Commission of Inquiry Into the Wrongful Conviction of David Milgaard

before

THE HONOURABLE MR. JUSTICE EDWARD P. MacCALLUM

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Transcript of Proceedings
and
Testimony before the Commission
sitting at the
Delta Bessborough Hotel at
Saskatoon, Saskatchewan

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On Thursday, March 2nd, 2006
Volume 131
Inquiry Proceedings

Commission Staff:

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

Support Staff:

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Ms. Karen Hinz, CSR, and *Mr. Don Meyer, RPR, CSR*,	Official Q.B. Court Reporters
Mr. Hugh Esson,	Security Officer
Mr. Aaron Ladd,	Audio Technician

Appearances:

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. Aaron Fox, Q.C. and 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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Transcript of Proceedings

(Reconvened at 9:10 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

MR. HODSON: I have no further questions for Mr. Kujawa and I think the next to examine will be Mr. Wolch.

COMMISSIONER MacCALLUM: Thank you.

SERGE KUJAWA, continued:

BY MR. WOLCH:

Q Mr. Kujawa, I'm Hersh Wolch, I'm David Milgaard's counsel and I have a few questions for you.

You indicated in your evidence that you were upset at accusations or comments that were made about, that may have challenged your integrity over the course of time?

A Yes, I was concerned, yes.

Q Yes. And you felt, you said, hurt or upset or whatever, the accusations being basically that either you covered up certain things or else you didn't do your job properly, things like that, I'm not going to go into it in detail, but that's the general tenor of it?

A Yes, right.

Q You might agree with me that those accusations pale in comparison to being accused of murder and rape and you didn't do it, far less serious accusations?

A I agree with that, yes.

Q Right. And you indicated that you were upset, for example, about this fellow Breckenridge that came forward with some false comments about you?

A Yes, I certainly was.

Q Right. And I take it you would have been more upset if instead of people saying look, his accusations don't check out, they would have taken him to a hypnotist or somebody to try to revive memories or correct obviously incorrect things?

A Well, I don't know how much use a hypnotist is at all, but I agree with you that --

Q What I'm saying is you might put yourself in David's position where Nichol John gives a story that makes not much sense and instead of looking at it critically, people try to revive her memory by hypnosis and everything else assuming it must be true. Do you see the parallel?

A Yes, yes.

Q Now, I don't intend to be that long, sir, but I might say at the outset I'm not going to be suggesting that you ever tried to keep an innocent man, or a man you believed to be innocent in jail. Do you understand that?

A Yes, and I appreciate that.

Q Okay. But you might not appreciate that I am going to suggest that you did things perhaps wrongly or improperly believing the man was guilty and trying to maintain the conviction of a guilty man, this is where we may disagree, but that's the area where I'm coming from so you know that, okay.

A Okay.

Q Now, back in 1969 when you were in Regina, reports were provided to your department and to you regarding the murder investigation of Gail Miller, and I want to be sure I have your evidence, and if we can turn to 065349. Now, I'm a little unclear, it is -- it appears to bear your initials, so I would expect the report came to you, and what is the significance of your initial being there?

A Just that I must have gotten that document and then initialed it as having seen it.

Q Well, that's what I want to be clear. I've always understood you to be a responsible person dedicated to your job.

A Well, I certainly thought I was.

Q And this is a very serious murder investigation?

A Oh, every murder is very serious.

Q This is a particularly brutal, unsolved at the time, terrible crime?

A Yes, yes.

Q And would I be correct in assuming that you would read the report?

A Not necessarily.

Q I find that difficult, sir, that in your position, having received this report, that you wouldn't read it, I don't understand that. Can you help me with that?

A Well, in my position I was not keeping track of investigations of all kinds of crimes going around all around the province, I had a whole lot of other duties that kept me more busy than I wanted to be, and so if there was a case from Saskatoon that was being dealt with by the police, a senior counsel by the name of Caldwell should have been on top of it and should have been in touch with me if he wanted to hear anything from me, that was basically my attitude. I was a very busy fellow and didn't have time to look at everything that was going on in the Department of the Attorney General.

Q I'm not asking you to have studied it and made notes of it, but it just would appear to me that in the entire province there might be, in the course of a year, how many, five, six, murders? I don't know.

A I don't either.

Q Somewhere in that area in the course of a year?

A I would guess that. I don't know.

Q And a Gail Miller type of murder might be one a year, one every five years?

A Well, an outdoor rape in a snowbank at 40 below is an extremely rare happening and I think that in itself attracted some extra attention.

Q What I'm saying is as the top guy you would want to have some idea what it's about, so I'm having a hard time understanding why you wouldn't read, take the five minutes to read a report.

A Because there were reports coming from all corners of the province and I had other things that I was busy at. I couldn't read all the reports that came in.

Q I'm sure there were reports on motor vehicle accidents, minor things, but I'm having a hard time with you not looking at the most serious case that crosses your desk.

A Well, I guess unless my attention was drawn to it, I wouldn't know how serious it was until it got to a greater stage, like whether it got into Court or the Court of Appeal or something of that nature.

Q So you are saying that putting your initials on it really meant nothing?

A I don't really know how all that initial stuff went on there and I guess when I see that it looks like my own SK, so I must have put that on and I must have read that little bit, but what it tells me I don't know.

Q But you can see that there is a very real possibility that you did read the report and then put your initial on it?

A Yeah, there's a real possibility, yes.

Q And if we can turn to 335498, now, this is a list of materials in your office and this list was created, it wasn't found in the file, but -- so in the file that would have been in your office, and at the relevant times, I just want to draw your attention to certain matters, and if we can just scroll down a little bit, on this list you'll see under number 15, statement of (V1)--- (V2)- (V1)- dated October 22nd, 1969. You see that there?

A Yes, I do.

Q And do you know who (V1)--- (V2)- (V1)- is?

A Right now, no, I don't.

Q If I was to tell you she was a victim of Larry Fisher, would that help you?

A Well, it would because you wouldn't tell me that if you didn't know it, but the name means nothing to me right now.

Q Okay. But you see it there, I'm just trying to help you with that. And you'll see it's number 15 on this list. Number 14 is a statement of Ron Wilson and number 13 is a statement of David Milgaard?

A Right.

Q And right after (V1)--- (V2)- (V1)- we have listed here (V2) (V2)- (V2)-----, and you can take it that she is also a victim of Larry Fisher.

A Well, I'll take it if you say so, but I didn't know who it was when I saw the name.

Q No, I appreciate that, but I'm trying to refresh your memory on it and that's just a fact.

A Right.

Q And then you have the statement of (V3)-- (V3) (V3)------, another one of his victims; do you see that?

A Yes.

Q And then next to her you have here the statement of Nichol John. You see that?

A Yes.

Q And I'll just draw this to your attention, there's no statement here regarding the fourth victim, (V5)-- (V5)---, but her attack was later and wouldn't be in this file, if you follow what I'm saying?

A Yes.

Q And these are not minor statements, I believe one of them, I think Miss (V1)-'s is seven pages long in handwriting, I'm not going to go to the document, we've all seen them, but they are lengthy statements, full details. Can we not presume you would have read them?

A Well, again, unless that was somehow brought to my attention where I was, I wouldn't read them because I couldn't read all of the statements that were brought into the Department of Justice.

Q I appreciate that, sir, but this is a file of significance, it's a file where you will have gone to the Court of Appeal, it's a file where you will have gone to the Supreme Court and you were a thorough, dedicated prosecutor. Are you suggesting that you might have gone to two appellate levels without reviewing your file?

A Well, the only thing that I took to the Court of Appeal was the only material the Court of Appeal relied on in deciding the case.

Q I understand what you are saying, but I'm going to suggest to you that a dedicated prosecutor reads his file, reads the file to see, to understand the whole picture as to what the case is about. Isn't that normal, and particularly on a major case? I want to be clear, you are saying that on a case of this significance going to the Supreme Court, you wouldn't have read the entire file?

A You mean the investigation details?

Q Everything that was in your -- you have a binder of material that's in front of you.

A Yes, I would have said I didn't read everything in that file because the Court, the Supreme Court, nor I, could deal with all of those things at that level.

Q I appreciate that, but don't you want to have a handle on the prosecution?

A Don't I which?

Q Want to have an understanding, a grip on the prosecution, as to what it's all about, be prepared for anything that might arise? The Court may ask you a question on any issue and you are not going to say I haven't read my file.

A Well, the only file that I understood was involved was the transcript of the evidence and judging, judgmental comments by the trial judge.

COMMISSIONER MacCALLUM: Yes, Mr. Wilson?

MR. WILSON: Mr. Commissioner, Mr. Wolch is posing his questions on the basis, the presumption that the documents he's referred to on that list on the screen were in the file that Mr. Kujawa had. We had clear evidence from Mr. MacKay yesterday or the day before that the filing system then, where those went, where they would be at the time the file on the appeal, Milgaard appeal came to Mr. Kujawa nobody knows, but certainly they were not in his file that he didn't read as Mr. Wolch is suggesting.

COMMISSIONER MacCALLUM: Well, yes, the question of whether there was only one file or more of course is not finally answered at this point, but I would invite you, Mr. Wilson, to raise that subject if you wish when it comes your turn to cross-examine.

MR. WILSON: I'm sorry?

COMMISSIONER MacCALLUM: I would invite you to raise that subject when it comes your turn to cross-examine if you wish. I understand you are concerned about being fair to the witness, but if he doesn't know the filing system, that's all he has to say, sir.

MR. WILSON: Just as long as we're clear on that.

COMMISSIONER MacCALLUM: Yes.

BY MR. WOLCH:

Q Mr. Kujawa, my understanding is that there was one file that was retrieved in 1993 by the RCMP and all these materials were in it, that's my understanding. Mr. Hodson I think can explain it better than anybody else.

MR. HODSON: Well, if you are inviting me to, the file that -- just so that there's no misunderstanding in the document that we prepared, the Commission received a set of documents from the government a couple of years ago that contained a number of documents. Whether or not -- I was not led to believe that it was the file, it was some documents that had not previously been disclosed, and so, and I said this at the outset, that our listing of the documents, this index here, simply to say this is the collection of documents that we have been able to determine the Government of Saskatchewan or the Attorney General would have had at around that time and where they all came from, there were some different sources, so I don't -- I don't want it to be taken that we've made that determination that they were all in one file. In fact I'm having the original, I can have the original box brought over.

COMMISSIONER MacCALLUM: That was my understanding, Mr. Wolch, we just got the material in.

MR. WOLCH: My understanding, though, is that this witness initialed -- what was received would have been the Rasmussen report and attached to that would be the three complainants' statements. I believe I have that right. I don't want to be unfair, but --

COMMISSIONER MacCALLUM: Yes, but I suppose the question is whether or not those reports bearing his initial were contained in the material he later used to take to the Court of Appeal, and we don't, I don't just remember any conclusive evidence about that at all.

BY MR. WOLCH:

Q I'm assuming, sir, that your department tried to run your office in an efficient way; would that be fair?

A Yes.

Q And if things came in on the Miller investigation they would be put into a particular file, presumably?

A They'd be put into wherever they thought the materials belonged.

Q Outside of the Miller file, can you think of anywhere else it should go?

A Well, the Miller file was not necessarily in one piece and all at one time, I imagine it was -- well, for instance, if there were all kinds of administrative details to do with any file that hit the department, and where those things were kept and why they were kept and for how long I didn't know, and no one prosecutor knew because there was too much of it.

Q Well, but can I not assume that you have an investigation going on on a particular case, that anything coming in on that case would go into that case file, or should at least?

A I suppose it would, yeah.

Q Isn't that the whole purpose of filing?

A Well, the main purpose, I guess.

Q So you can retrieve what's relevant to that issue; isn't that the whole purpose of having a file?

A So I would what?

Q Well isn't the whole purpose of having a file so that you can keep everything in one central location so when you need the file you get it all, you don't miss things?

A Yeah, well that seems right to me, yes.

Q Yeah. Well you are not saying outright that you didn't read it, are you, you are saying "I don't remember if I read it or not" in terms of these reports and the victims of Larry Fisher at the time?

A Well, I certainly didn't read all of them, but I don't know what all I read, I certainly don't have that good a memory and don't know. But I do know that I certainly didn't read every file and every bit of every file that came into the AG's department, and until something drew it, the file to my attention, or someone did, I didn't get to see it until it hit the courts, or mainly the Court of Appeal. That's when I got into most of the files.

Q Now how would you describe your involvement in the actual prosecution of David Milgaard before the appeal level?

A Well I, as far as I can remember, I knew it was going on, and I knew Caldwell was in charge, and I remember one phone call from Caldwell asking for some legal advice in a particular area, which I've already mentioned and you've heard me talk about.

Q Yes. I'm gonna suggest that you might also, and did, give him advice on the rule of warnings for accomplices; do you have any recollection of that?

A No.

Q Is it possible you may have?

A Well, it's not likely. Again, I've mentioned before that he was a more experienced prosecutor than I was.

Q Would you say you gave him considerable guidance during trial?

A Well, it's not considerable guidance if I answered one question on a -- of law in the course of the whole thing.

Q Okay.

A That's all I remember doing.

Q No, and I appreciate it's been a long time, but if we could look at 042956. This is a memorandum prepared by Murray Brown to the -- to Mr. Mitchell, the then-Minister of Justice, and I only want to refer you to this portion here regarding yourself. The Minister has asked for this information, and it says here that you were the Director of Public Prosecutions when this case first reached the courts in 1969, September, for preliminary hearing, and January for trial:

> "As such he provided considerable guidance to Bobs Caldwell ... the ... prosecutor who did the actual preliminary and trial."

Now did Mr. Brown talk to you then to -- I'm wondering how Mr. Brown would have got this information, or if you know?

A I don't know.

Q So I take it you disagree with that comment that he -- that you had provided considerable guidance?

A Yeah, well, I've told you that I remembered giving him guidance on one point only in the whole case.

