that you were not  
18                  asked at trial, as best you can recall, about  
19                  several of the other items that we reviewed in  
02:02 20                  your notes including, for example, the items  
21                  retrieved from the vehicle and Constable Bagwell's  
22                  involvement in terms of locating the pants and I  
23                  believe a blue seat cover, and again all I can ask  
24                  is for your best recollection. We have the  
02:02 25                  transcript which will speak for itself, but you



1 don't recall speaking to those matters do you?

2 A At the trial?

3 Q Yes.

02:02

4 A I couldn't recall it without looking at the  
5 transcript.

6 Q No, fair enough. And were you aware at the time,  
7 Mr. Paynter, that Dr. Emson was also testifying at  
8 this trial?

02:03

9 A Well, I would know that he would be called as he  
10 was, he did the autopsy, so I would assume that he  
11 would be called.

12 Q And were you aware at all of his testimony  
13 provided at that time?

14 A I don't believe so.

02:03

15 Q I just want to refer you to a couple of very short  
16 portions, if we could go to document 255230,  
17 please, and page 255256, this is the examination  
18 by Mr. Caldwell, if I could start there, please,  
19 I'm going to read a portion to you again:

02:03

20 "Q Are there conditions under which human  
21 blood as such can get into seminal fluid  
22 or spermatozoa in the male person?

23 A Yes.

02:04

24 Q Could you tell the Court what they are  
25 please?



1 A One would be local injury to the male  
2 genitals. A second and quite common  
3 occurrence would be any inflammation  
4 either internal or external of the  
02:04 5 male genitals.

6 Q Are there any other causes?

7 A There are rarer conditions but I think  
8 the injury and the inflammation are  
9 the most common ones.

02:04 10 Q You understood my question to be  
11 speaking of blood as such as opposed to  
12 any constituent of blood?

13 A Yes - blood cells."

14 I'm going to continue, but we'll move to the next  
02:04 15 page. I'm sorry, page 255272, starting here:

16 "Q Now, you told my learned friend --"

17 And this is on cross-examination:

18 "Q Now, you told my learned friend also  
19 that blood is sometimes located in the  
02:05 20 seminal fluid of a male person and you  
21 told my learned friend, the jury and His  
22 Lordship certain things that may cause  
23 this. Now, would I be correct - well,  
24 have you ever found blood in say a  
02:05 25 sixteen and a half year old boy where



1                   you have tested his seminal fluid - have  
2                   you personally ever found that  
3                   condition?

02:05 4                   A    I don't ever recollect having done it  
5                   before on a sixteen and a half year  
6                   old boy.

7                   Q    I see; you've never personally done it?

8                   A    No.

02:05 9                   Q    And I take it that - well, do you  
10                   recollect ever having done it on we'll  
11                   say a seventeen or eighteen year old boy  
12                   - in that area?

13                   A    I'm afraid I can't give you the ages  
14                   of the patients on whom this has been  
02:05 15                   done. It is I think accepted medical  
16                   knowledge that small amounts of blood  
17                   commonly find their way into seminal  
18                   fluid of males of any age beyond  
19                   puberty, in conditions particularly of  
02:05 20                   slight infection anywhere in the  
21                   genital or urinary system; and less  
22                   commonly in the events of external  
23                   injury.

24                   Q    And is it fair to say that it is less  
02:06 25                   likely - that these inflammations are



1 less likely to occur in a younger  
2 person?

3 A No, I don't think so.

4 Q There is no distinction?

02:06 5 A I don't think so.

6 Q But you haven't personally conducted any  
7 tests on any group ..?

8 A .. I have never done any series of  
9 this.

02:06 10 Q I see ..?

11 A .. but the type of inflammation of  
12 which one thinks of the urinary  
13 bladder or prostate is not uncommon in  
14 young people at all.

02:06 15 Q And this is determined by clinical  
16 testing?

17 A Yes."

18 And perhaps I'll ask you at the outset, do you  
19 have any comments on the information that  
02:06 20 Dr. Emson was providing at this time, and in  
21 particular would you agree with that information  
22 as to its accuracy?

23 A I have no comment on it. I have no idea of its  
24 accuracy. Common sense would tell me that it  
02:07 25 probably is accurate, but I have no reason to base



1           it other than common sense that this is what could  
2           happen. It's the way the body is built.

3           Q       And in particular relating to his conclusions that  
4           it was not uncommon at all to find this occurrence  
02:07 5           in a young person, particularly blood in seminal  
6           fluid, and I guess you can only speak from your  
7           experience in testing, do you recall whether you  
8           had seen an occurrence of that nature as of 1969?

9           A       I don't ever recall testing for it, I don't ever  
02:07 10          recall seeing it, and I wouldn't be looking for it  
11          anyway.

12          Q       And just based on your knowledge generally I guess  
13          of science at the time, would you have been able  
14          to comment on whether or not that was a common  
02:07 15          finding?

16          A       I couldn't comment on that at all.

17          Q       After Mr. Milgaard's trial and conviction, what's  
18          your recollection of your next formal involvement  
19          in Mr. Milgaard's situation as best you can  
02:08 20          recall, Mr. Paynter?

21          A       In his situation?

22          Q       Yes.

23          A       Formal involvement? This hearing.

24          Q       No other contact between the time of the trial and  
02:08 25          now from any interested party?



1 A Interested party? I can only recall one inquiry  
2 that I received a phone call from a television  
3 program at one time wanting to ask me about my  
4 involvement in it and whether I thought it would  
02:08 5 be worth them doing a piece on it. That program  
6 was the CTV W-Five program.

7 Q And what happened as a result of that phone call?

8 A Well, we talked about it on the phone once and  
9 maybe twice and I explained my involvement to him  
02:09 10 and his opinion I believe at that time expressed  
11 to me was that they didn't think that they would  
12 be involved in doing a program on it. That would  
13 be sometime between 1985 and '90.

14 Q And I take it then other than that contact, no  
02:09 15 other interested party contacted you through the  
16 years relating to this matter?

17 A Not that I can recall.

18 Q Did you become aware of various efforts on behalf  
19 of David Milgaard particularly during the later  
02:09 20 1980s to have his conviction reviewed?

21 A Basically what I read in the press.

22 Q And was that your source of information then in  
23 terms of anything that was happening on this  
24 matter?

02:10 25 A How do you mean that?





1 Q I guess is that where you were gathering  
2 information, you've indicated that you had some  
3 knowledge of the efforts that I spoke of to have  
4 the conviction reviewed, but I just wanted to  
02:10 5 confirm, it sounds like your sole source of that  
6 information was reading the press?

7 A The press. I also attended the trial as a witness  
8 in the case of Larry Fisher, it was probably  
9 discussed some there. I have read some documents  
02:10 10 or correspondence from other people who became  
11 involved in this case one way or another that I  
12 have obtained some information from.

13 Q And I think we're going to speak of some of that  
14 in a moment. Again, I'm just trying to isolate  
02:10 15 for now, leading up to 1992, in particular when we  
16 know that the application that I'm speaking of  
17 took place, whether you shared with us your best  
18 recollection of any contacts you may have had.

19 A Not that I can recall. I knew that there was an  
02:11 20 inquiry going on by the RCMP. I was not contacted  
21 by any of those members doing that investigation.  
22 I had retired at that time and basically, shall I  
23 say, lost interest in my past life.

24 Q Fair enough. Did you become aware of certain  
02:11 25 reports that were coming forward, and again I'm



1 going to use that time frame around the later  
2 1980s, early 1990s, but certain reports that were  
3 coming forward that were commenting upon your  
4 original serological work in this case?

02:11 5 A I became aware of it sometime. Whether it was in  
6 that time frame or not I'm not sure, but I do  
7 remember, or hearing some comments.

8 Q And we'll deal with them specifically, but  
9 generally speaking, how did you learn of those  
02:12 10 reports?

11 A I can't recall that. It may have been in  
12 discussions with former colleagues, it may have  
13 been in the press. I remain good friends with a  
14 couple of people that remained in the laboratory,  
02:12 15 there could have been discussions with them, but I  
16 can't say at this time.

17 Q Okay. I'll turn your attention to the first one  
18 that I want to look at, it's a report by a  
19 Dr. James Ferris, and if we can turn to document  
02:12 20 002486, please. It's a report dated September  
21 13th, 1988 by James Ferris directed to Mr. Wolch.  
22 We know from other evidence that this was a part  
23 of the original application to have Mr. Milgaard's  
24 conviction reviewed and just noting briefly from  
02:13 25 the first page, it would appear that Mr. Ferris



1 had the opportunity to review various original lab  
2 reports as well as some testimony from the  
3 preliminary hearing and the trial and I've taken a  
4 look at the letter, it would not appear that he  
02:13 5 had your original notes that we've been looking at  
6 today and it would not appear at least from the  
7 face of the document that he had had any contact  
8 with you in preparation for this report. Do you  
9 recall any discussions with a James Ferris in  
02:13 10 relation to your original serological work?

11 A I do not recall ever talking to Dr. Ferris.

12 Q Do you recall any request for your original notes  
13 in that context?

14 A No, I do not.

02:13 15 Q Generally speaking, and I guess we can only  
16 speculate at this point, but what would have been  
17 your response if you had been contacted by an  
18 individual who was taking a look at your original  
19 serological work?

02:14 20 A If he wanted my original notes?

21 Q Okay, yeah, sure, we can deal with that one.

22 A My response would have been no.

23 Q Okay. And what would have been your response in  
24 terms of wanting, for example, to speak with you?

02:14 25 A I would talk to him, no problem there, I would



1 talk to him, but --

2 Q Okay. So let's take a look at this report. I'm  
3 going to turn you first to page 002489, take a  
4 look at this paragraph in particular. It states:

02:14 5 "In view of the extensive disturbance of  
6 the scene and the obvious potential for  
7 contamination of the scene, I find it  
8 quite remarkable that two small pools of  
9 semen were identified four days after  
02:15 10 the initial examination. On the basis  
11 of the forensic testing that was done I  
12 have no doubt that semen was recovered  
13 as described. However, it would be most  
14 unusual for this semen not to have been  
02:15 15 contaminated by all of the tampering  
16 which had gone on with the evidence  
17 around the scene. I am surprised that  
18 with this clear inability to prove  
19 either the continuity or the integrity  
02:15 20 of these seminal samples, they were  
21 considered admissible evidence."

22 I don't know that this is something you can speak  
23 to directly, Mr. Paynter, but am I correct that  
24 you were aware of the circumstances of the  
02:15 25 retrieval of those two frozen lumps of substance?



1 A I'm not sure I was aware of how long after the  
2 occurrence that it was picked up, but again, that  
3 was not my concern, I would not be concerned with  
4 continuity until the moment I received them.  
02:15 5 Anything before that would be up to somebody else  
6 to be concerned about.

7 Q Would knowledge of those circumstances, accepting  
8 for a moment that there was the opportunity for  
9 contamination, would knowledge of those  
02:16 10 circumstances have affected your approach at all  
11 to your testing methods in 1969?

12 A No, it would not.

13 Q And would you be concerned at all about the  
14 results that were obtained as you've reported them  
02:16 15 with knowledge of those circumstances?

16 A No, it would not.

17 Q Okay. I turn you to the next page, you'll see the  
18 heading serology of seminal stains, and the first  
19 paragraph or so discusses initially the issue of  
02:16 20 blood in the semen and the hemostix test, and I  
21 believe that it's fairly consistent with what  
22 you've told us thus far. Dr. Ferris goes on to  
23 set out some assumed facts, starting about in this  
24 paragraph, and one of those is that Gail Miller  
02:16 25 was of type O blood, also that David Milgaard was



1 a type A non-secretor. Then he notes:

2 "Finally I have assumed as a fact that  
3 in 1969 the techniques available in the  
4 serology section of the R.C.M.P.  
02:17 5 Laboratory in Regina were unable to  
6 distinguish between type A and type AB  
7 blood in a case where only A antigens  
8 were detected in the semen."

9 And would that last assumption be accurate, Mr.  
02:17 10 Paynter?

11 A The last one?

12 Q Yes, that I've just read to you.

13 A The last part would be, yes.

14 Q And from those assumed facts, he goes on to --

02:17 15 A Excuse me.

16 Q Yes.

17 A I did not say that David Milgaard was a  
18 non-secretor. That can't be attributed to  
19 anything I said.

02:17 20 Q No, and I wasn't asking you to comment on that, I  
21 just wanted to highlight what the assumed facts by  
22 Dr. Ferris were, and I'm sorry if you didn't  
23 understand me, Mr. Paynter, I was simply asking  
24 for your comment on that last sentence in this  
02:18 25 paragraph which starts finally, and I think you've



1 confirmed, and you can read it again, but you've  
2 confirmed that that particular --

3 A If we're talking about that particular sentence,  
4 yes.

02:18 5 Q Is accurate, okay. And based upon those assumed  
6 facts he goes on to offer some conclusions  
7 stating:

8 "Assuming these facts there are a  
9 limited number of interpretations which  
02:18 10 can be based on this evidence."

11 Number 1, he states:

12 "Semen which is proven to contain type A  
13 antigens is most likely to have come  
14 from an individual who is blood type A  
02:18 15 and a secretor."

16 As of 1969, Mr. Paynter, would you have agreed  
17 with that conclusion?

18 A I would.

19 Q We'll move on to number 2, it states at the  
02:18 20 outset:

21 "Semen which contains type A antigens  
22 could have come from a secretor or  
23 non-secretor and have been contaminated  
24 with antigens from type A blood. In  
02:19 25 this case it is alleged that the



1                   apparent bloodstaining of the seminal  
2                   fluid recovered near the scene must have  
3                   been contaminated by blood from David  
4                   Milgaard."

02:19 5                   I turn you to the next page, there's a portion  
6                   where he indicates from his review that there was  
7                   no evidence to suggest such an injury, but for  
8                   your purposes, if we could look at that short  
9                   portion, he states:

02:19 10                  "I have also spoken to a number of  
11                  personal contacts in other forensic  
12                  science laboratories and on the basis of  
13                  their experience and my own experience,  
14                  we are not familiar with a single case  
02:19 15                  where seminal fluid or stains have been  
16                  found to be contaminated by blood from  
17                  the alleged assailant."

18                  Again, Mr. Paynter, do you recall whether you had  
19                  had experience with such a finding as of 1969?

02:19 20                  A                  I believe I indicated earlier that I never tested  
21                  any samples for it, so I can't really say whether  
22                  I did or I didn't.

23                  Q                  Okay. I turn your attention to point number 3,  
24                  move down the page, just at the outset of the  
02:20 25                  paragraph he states:





1 "In my opinion there is clear evidence  
2 from the circumstances of the scene and  
3 also from the apparent contamination of  
4 the scene by the victim's blood that if  
02:20 5 this seminal sample was contaminated  
6 with blood, it was almost certainly  
7 contaminated with type O blood from the  
8 victim."

9 And just for starters, accepting that theory,  
02:20 10 again that would be consistent with your serology  
11 as conducted in 1969?

12 A It would be, and common sense would dictate that  
13 if she would have been, the way she was murdered,  
14 that there would be a considerable amount of her  
02:20 15 blood laying around, so it would be a fairly  
16 logical conclusion.

17 Q And speaking from a scientific testing perspective  
18 though, would there have been any method that  
19 would tend to suggest one scenario, for example,  
02:21 20 as more likely than the other?

21 A Which are the two scenarios?

22 Q Blood from the victim versus blood from the  
23 assailant.

24 A Well, you could almost guarantee there would be  
02:21 25 blood from the victim, and again, there would have



1 to be an injury to the assailant to cause him to  
2 bleed or those facts mentioned by Dr. Emson which  
3 I have no knowledge of.

4 Q Okay. And then point number 4 he indicates:

02:21 5 "It is not possible to completely  
6 exclude the semen sample as having come  
7 from a type AB secretor assailant. Such  
8 an assailant could not be David  
9 Milgaard."

02:21 10 And just in terms of the first sentence, is that  
11 something you would have agreed with?

12 A Yes, I would.

13 Q In 1969?

14 A Yes, I would.

02:21 15 Q If we turn to the last page, 002492, and just this  
16 paragraph right there, Dr. Ferris writes:

17 "On the basis of the evidence that I  
18 have examined, I have no reasonable  
19 doubt that serological evidence  
02:22 20 presented at the trial failed to link  
21 David Milgaard with the offence and that  
22 in fact, could be reasonably considered  
23 to exclude him from being the  
24 perpetrator of the murder."

02:22 25 Would you agree with that statement, Mr. Paynter,



1 in terms of what you knew in 1969?

2 A My statement there would be that the evidence did  
3 nothing to either link him to it or exclude him  
4 from it.

02:22 5 Q Based again on the science and the testing that  
6 you applied, did you have any ability to comment  
7 on likelihoods at that point in time?

8 A No, I did not.

9 Q And would you have the ability to comment on  
02:23 10 whether the bulk of the evidence more strongly  
11 suggested that David Milgaard was not the donor of  
12 the semen versus being the donor of the semen?

13 A If I had conclusive evidence that he was a  
14 non-secretor, then I would have believed that it  
02:23 15 leaned toward eliminating him, yes. I did not  
16 have that evidence in 1969.

17 Q I'm not sure if this is a fair question for you,  
18 Mr. Paynter, but I'll put it to you anyways.  
19 If -- in which direction in your view, based upon  
02:23 20 your findings in 1969, did the balance tip?

21 A I never considered that and I don't believe I have  
22 a comment on it. It wasn't my position to weigh  
23 the evidence and decide what the evidence was. I  
24 received the exhibits, did my examination,  
02:24 25 reported my results and that was it. I didn't



1 make any comments.

2 Q And perhaps I should state it a little more  
3 fairly, and again let's not speak of Mr. Milgaard  
4 necessarily, but when I talk about the bulk of the  
02:24 5 evidence tipping the balance towards a  
6 non-secretor being the donor of the semen versus a  
7 secretor?

8 A Well, I mentioned that it was probably from a  
9 secretor and if you want to consider that as being  
02:24 10 more towards eliminating him on that basis, it  
11 would, yes.

12 Q There's a follow-up report that I don't need to  
13 refer to. I'm going to turn you next to another  
14 document that arose during the course of these  
02:25 15 various reports that were coming forward and I'll  
16 turn your attention to 016920, please, and it's  
17 from Patricia Alain of the serology section of  
18 the, I believe the central federal lab, and it's a  
19 memo to Mr. Eugene Williams discussing the case  
02:25 20 and there's a short portion on this first page  
21 that I wanted to bring your attention to, and I  
22 should have pointed out the date, I believe the  
23 date is August 8th, '89 and I'll read this to you.  
24 Ms. Alain states:

02:25 25 "Another possibility of "A" antigen



1 source that may not have been eliminated  
2 or could not be eliminated, unless one  
3 had access to the notes of S/Sgt.  
4 Paynter is contamination due to a  
02:26 5 bacterial soil or other environmental  
6 source. The possibilities, that other  
7 sources such as this were not explored  
8 in the trial as recorded in the  
9 transcript."

02:26 10 And were you aware of this possibility when you  
11 testified, Mr. Paynter?

12 A I don't believe so, no.

13 Q Do you accept though that that is valid in terms  
14 of what Ms. Alain is saying here?

02:26 15 A I have no reason not to.

16 Q Not something you were aware of though in 1969; is  
17 that correct?

18 A That is correct.

19 Q Okay. I'll turn you to the next page, it's  
02:26 20 016921, and just at the bottom of this paragraph  
21 speaking of the saliva samples, it indicates:

22 "In other words, the absence of "A" or  
23 "B" antigens in a stain that has been  
24 identified and proven to contain saliva  
02:27 25 does not definitely prove that a person



1 is a non-secretor."

2 And I think we've covered this, Mr. Paynter, but  
3 were you aware of this, accepting it as true,  
4 were you aware of this at the time of trial?

02:27 5 A Not in 1969, no.

6 Q You were not aware of that?

7 A Pardon me, I was aware of that, yes, this part  
8 here.

9 Q Okay. And sorry, what were you thinking or  
02:27 10 wanting to say?

11 A I was thinking of something completely different.

12 Q And then if we go down to, a little bit further  
13 down the page, right there, I'll read you a short  
14 portion starting at the second sentence, it  
02:27 15 states:

16 "In his transcript --"

17 Page such and such,

18 "-- he states that he has found that  
19 false positive reactions can be obtained  
02:27 20 with "certain green vegetables and with  
21 leather". As well, it is known that  
22 chemicals such as bleach, and oxidized  
23 metals, such as copper can give a  
24 positive reaction."

02:28 25 And I take it you weren't aware of those



1 possibilities, again accepting them as true in  
2 1969, Mr. Paynter?

3 A I was not aware of them.

4 Q Then continuing on to the next paragraph, stating  
02:28 5 at the beginning:

6 "If the substance in Exhibit I1 did  
7 contain "A" blood, the amount of blood  
8 present would not have been sufficient  
9 to give an "A" antigen result."

02:28 10 I'll ask the question at the outset whether you  
11 agree with that comment.

12 A Well, at the time I felt that it did and I have  
13 had no reason since to believe that it didn't.

14 Q And help me along in understanding this, but I  
02:29 15 think the suggestion here is that there was no  
16 doubt enough A antigen present to in fact detect  
17 the A antigen --

18 A That is correct.

19 Q -- in I1, and I think the suggestion is made that  
02:29 20 if indeed there was blood, whatever amount of  
21 blood was there wouldn't have been sufficient to  
22 actually give that result?

23 A I believe that is what she is saying, yes.

24 Q Which I guess would lead to the conclusion again  
02:29 25 that the presence of the A antigen did not come



1 from blood, but in fact from the donor of the  
2 semen?

3 A That again is what she is saying, yes.

4 Q And what -- did you have any thought about that  
02:29 5 possibility in 1969 as best you can recall?

6 A My thoughts in 1969 would have been that it came  
7 from either the semen or, if not there, there was  
8 enough blood contamination that it could have come  
9 from a group A blood.

02:30 10 Q Okay. I'll turn your attention to a memo which  
11 followed shortly after this document that we were  
12 looking at, it's document 002473, just reading the  
13 portions that I had highlighted on this document.  
14 We may have covered this, Mr. Paynter, just give  
02:30 15 me a moment. I think I'm satisfied with what I  
16 had been going to ask you in relation to that  
17 document.

18 I'll turn your attention to a  
19 further report by Dr. Markesteyn and that's  
02:31 20 document 004772. If we turn to the next page,  
21 it's the beginning of the report. You'll see it's  
22 dated, Mr. Paynter, June 4th, 1990 directed to  
23 David Asper. Can you go back up to the top of the  
24 page, please. Were you aware of a Dr. Markesteyn  
02:31 25 previously, Mr. Paynter?





1 A I believe I had heard of the name, yes.

2 Q Okay. I would like to point out a few portions of  
3 his report for your comment as well. If we could  
4 turn to page 004776, please, actually we can go to  
02:32 5 004778. You will note the heading at the top,  
6 Seminal Stains At Scene (Yellowish Stains in the  
7 Snowbank), and starting at the second paragraph  
8 Dr. Markesteyn indicates:

9 "Yellowish stains in snowbanks most  
02:32 10 commonly find their origin, not in human  
11 ejaculates, but in urine, most commonly  
12 of canine origin. I have been informed  
13 that male dog urine often contains  
14 semen. "Unused" semen in dogs is not  
02:32 15 reabsorbed but is secreted in the  
16 urine."

17 Skipping ahead one sentence:

18 "Dogs have antigens which serologically  
19 cross-react with human A-antigen."

02:33 20 Do you recall whether you considered the  
21 possibility that this substance was dog urine in  
22 1969, Mr. Paynter?

23 A I would doubt very much if I did. I don't recall  
24 it.

02:33 25 Q I think we'll, and we'll follow this through, I'm



1 just going to take you down to the bottom of this  
2 paragraph here and read you some further portions.

3 Dr. Markesteyn indicates:

4 "In order to reach a firm scientific  
02:33 5 conclusion whether the semen retrieved  
6 from the snowbank four days after the  
7 assault was indeed human one needs to  
8 review the methodology used by the  
9 serologist at that time and thus one  
02:33 10 needs to review the notes that were made  
11 at that time.

12 I have been informed that the  
13 original notes on which this evidence by  
14 Staff Sgt. Paynter was based are no  
02:33 15 longer available. Staff Sgt. Paynter  
16 informed me that he does not remember  
17 (some twenty years after the event)  
18 whether or not he performed specific  
19 tests to determine the human origin of  
02:34 20 these specimens."

21 Do you recall any discussion of this nature with  
22 Dr. Markesteyn, Mr. Paynter?

23 A I do not recall ever talking to Dr. Markesteyn.

24 Q And if, indeed, he had asked you about testing the  
02:34 25 human origin of the substances; what would your



1 response have been?

2 A My response would have been to tell him exactly  
3 what I did in the case, and what my conclusions  
4 was, and what I based it on.

02:34 5 Q And would you have been able to confirm for him or  
6 offer a conclusion that you had tested for human  
7 origin?

8 A Yes, I believe we've gone through that a few times  
9 today on what I actually did, and that would have  
02:34 10 been what I would have told him.

11 Q Okay. And do you recall a request being made, at  
12 any point during this time, for your notes for Mr.  
13 -- for Dr. Markesteyn's purposes?

14 A I do not recall them ever being mentioned, I do  
02:35 15 not recall talking to him, and they were available  
16 at that time, although, like with Dr. Ferris, they  
17 probably wouldn't have been provided to him  
18 without some court order.

19 Q You don't recall, though, indicating that the  
02:35 20 original notes were no longer available?

21 A I don't even recall talking to him.

22 Q Okay. I'll read the next paragraph as well:

23 "The fact that the semen contained an  
24 A-antigen does not make it human nor, I  
02:35 25 am informed, does the enzyme test for



1 phosphatase used at that time make it  
2 human. The human antibody test doesn't  
3 make it human if there was any  
4 contamination with human blood. The  
02:35 5 only way of excluding this semen from  
6 being of non-human origin would have  
7 been the morphology and/or species  
8 specific antigen-antibody reaction  
9 tests."

02:36 10 And I'm going to step back for a moment, here,  
11 Mr. Paynter. Were you aware -- and I think  
12 you've confirmed this for us -- but you were  
13 aware, generally, of this assertion that the  
14 substance that you may have tested in 1969 was,  
02:36 15 in fact, dog urine?

16 A I became aware of his assertion at some time much  
17 later, probably in about the time of this letter.

18 Q And do you recall what your reaction was to that?

19 A Well, at the time, I was wondering why he would  
02:36 20 question my results when he had not even seen the  
21 exhibit, and he was able to determine it was dog  
22 urine without looking at it, so I did not have a  
23 lot of faith in what he was saying.

24 Q Okay. And in the midst, the middle of that last  
02:36 25 paragraph, he says:



1 "The human antibody test doesn't make it  
2 human if there was any contamination  
3 with human blood."

4 Would the human antibody test be the test we have  
02:37 5 been seeing as AH positive?

6 A It would be --

7 Q Anything else?

8 A -- but it also, as described here, he refers to it  
9 as a 'species specific antigen-antibody reaction  
02:37 10 tests', and that was basically what it was.

11 Q Okay. And I wanted to move to that last sentence.  
12 He says:

13 "The only way of excluding this semen  
14 from being of non-human origin would  
15 have been the morphology and/or species  
16 specific antigen-antibody reaction  
17 tests."

18 And maybe we'll deal with the second one first;  
19 is that a test that you conducted in 1969  
02:37 20 according to your notes?

21 A I believe it was.

22 Q And is that the AH positive test we have been  
23 referring to?

24 A I believe that would be referred to as that kind  
02:37 25 of a test, yes.



1 Q And, in terms of his mention of the morphology  
2 test, would that test have been conducted?

3 A That would be the identification of the human  
4 spermatozoa using a microscope, and that was done  
02:38 5 as well.

6 Q And the implication I guess being, here, that the  
7 morphology of human spermatozoa is  
8 distinguishable --

9 A It was.

02:38 10 Q -- from that of dog spermatozoa?

11 A It was quite definite under the microscope that we  
12 used at the time, yes.

13 Q And you would have recognized that difference at  
14 that time then?

02:38 15 A Yes, I would.

16 Q Okay. I turn your attention to the next page of  
17 that report, please. I just want to look at a  
18 single paragraph, being the middle paragraph, it  
19 indicates -- Dr. Markesteyn indicates:

02:38 20 "I agree with the opinion expressed by  
21 Mr. Brain Jay that if blood  
22 contamination of type A had taken place,  
23 but that the amount of blood was so  
24 little that it would be Hemostix  
02:38 25 positive and haemochromogen negative,



1 the amount of blood would also be too  
2 small to show the presence of  
3 A-antigen."

4 Am I correct that this is just another way of  
02:39 5 stating what Ms. Alain had pointed out in that  
6 previous report that we looked at?

7 A It could be.

8 Q How do you interpret this paragraph?

9 A I don't agree with it.

02:39 10 Q And on what basis?

11 A My experience of doing the tests.

12 Q Can you be a little bit more detailed with me?

13 A Well when we did the, when we did our tests, you  
14 could get a positive result for our antigens doing  
02:40 15 our absorption inhibition method on blood stains  
16 that were diluted, and they were diluted. But  
17 when we did it we didn't make them full strength,  
18 they were often diluted to the point where the  
19 liquid was clear and we would still get a reaction

02:40 20 to the tests even though -- to the point where  
21 they were diluted to where they were clear, it  
22 would be absolutely impossible to do the  
23 haemochromogen tests that we did at that time.

24 Q Okay. And if we carry that further to the  
02:40 25 circumstances of this situation, though, comparing



1 the amount, if I can put it that way, of the A  
2 antigens which were detected in the seminal sample  
3 -- are you following me so far?

4 A I think so.

02:40 5 Q If we then note that you conducted a positive test  
6 for the presence of blood, but there was an  
7 insufficient amount to go forward with the  
8 haemochromogen test, would that be consistent  
9 with -- and, again, if I can say it this way --  
02:41 10 with the amount of A antigens that you had already  
11 determined to be present in the seminal sample?

12 A I don't think I can answer that question. Umm, I  
13 believe I was of the opinion that it was possible  
14 that there was enough there to interfere with the  
02:41 15 reaction to the point where I could not positively  
16 say what it was or what was causing it.

17 Q Okay. That was your knowledge as of 1969?

18 A That is correct.

19 Q Okay. I'll show you one article that followed in  
02:42 20 and around this time. There were some other press  
21 articles but I have picked out one of them,  
22 Mr. Paynter, I'll refer your attention to document  
23 039070, a *Saskatoon Star-Phoenix* article June 6  
24 th, 1990, *Key evidence in conviction called*  
02:42 25 *flawed*, and I'll just point out a couple of





1 portions starting here, please. Those two  
2 paragraphs note:

3 "Alleged semen found in the snow at the  
4 scene four days after the murder, which  
02:42 5 was linked to Milgaard, could have been  
6 contaminated by dog urine.

7 The revelation is contained in  
8 a review of forensic evidence by  
9 Manitoba's chief medical examiner, to be  
02:43 10 released today."

11 Skip past that next paragraph and continue here,  
12 please. It states:

13 "In the report, Dr. Peter Markesteyn  
14 says investigators failed to eliminate  
02:43 15 the possibility that the two yellowish  
16 frozen lumps were dog urine. They were  
17 found by then lieutenant Joe Penkala-now  
18 Saskatoon's police chief.

19 "The evidence doesn't exclude  
02:43 20 it (as dog urine)," Markesteyn said from  
21 Winnipeg. "There are various sources of  
22 yellow stains in a snowbank."

23 David Asper, Milgaard's lawyer,  
24 is more blunt about the report.

02:43 25 It concludes that what Penkala



1 found in the snow could well be dog  
2 urine," said Asper."

3 And were you aware of this article or articles  
4 like this, Mr. Paynter, in and around this time?

02:43 5 A No I wasn't.

6 Q And were you ever contacted by the press for  
7 comment in relation to this issue at all?

8 A I may have been, but I don't recall it.

9 Q And I think we've covered it but your position, if  
02:44 10 you were contacted, would be that you had excluded  
11 that possibility in 1969 during the course of your  
12 testing?

13 A My response would have been the same as it was at  
14 the trial, this is what I found, and this is what  
02:44 15 was there as far as I was concerned, and it wasn't  
16 dog urine.

17 Q I don't think I have any questions, further  
18 questions following from that for you,  
19 Mr. Paynter. Just give me a moment, there are a  
02:44 20 couple of other documents.

21 I turn your attention to  
22 document 185365, just a short portion of this  
23 page, a letter from Patricia Alain again dated  
24 June 12, 1990 to Mr. Eugene Williams commenting on  
02:45 25 Dr. Markesteyn and Dr. Ferris, and just a short



1           portion in this paragraph I'll direct your  
2           attention to. It states:

3                       "From personal experience, I have noted  
4                       that some canine blood will carry A-like  
02:45 5                       antigens. I cannot make any comments  
6                       regarding canine urine or semen. The  
7                       morphological differences of human  
8                       spermatozoa and canine spermatozoa are  
9                       several. The experienced examiner would  
02:45 10                      not have any problem in distinguishing  
11                      between human and canine spermatozoa."

12           Would you agree with that conclusion, or would  
13           you have agreed with that conclusion as of 1969,  
14           Mr. Paynter?

02:45 15           A           I was not aware of and I still have no knowledge  
16                      of the A-like antigens in canine blood. I would  
17                      agree with the last part about the differences in  
18                      the spermatozoa, yes.

19           Q           Okay. I turn your attention to document 009789,  
02:46 20                      it's a letter to Mr. Murray Brown, Director of  
21                      Appeals, dated January 3rd, 1992. The letter is  
22                      from David Asper and just one portion of this  
23                      correspondence I wanted your comment on. If we  
24                      could turn to the next page, please, and focus in  
02:46 25                      on the top of this paragraph it states:



1 "Finally, it is our understanding that  
2 following the presumptive test for blood  
3 in the alleged semen samples, a positive  
4 result was obtained. This alone,  
02:46 5 however, would not chemically identify  
6 the presence of blood, and we understand  
7 that it would naturally follow that a  
8 secondary screening test called a  
9 haemachromagn test would be performed.  
02:47 10 We have heard that such a test was in  
11 fact performed and resulted in the  
12 negative for the presence of blood."

13 To the best of your knowledge, Mr. Paynter, was  
14 this second test performed?

02:47 15 A Not by myself.

16 Q Do you have any idea on what basis Mr. Asper is  
17 making this suggestion that the second test was  
18 performed with a negative result?

19 A No I don't.

02:47 20 Q Okay.

21 COMMISSIONER MacCALLUM: What was the date  
22 of the letter, please?

23 MR. HARDY: The date was January 3rd, 1992.

24 COMMISSIONER MacCALLUM: Thanks, and it was  
02:47 25 addressed to whom?



1 MR. HARDY: It was addressed to Murray  
2 Brown, actually, Director of Appeals, attention  
3 Murray Brown.

4 COMMISSIONER MacCALLUM: Okay.

02:48 5 MR. HARDY: I know we're a little bit early  
6 for the break, Mr. Commissioner, but this might  
7 be a good spot if it suits you?

8 COMMISSIONER MacCALLUM: Yes, it does.

9 MR. HARDY: Okay.

02:48 10 *(Adjourned at 2:48 p.m.)*

11 *(Reconvened at 3:09 p.m.)*

12 BY MR. HARDY:

13 Q Mr. Paynter, are you aware that further tests were  
14 again conducted on a new sample of saliva from  
03:09 15 David Milgaard in 1992 by the RCMP Central  
16 Forensic Lab, and that these tests concluded that  
17 David Milgaard was in fact an A secretor?

18 A I was aware of the fact that he had been  
19 determined that he was an A secretor.

03:09 20 Q Which was contrary, of course, to your original  
21 findings in 1969? Perhaps I stated that too  
22 bluntly, you can restate it for me.

23 A I think you stated it a little bit more than what  
24 I said.

03:10 25 Q Okay. How would you state that?



1 A Umm, it would be contrary to what I found in 1969,  
2 but I did not say that he was a non-secretor, I  
3 said I did not find any antigens. I did not say  
4 they were not there.

03:10 5 Q And in fairness, during your trial testimony,  
6 though, I believe you indicated that the results  
7 indicated that the donor was a non-secretor?

8 A It indicated that but it was not proof positive.

9 Q Okay. And, in terms of David Milgaard being a  
03:10 10 secretor, were you surprised at all by that  
11 finding?

12 A No.

13 Q Had you previously considered that possibility?

14 A I hadn't really thought about it.

03:10 15 Q I don't think we need to look at the actual lab  
16 report, but just for reference, the report that  
17 sets out that finding is doc. ID 019279.

18 And following that finding,  
19 Mr. Paynter, a further report respecting the  
03:11 20 original serological findings was prepared by a  
21 Dr. Colin Merry from Winnipeg on March 6th, 1992,  
22 and perhaps we can turn to his report. It's  
23 document ID 032355, you will note the date of that  
24 report is March 6th, 1992 directed to David Asper  
03:11 25 and, again, this is by Dr. Colin Merry. Are you



1 familiar with that name?

2 A I had not heard that name until I was reviewing  
3 some material just prior to the hearing here.

4 Q Okay. And, again, I just want to read you a  
03:11 5 couple of portions of Dr. Merry's report.

6 COMMISSIONER MacCALLUM: I can't see his  
7 last name; would you spell it for me, please?

8 MR. HARDY: Oh sure, I'm sorry, it's  
9 M-E-R-R-Y.

03:12 10 COMMISSIONER MacCALLUM: Thanks.

11 BY MR. HARDY:

12 Q Actually on the first page, just picking up on the  
13 last word there, you can actually move to the next  
14 page, it indicates:

03:12 15 "From the transcript it appears unlikely  
16 that the original specimen of saliva  
17 obtained from Mr. Milgaard was  
18 immediately heat inactivated, as is  
19 required in determining antigen secretor  
03:12 20 status. Failure to do this would result  
21 in the enzyme pryalin, which is present  
22 in saliva, digesting the A-antigen  
23 before the specimen was examined. This  
24 would account for the false negative  
03:12 25 A-antigen secretor status obtained."



1 And were you aware of this technique in 1969 ,  
2 Mr. Paynter?

3 A No I was not.

4 Q Would you agree with his comment as presented  
03:13 5 here?

6 A I have no reason to disagree so I would have to  
7 agree with it.

8 Q And I think you indicated earlier on that you did  
9 become aware, at some point in time, that the  
03:13 10 method by which you were directing the retrieval  
11 of saliva samples, and the dealing with that  
12 sample afterwards, was perhaps the incorrect  
13 method --

14 A I believe so, yes.

03:13 15 Q -- for purposes of testing later for ant -- the  
16 presence of antigens?

17 A Yes.

18 Q And we don't need to delve into it too deeply, but  
19 how did that understanding develop, then?

03:13 20 A How did I become aware of it?

21 Q Yes?

22 A I don't know how I became aware of the fact that  
23 that was an improper method. I think it was  
24 probably through general conversation with a  
03:13 25 friend that I had still employed at the laboratory





1           that I found out about Mr. Milgaard being a  
2           secretor. But, again, I don't know when or the  
3           circumstances but that would be my best guess.

4           Q       And I guess I'm talking, though, in terms of  
03:14 5           learning about the proper technique?

6           A       I'm not sure when --

7           Q       -- in relation to saliva samples?

8           A       I'm not sure when I became aware of that.

9           Q       Okay. I'm not going to review very many portions  
03:14 10           from Dr. Merry's report. You've had a chance,  
11           though, to take a look at this report; have you?

12          A       I think I read it, yes.

13          Q       I'll turn your attention to page 032357, I believe  
14           we've dealt with most of this already, it's under  
03:14 15           the heading on the previous page Frozen lumps of  
16           "yellowish substance" found in snow bank, later  
17           thawed to a "yellowish liquid". Just in this  
18           middle paragraph, here, it indicates:

19                    "This "yellowish frozen  
03:15 20                    substance/yellowish liquid" could only  
21                    have been urine which contained  
22                    spermatozoa. There is no other  
23                    yellowish body fluid which contains  
24                    spermatozoa!"

03:15 25           And I think we've covered this; your testing



1 procedures in 1969 confirmed that that substance  
2 was of human origin?

3 A There has been no doubt in my mind, or no doubt in  
4 my mind then or since, that that is what I found.

03:15 5 Q And I take it from your previous answer you were  
6 never contacted by Dr. Merry for your comment in  
7 relation to this matter?

8 A And as I say, I don't even -- other than reading  
9 this piece of correspondence in the material that  
03:15 10 you gave to me, I do not have any idea who he is  
11 or anything about him, no.

12 Q Okay. And, Mr. Paynter, were you aware of an  
13 investigation that was conducted by the RCMP in  
14 1993 in relation to alleged wrongdoings  
03:16 15 surrounding the David Milgaard matter?

16 A I was aware that there was an investigation going  
17 on, yes.

18 Q Were you ever interviewed or contacted by an RCMP  
19 member in relation to that investigation?

03:16 20 A No I wasn't.

21 Q Okay. Mr. Commissioner, I think I'll just refer  
22 to some documents, I don't see any need to review  
23 those documents but I'll identify them for  
24 reference sake in relation to the RCMP review, and  
03:16 25 they are 045807, 035878, 045969, and 041902.



1 COMMISSIONER MacCALLUM: What was the first  
2 one, please, 04?

3 MR. HARDY: 045807.

4 COMMISSIONER MacCALLUM: Okay, thanks. And  
03:17 5 they all relate to the '93 RCMP investigation?

6 MR. HARDY: That's correct.

7 BY MR. HARDY:

8 Q And Mr. Paynter, are you aware, as the 1990's  
9 continued, of attempts to conduct DNA analysis in  
03:17 10 relation to the original items in connection with  
11 this case?

12 A I believe I was aware that it was going on.

13 Q And were you aware that ultimately a report was  
14 produced by a forensic scientist by the name of  
03:17 15 Michael Barber from England?

16 A I did not -- I was not aware of his name, but I  
17 was aware that they had come up with a result,  
18 yes.

19 Q And were you ever given an opportunity to review  
03:18 20 that report?

21 A Nope.

22 Q And I'll just refer, for reference to the  
23 documents, 231077, and I don't need to --

24 A Pardon me, I reviewed the report during this  
03:18 25 previous last couple of weeks, but I was not made



1           aware of it, of anything before that.

2           **Q**       Okay. That's how I understood you, Mr. Paynter.  
3                    And if I could summarize it, and the report will  
4                    be there for all of us to take a look at, but the  
03:18 5                    tests conducted detected semen and sperm on  
6                    Miss Miller's panties beyond the semen that you  
7                    had detected in 1969, and as well on Miss Miller's  
8                    dress, and furthermore that there was semen on the  
9                    coat but no sperm. And you've likely been asked  
03:18 10                  this question before, but if one were to ask you  
11                  how or why you didn't detect those additional  
12                  semen spots in 1969, how would you respond?

13           **A**       My response at the time would have been I don't  
14                    know how or why I didn't detect it, otherwise I  
03:19 15                    would have done it, umm, and even since then I  
16                    don't know why or how, but they obviously weren't  
17                    visible in the tests that I used. And I believe,  
18                    reading some of the other correspondence, there  
19                    was several other people that came to the same  
03:19 20                  conclusion that I did, and that the people in  
21                  Britain did the acid phosphatase test basically  
22                  right on the material, doing the whole garment,  
23                  and that was how they located 'em. They were not  
24                  visible to the naked eye to them, and that test  
03:19 25                  that they used at that time was not in use in



1 1969, I would say I started using it -- it would  
2 be -- I'm going to put 1973 plus or minus a year  
3 or two.

4 Q And you indicated that that test would test the  
03:20 5 entire garment or the entire article?

6 A Well you could test as much of it as you wanted  
7 to, sometimes we would test the whole garment,  
8 sometimes we would test areas.

9 Q And not something you did in 1969 though?

03:20 10 A No, it was not.

11 Q And just going back to 1969 for a moment, and I  
12 guess I'm asking you to think in terms of the  
13 investigative considerations, would there have  
14 been any investigative purpose for continuing to  
03:20 15 look at the numerous items for semen once semen  
16 had been found on the panties?

17 A Our general assumption at that time, the best  
18 result in a sexual assault case, the best evidence  
19 we could find would be seminal fluid found in the  
03:20 20 vaginal aspirations or slides made from that. The  
21 second best would be on her clothing from that  
22 immediate area. If we go down to the point where  
23 we were saying there was seminal fluid on the car  
24 seat, I personally considered it a waste of my  
03:21 25 time and everybody else's, but sometimes we did it



1 to keep people happy, so the best evidence  
2 depended on how far away you got from the actual  
3 point, and once I determined that there was  
4 seminal fluid on the panties, it would not have  
03:21 5 added anything that I could have said at that time  
6 by finding seminal fluid on the dress, jacket or  
7 any of her other clothing as far as a sexual  
8 assault goes.

9 Q Okay. Of course no DNA analysis at that point in  
03:21 10 time?

11 A There was none.

12 Q Am I correct, Mr. Paynter, that you testified at  
13 the preliminary hearing and trial of Larry Fisher?

14 A I did.

03:21 15 Q And I do not have any portions of those  
16 transcripts to review with you, I'll simply  
17 identify the transcripts for the record, they are  
18 IDs 315727 and 311611, and, Mr. Paynter, those are  
19 all the questions I have. Thank you for your  
03:22 20 patience. My friends may have some questions for  
21 you.

22 MR. HODSON: I believe, Mr. Commissioner,  
23 there may not be any questions. Oh, sorry.

24 MR. GIBSON: Just a couple.

03:22 25 MR. HODSON: Ms. Knox, Mr. Gibson. Anybody



1           else?

2           **BY MS. KNOX:**

3           **Q**       Mr. Paynter, as you know from an introduction that  
4                   was made yesterday morning by Mr. Caldwell, my  
03:23 5                   name is Catherine Knox and I act as counsel for  
6                   him, and with the exception of that introduction  
7                   yesterday and the time we've spent in this room  
8                   together, would it be fair to say that you and I  
9                   have never met, don't know each other?

03:23 10          **A**        I would say so, yes.

11          **Q**        You managed to have that relief in your life. I  
12                   apologize that I'm going to be a little bit  
13                   muddled here, but somehow this came up on me a  
14                   little faster than I expected, but I wonder first  
03:23 15                  if I could ask staff to bring up document number  
16                  045918, or 917 I think would be the first page.  
17                  Now, Mr. Paynter, do you remember being shown or  
18                  being referred this morning by Mr. Hardy to some  
19                  notes that have been identified, he said that he  
03:23 20                  believed to be the notes of Mr. Caldwell, and  
21                  which I can confirm to you are handwritten notes  
22                  of Mr. Caldwell, the date on the top of the page  
23                  indicating that he made them on the 14th of  
24                  January, 1970 which just would be around the time  
03:24 25                  he was preparing for the commencement of the



1 trial.

2 A Yes.

3 Q Okay. And if I could refer to page 2 of the  
4 notes, please. You indicated that you essentially  
03:24 5 agree with what's contained in his notes being  
6 correct except for a small part that appears to  
7 have been inserted because it's -- sorry, I didn't  
8 outline that very well, it's crowded together in  
9 the last two lines in a single-spaced fashion  
03:24 10 where all his other notes are double spaced. Do  
11 you see the part:

12 "Because of the presence of "A"  
13 antigens, it cannot be Gail Miller's  
14 blood which is type "O"."

