Commission of Inquiry

Into the Wrongful

Conviction of David Milgaard

before

THE HONOURABLE MR. JUSTICE

EDWARD P. MacCALLUM

****

Transcript of Proceedings

and

Testimony before the Commission

sitting at the

Ramada Hotel at

Saskatoon, Saskatchewan

****

On Tuesday, April 18th, 2006

Volume 133

Inquiry Proceedings

***Commission Staff**:*

Mr. Douglas C. Hodson,	Commission Counsel
Ms. Candace D. Congram,	Executive Director
Ms. Kara Isabelle,	Document Assistant
Ms. Jodie Kendry	Document Assistant

***Support Staff**:*

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Mr. Don Meyer, RPR, CSR,	
Mr. Hugh Esson,	Security Officer
Mr. Jay Boechler,	Inland Audio Technicians
and *Mr. Larry Prehodchenko*	

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.,	**for**	Mr. Serge Kujawa
Mr. Rick Elson, Esq.,	**for**	the Saskatoon Police Service
Mr. Chris Boychuk, Esq.,	**for**	Mr. Eddie Karst
Mr. Bruce Gibson, Esq.,	**for**	the RCMP
Mr. David Frayer, Q.C. and Ms. Jennifer Cox,	**for**	Minister of Justice (Canada), The Hon. Vic Toews
Mr. Donald J. Sorochan, Q.C.,	***for***	*Mr. David Asper*

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Transcript of Proceedings

(Reconvened at 9:00 a.m.)

COMMISSIONER MacCALLUM: Good morning.

ALL COUNSEL: Good morning.

MR. HODSON: Morning, Mr. Commissioner. Just one quick housekeeping matter before I proceed with Mr. Asper.

Back when we adjourned, I think on March 2nd or prior to that, I had raised with you the issue of the Federal Justice Minister and the privilege claim that they may be asserting over both documents and subject matters, and Mr. Frayer indicated that prior to or at the time of recommencement yesterday they would provide us with their position, and they have done that last Thursday. And if I could just call up 337473, please, it's actually 337471 I think might be the doc. ID, and 473. There is two letters here that I'll just quickly touch on just to advise you, Mr. Commissioner. There was two issues, well, actually three issues.

The first one related to documents that were already in the Commission database that we received I think from the Government of Saskatchewan where the Federal

Minister said they may claim privilege over even though we had them, and this letter confirms that, I mean as stated, that:

> '... to expedite the work of the Commission, the Minister is prepared to allow documents generated by the Federal Department of Justice that have already been disclosed to the Commission by other parties to be utilized by the Commission.",

but not:

> "... be construed as a waiver of privilege...',

and:

> '... nor ... an admission that the Commission has a mandate to look into the internal operations of the Federal Department of Justice."

So to the extent that -- and there's been the odd document that counsel, and in fact I have tried to utilize where an issue has been raised, and we've agreed to defer that issue, so now any document in our database from the Federal Justice Minister, I think they're now saying even though it may have been privileged, you are entitled to

utilize it on the conditions stated in this letter.

Issue number 2, if I could get 337471, relates to the question of privilege over the documents they have not provided us, and if we can go to the, just the second paragraph, their position as stated is that:

> "Most of the documents the Minister objects to producing are protected by solicitor-client privilege. In addition to being privileged, the Minister also takes the position that production of these documents takes the Milgaard Inquiry beyond the mandate of a Provincial Inquiry."

And you'll recall, back at the outset when the Commission put its position paper together and sent it to the parties, there was an issue with respect to whether -- the extent to which this Commission of Inquiry can delve into matters that may affect the Federal Minister of Justice, and there may well be a constitutional issue there as to where the line must be drawn as to where our Commission can go with respect to the operations of the Department of Justice under 690 and other

related matters, so that's an issue that we've said the Commission would address at some later point, and that later point is coming soon.

The next page to this letter indicates -- is an appendix the sets out the Federal Minister's position on what they claim privilege and relevance over, so in other words here's a summary of the documents that they say they do not feel are -- they are required to provide.

I can say that I spent two days with Mr. Williams last week in Ottawa, with Mr. Frayer, in interviewing him in preparation for his evidence, and there certainly is a significant part of his work that he will be testifying on the investigative stage, and I think there are some issues that need to be resolved with respect to both privilege, to the extent that whether it's properly asserted and, to the extent that it is, what does it cover, and secondly on this constitutional issue, so I think I just want to raise it at this point.

I provided this to the parties, and in the next short while I will be considering how best to put that issue before the Commission

so that parties can have an opportunity to be heard and we can sort out and have you likely rule on privilege and relevance before Mr. Williams testifies.

Now, Mr. Frayer, have I accurately put that forward?

MR. FRAYER: Yes, you have, Mr. Hodson.

MR. HODSON: Okay. So, with that, I'll carry on with Mr. Asper.

DAVID ALLAN ASPER, continued:

BY MR. HODSON:

Q If we could call up 004823. I just want to go back. When we left off yesterday, Mr. Asper, we were talking about, I think we were in March of 1990, and we were talking about the parallel -- or the investigations that your client, Mrs. Milgaard, was conducting with respect to Larry Fisher, and what the RCMP were doing. But I just want to go back, this relates to the Deborah Hall issue, and you'll recall yesterday I showed you the interview transcript where Eugene Williams interviewed Deborah Hall I think on November 6th, 1989, and you indicated that at some point around there you would have talked to Deborah Hall. This is a newspaper article of the *StarPhoenix* November

4th, Saturday, 1989, so two days before Mr. Williams' interview, and it quotes you at the bottom, or attributes to you, it says:

> "Asper said justice officials have finally contacted Debbie Hall, a woman who can refute some testimony given at the trial. She was never called as a witness."

So it appears from this article that on November 4th you would have been aware, presumably from either Ms. Hall or Mr. Williams, that he was about to interview her; is that right?

A Yes. I think Ms. Hall contacted me.

Q Before the interview?

A Yes.

Q Okay. If we can then go back, 332053, and just carry on where we left off. And this is a memorandum from Mr. Williams to his file about a conversation with Mr. Wolch, and again Mr. Wolch tells Mr. Williams that his client has been persuaded to avoid contacting potential witnesses, and I think that's consistent with what you have told us yesterday, that you would have talked to Mrs. Milgaard and her team, if I can call it that, and I think your advice to them was, "lookit,

don't contact witnesses"; is that fair?

A Yes.

Q And I think you've told us that notwithstanding that, under the radar and unbeknownst to you, they did proceed and contact some?

A Well, I'm not sure it would be totally accurate to say unbeknownst to me, but they -- you are essentially correct that they continued.

Q Okay. Well let me rephrase that. Notwithstanding your advice to her and your assurances to Mr. Williams that they continue, then, to do some investigative work?

A Yes.

Q Known to you?

A Yes.

Q But under the radar so that Mr. Williams and Mr. Pearson wouldn't find out?

A Yes.

Q If we can go to 050467. And this is a letter from you, Mr. Asper, March 15th, 1990 to Mr. Williams, and this is where you send a copy of the statement from Linda Fisher and then you go on to say:

"It is our understanding that Mr. Fisher's record is as follows:",

and you record December 21, '71, Regina, and

we've heard evidence that that's the date that Mr. Fisher entered guilty pleas in Regina to the four Saskatoon offences, being the three counts of rape and one count of indecent assault. And I think you told us yesterday that at this time you and everybody else were of the view that Mr. Fisher's rapes, if I can call them the Saskatoon rapes, had occurred in Regina because the CPIC said Regina; is that right?

A Yes, I think so.

Q And so -- and I think if we compare what's in the body of your letter to the versions of the CPIC, that they appear to be similar, and would this information, then, have been obtained from a CPIC record -- of Larry Fisher's record?

A Yes.

Q Now we, we had talked back in February when you testified about newspaper clippings that had talked about unsolved rapes in Saskatoon, and I think there was a newspaper article December 14th, 1968 and then again in February 1969 where they talked about these unsolved rapes. At what point, are you able to tell us at what point in your mind, sir, you connected -- if we can get the letter back up -- umm, when you connected Mr.

Fisher and these rapes as being the same rapes that were reported back at the time? Do you follow where I'm going?

A Yes.

Q And let me just --

A I --

Q I think it was in June, in July 4th of 1990 that it appears -- and I will be showing you this memo in a moment -- that Carl Karp contacted you or Mr. Wolch and said "lookit, these are Saskatoon rapes, and here's the names". So I put that to you, and are you able to tell us at what point, in your mind, you connected Mr. Fisher to the rapes that you had read about in the newspaper articles?

A I -- I have a feeling it was when we, when we discovered that the Fisher offences had occurred in Saskatoon.

Q And then did you connect that to what was reported in the newspapers, then, around that time?

A I think that's when the light went on, as it were.

Q And so, at this point, is it fair to say that you and others had not connected Mr. Fisher to the Saskatoon rapes that had been talked about in the newspaper?

A I think that's true, yes.

Q Now, if we can also go down, there's some information here about:

"... the offence dates for some of the convictions which are entered on the record are as follows:",

and those are in fact the dates of the (V1)-, (V2)-----, (V3)------ and (V5)--- rapes, and I'm not sure, I don't -- and I stand to be corrected on that -- but I don't believe those dates are contained on the CPIC. I could be wrong on that. Are you able to tell us where you got that information from?

A No. I think, at this point, all I had was the CPIC though.

Q Okay. And as I say, it may well be that certainly --

A I think there are different versions and different requests that you can make of the CPIC.

Q So your recollection is that this information would have been obtained from the CPIC?

A I think so.

Q And again just, I think this confirms what you said earlier:

"... it is our understanding that some of the offences occurring prior to the

murder of Gail Miller occurred both in Regina and Winnipeg, and that's what you've told us; correct?

A Yes.

Q Then the next paragraph, and again keeping in mind this is March 15 of 1990, so up until this point what the record reflects is you have the tip from Sidney Wilson and you have Joyce Milgaard and Paul Henderson interviewing Linda Fisher and Cliff and Roy Pambrum and you say:

"As you are probably aware, Mr. Fisher was interviewed by the police in Saskatoon on February 5, 1969."

Let me just pause there and note that I think the police report was dated February 5. February 3rd was the actual interview date, but I don't think anything turns on that.

"Evidently, Mr. Fisher took the bus to work from the same bus stop used by Gail Miller. He was apparently waiting at that bus stop while the police were asking individuals if they had seen or heard anything on the morning of the murder. Mr. Fisher apparently told the police that on the morning of the

murder, he had caught the bus at 6:30 a.m. or 7:00 a.m. and had gone to work. You will see from Mrs. Fisher's statement that her husband did not go to work on the date of the murder."

What Mrs. Fisher, Linda Fisher's evidence was and what's in the tape of the interview I think of her by Mrs. Milgaard and Mr. Henderson is I think she said she didn't know that Larry had been contacted and stopped by the police and so from that I'm just wondering again the source of this information, Mr. Asper, would this have been from the Peter Carlyle-Gordge work or from the file work that you had or from Mrs. Milgaard?

A I can't say for sure, but that would be my guess.

Q Someone would have given you that -- someone internal would have given you that information; is that fair?

A Yes, yes. That paragraph is dripping with sarcasm.

Q I didn't -- no drips hit me. Can you tell me where?

A Well, it's -- it's almost mocking Mr. Williams because we would have hoped that Mr. Williams would already be aware of that information. The

beginning of the sentence, "As you are probably aware," is a --

Q So let me go back. Would you have expected Mr. Williams then after February 28th to have gone to check to see whether Fisher's name --

A Yes.

Q And did you have information to suggest that he had not?

A We were -- no, I didn't have any specific information. We were making assumptions. I mean, this sort of illustrates the character of the relationship. It may not come off the page that way, but --

Q I think --

A -- that's what was going on.

Q And I think there was some evidence from Mr. Pearson that, and we'll hear from Mr. Williams, I think there's some memorandums that after your call on February 28th I think he did contact, it may well have been Mr. Caldwell or it may have been the city police, to find out if the police had interviewed Fisher, I'm not sure, but I think it was around this date. Were you aware of that from Mr. Pearson or otherwise?

A I believe it came to my knowledge because I was

very unhappy that Mr. Caldwell or any others involved in the original investigation would have been involved in the reinvestigation.

Q Okay. Let me -- and I'll touch on this, this later. Did you have any concerns with Mr. Williams contacting Mr. Caldwell to say on your prosecution file do you have any information relating to Larry Fisher?

A Yes, I had very serious difficulty with Mr. Caldwell being treated as anything other than a witness as the witnesses we had offered had been treated as well.

Q Okay. Let me rephrase it. I think you said yesterday as a source of information, so presumably if Mr. Williams wants to find out if the prosecutor had anything on his file that related to Larry Fisher and given that his memorandum of February 28th indicates that you told him, at least according to his note, that Linda Fisher was interviewed by Mr. Caldwell, how did you expect Mr. Williams then to get the information from Mr. Caldwell other than contacting him?

A I would have expected, and I believe we made the point to the Department of Justice several times,

that Mr. Caldwell should have been put under oath and treated as Deborah Hall was treated.

Q So as far as Mr. Williams wants to find out if Mr. Caldwell has, for example, a police report or any interviews with Larry Fisher, he should have been put under oath?

A And produce his documents and be questioned about them.

Q Okay. So as far as the request to gather information, though, did you have concerns about that, the simple request?

A Yes.

Q And what was the concern?

A Mr. Caldwell's prosecution of David Milgaard was the subject of our application and I would not want the reinvestigation of that potentially tainted by someone who had a lot to lose personally.

Q And there's some mention later on in the document, I think where this issue comes up directly, I think you write to the minister about this and we'll deal with that, and I think at that point the question was raised or the position they took was prosecutorial misconduct was not part of your application. Do you remember that being raised

with you, and if you want, we can defer that and go to the document a bit later.

A I don't recall specifically.

Q Okay.

A But this isn't an issue of prosecutorial misconduct, this is an issue of what is an appropriate way to investigate a potential wrongful conviction.

Q I think what the federal department said back to you was words to the effect that lookit, in your application you did not raise as a ground for the re-opening that Mr. Caldwell, or that there was prosecutorial misconduct, so therefore, and I'm paraphrasing, we weren't looking at his conduct and therefore -- and I think they went on to say, and we'll see it in the letter, that he's the source of information and that's where we're going to get it from anyway?

A I understand, but I'm just making the point that from my perspective it just so profoundly illustrated the bias of the Federal Department of Justice where witnesses that we offered were put under oath and questioned and cross-examined by Mr. Williams, but Mr. Caldwell was treated as an assister, he was an assistant to the Department of

Justice rather than a witness.