Q Okay, well what I am getting at is you don't agree with that, that's fair game I guess, but I just want to understand if you agree with what he advised the Minister. It says here "considerable guidance", which suggests to me more than one phone call?

A Well, you've heard my answer.

Q Okay. I was a little unclear, from your previous testimony, as to what your position, and perhaps your department's position, would have been, or was, on a post-conviction and appeals request for file information, documents, or whatever made by counsel or by David Milgaard himself. I'm not sure what your answer was; can you help me on that?

A Our answer to what request?

Q Well let us say we're all done, and David Milgaard is not accepting the result and wants to re-open his case or whatever, and somebody comes to you and says "Mr. Kujawa, can I go through your files", by "somebody" I mean somebody with a legitimate purpose; what would your position have been?

A Well, I don't know, I suppose it would depend on who it was that says "I want to go through your file" and why.

Q Well I guess what I am puzzled about is this: The trial and the appeals are handled with an understanding that there has to be appropriate disclosure to Mr. Tallis; right?

A Yes.

Q Would it be fair that people should be able to assume that Mr. Tallis got everything that was relevant?

A It should be fair to assume that, yes.

Q That one should not expect to be able to go into the files and find gems that point to acquittal; should they?

A That's right.

Q That is if you assume that Mr. Caldwell has gone through the material, he's a man of integrity, if you assume that you have gone through the material, assume it, and you're a man of integrity, one can safely say "I don't expect to find anything in there"; wouldn't that be fair?

A Yes.

Q And do you know of any policy on post-appeal disclosure; is there any policy?

A Well, I don't know what you mean by "post-appeal"?

Q Well, the case is done, --

A Okay.

Q -- if something comes to your attention that might question the conviction do you feel an obligation to disclose it?

A Oh, certainly, if I find something or someone points out something to me that might have a major impact on -- a different impact on the case, it is certainly my job to disclose it.

Q And --

A I am required to do that.

Q You appreciate that from the Milgaard perspective, 20 or so years after the offence, that the thought of solving the crime is pretty remote?

A That the which?

Q The idea that you might be able to solve the crime 20 or so years later would be a very remote possibility?

A I suppose usually it is, right.

Q Well, you know that the police investigated, you know the Crown had the reports, how can you, without police training, go and solve a crime; it's a pretty remote idea, isn't it?

A I guess so, yeah.

Q And you might agree with me that the thought that in the files there would be another suspect, a very legitimate suspect, and that that wouldn't have been disclosed to Mr. Tallis, might be something that wouldn't necessarily cross your mind?

A Well, if I had thought there was that sort of a suspect or that sort of an item in the file, I would have disclosed it to Mr. Tallis.

Q Well, yeah, and the other side could expect that or should expect that?

A Right.

Q Are you aware that a request was made for access to information?

A Umm, a request to who for what, I don't know.

Q 004452. This is in '92, it's addressed to the prosecutors in Saskatoon under the *Privacy Act*, and received from David Milgaard, I take it, a request for access to information. This went to the, to Saskatoon, to the prosecutors office; would you have been aware of this?

A Well I don't think so, I certainly have no memory of it, but I certainly don't have a memory of all kinds of details.

Q Do you have any information of anything being disclosed of any significance?

A Not that I know of, no.

COMMISSIONER MacCALLUM: I don't really understand what you are talking about there, Mr. Wolch, "do you have any personal information"?

MR. WOLCH: I'm sorry?

COMMISSIONER MacCALLUM: What do they mean by "personal information"?

MR. WOLCH: Well, of any being requested to provide information, being asked to -- "do you have any files", from anybody coming to you and saying "do you have anything to answer this request", that's all I'm getting at. I'm just wondering if he was approached by anybody saying that this request has come in, do you have anything on hand, or anything like that.

BY MR. WOLCH:

Q And your answer is you didn't see that?

A Right.

Q Sorry, Mr. Commissioner, if I -- do you want me to --

COMMISSIONER MacCALLUM: Yes, go ahead.

BY MR. WOLCH:

Q So, Mr. Kujawa, do you agree with the proposition that there is an ongoing duty on prosecutors to disclose anything relevant, or borderline relevant, to the defence?

A Yes.

Q It doesn't stop at any point; does it?

A No.

Q And you've got a chance to look at the Rasmussen report amongst others, have you not, the report from the RCMP prepared way back at the beginning identifying the person who turned out to be Larry Fisher as an extremely viable suspect?

A Did I know about that?

Q No, you know it now at least?

A Well, I've heard about it now, right.

Q And you agree that that report should have been disclosed at all times, it's always relevant? I'm not quarrelling with whether you knew about it or not, but I'm saying that it should have been disclosed by anybody who knew about it, I'll put it that way?

A Well I would want to know more about the report before I could possibly answer that question.

Q Assume it identifies a viable suspect?

A Okay, but what makes the suspect viable?

Q That he was committing similar crimes in the very same area, in the very same method, and warnings had gone out to people in the area about him, and the theory was that he had killed Gail Miller, that trained investigators believed that or at least believed it was a real likelihood.

A I --

Q Are you quarrelling that defence should know about that?

A No. I'm saying that if they have any evidence of that, the defence should know about it sooner or later or anywhere along, as soon as it's discovered.

Q I agree with you.

A But whether it is evidence or someone's suspicion, I'd have to have some reason to choose one or the other of the two.

Q Yeah, but you are not the one who should be doing the choosing, it should be the defence; is that not true? If you don't accept it or don't think it has great merit, you're not the ultimate decision-maker, are you?

A Well if I'm not going to -- if I don't accept it, if I don't think it has any justification, then I certainly am not going to go and bug any defence counsel saying "here's a bit of reading that you should do because you might find it interesting".

Q Assuming you find it of some merit, it should be disclosed?

A If I find it is of some merit, it should be disclosed, yes.

Q And this report was not disclosed, and would it concern you to know it wasn't even disclosed at the Supreme Court, that is that the Supreme Court didn't know about it, his counsel didn't know about it, it was only found here or at least disclosed here?

A Well I don't know how it would be disclosed to the Supreme Court.

Q Well, to his counsel, to use it?

A Well if I knew about it, and if I thought it was of some significance, I would certainly be obligated to report it to defence counsel.

Q Now what if you looked at it and decided, in your own mind, "well I realize they are in the same area and I realize there is a number of similarities, the clothing being removed, that kind of stuff, but I don't think it helps the accused and I'm not gonna disclose it"; could you have made that decision?

A Well if I made the decision that it wasn't usable evidence, then I had nothing to pass on, that's the --

Q That's your call.

A -- the way my mind worked, --

Q But if it --

A -- still does.

Q Okay. Now I've heard you very clearly, and you did it on television even, had a lot of skepticism in the value of the Fisher evidence. We saw you on television saying it wasn't admissible and things like that. Now I'm -- I want to pause there. Is it not, then, very conceivable that, when you were directly involved in the case, you looked at Fisher, you looked at the statements, and you made the judgement call that it doesn't help Milgaard?

A Well all I know is that I wasn't looking at any Fisher file in dealing with the Milgaard file because I was dealing with the law dealing with Milgaard, --

Q But --

A -- and nothing --

Q Right.

A -- that I knew about indicated to me that this other file contained something that was of interest on file number 1.

Q Okay. Now the Milgaard file had the full statements --

A The full which?

Q -- the full statements of (V1)-, (V2)----- and (V3)------. It had it, we know that, it had it. It's in the, it's in your office somewhere, by "your office" I mean the general office, it's in the office, okay? When you are prosecuting Fisher you likely have either the very same statements or Mr. Corey's summary of those statements all at the same time; do you understand that?

A Would you please get a little closer to the microphone? My hearing is not --

Q Oh, I'm sorry, I apologize. At the very same time, in the general office, at least, and maybe in your own personal office, there was, on the Milgaard file, the statements, the full statements of (V1)-, (V2)-----, and (V3)------; you appreciate that?

A Okay.

Q Okay. And at the very same time, on the Fisher file, there was either the full statements, or at the very least there was Corey's summary, a very lengthy summary sufficient for you to go to Court with, of the very same people; do you see that? I mean those are facts, we can't -- I don't, I'm not sure why you don't appreciate that?

A But I was not prosecuting the Fisher file, I was doing some technical applications to dispose of certain pleas, but that's all I was doing with it.

Q Well, I appreciate that, but when you take some -- when you arrange for pleas of guilty you walk into Court, you ask for a sentence, perhaps you might agree that that could be defined as prosecuting?

A See, I'm sorry, I --

Q You can't hear? I'll try again. When you go to the Attorney General for a direct indictment, and you make arrangements for an accused to be in Court, --

A Right.

Q -- and you appear in front of a judge and you ask for a sentence, and you report the matter out, isn't that prosecuting?

A Well, in a technical way it is, yeah. But the practicality of it is I'm merely putting this through getting rid of a formal piece of something, I have no evidence to support the charge other than his guilty plea, and we've formed an admission between counsel as to the sentence.

Q Okay.

A So that's automatically done and I'm finished with it.

Q But you have to know the facts?

A Well, I have to know the basic facts, that he admitted raping woman X.

Q Well, you have to know what the police say the facts are, you have to know what facts to give to the Court?

A Well, really, those are all the facts that I have to give to the Court.

Q I understand that, but you have to give the Court an understanding of what the man did?

A He raped this woman.

Q Okay. Mr. Hodson then asked you yesterday whether you would ever have a trial if somebody was pleading guilty, and you said "no", do you recall that?

A Where they're -- yeah, I don't call it a trial if somebody pleads guilty, right.

Q Okay. But, if someone pleads guilty, there still can be a trial on the facts?

A If there is no agreement on it, yes, there is --

Q Yes. If Fisher was to say "look, I raped her but I didn't have a knife", there still could be a trial to determine that issue?

A If that were an issue. The only thing that would have a bearing on is the amount of sentence.

Q Well, of course, but I mean but there still can be a trial on an issue, a guilty plea doesn't end the possibility of evidence being called?

A Well it depends on the purpose of the evidence.

Q So --

A It's either for the, to support the charge, or to enhance or decrease the sentence.

Q So, as you understood it, Larry Fisher was accepting the victim's version of what happened?

A I don't -- I don't know if he ever heard the victim's version of it.

Q Well --

A I was going by his version of what happened, when, and where.

Q But you would have, I presume, given to the judge the victims' version of what happened as contained in Mr. Corey's summary?

A I couldn't give him a different version than he already got from our agreement as to what happened. When we decided, when he decided to make a guilty plea, the facts and time and all about what happened were agreed upon between him and the Crown, were taken to the Court, those facts were presented, and on the basis of that the sentence was passed, and usually we'd agreed on the number of years in jail and that was not argued, usually accepted and imposed.

Q Are you saying that you and Mr. Greenberg sat down and went over the facts as to what was for real, and what he was accepting, and what he wasn't accepting?

A We went over the facts to which he was willing to plead guilty, which is raping this woman at this place at this time.

Q You do agree that this was not a transfer of charges, correct, other than from Saskatoon to Regina?

A What do you mean "not a transfer of charges"?

Q Well a normal transfer of charge is if Fisher was in Winnipeg and said "send me my rapes from Saskatoon and I'll plead guilty here", that's a transfer of charge; correct?

A Well, I didn't think that was possible, I don't know.

Q Well, no, you miss my question. That's only an example. If Fisher was in Toronto and said "send me my Vancouver charges", that's a transfer of charges?

A Well, as I say, I didn't know it was possible.

Q I'm not asking if it's possible, sir.

A Well then, if it's imaginable, you, your imagination is great, go ahead.

COMMISSIONER MacCALLUM: But obviously it's not an inter-provincial transfer.

BY MR. WOLCH:

Q That's all I'm saying, sir. What I am saying is in a normal situation, if a crime is committed let's say in Saskatoon, if somebody was to commit a murder today and flee to Vancouver and then was arrested, that person would be brought back to Saskatoon to face the charge; that's normal?

A Yes.

Q Okay. Fisher committed crimes in Saskatoon, he's arrested in Winnipeg, so what's normal is to bring him back to Saskatoon to face the charges, that's normal; is it not?

A Well it's not -- it doesn't have to be Saskatoon, it's back to Saskatchewan, that's the only legal --

Q I'm talking about normality.

A Well I think it's through normality that, if you commit an offence in Saskatchewan, you can be tried anywhere in Saskatchewan and dealt with there.

Q Normally in the area in which the crime was committed?

A Ordinarily it was there, yes.

Q So one would have expected him to be dealt with in Saskatoon?

A Well when you say "it would be expected", why would he? It's certainly not the most convenient way of doing it.

Q Well I don't believe that we're normally worried about the convenience of multiple rapists, we're worrying more about the citizens of Saskatoon, who want to know that their streets are safe; isn't that the prime concern?

A Well, if he pleaded guilty in Saskatoon, would that increase that in some way?

Q Wouldn't the public, people in Saskatoon, be relieved to know that the rapist was caught?

A I suppose those who found out would be, and I don't know how much it was passed around, I just don't know.

Q And don't we want to deter other criminals in Saskatoon?

A Yeah, and in Saskatchewan.

Q Well, this case got no publicity at all, why would it deter 'em? Isn't the purpose of punishment to deter others?

A Yes.

Q How do you deter if others never hear about it?

A Well, I assume that they hear about it, I don't know.

Q Well, as a prosecutor, wasn't it your purpose that

-- to educate the public and to educate potential criminals that the system isn't easy, that you get punished for your crimes?

A Umm, that's right, and I don't know how the information of these guilty pleas was passed around to the public. I don't know. I suppose I should but I don't.

Q I'm trying to understand why he was treated so nicely, I guess is what I am getting at, like why you are so worried about Mr. Fisher?

A I'm not worried about Mr. Fisher.

Q Well, let's take a look at 010683, this is a letter from Ken MacKay, but -- to Larry Fisher. I mean, was it normally your practice to write to inmates? That's kind of a strange thing isn't it?

A I don't know.