03:24 15 And you indicated that that's not necessarily  
16 correct, a correct statement on his part, or a  
17 correct note on his part I should perhaps better  
18 say?

19 A Because it was A antigens, the A antigen did not  
03:24 20 come from her blood.

21 Q Right.

22 A But I'm not saying that her blood wasn't present.

23 Q Right. So basically what he's, he may not be as  
24 clear on because of his absence of a scientific  
03:25 25 background is that distinction, but there's no





1           doubt that the A antigen could not have come from  
2           Gail Miller?

3           A        Oh, no doubt.

4           Q        Okay. Now, sir, you indicated that you didn't  
03:25 5           have a meeting with him at this point in time.  
6           You also indicated that you knew him fairly well,  
7           that you and he worked together a lot before then  
8           and subsequently. Was it an uncommon or a  
9           practice that if he as a prosecutor had a question  
03:25 10          about a scientific report that had been delivered  
11          by your lab, that he might pick up the phone and  
12          call and have a chat with you, or if you were down  
13          here on another case he might talk to you about  
14          something to do with a current or a pending case?

03:25 15          A        There would be no reason whatsoever of why it  
16          couldn't have happened, but I do not have any  
17          recollection of it ever happening.

18          Q        So my point only is that while you don't have a  
19          memory of talking to him, it's possible that in  
03:25 20          part these notes may have been as a result of  
21          efforts on his part to get you to give him a clear  
22          understanding of evidence that he had to present  
23          to a jury a short while later?

24          A        That is possible. My personal opinion is this  
03:26 25          would probably be made up from having my report



1 plus probably talking to the police officer that  
2 was responsible for the case preparation, but I  
3 cannot say that it wasn't me.

03:26 4 Q And I'm going to suggest to you that there was a  
5 further source of information that could have come  
6 from you and that in fact was the transcript of  
7 your evidence given at the preliminary inquiry  
8 four months earlier, you testified on September  
9 5th, 1969?

03:26 10 A That would definitely be available to him.

11 Q And available to you as well prior to giving your  
12 testimony at trial if you wanted to review it?

13 A If I wanted it, I could have asked for it. I  
14 never did. It may have been given to me before  
03:26 15 the trial or it may not have. It was available.

16 Q In his attempt to prepare he had your report, he  
17 had the opportunity to examine you and hear you  
18 cross-examined at the preliminary inquiry in  
19 September of '69 and he may or may not have had  
03:27 20 subsequent conversations with you that formulated  
21 the information that he put into trying to get a  
22 comprehensive explanation for this scientific  
23 evidence for the jury?

24 A That's correct.

03:27 25 Q Okay. Now, sir, with respect to the, what was



1 said by him in the courtroom, at the trial, if I  
2 could refer to page 041948, please, and if I could  
3 just refer to this question that's right here, if  
4 we could have that brought out, please. Now,  
03:27 5 there's a question directed to you by Mr. Caldwell  
6 there, and it says:

7 "Q Now, Staff - and I expect you have told  
8 the Court but just to be clear on this -  
9 are "A" antigens any part or is there  
03:27 10 any way that they can be obtained from  
11 "O" blood?"

12 And your answer to that was, "No sir." Do you  
13 remember giving that evidence?

14 A I don't remember giving it, but --

03:27 15 Q Was that correct information that you gave him at  
16 the time?

17 A It was.

18 Q And is it in part what he summarized in that one  
19 quick note at the bottom of those earlier  
03:28 20 handwritten notes that we just referred to, that  
21 the A antigen could not have come from Gail  
22 Miller's blood because she was O blood?

23 A That could be the very reason why he did write  
24 that, yes.

03:28 25 Q Now, I've reviewed, and I've done a quick review



1 of the rest of your transcript and I don't see  
2 anywhere else that there's reference to it, but  
3 essentially right here you didn't offer any more  
4 information than very specifically that the A  
03:28 5 antigen could not have come from Gail Miller, or  
6 from O blood, which we knew through other evidence  
7 you had earlier given was the case for both Ron  
8 Wilson and Gail Miller?

9 A I felt that was as clear as I could probably make  
03:28 10 it.

11 Q Now, sir, there has been a great deal of review  
12 done over the years and some done in the evidence  
13 that has been tendered this morning through your  
14 cross-examination and your cross this afternoon  
03:28 15 about the accuracy of the testing results and the  
16 information that you obtained in 1969, and I'm  
17 sure you've had some time to think about that?

18 A It probably has crossed my mind a few times.

19 Q Okay. Were you present, and in thinking about it,  
03:29 20 have you ever taken the opportunity to review or  
21 were you present in the courtroom when Mr.  
22 Caldwell as prosecutor summarized for the jury  
23 what they could or could not conclude from the  
24 evidence that you had found and that you had given  
03:29 25 at the trial of David Milgaard?



1 A No, I would not be there.

2 Q I'm going to ask to have brought up the transcript  
3 of the address to the jury that was done by Mr.  
4 Caldwell and the first page of the document for  
03:29 5 identification purposes is 141905 and if I could  
6 go to 141938, please, and starting, if we could  
7 bring up below this paragraph here. Perhaps it  
8 will be easiest for the record if I read to you  
9 what's in front of you and then I will ask you  
03:30 10 after we've looked at it whether or not what he  
11 has stated, or tried to state to the jury was in  
12 fact a correct representation of your evidence,  
13 and he started by saying, with regard to that  
14 evidence:

03:30 15 "You remember that the spermatozoa in  
16 the body was blood stained and Staff  
17 Sergeant Paynter found "A" antigens in  
18 the vial which contained the lump and he  
19 tested, later, the same sample for the  
03:30 20 presence of human blood and got a  
21 reaction indicating the presence of  
22 either blood or those two other extracts  
23 he mentioned, mainly leafy vegetables or  
24 leather..."

03:30 25 And is that a correct summary of the evidence



1           that you gave and your findings?

2           A           I believe that was what I said or tried to convey.

3           Q           And looking back at it today, is this accurate  
4           information that he summarized for the jury?

03:31 5           A           Oh, yes, I have no problem with that summation.

6           Q           So even today all these years later and all the  
7           reviews later that's correct. And he went on to  
8           say:

9                           "...and that his evidence was finally to  
03:31 10           the effect that he could not say  
11           definitely if the person whose seminal  
12           fluid he examined was a secretor or was  
13           not a secretor."

14          A           Yes, that is quite correct.

03:31 15          Q           He again correctly summarized your findings in  
16          1969?

17          A           He did.

18          Q           We know today that Mr. Milgaard was in fact a  
19          secretor, but based on what you had and what you  
03:31 20          had tried to convey, he accurately summarized it  
21          for the jury?

22          A           He did.

23          Q           Okay. Now, he goes on to summarize a bit of  
24          evidence from Dr. Emson that you had reviewed with  
03:31 25          you by Mr. Hardy and I'm sure you've read and I'll



1 read it just because of the second part of it, he  
2 says:

3 "The evidence of Dr. Emson, as I said,  
4 was that the spermatozoa in the body was  
03:31 5 blood stained and that there was a  
6 number of ways in which blood can get  
7 into spermatozoa within the male  
8 person..."

9 And you know or you've been told that that was  
03:32 10 Dr. Emson's evidence and that was what was  
11 contained in that letter that Sergeant Penkala  
12 sent to you in June of 1969 wasn't it?

13 A I believe it was.

14 Q Okay. Mr. Caldwell goes on to say:

03:32 15 "...and all of this, I submit, while it  
16 does not have the effect of identifying  
17 Milgaard alone as the source of that  
18 spermatozoa, certainly had the effect of  
19 not eliminating him either, and that is  
03:32 20 the effect I ask you to give it. I am  
21 not saying it could only be him, I am  
22 saying that it certainly has the effect  
23 of not eliminating him, he is one of the  
24 thousands."

03:32 25 Was that a correct summary of your findings and



1 the scientific evidence available to you and the  
2 opinion that you formed based on it up to  
3 January, 1970?

03:32 4 A I would say that is in effect what I said and  
5 explained very well, yes, what I said.

6 Q So basically what he said to them is, like, you  
7 have his evidence, it doesn't include him, but it  
8 doesn't rule him out, so you treat it as you will?

9 A That is correct.

03:33 10 Q And if we could go to the next page, 141940, and  
11 I'm just going to the last part of the top  
12 paragraph, the sentence, and he finally concluded  
13 on that particular point, and he does talk, and  
14 the next point he talks about is the presence of A  
03:33 15 antigens, but I just want to go to his summary  
16 sentence:

17 "So I leave that phase of the matter by  
18 stressing again that while this part of  
19 the evidence does not, of itself,  
03:33 20 identify the accused, it most certainly  
21 does not eliminate him."

22 And again would you agree with me that that was a  
23 fair and accurate summary of the scientific  
24 evidence that you were able to find and present  
03:33 25 with respect to your test in this case?





1 A Yes, it would.

2 MS. KNOX: I don't have any further  
3 questions for Mr. Paynter.

4 COMMISSIONER MacCALLUM: Thank you.

03:34 5 **BY MR. GIBSON:**

6 Q Just a couple of questions, I won't be too long  
7 with you. You mentioned, Mr. Paynter, that you  
8 weren't willing to share your notes with  
9 individuals had they contacted you, but you would  
03:34 10 have spoken with them. You of course worked for  
11 the RCMP for a number of years and I believe you  
12 said you retired in 1993; is that correct?

13 A 1990.

14 Q 1990. And would you have been aware of access to  
03:34 15 information and privacy legislation as to what you  
16 could and couldn't share when you held information  
17 in relation to a third party?

18 A I don't recall whether that was a common thing at  
19 that time or not.

03:34 20 Q But as far as sharing RCMP documentation, if you  
21 had to or were requested to share something, you  
22 may well have consulted within your department as  
23 to what you could share concerning information  
24 about a third party?

03:35 25 A I probably would have discussed it with him on the



1 phone without talking to anybody about it because  
2 I had no reason not to. As far as him, or  
3 supplying him with my written notes, I would be  
4 dead set against them leaving my control at that  
03:35 5 time and going somewhere else and, as I mentioned,  
6 if somebody showed up with a court order, that  
7 would have been the only way they would have got  
8 them as far as I'm concerned.

9 Q And to your knowledge, I take it that no one ever  
03:35 10 made an access to information request to get those  
11 notes?

12 A As far as I can recall, no one ever asked to see  
13 the notes, never mind obtain them.

14 Q Very good. Just a document that I'm going to  
03:35 15 reference, it's not necessary to put it up, it's  
16 278893, it's a memo from Cathy MacMillan, a  
17 scientist within the RCMP, and it's dated March  
18 22nd of 1993, and she eventually concludes on the  
19 basis of tests that were carried out that both Mr.  
03:36 20 Milgaard and Mr. Fisher were A type secretors, and  
21 I think Mr. Hardy made you aware of that fact when  
22 he questioned you?

23 A He mentioned Mr. Milgaard. I'm not sure whether  
24 he mentioned Fisher or not. He may have. I could  
03:36 25 have been having a nap.



1 Q If in 1969 you have two individuals and they are  
2 both A type secretors, is there any other testing  
3 that you can do to try and differentiate between  
4 those two individuals with respect to a seminal  
03:36 5 stain or sample that may be available for testing?

6 A None that I was aware of, no.

7 Q So there would be no way to differentiate between  
8 those individuals?

9 A None.

03:36 10 Q Now, let's say you located additional seminal  
11 fluid or spermatozoa from an A type secretor, if  
12 you would have had more of this sample, would  
13 there be any other testing that could have been  
14 done?

03:36 15 A Not by me, no.

16 Q If we could put up document 252047, please, and  
17 you'll see that this is a document that you went  
18 through with Mr. Hardy, it's a letter directed to  
19 David Asper from a Dr. Markesteyn dated June 4th  
03:37 20 of 1990. Sorry, 041, 252041. And in that  
21 document it references a number of documents that  
22 he went through and one of the items that's  
23 referenced there as "I" is excerpted evidence of  
24 Staff Sergeant Paynter, and I'm assuming that's in  
03:37 25 relation to the trial where you gave evidence in



1 1969, and the only point that I want to discuss  
2 with you is if we can go to 252047 of that  
3 document and if we could just call up that part,  
4 and you'll recall that you had some fairly lengthy  
03:38 5 discussion with Mr. Hardy about the saliva testing  
6 that you carried out and in order to determine Mr.  
7 Milgaard's secretor status from doing the saliva  
8 testing, and the only thing I wanted to point out  
9 on that document is it appears that Dr. Markesteyn  
03:38 10 here is indicating that the determination of the  
11 non-secretor status of Mr. Milgaard, although  
12 perhaps acceptable at that time but now no longer  
13 serves as proof of his non-secretor status, and I  
14 appreciate that we've discussed quite a bit now  
03:39 15 that you are not taking the position that you  
16 definitely identified Mr. Milgaard as a  
17 non-secretor, but that the tests that you carried  
18 out at the time was that it was likely or probable  
19 that he was a non-secretor. Is that fair to say?

03:39 20 A Yes. I have never said that he was a  
21 non-secretor. I said whoever supplied the sample  
22 probably was a secretor, but I've never said that  
23 either of the people involved were non-secretors.

24 Q And as far as the testing that you carried out in  
03:39 25 1969 and the collection of the saliva samples from



1 Mr. Milgaard, I take it that that was the  
2 acceptable standard at the time for doing that;  
3 correct?

4 A To the best of my knowledge it was.

03:39 5 Q And it appears that Dr. Markesteyn agrees with  
6 you, that that was perhaps acceptable at the time  
7 for the tests that you carried out. Now, again  
8 we've spent a lot of time talking about secretor  
9 tests and blood grouping. With the advent of DNA,  
03:40 10 Mr. Paynter, and I appreciate that you retired in  
11 1990 and I guess that was just sort of the advent  
12 of DNA testing coming in --

13 A Yes, they started practicing with it or testing it  
14 in our laboratories two or three years before I  
03:40 15 retired.

16 Q Now, is there anything that you can help the  
17 Commission with as far as whether it would still  
18 be testing carried out by labs with respect to  
19 secretor status and blood grouping on such samples  
03:40 20 as blood and on seminal samples with DNA now  
21 available, is that still the type of testing that  
22 can go on, like --

23 A I can't say for sure, but I would doubt it very  
24 much. I could see no point in it if they could  
03:40 25 get a DNA profile from the sample, then any other



1 tests would be irrelevant.

2 Q And I think we all know the answer as to why, but  
3 perhaps you could just expand on that a little  
4 bit.

03:41 5 A Well, the DNA will bring it down to such a fine  
6 point that secretor status, ABO or any of those  
7 other tests are a waste of time and don't say  
8 anything compared to what the DNA can say, so  
9 there's no point in doing it.

03:41 10 MR. GIBSON: Thank you. Those are my  
11 questions. I believe Mr. Elson had a question.

12 BY MR. ELSON:

13 Q Mr. Paynter, my name is Richard Elson, I'm counsel  
14 for the Chief of Police and the Saskatoon Police  
03:41 15 Service. I wasn't originally planning to ask any  
16 questions, but something just occurred to me in  
17 the course of some of the more recent questions.  
18 In Dr. Merry's report, and I'm not sure we need it  
19 produced, he identified an enzyme that was found  
03:41 20 in saliva, and the enzyme, I believe if I recall  
21 the question Mr. Hardy asked in the report  
22 correctly, was an enzyme known as pryalin. Do you  
23 recall that enzyme being put to you in the report  
24 in the question Mr. Hardy put?

03:42 25 A I recall it being on the screen when we were



1 talking about it.

2 Q Now, one of the things that this Commission has  
3 been concerned with, and certainly from our  
4 client's perspective, is the fact that not only  
03:42 5 has the law changed, but science and technology  
6 has changed. In 1969, based on your training to  
7 that point in time, were you familiar with the  
8 enzyme ptyalin in saliva as well as the  
9 characteristics of that enzyme with respect to A  
03:42 10 antigens?

11 A No, I wasn't.

12 Q Now, are you aware as to whether or not that was  
13 generally known within the scientific community,  
14 about the presence of the enzyme ptyalin in saliva  
03:42 15 in 1969?

16 A I am not aware of that, no.

17 Q Now, as I understand it, and I may have missed it,  
18 in the testing that was done to determine blood  
19 grouping in bodily fluids other than blood, would  
03:43 20 there be any difference in the conduct of the test  
21 if one were to have seminal fluid on one hand and  
22 saliva on the other hand? In other words, was the  
23 test that you used to determine the blood grouping  
24 of seminal fluid the same as the test that would  
03:43 25 be used to determine the blood grouping of a



1 saliva donor?

2 A The tests would be the same to do seminal fluid,  
3 saliva and it was the same test as one of the  
4 tests we used on dry blood stains.

03:43 5 Q All right. So -- and clearly the implication from  
6 Dr. Merry's report is that the manner of testing  
7 for antigens in saliva is different than the  
8 manner of testing for seminal fluid due to the  
9 presence of the enzyme pryalin?

03:44 10 A I have no idea what that enzyme is or does and I  
11 couldn't really comment on that.

12 Q You would agree with me that if you were aware of  
13 the -- first of all, I take it you were not aware  
14 of the presence of the enzyme pryalin in saliva at  
03:44 15 all in 1969?

16 A To the best of my knowledge, I have never seen the  
17 word until today.

18 Q All right. You would agree with me that were you  
19 aware of the presence of the enzyme pryalin in  
03:44 20 saliva as well as its characteristics, namely, the  
21 ability to digest the A antigen, in 1969 the test  
22 you would have conducted would have been done in  
23 such a way so as to avoid the impact of the enzyme  
24 pryalin?

03:44 25 A It wouldn't have affected the test on the





1 material. It may have affected how the material  
2 was preserved until I got around to doing the  
3 test.

4 Q All right.

03:44 5 A I think that is what he's referring to when they  
6 state they heat the sample instead of drying it in  
7 order to kill that enzyme so it doesn't react on  
8 the antigens. That would be my assumption of what  
9 he's talking about.

03:45 10 MR. ELSON: Thank you. I have no further  
11 questions.

12 MR. WOLCH: Mr. Commissioner, I just have  
13 one question.

14 COMMISSIONER MacCALLUM: Okay.

03:45 15 MR. WOLCH: I shouldn't say one, but  
16 possibly one.

17 BY MR. WOLCH:

18 Q Mr. Paynter, you and I know each other from --

19 A I think we go back a fair distance.

03:45 20 Q We've had a few cases together.

21 A Probably longer than we want to talk about.

22 Q You're right.

23 COMMISSIONER MacCALLUM: Just for the  
24 record.

03:45 25 BY MR. WOLCH:



1 Q Hersh Wolch for David Milgaard. My question only  
2 arises out of Ms. Knox's question. When she was  
3 asking you to comment on Mr. Caldwell's address to  
4 the jury, and I'll try and paraphrase what she  
03:45 5 said as best I can, or what she said he said about  
6 it, it doesn't identify or include David and  
7 doesn't exclude him, jurors make of it as you  
8 will, that's the gist of it. May I ask you this,  
9 and it's perhaps a difficult question, but if you  
03:46 10 were a juror in that case, what would you make of  
11 your evidence, what would you understand you to be  
12 saying?

13 A From his comment or from --

14 Q No, if you were sitting as a juror and heard  
03:46 15 yourself testify.

16 A From my evidence or from his comment?

17 Q No, from your evidence, what would you understand  
18 as a juror a juror should take out of your  
19 evidence to help the juror decide if David was  
03:46 20 innocent or guilty?

21 A Having never been a juror, called once and refused  
22 because of my profession, I can only say that I  
23 would lean, in that case I think, try to be very  
24 fair and lean towards saying that it eliminated  
03:47 25 him more than it pointed towards him.



1 Q So it was more favourable than not?

2 A Yeah, I would say it was more favourable if they  
3 listened closely to what I said, I believe that's  
4 how I would interpret it if I had been on the  
03:47 5 jury.

6 Q That's right. Because basically what you are  
7 saying is if he's a non-secretor and the  
8 individual is a secretor, then he couldn't have  
9 done it, but there could be errors?

03:47 10 A That's right, there was always that small chance  
11 that, you know, that the test didn't work, and as  
12 it turned out there was a valid reason why it  
13 didn't work which I was not aware of, but they  
14 didn't know that and I didn't know that at the  
03:47 15 time and, as I said, I would have definitely  
16 leaned towards eliminating him at that time.

17 Q Right. And what eventually proved to be an error  
18 was David's testing itself, and error may be not  
19 the right word, but did anybody ask to your  
03:48 20 knowledge for David to give another sample,  
21 because as we know he was always willing to give  
22 samples, he never --

23 A I never heard of a second sample being required,  
24 no, or asked for.

03:48 25 Q So you never asked for a second known sample?



1 A No, I didn't.

2 Q Mr. Caldwell, Mr. Tallis?

3 A I can't say what they asked for, but not with my  
4 knowledge.

03:48 5 Q No investigator brought to your attention maybe we  
6 should get another sample from David to be sure we  
7 have the opinion as to whether he's a secretor or  
8 not down pat?

9 A None, no, the thought never came up as far as I  
03:48 10 know to anybody.

11 MR. WOLCH: Thank you very much.

12 MR. HARDY: No questions on re-exam,  
13 Mr. Commissioner.

14 COMMISSIONER MacCALLUM: Thanks.

03:49 15 MR. HODSON: That is all.

16 COMMISSIONER MacCALLUM: Mr. Paynter, thank  
17 you very much for coming. You are accused.

18 MR. HODSON: The next witness is Mr. Jack  
19 Wood, if you could come forward, please.

03:50 20 **JOHN ALDEN WOOD, sworn:**

21 **BY MR. HODSON:**

22 Q Good afternoon, Mr. Wood. Thank you for agreeing  
23 to testify before this Commission. I understand  
24 that you are, although your full name is John, as  
03:50 25 you say, A. Wood, that you often go by Jack Wood;



1 is that correct?

2 A That is right.

3 Q And that you currently reside in Vernon, British  
4 Columbia?

03:50 5 A Right.

6 Q And what is your age currently?

7 A Born September 14th, 1922.

8 Q So that would put you 82; is that correct?

9 A Until September.

03:50 10 Q Until September. I've been tripped up on the age  
11 question before, so I'll leave that one. I  
12 understand, sir, that you served with the  
13 Saskatoon City Police Service starting in 1946 and  
14 retired in 1977; is that correct?

03:50 15 A That's right.

16 Q And we'll call up your service record, it's page  
17 325563 of the document 325555, if you could just  
18 highlight that part, please, and this is a report,  
19 Mr. Wood, that we obtained recently from the  
03:51 20 Saskatoon City Police Service for a number of  
21 officers and it indicates that you started on  
22 April 1, 1946 and I think you've had a chance to  
23 look at this and can you confirm that this would  
24 reflect the dates and positions you held with the  
03:51 25 Saskatoon City Police Service?



1 A That's right, sir.

2 Q And so if we take a look at January 1, 1968, we're  
3 going to be talking about the Gail Miller murder  
4 investigation, the murder was January 31, 1969, at  
03:51 5 that time you were detective superintendent; is  
6 that right?

7 A That is right, sir.

8 Q And so you would have held that position for about  
9 a year prior to Gail Miller's death; is that  
03:51 10 correct?

11 A Yes, I think that was correct.

12 Q And then prior to that, at least for the previous  
13 11 years, you were a traffic inspector and in  
14 traffic, and other than for three years in the  
03:51 15 early '50's where you were a detective you would  
16 have been in traffic; is that correct?

17 A Yes sir.

18 Q And then I think, if we take a look at following  
19 your detective superintendent on April 1st, 1971,  
03:51 20 you moved to operations; is that correct?

21 A Yes sir.

22 Q And I think that's where you were when you retired  
23 in 1977; is that correct, sir?

24 A That's correct, yeah.

03:51 25 Q I'm going to call up an organizational chart, it's



1 325569. And, Mr. Wood, this is a chart -- and I  
2 have shown you a copy of this before -- this is a  
3 chart that we obtained from the annual report  
4 prepared by the chief of police back in I think  
03:52 5 1970 that sets out the organizational chart, and  
6 you are familiar with this chart, are you, sir?

7 A Yes sir.

8 Q And would this accurately reflect the organization  
9 of the police force, at that time, in 1969?

03:52 10 A I would think so, yes, I think that's when it was  
11 made.

12 Q Okay. And then if we could just go, we'll call up  
13 the document that has the names on it, 325569 --  
14 oh, sorry -- 571, and we'll just take a look here.  
03:52 15 You will see at the top, Mr. Wood, that James  
16 Kettles, he was the chief of police at that time;  
17 is that correct?

18 A Yes sir.

19 Q And then Deputy Chief James Forbes would be  
03:53 20 directly beneath him?

21 A That's right.

22 Q What, we have not seen much about James Forbes, at  
23 least in this investigation, what was -- what were  
24 his responsibilities at that time, generally?

03:53 25 A Well he was second in command of the police



1 department.

2 Q And would he have -- would he be involved in  
3 day-to-day investigations or would he be more  
4 administrative?

03:53 5 A Administration.

6 Q And then we see over here your position as  
7 superintendent of criminal investigations, and  
8 then underneath you we see the detective division,  
9 morality division, and identification division; is  
03:53 10 that correct?

11 A Yes sir.

12 Q And then we see that we have Short, Nordstrom, and  
13 Penkala being the senior officers in charge of  
14 each of those divisions; is that right?

03:53 15 A That's right, yes.

16 Q And would it be fair to say, then, that those  
17 three gentlemen would report to you as the  
18 Superintendent of Criminal Investigations?

19 A Yes sir.

03:53 20 Q And that you, in turn, were the one that --

21 A And direct to the chief too.

22 Q Okay.

23 A And direct to the chief, their reports would go to  
24 me and to the chief of police.

03:54 25 Q And when we look at this organizational chart,





1 let's talk about what actually happened at the  
2 time as opposed to what, what's on paper, and if  
3 it's the same then please tell us, but what --  
4 back in and around 1969, or your term as  
03:54 5 superintendent of criminal investigations, did for  
6 example Lieutenant Short report to you on a  
7 day-to-day basis about what he was doing, and did  
8 you in turn give him instructions and direct him  
9 in his work?

03:54 10 A Yes sir.

11 Q And would that same go for Inspector Nordstrom and  
12 Lieutenant Penkala?

13 A Not necessarily, unless there was something  
14 important enough.

03:54 15 Q Okay. Would your relationship as senior -- I'm  
16 not sure I'm using the right term here. Certainly  
17 in the org. chart Lieutenant Short in detectives  
18 would report to you and it would appear to be in  
19 the same position as Nordstrom and Penkala, in  
03:54 20 actual practice was your -- was the reporting  
21 relationship with Short to you any different than  
22 with Nordstrom and Penkala to you?

23 A Well Lieutenant Short would work opposite to me,  
24 he would work the afternoon shift if I -- I worked  
03:55 25 the day shift normally, on my days off, Lieutenant



1 Short would be in charge of the department.

2 Q Of which department?

3 A The detective department.

4 Q Okay. And when you were working, were you in  
03:55 5 charge of the detective department as well, then?

6 A The detective department was my department.

7 Q Okay. What about morality and identification;  
8 were you in charge of those departments as well?

9 A Normally by the chart, yes, but normally -- not by  
03:55 10 work. A morality officer would -- they would be  
11 separate identities. Operation -- detective work  
12 would be separate too, and then morality would be  
13 separate, and then detective would be separate, in  
14 that fashion.

03:55 15 Q So, back to my question, let's talk about  
16 Nordstrom and morality. I mean if I look at this  
17 chart it would seem to me that both Short and  
18 Nordstrom would report to you and that you would  
19 be their senior officer, and was there a  
03:56 20 difference in their -- in relationship between  
21 those two officers and you?

22 A Well, only in this, that they were in charge of  
23 those sections.

24 Q Yes?

03:56 25 A Morality, Nordstrom was in charge of that section,



1 and he didn't have to report to me daily unless  
2 there was something important enough to report to  
3 me. He would do all as scheduled in this other  
4 report here under the morality functions. The  
03:56 5 same thing with identification, ident., Penkala.  
6 That's a specialized field and he wouldn't report  
7 to me unless it was something in connection with  
8 what our report was on at that time.

9 Q Did Nordstrom and Penkala report more to Chief  
03:56 10 Kettles than to you?

11 A Well they would, they would, everybody would  
12 report directly to the chief. All reports  
13 normally ended up in the chief's office at one  
14 time or another, but they would ra -- there would  
03:57 15 be nothing to report to me unless it was an  
16 investigation within the detective department.

17 Q And I think you --

18 A If it was a simple assault or something like that,  
19 that it was under their heading, they wouldn't  
03:57 20 necessarily have to report to the detective part.

21 Q See, and I think you said earlier that you and  
22 Lieutenant Short -- and I don't know if this was  
23 your word -- but almost 'platooned', you worked  
24 opposite each other; is that right?

03:57 25 A Yes, except on my days off, then he would work the



1 day shift, yes.

2 Q And so that either you or Lieutenant Short would  
3 be there pretty much at any given time other than  
4 --

03:57 5 A Days off and whatnot, yes.

6 Q And so that the plan was that either you or Short  
7 would cover detectives; is that right?

8 A Right, yes.

9 Q And be in charge of detectives?

03:57 10 A And be in charge of detectives.

11 Q Okay. And would that be the same way in which  
12 Nordstrom would be in charge of morality?

13 A That's right, yes.

14 Q And Penkala would be in charge of ident.; is that  
15 right?

16 A Yes, right, sir.

17 Q And would it be fair to say, Mr. Wood, that you  
18 would have spent -- and again talking '68 to '71  
19 when you were superintendent -- that you would  
03:58 20 have spent -- more of your focus of your time  
21 would have been on the detectives division than on  
22 morality and ident.?

23 A That's right.

24 Q And can you tell us, again you are the most senior  
03:58 25 officer from the time that will be testifying



1 before this Commission, can you tell us just a bit  
2 about how Chief Kettles operated, and I'm talking  
3 in 1969 in and around the Gail Miller  
4 investigation, as far as what his role was in the  
03:58 5 direction of the police officers and investigation  
6 and how hands-on was he with what was going on?

7 A Normally, all reports that would go through the  
8 department overnight -- now you have got to  
9 understand that at that stage of the game in the  
03:58 10 reporting everything was put onto tape, and those  
11 tapes would then go up to central records who  
12 would type out the information off the tapes, and  
13 that would then end up in the chief's office where  
14 he would read them, and then they would come out  
03:59 15 to the individual department.

16 Q So let's just pause there. Would these be -- and  
17 we will be looking at some of them in a moment --  
18 would these be the investigation reports; is that  
19 right?

03:59 20 A That's right, yes, yeah, any occurrence, anything  
21 that happened this that 24-hour period.

22 Q So they would be typed and everything would go  
23 through the chief's office?

24 A Would normally go through the chief, if he was  
03:59 25 available it would go through him, if not then it



1 would go directly to the court or direct to our  
2 department or to morality or to ident.

3 Q And when you talk about 'going through his office'  
4 are you talking that physically the piece of paper  
03:59 5 would be given to him where he would normally read  
6 it?

7 A Yeah, that's right. What we called occurrence  
8 reports.

9 Q Yes.

03:59 10 A These were occurrences, see, the first original  
11 occurrence reports would normally -- he would see  
12 them if he was there, if he was available, if he  
13 wasn't well then they would have to keep on going  
14 into the various departments.

03:59 15 Q And what about investigation reports, would they  
16 all --

17 A That's the same thing.

18 Q The same thing?

19 A They all came in through the tape, --

04:00 20 Q Okay?

21 A -- they were all reported on tape and retyped.

22 Q And based on your dealings with Chief Kettles at  
23 the time, to your knowledge, did he take an active  
24 part in reading these reports and --

04:00 25 A I would think so. I think, if I remember back, at



1           one time he used to stamp them all and put his  
2           stamp that they went through his office, but I  
3           don't recall, I haven't any forms here to show  
4           that.

04:00 5           **Q**       Yeah. And then what would happen, again help us  
6           out on the paper flow, once he got -- let's take  
7           the Gail Miller occurrence report would get typed  
8           up, would go through his office; what would he do  
9           with it then?

04:00 10          **A**       It would come to our department, the detective  
11          department.

12          **Q**       Okay. When you say 'our department, detectives',  
13          again I --

14          **A**       Detectives, yes.

04:00 15          **Q**       And when I looked at this chart you are talking  
16          about it would go to the detective department over  
17          there as opposed to you as superintendent of  
18          criminal investigations; is that fair?

19          **A**       It would go to that department because it didn't  
04:00 20          matter who was working, well, it was myself or  
21          Short.

22          **Q**       So if we talk -- and perhaps we can just go back  
23          and call up page 325570, and so here we have the  
24          detective division, and I think it covered  
04:01 25          homicides; correct?



1 A Right.

2 Q And morality would cover moral offences, which  
3 would be sexual assault or rape at that time; is  
4 that correct?

04:01 5 A That is right, yes.

6 Q So that an occurrence report or an investigation  
7 report would go to the chief, the chief would then  
8 send it down to detective division or to morality,  
9 depending upon which division was looking after  
04:01 10 the file; is that right?

11 A That's right, yes.

12 Q And then I think you said either you or Short  
13 would look at it; is that right?

14 A Right.

04:01 15 Q And in your capacity as superintendent, then, did  
16 you tend to read all these reports as they come  
17 through?

18 A Everything that would come over my desk, I would  
19 have read it at -- when it come over my desk, yes.

04:01 20 Q So can we conclude, sir, that -- let's talk about  
21 the Gail Miller murder investigation -- that the  
22 occurrence report and all of the investigation  
23 reports would have likely passed through the  
24 chief's office and, as well, through your office?

04:02 25 A Right.





1 Q And when they passed through your office when you  
2 were working, you would have read them while you  
3 were on shift, is that right?

4 A Right.

04:02 5 Q And while you were not on shift Short would  
6 usually be on shift, and he would read them, is  
7 that fair?

8 A That's right, yes, yeah. And then they would go  
9 to the recording officer.

04:02 10 Q And who was the recording officer?

11 A Sergeant Mackie and Reid both were working in  
12 that. They were all recorded in one location.

13 Q When you use the term 'recording officer' what do  
14 you mean by that?

04:02 15 A Well they would take the files and they would make  
16 up a file and record it into their own book, type  
17 of thing, and then turn it over to the  
18 investigators.

19 Q So if I -- the Gail Miller murder is January 31,  
04:02 20 if on February 28th, '69 I walk into the police  
21 station and say 'lookit, I want to read the police  
22 file on Gail Miller', where would it be and who  
23 would be responsible for it?

24 A It would be with Sergeant Mackie or Sergeant,  
04:03 25 Reid, who has all the files, and then they farmed



1           them out or sent them out to the various  
2           investigating officers, but they would have  
3           knowledge of where the file was.

04:03 4           Q           So they would keep one set of everything; is that  
5           correct?

6           A           Well, they would keep the recording of it, as to  
7           what it was.

8           Q           And would there also be a copy in central records  
9           as well?

04:03 10          A           The original would go to central records, yes.

11          Q           Now we've heard some evidence of a fellow named  
12          Jack Ward, who I think passed away in 1969, --

13          A           Right.

14          Q           -- being involved; do you recall him being  
04:03 15          involved in this file?

16          A           No, I don't, I don't recall what he would have  
17          done.

18          Q           So who would be -- I mean I think you said you  
19          would have read some of, some of the investigation  
04:03 20          reports; is that fair?

21          A           I think I would have read all the -- that would  
22          come over my desk while I was working.

23          Q           And --

24          A           But to remember them, I can't remember what would  
04:03 25          be in them.



1 Q And what was your purpose in reading them, why did  
2 you read them, what were you reading them for and  
3 what did you do with them?

4 A Well to where I was going to send them. See, not  
04:04 5 only those reports, the Milgaard murder report  
6 would go to one place, we had many other files  
7 that would go to other individual investigating  
8 officers. So it wasn't just that we were getting  
9 one file coming up on Milgaard, we had break and  
04:04 10 enters, we had every other type of file that would  
11 come up.

12 Q Okay. You are referring to the Gail Miller file;  
13 is that right?

14 A Pardon?

04:04 15 Q To the Gail Miller file?

16 A Well that information would come up, but we  
17 wouldn't -- don't just stop at one file.

18 Q Yes.

19 A There might be 10 or 12 of them come in in a day's  
04:04 20 time, or overnight even, and break and enters and  
21 thefts and whatnot, that all comes under that  
22 heading.

23 Q Right.

24 A Well then they would be read and sent out to the  
04:04 25 individual detectives who were going to



1 investigate 'em.

2 Q So one purpose in you reading them would be to see  
3 where you should send it; is that fair?

4 A That's right, yup.

04:04 5 Q And would you also read it for the content, to see  
6 what was happening on the investigation, so you --

7 A I would read the whole file, yeah.

8 Q And let me give you an example. Let's say the  
9 police report said, you know, 'we got contacted by  
04:05 10 someone who said they may have seen Gail Miller on

11 the morning of her murder and someone should

12 follow up with photos and someone should call

13 Mr. X'. If that's in a report, when you read the

14 report, would it be your job or responsibility to

04:05 15 say 'okay, well someone better follow up', or

16 would that be someone else's? Whose job would it

17 be to make sure that happened?

18 A Well, it would come out of my office and it would

19 go to whoever is going to -- on the job, whoever

04:05 20 is working that day, to follow up on the file. If

21 there was an inquiry or we would have many reports

22 coming in with information, suspects around that

23 they think should be checked and whatnot, well

24 then that would be sent out to the investigating

04:05 25 officers to go out and follow up on it.



1 Q So when you read the report, though, would you be  
2 reading it so that you could identify tasks that  
3 officers in the detective division should be doing  
4 that day or did you leave that to somebody else to  
04:05 5 handle for you?

6 A Well that would go, if it was regarding the Miller  
7 case, then it would go to Sergeant Mackie and  
8 Sergeant Reid.

9 Q Okay. So let's talk about the Miller case and  
04:06 10 that type of report. If you read that, saying  
11 that 'somebody should follow up with Mr. X and  
12 show photos', are you telling us that you would  
13 give that to Mackie or Reid and it would be their  
14 responsibility to, number 1, read it --

15 A Yeah.

16 Q -- and, number 2, send someone out or decide what  
17 should be done?

18 A That's right, yeah.

19 Q So are you telling us, then, that the actual file  
04:06 20 decision-making would have been at the Mackie/Reid  
21 level as opposed to your level?

22 A Well, at the investigation level, yeah.

23 Q Okay.

24 A Yeah.

04:06 25 Q And what about Short, then, what role -- would he



1 -- would it be fair to say that, as far as the  
2 Gail Miller investigation is concerned, he would  
3 have played a similar role to you, or was he more  
4 hands-on on the investigation, or --

04:06 5 A He assisted in the investigation along with  
6 Detective Karst and the other officers that was on  
7 the investigation.

8 Q Okay. So he, partly he was in the office reading  
9 reports much like you when he was covering --

04:07 10 A When I wasn't available.

11 Q And, in addition, he was out in the field doing  
12 some investigation work?

13 A That's right, yup.

14 Q And do you recall whether you were out in the  
04:07 15 field doing any investigation work?

16 A No, no, I didn't have time for it.

17 Q Now would there be occasions where you might  
18 identify something in a report and jot a note to  
19 somebody, 'check this out', or 'follow up on  
04:07 20 that'?

21 A I would get reports coming over my desk with the  
22 information or -- as I pointed out before, we went  
23 to the public and asked for help, all the help we  
24 could get, and any reports that would come in,  
04:07 25 then I would read them over and I would write



1 letters, and in fact several letters show up in  
2 the file, so -- of this type of information, that  
3 we sent men out to follow through with it and have  
4 it cleared one way or the other.

04:07 5 Q So if you could describe to the Commission what  
6 you understood your role to be in the Gail Miller  
7 murder investigation, what is that, what was your  
8 role as you saw it?

9 A Well the investigation on the Miller case, I -- I  
04:08 10 received the first call on the Miller case that  
11 was phoned in to the department that morning, and  
12 I in turn then called Detective Reid, I believe it  
13 was, and Parker I believe, Detective Parker, and  
14 sent them. Because the call came in as a  
04:08 15 suspicious person in a back lane, and they were  
16 sent to investigate, and when they appeared at the  
17 investigation and found what they found they  
18 radioed back immediately to ask for the  
19 identification section to be sent out to check the  
04:08 20 area and to do what they have to do, and that is  
21 the photography work, fingerprint work, and all  
22 that type of thing. See, they are specialized in  
23 that field, and detectives aren't normally  
24 specialized in that type of work, so ident.  
04:08 25 section was sent out, then, to follow up on the



1 investigation.

2 Q And beyond that, and let's go from the date of  
3 death after that first call until charges being  
4 laid at the end of May, what was your role, sir,  
04:09 5 in the active investigation? What were your  
6 responsibilities and what was it that you were  
7 doing?

8 A Either to follow up on reports and send out  
9 letters of inquiry and reading the files and  
04:09 10 sending them out to the respective places.

11 Q Who would be the decision-maker, or  
12 decision-makers, in deciding things such as how  
13 many officers should be devoted to the Gail Miller  
14 file compared to other investigations, who it  
04:09 15 should be, who should interview these witnesses,  
16 etcetera?

17 A I don't believe we set any actual number. I don't  
18 remember any number being set of how many would be  
19 attached or sent for that specific thing, but all  
04:09 20 detectives worked on it at the start, and then it  
21 ended up with just maybe four or five, maybe six  
22 officers that were working mostly full-time on it.

23 Q Okay. Yeah. I tried this question with Penkala,  
24 and he is not a football player, maybe you can  
04:10 25 help us out. Who, if there was a quarterback of





1 the investigation, who would be calling the shots  
2 in the Gail Miller investigation as far as if  
3 there was one person or two persons that were  
4 making the majority of the decisions as to what  
04:10 5 should be done, when it should be done, and who  
6 should be doing it?

7 A I believe mainly the top investigators of the case  
8 would be the ones. Umm, they went -- often would  
9 go to the chief for direction on which way to  
04:10 10 go --

11 Q Okay.

12 A -- and to get help.

13 Q Yeah, and who were the top officers?

14 A Detective Short -- or Lieutenant Short and  
04:10 15 Detective Karst.

16 Q Okay. Anybody else?

17 A Umm, well, Detective Reid.

18 Q What --

19 A I can't remember names, now, of --

04:10 20 Q What about Mackie?

21 A Mackie?

22 Q Ray Mackie?

23 A Yeah, Ray Mackie, he was the one that was singled  
24 out mainly to do the recording and looking after  
04:10 25 the files.



1 Q Okay. And what role, then, would the chief have  
2 played in, again, the decision-making about what  
3 to do?

4 A I don't think he would play that big a role except  
04:11 5 that they -- he would be more -- they would report  
6 to him more than anybody else. He would, anybody  
7 that was out and had to leave the city or go  
8 anywhere out of our jurisdiction, approval had to  
9 come through the chief's office.

04:11 10 Q Okay. And so if an officer, for example, had to  
11 go to Regina to interview Ron Wilson, Chief  
12 Kettles would have to approve that?

13 A That's right, yeah, --

14 Q And --

04:11 15 A -- the expenditure would have to be approved by  
16 him.

17 Q And help us out, was it an approval -- was it a  
18 bureaucratic 'I got to approve the money and there  
19 is a budget' or 'I want to know who is going  
04:11 20 where'?

21 A Well he has got to be -- report back to the  
22 Commission as to the expenditure --

23 Q Right.

24 A -- of the money.

04:11 25 Q But what was driving the need to have the chief



1 approve the trip, was it money or --

2 A Well, yes, we didn't have money to -- the  
3 departments didn't have, each individual  
4 department didn't have a budget as such at that  
04:12 5 time to play a role in financing or saying to  
6 somebody, 'oh, just go ahead and go'. The chief  
7 has got to look after it through his own Board of  
8 Police Commissioners.

9 Q Right. But apart from the budget concerns would  
04:12 10 the chief want to know who is going, where they  
11 are going, why they are going, and would the chief  
12 have some input as to --

13 A I think the chief was pretty much on top of  
14 everything that was taking place.

04:12 15 Q Okay. Now what about coordination, if we can talk  
16 a bit about that, between the detective division,  
17 morality division, and identification division? I  
18 think you told us that morality sort of operated,  
19 not on their own, but Nordstrom would report more  
04:12 20 to the chief than he would report to you; is that  
21 fair?

22 A Yes. Well I would say that, yes, because we had  
23 -- the chief set up a department -- or a coffee  
24 break time in the department, every morning at  
04:13 25 10:30 all the senior officers were to report at



1 this coffee break time, at which a report would be  
2 given from what took place in each individual  
3 section over the last 24 hours --

4 Q And so who would be the --

04:13 5 A -- to bring the chief up to date on what was  
6 taking place.

7 Q So who would be, who do you describe as 'senior  
8 officers', what rank and what --

9 A From the lieutenant up.

04:13 10 Q So Short, Nordstrom, Penkala, you, the chief; is  
11 that fair?

12 A That's right, yes, deputy chief.

13 Q And deputy chief?

14 A Yes.

04:13 15 Q So there would be a meeting every day?

16 A Monday to Friday, because the coffee shop wasn't  
17 open on Saturday or Sunday.

18 Q Okay. And so, what, would there be regular  
19 attendance by these senior officers at that time?

04:13 20 A Not -- well Short wouldn't be there because he  
21 would be in the afternoon shift, --

22 Q Okay.

23 A -- but Penkala and Nordstrom, the deputy chief and  
24 myself and the chief, we would be there. Penkala.

04:14 25 Q And would this be an informal 'tell us what's



1           happening, what you found out'?

2           A           That's right, yes.

3           Q           And, at those meetings, certainly you and the  
4                    chief would have had a chance to read all of the  
04:14 5                    investigation reports for all three divisions; is  
6                    that fair?

7           A           Right, yeah.

8           Q           So let's take a look at morality. You would have,  
9                    if you were in the office when the reports came  
04:14 10                   through, you would have read the morality files to  
11                   know what occurrences had taken place; is that --  
12                   is that right?

13          A           Right.

14          Q           And we'll deal with this a bit more specifically a  
04:14 15                   bit later, but we know that prior to Gail Miller's  
16                   murder there were two sexual assaults and one  
17                   attempted sexual assault within a couple of months  
18                   and then one right after the conviction, and do  
19                   you have any recollection, Mr. Wood, of those  
04:14 20                   occurrences?

21          A           No, I don't. I can't say I do, no.

22          Q           Okay. Is it fair to assume that those occurrence  
23                   reports and investigation reports would be the  
24                   type that might pass across your desk and that you  
04:15 25                   may have read them? I appreciate you say you



1 don't remember them.

2 A Not the assaults, I don't think I would have  
3 access to the assaults, because there were  
4 assaults all the time that would go direct to the  
04:15 5 morality section that I wouldn't be aware of.

6 Q Okay. Let me back up and maybe I misunderstood.  
7 When Chief Kettles got investigation reports,  
8 let's say he gets a murder investigation report, a  
9 sexual assault investigation report, and Penkala's  
04:15 10 ident. report on something; now do those three  
11 reports cross your desk on a daily basis or not?

