

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

Transcript of Proceedings

and

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

On Tuesday, February 28th, 2006

Volume 129

Inquiry Proceedings



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Mr. Hersh Wolch, Q.C., **for** Mr. David Milgaard
Ms. Joanne McLean, **for** Ms. Joyce Milgaard
Ms. Lana Krogan, **for** Government of Saskatchewan
Ms. Catherine Knox, **for** Mr. T.D.R. (Bobs) Caldwell
Mr. Garrett Wilson, Q.C., and Mr. Jay Watson, Esq.,
 for Mr. Serge Kujawa
Mr. Pat Loran, Esq., **for** the Saskatoon Police Service
Mr. Chris Boychuk, Esq., **for** Mr. Eddie Karst
Mr. Bruce Gibson, Esq., **for** the RCMP
Mr. Eamon O'Keefe, Esq., **for** Mr. Larry Fisher
Mr. David Frayer, Q.C., **for** Minister of Justice
 (Canada), The Hon. Vic Toews
Mr. Marshall Hopkins, Esq., **for** Justice Calvin Tallis
 (Retired)



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1 appeal on January 5th, 1971 and that an
2 application for leave to appeal to the Supreme
3 Court had been received on June 15th, 1971 and
4 then was argued and refused on November 15th,
5 1971. And so in terms of a period of overlap when
6 we look at your office's dealings with respect to
7 the two matters, I guess it would be fair to say
8 that there was a period of overlap between
9 February, approximately 1971, and November, 1971
10 once the Supreme Court had refused Mr. Milgaard's
11 application for leave.

12 And we've heard your thoughts as
13 well, Mr. MacKay, on what material Mr. Kujawa
14 likely would have reviewed in terms of his work on
15 both matters. Do you have any recollection or
16 knowledge of a connection being drawn by Mr.
17 Kujawa or anyone else in the office in 1971 to the
18 effect that Larry Fisher might be responsible for
19 the Gail Miller murder?

20 A No.

21 Q Do you think that it is possible that Mr. Kujawa
22 made this connection and chose to ignore it and/or
23 cover it up?

24 A I'm not sure how to answer that question. I
25 wouldn't know whether he made the connection or



1 not because I never discussed either case with
2 him. If you are asking me would I be surprised if
3 he made the connection and ignored the connection
4 or attempted to cover it up, I would be amazed.

5 Q And I guess I'm asking that from the perspective
6 that you would have had an opportunity through the
7 years in your work with Mr. Kujawa to observe his
8 habits, his approach to his work, his ethics and
9 otherwise.

10 A Yes.

11 Q And I think my question comes from that context,
12 whether, and I realize I'm just asking for your
13 own opinion, but having knowledge of those
14 matters, would you expect that that would be
15 something that Mr. Kujawa could possibly do?

16 A No, no, it would be antithetical to everything
17 that I know that Mr. Kujawa stands for and
18 believes in and from a purely utilitarian point of
19 view I can't, I cannot understand why he or anyone
20 else would do it because at worst what it would
21 mean if it -- if -- if there was -- if there was
22 a -- if the prosecution had failed, if there was a
23 wrongful conviction in this situation, then that
24 matter would have been fixed if it came to Mr.
25 Kujawa's attention, and the reason why I say from



1 a utilitarian point of view, that there is no,
2 there's nothing involved in this except -- for Mr.
3 Kujawa's sake, except for some embarrassment, and
4 Mr. Kujawa would not be the one who would be
5 embarrassed in any event. He couldn't be sued,
6 *The Queen versus Nelles* came down from the Supreme
7 Court long after this happened. He wouldn't be
8 fired, we went into the Court of Appeal all the
9 time and were told that people were convicted when
10 they shouldn't have been convicted, it didn't
11 happen all the time, but it happened from time to
12 time. There would just be no reason why he would
13 go into an elaborate cover-up for the purpose of
14 what, antagonism to Mr. Milgaard? I can't see
15 that. He didn't know Mr. Milgaard as far as I
16 know. To protect the reputation of the
17 prosecution service? That's absurd on its face
18 because he would enhance the reputation of the
19 prosecution service if he were aware of someone
20 who was wrongfully convicted and did something
21 about it, that would enhance the reputation, not
22 be contrary to the reputation, so no, on any of my
23 knowing Mr. Kujawa and on many, on practical
24 reasons I just cannot, I couldn't accept that that
25 was so.



1 Q And speaking hypothetically then, if a suspicion
2 of this nature had arisen, that there was in fact
3 a connection following Mr. Kujawa's dealings with
4 both files, or both sets of materials and matters,
5 what do you expect he would have done if that
6 suspicion had arisen in his mind?

7 A If the suspicion had arisen in his mind, he would
8 have contacted defence counsel I would think and
9 would have consented to the matter being reheard
10 by the Court of Appeal.

11 Q So following Mr. Fisher's convictions in December,
12 1971, what do you recall was your next involvement
13 with either of these cases, Mr. MacKay?

14 A I really can't recall. I think that -- I learned
15 that I drafted a letter for the signature of the
16 Minister of Justice, I think that was the only
17 involvement that I had. I had no involvement that
18 I can recall when I was director of public
19 prosecutions, at that time I suspect that Mrs.
20 Milgaard and people who were assisting her were
21 working very hard for Mr. Milgaard, but it didn't
22 come into my purview, nor did it at any time that
23 I was, the very brief time that I was Acting
24 Deputy Attorney General or Deputy Minister of
25 Justice.



1 Q And I understand, with the benefit now of having
2 reviewed some materials, you realize there was
3 some sporadic involvement by yourself, and I think
4 you've referred to one of the matters --

5 A Yeah.

6 Q -- and perhaps we'll take a look at just a couple
7 of other pieces of material.

8 A Sure.

9 Q The first piece is a letter from 1977, the
10 document is 066537, and you'll note it's a letter
11 dated October 31, 1971 from yourself to Mr.
12 Caldwell and you are enclosing the trial
13 transcript and asking that it be returned after
14 he's finished using it. Do you have any
15 recollection of forwarding the transcript on to
16 Mr. Caldwell at this time period?

17 A No, I don't.

18 Q Or any discussions that were --

19 A No.

20 Q -- occurring with Mr. Caldwell?

21 A I assume that he either called me or wrote me and
22 asked me to send the transcript back to him.

23 Q Okay. And just one other observation on this
24 page, we see the file reference that we've become
25 familiar with with respect to *R versus Milgaard*



1 being C 16297 on this piece as well.

2 The next document I'm going to
3 show you is a 1990 piece of correspondence, the
4 document ID is 004703 -- I'm sorry, 004705. This
5 is the letter that I think begins this chain of
6 correspondence. It's a letter dated September 24,
7 1990 directed to public prosecutions in Regina
8 from Bruce Miller, director of Winnipeg
9 prosecutions, he notes:

10 "Enclosed herewith please find a copy of
11 a letter which was written to the
12 Minister of Justice of Manitoba by a
13 resident of the City of Winnipeg
14 relating to the case of David Milgaard.
15 This is forwarded to you for whatever
16 action, if any, you deem appropriate."

17 And the letter is attached and it's a citizen
18 urging that the David Milgaard case be re-opened
19 and it is page 2 of this document, but I'll turn
20 next to 004703 and this appears to be a memo from
21 yourself to Ellen Gunn, executive director, and
22 it's in relation to the letter that had been
23 received and forwarded on from Winnipeg and you
24 state:

25 "The letter to the Manitoba Attorney



1 General, a copy of which Bruce Miller
2 forwarded to us is a general complaint
3 based upon the conclusion that David
4 Milgaard is innocent. I do not think
5 that it needs any further response
6 except for an acknowledgement to Bruce
7 Miller which I have done."

8 And do you recall why you would have had
9 involvement in this apparent capacity at that
10 time?

11 A Because I had been -- because I had been
12 involved -- well, first of all, because I was
13 around at that time, or just shortly after Mr.
14 Milgaard's trial occurred, and Mr. Kujawa at that
15 point, this was 1990, was no longer in public
16 prosecutions, he was general counsel, and because
17 I had been involved, I assume, in the Larry Fisher
18 matter which was tied up with it too, it could
19 have been that, or it could have simply been that
20 these, this sort of matter was parceled out to
21 various people in public prosecutions, in head
22 office and public prosecutions, which was a very
23 different operation at 1990 than it was in 1971,
24 and the point was was that the director of public
25 prosecutions was not necessarily able to take



1 action on all these things, so what she did was,
2 it went out to other people who were in the office
3 and you handled it, so I may have just been the
4 person who was on the list.

5 Q And I'm going to step back in time from this
6 correspondence for a moment. We've heard in
7 evidence previously in the Inquiry that a request
8 was made on behalf of the Milgaard family in
9 approximately 1981 of the Saskatoon Police
10 Department for a copy of their file in relation to
11 the Milgaard investigation and as well permission
12 to contact certain officers who had been involved
13 in that investigation. I don't have the response
14 from the Police Service, but I think I can
15 summarize it. In effect, the Police Service
16 indicated that they weren't willing to provide the
17 file directly to the persons who were requesting
18 the file, nor give permission to have access to
19 some of their officers for purposes of interviews,
20 although they did invite those who were requesting
21 to contact the Attorney General's office and to
22 process those requests through the Attorney
23 General's office so that they could be dealt with
24 in that manner, and I'm wondering through, and I
25 realize I'm covering a long time period, but



1 through the 1970s, 1980s, do you have any
2 recollection of the department being contacted by
3 someone on behalf of the Milgaard family in
4 relation to such matters, including obtaining the
5 Saskatoon Police Service file or otherwise?

6 A No, I don't, and I probably wouldn't know about
7 it, I would think those contacts would go to the
8 deputy minister's office, and the director of
9 public prosecutions at the time may have been
10 consulted with regard to this matter. I would
11 have thought that perhaps more likely it would be
12 some people in civil law on the policy -- there
13 was a policy generally, I can speak to that, with
14 regard to providing Crown files to people who
15 generally wanted them for civil action and that
16 policy was that they would provide witness
17 statements to both parties, but that other
18 matters, such as police reports, were privileged.
19 Now, that was a legal opinion that I didn't make
20 and I assume it was obtained from the civil --
21 from the civil side of the ministry, of the
22 justice ministry, so I don't, and I likely
23 probably would not have in any event if there had
24 been.

25 Q Had been involved?



1 A If there had been some inquiries with regard to
2 files.

3 Q And given what you understand of the policy and
4 the practice, and if we apply it more specifically
5 to these circumstances, of course the family was
6 attempting to gather information, had taken the
7 position that Mr. Milgaard had been wrongfully
8 convicted, from an understanding of the policy
9 that had existed and the practices that were
10 employed at the time, what do you expect would
11 have been done with a request for assistance of
12 the nature that I've outlined?

13 A I really can't say. I really don't know. Mr.
14 Milgaard had been convicted, he claimed that he
15 was wrongly convicted, and there was -- there were
16 people who were working very hard to establish
17 that or to assist him with regard to that. Many
18 people claim to be wrongfully convicted, some of
19 them obviously are, and you have to certainly
20 guard against it. How seriously this would have
21 been taken by authorities in the ministry, in the
22 Justice Department, I really can't say.

23 Q And I won't dwell on it for very long, but given
24 that the original police investigation material
25 may in fact hold some information, potentially,



1 that would be very relevant to that cause, would
2 that be a consideration in determining whether a
3 party, in that sort of circumstance, should have
4 access to that sort of information, or what role
5 might the Attorney General's Department play?

6 A Again, I'm sorry, it's really -- it's not
7 something I can speak to because I would have to,
8 I would have to be guessing what the point of view
9 of people in the Justice Department were at that
10 time.

11 I suspect they would have
12 started from the proposition that Mr. Milgaard had
13 been convicted, that the matter had gone to the
14 Court of Appeal and had been reviewed at the Court
15 of Appeal, and the conviction had been upheld, and
16 the matter had gone to the Supreme Court of Canada
17 for leave to appeal and the leave had not been
18 granted, and on that basis it may not have had --
19 the application for the file, if I can call it
20 that, may not have had -- been sympathetically
21 viewed. Okay. But I'm, again, I'm just guessing
22 that that's what it might be.

23 Q Okay. Just moving forward chronologically, then,
24 the next time period I'm going to deal with is
25 1991. I'm wondering if you have a recollection,



1 Mr. MacKay, of an investigation that was being
2 conducted by the Saskatchewan Police Commission in
3 approximately 1991 into issues surrounding the
4 retention of the Larry Fisher files by the
5 Saskatoon Police Department, and certain other
6 suggestions of wrongdoing circulating around that;
7 do you have any recollection of that
8 investigation?

9 A I have a vague recollection of that, and it's been
10 reconstructed to a certain extent because I have
11 read, I have now read the Commission, and I may
12 indeed have read Commission's report, seen a copy
13 and read Commission's report when it came down.

14 Q I'm going to turn your attention to a copy of that
15 report. The document ID is 330778. If we could
16 turn to the next page, please, I'll read a portion
17 of the introductory comments to you, Mr. MacKay,
18 for context. Beginning in the first paragraph, at
19 the, first of all at the top it notes *Report on*
20 *Investigation Into Saskatoon City Police Force,*
21 *Retention of Files Relating to Larry Earl Fisher,*
22 it goes on to state:

23 "The Board of Police Commissioners of
24 the City of Saskatoon by a letter dated
25 September 13, 1991 requested the



1 Saskatchewan Police Commission to
2 inquire into allegations which appeared
3 in several newspaper articles that
4 certain files and records with respect
5 to convicted rapist Larry Earl Fisher
6 were missing from the Saskatoon Police
7 Department record system. The
8 allegations included:

- 9 1. That the Larry Fisher files and records
10 had been recently deliberately removed
11 from the system by someone.
- 12 2. That Larry Fisher had received unusual
13 treatment in having his guilty plea on
14 three charges of rape and one charge of
15 indecent assault which all originated in
16 Saskatoon disposed of in the City of
17 Regina.
- 18 3. That the four women who were the victims
19 of the above charges were never advised
20 that their attacker had plead guilty
21 with respect to such charges.

22 The thrust of the combined
23 allegations was that someone in the
24 Saskatoon City Police department was out
25 to conceal the existence of Larry



1 Fisher, and his convictions for sexually
2 assaulting four Saskatoon women, which
3 attacks occurred on October 21, 1968,
4 November 13, 1968, November 29th, 1968,
5 and February 21, 1970. The concern
6 expressed in the newspaper articles was
7 raised in the context that Larry Fisher
8 was a possible suspect in the murder of
9 Gail Miller in Saskatoon on January 31,
10 1969, for which murder David Milgaard
11 was convicted on January 31, 1970."

12 Listening to me read that, does that refresh your
13 memory at all, Mr. MacKay, as to this
14 investigation that was conducted?

15 A Not really. I think I was aware, I must have been
16 aware that the Police Commission was investigating
17 this, because one of my jobs as appellate counsel
18 was to review complaints against police officers
19 throughout the province to see if charges should
20 be laid, and so a great many of these things would
21 come across my desk.

22 I don't think that this one did
23 because there -- because in the Department of
24 Justice there was a policing division at that
25 time, and they would have been the people who



1 would be working with the police, with the
2 Commission.

3 Q I'm going to refer you to a couple other portions
4 of the report. The first starts at 330787. And
5 just prior to the last paragraph on the page, the
6 report has been speaking of the process leading to
7 Mr. Fisher's guilty pleas and the use of the
8 direct indictment in Regina, and the report then
9 goes on to state:

10 "Mr. Caldwell, Mr. Kujawa, and Mr. ...
11 McKay, were all interviewed and
12 indicated it was routine that persons
13 incarcerated in Prince Albert
14 Penitentiary who wished to dispose of
15 charges against them, were dealt with at
16 the City of Regina. The reasons
17 advanced by such persons had largely to
18 do with matters of convenience which
19 included:

20 1. If the matter was to be disposed of by
21 direct indictment, such indictment would
22 have to be signed by the
23 Attorney-General in the City of Regina."

24 And I think this was a factor that you mentioned
25 to us yesterday, Mr. MacKay, and is that the



1 rationale that you would agree with?

2 A Yes. Yes.

3 Q Number:

4 "2. Regina was the head office of the
5 Attorney-General's Department where the
6 staff existed to process such paperwork.
7 Other Attorney-General offices in the
8 Province of Saskatchewan including
9 Saskatoon were intended to be
10 prosecution offices only. The Saskatoon
11 office was staffed by two lawyers and
12 one secretary."

13 And would you agree that this was another reason
14 for the matter being processed in Regina?

15 A Yes, yes.

16 Q Number:

17 "3. The R.C.M.P. transports prisoners within
18 the province and R.C.M.P. planes
19 travelled more frequently between Prince
20 Albert and Regina than to any other
21 centre in the province due to the fact
22 that all sentence appeals by inmates are
23 heard by the Court of Appeal in Regina."

24 And would that be a rationale that you would
25 agree with?



1 A Yes.

2 Q And can you tell us as sense of what was happening
3 with sentence appeals in around this time period
4 that we're dealing with in 1991?

5 A Well, first, I guess I should say clearly I did
6 know about the Commission investigation since I
7 was interviewed.

8 The Court of Appeal at that
9 time, and to perhaps a lesser extent but pretty
10 well the same procedure still exists, heard
11 appeals, sentence appeals in Regina, and they were
12 set -- they heard sentence appeals every month all
13 year 'round, and for example during long vacation
14 in the summertime the Court of Appeal still sat
15 with regard to sentencing and sentence appeals.
16 Usually the sentence appeals were two days in the
17 month and the Court of Appeal heard a vast number
18 of appeals, they could hear up to 18 appeals a
19 day, so there were -- it was -- and the reason for
20 that was that appellants came from all over the
21 province to appear, and most of them appeared
22 without counsel and most of them argued their own
23 appeals, because it -- the appeal process was, in
24 many ways, a sentencing *de novo* hearing, although
25 the Court of Appeal, by the time of this, were --



1 was much more inclined to defer to what the trial
2 judge, what the trial judge, what the sentencing
3 judge had done. So there was -- there were many
4 appeals heard, everyone came from across the
5 province, and many of these people came from
6 Prince Albert because there was a penitentiary and
7 a correctional centre there, and so they were
8 flown directly between Prince Albert and Regina on
9 a regular basis. Taking prisoners up, also, that
10 happened.

11 Generally out of Saskatoon, if
12 they were taken to Prince Albert, they were
13 usually taken by van or by car. So I guess,
14 really, that process was already in place to bring
15 prisoners to Regina where it was not in place to
16 bring prisoners to other places.

17 Q I'll read you number 4:

18 "4. There had been no Court proceedings with
19 respect to the matters involving Larry
20 Fisher in Saskatoon, no prosecution file
21 had been opened in Saskatoon, and
22 therefore the most expedient method to
23 dispose of the charges against Fisher
24 given the resources available was
25 utilized."



1 And given the facts as stated there, would you
2 agree with that rationale as well, Mr. MacKay?

3 A Yes.

4 Q I'll turn you briefly to one further page in the
5 report, it's 330859. Umm, there, that's the page
6 I'm looking at. Just brief mention of contact
7 with you in the context of this investigation, Mr.
8 MacKay.

9 COMMISSIONER MacCALLUM: What was the doc.
10 ID, please?

11 MR. HARDY: Oh, the doc. ID is the same
12 document, Mr. Commissioner, that we have been
13 referring to, that is document ID --

14 COMMISSIONER MacCALLUM: Oh, okay.

15 MR. HARDY: -- 330778.

16 COMMISSIONER MacCALLUM: Uh-huh.

17 BY MR. HARDY:

18 Q It states that:

19 "On November 12, I spoke with Kenneth
20 McKay. ... and he advised that after
21 considerable thought on this matter he
22 recalled preparing the material but
23 handed the file to Serge Kujawa who
24 spoke to the matter."

25 I think we've covered that, Mr. MacKay. It goes



1 on to state:

2 "Serge Kujawa was contacted and he
3 supplied a letter which outlines the
4 rationale behind having the matter dealt
5 with in Regina. This letter is included
6 at this point."

7 And if we turn to the next page, please, we see a
8 copy of the letter from Mr. Kujawa to Mr. Graham,
9 and I'll read a portion of this letter to you.
10 Mr. Kujawa states, starting in the second
11 paragraph:

12 "While I do not have specific recall of
13 the details of this particular matter
14 all transfers of outstanding charges
15 came to the head office of the Attorney
16 General in Regina. This was true in
17 1971 and is still true to this day.

18 In 1971, I do not believe we
19 had an office in Saskatoon, matters were
20 handled by one person T.D.R. Caldwell.
21 Rather than send instructions to him, we
22 had the staff handle these transfers so
23 arrangements were made to hear the
24 matter in Regina."

25 And do you understand what Mr. Kujawa is stating



1 as a rationale here, Mr. MacKay?

2 A Yes.

3 Q And do you agree with that?

4 A Umm, I'm not sure that there was just one person,
5 there may have been two people in 1971. Mr.
6 Kujawa is probably right, his memory might be
7 better about this than I am, he was the Director
8 of Public Prosecutions. I thought that there was
9 just Mr. Caldwell and some office staff, but I --
10 or I thought there were Mr. Caldwell and I thought
11 that Mr. Perras was probably there at that time,
12 but I may be wrong.

13 Q And am I correct, though, that this technically
14 isn't -- wasn't a situation of a transfer of
15 charges as perhaps that term or phrase might
16 usually be referred to?

17 A No, it wasn't a transfer of charges, but it was,
18 in essence it was inter-provincial in the sense
19 that defence counsel was from Winnipeg and that
20 the request came from Manitoba when Larry Fisher
21 was in custody in Manitoba, but it's not, it's not
22 a transfer of charges.

23 Q Okay. And just a short portion of the last
24 paragraph, it notes:

25 "Another factor ...",



1 Mr. Kujawa notes:

2 "Another factor was the RCMP escort
3 plane flew more frequently between
4 Prince Albert and Regina than to
5 Saskatoon."

6 And, again, I think we've covered that aspect,
7 Mr. MacKay, and it's a rationale I think that you
8 agreed with; is that correct?

9 A Yes.

10 Q I'd like to move forward, and I should note during
11 about this time period we know that Mr. Milgaard
12 has made an application to have his conviction
13 reviewed by the Supreme Court of Canada, and we
14 know as well that the Government of Saskatchewan
15 became involved in that matter, and I wanted to
16 ask you; do you recall having any direct
17 involvement, yourself, in that process?

18 A No, I wasn't directly involved, except insofar as
19 by that time members of head office held regular
20 meetings in which there were information items and
21 work was parceled out, divided, and there were
22 also items that needed to have decisions made, and
23 they were made by the members of head office
24 rather than by the executive Director of Public
25 Prosecutions as that person had become. And so I



1 Crown.

2 The former head of prosecutions
3 for Saskatchewan is furious the *David*
4 *Milgaard* case will be reviewed by the
5 Supreme Court of Canada.

6 It doesn't matter if Milgaard
7 is innocent of the 1969 murder for which
8 he's spent 22 years in prison - his case
9 should remain closed, said Serge Kujawa,
10 now an NDP MLA

11 'I'm not primarily concerned
12 with his guilt or his innocence - what I
13 am concerned with is that you (the
14 media) and the lawyers are selling us
15 down the river.'

16 'The whole judicial system is
17 at issue - it's worth more than one
18 person,' he said.

19 Milgaard, 39, said Friday heads
20 will roll in the Saskatchewan Justice
21 system if the Supreme Court review -
22 likely to be held early next year -
23 finds he was wrongly convicted of the
24 Jan. 31, 1969 rape and murder of
25 Saskatoon nursing assistant Gail Miller.



1 'There's been a lot of
2 irresponsibility, there is no question
3 about that. Some heads will fall,' he
4 said.

5 Kujawa called Milgaard a
6 'kook,' and blamed the media for forcing
7 Justice Minister Kim Campbell to order
8 the review nine months after she refused
9 an earlier application for a new trial.

10 'The whole system of Justice is
11 built on the principle that the rights
12 of the community are more important than
13 the rights of the individual,' he said.

14 'That the rights of one
15 individual are more important than the
16 rights of everyone - that's the American
17 way. That's not the British (or
18 Canadian) way."

19 And I'll pause there for a moment, Mr. MacKay.
20 Do you generally recall these comments, or the
21 reporting of these comments, by Mr. Kujawa?

22 A No, but I probably -- I'm sure I was aware of
23 them.

24 Q Do you have any recollection of a reaction, on
25 your part, to these comments upon learning them?



1 A Well, my reaction would be that I don't agree with
2 them, and I probably would be surprised in -- that
3 Mr. Kujawa made those comments. On the other hand
4 Mr. Kujawa was known for his out -- for speaking
5 out when he was dealing with the media and perhaps
6 saying things that were, from time to time, not
7 really what he meant because they were done on the
8 spur of the moment, but I'm just meandering with
9 regard to that, I can't say. But do I agree with
10 them, certainly not.

11 Q Okay. You don't have a specific recollection of
12 considering these at the time and having a
13 reaction?

14 A No, but I understand that I did draft a letter for
15 the Minister of Justice, so I obviously did
16 consider them at the time.

17 Q Yes, and we'll look at that in just a moment. I'm
18 going to continue on with the article from where I
19 left off, starting here, and read the remaining
20 portion to you:

21 "Kujawa advised Crown attorney Bobs
22 Caldwell during Milgaard's 1970 trial,
23 and handled a failed appeal to the
24 Saskatchewan Court of Appeal in 1971,
25 and a later failed request for leave to



1 appeal to the Supreme Court of Canada.

2 In December 1971, he prosecuted
3 serial rapist Larry Fisher in Regina on
4 three rape charges and an assault charge
5 - but Fisher's Saskatoon victims were
6 never notified of his arrest or
7 conviction.

8 Milgaard's mother, Joyce, said
9 she can't believe Kujawa could have
10 handled both cases at the same time
11 without realizing Fisher could have been
12 Miller's murderer, as investigators now
13 believe.

14 'The whole thing stinks to high
15 heaven,' she said.

16 Fisher lied to police who
17 questioned him shortly after Miller's
18 murder, saying he went to work as usual
19 the day of her killing, but police
20 didn't investigate the false alibi.
21 He's now serving time in a B.C. prison
22 for a later rape.

23 Joyce Milgaard has said several
24 people involved in the original trial
25 who've made their careers in the



1 Saskatchewan Justice system don't want
2 the case re-opened.

3 Milgaard's defence lawyer,
4 Calvin Tallis, is now a Saskatchewan
5 Court of Appeal Justice, Caldwell worked
6 with the federal Justice Department
7 until his recent retirement, and a
8 police investigator on the case, Joe
9 Penkala, was Saskatoon's chief of police
10 until his own retirement this fall."

11 And do you recall, at this time, being generally
12 aware of this type of allegation or accusation,
13 Mr. MacKay, coming from those on behalf of Mr.
14 Milgaard?

15 A Well I think I must have been.

16 Q Turn, next, to 004290. It's another article that
17 shortly follows the one we've just covered,
18 December 3rd, 1991, Canadian Press, the headline
19 being *Kujawa comments 'shocking'*. And the first
20 portion, I won't read all of it, the first portion
21 outlines Mr. Wolch's reaction to Mr. Kujawa's
22 comments, and near the bottom of that first column
23 it restates some of the comments that we just
24 reviewed in the first article. If we could move
25 to the second column, please, I'll read a portion



1 of this to you. It states:

2 "But in an interview Monday, Kujawa took
3 issue with the quote and said the point
4 he was trying to make is that 'the
5 country is more important than any one
6 individual in it. Of course I care (if
7 an innocent person is in prison). It
8 could be my kid. It could be me.'

9 Kujawa said the media and
10 'self-promoting' lawyers have damaged
11 the system by forcing the *Milgaard* case
12 to the Supreme Court.

13 'No system is perfect, but we
14 can't, because of the possibility that
15 one person was improperly convicted,
16 ruin our whole Justice system and put it
17 in the hands of the prostitute lawyers
18 and media.

19 If *Milgaard* was wrongly
20 convicted, the matter should be dealt
21 with 'according to law,' said Kujawa.
22 The *Criminal Code of Canada* provides for
23 reviews of such cases."

24 And does this fit with your recollection or do
25 you have any recollection of some of these



1 follow-up comments by Mr. Kujawa, Mr. MacKay?

2 A No, I have no recollection of those, but I
3 probably was aware of them.

4 Q Okay. I'll turn you next to 160195. We see
5 another article that shortly follows the last one,
6 this one from the Saskatoon *StarPhoenix* dated
7 December 4th, 1991 indicating in the headline
8 *Kujawa's remarks not government view: Mitchell*.
9 The first paragraph states:

10 "What Serge Kujawa says about the *David*
11 *Milgaard* case is his own business, but
12 his remarks certainly don't reflect the
13 government's view, says Justice Minister
14 Bob Mitchell."

15 And if we move to the second column, beginning
16 here:

17 "'He's speaking for himself as a private
18 member. That's not the government's
19 view,' Mitchell said in an interview
20 Tuesday.

21 The provincial government will
22 do everything it can to co-operate with
23 the Supreme Court review of the case,
24 requested by federal Justice Minister
25 Kim Campbell, Mitchell said.