Q Let's read it:

> "We wish to advise that hearing of the charges against you in Saskatchewan has been set for December 21, 1971, at 2:00 p.m. It is our understanding that you will be pleading guilty to the said charges, and the Director of Public Prosecutions --"

Yourself,

"-- has asked the writer to advise you that the Crown will be consenting to the request for concurrent sentences."

Why would you ask Mr. MacKay to do that?

A It's just to inform the fellow that his contract has been completed and the date has been set, that's all.

Q Well, let him know you are asking for concurrent time? He's got a lawyer. Why do you want to really re-assure this serial rapist that he's going to get a deal?

A Because he made the deal and it's been accepted, so you let him know and that's the way it's done.

Q Well, do you normally go to the accused when he's got a lawyer, that's all I'm asking you.

A Well, I don't know why he went to Fisher instead of just the lawyer. Don't know, don't care either.

Q Okay.

A He was informed.

COMMISSIONER MacCALLUM: I don't think that question was asked of Mr. MacKay was it?

MR. WOLCH: No, but it says here in direct that he was acting on instructions.

COMMISSIONER MacCALLUM: Okay, yeah.

BY MR. WOLCH:

Q There's something you've said many times that I have to take issue with and you've continually said that there was no case against Fisher. Do I have it right?

A Yes, I said that continually. As far as I knew, we didn't have a case against Fisher on those charges.

Q On all the charges or any of the charges?

A Well, on those that were disposed of here.

Q Okay. Now, we know that on at least two there were confessions. Now, my understanding is that a confession is very strong evidence.

A And my understanding is exactly the same as yours if it is an admissible confession, but a confession obtained from an accused on a very serious matter is always a questionable issue and usually hard to prove. If there is some hang-ups, little miscarriages in it, it will usually be found unfit for admission.

Q Well --

A And the fact that this fellow had a counsel and the police knew that he had a counsel and ignored him or evaded him to go and talk to this other fellow in some little cubicle in the penitentiary, that starts off sounding like it wasn't a totally voluntary confession, and if it isn't that, it's not admissible in law.

Q Well, let's back up a little bit. In 1970, '71 there was no right to counsel?

A There was no which?

Q Right to counsel.

A I don't know if there was right to counsel or not.

Q There was no warning given about the right to counsel, correct, there was no Bridges warning about Legal Aid, they all came years later?

A But I understand that Fisher had counsel acting for him. The Crown knew about it, the Crown ignored that counsel and interviewed him and got some sort of an admission.

Q Well, let's back up.

COMMISSIONER MacCALLUM: Just a second.

MR. WOLCH: I thought you were finished. I'm sorry, go ahead.

A And I, for I don't know what combination of reasons, but I had felt that I was going to get that confession admitted as evidence in Court. That's why I said I didn't have a case. I wasn't going to lay a charge because I didn't have the basis for laying a charge.

BY MR. WOLCH:

Q Well, let's back up a minute. In 1970, '71 I suggest to you the practice was almost always for the police to go talk to an accused after they had counsel in the absence of counsel. In fact, it strengthened the admissibility in those days that he had a lawyer. The argument was he had spoken to a lawyer, he had been told about his rights and now he spoke to police, that was the position invariably in a multitude of cases. There was no right to counsel in 1970, '71.

A Well, he didn't have the right, he had counsel.

Q Right. The better argument would have been he never had a counsel and they spoke to him. Having a counsel strengthens the admissibility in those days and you would have known that?

A The admissibility in any confession depended on the circumstances, all the circumstances of each individual case, and I don't pretend to know all of the circumstances now, but I know I felt that we didn't have an admissible confession and therefore we couldn't lay that charge.

Q What did Mr. Karst tell you?

A Mister who?

Q Karst. What did he tell you?

A Oh, I didn't talk with him directly, but that's the impression I got.

Q Let's back up a minute. If you are concerned about the voluntary nature of a confession, surely you would talk to the officer who took the confession?

A Well, if I thought the circumstances under which it was obtained were close enough to examine, I or someone else would have examined it and decided to go ahead if they so agreed.

Q Well, you knew Mr. Karst; did you not?

A I don't know that I even met him. I knew that he existed as an officer in Saskatoon, yes.

Q And you knew that he went to all the trouble of going to Winnipeg to get a confession?

A Yeah, I had heard that.

Q By the way, you probably knew he was involved in the Miller murder; did you not?

A Pardon?

Q You knew he was involved in the Miller murder; did you not?

A No, I didn't, or I don't think I did. I don't know.

Q You might have known that, okay. But you knew he went to Winnipeg, you knew he got confessions on very serious crimes; correct?

A I knew he got something that looked, at least on the face of it, like a confession, right.

Q Well, can you explain to me, or to anyone, how you could possibly make a judgment call on a confession without talking to the officer who took the confession?

A Well, first of all, I wasn't in charge of the cases that he was examining, and secondly, I knew, I had gone through a lot of confessions in my days, a whole lot of them, and unless they were clearly voluntarily given, I found that they were not admissible, so someplace or other I got the impression that this thing was not admissible. Now, I might have been wrong, but that's the decision that --

Q What I'm getting at is this, the law in those days -- for example, in 1969 --

A Well, I'm talking about --

Q Let me finish. In 1969, if a statement was exculpatory, you didn't even have to prove it voluntary, you could beat it out of somebody, that was the law. Do you recall that?

A That you could beat it out of them?

Q Yeah.

A And get it admitted?

Q Yes, 1969. They changed it the day David was convicted, in the Supreme Court.

A Well, my memory is obviously worse than yours because I don't remember that in '69.

Q 1969, the day David was convicted they changed the law on exculpatory statements, any statement could be beaten out of somebody and would be admissible as long as they didn't confess, that was the law, that was the attitude toward statements. Surely you are not suggesting statements were being tossed left and right out of courts? I would suggest it was the exception that was found to be not voluntary.

A Well, you've heard my comment. I have nothing to add to it.

COMMISSIONER MacCALLUM: I hope we're all on the same page. We're dealing with -- your suggestion relates to exculpatory statements?

MR. WOLCH: Yes. I'm saying the law was so much different back then that the idea that your lawyer was not there was meaningless.

COMMISSIONER MacCALLUM: But of course this witness is giving his comments with respect to inculpatory statements.

BY MR. WOLCH:

Q Absolutely, but I'm saying the general tenor of the law was so much different that it was routine to question inmates after they seen their lawyer. In fact, if a lawyer turned a client in and left, the accused would be questioned routinely, even today actually, that was a practice, and I'm saying as an experienced man who spent your life in this field you would know that. If you look in the Milgaard file, they are eavesdropping on him, he's talking to his mother, they are trying to hear him. It was all different back then, there was no Charter, there was no right to counsel. The suggestion that he may have talked to a lawyer and therefore this is not voluntary, I submit, has no basis, no merit.

A Well, if you are right and I was wrong, maybe we did have a case that we could have taken into Court.

Q Well, I'm suggesting --

A But I concluded otherwise.

Q Okay. But I'm suggesting that it would be totally irresponsible of you, and you don't sound like an irresponsible man, totally irresponsible of you not to check with the detective who took the actual statement to get the background and circumstances.

A I wasn't dealing with the case.

Q Pardon me?

A I wasn't dealing with the case at the time that he took that and had that all done up.

Q No, but you are going into a courtroom, you are making judgment calls, you say you were greatly influenced by the fact it might be difficult to get the statement into Court. You were dealing with the case, I don't know how you can say you weren't. Are you maintaining you weren't dealing with the case? I don't get it.

A To the extent that I knew about some confession being given somewhere, I was deciding whether I thought that was possibly admissible in a Court of law.

Q I appreciate that, but do you understand the difficulty with that position if you maintain you didn't talk to the officer who took the statement?

A It depends on why I took -- made that conclusion. I don't know.

Q Are you sure you didn't talk to the officer?

A About 99 percent sure.

Q And can you offer an explanation as to why you wouldn't go to the statement taker, whom I assume you respected and trusted, and say to him, "Tell me the circumstances? Do you think it's admissible? You are a very experienced officer, do I have any problems?"

A Well, first of all, whatever he did he reported to somebody in Saskatoon, not to me in the headquarters of Regina, so that's why he wouldn't talk to me or I didn't talk to him. I wasn't on the case, I wasn't dealing with his investigation.

Q There's nothing stopping you from picking up the phone and saying detective, should I be concerned about the statement?

A If I had a basis for wanting to do that, I could have done it like you say, but I didn't do it, I didn't think I had the basis for it.

Q Well, from whom did you get the basis to conclude that the statement may not be voluntary?

A I don't know the details of that at all.

Q Well, who could you have got it from?

A I don't know.

Q Fisher? Did you ever talk to him?

A Not that I know of, no.

Q The only other choice is Greenberg, so is Greenberg the one who told you, hey, your statement is no good, and you said okay, it's no good?

A I don't know.

Q Did you talk to Lorne Huff or any of the Fort Garry cops to say hey, how was this guy treated?

A No, I didn't.

Q Do you appreciate, with the benefit of hindsight, that maybe you should have done those things before you decided to ask for concurrent time and thinking you had no case?

A Whether I should have asked -- that I should have done certain things before deciding I didn't have a case?

Q Yeah.

A Well, I was, I had formed the opinion that we didn't have a case, and I don't know the details for the, to back up that opinion, but I had confidence in it, to me that issue was done and over with, and if you were working this sort of a field, you have to make a lot of decisions whether something is going to go on or it isn't day after day, so this was not an unusual experience for me.

Q I -- well, not unusual. I suggest it was unusual, this is not an everyday case, we're talking about four serious sexual assaults, very serious, they don't come around every day, they come around one every five, six years, 10 years. This is not a usual case.

A And it's not usual that you get a confession in such unusual cases either.

Q He confessed in Winnipeg.

A He which?

Q He confessed in Winnipeg. Why not confess and clean up your act? I don't understand, confessions happen all the time. People have remorse sometimes, they figure they are going to get caught anyway, they might as well confess and maybe get some brownie points, I don't know, they confess.

A They occasionally do, certainly.

Q And when they confess, they are used in courts, that's pretty obvious.

A If the Court finds the admission admissible.

Q And here's a guy who wanted to plead guilty.

A Eventually he wanted to plead guilty according to his lawyer and he wanted to clean up his record and he wanted to get a new start on life. That's what I was told.

Q Okay. But surely you would have given some thought to the fact, look, Bill Morton, the Crown in Winnipeg says the judge didn't know about this, about his charges in Saskatoon, clearly implying that he should be sentenced to something for Saskatoon; correct? You saw that?

A Okay, but what he thought about what the sentence should be may or may not agree with my position on it, and I think our position at that time was much lighter sentences in Saskatchewan than in Manitoba and so I would normally ask for a little less of a sentence than he would.

Q Well, you asked --

A Who was right, I don't know.

Q You asked for nothing.

A Pardon?

Q You asked for nothing, you asked for not an extra day in jail; isn't that correct?

A Yeah.

Q Now, isn't this the way it would have been approached in those days, and even today, the Manitoba judge was faced with the Manitoba charges and would have given a global sentence taking into account the principle of totality; would that be right?

A I suppose.

Q No, do you -- I don't want to confuse you. Do you understand what I'm saying? A Manitoba judge would have said look, the rape on (V7)--- should be 10 years, the rape on (V8)--- should be 10 years, I'm not going to give him 20, I'll give him 13 in total because 20 is too much on the principle of totality. Do you understand that?

A Yeah.

Q Okay. And what would normally be put before the Saskatchewan judge is this, here's what you have to consider, My Lord, what would the Manitoba judge have given if he had been aware that there were four additional crimes, that is, what would the Manitoba judge have given if there was the two from Manitoba and the four from Saskatchewan, what would the global sentence have been, approach it from that way. Isn't that the normal way of doing it in a courtroom?

A No.

Q It's not?

A His decision is what should the Saskatchewan Court do with this charge if -- let's say that the Manitoba Court sentenced him to 25 years.

Q Yes.

A It is certain in our attitude today that the Saskatchewan Court of Appeal wouldn't consider for a minute to enlarge it, in those days that's the way it felt, as I understood it, about the 13 year sentence.

Q Well, we looked at the *Bonisteel* case. Were you here when we looked at that case the other day?

A The which case?

Q *Bonisteel*, a couple of years later it was a life sentence reduced to 20 years for two rapes, one in Saskatchewan and one in Manitoba. Sentences for guys with knives have always been very long in rape cases. The guy hiding in the bush is a terrible, terrible thing, that's a danger forever, no one has ever been light on those, and I suggest to you Saskatchewan was never light on those, it just didn't have them. You weren't handling all kinds of light rape sentences for guys with knives in parking lots were you?

A I don't know what your question is.

COMMISSIONER MacCALLUM: I think we'll take a break.

MR. WOLCH: Certainly, sir.

(Adjourned at 10:18 a.m.)

(Reconvened at 10:41 a.m.)

BY MR. HODSON:

Q Mr. Kujawa, I would like to draw your attention to a couple of documents, 010721, this is one of the statements that Mr. Karst took from Mr. Fisher at the crucial time and it would appear that he was given the charge and you'll see where he's told:

> "Do you wish to say anything in answer to the charge? You need not say anything. You have nothing to hope from any promise or favour and nothing to fear from any threat whether or not you say anything. Anything you do say may be used as evidence at your trial."
>
> Q Do you understand that the charge ...
>
> A Yes.
>
> Q Do you understand the warning ...
>
> A Yes."

Now, isn't that a pretty good basis for getting a statement admitted?

A It seems that way right there, yes.

Q Now, this is one of the statements that you would have determined, or believed to be not voluntary. Do you understand that?

A I certainly don't remember reading that part before, so maybe I didn't.

Q How are you assessing a case without having the confession of the accused?

A I don't remember.

Q Well --

A I don't.

Q I'm going to draw to your attention 012111. I won't read it all out, but once again you have exactly the same, the same beginning with the charge caution and what appears to be an understanding by Mr. Fisher. Do you see that?