12 A Not, not really, because I don't think you would  
13 find three of them coming in at the same time.

14 Q Well let's assume that they came in over the  
04:15 15 course of a week.

16 A Yeah.

17 Q Would -- first of all, the homicide report would  
18 go across your desk, right?

19 A Right, yeah.

04:15 20 Q And then you told us you would send it down to  
21 detectives?

22 A Yeah.

23 Q Would an occurrence report on a sexual assault go  
24 across your desk from Chief Kettles' office?

04:16 25 A I can't really say because a special assault,



1 assaults is assault, and so we had lots, so many  
2 of them, so I can't say that that would be going  
3 through my office and then to morality, or it  
4 would be discussed, even, in the chief's coffee  
04:16 5 break.

6 COMMISSIONER MacCALLUM: I wonder if you  
7 could just be clear to the witness that in '68  
8 the complaints would be two rapes and one  
9 attempted rape.

04:16 10 BY MR. HODSON:

11 Q Fair enough. Sure. And at the time they would be  
12 rapes, Mr. Wood, so a rape file that would be  
13 handled by morality; so back in '68-'69 would an  
14 occurrence report on a rape file go from Chief  
04:16 15 Kettles across your office, or would it go  
16 directly to morality, to Nordstrom?

17 A It would go right directly to morality.

18 Q And what about --

19 A We might not know about it in detectives, and yet  
04:16 20 if the morality wanted help from the detectives  
21 and brought it to our attention, then we would  
22 know about it.

23 Q Okay. So then back in the ident. report, that  
24 let's say Joe Penkala types up an ident. report on  
04:17 25 a rape case, it has nothing to do with detectives,



1           it goes up through Chief Kettles, is that  
2           something that would go from Kettles through your  
3           office or would it go directly to Penkala's?

4           A           It would go directly to morality, yes.

04:17 5           Q           Okay.

6           A           Yeah.

7           Q           So then when we have -- let's go back to these  
8           morning meetings; what were the type of things  
9           that were discussed and what were the purpose of  
04:17 10          these meetings?

11          A           Well just to bring the chief up to date on  
12          anything that occurred in the last 24 hours, it  
13          was mainly arrests and stuff, not -- that was  
14          the -- even when the Milgaard murder trial was in  
04:17 15          place, the investigation. But that would all just  
16          be discussed normally, what they had done, what  
17          files I had seen and he may not have seen, and so  
18          what morality might have had and ident. might have  
19          had what files they might have come across.

04:17 20          Q           For example, and we have seen reports and we've  
21          heard evidence that in the course of the Gail  
22          Miller murder investigation some police officers  
23          looked at the two previous rapes and attempted  
24          rape files and draw -- and drew some comparisons  
04:18 25          with the Gail Miller investigation, and so





1           there's -- for example Joe Penkala prepared a  
2           document saying that there may be a connection,  
3           and so there was some cross-over, if I can call it  
4           that, between morality and detectives in the  
04:18 5           investigation of the Gail Miller murder; were you  
6           aware of that?

7           A           No. No.

8           Q           Is that something --

9           A           He might have discussed that with morality and not  
04:18 10           even mentioned it to the detective department.

11          Q           Okay. Is that the type of thing that might be  
12           discussed at these morning meetings between  
13           morality and detectives?

14          A           No, not really, other than just the fact what  
04:18 15           occurred in the last 24 hours.

16          Q           Let me put it this way. Let's take a case where  
17           there is a murder file and a couple of sexual --  
18           or a couple of rape files and there are  
19           similarities and there may be a connection; tell  
04:18 20           me how the police service, at that time, would  
21           cause the right hand to communicate with the left  
22           hand so that the people investigating the murder  
23           would know what they need to know about the rape  
24           files and vice versa?

04:19 25          A           Well, first, I don't think you would find a murder



1 trial and three rape files coming through at the  
2 same time, the murder -- the murder file probably  
3 would come in at one time, and maybe a week later  
4 they would have the assault, and maybe --

04:19 5 Q Fair enough, yes.

6 A -- a week later the assault, and it wouldn't mean  
7 anything other than the morality were  
8 investigating that.

9 Q Yeah.

04:19 10 A And it probably just wouldn't have twigged anybody  
11 to say 'well maybe there is a connection with the  
12 murder trial'. I don't recall ever seeing  
13 anything connecting the assaults with the murder.

14 Q All right. And I will show you, Mr. Wood, and I  
04:19 15 think I have shown you in your preparations for  
16 your testimony, that there are some documents  
17 where other officers have connected the two, and I  
18 appreciate you don't have a recollection about it.  
19 What I am trying to get from you, though, is,  
04:19 20 based upon your experience and your position at  
21 the time, how did the police service operate? How  
22 was it that one division would know, where  
23 necessary, what the other division was doing? Or  
24 maybe they didn't. Do you understand my question?

04:20 25 A I think so. I don't think they would know unless



1           it was brought to their attention, because the  
2           file would go to morality and morality had their  
3           own investigators --

4           **Q**       Okay.

04:21 5           **A**       -- to do their investigating, the same with the  
6           detectives, had their own investigators, and not  
7           necessarily unless information came to the  
8           morality section about the murder or vice versa,  
9           then they might connect at that stage, but that's  
04:21 10          about the only way.

11          **Q**       Well let's back up and put aside when they come  
12          in, let's assume they come in over a three month  
13          period, that you have three unsolved rapes or  
14          attempted rapes with witness statements and a  
04:21 15          description of an assailant and a method of  
16          attack, etcetera, that morality is investigating  
17          trying to find out who the assailant is, okay.  
18          You then have a murder which is investigated by,  
19          for the most part, different officers, detectives,  
04:21 20          and let's assume for the moment that there may be  
21          similarities and that as a police officer or as a  
22          police service it might help the murder  
23          investigators to have the information in morality,  
24          and let's assume that it's the same assailant, the  
04:22 25          same person who committed the rapes committed the



1 murder. Are you telling us that detectives would  
2 go off looking for the murderer, morality would go  
3 off looking for the rapist, they would never cross  
4 paths?

04:22 5 A The investigators may have crossed paths, I can't  
6 say, but I don't recall anything going over to my  
7 office where the two were together.

8 Q I appreciate that, but from how the service  
9 operated at the time, you were the superintendent,  
04:22 10 and at least on paper in charge of detectives,  
11 morality and ident, how is it, or what systems  
12 were in place so that there was an exchange of  
13 information on the investigation front where  
14 necessary?

04:22 15 A It would only be word of mouth talking with one  
16 another from the different sections. Morality  
17 section was in one part of the building,  
18 detectives in another, ident in another, had their  
19 own separate identities.

04:23 20 Q Well, let me put it this way, do you think it  
21 would be a good thing for police officers to know  
22 what other investigations are going on that might  
23 impact on the investigation they are doing?

24 A I agree it would be, yeah, if there had been  
04:23 25 closer contact, yes.



1 Q And if, for example, in detectives division, let's  
2 say rapes, as they were called then, were moved  
3 over to detectives so that detectives were looking  
4 after homicides and rapes, then they would all be  
04:23 5 working or similar files; right?

6 A Yeah, but I can't speak for the investigators who  
7 were on the case because maybe they were doing  
8 that unknown to me.

9 Q Okay. And again just the last question on this  
04:23 10 point, I think you would agree that if the rapes  
11 and homicides were in the same group, there would  
12 likely be the same detectives, likely be more  
13 sharing of information or more knowledge because  
14 it would be the same officers; right?

04:23 15 A I would think so, yes.

16 Q So the fact that rapes are being investigated by a  
17 different division on a different floor, what was  
18 it that you did as superintendent in charge to  
19 make sure that there was proper communication  
04:24 20 between the two divisions so that where necessary  
21 homicide investigators would know what the  
22 morality investigators are doing?

23 A Well, I wouldn't have access to the files usually  
24 in the first place because they would have gone  
04:24 25 right to morality, they wouldn't have gone -- if



1 all files had come up to my office where I would  
2 have read all the files, then I would know before  
3 they went to the separate divisions, but from  
4 records all the files were placed into, you might  
04:24 5 say, bins or whatever you want to call them to go  
6 to the morality section, detective section or the  
7 ident section.

8 Q Sir, I'm not trying to suggest that you should  
9 have been the person that was coordinating the  
04:24 10 two, I'm trying to understand what happened at the  
11 time, because we know for a fact, we've heard  
12 evidence and we'll hear more evidence that  
13 officers worked on both rape files and the murder,  
14 the Gail Miller file and the rape files and some  
04:24 15 officers drew comparisons and connections, so it  
16 did happen. My question to you is to try and find  
17 out what systems, if any, were in place so that  
18 that would happen or was it just by luck that they  
19 happened to be crossing paths?

04:25 20 A No, it would be by reports that would come through  
21 the office. It would have been by files and what  
22 reports.

23 Q Fair enough. Why don't we turn to the occurrence  
24 report. If we could call up 006255, please, and  
04:25 25 we'll come back to that, Mr. Wood, maybe when I



1 get some specific documents we can revisit that,  
2 and I think this is the original occurrence  
3 report, we have spent some time with this document  
4 before, and I think there's a reference here,  
04:25 5 Parker and Reid got a call from you to proceed to  
6 the alley. Is that right?

7 A That's right, yes.

8 Q And Reid and Parker, would they be the detective  
9 sergeants on duty that morning, is that why they  
04:26 10 got the call?

11 A That's right, they were working in the patrol car,  
12 detective car.

13 Q And we've heard from other witnesses that  
14 subsequently Ray Mackie became the officer in  
04:26 15 charge with Parker -- or in charge with Reid. Do  
16 you know how that came about or who would have  
17 made that decision?

18 A Well, it would have depended how the shift was  
19 made up and who was working with who. Usually  
04:26 20 there was two detectives worked together.

21 Q But my question is this, Parker and Reid were the  
22 officers who went to the scene?

23 A Right.

24 Q For the rest of the investigation the officers in  
04:26 25 charge, two officers were assigned responsibility



1 for the file and they were Mackie and Reid and I'm  
2 wondering who made the decision to put Mackie and  
3 Reid in charge of the file?

4 A I don't really know. It was just -- I can't  
04:26 5 really say.

6 Q At the time -- we're done with this document. Who  
7 would have been responsible with the police  
8 service back at the time of the Gail Miller murder  
9 to deal with the media?

04:27 10 A There was no one appointed at that time. The  
11 media just had access to the police building, you  
12 would find them all anywhere and everywhere until  
13 such time as the chief put a stop to it and said  
14 they could only come in at a certain time of the  
04:27 15 day and get their information, but at the start, I  
16 don't know, they were all over. I talked to them,  
17 and reports show.

18 Q Yeah. Who would they go talk to, whoever they  
19 could find or were you the person that was to  
04:27 20 speak to them?

21 A In the detective department I would talk to them  
22 normally, yeah.

23 Q So in a murder investigation, the person who would  
24 talk to the media would be you; is that correct?

04:27 25 A Right, yeah.





1 Q And I think we'll see newspaper reports in a  
2 moment. And would other officers be talking to  
3 the media?

4 A Not to my knowledge, not officially.

04:27 5 Q And I think you were saying that they were always  
6 there at the police station; is that right, the  
7 media?

8 A Always.

9 Q And so I take it at that time it would be  
04:28 10 newspaper reporters, radio reporters, television  
11 reporters?

12 A No, I think it was just newspaper reporters.

13 Q Newspaper?

14 A Yeah.

04:28 15 Q And at that time do you remember whether there was  
16 any proactive efforts by the police to be  
17 communicating information out through the media to  
18 the public?

19 A No.

04:28 20 Q And we'll see in a moment, or tomorrow, some  
21 newspaper articles where you would be asking the  
22 public for help on the investigation?

23 A Where I was?

24 Q Yes.

04:28 25 A That's right, yes.



1 Q And I take it that would be proactive, look,  
2 reporter, help me out here, can you run a story,  
3 we're looking for X, is that how that would  
4 happened?

04:28 5 A That's right.

6 Q I take there weren't press releases at that time,  
7 or were there?

8 A Not as such that I can recall.

9 MR. HODSON: This is probably an  
04:28 10 appropriate spot to break, Mr. Commissioner.

11 COMMISSIONER MacCALLUM: Uh-huh. Nine  
12 o'clock tomorrow, please.

13 (Adjourned at 4:30 p.m.)  
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11272:7  
'68-'69 - 11272:13  
'69 - 11227:19,  
11258:20  
'71 - 11253:18  
'89 - 11197:23  
'90 - 11185:13  
'93 - 11220:5  
'check - 11263:19  
'em - 11221:23,  
11261:1  
'follow - 11263:19  
'going - 11255:3  
'it - 11117:12,  
11117:22  
'lookit - 11258:21  
'maybe - 11085:4  
'not - 11082:3  
'oh - 11268:6  
'okay - 11261:15  
'our - 11256:12  
'platooned' - 11252:23  
'positive - 11031:20,  
11032:20, 11040:21  
'recording - 11258:13  
'secretors' - 11037:16  
'senior - 11269:7  
'somebody - 11262:11  
'species - 11206:9  
'tell - 11269:25  
'this - 11063:12  
'we - 11261:9  
'weak' - 11113:12  
'well - 11275:11

**O**

002473 - 11201:12  
002486 - 11187:20  
002489 - 11189:3  
002492 - 11195:15  
004102 - 11127:9  
004103 - 11127:19  
004772 - 11201:20  
004776 - 11202:4  
004778 - 11202:5  
006255 - 11279:24  
006262 - 11034:5  
006929 - 11131:14,  
11132:21  
006934 - 11131:20  
009259 - 11053:25,  
11055:23  
009281 - 11108:25  
009282 - 11108:24  
009374 - 11108:16,  
11127:22  
009386 - 11127:22  
009390 - 11108:14  
009403 - 11118:11  
009789 - 11212:19  
016920 - 11197:16  
016921 - 11198:20  
019279 - 11215:17  
031373 - 11054:20  
031386 - 11085:19  
032355 - 11215:23  
032357 - 11218:13  
035878 - 11219:25  
039070 - 11209:23  
04 - 11220:2  
041 - 11236:20

041902 - 11219:25  
041925 - 11138:9  
041930 - 11140:2  
041932 - 11141:7  
041935 - 11143:7  
041938 - 11147:10  
041940 - 11150:2  
041942 - 11153:3  
041946 - 11157:23  
041948 - 11228:2  
041949 - 11161:24  
041954 - 11163:5  
041962 - 11164:15  
041968 - 11167:16  
041975 - 11175:13  
041978 - 11178:10  
042742 - 11106:14  
042757 - 11108:13  
045807 - 11219:25,  
11220:3  
045917 - 11132:17  
045918 - 11224:16  
045969 - 11219:25  
045986 - 11116:11  
082377 - 11033:17  
082379 - 11059:3  
082380 - 11076:13,  
11087:23, 11095:18  
082381 - 11115:24,  
11117:8  
082382 - 11108:20,  
11110:15  
082385 - 11107:8  
082386 - 11032:16,  
11040:18, 11047:11  
082389 - 11090:15  
084976 - 11046:1,  
11048:12

**1**

1 - 11048:25, 11086:7,  
11096:12, 11096:24,  
11109:20, 11124:1,  
11128:7, 11192:11,  
11246:22, 11247:2,  
11262:14  
1/2 - 11077:22  
10 - 11110:2, 11260:19  
105534 - 11067:15  
105544 - 11035:21  
105558 - 11108:1  
105559 - 11089:17,  
11090:20, 11095:12,  
11114:22  
10:30 - 11095:8,  
11268:25  
10:46 - 11095:9  
11 - 11247:13  
11030 - 11029:4  
11224 - 11029:5  
11234 - 11029:6  
11239 - 11029:7  
11242 - 11029:8  
11245 - 11029:10  
11:56 - 11149:21  
11th - 11127:25  
12 - 11121:11,  
11211:24, 11260:19  
12th - 11046:13,  
11053:6, 11089:19,  
11122:10  
138-69 - 11046:9,  
11121:15  
13th - 11187:21  
141905 - 11230:5  
141938 - 11230:6  
141940 - 11233:10  
14th - 11116:10,  
11133:1, 11224:23,

11246:7  
15 - 11116:22  
15th - 11127:12  
16th - 11026:21,  
11116:2  
17th - 11036:8  
185365 - 11211:22  
18th - 11054:22,  
11119:13  
1922 - 11246:7  
1946 - 11246:13,  
11246:22  
1958 - 11109:6  
1959 - 11140:5  
1964 - 11140:16,  
11140:20  
1965 - 11140:22,  
11141:9  
1968 - 11247:2  
1969 - 11036:9,  
11046:13, 11047:18,  
11052:9, 11061:9,  
11062:15, 11063:1,  
11063:4, 11063:22,  
11069:12, 11076:14,  
11086:15, 11086:16,  
11089:24, 11090:4,  
11097:23, 11108:20,  
11109:8, 11116:17,  
11119:13, 11121:12,  
11133:17, 11134:9,  
11152:9, 11153:11,  
11164:12, 11164:13,  
11174:22, 11184:8,  
11190:11, 11191:3,  
11192:16, 11193:19,  
11194:11, 11195:13,  
11196:1, 11196:16,  
11196:20, 11198:16,  
11199:5, 11200:2,  
11201:5, 11201:6,  
11202:22, 11205:14,  
11206:19, 11209:17,  
11211:11, 11212:13,  
11214:21, 11215:1,  
11217:1, 11219:1,  
11221:7, 11221:12,  
11222:1, 11222:9,  
11222:11, 11227:9,  
11229:16, 11231:16,  
11232:12, 11236:1,  
11237:1, 11237:25,  
11240:6, 11240:15,  
11241:15, 11241:21,  
11247:4, 11248:9,  
11250:4, 11254:3,  
11259:12  
1970 - 11116:2,  
11116:10, 11133:2,  
11224:24, 11233:3,  
11248:5  
1971 - 11247:19  
1973 - 11222:2  
1977 - 11246:14,  
11247:23  
1980s - 11185:20,  
11187:2  
1985 - 11185:13  
1988 - 11187:21  
1990 - 11201:22,  
11209:24, 11211:24,  
11234:13, 11234:14,  
11236:20, 11238:11  
1990's - 11220:8  
1990s - 11187:2  
1992 - 11186:15,  
11212:21, 11213:23,  
11214:15, 11215:21,  
11215:24  
1993 - 11219:14,

11234:12, 11235:18  
1:30 - 11149:22  
1st - 11247:19

**2**

2 - 11040:19, 11049:6,  
11054:13, 11055:3,  
11064:23, 11067:23,  
11077:22, 11090:22,  
11103:13, 11109:20,  
11124:2, 11124:19,  
11192:19, 11225:3,  
11262:16  
2005 - 11026:21  
20th - 11066:8  
21st - 11053:22,  
11054:1, 11059:7,  
11063:24  
22nd - 11235:18  
231077 - 11220:23  
23rd - 11063:22,  
11065:20  
24 - 11269:3,  
11273:12, 11274:15  
24-hour - 11254:21  
250597 - 11066:4,  
11067:3  
250605 - 11066:7  
250606 - 11066:6  
252041 - 11236:20  
252047 - 11236:16,  
11237:2  
255230 - 11180:16  
255256 - 11180:17  
255272 - 11181:15  
278893 - 11235:16  
28th - 11258:20  
29th - 11089:24,  
11090:4, 11090:10,  
11091:23, 11108:20  
2:48 - 11214:10  
2nd - 11067:15,  
11070:9

**3**

3 - 11048:22,  
11049:12, 11050:6,  
11055:2, 11056:7,  
11065:2, 11065:8,  
11077:22, 11095:13,  
11096:5, 11103:15,  
11109:18, 11109:21,  
11115:2, 11124:24,  
11193:23  
30th - 11069:12,  
11070:1, 11106:16,  
11106:21, 11106:22,  
11107:11, 11109:2  
31 - 11247:4, 11258:19  
311611 - 11223:18  
315727 - 11223:18  
32 - 11050:14,  
11053:15, 11053:17,  
11058:24  
324671 - 11119:13  
324672 - 11122:20  
324690 - 11063:20  
324695 - 11070:8  
324697 - 11069:5  
325555 - 11246:17  
325563 - 11246:17  
325569 - 11248:1,  
11248:13  
325570 - 11256:23  
3:09 - 11214:11  
3rd - 11067:12,  
11069:6, 11076:14,  
11086:2, 11089:25,

11090:5, 11090:12,  
11091:18, 11095:19,  
11096:11, 11109:8,  
11153:11, 11212:21,  
11213:23

**4**

4 - 11051:8, 11056:13,  
11057:1, 11057:8,  
11057:21, 11058:11,  
11109:22, 11115:19,  
11195:4  
40 - 11050:12, 11058:2  
44 - 11131:24  
4:30 - 11283:13  
4th - 11034:3,  
11034:14, 11201:22,  
11236:19

**5**

5 - 11053:1, 11056:18,  
11057:2, 11057:8,  
11058:11, 11058:18,  
11109:23, 11110:7  
50's - 11247:15  
53 - 11132:13  
57 - 11026:22  
571 - 11248:14  
5th - 11227:9

**6**

6 - 11109:24, 11209:23  
606 - 11066:9  
641/69 - 11119:15  
69 - 11047:17  
6th - 11047:18,  
11047:25, 11053:7,  
11215:21, 11215:24

**7**

7 - 11109:25  
7th - 11046:15,  
11108:7, 11127:14,  
11149:3

**8**

8 - 11110:1  
80 - 11050:10,  
11050:13, 11133:11  
80% - 11071:1  
82 - 11246:8  
8th - 11197:23

**9**

9 - 11110:1  
917 - 11224:16  
93A - 11132:19  
9:00 - 11030:2  
9th - 11047:7

**A**

A-1 - 11131:25,  
11171:6, 11171:17  
A-2 - 11132:1, 11171:6,  
11171:20  
A-antigen - 11202:19,  
11204:24, 11208:3,  
11216:22, 11216:25  
A-like - 11212:4,  
11212:16  
A1 - 11172:22,  
11172:24, 11173:4,  
11173:16, 11173:18,



11175:6  
**A2** - 11172:23,  
11172:24, 11173:5,  
11173:18, 11175:5  
**A3** - 11172:23, 11173:5  
**A4** - 11173:5  
**Aaron** - 11028:8  
**Ab** - 11038:22,  
11039:3, 11039:5,  
11043:2, 11058:4,  
11058:10, 11121:3,  
11151:18, 11151:19,  
11161:9, 11168:23,  
11191:6, 11195:7  
**abbreviation** -  
11033:14  
**abbreviations** -  
11030:14, 11037:1  
**ability** - 11090:2,  
11174:1, 11174:14,  
11196:6, 11196:9,  
11241:21, 11284:7  
**able** - 11081:3,  
11081:8, 11081:16,  
11091:5, 11092:2,  
11092:3, 11131:16,  
11133:13, 11147:16,  
11157:12, 11167:8,  
11178:24, 11184:13,  
11204:5, 11205:21,  
11233:24  
**Abo** - 11050:8,  
11056:15, 11056:20,  
11120:13, 11120:19,  
11128:12, 11146:20,  
11239:6  
**absence** - 11148:13,  
11166:21, 11198:22,  
11225:24  
**absolutely** - 11157:13,  
11208:22  
**absorbed** - 11060:25  
**absorption** - 11061:5,  
11208:15  
**academic** - 11140:4,  
11140:10  
**accept** - 11198:13  
**acceptable** - 11237:12,  
11238:2, 11238:6  
**accepted** - 11085:22,  
11182:15  
**accepting** - 11090:3,  
11190:7, 11194:9,  
11199:3, 11200:1  
**access** - 11198:3,  
11234:14, 11235:10,  
11271:3, 11278:23,  
11281:11  
**accord** - 11148:23  
**accordance** - 11148:3  
**according** - 11114:3,  
11206:20  
**Accounting** - 11109:11  
**account** - 11134:22,  
11179:5, 11216:24  
**accuracy** - 11135:6,  
11136:15, 11183:22,  
11183:24, 11229:15  
**accurate** - 11050:17,  
11065:5, 11088:3,  
11110:23, 11111:18,  
11111:19, 11133:15,  
11134:8, 11134:18,  
11136:13, 11141:4,  
11142:12, 11147:3,  
11147:4, 11147:7,  
11151:23, 11155:10,  
11156:16, 11157:20,  
11159:13, 11161:4,  
11163:1, 11164:6,  
11167:13, 11169:20,  
11172:1, 11178:6,  
11178:8, 11179:14,  
11183:25, 11191:9,  
11192:5, 11231:3,  
11233:23  
**accurately** - 11231:20,  
11248:8  
**accused** - 11233:20,  
11245:17  
**acid** - 11030:21,  
11032:23, 11037:4,  
11076:23, 11088:1,  
11110:21, 11111:16,  
11112:16, 11221:21  
**act** - 11224:5  
**active** - 11255:23,  
11265:5  
**actual** - 11031:11,  
11035:20, 11048:4,  
11163:14, 11215:15,  
11223:2, 11250:20,  
11262:19, 11265:17  
**add** - 11041:9,  
11058:12, 11060:22  
**added** - 11043:15,  
11045:3, 11081:13,  
11087:8, 11223:5  
**adding** - 11045:4,  
11113:7  
**addition** - 11263:11  
**additional** - 11221:11,  
11236:10  
**address** - 11230:3,  
11243:3  
**addressed** - 11069:7,  
11213:25, 11214:1  
**Adjoined** - 11095:8,  
11149:21, 11214:10,  
11283:13  
**Administration** -  
11249:5  
**administrative** -  
11249:4  
**admissible** - 11189:21  
**advent** - 11238:9,  
11238:11  
**advised** - 11069:20,  
11110:11, 11119:3  
**advising** - 11106:25  
**affected** - 11190:10,  
11241:25, 11242:1  
**afraid** - 11182:13  
**afternoon** - 11149:24,  
11149:25, 11229:14,  
11245:22, 11250:24,  
11269:21  
**afterwards** - 11217:12  
**age** - 11182:18,  
11246:6, 11246:10  
**agency** - 11115:17  
**ages** - 11182:13  
**agglutininogen** -  
11124:21  
**agglutinogens** -  
11055:5, 11055:6,  
11055:11, 11055:16,  
11056:20, 11120:14,  
11120:20, 11123:20,  
11128:19, 11128:24  
**Agglutinogens** -  
11123:14  
**ago** - 11097:5  
**agree** - 11053:11,  
11065:5, 11068:16,  
11135:5, 11135:18,  
11183:21, 11195:25,  
11200:11, 11207:20,  
11208:9, 11212:12,  
11212:17, 11217:4,  
11217:7, 11225:5,  
11233:22, 11241:12,  
11241:18, 11277:24,  
11278:10  
**agreed** - 11192:16,  
11195:11, 11212:13  
**agreeing** - 11245:22  
**agrees** - 11238:5  
**Ah'** - 11032:20,  
11040:21  
**ahead** - 11101:3,  
11131:3, 11202:17,  
11268:6  
**Alain** - 11197:17,  
11197:24, 11198:14,  
11208:5, 11211:23  
**Alberta** - 11141:2  
**Alden** - 11029:9,  
11245:20  
**Alexander** - 11028:14  
**alleged** - 11119:17,  
11192:25, 11193:17,  
11213:3, 11219:14  
**Alleged** - 11210:3  
**alley** - 11280:6  
**allow** - 11062:20,  
11081:10, 11127:2,  
11153:1, 11158:16  
**allowed** - 11094:21,  
11152:23  
**allowing** - 11152:2  
**allows** - 11044:7  
**almost** - 11172:25,  
11194:6, 11194:24,  
11252:23  
**alone** - 11125:23,  
11155:25, 11164:1,  
11213:4, 11232:17  
**Alright** - 11147:19,  
11168:11  
**altern** - 11080:9  
**alternate** - 11080:9  
**amount** - 11035:2,  
11036:17, 11091:24,  
11165:16, 11165:18,  
11176:17, 11176:25,  
11177:12, 11178:21,  
11194:14, 11200:7,  
11200:20, 11207:23,  
11208:1, 11209:1,  
11209:7, 11209:10  
**amounts** - 11182:16  
**amylase** - 11083:20  
**analysed** - 11141:10  
**analysis** - 11086:13,  
11220:9, 11223:9  
**animal** - 11137:19  
**annual** - 11248:3  
**anomalies** - 11074:17  
**anomaly** - 11071:10,  
11071:14, 11071:16,  
11071:18, 11071:24  
**answer** - 11041:13,  
11071:15, 11072:8,  
11164:9, 11169:23,  
11209:12, 11219:5,  
11228:12, 11239:2  
**answered** - 11033:7,  
11084:7, 11117:21  
**answers** - 11152:1  
**ant** - 11217:15  
**anti** - 11173:15  
**anti-a** - 11173:15  
**antibodies** - 11043:5,  
11043:6, 11043:7,  
11043:12, 11043:25,  
11044:3, 11044:7,  
11044:19, 11055:13,  
11151:3, 11151:5,  
11151:8, 11172:18  
**antibody** - 11044:12,  
11205:2, 11205:8,  
11206:1, 11206:4,  
11206:9, 11206:16  
**anticipate** - 11131:18,  
11132:24  
**antigen** - 11038:5,  
11043:1, 11043:6,  
11043:7, 11043:17,  
11044:12, 11061:2,  
11070:22, 11070:24,  
11071:7, 11072:12,  
11073:10, 11073:16,  
11073:18, 11080:25,  
11083:24, 11124:12,  
11136:21, 11139:4,  
11146:23, 11148:18,  
11151:11, 11151:13,  
11151:17, 11161:18,  
11197:25, 11200:9,  
11200:16, 11200:17,  
11200:25, 11202:19,  
11204:24, 11205:8,  
11206:9, 11206:16,  
11208:3, 11216:19,  
11216:22, 11216:25,  
11225:19, 11226:1,  
11228:21, 11229:5,  
11241:21  
**antigen-antibody** -  
11205:8, 11206:9,  
11206:16  
**Antigens** - 11087:19,  
11146:22  
**antigens** - 11038:6,  
11038:17, 11039:6,  
11039:13, 11039:18,  
11039:24, 11041:6,  
11041:25, 11043:5,  
11043:23, 11044:2,  
11044:16, 11044:25,  
11045:3, 11050:9,  
11051:5, 11051:14,  
11051:17, 11052:3,  
11052:9, 11052:20,  
11052:21, 11055:13,  
11055:14, 11055:18,  
11055:19, 11057:12,  
11057:14, 11057:18,  
11058:20, 11060:15,  
11060:22, 11061:25,  
11062:4, 11062:13,  
11063:3, 11063:5,  
11064:14, 11065:2,  
11065:16, 11074:23,  
11079:20, 11080:10,  
11080:15, 11080:17,  
11080:22, 11081:25,  
11084:5, 11084:9,  
11086:24, 11087:18,  
11088:7, 11088:25,  
11089:1, 11089:11,  
11100:9, 11100:15,  
11103:19, 11105:1,  
11112:23, 11113:6,  
11113:19, 11114:8,  
11114:12, 11114:13,  
11115:5, 11121:3,  
11122:12, 11123:22,  
11123:24, 11125:23,  
11126:11, 11129:2,  
11132:6, 11132:15,  
11133:8, 11134:3,  
11134:4, 11134:23,  
11134:25, 11135:2,  
11136:9, 11136:18,  
11136:25, 11137:10,  
11142:19, 11144:20,  
11145:1, 11145:6,  
11145:8, 11145:13,  
11146:1, 11146:4,  
11146:5, 11146:8,  
11146:11, 11146:15,  
11146:25, 11147:2,  
11149:7, 11150:13,  
11150:14, 11151:2,  
11152:3, 11152:14,  
11152:24, 11154:4,  
11160:18, 11160:20,  
11163:22, 11163:23,  
11172:5, 11172:7,  
11172:11, 11172:16,  
11172:17, 11173:2,  
11173:10, 11173:13,  
11174:17, 11174:21,  
11174:24, 11191:7,  
11192:13, 11192:21,  
11192:24, 11198:23,  
11202:18, 11208:14,  
11209:2, 11209:10,  
11212:5, 11212:16,  
11215:3, 11217:16,  
11225:13, 11225:19,  
11228:9, 11230:17,  
11233:15, 11240:10,  
11241:7, 11242:8  
**antihuman** - 11033:15,  
11037:9  
**anyway** - 11036:17,  
11069:21, 11082:17,  
11184:11  
**anyways** - 11196:18  
**apart** - 11170:17,  
11178:25, 11268:9  
**apologize** - 11224:12  
**apparent** - 11071:9,  
11193:1, 11194:3  
**Appeals** - 11212:21,  
11214:2  
**appear** - 11031:16,  
11088:12, 11109:5,  
11112:22, 11113:14,  
11116:6, 11117:17,  
11119:22, 11187:25,  
11188:4, 11188:6,  
11250:18  
**appearance** - 11144:1  
**Appearances** -  
11028:1  
**appearances** -  
11110:5  
**appeared** - 11065:25,  
11112:24, 11153:16,  
11264:16  
**application** -  
11186:16, 11187:23  
**applied** - 11196:6  
**applies** - 11103:14  
**apply** - 11035:10,  
11101:3, 11104:8,  
11173:21  
**appointed** - 11281:10  
**appreciate** - 11237:14,  
11238:10, 11270:25,  
11275:18, 11277:8  
**approach** - 11073:23,  
11190:10  
**appropriate** -  
11283:10  
**approval** - 11267:8,  
11267:17  
**approve** - 11267:12,  
11267:18, 11268:1  
**approved** - 11267:15  
**approximation** -  
11141:13  
**April** - 11053:22,  
11053:25, 11054:22,  
11059:7, 11063:22,  
11063:24, 11065:20,



11106:16, 11106:21,  
11106:22, 11107:11,  
11127:12, 11127:14,  
11127:25, 11246:22,  
11247:19  
**area** - 11034:8,  
11042:4, 11045:23,  
11051:20, 11052:3,  
11055:25, 11056:11,  
11057:3, 11059:8,  
11077:24, 11083:21,  
11112:15, 11127:1,  
11139:9, 11162:9,  
11162:13, 11162:15,  
11178:17, 11178:19,  
11178:20, 11178:21,  
11179:9, 11182:12,  
11222:22, 11264:20  
**areas** - 11110:19,  
11110:23, 11111:1,  
11111:7, 11111:12,  
11111:15, 11111:16,  
11111:21, 11111:25,  
11112:1, 11112:2,  
11112:12, 11114:16,  
11114:17, 11117:15,  
11118:5, 11118:8,  
11123:15, 11123:23,  
11123:24, 11124:4,  
11222:8  
**arise** - 11174:15  
**arisen** - 11068:7  
**arises** - 11243:2  
**arose** - 11045:24,  
11068:6, 11105:17,  
11135:21, 11197:14  
**arrests** - 11273:13  
**arrived** - 11072:15  
**article** - 11030:19,  
11031:11, 11109:13,  
11209:19, 11209:23,  
11211:3, 11222:5  
**articles** - 11110:11,  
11209:21, 11211:3,  
11282:21  
**ascertain** - 11147:16  
**ascertaining** - 11179:1  
**aside** - 11276:11  
**aspect** - 11096:3,  
11113:17, 11120:24,  
11122:15, 11130:8,  
11172:20, 11179:6  
**Asper** - 11201:23,  
11210:23, 11211:2,  
11212:22, 11213:16,  
11215:24, 11236:19  
**aspirate** - 11138:17,  
11139:8, 11139:15,  
11139:20, 11139:22  
**aspirations** - 11222:20  
**assailant** - 11071:20,  
11071:21, 11072:1,  
11072:2, 11170:11,  
11193:17, 11194:23,  
11195:1, 11195:7,  
11195:8, 11276:15,  
11276:17, 11276:24  
**assault** - 11203:7,  
11222:18, 11223:8,  
11252:18, 11257:3,  
11270:17, 11271:9,  
11271:23, 11271:25,  
11272:1, 11275:4,  
11275:6  
**assaults** - 11270:16,  
11271:2, 11271:3,  
11271:4, 11272:1,  
11275:13  
**assertion** - 11205:13,  
11205:16

**assigned** - 11280:25  
**assist** - 11069:21,  
11175:19  
**assistance** - 11174:2  
**Assistant** - 11027:3,  
11027:6  
**assisted** - 11263:5  
**assists** - 11172:6  
**assume** - 11043:16,  
11045:24, 11052:7,  
11065:13, 11088:8,  
11103:8, 11121:25,  
11124:16, 11126:10,  
11128:14, 11170:4,  
11180:10, 11270:22,  
11271:14, 11276:12,  
11276:20, 11276:24  
**assumed** - 11190:23,  
11191:2, 11191:14,  
11191:21, 11192:5  
**Assuming** - 11089:4,  
11192:8  
**assuming** - 11044:19,  
11073:2, 11074:21,  
11236:24  
**assumption** -  
11084:17, 11191:9,  
11222:17, 11242:8  
**assumptions** -  
11130:25  
**attached** - 11265:19  
**attack** - 11276:16  
**attempt** - 11059:15,  
11059:18, 11099:24,  
11124:20, 11133:25,  
11156:4, 11157:12,  
11174:23, 11227:16  
**attempted** - 11120:13,  
11270:17, 11272:9,  
11273:23, 11276:14  
**attempting** - 11095:15,  
11096:3  
**attempts** - 11220:9  
**attendance** - 11034:6,  
11269:19  
**attended** - 11110:6,  
11140:7, 11186:7  
**attention** - 11069:8,  
11108:18, 11122:18,  
11143:7, 11157:23,  
11161:23, 11163:5,  
11164:15, 11167:16,  
11187:17, 11193:23,  
11197:16, 11197:21,  
11201:10, 11201:18,  
11207:16, 11209:22,  
11211:21, 11212:2,  
11212:19, 11214:2,  
11218:13, 11245:5,  
11272:21, 11276:1  
**attributed** - 11191:18  
**auction** - 11109:8  
**Audio** - 11027:13  
**August** - 11026:21,  
11089:19, 11197:23  
**automobile** - 11110:3  
**autopsy** - 11138:13,  
11138:19, 11180:10  
**availability** - 11139:23  
**available** - 11042:20,  
11073:20, 11173:17,  
11173:19, 11191:3,  
11203:15, 11204:15,  
11204:20, 11227:10,  
11227:11, 11227:15,  
11233:1, 11236:5,  
11238:21, 11254:25,  
11255:12, 11263:10  
**average** - 11046:19,  
11046:20, 11046:23

**avoid** - 11241:23  
**aware** - 11062:9,  
11062:14, 11062:16,  
11062:22, 11063:4,  
11068:16, 11072:13,  
11073:1, 11073:3,  
11075:7, 11079:15,  
11083:15, 11083:16,  
11084:22, 11107:2,  
11119:2, 11138:16,  
11138:20, 11138:21,  
11138:22, 11173:6,  
11174:6, 11180:6,  
11180:12, 11185:18,  
11186:24, 11187:5,  
11189:24, 11190:1,  
11198:10, 11198:16,  
11199:3, 11199:4,  
11199:6, 11199:7,  
11199:25, 11200:3,  
11201:24, 11205:11,  
11205:13, 11205:16,  
11211:3, 11212:15,  
11214:13, 11214:18,  
11217:1, 11217:9,  
11217:20, 11217:22,  
11218:8, 11219:12,  
11219:16, 11220:8,  
11220:12, 11220:13,  
11220:16, 11220:17,  
11221:1, 11234:14,  
11235:21, 11236:6,  
11240:12, 11240:16,  
11241:12, 11241:13,  
11241:19, 11244:13,  
11271:5, 11274:6

**B**

**Bachelor** - 11140:8  
**background** -  
11225:25  
**backup** - 11041:14  
**bacterial** - 11198:5  
**bag** - 11109:22,  
11116:4  
**Bagwell** - 11108:4  
**Bagwell's** - 11179:21  
**balance** - 11196:20,  
11197:5  
**bank** - 11218:16  
**Barber** - 11220:15  
**base** - 11183:25  
**based** - 11065:4,  
11066:16, 11066:20,  
11075:3, 11075:4,  
11087:12, 11089:2,  
11113:17, 11129:6,  
11129:20, 11130:24,  
11184:12, 11192:5,  
11192:10, 11196:19,  
11203:14, 11204:4,  
11231:19, 11233:2,  
11240:6, 11255:22,  
11275:20  
**Based** - 11087:7,  
11196:5  
**basis** - 11050:1,  
11105:4, 11170:1,  
11170:2, 11189:10,  
11193:12, 11195:17,  
11197:10, 11208:10,  
11213:16, 11235:19,  
11250:7, 11271:11  
**Bb** - 11111:14  
**bear** - 11070:10,  
11089:22, 11125:20,  
11136:22  
**bearing** - 11120:5,  
11175:12

**became** - 11030:24,  
11138:21, 11138:22,  
11186:10, 11187:5,  
11205:16, 11217:22,  
11218:8, 11280:14  
**become** - 11124:25,  
11125:5, 11125:16,  
11126:4, 11185:18,  
11186:24, 11217:9,  
11217:20  
**becomes** - 11072:5  
**beginning** - 11109:12,  
11116:14, 11140:22,  
11175:14, 11200:5,  
11201:21  
**Beginning** - 11167:16  
**behalf** - 11185:18  
**Beitel** - 11027:9  
**belief** - 11169:24  
**belonged** - 11110:12  
**below** - 11230:7  
**Bench** - 11284:1,  
11284:3, 11284:14,  
11284:18  
**beneath** - 11248:20  
**benefit** - 11145:19  
**beside** - 11032:5  
**Best** - 11155:13  
**best** - 11050:19,  
11061:6, 11062:19,  
11062:23, 11113:17,  
11126:23, 11133:16,  
11134:9, 11148:19,  
11155:12, 11159:14,  
11174:18, 11178:8,  
11179:18, 11179:24,  
11184:19, 11186:17,  
11201:5, 11213:13,  
11218:3, 11222:17,  
11222:18, 11222:21,  
11223:1, 11238:4,  
11241:16, 11243:5,  
11284:6  
**better** - 11090:1,  
11225:17, 11261:15  
**between** - 11046:16,  
11047:25, 11048:3,  
11061:18, 11062:5,  
11072:20, 11091:24,  
11093:10, 11102:1,  
11113:15, 11117:24,  
11157:24, 11172:24,  
11173:7, 11184:24,  
11185:13, 11191:6,  
11212:11, 11236:3,  
11236:7, 11251:20,  
11268:16, 11274:4,  
11274:12, 11278:20  
**Bev** - 11127:10  
**beyond** - 11110:21,  
11143:4, 11182:18,  
11221:6, 11265:2  
**big** - 11080:1,  
11113:12, 11267:4  
**bins** - 11279:5  
**biological** - 11062:17  
**bit** - 11036:16,  
11039:21, 11042:14,  
11046:22, 11048:3,  
11061:20, 11069:4,  
11092:14, 11116:13,  
11135:20, 11152:12,  
11157:24, 11173:2,  
11199:12, 11208:12,  
11214:5, 11214:23,  
11224:12, 11231:23,  
11237:14, 11239:4,  
11254:1, 11268:16,  
11270:14, 11270:15  
**black** - 11109:22,

11109:24, 11110:12,  
11114:16, 11129:14,  
11162:14, 11162:18,  
11178:20  
**bladder** - 11183:13  
**blade** - 11031:19,  
11048:21, 11049:8  
**blanket** - 11054:10  
**Bld** - 11087:23,  
11104:1  
**bleach** - 11199:22  
**bleed** - 11195:2  
**Blood** - 11167:4,  
11194:22  
**blood** - 11031:15,  
11031:18, 11031:24,  
11032:1, 11032:2,  
11032:3, 11033:3,  
11033:10, 11037:12,  
11037:15, 11037:18,  
11037:21, 11038:5,  
11038:9, 11038:16,  
11039:17, 11041:14,  
11041:25, 11043:3,  
11043:4, 11043:9,  
11043:19, 11043:21,  
11043:22, 11044:5,  
11044:8, 11044:10,  
11045:4, 11045:6,  
11048:19, 11048:20,  
11048:22, 11049:1,  
11049:7, 11050:8,  
11051:25, 11054:12,  
11054:18, 11054:25,  
11055:3, 11055:18,  
11055:20, 11056:9,  
11056:10, 11056:14,  
11056:15, 11057:8,  
11057:10, 11057:11,  
11057:13, 11057:14,  
11057:17, 11057:21,  
11057:23, 11058:4,  
11058:5, 11059:13,  
11059:17, 11059:23,  
11059:24, 11060:3,  
11060:7, 11060:15,  
11060:21, 11060:22,  
11060:24, 11061:2,  
11061:10, 11064:10,  
11064:12, 11064:14,  
11064:20, 11064:21,  
11064:23, 11065:2,  
11069:16, 11070:20,  
11070:23, 11071:1,  
11071:4, 11071:5,  
11076:22, 11076:23,  
11077:1, 11077:2,  
11077:4, 11077:13,  
11077:14, 11077:17,  
11078:2, 11078:12,  
11078:15, 11078:16,  
11078:25, 11079:23,  
11079:24, 11080:2,  
11080:3, 11080:8,  
11080:12, 11080:16,  
11080:17, 11080:25,  
11081:6, 11086:13,  
11092:17, 11093:18,  
11093:22, 11094:14,  
11097:1, 11097:9,  
11097:13, 11097:21,  
11098:14, 11098:15,  
11099:1, 11099:8,  
11099:9, 11099:12,  
11099:16, 11099:21,  
11099:22, 11099:25,  
11100:1, 11100:16,  
11100:23, 11101:3,  
11101:11, 11101:17,  
11102:2, 11102:15,



11103:1, 11103:23,  
11104:3, 11104:5,  
11105:24, 11106:4,  
11106:17, 11107:12,  
11107:19, 11110:5,  
11110:19, 11111:1,  
11111:15, 11111:22,  
11111:23, 11111:25,  
11112:1, 11112:12,  
11113:8, 11114:16,  
11115:1, 11117:3,  
11117:11, 11117:19,  
11117:20, 11117:23,  
11118:1, 11118:7,  
11118:9, 11124:8,  
11124:12, 11125:9,  
11125:14, 11125:25,  
11126:20, 11127:17,  
11128:3, 11128:8,  
11128:11, 11128:12,  
11128:16, 11128:17,  
11128:19, 11129:3,  
11132:2, 11132:3,  
11132:8, 11133:8,  
11133:13, 11134:1,  
11134:3, 11134:15,  
11134:16, 11134:21,  
11134:25, 11135:3,  
11135:9, 11136:10,  
11136:19, 11136:20,  
11137:1, 11137:12,  
11137:15, 11137:19,  
11137:22, 11137:24,  
11138:1, 11138:2,  
11138:3, 11139:18,  
11141:11, 11141:20,  
11141:22, 11141:23,  
11144:20, 11144:25,  
11145:5, 11145:14,  
11145:22, 11146:2,  
11146:3, 11146:6,  
11146:9, 11146:12,  
11146:17, 11146:19,  
11146:20, 11147:1,  
11147:16, 11148:17,  
11150:23, 11151:1,  
11151:4, 11151:6,  
11153:24, 11154:2,  
11154:3, 11154:5,  
11154:14, 11154:16,  
11155:1, 11155:17,  
11155:18, 11155:25,  
11156:6, 11156:22,  
11157:4, 11157:6,  
11157:10, 11157:14,  
11157:19, 11158:5,  
11158:7, 11158:9,  
11158:14, 11158:15,  
11158:22, 11159:8,  
11160:3, 11160:16,  
11160:21, 11160:23,  
11161:2, 11161:8,  
11161:14, 11161:19,  
11166:12, 11168:9,  
11168:13, 11168:14,  
11168:18, 11168:24,  
11169:1, 11169:2,  
11169:3, 11169:7,  
11169:8, 11169:10,  
11169:12, 11169:25,  
11170:10, 11170:15,  
11170:16, 11170:24,  
11171:22, 11172:4,  
11172:5, 11172:6,  
11172:12, 11172:21,  
11173:12, 11173:18,  
11174:1, 11174:6,  
11174:15, 11174:16,  
11175:1, 11177:5,  
11177:6, 11177:8,