1 'I'm not clear what the role is
2 because I'm not exactly clear how the
3 Supreme Court is going to handle the
4 matter when it comes to them.'

5 Asked if Kujawa's remarks are
6 an embarrassment, Mitchell said the
7 government goes does not muzzle its
8 members.

9 'I guess if they feel strongly
10 about it and they want to make their
11 views public, that's up to them. But I
12 do want to make it clear that Mr. Kujawa
13 is not stating the policy of the
14 government.' "

15 And does that fit with your recollection as to
16 the position of the government on this matter,
17 Mr. MacKay, in and around this time period?

18 A I would think so, yup.

19 Q And I'll turn you next to document 026635. And
20 what this letter appears to be is a draft letter
21 prepared by you, Mr. MacKay, in response to a
22 complaint that had been received by a member of
23 the public respecting Mr. Kujawa's comments, and I
24 think perhaps we've touched on this, and I'll ask
25 you again; do you recall what your role might have



1 been in terms of -- and we'll review the letter in
2 a moment -- but do you recall what your role may
3 have been in terms of drafting a letter in
4 response to a member of the public relating to
5 this matter?

6 A Well when the Minister gets a letter from the
7 public that has to do with an issue that involves
8 public prosecutions, then the letter is forwarded
9 to public prosecutions, and someone in the office
10 drafts a reply setting out what they consider the
11 views of the Department of Justice are, or should
12 be. That goes back to the Minister of Justice,
13 and if he's in agreement with that, then he signs
14 the letter off and the letter goes out over his
15 signature.

16 These letters come -- and as a
17 matter of fact a similar procedure, I think, is
18 used in every department of government, so --
19 because the Minister is not familiar and doesn't
20 involve himself in these cases, he has to look to
21 his agents to do those letters for him. This,
22 when they, when the letter is sent over to say
23 public prosecutions it is parceled out everybody
24 takes their turn in answering letters, and
25 sometimes they are sent out to or they're given to



1 people who have expertise, or if the person is
2 familiar with the case then they will get the
3 letter, but very often it's simply sent to someone
4 who is available to write the letter, and I assume
5 this was sent to me because I was available to
6 write the letter.

7 Q You don't recall, then, having a specific
8 designated role in this respect?

9 A No.

10 Q I'll read a portion of the letter to you starting
11 here. It states:

12 "The other issue is perhaps more
13 difficult. Mr. Kujawa was expressing
14 his own personal opinions. He was not
15 speaking as a representative of the
16 Justice system or even as a member of
17 the legislative assembly. It seems
18 clear that the media sought his opinion
19 not primarily because of his political
20 position but because he had been
21 involved in the case in question and in
22 other high-profile criminal cases. Mr.
23 Kujawa is entitled to his opinion just
24 as you are entitled to yours. And he is
25 entitled to express his opinions within



1 the limits set by the law just as you
2 are entitled to express yours. It may
3 appear that because of his position, the
4 expression of his views received greater
5 attention than did contrary views, but I
6 am not sure that that is so. The
7 publicity given to those views has
8 stimulated thoughtful discussion and
9 generated spirited arguments such as
10 those in your letter affirming the need
11 for the Justice system to be open, fair
12 and accountable.

13 In your letter, you appear to
14 suggest that somehow Mr. Kujawa's right
15 to express his personal opinions should
16 be restricted because he is an elected
17 representative. Surely that would be
18 antithetic to the very principles of
19 freedom which the Justice system must
20 defend. The fact that you or I do not
21 agree with Mr. Kujawa's opinion cannot
22 confer any right to stifle the
23 expression of that opinion. The Justice
24 system will not suffer because of the
25 free expression of conflicting views.



1 Indeed, in my opinion such freedom is
2 essential to the health of that system
3 and to the health of democracy itself."
4 And do you have any recollection of writing that
5 letter, Mr. MacKay?

6 A I don't have any recollection of writing the
7 letter, but --

8 Q And, as I say, --

9 A -- I could --

10 Q -- this was I believe a draft version, and I'll
11 turn you to what I think became the final version
12 of this letter, 026633. And I'm sorry, at the
13 bottom of this letter I didn't point out, I think
14 your name was noted, and we have already
15 established that the document was prepared by you.
16 And if we turn to 026633, I won't review the whole
17 letter, it's a much-shortened version of the
18 letter that we have just reviewed.

19 In considering that do you, can
20 you tell us what likely had happened, then, in
21 this instance?

22 A Mr. Mitchell probably thought that I was too
23 prolix --

24 Q Okay.

25 A -- and so he sent it back and he said "make it



1 concise".

2 **Q** Do you recall having any further involvement in
3 this sort of capacity?

4 **A** No.

5 **Q** And do you have any further recollection in terms
6 of the government's position on these matters that
7 were ongoing at this time?

8 **A** No. I would think that that letter sums up the
9 position of the government. I can't think that
10 the government could have any other position.

11 **Q** Just one other observation, I note the top what
12 appears to be again the C 16297 reference, so it
13 appears that materials relating to Mr. Milgaard's
14 matter are still being filed on that particular
15 file, if indeed it is a file reference, and again
16 I don't know that, I don't think you can comment
17 on that aspect, Mr. MacKay.

18 And would I be correct, Mr.
19 MacKay, that you were contacted in 1993 in
20 relation to an investigation that the RCMP was
21 conducting into alleged wrongdoings surrounding
22 the David Milgaard matter?

23 **A** Yes, I was.

24 **Q** And do you recall, Mr. MacKay, that the department
25 of the Attorney General and Serge Kujawa in



1 particular had been directly implicated in these
2 allegations?

3 A Yes.

4 Q And your position in the department, again given
5 this time period, 1993, your position in the
6 department would be senior appellate counsel; is
7 that correct?

8 A That's right.

9 Q And I'm going to review a number of documents, Mr.
10 MacKay, to give this area some context. You'll
11 have to bear with me, I'm going to be reading for
12 some period of time, but I think it's important in
13 terms of the foundation of these allegations to
14 review some of these materials. We'll then
15 consider some of the contact that the RCMP had
16 directly with you relating to the allegations that
17 were being investigated, so the first document I'm
18 going to read from is 159537. This is a letter
19 received by Mr. Wolch, it's dated March 21st,
20 1992, and it is from an individual by the name of
21 Michael Breckenridge that we'll see, within the
22 context of the letter, indicated that he was
23 previously an employee of the Attorney General's
24 Department in the filing room I believe, and that
25 will become clear, but before we begin, when I



1 state that name, Michael Breckenridge, do you have
2 any recollection of a Michael Breckenridge working
3 in the department, Mr. MacKay?

4 A No, I don't.

5 Q Okay. I'll read this letter to you in full, it
6 states:

7 "I have been watching with interest the
8 David Milgaard case since I worked in
9 the Attorney Generals Dept. in Sask. at
10 the time of those cases (Fisher and
11 Milgaard). My job was to process the
12 criminal files. Serge Kujawa had just
13 been appointed Chief Crown Prosecutor
14 for party loyalty. Roy Romanow had just
15 been elected and appointed Attorney
16 General and wanted to make a name for
17 himself. Attorney General Mitchell was
18 Romanows law partner in Saskatoon.

19 At the time of these cases
20 there were many closed door meetings
21 between Romanow, Ken Lysyk - Deputy
22 Minister and Serge Kujawa all because
23 discrepancies in the two cases. I
24 remember delivering both cases to Serge
25 at the same time. The general feeling



1 in the Dept. at the time was that these
2 were to high profile cases that the
3 N.D.P. could appear to get great
4 political milage from as part of their
5 law and order platform. They figured
6 that since they were the gov't nobody
7 would ever question the findings of
8 their court system. Since then, like
9 now, their only objectives was to govern
10 at a cost.

11 Some other people in the Dept.
12 that can attest to this is Mr. Dale
13 Richter now with C.S.I.S. living in
14 Quebec, Mr. Dave Wolbaum now working at
15 the P.C.C. in Regain and Maurice Herauf
16 now a lawyer working in Regina.

17 Today, I would suggest that
18 there is a cover up by the present
19 administration to hide the sins of the
20 Blakeney regime. I would also suggest
21 that the main motivation is political as
22 opposed to legal. With people like Ned
23 Shillington, Louise Simard and Serge
24 Kujawa all part of both the present and
25 past regimes they have too much to lose



1 by having that association made.

2 All of these people have deep
3 rooted beliefs that the system is more
4 important than any individual rights and
5 they will now do everything they can to
6 change the law to eliminate those
7 rights. I would suggest you use all the
8 resources at your disposal to push for
9 an inquiry held by anyone outside the
10 N.D.P. system in Sask., B.C., Ont.,
11 otherwise it will never receive an
12 impartial hearing. These people will
13 use every means at their disposal to
14 make sure that they stack the deck in
15 their favor."

16 He then gives his phone number.

17 I'll turn next to 004012, and
18 this is apparently a statement given by
19 Mr. Breckenridge, I believe the date at the
20 bottom of the page is May 22nd, 1992, and again
21 I'll read in full from this statement, it
22 indicates:

23 "As to events surrounding the Milgaard
24 Case:

25 I was hired to the Blakeney



1 gov't in approximately 1970 or 1971. I
2 started in the Dept. of Ind. and
3 Commerce, the minister was Kim Thorson.
4 After approximately 6 mos. there I
5 transferred to the Attorney Generals'
6 dept. under Roy Romanow. Here I stayed
7 until my job was threatened by Serge
8 Kujawa. Then I transferred to the
9 Highway Traffic Board in Moosomin under
10 Robert Hogg.

11 All positions in the provincial
12 gov't were received because I was a card
13 carrying member of the N.D.P. at that
14 time. At first the positions were
15 temporary and then made permanent. When
16 a position was found where you were most
17 useful you were appointed by Order in
18 Council if you ranked high enough in the
19 party or were told to write a Public
20 Service Commission exam to legitimize
21 your appointment, the same as is being
22 done today. I wrote the exam.

23 After working within the dept
24 for some time trust of the minister and
25 others was gained. I went from working



1 8 hours a day in criminal records to
2 running errands for the minister that
3 were party business. All during this
4 time in the dept. Serge Kujawa was Chief
5 Crown Prosecutor and Bill Logan was
6 liason officer between police dept's.

7 My specific job was to receive
8 the mail and date it, sort it, place
9 file numbers on it, direct it to the
10 proper attorney, and match it to the
11 proper file for filing. In order to do
12 this all correspondence had to be read.
13 At first this was menial boring work but
14 that changed as we began to get mail
15 marked everything from "Private and
16 Confidential" to "Eyes Only" that was
17 directed to Mr. Romanow.

18 We didn't open this mail but
19 usually ended up getting it back for
20 filing. Sometimes this would be quite
21 soon other times it might be months
22 before it returned to our section for
23 filing. Often when this mail arrived we
24 had to pull the corresponding file and
25 take it to the ministers office or



1 Serges office as he usually made the
2 final decision in consultation with the
3 minister and whoever else in the dept
4 that needed to know. We were often
5 aware of these meetings because after we
6 delivered the file the attorneys would
7 meet behind closed doors and our section
8 was told to stay away from that meeting,
9 although, there were times when they
10 would request another file at the same
11 meeting. This often happened with the
12 Milgaard and Fisher files. Also there
13 was a paper shredder kept in the
14 ministers office that was used quite
15 extensively in cases of very sensitive
16 material that would do damage to the
17 gov't, in such cases, I was told that
18 the government could claim ignorance of
19 this matter thereby escaping any
20 political heat.

21 On the Milgaard case it was
22 brought to my attention by Dave Wolbaum
23 that according to the information we had
24 been receiving it was becoming very
25 evident that the Milgaard case was a



1 mistake. From the correspondence we
2 were filing our section was convinced
3 that there was error made in the
4 Milgaard case and this was brought to
5 Serge Kujawa's attention. We were told
6 basically to mind our own business if we
7 valued our jobs. After being told that
8 our section began to apply for transfers
9 or to find new jobs. This was done by
10 everyone except Patricia Styles, who was
11 the section head."

12 I turn next to 004064, this is a letter from Mr.
13 Wolch to The Honourable Kim Campbell. The date
14 of the letter is September 16th, 1992, I'll read
15 from the beginning of this letter, the letter
16 states:

17 "You will recall that we wrote to you on
18 April 20th, 1992, at which time we
19 advised you that we were requesting that
20 the Attorney General for Saskatchewan
21 order an inquiry into the Milgaard
22 matter. We also advised you that while
23 we felt that there was a federal
24 interest in conducting an inquiry, we
25 also felt that the primary



1 responsibility for ordering the inquiry
2 belonged to the Provincial Government.

3 However, new evidence has been
4 obtained which makes it imperative that
5 the Federal Government order an inquiry
6 into the entire Milgaard matter.
7 Briefly, this evidence consists of a
8 witness who was a former employee of the
9 Saskatchewan Attorney General's
10 Department who has come forward with
11 information concerning activities in the
12 Department shortly after David
13 Milgaard's conviction. Enclosed please
14 find a photocopy of the statement which
15 this witness has provided to a private
16 investigator in Saskatchewan.

17 It is clear from this statement
18 that some information came to the
19 attention of this witness which
20 suggested that there was a mistake made
21 in the Milgaard case. This witness
22 brought this information to Mr. Kujawa's
23 attention, and was told to mind his own
24 business if he valued his job. This
25 witness also indicated that by virtue of



1 the filing which was required in his
2 position, he became aware that meetings
3 were held where both the Milgaard and
4 Fisher files were considered together.
5 These meetings were behind closed doors
6 and involved senior attorneys in the
7 Attorney General's office.

8 Mrs. Milgaard, along with the
9 investigator in question, met with the
10 witness to follow up on the information
11 contained in the statement. The witness
12 described an incident which involved his
13 refiling the Milgaard and Fisher files,
14 which were requested for a meeting which
15 was attended by Mr. Romanow, attorneys
16 in the Attorney General's office, and
17 police officials.

18 As you know, the Supreme Court
19 of Canada has found that the Larry
20 Fisher evidence came to light and was
21 available in October of 1970. The
22 Supreme Court of Canada has also found
23 that this was credible evidence which
24 could reasonably have been expected to
25 affect the verdict of the jury. This



1 evidence was not disclosed to
2 Mr. Justice Tallis in October of 1970,
3 while Milgaard's appeal was pending, or
4 at any other time. Accordingly, we know
5 that the evidence of Larry Fisher was
6 suppressed. The following, however, has
7 not been established:

8 1. Who had the Larry Fisher information
9 in October of 1970, and what was done
10 with it?

11 2. Why was this information not
12 disclosed?

13 3. Was there a decision made, and if so
14 by whom, to withhold this information
15 from David Milgaard and his lawyers?

16 4. What steps were taken, if any, to
17 ensure that this information did not
18 come to light?

19 5. Who took these steps?

20 6. Have there been ongoing efforts to
21 cover up the true facts concerning when
22 this information came to light and what
23 in fact was done with it?

24 Mr. Mitchell has not seen fit
25 to order an inquiry into the Milgaard



1 matter, nor does he seem inclined to do
2 so. In light of the evidence linking
3 the present Premier of the Province of
4 Saskatchewan to the Milgaard case, we
5 would suggest that it would be
6 impossible for the Milgaard family to
7 obtain any form of impartial inquiry in
8 the Province of Saskatchewan. A full
9 and proper inquiry into this matter is
10 absolutely essential to deal with this
11 new evidence and with other issues which
12 need to be addressed.

13 Accordingly, we are now
14 formally requesting that you order an
15 inquiry into the entire matter of the
16 arrest, conviction and continued
17 incarceration of David Milgaard,
18 pursuant to The Federal Inquiries Act.
19 The issue of compensation should also be
20 placed before this Inquiry."

21 And we know, of course, Mr. MacKay, that the RCMP
22 investigation in 1993 followed, and to give this
23 matter some further context, I'll eventually
24 refer you to their report, but shortly following
25 this letter I want to first refer to a press



1 conference that was held and some of the comments
2 made at the press conference which will give, as
3 I say, further context to the allegations that
4 were being made, that document is 334827, and the
5 letter we had just read was September 16th, 1992,
6 the date of this press conference was September
7 19th, 1992, and if we can move, please, to page
8 334830, and up to this point some concerns had
9 been expressed and the participants as identified
10 up to this point at the press conference are
11 David Milgaard, Joyce Milgaard and later Mr.
12 Wolch we learn is involved as well, and up to
13 this page, or up to this point some concerns have
14 been expressed about the government's handling of
15 the Milgaard matter and in particular the
16 position that had been expressed by the Attorney
17 General in and around this time period, Bob
18 Mitchell, in relation to Mr. Milgaard's
19 situation, and beginning at the bottom of the
20 page, Joyce Milgaard is speaking and indicates,
21 and this is referring to the letter that we just
22 read:

23 "The new information is in this letter.

24 It was sent on Thursday to justice
25 minister, Kim Campbell. A man who



1 worked in the Saskatchewan Attorney
2 General's office in and around 1970 when
3 Roy Romanow was Attorney General, wrote
4 to us. He explained he worked with
5 files, reading them, pulling them out
6 for meetings and refiling them
7 afterwards. He knew what - who was
8 seeing what. His letter urged us to get
9 an outside inquiry. He said we would
10 never receive an impartial hearing with
11 the Saskatchewan government. He told of
12 delivering the Milgaard and Fisher files
13 together, to Serge Kujawa. He told of
14 meetings behind closed doors with Roy
15 Romanow, Kujawa and other senior police
16 and Crown officials with the Milgaard
17 and Fisher files.

18 We wanted to be clear that this
19 is not our quote "witness". He is
20 unconnected with the Milgaard family.
21 What he says, however, fits in with the
22 known and proven facts. The Supreme
23 Court said the Larry Fisher evidence
24 that the police had in 1970 was credible
25 evidence which could affect the verdict



1 of the jury. Justice Tallis said they
2 never ever told him about Larry Fisher.
3 Somebody suppressed that evidence and
4 there has been no inquiry into it to see
5 just how this happened. This new
6 evidence says that these people had the
7 files together. Since there was no
8 disclosure we can only assume a decision
9 was made to suppress it. Pure and
10 simply put, a coverup."

11 Moving to the next page, beginning at this
12 portion:

13 "Q What is the significance of the letters
14 you have from - legally."

15 Mr. Wolch responds:

16 "It's simply more evidence of what we
17 know to be a fact. Ah, ah um I take a
18 bit of a different view than Joyce I
19 think the letter simply adds one extra
20 feature of evidence but the coverup was
21 established a long time ago and this is
22 just one more piece in the puzzle that's
23 all it is.

24 Q What about the involvement of, ah,
25 Romanow? "



1 Mr. Wolch:

2 "Time will tell, I - the coverup was
3 there, the question was who covered it
4 up is more important to be found out.
5 Ah, the difficulty we have is that um
6 you have a situation where as we know
7 David spent 23 years in jail. There is
8 another individual out there somewhere,
9 who we believe committed the crime. Ah,
10 the Miller family right now has ah I
11 guess an unsolved murder and the
12 Attorney General for Saskatchewan says
13 that, uh justice has triumphed. There
14 is something questionable about that
15 given that background. And then you
16 have the person in charge of the case
17 saying that the system's more important,
18 ah, than correcting wrongs. You put
19 that all together, ah, and you, it cries
20 out for a full inquiry into what
21 transpired. And now we have more
22 evidence of coverup but I think we have
23 that from the very mouth of Mr. Kujawa
24 when he went on television and
25 acknowledged he had both files.



1 Q Is the Premier of Saskatchewan directly
2 involved in this, is he lying?"

3 Mr. Wolch:

4 "I have ... I'm not saying that.

5 Q What are you saying then Joyce? Is that
6 what you are saying?"

7 Mrs. Milgaard:

8 "What we're saying is we have
9 information that says Roy Romanow and
10 and this we have said in the letter to
11 the Minister of Justice - that he was in
12 these meetings. Now I'm not about to
13 judge his evidence. Ah I met with him
14 and I thought that, uh, he was credible.
15 I met with him and private
16 investigators. We made sure that he was
17 employed where he said he was at that
18 time, and that the people he mentioned
19 were also employed and that he in fact
20 did the things he said he did, but he's
21 the one that has come forward and said
22 that Roy Romanow was in these meetings
23 behind closed doors. I think that Hersh
24 properly has sent that information to
25 the Minister of Justice and he's



1 indicated how can we get an impartial
2 hearing in Saskatchewan if that is a
3 fact. So, the Justice Department, the
4 federal, ah government - if they put an
5 inquiry into place then we will find out
6 exactly what is true."

7 If we can move to the next page, starting here:

8 "Q Okay, if that's true are you saying that
9 Roy Romanow was deliberately involved
10 and knew that David Milgaard was
11 innocent of this crime and he knew that
12 the wrong man was in prison?"

13 Mrs. Milgaard:

14 "Perhaps I can tell you what this man
15 told me, very succinctly. I mean he
16 described and I've got it in my private,
17 ah sort, of my additional comments
18 there. He described what took place
19 after one of these closed door meetings.
20 Now Roy Romanow was in this meeting,
21 okay. Kujawa was in the meeting, senior
22 police officials were in that meeting.
23 They come out after this session and uh,
24 they had only two files in there. Like
25 this man is responsible for what goes in



1 and the only files that they had in this
2 meeting were the Miller, Milgaard file
3 and the Fisher file.

4 He described a scenario where
5 someone else in the department seeing
6 the files that Serge was returning
7 said - "gee it looks like there's been a
8 travesty of justice in this Milgaard
9 case now that we have the Fisher
10 information." He said Kujawa in no
11 uncertain terms told him to mind his own
12 business, to keep his mouth shut, if he
13 wanted to continue working there. And
14 then looking around the room at that
15 everyone who was there he said "and that
16 goes for the rest of you too, if you
17 know what's good for you."

18 And moving down the page, starting here:

19 "Q Can I ask you when exactly that meeting
20 took place? Was it after David's
21 conviction but before his appeal."

22 Mrs. Milgaard:

23 "Yeah, it was during 1971 that these
24 meetings took place when uh like the,
25 they had both the files together at that



1 time. And I guess a decision would have
2 had to have been made. This man said
3 that ah"

4 And moving to the next page, starting here:

5 "Q And Roy Romanow knew that the Fisher, I
6 believe that's what you are telling me
7 that Roy Romanow knew that there was
8 something fishy doing on here regarding
9 having this extra information with
10 Fisher, and he buried it?"

11 Mrs. Milgaard:

12 "All I know is that Roy Romanow, Serge
13 Kujawa, and other senior officials met
14 with those files. Serge Kujawa says we
15 never ever, - I never ever put them
16 together. Now they told these people
17 that put it together, or he told these
18 people according to our source, that ah
19 they had put it together because the
20 file clerks had put it together and
21 they, I mean their reaction you can
22 imagine if you had just been told that
23 these people just went back to their
24 desks very quietly but their mouths sort
25 of dropped open after this remarks from



1 Serge and explained that to us, our
2 source said that shortly after that
3 every one of those people in that
4 department with the exception of one
5 woman transferred out of Serge's
6 department."

7 And moving forward to page 13 of the document,
8 starting here, again relating to
9 Mr. Breckenridge, the question is:

10 "Q You've met with him and your private
11 investigator?"

12 Mrs. Milgaard: "

13 "Oh, yes, I've met with him. And he's -
14 well I've got to tell you the people
15 said to me why do you think he came
16 forward? I think everybody has an axe
17 to grind with government and this man
18 may have his axe to grind, I don't know.
19 But what impressed me about him and what
20 makes me think he's credible is that he
21 named names, like in his statement of
22 other people that were witness to this
23 conversation with Kujawa when he said
24 this. Now someone that is telling lies
25 they get to be very very vague about



1 things you know. And then they say, oh
2 well, I don't know who was there, I
3 don't know who said what. This man has
4 named names and I think that it's
5 important for that to be followed up.
6 And, quite frankly I didn't want to
7 taint the evidence because you know,
8 that that could have been the position
9 government would take if I'd been out
10 interviewing them."

11 If we could move forward to page 17 of the
12 document, the question from the reporter:

13 "Q I would think that if there were two
14 files in a room in 1971 and their
15 sitting down and looking at these two
16 files wouldn't you have been amazed, who
17 do you think they (inaudible)."

18 Mr. Wolch responds:

19 "Anybody who put their two files
20 together ah should come to the
21 conclusion that Fisher is the person
22 responsible and Milgaard isn't. If you
23 put the two files together that's your
24 conclusion. At the very least
25 considerable doubt in David's case. At



1 the very least."

2 Turning to the next page, the question:

3 "Q Why do you think that Romanow and Kujawa
4 buried this information shortly after
5 David Milgaard's conviction in 1970?"

6 Mr. Wolch responds:

7 "All I can say is that Mr. Kujawa has
8 publicly stated ah ah rather shockingly
9 that the system is more important than
10 the innocence of one man. That the
11 system has to be protected over the
12 individual. He has said it. That's his
13 own words as you've all heard. That
14 perhaps answers your question."

15 Move to page 23 of the document. The question:

16 "Q Mr. Milgaard how did this source know
17 that ah ah the Premium of Saskatchewan
18 was in this meeting? How did he know
19 that these people ...?"

20 Mrs. Milgaard:

21 "Well, you see, normally what happens
22 and these were questions that I asked.
23 Normally what happens they deliver the
24 files right into the meeting. Ah, and
25 you know doors are opened. The in and



1 out as they need files they call them
2 in. But in these particular meetings he
3 said they were quite different. In
4 these particular meetings, ah, he would
5 see the people go into the meeting okay
6 and the only two files that went in were
7 these two files. Now, this incident
8 that he described to me was after ah,
9 Roy Romanow left the meeting and, after
10 the other officials left the meeting and
11 when Serge Kujawa was returning the
12 files to them right there. And that's
13 when this whole incident happened that
14 he described to me. And he said that
15 there were many meetings like that."

16 And to page 25, please, the question:

17 "Q You said that he gave you other names,
18 the source gave you other names of
19 people in the Department"

20 Mrs. Milgaard:

21 "That's right.

22 Q Have you contacted them?"

23 Mrs. Milgaard:

24 "We ascertained that these people did in
25 fact Allan, work in the Department at



1 that time and that they also transferred
2 out."

3 I think those are all the portions that I had
4 wanted to read to you, Mr. MacKay. Do you recall
5 being aware of this press conference at the
6 time --

7 A No.

8 Q -- and being aware of the allegations that were
9 being made?

10 A I was aware of Mr. Breckenridge's allegations, I
11 wasn't aware of the press conference. I may have
12 been aware that there was a press conference, I
13 really don't know.

14 Q Okay. And as I mentioned earlier, what we know
15 ensued was a full RCMP investigation into these,
16 or into various allegations of wrongdoings,
17 including those outlined in the press conference,
18 and just for one last further bit of context, I'll
19 refer you to the eventual RCMP report that was
20 completed in relation to their investigation. If
21 we can turn, please, to document 023167, and it's
22 page 133 of that document, the top references:

23 "Investigation - Dept. of Attorney
24 General - Kujawa."

25 And under the general subheading it states:



1 "Issues 25-28 and 30-31 deal with the
2 allegation that the Saskatchewan
3 Department of the Attorney General, Mr.
4 Kujawa, in particular, took specific and
5 unusual actions to prevent public
6 awareness of Larry Fisher's crimes.
7 Kujawa is alleged to have had both the
8 Milgaard and Fisher files at his
9 disposal when speaking to the Milgaard
10 appeal and when handling the disposition
11 of Fisher's charges. The Milgaard file
12 is alleged to have had references to the
13 Fisher crimes and Kujawa should have
14 been concerned about the connection.
15 Mr. Wolch alleges Kujawa's failure to
16 disclose knowledge of evidence which
17 would call into question the Milgaard
18 conviction was a breach of the duty to
19 disclose evidence which would tend to
20 exculpate the accused.

21 This allegation is based
22 primarily on information provided by a
23 former clerk of the Department of
24 Attorney General, Michael Breckenridge.

25 In a letter dated 92-03-21, to



1 Mr. H. Wolch, Michael Breckenridge
2 stated there were many closed door
3 meetings between Mr. Romanow, then
4 Attorney General, Kenneth Lysyk, then
5 Deputy Minister, and Serge Kujawa, then
6 Director of Public Prosecutions,
7 concerning discrepancies in the Fisher
8 and Milgaard cases.

9 Later, on 92-05-22,
10 Breckenridge supplied a statement which
11 Mr. Wolch submitted to the Federal
12 Minister of Justice as evidence of the
13 need for an Inquiry. The statement
14 describes:

15 a) his access to correspondence marked
16 "private and confidential" and "eyes
17 only".

18 b) his knowledge of meetings between
19 Kujawa and the Minister of Justice often
20 dealing with the Milgaard and Fisher
21 files.

22 c) David Wollbaum bringing to his
23 attention the fact, according to the
24 information they were receiving, it was
25 evident the Milgaard case was a mistake;



1 d) the fact that when his section was
2 convinced there was an error, this was
3 brought to Kujawa's attention;
4 e) that his section was told to mind
5 their own business if they valued their
6 job; and,
7 f) that as a result of pressure being
8 applied to employees to say nothing, a
9 number applied for transfers out of the
10 department."