A Yes.

Q And I don't want to belabour it, but I'm having a very difficult time understanding how you can come to the conclusion that these statements were unlikely to be admitted into a Court of law.

A It seems to me I don't know, that's my number one answer, I don't know, but it seems that maybe that this understanding was made by him to the officer on the basis of we want to clean up all of these offences and that's why I'm asking you, that might be the basis, I don't know.

Q Why would that affect him?

A Well, if you are telling the fellow we're doing this for the purpose of getting rid of these charges --

Q Yes?

A -- without any extra sentence, that would be quite a considerable hope in the mind of the prisoner.

Q Hope for what?

A For no increase in sentences to clear up the offences.

Q Well, wouldn't you check with Detective Karst first to say "Detective, did you offer that kind of hope?"

A I don't -- I don't think I ever checked with Karst. I may have checked with whoever sent him or whoever had any dealings with it, but I don't know that I did.

Q Okay. But the statement is signed by Karst, the taker, on the witness. Scroll down to the bottom, you'll see it's Karst -- please go down to the bottom of the page. Witness - "E. Karst", that's the name that appears there. There's no more logical person to check with as to whether any hope or promise of favour was given to Mr. Fisher than Mr. Karst. There's no point to going to somebody in Saskatoon and say did Eddie Karst offer him a favour, you would go to Eddie Karst. He wasn't hiding.

A Well, I don't know, I just don't know.

Q I'm trying to understand, I'm having a very difficult time, as to why you would form this conclusion that this, on the face of a very proper statement, would not be admissible in a Court of law.

A And I've already given you my answer, which is I don't know. If you want me to speculate, because the Chief Justice of the Saskatoon Police Force said Karst, go to Winnipeg, make this kind of a deal, get him to admit it for no increase in sentence and clear up his whole case.

Q And what, probably pick Karst because he was investigating the Milgaard case?

A Pick Karst because he chose Karst. I don't know why.

Q Well, I'm sorry, I shouldn't have allowed you to speculate, to that degree at least. I'm more concerned with known facts. We know Karst took the statement, we know the only sources of information as to what transpired in that room would be Karst, Fisher or perhaps Greenberg repeating what Fisher told him.

A Or it could have been whoever said Karst had given him specific instructions along the lines I've already outlined.

Q But that person wasn't in the room to say what happened.

A No.

Q But you agree that possible sources are Karst, Fisher and Greenberg saying here, Fisher, those are the only sources aren't they?

A The only sources of what?

Q Of what transpired to bring about the confession.

A Well, how about if the Chief Justice told Karst to go down there and do this on this basis, wouldn't that be a reasonable source?

Q I'm not going to answer your question, I'll move on. Now, even with the benefit of hindsight, do you see the inappropriateness of Fisher getting not a day in jail for the four Saskatoon offences?

A No.

Q Even with hindsight you don't?

A Well, I've said it many times in this courtroom already, do you want to repeat?

Q What I am saying to you is this; if all the charges were dealt with at the same time in Manitoba, or all of the charges were dealt with at the same time in Saskatchewan, would it not be fair to say that, for six terrible crimes, a judge would have given a sentence approaching 20 years?

A It might be, but it would depend on how many cases we were able to bring before the Court without the cooperation of the accused, and since we -- let's say it was seven cases and we could prove only one without his cooperation, it's pretty hard to use those other six guilty pleas to increase the sentence. That's one of the reasons that the sentences were not increased. And then we started with the fact that 13 years, in Saskatchewan at that time, was quite a long sentence even for that number of offences.

Q Now your counsel, I believe in questioning Mr. MacKay, pointed out that Fisher got ten years for the attack on (V10) (V10)-; were you here when he did that or asked those questions --

A No, --

Q -- at all?

A -- I have no recollection of that.

Q I believe she was attacked at the end of, very end of March, 1980, now so Fisher would have been released on parole, obviously; do you agree? If he committed the offence in 1980 he would have had to have gotten paroled in about the eighth or ninth year, eighth year, of his 13-year sentence?

A I don't know. If you know, that's good enough for me.

Q Well, it makes sense. What I am saying is clearly, if Fisher had received consecutive or additional time for the four Saskatchewan rapes, he would not have been on the street when (V10) (V10)- was attacked; you appreciate that?

A Well I don't know when, who she is or when she was attacked, but he would have been -- if he had gotten more of a sentence he would have been in jail longer.

Q And from your experience in the sentencing system, if in fact he was convicted in 1980 for attacking (V10) (V10)- and got ten years, he would have had his parole revoked and would have had perhaps four or five years added on; would that be correct?

A I don't know, I --

Q Well, from all your experience in dealing with sentencing?

A Well, it works generally that way, that's all I know.

Q Yeah. If you are on parole you lose your parole time if you are caught committing an indictable offence; isn't that how it works?

A Basically, as I understand it, yeah.

Q I want to turn to a different area, and I think you will be really pleased to know that I don't intend to go through all kinds of newspaper clippings and all kinds of reporting, but I do want to touch on your attitude to the efforts to correct the miscarriage and the efforts of enlisting public support. I'm not really sure what your position is on that. You quarrelled, if I understood you correctly, with the concept of people who don't know the facts jumping into the fray, and those are my words, not yours; am I accurate, though, as to what you were generally saying?

A I think I was saying a fair bit of that about the news media, yes.

Q That these people didn't know the facts, that were making comments that were without bases, and were threatening the entire system; is that the idea?

A Well I thought that there was a certain amount of that going on, yes.

Q Well that would presuppose that you were reading the paper?

A Well, I was picking up some of the items from the paper, I certainly wasn't reading it carefully --

Q Okay.

A -- and constantly.

Q And what did you understand the system to be that was in jeopardy at that time, keeping in mind, as we know it, that the appeal procedure was exhausted and there was this 617, 690, and right now 696 mechanism or vehicle for going to the Minister of Justice; what did you understand was going on at this time or what system could be undermined, what was being threatened?

A Well the judicial system could be undermined if it was being pushed around by loud, vocal public opinion by people who were not qualified to practice in that field.

Q Well what does "qualified" mean to you, like why can't any citizen voice an opinion on the merits of a judgement?

A Because most citizens don't understand the merits or lack of merits of a judgement.

Q And you say the average person can't read a judgement and say "I agree, disagree" or anything like that?

A Yes, he can read that and he can say that, but I say he has a lack of understanding, he or she has a lack of understanding. After all, you've seen a whole lot of lawyers talk about legal matters, they showed very little understanding, and it's the great Albert Einstein says that the only real source of real intelligence and understanding is experience, and not all of us have experience in all areas.

Q Well I appreciate that not everybody has a lot of experience, but surely a young person can look at something and say "I don't agree" or "I see an error in it"; what is the problem in that?

A Well I could listen to a fellow speaking in Greek and say "I don't agree".

Q Are you saying the case is that complicated? I mean --

A No, I'm talking about the only issue that's before us, and that is can someone say that, and the answer is, of course, they can say that.

Q Okay. But your issue is that they are uninformed, now on what basis do you say they are uninformed, how do you know what the writers know or what they've got, how can you say they are uninformed, what basis for that?

A Well, first of all, their lack of experience in that field; and second, if you listen to them for a very short while, you realize that they make no sense, and so you jump to the conclusion that they are uninformed.

Q Okay. Well, in terms of knowledge and experience, might you agree that this particular case was fact-driven?

A Well, I don't know what you mean by "fact-driven"?

Q Well it's not a matter of, you know, what is the constitutional basis for admitting evidence, or do we impose, apply Section 1 or Section 24, this is a case of what are the facts. You don't have to be a lawyer to look at the facts of this case and make a conclusion or have an opinion, at least, so I'm saying this is a fact-driven case, not a legal-driven case or a law-driven case; do you agree with that?

A Well what is the difference between facts and logic?

Q Well no, what I am saying is when you are making a comment, the lay person may have difficulty on the constitutionality of a particular issue but the lay person might not have difficulty looking at the facts and saying, "eh, Larry Fisher did it". You follow what I am saying?

A I think I sort of follow what you are saying, but I certainly don't understand.

Q I'm trying to zero in on what your problem was with the public being educated on the facts in the *Milgaard* case. I'm having trouble with that.

A I was not talking about the public being educated, I'm talking about the public being extremely vocal in that case, without being educated.

Q Well, what were they getting wrong, what did you see as wrong?

A Well what can be right about an argument presented by someone who doesn't know what he is talking about?

Q Well where is your presumption they didn't know what they were talking about, what is it based on?

A Based on the lack of education and lack of experience, experience in a way more than the education.

Q Are you aware that the reporters were given access to everything that the counsel for David Milgaard had, to look at it, read it, study it, do what you want?

A Yeah, but I'm not talking about what they had access to, I'm talking about what they had understanding of.

Q Well, access gives understanding, does it not?

A Not necessarily, no. If I had access to a great argument by a couple of Greek philosophers would I understand what they were saying?

Q Well, who did you feel should be speaking, if anybody?

A People who had knowledge in that particular field.

Q Who would that be?

A People with knowledge.

Q Who?

A Whoever they are.

Q Yeah, but who, what are you talking about?

A Well basically, according to our rules, lawyers and judges.

Q Okay. The judges aren't going to speak to the media, that's pretty obvious, is it not?

A Well they speak to the media with their judgements every day.

Q Right. They are not going to offer opinions to the media, so we're left with the lawyers, correct? So you acknowledge that lawyers can speak out?

A Well the judges give opinions by the ton.

Q I appreciate that. We're talking about opinions that you find fault with, in that they shouldn't be doing it because they are -- they don't have the experience or the background, so you are -- but were not the reporters reporting what lawyers were saying and what witnesses were saying; isn't that what they were reporting?

A Well, I suppose they were, but so what?

Q Well, are you finding fault with that?

A Well, if they say that whatever the witness or the lawyer says is the final answer, I find 100 percent fault with that.

Q And --

A And so does anybody else who even has a half an eye open.

Q Are you finding there is something wrong with the media reporting Larry Fisher committed all these similar acts, same *modus operandi*, knives, bus stops, clothing, lived in the area, lived in Cadrain's house; is there a problem with the media reporting that or was there a problem in your mind?

A Well there is no problem, as far as I can see, of reporting the facts of any part of any case.

Q Well I'm trying to understand, and I don't want to get into this whole business, but I am trying to understand why your reaction would have been not to say "look, here's the other side of the story", but to say "David, you are a kook" and "you guys are prostitutes", why weren't you dealing with the merits, why the personal attacks?

A Well if I made some improper statements like calling someone a kook, and that's an improper statement, I shouldn't have done that, I'm sorry, I take it back. But that doesn't mean that he has an Einstein-like understanding of legal matters.

Q I understand that, I'm trying to identify what motivated you to behave in that way, because the criticism of you were fact-driven.

A Well --

Q Hang on, let me finish. They were "you had this report, you didn't do this, you didn't do that", that was the basis, generally, for the criticism, you know, the facts. But instead of dealing with facts your response was to call people names; now I want to know why?

A My response was which?

Q To call people names, I mean, to be very derisive. I mean, I don't know why you didn't react in a different way, and I'm trying to understand that?

A Well, because I am certainly a helluva long way from being in any way perfect, but I was certainly being annoyed and pushed and walked around by totally irresponsible people who were calling me a criminal, a kook, a cover-upper, etcetera, and those kind of people can get, until you grow up enough to realize that they are helpless nobodies, that they can be quite irritating, and especially if you -- if they have your kids reading their comments in the papers every day and hearing it on the radio every day.

Q But why wouldn't you deal with the merits, I mean the ac --

A Well --

Q What was being said then was --

A -- the merits is people shouldn't be allowed to be doing that.

Q Well Fisher was dealt in Regina which seemed strange, he got a sentence that seemed strange, nobody knew about it which seemed strange, those are all facts, they are facts that required answers. I'm just thinking about your response was to just attack as opposed to answer, that's what I am trying to get at.

A Well what answers did you want? The answer is he was dealt with in a Court of Queen's Bench in the City of Regina on the blank day of blank and here is the sentence that was passed. Is that what you want?

Q No, what I want to understand is this; you are saying that people -- and yet I suggest you have no basis for saying it -- you are saying that the opinions are uneducated or not properly founded, and yet you say, yourself, you made no effort to learn the facts yourself. As you are offering opinions, at the same time you are saying you are not reading reports, you are not educating yourself, you are not even reading the Supreme Court judgement if I understand you correctly, and you are offering opinions. I don't understand how you, with no basis, can say "everybody else doesn't know anything"?

A I didn't say everybody else doesn't know anything.

Q Well you are saying they are not based on experience, they are not based on study, they are just --

A I'm saying that certain of the people that were very vocal fit the category. That's all.

Q Well why weren't you educating yourself?

A Well I was trying to educate myself, but it was hard to believe that some people were talking like, like some people, if you will pardon the expression, were talking.

Q I've heard an expression several times, I want to know if you agree with it, and that is that from a prosecutor's perspective convicting an innocent person is a prosecutor's worst nightmare; have you heard that expression before?

A I don't know if I heard it exactly in that form, but basically, yes.

Q Do you agree with that?

A Yes.

Q Without being flippant, it seems to me you didn't lose an awful lot of sleep over this one?

A Over which one?

Q Well when they -- when the Milgaards and their support are coming forward and saying "this man is wrongly convicted, another guy did it", I know of no evidence of you going back and saying "look, I'm going to review the files, I want to know everything to make sure I was right"?

A They had never given me any evidence of who did what, or where, or why, and the Supreme Court of Canada said that this fellow was convicted properly according to the law. That doesn't mean everything was done in -- by perfection.

Q No, what I am getting at is from a personal level, you were counsel at two appellate levels, as a person, as a human being, as a man who would not like to have his worst nightmare realized, why wouldn't you, on your own accord, try to study it, say "I'm gonna look at the Fisher evidence, I'm gonna sit down myself, with all my experience, and form an opinion, and if I decide that Fisher was good evidence, I may even join in the application"; why wouldn't you do that?