11177:20, 11180:21,  
11181:11, 11181:12,  
11181:13, 11181:19,  
11181:24, 11182:16,  
11184:5, 11190:20,  
11190:25, 11191:7,  
11192:14, 11192:24,  
11193:3, 11193:16,  
11194:4, 11194:6,  
11194:7, 11194:15,  
11194:22, 11194:25,  
11200:7, 11200:20,  
11200:21, 11201:1,  
11201:8, 11201:9,  
11205:4, 11206:3,  
11207:21, 11207:23,  
11208:1, 11208:15,  
11209:6, 11212:4,  
11212:16, 11213:2,  
11213:6, 11213:12,  
11225:14, 11225:20,  
11225:22, 11228:11,  
11228:22, 11229:6,  
11230:16, 11230:20,  
11230:22, 11232:5,  
11232:6, 11238:9,  
11238:19, 11238:20,  
11240:18, 11240:19,  
11240:23, 11240:25,  
11241:4  
**bloodstaining** -  
11193:1  
**blue** - 11054:10,  
11054:11, 11056:8,  
11059:9, 11064:25,  
11078:23, 11097:20,  
11098:12, 11098:22,  
11101:12, 11101:14,  
11101:23, 11101:24,  
11102:14, 11102:17,  
11103:2, 11103:8,  
11108:5, 11109:21,  
11112:1, 11120:4,  
11123:7, 11123:16,  
11179:23  
**bluish** - 11102:21,  
11102:23  
**bluish-green** -  
11102:23  
**blunt** - 11210:24  
**bluntly** - 11214:22  
**Board** - 11268:7  
**Bobs** - 11028:5  
**bodily** - 11038:13,  
11038:17, 11039:12,  
11039:22, 11044:20,  
11052:1, 11062:13,  
11063:4, 11126:1,  
11126:2, 11133:14,  
11142:20, 11144:21,  
11147:17, 11150:25,  
11240:19  
**body** - 11037:16,  
11050:10, 11067:17,  
11069:9, 11070:24,  
11073:9, 11073:12,  
11073:14, 11074:19,  
11094:12, 11109:3,  
11133:9, 11145:1,  
11145:24, 11146:8,  
11151:7, 11166:22,  
11174:8, 11184:2,  
11218:23, 11230:16,  
11232:4  
**book** - 11258:16  
**Born** - 11246:7  
**Boswell** - 11027:5  
**bother** - 11104:14  
**bottle** - 11111:5,  
11111:6

**bottom** - 11036:6,  
11074:15, 11091:9,  
11123:9, 11132:13,  
11153:3, 11156:25,  
11163:5, 11167:17,  
11175:14, 11198:20,  
11203:1, 11228:19  
**bought** - 11116:21  
**box** - 11114:18  
**boy** - 11181:25,  
11182:6, 11182:11  
**Brain** - 11207:21  
**brassiere** - 11162:19  
**break** - 11093:8,  
11094:14, 11095:5,  
11095:7, 11095:13,  
11149:19, 11171:2,  
11171:5, 11214:6,  
11260:9, 11260:20,  
11268:24, 11269:1,  
11272:5, 11283:10  
**breakdown** - 11131:25  
**brief** - 11130:21  
**briefly** - 11031:14,  
11032:10, 11054:7,  
11060:18, 11085:18,  
11106:14, 11108:21,  
11140:3, 11187:24  
**bright** - 11035:8  
**bring** - 11030:11,  
11035:20, 11058:1,  
11058:2, 11095:11,  
11107:6, 11197:21,  
11224:15, 11230:7,  
11239:5, 11269:5,  
11273:11  
**Britain** - 11221:21  
**British** - 11246:3  
**brought** - 11090:25,  
11116:24, 11228:4,  
11230:2, 11245:5,  
11272:21, 11276:1  
**brown** - 11116:4  
**Brown** - 11212:20,  
11214:2, 11214:3  
**Bruce** - 11028:9,  
11029:3, 11030:5,  
11106:24  
**budget** - 11268:4,  
11268:9  
**budget'** - 11267:19  
**build** - 11081:8,  
11081:15  
**building** - 11277:17,  
11281:11  
**built** - 11184:2  
**bulk** - 11196:10,  
11197:4  
**bunch** - 11087:15  
**bunches** - 11113:11  
**bureaucratic** -  
11267:18  
**business** - 11167:21  
**buy** - 11117:1

**C**

**c.c.'s** - 11165:18,  
11177:6  
**Cadrain** - 11114:5,  
11114:7, 11114:12,  
11114:13  
**Cadrain's** - 11110:13,  
11114:4  
**Caldwell** - 11028:5,  
11131:8, 11131:19,  
11133:1, 11135:25,  
11143:10, 11145:12,  
11146:14, 11147:10,  
11150:4, 11156:7,

11158:2, 11158:10,  
11158:18, 11159:4,  
11159:17, 11160:8,  
11162:2, 11180:18,  
11224:4, 11224:20,  
11224:22, 11228:5,  
11229:22, 11230:4,  
11232:14, 11245:2  
**Caldwell's** - 11243:3  
**Calvin** - 11028:14  
**Canada** - 11028:12  
**Candace** - 11027:4  
**canine** - 11202:12,  
11212:4, 11212:6,  
11212:8, 11212:11,  
11212:16  
**cannot** - 11040:13,  
11098:20, 11129:14,  
11135:3, 11136:9,  
11136:18, 11138:20,  
11155:24, 11169:9,  
11169:11, 11169:19,  
11212:5, 11225:13,  
11227:3  
**cap** - 11034:24  
**capacity** - 11257:15  
**capture** - 11062:25  
**car** - 11110:18,  
11222:23, 11280:11,  
11280:12  
**cardboard** - 11114:7  
**Carlton** - 11140:7  
**carried** - 11163:8,  
11235:19, 11237:6,  
11237:17, 11237:24,  
11238:7, 11238:18  
**carry** - 11044:14,  
11047:22, 11103:1,  
11111:9, 11172:19,  
11208:24, 11212:4  
**carrying** - 11039:10,  
11075:17  
**carryover** - 11040:8  
**case** - 11037:17,  
11038:21, 11041:10,  
11046:12, 11062:8,  
11068:15, 11071:4,  
11073:2, 11074:20,  
11077:2, 11081:16,  
11086:21, 11088:9,  
11089:7, 11089:14,  
11094:8, 11096:8,  
11104:21, 11109:24,  
11113:7, 11119:1,  
11121:14, 11121:18,  
11130:23, 11131:5,  
11140:23, 11146:21,  
11147:14, 11173:22,  
11174:3, 11186:8,  
11186:11, 11187:4,  
11191:7, 11192:25,  
11193:14, 11197:19,  
11204:3, 11220:11,  
11222:18, 11226:13,  
11226:14, 11227:2,  
11229:7, 11233:25,  
11243:10, 11243:23,  
11262:7, 11262:9,  
11264:9, 11264:10,  
11266:7, 11272:25,  
11274:16, 11278:7  
**cases** - 11051:6,  
11094:10, 11101:15,  
11118:18, 11118:20,  
11118:23, 11119:5,  
11119:7, 11121:17,  
11130:3, 11141:21,  
11242:20  
**category** - 11050:12  
**Catherine** - 11028:5,

11224:5  
**Cathy** - 11235:16  
**caused** - 11081:1,  
11160:11, 11160:15,  
11161:2, 11179:1  
**causes** - 11160:11,  
11181:6  
**causing** - 11209:16  
**Cavalier** - 11026:16  
**Cc** - 11111:24,  
11165:17  
**cells** - 11045:5,  
11045:6, 11070:23,  
11073:8, 11073:11,  
11073:15, 11094:14,  
11113:8, 11113:10,  
11181:13  
**Central** - 11214:15  
**central** - 11197:18,  
11254:11, 11259:8,  
11259:10  
**cents** - 11116:22  
**Cerato** - 11116:11,  
11116:15  
**certain** - 11037:13,  
11098:1, 11098:22,  
11104:18, 11111:7,  
11154:20, 11181:22,  
11186:24, 11187:2,  
11199:20, 11281:14  
**Certainly** - 11250:16  
**certainly** - 11071:9,  
11073:7, 11117:2,  
11194:6, 11232:18,  
11232:22, 11233:20,  
11240:3, 11270:3  
**certainty** - 11098:20  
**Certificate** - 11284:1  
**certify** - 11284:4  
**chance** - 11091:20,  
11138:12, 11169:13,  
11218:10, 11244:10,  
11246:22, 11270:4  
**change** - 11078:23,  
11080:1, 11100:24,  
11129:22  
**changed** - 11240:5,  
11240:6  
**characteristics** -  
11240:9, 11241:20  
**charge** - 11249:13,  
11251:1, 11251:5,  
11251:8, 11251:22,  
11251:25, 11253:9,  
11253:10, 11253:12,  
11253:14, 11277:10,  
11278:18, 11280:15,  
11280:25, 11281:3  
**charges** - 11265:3  
**chart** - 11247:25,  
11248:1, 11248:3,  
11248:5, 11248:6,  
11249:25, 11250:17,  
11251:9, 11251:17,  
11256:15  
**chat** - 11226:12  
**check** - 11077:12,  
11078:13, 11086:24,  
11134:2, 11139:4,  
11148:15, 11149:6,  
11151:4, 11151:8,  
11172:17, 11179:10,  
11264:19  
**Checked** - 11132:6  
**checked** - 11133:22,  
11142:18, 11142:19,  
11147:19, 11158:7,  
11261:23  
**checking** - 11079:19,  
11122:1



**chemical** - 11031:4, 11077:9, 11077:24, 11146:19  
**Chemically** - 11157:18  
**chemically** - 11159:7, 11213:5  
**chemicals** - 11081:13, 11199:22  
**chemistry** - 11140:9  
**chew** - 11126:23  
**Chief** - 11239:14, 11248:19, 11252:9, 11254:2, 11255:22, 11267:11, 11271:7, 11271:24, 11272:14, 11273:1  
**chief** - 11164:22, 11210:9, 11210:18, 11248:4, 11248:16, 11249:21, 11249:23, 11249:24, 11252:12, 11254:24, 11257:7, 11266:9, 11267:1, 11267:25, 11268:6, 11268:10, 11268:11, 11268:13, 11268:20, 11268:23, 11269:5, 11269:10, 11269:12, 11269:13, 11269:23, 11269:24, 11270:4, 11273:11, 11281:13  
**chiefs** - 11252:13, 11254:13, 11254:23, 11257:24, 11267:9, 11272:4  
**circle** - 11062:11  
**circumstance** - 11126:9, 11131:2, 11137:18  
**circumstances** - 11051:20, 11078:11, 11079:14, 11117:25, 11152:10, 11189:24, 11190:7, 11190:10, 11190:15, 11194:2, 11208:25, 11218:3  
**City** - 11091:1, 11106:16, 11107:1, 11109:1, 11118:24, 11148:25, 11153:10, 11246:13, 11246:20, 11246:25  
**city** - 11267:7  
**clarify** - 11095:16  
**class** - 11071:8, 11144:24  
**classified** - 11146:24  
**clean** - 11126:24, 11126:25  
**clear** - 11030:24, 11086:2, 11133:24, 11154:1, 11167:20, 11189:18, 11194:1, 11208:19, 11208:21, 11225:24, 11226:21, 11228:8, 11229:9, 11272:7  
**cleared** - 11264:4  
**clearish** - 11143:21  
**clearly** - 11045:15, 11241:5  
**Clerk** - 11027:9  
**client's** - 11240:4  
**clinical** - 11183:15  
**closely** - 11244:3  
**closer** - 11277:25  
**closest** - 11035:6  
**cloth** - 11054:14, 11056:23, 11060:15, 11062:20, 11067:24, 11083:12, 11083:17, 11083:23, 11084:4, 11096:1, 11126:24, 11162:16, 11163:16, 11163:17, 11163:22  
**clothes** - 11116:24, 11117:17  
**clothing** - 11052:3, 11052:5, 11086:17, 11222:21, 11223:7  
**clump** - 11045:7, 11113:14  
**clumping** - 11113:10, 11113:12, 11113:13  
**coat** - 11162:18, 11221:9  
**coffee** - 11268:23, 11269:1, 11269:16, 11272:4  
**Colin** - 11215:21, 11215:25  
**collar** - 11120:5  
**colleagues** - 11187:12  
**collection** - 11237:25  
**color** - 11165:10, 11165:13, 11166:18, 11176:4, 11176:6, 11176:8, 11177:18  
**coloration** - 11165:20, 11177:9, 11177:23  
**coloring** - 11157:11  
**colour** - 11034:9, 11035:5, 11035:6, 11035:9, 11078:23, 11080:1, 11097:20, 11100:24, 11101:5, 11101:8, 11101:15, 11101:18, 11102:13, 11102:21, 11103:4, 11110:2, 11144:5, 11144:12, 11177:14  
**Colour** - 11144:3  
**coloured** - 11111:24, 11116:3  
**Columbia** - 11246:4  
**column** - 11040:21  
**comfortable** - 11049:22, 11089:2, 11129:20, 11144:11, 11164:11, 11164:13  
**coming** - 11070:19, 11186:25, 11187:3, 11197:15, 11238:12, 11245:17, 11260:9, 11261:22, 11263:21, 11271:13, 11275:1  
**command** - 11248:25  
**commandement** - 11133:3, 11224:25  
**comment** - 11066:19, 11066:22, 11075:9, 11125:4, 11138:8, 11183:23, 11184:14, 11184:16, 11191:20, 11191:24, 11196:6, 11196:9, 11196:22, 11200:11, 11202:3, 11211:7, 11212:23, 11217:4, 11219:6, 11241:11, 11243:3, 11243:13, 11243:16  
**commenting** - 11187:3, 11211:24  
**comments** - 11066:3, 11183:19, 11187:7, 11197:1, 11212:5  
**commercial** - 11077:8  
**commercially** - 11078:3, 11173:19  
**Commission** - 11026:2, 11026:14, 11027:1, 11027:2, 11027:3, 11027:9, 11238:17, 11240:2, 11245:23, 11254:1, 11264:5, 11267:22  
**Commissioner** - 11030:3, 11067:1, 11093:7, 11093:15, 11093:21, 11094:1, 11094:5, 11094:8, 11094:13, 11094:17, 11094:20, 11094:24, 11095:4, 11095:7, 11096:13, 11096:17, 11096:20, 11096:23, 11132:18, 11132:22, 11149:17, 11149:20, 11213:21, 11213:24, 11214:4, 11214:6, 11214:8, 11216:6, 11216:10, 11219:21, 11220:1, 11220:4, 11223:22, 11234:4, 11242:12, 11242:14, 11242:23, 11245:13, 11245:14, 11245:16, 11272:6, 11283:10, 11283:11  
**Commissioners** - 11268:8  
**commit** - 11042:21  
**commitment** - 11115:11  
**committed** - 11276:25  
**common** - 11181:2, 11181:9, 11184:1, 11184:14, 11194:12, 11234:18  
**Common** - 11183:24  
**commonly** - 11034:24, 11182:17, 11182:22, 11202:10, 11202:11  
**communicate** - 11274:21  
**communicating** - 11282:17  
**communication** - 11278:19  
**community** - 11240:13  
**compared** - 11239:8, 11265:14  
**comparing** - 11208:25  
**comparisons** - 11273:24, 11279:15  
**compartment** - 11109:17, 11109:20, 11114:19  
**complaints** - 11272:8  
**complete** - 11110:3, 11110:18  
**completely** - 11062:9, 11077:15, 11115:8, 11117:24, 11195:5, 11199:11  
**component** - 11038:9, 11038:12, 11100:16, 11172:5, 11172:12, 11172:21, 11174:15  
**comprehensive** - 11227:22  
**compromise** - 11090:2  
**concentration** - 11081:11  
**concern** - 11048:7, 11093:12, 11093:20, 11190:3  
**concerned** - 11093:19, 11190:3, 11190:6, 11190:13, 11211:15, 11235:8, 11240:3, 11263:2  
**concerning** - 11234:23  
**concerns** - 11268:9  
**conclude** - 11113:18, 11113:20, 11150:22, 11229:23, 11257:20  
**concluded** - 11045:9, 11214:16, 11233:12  
**concludes** - 11210:25, 11235:18  
**concluding** - 11032:22, 11084:19, 11088:5, 11107:24  
**conclusion** - 11036:5, 11049:4, 11049:10, 11049:17, 11051:12, 11053:1, 11065:9, 11071:18, 11079:24, 11097:4, 11103:7, 11103:13, 11113:16, 11115:19, 11128:15, 11128:18, 11129:8, 11136:12, 11161:8, 11170:7, 11192:17, 11194:16, 11200:24, 11203:5, 11204:6, 11212:12, 11212:13, 11221:20  
**conclusions** - 11045:12, 11048:25, 11050:6, 11051:8, 11052:24, 11065:5, 11096:11, 11096:24, 11097:7, 11126:8, 11129:7, 11129:21, 11184:3, 11192:6, 11204:3  
**Conclusions** - 11064:17, 11114:25, 11123:3, 11123:12, 11124:3, 11128:6  
**conclusive** - 11044:24, 11084:18, 11102:6, 11102:10, 11102:20, 11196:13  
**condition** - 11089:3, 11182:3  
**conditions** - 11180:20, 11181:7, 11182:19  
**conduct** - 11042:5, 11044:7, 11048:15, 11064:6, 11079:7, 11079:13, 11081:7, 11081:22, 11084:12, 11086:12, 11088:15, 11092:12, 11099:11, 11104:4, 11105:11, 11123:1, 11128:4, 11148:21, 11163:18, 11220:9, 11240:20  
**conducted** - 11032:25, 11033:9, 11040:11, 11040:24, 11044:24, 11048:2, 11048:5, 11052:2, 11052:13, 11052:22, 11053:7, 11060:21, 11061:8, 11074:12, 11075:14, 11088:13, 11089:5, 11089:8, 11089:10, 11089:20, 11089:23, 11090:4, 11090:8, 11095:20, 11105:16, 11108:14, 11117:10, 11121:7, 11127:6, 11128:6, 11130:1, 11138:13, 11148:22, 11164:17, 11166:13, 11183:6, 11194:11, 11206:19, 11207:2, 11209:5, 11214:14, 11219:13, 11221:5, 11241:22  
**conducting** - 11031:4, 11074:8, 11106:4  
**confirm** - 11041:15, 11043:10, 11044:18, 11054:23, 11068:20, 11078:14, 11091:18, 11097:10, 11099:8, 11099:12, 11105:21, 11113:1, 11113:2, 11168:20, 11186:5, 11204:5, 11224:21, 11246:23  
**confirmation** - 11033:6, 11042:22, 11042:24, 11077:16, 11079:3, 11081:7, 11097:11, 11104:11, 11104:15, 11129:10, 11129:13, 11157:13  
**confirmed** - 11095:20, 11103:18, 11120:3, 11120:7, 11192:1, 11192:2, 11205:12, 11219:1  
**confirming** - 11081:18  
**confuse** - 11055:7  
**confused** - 11043:18  
**confusing** - 11090:6  
**confusion** - 11090:21  
**Congram** - 11027:4  
**connect** - 11276:9  
**connected** - 11275:17  
**connecting** - 11275:13  
**connection** - 11056:16, 11056:21, 11069:11, 11069:22, 11118:16, 11119:2, 11119:5, 11121:8, 11121:17, 11176:2, 11220:10, 11252:7, 11274:2, 11274:19, 11275:11  
**connections** - 11279:15  
**consider** - 11063:1, 11075:1, 11077:15, 11152:18, 11175:10, 11197:9  
**considerable** - 11093:25, 11194:14  
**consideration** - 11075:19, 11119:4  
**considerations** - 11222:13  
**considered** - 11063:25, 11073:22, 11076:24, 11097:25, 11118:18, 11189:21, 11195:22, 11196:21, 11202:20, 11215:13, 11222:24  
**considering** - 11074:5, 11074:25, 11075:17, 11075:25, 11085:9  
**consistent** - 11052:22, 11052:23, 11057:23, 11058:1, 11058:8, 11058:21, 11058:23, 11089:9, 11092:20, 11115:6, 11127:4, 11137:25, 11190:21, 11194:10, 11209:8  
**Constable** - 11090:25, 11106:15, 11107:7, 11108:4, 11109:2, 11179:21





**constituent** - 11095:24, 11154:3, 11181:12  
**consult** - 11131:10  
**consultation** - 11130:22  
**consulted** - 11234:22  
**contact** - 11069:23, 11078:22, 11184:24, 11185:14, 11188:7, 11277:25  
**contacted** - 11069:13, 11075:23, 11185:15, 11186:20, 11188:17, 11211:6, 11211:10, 11219:6, 11219:18, 11234:9, 11261:9  
**contacts** - 11186:18, 11193:11  
**contain** - 11057:14, 11076:21, 11133:23, 11192:12, 11198:24, 11200:7, 11284:5  
**contained** - 11045:18, 11083:21, 11143:20, 11174:19, 11204:23, 11210:7, 11218:21, 11225:5, 11230:18, 11232:11  
**container** - 11114:18  
**containing** - 11031:24, 11109:22, 11119:25, 11163:10  
**contains** - 11192:21, 11202:13, 11218:23  
**contaminate** - 11080:4  
**contaminated** - 11079:22, 11189:15, 11192:23, 11193:3, 11193:16, 11194:5, 11194:7, 11210:6  
**contamination** - 11152:17, 11189:7, 11190:9, 11194:3, 11198:4, 11201:8, 11205:4, 11206:2, 11207:22  
**content** - 11094:12, 11261:5  
**contents** - 11106:25, 11143:17, 11144:1, 11147:25, 11148:16, 11153:12, 11157:3  
**context** - 11085:19, 11087:5, 11108:24, 11116:9, 11130:1, 11188:13  
**Continue** - 11154:6  
**continue** - 11030:9, 11033:13, 11105:13, 11124:19, 11155:14, 11156:25, 11181:14, 11210:11  
**Continued** - 11029:3  
**continued** - 11030:5, 11123:13, 11220:9  
**continues** - 11073:5, 11133:6, 11145:12, 11146:14, 11156:7, 11159:18  
**continuing** - 11114:15, 11159:17, 11162:2, 11175:17, 11200:4, 11222:14  
**continuity** - 11139:14, 11139:17, 11189:19, 11190:4  
**contrary** - 11096:4, 11214:20, 11215:1  
**contrast** - 11043:19  
**contributed** - 11079:18, 11080:13, 11114:13, 11136:21  
**contributing** - 11107:21, 11115:17  
**contributor** - 11062:3, 11071:22, 11080:24, 11125:10  
**control** - 11054:15, 11056:23, 11088:18, 11235:4  
**conversation** - 11042:11, 11068:24, 11069:1, 11076:9, 11110:9, 11122:5, 11122:6, 11217:24  
**conversations** - 11227:20  
**convey** - 11231:2, 11231:20  
**conviction** - 11184:17, 11185:20, 11186:4, 11187:24, 11209:24, 11270:18  
**Conviction** - 11026:4  
**coordinating** - 11279:9  
**coordination** - 11268:15  
**copies** - 11069:18  
**copper** - 11199:23  
**copy** - 11248:2, 11259:8  
**corner** - 11047:8, 11047:16, 11126:25, 11127:12  
**Corporal** - 11036:8, 11066:5, 11067:4, 11116:1  
**Correct** - 11103:20, 11161:21  
**correct** - 11030:17, 11030:22, 11031:21, 11032:9, 11032:22, 11033:11, 11038:1, 11038:14, 11038:19, 11039:15, 11040:12, 11040:22, 11044:4, 11044:22, 11045:1, 11045:21, 11050:3, 11051:3, 11055:21, 11056:1, 11058:17, 11060:1, 11071:17, 11078:10, 11080:9, 11080:12, 11081:20, 11081:23, 11083:10, 11088:5, 11089:14, 11094:4, 11099:6, 11103:11, 11103:12, 11103:19, 11104:20, 11105:14, 11110:17, 11114:9, 11118:8, 11122:17, 11125:12, 11125:13, 11125:24, 11137:14, 11143:2, 11143:3, 11143:23, 11148:5, 11152:7, 11156:11, 11160:25, 11163:11, 11165:5, 11167:12, 11171:7, 11171:21, 11179:17, 11181:23, 11189:23, 11198:17, 11198:18, 11200:18, 11208:4, 11209:18, 11220:6, 11223:12, 11225:6, 11225:16, 11225:17, 11227:24, 11228:15, 11230:12, 11230:25, 11231:7, 11231:14, 11232:25, 11233:9, 11234:12, 11238:3, 11246:1, 11246:8, 11246:14, 11247:10, 11247:11, 11247:16, 11247:20, 11247:23, 11247:24, 11248:17, 11249:10, 11256:25, 11257:4, 11259:5, 11281:24, 11284:5  
**correctly** - 11041:17, 11100:20, 11231:15, 11239:22  
**correspondence** - 11070:7, 11186:10, 11212:23, 11219:9, 11221:18  
**Cotler** - 11028:13  
**counsel** - 11130:18, 11157:25, 11224:5, 11239:13  
**Counsel** - 11027:2, 11027:3, 11030:4  
**couple** - 11046:8, 11062:11, 11069:2, 11106:13, 11111:16, 11118:17, 11119:4, 11119:14, 11131:13, 11131:21, 11180:15, 11187:14, 11209:25, 11211:20, 11216:5, 11220:25, 11223:24, 11234:6, 11270:17, 11274:17, 11274:18  
**course** - 11066:23, 11076:5, 11105:18, 11161:11, 11197:14, 11211:11, 11214:20, 11223:9, 11234:10, 11239:17, 11271:15, 11273:21  
**Court** - 11027:10, 11145:3, 11150:20, 11155:14, 11157:15, 11157:24, 11158:8, 11158:11, 11158:21, 11159:25, 11160:22, 11167:17, 11180:24, 11228:8, 11284:1, 11284:3, 11284:14, 11284:18  
**court** - 11139:13, 11204:18, 11235:6, 11255:1  
**courtroom** - 11228:1, 11229:21  
**courts** - 11140:24, 11140:25  
**cover** - 11046:22, 11108:5, 11179:23, 11253:7, 11257:2  
**covered** - 11053:3, 11112:14, 11115:23, 11179:13, 11199:2, 11201:14, 11211:9, 11218:25, 11256:24  
**covering** - 11263:9  
**covers** - 11118:14  
**Cox** - 11028:11  
**creates** - 11151:9  
**Cressman** - 11127:10  
**crime** - 11034:2, 11106:21, 11110:6, 11127:20  
**Crime** - 11034:12, 11055:4, 11072:25, 11085:24  
**Criminal** - 11249:18  
**criminal** - 11249:7, 11250:5, 11256:18  
**cross** - 11164:17, 11170:22, 11181:17, 11202:19, 11227:18, 11229:14, 11271:11, 11274:3, 11277:3  
**cross-examination** - 11164:17, 11170:22, 11181:17, 11229:14  
**cross-examined** - 11227:18  
**cross-over** - 11274:3  
**cross-react** - 11202:19  
**crossed** - 11085:6, 11229:18, 11277:5  
**crossing** - 11279:19  
**crotch** - 11117:3, 11162:9, 11162:13, 11178:16, 11178:20  
**crowded** - 11225:8  
**crystals** - 11081:16  
**Csr** - 11027:10, 11027:11, 11284:2, 11284:12, 11284:13, 11284:16, 11284:17  
**Ctv** - 11185:6  
**curious** - 11136:6  
**current** - 11226:14  
**cut** - 11031:13, 11087:19, 11116:5, 11162:14, 11178:21  
**cutting** - 11030:25  
**D**  
**daily** - 11252:1, 11271:11  
**damp** - 11078:21  
**dampen** - 11078:19, 11078:20  
**Dan** - 11091:1  
**dark** - 11109:21, 11111:11  
**Dark** - 11102:17  
**darker** - 11102:15  
**dash** - 11047:16, 11047:17  
**data** - 11048:18, 11095:14  
**date** - 11034:13, 11046:13, 11047:6, 11047:18, 11047:21, 11048:1, 11053:5, 11053:25, 11063:21, 11066:6, 11066:7, 11067:15, 11070:8, 11089:18, 11107:10, 11108:25, 11127:13, 11127:24, 11133:1, 11134:12, 11136:1, 11197:22, 11197:23, 11213:21, 11213:23, 11215:23, 11224:22, 11265:2, 11269:5, 11273:11  
**dated** - 11054:22, 11067:12, 11069:6, 11086:2, 11106:16, 11119:13, 11122:10, 11127:12, 11187:20, 11201:22, 11211:23, 11212:21, 11235:17, 11236:19  
**dates** - 11070:15, 11091:13, 11246:24  
**Dave** - 11116:16  
**David** - 11026:4, 11028:2, 11028:11, 11055:1, 11060:7, 11064:21, 11065:21, 11116:21, 11117:5, 11130:13, 11185:19, 11190:25, 11191:17, 11193:3, 11195:8, 11195:21, 11196:11, 11201:23, 11210:23, 11212:22, 11214:15, 11214:17, 11215:9, 11215:24, 11219:15, 11229:25, 11236:19, 11243:1, 11243:6, 11243:19, 11244:20, 11245:6  
**David's** - 11244:18  
**day's** - 11260:19  
**day-to-day** - 11249:3, 11250:7  
**days** - 11047:23, 11136:2, 11189:9, 11203:6, 11210:4, 11250:25, 11252:25  
**Days** - 11253:5  
**Dd** - 11112:1  
**dead** - 11235:4  
**deal** - 11092:13, 11177:13, 11187:8, 11188:21, 11206:18, 11229:11, 11270:14, 11281:9  
**dealing** - 11093:2, 11175:20, 11217:11  
**dealings** - 11255:22  
**dealt** - 11087:20, 11218:14  
**death** - 11247:9, 11265:3  
**decide** - 11196:23, 11243:19, 11262:16  
**decided** - 11042:6  
**deciding** - 11079:13, 11265:12  
**decision** - 11082:20, 11088:16, 11088:17, 11149:11, 11262:20, 11265:11, 11265:12, 11267:2, 11280:17, 11281:2  
**decision-maker** - 11265:11  
**decision-makers** - 11265:12  
**decision-making** - 11262:20, 11267:2  
**decisions** - 11266:4  
**declare** - 11044:13  
**decrease** - 11173:3  
**deep** - 11101:12, 11101:13, 11103:2  
**deeply** - 11217:18  
**defence** - 11130:18  
**defined** - 11050:7  
**definite** - 11129:8, 11141:18, 11207:11  
**definitely** - 11042:2, 11051:21, 11109:14, 11157:19, 11169:9, 11169:15, 11198:25, 11227:10, 11231:11, 11237:16, 11244:15  
**definition** - 11050:5  
**degradation** - 11093:24, 11152:16  
**degree** - 11140:8, 11140:14, 11140:16  
**degrees** - 11140:11  
**deliver** - 11110:7  
**delivered** - 11072:23, 11085:24, 11086:6, 11106:20, 11226:10  
**delivering** - 11072:25  
**delve** - 11217:18



**demolish** - 11109:12  
**department** - 11046:7, 11075:22, 11166:9, 11234:22, 11249:1, 11251:1, 11251:2, 11251:3, 11251:5, 11251:6, 11252:16, 11254:8, 11254:15, 11255:2, 11256:10, 11256:11, 11256:12, 11256:16, 11256:19, 11264:11, 11268:4, 11268:23, 11268:24, 11274:10, 11281:21  
**Department** - 11109:1  
**departments** - 11251:8, 11255:14, 11268:3  
**depended** - 11223:2, 11280:18  
**deposited** - 11095:1  
**Deputy** - 11248:19  
**deputy** - 11269:12, 11269:13, 11269:23  
**derived** - 11174:19  
**describe** - 11042:25, 11049:16, 11059:10, 11144:23, 11264:5, 11269:7  
**described** - 11031:5, 11032:6, 11033:1, 11033:21, 11050:1, 11052:12, 11053:16, 11054:3, 11059:22, 11071:13, 11071:23, 11104:17, 11156:21, 11165:9, 11189:13, 11206:8  
**describing** - 11033:9, 11037:23  
**description** - 11143:24, 11144:11, 11276:15  
**Description** - 11029:2  
**desk** - 11257:18, 11257:19, 11259:22, 11263:21, 11270:24, 11271:11, 11271:18, 11271:24  
**destroyed** - 11039:1, 11062:4, 11062:17, 11063:7, 11063:11, 11083:8, 11151:12, 11152:5, 11152:15, 11152:19, 11152:25  
**destruction** - 11062:12  
**detail** - 11053:4, 11105:22  
**dated** - 11208:12  
**detect** - 11173:10, 11177:18, 11200:16, 11221:11, 11221:14  
**detected** - 11039:25, 11045:15, 11052:20, 11063:8, 11080:11, 11080:22, 11088:1, 11136:24, 11138:2, 11152:6, 11191:8, 11209:2, 11221:5, 11221:7  
**detecting** - 11031:15, 11044:8, 11078:12, 11078:25  
**Detection** - 11034:12, 11055:5, 11073:1, 11085:25  
**detection** - 11030:16, 11123:20, 11125:11  
**Detective** - 11263:6, 11264:12, 11264:13, 11266:14, 11266:15, 11266:17  
**detective** - 11247:5, 11247:15, 11247:19, 11249:8, 11251:3, 11251:5, 11251:6, 11251:11, 11251:13, 11252:16, 11252:20, 11256:10, 11256:16, 11256:24, 11257:8, 11262:3, 11268:16, 11274:10, 11279:6, 11280:8, 11280:12, 11281:21  
**detectives** - 11250:17, 11253:7, 11253:9, 11253:10, 11253:21, 11260:25, 11264:23, 11265:20, 11271:21, 11272:19, 11272:20, 11272:25, 11274:4, 11274:13, 11276:6, 11276:19, 11277:1, 11277:10, 11277:18, 11278:1, 11278:3, 11278:12, 11280:20  
**Detectives** - 11256:14  
**detectives'** - 11256:12  
**determination** - 11033:2, 11057:22, 11058:5, 11111:2, 11122:8, 11172:14, 11237:10  
**determinations** - 11174:2  
**determine** - 11048:20, 11057:10, 11057:16, 11057:17, 11064:9, 11074:9, 11081:5, 11083:20, 11086:13, 11096:16, 11102:1, 11103:22, 11124:20, 11126:19, 11132:2, 11136:25, 11141:22, 11151:5, 11153:24, 11163:20, 11163:23, 11166:3, 11166:7, 11203:19, 11205:21, 11237:6, 11240:18, 11240:23, 11240:25  
**determined** - 11041:22, 11052:6, 11058:13, 11100:8, 11126:5, 11138:1, 11172:7, 11175:4, 11183:15, 11209:11, 11214:19, 11223:3  
**determining** - 11032:7, 11139:2, 11170:10, 11216:19  
**Determining** - 11107:19  
**develop** - 11217:19  
**devoted** - 11265:13  
**Diagnostics** - 11060:23  
**dictate** - 11194:12  
**difference** - 11102:1, 11102:7, 11102:11, 11102:13, 11139:12, 11172:24, 11173:7, 11207:13, 11240:20, 11251:20  
**differences** - 11171:10, 11212:7, 11212:17  
**different** - 11038:4, 11090:16, 11091:9, 11101:8, 11113:4, 11119:15, 11122:2, 11122:22, 11154:7, 11199:11, 11241:7, 11250:21, 11276:19, 11277:16, 11278:17  
**differentiate** - 11236:3, 11236:7  
**difficult** - 11243:9  
**difficulty** - 11177:7  
**digest** - 11241:21  
**digesting** - 11216:22  
**diluted** - 11208:16, 11208:18, 11208:21  
**dipping** - 11078:6  
**direct** - 11069:23, 11212:1, 11249:21, 11249:23, 11250:8, 11255:1, 11271:4  
**directed** - 11054:1, 11067:16, 11070:9, 11119:14, 11187:21, 11201:22, 11215:24, 11228:5, 11236:18  
**directing** - 11217:10  
**direction** - 11196:19, 11254:5, 11266:9  
**directly** - 11104:16, 11108:3, 11189:23, 11248:20, 11252:12, 11255:1, 11272:16, 11272:17, 11273:3, 11273:4  
**Director** - 11027:4, 11212:20, 11214:2  
**disagree** - 11137:20, 11217:6  
**discontinue** - 11111:8  
**discretion** - 11088:19  
**discretionary** - 11088:11  
**discuss** - 11237:1  
**discussed** - 11030:10, 11032:13, 11105:5, 11123:19, 11152:3, 11152:8, 11186:9, 11234:25, 11237:14, 11272:4, 11273:9, 11273:16, 11274:9, 11274:12  
**discusses** - 11190:19  
**discussing** - 11031:19, 11068:13, 11090:22, 11091:17, 11092:11, 11197:19  
**discussion** - 11042:9, 11042:15, 11069:12, 11069:25, 11070:4, 11073:25, 11107:4, 11131:6, 11135:21, 11136:3, 11139:22, 11203:21, 11237:5  
**discussions** - 11074:2, 11076:3, 11084:25, 11106:8, 11131:3, 11135:24, 11187:12, 11187:15, 11188:9  
**dispute** - 11036:4, 11049:3, 11049:9, 11051:12  
**disrupt** - 11073:7, 11073:8  
**disruption** - 11073:14  
**distance** - 11242:19  
**distinction** - 11183:4, 11225:25  
**distinguish** - 11191:6  
**distinguishable** - 11207:8  
**distinguishing** - 11212:10  
**disturbance** - 11189:5  
**dividing** - 11173:17, 11173:20  
**division** - 11249:8, 11249:9, 11253:21, 11256:24, 11257:8, 11257:9, 11262:3, 11268:16, 11268:17, 11275:22, 11275:23, 11278:1, 11278:17  
**divisions** - 11249:14, 11270:5, 11278:20, 11279:3  
**Dna** - 11220:9, 11223:9, 11238:9, 11238:12, 11238:20, 11238:25, 11239:5, 11239:8  
**doc** - 11033:17, 11047:11, 11090:20, 11215:17  
**document** - 11032:16, 11034:4, 11035:21, 11040:18, 11040:19, 11045:25, 11053:24, 11054:20, 11059:4, 11063:19, 11066:4, 11067:3, 11067:14, 11069:5, 11070:8, 11085:19, 11086:1, 11089:17, 11090:6, 11108:15, 11114:22, 11116:11, 11119:13, 11131:14, 11132:12, 11132:16, 11132:17, 11132:19, 11138:9, 11180:16, 11187:19, 11188:7, 11197:14, 11201:11, 11201:12, 11201:13, 11201:17, 11201:20, 11209:22, 11211:22, 11212:19, 11215:23, 11224:15, 11230:4, 11235:14, 11236:16, 11236:17, 11236:21, 11237:3, 11237:9, 11246:17, 11248:13, 11274:2, 11280:3, 11281:6  
**Document** - 11027:5, 11027:6  
**documentation** - 11234:20  
**documents** - 11069:3, 11106:14, 11108:11, 11119:10, 11119:17, 11120:2, 11131:14, 11149:5, 11186:9, 11211:20, 11219:22, 11219:23, 11220:23, 11236:21, 11275:16, 11280:1  
**dog** - 11202:13, 11202:21, 11205:15, 11205:21, 11207:10, 11210:6, 11210:16, 11210:20, 11211:1, 11211:16  
**dogs** - 11202:14  
**Dogs** - 11202:18  
**Don** - 11027:11  
**Donald** - 11284:2, 11284:17  
**done** - 11040:14, 11041:4, 11041:7, 11042:18, 11047:4, 11061:13, 11061:15, 11082:10, 11087:7, 11088:18, 11091:22, 11094:22, 11104:21, 11105:24, 11118:5, 11121:16, 11139:4, 11139:18, 11148:19, 11149:11, 11174:5, 11174:6, 11175:3, 11182:4, 11182:7, 11182:10, 11182:15, 11183:8, 11189:11, 11207:4, 11221:15, 11228:25, 11229:12, 11230:3, 11236:14, 11240:18, 11241:22, 11244:9, 11259:17, 11262:17, 11266:5, 11273:16, 11281:6  
**donor** - 11037:20, 11053:9, 11057:24, 11058:15, 11058:22, 11062:1, 11065:9, 11065:22, 11084:20, 11126:14, 11130:2, 11161:8, 11175:6, 11196:11, 11196:12, 11197:6, 11201:1, 11215:7, 11241:1  
**donors** - 11041:8, 11041:23, 11130:3  
**double** - 11225:10  
**doubt** - 11118:22, 11136:3, 11139:15, 11149:16, 11189:12, 11195:19, 11200:16, 11202:23, 11219:3, 11226:1, 11226:3, 11238:23  
**Douglas** - 11027:2  
**down** - 11041:8, 11041:23, 11042:14, 11042:18, 11053:15, 11058:1, 11058:2, 11060:6, 11064:4, 11083:11, 11085:14, 11091:16, 11096:11, 11109:18, 11111:24, 11122:24, 11123:25, 11127:14, 11127:17, 11129:23, 11132:5, 11159:17, 11159:20, 11159:22, 11171:2, 11171:5, 11171:16, 11176:18, 11193:24, 11199:12, 11199:13, 11203:1, 11222:22, 11226:12, 11239:5, 11245:8, 11257:8, 11271:20  
**Dr** - 11069:13, 11069:19, 11069:20, 11070:6, 11070:12, 11072:7, 11072:24, 11074:14, 11074:21, 11075:12, 11079:5, 11180:7, 11183:20, 11187:19, 11188:11, 11190:22, 11191:22, 11195:2, 11195:16, 11201:19, 11201:24, 11202:8, 11203:3, 11203:22, 11203:23, 11204:13, 11204:16, 11207:19, 11210:13, 11211:25, 11215:21, 11215:25, 11216:5, 11218:10, 11219:6, 11231:24, 11232:3, 11232:10, 11236:19, 11237:9, 11238:5, 11239:18, 11241:6  
**draw** - 11136:12,



11273:24  
**drawn** - 11071:19  
**dress** - 11162:20,  
 11221:8, 11223:6  
**drew** - 11273:24,  
 11279:15  
**dried** - 11078:17,  
 11078:18, 11082:7,  
 11093:18, 11093:23,  
 11110:5, 11153:17,  
 11172:17, 11178:25,  
 11179:4  
**driving** - 11267:25  
**drop** - 11081:10,  
 11177:10  
**drug** - 11034:25  
**dry** - 11062:21,  
 11094:21, 11127:2,  
 11163:17, 11241:4  
**drycleaned** - 11117:4  
**drying** - 11242:6  
**due** - 11198:4, 11241:8  
**during** - 11138:18,  
 11141:9, 11142:5,  
 11159:10, 11185:19,  
 11197:14, 11204:12,  
 11211:11, 11215:5,  
 11220:24  
**During** - 11141:19  
**duty** - 11280:9  
**dwelling** - 11080:7  
**Dyck** - 11091:1,  
 11106:15, 11107:7,  
 11109:2

**E**

**Eamon** - 11028:10  
**early** - 11187:2,  
 11214:5, 11247:15  
**easiest** - 11230:8  
**easily** - 11062:17  
**easy** - 11085:2  
**Eddie** - 11028:8  
**Edward** - 11026:7  
**Ee** - 11112:11, 11115:3  
**effect** - 11093:16,  
 11117:18, 11124:9,  
 11132:15, 11160:12,  
 11172:25, 11231:10,  
 11232:16, 11232:18,  
 11232:20, 11232:22,  
 11233:4  
**efforts** - 11185:18,  
 11186:3, 11226:21,  
 11282:16  
**eighteen** - 11182:11  
**Either** - 11265:8  
**either** - 11045:20,  
 11078:19, 11101:20,  
 11104:16, 11163:21,  
 11181:4, 11189:19,  
 11196:3, 11201:7,  
 11230:22, 11232:19,  
 11237:23, 11253:2,  
 11253:6, 11257:12  
**ejaculates** - 11202:11  
**eliminate** - 11082:24,  
 11107:20, 11137:24,  
 11156:3, 11160:17,  
 11210:14, 11233:21  
**eliminated** - 11066:15,  
 11198:1, 11198:2,  
 11243:24  
**eliminating** -  
 11196:15, 11197:10,  
 11232:19, 11232:23,  
 11244:16  
**Elson** - 11028:7,  
 11029:7, 11239:11,

11239:12, 11239:13,  
 11242:10  
**embedded** - 11077:9,  
 11077:24  
**employed** - 11060:19,  
 11217:25  
**empty** - 11143:14  
**Emson** - 11069:13,  
 11069:20, 11070:13,  
 11072:7, 11072:24,  
 11074:14, 11074:21,  
 11075:12, 11079:5,  
 11132:14, 11180:7,  
 11183:20, 11195:2,  
 11231:24, 11232:3  
**Emson's** - 11069:19,  
 11070:6, 11232:10  
**enclosed** - 11070:7  
**end** - 11066:10,  
 11077:9, 11077:24,  
 11102:15, 11254:13,  
 11265:4  
**endeavoring** -  
 11176:10  
**ended** - 11252:13,  
 11265:21  
**engage** - 11174:13  
**England** - 11220:15  
**entered** - 11140:5  
**enters** - 11260:10,  
 11260:20  
**entire** - 11222:5  
**entirely** - 11130:24  
**entries** - 11030:13,  
 11033:19, 11034:16,  
 11037:3, 11057:1,  
 11059:11, 11060:13,  
 11083:14, 11131:21  
**entry** - 11032:5,  
 11032:13, 11032:17,  
 11036:24, 11046:9,  
 11057:21, 11067:12,  
 11075:21, 11076:16,  
 11076:17, 11082:2,  
 11085:19  
**envelopes** - 11106:24  
**environmental** -  
 11198:5  
**enzyme** - 11083:19,  
 11204:25, 11216:21,  
 11239:19, 11239:20,  
 11239:22, 11239:23,  
 11240:8, 11240:9,  
 11240:14, 11241:9,  
 11241:10, 11241:14,  
 11241:19, 11241:23,  
 11242:7  
**error** - 11244:17,  
 11244:18  
**errors** - 11244:9  
**Esq** - 11027:3,  
 11028:6, 11028:7,  
 11028:10  
**essentially** - 11030:18,  
 11225:4, 11229:3  
**establish** - 11056:10,  
 11056:15, 11056:20,  
 11120:13  
**establishing** -  
 11055:5, 11120:19  
**estimate** - 11142:22  
**etc** - 11132:1  
**etcetera** - 11139:19,  
 11265:16, 11276:16  
**Eugene** - 11197:19,  
 11211:24  
**evaporate** - 11081:11  
**event** - 11118:4,  
 11176:24, 11203:17  
**events** - 11182:22