11 And I've moved ahead a time again just to give
12 that context, but I understand, as I stated
13 earlier, Mr. MacKay, that you were directly
14 contacted by the RCMP in the course of the
15 investigation that eventually led to the report
16 we've just referred to?

17 A That's right.

18 Q And do you recall those meetings?

19 A I think there was one meeting.

20 Q Okay. And you might be right actually, there's a
21 couple of different sets of notes, but they often
22 relate to the same meeting that I believe took
23 place on March 25th, 1993, and I'm going to refer
24 to some of those notes for your comment. The
25 first set of notes is document 034803, again this



1 is a continuation report by the RCMP officer who
2 apparently met with you on this occasion and these
3 are his notes following his discussions with you,
4 Mr. MacKay, and again you'll note the date being
5 March 25th, 1993. Just a few portions of this set
6 of notes that I'll read to you starting at the
7 beginning, it indicates:

8 "Interviewed Kenneth McKay. Appeal
9 Director - Sask Justice Public
10 Prosecutions in company with Cst.
11 Jorgenson.

12 Ken McKay was a junior lawyer
13 (prosecutor) with Sask Justice back in
14 1969/70/71 when the Milgaard, Fisher
15 matters were respectively dealt with.
16 Although McKay does relate that he
17 authored a number of letters between
18 Sask Justice and Lawrence Greenberg -
19 then Larry Fisher's lawyer in Winnipeg,
20 he was not directly involved with the
21 case. He does recall that Serge Kujawa
22 was the Director of Prosecutions and
23 would have relayed or directed him to
24 send the letters to Greenberg on his
25 behalf."



1 I think that fits with what you previously
2 advised us, Mr. MacKay?

3 A Yes.

4 Q I turn you to the next page and starting here, the
5 RCMP officer notes:

6 "Briefly, McKay recalls that since the
7 charges could not be waived to Manitoba
8 (from Saskatoon) they were awaiting the
9 results of the Manitoba charges.

10 Once the charges against Fisher
11 were disposed of in Manitoba on the 28th
12 of May, 1971 advice was forthcoming and
13 arrangements were most likely made
14 between Greenberg and Kujawa that a
15 Direct Indictment could be accommodated
16 in Regina and Concurrent Sentencing
17 would be agreed to once guilty pleas
18 were entered on the Saskatoon charges.
19 This is reflected on the attached
20 correspondence."

21 Just moving down to this paragraph.

22 "McKay as a matter of interest related
23 that the Sask Justice Prosecution office
24 consisted only of 4-5 prosecutors and
25 was quite small at the time. He also



1 related that Kujawa was somewhat of a
2 weak administrator as far as paper work
3 went. Subsequently some of the records
4 missing and or difficulty in locating
5 any missing documents may be as a result
6 of this administrative deficiency.
7 Kujawa did all of the major Court -
8 trial appeals etc in the Regina office
9 until at least 1973 when MacKay was
10 assigned the appeals. Kujawa simply
11 could not properly administer all the
12 paper work associated to his court
13 appearances. Once McKay started to
14 share the workload, Kujawa's
15 administrative capabilities improved due
16 to the decrease of his workload."

17 And would those be comments that you would agree
18 with, Mr. MacKay?

19 A Yes.

20 Q And I won't read the next portion, I think we've
21 covered it, it goes on to set out your thoughts on
22 why a direct indictment was used in this case and
23 some of the other questions in terms of it taking
24 place in Regina, etcetera. I'll move to page 5,
25 and beginning at the bottom it states:



1 "Mr. McKay feels the insinuation that
2 the processing of Larry Fisher was done
3 deliberately to get Milgaard out of the
4 way and to avoid any publicity is pure
5 nonsense.

6 The facts are that the handling
7 of the Direct Indictment was more
8 conveniently done in Regina for the
9 Prosecutor Kujawa and Defence Lawyer
10 Lawrence Greenberg from Winnipeg as was
11 the availability of the Q.B. judge
12 namely F.W. Johnston!

13 As for the date being set
14 before Xmas in an empty courtroom, McKay
15 could only rationalize that this date
16 was set and confirmed with Q.B. sittings
17 and dockets of the day. He could have
18 appeared before and or after Xmas as it
19 would not have made any difference as to
20 sentences on time/date of appearances."

21 And would those be comments that you would agree
22 with --

23 A Yes.

24 Q -- as well, Mr. MacKay?

25 A Yes.



1 Q And the next paragraph:

2 "Not informing the police in Saskatoon
3 was characteristic of Kujawa. McKay
4 related that Kujawa was not the type of
5 person to personally phone the Police to
6 inform them of the court results. McKay
7 also related that he would too be
8 surprised if he informed Bobs Caldwell
9 of Fisher's disposition."

10 And, again, would that be an accurate indication
11 of your thoughts on those matters, Mr. MacKay?

12 A Yes.

13 Q Okay. I think those are all the portions of --
14 actually, there is one final portion of that
15 document, if we can turn to page 9, please. These
16 notes are continuing in relation to the meeting
17 with you. It states -- sorry, just a little bit
18 up from there:

19 "The fact of the so called quiet
20 publicity was attributed to Kujawa's
21 administrative deficiencies and
22 certainly McKay related would not be
23 intended to be any coverup.

24 McKay feels the opposite and if
25 in fact Mr. Kujawa or anyone in Public



1 Prosecutions was aware of a Miscarriage
2 of Justice they would be quick to jump
3 on the bandwagon - admit the mistake
4 thus receiving favourable credibility
5 not only from the Court but to the
6 citizens of the Province.

7 The bottom line is there is
8 nothing whatsoever to relate to any type
9 of coverup and certainly everything was
10 done within the scope of the Justice
11 mandate."

12 And would those be comments that you would
13 continue to agree with today, Mr. MacKay?

14 A Yes.

15 Q I'll refer you to another set of notes, and it
16 looks like perhaps it was on the same date and
17 during the same meeting, it's just a separate
18 document though, 034812. Again you'll note the
19 date, March 25th, 1993, a similar form of a
20 continuation report. Just one portion I'm going
21 to refer you to, and that's -- begins at page 5.
22 The RCMP officer's notes state:

23 "Further to this we talked about various
24 meetings that Serge Kujawa would have
25 had with the respective Attorneys



1 General.

2 MacKay feels that no employees
3 would bring files directly into the A.G.
4 In all probability and most cases Kujawa
5 would address any concerns with the
6 Deputy Minister of the day, prepare any
7 briefs and if necessary speak to the
8 A.G. usually and in most cases
9 accompanying the Deputy Minister (who
10 did not like to be bypassed direct to
11 the A.G.)

12 It was highly unlikely that a
13 meeting in progress would be resulting
14 in the calling of an office staff to
15 locate and bring any file to the A.G.'s
16 office.

17 MacKay described this as very
18 unlikely to happen.

19 Further to this Serge Kujawa
20 got along very well with all the office
21 employees and was certainly
22 well-respected.

23 If Kujawa foresaw any problem
24 areas in the office MacKay related he
25 would approach the employee put his feet



1 on the desk and argue out the conflict
2 with the employee."

3 And, again, would those be comments that you
4 would agree with today, Mr. MacKay?

5 A Yes.

6 Q And just in terms of wrapping this matter up
7 relating to the RCMP's investigation, do you
8 recall any further involvement than as we've noted
9 here directly by yourself, Mr. MacKay?

10 A No.

11 Q And I'll refer to another concluding report by the
12 RCMP in terms of how they summarized some of their
13 conclusions on this particular aspect that we have
14 been discussing, and the document is 032805. You
15 will see it's a *Report of Alberta Justice Into*
16 *Allegations of Criminal Offences Arising From the*
17 *David Milgaard Case*. And if we turn, please, to
18 page 15 of this document that's dated August 15th,
19 1994, under the heading *Allegations Against*
20 *Mr. Surge Kujawa, Q.C., and Other Members of the*
21 *Saskatchewan Department of Justice Including the*
22 *Then Attorney General, Roy Romanow, Q.C.* it is
23 written:

24 1. It is alleged that Mr. ... Kujawa sought
25 a direct indictment against Larry Fisher



1 and prosecuted Fisher in Regina to avoid
2 publicity and thereby continue the
3 cover-up of the miscarriage of Justice
4 against Milgaard.

5 This allegation stems from the
6 fact that Mr. ... Kujawa arranged for a
7 direct indictment to prosecute Mr.
8 Fisher in Saskatchewan. He also
9 arranged to have this matter dealt with
10 in Regina and agreed to concurrent time
11 to the thirteen year penalty Fisher
12 received for similar offences in
13 Winnipeg.

14 The RCMP investigation reveals
15 that while a direct indictment was
16 unusual, it was appropriate in this case
17 to deal with the Fisher file. Defence
18 counsel for Fisher was in agreement with
19 this arrangement and in fact may have
20 requested it as it was convenient to all
21 concerned. Kujawa agreed to concurrent
22 time as he had some concerns with the
23 evidence available to prosecute Fisher
24 and the fact that the thirteen year
25 penalty in Winnipeg was substantial.



1 There is no evidence that this
2 was done in any way to cover up a
3 miscarriage of Justice in the Milgaard
4 file.

5 2. It is alleged that S. Kujawa (then the
6 Director of Public Prosecutions for
7 Saskatchewan), K. Lysyk (then Deputy
8 Attorney General of Saskatchewan) and R.
9 Romanow (then Attorney General of
10 Saskatchewan) connected the Milgaard
11 file with the Fisher file and knew that
12 there was a miscarriage of Justice.

13 This allegation stems from a
14 former employee of the Saskatchewan
15 Department of Justice, Michael
16 Breckenridge, who alleges there were
17 many closed door meetings between
18 Romanow, Lysyk and Kujawa concerning
19 discrepancies in the *Fisher* and *Milgaard*
20 cases. Mr. Breckenridge indicated he
21 delivered those confidential files to
22 these meetings and this could be
23 corroborated by co-worker David
24 Wollbaum.

25 Mr. David Wollbaum was



1 interviewed and does not support
2 Mr. Breckenridge's version of events.

3 Two further co-workers,
4 Ms. Styles and Mr. Richter, were also
5 interviewed by the RCMP and reject
6 Breckenridge's version of events.

7 Messrs. Kujawa, Lysyk and
8 Romanow were interviewed and all deny
9 such meetings taking place.

10 Breckenridge worked in the
11 Saskatchewan Department of Justice from
12 October 3, 1973 to June 29, 1975. The
13 Milgaard leave to appeal to the Supreme
14 Court of Canada was denied on November
15 15, 1971, and Larry Fisher pled guilty
16 in the Court of Queen's Bench in Regina
17 on December 21, 1971. It appears
18 extremely unlikely that the Attorney
19 General of Saskatchewan and his senior
20 officials would be interested in these
21 files two or more years after they were
22 concluded.

23 The RCMP investigation fails to
24 uncover any evidence to support this
25 allegation and this allegation appears



1 to be absurd.

2 *Summary*

3 Therefore, the RCMP
4 investigation has failed to uncover any
5 evidence to support the allegations
6 against Mr. Serge Kujawa ... or any
7 other members of the Saskatchewan
8 Department of Justice including then
9 Attorney General Roy Romanow ..."

10 And in terms of a summary of those conclusions on
11 these particular aspects, do you recall learning
12 of these conclusions that had been reached?

13 A Since I was interviewed I probably saw a copy of
14 this, I don't recall it, but I probably did
15 have --

16 Q You don't recall?

17 A I'm sure I did.

18 Q Okay.

19 A Yeah.

20 Q Thank you, Mr. MacKay, those are all the questions
21 that I have for you. I'm sure My Friends will
22 have some questions for you.

23 I see the time, Mr.

24 Commissioner, perhaps this is a good time to
25 break?



1 COMMISSIONER MacCALLUM: It is.

2 (Adjourned at 10:25 a.m.)

3 (Reconvened at 10:46 a.m.)

4 BY MR. HARDY:

5 Q Mr. MacKay, my apologies, I do have a couple of
6 questions for you that I should have covered
7 previously.

8 In terms of the information that
9 was provided by Mr. Breckenridge in particular --
10 and I'm referring to the closed doors, closed-door
11 meetings that he referred to between Mr. Kujawa
12 and Mr. Romanow and others -- do you, and I should
13 have asked you, do you have any recollection of
14 meetings of that nature taking place where perhaps
15 the Fisher and Milgaard matters were being
16 discussed in that context?

17 A No.

18 Q No recollection of anything of that nature
19 whatsoever?

20 A No.

21 Q Okay. And would it be common for such a meeting
22 to take place between the Attorney General and Mr.
23 Kujawa in relation to particular files?

24 A No, it would be uncommon. The Attorney General --
25 I have -- every Attorney General that I have



1 worked with and for, and I think that runs around
2 seven, six or seven, all of them have taken the
3 traditional and classic position of not being
4 involved in day-by-day cases. They may request
5 briefing notes, they may want to be kept up to
6 date on some cases, generally that's because those
7 cases are very high profile, they may have to ask
8 -- answer questions on them. Those, that kind of
9 briefing, is done by way of briefing note. It
10 would be unusual -- it depends on the Minister of
11 Justice -- it would be unusual to meet with the
12 Minister of Justice, not that it didn't happen,
13 but it would happen with the Deputy Minister.

14 The arrangement has generally
15 been the classic English -- I call it that -- I
16 guess the classic English procedure where the
17 Deputy Minister is the person who deals with the
18 Minister and we deal with the Deputy Minister.
19 From time to time to brief ministers, depending on
20 the style of the Deputy Minister or the Minister,
21 the Deputy Minister, when he goes to meet with the
22 Minister, may take along some of his officials who
23 have particular knowledge about whatever is going
24 on in order to brief the Minister, but those are
25 open and public meetings and they come after long



1 preparation. There would be no reason to take the
2 file in because what is being taken -- what has
3 been produced are briefing notes, and each person
4 might bring a portion of his or her own file, but
5 that would be the only kind, and that would be an
6 unusual meeting.

7 Q And what about some of the other matters that
8 Mr. Breckenridge spoke about, including rumblings
9 within the office that it was becoming apparent
10 that there was something wrong with the Mr.
11 Milgaard -- or Mr. Milgaard's conviction; do you
12 have any recollection of comments of that nature?

13 A I have no knowledge of that.

14 Q And what about -- and I realize this is probably
15 tough to reflect back on -- but it seems that
16 Mr. Breckenridge refers to a period where several
17 members of the office transferred out of the
18 office following a warning that had been given by
19 Mr. Kujawa; do you have any recollection of
20 anything of that nature occurring?

21 A No, I have nothing, and it would be -- umm, let me
22 put it this way, I would be astonished if Mr.
23 Kujawa went and threatened someone's job. That
24 wasn't the way, as I said in the interview with
25 the RCMP, that wasn't the way Mr. Kujawa handled



1 problems in the office. I mean, to begin with
2 these people didn't work for Mr. Kujawa, they
3 worked for the Department of Justice or the
4 Attorney General's Department as it was then
5 known, they were in a different division, a
6 different branch of that department. Mr. Kujawa,
7 I'm sure, knew them, but if there was a problem
8 with them, as I said, Mr. Kujawa's way of dealing
9 with this would be to go and see the person, put
10 his feet on that person's desk, sit back and
11 debate the matter.

12 Q Thank you, Mr. MacKay, those are all the questions
13 that I have. My Friends have some questions for
14 you, I think we're starting with Mr. Wolch.

15 BY MR. WOLCH:

16 Q Morning, Mr. MacKay.

17 A Morning, Mr. Wolch.

18 Q As you know, I'm David Milgaard's lawyer.

19 A Yes.

20 Q Umm, I don't have that many questions for you but
21 I will be a little bit of time. In between 1969
22 and 1971 there would have been a fair amount of
23 reports and files in connection with the Miller
24 murder and the Fisher allegations in your, quote,
25 "office"; would that be fair?



1 A Umm, well there were certainly the RCMP reports.

2 Q And --

3 A And, well, if you are satisfied with that answer,
4 I was going to expand on it a little bit.

5 Q Okay, you go ahead, I was going to ask you more
6 questions but go ahead?

7 A There would have been RCMP reports; there would
8 not probably have been any -- there would be no
9 other police reports because we didn't receive
10 those police reports, they were at -- it was a
11 Saskatoon matter; there could be reports on
12 completed cases, there would have been the report
13 on the completion of the preliminary hearing,
14 there would have been a report on completed case
15 with -- after the trial; and really that's -- I
16 mean I can't say for sure but that's, that's all I
17 could think of that would come into our office.

18 Q Is there any reason why the RCMP reports wouldn't
19 go to the Saskatoon Police?

20 A I think probably it was simply because they were
21 reporting as part of the contract with the
22 Government of Saskatchewan. It was a report to
23 Justice, not to Public Prosecutions but to
24 Justice, about the activities that they were
25 carrying out pursuant to the contract. I have no



1 idea why they wouldn't have sent a copy to the
2 police service, the Saskatoon Police Service, I
3 assume that they had constant contact with them.

4 Q So --

5 A Perhaps they felt they didn't need to, I don't
6 know.

7 Q -- you would have assumed that whatever they sent
8 you they would have shared with the Saskatoon
9 Police, otherwise there was no purpose in even
10 investigating?

11 A Well, I mean they were working with the Saskatoon
12 Police, obviously.

13 Q And, without going through them, those reports
14 from the RCMP clearly identified the person who we
15 later knew to be Larry Fisher as the key suspect
16 in the Gail Miller murder?

17 A Well I don't know that because I haven't read the
18 reports.

19 Q Well, except that they did that from -- I don't
20 think that we have to go through that.

21 A I thought that the only thing that they said was
22 that there was a similar, there was a similar
23 modus operandi between the *Gail Miller* case and
24 the other rapes, but that nobody could be
25 identified. That's the only report that I saw,



1 and I saw that report in preparation for this
2 hearing.

3 Q Okay. But that report would have been in your
4 office, when I say "your", the general office?

5 A It would have been in the Attorney General's
6 Department , yes.

7 Q And then, of course, there was the Milgaard appeal
8 file --

9 A That's right.

10 Q -- and whatever material came in on Larry Fisher,
11 so it was all there at the same time, roughly,
12 between '69 and '71?

13 A It was in the Attorney General's office, yes, that
14 is 'the Attorney General's office' meaning the
15 department.

16 Q Right. And these were not minor matters?

17 A No, they certainly weren't.

18 Q When we talk about high profile, the murder of
19 Gail Miller would have been about as serious a
20 case as there was in the entire province at that
21 time or at any time?

22 A No, I have to disagree with you that that would be
23 so. It's a very, very serious matter, and I don't
24 in any way mean to diminish its seriousness, but
25 it's very often people look at the cases in the



1 department over the years, in my experience, and
2 have said -- I once recall, for example, and I
3 won't bore you with a long story, but I once
4 recall getting a letter from a very prominent
5 counsel from Toronto who had come to defend a bank
6 on a charge of fraud, the bank was acquitted, he
7 then wrote asking that we pay his costs and he
8 said that this was probably the most serious case,
9 in fact it wasn't the most serious case.

10 I mean I don't know what other
11 cases were there at the time, this was a very high
12 profile and very serious case, to say that it was
13 the most serious case or that it took all our
14 attention most of the time would not be true.

15 Q Yeah. What I am getting at is it would be among
16 the most serious and one that would have to be
17 looked at very carefully?

18 A Any murder is serious.

19 Q Yes. And this is a particularly brutal murder?

20 A Surely, yeah.

21 Q And I can use the word "scary" murder in the sense
22 that some murderers -- and I'm not belittling
23 them -- it's a domestic dispute or a gang dispute,
24 but this is the kind that really shocks the
25 sensibilities and frightens people?



1 A Sure.

2 Q And on the other hand, Fisher would have been
3 extremely serious too, because you are talking
4 about three rapes and an indecent assault that
5 frightened the community?

6 A Yes.

7 Q So these are not cases that are passed by, it's
8 not a minor matter arising somewhere, these are
9 serious, attention-grabbing matters?

10 A Yes, they are, and they were treated seriously.

11 Q And anybody, looking at both, can see that Fisher
12 would have been a suspect in the Miller murder?

13 A Not necessarily, in -- not necessarily in head
14 office. I didn't look at, well I didn't look at
15 the cases, so I didn't -- it didn't occur to me to
16 put the two together. If I had been doing the
17 appeal, I'm not sure it would have occurred to me,
18 because I didn't know the details of the Fisher --
19 or, and I'm speaking for myself -- I didn't know,
20 all I knew was that there were some sexual
21 assaults and that there was someone who wanted to
22 plead guilty to those sexual assaults.

23 Now I'm not suggesting that they
24 aren't serious, of course they're serious, but
25 they aren't so sensational that we would drop



1 everything and say "we're going to concentrate on
2 only these things".

3 And to take the other step is a
4 real stretch, to say "well we would have been so
5 familiar with the investigation file that we could
6 not do anything except put 2 and 2 together and
7 get 4 that there was a relationship between the
8 two of them, that doesn't follow, and I must say,
9 in my opinion, it's a stretch.

10 Q Well they are both happening at the same time,
11 that is Fisher is coming up while Milgaard's
12 appeal is still pending?

13 A That's right, yes.

14 Q Right?

15 A Yup.

16 Q Milgaard is still in the Court system?

17 A Yup.

18 Q So it's not like looking back five or six years,
19 they are both there?

20 A Yup.

21 Q And you look at Fisher, and you see the
22 description of his crimes, and those names appear
23 in the RCMP reports on Milgaard?

24 A But I did not see the RCMP reports, and I don't
25 know -- Mr. Kujawa will have to answer for



1 himself -- I don't know whether Mr. Kujawa saw
2 them or not, but I would be surprised if he did,
3 because he was handling the appeal with regard to
4 Milgaard and he was concentrating on the trial of
5 Mr. Milgaard, and he was handling the guilty pleas
6 with regard to Mr. Fisher and he would have seen
7 material with regard to Mr. Fisher, I agree with
8 that.

9 Q Okay. He may very well have had both files on his
10 desk at the same time?

11 A He could, because he had a lot of files -- I'm not
12 being flippant -- he had a lot of files on his
13 desk.

14 Q Now the matter of the handling of Mr. Fisher, now
15 it's been referred to in various times as a
16 transfer of charges or a waiver of charges, but
17 that's not what it was; is it?

18 A No it's not.

19 Q In fact, it's simply a matter of pleading guilty
20 to charges that arose in the -- in Saskatoon?

21 A That's right.

22 Q Now let us say that Larry Fisher had been arrested
23 in Saskatoon and said "okay, you got me, I'm
24 pleading guilty"; what would have happened?

25 A He would have been dealt with by Saskatoon.



1 Q How?

2 A By Mr. Caldwell.

3 Q But in what way, though?

4 A Well he would have been taken and -- into -- are
5 you saying would he have been directly indicted?

6 Q Yeah, what would have happened to him? You've
7 arrested him in Saskatoon --

8 A He would have --

9 Q -- and he's made his confessions, no point in
10 fighting it, he wants to plead guilty.

11 A Uh-huh.

12 Q What's the mechanical process?

13 A The mechanical process would probably be the same
14 way, and that is that -- but probably Mr. Caldwell
15 -- well, I have no idea which he would decide to
16 do. He could very well have asked us to obtain a
17 direct indictment so that he could go directly
18 into the Queen's Bench, because that's where he
19 had to enter the guilty plea, or he might very
20 well have taken him to the Provincial Court, the
21 Magistrate's Court at that time, and on agreement
22 with counsel waived the preliminary hearing and
23 then filed an indictment. Whichever way, it would
24 have been his choice.

25 Q Okay. The --



1 A I suspect that he probably would ask for the
2 direct indictment because it was the fastest, the
3 quickest, and the easiest way to do it.

4 Q Well, I might tend to disagree with you there, but
5 let us say he appeared on Monday and his counsel
6 walked in and said "I agree to waive a preliminary
7 and agree to committal"?

8 A Uh-huh.

9 Q Correct?

10 A Right.

11 Q Then you or Mr. Kujawa or Mr. Caldwell could draw
12 an indictment the next day?

13 A Yes, and then we'd have to file the indictment, we
14 would have to then get a Court date.

15 Q That's all you had to do?

16 A Yeah.

17 Q And it's done, I mean it's not -- you don't have
18 to wait for a politician, you can just do it?

19 A Uh-huh.

20 Q And get -- the plea of guilty can be entered in a
21 month, two weeks, a month, whatever?

22 A Well I don't know what time it could be entered,
23 but if what you are saying is it was so simple
24 that it was preferable to getting a direct
25 indictment, I would disagree.



1 Q Well --

2 A Why would we at this point, and particularly when
3 we are dealing with counsel from out of the
4 province, why would we bother to go through a step
5 which is meaningless, and that is putting Mr.
6 Fisher in the Provincial Court and having the
7 preliminary hearing waived?

8 Q Well that is done all the time; isn't it?

9 A No, it's not.

10 Q Preliminaries are waived all the time?

11 A Well, preliminaries are waived all the time, but
12 they're not waived by agreement at -- to plead
13 guilty.

14 Q That's your understanding?

15 A That's my understanding.

16 Q Okay. In any event, it could easily have been
17 done in Saskatoon?

18 A No, it couldn't have easily been done in
19 Saskatoon, but it could have been done in
20 Saskatoon.

21 Q Why is it more difficult in Saskatoon than it is
22 in Regina?

23 A Because we -- because we have to get the direct
24 indictment and because our office was the office
25 that dealt with people who were from out of the



1 province, that was the policy, and that was the
2 way it was done.

3 Q But he's not from out of the province?

4 A No, but his counsel is.

5 Q Well, are you telling me if I go to Saskatchewan I
6 can pick my city?

7 A No, you are not picking your city. If you go to
8 Saskatchewan, you want to deal with these things,
9 you deal with head office.

10 Q No, what I am getting at is this; direct
11 indictments are a rare procedure?

12 A No, Mr. Wolch, they're not a rare procedure. They
13 are an unusual -- they were an unusual procedure
14 at that time.

15 Q Either way, if you got the direct indictment in
16 Regina, there is no big deal to send it over to
17 Saskatoon and say "process it there"?

18 A But why would you bother doing that since Mr.
19 Caldwell had not been involved in the case at all,
20 he had no knowledge of the case.

21 Q Well you say he had no knowledge of it?

22 A Well, I mean, he knew that the case existed but he
23 --

24 Q Well he --

25 A -- he hadn't been on the case.



1 Q But it's Saskatoon that's sending you the
2 information?

3 A The Saskatoon Police Service.

4 Q Well, on Mr. Caldwell's instructions?

5 A Yeah, so, because I asked Mr. Caldwell to get the
6 Saskatoon Police Service to send me that.

7 Q Well presumably he would know what he is sending
8 you?

9 A Why do you presume that?

10 Q Well --

11 A Why would he read, why would he read the file if
12 what he has done -- and as a matter of fact, as I
13 recall, the matter was sent directly to me by the
14 Saskatoon Police Service at the -- on the request
15 of Mr. Caldwell.

16 Q Now he was a senior prosecutor?

17 A Uh-huh, yes.

18 Q Is it that much more difficulty in processing a
19 plea of guilty on facts that are admitted; how
20 difficult is that?

21 A I don't know why difficulty comes into it, it has
22 nothing to do with difficulty, it comes into
23 convenience.

24 Q Convenience for who?

25 A Convenience for the system. Mr. Caldwell had his



1 own cases and he can answer to himself about how
2 busy he was, Mr. Kujawa was the person who usually
3 did this sort of thing, and so that's who did it.

4 Q That's --

5 A I'm not attempting to justify it, Mr. Wolch, I'm
6 attempting to tell you what happened.

7 Q Well, and I'm trying to understand it.

8 A Well --

9 Q But the charges arose in Saskatoon?

10 A That's right.

11 Q Charges were laid in Saskatoon?

12 A That's right.

13 Q A man was willing to plead guilty?

14 A That's right.

15 Q It was a Saskatoon case?

16 A That's right.

17 Q Right? There is no reason to believe that Mr.
18 Caldwell was more or less busy than Mr. Kujawa?

19 A All right.

20 Q Correct? The matter would take maybe an hour in
21 Court; correct?

22 A Okay.

23 Q And normally it's held in the jurisdiction where
24 it happened; that's the usual procedure?

25 A All right, yes.



1 Q Correct?

2 A Uh-huh.

3 Q When you bring somebody back from another province
4 to face charges, they go to where the crime was
5 committed, that's the normal procedure?

6 A Okay.

7 Q Do you agree with that?

8 A Umm, yes, all right.

9 Q And that's what you believed back then?

10 A Well, that's what I suggested, yeah.

11 Q You believed that to be the procedure, you
12 yourself?

13 A No, that's not what I said in my handwritten
14 letter, what I said was since it happened in
15 Saskatoon it probably would be handled in
16 Saskatoon.

17 Q Well you didn't use the word "probably", you said
18 it would seem to be handled in Saskatoon?

19 A Seem to be handled in Saskatoon?

20 Q Which was the way it was normally done?

21 A Okay.

22 Q The man committed the offences in Saskatoon, it's
23 of concern to the Saskatoon community, you bring
24 him back to Saskatoon to face the charge, you
25 don't bring him to Regina, you don't bring him to



1 Moose Jaw, you bring him to Saskatoon; that's what
2 you believed then.

3 A All right.

4 Q What changed your mind?

5 A Well I didn't -- I learned what the procedure was.

6 Q Had it ever happened before?

7 A Well, it hadn't happened in my experience before,
8 because I had only been there a year.

9 Q It's hardly the procedure when it never happens?

10 A Well, I don't know what had happened before.

11 Q Now, if we can have a look at the document we were
12 just talking about, 032107, I take it this is the
13 letter that you were referring to earlier?