Q So at this point then you would take issue with Mr. Williams' contacting Mr. Caldwell to find out whether he had interviewed Linda Fisher, whether he had interviewed Larry Fisher, whether there was any statement from Larry Fisher and whether there's anything on the prosecutor's file relating to Larry Fisher?

A Yes. I would have expected that Mr. Williams would have asked the Attorney General's Department to turn over all of its files to the Federal Department of Justice for review by the Federal Department of Justice and Mr. Williams would then treat Mr. Caldwell as a witness and interview him as he interviewed Deborah Hall and Dr. Ferris.

Q Okay. And again there is some correspondence that sets out your concerns later and I'll allow you to go through that again when we get to that letter.

A Okay.

Q And here it says:

"Secondly, we reviewed the transcript of the preliminary enquiry, and can confirm that a double-edged bone-handled hunting-type knife was found at the scene of the crime shortly after the

police attended the scene. The police clearly believed that this knife might have had something to do with the crime, and the pathologist agreed that some of the wounds could have been inflicted with a double-edged blade. Oddly enough, this weapon was lost after being taken into police custody, and never played any part in the trial proceedings."

We dealt a bit with this yesterday. Where would this information have come from, Mr. Asper?

A It appears to me that, as I said yesterday, that it came from the preliminary inquiry.

Q And again the fact that the police clearly believed the knife might have had something to do with the crime, was that based on your reading of the prelim and trial transcript, or the prelim transcript?

A Yes, I think so.

Q Okay. And then secondly about this weapon was lost after being taken into police custody and never played any part in the trial proceedings, do you know where that information came from?

A No, I don't recall.

Q And then down at the bottom, here you say:

"We are encouraged that you have assigned this task to an investigator --"

And I remind you that the day before this letter, I think March 14th, was your first contact with Mr. Pearson,

"-- and we feel that there are many leads that ought to be pursued. We are most willing to co-operate in any way with your office, and if you require any further assistance, please do not hesitate to call."

And again, this most willing to co-operate with your, in any way with your office, did that relate to the Larry Fisher investigation?

A Or any other aspect of the case, yes.

Q Okay. Go to 155610, again it looks like the next day Mr. Wolch also sends a copy of the statement to Eugene Williams and says:

"I would only re-emphasize that it is not our task to solve the crime 21 years later, even though it appears we may very well be able to do so."

Can you tell us, Mr. Asper, and this is March,

March of 1990, and more information is obtained about Mr. Fisher and provided to Justice in the following months. Can you tell us, in the first application, I think it's no dispute that the original application letter December 28, 1988 did not include Larry Fisher, but that it was supplemented later on?

A Yes.

Q And we will be turning to Kim Campbell's letter later on where she responds to the grounds put forward by you, but can you tell us, what was the position put forward to the Minister of Justice? Can you explain how the Larry Fisher information, how did you see that or portray that as a ground in support of your application for relief under Section 690?

A In the first application?

Q Yes, in the first application.

A I think that -- I think in general the position was that we, that David would have been entitled at his trial to advance the possibility of an alternate perpetrator, that we were able to do so at that point, and that irrespective of being able to prove that Larry Fisher was the true killer, that the information regarding Larry Fisher could

have changed the verdict had that information been known, it's essentially a fresh evidence test, and that on that basis the case should be re-opened. That's my recollection of what we were trying to do.

Q Okay. If we could go to 056743 which is Mr. Pearson's notes and go to page 056755, and again I won't be going through all of these notes, but this is March 19th of 1990 and it's Mr. Pearson saying that he phoned you:

> "... to assure him and Mrs. Milgaard that the new information presented to the Justice Department was in fact being pursued."

And I think you told us yesterday that you had pretty open dialogue with Mr. Pearson where he would tell you what he was doing basically and communicating what was happening; is that fair?

A Yes. I mean -- yes, he didn't have to tell me that there were things he wasn't going to be able to tell me in our dialogue, I knew that, I knew that's the nature of a police investigation, but we had a very good dialogue.

Q And then paragraph 54, it looks like the next day another discussion and reiterating the concern

that Mrs. Milgaard permit authorities to follow up on the Fisher information, and then the next paragraph, 55, it says while talking to you:

> "... he stated he had received a call --"

He being you,

> "-- from Linda Fisher, he thought this past Saturday, indicating that she was going to the Prince Albert Penitentiary with Larry Fisher's mother, and she was going to talk to Larry and ask him about this incident. Asper indicated that he discouraged Linda from doing this, but suggested that if she could get any cigarette butts, or anything at all which would assist in having the blood typed for possible analysis, she should consider doing that. At this time I'm not sure if Linda did in fact go on Saturday to P.A. as indicated."

Do you recall the discussion with Linda and your discussion with Mr. Pearson about that?

A I don't recall the specific conversation, but I do remember hatching the idea at some point.

Q And can you -- what was the idea?

A The idea was to try and get some of Fisher's saliva.
Q For what purpose?
A To try to test him for his blood antigens and potentially DNA.
Q And so one of the plans was to get his daughter and you -- I think at one point it included you; is that right?
A I think, yes, there was some discussion about that.
Q And going up and it would be surreptitiously trying to get body fluids from Mr. Fisher?
A Yes.
Q And did that ever happen?
A No.
Q Why not?
A I think it was probably not feasible.
Q Okay. If we can go to the next page, Mr. Pearson asks you about, and again I think the date of this is March 19th, and you recall March 15th you wrote to Mr. Williams and gave information about what was in a police -- or about the city police contacting Fisher. Pearson says he asked you if:

> "... he or Mrs. Milgaard had possession of a statement given to the City Police,

indicating that Larry had been interviewed, and had indicated he had taken the 6:30 a.m. bus on the morning of the Miller murder. Mr. Asper said he had no such statement but indicated that this information was the result of a verbal conversation between the Saskatoon City Police investigator and Larry Fisher, sometime shortly after the murder."

And again, would that be information that you would have obtained from your files and most likely from Mr. Carlyle-Gordge's notes or information from him or Mrs. Milgaard?

A I assume so, yes.

Q Go to 009476, and this is a letter March 20th, 1990 from Mrs. Milgaard directly to the Minister of Justice, and would you have been aware, Mr. Asper, around this time that both David Milgaard and Joyce Milgaard were sending their own communications to the Minister of Justice or to their department?

A I don't recall about this specifically, but we were not always aware of what Joyce and David was sending.

Q And so again the date here is March 20th and I think I showed you yesterday a letter that she wrote on March the 5th to the minister and goes on to talk about -- if we can go to the next page -- she writes:

> "A well respected forensic pathologist has interpreted the evidence in my son's case and concluded that the same evidence used to convict him, in fact, disproves his guilt."

And we touched on this back in February, or when you were testifying, and I think you told us that both David Milgaard and Joyce Milgaard put a great deal of weight in Ferris' opinion in that it proved David's innocence and that I think you said in and of itself you believed that should have re-opened the case. Is that correct?

A Yes. I mean, you have to put it in the context. At the time it was pretty much all we had.

Q And I think you said in the case of David Milgaard, that his view was, and I think we saw it in one of his letters, that with the Ferris opinion, that that should have sort of immediately allowed him to get out of jail because it proved -- in David Milgaard's mind that proved his

innocence; is that --

A Yeah, that's probably true.

Q And that was his -- and we'll see it in some later correspondence, I think he held that view and in fact may still hold that view today, that the Ferris report in and of itself should have re-opened the case and got him out of jail; would that be a fair -- is that your understanding of what David Milgaard thought?

A Oh, yes, yes.

Q And I think that the fact that nothing was done in his mind and Mrs. Milgaard's mind with respect to the Ferris report by the Department of Justice was one of the factors that caused them to grow impatient and to lose some faith in the justice system; is that fair?

A Yes.

Q And so here we see that Mrs. Milgaard has recited that Ferris report as well and talks about:

> "The facts of the case itself as presented to the jury provided my son with an alibi, yet the Crown pressed on with evidence that police must have tailored to fit their theory of the murder."

And I think that deals with, we saw in some of the earlier documents the whole timing issue and where David was at the time.

A The last three lines are actually quite prophetic.

Q The --

A "The police must have tailored it to fit their theory of the murder," given what we later learned, but sure, that was Joyce's view.

Q And what did you later learn?

A The script document --

Q Okay.

A -- that was used to conduct the interrogations May 24th, 1969.

Q And that's the document that I think was provided, or you became aware of prior to the Supreme Court reference and was used at the Supreme Court reference?

A Yes.

Q And I'll go through that with you when we get to that stage, it's probably more appropriate to question you about that then. Then down at the bottom she says:

> "The officials in your department who are handling this case have not given me the slightest glimmer of hope. It has

been over a year now since my son's application was filed and there has been no indication or communication as to what has been done."

Next page. I think it says:

"I cannot --"

There's a whole punched there,

"I cannot stand by in the hope that the system which condemned my son will secretly help to free him. I'm afraid I have lost faith in the justice system."

And then down at the bottom she says:

"My trust in the system has been so shaken that I am forwarding the original statements from my investigative work to you directly with this letter."

And you had talked, I think on the opening day of your evidence, that at some point in the process, and I can't recall your words, but the rules changed or the game changed when you sort of lost confidence or lost faith in what the Justice Department was doing. Do you recall evidence to that effect?

A Yes.

Q Would -- and we had tried to identify a time

frame, and would it be fair to say that around this time, March 20th, at least according to Mrs. Milgaard, that she had, as stated in this letter, lost faith in the justice system, or it may well have been prior, but --

A Well, I think I said, and I would maintain that it was a slow build, but yes, we were -- this was reaching the boiling point.

Q And so again, and I know we've covered some of these, at this point, and again based on your observations and your dealings with Joyce and David Milgaard, this lost confidence or this lost faith in the system, would it be primarily related to the frustration they were experiencing with Federal Justice and the fact that they hadn't heard anything back on the Ferris and Hall information, the time frame, and that they did not believe things were being done properly and in a timely manner?

A Yes, and I think if you, if I may, if you look at the time period even up to the point of this letter that elapsed between the tip of Larry Fisher, the production of the CPIC information as to his record and what could have been very easily obtained by the Department of Justice in terms of

the location of the offences and the detail, not necessarily the very precise detail, but certainly the fact that the offences had been committed in Saskatoon could have been found out in a day or two days probably, and so -- and everything just took a long period of time and everything, everything did from the very beginning, and you are seeing mounting frustration in this letter.

Q Just back on that point, could have been found out, and we'll see later -- how do you think they could have found out?

A I think it could have been found out a number of ways. Number 1, Mr. Williams could have contacted, could have put, continued an examination of witnesses the Saskatchewan Justice Department had prosecuted or Saskatoon police officials, dug deeper into the Fisher matter and discovered very quickly that the offences occurred in Saskatoon. If the Department of Justice found that those offences had occurred in Saskatoon, within 24 hours of being provided the tip one would think naturally that it would have led to a path of inquiry that would have escalated the pace of this matter in terms of the Department of Justice and may have caused the Department of

Justice, although the minister ultimately refused our first application, it may not have changed the outcome, but it certainly would have provided the Milgaards and all of us making the application with the information on a faster basis and it would have come from the appropriate authority as opposed to us having to get it.

Q And we'll deal with that, I think it was July 4th when Carl Karp phoned Mr. Wolch, I think that's, at least from the documents, where that information first came to light, and we'll come back to this issue when we get to that point.

A I mean, it is truly, I'll just try to confine this to an observation, that it took from March until July for the media to find out where these offences had occurred.

Q And how did the media find out; do you know?

A I don't know. They investigated it.

Q And again as far as your efforts, I think we referred to the CPIC that indicated Regina being the place where he pled guilty and I think people assumed, and in hindsight incorrectly, that that's where the offences took place. Did you do any further, do you recall doing any further work on your own on that or did you rely on Justice?

A I don't recall, but, you know, Mr. Williams could have called Mr. Karst and asked him about it.

Q Okay. So we'll come back to that, but at this point, March 20th, just again at this point, according to this letter, Mrs. Milgaard is saying I don't, I've lost faith in the system and I think I've lost faith in your department and I'm now sending everything to you directly rather than to rely on them, and I just want to make sure that we've heard the reasons for that or what was going on and I think you've told us, please correct me if I'm wrong, that it was the frustration of dealing with the Federal Department of Justice not getting feedback, not knowing why something hadn't been done with Ferris and Deborah Hall with the information to date that led to that.

A Yes. I think also it was just the fact that once again we, or she felt, rightly or wrongly, that with the Fisher information, that our efforts had to be employed in addition to whatever Sergeant Pearson was doing, and as I say, rightly or wrongly.

Q At this point though, on March 20th, I think what the record shows is that you've had at least two discussions, maybe three, with Sergeant Pearson

and you've been told that he's investigating and in fact by March 20th, although you may not have known this, he had already interviewed Linda Fisher, you may have known that from your discussion with him, so at this point is it fair to say, March 20th, that on the Fisher information things were happening, maybe not as -- I think you told us yesterday, not as quickly as you would like, but at least Sergeant Pearson was doing his best I think is what you said?

A I seem to recall a conversation with Joyce, and it was a very heated conversation at one point, where she says it only took them two days in Saskatoon to work over Nichol and Ron, how come they can't get it that fast from Fisher, meaning an admission, and that was her mindset.

Q Okay.

A And that was part of the frustration.

Q So on March 20th of 1990 then, are you able to tell us whether the Federal Justice's dealings with and reaction to the Fisher information, which would be about 20 days old, was that a factor as well are you able to tell us?

A Oh, sure.

Q I suppose Mrs. Milgaard can speak for herself on

that, but I'm looking for your observations, was what Federal Justice was doing with the Fisher information on March 20th, did that cause you to lose faith in the justice system or cause your clients to or your group to?

A Yes.

Q And what was it again at that time about what they were doing or not doing with the Fisher information other than what you've already told us?

A I think that Joyce and, as I say, I'm sympathetic with her view, but I didn't completely accept it because I understood that the process might take some time, the investigative process might take some time, but Joyce's view was that we had provided the Department of Justice with the information on Larry Fisher and she wanted a resolution to it instantly and just wasn't in a state of mind to be patient.

Q And I think you told us yesterday as well that her patience level may have been different in March of 1990 because she was already impatient for the previous 14 months; in other words, that had this information come about earlier on, she might have been more patient or allowed more time. Is that

fair, that --

A Yes, yes.

Q If we can go to 158345.

COMMISSIONER MacCALLUM: Excuse me. I'm not sure you answered the question, Mr. Asper. I think it was by March the 20th did Pearson's activities with Linda Fisher, or at least his activities with respect to the Larry Fisher investigation cause you to lose faith in the justice system. We know that it caused Mrs. Milgaard according to her own letter, but the question was did it cause you to lose faith at that point, and then I'm not sure -- you answered yes and then you seemed to qualify it by saying that she lost faith. Which is it? Both?