A Because I never had the Fisher evidence before me to deal with.

Q Well, you had all of the Fisher evidence at one time or other, but --

A What do you mean I had all of the --

Q Well you had the statements of the victims in both of the, in both, in two different files?

A Statements of victims and whatever the police have found are not referred to me until there is a basis for a charge to be laid.

Q But --

A I'm not involved with the first-step investigations of offences.

Q But --

A I couldn't be.

Q But are you suggesting, as a Member of the Legislature and as the former Director of Prosecutions, that if you went to Murray Brown or to anybody and said "look, let me go through the files" it would have been denied to you?

A Do I think it would be denied?

Q Yes?

A No, I don't think so, if the file was there it wouldn't be.

Q Whatever was available you likely could have seen --

A Right.

Q -- given your background?

A I think so.

Q Yeah. But you never made any single effort to see if maybe you had contributed to a miscarriage of justice?

A No, and I have told you why I haven't.

Q Tell me again?

A Okay, I'll tell you once more. Milgaard was convicted according to proper evidence presented in a Court of law, he was convicted by a jury, his conviction was upheld on appeals, he didn't even say "I didn't do it". That, in a prosecutor's busy mind and busy day, means that case is over with, what is piled up in front of me now.

Q Well, let me pause there. Are you not being a little unfair to a 16-year-old in terms of testifying and whether or not he had competent legal advice that assisted him in that decision?

A I am going by what is normally in the mind of a prosecutor who's dealing with a file like that, and when it's over it's done, he goes on to the next half a dozen files that are waiting for him.

Q You knew he had made statements to the police in the very beginning denying the offence, offered samples, and did all of those sort of things at the time?

A I didn't, I didn't go through the details of what he or anybody else did, the case was in the hands of T.D.R. Caldwell in Saskatoon.

Q When the case is over are you saying that you don't even allow for the possibility there was an error or a miscarriage?

A I may -- I don't say that -- first of all, I don't think human beings are ever 100 percent correct and accurate, but when a thing has gone through the process that this one has gone through and it's done and over with, I go on to the next things on my desk, I don't continue going through that same file over and over.

Q No, but when somebody brings before you, or brings out in the public credible arguments that there was a miscarriage, you don't have to accept them, but at least they have a foundation, they are not pie in the sky, knowing you were involved are you saying there was no desire on your part to say "wait a minute, I don't want to have anything to do with an innocent person being in jail, I want to find out for myself if there was an error here"; is that your position?

A My position is if I think he was wrongfully convicted, I'm gonna do everything I can to get that straightened out, but who brought this stuff to me that you say was brought to me?

Q But you saw fit to comment publicly on the lack of merit in the application; did you not?

A Are you gonna answer my question?

Q Sorry, I lost your question, I -- my -- you did see fit to bring forward publicly that the application was without merit?

A Because I said that no one brought any merit to show me.

Q But why wouldn't you go and ask? You had much more access to everything than anybody.

A I told you that I didn't go and ask because I considered the case done and over with, and no one brought me all of these goodies that you are talking about, and you certainly didn't bring any.

Q Now you commented on the Supreme Court, and I have no problem with you disagreeing with their judgement, you are not the only one, I think Kim

Campbell and a whole bunch of people disagreed, but I'm a little concerned about you calling them silly. Do you regret saying that?

A Well I don't know exactly how I said it or whatever, but I know that I didn't read the Supreme Court judgement at the time of that interview alongside of Asper, and I was making comments about what he said the Supreme Court of Canada said.

Q I don't want to --

A That's my memory of that situation.

Q I don't want to replay it, but I see a bit of irony in the fact that you are generally complaining that people are making uneducated comments and causing the system to be looked at perhaps with a bit of scorn, but here we have a man in your position, in your position, calling the Supreme Court silly on a judgement you haven't even read?

A Okay, and it was because I was referring to the expression of -- or it's a description of what they have just did from this lawyer, and that was a mistake on my part, and I was wrong, I shouldn't have said it, I shouldn't have done it, I shouldn't have concluded it, and I should not have assumed that he knew what the Supreme Court of Canada said.

Q Well --

A So I made a lot of mistakes.

Q Well, it -- well, yeah. You said, there, that basically -- and I'm paraphrasing and I could be a little bit off -- but you did basically say that there is no bases for the admission of similar act evidence; is that not what you said, or I don't want to misquote you?

A Well basically that's just that kind of a statement, yes, I said that.

Q And I think you said no -- "I can't find a lawyer in the land who would agree that that similar act evidence is admissible", what was your basis for saying that, why would you think it wouldn't be admissible?

A Because I know of no place in the field of criminal law where it was held to be admissible.

Q Where what was held to be admissible?

A Straight similar fact evidence with no other connection between the accused and this offence.

Q Okay. Well Larry Fisher took the same bus as Gail Miller, lived in the Cadrain home, attacked women in the area in the same way, his wife said he didn't come home -- or didn't go to work that morning, there were three jail, or four jailhouse confessions; were you aware of all that?

A No, I wasn't aware of all of that, and you say that there were these number of confessions?

Q Well I'm just saying, I'm giving you a picture to say I can't, for the life of me, understand why you say all those extremely similar acts would (a) not be admissible against Larry Fisher at his own trial, and for sure at David Milgaard's trial where the threshold for admissibility is lesser?

A Because just the fact that he may have committed or been capable of committing that sort of an offence is not evidence that he did it.

Q Well, what are similar acts, what are they in our law?

A That he raped people.

Q Well what's the evidentiary value of that?

A Well that's my question to you; what's the evidentiary value? Just the fact that he raped people doesn't mean that he raped this particular people and, therefore, it's not evidence admissible on this particular charge.

Q Are --

A That's all I'm saying.

Q Are similar acts ever admissible?

A Pardon?

Q Are similar acts ever admissible in your understanding of the law?

A They are not admissible unless they point at a particular person. Just the fact that he may have done something similar doesn't mean it's evidence against him on which a jury could convict.

Q Is that still your opinion?

A That's still my opinion, yes.

Q And that certainly would have been your opinion in 1969?

A Yes.

Q So, if you saw that, you would have thought nothing of it?

A If I --

Q If you saw that in, when you prosecuted Fisher --

A Okay, well if I saw something that wasn't evidence, I wouldn't be looking at evidence.

Q So if you saw and looked at Fisher's rapes in '69 in the early '70s when you saw them, you would have thought nothing of it, you would have said "this is not evidence that could be used by Milgaard"? It's not a matter of you not seeing, it's a matter had you seen it you would have thought nothing of it, that's your opinion then and your opinion today?

A Well, if it wasn't evidence, it wasn't evidence. That's my opinion, yes.

Q And that would have been your opinion back then?

A That was my opinion always.

Q Okay. Do you appreciate there might be a lower threshold when you are trying to prove your innocence as opposed to trying to establish guilt? Do you understand what I'm saying? I'll help you with that. If you are prosecuting Larry Fisher there is concern on the judge's part that the similar act has to be a stamp of the accused, so to speak, because a jury might be overly persuaded by it to convict. I haven't put it very well, but that's the tenor of it. However, if an accused is trying to raise a reasonable doubt, there's a lesser threshold because you don't have the same danger, you are not convicting on it, you are acquitting on it is what I'm saying.

A Okay, but that's if -- if he can call in similar act evidence by someone else which has some means of saying I didn't do it, he must have done it.

Q Okay, yes, that's right.

A If you have that, great, it's admissible evidence.

Q Okay. Are you aware that on the higher threshold the judge, in the eventual Larry Fisher prosecution, admitted certain of the offences as similar acts that could be led against Larry Fisher?

A I don't know, because when I was working on that file I wasn't working on Fisher, I was working on the Milgaard case.

Q Okay. What would have been your reaction when you learned of the DNA? By that I mean -- I'll be more precise. In 1997 you are aware of the fact that DNA established, with the aid of, I think it's three reputable scientists and very careful preservation of exhibits, led to the absolute conclusion that Fisher was the man who committed the crime. What was your reaction?

A Well, first of all, once again, nothing is perfectly proven and I don't know exactly how the substance that was tested on those clothes got onto that substance, but --

Q Sorry, what does that mean?

A Well, I don't know where it came from.

Q I don't want to be flippant, we did talk about a semen fairy, but I don't get you. What do you mean how it got on the clothes?

A When did it get on, how did it get on, was it on there back in 1969 or could it have been put on later.

Q By who? Who would have Fisher's semen?

A Whoever was looking for it might have been able to find it, I don't know, but it's a possibility, that's all I know.

Q So your reaction was doubt? What was your reaction? I mean, you have acceptance by the police, acceptance by the RCMP, acceptance by the minister. What was your personal reaction; doubt?

A Well, my first question was where did this substance that was tested come from.

Q Okay. Your next question?

A And the next question is, well, since it apparently came from Fisher, Fisher would be likely the one who was, who had committed that offence.

Q Okay. And then were you at that point even satisfied that he did it or were you still in the doubt stage or what stage were you at?

A I have to be satisfied that that's what happened and I certainly supported the prosecution of Fisher for that event.

Q Would it be fair to say that in truth you didn't believe it?

A Didn't believe what?

Q That they -- that it was Fisher's semen that was discovered?

A No, I didn't for a moment say or believe that it wasn't Fisher's, my only question is when did it get on those clothings, that's -- now, I don't pretend to know all about it by any means, I don't know if semen stays on for 23 years and held in a dingy corner of the courthouse and is still testable, maybe it is, maybe it isn't. They say it is.

Q I guess what --

A I have to accept their finding.

Q I guess what I'm having difficulty with is this, on one hand you doubt the confessions that Mr. Karst took from Fisher, on another hand you have some doubt about DNA that's so carefully taken, and yet in prosecuting David Milgaard you don't look at Nichol John's statement and go what is this all about. Why didn't you apply the same doubt to that case?

A Why didn't I which?

Q The same kind of scrutiny and taking a step back and saying look, DNA, are you for real, these confessions, are you voluntary, why didn't you apply that same kind of mentality when you did the appeals on David Milgaard, the evidence that is so fraught with problems?

A Well, because I was going by the only material that I had before me to deal with that appeal and if I was wrong and stupid, so were all the Court of Appeal members because they agreed.

Q Did you want a public inquiry?

A Like --

Q -- here.

A This public inquiry?

Q Yes.

A No, I didn't want it.

Q You asked for it; didn't you?

A No, I didn't. I don't know it's purpose, objective or its limits or anything like that. I don't pretend to know enough about it to know whether I would vote for it or not. No one ever asked for my opinion.

Q Perhaps we might look at 033005. Have you seen this document in preparing for your testimony?

A Right now I can't read it. Unless it's enlarged I won't be able to read it.

Q I'll go through it with you. For now I just want to know whether you've seen it in preparation.

A I think I have, yeah, but if you read it, it would go faster.

Q Okay. Well, let's have a look at it, what it is. It's a memorandum from Murray Brown, who you know, to John Whyte, Deputy Minister, who I presume you know, and it's dated July 21st, 1997. Do you see that?

A Yes.

Q And that would have been pretty much around the time the DNA results came in. The memo says:

> "I have just spoken again with Sy Halyk who represents Serge Kujawa and Bobs Caldwell in one of the Milgaard law suits. He informs me that he will be holding a press conference today to do two things on behalf of his clients. First, he will apologize to David Milgaard and second, he will call for a public inquiry and ask that it proceed as soon as possible."

Now, it would appear that he was doing that on your instruction. Do you see that?

A I see that statement, yeah, but I don't remember giving any such instructions.

Q But it may be that you did ask him to ask for a public inquiry?

A Maybe.

Q It says:

> "First, he will apologize to David Milgaard and second, he will call for a public inquiry... Consistent with what I told you this morning, he wants the inquiry to proceed after the criminal case is finished but before the civil case proceeds. He spoke to ... Roden ... on the civil suit ... and Mr. Roden apparently agrees that this is ... appropriate.
>
> He suggested as well that if the questions at the press conference allow, he intends to suggest publicly that the inquiry process should start now at getting things organized. Why he is in that much of a hurry is difficult to know except that it perhaps that might take pressure off his clients."

Did you feel you were under pressure at that time?

A Not that I know of.

Q "He is also going to point out if he gets the chance that several separate inquiries into this case have failed to find any wrongful conduct on the part of his clients. I suggested some caution there simply because of the way that might look at this stage."

Here's the part I'm concerned about:

"Sy also reports that Bobs Caldwell is adjusting to this new reality but Serge Kujawa is not. Apparently, Serge's view is that you can get experts to say anything you want and this is just another case of that."

That was your view then?

A To some degree, yes.

Q Were you aware of the process that Justice took to handle the exhibits and to get the best experts possible from three different countries to do the analysis?

A Well, I don't know how the exhibits were handled and I don't think anybody does, most didn't even know where the exhibits were for all of those years. Now, how they were handled, how they were discovered, what if anything was put on them I don't know, and will never know.

Q It goes on here:

> "Sy thinks he has Serge under control for the time being and will stay in touch with him to ensure he remembers to keep his mouth shut."

It would appear that there was some problem with you sounding off was there?

A Well, the fellow put it in his letter. He must have thought so.

Q Okay. Well, I mean, at the press conferences you quite properly apologized and did all that, but it would appear to me from this memo that it really wasn't all that sincere, that you were doubting it all and questioning it all and you weren't adjusting particularly well.

A Well, my apology was I'm sorry, Mr. Milgaard, that you were improperly convicted, this DNA stuff has proven that you were not the fellow who did it and I'm sorry all of this happened, but I don't admit to any wrongful or dishonest or improper moves on the part of myself or anybody else that I knew of and therefore it wasn't a complete apology of I'm sorry what we did to you, because we did never mean to do it. We made a mistake.

Q Okay, but is it fair to say, though, that that mistake may have been, in part, caused by the view that you took then, and perhaps to a considerable degree still hold, as to the value of similar act evidence?