14 A Yes, I think so.

15 Q So it indicates that the author was contacted by
16 Mr. Caldwell who requested that you get a summary
17 of the offences; correct?

18 A That's right.

19 Q And if we can -- and there's four outstanding
20 charges against Mr. Fisher, and if we can turn the
21 page, and he gives a pretty succinct description
22 of the offences; would you agree with that?

23 A Yes.

24 Q There's sufficient detail that one could walk into
25 court and describe what happened to the



1 satisfaction presumably of the judge and one would
2 have a pretty clear understanding of the essence
3 of the offences; correct?

4 A Well, I haven't read it closely, but it certainly
5 looks that way.

6 Q Okay. And if we can turn the page, and it says
7 that Fisher was interviewed and he admitted two
8 and denied two. Do you see that?

9 A Yes.

10 Q Now, there is no indication that there was
11 anything untoward in the questioning of Mr.
12 Fisher?

13 A Not in this letter.

14 Q Anywhere?

15 A I don't know.

16 Q Well, you said not in this letter. I'm referring
17 to this letter.

18 A Not anywhere in the letter, no.

19 Q But there's nothing here to suggest that Fisher
20 was beaten into confessing, was intimidated, was
21 threatened or anything like that?

22 A No.

23 Q And then it says that the investigation revealed
24 that Fisher lived within a block of the locations
25 where the rapes occurred, he matches the



1 description generally and the modus operandi is
2 the same. He claims he never heard of these
3 offences which is hard to believe because of the
4 publicity. You see that?

5 A Uh-huh, yes.

6 Q Okay. So it's not just a matter of a confession
7 with nothing to back it up, you've got a general
8 description that matches, you've got him living in
9 the areas and you have what may be similar act
10 evidence; correct?

11 A Yes.

12 Q It's not just a case totally hinging on a
13 confession, there seems to be backup to it?

14 A Well, I have no idea why Mr. Kujawa, if this is
15 what you are getting at, why Mr. Kujawa said that
16 the confession would not be admissible because I
17 don't know what the circumstances are in which the
18 confession was obtained, so that's the first
19 thing.

20 The second thing, my
21 understanding from what I have read in preparation
22 for this hearing is that none of the victims could
23 identify Larry Fisher. Now, I may be incorrect
24 with regard to that, but that's my understanding,
25 so to say that they all occurred in an area where



1 Mr. Fisher lived and they all occurred in -- and
2 they all occurred around the same time, or
3 whatever it says, I read that as the police saying
4 that while he denied two of them, there's lots of
5 evidence that he committed those two, but it
6 doesn't say, it doesn't address what evidence
7 there is with regard to the two that he's prepared
8 to plead guilty to, except that he's prepared to
9 plead guilty and that there was a confession. I
10 don't know the details of that confession. I
11 assume that Mr. Kujawa did since he made the
12 judgment call with regard to its admissibility.

13 Q Well, there were also rapes in Manitoba?

14 A Yes.

15 Q Where he was caught in the act?

16 A Yes.

17 Q And that could be used as similar act; could it
18 not?

19 A It may be able to be used as similar act, I don't
20 know, I don't know all the details, so I can't
21 tell you whether it would fit the rules with
22 regard to similar act evidence. It's something
23 that you would probably have to ask Mr. Kujawa.

24 Q But you have a fair bit of confirmatory evidence
25 in terms of he lived in the area, he matched the



1 general description, he committed similar crimes,
2 and then of course you have a confession, or two
3 confessions.

4 A Well, once you get over the identity problem, of
5 course it's all confirmatory evidence, it's all
6 very good evidence.

7 Q You are over the identity problem in two ways, one
8 is you have a confession to two of them?

9 A Well, but one is -- the main way you are over the
10 identity problem is that he's prepared to plead
11 guilty to two of them.

12 Q Yes, and if one person committed all of them,
13 that's pretty good evidence, he admits two of
14 them.

15 A Sure, but he denied them all, but he ended up
16 pleading guilty to them all as I recall.

17 Q Right. And just dealing with that issue of a
18 confession, confessions are pretty good evidence
19 normally aren't they?

20 A If they are admissible.

21 Q In your experience, not too many confessions to
22 rapes and serious crimes are excluded by courts?

23 A Well, all I can say, Mr. Wolch, is that I have had
24 a number of battles in the Court of Appeal
25 attempting to defend confessions and their



1 admissibility. I was probably mostly successful,
2 but not always.

3 Q But mostly successful?

4 A Uh-huh.

5 Q But the fact of the matter is, you start off, if
6 you have a credibility issue, between a police
7 officer and a criminal?

8 A You start off by looking at all the circumstances
9 surrounding the confession.

10 Q I appreciate that, but would you agree with me
11 that normally speaking, if Mr. Karst, for example,
12 was to say one thing and Mr. Fisher another, the
13 trier of fact is more than likely going to accept
14 Mr. Karst?

15 A No, I can't say that.

16 Q You can't agree with that proposition?

17 A No. It depends on the circumstances that surround
18 it, and the issue of the admissibility of the
19 confession doesn't come down to just he said, he
20 said, it comes down to -- it comes down to taking
21 a look at all the circumstances. I've had
22 confessions that have been thrown out of court
23 simply because the trial judge did not like the
24 atmosphere that was created around the taking of
25 the confession, and that evidence came from the



1 police officers.

2 Q And probably on a traffic case or drunk driving?

3 A Well, I did a few other cases besides traffic and
4 drunk driving.

5 Q Now, would I be correct in saying, though, that it
6 has not been brought to your attention in any
7 particular document, report or statement, leaving
8 aside Mr. Kujawa's comment, that the confessions
9 in this case were improperly obtained?

10 A No, I have no -- I have no knowledge of how the
11 confessions were obtained, so I don't know whether
12 they were improperly obtained or not.

13 Q And if Mr. Karst was to testify here that they
14 were properly taken, you have no basis to
15 disagree?

16 A No. I would take a look at his testimony and see
17 whether it fit into what the law required, but
18 there's no reason for me to disbelieve Mr. Karst
19 or anyone else.

20 Q And you have no indication that Mr. Fisher was
21 complaining about it particularly?

22 A I don't think so. He was prepared to plead
23 guilty.

24 Q Now, I believe the evidence is that the charges
25 against Fisher were laid in December of '70, but



1 not disposed of until December of '71. That seems
2 like an awful long time to wait. I'm not sure I
3 have your explanation as to why it took a year on
4 what you say might be an expedited procedure.

5 A I can't give you an explanation except to say that
6 I was asked to do the paperwork with regard to
7 this matter. We had to, I gather, from looking at
8 the material, that we felt we had to wait until
9 the charges were disposed of in Manitoba. They
10 weren't disposed of in Manitoba until, I'm not
11 sure when it was, I can't remember, but it was
12 sometime after March at any rate, and then at that
13 point there was the question of getting Mr. Fisher
14 into Saskatchewan and there was a request made for
15 a direct indictment, the government changed and
16 then there was another request made for a direct
17 indictment, a trial date -- or a hearing date was
18 set, a guilty plea date was set, that would have
19 been set in conjunction with the Court, and
20 therefore at the convenience of the Court, as well
21 as the parties involved, and probably because I
22 was busy doing other work and Mr. Kujawa was busy
23 doing other work and Mr. Fisher in any event had
24 received 13 years, that we didn't feel it was as
25 urgent as Mr. Greenberg did.



1 Q Or perhaps, I'm going to suggest to you, that the
2 desire was to distance itself from the Milgaard
3 appeal?

4 A Well, I don't accept that.

5 Q Had it been done in the normal time frame, it
6 would have been done approximately around the time
7 when the Court of Appeal rendered its judgment in
8 Milgaard?

9 A And so?

10 Q Sorry?

11 A And so?

12 Q And perhaps it may have come to somebody's
13 attention there was a connection.

14 A Well, perhaps there would, Mr. Wolch, and perhaps
15 it would have come to someone's attention when it
16 happened a month after, it didn't, and since the
17 appeal was not in any way connected with Larry
18 Fisher at that time, I'm not sure why it would
19 have come to some person's attention. It happened
20 in the same city. If you are depending on the
21 media to bring it to people's attention, well, the
22 media in Saskatchewan regularly don't cover
23 appeals.

24 Q The media clearly normally --

25 A They probably would have covered this appeal, I



1 agree with you.

2 Q I mean, the Milgaard appeal was one of interest
3 particularly in Saskatoon and the catching of the
4 serial rapist certainly would have been of
5 interest in Saskatoon?

6 A Yes.

7 Q I mean, there were actually warnings in the paper
8 about him before he was caught?

9 A Uh-huh, yes.

10 Q So he was of extreme interest to the women of
11 Saskatoon who presumably would go on being worried
12 that that rapist was still around?

13 A Well, absolutely true. I'm just saying to you
14 that the two happening, that the two going on at
15 the same time would have no greater effect than
16 the two going on when they did.

17 Q Well, perhaps Justice Tallis, for example, Justice
18 Tallis handling the appeal reads in the paper that
19 there has been that rapist they caught in
20 Saskatoon for rapes around that time, he might
21 have looked into it, and probably would have is
22 what I'm saying, and that's something that could
23 have been anticipated?

24 A I don't know whether he would have looked into it
25 or he would not have looked into it, but I don't



1 think it's something that would have been
2 anticipated. I don't think -- I certainly didn't
3 turn my mind to that, it never occurred to me. I
4 don't know whether Mr. Kujawa did or not, I don't
5 think he did, but I don't know whether he did.

6 Q You don't know?

7 A No. We never discussed either case, the substance
8 of either case.

9 Q The media covered the courts and covered Queen's
10 Bench; did it not?

11 A Sporadically.

12 Q Well, I mean, we know in this case, for example,
13 Mr. Melnyk, his case involving a robbery got play
14 in the paper in Regina. I'm not sure if you know
15 that or not, but it did.

16 A I didn't know that.

17 Q So I would expect three rapes and an indecent
18 assault would get more play than that.

19 A I can't judge that, whether it would or not.

20 Q But coming into court around Christmas, odds are
21 no one is around?

22 A No one who? You mean nobody from the media is
23 around?

24 Q Well, sure, that's the time when sensitive cases
25 are often put through the courts.



1 A Oh, okay, if that's your experience that's fine.

2 Q Absolutely.

3 A Well, it's not mine.

4 Q Well, I'm suggesting that your being involved to a
5 degree in the political side of justice, you are
6 aware that many things are done with the media in
7 mind. For example, Monday is a good day because
8 Tuesday people read the papers, Friday is a good
9 day to put things through because they don't read
10 them on Saturdays, isn't that how it works?

11 A I never practiced that way, so I don't know, and
12 I'm sorry, I'm not involved politically. There
13 are politics of course involved in every
14 prosecution in the sense that the public is very
15 interested in it and so therefore the government
16 is, but frankly, I have never decided that I'm
17 going to do it on some time when the media -- most
18 of the time I wish the media were there and they
19 aren't, and appeals, most of the time I wish the
20 media were there, but I certainly take your point
21 that Mr. Milgaard's appeal would have been covered
22 by the media.

23 Q And under normal circumstances a fellow pleading
24 guilty to three rapes and an indecent assault
25 would have been covered in the media?



1 A Not necessarily.

2 Q But usually?

3 A Perhaps.

4 Q Particularly in Saskatoon where it happened?

5 A Sure, perhaps.

6 Q Now, do you see, and I appreciate you are saying
7 nothing bad happened here, but do you appreciate
8 how somebody looking at it might come to the
9 conclusion there is something wrong?

10 A Well, I've listened to your argument with regard
11 to this and I understand what it is. I'm not sure
12 that all these things have the same significance
13 that you would like to put on them, but I
14 understand the significance that you are putting
15 on them, and it appears to me at any rate that to
16 say that this was some sort of plan to avoid any
17 information coming out so that we would -- so
18 that -- when I say we, so that Mr. Kujawa and
19 whoever else he was supposed to be working with
20 would say, well, we'll do this on the 21st of
21 December because we know that it won't be covered,
22 well, I'm sorry, we don't know that it won't be
23 covered, we'll wait until after the leave to
24 appeal. It's a very elaborate plan for the
25 purpose of what, is what I ask myself, for the



1 purpose of making sure that David Milgaard remains
2 in jail when Mr. Kujawa would have known that
3 there was evidence that could show that he
4 shouldn't be in jail? Well, it's a lot easier to
5 simply face the fact and go ahead and get Mr.
6 Milgaard out of jail.

7 Q Well, except you are missing the third scenario.

8 A Okay.

9 Q You are missing the scenario where the prosecutor
10 believes in the conviction and believes that this
11 evidence will not exonerate him, but might get him
12 off on a crime he did. You follow what I'm
13 saying?

14 A I follow what you are saying.

15 Q Yeah. Another scenario --

16 A You'll have to ask Mr. Kujawa that.

17 Q But you are assuming, you are taking the
18 assumption that the only motivation that makes no
19 sense is I'm going to keep an innocent man in
20 jail, and I agree with you, that when you look at
21 tunnel vision and what I think somebody said was
22 noble cause corruption, it's not the desire to
23 keep an innocent guy in jail, it's a desire to
24 keep a guilty man in your mind in jail by not
25 releasing evidence that could get him out.



1 A Well, I can only speak for myself and say that I
2 hope I'm professional enough to act as a
3 prosecutor and not on what I believe to be true.
4 I have prosecuted people that I thought were
5 guilty and they have ended up being acquitted and
6 it didn't bother me one little bit, so my
7 knowledge of Mr. Kujawa is that way, so I suppose
8 that there are -- that there are prosecutors who
9 become so involved and who feel someone is so
10 guilty that they are prepared to suppress evidence
11 to do it. I've never met one like that, but I'll
12 take your word for it that there are.

13 Q So there are cases that we're not going to go
14 into, but --

15 A Sure.

16 Q -- what I'm saying is I'm just challenging you on
17 what I think is your assumption that holding back
18 evidence, not giving disclosure is predicated on a
19 desire to see an innocent person convicted. It's
20 not, it's to see a person that's believed to be
21 guilty by the person holding back.

22 A Well, it's not predicated on the desire to see an
23 innocent person remain convicted, it's predicated
24 on the fact that there is evidence that comes to
25 light which shows that this person may not be



1 guilty. Now, if that evidence is credible
2 evidence, then I would expect that any prosecutor
3 would look at it and change his or her mind about
4 whether that person is guilty.

5 Q Well, I appreciate that, but there was, for
6 example, in this case, even after the Supreme
7 Court hearing, Mr. Mitchell said he believed David
8 was guilty. Do you recall that?

9 A Well, people believed David was guilty because he
10 had been convicted and what the Supreme Court of
11 Canada, what the Supreme Court of Canada said, as
12 I understand it, that there was evidence that
13 would warrant a new trial that could change the
14 basis. That's not evidence -- so whether
15 Mr. Mitchell felt that he was still guilty or not,
16 well --

17 Q You know, he said it publicly in *The Globe and*
18 *Mail*, I think you are certainly aware of that?

19 A No, I'm not, but if he was, that's fine.

20 Q Yeah. But what I'm saying, there's all the
21 evidence, Larry Fisher was in the open, his acts,
22 it was all there and it was still the position of
23 the prosecution that David was guilty.

24 A But I have not met a prosecutor who was so
25 unprofessional that even if he believed the person



1 was guilty would ignore an attempt to suppress
2 evidence that might not enable him to prove the
3 case beyond a reasonable doubt. We're not
4 avenging angels, I don't consider my job to be an
5 avenging angel, to punish the guilty and the
6 sinful because I think they are guilty, my job is
7 to put the case before the Court and try to prove
8 it beyond a reasonable doubt, and that's all the
9 evidence that goes before the Court, and as far as
10 I know, most of the prosecutors I know across the
11 country look at it that way.

12 Q I agree with you, but the term is most of.

13 A Well, fine.

14 Q Obviously some don't.

15 A And if you are saying that Mr. Kujawa is not that
16 kind of a prosecutor, you'll have to ask him.

17 Q Your opinion of Serge Kujawa is based on
18 experience with him, working with him?

19 A That's right.

20 Q On the facts of this case you haven't got personal
21 knowledge of what prompted him to do a lot of
22 things?

23 A I don't have any personal knowledge of what
24 prompted him and I just don't agree with you that
25 that would be his motivation.



1 Q But seeing his reaction of calling David a kook
2 and things like that, that's somewhat offensive;
3 is it not?

4 A It's very offensive. Mr. Kujawa has been known to
5 say things, to shoot before he has taken aim. I
6 read that and I think what he was saying is he was
7 outraged about what he felt was an assault on the
8 administration of justice. I don't agree that it
9 was an assault on the administration of justice
10 myself, I don't think it was, I think that it was
11 positively indicated that justice was being done
12 finally to have the Supreme Court of Canada
13 hearing, but that wasn't Mr. Kujawa's reaction to
14 it, and what he did, he put it strongly and he put
15 it intemperately, very intemperately in my
16 opinion.

17 Q And after the Supreme Court hearing, would it be
18 fair to say that the position of your department
19 was that David was guilty and we're not going to
20 do anything to try to bring Larry Fisher to
21 justice?

22 A Oh, no, that wasn't it.

23 Q There was nothing active done was there?

24 A Well, Mr. Fisher was finally --

25 Q Sorry?



1 A Mr. Fisher was finally prosecuted for it.

2 Q He was prosecuted only after DNA which was
3 obtained with no assistance of Saskatchewan at
4 all?

5 A Because the case, as I understand it, and I didn't
6 do the case, so I don't know all the details, but
7 as I understand the case, the case remained the
8 way it had before; that is, that there was some
9 evidence, there was evidence that Larry Fisher
10 lived in the area and you had similar fact
11 evidence, that evidence was called, but what
12 finally clinched it, and it may very well have
13 been that the review of the prosecutors was that
14 the case was not strong enough to prove beyond a
15 reasonable doubt. I don't know, I wasn't privy to
16 that sort of thing, but certainly once there is
17 DNA evidence, then it was pretty clear, but, you
18 know, I have no idea whether the similar fact
19 evidence together with -- well, really what you
20 have is the similar fact evidence.

21 Q Were you aware that the people on behalf of Mr.
22 Milgaard offered to prosecute Larry Fisher free of
23 charge before the DNA was even found and
24 maintained, that a conviction could be maintained?

25 A No, I wasn't, but I'm not surprised that they were



1 turned down. There have been many offers from
2 time to time over the time I've been with the
3 Department of Justice where people have said we're
4 prepared to go ahead and prosecute this ourselves.
5 It's been the policy of the department, and I
6 think the policy of every ministry of justice
7 across the country, that the public prosecutor
8 takes over once the matter is going to go to trial
9 and it's not done on a private prosecution.
10 Prosecutions in my view are not a contest between
11 two people or two groups of people, the public,
12 the community, if you like, against an accused,
13 and so I'm not surprised that it was turned down,
14 but I'm not aware of it, so --

15 Q I want to turn finally to the matter of the
16 sentencing of Larry Fisher and, as I understand
17 it, and I'll bring up a document if you need it,
18 but Bill Morton, the Crown Attorney in Manitoba,
19 indicated that the Manitoba sentence was
20 independent of Saskatchewan charges.

21 A That's right, that's right.

22 Q And your views on that, him telling you that?

23 A Well, my view on that is that -- first of all, I'm
24 not sure that Mr. Morton, and I know Mr. Morton
25 would know this, that Mr. Morton would be able to



1 make reference to the fact that there were
2 outstanding charges in Saskatchewan of similar --
3 of similar events in order to have that be
4 relevant to sentencing, because I don't think it
5 is relevant to sentencing, and Mr. Fisher at that
6 point had not been convicted of any charges. He
7 had indicated he was going to plead guilty and
8 perhaps Mr. Morton might have said that, but I
9 think what Mr. Morton was signaling to us was that
10 we could go ahead and independently take our case
11 as far as we could take it.

12 Q Yeah, he hadn't been punished at all for
13 Saskatchewan in Manitoba?

14 A Well, he had not been before the Court.

15 Q Right. It's something that Mr. Greenberg might
16 have done in the sense of saying to the judge,
17 look, this poor guy, he's got to go face more time
18 in Saskatchewan, but that didn't happen?

19 A No, it didn't.

20 Q And in regard to the offences, I'm going to
21 suggest to you that while all rape is serious,
22 there are different degrees of seriousness between
23 case to case?

24 A Yes.

25 Q And the absolute worst type of rape is the guy who



1 hides in the parkade or down the back lane with a
2 knife and attacks women who are strangers to him,
3 that's considered about the worst?

4 A You keep wanting me to put values on this about
5 what is the worst and what is not the worst and I
6 keep resisting because I'm not sure that -- you
7 can always find something worse. I once had a
8 case where the woman was not only dragged into a
9 car, she was stripped, she was beaten, she was
10 raped and then she was thrown out in the middle of
11 the prairie in mid winter naked to walk home. I
12 would think that that's getting pretty bad.

13 Q It's bad -- did they know each other before?

14 A No, and if you are talking about -- but whether
15 they knew each other before or not, if they knew
16 each other before it would be even worse as far as
17 I'm concerned, but if what you are saying is that
18 this is a random choice of a victim with violence,
19 that's very bad.

20 Q It frightens the community the most?

21 A Sure.

22 Q I mean, that is, if you read in the paper that two
23 acquaintances, one is charging the other with
24 rape, a date rape or whatever it is, it's a bad
25 allegation, but it doesn't cause the average woman



1 to say I can't walk down the street or --

2 A That's right.

3 Q Or whatever?

4 A Yeah.

5 Q But when you read that some guy is hiding in a
6 parking lot or a women's washroom with a knife,
7 everybody gets scared?

8 A Yes.

9 Q And deterrence becomes a huge factor in those
10 cases particularly because the guys who commit
11 those crimes are really dangerous?

12 A Yes. Whether they can be deterred or not is
13 something we can debate forever and ever, but I
14 will go this far with you, of course the sentence
15 should reflect the seriousness of the offence.

16 Q I'm not championing date rape, but what I am
17 saying is that --

18 A I didn't think you were.

19 Q -- the fellow who commits the date rape, you can
20 take a little more comfort in the fact you may be
21 able to rehabilitate him or make him understand
22 better that no means no, you can do that, but
23 rehabilitating the guy with the knife in the
24 parking lot is a very, very difficult task?

25 A Well, it doesn't come down to deterrence or



1 rehabilitation, but I take your point.

2 Q It's easier to rehabilitate the one than the
3 other?

4 A Why don't we go out and we'll agree, I'll agree
5 that it's a point that I understand. I'm not sure
6 it's easy to rehabilitate either one of them.

7 Q Now the good news is that the guys in the back
8 lanes with the knives are pretty rare?

9 A That's right.

10 Q I mean have you prosecuted any yourself?

11 A I've prosecuted rape where there's been violence,
12 yeah.

13 Q Not violence, I'm talking unknown assailants
14 hiding somewhere, attacking women.

15 A Yes.

16 Q I understand it's very rare?

17 A Yeah, it's, well it's rare, but I have
18 prosecuted --

19 Q Maybe one?

20 A -- one or two.

21 Q It's a rare circumstance?

22 A Yes.

23 Q Fortunately.

24 A Uh-huh.

25 Q These are rare people?



1 A Uh-huh.

2 Q They have a certain mentality, they -- whereas the
3 one form of rape, it's a sexual desire or
4 whatever, this is more to it; it's punishing
5 women, hurting women, it's a different mentality?

6 A Well, all rape is punishing and hurting women, in
7 my opinion.

8 Q No, but the --

9 A Go ahead, I understand what you are saying, yes.

10 Q See, Larry Fisher has said that it was the
11 punishment more than the sex that drove him, and I
12 think that's correct that those kind of people
13 have much more on their brains and they're much
14 more scary and violent and dangerous?

15 A Well I don't want to get into a debate with you
16 about this, Mr. Wolch, but in my respectful
17 opinion all rape is -- sex has nothing to do with
18 any rape.

19 Q Okay, but there is a big difference between the
20 guy at the party and the Fishers and the
21 Bernardos, they're in their own category, that's
22 all I'm saying?

23 A Yeah. I'm not sure that Fisher is Bernardo, but,
24 okay.

25 Q A couple less, but whatever it is?



1 A Yeah.

2 Q Okay.

3 A Uh-huh.

4 Q So what I am saying is, though, that when we talk
5 about sentences there is a big difference. When
6 it comes to the date rape type of situation, the
7 courts have indicated a certain range of
8 sentencing, some provinces have starting points,
9 some don't, but generally speaking, you know, the
10 less serious would be around three years, the more
11 serious around seven, that seems to be the range,
12 give or take, depending on circumstances?

13 A Yeah, sure.

14 Q Okay.

15 A I understand the bottom line is two years in
16 Saskatchewan, but yeah.

17 Q Whatever it is. But when it comes to a guy with a
18 knife in the parking lot it is almost always ten
19 years or more?

20 A Well that's, that may or may not be so, but the
21 fact is that Mr. Fisher had already been sentenced
22 to 13 years. To say that 'oh well, he is being
23 punished for Manitoba, now we've got to go and
24 punish him for' -- which is -- there is the
25 principle of totality that comes into play here,



1 and I'm simply saying that in my experience here
2 in this province the principle of totality would
3 have prevented a consecutive sentence, if that's
4 what you are saying. I mean let's get down to it.
5 It would have, and it would have not permitted
6 consecutive sentence, and I cannot think that
7 judge would have said "well I'm going to, I'm
8 going to, I'm going to sentence you to 16 years".

9 Q No, but let's back up a little bit. The judge in
10 Manitoba was faced with two rapes. Okay? Now,
11 presumably he may have said "rape A calls for ten
12 years and rape B calls for ten years, but on the
13 principle of totality I'm not going to give him
14 20, I'll give him 13"?

15 A Right.

16 Q Right?

17 A Uh-huh.

18 Q Had the judge had six rapes he may have said
19 "totality, I'm not going to give him 60 years,
20 I'll give him 20.

21 A Well, that may have happened in Manitoba, it
22 wouldn't have happened here.

23 Q Well, that's how totality works?

24 A Well that's how totality works, that's right, I
25 mean you have to -- but what you had here was you



1 had 13 years, you had 13 years and you had guilty
2 pleas and the sentence was 4 1/2 years, and I'm
3 simply saying that if Mr. Kujawa -- and he can
4 speak to this -- if Mr. Kujawa had gone into Court
5 and said "I want you to make that 4 1/2 years
6 consecutive", he would have been unsuccessful, and
7 he knew that.

8 Q Well what if he asked for concurrent time but said
9 four rapes, or three rapes and an indecent
10 assault, if you add it all up it comes to 30 years
11 or whatever, but why not give him 20 years
12 concurrent to the 13?

13 A Because he wouldn't have got it here.

14 Q But what's wrong with asking for it? As a person
15 protecting society, why would you take the
16 position that this man should not get a day in
17 jail for four serious attacks on women?

18 A He got 13 years.

19 Q But not for the four attacks.

20 A Well, all the sentences are subsumed together,
21 that's what totality means.

22 Q Well --

23 A And to say why didn't he ask for it; because it
24 would damage his credibility and the credibility
25 of his case to go into a Court and ask for



1 something that he knows at the very beginning is
2 not going to happen.

3 Q Well, I don't understand "the credibility of his
4 case", what can he lose by asking for time?

5 A He would only lose the credibility that he has
6 established with the Court.

7 Q Well, walking into Court and saying "I have a
8 serious rapist here who has committed four
9 terrible crimes and I want a couple of days in
10 jail", you'd lose credibility.

11 A Well "a couple of days in jail"?

12 Q Well, anything, he never got a day.

13 A 20 years?

14 Q Whatever. Why wouldn't he get 20 years?

15 A Well, I can't speak to it.

16 Q For six serious rapes.

17 A I can't speak to it, Mr. Wolch, because I'm only
18 telling you what the sentencing patterns were in
19 Saskatchewan.

20 Q Can you cite a case that is similar where the
21 sentencing pattern shows this?

22 A Well, I can't cite cases to you because I can't
23 recall cases.

24 Q Do you remember the case you did? You mentioned
25 one that you had.



1 A Yeah.

2 Q Do you remember the guy's name?

3 A Well I had it in the Court of Appeal, so I can't
4 remember the name of the person, I mean the --

5 Q Okay. I'm going to suggest to you, sir, that you
6 are simply wrong on your assessment. And I want
7 to bring a case to your attention. Are you
8 familiar with the *Bonisteel* case?

9 A Yes, I think so, yeah.

10 Q In the early '70s?

11 A Yeah, I think so.

12 Q What's your memory of that?

13 A I have no memory, but refresh my memory of it?

14 Q Well it's very similar in a sense, because
15 Bonisteel had committed a rape in Saskatchewan, a
16 rape in Manitoba, and I think a few months ago he
17 was convicted of murder, a murder that occurred
18 before the rapes, actually, so it's a -- quite a
19 parallel with Fisher. And that case was heard in
20 the Manitoba Court of Appeal in 1975, so the two
21 rapes -- and "just" two, and when I say "just" I
22 said it in quotation marks -- occurred around
23 1973. And perhaps I can, I have the case here, if
24 I can somehow show it to you.