A No. I still, remarkably I still had faith in the system.

COMMISSIONER MacCALLUM: All right.

A At that point.

BY MR. HODSON:

Q 158345 is a March 26th letter to Paul Henderson and --

A Sorry, and I want to qualify that, because I do want to, for the record, and I hope I'm doing it, the dealings with Sergeant Pearson were really a

ray of light in the whole process in what had been quite icy between us and the Department of Justice. Dealing with Sergeant Pearson gave me hope.

COMMISSIONER MacCALLUM: So you had faith in Pearson?

A Yes.

COMMISSIONER MacCALLUM: Okay.

BY MR. HODSON:

Q And this is a letter, March 26th, 1990, to Paul Henderson, and it's sending a draft, what it says:

> "Enclosed herewith is a draft of the brief that was originally contemplated as comprising the application ... that was written before the report of Dr. Ferris, and was never sent to Ottawa. Nonetheless, it provides a relatively detailed analysis of the facts, as well as the theory of the prosecution. I can appreciate that it is in draft form, but hope that you will be able to get the gist of the argument."

And then statements of Linda Fisher. And March 26th would have been a couple of weeks after Paul Henderson first became involved and went to

interview Linda Fisher and this, I think what Mr. Henderson's evidence was, that you had sent him this information to assist him in briefing him for the next, I think for the next round of interviews, or it was given to him and he certainly used it to sort of inform himself of the facts, and I just want to confirm, if we could call up 157552, and I went through this with you earlier, this is the cover page. Maybe just go to the next page. And this is -- how many pages is this document?

MS. KARA ISABELLE (DOCUMENT ASSISTANT): 72.

BY MR. HODSON:

Q It's a 72-page brief, and I think this is one that you told us that you drafted I think in the latter part of 1986 based on what you had, and I think Mr. Henderson said, yeah, this is the brief that he received from you, and I just -- does that sound right, that you would have sent him sort of the -- the -- your letter says you sent him one that wasn't filed with Ottawa and your brief before Ferris, and this appears to be the only one that we have, and it's the one that he says he got?

A I think so, yes, I think that's the one.

Q 157062. So, again, this is now March 26th, 1990, a letter from Mr. Williams to you, and you'll note that he acknowledges Mrs. Milgaard has sent a video, and I think the video, I don't know that I have identified it but I think it related to interviews of David Milgaard, and it may well have been media clips, it's not a video of a re-enactment or anything like that, at least to my knowledge. But then he goes on to say:

> "I am also writing to determine whether there are any further submissions to be made on behalf of David Milgaard ...",

and:

> "... please submit them on or before April 12, 1990 so that a decision can be made ...".

And, again, we saw this, this type of letter earlier, I think we saw one in January saying "okay, here's two weeks, we're gonna" -- and I think what you told us is that you believed that this was a signal that they were going to complete their report, send it up -- 'they' being the Department of Justice or Mr. Williams -- and send it up the line to the Minister; is that

right?

A Yes.

Q And so at this time, again, do you recall whether you had any reaction or any concerns about this letter at this time?

A I just -- I don't recall a specific reaction, I -- as I look at it, I, my best guess would be bewilderment --

Q And can you --

A -- at the paragraph "do you have anything else".

Q And could you elaborate on that?

A Umm, we were in the middle of an investigation being conducted by Sergeant Pearson, and we had provided the identity of potentially the true killer, and it seemed to me, and it looks from this letter, that Mr. Williams or his superiors are applying a deadline where the investigation really had only just begun. My reaction in seeing this letter is -- now, I think, reflects what it would have been at the time.

Q If we can go 162388. And this is March 27th, I'm not sure who Mr. Alan Aitken is, he may have been -- do you recall? I don't think anything turns on it, just there's some statements in here I want to ask you about; do you remember who?

A I don't recall.

Q And it may well have been someone who just inquired about some information. But in any event this is March 27th, I want to ask you, you say in the letter:

> "In brief, the Crown's case rested on three major foundations:"

And:

> "2) The evidence of experts who claimed that semen samples found at the scene of the crime belonged to David Milgaard."

And we talked a bit about this yesterday, I think you said that was your understanding of the Crown's theory, but what experts or what did you understand the experts' evidence to be at the original trial, and did you understand it to be that the semen belonged to David Milgaard?

A Oh no, the expert of Staff Sergeant Paynter was as Mr. Tallis had hoped, but the Crown's theory, and the Crown attempted to have an interpretation by Mr. Paynter of that evidence that would have, umm, inculpated David.

Q Okay. But as far as the evidence of experts who claimed that semen samples found at the scene belonged to David, were there -- did you

understand that there was expert evidence that said "in my opinion, the semen sample belongs to David Milgaard"?

A No. I think, to be fair, that paragraph misstates what I just said.

Q Okay. And so what your understanding was at the time, can you just --

A No, but the understanding clearly was that Staff Sergeant Paynter provided evidence that, in a linear sense, excluded David as the perpetrator. Mr. Caldwell attempted to provide an explanation or to elicit from the witness an explanation as to how David might be included that was ultimately rejected by -- umm, that the presiding judge didn't allow him to go down that path, although the jury heard it.

Q Okay. So just on that, I guess if -- if your understanding was that Paynter said, "okay, it excludes David Milgaard because I can't find any blood in the sample, my test doesn't show that", you say Mr. Caldwell then tried to put blood there to say -- so that it would include David, --

A Right.

Q -- not eliminate him, and the judge says, "no", and we've looked at that passage on a number of

occasions, saying, "there is no evidence of any blood". I guess my question was what was your understanding and how did that, then, link the semen sample to David Milgaard in light of what you just said, being the judge's comment and Staff Sergeant Paynter's?

A It didn't.

Q Okay. So what -- what was it? We have seen in some of the correspondence and certainly in the application your position being, lookit, the Crown theory was and the evidence was that this semen sample belonged to David Milgaard. If what you say about Paynter --

A Well the indication of tendering evidence of a semen sample at a trial is that the perpetrator of the crime left the semen sample. Staff Sergeant Paynter didn't provide Mr. Caldwell with what he needed in a linear sense, as I say, and so the only way for it to tie -- to be tied to David was to find the explanation that a drop of blood was in the semen --

Q You --

A -- based on the evidence at the time.

Q But based on that, one view might be -- and I'd like your response to this -- that the evidence at

trial actually exculpated, exonerated Mr. -- was exculpatory, because what Staff Sergeant Paynter said is, "David is a non-secretor, there is no blood in the sample", and the judge says, "don't go down there, there is no blood", and I think Mr. Tallis told us in his closing address to the jury he said, "the semen sample exonerates my client", and so what is your response to that? Because in some of your materials you seem to be taking a different view, that that evidence was that -- that linked David Milgaard to the crime?

A Well Mr. Caldwell as I say, and I don't recall the length of the exchange, he certainly tried to tie it to David. And I think you have to look at the evidence from the perspective of a juror. Why is that evidence there? If it excludes David, why didn't the Crown say so, why didn't the Crown -- why was the Crown trying to tie it to him if it was exculpatory?

Q I think what -- and, again, one position that has been put forward was that it wasn't to tie him but it was to say, "lookit, it doesn't exclude him", which is maybe saying the same thing, that -- and I think in his closing address to the jury, the closing addresses to the jury, Mr. Caldwell says,

"it's neutral, it doesn't implicate him but it doesn't exculpate him", and Tallis, Mr. Tallis says, "no, it exculpates him". And, again, just going back to try and get -- because the Ferris report and the Markesteyn report says, "lookit, the semen sample doesn't link David Milgaard to the crime", and I think you put it forward to the Federal Minister saying, "lookit, this is new evidence, what was used to convict him doesn't convict him", and I guess that's the question. What was your understanding of the basis of your belief that the semen sample was used to convict David Milgaard, to link him to the crime?

A Well, that it was tendered by the Crown, and that the Crown's theory was that in order for the antigens to be present in the semen sample, David must have bled into it.

COMMISSIONER MacCALLUM: I understand that was your under -- that was what you believed from the Crown's tactics, if I can call them that, but the problem here is that I think you've already admitted that this was a misstatement, "the evidence of experts who claimed that the semen samples"; the experts never said anything like that?

A That's correct.

COMMISSIONER MacCALLUM: That's right.

A That's a misstatement.

COMMISSIONER MacCALLUM: That's a misstatement.

BY MR. HODSON:

Q But, again, I think what Mr. Tallis told us at the end of the trial he wanted the semen sample in because it was exculpatory, and he argued that in front of the jury, as opposed to it being used to convict him he -- his view was that it was in primarily because he wanted it in, and it was used to exculpate, and I'm trying to figure out --

A Well, but Mr. Hodson, if he -- either the evidence at the trial exculpates Mr. Milgaard or it has -- or it inculpates him, or it has no value.

Q Right.

A Okay. Umm, Mr., Mr. Caldwell attempted, in my opinion as from a reading of the evidence, to im -- to inculpate, to use it to establish, because it's a matter of common sense, you have a sex crime and a murder and semen and a perpetrator, and we want to tie them together.

Q Okay. And so that was his effort, and I think you told us that it didn't work because Staff Sergeant

Paynter said "no" and the trial judge said "no"?

A Well, not only did it not work, it was exculpatory, and his position was not that it was exculpatory, that it was neutral.

Q Okay. And I guess what I am trying to understand is, in light of that, you -- can you explain how your position was, then, in the first application that the semen -- that the frozen semen was used to convict David Milgaard and to link him to the crime? That's -- I appreciate what you are saying and I'm just trying to understand what your thinking was, at the time, as to how you arrived at that conclusion?

A My thinking was that the jury is sitting listening to the case of a horrendous murder, a piece of evidence is tendered, it's confusing probably to the jury, it's confusing to all of us, and that it's reasonable to assume that people might misconstrue the value of that evidence.

Q Okay. So is it, let me put it to you this way and see if you agree; that even though Mr. Caldwell's effort was to have evidence that there was blood in the semen and therefore not exclude David, even though that didn't succeed because of Staff Sergeant Paynter's evidence and the trial judge

saying so, your view was that the jury may have still construed this as being David Milgaard's? And, again, I --

A Yes.

Q -- don't think any of us know what the jury were thinking at the time, but was your conclusion based on the fact, based on your reading of the transcript, that 'I think that the jury might have thought that this frozen, or that this semen belonged to David Milgaard'?

A Yes.

Q Based on your reading, and not notwithstanding Paynter's evidence and the judge's comments, you still held the view that the jury might have thought that it was connected to him?

A Yes.

Q Is that fair?

A Yes.

Q Okay.

COMMISSIONER MacCALLUM: But just a minute. You didn't know anything about the judge's comments, did you, at the time?

A I think we had the charge, yes.

COMMISSIONER MacCALLUM: Oh, okay.

A I'm talking about the judge's comments during the

trial.

COMMISSIONER MacCALLUM: Oh yeah, I'm sorry, what you didn't have was Caldwell's summing up?

A Right.

COMMISSIONER MacCALLUM: Okay.

BY MR. HODSON:

Q Yeah, and I think the charge to the jury was silent on this issue. Certainly, in the course of Mr. Paynter's evidence, the judge made some statements about the blood issue; I think that's what you are referring to?

A Well, I mean yes, I mean Mr. Caldwell continued to question Mr. Paynter on the assumption that there was blood in the sample, and Justice Bence interrupted him several times --

Q Right.

A -- and said "wait a minute, there is no evidence of blood".

Q Okay. And I think, and we'll see some documents later, that suggest that certainly at this time that what you would have had and what your review would have been is the trial transcript and Mr. Caldwell's opening address, but not his closing address, and not Mr. Tallis' closing address?

A Right.
Q Okay. And the judge's charge to the jury, which was silent on the issue?
A Right.
Q So if we could go to 056761. This is, again, part of -- just for the record, when I referred to Mr. Pearson's notes, the doc. ID is 056743, we'll see this is page 19 of that. So this is now March 28th, 1990, and Mr. Pearson says you called him wanting to know what he had come up with, and Sergeant Pearson told you that:

> "... new information was being pursued ... contact had been made with the Saskatoon City Police, Larry's former boss, and that Mr. Williams had been in Saskatoon."

And, again, would that be -- any reason to dispute that comment?
A No.
Q 010045. This is an April 2nd letter from you to Mr. Williams, and you'll recall the March 26th letter I showed you was the one that said 'give us your final submissions by I think April 12th or within two weeks', and if we can just go down to this part here you say:

"Since the filing of our original application in December of 1988, we have also acquired information which we believe establishes the identity of the true killer of Gail Miller."

At this point again, and yesterday, you expressed your own concern about at least publicly identifying someone else as the perpetrator of the crime. At this point it, it appears that your belief is, "lookit, that Larry Fisher is the perpetrator of the crime", is that a fair reading of this letter?

A Well I want to, I want to -- I mean I think you've got to go further down in the letter, --

Q Sure, that's --

A -- in the paragraph, because it's a little contradictory.

Q Yeah, I'm sorry, let me read the paragraph.

A Yeah, it's a little contradictory, because I mean further down the paragraph I make reference to the type A secretor issue that may exclude him as well.

Q Okay. Let me just go through that. You say:

"We're not privy to the results of your investigation into Larry Fisher, but

based upon what we do know, we are satisfied that he is the culprit. If it is discovered that Mr. Fisher is a Type A secretor, then we're all the more convinced. If he is not a Type A secretor, then he might very well be as innocent as Mr. Milgaard. However, the fact that Mr. Fisher was in the midst of a spree of rapes and other violent crimes at the time that Gail Miller was murdered, coupled with other circumstantial evidence, certainly raises strong suspicion--the likelihood of there being two violent rapists in the same home in Saskatoon on the morning that a nurse was murdered one block away from that home is difficult to accept."

So, again, would that -- would that accurately --

A I think I'm trying to say there is a lot of smoke here, we may not have the burning fire but there is a lot of smoke here.

Q And is it fair to say that the secretor evidence might exclude him but, apart from that, you have the belief that he is the likely killer; is that

fair?

A Yes, yes.

Q So by this time at least in your mind, April of 1990, would it be fair to say that, lookit, you're -- and I appreciate that you are not the judge and jury, but that unless something else comes forward, you have pretty strong feelings that he's the culprit; is that fair?

A Yes, I'm -- you know, I think it's fair to say that our thinking, my thinking fairly evolved. Some people got to it faster than me. But when you start, as we started to think about just the odds and the probabilities, I guess -- I guess I became firmer in my thinking.

Q If we can go to 162387. This is an April 6th memorandum to the file from you, and there is a comment here where you spoke with Jim McCloskey on April 4th, and it says:

> "He urged that we not go public and start attacking the Department of Justice until giving them a fair opportunity to investigate. However, he said that if we could wait no longer, he would be prepared to come to Canada with Henderson and get involved."