A Well, what other comment could I make on that?

Q Yes. You could agree with me. Do you understand? I'm not trying to be difficult, but do you understand what I'm saying?

A What's your question?

COMMISSIONER MacCALLUM: I just have a little trouble with the point of relevance, Mr. Wolch, because I think at the time that he expressed these opinions about similar act evidence it was around 1992 and at the time in question really when he argued the appeals he simply said he didn't make the connection between the two cases, so how could his opinion in 1992 about the admissibility of similar act evidence have a bearing. The real problem was that he didn't make the connection.

MR. WOLCH: Well, I'm suggesting he did, he made a connection, but then decided it wasn't -- it wasn't of any value, that's what I'm saying.

COMMISSIONER MacCALLUM: Well, you don't --

all right, then, if you don't accept the premise.

BY MR. WOLCH:

Q What I'm saying is we're going back a long time and I'm saying to you that given what was in the files, given that these are the two most high-profile cases probably you were doing at that time, and you were doing them both at the same time, at least for a period of time, that it's not a matter of you not making the connection, it's a matter of you looking and saying look, on one hand I have a rape/murder in an alley in Saskatoon, on the other hand I have a bunch of rapes in alleys in Saskatoon, I don't believe in similar acts, that the second can be applied to the first. I'm saying you made the decision, it's not a matter about connecting them, you looked at them and made a decision that they didn't connect, that's the difference.

A Well, but what you are saying is that I walked outside at midnight, way out in the bush, and the sun wasn't shining because it was midnight and there was no moon light, and for me to say it was dark out, is that what you are trying to make a case of?

Q No.

A Well then --

Q I think your counsel has something to say.

A Then you should replay what you just asked.

COMMISSIONER MacCALLUM: Sorry, Mr. Wilson, I didn't see you get up. Yes?

MR. WILSON: Mr. Commissioner, after an hour's restraint, I think I'm compelled to observe that Mr. Wolch is on delicate ground perhaps. Years back, 15 years perhaps, he abandoned his role as counsel for the Milgaards and joined them in a partisan way and made a number of personal attacks on Mr. Kujawa that were highly publicized, some of which we saw yesterday, and now it's difficult for him to maintain his objectivity as counsel because what he is doing in large part is attempting to justify his own extreme conduct of years past and unprofessional statements made by him. Now to stand here supposedly as counsel and utilize the privileges of that status in the way he is I submit is an abuse of the privileges of this inquiry.

COMMISSIONER MacCALLUM: I can agree that if he's doing that, of course that would be abusive. The question is, is he, I suppose, and

I'll ask him to comment.

MR. WOLCH: Mr. Commissioner, I really take exception to what My Friend has just said. It is not for him to say that "years ago abandoned the role of counsel," at all times I've been acting as counsel. In terms of what I have said in the past, I stand by every comment, they are made to advance a cause and made in good faith and are still the views that we hold, there's no change in position. It is not a matter of professionalism or not, that is what I'm here for, is to probe, and the difference in those media articles and broadcasts are that the focus I directed are the very same ones here as to here are the questions that need answering and that's why we are here in part on the inquiry.

What My Friend fails to understand is that his client made personal attacks and name calling. The focus of the direction on his client was that what you've done here appears to be either a cover-up or whatever it might be and here are the facts and that's what I'm probing, why was it done in Regina, why didn't he get time, why do you say he shouldn't get any time, why did nobody know, those are all legitimate questions, that's why we're here, that's what I'm probing.

COMMISSIONER MacCALLUM: That's right, and those kind of questions didn't raise any objection.

MR. WOLCH: I'm not sure they didn't.

COMMISSIONER MacCALLUM: Well, what has happened, of course, is the investigation of this witness' statements to the press after his retirement from the Department of Justice, so it's of course common ground that there was a good deal of personal attacks on both sides, we've seen it on TV clips, and my concern that I voiced just a minute ago is that we're stretching the bounds of relevance at this point. If it can somehow be brought home to the Department of Justice that because of this witness' statements they didn't take timely action on information which came to their attention to re-open the case sooner, then that's relevant, but otherwise just to trade barbs about what was said in 1992 I'm afraid is --

MR. WOLCH: No, the question that --

COMMISSIONER MacCALLUM: -- hardly relevant.

MR. WOLCH: My Friend stood up when I was questioning specifically on the course of conduct back in 1969, that was a question I had asked at the time.

COMMISSIONER MacCALLUM: Yes. Well, you are quite right, it was, but he said that he had been having difficulty restraining himself for the last hour and over the last hour we've been talking about just the sort of thing that followed his retirement, so I think to end all this, we're just going to have to try our best to focus on issues which relate to the third ground of the Terms of Reference, is this information which came to the attention of the authorities and which should have caused the re-opening to take place sooner than it did, and I'm left in some doubt that this witness' statements to the press and in conferences involving Mr. Asper and so on were really representative of any position taken by the government or which he should have taken as a former member of the Department of Justice and at the time a member of the legislative assembly --

MR. WOLCH: Mr. Commissioner --

COMMISSIONER MacCALLUM: -- as opposed to simply pique and resentment at having his reputation impugned, and really, I've heard about enough of that. I mean, anybody can understand what's going on here.

MR. WOLCH: I know, Mr. Commissioner, I think, though, the point --

COMMISSIONER MacCALLUM: Well, the point -- just excuse me. I understand the point you are trying to make is that even though he might not have conspired or suppressed evidence for the purpose of seeing an innocent man stay in jail, he did so for the purpose of keeping what he believed to be a guilty man in jail, and if the evidence got out, then the fellow might get out, be released, that's what you are trying to establish.

MR. WOLCH: I was, yes.

COMMISSIONER MacCALLUM: But I don't know how many times he's denied that, Mr. Wolch.

MR. WOLCH: My point -- well, I'll deal with similar act evidence. I want to get back to the point --

COMMISSIONER MacCALLUM: And of course on the similar act evidence, we do have the distinction which I know you made, which might not have been appreciated by everybody, that there is a lesser onus if similar act evidence is thought to be introduced by the defence to show that a third party might have committed the crime and not him as opposed to similar act evidence which is thought to be introduced by the Crown to establish that the accused committed the offence, so those would be similar acts of the accused himself. So as long as everybody is aware of that distinction, including the witness.

MR. WOLCH: Yes, there were two points I was making, one was that his understanding of similar act evidence at the time could lead to the conclusion by the trier of fact that he did look at it, he looked at it and decided it was not admissible evidence and put it aside, that could have happened as opposed to giving it to Mr. Tallis, that's the first point. The second point about the press conference and the reaction to the DNA, the point I will be making later is that that's an example of tunnel vision; that is, you are so convinced of your position that even when, in the light of all this you get DNA you still can't face the reality, and that's just on prosecutor's tunnel vision, that was the purpose of that.

COMMISSIONER MacCALLUM: Well, if that was his -- are you trying to say that if that was the opinion he demonstrated, the point of view he demonstrated in 1997 --

MR. WOLCH: Yes.

COMMISSIONER MacCALLUM: -- it must have been the point of view he had in 1969?

MR. WOLCH: No, after the conviction, that is, when he got to the appeal level.

COMMISSIONER MacCALLUM: 1970, all right.

MR. WOLCH: Yes. In terms of the whole concept of re-opening these cases, that the prosecutors involved very often get a tunnel vision that even when they are faced with DNA, it's hard to get them to appreciate or get them into the reality of it, that's the point of that. It wasn't anything more than that.

COMMISSIONER MacCALLUM: Mr. Wilson?

MR. WILSON: I heard Mr. Wolch say in response to my original objection here a minute ago was confirmation of what I see him doing in that he is using his position here this morning to prove and substantiate the allegation of criminal conduct that he made against Mr. Kujawa

15 years ago which has been fully investigated at homongous cost and found to be absurd as we saw in the RCMP report yesterday, and there's not a scintilla of evidence of criminal conduct anywhere in this hearing and yet Mr. Wolch is still beating that old drum.

MR. WOLCH: No, that's totally wrong. First of all, if My Friend wants to point to a particular accusation, I'll back it up. This muddying of the waters is unacceptable. The second point is to talk about other reports and other findings, we know now what those people didn't have, we know now they didn't even have Rasmussen's report in the prosecutor's office, so to start making speeches about that is just not right.

COMMISSIONER MacCALLUM: Mr. Wilson, I have not -- I am mindful of the content of your objection, as I said before, and in my judgment Mr. Wolch has not yet reached the point where the questions have amounted to an abuse of his standing as counsel in this inquiry. I recognize the fact that he is persisting in a point of view which was touched on the criminal side by the RCMP investigation, but his representation at the moment is not exactly that, you must admit, he's saying that the witness really knew that both files were there, he just didn't make the connection in the sense that he thought that an innocent man might be suffering by it.

MR. WILSON: My concern has been exposed. Thank you.

COMMISSIONER MacCALLUM: Yes, thank you. Go ahead.

BY MR. WOLCH:

Q I want to turn to systemic problems, and did I hear you right regarding your answers to Mr. Hodson that when you really have no recourse, getting the public on your side might be the appropriate thing to do?

A Would you explain that question, please? I don't understand it.

Q Well, when you exhausted all your appeals, okay, and you appreciate, for example, that the Minister of Justice is not going to give you a fair shake, that perhaps putting your case out in the public is appropriate?

A Well, when you talk about my appeals, how does the Minister of Justice get into it? I don't appeal to him.

Q Under 617 or 690.

A You mean -- well, what is the question?

Q Let me put it this way: Do you feel that there should be somebody independent to review allegations of wrongful conviction that at least pass a threshold test of having some merit?

A Well I think that there are such things in our justice system and there have been ever since I have known about it.

Q Well, when you look back at it, you can't be happy about what happened here; can you?

A Well what do you mean by "happy about"?

Q Well, that a man spent 23 years in jail for a crime he didn't commit, a killer was loose for a long time; you can't be pleased about that?

A Well, I thank you for that statement, that's contrary to what you have been saying publicly for years.

Q Sir, if you had your way Milgaard would still be in jail, wouldn't he? Would he not?

A If that's a question I don't see how it can pass the test of being a decent question.

Q Well you maintained he was guilty right up until DNA?

A I which?

Q You maintained he was guilty right up until DNA; correct?

A I --

COMMISSIONER MacCALLUM: The question is too argumentative.

MR. WOLCH: Well I didn't -- a response is what I am saying, sir.

COMMISSIONER MacCALLUM: Just get back to the question of whether he thinks that an independent review board would be a good idea.

MR. WOLCH: That's what I was trying to do.

COMMISSIONER MacCALLUM: All right.

BY MR. WOLCH:

Q Do you think an independent review board would be a good way to go?

A Well, yeah, but we have some of those.

Q Not in this country, but in any event --

A Well we have the Court of Appeal, the Supreme Court, this Minister of Justice thing, those are all boards.

Q Okay. I think it was raised several times, the Colin Thatcher matter, you're -- we heard his name raised and that he had a review; did you play a part in that?

A No.

Q I'm not sure why it was raised, so maybe you could help me, it was raised in connection with this. Did it play any part in Milgaard at all?

A I don't know how.

Q Were you contacted at all by the Department of Justice in regard to what they were doing and what they might want to know from you?

COMMISSIONER MacCALLUM: Are you talking about a Section 690 for Mr. Thatcher?

BY MR. WOLCH:

Q Yes, I'm talking about the 690 or 617, or whatever?

A Was I contacted by who?

Q Anybody from the Department of Justice, Eugene Williams or people of that ilk, to say "look, do you know anything, do you have any files, anything like that"?

A No.

Q Pardon me?

A No.

Q Now, Mr. Commissioner, unfortunately I don't think it's on CaseVault, but I do want to refer to something that I mentioned to my -- to Mr. Hodson, I don't know if they found it or not, but it should be on CaseVault. I don't intend to go very long into this but -- I see somebody has the book. I forget what it's called, there is a book by the former Prime Minister, Kim Campbell, called *The Making of a Politician*, and I thought it would be on CaseVault, I'm confident I turned in the chapter but I guess it didn't make it there. But in Chapter 10 and --

MR. HODSON: We'll put it up there.

BY MR. WOLCH:

Q Okay. I want to show you some things, and I'm not going to be long with this because hopefully we'll be able to ask Ms. Campbell about it, but there is a full chapter devoted to the *Milgaard* case and some of it you will find very interesting from a personal point of view. I want to go through it pretty quickly, I think I can do it without reading that much time, I don't want to go through it now because Mr. Williams and Ms. Campbell will have much more to say about it, I'm sure, but the chapter is called *Doing the Right Thing*, and this is a book she wrote after the Supreme Court reference, and I want to set the stage for it. She deals with it in about 22 pages, and she talks about how she learned the whole case over a weekend, and there is obvious factual errors regarding Nichol John, what she said and what she did, and I won't go through that now. There's indications here that Nichol John testified at the preliminary hearing, that she saw the murder, it's -- there's all kinds of facts that are difficult to imagine that she would have thought when she wrote the book. But she does explain the thought process on the 690 review, and how she was blindsided by Mr. Mulroney, and how she went to Justice McIntyre for opinions, and she deals with all the facts. And you will take comfort in this, too, because she does say she was perplexed by the Supreme Court, and talks about a threshold test, it's quite informative. And I know I shouldn't put it in through you, I don't want to, but there is a part that is particularly relevant to you.

So the chapter starts at page 179 of her book, and for the first 20 or so pages she gives a complete account of what she did and what she thought and what she agreed with and what she didn't agree with, but here's the part that I think is particularly relevant to you and I'd like your comments on it. This is at page 201. And maybe this I should put up, in fairness to you, because this is the only part that I think should come from you and not from the others. So she says that:

> "After the Milgaard case, I initiated a review of the section 690 process in the Department of Justice. The recommendations stemming from that review, I'm told, are now making their way to the office of the current Minister, Allan Rock. In advance of any major reform, Rock has made two departures from prior practice in dealing with the application of Colin Thatcher, a former cabinet minister in the government of Saskatchewan, who was convicted of the murder of his wife."