25 A Well, why don't you tell me what happened?



1 Q Well, I'd rather go through it, I'm not just sure
2 how we do it. I should have thought of this
3 earlier. It's only two pages.

4 MR. HODSON: I might just suggest that Mr.
5 MacKay be given an opportunity to read it to
6 himself and then we will put it up.

7 COMMISSIONER MacCALLUM: Okay.

8 A Sure. (*Witness reading*). All right.

9 BY MR. WOLCH:

10 Q Perhaps we can go through that. Now this case is
11 heard December the 1st of '75, and judgement '76,
12 and you'll note -- might not be aware of this, but
13 the judge speaking for the Court is Justice Matas,
14 the very same judge who sentenced Larry Fisher, by
15 coincidence. And you'll also note that it's the
16 full Court, that is there are all five judges
17 sitting on this, and from your experience five
18 judges; what does that signify to you, as opposed
19 to the normal three?

20 A That it's a serious case.

21 Q Yeah, they're making a statement I would think.
22 And it says that:

23 "... Bonisteel, has appealed from two
24 sentences for rape, imposed by Trudel
25 ... after pleas of guilty."



1 2. The first offence occurred on February
2 12, 1975, ...",

3 I was wrong when I said '73, it's right there,
4 '75:

5 "... in Saskatchewan; the second ... in
6 Winnipeg on February 18 ... The learned
7 trial judge imposed a life sentence for
8 the Winnipeg offence and 15 years
9 concurrent for the rape in Saskatchewan.
10 The main thrust of the appeal was that a
11 life sentence was not warranted under
12 all the circumstances; it was also
13 argued that a term of 15 years was
14 excessive for the first offence. Crown
15 attorney took the position that there
16 has not been any error in principle, the
17 sentences were neither harsh nor
18 excessive and especially that a life
19 sentence was appropriate for the
20 Winnipeg offence."

21 I pause there to say here's a Crown attorney not
22 frightened to suggest to a Court that life is
23 appropriate for one rape, as opposed to your
24 comments earlier?

25 A Oh, I don't think Mr. Kujawa was frightened to say



1 that.

2 **Q** No, but losing credibility, here's a Crown
3 attorney upholding a life sentence for one?

4 **A** Well, may I say at the outset that this is the
5 Court of Appeal of Manitoba and we're talking
6 about the Court of Appeal in the Queen's Bench in
7 Saskatchewan, the sentencing patterns were
8 different. But go right ahead and make your
9 point.

10 **Q** If we can go ahead, paragraph:

11 "3. Appellant acted in a way which calls for
12 severity. In my opinion, lengthy terms
13 of incarceration are indicated. But,
14 without minimizing the seriousness of
15 the matter before us, and taking into
16 account circumstances of the offences
17 and the offender, I am of the view that
18 a life sentence is not warranted.

19 4. We have had the advantage of a full
20 presentence report ... a summation from
21 Dr. Bankier ... a probation report ...
22 and reports from probation officers in
23 Ontario and British Columbia.

24 5. Appellant is 27 years of age, married
25 with one child ... no previous crimes of



1 violence ... there are four prior
2 offences - theft ... vagrancy ... taking
3 an automobile ... and break, enter and
4 theft in 1971. Appellant received a
5 light sentence in each case.

6 6. In February, 1975, appellant quit his
7 job, left his wife and child in
8 Vancouver, proceeded to drive east, and
9 at the same time began to drink
10 excessively. However, the planning and
11 deliberation for each offence militates
12 against any suggestion that liquor
13 consumption had in any way detracted
14 from the seriousness of appellant's
15 actions. Counsel suggested that
16 appellant was merely trying to escape
17 responsibility from his financial and
18 marital obligations and actually wanted
19 to be caught and sent to prison. I
20 consider this to be no excuse at all for
21 imposing terror on, and assaulting
22 innocent people.

23 7. In the first case, during the afternoon
24 of February 12, 1975, appellant, using a
25 pretext, induced the complainant, a



1 young register nurse, to stop her car on
2 the highway. She was driving alone.
3 Appellant produced a knife, forced
4 complainant to join him in his car and
5 drove to a lonely road. He robbed her
6 of \$15.00, forced her to commit fellatio
7 and to have intercourse with him. After
8 extracting a promise from complainant
9 not to report the matter to police, he
10 drove her back to her car and let her
11 out. The absence of injury to
12 complainant was no credit to appellant.
13 She obviously had followed the advice,
14 tendered publicly to women, not to
15 resist in crimes such as these."

16 Now, pausing there, that is not all that
17 different from Fisher's offences; might you agree
18 with that?

19 A Umm, yes, I'm --

20 Q You are familiar --

21 A As familiar, as much as I know about Fisher's
22 offences, yes.

23 Q Yes:

24 "8. About 11:30 p.m., on February 18, 1975,
25 appellant attacked the second



1 complainant, a young teacher, as she was
2 about to park her car in a parking
3 garage attached to her apartment block.
4 Using a knife again, appellant forced
5 complainant back in her car, robbed her
6 of a small amount of money and held her
7 prisoner for four or five hours.
8 Complainant received superficial cuts
9 from the knife of the appellant. She
10 was sexually abused, several times, in
11 different ways, under threat of physical
12 violence, to the extent that complainant
13 believed she would be killed if she did
14 not do what she was told. About 5:00
15 o'clock in the morning appellant allowed
16 complainant to dress and drove the car
17 towards the airport where he ended up
18 near a runway. An alert ...",

19 RCMP officer arrested him.

20 "9. The psychiatrist's report is only of
21 limited use because it was directed to
22 the question of whether the appellant
23 was fit to plead and to stand trial."

24 That's academic, he pled guilty. If we could
25 just go down to the bottom there:



1 "The psychiatrist's report is only of
2 limited use ..."

3 "Apart from some mild degree of
4 depression, I can find no evidence of
5 mental illness ... a schizoid,
6 sociopathic type of personality ...
7 unable to cope with the responsibilities
8 of a husband and a father and has
9 constant feelings of frustration and
10 failure. ... he is a product of a
11 pathological and unhappy family
12 background but on the other hand, he
13 realizes the seriousness of charges
14 against him and ... is able to
15 appreciate the difference between right
16 and wrong ...",

17 and the probation officer says:

18 "His rationale for the use of the knife,
19 was that it would overcome any
20 resistance. He thought that the use of
21 a knife would prevent the complainant
22 from resisting him and suffering any
23 injuries."

24 COMMISSIONER MacCALLUM: Mr. Wolch, you are
25 reading very speedy.



1 MR. WOLCH: Too fast?

2 COMMISSIONER MacCALLUM: The reporter can't
3 follow you.

4 MR. WOLCH: I'm sorry, I'll provide a copy
5 of it afterward as well.

6 BY MR. HODSON:

7 Q 'He thought that the use of a knife would
8 prevent the complainant from resisting
9 him and suffering any injuries. Then he
10 mentioned that he did not realize how
11 easy it was to get 'scored', with the
12 help of a knife. He recalled that when
13 he dated a young lady, he had to exert
14 more effort and incur more expenses to
15 encourage her to engage in any sexual
16 activities with him.'

17 At page 13 he said:

18 'It is urged that this young man be
19 examined by a psychiatrist at the
20 earliest date. Furthermore, it is felt
21 that unless he receives adequate
22 psychiatric treatment within a secure
23 institution, he will continue to be a
24 danger to the community. It is also
25 very important that he realize the



1 seriousness of his predicament.

2 Otherwise, he may resort to similar
3 violent behaviour in the future.'

4 11. These comments of the probation officer
5 must be taken to have been made on the
6 basis of his professional experience,
7 although he is not a psychiatrist.

8 12. There was extensive reference to the
9 deprived background of appellant but in
10 spite of those factors the question of
11 deterrence is an extremely important,
12 essential component of the fitness of
13 the sentence to be imposed.

14 13. The offences were grave and were brutal.
15 I would allow the appeal in part and
16 substitute a sentence of 20 years for
17 the rape in Manitoba. I would not
18 disturb the sentence of 15 years for the
19 offence in Saskatchewan. The sentences
20 are to be concurrent."

21 Now this is the full Court making a clear
22 statement on a man with two offences, albeit very
23 serious, but not all that different than Fisher;
24 do you agree?

25 A With what; that it's not that different from



1 Fisher?

2 Q Well it's less, I mean he has got two, Fisher has
3 got six?

4 A Well, or that it's the full Court and that,
5 therefore, it's serious?

6 Q Yeah?

7 A I've already agreed with that, yeah.

8 Q Yeah. And I'm suggesting that Manitoba and
9 Saskatchewan weren't all that different?

10 A Well, I don't know whether they were different or
11 not, and let me just be clear. I'm not suggesting
12 that the sentence of 4 1/2 years was necessarily
13 the sentence that I would have liked to have seen.
14 I'm not defending the sentence. I'm simply saying
15 to you that it was consistent, in my opinion, with
16 what the sentences would be in this jurisdiction.

17 The fact that this sentence was
18 handed down at another jurisdiction is
19 interesting, and I also probably agree with it,
20 and if I were the Crown attorney, as they're
21 called in Manitoba, I would have probably stood up
22 and said "there's been no error in principle for
23 the life sentence". I'm not sure that I would
24 have been terribly comfortable doing that but I
25 would have done it. And the fact that it wasn't



1 done here, I guess what I am saying, Mr. Wolch, is
2 you'll have to ask Mr. Kujawa.

3 Q What I am saying is just looking at it
4 objectively, in and around that period of time
5 Mr. Bonisteel commits one rape in Saskatchewan,
6 one in Manitoba, and at the end of the day it's 20
7 and 15 years, totality principle, he gets 20 in
8 total.

9 A Every sentence, as you well know, is different.
10 Every sentence depends on its own facts and its
11 own circumstances. You can say that there are
12 similar circumstances. I'll take your word for it
13 the similar circumstances are there. You can
14 argue, and perhaps you should have been speaking
15 to sentence, because you can argue that this is --
16 these are six rapes we're talking about and not
17 two rapes, and I can say "yes, I understand
18 everything you are saying with regard to that and
19 I don't necessarily disagree with it", but the
20 fact remains that Mr. Fisher was -- had been
21 sentenced to 13 years, which in 1971 in
22 Saskatchewan was a very stiff sentence.

23 Q But my point --

24 A And it would be not -- and what we're talking
25 about is we're talking either that the Court be



1 urged to impose a consecutive sentence or to
2 impose a concurrent sentence that was greater than
3 the sentence that was there, and I'm simply saying
4 to you that in my experience, in 1971 I had very
5 little experience, but that that was not a
6 sentence that the Court could be induced to -- now
7 why did Mr. -- if you are saying "well Mr. Kujawa
8 should have stood up and shook his fist and asked
9 for it notwithstanding", well I don't know why he
10 didn't, why he didn't, and you'll have to ask him.

11 Q Yeah, but you say 13 years was a lengthy sentence,
12 that's true, it's a long time, but there were
13 exceptionally few other similar cases, thank
14 goodness.

15 A If what you are saying is that this sentence, this
16 rape was so different from other rapes that it
17 deserved to be treated differently and that it
18 should have gone out of the ordinary pattern of
19 sentencing, I can't say to you whether that's,
20 whether that's right or that's wrong, it -- and I
21 suppose I can say "well, you know, there are rapes
22 with violence and rapes with violence are worse
23 than" -- and I know that you are saying not only
24 rapes of violence but rapes of random choices and
25 there are rapes with random choices with violence,



1 and they attract serious sentences.

2 Q You have the Manitoba Court of Appeal saying one,
3 one of these offences could call for 15 or 20
4 years, just one is what the Court is saying, and
5 I'm having a hard time understanding how
6 Saskatchewan would say "four years concurrent is
7 good for four offences"; it doesn't make any
8 sense?

9 A Well, I can't explain it to you, perhaps Mr.
10 Kujawa can. I can't explain it to you, I'm not
11 sure -- well, I'm -- we can go on. Are you
12 suggesting that Mr. Kujawa had some other motive
13 for asking for this, for asking --

14 Q I don't understand it.

15 A For another --

16 Q I don't understand, I'm suggesting to you it makes
17 no sense to give him concurrent time and then to
18 say that the confession might have been not
19 appropriate without any basis for that, that's the
20 difficulty.

21 A Well it's -- there is no indication that there was
22 no basis for him saying that, I don't know what
23 basis there was; do you?

24 Q No.

25 A No.



1 Q I mean --

2 A I mean I haven't looked at the case, I don't know
3 what the circumstances were around the confession.

4 Q What is the purpose in getting Fisher to plead
5 guilty; what's to be accomplished?

6 A What's to be accomplished is that the offences are
7 finally gone, that --

8 Q For whose benefit?

9 A Well for the benefit of everyone. Should we,
10 should we not have Fisher plead guilty; is that
11 what you are saying?

12 Q No, I -- what is the purpose of it?

13 A Well, I thought the purpose would be obvious, I
14 mean --

15 Q What?

16 A -- he committed the offences --

17 Q All right.

18 A -- and he was prepared to plead guilty.

19 Q Okay, so he's not getting a day in jail, what
20 other purpose is there?

21 A Well he has 13 years in jail.

22 Q Well, for these offences, we could go on forever
23 on that, but for these offences he is getting
24 nothing.

25 A Well --



1 Q What other purposes are there?

2 A Well for to get those offences off the docket, if
3 you like, and to have him face up to the offences.
4 And if what you are saying, he doesn't receive any
5 extra punishment, what would you suggest, in
6 practical terms, we do when he comes and says --

7 Q Well --

8 A -- "I would like to plead guilty to these offences
9 because I want to get them off the sheet, I want
10 to get them over with", should we at that point
11 say "well, you are probably not going to get any
12 more time so we're not going to accept the guilty
13 plea"?

14 Q Well why not just say "we're going to prosecute
15 you, we have a confession, we're going to put you
16 in Court and we're going to ask for appropriate
17 time, you want to plead guilty, go ahead"?

18 A Well, we're going around in circles, because I --
19 I -- it was Mr. Kujawa, as I understand it, it was
20 Mr. Kujawa's opinion that the confession was not
21 admissible. Now if -- now you are working from
22 the assumption that the confession was admissible,
23 that's fine, if you have information that supports
24 that, that's good. I don't have that information,
25 and surely that debate should be with Mr. Kujawa.



1 Q Worst case comes to worse and the confessions
2 don't get into Court, there is no benefit to
3 Fisher either, he just gets one -- four less
4 convictions, he's still doing 13 years.

5 A And what we do is we put the complainants through
6 the stress of a trial.

7 Q Well no one --

8 A We go through the costs -- well, we should not be
9 concerned of the effect of a trial of this nature
10 on the complainants?

11 Q First of all, the credibility of the complainants
12 is not an issue.

13 A That's fine.

14 Q Hang on.

15 A I know what you are saying.

16 Q They're not being challenged that they were
17 attacked, most good counsel would admit it and
18 only focus on whether they can identify the
19 attacker, you don't even need the complainants.
20 You have a voir dire on the confession, that's the
21 end of the case, you know that.

22 A Well I --

23 Q But --

24 A If you say so.

25 Q But what I am concerned about is your concern for



1 the complainants; then why aren't they told?

2 A Well, again, you will have to ask Mr. Kujawa. It
3 was not usual to tell complainants, in those days,
4 about these things. You can say it was a bad
5 practice, it doesn't happen now, it wasn't usual
6 for him to tell them.

7 Q What about the women of Saskatoon who still
8 thought there was a rapist out there; what about
9 telling them?

10 A Well, fine. What is the point? Are you -- you
11 are saying that they weren't told because Mr.
12 Kujawa didn't want this to come out; is that it?

13 Q Something. You can take an active approach and
14 call the media and say "look,", the police have
15 press conferences all the time, Crown attorneys
16 do.

17 A Crown attorneys?

18 Q "We've got the guy, we've caught the guy"?

19 A Okay. Crown attorneys that have press conferences
20 all the time, --

21 Q Some of them?

22 A -- perhaps from time to time now, they never
23 had -- held press conferences in 1971.

24 Q There was the means to advise the public, in
25 Saskatoon, that the rapist was caught?



1 A Okay.

2 Q And that wasn't done?

3 A Okay.

4 Q All right? So when you have concern for the
5 community and for the victims, nothing was done to
6 satisfy their fears?

7 A Well, I'm only speaking for myself.

8 Q I appreciate that.

9 A You are really going to have to ask Mr. Kujawa
10 about that.

11 Q I understand. But do you understand and
12 appreciate, when you look at the delay in
13 prosecuting Fisher, when you look at the location,
14 when you look at the punishment he received and
15 the lack of publicity, do you understand why
16 reasonable people could come to the conclusion
17 that there was a coverup?

18 A No.

19 Q Nothing, no --

20 A No.

21 Q A reasonable person looking at it?

22 A No.

23 Q No? Why not?

24 A Well, because -- I've attempted to give you an
25 explanation, and a reasonable person can assume



1 all sorts of things, I guess, --

2 Q True.

3 A -- but in my opinion no.

4 Q Okay. Those aren't assumptions, those are facts.

5 A Okay. Umm --

6 Q And I'm not saying you should accept the fact
7 there was a coverup --

8 A No.

9 Q -- all I'm asking you is if you look at all of
10 those facts would it not be reasonable to conclude
11 that there is something wrong here and there was a
12 coverup?

13 A No.

14 Q Based on all those facts I gave you?

15 A Based on all those facts, it's with -- what you
16 are saying is that it's consistent with a coverup?

17 Q Yes.

18 A I don't even think that it's consistent with a
19 coverup. Sorry, first of all you have to, you
20 have to say "why?", why cover it up?

21 Q Okay, we -- I say because you believe the person
22 is guilty, --

23 A Well that's --

24 Q -- you believe in the guilt, and you don't want to
25 rock the boat?



1 A Well, that's something you are going to have to
2 ask Mr. Kujawa.

3 Q Thank you. Those are my questions, sir, thank you
4 very much.

5 COMMISSIONER MacCALLUM: I guess we'll
6 adjourn for lunch then.

7 *(Adjourned at 12:03 p.m.)*

8 *(Reconvened at 1:33 p.m.)*

9 **BY MR. WILSON:**

10 Q Good afternoon, Mr. MacKay.

11 A Good afternoon.

12 Q For the record only, I represent Serge Kujawa and
13 my name is Garrett Wilson. I think you knew all
14 that.

15 A I think I did, yes.

16 Q A couple of things arising out of Mr. Wolch's
17 examination before lunch. The Manitoba Court of
18 Appeal decision that he referred us to was dealing
19 with two offences, one in Saskatchewan and one in
20 Manitoba, and the result was 15 years for the
21 Saskatchewan offence and 20 for the one in
22 Manitoba; is that correct, to be served
23 concurrently?

24 A Yes.

25 Q And isn't the obvious result of that that there



1 was nothing extra for the Saskatchewan conviction?

2 A Well, if you use Mr. Wolch's reasoning, I think
3 that that's true, yes.

4 Q On the subject of sentencing, you told us quite
5 clearly that in your view in the era of 1971 a 13
6 year sentence in the circumstances facing Larry
7 Fisher was about the maximum that could be
8 expected out of the system in Saskatchewan?

9 A Well, it's difficult to say that it was the
10 maximum. I suppose that one could envision some
11 case where it would be more, but it was very -- it
12 was only recently that 12 years was handed down,
13 well, not recently, but within the past 15 years,
14 that 12 years was a sentence for manslaughter,
15 which I think was considered to be probably the
16 highest sentence that had been handed out for that
17 kind of an offence, so when we get to sentences
18 that are above 10 years, at that time at least
19 they were very unusual, unless they were a minimum
20 sentence such as murder.

21 Q We're aware here, sir, and perhaps you are also,
22 that in 1980 when Larry Fisher was released from
23 jail having served the sentence that we're talking
24 about, within a matter of a few weeks only he
25 assaulted a woman in North Battleford and wound



1 up -- a vicious, vicious attack, again with a
2 knife, and wound up convicted again of a rape and
3 attempted murder, he actually had left the woman
4 for dead?

5 A Yes, I'm aware of that.

6 Q The sentence was 10 years. Were you aware of that
7 also?

8 A I believe so, yes.

9 Q Which I suggest to you speaks somewhat to the
10 standard of sentencing in the criminal justice
11 system in Saskatchewan at that time.

12 A Well, I would say so. I mean, he had just come
13 off a 13 year sentence for rape with violence and
14 then he was at it again and it garnered him
15 another 10 years. Presumably in another
16 jurisdiction it may have been more than that.

17 COMMISSIONER MacCALLUM: Do you remember
18 what year that was, Mr. Wilson?

19 MR. WILSON: 1980, sir.

20 COMMISSIONER MacCALLUM: 1980, thanks.

21 BY MR. WILSON:

22 Q Now I want to talk to you just a little bit, Mr.
23 MacKay, about the manner in which the date was
24 chosen for the appearance on the direct indictment
25 against Larry Fisher in December of 1971 and we



1 looked at a Memorandum of Relief that you have
2 prepared and signed and it's number 010662, and
3 you identified that as having been drawn by you?

4 A Yes.

5 Q And I note that it was filed in the Queen's Bench
6 Regina on December the 9th, 1971?

7 A Yes.

8 Q And if we turn the page, please, what you are
9 asking for is an order providing for the transit
10 of Larry Fisher from the Saskatchewan
11 Penitentiary, Prince Albert, to Regina to be tried
12 on the 21st of December at two p.m.; right?

13 A Yes.

14 Q So certainly on the 9th of December when that
15 material was filed, the December 21st date had
16 already been selected and fixed?

17 A Yes.

18 Q And in fact there was an affidavit that you filed
19 along with it setting out those circumstances, and
20 we don't need to go into that. Now, as a matter
21 of basic practicality, you as a junior counsel in
22 1971 would, to arrange that Court date I suggest,
23 did the following things, you checked Mr. Kujawa's
24 calendar to see when he was available?

25 A Yes.



1 Q You would talk to the local register at the court
2 to see when the judge was available?

3 A Yes.

4 Q And you in fact had some conversations with
5 Mr. Greenberg in Winnipeg about when he could be
6 available?

7 A I don't recall having conversations, but either I
8 did or perhaps Mr. Kujawa did, but certainly we
9 would have to be, we would have to ascertain when
10 Mr. Greenberg would be available.

11 Q You had to coordinate that?

12 A Yeah.

13 Q I want you to look at 010682, please, this is a
14 document that you told us is noted in your
15 handwriting at the bottom of a telephone
16 conversation with Mr. Greenberg?

17 A Yes. Yes, it is.

18 Q And that was done on the 10th of December --

19 A That's right.

20 Q -- the day after your Memorandum of Relief. As a
21 matter of fact, I can go back to the Memorandum of
22 Relief and I note that Mr. Justice Davis granted
23 the order and in terms, in the usual way.

24 A Yes.

25 Q Pretty standard stuff?



1 A Yes.

2 Q You talked to Mr. Greenberg on the 10th of
3 December?

4 A Yes, I did.

5 Q Now, I want you to look at document 010686,
6 please. This is a copy of the letter to the
7 Acting Attorney General for the direct indictment
8 and it contains some handwriting on the bottom
9 which apparently refers to another telephone
10 conversation with Mr. Greenberg?

11 A Yes, that's my handwriting.

12 Q Again -- and that's dated the 9th of December?

13 A Yes.

14 Q So may I suggest that that would indicate that
15 obviously you had cleared the 21st with
16 Mr. Greenberg before you filed the material with
17 the local registrar?

18 A Yes, it would.

19 Q So you had at least two conversations with
20 Mr. Greenberg?

21 A Yes.

22 Q Do you recall, Mr. MacKay, in either of those
23 conversations, or any other conversations you
24 might have had with Mr. Greenberg, him mentioning
25 concerns that he had about the admissibility of



1 the confessions that had been taken in Winnipeg?

2 A No, I don't. I don't in fact recall the
3 conversations. I must have had the conversations
4 with him because I made a note of them, but I
5 don't recall the conversations, and I wouldn't
6 have -- I guess I can go this far and say that I
7 wouldn't have discussed the case as the substance
8 of the case with Mr. Greenberg because first of
9 all I wasn't handling it, I was simply attempting
10 to manage the hearing of the guilty plea, and
11 second of all, I wasn't familiar with the case and
12 I wasn't familiar with whether the confession was
13 admissible or not.

14 Q No, but we experienced, when Mr. Greenberg was
15 with us, that he was quite a loquacious gentleman
16 and he might well have introduced that into the
17 conversation?

18 A He could have. I have no recollection of it.

19 Q I want to take that a little further and ask if
20 this will trigger any recollection on your part,
21 that Mr. Greenberg told you that he was upset that
22 the confessions in Winnipeg had been taken behind
23 his back as counsel after he had been appointed
24 and was acting for Mr. Fisher?

25 A I can't say that he said it or didn't, because I



1 don't recall, but if he was given -- perhaps he
2 did say it, yes. I don't recall him saying it.

3 Q I'll just take it one step further and hope that I
4 can trigger a recollection with this. Might
5 Mr. Greenberg have mentioned in either of those
6 conversations or others that you didn't note that
7 Mr. Fisher had been severely beaten while he was
8 in Headingley Jail in Manitoba and as a result, to
9 escape further brutal treatment, he asked to make
10 a confession and get better treatment?

11 A Well, now that you mention that, I certainly was
12 aware of that. It could have come from
13 Mr. Greenberg, I don't know where it came from. I
14 probably assumed it came from somewhere, I don't
15 know, but I was aware that he had been beaten and
16 he wanted to get out of the fix he was in.

17 Q Not to beat the thing unnecessarily, but if that
18 was a fact and if the police had in fact
19 interviewed Mr. Fisher behind the back of his
20 acting counsel, those would be circumstances that
21 would seriously impact upon the admissibility of
22 those confessions; would they not?

23 A Yes, it certainly would, if he had counsel and the
24 police interviewed him, regardless of having
25 counsel there, it would certainly be a point that



1 would be argued I suspect very strenuously about
2 the admissibility, and if in fact he was receiving
3 beatings, that would -- in my opinion, that would
4 impact on whether the statement was voluntary or
5 whether he was making it in order to get out of a
6 bad situation.

7 Q If you had received that information from
8 Mr. Greenberg during your conversations with him,
9 might you logically and reasonably have imparted
10 that to Mr. Kujawa?

11 A Oh, yes, I would have, yeah.

12 Q Now, there is another high profile prosecution
13 involving your office in the 1980s and on into the
14 1990s and I'm referring to the case of *The Queen*
15 *versus Colin Thatcher*?

16 A Yes.

17 Q And you had some responsibilities in connection
18 with that prosecution I believe?

19 A I was the director of public prosecutions at that
20 time.

21 Q And Mr. Kujawa handled the --

22 A He was counsel.

23 Q -- the prosecution in Court?

24 A Yes, he was Crown counsel.

25 Q So you followed the case very carefully I think?



1 A Yes, although I might say as just an aside, with
2 Mr. Kujawa you gave him his head and let him run.

3 Q I'm sorry?

4 A You gave him his head and let him run, but I
5 certainly followed the case closely, yes.

6 Q Well, the conviction went down in early November
7 of 1984 as I recall.

8 A Yes.

9 Q There was an appeal to the Saskatchewan Court of
10 Appeal and one to the Supreme Court of Canada?

11 A Yes.

12 Q And I suggest to you that the dismissal of the
13 appeal came down from the Supreme Court in the
14 spring of 1987; is that right?

15 A That would probably be right, yes.

16 Q But that very shortly thereafter Mr. Thatcher
17 began to publicly claim he had been wrongfully
18 convicted, that the police and your department had
19 wrongfully suppressed evidence of his innocence?

20 A Yes.

21 Q And there was quite a media blitz; was there not?

22 A Yes, there was.

23 Q Do you recall in fact television interviews with
24 Mr. Thatcher in the Edmonton max prison in
25 Edmonton?



1 A I don't recall specifically, but I know there was
2 a lot of media coverage and I would agree that
3 there was television coverage as well I'm quite
4 sure.

5 Q And there was a 690 application in that case as
6 well?

7 A That's right.

8 Q And there were a number of press releases issued
9 on behalf of Mr. Thatcher by his son Greg. Do you
10 remember those?

11 A Again, not specifically, but I know that Greg was
12 certainly very much involved in this matter.

13 Q And do you recall a private investigator from
14 Calgary by the name of Bruce Dunn who was also in
15 the media?

16 A Yes.

17 Q And he was supposedly digging up the fresh
18 evidence --

19 A That's right, yes.

20 Q -- and supporting the claim of wrongful conviction
21 generally?

22 A That's right, yeah.

23 Q And there were accusations arising out of all that
24 that your department had in fact suppressed
25 evidence that would have tended to show the



1 innocence of Mr. Thatcher?

2 A Yes.

3 Q And that the Regina police were similarly guilty
4 of that?

5 A Yes. The complaints were primarily against the
6 Regina police, but certainly they were against the
7 Department of Justice as well.