And am I right that "a fair opportunity to investigate"; would that be related to Larry Fisher?

A Yes.

Q And can you elaborate or tell us what brought this discussion about, and any more than what's in the file memorandum?

A Umm, I was probably, it seems to me that we were probably talking about tactics and McCloskey was urging patience.

Q And when you say 'tactics', was one of the potential tactics going public with the information about Larry Fisher, not only that he was a suspect but naming him, and basically what happened at the end of June 1990, that type of thing?

A I have to assume that that would have been the subject matter of the conversation.

Q And it appears here that Mr. McCloskey was saying "no, wait, let them, let them investigate"?

A Yes.

Q And would you be consulting Mr. McCloskey because of his expertise in this area of work or --

A Yes.

Q And --

COMMISSIONER MacCALLUM: What was the doc. ID, I'm sorry?

MR. HODSON: Oh, I'm sorry, it's 162387.

COMMISSIONER MacCALLUM: Thank you.

BY MR. HODSON:

Q And did you end up taking his advice on this or did -- can you tell us what impact or influence, if any, Mr. McCloskey's advice had on your tactics?

A Umm, I took his advice, I was prepared to allow the investigation to continue.

Q And then, at some point, did your thoughts change on --

A Well, I don't recall when we started our contact with the media to conduct what I would call the covert investigation, where the media -- and it was, I believe, the CBC and *The Globe and Mail* -- much as it bothers me to say that but, umm, on a personal level -- umm, that had resource, had offered the resources, and we provided them with information, and I don't -- I -- it must have been around this time because it took them some time to do their investigation. So I think we took McCloskey's advice at a public -- in terms of the public, --

Q Okay.
A -- but we were doing some other things quietly.
Q Let me just follow up on that. So, and we'll see some documents later, but around this time, whether it's April or May of 1990, at some point you decided to, I think your words were, to get the media to assist in some covert investigation of Larry Fisher; is that right?
A Yes.
Q And so *The Globe and Mail*, I think you said, and the CBC?
A Yes.
Q And the CBC; would that have been Carl Karp and Cecil Rosner?
A Yes.
Q And *The Globe and Mail* would have been Dave Roberts and Tim Appleby?
A Yes.
Q And so what would you -- what information would you give from them and what would you ask them to do?
A I think, as I recall, I don't recall the specific meetings but I think we probably provided them with a copy of the CPIC, or at least a transcript of what was on the CPIC information sheet, and

probably the Linda Fisher statements, whatever I -- probably whatever we had at the time.

Q And so any information you had at that time related to Larry Fisher. What about Peter Carlyle-Gordge's notes about what was on the police files; is that something you think you would have provided?

A I, I suspect we did, but I don't recall specifically.

Q And would it be a simple case of, "here, we think Larry Fisher is the real killer, here is some information, go out and investigate and see what you can find to assist us in establishing that"?

A I'm not sure that we would have given them the conclusion the way you did at the beginning.

Q Okay.

A I, umm, I think we said, "we have received this information, this looks very fishy to say the least, why don't you take this information and see where it leads".

Q And were you not prepared to let Sergeant Pearson do that same thing?

A Umm, yes, we were.

Q And -- but, well, let me ask it a different way, were you -- it sounds like you were not prepared

to rely solely on Sergeant Pearson's investigation work?

A That's true.

Q And why was that?

A Because, umm, the Milgaards were not content to rely on it.

Q And so then it's given to the media, am I to understand, so that the media might be able to find out facts or information that Mr. Pearson could not?

A Yes. I think that, and as I recall, it may have been Mrs. Milgaard who actually initiated the first contact with the media on the Fisher investigation -- on the Fisher investigation side. But I think the theory was that if, umm, if there was pressure on the RCMP because they were aware that there was pressure coming from an outside investigative source, that that might make things happen faster.

Q So again, back to a bit of a parallel to what you told us about yesterday, would this be -- and maybe "tactic" is the wrong word, maybe it's the right word -- but this would be an effort the purpose of which would be (a) to uncover some information, but (b) to put pressure on the

investigators and the authorities to try and get a favourable result on David's request to re-open; is that fair?

A Yes.

Q And so that if Mr. Pearson knew that the media was watching over his shoulder, that that might influence him to do a quicker job, a better job, things of that nature; would that have been one of the purposes?

A That was the theory anyway.

Q Theory. And did that happen?

A No. As I recall, it, it adversely affected what he was trying to do. Umm, umm, the unnamed publicity, the publicity which did not name Fisher, as I recall, somehow got into the institution where Fisher was residing and put him on, put him on guard, and as I recall it became difficult for Sergeant Pearson to establish the kind of rapport that I think he wanted to try to establish for his -- the purpose of questioning Fisher.

Q And so was it your understanding that these, these covert efforts, then, actually impeded the work that Mr. Pearson was trying to do with Mr. Fisher?

A That was my understanding.

Q Now just back on the --

A Now I didn't know that, I discovered that after the fact, --

Q Okay.

A -- I was not knowing that contemporaneously.

Q So the theory going in was that this may help, and ultimately are you saying that it not only didn't help, but it may have actually hurt what the authorities were doing on the investigation; is that --

A Yes.

Q And when you went to the media, you talked about this yesterday a bit, was there some -- and I'm afraid I don't understand how they operate, but this 'off the record', what prevented *The Globe and Mail* and the CBC, from the day they met with Mrs. Milgaard, running a story (a) they're looking at someone else, and (b) here's who he is, and was there some agreement that "lookit, you can't, you've got to embargo this or you can't run with it", can you elaborate on that?

A To be honest, I do not recall the exact conversations, but -- umm, and I don't even recall if I had them or if Mrs. Milgaard had them, frankly, but typically what one would say is you

would provide information on a background or off-the-record basis, and on an embargoed basis in this case, umm, for the purpose of conducting an investigation, investigative journalism, the product of which would be determined.

Q So that you'd give them the seed, if they could go develop it whatever they developed they could do what they wished, but they couldn't come back and say "Joyce Milgaard told me X, Y, and Z"; is that the --

A That's true, but there may also have been an embargo on the outcome, give them the seed and whatever they develop can't be used unless certain conditions are satisfied.

Q And are you aware that there was some type of conditions put in place at the time, are you familiar with what --

A I -- I'm pretty sure there were conditions.

Q And the reason I raise that is we'll see in June, when the CBC report does break, I think you contacted Mr. MacFarlane, and I think your words were to the effect that, lookit, it was out of your control, and even though you didn't want it publicized, it was being publicized, and I got the impression that, lookit, we opened the door

because we gave them the information, but at some point we lost the control of it not being published; is that a fair characterization of what you --

A Well, I don't want to -- I really don't have a detailed recollection as to whether there was, there were terms, umm, on the use of the information. I don't recall.

Q Okay. Maybe when we get to, I think there is a letter in June from you to I think Mr. MacFarlane on this, and maybe we'll come back to this issue. So again, as far as this covert media operation, did you -- would you have told Sergeant Pearson about this?

A I don't recall.

Q And then, again, let's just go back to this memo where we're talking about --

A Now I will say, I will say that I treated -- Sergeant Pearson was, as far as I was aware was focusing on Fisher and the people around him, the Pambruns and Linda Fisher. This, the media investigation, was more of a background, as I understood it, looking into Fisher's past activities.

Q And some of his victims as well?

A Well, I think that came later, but I'm not sure.
Q Okay. So let's just go back to this memo, and about I think you said you took Mr. McCloskey's advice not to go public for reasons stated, and then you told us that there was this media operation underway. Ultimately in June, or actually in May of 1990, I think around May 10th or thereabouts, John Harvard raised the subject in the House of Commons, and based on some documents I'll show you later it looks like he was not supposed to do that, is that fair, that you had -- that you did not want him to do that or had asked him not to do it but he did; is that fair?
A Yes, that's true.
Q And so that the story of another suspect got out through Mr. Harvard, and did you or Mrs. Milgaard tell Mr. Harvard about this and that's where he got the information, is that right?
A Yeah, we were, we were -- I'm -- we were keeping a number of people abreast of what was happening, but --
Q And I think in Mr. Harvard's questioning -- and we'll see it in a moment -- if I'm not mistaken, I think he attributes his source of information to be either you or the Milgaards or something; is

that fair?
A Yes.
Q And so the fact that there was a parallel investigation came out in May, and would that have been unplanned in the sense that you did not want it to come out, but it came out?
A I think that's true, yes.
Q Was there a difference, a different view between you and Mrs. Milgaard as to whether this information should come out?
A There was certain -- yes. I don't know if it existed -- well, certainly I did not want the information out at that point.
Q Did Mrs. Milgaard to your knowledge want it out?
A I don't recall if it was then or at other times, but there were differences of opinions, absolutely.
Q And there was some suggestion in the documents that she wanted the information to go out and you didn't and you were trying to convince her not to go public?
A Well, then I would rely on those documents.
Q Well, in fairness, there's different times and we'll go through them, but does that -- do you have any recollection of that?

A As I say, I don't recall that specific moment.
Q Okay.
A There were moments where we debated that issue.
Q Okay. Now -- so the second -- so the first disclosure is that there's another investigation, the second disclosure comes in June, on June 21, 1990 when the CBC says not only is there another investigation, but here's who the suspect is and here are his previous crimes, or some information on that, and again, was that an unplanned disclosure as well, in other words, something that you did not want out that came out?
A I think that's true, yes, I did not want it out because I remember that I was quite floored by it.
Q And is it fair to say that you didn't want it out based in part on your discussions with Mr. McCloskey and as well your discussions with Mr. Pearson, that lookit, disclosing, A, the fact that there's another suspect, and B, who it is, might impede his work?
A Yes. It was sort of the betrayal of the conversation with Pearson that concerned me.
Q And is it fair to say that I think you said when Mr. Harvard made it public, that the source of his information was from you?

A Yes.

Q Or from your group?

A Yes.

Q And when the CBC made it public, is it fair to say that at least the initial source of information was from you or Mrs. Milgaard?

A Yes.

Q Go to 010041, this is now April -- sorry, 010044. This is April 9th, 1990 and this is just a memo from Mr. Williams to the file and this is where Mr. Wolch is asking about Fisher's blood type and then he says:

> "He also wanted to alert me to the fact that there will be further media coverage of the Milgaard application. In the past Mr. Wolch's advice to me that he was having trouble keeping the lid on this file, occurred the day before another news item on the Milgaard case appeared in Winnipeg or Saskatoon."

And then in the next paragraph it talks about:

> "... I spoke with John Maddigan who advised me that Dan Lett of the Winnipeg Free Press had contacted him concerning a story which is slated to appear on

April 10, 1990."

And at this time can you tell us, Mr. Asper, you talked yesterday about your objectives in communicating information through the media, that one of them, one of the objectives was to put pressure on the authorities to provide a favourable response to the re-opening request; is that correct?

A Yes.

Q So again at this time would April 9th, and I think the record shows that there are more and more media reports about the matter, would things have been, I think the words are, heating up at this time in the media?

A Yes.

Q And again, are you able to tell us whether, and again this is a call between Mr. Wolch and Mr. Williams, but would this be one of the purposes of the call, to say lookit, the media is on this and is going to be pressure on you, so A, act quickly, and B, act favourably, that that's --

A Yes.

Q If we can then go to 159873, and this is the next day, April 10th, and this is a story by Dan Lett, can you tell us -- we see a lot of stories from

Dan Lett in the database and in the record. Can you just give us a quick and general overview of Mr. Lett's involvement in this matter as it relates to what you told us yesterday about communicating information through the media to the public to influence authorities?

A I'm not sure how we originally met Dan. I think possibly Joyce had established a relationship with him by the time he had, by the time she had retained our firm. After that Dan, we provided Dan with copies of all the trial transcripts and invited him to read the material and invited him to follow along what we were trying to do and to reach his own conclusions as to what we were doing and the merit of what we were doing and he did.

Q And when you had occasions where you had some information that you wanted to get out in the public domain for the purposes of influencing the authorities, would Dan Lett be a resource that you would often go to?

A I'll just be quite candid in saying that Dan served value insofar as the *Winnipeg Free Press* was concerned and making it a local issue. When we decided that we needed to get Ottawa's attention, Ottawa didn't pay much attention to

what goes on in Winnipeg and so we decided that we needed to attract different media outlets and to, if we were going to make it a national issue, we needed to go beyond Dan and the *Winnipeg Free Press*.

Q And so I think the record shows you made efforts with Dave Roberts at *The Globe and Mail*, the *Toronto Star*, I think Peter Edwards, CBC National, CTV National; is that correct?

A Yes.

Q So let's just go back though to my question about Dan Lett though. Was he a person that, I think you told us, was familiar with the issues and I think wrote a number of stories, and if you had information, then would you go to him with, so lookit, here's a new piece of information, look at it and if you think it's worthy of a story run with it? If you wanted -- let me back up. If you wanted something in the media, and I think you told us yesterday you did, you wanted information to go into the media to influence authorities, and we'll see it later with the Ron Wilson recantation, for example, and tell us, what was your relationship with Dan Lett, was he one you could go to and say lookit, here's something, give

him an exclusive or here's something, go ahead and run with it?

A Yes, I could do that, but I don't want you to misunderstand the nature of the relationship with the media.

Q I want you to explain it to me.

A Well, the risk with the media is we have no control whatsoever as to the outcome of an approach to the media, so that if me or Joyce Milgaard or anyone went to Dan Lett and said here's a piece of information, you know, tell us what you think or here's the information, do a story, you have no idea what's going to come of that story, absolutely no idea, or control, and the risk with Dan Lett, with any other journalist, was that they might reach an adverse interpretation of what we were providing them and it can backfire, so yes, there was a relationship with Dan, that we provided Dan with information and we provided him on a favourable basis with information.

Q What do you mean by that?

A Well, Dan would get information on occasion that the *Winnipeg Sun* wouldn't, we wouldn't call the *Winnipeg Sun*, we would call Dan Lett.

Q And again, what would be the reason for that?
A Because the *Winnipeg Free Press* has a daily average readership of 123,000 and the *Winnipeg Sun* is 40,000.
Q So again, over the course of time, did you ever have a case backfire where something you gave to a reporter they ended up reporting something unfavourable to your position?
A Any case?
Q In this matter.
A I don't recall.
Q Okay.
A I don't recall that. As I say, we would provide Dan with information and I have to say his newspaper also, to their credit, gave him the time and resources to follow it and to take the time that they felt was necessary to evaluate the information that we were providing them.
Q And would it be fair to say that his articles were generally favourable to the position that you were putting forward to the minister?
A Yes.
Q Just one comment in here, and again this is April 10th, and what this talks about here is that the file has never been forwarded to the minister.