That's why I say, I'm drawing your attention to this, given your background there.

> "First, he provided the department's investigation brief (a summary of the information gathered during the investigation of the application) to the applicant and his counsel for their response and comment before he considered it."

So, you see, she's saying here she made a change, when she did the Thatcher one, with a little more disclosure.

> "That makes sense to me, although it could sometimes create problems of confidentiality. Second, his seventy-five pages of reasons for rejecting the application were immediately published in a form suitable for distribution. I'm also told that the Department of Justice is now more aggressive in responding to inaccuracies or attacks in the press relating to ongoing section 690 applications."

Do you see that? Now my first concern is were you, given your intimate involvement with Thatcher, provided with that information?

A No.

Q Did you have input into that?

A No.

Q Because she is saying here she has changed the system, or the system has been changed to a degree, in terms of giving at least the applicant more information. I'm wondering where the prosecution would have fit into this?

A I had nothing to do with this.

Q Now she talks about inaccuracies, and I'd invite you to read the whole chapter because you will find that among the things she says is that Nichol John testified at the preliminary hearing as to having seen the murder, a fairly major mistake.

A Right.

Q But, in any event, she seems to be sensitive to the press and perhaps to changing the system a bit. She then goes on to say, and I'll just take you through it, because I think it's valuable to the Commission more than to yourself.

> "The unresolved issues in the Donald Marshall case led the government of Nova Scotia to convene a royal commission, which eventually recommended the creation of an independent body to review claims of wrongful conviction. These recommendations were raised with the provincial attorneys general as well as the Department of Justice in 1991 but didn't find much support. The most common concern was that the creation of such a body would become yet another level of court. The move from the courts to the executive responds to the

> need for some finality in the process."

If we can just go down, we're almost at the end.

> "The British have just concluded their royal commission into the workings of their justice system. The powers comparable to those granted under section 690 are exercised in Britain by the home secretary. The British situation differs from the Canadian in that Britain is not a federal state, and the home secretary, unlike the Canadian minister of justice, is in charge of the prosecutorial arm of government and thus not at arm's length from the review process. The this royal commission has recommended the creation of an independent body to review applications for relief from wrongful conviction, or miscarriage of justice. To the extent that such an approach could reduce the politics surrounding these applications, it would be desirable, but I doubt that can really be achieved. I wouldn't want to do away with public interest or even public pressure ..."

Now, you see, she seems to say there that public interest and public pressure:

> "... where it might lead to the discovery of evidence or witnesses capable of establishing a wrongful conviction ...",

so she is not saying you shouldn't have public pressure; is that something you might agree with? Is that the way you would like to phrase it or do you have a different view of that?

A I don't --

Q She says she doesn't:

> "... want to do away with public interest or even public pressure, where it might lead to the discovery of evidence or witnesses capable of establishing a wrongful conviction."

In the *Milgaard* case, clearly publicity led to a lot of information, there's no question about that. Do you see that? If you read the entire chapter you will note that she acknowledges that public pressure was one of her reasons for re-opening the case. She had turned it down once, if she had her way, there never would have been a clearing of David Milgaard or a conviction of Larry Fisher, not deliberately, that would have been the result.

> "The capacity for publicly expressed outrage at injustice is a hallmark of a free and democratic society. It is an important safeguard of justice, however uncomfortable it may occasionally be for those on the receiving end."

Do you agree with that?

A Well, I don't know, I can't make comments on a great part of the book just seeing a bit here.

Q Well no, she's pretty obviously correct, that's all I'm saying. It's not very difficult. But here she goes on:

> "Did David Milgaard kill Gail Miller? Perhaps none of us will ever know for certain. I had some tough questions about the Milgaard case, but I don't for a moment begrudge Milgaard his freedom. The issue was never a personal one with me. Whatever my own views, there came a point when I had to let it go. Dealing with this and other cases has made me quite modest about my own ability to know the absolute truth. That is why we

> must find methods of post-conviction review that make possible a fair and open-minded approach to the possibility of error in our courts. But I hope I can be forgiven for saying that "wrongful conviction" can be just as unjust when it occurs in the court of public opinion as when it happens in a court of law."

Is there anything there that you take issue with or would like to elaborate on?

A No.

Q What about her comments about perhaps an independent, an independent body, do you have any feeling about that?

A Well, if anyone has a final power in any area, that's freedom. Without it, you can't have it. I don't see what possible discussion you could have on that.

Q Okay. I guess part of the difficulty I have is that here you have, after the Supreme Court reference, if you read the chapter you'll see that she still has a lot of doubts, she misinterprets Nichol John completely, and that is her position at -- this is after the Supreme Court reference.

And we know that getting there was all sorts of bad feeling, argument, and whatever, and I'm wondering, with your experience, if you would not agree or suggest that maybe we need a different system, something different? And I thought maybe, because Colin Thatcher was mentioned there and there was an adjustment there, that maybe you would have had some input on that?

A I didn't.

Q Did you even know that the system was different for Thatcher?

A No.

Q Did you have any comment on improving it and changing it and making it better?

A No.

Q All right. I just had one last question. It's quite clear that when it comes to people such as yourself, Mr. Caldwell, Eugene Williams, Kim Campbell, people in the justice system -- I can add a lot more, it's not, I'm not going to be that particular -- people in the justice system had such a hard time accepting that there was a miscarriage, that David was wrongly convicted, yet people not in the justice system, the ordinary person, could look at the Milgaard evidence and the Fisher evidence and come to the right conclusion. Do you have any view why the people in the system had so much difficulty with getting to the right answer and that people out of the system got it, got there so easily; do you have any comment on that?

A Well I have comments that you decide which is the right answer and which is the wrong answer, and that is your way of deciding the whole question, I don't suppose anybody else on the planet would be willing to do that so you are not likely to be pushed out of your place.

Q No, I'm trying to understand, like, why it is that the average person can look at the obvious, what I suggest is the obvious, the strength of the Fisher evidence, weakness of the Milgaard, and come to the conclusion that Fisher did it, I mean that's what people decided; while all those in the system didn't come to the same conclusion? And maybe the answer is an independent group that has no allegiance to anybody, that can just look at it properly, do you not think that might be the answer?

A Well I think the group should have an allegiance to justice, not to any particular direction or cause.

Q Well, that's what I am saying.

A And that's what the justice system is supposed to try and achieve. It's composed of human beings, and it's not perfect, and it never will be.

Q But we can try for it; can't we?

A Well yes, we can try for it, but we need to try honestly.

Q And my final question is this: As the man who was so deeply involved in the case, did you ever, for your own sake, make any personal effort to determine whether or not there was a miscarriage of justice in this case?

A Well I think I made that personal effort all the way along, and I certainly am not saying that I was perfect in the attempt or in the accomplishment of it, but I've always wanted that.

Q I don't think you are getting my question. I don't mean back in the old days, we can argue that forever, I'm talking about when the Fisher evidence surfaced and Ron Wilson was saying that he lied, when all that was coming out did you make any effort at all on your own, as a person so deeply involved, to go back, review, check, do anything where you might have been in a position, at the end of the day, to say "look, I think they are right"?

A Well, I've answered this many a time, the answer --

Q Only once?

A The answer hasn't changed. I had, I hope properly, a great deal of faith in our justice system and a great deal of expectation from it. We're seeking justice, we don't pull in evidence unless it's proper evidence, etcetera, etcetera, we take the case to the courts, and if they dismiss the thing as this conviction is over with and done and finished, then I go on to my other piles of files that are stuck up and consider that done.

I don't have the opportunity to go back, nor do I have the ability to go back and find out, with my great mind, whether they -- everybody was always right. It's just never part of the possibility of a person working in that sort of thing doing that on a regular basis.

But the attempt to do justice was always there and should have always been continued, and so far as I understood me, it always was.

Q Are you troubled by the fact that the determination that Larry Fisher was the killer, and the gathering of the evidence, was not done by the authorities at all?

A Well, I've told you, I thought the case was done and, according to law, that everything was over with.

Q Those are my questions, Mr. Commissioner.

COMMISSIONER MacCALLUM: Okay.

MR. HODSON: Before we adjourn for lunch I will canvass counsel to see who is left.

COMMISSIONER MacCALLUM: Okay.

(Adjourned at 12:08 p.m.)

(Reconvened at 1:32 p.m.)

BY MR. WOLCH:

Q Mr. Commissioner, as I mentioned to Commission Counsel, I have just two more questions, or by two, I mean about two minutes of questions before I'm finished.

Mr. Kujawa, this morning I went over with you the statements made by Fisher's victims to Detective Karst. What I wasn't clear about, and Mr. Fox brought it to my attention, is that are you aware that Fort Garry police had taken statements from Fisher before Detective

Karst got there?

A No. I wasn't aware of that, no.

Q Okay. We've heard from Lorne Huff here that there was a previous statement taken before Karst and Nordstrom came to Winnipeg. I just want to ask you if you knew anything about that at all?

A No.

Q And the last question I have is, if we can turn to a document, 022706, and I only want to draw one paragraph to your attention and ask if you can comment on an answer that you would have given to the RCMP in 1993. If we can go to 719, and I want you to comment, if you can, on a portion of this interview that you had with the RCMP where they are talking about the same issue, and he talks about the direct indictment and then you say without his confession in Winnipeg -- you are reading from the letter I take it -- we have no evidence at all to charge Fisher, and you say:

> "Yeah, I don't quite recall the exact thing, but it seems right on with what I remember happening."

And if we can go down a little bit, just go back a little bit, and I want to get the question in context, and the officer says:

> "The question that I had then deals with December the 24th/71, which would have been after Mr. Fisher's guilty pleas, and it mentions concerns about the admissibility of the statements and, again, this is going to be a difficult question to answer. Do you recall what concerns you might have had over the Warned Statement that Detective Karst had taken?"

And I pause there. He didn't ask you here about the previous statement, which I brought to your attention, but I want to deal with your answer and have you comment on it.

> "Oh ... the statement to which I was referring were not Detective Karst's, they were, as I understand it, statements that he made to his lawyer in Manitoba, saying hey I did those charges in Saskatchewan, I want to straighten them out."

And if you go down to the officer's response:

> "So the admissions that he made to police, then weren't the area of concern that you were referring to?"

Now, I take it you would agree you gave those answers to the police?

A I must have, yes.

Q Can you explain what you might have meant by that?

A Well, it was either a case of there was something wrong with the statement that was given to Karst or else he was referring to statements given in connection with trying to get a guilty plea to get rid of his charges.

Q No, I'm sorry, I want to make it clear, the officer is saying to you, in effect, I assume you think there might be a difficulty with police statements and you are saying I'm not referring to Karst, and it doesn't appear you are referring to the Fort Garry police, you are saying it's the statements he made to his lawyer, that's what you are saying, and, quite frankly, it makes no sense to me and I'm asking you to help me with it. That's all I want to know, that's my last question of you. I don't understand it.

A Here about --

Q Where that red line is.

A The statement to which I was referring -- (*witness reading*).

Q I'm sorry, when I read that it sounds like what you are saying is you were planning on tendering his lawyer's statements and couldn't get it in. Now, if I'm misreading, please correct me.

A No, my understanding then was that the statements that were referred to to Karst were not what he told to Karst, as I understand it, it's what he told to his lawyer and Karst found out about it. How I don't know.

Q Okay. So to put it in context, we know he made statements to the Fort Garry police, we know he made statements to Detective Karst, and we also assume he must have instructed his counsel, okay. Now --

A We assume he must have which?

Q I'm sorry, instructed his counsel or told his counsel something. What I'm getting at is when you give your memo saying that there's trouble with voluntariness, I, for example, assume you are talking about either Karst's statements or Lorne Huff's statements or Doug Gilbert's, Fort Garry police, that's what I assume you are talking about, statements made to people in authority. This seems to suggest your concern was with statements made to his lawyer which puzzles me and I'm trying to give you a chance to explain it, that's all.

A Well, I'm not -- I guess I was never sure who the statement was made to or under what circumstances and that is why generally I had the feeling that this is not a confession that I would be able to get admitted in a court of law.

Q Well, I would -- if you are talking about a statement made to his lawyer, we're totally in agreement, but not on a voluntary test, I don't know how you could call his lawyer, but I'm trying to be helped on that one quotation, it has me puzzled.

A And I'm just not sure who the statement, who it was given to or what is the exact reason why I thought the statement wasn't admissible, I never did know that, or at least I never remembered that, I had the idea that it wasn't admissible. But there's no big deal because he wanted to plead guilty anyway.

Q Okay. But you see where your statement says you are not talking about police statements, you are talking about statements to his lawyer, that's the only thing I'm concerned about.

A Well, like I say, I never knew just what the story was that came down through Karst or by Karst or at that time, so it might have been a statement given to the lawyer is what I had in mind at that time.

Q But I'm just a little bewildered. Is there any circumstance where you could try to call the lawyer to give a statement? I don't know of any. Do you?

A No, and that's another reason why I thought if he gave it to his lawyer I couldn't call him, I couldn't present that as evidence, unless they came in with an admission.

Q So when you are talking about confessions, you are talking about confessions to counsel; is that correct?

A Yeah.

MR. WOLCH: Those are all my questions, sir.

BY MR. FOX:

Q Mr. Kujawa, my name is Aaron Fox, I'm the lawyer for Eddie Karst, and I thank my learned friend for trying to clarify the business about the confessions a little bit.

If we could bring up maybe, and this is one of them that I'm referring to, document 012111. Now, Mr. Kujawa, that's the typewritten copy of one of the confessions that

Eddie Karst got from Mr. Fisher in Manitoba in Winnipeg in the fall of 1971, that's what that document is.

Now, am I correct that at this point in time, although you have a recollection that there were some problems, as you perceived it, with the admissibility of those confessions, what those exact problems were you are not able to tell us today; would I have that correct?

A Yes.