8 Q And that media blitz carried on into the mid 1990s
9 I believe?

10 A Yes, it went on for some time.

11 Q I suggest to you that the 690 application was
12 finally refused in the spring of 1994. Does that
13 ring a bell?

14 A Yes.

15 Q And Mr. Thatcher turned around and sued the then
16 Minister of Justice in Ottawa, Allan Rock?

17 A Yes.

18 Q So your department was being assailed on two
19 fronts for improper conduct in high profile
20 trials; correct?

21 A Yes, yes. The department was often being assailed
22 for one thing or another.

23 Q In all your career, had you ever seen public
24 accusations of that nature in any other cases
25 other than *Milgaard* and *Thatcher*?



1 A I'm trying to recollect, and I don't recollect any
2 in my experience where the accusations were that
3 evidence was suppressed for the purpose of
4 maintaining a conviction or obtaining a
5 conviction. I don't recall any, no.

6 Q You told us quite frankly this morning that with
7 respect to some of the press clippings that
8 resulted from Mr. Kujawa's responses, that he
9 tended to be somewhat vocal in these matters?

10 A Yes, Mr. Kujawa was very vocal. He wasn't afraid
11 of talking to the media.

12 Q And that was so in the *Thatcher* matter as well as
13 the *Milgaard* matter; was it not?

14 A Yes, very much.

15 Q Perhaps even more so?

16 A Well, certainly -- yes, I would think more so.

17 Q Now, Mr. Wolch asked you this morning with respect
18 to the handling of the appeal and the Fisher
19 direct indictment and the timing thereof and what
20 not, whether you would think that a reasonable
21 person looking at all that wouldn't see that there
22 was a coverup going on. You disagreed with that
23 suggestion?

24 A I did.

25 Q Let me put it to you in a slightly different way.



1 Would it be reasonable in your view for a trained
2 and experienced criminal lawyer to look at what
3 had happened in that time period and conclude that
4 there was a coverup and obstruction of justice
5 going on in the top personnel of the department in
6 Saskatchewan?

7 A Well, you are asking me if it would be reasonable?

8 Q As opposed to the man on the street.

9 A Yes, I understand what you are saying. I guess
10 the problem is that, the problem is for me at any
11 rate, that there were a number of things that can
12 be spun into that sort of a situation, but to
13 reach the conclusion just putting all those facts
14 together and being compelled to a conclusion as a
15 rational person is not something that -- I don't
16 agree that you are compelled to that conclusion.

17 Q And someone who is knowledgeable --

18 COMMISSIONER MacCALLUM: Sorry, Mr. Wilson,
19 as a trained criminal lawyer he was asking as
20 opposed to the man on the street.

21 A The situation for me would be the same in either
22 case.

23 COMMISSIONER MacCALLUM: In either case,
24 okay.

25 MR. WILSON: Thank you , Mr. MacKay.



1 BY MS. KROGAN:

2 Q Mr. MacKay, it is only, given that we're
3 acquainted, it is only for the record that I say
4 I'm Lana Krogan and I'm representing the
5 Government of Saskatchewan, and you'll be pleased
6 to know that I have very few questions to ask of
7 you given the number of questions that you have
8 answered thus far, and I only have three areas to
9 touch on, Mr. MacKay, and the first of which is I
10 wonder if I could test your memory a bit more and
11 ask you, if you would, to flesh out a bit more for
12 us how many files might have gone through head
13 office during -- around, you know, 1969 to 1971,
14 and if I might direct you firstly to a comment
15 that you made this morning that sentence appeals
16 occurred two days a month?

17 A Yes.

18 Q And if I understood you correctly, there would be
19 approximately, or there could be approximately 18
20 files for both days?

21 A Yes.

22 Q Am I correct?

23 A Yes, it varied, but there could be up to 18.
24 There may have been more.

25 Q Or may have been less?



1 A Certainly there would have been less in some
2 cases, yes.

3 Q I certainly accept that. And, sir, for conviction
4 matters during that time, any notion of how many
5 days the Court would sit on matters such as those?

6 A Well, the Court set those very differently. The
7 sentence appeals were set as a regular matter, I
8 mean, we knew that the sentence appeals would be
9 set. We didn't necessarily know the exact dates,
10 but we knew that they would be two days in each
11 month that they would be set aside. Conviction
12 appeals came up as the Court file was prepared and
13 as the Court was prepared to hear them, so it's
14 very difficult to say that there were so many
15 heard every month. Conviction appeals were heard
16 along all the time and so I really can't say, but
17 there were -- there were a number of conviction
18 appeals, there were a number of conviction appeals
19 that were brought simply by the convicted person
20 himself without benefit of counsel, that was
21 certainly not discouraged by the Court of Appeal
22 at that time, and so these appeals would come in
23 on a regular basis and have to be prepared for.
24 What you were doing is you were carrying a full
25 load, and Mr. Kujawa could correct me, but I would



1 think that you were in Court maybe six, seven days
2 a month perhaps in addition to the sentence
3 appeals.

4 Q In addition. So that would be, sir, for
5 conviction appeals?

6 A That would be conviction appeals and other,
7 sometimes there were other motions and that sort
8 of thing, but there would be, that would be -- I
9 think that would be a fair estimate.

10 Q So six to seven days on conviction appeals and a
11 few more for sentence appeals?

12 A Yeah.

13 Q And if I understood your evidence, Mr. MacKay, you
14 did say that Mr. Kujawa might have also -- and I
15 should back up. Those in 1971, those appellate
16 matters were matters that Mr. Kujawa handled?

17 A He handled them, yes.

18 Q He handled them all?

19 A Yes.

20 Q And if I understood you then, sir, there were
21 trial matters that he was tasked with handling
22 also?

23 A Yes, he handled large cases and serious cases, but
24 he didn't carry the same load that the other, that
25 the other lawyers in the office did with regard to



1 trial matters, so he would -- and again, I'm not
2 sure I can give you any accurate figure, but he
3 would be -- he would usually have one or two trial
4 matters that would be on the go most of the time,
5 yeah.

6 Q So in terms of what may or may not have been in
7 his office or on his desk in perhaps a given
8 month, there might be conviction appeals?

9 A Yes.

10 Q Sentence appeals?

11 A Yes.

12 Q And perhaps some trial matters?

13 A And there could be trial matters as well, yes.

14 Q And also, if I might add, you did say that there
15 were law reform issues that were, that he was
16 dealing with on an ongoing basis as well?

17 A Yes. Mr. Kujawa was the person who dealt with the
18 other provinces and that was one of the reasons,
19 when a lawyer from out of province indicated that
20 his client wanted to plead guilty to offences in
21 Saskatchewan, that it would naturally go to Mr.
22 Kujawa, but he also dealt, he dealt with the
23 federal government, he dealt with inter-provincial
24 matters, there was uniformity, the Uniform Law
25 Conference, he was a delegate to the Uniform Law



1 Conference for the criminal side, any other
2 matters, he was the one who did it, and he did the
3 Supreme Court of Canada matters as well.

4 Q Of course, sure. Mr. MacKay, I understand during
5 that time you had developed a bit of an expertise,
6 or one of your niche areas, if I can term it as
7 such, was that you dealt with many of the sexual
8 assaults that were prosecuted in the Regina area?

9 A Yes, I seemed to have evolved into that position.

10 Q And would it be fair to categorize or to describe
11 that practice, and that is dealing with sexual
12 assault matters from that area, to describe that
13 as a busy practice, that you were kept busy with
14 those types of files?

15 A Well, busy perhaps is too -- I mean, there was
16 certainly a number of files that -- there wasn't a
17 sexual assault occurring every week or anything
18 like that.

19 Q And I'm not meaning to suggest that.

20 A But there were certainly a number of files that
21 came across. When it happened in the Regina area,
22 then it generally came up on my desk when it was
23 going to trial, so I can't really estimate the
24 bulk, but certainly it was a part of, a large part
25 of my practice.



1 Q A large part of your practice?

2 A Yes.

3 Q And as I just might point out, that was in Regina
4 and area. I think you said yesterday that the
5 office also covered Fort Qu'Appelle and Indian
6 Head; is that correct?

7 A Fort Qu'Appelle, Indian Head, Strasbourg, Lumsden,
8 I don't think we went as far at that time as
9 Whitewood or Moosomin, but it was pretty well that
10 area just around, surrounding Regina.

11 Q And of course --

12 A Southey -- not Southey, but at any rate, towns
13 around Regina.

14 Q And I state the obvious of course, Saskatoon would
15 have dealt with their own sexual assault matters
16 and the fee-for-service agents or farm-out agents
17 would have dealt with their own sexual assault
18 matters?

19 A That's right.

20 Q All right.

21 A But while it -- that's not exactly accurate
22 because in Saskatoon the fee-for-service agents
23 would get cases from Saskatoon, Saskatoon would
24 assign the cases. The drill was, as I understood
25 it, that Saskatoon would be the first, the



1 Saskatoon regular prosecutors would handle the
2 matter if they could, but of course they couldn't
3 because there were only I think two of them, so
4 cases they couldn't handle they would then
5 contract out to fee-for-service agents.

6 Q I see. I guess my point, Mr. MacKay, is that with
7 sexual assault matters, I know the terminology is
8 different now, but on sexual assault matters,
9 those kept you fairly busy in the Regina area and
10 my point is there were also other sexual assaults
11 that were occurring throughout the province at
12 that time that other offices had to handle?

13 A Oh, yes.

14 Q So it wasn't an unusual event to be dealing with
15 sexual assaults, or sexual assaults perhaps that
16 involved violence; would that be correct?

17 A No, it wasn't unusual, no.

18 Q Mr. MacKay, if I could now turn to a further
19 discussion on media attention of particular
20 criminal matters, and you, the information you
21 provided to the inquiry is that in the south in
22 particular there was a crime beat that was
23 covered, but it wasn't with any consistency, if I
24 can phrase it that way; is that correct?

25 A Well, I think that's right. I don't think that --



1 later on, as things developed later on in the
2 '70s, and certainly into the '80s, you had
3 dedicated reporters from the newspapers, for
4 example, who had a crime beat.

5 Q Certainly, but in 1971 for instance?

6 A In 1971 I think it was really covered on an ad hoc
7 basis. There may have been someone who attended
8 docket court, but I don't recall that, and the
9 provincial docket court, for example, was in the
10 provincial courthouse, there wasn't a separate
11 Magistrates' Court. The city Provincial Court,
12 city Magistrates' Court was in the police station
13 and I don't recall -- I mean, there was certainly
14 the presence of -- I don't recall any radio or
15 television coverage at that time, but there may
16 have been, but there was certainly, there would be
17 a presence from time to time from the newspaper.
18 The Provincial Court, which -- the provincial
19 Magistrates' Court I don't really recall, I don't
20 really recall there ever being a newspaper
21 reporter in that Court, but of course I wasn't
22 there all the time myself, and after 1973 I wasn't
23 in those courts at all.

24 Q So, Mr. MacKay, would it be fair to say that it
25 would be, given that it was sort of hit and miss,



1 what was covered by the media would be of course
2 their choice and it would depend on the diligence
3 of perhaps the reporter who may or may not have
4 gathered certain information from the courthouses
5 for instance; would that be a fair statement?

6 A I think that's a fair statement, yes.

7 Q And the same, sir, would likely hold true in
8 Saskatoon; wouldn't that be fair to say?

9 A Well, I don't know. Media matters in my
10 experience has been that everybody has his or her
11 own style.

12 Q Absolutely.

13 A And they may have been more diligent at, the
14 *StarPhoenix* may have been more interested in
15 covering crime than the *Regina Leader-Post*, I
16 wouldn't want to say that's true at that time, but
17 that may be so, but I would think that certainly
18 sensational cases would get coverage.

19 Q My point is, Mr. MacKay, that -- and I'm asking
20 you whether or not you might agree with it, that
21 even if Larry Fisher's matters were dealt with in
22 Saskatoon, that doesn't necessarily mean that the
23 media would have covered it there; would you agree
24 with that?

25 A Well, I would agree with that. I mean, Larry



1 Fisher, since the matters occurred in Saskatoon,
2 it's possible that the newspaper would have been
3 certainly interested in that, and if they checked
4 with the courthouse and found out they may have
5 sent a reporter, you know, I can't -- but I can't
6 say that for certain, and I don't disagree with
7 what you are saying.

8 Q All right. Was it ever the case, sir, in 1970,
9 and perhaps even on, you can comment on that, was
10 it ever the practice of the prosecutor's office to
11 contact the media to let them know if and when
12 something was taking place in a given court?

13 A No.

14 Q Finally, if I understand it correctly, in 1971 the
15 *StarPhoenix* and the *Leader-Post* were owned by the
16 same company; is that correct?

17 A To my knowledge, yes.

18 Q And would it be the case that at times the same
19 story would be shared between the *Leader-Post* and
20 the *StarPhoenix*?

21 A Oh, I'm sure they shared stories, and they still
22 do.

23 Q And still do. And simply because a matter took
24 place in Regina doesn't necessarily preclude the
25 story from being carried in Saskatoon; would that



1 be a fair statement?

2 A Oh, I would think that's -- certainly there were
3 stories about Mr. Milgaard and there were stories
4 about Larry Fisher I think in the Regina press and
5 they would be feed from Saskatoon, you know, I
6 think that was the case, yes.

7 Q Thank you. The final area, sir, that I wish to
8 canvass with you is the area involving
9 Mr. Breckenridge, and if I could just revisit a
10 few points, in the years that you were with the
11 Department was it ever your experience that the
12 Attorney General concerned himself with particular
13 prosecutorial matters? And perhaps you answered
14 this earlier.

15 A I have never worked with an Attorney General who
16 -- I mean certainly they were concerned about
17 specific matters because they wanted to know, I've
18 never dealt with an Attorney General who
19 interested himself in the -- in a criminal matter
20 in a participatory way. I'm trying to put this as
21 carefully as I can because to say that they
22 weren't concerned would not be true.

23 Q Oh, and I don't wish to --

24 A Yeah.

25 Q Exactly, I understand the -- where you are going.



1 A But I've never experienced an Attorney General who
2 intervened, if I can put it that way, and -- into
3 the handling of the case.

4 Q And, having worked with Mr. Romanow in his
5 capacity as Attorney General, would it be fair to
6 say that he was particularly concerned of -- with
7 the lack of intervention?

8 A Oh yes, yes.

9 Q Mr. MacKay, we have documentation regarding
10 Mr. Breckenridge and his, the time of his
11 employment. But, first, if I could ask that a
12 document that predates this be put on the screen,
13 and that's document 047268. Just to put this into
14 sort of a time perspective, Mr. MacKay, what we're
15 all looking at is a -- the Grade 12 diploma of Mr.
16 Breckenridge, and if you will note he graduated
17 high school in December of 1972?

18 A Yes.

19 Q So shortly thereafter, if I could now ask that
20 document 047242 be put on the screen, this is a
21 letter -- and I understand, Mr. Commissioner, that
22 all of the documents that the Commission has in
23 its possession has the names blacked out as we see
24 here in the document?

25 COMMISSIONER MacCALLUM: Uh-huh.



1 BY MS. KROGAN:

2 Q But we're given to understand, Mr. MacKay, that
3 this is Michael Breckenridge's employment record,
4 and as you can see from that, sir, where the arrow
5 is drawn, he was employed in October '73 to June
6 of '75 --

7 A Yes.

8 Q -- with the department. Now putting that in an
9 historical perspective, if you would trust me when
10 I say that Mr. Milgaard's matter, leave to apply
11 to the Supreme Court was denied in December of
12 1971?

13 A Yes.

14 Q Mr. Fisher was sentenced in December of 1971?

15 A Yes.

16 Q Now Mr. Breckenridge is employed in 1973 to '75?

17 A Yes.

18 Q In your -- do you have any knowledge of the
19 department having any concern or any discussions
20 regarding either the Larry Fisher file or the
21 David Milgaard file --

22 A No.

23 Q -- from 1973 to 1975?

24 A No.

25 Q And is there anything in your memory that



1 indicates to you, or that you can recall, to
2 indicate that there was any public activity on
3 behalf of Mr. Milgaard and Mrs. Joyce Milgaard at
4 that time, anything to indicate that they were
5 working on, actively working on the file at that
6 time?

7 A I don't recall anything, but I don't know whether
8 they were or not, I don't recall anything.

9 Q Finally, Mr. MacKay, I just want your comment
10 please, if you would. If someone like Mr. Kujawa
11 is endeavouring to suppress evidence would you
12 kindly, for me, comment on the wisdom of speaking
13 with senior people in the department and a
14 politician?

15 A Well, I think your question answers itself, it
16 wouldn't be a very wise thing to do. If you were
17 going to do that I would think that, unless you
18 are involved in a vast conspiracy, it would seem
19 to me that the more people you told about this the
20 less likely it was going to be, and certainly if
21 you are telling the Attorney General, you are
22 talking to the Attorney General of doing this
23 thing, then you have to stretch that to believe
24 that the Attorney General would sanction that and
25 consider that it was a good thing, and I can't



1 think that Mr. Romanow or any Attorney General,
2 for no other reason than political reasons let
3 alone altruistic reasons, would want to become
4 involved in that sort of thing. I would think
5 that the reason that Attorneys General don't
6 become involved in this is simply by the fact that
7 they are politicians and that they don't -- do not
8 want this, do not want the practice -- the
9 prosecutions to be politicised, that's the first
10 thing. The second thing is self-interest as well,
11 because if they become involved in these things
12 then they're open immediately to the charge that
13 there's political influence being -- and I would
14 think that any Attorney General would run very
15 fast, very far in the opposite direction if that
16 was tried, and I can't think that Mr. Kujawa or
17 anyone else would try it out.

18 Q Thank you, sir.

19 MR. HARDY: No re-examination, Mr.
20 Commissioner.

21 COMMISSIONER MacCALLUM: Thank you. Thank
22 you, Mr. MacKay, for testifying. You are
23 excused.

24 MR. HODSON: The next witness is Mr. Serge
25 Kujawa.



1 **SERGE KUJAWA, sworn:**

2 MR. WILSON: Mr. Commissioner, although we
3 have made no request for accomodation I would
4 like the Inquiry to be alert to the fact that Mr.
5 Kujawa is now 81 years of age, he is equipped
6 with two hearing aids, and although while
7 obviously not frail he no longer, as he once was
8 wont and did, tear the Saskatoon telephone book
9 in two.

10 COMMISSIONER MacCALLUM: Thank you very
11 much.

12 **BY MR. HODSON:**

13 **Q** Good afternoon, Mr. Kujawa. Thank you for
14 agreeing to testify before this Commission of
15 Inquiry.

16 For the record, you are a party
17 with standing, and your counsel representing you
18 are Mr. Garrett Wilson and Mr. Jay Watson. And I
19 understand, sir, that you are 81 years of age; is
20 that correct?

21 **A** Yes.

22 **Q** And that you reside in Regina, Saskatchewan?

23 **A** Yes.

24 **Q** And you have been kind enough to provide us with a
25 CV through your counsel. If I could call up



1 335511. And I'll just go through this with you,
2 Mr. Kujawa, on a couple of highlights. I
3 understand that you graduated from law school in
4 1957; is that correct?

5 A Yes.

6 Q And that you started working with the Department
7 of the Attorney General of Saskatchewan in 1960;
8 is that correct?

9 A Right.

10 Q And then if we can just scroll down a little bit,
11 you would have been appointed in 1966 as the
12 Saskatchewan Director of Public Prosecutions, and
13 we'll come back to that a little bit later. It's
14 my understanding that that was the -- you were the
15 first Director of Public Prosecutions appointed in
16 Canada; is that correct?

17 A Yes.

18 Q And in 1968 your Queen's Counsel designation
19 venture, and then some various positions that you
20 held with the Department of Justice through the
21 '70s and '80s; is that correct?

22 A Right.

23 Q And then retired in 1989. And so is it fair to
24 say that from 1960 through until 1989 you were an
25 employee of the Saskatchewan Department of Justice



1 or the Attorney General of Saskatchewan?

2 A Yes, I was.

3 Q And would it be fair to say that during that time
4 your work would have involved in the area of
5 prosecutions, whether it be actual prosecutions or
6 policy or planning, other than as noted a few
7 forays, I think, into the Securities Commission
8 and a few other things?

9 A It was involved with the criminal prosecutions and
10 details thereof.

11 Q And so if we -- is it fair to say that the 30
12 years you spent, or 29 or 30 years you spent with
13 the Government of Saskatchewan at that time, would
14 be devoted to the area of criminal prosecutions?

15 A Yes.

16 Q If we can scroll down. I understand, sir, that
17 you represented the Saskatchewan Crown in many
18 cases at the trial and appellate level, and we'll
19 come back to that in a little more detail, but as
20 well 35 appearances before the Supreme Court of
21 Canada; is that correct?

22 A Yes.

23 Q And, again, the CV lists a couple of cases here,
24 one the *Victor Hoffman* case in 1967, nine
25 homicides that you prosecuted; is that correct?



1 A Yes.

2 Q And as well, on the next page, the Colin Thatcher
3 prosecution in 1984 that Mr. Wilson had referred
4 to with Mr. MacKay, you were involved as the lead
5 prosecutor in that matter; is that correct?

6 A Right.

7 Q And as well, in following years, dealing with
8 suggestions or allegations of wrongful conviction
9 by Mr. Thatcher?

10 A There were many things were raised in some way or
11 other over the years.

12 Q Okay. And then, as well, I understand that you
13 would have lectured at the Calgary Bar Association
14 and, as well, matters of criminal law in every
15 province and territory in Canada, as well as the
16 United States, England, and Switzerland; is that
17 correct?

18 A To some degree, yes.

19 Q And then if we could, just for the record, 332028.
20 This is a document that Saskatchewan Justice
21 provided to your counsel, and if we can just go to
22 the next page, it sets out your appointments in
23 accordance with the government titles; Crown
24 Solicitor, Director, etcetera, and effective
25 dates, and retirement November 30, 1989; do you



1 have any reason to dispute the accuracy of what
2 the government has put in this record of
3 employment?

4 A No.

5 Q I'd now like to turn our attention if we can, Mr.
6 Kujawa, to the 1969-1971 time period, for that
7 three-year time period, and the importance of that
8 time period as it relates both to matters
9 involving David Milgaard and matters involving
10 Larry Fisher. So during that time I think the,
11 your CV shows that you became the Director of
12 Public Prosecutions in 1966, and that in the years
13 1969 to 1971 you would have been the Director of
14 Public Prosecutions; is that correct?

15 A Yes.

16 Q Can you tell us, just generally, what -- what did
17 that job entail; what was the Director of Public
18 Prosecutions?

19 A Well I suppose I had sort of the last word on
20 details of conclusions to draw from cases that
21 were presented before us or presented to us to
22 take to Court, and opinions on legal matters, and
23 questions of all sorts related to that whole area
24 of practice.

25 Q Would it be fair to describe you as the lead



1 prosecutor in the province? I was going to use
2 the word "senior" but I don't mean to connote
3 years with the government, but would you be the
4 top prosecutor, if I could call you that?

5 A I suppose status-wise, because of that Director of
6 Public Prosecutions thing, yes. And I had a great
7 many cases to do on a regular basis, but -- myself
8 in mostly the Court of Appeal, the Supreme Court,
9 and a fair number in trial courts throughout
10 Saskatchewan.

11 Q And who did you report to? And, again, these
12 questions I'm asking you are generally the
13 1969-1971 time frame; but what office or what
14 person did you report to?

15 A Well I reported to the Justice Department, which
16 is basically, as I saw it, the Deputy Attorney
17 General, and he passed it on to whoever he thought
18 it should go to, mostly to the administrators who
19 would take care of the financial details,
20 etcetera, and wait for the next report.

21 Q And so, my understanding, the Deputy Attorney
22 General is a fellow by the name of Roy Meldrum
23 during the 1969 to '71 time frame?

24 A That's right.

25 Q And the Attorney General was Darrell Heald, is



1 that correct, until the election in June of '71?

2 A Yeah, Heald was I think when I got in there
3 initially, and then Roy Romanow.

4 Q Yeah. I think the evidence we have is June 23rd,
5 1971 was the election, and so subject to the
6 swearing-ins, etcetera, around that time frame the
7 government changed from the Liberal to the NDP,
8 Mr. Heald was no longer the Attorney General and
9 Mr. Romanow became the Attorney General; is that
10 correct?

11 A Correct.

12 Q And as far as who reported to you, and we'll talk
13 in a bit more detail about who else was involved
14 in the province, but did the other prosecutors in
15 your department report to you as the director?

16 A Perhaps to some degree.

17 Q I see.

18 A Not so much report to me as to make sure they
19 looked after their area of responsibility and
20 asked questions if they had questions to ask.

21 Q Were you responsible for the administration of the
22 prosecutions branch, the managing and paperwork
23 and administration?

24 A I wasn't in charge of that. That, to me, was
25 administration. I was in charge or concerned with



1 the policy, with the questions, the answers to the
2 legal problems.

3 Q And so who else, who would look after the flow of
4 paper, administration, things of that nature --

5 A Well --

6 Q -- in the prosecutions office?

7 A Umm, in the prosecutions office, that would be the
8 administrator. I think a whole lot of that was
9 done, and we've heard about it here in the last
10 day or two, by a very brilliant and able and
11 hard-working young lady who joined the department,
12 and her name was Elizabeth McFadyen, and she
13 worked about 16 hours a day looking after details
14 involved with prosecutions.

15 Q We have seen the name A. Boyd, who was -- and I
16 think his title was Administrative Officer?

17 A Arnold Boyd was the Administrative Officer.

18 Q I see.

19 A He looked after the finances, the payments of the
20 fees, the details of getting things done, and
21 followed up. He was a very busy administrator of
22 the department.

23 Q What was your approach to dealing with paperwork
24 and reports, Mr. Kujawa, generally?

25 A Well, generally I did as little as I could get



1 away with doing, and I certainly enjoyed doing a
2 case in Court a great deal more than I enjoyed
3 doing a stack of paperwork in the office, but I
4 had to do a certain amount of that too.

5 Q Just talk about the Regina office. We've heard
6 evidence from Mr. MacKay, it's my understanding
7 that your office back in '69 to '71 would have
8 been at the Legislature, is that correct?

9 A Yes.

10 Q And so would it be a separate department or a
11 sub-department of the Justice Department, if I
12 could call it that?

13 A Well it was an important part of the Justice
14 Department, but the other details were on the same
15 floor pretty well, and all around us.

16 Q And would it be fair to say that the Department of
17 Justice would have other areas and other people
18 involved in Justice matters that did not relate to
19 prosecutions?

20 A Yes.

21 Q And so there would be other Justice people dealing
22 with other matters in your same building, so to
23 speak?

24 A Yes.

25 Q So, in your Regina office, would it be fair to



1 call it the prosecution office in Justice?

2 A Yes.

3 Q Who were the other people who were involved by way
4 of lawyers?

5 A Well, there were a fair number, and the government
6 --

7 Q In '69 to '71, that time frame? And if that -- I
8 think we've heard evidence of, I think you said
9 Elizabeth McFadyen, Mr. MacKay, who testified;
10 were they both there at the time?

11 A Yes, and there were others, there was one I
12 remember well is Chad Musk.

13 Q So would there be other lawyers, then, involved in
14 doing some of the prosecutions and other work?

15 A Oh yes, yes.

16 Q And I think we've heard the term staff prosecutors
17 or employee prosecutors as distinct from
18 fee-for-service or agents; was that a distinction
19 made at the time?

20 A Yes. When our department was set up and when I
21 became in charge of it, of the criminal side of
22 it, it was the first time in Saskatchewan that we
23 had regular employees whose sole job was to handle
24 prosecutions and deal with the cases. In the
25 small areas outside of Regina and Saskatoon people



1 were hired to do cases that came up and needed
2 doing in their area, and they got paid for each
3 case that they did, and Arnold Boyd looked after
4 the hiring and the paying and the looking after
5 them and the circumstances in which they worked
6 and things of that nature.

7 Q We've heard the term farm-out prosecutions; is
8 that what they were sometimes called?

9 A Yes.

10 Q And they'd be farmed out to a private lawyer who
11 would act as the prosecutor in the case; is that
12 correct?

13 A Yes.

14 Q And so was it in 1966 then, when you became the
15 Director of Public Prosecutions, that the province
16 actually started to staff up with staff
17 prosecutors?

18 A Well, I think we started a little before that,
19 because when I was first hired, which was about
20 1960, I was a full-time operator as a prosecutor.

21 Q Okay, so at some time prior to 1966 there were
22 staff prosecutors. So, in the Regina office, can
23 you tell us what prosecutions would the Regina
24 prosecutors look after -- and I'll deal with you
25 specifically later -- but just generally what



1 areas; was it a geographical area or a type of
2 offence that they covered?

3 A Just the geographical area, every serious offence
4 that took place there, these people looked after.
5 They -- some were in the Provincial Court, Q.B.,
6 District Court, they handled them wherever those
7 cases went.

8 Q And, now, we've also heard evidence that in '69 to
9 '71 there was also one and two, I think actually
10 two prosecutors, staff prosecutors in Saskatoon,
11 namely Mr. Caldwell and a fella by the name of Del
12 Perras; is that correct?