**eventually** - 11235:18,  
 11244:17  
**everywhere** -  
 11281:12  
**evidence** - 11033:24,  
 11047:20, 11072:22,  
 11108:9, 11108:11,  
 11120:6, 11135:22,  
 11140:24, 11140:25,  
 11164:22, 11187:22,  
 11189:16, 11189:21,  
 11192:10, 11193:7,  
 11194:1, 11195:17,  
 11195:19, 11196:2,  
 11196:10, 11196:13,  
 11196:16, 11196:23,  
 11197:5, 11203:13,  
 11209:24, 11210:8,  
 11210:19, 11222:18,  
 11223:1, 11226:22,  
 11227:7, 11227:23,  
 11228:13, 11229:6,  
 11229:12, 11229:24,  
 11230:12, 11230:14,  
 11230:25, 11231:9,  
 11231:24, 11232:3,  
 11232:10, 11233:1,  
 11233:7, 11233:19,  
 11233:24, 11236:23,  
 11236:25, 11243:11,  
 11243:16, 11243:17,  
 11243:19, 11259:11,  
 11273:21, 11279:12  
**evidence-in-chief** -  
 11164:22  
**exact** - 11098:14,  
 11138:4, 11165:16  
**exactly** - 11060:20,  
 11068:9, 11138:5,  
 11204:2  
**exam** - 11245:12  
**examination** -  
 11032:25, 11033:4,  
 11037:6, 11044:15,  
 11046:6, 11048:2,  
 11048:16, 11061:12,  
 11064:6, 11082:9,  
 11088:3, 11091:6,  
 11092:13, 11096:8,  
 11112:18, 11121:5,  
 11123:1, 11126:22,  
 11128:4, 11147:23,  
 11147:24, 11148:12,  
 11150:6, 11150:10,  
 11150:12, 11153:23,  
 11154:11, 11164:17,  
 11170:22, 11176:3,  
 11178:2, 11180:17,  
 11181:17, 11189:10,  
 11196:24, 11229:14  
**examinations** -  
 11056:2, 11121:6,  
 11142:8, 11162:1  
**examine** - 11031:9,  
 11086:16, 11107:15,  
 11107:17, 11133:25,  
 11147:24, 11148:12,  
 11149:4, 11153:19,  
 11153:22, 11162:3,  
 11162:17, 11166:14,  
 11227:17  
**Examine** - 11056:8,  
 11056:14, 11056:19,  
 11086:11, 11120:10  
**examined** - 11048:20,  
 11048:21, 11048:23,  
 11064:9, 11064:11,  
 11064:13, 11072:12,  
 11087:24, 11092:16,  
 11092:17, 11092:18,

11093:5, 11095:15,  
 11096:6, 11096:14,  
 11096:15, 11104:2,  
 11124:18, 11134:12,  
 11141:19, 11142:3,  
 11143:11, 11147:22,  
 11169:16, 11195:18,  
 11216:23, 11227:18,  
 11231:12  
**examined'** - 11082:4  
**examiner** - 11210:9,  
 11212:9  
**examining** - 11035:18,  
 11134:14, 11143:10,  
 11147:11, 11150:4  
**example** - 11040:3,  
 11041:24, 11061:14,  
 11063:7, 11066:2,  
 11074:24, 11085:10,  
 11093:22, 11100:23,  
 11105:23, 11113:4,  
 11152:3, 11152:14,  
 11171:5, 11171:13,  
 11172:22, 11173:9,  
 11174:17, 11174:23,  
 11174:25, 11175:4,  
 11179:20, 11188:24,  
 11194:19, 11250:6,  
 11261:8, 11267:10,  
 11273:20, 11274:1,  
 11278:1  
**examples** - 11038:15  
**except** - 11225:6,  
 11252:25, 11267:4  
**exception** - 11224:6  
**excerpted** - 11236:23  
**exchange** - 11157:24,  
 11159:10, 11277:12  
**exclude** - 11195:6,  
 11195:23, 11196:3,  
 11210:19, 11243:7  
**excluded** - 11211:10  
**excluding** - 11205:5,  
 11206:13  
**exclusive** - 11137:7  
**Excuse** - 11096:13,  
 11191:15  
**excuse** - 11158:8,  
 11159:5  
**Executive** - 11027:4  
**exhibit** - 11034:11,  
 11064:24, 11083:16,  
 11085:23, 11086:5,  
 11087:10, 11087:21,  
 11089:3, 11104:3,  
 11111:20, 11116:1,  
 11124:16, 11162:12,  
 11178:14, 11205:21  
**Exhibit** - 11048:18,  
 11048:20, 11049:1,  
 11049:8, 11049:15,  
 11051:11, 11054:8,  
 11054:9, 11054:10,  
 11054:11, 11054:12,  
 11054:13, 11054:15,  
 11054:25, 11056:8,  
 11056:14, 11056:17,  
 11056:19, 11056:22,  
 11057:7, 11057:13,  
 11057:15, 11064:9,  
 11064:11, 11064:18,  
 11067:21, 11067:23,  
 11069:17, 11086:7,  
 11086:11, 11097:1,  
 11119:24, 11120:1,  
 11120:4, 11121:8,  
 11123:5, 11123:7,  
 11123:8, 11123:16,  
 11123:17, 11124:21,  
 11128:8, 11128:20,

11200:6  
**Exhibits** - 11054:17,  
 11064:7, 11064:13,  
 11065:3, 11087:21,  
 11095:14, 11120:10,  
 11123:2  
**exhibits** - 11036:8,  
 11047:19, 11048:16,  
 11048:23, 11053:3,  
 11054:24, 11067:18,  
 11076:20, 11088:19,  
 11090:23, 11091:5,  
 11092:6, 11105:19,  
 11107:7, 11115:2,  
 11119:22, 11119:24,  
 11120:18, 11122:25,  
 11124:13, 11124:14,  
 11124:16, 11124:17,  
 11128:5, 11196:24  
**expand** - 11239:3  
**expect** - 11039:7,  
 11089:10, 11100:13,  
 11113:9, 11114:8,  
 11114:12, 11228:7  
**expectations** -  
 11089:13  
**expected** - 11224:14  
**expenditure** -  
 11267:15, 11267:22  
**experience** -  
 11078:25, 11097:16,  
 11098:3, 11098:24,  
 11101:18, 11141:5,  
 11144:18, 11170:2,  
 11170:3, 11174:23,  
 11184:7, 11193:13,  
 11193:19, 11208:11,  
 11212:3, 11275:20  
**experienced** - 11212:9  
**expert** - 11075:23  
**expertise** - 11057:3  
**explain** - 11037:2,  
 11041:3, 11049:17,  
 11097:3, 11145:18,  
 11154:12  
**explained** - 11038:11,  
 11041:12, 11049:20,  
 11087:24, 11097:5,  
 11099:10, 11125:23,  
 11185:9, 11233:5  
**explanation** -  
 11080:21, 11156:20,  
 11227:22  
**explanations** -  
 11063:14  
**explanatory** - 11060:8  
**explored** - 11198:7  
**expressed** - 11185:10,  
 11207:20  
**extended** - 11092:4  
**extensive** - 11189:5  
**extent** - 11157:8  
**external** - 11181:4,  
 11182:22  
**extract** - 11031:10,  
 11031:13, 11095:2,  
 11102:4, 11160:3,  
 11160:4  
**extraction** - 11031:11  
**extracts** - 11230:22  
**extreme** - 11065:12  
**eye** - 11165:24,  
 11177:24, 11221:24

**F**

**face** - 11188:7  
**fact** - 11036:2,  
 11040:23, 11047:3,  
 11051:20, 11052:20,



11058:19, 11062:16,  
11063:2, 11063:10,  
11066:24, 11071:18,  
11071:19, 11071:25,  
11073:2, 11079:15,  
11080:19, 11081:5,  
11082:18, 11096:6,  
11096:14, 11104:25,  
11107:6, 11114:11,  
11125:23, 11137:15,  
11138:3, 11141:10,  
11149:12, 11171:9,  
11173:1, 11175:3,  
11175:6, 11191:2,  
11195:22, 11200:16,  
11201:1, 11204:23,  
11205:15, 11213:11,  
11214:17, 11214:18,  
11217:22, 11227:6,  
11230:12, 11231:18,  
11235:21, 11240:4,  
11264:1, 11274:14,  
11278:16, 11279:11  
**factions** - 11173:4  
**factor** - 11038:3  
**factors** - 11037:15,  
11158:24  
**facts** - 11190:23,  
11191:14, 11191:21,  
11192:6, 11192:8,  
11195:2  
**failed** - 11195:20,  
11210:14  
**Failure** - 11216:20  
**fair** - 11053:7,  
11053:12, 11053:18,  
11065:18, 11119:9,  
11129:25, 11177:17,  
11180:6, 11182:24,  
11196:17, 11224:8,  
11233:23, 11237:19,  
11242:19, 11243:24,  
11249:16, 11253:17,  
11256:18, 11258:7,  
11259:20, 11261:3,  
11263:1, 11268:21,  
11269:11, 11270:6,  
11270:22  
**Fair** - 11186:24,  
11272:11, 11275:5,  
11279:23  
**fairly** - 11062:17,  
11063:23, 11063:25,  
11087:10, 11105:4,  
11178:17, 11190:21,  
11194:15, 11197:3,  
11226:6, 11237:4  
**Fairly** - 11064:2,  
11130:21  
**fairness** - 11040:17,  
11215:5  
**faith** - 11084:13,  
11205:23  
**false** - 11097:15,  
11097:22, 11098:6,  
11099:2, 11154:19,  
11154:22, 11155:2,  
11155:23, 11156:10,  
11156:12, 11158:23,  
11159:2, 11161:11,  
11199:19, 11216:24  
**familiar** - 11119:19,  
11131:4, 11131:9,  
11193:14, 11216:1,  
11240:7, 11248:6  
**far** - 11049:21,  
11050:2, 11093:18,  
11136:12, 11139:2,  
11174:4, 11190:22,  
11209:3, 11211:15,  
11223:2, 11223:7,  
11234:20, 11235:2,  
11235:8, 11235:12,  
11237:24, 11238:17,  
11245:9, 11254:4,  
11263:1, 11266:2  
**farmed** - 11258:25  
**fashion** - 11225:9,  
11251:14  
**faster** - 11152:19,  
11224:14  
**fathom** - 11040:14  
**favourable** - 11244:1,  
11244:2  
**February** - 11034:3,  
11034:14, 11046:15,  
11149:3, 11258:20  
**federal** - 11197:18  
**Fedor** - 11109:9,  
11109:11  
**fell** - 11045:23,  
11055:25, 11057:2  
**fellow** - 11259:11  
**felt** - 11049:22,  
11200:12, 11229:9  
**Ferris** - 11187:19,  
11187:21, 11187:25,  
11188:9, 11188:11,  
11190:22, 11191:22,  
11195:16, 11204:16,  
11211:25  
**few** - 11058:12,  
11097:5, 11127:1,  
11136:2, 11142:2,  
11155:22, 11175:15,  
11175:18, 11202:2,  
11204:8, 11229:18,  
11242:20  
**Ff** - 11114:15  
**fibre** - 11035:24,  
11056:3  
**fibres** - 11056:4  
**field** - 11041:8,  
11075:23, 11140:12,  
11252:6, 11263:11,  
11263:15, 11264:23  
**figure** - 11142:1,  
11142:9  
**file** - 11046:11,  
11056:16, 11056:21,  
11113:7, 11121:15,  
11122:21, 11122:22,  
11257:10, 11258:16,  
11258:22, 11259:3,  
11259:15, 11260:9,  
11260:10, 11260:12,  
11260:15, 11260:17,  
11261:7, 11261:20,  
11262:19, 11264:2,  
11265:14, 11272:12,  
11272:14, 11274:17,  
11275:2, 11276:2,  
11279:14, 11281:1,  
11281:3  
**files** - 11258:15,  
11258:25, 11260:6,  
11265:9, 11266:25,  
11270:10, 11273:17,  
11273:19, 11273:24,  
11274:18, 11274:24,  
11275:1, 11278:5,  
11278:23, 11279:1,  
11279:2, 11279:4,  
11279:13, 11279:14,  
11279:21  
**final** - 11045:6  
**finally** - 11191:25,  
11231:9, 11233:12  
**Finally** - 11191:2,  
11213:1  
**financing** - 11268:5  
**findings** - 11058:9,  
11063:14, 11087:5,  
11110:24, 11122:11,  
11196:20, 11214:21,  
11215:20, 11231:1,  
11231:15, 11232:25  
**fine** - 11096:23,  
11239:5  
**fingerprint** - 11056:1,  
11264:21  
**fingerprinting** -  
11056:5  
**finished** - 11132:20  
**firm** - 11203:4  
**first** - 11032:11,  
11044:11, 11048:12,  
11053:23, 11055:24,  
11068:21, 11070:12,  
11079:16, 11081:1,  
11082:8, 11084:14,  
11090:21, 11092:25,  
11093:3, 11096:9,  
11106:1, 11106:14,  
11114:23, 11124:24,  
11128:24, 11131:14,  
11135:9, 11147:21,  
11147:24, 11160:14,  
11160:19, 11165:15,  
11177:21, 11187:17,  
11187:25, 11189:3,  
11190:18, 11195:10,  
11197:20, 11206:18,  
11216:12, 11220:1,  
11224:14, 11224:16,  
11230:4, 11241:13,  
11255:10, 11264:10,  
11265:3, 11271:17,  
11274:25, 11278:24  
**Firstly** - 11119:12  
**Fisher** - 11028:10,  
11186:8, 11223:13,  
11235:20, 11235:24  
**fit** - 11058:10,  
11143:25  
**five** - 11185:6,  
11265:21  
**flawed** - 11209:25  
**floor** - 11278:17  
**flow** - 11066:9,  
11256:6  
**fluid** - 11030:16,  
11033:5, 11036:15,  
11037:6, 11037:8,  
11037:20, 11040:2,  
11040:9, 11041:9,  
11041:22, 11042:1,  
11045:15, 11048:24,  
11049:13, 11051:5,  
11051:10, 11052:1,  
11052:6, 11052:8,  
11053:2, 11061:11,  
11062:3, 11062:13,  
11062:17, 11063:4,  
11063:5, 11074:19,  
11076:24, 11079:18,  
11080:13, 11080:18,  
11086:18, 11086:22,  
11087:25, 11088:1,  
11092:18, 11093:19,  
11094:12, 11103:16,  
11107:22, 11110:20,  
11111:15, 11111:25,  
11112:12, 11114:10,  
11114:11, 11114:16,  
11115:3, 11115:20,  
11120:18, 11121:2,  
11123:4, 11124:8,  
11124:13, 11125:15,  
11126:1, 11126:2,  
11126:12, 11129:9,  
11129:12, 11132:4,  
11132:6, 11132:9,  
11133:10, 11134:5,  
11134:14, 11134:23,  
11136:23, 11136:24,  
11138:18, 11139:3,  
11142:4, 11142:20,  
11145:25, 11148:1,  
11148:9, 11148:10,  
11148:14, 11149:4,  
11150:17, 11162:5,  
11162:8, 11162:21,  
11162:24, 11164:24,  
11164:25, 11165:4,  
11166:13, 11167:4,  
11167:24, 11169:16,  
11174:8, 11176:3,  
11179:2, 11180:21,  
11181:20, 11182:1,  
11182:18, 11184:6,  
11193:2, 11193:15,  
11218:23, 11222:19,  
11222:23, 11223:4,  
11223:6, 11231:12,  
11236:11, 11240:21,  
11240:24, 11241:2,  
11241:8  
**fluids** - 11037:16,  
11039:23, 11044:20,  
11050:10, 11052:1,  
11070:24, 11073:13,  
11133:9, 11133:14,  
11144:21, 11145:1,  
11145:24, 11146:9,  
11147:17, 11150:25,  
11151:7, 11240:19  
**Focus** - 11150:2  
**focus** - 11036:25,  
11054:20, 11056:6,  
11066:11, 11106:18,  
11172:4, 11212:24,  
11253:20  
**Follow** - 11089:15  
**follow** - 11053:20,  
11067:11, 11068:3,  
11098:7, 11104:23,  
11127:8, 11127:21,  
11133:19, 11161:8,  
11197:12, 11202:25,  
11213:7, 11261:12,  
11261:15, 11261:20,  
11261:25, 11262:11,  
11264:3, 11264:25,  
11265:8  
**follow-up** - 11104:23,  
11197:12  
**followed** - 11059:2,  
11063:19, 11080:6,  
11089:16, 11201:11,  
11209:19  
**following** - 11053:6,  
11060:13, 11067:18,  
11086:5, 11109:19,  
11119:21, 11122:19,  
11209:3, 11211:18,  
11213:2, 11215:18,  
11247:18  
**follows** - 11070:17,  
11083:13, 11107:23  
**fooling** - 11116:23  
**football** - 11265:24  
**Forbes** - 11248:19,  
11248:22  
**force** - 11248:9  
**foregoing** - 11284:4  
**Forensic** - 11214:16  
**forensic** - 11189:11,  
11193:11, 11210:8,  
11220:14  
**form** - 11046:2,  
11046:4, 11046:5,  
11063:20, 11089:17,  
11093:23, 11143:17,  
11147:20, 11163:12,  
11176:22  
**formal** - 11184:18  
**Formal** - 11184:23  
**formed** - 11233:2  
**former** - 11187:12  
**forms** - 11164:24,  
11175:21, 11256:3  
**formulated** - 11227:20  
**forth** - 11171:6  
**forward** - 11066:9,  
11066:17, 11085:1,  
11114:15, 11144:14,  
11147:9, 11166:16,  
11172:19, 11186:25,  
11187:3, 11197:15,  
11209:7, 11245:19  
**forwarded** - 11055:4,  
11056:24  
**forwarding** - 11069:18  
**four** - 11189:9,  
11203:6, 11210:4,  
11227:8, 11265:21  
**Fox** - 11028:8  
**frame** - 11187:1,  
11187:6  
**Framer** - 11028:11  
**free** - 11168:13,  
11168:14  
**freeze** - 11132:14  
**freezing** - 11073:5,  
11073:25, 11075:15  
**frequently** - 11073:8  
**Friday** - 11269:16  
**friend** - 11164:21,  
11165:7, 11175:23,  
11178:12, 11181:16,  
11181:18, 11181:21,  
11217:25  
**friends** - 11187:13,  
11223:20  
**front** - 11110:3,  
11110:18, 11112:13,  
11230:9, 11277:13  
**Frozen** - 11218:15  
**frozen** - 11033:22,  
11034:2, 11034:9,  
11034:11, 11035:4,  
11036:22, 11072:10,  
11072:14, 11072:19,  
11073:17, 11133:22,  
11143:9, 11144:4,  
11144:7, 11189:25,  
11210:16, 11218:19  
**full** - 11208:17,  
11245:24, 11265:22  
**full-time** - 11265:22  
**functions** - 11252:4  
**fur** - 11120:5  
**furthermore** - 11221:8

**G**

**Gail** - 11109:3,  
11118:16, 11119:5,  
11119:16, 11121:14,  
11121:17, 11122:8,  
11127:10, 11135:3,  
11136:9, 11136:18,  
11136:20, 11137:21,  
11138:3, 11190:24,  
11225:13, 11226:2,  
11228:21, 11229:5,  
11229:8, 11247:3,  
11247:9, 11254:3,  
11256:7, 11257:21,



11258:19, 11258:22,  
11260:12, 11260:15,  
11261:10, 11263:2,  
11264:6, 11265:13,  
11266:2, 11270:15,  
11273:21, 11273:25,  
11274:5, 11279:14,  
11281:8  
**gain** - 11131:22  
**game** - 11254:9  
**garbling** - 11152:12  
**garment** - 11221:22,  
11222:5, 11222:7  
**gathering** - 11186:1  
**general** - 11048:12,  
11069:1, 11092:10,  
11217:24, 11222:17  
**General** - 11064:4,  
11114:24, 11122:24,  
11128:2  
**Generally** - 11188:15  
**generally** - 11066:9,  
11184:12, 11187:9,  
11205:13, 11240:13,  
11248:24  
**genital** - 11182:21  
**genitals** - 11181:2,  
11181:5  
**gentlemen** - 11249:17  
**George** - 11109:8  
**Gibson** - 11028:9,  
11029:6, 11223:24,  
11223:25, 11234:5,  
11239:10  
**girdle** - 11162:18  
**gist** - 11243:8  
**given** - 11062:5,  
11088:14, 11130:25,  
11140:24, 11163:15,  
11220:19, 11227:7,  
11227:14, 11229:7,  
11229:24, 11253:3,  
11255:5, 11269:2  
**gladly** - 11069:21  
**glass** - 11119:25  
**glove** - 11109:16,  
11109:20, 11114:19  
**gloves** - 11109:21,  
11112:1  
**go** - 11268:6  
**Government** - 11028:4  
**Grant** - 11054:7,  
11059:6  
**granular** - 11094:25,  
11095:3  
**great** - 11061:15,  
11177:13, 11229:11  
**green** - 11098:1,  
11098:5, 11102:23,  
11120:2, 11154:20,  
11160:5, 11199:20  
**greenish** - 11097:20,  
11098:22, 11101:14,  
11101:23, 11102:14,  
11102:22  
**greenish-blue** -  
11101:14  
**grey** - 11110:2,  
11110:11, 11111:14  
**Group** - 11049:2,  
11049:7, 11049:14,  
11066:13, 11107:14,  
11124:5, 11125:2,  
11128:9, 11151:17,  
11151:18, 11151:19  
**group** - 11037:21,  
11039:5, 11039:17,  
11039:19, 11042:3,  
11044:11, 11044:13,  
11048:20, 11049:19,

11049:24, 11050:13,  
11050:16, 11056:10,  
11057:11, 11057:13,  
11057:14, 11057:15,  
11057:17, 11058:3,  
11058:10, 11058:24,  
11060:15, 11064:10,  
11064:14, 11064:22,  
11064:23, 11065:15,  
11065:16, 11070:20,  
11070:22, 11071:2,  
11071:5, 11072:12,  
11073:10, 11073:15,  
11074:18, 11086:13,  
11107:19, 11113:12,  
11113:21, 11113:23,  
11113:25, 11114:14,  
11125:7, 11125:8,  
11125:16, 11125:19,  
11125:22, 11126:7,  
11128:12, 11129:13,  
11129:18, 11131:25,  
11132:3, 11133:13,  
11134:3, 11134:6,  
11135:1, 11135:17,  
11141:23, 11144:25,  
11145:5, 11145:14,  
11145:22, 11145:23,  
11147:1, 11147:17,  
11151:1, 11151:6,  
11167:25, 11168:1,  
11168:8, 11168:22,  
11171:1, 11171:2,  
11171:9, 11171:14,  
11171:17, 11171:20,  
11172:12, 11172:13,  
11173:16, 11183:7,  
11201:9, 11278:11  
**grouped** - 11071:5  
**grouping** - 11037:12,  
11037:15, 11037:18,  
11037:19, 11038:3,  
11038:5, 11039:4,  
11041:14, 11050:8,  
11055:19, 11055:20,  
11056:15, 11057:12,  
11059:15, 11059:19,  
11060:5, 11060:22,  
11060:24, 11061:2,  
11061:10, 11069:16,  
11125:10, 11128:13,  
11133:8, 11141:21,  
11146:20, 11146:21,  
11148:17, 11150:23,  
11150:24, 11151:3,  
11170:18, 11170:24,  
11171:23, 11171:24,  
11172:4, 11172:6,  
11238:9, 11238:19,  
11240:19, 11240:23,  
11240:25  
**groupings** - 11173:17  
**groups** - 11065:2,  
11113:11, 11128:19,  
11171:3, 11171:11  
**guarantee** - 11194:24  
**guess** - 11042:13,  
11060:8, 11071:11,  
11071:16, 11089:24,  
11092:8, 11101:25,  
11105:15, 11118:21,  
11133:2, 11136:6,  
11161:12, 11184:6,  
11184:12, 11186:1,  
11188:15, 11200:24,  
11207:6, 11218:3,  
11218:4, 11222:12,  
11238:11  
**guessing** - 11042:13  
**guilty** - 11243:20

## H

**haemachromagn** -  
11213:9  
**haemochromogen** -  
11031:22, 11081:14,  
11081:19, 11207:25,  
11208:23, 11209:8  
**haemoglobin** -  
11097:10, 11100:18  
**hair** - 11034:9,  
11035:14, 11035:16,  
11035:18, 11035:24,  
11036:3, 11036:12,  
11054:15  
**half** - 11054:21,  
11060:20, 11077:25,  
11162:19, 11181:25,  
11182:5  
**halfway** - 11091:16  
**hand** - 11032:19,  
11040:21, 11047:8,  
11059:21, 11127:12,  
11240:21, 11240:22,  
11274:21, 11274:22  
**handkerchief** -  
11126:25  
**handle** - 11262:5  
**handled** - 11272:13  
**hands** - 11111:6,  
11254:6, 11263:4  
**hands-on** - 11254:6,  
11263:4  
**handwritten** -  
11224:21, 11228:20  
**happy** - 11100:4,  
11223:1  
**Hardy** - 11027:3,  
11029:4, 11030:6,  
11067:2, 11067:3,  
11067:6, 11095:6,  
11095:10, 11096:21,  
11096:22, 11132:21,  
11132:23, 11149:17,  
11213:23, 11214:1,  
11214:5, 11214:9,  
11214:12, 11216:8,  
11216:11, 11220:3,  
11220:6, 11220:7,  
11224:18, 11231:25,  
11235:21, 11236:18,  
11237:5, 11239:21,  
11239:24, 11245:12  
**hazard** - 11118:21  
**head** - 11054:15  
**heading** - 11048:12,  
11048:14, 11048:18,  
11055:23, 11064:4,  
11095:14, 11096:24,  
11190:18, 11202:5,  
11218:15, 11252:19,  
11260:22  
**hear** - 11102:19,  
11108:9, 11227:17,  
11279:12  
**heard** - 11033:24,  
11072:22, 11100:20,  
11106:3, 11108:10,  
11135:22, 11202:1,  
11213:10, 11216:2,  
11243:14, 11244:23,  
11259:11, 11273:21,  
11279:11, 11280:13  
**hearing** - 11041:16,  
11043:20, 11106:2,  
11130:12, 11184:23,  
11187:7, 11188:3,  
11216:3, 11223:13  
**heat** - 11216:18,

11242:6  
**held** - 11073:10,  
11165:20, 11234:16,  
11246:24, 11247:8  
**Help** - 11142:24  
**help** - 11041:19,  
11061:16, 11061:20,  
11077:20, 11117:18,  
11142:25, 11149:8,  
11172:9, 11200:14,  
11238:16, 11243:19,  
11256:5, 11263:23,  
11265:25, 11266:12,  
11267:17, 11272:20,  
11276:22, 11282:22,  
11283:2  
**heme** - 11076:17,  
11112:2  
**hemo** - 11059:20  
**Hemo** - 11031:21  
**hemochromogen** -  
11059:22, 11099:11,  
11104:17  
**Hemostix** - 11207:24  
**hemostix** - 11077:10,  
11082:10, 11097:6,  
11097:19, 11098:8,  
11100:6, 11100:9,  
11100:11, 11100:17,  
11100:21, 11104:7,  
11104:13, 11104:19,  
11111:6, 11111:13,  
11112:4, 11112:7,  
11117:15, 11118:6,  
11137:3, 11137:11,  
11139:19, 11161:19,  
11190:20  
**hereby** - 11284:4  
**herein** - 11284:6  
**Hersh** - 11028:2,  
11243:1  
**highlight** - 11191:21,  
11246:18  
**highlighted** - 11201:13  
**highly** - 11049:13,  
11049:23, 11052:25,  
11129:17  
**Hinz** - 11027:10,  
11284:2, 11284:13  
**Hodson** - 11027:2,  
11029:10, 11149:23,  
11223:22, 11223:25,  
11245:15, 11245:18,  
11245:21, 11272:10,  
11283:9  
**hole** - 11162:14  
**holiday** - 11092:4  
**holidays** - 11092:2  
**homicide** - 11271:17,  
11278:21  
**homicides** - 11256:25,  
11278:4, 11278:11  
**Hon** - 11028:13  
**Honourable** - 11026:6  
**hope** - 11090:6  
**horseradish** -  
11098:2, 11102:4,  
11160:6  
**hospital** - 11077:11  
**Hospital** - 11069:14,  
11069:24  
**hospitals** - 11154:13  
**Hotel** - 11026:16  
**hours** - 11269:3,  
11273:12, 11274:15  
**housecoat** - 11109:24,  
11111:25  
**Huber** - 11054:2  
**Human** - 11049:7,  
11049:13, 11051:10,  
11064:23, 11123:4  
**human** - 11031:25,  
11032:8, 11033:2,  
11033:5, 11037:7,  
11037:8, 11037:11,  
11045:19, 11048:24,  
11056:9, 11059:13,  
11059:17, 11059:24,  
11060:21, 11082:19,  
11082:22, 11082:23,  
11082:25, 11088:2,  
11103:16, 11115:2,  
11120:12, 11129:9,  
11137:19, 11141:22,  
11142:4, 11148:1,  
11148:9, 11148:14,  
11162:4, 11162:8,  
11165:7, 11166:2,  
11166:21, 11167:2,  
11180:20, 11202:10,  
11202:19, 11203:7,  
11203:19, 11203:25,  
11204:6, 11204:24,  
11205:2, 11205:3,  
11205:4, 11205:6,  
11206:1, 11206:2,  
11206:3, 11206:4,  
11206:14, 11207:3,  
11207:7, 11212:7,  
11212:11, 11219:2,  
11230:20  
**hundred** - 11141:16,  
11142:24  
**hypothetical** -  
11052:17, 11068:10,  
11080:21, 11089:14,  
11100:6, 11158:12  
**hypothetically** -  
11052:4, 11052:10  
**hypotheticals** -  
11088:23

## I

**I-1** - 11148:8,  
11150:19, 11153:14,  
11153:19, 11175:20  
**I-2** - 11164:23,  
11164:25  
**I** - 11033:20, 11035:2,  
11036:16, 11036:18,  
11036:25, 11037:5,  
11037:7, 11037:11,  
11040:11, 11040:19,  
11049:15, 11052:22,  
11053:9, 11057:25,  
11058:9, 11058:16,  
11058:22, 11061:23,  
11063:1, 11065:22,  
11076:15, 11079:8,  
11092:15, 11092:16,  
11097:2, 11113:5,  
11122:12, 11133:23,  
11136:23, 11149:4,  
11150:7, 11156:23,  
11164:18, 11167:18,  
11173:10, 11200:6,  
11200:19  
**I2** - 11033:20, 11035:1,  
11035:3, 11036:16,  
11036:19, 11037:5,  
11037:11, 11045:14,  
11076:15, 11082:3,  
11082:4, 11082:9,  
11082:10, 11083:4,  
11092:15, 11092:18,  
11095:14, 11164:19,  
11166:7  
**Id** - 11032:16,  
11035:21, 11047:11,



11063:19, 11067:15,  
11069:5, 11070:8,  
11089:17, 11132:17,  
11132:19, 11138:9,  
11215:17, 11215:23  
**idea** - 11045:18,  
11068:5, 11072:21,  
11080:16, 11138:23,  
11142:17, 11142:21,  
11173:14, 11183:23,  
11213:16, 11219:10,  
11241:10  
**ident** - 11252:5,  
11253:14, 11253:22,  
11255:2, 11264:24,  
11271:10, 11272:23,  
11272:24, 11273:18,  
11277:11, 11277:18,  
11279:7  
**ident** - 11090:18,  
11090:24, 11153:9  
**identical** - 11032:17,  
11082:2  
**identification** -  
11054:6, 11108:8,  
11143:13, 11147:21,  
11159:1, 11207:3,  
11230:5, 11249:9,  
11251:7, 11252:5,  
11264:19, 11268:17  
**identification** -  
11054:6, 11059:6  
**identified** - 11039:16,  
11067:5, 11070:19,  
11088:2, 11121:13,  
11131:18, 11132:25,  
11189:9, 11198:24,  
11224:19, 11237:16,  
11239:19  
**identify** - 11031:24,  
11076:25, 11083:12,  
11133:5, 11156:5,  
11173:16, 11175:25,  
11213:5, 11219:23,  
11223:17, 11233:20,  
11243:6, 11262:2,  
11263:18  
**identifying** - 11232:16  
**identities** - 11251:11,  
11277:19  
**ids** - 11223:18  
**illustrate** - 11176:19  
**illustration** - 11171:19  
**immediate** - 11078:23,  
11222:22  
**immediately** -  
11094:15, 11098:12,  
11216:18, 11264:18  
**impact** - 11241:23,  
11277:23  
**implication** - 11207:6,  
11241:5  
**important** - 11087:4,  
11250:14, 11252:2  
**impossible** - 11208:22  
**improper** - 11062:6,  
11217:23  
**inability** - 11189:18  
**inactivated** - 11216:18  
**inch** - 11077:23,  
11077:25  
**inches** - 11077:23  
**inclined** - 11087:13,  
11088:15, 11105:11  
**include** - 11233:7,  
11243:6  
**included** - 11120:21,  
11157:25  
**includes** - 11139:10,  
11144:19  
**including** - 11130:18,  
11166:22, 11179:20  
**inclusive** -  
11080:5  
**inconsistent** -  
11058:14  
**incorrect** - 11217:12  
**indeed** - 11052:18,  
11083:21, 11125:22,  
11158:4, 11200:20,  
11203:7, 11203:24  
**indeterminate** -  
11064:23  
**index** - 11029:1  
**indicate** - 11032:3,  
11036:25, 11037:19,  
11040:23, 11041:1,  
11045:2, 11047:6,  
11047:14, 11047:18,  
11053:21, 11054:5,  
11061:1, 11064:8,  
11065:24, 11069:6,  
11077:14, 11079:5,  
11082:3, 11083:22,  
11084:10, 11089:22,  
11092:16, 11095:23,  
11099:15, 11101:16,  
11103:14, 11105:1,  
11110:6, 11112:2,  
11112:12, 11112:20,  
11115:7, 11115:13,  
11124:1, 11125:9,  
11126:3, 11126:18,  
11128:5, 11129:17,  
11134:5, 11140:4,  
11164:1, 11164:4,  
11168:21, 11169:24  
**indicated** - 11036:21,  
11040:10, 11063:3,  
11078:1, 11082:6,  
11091:22, 11092:22,  
11095:14, 11095:25,  
11096:5, 11104:1,  
11107:11, 11143:24,  
11158:19, 11186:2,  
11193:20, 11215:6,  
11215:7, 11215:8,  
11217:8, 11222:4,  
11225:4, 11225:15,  
11226:4, 11226:6  
**indicates** - 11034:10,  
11051:9, 11053:2,  
11055:3, 11056:7,  
11066:12, 11067:17,  
11069:10, 11075:21,  
11082:5, 11086:10,  
11087:21, 11103:16,  
11106:20, 11106:22,  
11108:6, 11109:6,  
11109:10, 11109:18,  
11116:14, 11121:10,  
11122:24, 11124:3,  
11125:13, 11127:16,  
11127:17, 11127:19,  
11128:1, 11132:13,  
11134:25, 11135:17,  
11136:7, 11193:6,  
11195:4, 11198:21,  
11202:8, 11203:3,  
11207:19, 11216:14,  
11218:18, 11246:21  
**indicating** - 11031:25,  
11032:1, 11046:10,  
11077:3, 11086:4,  
11112:21, 11140:3,  
11204:19, 11224:23,  
11230:21, 11237:10  
**indication** - 11048:13,  
11073:21, 11077:1,  
11077:16, 11080:8,  
11082:1, 11107:9,  
11115:15, 11121:20,  
11121:24  
**indicators** - 11170:5  
**individual** - 11038:5,  
11039:25, 11044:21,  
11057:22, 11057:24,  
11058:15, 11058:21,  
11084:19, 11137:4,  
11173:12, 11188:18,  
11192:14, 11244:8,  
11254:15, 11260:7,  
11260:25, 11268:3,  
11269:2  
**individual'** - 11085:5  
**individual's** -  
11043:22, 11057:18  
**individuals** - 11234:9,  
11236:1, 11236:4,  
11236:8  
**infection** - 11182:20  
**inflammation** -  
11181:3, 11181:8,  
11183:11  
**inflammations** -  
11182:25  
**inform** - 11069:3  
**informal** - 11269:25  
**information** -  
11050:17, 11050:21,  
11069:20, 11115:18,  
11133:16, 11134:8,  
11142:12, 11147:4,  
11147:5, 11151:23,  
11155:11, 11156:16,  
11157:20, 11159:13,  
11159:14, 11161:4,  
11163:1, 11164:6,  
11167:13, 11169:20,  
11172:1, 11173:22,  
11173:25, 11178:6,  
11179:14, 11183:19,  
11183:21, 11185:22,  
11186:2, 11186:6,  
11186:12, 11227:5,  
11227:21, 11228:15,  
11229:4, 11229:16,  
11231:4, 11234:15,  
11234:16, 11234:23,  
11235:10, 11254:12,  
11260:16, 11261:22,  
11263:22, 11264:2,  
11276:7, 11276:23,  
11277:13, 11278:13,  
11281:15, 11282:17  
**informed** - 11202:12,  
11203:12, 11203:16,  
11204:25  
**inhibition** - 11061:6,  
11208:15  
**initial** - 11084:18,  
11148:11, 11150:10,  
11189:10  
**initials** - 11123:9  
**injury** - 11181:1,  
11181:8, 11182:23,  
11193:7, 11195:1  
**Inland** - 11027:13  
**innocent** - 11243:20  
**input** - 11268:12  
**inquiries** - 11075:24  
**inquiry** - 11070:15,  
11185:1, 11186:20,  
11227:7, 11227:18,  
11261:21, 11265:9  
**Inquiry** - 11026:2,  
11026:23  
**inserted** - 11225:7  
**inside** - 11059:16,  
11120:6, 11162:15  
**insignificant** -  
11062:10, 11172:25  
**insofar** - 11084:19  
**Inssofar** - 11084:22  
**inspect** - 11030:19  
**inspection** - 11110:21,  
11111:2, 11111:5  
**inspector** - 11247:13  
**Inspector** - 11076:9,  
11250:11  
**instance** - 11039:24,  
11044:5, 11078:6,  
11081:22, 11103:5,  
11146:25, 11170:11,  
11171:23, 11174:22  
**instances** - 11112:7,  
11118:1  
**instant** - 11101:12  
**instantaneous** -  
11103:2, 11103:8  
**instead** - 11079:17,  
11242:6  
**instructions** -  
11126:16, 11250:8  
**insufficient** - 11060:2,  
11157:10, 11209:7  
**intact** - 11094:16  
**integrity** - 11189:19  
**intended** - 11078:1  
**intense** - 11078:23  
**interchangeably** -  
11145:15  
**interest** - 11186:23  
**interested** - 11184:25,  
11185:15  
**Interested** - 11185:1  
**interfere** - 11100:2,  
11209:14  
**interject** - 11159:6  
**internal** - 11181:4  
**international** -  
11039:4  
**interpret** - 11086:14,  
11120:15, 11120:16,  
11120:24, 11208:8,  
11244:4  
**interpretation** -  
11087:13, 11129:23  
**interpretations** -  
11192:9  
**interpreted** - 11086:25  
**interpreting** - 11067:8  
**interrupt** - 11167:20  
**interrupted** - 11047:24  
**interval** - 11093:9,  
11093:10, 11093:11,  
11093:14, 11093:15  
**interview** - 11265:15,  
11267:11  
**interviewed** -  
11219:18  
**introduction** -  
11224:3, 11224:6  
**investigate** - 11261:1,  
11264:16  
**investigated** -  
11276:18, 11278:16  
**investigating** -  
11046:7, 11259:2,  
11260:7, 11261:24,  
11274:22, 11275:8,  
11276:5, 11276:16  
**investigation** -  
11105:18, 11108:13,  
11108:23, 11118:17,  
11119:6, 11119:17,  
11122:9, 11127:9,  
11130:2, 11186:21,  
11219:13, 11219:16,  
11219:19, 11220:5,  
11247:4, 11248:23,  
11252:16, 11254:4,  
11254:5, 11254:18,  
11255:15, 11257:6,  
11257:21, 11257:22,  
11259:19, 11261:6,  
11262:22, 11263:2,  
11263:4, 11263:5,  
11263:7, 11263:12,  
11263:15, 11264:7,  
11264:9, 11264:17,  
11265:1, 11265:5,  
11266:1, 11266:2,  
11270:5, 11270:23,  
11271:7, 11271:8,  
11271:9, 11273:15,  
11273:22, 11273:25,  
11274:5, 11277:13,  
11277:23, 11280:24,  
11281:23, 11282:22  
**investigations** -  
11249:3, 11249:7,  
11250:5, 11256:18,  
11265:14, 11277:22  
**Investigations** -  
11249:18  
**investigative** -  
11041:17, 11041:19,  
11053:13, 11121:21,  
11175:7, 11222:13,  
11222:14  
**investigatively** -  
11118:19, 11121:5  
**investigator** -  
11041:20, 11042:10,  
11042:16, 11062:19,  
11066:19, 11108:12,  
11245:5  
**investigator's** -  
11066:3  
**investigators** -  
11067:8, 11068:13,  
11210:14, 11258:18,  
11266:7, 11276:3,  
11276:6, 11276:23,  
11277:5, 11278:6,  
11278:21, 11278:22  
**involve** - 11030:25,  
11154:7  
**involved** - 11041:11,  
11086:20, 11118:25,  
11122:2, 11130:8,  
11185:12, 11186:11,  
11237:23, 11249:2,  
11259:14, 11259:15  
**involvement** -  
11179:22, 11184:18,  
11184:23, 11185:4,  
11185:9  
**involving** - 11073:14  
**Irene** - 11027:9  
**irregularity** - 11071:17  
**irrelevant** - 11239:1  
**Irwin** - 11028:13  
**Isabelle** - 11027:6  
**ish** - 11035:9  
**isolate** - 11171:10,  
11176:10, 11186:14  
**issue** - 11031:14,  
11069:3, 11075:25,  
11149:9, 11190:19,  
11211:7  
**item** - 11031:18,  
11032:16, 11040:11,  
11052:11, 11057:25,  
11059:8, 11060:4,  
11060:6, 11079:8,  
11082:3, 11085:14,  
11087:23, 11089:5,  
11095:13, 11103:16,



11103:18, 11103:22,  
11104:5, 11106:9,  
11112:11, 11118:1,  
11118:7, 11118:12,  
11120:3, 11132:13,  
11138:25, 11139:23,  
11143:11, 11150:7,  
11159:20, 11163:9  
**items** - 11031:17,  
11033:25, 11034:15,  
11045:22, 11046:14,  
11047:4, 11048:4,  
11048:13, 11053:22,  
11054:5, 11059:2,  
11059:5, 11059:7,  
11063:24, 11064:3,  
11067:13, 11067:25,  
11068:8, 11070:2,  
11076:6, 11076:12,  
11076:13, 11089:25,  
11090:3, 11090:4,  
11090:9, 11091:17,  
11091:22, 11091:25,  
11092:10, 11092:13,  
11092:14, 11095:19,  
11095:22, 11096:10,  
11105:17, 11106:20,  
11107:4, 11107:10,  
11108:1, 11108:4,  
11108:19, 11108:21,  
11109:19, 11110:7,  
11110:15, 11114:22,  
11114:25, 11115:20,  
11119:6, 11125:12,  
11125:25, 11128:2,  
11162:25, 11163:19,  
11163:20, 11179:19,  
11179:20, 11220:10,  
11222:15, 11236:22  
**itself** - 11080:2,  
11100:19, 11179:25,  
11233:19, 11244:18  
**Ivan** - 11029:3,  
11030:5

## J

**Jack** - 11245:18,  
11245:25, 11259:12  
**jacket** - 11120:5,  
11120:11, 11123:8,  
11123:17, 11223:6  
**James** - 11187:19,  
11187:21, 11188:9,  
11248:15, 11248:19,  
11248:22  
**January** - 11116:2,  
11116:10, 11133:1,  
11212:21, 11213:23,  
11224:24, 11233:3,  
11247:2, 11247:4,  
11258:19  
**Jay** - 11028:6,  
11207:21  
**Jennifer** - 11028:11  
**Jerry** - 11027:12  
**Joanne** - 11028:3  
**job** - 11261:14,  
11261:16, 11261:19  
**Joe** - 11210:17,  
11272:24, 11274:1  
**jog** - 11106:12  
**John** - 11029:9,  
11245:20, 11245:24  
**Jordan** - 11027:3  
**jot** - 11263:18  
**Joyce** - 11028:3  
**judge** - 11145:16  
**July** - 11089:23,  
11090:4, 11090:10,

11091:3, 11091:23,  
11108:19  
**June** - 11067:12,  
11067:15, 11069:6,  
11070:9, 11076:14,  
11086:2, 11089:25,  
11090:5, 11090:12,  
11091:18, 11095:19,  
11096:10, 11153:11,  
11201:22, 11209:23,  
11211:24, 11232:12,  
11236:19  
**jurisdiction** - 11267:8  
**juror** - 11243:10,  
11243:14, 11243:18,  
11243:19, 11243:21  
**jurors** - 11243:7  
**jury** - 11145:20,  
11169:7, 11181:21,  
11226:23, 11227:23,  
11229:22, 11230:3,  
11230:11, 11231:4,  
11231:21, 11243:4,  
11244:5  
**Justice** - 11026:6,  
11028:12, 11028:14

## K

**Kara** - 11027:6  
**Karen** - 11027:10,  
11284:2, 11284:13  
**Karst** - 11028:8,  
11263:6, 11266:15  
**keep** - 11223:1,  
11255:13, 11259:4,  
11259:6  
**Kerr** - 11054:1,  
11054:2, 11067:16,  
11069:8, 11086:3,  
11119:14  
**Kettles** - 11248:16,  
11252:10, 11254:2,  
11255:22, 11267:12,  
11271:7, 11272:15,  
11273:1, 11273:2  
**Kettles'** - 11271:24  
**Key** - 11209:24  
**kill** - 11242:7  
**kind** - 11206:24  
**Kleiv** - 11090:18,  
11090:24, 11091:18,  
11153:9  
**knife** - 11031:19,  
11048:21, 11049:8  
**Knowing** - 11173:24  
**knowing** - 11106:1,  
11124:6, 11125:16  
**knowledge** -  
11050:19, 11063:1,  
11075:5, 11097:23,  
11099:15, 11122:4,  
11127:4, 11127:7,  
11144:18, 11144:19,  
11167:9, 11174:18,  
11182:16, 11184:12,  
11186:3, 11190:7,  
11190:9, 11190:15,  
11195:3, 11209:17,  
11212:15, 11213:17,  
11235:9, 11238:4,  
11241:16, 11244:20,  
11245:4, 11255:23,  
11259:3, 11278:13,  
11282:4, 11284:6  
**known** - 11030:21,  
11037:16, 11070:25,  
11083:20, 11113:8,  
11114:5, 11125:1,  
11125:6, 11145:2,