Actually, go back to the full page, please. And then Maddigan saying that the report from the Justice Department will not go to the minister until all the evidence is collected, and then it says:

> "However, Asper said he was personally assured by Justice Department investigators that Lewis had seen the Ferris report and other important details in January.
>
> "The Justice Department official told me: 'It's out of my hands now; the minister has it,'" Asper said. "Now, I hear it never made it to (Lewis's) in-basket. That's incredible."

Do you know who told you or what they told you?

A I don't recall.

MR. HODSON: This is probably an appropriate spot to break, Mr. Commissioner.

COMMISSIONER MacCALLUM: Okay.

(Adjourned at 10:26 a.m.)

(Reconvened at 10:52 a.m.)

BY MR. HODSON:

Q If I can call up 150566, please, this is a letter

April 17th, 1990 from Mr. Tallis to you and Mr. Wolch saying he has pursued inquiries and searches with respect to his old files pertaining to this matter and all that he had was a copy of the prelim hearing broken down into segments. I want to show you three documents, Mr. Asper, and see if you can assist us as to whether you saw them before or where they came from, and let me give you a bit of background. The first one is 153491 and this is a June 10th, 1969 memo to file and it's actually Mr. Tallis' memo to the file and there's three of them that I'll show you, and the evidence from Mr. Tallis is that he would have prepared many internal memorandum when he was preparing for the trial and I can't recall if he gave a number, but around 50 or a significant number that set forth his thoughts, he said those would have been on his file. We've heard evidence from Gary Young who was Joyce Milgaard's lawyer in 1980, '81 for a time period who actually requested Mr. Tallis' file which existed at the time and he was given an opportunity to review the file back then and I think Mrs. Milgaard had access to it. Mr. Young's evidence is that none of the internal memorandum, including the three I'm going to show

you, were on the file that he saw and there were some documents that suggested that internal memos were culled by Mr. Tallis' subsequent firm before they were given to them. Mr. Tallis testified that these memorandums would not have been provided to either David or Joyce Milgaard at the time because it was internal memorandums and I think he expressed, or he -- he didn't know how or where they would have come from, so I guess my question to you is do you know -- and they were documents the Commission received from Joyce Milgaard. Do you have any information or knowledge about whether or not any part of Mr. Tallis' file was part of the files you had an opportunity to look at or where these came from, and I can go through them with you if that would help.

A I don't recall seeing these.

Q Okay. And just for the record, this is the June 10th one and this is his very first meeting, he just talks about some of his efforts. The next one is 212231 and this is an August 20th, 1969 memo and when he takes a look at the site, so this is shortly after, this is right in the middle of the preliminary hearing and just his observations

about the site, and then the next one, 048305, is a September 8th memo detailing his meeting with Mr. Caldwell and reviewing the file and discussing witnesses and disclosure and we've only got the front page of that. Now, I do not believe that these documents were made part of the Supreme Court reference record. Do you have any -- as far as the three memos, do you recall seeing these before?

A No.

Q Is it a case of you might have seen them and you don't remember or you don't think you saw them?

A I don't recall. I don't recall seeing these.

Q Do you have a memory of -- I think you made efforts to find Mr. Tallis' file and these memorandums being his review at the time. Would they have been something that would have been significant to you in your work?

A Well, I don't recall seeing them, so I can't say if they would be significant.

Q Okay. And, I'm sorry, I'm just trying to get a sense of whether it's a case of I might have seen them and I simply don't remember or I don't think I saw them.

A I don't think I saw these.

Q Okay. And again do you have any information as to where or how these memorandums might have been obtained by Mrs. Milgaard or others?

A No.

Q On her behalf?

A No.

Q If we can go to 333378, and this is a memo from Mr. Corbett to John Maddigan at the minister's office and just before the break I brought up -- actually, if we can just go -- this refers to an article from the *Winnipeg Free Press*, it talks about continual delays, and if we can just go to the next page, this is the -- no, 333381, sorry, this is the article where we talked about the fact that the report had not gone to the minister, etcetera, so I touched on that.

Let's just go back to the memo. And this issue we see from time to time in the documents and let me just go through what Mr. Corbett is saying here. He says:

> "The "continual delays" referred to were occasioned by additional submissions by Mr. Walsh, another of Milgaard's lawyers. The most recent submission (February 28 and March 15, 1990) --"

And that would be the Larry Fisher tip and March 15th would be the Linda Fisher statement,

> "-- alleges that someone else committed the murder of Gail Miller. This obviously required investigation which is now taking place.
>
> I believe the press should be forcefully informed of the reasons for delay in this case."

I just want you to respond or comment on what the position of Federal Justice and/or the minister was from time to time on the issue of delay, that every time you gave them new information it delayed the process because they had to look at it and they couldn't complete their work until everything was in, and I think you expressed concern about that position from time to time. Can you just tell me your response to that?

A Well, yes, I was very frustrated by that response, but I think it again speaks to the fundamental disconnect that existed between our expectations of what would happen and the Department of Justice's expectations of what they were supposed to do. We expected the Department of Justice to be proactive, the Department of Justice was acting

reactively, and this, the comment you've referred to simply underlines again that problem.

Q And again was it a case, or it seems from the documents to be that you would want to give them further information as it became available that might assist you, every time you gave them some information they then would take more time to look at the information, so let me pause there. I take it when you gave them the Fisher information, you expected that they would follow up on it?

A Yes.

Q So it would take some time and it might otherwise delay the process?

A Yes.

Q And their Federal Justice position back to you seemed to be lookit, every time we're ready to deal with it, we get another piece of information, and not being critical of you for giving new information, but basically saying every time you do that we're going to take longer. Did you take issue with that response?

A Yes. Well, I didn't take issue with the response, I mean, that was the response. I think we were very frustrated with the length of time it was apparently taking given that there was basically

no, no communication with us as to what they were actually doing. It was very frustrating being told, well, it's just going to take longer, you've given us more information, it's going to take longer, but we're not going to tell you what we're doing, we're not going to tell you where we're headed or what interpretations we're placing on the information you provided us.

Q And did that happen on the October 1, 1990 meeting?

A Yes.

Q And so that would have been the response, here are our views?

A Yes.

Q And were those views favourable?

A But remember, by that time we had faced at least a couple of, you know, deadlines, give us all you've got because we're wrapping up our investigation.

Q And so again let's go back, what we know the minister said in her letter of February 27th of '91 is, with respect to Dr. Ferris' report and Deborah Hall, what if the minister, what if Eugene Williams would have called you up on January 2nd, 1989 and said I've read the Ferris report, it's wrong, here are the following reasons, it doesn't

help you, it actually hurts you and I'm going to interview Deborah Hall tomorrow, she's amplified what she said and this doesn't help you at all, just so you know. What if anything would you have done different?

A Well, I think at least, you know, we would have known and been able to react to it. I don't know, I can't say what we would have done, but at least we would have known and been able to move on.

Q And try to get other information?

A Absolutely.

Q If we can go to 333384, please, and this is an April 20th memorandum of Eugene Williams to his file of a conversation with you and we've touched on some of this subject earlier, he says:

> "David Asper called today to find out whether there were any developments in this investigation and to advise that Mrs. Joyce Milgaard was returning from her European trip sooner than anticipated. He also said that he had learned that Joyce Milgaard had told members of the press (in Saskatchewan or Manitoba I assume) details of the alleged involvement of Larry Fisher in

the death of Gail Miller.

He expressed some concerns about the impact, if any, that those revelations may have on the outcome of our investigation and upon Mr. Milgaard's application. He indicated also that his firm preferred that those allegations be kept confidential until they could be thoroughly investigated. He expressed some concerns about the risk of defamatory libel that the public airing of these concerns could attract."

And let me just pause there. I'll go through the rest of the memo with you, but would that be an accurate recording of what you would have said to Mr. Williams?

A Yes, I think so.

Q And again I think it suggests here that around April 20th, that you had learned that your client had told members of the press details of the involvement of Larry Fisher and so around this time, this would be the, I think you called it the covert operation of the media; is that what you are talking about here?

A I believe so, yes.

Q And that you indicate to Mr. Williams that you and your firm have some concerns and I guess one read of that is that you disagreed with the disclosure of the information to the media for reasons stated; is that right?

A I think that's a fair interpretation. I can't be definitive on my view there. I was very worried I can tell you.

Q I'm sorry?

A I was very concerned.

Q And why was that?

A Because it was such a sensitive moment, it was the precipice of everything we had been working for.

Q And so what prompted you to tell Eugene Williams this?

A I don't know. I can't recall.

Q Did you trust him with this information?

A Well, we were trying to pressure, we were trying to get action and, you know, to keep the heat on.

Q Okay. Would this be communicated to him then, would one of the reasons you would tell him this would be to put some heat or pressure on him to give a favourable or a prompter response to your application?

A I think that may have been the implication, but I

think it was also in the spirit of telling him what was going on just as I was telling Sergeant Pearson that Mrs. Milgaard was frustrated and was going to do her own thing. I think there came a point -- I think I refer to her in the first part of this memorandum, I think she's -- yes, she's returning from her trip and I think there was, I recall having a conversation with Sergeant Pearson where I had to say to him, okay, she's coming back because she had been overseas and I said to Sergeant Pearson she's coming back and, you know, I don't know if I can hold her out of your way. I don't know if that was at this point or a different point, but I do recall that occurring, so I think the first part of this memorandum with Mr. Williams was in the spirit of just, of the same kind of conversation I had with Sergeant Pearson which was telling him what was going on on my end.

Q And then if we can go to 056763 which is Pearson's note --

A I mean, I want to tell you also, and I think you should know just sort of the whole psychology at this point, which starts to infuse, or everything becomes infused with the sense that we were

getting close to being successful and we all started to believe that we had hit the right path here and so communication levels I think improved a little bit on the one hand, the public campaign had been managed a little bit differently and we started to get a feeling that we were going to succeed.

Q Based on the Larry Fisher information?

A Yes.

Q And so when you say the public plan or whatever changed, were you scaling that back?

A Yes. The plan was or the theory was to allow the investigation to occur and run its course and with that information in hand we just couldn't believe that there would be any sort of an adverse conclusion.

Q And so the plan then was to hold back on the public pressure that you talked about earlier?

A That was plan A, yes. It didn't work, but that was plan A.

Q Okay. And why -- were you concerned that you would upset Justice officials in continuing with that? I don't understand -- explain why you would hold off?

A No, we were not concerned about upsetting Justice

officials, we were concerned about, at our law firm we were concerned about undermining what Sergeant Pearson was trying to do.

Q Okay. So here we have this --

A The slam dunk for us, the slam dunk was for Sergeant Pearson to get Fisher and to have Fisher confess to the crime, that was the slam dunk, and that's what we were looking at.

Q And when you say we, are you referring to you and your law firm or we being the Milgaard group?

A I was saying that to everybody in our group over and over and over again.

Q Okay. And would it be fair to say that maybe Mrs. Milgaard and some others had a different view?

A No, I think they agreed. I think we probably had a debate as to how that was going to happen.

Q Okay. If we can go just down to the bottom, this is April 20th, '90 and this is Pearson's note and it looks as though you called him the same day you called Mr. Williams. Go to the next page. And it looks as though Mr. Williams reported to him about the call with you and that Mrs. Milgaard is coming back from England and will be promoting publicity. And then paragraph 106, if we can scroll down:

"Asper called me, wanting to know what

was happening. All I could tell him was that I had contacted Fisher and that ongoing inquiries were being made. Asper wanted to know what Fisher had to say, however I told him I had no more to tell him at this time. Asper said he was relieved that contact had been made with Fisher because Mrs. Milgaard was coming home early from England and it is suspected that she is going to press ahead with the inaction of the Federal Justice Department on their Section 690 application and Asper stated he felt better knowing that Fisher may co-operate with us. I advised Mr. Asper that unnecessary publicity would possibly hamper the police investigation and that there is a certain danger in having Fisher's name become the subject of a press release, and this will have no positive effect on our inquiries. I explained to Mr. Asper that my role at this point is to find the truth and to gather evidence, not become embroiled in a press release, which in my opinion

would serve no one's interest at this time."

Now, again, would that be an accurate note of what Sergeant Pearson told you?

A Yes.

Q And did you agree with what he said?

A Yes.

Q And at this time, I think it was April 10th Sergeant Pearson had interviewed Mr. Fisher, so he was keeping you up to date with the fact that he had talked to Fisher; is that right?

A Yes.

Q And was he sharing all the details or -- the note indicates that he had no more to tell you, but were there indications like lookit, he hasn't confessed yet, or did you get that impression?

A At some point it may have been in this conversation. We expressed an understanding toward each other that he was going to be doing certain things and obtaining certain information that he wasn't going to tell me and the same was going to be true from my side and we understood that and we understood that where there was something that needed to be said it would be, and I don't know if it was this time or a different

time, but this, I don't think he told me any details about his conversation with Fisher.

Q And is it fair to say that you understood that because of what he was doing and who he was, as a police officer, that there were some things he could not share with you?

A Absolutely, and he fully, I'm confident that Sergeant Pearson understood how mightily I was cheering for him to get a confession.

Q If we can go to 112914 -- actually, the doc ID is 912912 -- and this is a letter, we're now April 26th, 1990, this is a letter to Eugene Williams with a memorandum that you have sent to Mr. Wolch which you say is fairly self-explanatory. 001817, if you can call that up, is a similar letter of the same date to Sergeant Pearson again enclosing a memorandum to Mr. Wolch. And if we can go to 112915, which is part of 112912, this is the memorandum. It's April 26th, 1990, so this is the memo that you send to Mr. Williams and Sergeant Pearson.

A This is the "she's back" memo.

Q The pardon me?

A The "she's back" memo.

Q Oh. It says:

"As you know, the Milgaards are becoming more and more anxious about David's fate. To that end, Mrs. Milgaard has now returned from England and is once again focusing her energy on David's case. The original reason for her return was that they were prepared to 'go public' with the entirety of the case in an effort to publicize their plight."

And would it be fair to say that "the entirety of the case"; that would be the Fisher information?

A Yes.

Q And not only him as a suspect, but naming him, is that fair?

A Yes.

Q And then:

"Joyce Milgaard ...",

or pardon me:

"Based on my most recent conversation with Sgt. Pearson, however, I have been able to dissuade them from doing anything at this point."

And would that be the conversation where Pearson told you "lookit, I've met with him, and I am

making progress or I am working on it"?

A Yes.

Q Would that be fair?

A Yes.

Q It says:

> "Joyce Milgaard contacted me on Thursday, April 26th, to advise that she had called Mr. O'Sullivan, who is the Warden at Prince Albert Penitentiary. According to Joyce, O'Sullivan concurs that she could very well be an 'Ace in the hole' for the investigator in terms of obtaining a confession from Larry Fisher. The Warden also indicated that he would be prepared to make any arrangements required to have Joyce attend at the prison."