13 A Umm, yes, that's correct, and I think there might
14 have been one more right even at the start.

15 Q And would the function that Mr. Caldwell and
16 Mr. Perras perform in Saskatoon be similar to the
17 function that the prosecutors in the Regina head
18 office would perform, different geographic area
19 though?

20 A Yes, entirely similar.

21 Q And would Mr. Caldwell, I think the evidence we've
22 heard he was the senior prosecutor in the
23 Saskatoon area, would he be responsible, then, for
24 all serious prosecutions in the Saskatoon area;
25 would that be his mandate?



1 A Yes, it would. And he was expected to, if he ran
2 into a question that he had difficulty resolving,
3 to get in touch with the head office in Regina and
4 see if we could be helpful.

5 Q And so outside of Regina and Saskatoon, in the
6 1969 to 1971 time period, how did the Justice
7 Department handle prosecutions in those rural
8 areas or the smaller urban centres?

9 A Well we had people there that, they were available
10 to handle the criminal prosecutions as they came
11 up, and they got paid for doing them, and as
12 things went -- moved along we continued to try and
13 hire and place full-time prosecutors that did no
14 other legal work, just the prosecutions in those
15 areas. They became the full-time regular
16 prosecutors.

17 Q And, again in this time period, can you describe
18 for us your professional relationship with Mr.
19 Caldwell, and in particular did you supervise and
20 direct his work, or can you tell us what role you
21 would have played in connection with the
22 prosecutions he conducted?

23 A Well he was in charge of the cases that came to
24 him, and he had more experience as a prosecutor
25 than I did, and so he didn't come to me too often.



1 If he ran into any question he would phone or
2 write, or whatever, and see if I had any help for
3 him. Occasionally, I did.

4 **Q** And would your relationship or dealings with Mr.
5 Caldwell be the same as with the other Regina
6 staff prosecutors and the other Saskatoon staff
7 prosecutors?

8 **A** Yes.

9 **Q** And so, again, the fact that you were the Director
10 of Public Prosecutions; are you telling us that
11 you didn't -- or did you tell them how to do their
12 prosecutions or direct them on how to do it?

13 **A** Well I, with a great many, I assumed that they
14 knew what they were doing and they were -- they
15 knew that if they weren't sure, to ask me, in
16 other words get some help or at least make sure
17 the blame went onto me instead of being carried by
18 themselves. So I was consulted a fair bit, off
19 and on, when you consider the whole province full
20 of agents.

21 **Q** Apart from a consultation that may have been
22 initiated by one of your staff prosecutors would
23 you, as a matter of your job as director, go out
24 and supervise and observe, check their files, in
25 that fashion?



1 A I would get to see their files from time to time
2 in the course of working in the office, and if
3 anything came up which I thought was interesting
4 and needed to be ironed out a bit, we'd get
5 together and do our best to iron it out.

6 Q And you had mentioned earlier, I think, something
7 to the effect that you let the prosecutors do
8 their job; is that --

9 A Yes.

10 Q Would that be a proper description of matters?

11 A Yes.

12 Q Now as far as questions coming to you, would that
13 be a frequent occurrence where a prosecutor might
14 have a -- want to pick your brain on a matter or
15 ask you for some guidance on a particular issue;
16 is that the type of thing you are telling us
17 about?

18 A Yes, and that didn't come every day.

19 Q And did it go the other way, did you on occasion
20 consult them and ask for their views on certain
21 matters you were dealing with?

22 A I did, but mostly it was the other way around.

23 Q In -- let's now talk about the farm-out
24 prosecutors, if I can call them that, the private
25 lawyers that you would appoint as agents in



1 centres outside of Saskatoon and Regina, and
2 again, we're talking about the 1969-'71 time
3 period. Would you -- can you tell us what your
4 dealings would be with those prosecutors, would it
5 be similar to the staff prosecutors, or would
6 there be more or less supervision of the farm-out
7 agents?

8 A Similar to the others, and a lot of these
9 part-time prosecutors had quite a bit of
10 experience, and they didn't need a great deal of
11 help to continue doing a good job.

12 Q And, for example, we heard Mr. Tallis testify that
13 he was an agent at that time that would have been
14 appointed to prosecute, I think, in the Humboldt
15 area; do you recall that?

16 A Yes, and he would be asked to prosecute in some
17 other area if he was available and if it was a
18 tough case and we needed one with his experience.

19 Q I now want to turn to -- sir, let me just back up
20 on Mr. Boyd. Would he, as far as the
21 administration and the reporting matters, would
22 Mr. Boyd play some role in that, in keeping the
23 office running, so to speak?

24 A Well yes, he would, he'd run the business portion
25 of it.



1 Q And what about the filing, were there Justice
2 Department or government employees to look after
3 the filing of documents, things of that --
4 administrative matters of that nature?

5 A Yes, and I think that was basically under Arnold
6 Boyd's direction and control.

7 Q I now want to turn to your personal case load in
8 that time frame, 1969-1971, and I want to start
9 off with criminal sentence appeals. Can you tell
10 us what role, if any, you would have played in
11 arguing criminal sentence appeals during that time
12 period?

13 A Well, first of all, we had a great many criminal
14 sentence appeals came to the Court of Appeal on a
15 fairly regular basis, large numbers, and for a
16 long time I did all of the Court of Appeal work
17 and that means I had to prepare each case, appear
18 and present it and I was kept very busy with the
19 Court of Appeal work.

20 Q So in 1969 to 1971, is it your evidence that you
21 would have appeared on behalf of the Attorney
22 General for Saskatchewan in all matters, criminal
23 prosecution matters before the Court of Appeal?

24 A I would say so, yes.

25 Q And so let's just talk about criminal sentence



1 appeals. I take it those would be matters that
2 would be appealed from Queen's Bench Court,
3 District Court and Magistrates' Court as it was
4 then known; is that correct?

5 A Yes.

6 Q And where did the Court of Appeal hear those
7 matters?

8 A In Regina at the courthouse in their own setting.

9 Q And so would it be fair to say that a criminal
10 sentence appeal would, in most cases, be an appeal
11 that you would take after another prosecutor
12 argued the trial?

13 A Yes, yes.

14 Q So it would be either a staff prosecutor or a
15 farm-out agent that would have done the trial and
16 you would handle the sentence appeal; is that
17 correct?

18 A Right, right.

19 Q Can you give us some idea of how many sentence
20 appeals, and I appreciate we're asking you to go
21 back a while, Mr. Kujawa, but your best
22 recollection of the volume, the numbers that you
23 would have done, again '69 to '71, if you can do
24 it on a weekly basis or a monthly basis or a
25 yearly basis, to give us some idea how many times



1 you would appear in the Court of Appeal on a
2 sentence matter?

3 A I certainly can't give you an accurate number.
4 For one thing, as you've already heard, I'm not a
5 great numbers keeper, and there were a great many
6 numbers that needed to be kept. There's just a
7 great flow of these cases were going all the time.
8 I think it was sort of every week you had a group
9 of people flown into Regina to be dealt with by
10 the Court of Appeal. Over one a day.

11 Q If we were to go back in a month, I think Mr.
12 MacKay said earlier this morning that he thought
13 at least, or he thought two days' sittings a month
14 and as many as 18 a day. 25 a month, does that
15 sound -- 25 sentence appeals a month, 30
16 sentence --

17 A I would guess it's a little over 30 a month.

18 Q And so about 360 a year, thereabouts, or 400 a
19 year?

20 A About 400 a year. That's sentence appeals only.
21 There were other appeals as well.

22 Q And so on a sentence appeal, that would be
23 where -- let me back up. That would be where just
24 a sentence is appealed as opposed to the
25 conviction as well?



1 A Right.

2 Q And so can you tell us just generally, what would
3 you do to prepare for and argue a sentence appeal,
4 what would you get in by way of a file and what
5 would you do?

6 A I would have to get the, a clear understanding of
7 the crime that bore the sentence and a clear
8 understanding of this guy's background, his legal
9 history, his record as a violator or a law keeper
10 and other details, financial, family, etcetera,
11 that were involved that needed to be considered, I
12 had to have a reasonable knowledge of all relevant
13 details that had some bearing on a person's
14 sentence. Now, I certainly never had all of those
15 records, but my attempt was to have them as best I
16 could.

17 Q And so would you receive some type of file from
18 the court below or from the prosecutor who handled
19 the file in the court below?

20 A Oh, yes, I would get a file containing all this
21 material, right.

22 Q And so for every case that you presented before
23 the Court of Appeal, would you read the materials
24 or the relevant materials provided to you?

25 A Yes.



1 Q And so again, if we can take 1969, then, for an
2 example, is it your evidence that, and again I
3 appreciate you are estimating, but 300 -- you said
4 a little more than 30 per month, so 360 to 400
5 different files then you would have had direct
6 involvement in; is that -- on a sentence appeal?

7 A Yes, but I once again stress it's my guess, but
8 I'm guessing about 400 a year.

9 Q Okay. And did you become familiar with the
10 sentencing principles espoused by the Court of
11 Appeal on criminal matters in the years 1969, 1970
12 and 1971?

13 A I thought I was extremely familiar with their
14 attitudes on those matters.

15 Q If we can now go to -- just back up on this
16 location. I think you said Regina, Regina is
17 where the Court of Appeal heard these sentences?

18 A Yes.

19 Q And would it be normally the case that the accused
20 person who was appealing the sentence would be
21 brought in to Court from custody somewhere?

22 A Right.

23 Q And would that be -- I take it that could be a
24 provincial jail or the penitentiary; is that
25 correct?



1 A Yes, it was from a provincial jail, or a great
2 many came from the penitentiary in P.A.

3 Q And so were there, on these sentence appeals, can
4 you give us some idea, would there be a regular
5 transport of prisoners from the Prince Albert
6 Penitentiary to the courts in Regina for the
7 purposes of having the sentence appeals heard?

8 A Well, yes, there would be a regular transport, and
9 of the, say, 400 a year that were brought in, most
10 of them were flown in or brought in from a jail,
11 so that's how they got there.

12 Q I now want to turn to conviction appeals. Would
13 you -- I think you told us you dealt with all
14 Court of Appeal matters, so presumably where there
15 would be an appeal from a conviction on a criminal
16 matter in a lower court, being Queen's Bench,
17 District Court or Magistrates' Court, would you
18 handle the appeal on a conviction?

19 A Yes.

20 Q And presumably that would be whether it was the
21 accused or the Crown appealing?

22 A Right.

23 Q And can you give us some idea of how many of those
24 appeals you would handle in a year or a month,
25 whatever is easiest to estimate?



1 A Again, this was a much heavier load, it took a
2 great deal more time, and there were certainly a
3 lot fewer of them, but it seemed like about as
4 equal load as the other one, but I can't give you
5 any very accurate numbers.

6 Q For example, would it be, and I appreciate what
7 you are saying is that one conviction appeal would
8 take more time than one sentence appeal; is that
9 fair?

10 A Oh, one conviction appeal would almost always take
11 at least as long as a half a dozen sentence
12 appeals.

13 Q And so as far as number, would it be one a month,
14 is that --

15 A Oh, way more than that.

16 Q On the conviction appeals?

17 A Oh, yeah, way more than that.

18 Q Can you give us some idea, are we talking, in the
19 course of a year, 30, 40, somewhere in there, 50?

20 A I would say somewhere in there, 40, 50, sometimes
21 less, and sometimes it would be a great string of
22 them.

23 Q And so can you tell us, and again we'll deal with
24 this more specifically when we deal with the David
25 Milgaard appeal, can you tell us generally, what



1 was your practice in dealing with conviction
2 appeals, what did you get and what did you do?

3 A Well, the important thing was the evidence on
4 which the conviction was based, the directions by
5 the trial judge, the legal directions, and then
6 whatever arguments were raised, so it was dealing
7 with the whole legal issue involved in the trial.

8 Q And would there -- what would be the focus of
9 appellate counsel on a criminal matter then, what
10 would be your focus?

11 A Well, they would say here's an error made by the
12 trial judge, an error in law and therefore there
13 should be a quashing of the appeal, or of the
14 conviction, so it had to be an error in law
15 because you couldn't say I'm going to substitute
16 my judgment for that of the jury or the trial
17 judge because --

18 Q And as far as the record then that was placed
19 before the Court of Appeal to argue the matter,
20 what was -- again just speaking generally, what
21 was the record that was put before the Court of
22 Appeal by way of documents or files?

23 A Well, the record was all of the transcript which
24 includes all of the records and files that were
25 brought in to display to the trial judge, or trial



1 jury, and then the main part would be the judge's
2 direction to the jury, the legal guidance on what
3 they need to do in order to handle the trial, and
4 that was the main area of appeal, was the judge's
5 legal directions to the jury or to himself in
6 finding guilty or not guilty.

7 Q Was it your general practice to obtain from the
8 original prosecutor at the trial his or her
9 prosecution file containing police reports,
10 witness statements, etcetera?

11 A Usually not, no, because the only thing that
12 mattered, the only thing that the Court of Appeal
13 was going to consider is the transcript of the
14 evidence presented and legal matters that attached
15 to it.

16 Q And as far as your preparations, again speaking
17 generally, for a conviction appeal, what was your
18 practice as far as what you read to prepare
19 yourself to argue the appeal?

20 A The things I've just described, all of the
21 transcript and all of the legal comments and all
22 of the cases that I was reminded of that were
23 brought up in the issues.

24 Q And the Notice of Appeal, would that be a document
25 that would be important in your preparation?



1 A Oh, yeah. Oh, yes, yes.

2 Q The third area I want to talk about is trials that
3 you would have been involved in yourself as the
4 prosecutor at the trial level, and again did you
5 handle, in the 1969, 1971 time frame, did you
6 handle any prosecutions where you acted as the
7 prosecutor?

8 A Yes. Now, how many and where I don't know, but I
9 did handle cases in, say, Weyburn, North
10 Battleford, places like that, because of a case
11 that maybe the counsel that was already working
12 there had no experience with this sort of a case
13 and it was a little different, a little unusual or
14 whatever, I would get out there to do those cases.

15 Q And would they be high profile cases or cases that
16 might have a twist that you would become involved
17 in as prosecutor?

18 A Not so much high profile, but a twist.
19 Occasionally, and I think it's already mentioned
20 in something that you've read, where there's a
21 case like the greatest massacre in the history of
22 Canada took place at Shell Lake, Saskatchewan.
23 Well, about five minutes after this was discovered
24 I was being picked up by the RCMP to take out to
25 Shell Lake to start investigating the case because



1 of the high profile, so some of those I just
2 naturally did and some of the others, so all and
3 all, quite a few trials throughout the years.

4 Q And again, if you are able to give us an estimate,
5 and I appreciate that that's all it is, 1969, '70,
6 '71, on a yearly basis can you give us some range
7 of how many trials you would have acted as
8 prosecutor on before the courts?

9 A Not many. Perhaps half a dozen.

10 Q Is that per year or over the three years?

11 A Over -- perhaps a half a dozen a year, but I
12 wouldn't -- I wouldn't swear that that's accurate,
13 it might be fewer.

14 Q Six plus or minus some; is that a fair way to put
15 it?

16 A Right.

17 Q And so I think you've told us approximately 400
18 sentence appeals, 40 or 50 conviction appeals and
19 around six plus or minus on acting as prosecutor;
20 is that correct?

21 A Right, and I knew and the judges knew, etcetera,
22 that if I were prosecuting the case, it would last
23 approximately half as long as somebody else doing
24 it.

25 Q Okay. And why was that?



1 A Because I tended to get everything, get down to as
2 simple and as plain and short as possible.

3 Q And so in addition to those cases where you
4 appeared as counsel of record before a court,
5 would there be other files then, and let's talk on
6 a yearly basis, other files where you did not act
7 as counsel on record on a file, but would
8 otherwise have some involvement by way of
9 consultation with either a staff prosecutor or a
10 farm-out agent?

11 A There would be some of those, but not many.

12 Q And so how many times a month, for example, would
13 someone consult you on a file where you might read
14 something on a file, give some advice on a file
15 that you did not appear in court on?

16 A I think on a basis of, say, a year, it wouldn't be
17 several times a month, it would be maybe 10 times
18 a year that someone would inquire and seek
19 information on things like that.

20 Q So in the 1969 to 1971, that three year time
21 period, I think based on what you are telling me,
22 in the range of 1,200 perhaps to 1,400 files you
23 would have appeared in court as counsel of record
24 on; does that sound correct?

25 A Yes.



1 Q Now, what about, and again I'll come back to this
2 specifically when we deal with the Larry Fisher
3 matters, but what about out-of-province matters,
4 did you deal with requests where an accused might
5 be out of province and wished to deal with charges
6 in the province, things of that nature, were there
7 some miscellaneous areas that you had
8 responsibility for?

9 A Yes, there were some of those, and the transfer of
10 charges was one, and not everybody in our
11 department was ever involved in transfer of
12 charges from another jurisdiction, and I'm not
13 even sure now that I know exactly why that is. I
14 think it was to get the direct indictments that
15 required some status and that's why I was involved
16 in handling the details of those cases, but there
17 weren't many of those over the decades, but there
18 were a few over the years.

19 Q We have heard some -- I now want to move on to
20 some issues of police reporting. We've heard some
21 evidence, and expect to hear some more evidence
22 from another RCMP witness or two about an
23 arrangement the RCMP had with the Government of
24 Saskatchewan in the 1969 to 1971 time frame and
25 the evidence that we've heard is that they had an



1 agreement to provide police services in
2 Saskatchewan to rural areas that did not have a
3 police force and to assist municipal police forces
4 and we heard about the reporting procedures that
5 the RCMP would send in, and in particular Officer
6 Rasmussen of the RCMP talked about it, I don't
7 need to call this up, but just for the record,
8 it's at page 11572 and he talked about the reports
9 that he was preparing, it happened to be on the
10 Gail Miller investigation, and what he said at
11 line 20, he was asked the question:

12 "Q What was the purpose of this report?

13 And maybe we can go back to the first
14 page, please."

15 And he said:

16 "A Well, we're required under all
17 circumstances to advise of any work that
18 we do and it's a requirement that these
19 reports be forwarded to subdivision and
20 through to the Attorney General's
21 Department, so it's actually a
22 requirement."

23 And so I think his evidence was that they sent
24 these in as part of their arrangement with the
25 government. Were you aware, back at that time,



1 '69 to '71, of the RCMP providing regular,
2 whether it be daily, weekly or monthly reports to
3 the Government of Saskatchewan through the office
4 of the Attorney General with respect to the
5 policing they were doing in the province?

6 A I was aware to some degree, but so far as I was
7 aware, it was mostly an administration thing and
8 this fellow Arnold was the guy who was interested
9 in what they were doing and whether they were
10 doing it in the right places and for the right
11 amount and things of that nature. Occasionally,
12 of course, they would come up and say, hey, we
13 have discovered a case of this fellow who
14 committed this break and enter and theft offence
15 in Fort Qu'Appelle, okay, that means that that's
16 right close to where our office handles the
17 prosecution, that would be sent over to the
18 prosecutors and someone who appeared there on a
19 regular basis would look after it, but most of the
20 reporting was done for administrative purposes.
21 Occasionally they would report a case and then we
22 would say, okay, your case is well made out, we'll
23 be handling the prosecution next Tuesday at Indian
24 Head.

25 Q If -- what was your practice, Mr. Kujawa,



1 generally as far as reports, if a report was sent
2 through your office for information purposes, was
3 it your practice to read it?

4 A No, but I think if we had some arrangements made
5 of people who weren't so busy in the courts and in
6 that sort of thing reading to see if there was
7 anything more that needs to be done and looking
8 after it, and that's why this lady, that has
9 already been mentioned, who could handle a lot of
10 those reports and keep that tidy would be doing
11 them most of the time.

12 Q If we can maybe call up 065398. Mr. Kujawa, this
13 is a document, it's dated March 27th, 1969, this
14 Commission has already spent a fair bit of time on
15 this report, let me just go through parts of this
16 and then I'll have some questions for you. It's a
17 report, March 27th, '69 to the Deputy Attorney
18 General, received on March 28th, and it's from
19 Superintendent Ross, and it relates to the Gail
20 Miller investigation and it says:

21 "Attached is a report submitted by the
22 Officer in Charge of our Headquarters
23 Investigation Branch, covering the
24 assistance rendered to the Saskatoon
25 City Police in connection with this



1 investigation. Enquiries are continuing
2 and you will be advised of the results
3 of further investigation in due course."

4 And then if we can just go to the next page --
5 yeah, sorry, 065399, and then they go through,
6 and this is an RCMP report that details the
7 investigation work, or some of the investigation
8 work the RCMP had done to date. Now, if we can
9 just go back to the previous page, at this date,
10 March 28th, 1969, what the evidence we've heard
11 is that there was no charge laid in the Gail
12 Miller matter, that charge was at the end of May,
13 1969 and we have not heard any evidence yet that
14 the Regina prosecution's office was involved or
15 indeed Mr. Caldwell was involved, I think there
16 was some evidence that he may have been involved
17 in late April or early May, '69. Are you able to
18 tell us, Mr. Kujawa, whether you -- actually, let
19 me just back up. There is a reference here to
20 your name, Mr. Kujawa, and to "file K", if we
21 could just call out that "file K". Are you able
22 to tell us, is that your initial?

23 A I would say so, yes.

24 Q And is that "SK" it looks like?

25 A Yeah.



1 Q And would that be in your handwriting?

2 A I think so.

3 Q And then what about "Mr. Kujawa", would that be
4 your handwriting?

5 A No, that is not my handwriting.

6 Q Are you able to tell us whether you received this
7 report and, if so, whether you would have read it?

8 A I don't know if I did. The fact that I've marked
9 file on it, it looks like I have received it, but
10 until there is a charge that needs reading and
11 studying, I'm not going to read it. The fact that
12 they are investigating something doesn't mean that
13 I'm going to keep track of every sentence they
14 write on it because we're getting nowhere near, as
15 far as I know, to the court of law and therefore I
16 haven't got anything that I can do there that's of
17 any use, and if they have questions in connection
18 with an inquiry that they are conducting, then
19 they direct that to me and that I should read and
20 should respond to.

21 Q And so if -- if we could just scroll down -- if
22 the covering letter had directed your attention
23 and asked your advice on something, would that
24 change what you might do with the report?

25 A Then I should study that report very carefully and



1 respond to whatever question is asked.

2 Q Do you have any recollection of the volume of RCMP
3 reports that might have gone through, not just
4 your office, but the Attorney General's office
5 during this time frame?

6 A Oh, I think quite a few.

7 Q If we can then go to 065346, and I'm sorry, let me
8 just pause here for a moment. Would there be
9 anything at this time, March 28th, 1969, if
10 there's no charge laid, in fact, they are still
11 investigating, as far as your role as director of
12 public prosecutions would there be any function or
13 purpose for you to review this report, would it be
14 of assistance to you in any of the work that you
15 are doing?

16 A As I understood it, no, it wouldn't be part of
17 what I would be doing or should be doing.

18 Q If we can then go to 065346, this is a similar
19 report, this one is dated May 15th, 1969, received
20 May 16th, 1969, and I'll just go through parts of
21 this, and this refers to the previous letter and
22 sends along an investigation report and talks
23 about assisting Saskatoon Police on a full-time
24 basis and talks about a meeting at which time all
25 information will be checked, following this a



1 further report will be provided. And these
2 initials here, are you able to tell us whose those
3 are?

4 A I think Elizabeth McFadyen, that's the lady that
5 I've already mentioned that looked after a whole
6 lot of this sort of mail that came through, and
7 she said "file" which means that it didn't need to
8 be referred to me, there was nothing that I needed
9 to do on it at that time.

10 Q And then again if we can go up to the top, do you
11 know who would have written this on here, Mr.
12 Kujawa, or why that would have been written on
13 there?

14 A Who wrote it on there I don't know. It's not my
15 handwriting.

16 Q And then just the next page, 065403, this is the
17 report that's attached, and then in addition, I
18 don't propose to go through it all, but there was
19 also a group of statements, witness statements
20 that were referred to in this report, and so
21 again, if we can just go back to the letter, the
22 previous page, this letter and the attached
23 reports and statements, are you able to tell us,
24 Mr. Kujawa, whether you received this report and,
25 if so, whether you would have read the letter, the



1 report and the statements?

2 A I don't think I received it, I don't think I read
3 it.

4 MR. HODSON: I see it's three o'clock,
5 Mr. Commissioner, probably an appropriate spot to
6 break.

7 *(Adjourned at 2:58 p.m.)*

8 *(Reconvened at 3:25 p.m.)*

9 BY MR. HODSON:

10 Q If we could call up, again, 065346. And, again,
11 this was the letter, Mr. Kujawa, that I just
12 showed you, and the report, and I think you told
13 me that you did not -- that you did not think you
14 would have either received this report, nor do you
15 think you would have read it, and I just want to
16 go, if we can go to the next page in this report,
17 the RCMP report that was attached, if we can go to
18 0 -- sorry -- 065403. This is a lengthy
19 investigation report. This report is dated May
20 7th, 1969, and again, at this time there is no
21 charge laid for the Gail Miller murder, but in
22 this report it details police investigation
23 efforts, it's the RCMP reporting on what they have
24 done and what the Saskatoon City Police have done,
25 and it identifies three previous -- well, two



1 previous rapes and one attempted rape in the
2 couple of months prior to Gail Miller's murder,
3 and talks about the similarities of those rapes
4 and attempted rape and the murder, and the RCMP
5 state that the police say there is a strong
6 possibility that the rapes are directly connected
7 to the murder. So this is part of their
8 investigation report; do you have a recollection
9 back at that time, 1969, of reading anything like
10 that?

11 A I don't have any such recommendation -- or
12 recollection, but my memory has gotten a great
13 deal worse now than it has been.

14 Q Would information on what the police would be
15 investigating at this time, before a charge, would
16 that be relevant to anything that you were doing
17 at the time?

18 A No, it wouldn't be.

19 Q And if there was information regarding police
20 investigation that was relevant to a prosecution
21 would you expect the police force to give that
22 information to the prosecutor once a charge was
23 laid or after a charge was laid?

24 A Well, once the charge is laid, certainly.

25 Q If we can then just quickly go through the rest of



1 these. 065349. And again, Mr. Kujawa, and these
2 are just for the record, these are similar reports
3 and letters, I think they're all -- they're
4 different reports, and some have your name, some
5 have your initial. Is it fair to say that, where
6 your initial is on the front page, that that would
7 tell us that you would have at least received it;
8 is that fair?

9 A If it's actually my initial, but I'm looking at
10 that S.K., I don't really think that's mine.

11 Q Okay.

12 A I don't think I put that on, but I'm -- I might be
13 wrong.

14 Q Okay. So, again, are you able to tell us, looking
15 at this document today, whether you received this
16 report, letter and report, and if so whether you
17 would have read it?

18 A I don't think I've read it, no.

19 Q Go to 065364. It's August 15th, 1969, the report
20 again has someone written your name at the top,
21 and then at the bottom "file", and I think that's
22 "E.M.", is that right, in the bottom left?

23 A It looks like "E.M." to me, yes.

24 Q Are you able to tell us whether you received this
25 report and, if so, whether you have read it?



1 A I would say I haven't received it or read it.

2 Q I'd now like to turn to -- we're done with that
3 document -- to the prosecution of David Milgaard,
4 and I think the records show that he was charged
5 and arrested in late May of 1969, and maybe the
6 arrest was early June; were you involved in the
7 decision to lay a charge against Mr. Milgaard?

8 A No.

9 Q Did you provide any advice to the police in
10 connection with a decision to lay a charge against
11 David Milgaard?

12 A I don't think so at all. I think there was -- it
13 was a Caldwell case, and like I've already
14 mentioned before, he had had a little more
15 experience as a prosecutor than I did, and he was
16 a pretty earnest worker, and I figured that that's
17 in good hands.

18 Q And I think, I think Mr. Caldwell's evidence, and
19 perhaps some of the police officers, has been that
20 there might have been some consultation and
21 discussions between Mr. Caldwell -- if the police
22 were to go to someone from the prosecutions office
23 for assistance or advice prior to laying a charge
24 on a Saskatoon matter would it be fair to say that
25 Mr. Caldwell would be the person that they would



1 contact?

2 A I expect so, yes, yes.

3 Q And can you tell us, in this case, do you recall
4 whether or not Mr. Caldwell consulted you with
5 respect to any matters relating to the laying of
6 the charge?

7 A According to my memory, he hadn't consulted me,
8 the only consultation I remember is in connection
9 with that bit of cross-examination difficulty that
10 he ran into during the trial.

11 Q And that's the Section 9(2) application?

12 A Right.

13 Q Yeah, and we'll deal with that a bit later. As
14 far as the prosecution being assigned to Mr.
15 Caldwell, did that happen, was that an automatic
16 thing because he was the Saskatoon prosecutor or
17 did you assign it to him?

18 A Oh, I'd say it was automatic.

19 Q Now during the course of -- other than the Section
20 9(2) consultation, let's go back to the
21 preliminary hearing, would Mr. -- did or would
22 Mr. Caldwell consult with you or report to you and
23 tell you what was happening during the course of
24 the prosecution of David Milgaard?