11145:9, 11145:10,  
11199:21, 11239:22,  
11240:13, 11244:25  
**Knox** - 11028:5,  
11029:5, 11223:25,  
11224:2, 11224:5,  
11234:2  
**Knox's** - 11243:2  
**Krogan** - 11028:4  
**Kujawa** - 11028:6

## L

**lab** - 11106:21,  
11108:14, 11119:23,  
11122:21, 11122:22,  
11127:20, 11188:1,  
11197:18, 11215:15,  
11226:11  
**Lab** - 11055:5,  
11214:16  
**labelled** - 11175:20  
**laboratories** -  
11077:11, 11193:12,  
11238:14  
**laboratory** - 11046:11,  
11067:20, 11072:16,  
11090:25, 11091:3,  
11110:6, 11140:5,  
11140:18, 11153:10,  
11187:14, 11217:25  
**Laboratory** - 11034:12,  
11073:1, 11085:25,  
11121:7, 11127:3,  
11191:5  
**labs** - 11238:18  
**lack** - 11042:22,  
11042:23, 11129:10  
**ladies** - 11109:21,  
11120:10, 11120:11  
**lady's** - 11120:2,  
11120:4  
**laid** - 11265:4  
**Lana** - 11028:4  
**lane** - 11264:15  
**language** - 11049:23,  
11057:6, 11068:6,  
11086:23, 11097:3,  
11099:3, 11103:10,  
11145:21  
**lapse** - 11046:18,  
11048:3, 11089:19  
**lapsed** - 11091:24  
**large** - 11110:4,  
11113:14  
**larger** - 11035:2  
**Larry** - 11027:13,  
11028:10, 11186:8,  
11223:13  
**last** - 11037:22,  
11045:22, 11066:7,  
11066:12, 11085:21,  
11087:19, 11106:18,  
11115:19, 11116:6,  
11117:13, 11125:4,  
11134:20, 11135:5,  
11135:19, 11136:4,  
11136:6, 11136:15,  
11137:21, 11159:12,  
11169:23, 11191:9,  
11191:11, 11191:13,  
11191:24, 11195:15,  
11205:24, 11206:11,  
11212:17, 11216:7,  
11216:13, 11220:25,  
11225:9, 11233:11,  
11269:3, 11273:12,  
11274:15, 11278:9  
**late** - 11091:3  
**latter** - 11104:13

**law** - 11240:5  
**lawyer** - 11210:23  
**lay** - 11176:12  
**laying** - 11194:15  
**lead** - 11170:6,  
11200:24  
**leading** - 11186:15  
**leads** - 11128:15  
**leafy** - 11160:5,  
11168:17, 11230:23  
**lean** - 11243:23,  
11243:24  
**leaned** - 11196:15,  
11244:16  
**leaning** - 11113:22  
**learn** - 11187:9  
**learned** - 11051:1,  
11164:21, 11165:6,  
11175:23, 11178:12,  
11181:16, 11181:18,  
11237:18, 11257:23,  
11181:21  
**learning** - 11218:5  
**least** - 11072:24,  
11149:5, 11188:6,  
11247:12, 11248:23,  
11277:10  
**leather** - 11098:3,  
11098:4, 11154:21,  
11160:4, 11199:21,  
11230:24  
**leave** - 11233:17,  
11246:11, 11262:4,  
11267:7  
**leaving** - 11153:17,  
11235:4  
**left** - 11030:9, 11047:8,  
11047:16, 11161:13,  
11274:21  
**left-hand** - 11047:8  
**legible** - 11033:17,  
11041:3, 11059:3  
**legislation** - 11234:15  
**legs** - 11116:5  
**length** - 11092:6,  
11093:25  
**lengthy** - 11237:4  
**lent** - 11117:5  
**less** - 11036:20,  
11142:24, 11182:21,  
11182:24, 11183:1  
**letter** - 11053:24,  
11053:25, 11055:22,  
11067:14, 11067:17,  
11069:4, 11069:6,  
11069:9, 11069:19,  
11070:6, 11070:9,  
11070:11, 11072:6,  
11073:4, 11079:6,  
11085:15, 11086:2,  
11108:23, 11122:12,  
11122:19, 11188:4,  
11205:17, 11211:23,  
11212:20, 11212:21,  
11213:22, 11232:11,  
11236:18  
**letters** - 11264:1,  
11265:9  
**lettuce** - 11160:6,  
11168:17  
**level** - 11262:21,  
11262:22  
**Lieutenant** - 11034:1,  
11034:7, 11035:13,  
11054:22, 11069:5,  
11070:1, 11070:10,  
11072:23, 11076:4,  
11076:10, 11085:16,  
11085:20, 11086:3,  
11088:12, 11104:24,  
11119:23, 11119:24,

11250:6, 11250:12,  
11250:17, 11250:23,  
11250:25, 11252:22,  
11253:2, 11266:14  
**lieutenant** - 11210:17,  
11269:9  
**life** - 11186:23,  
11224:11  
**light** - 11165:21  
**lighter** - 11102:20  
**lighting** - 11178:3  
**lightly** - 11126:24  
**likelihoods** - 11196:7  
**likely** - 11047:21,  
11053:10, 11066:16,  
11114:1, 11131:2,  
11131:4, 11137:20,  
11170:11, 11182:25,  
11183:1, 11192:13,  
11194:20, 11221:9,  
11237:18, 11257:23,  
11278:12  
**limb** - 11065:13  
**limited** - 11097:17,  
11192:9  
**limits** - 11084:22  
**lined** - 11120:5  
**lines** - 11073:23,  
11225:9  
**lining** - 11120:6  
**link** - 11121:21,  
11195:20, 11196:3  
**linked** - 11118:19,  
11210:5  
**lipstick** - 11109:16  
**liquid** - 11033:22,  
11049:1, 11049:15,  
11053:10, 11056:17,  
11056:22, 11057:13,  
11060:7, 11064:20,  
11077:5, 11078:16,  
11079:21, 11079:22,  
11079:25, 11080:2,  
11080:3, 11081:9,  
11097:2, 11107:12,  
11121:9, 11128:3,  
11128:8, 11133:24,  
11134:5, 11141:11,  
11143:20, 11143:21,  
11144:4, 11150:15,  
11153:15, 11153:16,  
11153:25, 11154:16,  
11160:16, 11160:21,  
11163:14, 11165:13,  
11165:18, 11172:15,  
11173:18, 11174:6,  
11176:14, 11176:22,  
11177:15, 11208:19,  
11218:17, 11218:20  
**list** - 11090:21  
**listed** - 11048:17,  
11048:23, 11053:3,  
11108:22, 11114:23,  
11173:4  
**listened** - 11244:3  
**Literally** - 11121:1  
**local** - 11181:1  
**located** - 11036:3,  
11051:21, 11057:24,  
11060:3, 11108:7,  
11109:5, 11109:19,  
11174:25, 11181:19,  
11221:23, 11236:10  
**locating** - 11034:8,  
11179:22  
**location** - 11139:5,  
11139:6, 11139:7,  
11162:11, 11258:12  
**logical** - 11194:16  
**look** - 11030:11,



11032:13, 11034:4,  
 11036:24, 11045:11,  
 11045:12, 11045:25,  
 11046:1, 11053:1,  
 11053:22, 11053:23,  
 11059:1, 11059:8,  
 11060:21, 11061:24,  
 11063:18, 11064:3,  
 11064:16, 11076:11,  
 11085:2, 11085:21,  
 11085:25, 11086:22,  
 11089:15, 11089:21,  
 11091:20, 11096:12,  
 11103:24, 11104:3,  
 11104:5, 11110:18,  
 11119:12, 11120:17,  
 11121:1, 11127:9,  
 11127:18, 11129:15,  
 11136:5, 11164:10,  
 11187:18, 11188:4,  
 11188:18, 11189:2,  
 11189:4, 11193:8,  
 11207:17, 11215:15,  
 11218:11, 11221:4,  
 11222:15, 11246:23,  
 11247:2, 11247:18,  
 11248:14, 11249:25,  
 11251:16, 11257:13,  
 11268:7, 11270:8,  
 11283:1  
**Look** - 11090:21  
**looked** - 11063:21,  
 11073:19, 11089:18,  
 11110:19, 11117:2,  
 11122:19, 11177:22,  
 11208:6, 11230:10,  
 11256:15, 11273:23  
**Looking** - 11083:17,  
 11088:8, 11113:20  
**looking** - 11034:16,  
 11042:4, 11047:19,  
 11053:6, 11053:13,  
 11059:13, 11085:17,  
 11088:10, 11092:23,  
 11100:24, 11103:6,  
 11113:9, 11117:16,  
 11124:15, 11127:23,  
 11166:12, 11172:13,  
 11172:21, 11173:12,  
 11180:4, 11184:10,  
 11188:5, 11201:12,  
 11205:22, 11231:3,  
 11254:17, 11257:9,  
 11266:24, 11277:2,  
 11277:3, 11278:3,  
 11283:3  
**looks** - 11110:8,  
 11110:17, 11110:20,  
 11111:15, 11133:1  
**Lord** - 11145:11,  
 11150:25, 11158:10,  
 11159:7, 11160:8  
**Lordship** - 11181:22  
**Lorne** - 11054:7,  
 11059:6  
**lost** - 11186:23  
**low** - 11046:20,  
 11046:24  
**luck** - 11279:18  
**lump** - 11230:18  
**lumps** - 11034:9,  
 11034:10, 11133:22,  
 11189:25, 11210:16,  
 11218:15  
**M**  
**Maccallum** - 11026:7,  
 11030:3, 11067:1,  
 11093:7, 11093:15,  
 11093:21, 11094:1,  
 11094:5, 11094:8,  
 11094:13, 11094:17,  
 11094:20, 11094:24,  
 11095:4, 11096:13,  
 11096:17, 11096:20,  
 11132:18, 11132:22,  
 11149:20, 11213:21,  
 11213:24, 11214:4,  
 11214:8, 11216:6,  
 11216:10, 11220:1,  
 11220:4, 11234:4,  
 11242:14, 11242:23,  
 11245:14, 11245:16,  
 11272:6, 11283:11  
**Macdonald** - 11116:1  
**Mackie** - 11258:11,  
 11258:24, 11262:7,  
 11262:13, 11266:20,  
 11266:21, 11266:22,  
 11266:23, 11280:14,  
 11281:1, 11281:2  
**Mackie/reid** -  
 11262:20  
**Macmillan** - 11235:16  
**major** - 11131:6  
**majoring** - 11140:9  
**majority** - 11266:4  
**maker** - 11265:11  
**makers** - 11265:12  
**male** - 11041:23,  
 11053:17, 11058:24,  
 11086:16, 11180:22,  
 11181:1, 11181:5,  
 11181:20, 11202:13,  
 11232:7  
**males** - 11182:18  
**managed** - 11224:11  
**Manager** - 11027:5  
**Manitoba** - 11141:3  
**Manitoba's** - 11210:9  
**manner** - 11067:9,  
 11087:1, 11110:24,  
 11241:6, 11241:8  
**March** - 11036:9,  
 11046:13, 11047:7,  
 11047:10, 11047:18,  
 11047:25, 11053:6,  
 11053:7, 11066:8,  
 11119:13, 11121:11,  
 11122:10, 11215:21,  
 11215:24, 11235:17  
**margin** - 11032:19  
**mark** - 11127:1,  
 11162:11, 11162:14  
**marked** - 11148:7,  
 11150:19, 11153:14,  
 11164:23  
**Markesteyn** -  
 11201:19, 11201:24,  
 11202:8, 11203:3,  
 11203:22, 11203:23,  
 11207:19, 11210:13,  
 11210:20, 11211:25,  
 11236:19, 11237:9,  
 11238:5  
**Markesteyn's** -  
 11204:13  
**maroon** - 11109:23  
**material** - 11031:1,  
 11031:12, 11031:13,  
 11035:2, 11035:3,  
 11037:11, 11060:24,  
 11060:25, 11081:13,  
 11087:15, 11094:25,  
 11129:5, 11152:16,  
 11165:7, 11166:2,  
 11166:4, 11166:21,  
 11167:2, 11178:22,  
 11216:3, 11219:9,  
 11221:22, 11242:1  
**materials** - 11033:12,  
 11097:14, 11097:17,  
 11097:18, 11097:19,  
 11097:21, 11097:24,  
 11098:18, 11098:22,  
 11102:4, 11130:7,  
 11151:10, 11166:15  
**matter** - 11069:15,  
 11075:6, 11081:11,  
 11103:15, 11114:1,  
 11120:23, 11127:11,  
 11130:19, 11138:14,  
 11144:19, 11166:14,  
 11185:16, 11185:24,  
 11219:7, 11219:15,  
 11233:17, 11256:20  
**matters** - 11057:2,  
 11118:14, 11180:1  
**Maurice** - 11116:10  
**Maurice** - 11028:15  
**mean** - 11038:23,  
 11043:1, 11046:25,  
 11051:24, 11055:9,  
 11055:16, 11062:1,  
 11081:9, 11083:6,  
 11083:14, 11084:24,  
 11137:8, 11154:22,  
 11155:19, 11168:15,  
 11185:25, 11251:16,  
 11258:14, 11259:18,  
 11275:6  
**meaning** - 11037:2  
**means** - 11038:23,  
 11062:6, 11065:17,  
 11076:18, 11133:12  
**mechanical** - 11093:24  
**media** - 11281:9,  
 11281:11, 11281:24,  
 11282:3, 11282:7,  
 11282:17  
**medical** - 11182:15,  
 11210:9  
**medium** - 11095:1  
**meeting** - 11226:5,  
 11269:15  
**meetings** - 11270:3,  
 11273:8, 11273:10,  
 11274:12  
**member** - 11219:19  
**members** - 11186:21  
**memo** - 11197:19,  
 11201:10, 11235:16  
**memory** - 11074:1,  
 11076:2, 11106:12,  
 11107:3, 11119:12,  
 11121:16, 11130:7,  
 11135:24, 11136:1,  
 11226:19  
**men** - 11264:3  
**men's** - 11085:17,  
 11086:7, 11103:17,  
 11109:21, 11109:22,  
 11109:23, 11110:1,  
 11112:11, 11115:4  
**mention** - 11115:5,  
 11131:21, 11207:1  
**mentioned** - 11043:8,  
 11046:21, 11061:11,  
 11111:20, 11115:9,  
 11158:24, 11195:2,  
 11197:8, 11204:14,  
 11230:23, 11234:7,  
 11235:5, 11235:23,  
 11235:24, 11274:10  
**Merry** - 11215:21,  
 11215:25, 11216:9,  
 11219:6  
**Merry's** - 11216:5,  
 11218:10, 11239:18,  
 11241:6  
**met** - 11116:17,  
 11224:9  
**metals** - 11199:23  
**method** - 11123:18,  
 11194:18, 11208:15,  
 11217:10, 11217:13,  
 11217:23, 11276:15  
**methodology** -  
 11203:8  
**methods** - 11030:16,  
 11190:11  
**Meyer** - 11027:11,  
 11284:2, 11284:17  
**Michael** - 11220:15  
**micro** - 11087:25,  
 11112:14  
**microscope** - 11123:5,  
 11207:4, 11207:11  
**microscopic** -  
 11032:24, 11033:4,  
 11037:6, 11088:3,  
 11112:18  
**microscopically** -  
 11031:8  
**mid** - 11147:10  
**middle** - 11127:15,  
 11205:24, 11207:18,  
 11218:18  
**midst** - 11205:24  
**might** - 11036:18,  
 11039:1, 11057:6,  
 11068:6, 11073:15,  
 11087:4, 11088:22,  
 11092:21, 11093:16,  
 11102:8, 11104:18,  
 11106:10, 11118:22,  
 11126:4, 11135:15,  
 11149:14, 11158:23,  
 11160:2, 11160:23,  
 11169:12, 11171:20,  
 11172:9, 11177:3,  
 11214:6, 11226:11,  
 11226:13, 11260:19,  
 11263:17, 11270:24,  
 11272:19, 11273:18,  
 11273:19, 11274:9,  
 11274:11, 11276:9,  
 11276:22, 11277:22,  
 11279:4  
**Milgaard** - 11026:4,  
 11028:2, 11028:3,  
 11055:1, 11060:8,  
 11065:21, 11066:13,  
 11084:21, 11085:23,  
 11108:8, 11110:12,  
 11130:13, 11163:7,  
 11185:19, 11190:25,  
 11191:17, 11193:4,  
 11195:9, 11195:21,  
 11196:11, 11197:3,  
 11210:5, 11214:15,  
 11214:17, 11215:9,  
 11216:17, 11218:1,  
 11219:15, 11229:25,  
 11231:18, 11232:17,  
 11235:20, 11235:23,  
 11237:11, 11237:16,  
 11238:1, 11243:1,  
 11260:5, 11260:9,  
 11273:14  
**Milgaard's** - 11064:21,  
 11089:7, 11184:17,  
 11184:19, 11187:23,  
 11210:23, 11237:7  
**Miller** - 11109:3,  
 11118:16, 11119:5,  
 11119:16, 11121:14,  
 11121:18, 11122:9,  
 11127:11, 11130:2,  
 11138:3, 11190:24,  
 11226:2, 11229:5,  
 11229:8, 11247:3,  
 11254:3, 11256:7,  
 11257:21, 11258:19,  
 11260:12, 11260:15,  
 11261:10, 11262:6,  
 11262:9, 11263:2,  
 11264:6, 11264:9,  
 11264:10, 11265:13,  
 11266:2, 11273:22,  
 11273:25, 11274:5,  
 11279:14, 11281:8  
**Miller's** - 11258:22  
**Millers** - 11135:3,  
 11136:9, 11136:18,  
 11136:20, 11137:22,  
 11221:6, 11221:7,  
 11225:13, 11228:22,  
 11247:9, 11270:15  
**millilitres** - 11036:19  
**mind** - 11085:6,  
 11098:24, 11142:16,  
 11143:5, 11149:9,  
 11219:3, 11219:4,  
 11229:18, 11235:13  
**mindset** - 11152:22  
**mine** - 11056:4,  
 11079:9  
**Minister** - 11028:11  
**minus** - 11222:2  
**minute** - 11150:21,  
 11168:4, 11176:11,  
 11176:25  
**minutes** - 11097:5  
**Miss** - 11126:23,  
 11127:13, 11127:16,  
 11221:6, 11221:7  
**missed** - 11240:17  
**mistaken** - 11155:18  
**misunderstood** -  
 11271:6  
**mixed** - 11051:21,  
 11051:24, 11087:14  
**moisture** - 11163:14  
**Molchanko** -  
 11035:22, 11036:8  
**moment** - 11030:23,  
 11032:15, 11038:8,  
 11040:10, 11045:12,  
 11046:2, 11052:5,  
 11052:7, 11052:18,  
 11053:23, 11054:19,  
 11055:7, 11057:21,  
 11066:7, 11071:11,  
 11072:13, 11073:24,  
 11088:10, 11092:19,  
 11095:17, 11100:5,  
 11103:15, 11130:16,  
 11136:5, 11138:10,  
 11155:10, 11170:8,  
 11179:10, 11186:14,  
 11190:4, 11190:8,  
 11201:15, 11205:10,  
 11211:19, 11222:11,  
 11254:17, 11276:20,  
 11282:2, 11282:20  
**Monday** - 11269:16  
**money** - 11267:18,  
 11267:24, 11268:1,  
 11268:2  
**month** - 11046:16,  
 11093:9, 11093:10,  
 11276:12  
**months** - 11227:8,  
 11270:17  
**moot** - 11072:5  
**moral** - 11257:2  
**morality** - 11249:9,  
 11251:7, 11251:10,





- 11251:12, 11251:16,  
11252:4, 11253:12,  
11253:22, 11255:2,  
11257:2, 11257:8,  
11268:17, 11268:18,  
11270:8, 11270:10,  
11271:5, 11272:3,  
11272:13, 11272:16,  
11272:17, 11272:20,  
11273:4, 11273:18,  
11274:4, 11274:9,  
11274:13, 11275:7,  
11276:2, 11276:8,  
11276:16, 11276:23,  
11277:2, 11277:11,  
11278:22, 11278:25,  
11279:6  
**Morality** - 11251:25,  
11277:16  
**morning** - 11224:4,  
11224:18, 11229:13,  
11261:11, 11264:11,  
11268:24, 11273:8,  
11274:12, 11280:9  
**Morning** - 11030:3,  
11030:4, 11030:7,  
11030:8  
**morphological** -  
11212:7  
**morphology** -  
11205:7, 11206:15,  
11207:1, 11207:7  
**most** - 11031:15,  
11031:17, 11098:1,  
11126:10, 11136:6,  
11181:9, 11189:13,  
11192:13, 11202:9,  
11202:11, 11218:14,  
11233:20, 11253:24,  
11276:19  
**mostly** - 11265:22  
**motel** - 11116:22  
**mother** - 11120:2  
**mouth** - 11277:15  
**Move** - 11048:17  
**move** - 11030:20,  
11048:24, 11060:6,  
11060:11, 11064:4,  
11083:11, 11084:16,  
11085:14, 11092:11,  
11096:11, 11103:13,  
11104:16, 11114:20,  
11114:24, 11122:23,  
11123:12, 11127:14,  
11147:9, 11181:14,  
11192:19, 11193:24,  
11206:11, 11216:13  
**moved** - 11247:20,  
11278:2  
**moving** - 11111:14,  
11111:24  
**Moving** - 11064:16,  
11132:5  
**muddled** - 11224:13  
**murder** - 11070:18,  
11109:2, 11118:17,  
11119:5, 11119:16,  
11122:9, 11195:24,  
11210:4, 11247:3,  
11247:4, 11257:21,  
11258:19, 11260:5,  
11261:11, 11264:7,  
11270:16, 11271:8,  
11273:14, 11273:22,  
11274:5, 11274:17,  
11274:22, 11274:25,  
11275:2, 11275:12,  
11275:13, 11276:8,  
11276:18, 11276:22,  
11277:1, 11279:13,  
11281:8, 11281:23  
**murdered** - 11194:13  
**murderer** - 11277:2  
**Murray** - 11212:20,  
11214:1, 11214:3  
**must** - 11193:2  
**mutually** - 11137:7
- N**
- naked** - 11165:23,  
11177:24, 11221:24  
**name** - 11033:14,  
11060:18, 11061:4,  
11077:6, 11106:2,  
11106:3, 11131:22,  
11144:23, 11202:1,  
11216:1, 11216:2,  
11216:7, 11220:14,  
11220:16, 11224:5,  
11239:13, 11245:24  
**named** - 11259:11  
**namely** - 11241:20  
**names** - 11119:19,  
11248:13, 11266:19  
**nap** - 11235:25  
**narrow** - 11041:8,  
11041:22, 11042:18,  
11159:20, 11159:22  
**narrowed** - 11053:15  
**naturally** - 11213:7  
**nature** - 11042:15,  
11052:1, 11065:10,  
11074:9, 11102:11,  
11104:9, 11104:12,  
11115:14, 11118:21,  
11152:25, 11160:7,  
11184:8, 11203:21  
**near** - 11112:13,  
11132:12, 11161:24,  
11193:2  
**necessarily** -  
11044:18, 11161:1,  
11174:13, 11197:4,  
11225:15, 11250:13,  
11252:20, 11276:7  
**necessary** - 11082:15,  
11235:15, 11275:23,  
11277:14, 11278:20  
**necessity** - 11160:17  
**need** - 11080:7,  
11107:25, 11118:11,  
11197:12, 11215:15,  
11217:18, 11219:22,  
11220:23, 11239:18,  
11267:25, 11274:23  
**needed** - 11050:21  
**needs** - 11203:7,  
11203:10  
**negative** - 11037:11,  
11071:7, 11083:5,  
11083:6, 11087:12,  
11110:22, 11111:8,  
11111:13, 11111:17,  
11111:21, 11112:2,  
11112:5, 11118:6,  
11165:3, 11165:6,  
11166:2, 11166:22,  
11167:1, 11207:25,  
11213:12, 11213:18,  
11216:24  
**never** - 11039:16,  
11042:2, 11063:9,  
11089:12, 11098:4,  
11151:13, 11182:7,  
11183:8, 11193:20,  
11196:21, 11219:6,  
11224:9, 11227:14,  
11235:13, 11237:20,  
11237:22, 11241:16,  
11243:21, 11244:22,  
11244:23, 11244:25,  
11245:9, 11277:3  
**new** - 11214:14  
**newspaper** - 11282:1,  
11282:10, 11282:12,  
11282:21  
**Newspaper** - 11282:13  
**next** - 11033:19,  
11048:18, 11056:6,  
11060:6, 11064:16,  
11075:12, 11086:1,  
11092:11, 11096:17,  
11099:25, 11108:18,  
11109:9, 11114:24,  
11117:4, 11123:12,  
11127:19, 11132:12,  
11141:7, 11153:2,  
11157:23, 11161:23,  
11170:20, 11178:10,  
11181:14, 11184:18,  
11190:17, 11193:5,  
11197:13, 11198:19,  
11200:4, 11201:20,  
11204:22, 11207:16,  
11210:11, 11212:24,  
11216:13, 11233:10,  
11233:14, 11245:18  
**Next** - 11114:17,  
11146:10  
**Nine** - 11283:11  
**non** - 11039:11,  
11039:20, 11065:10,  
11071:8, 11071:22,  
11073:11, 11080:20,  
11080:24, 11082:19,  
11082:22, 11084:9,  
11084:20, 11094:6,  
11113:19, 11134:24,  
11139:23, 11146:7,  
11164:5, 11179:6,  
11191:1, 11191:18,  
11192:23, 11196:14,  
11197:6, 11199:1,  
11205:6, 11206:14,  
11215:2, 11215:7,  
11237:11, 11237:13,  
11237:17, 11237:19,  
11237:21, 11237:23,  
11244:7  
**non-availability** -  
11139:23  
**non-human** -  
11082:19, 11082:22,  
11205:6, 11206:14  
**non-presence** -  
11084:9, 11113:19  
**non-reactive** - 11094:6  
**non-secretor** -  
11039:11, 11039:20,  
11065:10, 11071:8,  
11071:22, 11073:11,  
11080:20, 11080:24,  
11084:20, 11134:24,  
11146:7, 11164:5,  
11179:6, 11191:1,  
11191:18, 11192:23,  
11196:14, 11197:6,  
11199:1, 11215:2,  
11215:7, 11237:11,  
11237:13, 11237:17,  
11237:19, 11237:21,  
11244:7  
**non-secretors** -  
11237:23  
**None** - 11049:5,  
11099:8, 11119:8,  
11130:10, 11236:6,  
11236:9, 11245:9  
**none** - 11065:11,  
11128:25, 11129:4,  
11163:24, 11223:11  
**nonetheless** -  
11044:23, 11137:11,  
11152:22  
**noon** - 11149:18  
**Nordstrom** - 11249:12,  
11250:11, 11250:19,  
11250:22, 11251:16,  
11251:18, 11251:25,  
11252:9, 11253:12,  
11268:19, 11269:10,  
11269:23, 11272:16  
**normally** - 11073:12,  
11086:16, 11250:25,  
11251:9, 11252:13,  
11254:24, 11255:5,  
11255:11, 11264:23,  
11273:16, 11281:22  
**Normally** - 11251:9,  
11254:7  
**Northwest** - 11141:1  
**notation** - 11031:20,  
11166:1  
**Note** - 11063:21,  
11108:25  
**note** - 11032:16,  
11032:18, 11034:7,  
11036:6, 11036:11,  
11036:13, 11040:20,  
11046:9, 11046:13,  
11050:4, 11055:2,  
11055:23, 11062:24,  
11065:8, 11065:11,  
11066:10, 11067:15,  
11069:7, 11070:8,  
11079:5, 11087:9,  
11089:18, 11090:17,  
11092:9, 11106:15,  
11108:11, 11109:3,  
11111:1, 11115:4,  
11119:14, 11128:6,  
11164:9, 11202:5,  
11209:5, 11210:2,  
11215:23, 11225:17,  
11228:19, 11263:18  
**noted** - 11048:16,  
11064:4, 11066:8,  
11115:2, 11129:21,  
11133:16, 11144:6,  
11144:12, 11212:3  
**notes** - 11030:11,  
11030:12, 11031:16,  
11032:11, 11032:15,  
11032:18, 11033:17,  
11034:14, 11036:11,  
11037:10, 11040:13,  
11040:17, 11041:3,  
11045:22, 11047:5,  
11047:11, 11047:12,  
11053:20, 11053:23,  
11059:1, 11059:5,  
11059:14, 11065:4,  
11067:11, 11068:3,  
11068:4, 11076:11,  
11082:2, 11084:10,  
11085:21, 11087:22,  
11088:5, 11088:8,  
11088:10, 11089:21,  
11089:22, 11090:7,  
11090:15, 11091:21,  
11092:20, 11092:21,  
11095:17, 11095:18,  
11099:19, 11099:20,  
11103:7, 11103:24,  
11105:14, 11105:21,  
11106:7, 11107:9,  
11107:24, 11108:2,  
11108:18, 11108:20,  
11110:14, 11113:17,  
11115:14, 11115:15,  
11115:23, 11117:8,  
11117:9, 11118:15,  
11131:17, 11131:18,  
11131:21, 11132:25,  
11133:5, 11144:6,  
11179:10, 11179:20,  
11188:5, 11188:12,  
11188:20, 11191:1,  
11198:3, 11203:10,  
11203:13, 11204:12,  
11204:20, 11206:20,  
11224:19, 11224:20,  
11224:21, 11225:4,  
11225:5, 11225:10,  
11226:20, 11228:20,  
11234:8, 11235:3,  
11235:11, 11235:13,  
11284:6  
**Notes** - 11095:23  
**Nothing** - 11170:8  
**nothing** - 11043:14,  
11043:16, 11045:17,  
11065:17, 11065:23,  
11082:4, 11082:16,  
11082:23, 11090:5,  
11196:3, 11252:15,  
11272:25  
**notice** - 11165:19  
**noticed** - 11117:1  
**noting** - 11187:24  
**notwithstanding** -  
11137:12  
**Notwithstanding** -  
11080:19, 11125:11  
**Nova** - 11141:3  
**number** - 11038:4,  
11046:11, 11048:22,  
11048:25, 11051:8,  
11053:1, 11054:5,  
11056:7, 11056:13,  
11056:18, 11057:1,  
11057:8, 11058:18,  
11059:4, 11061:15,  
11065:8, 11067:2,  
11072:15, 11073:17,  
11090:22, 11096:5,  
11096:12, 11096:24,  
11101:2, 11103:13,  
11105:15, 11105:17,  
11105:19, 11108:15,  
11108:19, 11108:21,  
11110:1, 11110:2,  
11110:4, 11110:7,  
11115:2, 11115:19,  
11118:23, 11122:21,  
11122:22, 11124:1,  
11124:19, 11124:24,  
11127:11, 11128:7,  
11132:13, 11141:11,  
11141:18, 11143:5,  
11171:3, 11175:22,  
11192:9, 11192:19,  
11193:10, 11193:23,  
11195:4, 11224:15,  
11232:6, 11234:11,  
11236:21, 11246:20,  
11262:14, 11262:16,  
11265:17, 11265:18  
**Number** - 11049:6,  
11049:12, 11075:13,  
11103:15, 11192:11  
**numbers** - 11061:19,  
11119:15, 11122:21,  
11141:25, 11142:7,  
11142:16  
**numerous** - 11222:15
- O**



**o'clock** - 11283:12  
**O'keefe** - 11028:10  
**observation** - 11071:13  
**observations** - 11122:14  
**obtain** - 11060:5, 11062:19, 11157:5, 11235:13  
**obtained** - 11060:23, 11077:8, 11077:19, 11096:25, 11097:7, 11105:25, 11106:5, 11106:19, 11126:23, 11140:8, 11140:16, 11157:6, 11161:3, 11174:9, 11186:12, 11190:14, 11199:19, 11213:4, 11216:17, 11216:25, 11228:10, 11229:16, 11246:19, 11248:3  
**obtaining** - 11106:17, 11126:17  
**obvious** - 11039:10, 11117:14, 11189:6  
**obviously** - 11087:14, 11124:18, 11221:16  
**occasion** - 11100:12, 11131:11, 11147:6, 11153:21, 11153:23, 11157:2, 11169:17, 11172:2  
**occasionally** - 11061:11  
**occasions** - 11142:17, 11263:17  
**occur** - 11070:25, 11152:11, 11174:5, 11183:1  
**occurred** - 11107:5, 11239:16, 11273:12, 11274:15  
**occurrence** - 11119:15, 11122:20, 11127:11, 11181:3, 11184:4, 11184:8, 11190:2, 11254:20, 11255:7, 11255:11, 11256:7, 11257:6, 11257:22, 11270:22, 11271:23, 11272:14, 11279:23, 11280:2  
**occurrences** - 11255:10, 11270:11, 11270:20  
**occurs** - 11072:9  
**offence** - 11086:17, 11086:20, 11195:21  
**offences** - 11122:2, 11257:2  
**offer** - 11065:8, 11115:1, 11126:8, 11192:6, 11204:6, 11229:3  
**offered** - 11066:17, 11122:14  
**offering** - 11065:6  
**offers** - 11075:13  
**office** - 11252:13, 11254:13, 11254:23, 11256:2, 11256:8, 11257:24, 11258:1, 11261:18, 11263:8, 11267:9, 11270:9, 11271:24, 11272:3, 11272:15, 11273:3, 11277:7, 11279:1, 11279:21  
**office'** - 11255:3  
**Officer** - 11027:12, 11054:7, 11059:6, 11090:18, 11090:24, 11153:9  
**officer** - 11227:1, 11251:10, 11251:19, 11253:25, 11258:9, 11258:10, 11267:10, 11276:21, 11280:14  
**officer'** - 11258:13  
**officers** - 11246:21, 11249:13, 11251:21, 11254:5, 11259:2, 11260:8, 11261:25, 11262:3, 11263:6, 11265:13, 11265:22, 11266:13, 11268:25, 11269:19, 11273:22, 11275:17, 11276:19, 11277:21, 11278:14, 11279:13, 11279:15, 11280:22, 11280:24, 11280:25, 11282:2  
**officers'** - 11269:8  
**Official** - 11027:10, 11284:1, 11284:3, 11284:14, 11284:18  
**officially** - 11282:4  
**often** - 11089:12, 11098:1, 11098:2, 11130:21, 11202:13, 11208:18, 11245:25, 11266:8  
**old** - 11181:25, 11182:6, 11182:11  
**once** - 11140:14, 11185:8, 11222:15, 11223:3, 11243:21, 11256:6  
**one** - 11035:1, 11035:15, 11036:4, 11036:12, 11037:10, 11043:10, 11043:12, 11049:1, 11049:8, 11049:18, 11051:11, 11060:16, 11064:20, 11064:25, 11066:2, 11072:8, 11074:18, 11075:13, 11077:24, 11079:18, 11079:21, 11085:3, 11085:15, 11085:17, 11086:7, 11096:7, 11097:2, 11098:1, 11098:15, 11101:5, 11101:9, 11101:19, 11102:2, 11102:3, 11102:8, 11102:18, 11105:1, 11106:14, 11109:6, 11109:24, 11110:1, 11112:11, 11113:12, 11113:14, 11114:15, 11115:22, 11120:1, 11120:4, 11127:24, 11128:8, 11128:21, 11131:14, 11131:15, 11132:19, 11133:23, 11135:23, 11145:13, 11146:12, 11147:17, 11148:7, 11150:10, 11150:16, 11153:14, 11153:16, 11154:13, 11161:13, 11161:16, 11164:23, 11165:2, 11165:17, 11168:19, 11169:23, 11173:17, 11176:1, 11183:12, 11185:1, 11185:3, 11186:11, 11187:17, 11188:21, 11190:24, 11191:11, 11194:19, 11198:2, 11202:17, 11203:7, 11203:9, 11206:18, 11209:19, 11209:21, 11212:22, 11220:2, 11221:10, 11228:18, 11232:23, 11235:9, 11235:12, 11236:22, 11240:2, 11240:21, 11241:3, 11242:13, 11242:15, 11242:16, 11246:11, 11249:20, 11252:13, 11256:1, 11258:12, 11259:4, 11260:6, 11260:9, 11260:17, 11261:2, 11264:4, 11266:3, 11266:23, 11270:16, 11270:18, 11272:8, 11275:3, 11275:22, 11277:15, 11277:17, 11281:10  
**One** - 11056:22, 11116:3, 11123:7, 11123:8, 11123:16, 11123:17, 11168:15, 11181:1  
**ones** - 11090:17, 11181:9, 11266:8  
**Ontario** - 11140:6  
**open** - 11269:17  
**operate** - 11275:21  
**operated** - 11254:2, 11268:18, 11277:9  
**Operation** - 11251:11  
**operations** - 11247:20  
**opinion** - 11167:24, 11168:5, 11169:10, 11169:24, 11185:10, 11194:1, 11207:20, 11209:13, 11226:24, 11233:2, 11245:7  
**opportunity** - 11188:1, 11190:8, 11220:19, 11227:17, 11229:20  
**opposed** - 11146:17, 11154:2, 11154:4, 11181:11, 11250:2, 11256:17, 11262:21  
**opposite** - 11250:23, 11252:24  
**order** - 11066:21, 11081:7, 11126:19, 11172:13, 11172:21, 11203:4, 11204:18, 11235:6, 11237:6, 11242:7  
**org** - 11250:17  
**organization** - 11248:8  
**organizational** - 11247:25, 11248:5, 11249:25  
**organizations** - 11173:4  
**origin** - 11032:8, 11045:20, 11082:20, 11082:22, 11082:23, 11082:25, 11202:10, 11202:12, 11203:19, 11203:25, 11204:7, 11205:6, 11206:14, 11219:2  
**original** - 11032:15, 11032:18, 11040:17, 11047:5, 11047:12, 11082:2, 11083:2, 11088:10, 11089:21, 11089:22, 11090:7, 11090:14, 11090:15, 11091:21, 11115:23, 11122:9, 11122:15, 11187:4, 11187:23, 11188:1, 11188:5, 11188:10, 11188:12, 11188:18, 11188:20, 11203:13, 11204:20, 11214:20, 11215:20, 11216:16, 11220:10, 11255:10, 11259:10, 11280:2  
**originally** - 11063:6, 11080:10, 11089:9, 11156:21, 11239:15  
**originating** - 11129:5  
**Ortho** - 11060:23  
**otherwise** - 11135:22, 11221:14  
**Ottawa** - 11140:6  
**ourselves** - 11053:4  
**out'** - 11263:19, 11270:1  
**outline** - 11225:8  
**outlined** - 11162:13, 11178:20  
**outset** - 11183:18, 11192:20, 11193:24, 11200:10  
**outside** - 11059:12  
**overall** - 11058:12  
**overnight** - 11254:8, 11260:20  
**own** - 11042:7, 11049:16, 11098:24, 11115:18, 11130:24, 11148:22, 11149:11, 11149:15, 11193:13, 11258:16, 11268:7, 11268:19, 11276:3, 11276:6, 11277:19  
**owned** - 11109:7  
**oxfords** - 11109:22, 11110:12  
**oxidized** - 11199:22

**P**

**P.10** - 11162:20  
**P.13** - 11143:12, 11147:20, 11165:2, 11175:21  
**P.24** - 11163:9  
**P.5** - 11162:17  
**P.6** - 11162:3, 11178:14  
**P.7** - 11162:18  
**P.8** - 11162:19  
**P.9** - 11162:19  
**page** - 11030:12, 11032:11, 11033:18, 11036:6, 11040:19, 11040:20, 11041:3, 11045:22, 11048:18, 11054:21, 11056:6, 11059:3, 11059:4, 11064:16, 11066:6, 11074:15, 11075:12, 11076:12, 11085:14, 11086:1, 11087:22, 11090:15, 11091:16, 11092:11, 11095:12, 11095:17, 11096:2, 11096:9, 11104:1, 11107:8, 11108:15, 11108:20, 11108:24, 11110:15, 11114:17, 11114:24, 11114:25, 11115:22, 11115:24, 11122:24, 11123:10, 11123:12, 11127:14, 11127:15, 11127:19, 11127:22, 11131:20, 11132:12, 11140:1, 11141:7, 11143:7, 11146:10, 11147:9, 11147:10, 11150:2, 11153:2, 11153:3, 11157:1, 11157:23, 11161:24, 11163:5, 11163:6, 11164:15, 11167:16, 11167:17, 11170:20, 11175:13, 11175:14, 11178:10, 11180:17, 11181:15, 11187:25, 11189:3, 11190:17, 11193:5, 11193:24, 11195:15, 11197:20, 11198:19, 11199:13, 11201:20, 11201:24, 11202:4, 11207:16, 11211:23, 11212:24, 11216:12, 11216:14, 11218:13, 11218:15, 11224:16, 11224:22, 11225:3, 11228:2, 11230:4, 11233:10, 11246:16, 11256:23  
**Page** - 11029:2, 11199:17  
**pages** - 11284:4  
**pair** - 11032:12, 11032:17, 11051:11, 11085:17, 11085:22, 11086:7, 11088:21, 11088:24, 11103:17, 11108:6, 11109:20, 11109:21, 11110:1, 11111:14, 11112:1, 11112:11, 11114:16, 11115:4, 11116:3, 11116:25, 11120:1, 11123:7, 11123:16, 11162:4, 11162:10, 11178:13, 11221:6, 11222:16, 11223:4  
**pants** - 11108:6, 11108:9, 11111:14, 11116:25, 11117:3, 11117:6, 11179:22  
**panty** - 11162:18  
**paper** - 11109:22, 11109:25, 11110:1, 11116:4, 11250:2, 11255:4, 11256:6, 11277:10  
**paragraph** - 11050:6, 11055:2, 11055:3, 11066:10, 11070:12, 11075:12, 11085:21, 11087:9, 11087:20, 11091:10, 11091:11, 11109:9, 11109:18, 11110:7, 11124:10, 11134:20, 11135:19, 11136:4, 11189:4, 11190:19, 11190:24, 11191:25, 11193:25, 11195:16, 11198:20, 11200:4, 11202:7,