Do I take it, from that, that Mrs. Milgaard was attempting to go to the prison and interview Larry Fisher on her own?

A Yes.

Q And did you have concerns about that?

A Yes.

Q And what were they?

A That it would undermine what Sergeant Pearson was

doing. I mean I have to say that we brainstormed that idea, among many others, as to what might move Mr. Fisher, but in the end I didn't agree with it.

Q And then you say:

"I have strongly cautioned Joyce that it would be contrary to our advice for her to get involved while the police investigation is under way. She has nevertheless asked that I communicate with Sgt. Pearson and advise him that she is available if he feels that her presence could be of some value. Both David and Joyce are prepared to respect the judgment of Sgt. Pearson in this matter, but they simply want him to know that they are prepared to do anything that might be of help. They also insist that I forward a copy of this memorandum to both Eugene Williams and Sgt. Pearson, and I will have done so by the time you read this."

So, again, would that be an accurate statement of their position?

A Yes.

Q So you had convinced them not to go, or her not to go and interview David Milgaard in jail --

A Larry Fisher.

Q Or, I'm sorry, you had convinced her not to go interview Larry Fisher in jail?

A McCloskey may have been the one that convinced her ultimately, yes.

Q And what --

A But she was convinced.

Q She was, Mrs. Milgaard was convinced, --

A Not to do it.

Q -- by Mr. McCloskey?

A Or Henderson, or a combination of all of us.

Q And you?

A Yes.

Q And do you recall what McCloskey's advice on the subject was?

A Umm, I think all the advice was don't do it.

Q And was it because it might undermine Sergeant Pearson's work?

A Yes.

Q And then:

"Finally, both Joyce and David have imposed a deadline of May 7, 1990. They are prepared at that time to go public,

regardless of the stage of the investigation, as they feel they can no longer wait for what to them seems to be an interminable process. They are very adamant about this, and are prepared to go forward over our advice to the contrary."

And, again, would that be accurate?

A Yes.

Q And so is it fair to say that May 7th they were going to go public, even though you and perhaps Centurion Ministries had said don't, they were gonna do it anyway?

A Yes.

Q And was this put forward to Williams and Pearson as pressure, do it quicker because if you don't we're gonna do something that you don't want us to do, and that might undermine what you are doing, and therefore do it quicker; is that --

A I think there was -- I think there was a part of that. I -- my view, Mr. Hodson, is that, umm, as I say, we had reached such a sensitive moment that, umm, umm, we were prepared to give them more slack and more respect than we had up until this point in the whole process, and that if in fact it

became public under the circumstances that was described by Mrs. Milgaard, we wanted them to know that that was happening because the Milgaards had decided it should happen, and not that it was our advice.

Q Okay. And when --

A We felt, and it was a real conflict, I mean it was a very difficult position to be in as counsel, because we felt at this point that we needed to maintain a, to the extent that we could, a working relationship with the RCMP, a working relationship with, as I say, to the extent possible with the Department of Justice, and to take instructions and act in the best interests of our client, and it became a real juggling act.

Q And as far as, I think what the record shows is that May 7th came and went and there was no public disclosure at that time; what happened to the deadline?

A I don't recall specifically.

Q Okay. What, what Sergeant Pearson testified to is that, umm, he had been in touch with Fisher, had interviewed Fisher, talked to him at least I think on April the 10th, Fisher then retained Legal Aid counsel, namely Stephen Carter, and that Stephen

Carter asked that all further communications be through Stephen Carter, and that Fisher then said he wanted to wait until I think some later -- he was delaying, I think, were Sergeant Pearson's words. Do you recall being informed of that information from time to time by Sergeant Pearson?

A I, I don't recall specifically, --

Q Yeah.

A -- but there was a point where Mr. Fisher was no longer available on the same basis.

Q Yeah. And I think there is a note of Sergeant Pearson where he actually told you, gave you the name of Mr. Fisher's lawyer, do you remember that, saying "here's who his lawyer is"?

A No, I don't recall specifically.

Q And do you have any reason to dispute his note and his evidence about that?

A No, I'm sure he told me.

Q And, in fact, I think what Sergeant Pearson said is that as a result, I think in part because of this deadline, he actually went and saw Fisher, I think through his lawyer, his lawyer said, "he is not available until after the deadline" but nonetheless he went anyway and talked to him without his lawyer knowing; were you aware of

that?

A I seem to recall that, yes.

Q And what do you recall about that?

A That there was, well, that there was one final attempt.

Q Yes.

A Pearson made one final attempt, and if that was it, then that's what I recall.

Q And did he tell you about that?

A I believe so, yes.

Q And I think his evidence, I don't know that his lawyer, I think his lawyer expressed concern about it, but were you aware that Sergeant Pearson was having trouble getting a chance to fully interview Larry Fisher, that he was delaying him a bit?

A I don't recall that specifically. I know he was, he was getting, I recall Sergeant Pearson sounding a little frustrated.

Q Okay. And I think it was actually in early July that Mr. Fisher was finally interviewed by Eugene Williams. Do you recall Mr. Pearson or Sergeant Pearson telling you that his efforts to interview Larry Fisher were, were a bit more difficult because Mr. Fisher was aware, and others inside the institution were aware, that he was identified

as a suspect in this murder?

A Umm, yeah, yes I do. I think I said, I think I had testified to that earlier, there was -- and that may have been early on in my discussions with Sergeant Pearson where he was worried about the publicity, and it may have been after the John Harvard moment in Question Period where, yes, he -- yeah, Fisher started, others in the prison started bugging or, you know, getting on Fisher about him being the suspect.

Q Okay.

A And I believe he had to go into isolation and he had to be managed differently in the prison than he had been. I think he was even moved at one point.

Q I think in the later 1990 he was moved out to British Columbia, yes. We can now go ahead, this is April, and I think May 7th this information wasn't disclosed. If you can just give me a moment here on the --

I now want to turn to mid-May when, if we can call up 220898, please. This is May 15th, and I think around -- this is just a, one of the reports, but there is a -- an encounter between Mrs. Milgaard and Kim Campbell, I think

around May 15th, it may in fact have been May 14th. And I think what the report suggests is that Mrs. Milgaard attempted to provide a copy of the Ferris report to her and Ms. -- the Minister indicated to her:

> "I'm sorry, but if you want your son to have a fair hearing, don't approach me personally, ...",
>
> "I'm sorry, but I want her son to have a hearing that will withstand scrutiny. I'm sorry."

And you are familiar with this event; correct?

A Yes.

Q Can you tell us, how did this come about, was it something that was planned in advance for this to happen or was it a spur of the moment thing, can you shed some light on that?

A It was, yes, it was planned in advance. Umm, it was, umm, an attempt at a photo op, a photo opportunity between Mrs. Milgaard and the Minister, and I think that Joyce believed that if she could speak directly to the Minister, she might -- that the Minister -- I think Joyce believed that the Minister was surrounded by officials who were filtering the information, umm,

I do recall that the Minister said that she -- I think she had said publicly that she doesn't pay much attention to the media, and Joyce decided that she would try to, because up to that point the only way that Joyce could communicate with the Minister was either through the application or via the media, that she could try communicate directly with the Minister, and the Minister was in Winnipeg at this point, and so that's what Joyce tried to do. The elevator opened up, the Minister walked out, and it became one of the turning points in the case.

Q And why is that?

A It catalyzed public opinion and got played over and over and over again and cast the Minister of Justice -- and I -- again, you know, it's one of the lucky things, but in the drama as this unfolded that moment made Kim Campbell into the evil empire and catalyzed public opinion. She then -- and I'll just, I'll just take a step ahead.

Q Okay.

A But that role that the Minister walked into, umm, was exacerbated with the rejection of the application in February, so the beginning of the

huge public outcry that occurred started with this moment that you are showing in this article.

Q And, again, was that -- was that part of the plan when Mrs. Milgaard went to see Ms. Campbell, is to get some, I think you said photo op, but something of value to use in your media campaign to influence the public and influence authorities?

A I don't think it's possible to plan what actually happened. It was impossible to plan the outcome that occurred.

Q And so let me just --

A This was, in theory, going to be David's mother going to meet with just, you know, seen with the Minister pleading her case.

Q There's some documents that suggest that media were contacted in advance saying, "you know, be here, be at this spot because Mrs. Milgaard is going to be there and is going to present this, and don't tell anybody because I don't want the Minister to find out, otherwise she might not come".

A Absolutely.

Q Is that correct?

A Oh, as I say, it was a photo opportunity, but it was designed -- the thinking was that it would be

a positive moment, that -- that Mrs. Milgaard would meet the Minister and actually say "help me".

Q And so --

A What happened, what happened was the Minister blew by her and created one of those moments that just get repeated over and over again, and creates an image.

Q And I take it your view that what happened was favourable to your cause and favourable to your efforts to re-open?

A Couldn't have asked for a better response from the Minister.

Q And so to go back, then, when this was being, umm, planned or staged or prepared for this to happen, was one of the outcomes you were looking for was to get a photo op that would put a favourable light on your position and an unfavourable light on the Minister's position?

A Absolutely not. I want to be -- I want to be totally clear here. At every step of the way, and it became -- and it occurred at a political level -- we began to communicate to the Minister, through intermediaries to the Minister suggesting that this could become a political problem, and we

wanted to help the Minister actually, and advised the Minister that the political problem could be avoided and the Minister could look like a hero by taking this ever-increasing controversy, getting it off her plate and having a Court grant a new hearing, irrespective of the outcome, the Minister looks like a hero. So we were not trying to put the Minister in a bad light.

Q So --

A We were trying to get the -- the Minister could look good.

Q So in other words, "Minister, your easy out here is, regardless about other factors, the easy out for you politically is send this to a Court, it's off your plate, and the Court can deal with it"?

A Absolutely.

Q But if the Court dealt with it in a reference case, it's advice that ultimately comes back to the Minister, correct?

A Yes.

Q So it's not off her plate completely?

A Well, except that the Minister's decision is then, would then be with the benefit of a judicial intervention.

Q And was that, then, one of your strategies, then,

to -- again we talk about the public pressure -- but to make it politically difficult for the Minister to reject your application and a political plus for her to grant it?

A Yes.

Q And that was -- would it be fair to say that your efforts with the media and this incident here would be one of those, a planned effort to try and further that cause, the objective of putting political pressure on the Minister to have a favourable decision?

A Sure. And I think you need to look at the difference in how -- there are two very distinct moments, TV moments, political moments. Look at the difference between how Minister Campbell handled her encounter with Mrs. Milgaard and how the Prime Minister, Prime Minister Mulroney, handled his encounter with Mrs. Milgaard. Vastly different.

Q Now, and I don't want to skip ahead because we'll deal with this subject in more detail later, but I think when the Minister, in February of 1991, rejected the application, and it was either then or perhaps in November of 1991 when she granted the second application, commented publicly that

"lookit, I can't base my decisions on whether an applicant gets media play or looks good in the media, that that's not the basis upon which I exercise my discretion and I will not be, and I cannot be, persuaded by how big a media machine an applicant can get going", and I'm paraphrasing that; do you recall those statements coming from her?

A Yes.

Q What, did you have any concerns that this effort might be counterproductive in the sense that she might not look favourably on the merits of your application because of the political pressure?

A Yes, I -- I was -- I suppose we were aware of that risk. Umm, but I -- again, look, I think you have to understand there was an arc to this story. It began as a small little story and a small little news item in a, in a very, umm, localized sense. Particularly after we got the Fisher information, this whole campaign took on totally different proportions, and I certainly felt highly emboldened, with the Fisher information, that we could fight and win a political battle against the Minister, and so I -- so whatever risk might have existed in our minds, umm, essentially dissipated

completely.

Q And let me just try and --

A And, sorry, I want to make -- because in -- you've asked questions regarding the role of publicity vis-a-vis officials in the Minister's office and in the Justice Department. I have to say that the media pressure, you know, may have been designed in some way to put a spotlight on what they were doing, but I do want to say that certainly when we get to this point, the sort of April-March of 1990, we were talking, we were trying to talk to the people, not the Justice officials, because we came to believe that our support and the pressure on the Minister was not going to come from inside, we knew that they were not on our side.

Q And again, though, the support of the people, as you say, the purpose of getting the support of the people would be to influence the authorities to re-open the investigation; is that fair?

A Yes.

Q To put pressure on them?

A Yes.

Q And is what you are --

A Yes. I mean at the political level, the people hire and fire these people at the political level,

and we wanted to have the political level consider that there may be consequences to ignoring us.

Q Okay. Can you elaborate on that; what do you mean "consequences"?

A Electoral consequences.

Q So in other words political, make it as difficult as possible, politically, for the Minister of Justice to turn down your application?

A Yes.

Q That was one of your goals?

A Bearing in mind that we believed we had the merits as well. This wasn't a, just a sort of a vacuous political campaign, we believed we had merit to our application, --

Q Yeah.

A -- were being ignored, and therefore we were going to mobilize the people, you know, in the general sense, get people across the country interested, and if, if we were treated badly by the Minister or by the government, that the people might exact consequences upon the politicians by un -- by not electing them.

Q Did you have any concern that your political campaign, if I can call it that, might have a negative effect or undermine the merits of your

legal campaign, if I can call it, in other words the merits of the actual information you put forward that formed the basis of the application, and were you ever concerned that when the Minister sat down to consider the merits of the case -- and we know on February 27th she got back to you and said "I don't accept the merits of what you put forward" -- but were you concerned that the political campaign might undermine what you were doing through Section 690? Do you understand where I'm going?

A Yes, and the answer is "no", I was not concerned.

Q If we can just, when we finish up then on this, and you mentioned that this thing was played, this incident was played over and over again; was it something, as well, that, after this event occurred, that you -- and when I say "you" being the Milgaard group -- used this photo op and this exchange later on in your efforts to get public support and put pressure on the politicians; is that --

A I don't actually think we had to use it. It became the definitive -- a definitive moment.

Q So, in other words, the media. Let me ask you this; did this moment, then, that you talk about

cause more media attention to the case?

A Without a doubt.

Q Let's just turn to Dr. Peter Markesteyn. And just going through chronologically, I'll deal with him in more detail when we get to his report, but his report is dated June 4th, 1990. And if we call up 155505, this appears to be when you first retain Dr. Markesteyn, and we've -- we have not yet heard from Dr. Markesteyn but he will be testifying before the Commission, we have certainly made reference to his reports, and he reviewed Dr. Ferris' report and the letter is fairly self-explanatory. Umm, you give him the same:

> "... materials with a view to offering your opinion on the report prepared by Dr. Ferris."