25 A I'd say no.



1 Q Now let's talk about Section 9(2). We've heard
2 evidence from Mr. Caldwell and Mr. Tallis, and
3 we've read the record about what happened there;
4 what are your recollections of what you and Mr.
5 Caldwell discussed?

6 A Well he said that a certain witness had given a
7 certain statement and now had forgotten it, or was
8 changing it or had changed it, and what could he
9 do about it. And so I told him about that section
10 and how it enabled him, in the appropriate case,
11 to cross-examine. We talked about that a bit,
12 went through a short A, B, C on how to apply it in
13 the cross-examination, "that's it, good luck, and
14 good night".

15 Q Now as far as what we've heard evidence on, at
16 least from Mr. Caldwell and Mr. Tallis, was that
17 Section 9(2) of the *Canada Evidence Act* was a
18 fairly recent provision and there wasn't much law
19 on it, and one of the issues that both Mr.
20 Caldwell and Mr. Tallis were addressing is whether
21 or not the examination of the witness about the
22 circumstances under which she gave this statement,
23 whether or not that should take place in the
24 presence or the absence of the jury; do you have
25 any recollection of that being an issue that Mr.



1 Caldwell would have discussed?

2 A I think that was discussed, yes.

3 Q And what Mr. Caldwell and Mr. Tallis both said to
4 the trial judge is that they basically took the
5 same position, that the jury should be out when
6 that happens, Chief Justice Bence disagreed and
7 had the jury in, and then subsequently we know --
8 and we'll deal with this a bit later -- the Court
9 of Appeal set out the correct procedure, which was
10 not the procedure followed at trial, and then went
11 on to say that it was not -- that it was not a
12 reversible error. And I'm wondering, are you able
13 to tell us whether what Mr. Caldwell presented in
14 Court as his position as to how this should be
15 done, would that have been the position that you
16 and he arrived at in these discussions?

17 A I really don't know.

18 Q Now just in the David Milgaard prosecution file,
19 actually the file that was in the Regina office,
20 we have some documents that suggest there was
21 correspondence on various matters between --
22 relating to the David Milgaard prosecution with
23 the Regina -- your head office, and they would
24 include things like witness fees, there's some
25 correspondence on Legal Aid, on getting copies of



1 transcripts, paying for experts, things of that --
2 would that be typical in these cases, where head
3 office would deal with those witness and
4 expense-related matters?

5 A Yes, I think that was a regular practice that they
6 covered, and that I had nothing to do with at all.

7 Q If we can call up 065484, and there is a couple of
8 -- this is a letter of June 10th, 1969, maybe
9 we'll just call it out a bit. And this is a
10 letter from Mr. Tallis, and I -- can you tell us,
11 Mr. Kujawa, at this time, June of 1969, have you
12 had dealings with Mr. Tallis on other files?

13 A Oh, yes, I have.

14 Q And what was your professional relationship like
15 with Mr. Tallis?

16 A Well my professional relationship was mainly one
17 of envy and respect because of his abilities and
18 his experience and all of that sort of thing, and
19 our relationship has been -- had been we'd worked
20 together on a fair number of cases, always got
21 along well, and I was very anxious to maintain
22 that relationship.

23 Q And so we see in this letter, and the contents,
24 what basically he says is that he has been
25 appointed by the Legal Aid system, and he's



1 talking about getting a defence psychiatrist
2 appointed and wants to authorize the expenditure,
3 and so again it looks like similar handwriting
4 with your name at the top; do you know whose
5 handwriting that would be, Mr. Kujawa?

6 A No idea.

7 Q And then down at the bottom it says "file",
8 and I think "E.M., has been dealt with", and are
9 you able to tell us what has happened with this
10 letter and who might have dealt with this?

11 A Well I think that's an "E.M." there, "file E.M.",
12 so that lady had dealt with it and everything was
13 on its way to get accomplished.

14 Q So, again, with letters like this, these types of
15 requests that are sent to you directly, would --
16 from time to time would you have others in the
17 office that might assist you on dealing with some
18 of the administrative matters?

19 A Well, not only assist me with them, just turn them
20 over and "here, you handle these administrative
21 matters, that's it", so it wasn't assisting, they
22 were doing it.

23 Q And, again, if we can call up 065352. This is a
24 letter July 8th, 1969, this is the letter from the
25 police to Mr. Caldwell, and again to the next



1 page, or the last page we'll see a c.c. to the
2 Deputy Attorney General, again someone has written
3 your name, and again, "filed E.M.". And I don't
4 propose to go through the letter, but this would
5 be the letter that the police sent to Mr. Caldwell
6 saying "please prosecute", and I think you said
7 that would have been an automatic that it went to
8 him as opposed to through you; is that correct?

9 A Yeah, that's right.

10 Q And then if we can go to 065480, and this is a
11 letter after the preliminary hearing, September
12 16th, 1969, from Mr. Caldwell to Mr. Meldrum, the
13 Deputy Attorney General, and again we see someone
14 has written your name and "file E.M."

15 And then if we can go to the
16 next, 065482, please. This is a report on
17 completed case, and I take it this is a document
18 that you would be familiar with, report on
19 completed case; this type of document?

20 A Yes, I'd be sort of familiar with that, because
21 that shows "here's the stage this is in now" and
22 so that needs noticing.

23 Q So this is what Mr. Caldwell told us, is that one
24 of the reporting requirements that a prosecutor
25 had was to prepare a report after the preliminary



1 hearing?

2 A Right.

3 Q And if we could scroll down a bit, it would just
4 set up what happened, and he said it was a
5 department form, the number of days, witnesses,
6 and a summary; was this the type of report that
7 you would prepare, as well, for the cases that you
8 prosecuted?

9 A Yes.

10 Q And, again, on -- this relates to the David
11 Milgaard prosecution, would you -- would this be a
12 document you think you would have reviewed,
13 received and reviewed?

14 A I probably would have received, but not really
15 reviewed, because it was in his hands and he was
16 handling it, and everything seemed to be going all
17 right, so just leave it there.

18 Q And similarly 066620. This is the concluding
19 report after trial, and again has I think
20 Ms. McFadyen's initials, and then if we can go to
21 the next page here is Mr. Caldwell's report on the
22 completed case and this is where he reports about
23 the verdict and then goes through with the
24 witnesses and a summary of the evidence?

25 A Right.



1 Q Are you able to tell us whether you received this
2 report, and if so, whether you would have read it?

3 A I doubt if I read it. I maybe received it and
4 just sort of passed it on.

5 Q And when you were arguing the appeal on this
6 matter would this -- would these reports give any
7 assistance to you in preparing for the appeal?

8 A No. Really, on the appeal, the transcript and the
9 legal portions of the trial is all that's
10 concerned.

11 Q Other than your discussion with Mr. Caldwell on
12 Section 9(2), are you able to tell us whether you
13 had any other involvement in the prosecution of
14 David Milgaard, through until he was convicted by
15 the jury?

16 A Not that I can remember, and I do happen to
17 remember that one call, but there could have been
18 others which I would have forgotten --

19 Q Okay.

20 A -- when -- or could have forgotten, I don't know.

21 Q But again, just based on your practices and your
22 dealings with Mr. Caldwell, would you have
23 expected to have hands-on involvement in the
24 original prosecution?

25 A No, I would not.



1 Q Now let's talk about the appeal. You argued the
2 appeal before the Court of Appeal in this matter;
3 is that correct?

4 A Yes, I think so.

5 Q The records reflect that you do. Do you have a
6 recollection of arguing the appeal?

7 A Not a great deal of memory of it.

8 Q And if we can call up 066619, please. And, again,
9 this is simply the letter from the Court to you
10 indicating the sending a copy of the notice of
11 appeal.

12 And if we can go to 066596, this
13 is the notice of appeal, and if we can go to the
14 next page. And I think what Mr. Tallis' evidence
15 was that what was filed with the Court of Appeal
16 was simply the transcript, and as well he
17 testified that at that time no written factums
18 were filed; is that your recollection?

19 A My recollection is that there was no written
20 factums, but this statement of appeal sort of
21 listed the points of evidence that he wanted to
22 deal with, and so in some form or other I was
23 preparing a response, and it might be a brief one
24 which was submitted to the Court, but I'm not sure
25 of that.



1 Q We have, the Commission has checked with the Court
2 of Appeal to find out what was on the file and
3 there was no written argument filed by either Mr.
4 Tallis or by you, according to our checks?

5 A Well, you must be right.

6 Q Would that have been the practice at the time, to
7 simply present oral argument?

8 A In most of them, yes.

9 Q So can you tell us what you would have had and
10 what you would have used by way of documents to
11 prepare for and argue the appeal in this matter?

12 A The transcript of the evidence that was given,
13 including any exhibits that were included, and the
14 directions by the trial judge to the jury word for
15 word, every word that he used to instruct them,
16 that's what the whole appeal amounted to to me.

17 Q Now we have heard evidence that the closing
18 address to the jury by the Crown and by Mr.
19 Tallis, Mr. Caldwell and Mr. Tallis, was not part
20 of the transcript and not part of the record at
21 the time for the appeal; is that your
22 understanding?

23 A It's not my understanding and normally I think
24 it's enclosed.

25 Q Okay. So the closing address by counsel; your



1 understanding was that it would be part of the
2 record?

3 A That's my understanding, yes.

4 Q And so, again, as far as the -- your preparations
5 in arguing the appeal, Mr. Caldwell has testified
6 before this Inquiry and has provided to us, I
7 think, six or seven file folders of documents,
8 being his prosecution file, that included many
9 pages of police reports, witness statements,
10 correspondence, lab reports, etcetera; are you
11 able to tell us whether you obtained any of Mr.
12 Caldwell's prosecution file for the purposes of
13 preparing for or arguing the appeal?

14 A I don't think so. I don't know why I would -- how
15 I could make use of it.

16 Q Okay. Mr. Caldwell's evidence, I believe, is that
17 he did not send you any of his file other than the
18 transcripts and maybe the notice of appeal; would
19 you have any reason to dispute that?

20 A No, none.

21 Q And would there be any value or purpose, Mr.
22 Kujawa, in having the police investigation reports
23 and all the witness statements for you to prepare
24 to argue the appeal?

25 A No, I don't think that would -- I don't think that



1 was something I could even use.

2 Q If we can go to 066606. And this, just for the
3 record Mr. Kujawa, this is the date that the
4 Deputy Attorney General gets the transcript of
5 evidence in the above appeal, so presumably this
6 is when you would have received the trial
7 transcript; is that right?

8 A Yes.

9 Q 066603. The transcript was received in May, the
10 appeal is actually argued in November 6th, 1970,
11 and the correspondence -- and I went through this
12 with Mr. Tallis -- suggests that a date was
13 selected, I think in part based on his calendar,
14 in November; do you recall anything about the time
15 it took to have this appeal set down for argument?

16 A No idea at all.

17 Q And if the transcript was ready in May, a
18 conviction the end of January, the transcript
19 ready May 20th, arguing the appeal in November,
20 does that sound within the normal time limits;
21 anything unusual about that?

22 A I would say it was unusual. I think it mostly
23 happened much closer one to the other.

24 Q Okay. If we could -- if we look at this letter
25 here, this is September 17th, Mr. Tallis is



1 writing to you to talk about getting a special
2 date fixed, and talks about the considerable
3 amount of work in connection with this appeal for
4 you having regard to the length of the trial; do
5 you have any recollection of your discussions with
6 Mr. Tallis on the scheduling of the date?

7 A No, not really, but I know that he was a very busy
8 person, and he would usually want to pick a date,
9 and you do your best to accommodate him.

10 Q 066594. This is a letter October 7th, 1970 from
11 Mr. Tallis to you, and he confirms the appeal will
12 be heard November 6th, and he says:

13 "I would like to thank you for your
14 assistance in picking a date which suits
15 my personal convenience. I also
16 appreciate the efforts that the Chief
17 Justice made to accommodate me."

18 Again, does that assist your recollection at all
19 as to how and when the date was selected?

20 A No, no recollection at all. It was set, I knew it
21 was going to be heard, when or how it didn't
22 matter.

23 Q 066601. And this is just, I think, the docket
24 that suggests it was argued on Friday, November
25 6th, 1970. And as far as the appeal itself, do



1 you have any recollection of arguing the appeal,
2 or what matters might have been put forward?

3 A No recollection.

4 Q And do you have any recollection of, again I
5 appreciate it's difficult to go back, but at the
6 time what, if anything, may have struck you as far
7 as your review of the case; was there anything
8 that was unusual or that would have come to your
9 attention in the arguing of the appeal?

10 A Not that I remember, or that, or that I think I
11 experienced at all. It just seemed to be an
12 ordinary case.

13 Q And if you would have had concerns, at the time of
14 arguing the appeal, that Mr. Milgaard was not
15 properly convicted, has that happened in your
16 career as appellate counsel?

17 A If I'd have had concerns of that kind I would
18 likely have remembered it for a long time.

19 Q Would you have done anything with it? At the time
20 of the appeal, if you had concerns about the
21 propriety of his conviction, what --

22 A If there was anything I could do about it, I would
23 have certainly done something about it, but the
24 concern is usually with how right was the judge on
25 certain statements of law that he made and that's



1 where the concern lies, and digging into the
2 reports and that sort of thing in the library to
3 try and figure out whether what he said and what
4 he did was justifiable, that would be the only
5 concern.

6 Q And would you put some weight on the fact that a
7 jury had convicted Mr. Milgaard?

8 A Oh, well that's already there, if they haven't
9 convicted you don't have a conviction, you don't
10 have an appeal to deal with. It's not so much
11 whether the jury did it as it is whether they were
12 properly instructed.

13 Q What Mr. Tallis has told us about the argument
14 before the Court of Appeal is that on the issue of
15 Section 9(2), now the Court of Appeal ended up
16 saying that Chief Justice Bence applied the
17 section wrong and that he should have excluded the
18 jury, and the Court of Appeal set out, I think,
19 the seven-step process as to what should happen.
20 Mr. Tallis' evidence before this Commission is
21 that at trial Mr. Caldwell agreed with Mr. Tallis'
22 position on how Section 9(2) should be applied,
23 that the judge misapplied it at the trial
24 according to Mr. Tallis and Mr. Caldwell, and that
25 before the Court of Appeal he said that you did



1 not -- you took the same position as Mr. Caldwell,
2 in other words that you agreed with Mr. Tallis
3 that the jury should have been out, that Chief
4 Justice Bence got it wrong, but you said it was
5 not a reversible error. Are you able to -- do you
6 take any issue with Mr. Tallis' recollection of
7 what position was taken on the Section 9(2) during
8 the argument of the appeal?

9 A No, I can't take any issue with that at all.

10 Q We'll call up 066505. It's just the front page of
11 the judgement, I don't propose to go through it,
12 but I can confirm, Mr. Kujawa, that you were
13 listed there as counsel. And that was before five
14 members of the Court. Was that unusual, at the
15 time, to have five judges?

16 A Not for a serious case like that, it -- that was
17 standard, pretty well standard.

18 Q If we can then go to 066587, please. So the date
19 of that appeal being dismissed is January the 5th,
20 1971, and this is February 9th, 1971, this is Mr.
21 Tallis writing to the Legal Aid Committee and
22 stating that -- he reiterates Mr. Milgaard's wish
23 to launch an appeal. It's my understanding that,
24 at this time, that he would need leave of the
25 Supreme Court of Canada to file an appeal; is that



1 your understanding?

2 A Yes.

3 Q And so at this point he is seeking leave in this
4 letter, and Mr. Tallis told us a bit about this,
5 he was seeking to get Legal Aid funding to allow
6 him to seek a leave application. And so this
7 letter indicates, number 1, he has got that
8 intent; and then down at the bottom Mr. Tallis
9 says -- and this is to the Legal Aid Committee and
10 this letter is copied to you, Mr. Kujawa, I'll
11 show you in a moment -- he says:

12 "I would also point out that I think
13 that Mr. Kujawa would co-operate in
14 facilitating this matter if you feel it
15 should be pursued."

16 And I think what Mr. Tallis said was to the
17 effect that if it was a point of law, and I think
18 he said this was a new point, Section 9(2), that
19 he may have contacted you to get your agreement
20 that this matter was worthy to go to the Supreme
21 Court of Canada; do you have any recollection of
22 discussions of that nature?

23 A Umm, I sort of vaguely remember a bit of
24 discussion here, but I have no idea what I said or
25 what he said, it's -- I know we didn't get into



1 any fight about it, that's all I know.

2 Q If Mr. Tallis would have come to you and said
3 "lookit, I think this issue bears scrutiny by the
4 Supreme Court of Canada, this Section 9(2) issue,
5 I'd like to apply for leave, I'd like to get Legal
6 Aid, would you assist me and say that this is
7 a" -- and I think, at that time, the Legal Aid
8 rules for going to the Supreme Court of Canada
9 were that it had to be something --

10 A They were rare.

11 Q -- rare, and that he may have come to you and said
12 "assist me in my efforts to get Legal Aid so that
13 we can take this matter to the Supreme Court?"

14 A Oh, I think I'd have -- I would be sort of
15 automatically assisting him.

16 Q And why do you say that?

17 A Well, because of the great respect I had for him
18 as the quality and ability and the fact that it is
19 an arguable point. After all, we've had some
20 dispute between the trial judge and the Court of
21 Appeal already, I can't say that it's not
22 arguable, so I would say let's go ahead and deal
23 with it.

24 Q If we can go to 066565, this is a letter May 3rd,
25 1971 from Mr. Caldwell to you. It's my



1 understanding that the, and I could be wrong on
2 this, but I think the time limit for an
3 application for leave to appeal to the Supreme
4 Court I believe was 60 days. Do you remember if
5 that's correct or not? I'm not sure if much turns
6 on that.

7 A I don't know.

8 Q There would be a time limit I take it?

9 A Yes, I think so.

10 Q And in this letter Mr. Caldwell writes to you
11 wondering if the case is going to the Supreme
12 Court and whether the matter can be regarded as
13 closed and he's looking to deal with exhibits.
14 And then if we can go to 046944, this would be
15 your letter back of May the 12th, '71 to Mr.
16 Caldwell and you say:

17 "It is, I suppose, impossible to say
18 that this case will not get to the
19 Supreme Court of Canada. However, the
20 more time goes by the less likely that
21 becomes. In any event, since the Court
22 of Appeal has dealt with the matter and
23 since no application was made for leave
24 within the statutory time, you are free
25 to pick up and dispose of all exhibits



1 according to the order of the trial
2 court. In the remote event that a new
3 trial is ordered, some items, like the
4 knife, perhaps should be retained for
5 some time but there is no need to hold
6 any of the other material."

7 And again, do you have a recollection of sending
8 this letter, Mr. Kujawa, or do you take any issue
9 with this letter?

10 A I have no recollection.

11 Q I take it you accept that this would have been
12 sent to Mr. Caldwell?

13 A Yeah.

14 Q And so at this time it appears that Mr. Milgaard's
15 time limits for applying for leave had expired and
16 that subject to an extension of time from the
17 Supreme Court his legal proceedings are concluded;
18 is that fair?

19 A It seems fair to me.

20 Q Then if we can go to 066572, and this is just a
21 memorandum to the Crimes Compensation Board, I'm
22 not sure whether anything turns on where you sent
23 it, but it's July 30th, 1971 and you say:

24 "Milgaard has finally made application
25 to the Supreme Court of Canada for leave



1 to appeal. Whether an extension of time
2 or whether leave will be granted, it is
3 impossible to say. At the present time,
4 however, the matter is under appeal and
5 the application is not likely to be
6 heard before October. Should you
7 require more information when the matter
8 of appeal has been settled, please let
9 us know."

10 So it looks like at least on July 30, 1971 you
11 would have been aware that Mr. Milgaard had filed
12 an application to the Supreme Court of Canada for
13 an extension of time; is that fair?

14 A Yes.

15 Q And 066573, a letter of the same date to the Court
16 of Appeal to the registrar sending an order to
17 have the file sent to the Supreme Court of Canada
18 three copies of the trial transcript, so it looks
19 July 30, 1971 is when things were put in motion to
20 send materials from our Court, from the
21 Saskatchewan Court of Appeal to the Supreme Court
22 of Canada; is that correct?

23 A That seems correct.

24 Q And just for completeness, 066557, this is the
25 letter back from the Court of Appeal August 16th,



1 '71 just saying everything has been sent to the
2 Supreme Court.

3 If I could now jump ahead to
4 066543, please, there is a letter of November
5 10th, 1971 from a law firm in Ottawa and it
6 appears, would these be your agents at the Supreme
7 Court of Canada for the purposes of filing?

8 A I have no idea.

9 Q Well, somebody is sending to Mr. Musk a Memorandum
10 of Argument which was served on them in the
11 matter, and the next page, if we could go to that,
12 is the memorandum -- go to the next page, it has
13 your name there, Gowling & Henderson, and then the
14 next page -- actually, go to 547, and this is the
15 Memorandum of Argument put forward by Mr.
16 Milgaard's counsel at the time, I think it was
17 Brian Crane from Gowlings in Ottawa that had put
18 forward the application. And in reviewing the
19 file -- actually, if we could just go to 053142,
20 this is the note that we can find on the Supreme
21 Court decision, it's an application by accused for
22 leave to appeal, and they say it was refused by
23 the Supreme Court on November 15, 1971 and the
24 following judgment was delivered orally by
25 Martland, J.:



1 "Leave to appeal is refused. In making
2 this decision we express no view as to
3 whether before granting the leave to
4 cross-examine provided for in s. 9(2) of
5 the *Canada Evidence Act*, the Court is
6 required to conduct a *voir dire* as to
7 the circumstances in which the statement
8 in writing was obtained."

9 And it lists you as counsel for the Crown. Are
10 you able to tell us, would you have appeared
11 before the Supreme Court of Canada on the leave
12 application?

13 A I expect so, yes.

14 Q And we do not have any record, and that's not to
15 say that it doesn't exist, of a written argument
16 filed on your behalf. Do you know whether you
17 would have filed a written argument?

18 A Well, this being an application for leave, I don't
19 think it required a written argument from me on
20 every occasion. Any case that's being heard
21 requires a written argument and the whole full
22 preparation, but not the leave to appeal at that
23 time.

24 Q And so is it possible that only Mr. Milgaard filed
25 a memorandum and that you simply appeared and



1 perhaps made oral submissions?

2 A Right.

3 Q Do you have a recollection of appearing before the
4 Supreme Court on this matter?

5 A I have a recollection of appearing, yes.

6 Q And do you remember anything about the proceeding?

7 A Well, just that it was a brief oral presentation
8 and I got in my argument and a few minutes after
9 that was finished we were told the appeal was
10 dismissed and good day.

11 Q Okay. Or the application for leave?

12 A The application, yes.

13 Q And would that be your last dealings then,
14 November 15, 1971, in connection with the David
15 Milgaard criminal proceeding?

16 A As far as I can remember it was the last dealing,
17 yes.

18 Q I now want to turn to the Larry Fisher matters,
19 and if I could call up 335508, this is a document,
20 I'll just enlarge it, that we prepared, Mr.
21 Kujawa, that lists the documents that we received
22 from the Government of Saskatchewan that were
23 contained in what was called the Larry Fisher
24 file; in other words, the Regina head office file
25 from 1971, and this lists the contents and we



1 actually have the file. Are you able to tell us
2 whether or not this would be an accurate listing
3 of the file materials, and I'll go through some of
4 these with you, but do you have any reason to
5 dispute what the government has given to us and
6 said here's what was on the Regina file?

7 A I have no reason to dispute it and I have no way
8 of agreeing. I just don't know.

9 Q Okay. Now, I want to go through just a bit of the
10 background -- we're done with this document for
11 the time being. What the evidence has been before
12 this Commission of Inquiry, and I don't think
13 there's much in the way of dispute of these facts,
14 is that Larry Fisher faced two charges in
15 Manitoba, one for a rape committed on August the
16 2nd, 1970, the second for a rape committed on
17 September 19th, 1970 and he was caught in the
18 course of the second offence and was put into
19 custody and charged with the two Manitoba rapes,
20 and he then, and while he was in custody
21 provided -- after he was arrested he then
22 confessed to the two Winnipeg rapes, he then
23 subsequently provided confessions to two rape
24 charges in Saskatoon and signed a confession and
25 thereafter through his counsel -- I'm actually



1 missing a step. After he signed the two
2 confessions, four charges were laid in Saskatoon
3 that included the two that he confessed to and two
4 others, one was a rape and one was an attempted
5 rape. Thereafter Mr. Greenberg his lawyer made
6 efforts through the Manitoba Crown Attorney and
7 through the Saskatchewan Attorney General's office
8 to get all the matters cleaned up and with guilty
9 pleas and disposition, and so just a couple of
10 general questions.

11 At that time, 1971, the evidence
12 we've heard is that, or actually what
13 Mr. Greenberg told us is that he initially wanted
14 to have the charges all moved into one place, from
15 Saskatchewan to Manitoba so that he could deal
16 with them all at once and get one sentence, and I
17 think what we've heard and certainly what the law
18 suggests at the time was that that wasn't
19 possible, you couldn't move an indictable rape
20 offence from Saskatchewan to a Manitoba court, it
21 didn't have jurisdiction. Was that your
22 understanding of the law at the time?

23 A Yes.

24 Q And so what Mr. Greenberg told us, told the
25 inquiry, is that his desire was to have Mr.



1 Fisher, to the extent possible, plead out to both
2 the Manitoba and Saskatchewan charges and get
3 sentenced, get everything cleared up. Now, let me
4 go back a step. Would that be something that you
5 would have had experience with in your capacity
6 where an accused would have charges in different
7 jurisdictions that he or she would want dealt with
8 at once?

9 A Yes, that had happened before and had some
10 dealings along that line.

11 Q And what would be the purpose, the stated purpose
12 of defence counsel, or an accused to want to have
13 charges -- let's take Regina and Moose Jaw, for
14 example, two different centres in Saskatchewan,
15 some charges in Regina and some charges in Moose
16 Jaw, what would be the objective or purpose on
17 behalf of defence counsel, to have them dealt with
18 all at once?

19 A Well, just mainly to clear up all of the horrible
20 futures that a charge entails to an accused, get
21 rid of that, try and get a new start, and by
22 clearing it up try and get a deal out of the
23 prosecution people to get not too heavy a total
24 sentence.

25 Q We've heard some witnesses use two terms, I think



1 Mr. MacKay used totality of sentence and I think
2 what we heard from Mr. Greenberg is a global
3 sentence, so in other words, getting all the
4 charges at once. Was that something that you were
5 familiar with at the time?

6 A Yes.

7 Q And I think how they explained it, that if you
8 had, for example, four charges, and if you dealt
9 with two in one centre and got a sentence and then
10 six months later dealt with the other two you
11 might get an additional sentence; is that right?

12 A Yeah, that's right, you might. No one knows for
13 sure, but --

14 Q And based on your experience with courts and
15 sentencing, would an accused who had two sets of
16 charges, different times, different locations,
17 likely get a lesser sentence by having them all
18 dealt with at once rather than having them dealt
19 with by different courts on different dates?

20 A According to my understanding, having dealt with
21 them all at once in one place, was going to likely
22 give the accused lesser time than he otherwise
23 would receive.

24 Q And would that be something that would be unusual,
25 Mr. Kujawa, to have an accused person -- let's



1 take the example of Regina and Moose Jaw where an
2 accused might have charges before the Regina court
3 and the Moose Jaw court for different offences on
4 different dates where an accused might want to
5 have the two of them dealt with together in one
6 court, and so they would move either from Moose
7 Jaw to Regina or Regina to Moose Jaw so that all
8 the charges are dealt with on a guilty plea on one
9 occasion.

10 A I don't think that that dealt, did that much to
11 them. It's getting the big important charges from
12 different areas, meaning different jurisdictions
13 like Winnipeg, Manitoba, Saskatchewan or Alberta
14 and cleaning them up, that's when I think you get
15 your best deal.

16 Q Let me just go back and talk about generally
17 though where an accused might have multiple
18 offences in different jurisdictions, whether it be
19 in different provinces or different judicial
20 centres within provinces, was it unusual for an
21 accused who intended to plead guilty to try and
22 collect the charges all together and deal with
23 them in front of one judge?

24 A Not unusual. He usually thought he would get a
25 better deal that way.



1 Q And again, just generally, Mr. Kujawa, if you
2 could tell us, what was your reaction or position
3 as a prosecutor if an accused in a charge came to
4 you and said I would like to plead guilty, were
5 there ever any cases where you would say no, we
6 would like to have the trial instead?

7 A I would say -- I'm not sure, but I would say no,
8 there weren't any of those cases, because if we
9 had, if we were in a position to go ahead with a
10 charge and convict a person, we wouldn't be
11 delaying it, we would be going ahead with it, and
12 by him all of a sudden saying I can get, clear up
13 the whole slate and my own background by pleading
14 guilty, that's how that was brought on.

15 MR. HODSON: I'm moving on to a different
16 area that I won't get done today,
17 Mr. Commissioner. I'm wondering if we might
18 break a bit early today?

19 COMMISSIONER MacCALLUM: Yes.

20 *(Adjourned at 4:12 p.m.)*

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

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

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11
12 _____, CSR

13 Karen Hinz, CSR

14 Official Queen's Bench Court Reporter

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16 _____, RPR, CSR

17 Donald G. Meyer, RPR, CSR

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