Q And we've heard -- Mr. Fisher, for example, has testified and referred to the fact that he was either subjected to a beating that some guards were perhaps involved with, and in fact I think were disciplined as a result of it, circumstances like that, if you were aware of them, might have an impact on the voluntariness of a confession that was given immediately thereafter?

A Yes, but I'm not sure if that had that impact.

Q No, I appreciate that, but hypothetically if that were a fact that you were aware of, that might have some bearing on voluntariness?

A Yes.

Q Secondly, we know that the Winnipeg City Police who had caught Larry Fisher red handed committing one rape and then obtained a confession from him on a second rape, asked him about some of the Saskatoon offences and he admitted to two of them, so by the time Eddie Karst went to Winnipeg to get the statement, he had already admitted to two of the offences to the Winnipeg police, would I be correct, you, as a Crown prosecutor, in looking at whether or not the confessions, for example, this one here would be admissible, you would have to know what the Winnipeg police said to Larry Fisher and what kind of discussions he had with them?

A Oh, I would have to know the full details of the prior interviews with him.

Q And confessions generally, one of the two main reasons they are not admissible, one would be if I force or beat someone or force someone to admit something, that would mean it wouldn't be voluntary?

A Force or sort of a promise of some favour.

Q That would be the other reason, if --

A Or deception, those are the three main ways of getting statements I think.

Q Sure. So if you said to Larry Fisher, you know, Larry, you just got beat up here, why don't you tell us about all of the offences you committed and we'll get you out of here and get you someplace where you are going to be okay, that might be a promise which would affect the voluntariness of the confession?

A Yes.

Q We know that Mr. Fisher signed two confessions, or gave two written confessions for two of the rapes and sexual assaults from Saskatchewan. He initially denied the other two and then eventually pled guilty to all four. Do you know if, on the two that he was denied, it's one in this statement, there's another written statement, but two that he denied that he eventually pled guilty to, do you know if you were advised of his guilt of that by his lawyer or by any other means or how you became aware that he was prepared to plead guilty to the other two?

A I can't say for sure that I know, but I have assumed for all of these years that I got the information from his lawyer asking for a plea bargain agreement from the Crown and that's where I got this information.

Q So you've got two written confessions which you might be able to use and then his lawyer saying, hey, okay, on these other two offences, if we can do a deal on all of them he will plead guilty to them as well?

A Right.

Q That's your general impression of what went on?

A Yes.

MR. FOX: Thank you. Those are all the questions I have, Mr. Kujawa.

COMMISSIONER MacCALLUM: Thanks.

BY MR. LORAN:

Q Good afternoon, Mr. Kujawa. I'm Pat Loran and I'm here for the Saskatoon City Police. I just have a couple of questions for you.

With regard to the Milgaard file, as I understand your evidence, your involvement at the trial level was limited to a conversation you had with Mr. Caldwell about the provisions of *The Canada Evidence Act*; is that correct?

A As far as I can remember, that's correct.

Q And at the Court of Appeal level you had the transcript and that's it in terms of the material with which you were dealing when you argued the appeal; is that correct?

A Yes, the transcript, including not only the evidence, but the legal part.

Q Okay. But you would not have had access to the police reports?

A No, not there.

Q And so you wouldn't be aware of evidence which was collected which didn't make its way into the transcripts?

A No.

Q Okay. Now, what I wanted is your confirmation that you had no communications directly with the Saskatoon City Police in the process of arguing the Milgaard appeal?

A Oh, I certainly wouldn't have any about the appeal, I don't think I had about the investigation even.

Q Okay. Thank you. Now the, that appeal, the Milgaard appeal, was argued in 1970, and at -- would it be consistent with your recollection if I told you that in January of 1971 the Court of Appeal handed down its decision?

A Well, I have no guess as to when it came down, but I accept your statement.

Q Okay. Now in March of 1971 we've got the first correspondence, which went to Mr. MacKay of your office, in regard to the Fisher matter; do you know if there was earlier communications between your office and the prosecutor's office in Saskatoon, or are you unable to comment on that?

A I have no memory of any prior knowledge to that.

Q Now in regard to the Fisher matter, aside from the letter or letters that passed between Mr. MacKay and the Saskatoon City Police, are we safe in assuming that there was no further communication between yourself and the Saskatoon City Police, or at least none you can recall?

A None that I can recall.

Q Thank you.

BY MR. O'KEEFE:

Q Good afternoon, Mr. Kujawa. My name is Eamon O'Keefe, I represent Larry Fisher.

Mr. Wolch had confirmed with you earlier on today that you had no direct communication with Larry Fisher; is that correct?

A Far as I can remember I had none.

Q All of your communications with the defence while you were negotiating a plea arrangement with Fisher would have gone through his counsel?

A Umm, I think that's -- I think that was all, right.

Q In your dealings with Mr. Greenberg do you recall receiving any requests from him or him taking any position that left you with the impression that he was trying to conceal the fact of Mr. Fisher's guilty pleas either from the public or from the media?

A There was zero, zero ingredients of that description involved, as far as I know.

Q Did Mr. Greenberg ever say anything to you that caused you to believe that Larry Fisher was trying to avoid media attention on his guilty pleas?

A I got no impression to that effect at all.

Q And, certainly, nothing would indicate to you that Mr. Greenberg was requesting, for any purpose related to Larry Fisher, that the pleas be taken in Regina rather than Saskatoon?

A No, that seemed to be of zero importance to him, just getting the matter cleared up and the fastest way we could arrange it was all he was asking for.

Q Mr. Hodson went over, with you, a number of different issues that you would take into account in assessing the appropriateness of a sentence back in the late '60s-early '70s while you were handling sentence appeals?

A Yes.

Q You recall going through that with him?

A I do, yes.

Q And, specifically, things that you would have taken into account when assessing the appropriateness of the 13 years that Mr. Fisher had received in Manitoba?

A Yes.

Q I don't recall Mr. Hodson raising with you the issue of pretrial custody, and I just wanted to address that with you this afternoon, if I could. You would have been aware, I assume, that prior to Mr. Fisher's plea being entered in May of 2 -- of 1971, that he had been in custody for a considerable period of time?

A Well, I would have expected that he had been in custody for some time, how long I didn't know and I didn't care.

Q I can tell you that it's approximately eight months that Mr. Fisher spent in custody before the plea was entered in Manitoba, and can I ask you what effect the pretrial custody would have had on your assessment of the sentence at that time?

A Well as far as I know, according to our experience, if someone put in time before the actual sentencing was done he was given about two days value for every day he had put in up 'til then.

Q That --

A That was generally the way our courts handled it.

Q And that was the practice in other cases that would go before the Court of Appeal on sentence?

A The Court of Appeal or just Court of Queen's Bench, right, and so it would be considered and given a great big length of worth for the time that was put in, and then whatever the offence and the facts justified were added onto that.

Q Do you think that that period of pretrial custody would have been something that you were aware of at the time that you were considering Mr. Fisher's sentence in 1971?

A I think that I would have been, but I have no memory of it right now, none.

Q I want to ask you as well about the issue of the strength of the case that you believed you had against Larry Fisher at the time that you were negotiating this plea arrangement. You have indicated that you didn't think you had a case against Mr. Fisher, and I just wanted to ask you, if you believed you did have a case against Larry Fisher do you think that you would have got a greater sentence from the Saskatchewan Court than if you didn't believe you had a case?

A I think we might have been able to get a little more, but it would be very little more, because in those years, according to my memory, 13 years for sexual offences was a mighty long sentence.

Q And taking into account pretrial custody it would have been up over 14 years, basically, is what you are saying?

A Way over 14, if he had put in that many months.

Q Would you have had concerns about calling Larry Fisher's victims to testify about the rapes if you didn't believe you could get any sort of significantly longer sentence by running a trial against Mr. Fisher?

A Well, so far as I knew, we didn't really have any evidence that we could call against him.

Q Assuming you could have made a case against Mr. Fisher on even one of the rapes, would you have had concerns about calling the victims to testify if you didn't think you could get anything more than a few extra months added onto his sentence?

A I would have had concern about that, and I would have talked to the victim or had someone else talk to the victim, because a great many rape victims do not like going into Court and don't like, don't like getting all that attention and having that bad history built up onto them, so if we are trying to help the law-abiding people of our community we have to have that in consideration, and if we can get 13 years on a guilty plea, exposing one of the victims to a whole lot of this exposition and attention to get another few months would not have been a great idea and I wouldn't normally push for that.

Q All right. Thank you, Mr. Kujawa.

BY MR. WILSON:

Q Just a couple of matters that I would like to clear up with you, Mr. Kujawa.

COMMISSIONER MacCALLUM: For the record, this is Mr. Wilson, Mr. Kujawa's lawyer.

BY MR. WILSON:

Q For the record, my name is Garrett Wilson, and I'm your counsel. I think you told Mr. Hodson, yesterday, you retired in 1989?

A I think that's right, yes. Well I'm quite sure that's right.

Q Yeah, I'm quite sure it is too, it's in the material that was presented to us. Now I understand that the first application that was made on behalf of David Milgaard under Section 690 of the *Criminal Code* to the Federal Minister of

Justice for a review of his conviction was made in 1988; do you have any recollection of that?

A None that I -- that's in my mind now.

Q At the time you retired in 1989 were you aware that a movement was underway to review the Milgaard conviction?

A Umm, I don't have any -- I can't say that I have a memory of it.

Q I see.

A I must have known something about it but it's not there.

Q You have told us on several occasions that you thought the justice system was the body to whom we should look and upon whom we should rely to review possible miscarriages of justice?

A Yes.

Q Mr. Wolch asked you, when you discovered that Mr. Milgaard was claiming that he was wrongfully convicted, why you didn't get into the file and investigate that. From and after 1989 you were out of the office; correct?

A Yes.

Q And from and after 1988 the question of the wrongful conviction was in the hands of the Federal Minister of Justice and being reviewed by counsel at that level; was it not?

A Some, to some effect that I don't, didn't entirely understand, but it was.

Q I take it that, so long as the alleged wrongful conviction was in the justice system and being reviewed according to the principles of that system, you were quite content to let the system look after the problem?

A Well, not only content, but I didn't see any alternative.

Q Can we have a look at 004451, please, dash 002. This is a letter dated April 29th, 1992 addressed to the Province of Saskatchewan, Crown prosecutors, from the access to information people in Ottawa. Mr. Wolch put that to you this morning and asked if you knew anything about that and you, of course, didn't. You had been retired three years at the time that document came into existence; had you not?

A Well, according to the date that you have already mentioned, I guess.

Q Yeah. Do you have any idea why Mr. Wolch would put that document to you knowing you had been retired for three years at the time it came into existence?

A No I don't.

Q I want you to tell us briefly about the Colin Thatcher matter. I raised that a couple of times and Mr. Wolch asked you about it this morning. You acted as the trial prosecutor against Colin Thatcher in 1984 I believe?

A Right.

Q And a conviction came down in early November of 1984?

A I think that's right.

Q And it went on to the Court of Appeal and then on to the Supreme Court of Canada, and I suggest that the decision of that latter Court came down in May of 1987, would that be about correct?

A I think so.

Q And then a couple of years later, about the time of your retirement, Mr. Thatcher opened a campaign claiming wrongful conviction, new evidence, suppression of evidence; do you recall that?

A Yes.

Q And that public relations campaign was going on in the media about the same time that the Milgaard one was?

A I think so.

Q And Mr. Thatcher had been a cabinet minister in the Saskatchewan Government in the 1980s; correct?

A Yes.

Q His father had been the Premier of the province in the 1960s?

A Yes.

Q Mr. Thatcher had a lot of prominence in his own right, and was able to command a lot of media attention, and did so?

A Yes.

Q And the media addressed quite a few inquiries to you, as they did in the Milgaard matter?

A Right.

Q And were you responding much in the same vein as you were with respect to the Milgaard matter?

A Well, I expect so, not that I remember every response or every question that clearly, but it would be pretty much the same.

Q So the point I wanted to make the Commissioner aware of, Mr. Kujawa, is that there were two high-profile Saskatchewan cases, claims of wrongful conviction, receiving considerable media attention, running parallel tracks in the same time period in the late 18 -- 1980s and the early 1990s?

A Right.

Q Mr. Thatcher also made an application to the Federal Minister of Justice for a 690 review and was rejected, finally, in 1994?

A Right.

Q Following which he commenced action against the Minister of Justice, etcetera. Colin Thatcher is still in prison?

A Far as I know, yes.

Q He is using the National Parole Board, now, to secure his release?

A Well he's been making attempts to get parole, I read details a bit in the paper, but that's all I know about it.

Q So just one last question. As I understood you to tell me, that Mr. Wolch's almost-final question to you before the noon break was "did you do anything to check if Mr. Milgaard was innocent or not", and I think you have told us that what you did was you relied upon the justice system?

A Would I have allied --

Q What you did, with respect to the guilt or innocence of David Milgaard, was rely on the justice system to determine that question?

A Yes.

Q Thank you.

MR. HODSON: I have no further questions. Thank you, Mr. Kujawa.

A Okay.

COMMISSIONER MacCALLUM: Mr. Kujawa, thank you for testifying, you are excused.

A Thank you, My Lord, thanks.

MR. HODSON: The, that is all the witnesses for this week, so I think we are adjourned until April 17th.

COMMISSIONER MacCALLUM: Thank you.

(Adjourned at 2:03 p.m.)

OFFICIAL QUEEN'S BENCH COURT REPORTERS' CERTIFICATES:

We, Karen Hinz, CSR, and Donald G. Meyer, RPR, CSR, Official Queen's Bench Court Reporters for the Province of Saskatchewan, hereby certify that the foregoing pages contain a true and correct transcription of our shorthand notes taken herein to the best of our knowledge, skill, and ability.

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Karen Hinz, CSR
Official Queen's Bench Court Reporter

__________________________, RPR, CSR
Donald G. Meyer, RPR, CSR
Official Queen's Bench Court Reporter

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