Why did you get Dr. Markesteyn, or not him specifically, but why did you go get another forensic pathologist to provide a report?

A Well, my recollection is that Dr. Markesteyn called us, but irrespective of who called whom we thought that, given that we hadn't heard anything from the Department of Justice -- and you've seen from the earlier correspondence that we were asking on numerous occasions "what's going on,

have you validated, have you looked at Dr. Ferris' report", didn't hear anything back from Ottawa in that respect -- that it would make sense that we'll do it for them.

Q And I think we touched on, yesterday or your previous evidence, the fact that when the *Fifth Estate* was going to run a story on the *David Milgaard* case at some point prior to this they declined, and there was a letter from, I think it may have actually been from David Milgaard, but it suggested that one of the reasons that the *Fifth Estate* didn't run the story is that they got their own expert in Toronto to review Dr. Ferris' report and either explicitly or implicitly said, "it's, it's either wrong or it doesn't help the cause"; do you recall that? Do you recall becoming aware that the CBC had done their own investigation and concluded that Ferris didn't help you?

A Right.

Q And was that -- did you provide that information to Eugene Williams?

A I don't know that we ever saw that information.

Q No. Well, you would have been aware from -- let me back up. Were you aware, '88-'89, in that time frame, from CBC, that one of the reasons they

weren't going to run the *Fifth Estate* was because they checked into your application materials, namely the Ferris report, they also interviewed Deborah Hall -- because we saw footage of that later -- but on the Dr. Ferris report I think the documents suggest that they had it checked and information, they had it checked and their expert said -- and I'm paraphrasing here -- but that "it's not favourable to your cause", and I think you said you would have been aware of that at the time?

A I think so, yeah.

Q And you may not have been aware of who the expert was or exactly what the expert said; is that fair?

A That's true.

Q But you were aware that another expert looked at Ferris for the CBC and said "either he is wrong or he's not favourable"; you would have been aware of that, is that correct?

A I think so, yes.

Q Yeah. And was that one of the reasons that prompted you to get Dr. Markesteyn?

A No. As I say, I have a feeling that Dr. Markesteyn called us and offered to assist --

Q Okay.

A -- out of the blue. I did, I was doing a lot of work with Dr. Markesteyn in my practice, he was the Chief Medical Examiner in Manitoba and I saw him routinely.

Q And so again, whether he called you or you called him, would it be fair to say one of the objectives would be to sort of bring the issue up again with Justice or give one further piece of information to them?

A Yes.

Q And would it be fair to say that, when you got the report from Dr. Markesteyn, that if you gave it to Federal Justice, that that would probably cause some further delay because they'd have to look at it, was that -- and the reason I say that, there's some reference in some of the documents at some point where you, I think it's a discussion with Mrs. Milgaard, say that, "lookit, every time we give them more information it takes longer and a catch 22, you know"?

A I don't recall. I -- at this point, umm, I don't recall precisely what was in my -- whether that was in my mind or not.

Q If we can go to 056767, please. This is Mr. Pearson's note, we're now May 4th of 1990, and

he -- Mr. Pearson gave us evidence on this, about a discussion he had with you, I can just read part of it. You called him saying you're concerned about David's problem with penitentiary staff, having difficulties, they're being cancelled, and having some trouble, David Milgaard is, with pen authorities, and then David apparently reacted badly after his last cancellation, and David:

> "Mr. Asper is going to see David on Monday. Asper really wanted me ...",

being Pearson:

> "... to talk with David to assure David that the system has not abandoned him and that his case is being examined. Asper will call me on Monday and update me ..."

And is that, would that be a fair recording of what was discussed with Sergeant Pearson?

A Yes.

Q And so did you go to him and say, "lookit, maybe, Pearson, you could go talk to David directly", and can you -- what was your thinking there?

A I don't know. I was probably just expressing, umm, umm, just sort of -- I was probably venting, actually.

Q And were you seeking, though, it looks -- it appears that you were seeking Sergeant Pearson's assistance to talk to David and give David some comfort that authorities were doing something?

A Yes, I may have hoped that he would do that, but it sounds to me like I was just completely not having a good day.

Q If we can then scroll down, there is a couple points here. You talk about you informed Sergeant Pearson about:

> "Audrey Bouton, a nurse, was assaulted approximately one month before the Miller assault, and the assailant at that time had a knife, possibly could have been Fisher."

Do you have any -- and just some background, Audrey Boutin, her married name was Audrey Odnokon, and there is a police report of February 3rd, '69 where she gave some information that a month earlier there was some suspicious activity. In any event, it was investigated by the police, I think Peter Carlyle-Gordge had a note of this on his file when he looked at Mr. Caldwell's file in '83, and I think it was followed up but nothing to connect it to Mr. Fisher, I think is

what the documents suggest. Do you have any recollection of anything beyond what's in this note, was this -- was this something you would have read in Peter Carlyle-Gordge's notes or document and passed on?

A I'm assuming so. I don't recall where I would have got that information.

Q And do you recall any discussion with Sergeant Pearson following up on this?

A On the Boutin matter?

Q Yes.

A Umm, I don't recall specifically.

Q Okay. And just for the record, we can quickly call them up, 009232, and this is the February 3rd police report, and I think we've been through this already with Sergeant Pearson, just the information from Audrey Odnokon -- I'm sorry, Odnokon was her maiden name -- about events in the alley, and then as well if we could call up 173869, this is Peter Carlyle-Gordge's notes from March of '83 when he looked at Mr. Caldwell's file and then he phoned this Audrey Boutin and got some information, and is it fair for us to assume that when you phoned Pearson, it would have been likely this information that Peter Carlyle-Gordge had

that would have been the source of your information?

A Yes, probably.

Q Would there have been any other source of information that you can think of where that might have come from?

A I don't -- I wouldn't know. I don't know.

Q And I think at this time, I don't believe you had copies of any Saskatoon City Police files did you?

A Well, I know we're going to get into that. I don't recall.

Q Okay. When you say we're going to get into that --

A Well, the whole issue of the Saskatoon police files I'm sure is a matter of interest.

Q Oh, I see.

A But I don't recall at this point having access to any files.

Q And then if we could just call up again 010056, and this is a document I showed to you earlier, it's an August 29th, '89 letter and I think I showed it to you back in February, your letter, and:

> "It has also come to our attention that there may have been reports of an

individual harassing or accosting nurses in the vicinity where Gail Miller was murdered in the days or weeks preceding the murder. Our information comes from Ms. Sandra Bartlett who is a researcher for C.B.C. in Regina. She indicated that she had reviewed the file of Mr. Caldwell who of course was the prosecutor in this case. Ms. Bartlett advises that she saw in the file either newspaper clippings or police incident reports showing that various other nurses had been accosted. Indeed, our information is that another nurse had actually been accosted by a knife-welding person but the attack was interrupted when the nurses boyfriend arrived ..."

And then you go on to say:

"We've attempted to locate this information by reviewing the Star-Phoenix in the time period including the weeks proceeding the murder of Gail Miller."

So certainly at this time, August 29th, I think

the review of the -- and if not earlier, a review of the newspapers had been done for this information; is that correct?

A Yeah, it looks like it, yes.

Q And so the December 14th, 1968 news article that talked about the actual rapes, I mean, was that -- I take it this was an attempted assault as opposed to a rape? I'm just trying to understand whether you connected this incident to the December 14th, '68 news article that talked about --

A No.

Q And is this, are you able to tell us whether the information in this letter is in fact the Audrey Boutin or Audrey Odnokon, is it the same piece of information?

A I can't say.

Q Now, let me just pause here because here you are writing -- this letter went to the minister instead of to Eugene Williams, but what you are saying is lookit, Sandra Bartlett, who is with the CBC, got a chance to look at Caldwell's file and she tells us that she saw something on Caldwell's file that might be relevant, and I think what we see, if we can call up 332490, this is on September 26 of 1989, this is Mr. Caldwell's note

that got a call from I think Eugene Williams and basically Mr. Williams asked Mr. Caldwell to review his file to see if he could identify what it is that you said Sandra Bartlett said was on his file, and my question is did you have any concern with Mr. Caldwell being deployed by Mr. Williams to follow up on your request to say lookit, we think there's something on his file that Sandra Bartlett saw that might be relevant?

A I find it astonishing that the Department of Justice would not have retrieved all of Mr. Caldwell's files and done this for themselves.

Q I'm sorry --

A And so yes, I do have a concern.

Q Sorry, federal or provincial?

A Federal Justice.

Q Okay, sorry.

A So yes, I do have a concern, I have a huge concern that the Federal Department of Justice would rely on the original prosecutor to assist them in the reinvestigation of the case and would be relying on the original prosecutor to provide evaluation or analysis of information that may or may not be in his file. Why wouldn't Mr. Williams look at the file for himself.

Q Okay. And so your view is what Mr. Williams should have done is got the entire prosecutor's file himself and done his own review as opposed to relying upon Mr. Caldwell to do it?

A Yes, and it places Mr. Caldwell in a potentially very difficult position.

COMMISSIONER MacCALLUM: What's the doc ID, please?

MR. HODSON: The doc ID is 332490.

COMMISSIONER MacCALLUM: Thank you.

BY MR. HODSON:

Q If we can go to 056771 and down at the bottom, again these are Mr. Pearson's notes, May 9th, '89, Pearson phoned you, indicated, you indicated to him that:

> "... David Milgaard had calmed down and there was no need to make any contact with David. I also explained to Asper that I had been to the P.A. Pen yesterday and made contact with Fisher, and that I would be seeing him again after the weekend of 19 May.
>
> Mrs. Asper --"

But I'm assuming that's a typo,

"Mr. Asper requested that I provide the

name of Larry's lawyer, which I did, with the request that no contact be made with him at this time as I wanted my dealings with Fisher to be as clean as possible."

Again, is that an accurate note, would that have -- do you recall that happening?

A Not specifically, but I'll accept the note as being accurate.

Q And 213579, this is David Milgaard's May 9th, 1990 letter directed to the minister and talks about:

"Your department will not disclose what action it has taken in regard to the conclusions of forensic expert ..."

And we've talked about this a bit, I think you've told us that you were frustrated yourself that you weren't getting any feedback from the Justice Department about the Ferris report and what did they make of it and it appears here that -- would you have passed that onto your client, David Milgaard, and said lookit, I haven't heard anything, I'm frustrated and conveyed those thoughts to him?

A Yes.

Q And so here, if we can go to the next page, what

David Milgaard says:

"In all likelihood, this report --"

And he's talking about the Ferris report --

"-- once validated will see me released."

And I think that's consistent with what you told us before, that that was David Milgaard's view, that this Ferris report was really the key that would open the door and let him out of jail?

A Yes.

Q If we can go to 056772 which is again part of the Pearson notes, and this is the, I think the first disclosure, so May 10th, 1990:

"I returned a telephone call to Mr. Asper, he expressed concern that Joyce Milgaard has released information to the press that the RCMP are investigating a suspect who is currently doing time in a Saskatchewan Penitentiary. Apparently Mrs. Milgaard has been talking with John Harvard, a member of Parliament, who raised certain questions with the Standing Justice Committee, who brought the Milgaard case up in the House of Commons. There are two parts to the

concerns raised by Harvard, (1) Why the Farris report has not been acted upon, and (2) What current inquiries are being made with Larry Fisher. According to Mr. Asper, Harvard was not to raise the issue of Fisher because he is under police investigation, however, it did seem that Harvard was to pursue the hold-up with the Justice Department so far as their action on the Farris report.

Mr. Asper also indicated that Joyce Milgaard had been in contact with Star Phoenix reporter Cam Fuller and that Fuller will soon be releasing a story on the details provided him by Mrs. Milgaard."

And let me just pause there. Again, would that be an accurate recording of what you told him?

A Yes.

Q And so it looks that on May 10th Mr. Harvard raised the issue in the house about an investigation and as well that Mrs. Milgaard had given the information. Is it fair to say that releasing a story of the details provided him by

Mrs. Milgaard, that the details would be the Larry Fisher information?

A I'm assuming that, but that doesn't sound correct actually. It doesn't sound -- I'm not sure that Cam would have been the source that Joyce would have employed.

Q And so it may have been just the fact of the investigation as opposed to the individual?

A Yes.

Q Or are you able to tell us?

A I can't tell you exactly what she might have discussed with Cam.

Q And then if we go to 212997, and this is a fax cover sheet, May 10th, 1990, and if we can go to page 213001, and this is where Mr. Harvard is questioning the minister and he says:

> "Just two or three more quick questions, Mr. Chairman. Madam Minister, the counsel for Mr. Milgaard tells me that the real killer has possibly been already identified. That the real killer is serving time in jail in Saskatchewan. That the RCMP have been appraised of this, in fact, the RCMP have interviewed this man twice. Can

you comment on that? What do you know about that?"

And would you be the counsel referred to by Mr. Harvard as the source of the information?

A I would assume so, yes.

Q And the fact that he had been interviewed twice would have been information that Mr. Pearson had given you?

A Yes.

Q And was the information that Mr. Pearson had given you about interviewing him twice, is that information that you wanted to be made public?

A No.

Q And why not?

A I treated it as highly sensitive information.

Q And why would you then have given that information to Mr. Harvard?

A Mr. Harvard was a member of parliament who had been briefed by Mrs. Milgaard and, as I recall, was very excited because they felt that there was a political gain to be made at Minister Campbell's expense and so I explained to Mr. Harvard in detail why exploiting the case at that moment could be harmful.

Q Okay. Are you telling us that in addition to

assisting you, that Mr. Harvard was in a position to be involved in this matter to his political advantage by -- he was an opposition MP at the time?

A Absolutely.

Q So his interest in this matter was that it could give him some political mileage, for lack of a better word?

A Oh, yes, and this exploded into the House of Commons in question period, I'm not sure if it was before or after this, but Mr. Harvard and others took full advantage of this case in the House of Commons on television for all to see.

Q And then if we go to 159870, this is a report by Dan Lett the next day about:

> "The RCMP are investigating a suspect they believe may be responsible ..."

And:

> "Winnipeg MP John Harvard told the Commons justice committee yesterday the investigation, which has been going on for the last two months, involves a man now serving time in the Saskatchewan federal penitentiary for rape and assault charges."

Would this -- are you able to tell us whether this information, and presumably the committee transcripts are public information, but would you or someone from the Milgaards have given the Harvard information to Mr. Lett, do you know, or would he have got that --

A No, I think that -- I think that John Douglas was the Ottawa bureau reporter for the *Free Press*.

Q And he's co-author or co --

A Yes, he shares the by-line, and I suspect he would have been following Mr. Harvard as a Winnipeg member of parliament in the justice committee.