- 11203:2, 11204:22,  
11205:25, 11207:18,  
11208:8, 11210:11,  
11212:1, 11212:25,  
11218:18, 11230:7,  
11233:12  
**Paragraph** - 11124:2  
**paragraphs** -  
11106:19, 11210:2  
**paraphrase** - 11243:4  
**Pardon** - 11199:7,  
11220:24, 11260:14  
**Parker** - 11264:13,  
11280:5, 11280:8,  
11280:15, 11119:21  
**part** - 11031:15,  
11084:17, 11088:12,  
11115:9, 11150:10,  
11164:24, 11175:21,  
11187:22, 11191:13,  
11199:7, 11212:17,  
11225:6, 11225:11,  
11225:16, 11225:17,  
11226:20, 11226:21,  
11228:9, 11228:18,  
11232:1, 11233:11,  
11233:18, 11237:3,  
11246:18, 11252:20,  
11255:24, 11276:19,  
11277:17  
**particular** - 11031:20,  
11034:20, 11041:4,  
11052:11, 11054:24,  
11061:2, 11063:2,  
11079:7, 11092:10,  
11095:23, 11096:7,  
11096:15, 11099:4,  
11103:5, 11104:21,  
11108:5, 11108:25,  
11124:15, 11124:16,  
11130:8, 11130:16,  
11159:24, 11164:20,  
11174:3, 11174:17,  
11183:21, 11184:3,  
11186:15, 11189:4,  
11192:2, 11192:3,  
11233:13  
**particularly** -  
11056:16, 11056:21,  
11092:20, 11121:22,  
11182:19, 11184:5,  
11185:19  
**partly** - 11263:8  
**parts** - 11109:13  
**party** - 11184:25,  
11185:1, 11185:15,  
11234:17, 11234:24  
**pass** - 11059:7,  
11270:24  
**passed** - 11257:23,  
11258:1, 11259:12  
**past** - 11081:4,  
11186:23, 11210:11  
**pat** - 11245:8  
**Pathologist** - 11069:13  
**paths** - 11277:4,  
11277:5, 11279:19  
**patience** - 11223:20  
**patients** - 11182:14  
**Patricia** - 11197:17,  
11211:23  
**patrol** - 11280:11  
**Paul's** - 11069:14,  
11069:24  
**pause** - 11030:23,  
11055:6, 11071:11,  
11072:13, 11073:24,  
11092:19, 11138:10,  
11144:15, 11155:10,  
11254:16  
**Paynter** - 11029:3,  
11030:5, 11030:7,  
11033:20, 11034:16,  
11049:4, 11050:18,  
11051:13, 11053:5,  
11056:11, 11057:3,  
11065:6, 11066:11,  
11067:7, 11067:20,  
11068:1, 11086:15,  
11090:2, 11092:23,  
11095:12, 11105:14,  
11106:24, 11108:2,  
11110:16, 11114:2,  
11115:24, 11116:14,  
11118:13, 11119:11,  
11119:19, 11120:16,  
11124:10, 11128:10,  
11128:23, 11130:11,  
11131:17, 11131:25,  
11132:2, 11132:10,  
11132:14, 11133:5,  
11133:21, 11134:18,  
11135:6, 11138:7,  
11141:5, 11142:14,  
11144:2, 11147:6,  
11148:20, 11149:24,  
11150:3, 11151:24,  
11155:12, 11156:18,  
11157:21, 11158:1,  
11161:5, 11163:2,  
11164:7, 11167:14,  
11169:21, 11172:2,  
11175:15, 11175:18,  
11178:7, 11179:14,  
11179:17, 11180:7,  
11184:20, 11189:23,  
11191:10, 11191:23,  
11192:16, 11193:18,  
11195:25, 11196:18,  
11198:4, 11198:11,  
11199:2, 11200:2,  
11201:14, 11201:22,  
11201:25, 11202:22,  
11203:14, 11203:15,  
11203:22, 11205:11,  
11209:22, 11211:4,  
11211:19, 11212:14,  
11213:13, 11214:13,  
11215:19, 11217:2,  
11219:12, 11220:8,  
11221:2, 11223:12,  
11223:18, 11224:3,  
11224:17, 11230:17,  
11234:3, 11234:7,  
11236:24, 11238:10,  
11239:13, 11242:18,  
11245:16  
**Paynter's** - 11095:11  
**pending** - 11226:14  
**Penkala** - 11034:1,  
11034:7, 11035:13,  
11053:24, 11054:22,  
11067:14, 11069:5,  
11070:1, 11070:10,  
11072:23, 11076:4,  
11076:10, 11085:16,  
11085:20, 11086:3,  
11088:13, 11104:25,  
11210:17, 11210:25,  
11232:11, 11249:13,  
11250:12, 11250:19,  
11250:22, 11252:5,  
11252:9, 11253:14,  
11265:23, 11269:10,  
11269:23, 11269:24,  
11272:24, 11274:1  
**Penkala's** - 11271:9,  
11273:3  
**Penkala-now** -  
11245:17  
**people** - 11133:11,  
11171:20, 11176:12,  
11183:14, 11186:10,  
11187:14, 11221:19,  
11221:20, 11223:1,  
11237:23, 11274:22  
**percent** - 11050:10,  
11050:12, 11050:14,  
11050:15, 11053:15,  
11053:17, 11058:2,  
11058:11, 11058:24,  
11133:11  
**percentage** - 11037:14  
**performed** - 11166:6,  
11203:18, 11213:9,  
11213:11, 11213:14,  
11213:18  
**Perhaps** - 11053:23,  
11106:13, 11106:18,  
11115:24, 11160:8,  
11214:21, 11230:7  
**perhaps** - 11030:11,  
11030:14, 11030:23,  
11034:3, 11042:13,  
11046:24, 11047:10,  
11047:23, 11050:5,  
11054:17, 11054:20,  
11058:8, 11066:11,  
11069:3, 11071:18,  
11072:23, 11074:21,  
11074:22, 11075:14,  
11075:22, 11075:23,  
11079:11, 11080:20,  
11084:13, 11085:3,  
11086:9, 11095:16,  
11096:4, 11101:8,  
11102:13, 11102:18,  
11102:20, 11109:4,  
11112:6, 11118:19,  
11135:14, 11139:5,  
11149:10, 11149:18,  
11158:20, 11172:19,  
11175:19, 11183:18,  
11197:2, 11215:22,  
11217:12, 11225:17,  
11237:12, 11238:6,  
11239:3, 11243:9,  
11256:22  
**period** - 11048:1,  
11141:9, 11141:19,  
11142:5, 11142:18,  
11254:21, 11276:13  
**perpetrator** - 11195:24  
**person** - 11037:21,  
11038:15, 11038:21,  
11039:3, 11039:5,  
11039:14, 11042:3,  
11043:2, 11043:21,  
11044:2, 11044:17,  
11044:19, 11049:19,  
11050:7, 11058:4,  
11058:13, 11070:19,  
11070:21, 11073:11,  
11080:13, 11080:14,  
11086:20, 11122:1,  
11124:5, 11126:21,  
11128:12, 11129:12,  
11133:7, 11134:6,  
11135:1, 11135:17,  
11137:16, 11145:22,  
11146:6, 11160:23,  
11164:2, 11164:4,  
11169:15, 11172:10,  
11172:22, 11180:22,  
11181:20, 11183:2,  
11184:5, 11198:25,  
11231:11, 11232:8,  
11264:15, 11266:3,  
11276:25, 11279:9,  
11281:19, 11281:23  
**personal** - 11193:11,  
11212:3, 11226:24  
**personally** - 11086:6,  
11182:2, 11182:7,  
11183:6, 11222:24  
**Persons** - 11144:25  
**persons** - 11041:24,  
11071:1, 11074:17,  
11144:21, 11144:24,  
11145:10, 11151:1,  
11266:3  
**perspective** -  
11071:12, 11071:14,  
11194:17, 11240:4  
**perspiration** -  
11040:3, 11040:4,  
11133:10, 11145:25,  
11167:5  
**Peter** - 11210:13  
**phase** - 11233:17  
**phenomenon** -  
11070:25  
**Phillishave** -  
11109:24, 11114:18  
**phoenix** - 11209:23  
**phone** - 11185:2,  
11185:7, 11185:8,  
11226:11, 11235:1  
**phoned** - 11264:11  
**phos** - 11087:25,  
11112:13  
**phosphatase** -  
11030:21, 11032:24,  
11037:4, 11076:24,  
11088:1, 11110:22,  
11111:17, 11112:16,  
11205:1, 11221:21  
**photography** -  
11264:21  
**photos** - 11261:12  
**photos'** - 11262:12  
**phrase** - 11129:16,  
11129:19  
**physical** - 11110:21  
**physically** - 11255:4  
**pick** - 11226:11  
**picked** - 11190:2,  
11209:21  
**picking** - 11216:12  
**picture** - 11032:5,  
11055:7, 11058:12  
**piece** - 11031:1,  
11052:5, 11062:20,  
11083:16, 11083:17,  
11109:25, 11126:24,  
11133:15, 11185:5,  
11219:9, 11255:4  
**pieces** - 11054:13,  
11067:23, 11163:16  
**pill** - 11034:23  
**pin** - 11034:25  
**pinhead** - 11176:20,  
11177:2, 11177:5,  
11177:11  
**pink** - 11032:17,  
11051:11  
**pinkish** - 11177:14,  
11177:18, 11177:23  
**place** - 11042:16,  
11063:23, 11074:2,  
11076:3, 11081:10,  
11085:1, 11110:9,  
11131:3, 11135:25,  
11186:17, 11207:22,  
11260:6, 11268:14,  
11269:2, 11269:6,  
11270:11, 11273:15,  
11277:12, 11278:24,  
11279:17  
**placed** - 11279:4  
**places** - 11265:10  
**plaid** - 11143:4  
**plaid** - 11120:5,  
11123:8, 11123:17  
**plain** - 11083:17,  
11145:20  
**plan** - 11253:6  
**planning** - 11239:15  
**plastic** - 11033:23,  
11034:23, 11067:21,  
11077:8, 11077:22,  
11110:1  
**plausibility** - 11075:10  
**play** - 11267:4,  
11268:5  
**played** - 11263:3,  
11267:2  
**player** - 11265:24  
**plus** - 11222:2,  
11227:1  
**Pm** - 11149:22,  
11214:10, 11214:11,  
11283:13  
**point** - 11046:8,  
11053:12, 11061:21,  
11065:20, 11066:17,  
11082:16, 11084:17,  
11087:6, 11096:3,  
11115:10, 11131:23,  
11140:3, 11140:6,  
11144:14, 11144:15,  
11152:13, 11155:15,  
11159:12, 11159:15,  
11167:21, 11188:16,  
11193:23, 11195:4,  
11196:7, 11202:2,  
11204:12, 11208:18,  
11208:20, 11209:15,  
11209:25, 11217:9,  
11222:22, 11223:3,  
11223:9, 11226:5,  
11226:18, 11233:13,  
11233:14, 11237:1,  
11237:8, 11238:24,  
11239:6, 11239:9,  
11240:7, 11278:10  
**pointed** - 11197:22,  
11208:5, 11243:25,  
11263:22  
**Police** - 11028:7,  
11091:1, 11106:16,  
11107:1, 11109:1,  
11118:24, 11148:25,  
11153:10, 11239:14,  
11246:13, 11246:20,  
11246:25, 11268:8  
**police** - 11210:18,  
11227:1, 11248:4,  
11248:9, 11248:16,  
11248:25, 11249:24,  
11254:5, 11258:20,  
11258:21, 11261:9,  
11273:22, 11274:20,  
11275:21, 11276:21,  
11276:22, 11277:21,  
11281:7, 11281:11,  
11282:6, 11282:16  
**Pontiac** - 11109:6  
**pools** - 11189:8  
**population** - 11037:14,  
11041:23, 11050:11,  
11050:13, 11050:15,  
11053:14, 11053:16,  
11053:17, 11058:3,  
11058:25  
**portion** - 11037:22,  
11060:14, 11060:23,  
11066:12, 11072:25,  
11086:9, 11108:18,  
11116:12, 11124:7,



11127:15, 11140:2,  
11146:12, 11146:18,  
11150:3, 11164:20,  
11180:19, 11193:5,  
11193:9, 11197:20,  
11199:14, 11211:22,  
11212:1, 11212:22  
**portions** - 11124:4,  
11138:8, 11138:9,  
11180:16, 11201:13,  
11202:2, 11203:2,  
11210:1, 11216:5,  
11218:9, 11223:15  
**pose** - 11070:16  
**posed** - 11169:24  
**position** - 11054:3,  
11196:22, 11211:9,  
11237:15, 11247:8,  
11249:6, 11250:19,  
11275:20  
**positions** - 11246:24  
**positive** - 11031:7,  
11032:4, 11032:23,  
11032:24, 11037:5,  
11037:7, 11037:17,  
11037:24, 11041:13,  
11043:13, 11043:15,  
11044:9, 11044:24,  
11059:20, 11059:23,  
11073:18, 11076:17,  
11077:3, 11077:15,  
11079:16, 11080:8,  
11083:1, 11083:12,  
11087:25, 11096:25,  
11097:13, 11097:15,  
11097:22, 11098:10,  
11098:14, 11099:2,  
11100:10, 11100:16,  
11101:16, 11112:13,  
11112:16, 11112:18,  
11112:24, 11129:23,  
11134:15, 11136:23,  
11137:3, 11137:11,  
11137:17, 11154:19,  
11154:22, 11154:24,  
11155:3, 11155:23,  
11156:4, 11157:6,  
11158:21, 11159:1,  
11159:2, 11159:3,  
11161:2, 11161:11,  
11161:14, 11161:15,  
11161:20, 11169:1,  
11170:15, 11199:19,  
11199:24, 11206:5,  
11206:22, 11207:25,  
11208:14, 11209:5,  
11213:3, 11215:8  
**positively** - 11031:23,  
11031:25, 11032:1,  
11042:21, 11077:1,  
11155:24, 11156:5,  
11169:11, 11209:15  
**positives** - 11098:6  
**possessing** -  
11070:22  
**possibilities** -  
11083:9, 11198:6,  
11200:1  
**possibility** - 11062:14,  
11072:9, 11073:13,  
11074:5, 11074:25,  
11075:2, 11075:10,  
11077:3, 11079:6,  
11083:23, 11099:2,  
11103:9, 11137:2,  
11137:5, 11137:6,  
11152:2, 11152:23,  
11153:1, 11161:13,  
11197:25, 11198:10,  
11201:5, 11202:21,

11210:15, 11211:11,  
11215:13  
**possible** - 11041:8,  
11066:15, 11073:23,  
11074:1, 11074:16,  
11076:8, 11091:23,  
11097:12, 11098:6,  
11104:4, 11104:6,  
11112:6, 11112:8,  
11112:9, 11135:15,  
11149:14, 11175:9,  
11175:10, 11179:4,  
11195:5, 11209:13,  
11226:19, 11226:24  
**possibly** - 11165:17,  
11242:16  
**potential** - 11189:6  
**potentially** - 11053:15,  
11100:22  
**pr** - 11116:21  
**practice** - 11226:9,  
11250:20  
**practicing** - 11238:13  
**pre** - 11132:15  
**pre-trial** - 11132:15  
**preceding** - 11108:12,  
11108:22  
**Prehodchenko** -  
11027:13  
**preliminary** -  
11130:12, 11188:3,  
11223:13, 11227:7,  
11227:18  
**preparation** -  
11131:10, 11131:19,  
11188:8, 11227:2  
**preparations** -  
11130:17, 11275:15  
**prepare** - 11227:16  
**prepared** - 11158:13,  
11215:20, 11248:4,  
11274:1  
**preparing** - 11224:25  
**presence** - 11031:18,  
11032:2, 11035:14,  
11036:11, 11041:5,  
11043:1, 11043:22,  
11044:6, 11044:16,  
11044:25, 11048:22,  
11048:23, 11051:5,  
11051:14, 11051:16,  
11052:9, 11052:19,  
11052:21, 11056:9,  
11058:20, 11064:11,  
11064:14, 11077:13,  
11078:12, 11080:10,  
11081:24, 11084:4,  
11084:8, 11084:9,  
11086:11, 11086:24,  
11087:17, 11088:6,  
11088:25, 11092:16,  
11092:17, 11092:22,  
11100:8, 11100:15,  
11103:23, 11113:19,  
11115:5, 11118:7,  
11120:12, 11124:21,  
11125:22, 11134:15,  
11134:21, 11134:22,  
11135:2, 11135:9,  
11136:8, 11136:17,  
11136:24, 11137:1,  
11137:10, 11141:20,  
11142:4, 11148:1,  
11148:13, 11148:16,  
11149:4, 11149:7,  
11150:12, 11157:3,  
11162:4, 11162:21,  
11200:25, 11208:2,  
11209:6, 11213:6,  
11213:12, 11217:16,

11225:12, 11230:20,  
11230:21, 11233:14,  
11240:14, 11241:9,  
11241:14, 11241:19  
**present** - 11035:14,  
11036:7, 11037:13,  
11043:10, 11044:20,  
11051:25, 11056:10,  
11059:23, 11059:25,  
11061:3, 11062:1,  
11063:3, 11063:6,  
11074:18, 11077:2,  
11077:4, 11077:17,  
11080:25, 11081:6,  
11086:12, 11094:1,  
11095:22, 11097:13,  
11098:14, 11098:15,  
11098:16, 11099:21,  
11100:23, 11101:20,  
11102:3, 11105:2,  
11120:12, 11137:9,  
11137:13, 11141:10,  
11150:14, 11151:12,  
11152:4, 11153:25,  
11157:14, 11161:15,  
11162:8, 11172:7,  
11172:11, 11173:11,  
11173:13, 11173:22,  
11200:8, 11200:16,  
11209:11, 11216:21,  
11225:22, 11226:22,  
11229:19, 11229:21,  
11233:24  
**presented** - 11195:20,  
11217:4  
**preserved** - 11242:2  
**press** - 11185:21,  
11186:6, 11186:7,  
11187:13, 11209:20,  
11211:6, 11283:6  
**presume** - 11097:9,  
11099:9, 11099:21  
**presumptive** -  
11076:22, 11097:1,  
11097:8, 11099:5,  
11101:16, 11134:16,  
11156:22, 11213:2  
**pretty** - 11253:3,  
11268:13  
**previous** - 11051:2,  
11056:17, 11056:22,  
11057:7, 11087:9,  
11111:20, 11121:6,  
11128:14, 11129:6,  
11208:6, 11218:15,  
11219:5, 11220:25,  
11247:12, 11273:23  
**previously** - 11054:3,  
11063:21, 11067:4,  
11082:18, 11089:18,  
11099:10, 11105:10,  
11114:21, 11118:2,  
11121:13, 11129:16,  
11143:1, 11152:8,  
11154:8, 11179:13,  
11201:25, 11215:13  
**prime** - 11077:11  
**Pringle** - 11028:14  
**privacy** - 11234:15  
**proactive** - 11282:16,  
11283:1  
**probable** - 11037:20,  
11052:25, 11068:14,  
11079:17, 11129:11,  
11237:18  
**problem** - 11070:16,  
11073:19, 11150:24,  
11151:9, 11188:25,  
11212:10, 11231:5  
**problems** - 11079:2,

11098:4  
**procedures** - 11048:8,  
11219:1  
**proceed** - 11134:2,  
11280:5  
**Proceedings** -  
11026:12, 11026:23,  
11029:1, 11030:1  
**process** - 11030:18,  
11073:6, 11073:7,  
11073:14, 11078:6,  
11079:10, 11079:12,  
11085:6, 11106:10,  
11175:3  
**produce** - 11100:3  
**produced** - 11046:17,  
11124:5, 11160:18,  
11220:14, 11239:19  
**product** - 11160:4,  
11173:15  
**profession** - 11243:22  
**profile** - 11238:25  
**program** - 11185:3,  
11185:5, 11185:6,  
11185:12  
**proof** - 11215:8,  
11237:13  
**proper** - 11218:5,  
11278:19  
**properly** - 11065:14,  
11071:13, 11093:18,  
11127:6  
**prosecutor** -  
11130:18, 11131:19,  
11132:25, 11226:9,  
11229:22  
**prostate** - 11183:13  
**prove** - 11157:13,  
11158:13, 11158:14,  
11189:18, 11198:25  
**proved** - 11244:17  
**proven** - 11192:12,  
11198:24  
**provide** - 11050:4,  
11124:22, 11159:15  
**provided** - 11155:11,  
11164:11, 11167:14,  
11169:21, 11172:2,  
11174:1, 11179:15,  
11180:13, 11204:17  
**providing** - 11050:18,  
11142:13, 11147:5,  
11151:24, 11156:17,  
11157:21, 11159:14,  
11161:5, 11163:2,  
11164:7, 11178:7,  
11183:20  
**Province** - 11284:3  
**provinces** - 11141:2  
**pryalin** - 11216:21,  
11239:22, 11240:8,  
11240:14, 11241:9,  
11241:14, 11241:19,  
11241:24  
**puberty** - 11182:19  
**public** - 11109:8,  
11263:23, 11282:18,  
11282:22  
**purchased** - 11109:15  
**pure** - 11052:7,  
11052:18, 11089:4,  
11100:7, 11114:10,  
11176:23  
**Purpose** - 11064:5,  
11086:9, 11120:8,  
11122:25, 11128:4  
**purpose** - 11048:15,  
11055:23, 11057:16,  
11077:11, 11078:1,  
11078:2, 11092:12,

11154:15, 11173:6,  
11222:14, 11260:1,  
11261:2, 11273:9  
**purposes** - 11032:7,  
11048:7, 11052:11,  
11056:24, 11061:9,  
11078:12, 11092:15,  
11119:7, 11138:24,  
11139:1, 11139:10,  
11139:13, 11144:9,  
11173:5, 11193:8,  
11204:13, 11217:15,  
11230:5  
**pursue** - 11158:17,  
11158:18  
**push** - 11174:10  
**put** - 11078:20,  
11085:1, 11087:5,  
11094:2, 11098:9,  
11102:16, 11105:8,  
11131:12, 11173:1,  
11177:4, 11196:18,  
11209:1, 11222:2,  
11227:21, 11235:15,  
11236:16, 11239:23,  
11239:24, 11246:8,  
11254:10, 11256:1,  
11274:16, 11276:11,  
11277:20, 11281:2,  
11281:13  
**putting** - 11071:8

**Q**

**Qb** - 11027:10  
**Qc** - 11028:2, 11028:8,  
11028:11, 11028:14  
**qualification** -  
11111:19  
**qualifications** -  
11140:4  
**qualify** - 11164:9  
**qualifying** - 11117:21  
**quality** - 11117:22  
**quantity** - 11060:3,  
11081:21, 11165:15,  
11176:12, 11177:8  
**quarter** - 11077:23  
**quarterback** -  
11265:25  
**Queen's** - 11284:1,  
11284:3, 11284:14,  
11284:18  
**questionable** -  
11107:21  
**questioned** - 11235:22  
**questions** - 11145:3,  
11145:16, 11155:14,  
11158:12, 11167:18,  
11169:23, 11175:15,  
11175:18, 11175:22,  
11176:1, 11211:17,  
11211:18, 11223:19,  
11223:20, 11223:23,  
11234:3, 11234:6,  
11239:11, 11239:16,  
11239:17, 11242:11,  
11245:12  
**quick** - 11064:1,  
11064:2, 11102:17,  
11228:19, 11228:25  
**quickly** - 11063:23  
**quite** - 11045:15,  
11046:22, 11116:20,  
11131:9, 11139:13,  
11164:13, 11181:2,  
11189:8, 11207:11,  
11231:14, 11237:14

**R**



**ra** - 11252:14  
**radio** - 11282:10  
**radioed** - 11264:18  
**ran** - 11033:3, 11037:4, 11037:8, 11037:12, 11083:18  
**random** - 11118:5  
**range** - 11141:16, 11142:7  
**rank** - 11269:8  
**rape** - 11070:18, 11118:18, 11119:4, 11119:18, 11257:3, 11272:9, 11272:12, 11272:14, 11272:25, 11273:24, 11274:18, 11274:23, 11275:1, 11279:13, 11279:14  
**rape-murder** - 11070:18  
**rapes** - 11272:8, 11272:12, 11273:23, 11276:13, 11276:14, 11276:25, 11278:2, 11278:4, 11278:10, 11278:16  
**rapist** - 11277:3  
**rare** - 11131:12  
**rarer** - 11181:7  
**Rasmussen**- 11066:5, 11067:4  
**rate** - 11158:20, 11168:5  
**Ray**- 11266:22, 11266:23, 11280:14  
**razor** - 11109:24  
**Rcmp**- 11028:9, 11066:5, 11186:20, 11191:4, 11214:15, 11219:13, 11219:18, 11219:24, 11220:5, 11234:11, 11234:20, 11235:17  
**re** - 11067:19, 11085:4, 11131:25, 11132:14, 11132:15, 11245:12  
**re-exam** - 11245:12  
**re-submitted** - 11067:19  
**re-test** - 11085:4  
**reabsorbed** - 11202:15  
**reach** - 11203:4  
**react** - 11098:21, 11202:19, 11242:7  
**reacting** - 11102:14  
**reaction** - 11043:14, 11045:5, 11045:9, 11081:1, 11081:15, 11098:11, 11098:14, 11098:17, 11100:21, 11101:5, 11101:12, 11101:13, 11103:3, 11103:5, 11103:8, 11111:8, 11112:25, 11113:3, 11113:4, 11113:8, 11113:13, 11137:16, 11137:17, 11154:19, 11154:23, 11155:3, 11170:15, 11177:7, 11199:24, 11205:8, 11205:18, 11206:9, 11206:16, 11208:19, 11209:15, 11230:21  
**reactions** - 11102:23, 11199:19  
**reactive** - 11094:6  
**read** - 11050:5, 11054:23, 11055:24, 11066:21, 11072:6, 11073:4, 11074:14, 11116:13, 11133:4, 11134:11, 11144:14, 11158:1, 11164:20, 11166:16, 11180:19, 11185:21, 11186:9, 11191:12, 11192:1, 11197:23, 11199:13, 11203:2, 11204:22, 11216:4, 11218:12, 11230:8, 11231:25, 11232:1, 11254:14, 11255:5, 11257:16, 11257:19, 11258:2, 11258:6, 11258:21, 11259:19, 11259:21, 11260:2, 11260:24, 11261:5, 11261:7, 11261:13, 11262:1, 11262:10, 11262:14, 11263:25, 11270:4, 11270:10, 11270:25, 11279:2  
**reading** - 11091:10, 11121:25, 11122:3, 11156:10, 11156:13, 11159:11, 11186:6, 11201:12, 11219:8, 11221:18, 11255:24, 11260:1, 11260:2, 11261:2, 11262:2, 11263:8, 11265:9  
**really** - 11040:6, 11065:12, 11071:15, 11193:21, 11215:14, 11241:11, 11271:12, 11271:25, 11274:14, 11281:4, 11281:5  
**realm** - 11139:11  
**rear** - 11178:19  
**reason** - 11039:15, 11040:16, 11041:7, 11042:24, 11049:3, 11049:9, 11051:12, 11063:13, 11078:3, 11079:20, 11080:9, 11084:13, 11092:6, 11099:3, 11099:7, 11100:12, 11102:25, 11155:23, 11156:24, 11183:25, 11198:15, 11200:13, 11217:6, 11226:15, 11228:23, 11235:2, 11244:12  
**reasonable** - 11195:18  
**reasonably** - 11195:22  
**reasons** - 11039:2, 11041:11, 11052:13, 11052:15, 11079:21, 11088:14  
**recap** - 11030:10  
**receipt** - 11034:17, 11048:4, 11059:2, 11067:13, 11089:25, 11091:25, 11093:10, 11095:18, 11107:4, 11107:9, 11108:19, 11128:2  
**receive** - 11098:10, 11098:13, 11118:23, 11137:17  
**received** - 11031:7, 11032:23, 11033:22, 11036:3, 11036:22, 11048:13, 11053:21, 11054:6, 11059:6, 11063:24, 11072:19, 11082:6, 11090:5, 11090:11, 11090:17, 11090:23, 11091:18, 11097:12, 11105:19, 11116:1, 11119:22, 11119:23, 11122:25, 11138:4, 11143:16, 11143:19, 11144:5, 11148:8, 11150:19, 11153:5, 11153:8, 11163:13, 11163:17, 11165:15, 11177:21, 11185:2, 11190:4, 11196:24, 11264:10  
**receiving** - 11119:6, 11138:25, 11144:7  
**recent** - 11239:17  
**recently** - 11246:19  
**recognized** - 11046:2  
**recognize** - 11207:13  
**recollect** - 11182:4, 11182:10  
**recollection** - 11034:19, 11040:12, 11061:7, 11068:22, 11070:3, 11074:8, 11075:16, 11084:11, 11105:15, 11113:18, 11119:3, 11122:4, 11143:25, 11159:9, 11159:11, 11179:24, 11184:18, 11186:18, 11226:17, 11270:19, 11275:18  
**Reconvaned**- 11030:2, 11095:9, 11149:22, 11214:11  
**record** - 11223:17, 11230:8, 11242:24, 11246:16, 11258:16  
**recorded** - 11074:20, 11198:8, 11258:12  
**recording** - 11258:9, 11258:10, 11259:6, 11266:24  
**records** - 11254:11, 11259:8, 11259:10, 11279:4  
**recover** - 11094:25  
**recovered** - 11189:12, 11193:2  
**red** - 11070:23, 11073:7  
**reddish** - 11176:4, 11176:6, 11176:8  
**reduce** - 11058:23  
**refer** - 11035:20, 11061:19, 11066:2, 11069:2, 11069:4, 11076:22, 11095:18, 11104:1, 11107:8, 11108:3, 11118:10, 11119:9, 11131:13, 11132:16, 11138:7, 11141:7, 11173:10, 11178:10, 11180:15, 11197:13, 11209:22, 11219:21, 11220:22, 11225:3, 11228:2, 11228:3  
**reference** - 11034:4, 11037:23, 11050:6, 11054:17, 11076:15, 11105:23, 11106:13, 11107:25, 11108:12, 11110:8, 11118:10, 11119:17, 11120:19, 11122:22, 11124:2, 11127:8, 11127:25, 11131:15, 11132:11, 11157:25, 11178:13, 11215:16, 11219:24, 11220:22, 11229:2, 11235:15, 11280:4  
**referenced** - 11062:12, 11085:15, 11091:13, 11127:13, 11236:23  
**references** - 11073:20, 11236:21  
**referred** - 11033:15, 11033:20, 11034:23, 11035:1, 11035:5, 11035:13, 11038:4, 11040:1, 11045:22, 11054:24, 11061:5, 11077:10, 11081:4, 11098:2, 11098:5, 11108:1, 11111:11, 11114:21, 11114:23, 11118:14, 11121:22, 11138:11, 11138:17, 11144:7, 11168:16, 11206:24, 11224:18, 11228:20  
**referring** - 11038:7, 11055:12, 11055:17, 11057:19, 11059:9, 11098:8, 11132:20, 11147:1, 11167:3, 11206:23, 11242:5, 11260:12  
**refers** - 11106:16, 11108:19, 11109:25, 11206:8  
**reflect** - 11246:24, 11248:8  
**reflects** - 11171:8  
**refresh** - 11074:1, 11076:2, 11107:3, 11121:15, 11130:7, 11135:23, 11136:1  
**refreshes** - 11119:11  
**refused** - 11243:21  
**regard** - 11230:13  
**regarding** - 11212:6, 11262:6  
**Regina**- 11091:1, 11105:4, 11106:15, 11108:4, 11109:1, 11116:18, 11140:17, 11191:5, 11267:11  
**regular** - 11105:4, 11269:18  
**regularly** - 11061:13  
**Reid**- 11258:11, 11258:25, 11262:8, 11262:13, 11264:12, 11266:17, 11280:5, 11280:8, 11280:15, 11280:21, 11281:1, 11281:3  
**relate** - 11220:5  
**related** - 11057:7, 11096:10, 11120:7, 11121:6  
**relates** - 11087:21  
**relating** - 11053:9, 11054:17, 11057:8, 11073:25, 11075:15, 11076:11, 11076:15, 11092:15, 11092:20, 11104:25, 11106:11, 11109:2, 11110:15, 11118:12, 11120:3, 11184:3, 11185:16  
**relation** - 11040:11, 11040:24, 11061:14, 11061:23, 11063:15, 11106:4, 11118:17, 11118:25, 11122:15, 11126:17, 11127:5, 11128:2, 11138:13, 11188:10, 11201:16, 11211:7, 11218:7, 11219:7, 11219:14, 11219:19, 11219:24, 11220:10, 11234:17, 11236:25  
**relationship** - 11131:7, 11250:15, 11250:21, 11251:20  
**relative** - 11114:25, 11167:18  
**relatively** - 11177:12  
**release** - 11073:10, 11073:15  
**released** - 11210:10  
**releases** - 11283:6  
**reliable** - 11078:24, 11100:3  
**relief** - 11224:11  
**remain** - 11094:16, 11187:13  
**remainder** - 11140:20  
**remained** - 11187:14  
**remarkable** - 11189:8  
**remarks** - 11050:4, 11053:16  
**Remarks**- 11121:4, 11121:23, 11123:25  
**remember** - 11035:1, 11035:16, 11098:23, 11187:7, 11203:16, 11224:17, 11228:13, 11228:14, 11230:15, 11255:25, 11259:24, 11265:18, 11266:19, 11271:1, 11282:15  
**remove** - 11117:23  
**removed** - 11109:14  
**render** - 11080:5  
**repeat** - 11068:19, 11136:14  
**replaced** - 11054:2  
**reply** - 11042:19  
**report** - 11034:5, 11035:20, 11035:21, 11045:11, 11045:24, 11046:2, 11046:4, 11046:16, 11048:1, 11048:11, 11053:5, 11054:22, 11063:9, 11063:12, 11063:18, 11063:20, 11066:4, 11067:4, 11068:14, 11085:20, 11089:15, 11089:17, 11090:13, 11090:19, 11091:12, 11092:9, 11093:3, 11095:11, 11096:2, 11096:7, 11104:24, 11106:15, 11107:11, 11107:23, 11108:6, 11108:13, 11108:14, 11108:23, 11109:1, 11114:3, 11114:20, 11114:21, 11118:11, 11121:11, 11122:3, 11122:9, 11122:10, 11122:16, 11122:18, 11127:9, 11127:10, 11127:22, 11127:24, 11128:14, 11138:13, 11167:23, 11168:3, 11187:18, 11187:20, 11188:8, 11189:2, 11197:12, 11201:19, 11201:21, 11202:3, 11207:17, 11208:6, 11210:13, 11210:24, 11215:16, 11215:19, 11215:22, 11215:24,



11216:5, 11218:10, 11218:11, 11220:13, 11220:20, 11220:24, 11221:3, 11226:10, 11226:25, 11227:16, 11239:18, 11239:21, 11239:23, 11241:6, 11246:18, 11248:3, 11249:17, 11250:6, 11250:18, 11251:18, 11252:1, 11252:2, 11252:4, 11252:6, 11252:8, 11252:9, 11252:12, 11252:15, 11252:20, 11256:7, 11257:6, 11257:7, 11257:22, 11260:5, 11261:9, 11261:13, 11261:14, 11262:1, 11262:10, 11263:18, 11267:5, 11267:21, 11268:19, 11268:20, 11268:25, 11269:1, 11271:8, 11271:9, 11271:10, 11271:17, 11271:23, 11272:14, 11272:23, 11272:24, 11279:24, 11280:3  
**reported** - 11122:11, 11190:14, 11196:25, 11255:21  
**reporter** - 11283:2  
**Reporter-** 11284:14, 11284:18  
**Reporters-** 11027:10, 11284:3  
**reporters** - 11282:10, 11282:11, 11282:12  
**Reporters'** - 11284:1  
**reporting** - 11063:23, 11115:13, 11250:20, 11254:10  
**reports** - 11036:2, 11066:8, 11097:14, 11186:25, 11187:2, 11187:10, 11188:2, 11197:15, 11249:23, 11252:12, 11254:7, 11254:18, 11255:8, 11255:11, 11255:15, 11255:24, 11257:16, 11257:23, 11259:20, 11260:5, 11261:21, 11263:9, 11263:21, 11263:24, 11265:8, 11270:5, 11270:9, 11270:23, 11271:7, 11271:11, 11273:20, 11279:20, 11279:22, 11281:17, 11282:1  
**representation** - 11230:12  
**request** - 11067:19, 11068:5, 11068:7, 11086:14, 11086:25, 11107:1, 11120:16, 11120:17, 11120:23, 11120:25, 11148:24, 11149:3, 11149:6, 11188:12, 11204:11, 11235:10  
**requested** - 11148:21, 11234:21  
**required** - 11056:25, 11216:19, 11244:23  
**research** - 11050:22  
**reservations** - 11174:12  
**reside** - 11246:3  
**residence** - 11075:25  
**respect** - 11045:14, 11057:1, 11057:21, 11082:3, 11091:21, 11100:21, 11113:18, 11148:6, 11164:10, 11227:25, 11233:25, 11236:4, 11238:18, 11240:9  
**respecting** - 11034:5, 11067:12, 11215:19  
**respective** - 11265:10  
**respects** - 11108:10  
**respond** - 11221:12  
**response** - 11070:14, 11105:9, 11164:11, 11188:17, 11188:22, 11188:23, 11204:1, 11204:2, 11211:13, 11221:13  
**responsibilities** - 11248:24, 11265:6  
**responsibility** - 11261:14, 11262:14, 11280:25  
**responsible** - 11126:12, 11227:2, 11258:23, 11281:7  
**rest** - 11135:18, 11229:1, 11280:24  
**restate** - 11214:22  
**resubmission** - 11067:25, 11070:2, 11074:3, 11076:5, 11076:12  
**resubmitted** - 11068:4, 11090:9  
**result** - 11031:7, 11037:17, 11043:15, 11044:9, 11044:25, 11045:2, 11073:9, 11083:5, 11087:12, 11089:2, 11089:7, 11089:8, 11096:25, 11097:13, 11098:22, 11100:10, 11100:17, 11107:13, 11154:10, 11154:24, 11154:25, 11156:21, 11157:4, 11157:6, 11158:19, 11159:21, 11159:23, 11160:10, 11160:14, 11160:15, 11160:21, 11162:7, 11185:7, 11200:9, 11200:22, 11208:14, 11213:4, 11213:18, 11216:20, 11220:17, 11222:18, 11226:20  
**resulted** - 11213:11  
**resulting** - 11108:13  
**results** - 11042:21, 11046:6, 11048:9, 11052:24, 11053:8, 11057:6, 11061:22, 11065:21, 11066:16, 11067:8, 11068:14, 11068:16, 11079:16, 11080:4, 11082:8, 11083:5, 11084:14, 11084:18, 11087:11, 11098:19, 11100:4, 11111:13, 11111:17, 11116:8, 11124:25, 11137:25, 11138:4, 11138:5, 11159:19, 11162:23, 11174:9, 11190:14, 11196:25, 11205:20, 11215:6, 11229:15  
**retained** - 11034:10, 11085:23, 11091:2, 11091:6, 11109:19  
**retested** - 11093:5  
**Retired-** 11028:15  
**retired** - 11186:22, 11234:12, 11238:10, 11238:15, 11246:14, 11247:22  
**retrieval** - 11189:25, 11217:10  
**retrieved** - 11033:25, 11034:3, 11179:21, 11203:5  
**returned** - 11068:8, 11091:3  
**retyped** - 11255:21  
**reveal** - 11176:4  
**revealed** - 11058:19, 11118:4  
**revelation** - 11210:7  
**reverse** - 11043:8  
**review** - 11105:22, 11123:3, 11138:12, 11188:1, 11193:6, 11203:8, 11203:10, 11210:8, 11218:9, 11219:22, 11219:24, 11220:19, 11223:16, 11227:12, 11228:25, 11229:11, 11229:20  
**reviewed** - 11065:4, 11130:6, 11138:15, 11149:5, 11179:19, 11185:20, 11186:4, 11187:24, 11220:24, 11228:25, 11231:24  
**reviewing** - 11105:13, 11216:2  
**reviews** - 11231:7  
**revisit** - 11149:9, 11280:1  
**Richard-** 11239:13  
**Rick-** 11028:7  
**right-hand** - 11032:19, 11040:21, 11059:21, 11127:12  
**rise** - 11093:8, 11100:10  
**road** - 11042:14, 11129:24  
**Rochelle** - 11028:9  
**role** - 11254:4, 11262:25, 11263:3, 11264:6, 11264:8, 11265:4, 11267:1, 11267:4, 11268:5  
**Ron-** 11105:25, 11106:1, 11109:5, 11110:9, 11229:7, 11267:11  
**Ronald-** 11109:7  
**room** - 11116:23, 11127:2, 11224:7  
**routine** - 11041:10, 11051:4, 11061:12, 11143:2  
**Rpr-** 11027:11, 11284:2, 11284:16, 11284:17  
**rule** - 111038:21, 11083:23, 11233:8  
**run** - 11033:2, 11033:6, 11141:25, 11178:24, 11283:2  
**S**  
**S/sgt** - 11198:3  
**sake** - 11034:4, 11118:10, 11127:8, 11131:15, 11132:11, 11157:25, 11219:24  
**saline** - 11094:11, 11094:12, 11094:15, 11094:18  
**saliva** - 11040:2, 11054:13, 11054:19, 11055:1, 11055:2, 11055:17, 11056:19, 11057:9, 11057:15, 11057:18, 11058:19, 11060:11, 11060:17, 11061:3, 11061:14, 11067:23, 11071:6, 11074:24, 11083:12, 11083:13, 11083:19, 11083:21, 11083:22, 11083:25, 11084:2, 11085:11, 11089:10, 11092:23, 11093:4, 11095:22, 11095:24, 11095:25, 11096:14, 11096:16, 11106:19, 11107:15, 11107:17, 11126:20, 11126:22, 11127:16, 11128:3, 11128:21, 11129:1, 11133:10, 11145:24, 11153:7, 11163:6, 11163:10, 11163:16, 11163:22, 11167:4, 11198:21, 11198:24, 11214:14, 11216:16, 11216:22, 11217:11, 11218:7, 11237:5, 11237:7, 11237:25, 11239:20, 11240:8, 11240:14, 11240:22, 11241:1, 11241:3, 11241:7, 11241:14, 11241:20  
**salt** - 11094:19  
**Sample** - 11033:22  
**sample** - 11033:10, 11037:13, 11041:9, 11043:14, 11045:5, 11045:14, 11049:1, 11049:15, 11053:10, 11054:10, 11054:12, 11054:13, 11054:15, 11054:18, 11054:25, 11055:1, 11055:3, 11056:14, 11056:17, 11056:19, 11056:22, 11056:23, 11057:9, 11057:10, 11057:15, 11057:22, 11058:6, 11058:19, 11058:20, 11060:7, 11060:15, 11061:14, 11064:20, 11067:23, 11077:4, 11078:8, 11078:9, 11079:21, 11079:22, 11079:25, 11080:3, 11082:5, 11083:12, 11085:10, 11085:11, 11093:22, 11095:1, 11097:2, 11101:20, 11102:3, 11105:24, 11106:5, 11106:17, 11106:19, 11107:12, 11107:15, 11107:18, 11107:19, 11121:8, 11124:23, 11126:20, 11126:21, 11126:22, 11127:16, 11127:18, 11128:3, 11128:8, 11128:11, 11128:17, 11128:21, 11134:13, 11134:17, 11134:22, 11135:10, 11136:22, 11138:2, 11138:17, 11139:6, 11139:14, 11139:16, 11139:19, 11150:14, 11152:4, 11156:23, 11157:11, 11157:12, 11158:6, 11172:15, 11173:13, 11175:5, 11176:14, 11194:5, 11195:6, 11209:2, 11209:11, 11214:14, 11217:12, 11230:19, 11236:5, 11236:12, 11237:21, 11238:25, 11242:6, 11244:20, 11244:23, 11244:25, 11245:6  
**samples** - 11033:3, 11036:15, 11041:6, 11043:4, 11055:2, 11055:17, 11060:12, 11060:14, 11060:17, 11062:20, 11076:20, 11077:12, 11084:4, 11093:17, 11093:19, 11094:2, 11095:25, 11101:4, 11126:17, 11127:20, 11141:11, 11153:7, 11163:6, 11163:10, 11163:12, 11164:3, 11173:18, 11174:6, 11177:17, 11189:20, 11193:21, 11198:21, 11213:3, 11217:11, 11218:7, 11237:25, 11238:19, 11238:20, 11244:22  
**Sandra** - 11027:5  
**Saskatchewan** - 11045:7, 11028:4, 11141:2, 11284:4  
**Saskatoon** - 11026:17, 11028:7, 11069:14, 11069:24, 11105:3, 11107:1, 11116:16, 11118:18, 11118:24, 11148:25, 11153:10, 11209:23, 11239:14, 11246:13, 11246:20, 11246:25  
**Saskatoon's** - 11210:18  
**satisfied** - 11115:8, 11115:10, 11201:15  
**Saturday** - 11269:17  
**saw** - 11096:9, 11264:8  
**scale** - 11102:15  
**scenario** - 11100:6, 11194:19  
**scenarios** - 11194:21  
**scene** - 11034:1, 11034:2, 11070:18, 11189:6, 11189:7, 11189:17, 11193:2, 11194:2, 11194:4, 11210:4, 11280:22  
**Scene** - 11202:6  
**scheduled** - 11252:3  
**science** - 11131:1, 11184:13, 11193:12, 11196:5, 11240:5  
**Science** - 11140:8  
**scientific** - 11055:15, 11071:14, 11167:9, 11194:17, 11203:4, 11225:24, 11226:10, 11227:22, 11233:1, 11233:23, 11240:13  
**scientifically** -



11175:25, 11176:11  
**scientist** - 11220:14, 11235:17  
**Scotia** - 11141:3  
**screen** - 11030:12, 11239:25  
**screening** - 11076:19, 11077:7, 11078:13, 11079:3, 11081:4, 11156:2, 11213:8  
**searching** - 11034:8  
**seat** - 11108:5, 11110:3, 11110:18, 11110:19, 11179:23, 11222:24  
**second** - 11033:18, 11037:10, 11044:7, 11045:4, 11045:14, 11048:14, 11075:21, 11081:18, 11092:25, 11093:2, 11093:4, 11095:12, 11095:19, 11128:18, 11150:5, 11150:9, 11154:10, 11157:2, 11160:13, 11181:2, 11199:14, 11202:7, 11206:18, 11213:14, 11213:17, 11222:21, 11232:1, 11244:23, 11244:25, 11248:25  
**secondary** - 11213:8  
**secondly** - 11128:25  
**seconds** - 11127:1  
**secrete** - 11037:14, 11074:23, 11144:25, 11145:4  
**secreted** - 11073:12, 11202:15  
**secretes** - 11070:23  
**secreting** - 11132:8  
**secretion** - 11071:6, 11074:17, 11144:20  
**secretor** - 11038:16, 11039:8, 11039:9, 11039:11, 11039:20, 11039:25, 11044:21, 11049:14, 11049:19, 11049:24, 11050:5, 11050:7, 11053:10, 11057:19, 11063:7, 11065:10, 11066:14, 11070:20, 11071:8, 11071:22, 11071:23, 11073:11, 11080:20, 11080:24, 11084:20, 11085:4, 11113:21, 11122:15, 11125:3, 11125:7, 11126:7, 11129:18, 11133:7, 11134:7, 11134:24, 11137:3, 11137:9, 11142:18, 11145:20, 11146:7, 11147:15, 11160:18, 11160:24, 11161:1, 11161:9, 11164:5, 11167:22, 11167:25, 11168:1, 11168:6, 11168:8, 11168:22, 11169:4, 11169:17, 11169:18, 11179:6, 11191:1, 11191:18, 11192:15, 11192:22, 11192:23, 11195:7, 11196:14, 11197:6, 11197:7, 11197:9, 11199:1, 11214:17, 11214:19, 11215:2, 11215:7, 11215:10, 11216:19, 11216:25, 11218:2, 11231:12, 11231:13, 11231:19, 11236:11, 11237:7, 11237:11, 11237:13, 11237:17, 11237:19, 11237:21, 11237:22, 11238:8, 11238:19, 11239:6, 11244:7, 11244:8, 11245:7  
**secretors** - 11038:12, 11050:14, 11050:16, 11074:22, 11130:4, 11133:12, 11145:2, 11145:9, 11145:10, 11147:13, 11235:20, 11236:2, 11237:23  
**secrets** - 11050:8  
**section** - 11035:25, 11091:5, 11121:4, 11121:23, 11124:1, 11140:20, 11191:4, 11197:17, 11251:25, 11264:19, 11264:25, 11269:3, 11271:5, 11276:8, 11277:17, 11279:6, 11279:7  
**sections** - 11251:23, 11277:16  
**Security** - 11027:12  
**sedan** - 11109:6  
**see** - 11032:19, 11034:13, 11040:16, 11040:19, 11047:16, 11048:12, 11048:14, 11048:25, 11053:25, 11054:21, 11057:11, 11059:20, 11076:13, 11076:14, 11076:16, 11078:14, 11079:19, 11082:1, 11082:14, 11082:16, 11083:18, 11085:14, 11085:20, 11087:23, 11092:12, 11101:5, 11102:21, 11103:10, 11107:9, 11107:11, 11107:24, 11108:21, 11119:11, 11120:8, 11121:2, 11122:1, 11122:20, 11127:11, 11127:24, 11131:23, 11132:13, 11133:4, 11134:2, 11143:22, 11149:9, 11153:19, 11165:19, 11165:23, 11166:17, 11166:25, 11167:6, 11170:23, 11170:25, 11173:22, 11175:2, 11176:24, 11177:9, 11177:25, 11179:8, 11182:7, 11183:10, 11190:17, 11201:21, 11216:6, 11219:22, 11225:11, 11229:1, 11235:12, 11236:17, 11238:24, 11248:15, 11249:6, 11249:8, 11249:12, 11255:10, 11255:11, 11261:2, 11261:5, 11282:1, 11282:20  
**See** - 11121:11, 11252:21, 11260:4, 11264:22  
**seeing** - 11047:8, 11103:6, 11184:10, 11206:5, 11275:12  
**seem** - 11089:22, 11090:16, 11096:4, 11251:17  
**selected** - 11110:23, 11111:16  
**self** - 11060:8  
**self-explanatory** - 11060:8  
**Semen** - 11192:12, 11192:21  
**semen** - 11033:10, 11053:9, 11057:24, 11058:15, 11058:22, 11065:22, 11069:16, 11070:17, 11072:10, 11073:16, 11074:23, 11093:22, 11100:8, 11120:12, 11125:12, 11126:14, 11130:3, 11137:2, 11137:9, 11161:9, 11189:9, 11189:12, 11189:14, 11190:20, 11191:8, 11195:6, 11196:12, 11197:6, 11201:2, 11201:7, 11202:14, 11203:5, 11204:23, 11205:5, 11206:13, 11210:3, 11212:6, 11213:3, 11221:5, 11221:6, 11221:8, 11221:12, 11222:15  
**seminal** - 11030:16, 11030:20, 11033:5, 11037:7, 11037:8, 11037:20, 11040:2, 11041:9, 11041:22, 11044:15, 11045:15, 11048:24, 11049:13, 11051:5, 11051:10, 11052:6, 11052:7, 11052:19, 11053:2, 11061:11, 11062:3, 11063:5, 11076:24, 11079:18, 11080:13, 11080:18, 11086:12, 11086:17, 11086:22, 11088:1, 11088:21, 11088:23, 11089:4, 11092:17, 11093:19, 11103:16, 11107:21, 11110:20, 11111:15, 11111:25, 11112:12, 11114:10, 11114:16, 11115:3, 11115:20, 11120:18, 11121:2, 11123:4, 11124:7, 11124:13, 11125:11, 11125:15, 11126:12, 11129:9, 11129:12, 11132:3, 11132:6, 11132:9, 11133:10, 11134:13, 11134:23, 11136:24, 11139:3, 11142:4, 11145:25, 11148:1, 11148:9, 11148:10, 11148:14, 11149:4, 11150:17, 11152:4, 11162:1, 11162:5, 11162:8, 11162:21, 11162:24, 11164:23, 11164:25, 11165:4, 11166:12, 11167:4, 11167:24, 11169:16, 11173:13, 11174:25, 11175:1, 11175:5, 11176:3, 11178:15, 11178:17, 11178:25, 11179:2, 11179:5, 11180:21, 11181:20, 11182:1, 11182:17, 11184:5, 11189:20, 11190:18, 11193:1, 11193:15, 11194:5, 11209:2, 11209:11, 11222:19, 11222:23, 11223:4, 11223:6, 11231:11, 11236:4, 11236:10, 11238:20, 11240:21, 11240:24, 11241:2, 11241:8  
**Seminal** - 11087:25, 11202:6  
**send** - 11046:5, 11068:19, 11257:8, 11260:4, 11261:3, 11262:16, 11265:8, 11271:20  
**sending** - 11265:10  
**senior** - 11249:13, 11250:15, 11251:19, 11253:24, 11268:25, 11269:19  
**sense** - 11036:14, 11062:25, 11090:8, 11146:16, 11183:24, 11184:1, 11194:12  
**sent** - 11127:20, 11232:12, 11259:1, 11260:24, 11261:24, 11264:3, 11264:14, 11264:16, 11264:19, 11264:25, 11265:19  
**sentence** - 11066:12, 11124:24, 11136:6, 11136:16, 11137:21, 11191:24, 11192:3, 11195:10, 11199:14, 11202:17, 11206:11, 11233:12, 11233:16  
**separate** - 11251:11, 11251:12, 11251:13, 11277:19, 11279:3  
**September** - 11140:18, 11187:20, 11227:8, 11227:19, 11246:7, 11246:9, 11246:10  
**sera** - 11173:19  
**Serge** - 11028:6  
**Sergeant** - 11067:20, 11230:17, 11232:11, 11236:24, 11258:11, 11258:24, 11262:7, 11262:8  
**sergeants** - 11280:9  
**series** - 11183:8  
**serological** - 11048:15, 11064:6, 11092:12, 11123:1, 11128:4, 11187:4, 11188:10, 11188:19, 11195:19, 11215:20  
**serologically** - 11202:18  
**serologist** - 11203:9  
**serology** - 11140:19, 11190:18, 11191:4, 11194:10, 11197:17  
**serum** - 11060:22  
**served** - 11246:12  
**serves** - 11237:13  
**Service** - 11028:7, 11239:15, 11246:13, 11246:20, 11246:25  
**service** - 11246:16, 11274:20, 11275:21, 11276:22, 11277:8, 11281:8  
**set** - 11053:22, 11190:23, 11235:4, 11259:4, 11265:17, 11265:18, 11268:23  
**sets** - 11215:17, 11248:5  
**seventeen** - 11182:11  
**several** - 11047:23, 11072:11, 11073:23, 11092:13, 11105:6, 11112:2, 11118:5, 11154:18, 11179:19, 11212:9, 11221:19, 11264:1  
**severely** - 11113:11  
**sexual** - 11086:17, 11086:20, 11222:18, 11223:7, 11257:3, 11270:16, 11270:17, 11271:9, 11271:23, 11274:17  
**Sgt** - 11203:14, 11203:15  
**shade** - 11101:22, 11102:13, 11102:21  
**shall** - 11186:22  
**share** - 11034:19, 11057:5, 11068:11, 11170:6, 11234:8, 11234:16, 11234:21, 11234:23  
**shared** - 11063:16, 11105:10, 11186:17  
**sharing** - 11234:20, 11278:13  
**Sheraton** - 11026:16  
**shift** - 11250:24, 11250:25, 11253:1, 11258:3, 11258:5, 11258:6, 11269:21, 11280:18  
**shoes** - 11114:16  
**shop** - 11269:16  
**Short** - 11119:23, 11119:24, 11249:12, 11250:6, 11250:17, 11250:21, 11250:23, 11251:1, 11251:17, 11252:22, 11253:2, 11253:6, 11256:21, 11257:12, 11258:5, 11262:25, 11266:14, 11269:10, 11269:20  
**short** - 11046:21, 11049:18, 11116:13, 11180:15, 11193:8, 11197:20, 11199:13, 11211:22, 11211:25, 11226:23  
**shorthand** - 11284:5  
**shortly** - 11039:22, 11066:24, 11070:1, 11201:11  
**shorts** - 11086:8, 11088:22, 11109:23, 11110:13, 11114:4, 11114:7  
**shots** - 11266:1  
**show** - 11208:2, 11209:19, 11256:3, 11262:12, 11264:1, 11275:14, 11281:17  
**showed** - 11112:5, 11157:9, 11235:6  
**shown** - 11224:17, 11248:2, 11275:15  
**side** - 11046:20, 11046:24, 11059:21, 11113:22, 11131:12  
**significance** - 11044:6, 11045:17, 11059:10, 11060:12, 11061:22, 11063:14,



11128:22, 11129:7,  
11131:23, 11173:7,  
11175:8  
**significant** - 11082:17,  
11082:20, 11125:1,  
11125:5, 11125:17,  
11126:4, 11139:8,  
11139:14  
**similar** - 11105:9,  
11263:3, 11278:5  
**similarities** -  
11274:19, 11276:21  
**Similarly** - 11044:2  
**similarly** - 11049:9,  
11058:4, 11114:17,  
11137:16  
**simple** - 11077:7,  
11252:18  
**simplistic** - 11100:14  
**simplistically** -  
11173:2  
**simply** - 11032:1,  
11048:13, 11050:23,  
11103:14, 11107:24,  
11127:19, 11170:14,  
11191:23, 11223:16  
**single** - 11193:14,  
11207:18, 11225:9  
**single-spaced** -  
11225:9  
**singled** - 11266:23  
**sitting** - 11026:15,  
11243:14  
**situation** - 11100:10,  
11153:4, 11184:19,  
11184:21, 11208:25  
**situations** - 11102:2  
**six** - 11047:16,  
11092:5, 11265:21  
**sixteen** - 11181:25,  
11182:5  
**size** - 11059:14,  
11059:18, 11176:19,  
11176:22, 11177:10  
**skeptical** - 11174:8  
**skill** - 11284:6  
**Skip** - 11210:11  
**Skipping** - 11202:17  
**slide** - 11081:10,  
11094:21, 11094:22,  
11094:23, 11119:25,  
11120:10  
**slides** - 11123:6,  
11124:22, 11222:20  
**slight** - 11182:20  
**slip** - 11162:19  
**slow** - 11101:13  
**slower** - 11102:14  
**small** - 11036:17,  
11058:11, 11081:9,  
11083:17, 11165:18,  
11176:17, 11177:8,  
11177:12, 11182:16,  
11189:8, 11208:2,  
11225:6, 11244:10  
**smaller** - 11059:17,  
11082:5, 11176:20,  
11177:3  
**smear** - 11119:25,  
11124:22  
**smears** - 11123:5  
**snap** - 11034:24  
**snap-on** - 11034:24  
**snow** - 11034:8,  
11210:3, 11211:1,  
11218:16  
**Snowbank** - 11202:7  
**snowbank** - 11139:7,  
11139:16, 11203:6,  
11210:22  
**snowbanks** - 11202:9  
**soil** - 11198:5  
**soiled** - 11086:8,  
11087:10  
**sold** - 11078:3,  
11109:7  
**sole** - 11186:5  
**solely** - 11042:24  
**solution** - 11094:3,  
11094:11, 11094:15,  
11094:18, 11094:19  
**solvent** - 11094:6  
**someone** - 11117:6,  
11149:12, 11261:10,  
11261:11, 11261:12,  
11261:15, 11261:16,  
11262:16  
**someplace** - 11099:19  
**some time** - 11089:24,  
11138:21, 11185:13,  
11187:5  
**Sometimes** - 11101:12  
**sometimes** -  
11141:23, 11181:19,  
11222:7, 11222:8,  
11222:25  
**Somewhere** -  
11061:18  
**somewhere** - 11062:5,  
11113:15, 11235:5  
**Sorry** - 11084:7,  
11092:23, 11096:20,  
11135:8, 11236:20  
**sorry** - 11055:11,  
11067:2, 11090:6,  
11150:5, 11150:7,  
11150:9, 11152:11,  
11167:19, 11172:9,  
11181:15, 11191:22,  
11199:9, 11216:8,  
11223:23, 11225:7,  
11248:14  
**sort** - 11065:9,  
11065:18, 11074:8,  
11075:17, 11105:11,  
11111:2, 11165:10,  
11176:5, 11238:11,  
11268:18  
**sound** - 11100:14,  
11119:19  
**sounds** - 11186:5  
**source** - 11077:8,  
11098:6, 11185:22,  
11186:5, 11198:1,  
11198:6, 11227:5,  
11232:17  
**sources** - 11198:7,  
11210:21  
**spaced** - 11225:9,  
11225:10  
**speaking** - 11034:6,  
11034:15, 11042:23,  
11052:10, 11066:18,  
11073:5, 11100:25,  
11143:8, 11146:16,  
11147:13, 11150:7,  
11154:2, 11161:12,  
11163:6, 11164:18,  
11164:19, 11170:24,  
11174:16, 11180:1,  
11181:11, 11186:16,  
11187:9, 11188:15,  
11194:17, 11198:21  
**speaks** - 11115:25  
**special** - 11271:25  
**specialized** - 11252:6,  
11264:22, 11264:24  
**species** - 11205:7,  
11206:15  
**specific** - 11068:22,  
11070:3, 11110:20,  
11118:20, 11154:15,  
11203:18, 11205:8,  
11206:9, 11206:16,  
11265:19, 11280:1  
**specifically** - 11187:8,  
11229:4, 11270:14  
**specimen** - 11069:16,  
11070:17, 11072:10,  
11216:16, 11216:23  
**specimens** - 11203:20  
**speculate** - 11188:16  
**spell** - 11216:7  
**spent** - 11224:7,  
11238:8, 11253:18,  
11253:20, 11280:3  
**sperm** - 11132:14,  
11221:5, 11221:9  
**spermatzoa** -  
11037:8, 11088:2,  
11112:20, 11133:23,  
11142:5, 11180:22,  
11207:4, 11207:7,  
11207:10, 11212:8,  
11212:11, 11212:18,  
11218:22, 11218:24,  
11230:15, 11232:4,  
11232:7, 11232:18,  
11236:11  
**spoken** - 11037:1,  
11101:9, 11102:5,  
11193:10, 11234:10  
**spot** - 11095:23,  
11214:7, 11283:10  
**spots** - 11221:12  
**spread** - 11117:23  
**St** - 11069:13,  
11069:23  
**Staff** - 11027:1,  
11027:8, 11067:19,  
11140:15, 11144:16,  
11144:24, 11146:16,  
11147:12, 11147:14,  
11147:22, 11150:5,  
11150:9, 11154:1,  
11160:13, 11162:3,  
11162:11, 11162:17,  
11163:25, 11203:14,  
11203:15, 11228:7,  
11230:16, 11236:24  
**staff** - 11224:15  
**staffed** - 11046:21  
**stage** - 11045:6,  
11120:18, 11153:13,  
11254:9, 11276:9  
**stain** - 11030:20,  
11031:2, 11031:24,  
11039:17, 11044:10,  
11044:13, 11044:15,  
11051:13, 11051:22,  
11051:24, 11052:3,  
11052:5, 11052:8,  
11052:19, 11059:12,  
11059:17, 11060:24,  
11060:25, 11061:3,  
11063:5, 11076:21,  
11078:14, 11078:20,  
11081:8, 11081:12,  
11081:15, 11083:18,  
11087:11, 11088:21,  
11088:23, 11089:1,  
11089:5, 11104:12,  
11111:9, 11114:10,  
11117:19, 11120:5,  
11125:12, 11129:4,  
11153:17, 11172:17,  
11174:7, 11174:25,  
11178:17, 11179:5,  
11198:23, 11236:5,  
11123:15,  
11123:23, 11124:4,  
11178:19, 11230:16,  
11232:5  
**staining** - 11178:22  
**Stains** - 11202:6  
**stains** - 11043:4,  
11060:21, 11076:20,  
11077:19, 11078:17,  
11078:18, 11086:12,  
11098:4, 11104:9,  
11104:10, 11104:13,  
11110:4, 11111:12,  
11117:14, 11117:16,  
11128:25, 11141:20,  
11142:3, 11151:9,  
11156:3, 11162:1,  
11163:16, 11175:1,  
11178:16, 11178:25,  
11190:18, 11193:15,  
11202:9, 11208:15,  
11210:22, 11241:4  
**stamp** - 11256:1,  
11256:2  
**standard** - 11046:4,  
11046:5, 11046:17,  
11061:8, 11115:12,  
11238:2  
**standards** - 11143:5  
**standpoint** - 11053:13,  
11085:2  
**Star** - 11209:23  
**Star-phoenix** -  
11209:23  
**start** - 11088:22,  
11117:11, 11140:1,  
11141:7, 11143:8,  
11147:10, 11158:2,  
11161:24, 11177:14,  
11180:18, 11265:20,  
11281:15  
**started** - 11042:25,  
11047:7, 11047:19,  
11222:1, 11230:13,  
11238:13, 11246:21  
**starters** - 11194:9  
**starting** - 11091:15,  
11140:2, 11150:3,  
11153:3, 11164:16,  
11170:20, 11178:10,  
11181:15, 11190:23,  
11199:14, 11202:7,  
11210:1, 11230:6,  
11246:13  
**starts** - 11191:25  
**state** - 11034:11,  
11036:22, 11094:2,  
11129:14, 11135:23,  
11144:7, 11197:2,  
11214:25, 11230:11,  
11242:6  
**statement** - 11087:3,  
11116:9, 11116:13,  
11136:13, 11195:25,  
11196:2, 11225:16  
**statements** - 11276:14  
**states** - 11072:7,  
11074:14, 11189:4,  
11192:11, 11192:19,  
11193:9, 11193:25,  
11197:24, 11199:15,  
11199:18, 11210:12,  
11212:2, 11212:25  
**stating** - 11134:20,  
11192:7, 11200:4,  
11208:5  
**station** - 11258:21,  
11282:6  
**status** - 11070:20,  
11085:4, 11142:19,  
11216:20, 11216:25,  
11237:7, 11237:11,  
11237:13, 11238:19,  
11239:6  
**stay** - 11093:24,  
11093:25  
**stayed** - 11116:19,  
11116:23  
**step** - 11030:18,  
11049:18, 11096:17,  
11099:25, 11171:16,  
11205:10  
**stick** - 11077:21,  
11078:19, 11078:21  
**still** - 11033:5,  
11052:15, 11072:19,  
11080:25, 11144:4,  
11147:7, 11147:13,  
11153:15, 11161:15,  
11208:19, 11212:15,  
11217:25, 11238:17,  
11238:21  
**stop** - 11260:17,  
11281:13  
**stopping** - 11049:18,  
11065:19  
**storage** - 11062:7  
**store** - 11034:25  
**story** - 11283:2  
**straight** - 11104:11  
**straightened** -  
11132:9  
**strength** - 11208:17  
**stressing** - 11233:18  
**strip** - 11077:22,  
11078:7, 11098:9,  
11100:25  
**strips** - 11077:8  
**strong** - 11077:3,  
11077:16  
**strongly** - 11196:10  
**stuff** - 11273:13  
**sub** - 11171:3,  
11171:11, 11171:17,  
11171:24  
**sub-group** - 11171:17  
**sub-grouping** -  
11171:24  
**sub-groups** - 11171:3,  
11171:11  
**subdivision** - 11174:4  
**subgroup** - 11172:22,  
11174:1, 11174:14,  
11174:24, 11175:5  
**subgrouped** -  
11173:11  
**subgrouping** -  
11172:20  
**subject** - 11093:23  
**subjects** - 11156:8  
**submission** -  
11092:25, 11093:1,  
11093:2, 11093:3,  
11106:9, 11106:11  
**submissions** -  
11107:5  
**submit** - 11232:15  
**submitted** - 11034:12,  
11046:14, 11067:19,  
11069:15, 11076:14,  
11096:10, 11104:24,  
11126:21  
**submitting** - 11127:3  
**subsequent** -  
11117:19, 11227:20  
**subsequently** -  
11226:8, 11280:14  
**substance** - 11032:8,  
11034:20, 11035:11,  
11037:18, 11037:19,  
11037:25, 11038:2,





11038:5, 11040:25,  
11041:21, 11043:13,  
11045:8, 11045:10,  
11045:16, 11045:18,  
11055:20, 11063:6,  
11067:22, 11072:14,  
11072:23, 11074:18,  
11079:1, 11080:23,  
11082:19, 11098:10,  
11099:16, 11102:2,  
11102:24, 11113:6,  
11114:6, 11143:9,  
11145:23, 11150:8,  
11152:24, 11155:24,  
11161:7, 11164:18,  
11165:3, 11166:7,  
11168:11, 11168:25,  
11175:24, 11176:9,  
11176:14, 11176:16,  
11176:23, 11189:25,  
11200:6, 11202:21,  
11205:14, 11218:16,  
11219:1  
**substance/yellowish** -  
11218:20  
**substances** - 11034:2,  
11037:12, 11037:15,  
11038:13, 11038:17,  
11039:12, 11043:15,  
11050:9, 11098:16,  
11101:2, 11101:9,  
11101:20, 11102:18,  
11133:9, 11145:5,  
11145:14, 11146:22,  
11146:24, 11148:17,  
11154:18, 11154:25,  
11155:3, 11155:9,  
11155:21, 11155:22,  
11156:13, 11161:16,  
11166:22, 11168:16,  
11203:25  
**substantial** - 11178:17  
**successful** - 11059:16  
**sufficient** - 11033:4,  
11059:14, 11060:5,  
11081:21, 11099:23,  
11156:6, 11200:8,  
11200:21  
**suggest** - 11044:17,  
11076:8, 11130:2,  
11193:7, 11194:19,  
11227:4, 11279:8  
**suggested** - 11053:8,  
11065:21, 11067:9,  
11068:18, 11126:20,  
11196:11  
**suggesting** -  
11074:22, 11135:20  
**suggestion** - 11114:2,  
11200:15, 11200:19,  
11213:17  
**suggestions** -  
11069:15, 11075:13  
**suggests** - 11075:13,  
11075:22  
**suits** - 11214:7  
**summarize** -  
11030:15, 11057:20,  
11109:4, 11110:16,  
11221:3, 11231:23  
**summarized** -  
11228:18, 11229:22,  
11231:4, 11231:15,  
11231:20  
**summarizing** -  
11065:19, 11110:24  
**summary** - 11135:5,  
11141:4, 11147:3,  
11230:25, 11232:25,  
11233:15, 11233:23  
**summation** - 11231:5  
**Sunday** - 11269:17  
**superintendent** -  
11247:5, 11247:19,  
11249:7, 11250:5,  
11253:19, 11256:17,  
11257:15, 11277:9,  
11278:18  
**Superintendent** -  
11249:18  
**supplied** - 11164:3,  
11237:21  
**supplying** - 11235:3  
**Support** - 11027:8  
**suppose** - 11178:2  
**surprise** - 11067:7,  
11067:10  
**surprised** - 11189:17,  
11215:10  
**surrounding** -  
11106:9, 11107:5,  
11219:15  
**suspect** - 11040:7,  
11042:8, 11054:12,  
11054:16, 11055:13,  
11066:15, 11068:15,  
11068:17, 11068:18,  
11068:25, 11071:4,  
11071:19, 11071:21,  
11071:25, 11076:19,  
11076:20, 11078:13,  
11078:20, 11079:16,  
11079:17, 11107:20,  
11111:11, 11112:9,  
11118:9, 11175:6,  
11177:20  
**suspected** - 11030:20,  
11031:1, 11076:21,  
11086:17, 11112:15  
**suspects** - 11053:14,  
11261:22  
**suspicious** - 11102:9,  
11102:12, 11264:15  
**sweater** - 11054:9  
**sworn** - 11245:20  
**Sworn** - 11029:9  
**system** - 11039:5,  
11128:13, 11140:5,  
11146:21, 11182:21  
**systems** - 11277:11,  
11279:17

**T**

**talks** - 11034:7,  
11233:14  
**Tallis** - 11028:14,  
11159:5, 11164:17,  
11167:20, 11170:21,  
11175:17, 11245:2  
**tampering** - 11189:15  
**tape** - 11254:10,  
11255:19, 11255:21  
**tapes** - 11254:11,  
11254:12  
**tasks** - 11262:2  
**Tdr** - 11028:5  
**tears** - 11133:11,  
11145:25  
**Technician** - 11027:13  
**technique** - 11154:8,  
11217:1, 11218:5  
**techniques** - 11191:3  
**technology** - 11240:5  
**telephone** - 11070:14,  
11110:9  
**television** - 11185:2,  
11282:10  
**temperature** - 11127:2  
**tend** - 11194:19,  
11257:16  
**tendered** - 11229:13  
**term** - 11055:8,  
11171:11, 11250:4,  
11250:16, 11258:13  
**terminology** - 11039:5  
**terms** - 11046:18,  
11055:15, 11057:5,  
11078:25, 11079:13,  
11080:21, 11082:20,  
11103:4, 11105:10,  
11107:3, 11115:12,  
11122:8, 11123:19,  
11135:6, 11143:4,  
11144:12, 11152:9,  
11152:22, 11164:12,  
11175:5, 11176:18,  
11177:2, 11179:22,  
11185:23, 11188:24,  
11195:10, 11196:1,  
11198:13, 11207:1,  
11215:9, 11218:4,  
11222:12  
**Territories** - 11141:1  
**territory** - 11046:22  
**test** - 11030:21,  
11031:4, 11031:8,  
11031:17, 11031:22,  
11031:23, 11032:6,  
11032:24, 11032:25,  
11033:2, 11033:8,  
11033:15, 11037:4,  
11037:9, 11037:12,  
11040:11, 11040:24,  
11041:4, 11041:5,  
11041:10, 11041:14,  
11042:5, 11042:6,  
11042:20, 11042:22,  
11042:24, 11043:4,  
11043:11, 11043:12,  
11043:13, 11044:8,  
11044:23, 11051:4,  
11051:19, 11052:2,  
11052:14, 11052:19,  
11052:23, 11052:24,  
11056:24, 11059:21,  
11059:22, 11060:19,  
11060:20, 11061:4,  
11061:6, 11061:8,  
11065:15, 11065:21,  
11066:16, 11073:18,  
11074:12, 11075:14,  
11075:18, 11076:19,  
11076:23, 11077:3,  
11077:6, 11077:7,  
11077:16, 11078:11,  
11078:13, 11078:24,  
11079:3, 11079:4,  
11079:7, 11079:13,  
11079:23, 11080:4,  
11081:2, 11081:4,  
11081:7, 11081:14,  
11081:18, 11081:19,  
11081:22, 11081:24,  
11082:7, 11082:10,  
11083:1, 11083:2,  
11083:7, 11083:15,  
11083:19, 11084:3,  
11084:8, 11084:12,  
11085:4, 11087:4,  
11087:14, 11087:16,  
11087:18, 11088:2,  
11088:6, 11088:13,  
11088:15, 11089:1,  
11089:5, 11089:8,  
11089:12, 11090:3,  
11094:2, 11094:22,  
11094:23, 11097:1,  
11097:5, 11097:8,  
11097:16, 11098:8,  
11098:19, 11099:12,  
11100:2, 11100:6,  
11100:7, 11100:9,  
11100:11, 11100:17,  
11100:21, 11101:4,  
11101:17, 11103:18,  
11104:4, 11104:7,  
11104:11, 11104:17,  
11104:19, 11105:11,  
11106:4, 11110:22,  
11112:16, 11113:7,  
11117:20, 11118:6,  
11127:5, 11127:16,  
11129:6, 11129:10,  
11129:14, 11134:16,  
11137:3, 11137:11,  
11137:25, 11143:2,  
11148:21, 11148:22,  
11149:11, 11149:12,  
11149:15, 11154:12,  
11154:13, 11154:17,  
11155:20, 11155:25,  
11156:2, 11156:5,  
11156:21, 11157:7,  
11158:19, 11159:24,  
11160:13, 11160:14,  
11160:15, 11160:19,  
11161:2, 11161:14,  
11161:18, 11161:19,  
11162:16, 11163:8,  
11163:18, 11166:3,  
11166:13, 11166:20,  
11169:1, 11170:14,  
11174:9, 11179:4,  
11179:8, 11190:20,  
11204:25, 11205:2,  
11206:1, 11206:4,  
11206:19, 11206:22,  
11206:25, 11207:2,  
11209:5, 11209:8,  
11213:2, 11213:8,  
11213:9, 11213:10,  
11213:14, 11213:17,  
11221:21, 11221:24,  
11222:4, 11222:6,  
11222:7, 11222:8,  
11233:25, 11240:20,  
11240:23, 11240:24,  
11241:3, 11241:21,  
11241:25, 11242:3,  
11244:11  
**tested** - 11039:12,  
11051:14, 11051:16,  
11052:8, 11060:14,  
11060:15, 11061:1,  
11062:6, 11063:8,  
11082:18, 11084:3,  
11088:24, 11092:22,  
11093:4, 11097:6,  
11103:22, 11107:12,  
11111:12, 11111:21,  
11112:4, 11112:23,  
11113:5, 11117:14,  
11123:15, 11123:24,  
11136:23, 11138:19,  
11154:17, 11155:21,  
11156:14, 11157:3,  
11163:20, 11164:22,  
11164:25, 11166:2,  
11182:1, 11193:20,  
11204:6, 11205:14,  
11230:19  
**testified** - 11198:11,  
11223:12, 11227:8  
**testify** - 11130:12,  
11243:15, 11245:23  
**testifying** - 11066:24,  
11180:7, 11253:25  
**Testimony** - 11026:14  
**testimony** - 11130:15,  
11131:11, 11138:6,  
11140:1, 11180:12,  
11188:2, 11215:5,  
11227:12, 11275:16  
**testing** - 11030:15,  
11044:5, 11044:10,  
11047:3, 11048:8,  
11051:4, 11051:23,  
11053:6, 11053:8,  
11063:4, 11068:8,  
11072:24, 11078:2,  
11083:21, 11084:23,  
11089:16, 11091:21,  
11091:22, 11091:25,  
11093:11, 11095:21,  
11101:21, 11105:24,  
11106:10, 11111:7,  
11111:17, 11116:8,  
11118:4, 11118:16,  
11119:7, 11121:14,  
11121:16, 11123:18,  
11125:8, 11129:25,  
11130:1, 11136:25,  
11139:1, 11139:11,  
11139:12, 11139:18,  
11139:19, 11139:23,  
11154:16, 11167:10,  
11172:16, 11183:16,  
11184:7, 11184:9,  
11189:11, 11190:11,  
11194:17, 11196:5,  
11203:24, 11211:12,  
11217:15, 11218:25,  
11229:15, 11236:2,  
11236:5, 11236:13,  
11237:5, 11237:8,  
11237:24, 11238:12,  
11238:13, 11238:18,  
11238:21, 11240:18,  
11241:6, 11241:8,  
11244:18  
**tests** - 11033:6,  
11033:12, 11043:9,  
11045:25, 11048:4,  
11052:20, 11052:22,  
11056:3, 11058:19,  
11063:2, 11063:19,  
11063:22, 11065:21,  
11065:25, 11066:20,  
11068:19, 11071:6,  
11074:8, 11074:12,  
11088:18, 11089:9,  
11089:20, 11089:23,  
11090:3, 11090:9,  
11099:14, 11101:6,  
11105:16, 11110:21,  
11115:8, 11117:9,  
11124:23, 11125:5,  
11126:3, 11128:5,  
11157:13, 11166:6,  
11166:13, 11170:18,  
11174:14, 11178:24,  
11183:7, 11203:19,  
11205:9, 11206:17,  
11208:11, 11208:13,  
11208:20, 11208:23,  
11214:13, 11214:16,  
11221:5, 11221:17,  
11235:19, 11237:17,  
11238:7, 11238:9,  
11239:1, 11239:7,  
11241:2, 11241:4  
**tests'** - 11206:10  
**th** - 11209:24  
**that'** - 11263:20  
**thaw** - 11132:14  
**thawed** - 11072:11,  
11072:15, 11072:20,  
11073:17, 11133:25,  
11218:17



**thawing** - 11073:5,  
 11073:25, 11075:15  
**thefts** - 11260:21  
**themselves** - 11045:13  
**theories** - 11085:1  
**theory** - 11074:11,  
 11074:13, 11075:4,  
 11075:15, 11194:9  
**therefore** - 11032:4,  
 11037:8, 11039:18,  
 11052:2, 11063:8,  
 11080:5  
**thinking** - 11084:24,  
 11099:4, 11199:9,  
 11199:11, 11229:19  
**thinks** - 11183:12  
**third** - 11234:17,  
 11234:24  
**thoughts** - 11075:6,  
 11201:6  
**thousand** - 11142:2,  
 11142:11  
**thousands** - 11232:24  
**three** - 11030:18,  
 11036:18, 11047:17,  
 11122:2, 11141:16,  
 11177:6, 11238:14,  
 11247:14, 11249:17,  
 11270:5, 11271:10,  
 11271:13, 11275:1,  
 11276:12, 11276:13  
**three-step** - 11030:18  
**tip** - 11196:20  
**tipping** - 11197:5  
**today** - 11047:20,  
 11049:4, 11049:10,  
 11143:25, 11144:9,  
 11148:20, 11149:8,  
 11188:6, 11204:9,  
 11210:10, 11231:3,  
 11231:6, 11231:18,  
 11241:17  
**today'** - 11063:12  
**today's** - 11070:15  
**together** - 11043:16,  
 11045:7, 11113:11,  
 11224:8, 11225:8,  
 11226:7, 11242:20,  
 11277:7, 11280:20  
**tomorrow** - 11282:20,  
 11283:12  
**tone** - 11069:1,  
 11076:8  
**took** - 11042:16,  
 11063:23, 11110:9,  
 11110:18, 11135:24,  
 11186:17, 11269:2  
**tool** - 11041:17,  
 11041:19  
**top** - 11034:13,  
 11040:20, 11047:16,  
 11054:21, 11075:12,  
 11091:10, 11091:15,  
 11122:21, 11127:12,  
 11131:24, 11133:6,  
 11146:10, 11161:25,  
 11201:23, 11202:5,  
 11212:25, 11224:22,  
 11233:11, 11248:15,  
 11266:7, 11266:13,  
 11268:13  
**toque** - 11059:9,  
 11059:12, 11064:25  
**touch** - 11062:24,  
 11068:12, 11078:19,  
 11138:11  
**touched** - 11031:14  
**touque** - 11054:11,  
 11056:8  
**toward** - 11196:15  
**towards** - 11113:22,  
 11197:5, 11197:10,  
 11243:24, 11243:25,  
 11244:16  
**traffic** - 11247:13,  
 11247:14, 11247:16  
**training** - 11140:11,  
 11141:5, 11144:18,  
 11240:6  
**transcript** - 11147:9,  
 11150:1, 11150:8,  
 11175:13, 11179:25,  
 11180:5, 11198:9,  
 11199:16, 11216:15,  
 11227:6, 11229:1,  
 11230:2  
**Transcript-** 11026:12,  
 11030:1  
**transcription** -  
 11284:5  
**transcripts** - 11223:16,  
 11223:17  
**transferred** -  
 11094:21, 11140:17  
**treat** - 11233:8  
**trial** - 11130:13,  
 11130:15, 11130:17,  
 11131:19, 11132:15,  
 11133:3, 11136:2,  
 11138:6, 11140:1,  
 11150:1, 11159:10,  
 11179:18, 11180:2,  
 11180:8, 11184:17,  
 11184:24, 11186:7,  
 11188:3, 11195:20,  
 11198:8, 11199:4,  
 11211:14, 11215:5,  
 11223:13, 11225:1,  
 11227:12, 11227:15,  
 11228:1, 11229:25,  
 11236:25, 11273:14,  
 11275:1  
**trial'** - 11275:12  
**tried** - 11155:6,  
 11155:8, 11230:11,  
 11231:2, 11231:20,  
 11265:23  
**trip** - 11116:17,  
 11268:1  
**tripped** - 11246:10  
**trousers** - 11110:2,  
 11110:11, 11116:21,  
 11117:10  
**Trousers-** 11116:3  
**true** - 11143:22,  
 11199:3, 11200:1,  
 11284:5  
**trunk** - 11109:23  
**try** - 11041:7,  
 11042:10, 11042:20,  
 11057:16, 11062:25,  
 11084:15, 11084:16,  
 11090:7, 11174:7,  
 11236:3, 11243:4,  
 11243:23, 11279:16  
**trying** - 11125:21,  
 11173:21, 11174:9,  
 11186:14, 11227:21,  
 11275:19, 11276:17,  
 11279:8, 11279:10  
**tube** - 11094:23,  
 11109:16  
**Tuesday-** 11026:21  
**Turn-** 11075:12  
**turn** - 11040:17,  
 11040:19, 11045:24,  
 11054:19, 11056:6,  
 11066:5, 11067:13,  
 11070:6, 11089:16,  
 11098:12, 11107:25,  
 11108:17, 11116:11,  
 11118:11, 11122:18,  
 11138:6, 11143:7,  
 11153:2, 11157:23,  
 11161:23, 11163:5,  
 11164:15, 11167:16,  
 11170:20, 11175:13,  
 11187:17, 11187:19,  
 11189:3, 11190:17,  
 11193:5, 11193:23,  
 11195:15, 11197:13,  
 11197:16, 11198:19,  
 11201:10, 11201:18,  
 11201:20, 11202:4,  
 11207:16, 11211:21,  
 11212:19, 11212:24,  
 11215:22, 11218:13,  
 11249:20, 11250:8,  
 11258:17, 11264:12,  
 11279:23  
**turnaround** -  
 11063:25, 11064:1  
**turned** - 11106:23,  
 11157:16, 11168:12,  
 11168:14, 11244:12  
**twenty** - 11203:17  
**twice** - 11185:9  
**twiggd** - 11275:10  
**two** - 11033:19,  
 11033:25, 11034:2,  
 11034:8, 11034:15,  
 11034:17, 11034:20,  
 11034:21, 11036:18,  
 11043:9, 11045:22,  
 11055:24, 11057:1,  
 11061:18, 11061:24,  
 11063:13, 11067:21,  
 11083:9, 11090:16,  
 11093:9, 11093:10,  
 11102:1, 11106:18,  
 11106:24, 11110:22,  
 11122:2, 11133:22,  
 11137:7, 11141:16,  
 11143:8, 11143:13,  
 11143:14, 11145:15,  
 11147:19, 11155:4,  
 11156:8, 11163:9,  
 11163:19, 11164:18,  
 11165:17, 11173:8,  
 11176:1, 11177:5,  
 11189:8, 11189:25,  
 11194:21, 11210:1,  
 11210:15, 11222:3,  
 11225:9, 11230:22,  
 11236:1, 11236:4,  
 11238:14, 11251:21,  
 11266:3, 11270:16,  
 11272:8, 11273:23,  
 11275:17, 11277:7,  
 11278:20, 11279:10,  
 11280:20, 11280:25  
**Two-** 11123:5  
**type** - 11038:15,  
 11039:3, 11039:13,  
 11041:25, 11043:2,  
 11043:21, 11044:2,  
 11044:17, 11044:19,  
 11057:23, 11058:4,  
 11058:14, 11060:3,  
 11060:9, 11100:1,  
 11114:5, 11128:16,  
 11129:3, 11129:4,  
 11130:3, 11131:2,  
 11135:4, 11136:10,  
 11136:19, 11137:2,  
 11137:4, 11137:9,  
 11137:12, 11137:16,  
 11137:22, 11166:4,  
 11172:10, 11172:22,  
 11173:12, 11183:11,  
 11190:25, 11191:1,  
 11191:6, 11192:12,  
 11192:14, 11192:21,  
 11192:24, 11194:7,  
 11195:7, 11207:22,  
 11225:14, 11235:20,  
 11236:2, 11236:11,  
 11238:21, 11254:12,  
 11258:16, 11260:10,  
 11262:10, 11264:2,  
 11264:22, 11264:24,  
 11270:24, 11273:8,  
 11274:11  
**Type-** 11123:14  
**typed** - 11099:22,  
 11254:22, 11256:7  
**types** - 11272:24  
**typing** - 11099:24,  
 11100:2  
**U**  
**U1** - 11060:11,  
 11063:15, 11064:7,  
 11064:13, 11065:3,  
 11083:11, 11092:18,  
 11092:21, 11095:14,  
 11095:21, 11096:5  
**U2** - 11060:11,  
 11063:15, 11064:7,  
 11064:13, 11065:3,  
 11083:11, 11092:15,  
 11092:18, 11092:21,  
 11095:15, 11095:21,  
 11096:6  
**ultimately** - 11048:8,  
 11220:13  
**Umm** - 11035:4,  
 11040:6, 11040:13,  
 11063:9, 11065:23,  
 11068:12, 11071:15,  
 11084:13, 11209:12,  
 11215:1, 11266:8,  
 11266:17  
**umm** - 11037:10,  
 11221:15  
**unable** - 11191:5  
**unclear** - 11107:10  
**uncommon** -  
 11061:17, 11068:12,  
 11086:19, 11093:13,  
 11093:16, 11183:13,  
 11184:4, 11226:8  
**under** - 11048:12,  
 11050:11, 11051:19,  
 11064:4, 11092:10,  
 11095:13, 11096:24,  
 11114:24, 11121:4,  
 11122:24, 11146:20,  
 11178:3, 11180:20,  
 11207:11, 11218:14,  
 11252:4, 11252:19,  
 11260:21  
**Under** - 11048:18  
**underneath** - 11249:8  
**undershorts** -  
 11085:17, 11085:22,  
 11088:24, 11089:11,  
 11103:17, 11105:2,  
 11112:11, 11115:4  
**understood** -  
 11030:17, 11031:22,  
 11159:4, 11181:10,  
 11221:2, 11264:6  
**understudy** - 11091:4,  
 11140:19  
**undertake** - 11149:15  
**uniform** - 11162:20  
**University** - 11140:7  
**unknown** - 11067:21,  
 11278:8  
**Unless** - 11071:25,  
 11161:11  
**unless** - 11099:18,  
 11158:12, 11198:2,  
 11250:13, 11252:1,  
 11252:7, 11252:15,  
 11275:25, 11276:7  
**unlikely** - 11216:15  
**unsolved** - 11276:13  
**Unused** - 11202:14  
**unusual** - 11189:14  
**up** - 11030:12,  
 11035:20, 11036:7,  
 11042:9, 11073:19,  
 11081:8, 11082:7,  
 11092:3, 11094:14,  
 11095:11, 11104:23,  
 11112:5, 11118:6,  
 11125:14, 11165:20,  
 11167:20, 11186:15,  
 11190:2, 11190:5,  
 11197:12, 11201:23,  
 11216:12, 11220:17,  
 11224:13, 11224:15,  
 11226:11, 11226:25,  
 11230:2, 11230:7,  
 11233:2, 11235:6,  
 11235:15, 11236:16,  
 11237:3, 11245:9,  
 11246:10, 11246:16,  
 11247:25, 11248:12,  
 11252:13, 11254:11,  
 11254:13, 11256:8,  
 11256:23, 11258:16,  
 11260:9, 11260:11,  
 11260:16, 11261:12,  
 11261:20, 11261:25,  
 11262:11, 11263:19,  
 11264:1, 11264:25,  
 11265:8, 11265:21,  
 11268:23, 11269:5,  
 11269:9, 11271:6,  
 11272:24, 11273:1,  
 11273:11, 11276:11,  
 11279:1, 11279:24,  
 11280:19  
**up'** - 11261:15  
**urinary** - 11182:21,  
 11183:12  
**urine** - 11077:12,  
 11078:2, 11078:9,  
 11154:14, 11166:23,  
 11167:1, 11202:11,  
 11202:13, 11202:16,  
 11202:21, 11205:15,  
 11205:22, 11210:6,  
 11210:16, 11210:20,  
 11211:2, 11211:16,  
 11212:6, 11218:21  
**Urine** - 11040:5  
**useless** - 11157:16  
**usual** - 11078:1  
**V**  
**V1** - 11119:18,  
 11120:4, 11120:8,  
 11122:23, 11125:2,  
 11126:23, 11127:14,  
 11127:17, 11128:1,  
 11128:15  
**V2** - 11119:18,  
 11119:25, 11120:1,  
 11122:22, 11122:23,  
 11128:1  
**vagina** - 11138:18  
**vaginal** - 11051:25,  
 11119:25, 11138:17,  
 11139:20, 11222:20



**valid** - 11198:13,  
11244:12  
**value** - 11082:17,  
11138:24, 11139:5  
**variable** - 11100:22  
**various** - 11039:2,  
11052:1, 11062:6,  
11097:14, 11160:1,  
11185:18, 11188:1,  
11197:15, 11210:21,  
11255:14, 11259:1  
**vary** - 11113:13  
**vegetables** - 11098:1,  
11098:5, 11154:20,  
11155:17, 11160:5,  
11160:6, 11199:20,  
11230:23  
**vehicle** - 11109:6,  
11109:12, 11109:15,  
11179:21  
**verbally** - 11106:25  
**Vernon** - 11246:3  
**versa** - 11274:24,  
11276:8  
**version** - 11033:17,  
11127:23  
**versus** - 11139:6,  
11194:22, 11196:12,  
11197:6  
**vial** - 11033:23,  
11052:22, 11148:10,  
11150:8, 11150:18,  
11153:15, 11153:18,  
11165:3, 11165:14,  
11166:7, 11175:20,  
11230:18  
**vials** - 11034:17,  
11034:20, 11034:21,  
11034:22, 11034:23,  
11035:10, 11035:11,  
11035:15, 11036:3,  
11036:12, 11067:21,  
11143:9, 11143:14,  
11143:16, 11143:19,  
11143:22, 11144:1,  
11144:17, 11147:20,  
11147:23, 11147:25,  
11148:7, 11148:16,  
11153:6, 11153:9,  
11153:12, 11163:9,  
11164:18  
**vice** - 11274:24,  
11276:8  
**victim** - 11170:12,  
11194:8, 11194:22,  
11194:25  
**victim's** - 11048:19,  
11054:9, 11194:4  
**Victor** - 11035:22  
**view** - 11082:8,  
11189:5, 11196:19  
**Vinnick** - 11091:2,  
11091:4  
**visible** - 11080:1,  
11117:15, 11221:17,  
11221:24  
**visit** - 11127:13  
**visual** - 11111:2,  
11111:4, 11176:3  
**visually** - 11030:19  
**Volume** - 11026:22

## W

**W-five** - 11185:6  
**wade** - 11131:1  
**waistband** - 11112:13  
**walk** - 11258:20  
**wallet** - 11054:8,  
11056:2

**Ward** - 11259:12  
**wash** - 11117:22  
**washed** - 11116:6,  
11117:12, 11117:17,  
11118:2  
**washing** - 11117:19  
**waste** - 11222:24,  
11239:7  
**Water** - 11094:8  
**water** - 11094:10,  
11094:14, 11094:19,  
11111:6  
**Watson** - 11028:6  
**ways** - 11038:5,  
11061:24, 11232:6  
**weak** - 11040:8,  
11094:18, 11112:25,  
11113:3  
**weaker** - 11039:2,  
11173:2  
**weakness** - 11173:3  
**Wednesday** - 11133:2  
**week** - 11271:15,  
11275:3, 11275:6  
**weeks** - 11092:5,  
11220:25  
**weigh** - 11196:22  
**Wempe** - 11028:9  
**whatnot** - 11178:4,  
11253:5, 11260:21,  
11261:23  
**whatsoever** - 11119:8,  
11130:10, 11173:7,  
11173:23, 11226:15  
**where** - 11267:20  
**whereas** - 11043:11,  
11094:15, 11139:16  
**white** - 11083:17,  
11085:22, 11086:7,  
11129:14, 11162:20  
**whole** - 11080:5,  
11146:17, 11221:22,  
11222:7, 11261:7  
**wide** - 11077:23  
**Wilde** - 11027:12  
**Williams** - 11197:19,  
11211:24  
**willing** - 11234:8,  
11244:21  
**Wilson** - 11105:25,  
11106:1, 11106:6,  
11106:17, 11109:7,  
11110:9, 11114:3,  
11229:8, 11267:11  
**Wilson's** - 11109:5  
**wine** - 11111:24,  
11116:3, 11116:21  
**Winnipeg** - 11116:19,  
11116:20, 11210:21,  
11215:21  
**winter** - 11116:17  
**wipe** - 11117:13  
**wise** - 11144:3,  
11144:5  
**witness** - 11158:16,  
11160:9, 11186:7,  
11245:18, 11272:7,  
11276:14  
**witnesses** - 11265:15,  
11280:13  
**Wolch** - 11028:2,  
11029:8, 11187:21,  
11242:12, 11242:15,  
11242:17, 11242:25,  
11243:1, 11245:11  
**wonder** - 11090:13,  
11224:14, 11272:6  
**wondering** - 11085:5,  
11118:15, 11125:4,  
11136:15, 11137:1,

11152:12, 11205:19,  
11281:2  
**Wood** - 11029:9,  
11245:19, 11245:20,  
11245:22, 11245:25,  
11246:19, 11248:1,  
11248:15, 11253:17,  
11270:19, 11272:12,  
11275:14, 11279:25  
**wool** - 11054:10,  
11054:11, 11056:8,  
11109:21  
**word** - 11099:5,  
11135:7, 11135:11,  
11135:15, 11149:2,  
11216:13, 11241:17,  
11244:19, 11252:23,  
11277:15  
**words** - 11041:21,  
11049:16, 11070:21,  
11146:3, 11155:16,  
11161:12, 11198:22,  
11240:22  
**worn** - 11116:7  
**worn'** - 11117:13  
**worth** - 11185:5  
**write** - 11070:14,  
11228:23, 11263:25  
**writer** - 11109:20  
**writes** - 11070:13,  
11195:16  
**written** - 11066:21,  
11099:18, 11235:3  
**wrongdoings** -  
11219:14  
**Wrongful** - 11026:3

## X

**X'** - 11261:13

## Y

**year** - 11092:1,  
11092:3, 11118:24,  
11140:18, 11181:25,  
11182:5, 11182:11,  
11222:2, 11247:9  
**years** - 11185:16,  
11203:17, 11229:12,  
11231:6, 11234:11,  
11238:14, 11247:13,  
11247:14  
**yellow** - 11035:7,  
11035:8, 11035:9,  
11165:12, 11210:22  
**yellowish** - 11034:9,  
11035:5, 11067:22,  
11133:24, 11143:21,  
11165:10, 11210:15,  
11218:16, 11218:17,  
11218:19, 11218:23  
**Yellowish** - 11202:6,  
11202:9  
**yellowy** - 11166:18  
**yesterday** - 11030:9,  
11030:25, 11031:5,  
11032:14, 11043:9,  
11046:21, 11224:4,  
11224:7  
**young** - 11183:14,  
11184:5  
**younger** - 11183:1  
**yourself** - 11105:16,  
11166:11, 11171:14,  
11243:15  
**Yukon** - 11140:25  
**yup** - 11261:4,  
11263:13