Q And again, this information, in addition to you not wanting it to be disclosed by Mr. Harvard in parliament, is it fair to say you also did not want it reported in the media, this information?

A That's true.

Q 212951, here's a letter May 14th to Mr. Harvard saying:

> "Firstly, on behalf of the Milgaard family, let me express my thanks to you for raising the matter before the Commons Justice Committee on May 10th, 1990. As you know, this has been a very long and difficult process, and we truly

appreciate your confronting the Minister directly with the problem."

And again, was it your position that -- I thought you had told us that you didn't want him to raise the Fisher, or the second investigation matter. This letter, you appear to be thanking him for doing it. Can you elaborate on that?

A Well, I think that there were two parts to it and I think that's, I think it's reflected, I think it's in Sergeant Pearson's note, the delay was the main issue that we had and wanted to have raised. I think the -- I'm interpreting, but I think Mr. Harvard took the matter of delay to an extreme by trying to show the problem of or trying to illustrate the delay by suggesting, by using the police investigation as an example of what was going on. I had to keep everybody on side and I was not prepared at this point to cut Mr. Harvard loose even though I wasn't totally happy with what he had done.

Q Okay. So at this time you were not -- I mean, although you appreciated him bringing up the subject matter, your view was he went further than you had hoped or asked him to do?

A Way beyond.

Q And yet you still wanted to utilize his services down the road, so you didn't want to --

A Well, you have to imagine, you know, I mean, I don't want to get too philosophical here, but you have to act in the best interests of your client. Keeping everybody on side here was in the best interests of my client.

MR. HODSON: This is probably an appropriate spot to break for lunch.

(Adjourned at 11:58 a.m.)

(Reconvened at 1:31 p.m.)

BY MR. HODSON:

Q Mr. Asper, we were in mid May when we finished off 1990 and now I want to go into two, sort of two areas that followed, and I think May and June of 1990 were quite busy months. I think during May we've heard evidence that this is when, through May and June, up until June 21, 1990 when the Larry Fisher information broke in the media, so that was one of the areas that you were tending to. The other two were, number 1, Dr. Markesteyn and Dr. Merry, his report came June 4th and I think you were pursuing that, and the third one is the interviews of witnesses, and May 26th is when Dennis Cadrain was interviewed, June the 4th --

actually, the same day as Dr. Markesteyn's report Ron Wilson was interviewed and thereafter, so what I would like to do is rather than go through this area chronologically, I'm going to deal with Dr. Markesteyn first and then go through the witnesses and then we'll pick it back up towards the middle of June. If we can just go back to 155507, and this is a letter May 15th, 1990 from you to Dr. Markesteyn. I had shown you the May 1 letter which is the initial letter of instructions and it looks as though this is a follow-up and you are asking him in addition to reviewing Ferris' report, to offer an opinion if possible on whether the evidence tendered at the Milgaard -- presumably trial -- supports the Crown's theory of the case, and I think this related to the location of the body and things of that nature; is that correct?

A It looks to be, yes.

Q And I think in his report we'll see a bit later that he came back and said lookit, I can't answer that, I don't have enough information or I don't have enough time; is that right?

A I think so, yeah.

Q 039010 -- sorry, I think we've -- no, sorry, I

think we've touched on that, that's the article that talks about Mr. Harvard. If we can go to 169911, and this is May 25, 1990, a memo from you to Mr. Wolch, and you say:

> "In anticipation of the Markesteyn report I think you should be aware of the relevance of the blood-typing issue at the trial.
>
> Firstly, the prosecutor devoted four pages of transcript in his opening address to the evidence he expected to get from Staff Sgt. Paynter, who was the RCMP Serologist that ultimately gave the evidence about the secretor stuff."

And then:

> "... Paynter's evidence takes approximately fifty pages of the trial transcript."

You then go on and recite from the Court of Appeal and you say:

> "The bottom line is that the suggestion that this evidence did not play any kind of a meaningful role in the trial does not make sense. The Crown obviously thought it did, and so did the Court of

Appeal. The Crown successfully fit a square peg into a round hole."

I'm wondering where this -- you talk about the suggestion that the evidence did not play any kind of meaningful role. Where did that come from, what were you responding to; do you remember?

A No, I don't. It may have been something, a conversation with Federal Justice, but I'm not sure about that. By this point we were having, Mr. Wolch certainly was having conversations, general conversations with the senior officials about the case and the nature of the case and the evidence in the case and --

Q And when you say senior officials, who would that be?

A MacFarlane, Rutherford.

Q Corbett?

A I don't know if Corbett was part of it.

Q And Williams, Mr. Williams?

A He may have been involved. I don't know.

Q And so is it possible then at this stage that Mr. Wolch had received some feedback from senior justice officials to the effect that the evidence, being the frozen semen, did not play any

meaningful role in the trial and that what you were getting Dr. Markesteyn to do was to respond to what Federal Justice was, through senior officials through to Mr. Wolch, communicating about concerns?

A That seems to ring a bell, but I can't be absolutely certain about that, but it looks to be that we were responding to something.

Q So would it be fair to say that someone outside of your group raised an issue that lookit, this frozen semen didn't play any meaningful role in the trial?

A Yes.

Q And I take it in this memo you are expressing your view to the contrary because, as you told us earlier, you thought that it did; is that right?

A Yes, yes, very much so.

Q And you rely on the opening address of Mr. Caldwell, Paynter's evidence and thirdly the Court of Appeal; is that correct?

A Yes.

Q And then just again you talk about four pages of his opening address. If we could call up 210858 which is a lengthy document, and this is the transcript of the opening of the original trial in

1970. If we can go to 210899, and I think I've identified the four pages, I just want to go through, and again the opening address speaks for itself, Mr. Asper, it says what it says, but I think this, I just want to get your comment as to whether this is what you are referring to and relying upon. Mr. Caldwell says there will be a group of other experts who will testify from the crime lab and you will recall they received a goodly number of items and then talks about Paynter's evidence about what he found, and then if we can go to the fourth page of this, 210902, and again this is just where -- we've been through this before with Mr. Caldwell, so I won't read it all, but this part here Mr. Caldwell says -- he describes about the first test not looking for blood and then Paynter goes back and looks at it, he says:

> "The first time he hadn't looked for blood as such; the second time I expect he will testify that he did; and that when he looked for blood as such, using of course a different technique than that used to check for the antigens, that he got what he calls a positive

presumptive test for blood on the sample, which in our language means that he found a minute trace of blood as such in the sample. Now, the presence of blood is such - that is not talking about the broken down parts - in the sample would of course account for the presence of the antigens in the sample and would account for the presence of antigens in the sample of fluid of a non-secretor."

And again I take it, would that be part of what you were relying upon, Mr. Asper?

A For what?

Q I'm sorry, when you said that as far as the evidence, you were saying that the frozen semen was used to link Mr. Milgaard to the crime and was evidence at the trial.

A Yes.

Q And you said based upon the opening address of Mr. Caldwell, secondly, the evidence of Paynter, and third, the Court of Appeal?

A Right.

Q And so I'm just going through, you said --

A Yes, this is -- yes, this is what I'm referring

to.

Q And then on the next page, so what Mr. Caldwell says here is that Staff Sergeant Paynter did a test and found minute traces of blood that would explain why a non-secretor, explain why it could be from a non-secretor because there's blood in there?

A Well, we're not going to retry the case. I could go back to the other page and ask a bunch, or wonder aloud of certain things that Mr. Caldwell said there, but let's I guess proceed.

Q And I think, you know, and I've gone through, up until this point there's one other comment I want to put to you.

A Yes.

Q The earlier comments, I think, are referring to the test, and this is the part where he talks about the blood. Now I think your evidence and the evidence we heard from Mr. Paynter and Mr. Caldwell is that when Staff Sergeant Paynter gave his evidence he actually said, "there was a presumptive test for blood, it was positive, but that doesn't mean there was blood in there and I can't say there is."

A But that's actually at odds with --

Q That's at trial?

A That's at odds with the page you just showed me.

Q Okay. And so that's, I think, what you were referring to earlier?

A Yes.

Q Okay. So the opening address, and then what Staff Sergeant Paynter said at trial, if we could just go to the next page, here, and here is just, I think, the concluding part, or concluding part, this is opening address:

> "Now, as part of this picture incidentally I believe the evidence will indicate that Milgaard who gave the saliva sample was a non-secretor, so the finding of blood as such in the sample would not rule him out let us say as the donor of it if it were blood in there rather than items secreted."

And it goes on to say:

> "... I think the evidence will go along those lines."

I mean this is what his opening address was and this is what you construed as trying to put a square peg in a round hole?

A Yes. I mean, you know, the inverse is that if you

accepted the evidentiary, or evidence that the sample excluded David, if Mr. Caldwell were to accept that then one would have to ask whether he could think there was a reasonable likelihood of a conviction in the first place if the scientific evidence excluded the man he was trying to prosecute.

Q I think what Mr. Caldwell's evidence, at least before the Commission of Inquiry, is that as far as the sample was concerned, if there was blood in the sample, then it would be consistent with coming from a non-secretor, and the evidence seemed to suggest that, certainly from Mr. Tallis' perspective, that it was established that there was no blood in there either chemically, based on Staff Sergeant Paynter's test, and secondly no evidence that David Milgaard bled into his semen. So, from his perspective, I think Mr. Tallis' view was that it was exculpatory.

A Mr. Tallis' view.

Q Yes.

A But my problem has always been with Mr. Caldwell's view of that evidence, and my view has always been that it was thrown up against a wall and tried, and they tried to make it stick.

Q Yes. If we could then go to 169913. And with some reluctance I will enter into the issue of the dog urine, Mr. Asper, and Dr. Merry, who we did hear from. This is a memo of May 30th, 1990, and it looks as though you were contacted by a Dr. Merry, who was a hematopathologist at the Health Services Centre who was consulted by Dr. Markesteyn, and conducting tests which he believes will establish:

> "That human semen is not yellow in the snow, but rather either clear or white, and not visible to the human eye. This likely means that what the police officer found in the snow was urine, and probably urine from some kind of an animal. He believes that certain enzymes found in human urine will give rise to a positive test for human semen, as well as any testing for the presence of antigens."

And then:

> "Assuming that the samples were in fact human semen, there is no evidence whatever to establish the presence of blood, and in the absence of such, the

only conclusion was that the antigens were present in the semen by virtue of secretion, and therefore excludes Milgaard as the donor ...".

Again, that last point is similar to what Dr. Ferris said; correct?

A Yes.

Q The dog urine issue is a new one; correct?

A Yes.

Q Can you tell us, umm, elaborate on what your discussion was with Dr. Merry? He was, he was brought into the picture by Dr. Markesteyn; is that right?

A Yes.

Q And ultimately this got a fair bit of play in the media, didn't it, that this might be dog urine, or that it is? It went from it "might be", "could be", "probably", to "it is dog urine", would you agree with that, in the various stages? And I think in fact you, at least from what I have reviewed in the media, said a number of things, including that "it is dog urine", as opposed to "probably". Can you explain what your thoughts were at the time and how this fit into the re-opening?

A Umm, it's -- fell out of the blue. To be perfectly honest, it fell, completely fell out of the blue. It challenged a fundamental aspect, or at least what we felt was a fundamental aspect of the Crown's case, and I think, you know, in hindsight I really don't recall, umm, exactly what we were thinking at the time other than it probably had great publicity value in terms of continuing to discredit the evidence at the trial.

Q Okay. Apart from great publicity value, what about value as being information that might prove --

A Well, that's what I say.

Q -- to --

A To discredit the evidence tendered at the trial.

Q Okay. But you talked about publicity, let's talk about as far as scientific evidence that might convince the Justice Minister that this frozen sample is dog urine, and therefore might assist you in your efforts?

A We'll we had two very well-regarded scientists in Dr. Merry, as quirky as he may be, and Dr. Markesteyn who brought and drew into serious question the integrity of the evidence tendered at David 's trial, and that information was provided

to the Department of Justice.

Q And would the focus be, and let's just focus on the dog urine, the fact that it would be dog urine; would that be dependent upon the premise that the frozen semen was actually used to incriminate David Milgaard, in other words used to convict him?

A Well, Mr. Hodson, I know you and I have gone back and forth on this. I'm going to tell you I don't believe it's a premise, I believe that the evidence at the trial is clear and unequivocal that Mr. Caldwell believed that the sample was tendered for the purpose of linking David Milgaard to the murder.

Q Fair enough. Okay. Let's --

A There is no other reason for it being there.

Q So let's take that as the premise then.

A Okay.

Q And I appreciate your point on that. So by saying it's dog urine, then, you would undermine that evidence saying, "evidence used to convict David Milgaard was really dog urine and not his semen"?

A Yes.

Q Is that --

A Yes.

Q And so I guess the reason I asked the question is because Mr. Tallis, who testified here, he took a different approach and he said, "well, it wasn't used to convict him, in fact I tried to use it to exonerate him". And let me pose you this question. How, when you got this information on the dog urine saying, "okay, it might be dog urine, therefore of no value and shouldn't have been used to convict Mr. Milgaard", how did you rationalize that with Dr. Ferris who came and said, "the frozen semen actually exonerates David Milgaard, in fact if it is from the assailant it actually proves David didn't do it", so on the one hand one expert says "lookit, the frozen semen is from the killer and it's not David", now I've got a guy who says, "oh, that frozen stuff is dog urine", and did it not end up undermining Dr. Ferris' position that it exonerates, or was that a potential? Do you follow what I am --

A Oh, yeah, I follow it. It, yes, it was a potential, but I think at that point it was part of -- it's true that we may have undermined Dr. Ferris. At that point, umm, it was so -- we -- I think we were at the point of discrediting everything.

Q What was the, you talked about the publicity, was the fact of -- that it might be dog urine or it is dog urine, or whatever, did that have a certain value to you in the publicity area that you could use publicly to discredit the case, in other words that --

A Umm, I don't -- well, no, I don't think it was so much to discredit the case as it was to, again, try to motivate the public to put pressure on the politicians to give us a hearing.

Q And in your experience did the fact that it might be dog urine; was that something that interested the media?

A It was very sensational.

Q And maybe that was the right word I was looking for was 'sensational'. So was this something, when you got this information, that it was something that was sensational that would get out in the public, and it favoured your client; is that fair?

A Yes.

Q And now what about the -- were you concerned about proving that it was dog urine?

A I believe we asked for the testing to be done to -- in that regard, yes.

Q And the evidence that we've heard before the Commission, we haven't heard from Dr. Markesteyn yet but we -- if I can summarize it a bit this way, I think Dr. Markesteyn and even Dr. Merry said that first of all they relied upon that the first starting point to get them to the dog urine was because someone described it as a yellowish substance, and --

A Lieutenant Penkala did, yes.

Q And Penkala and Staff Sergeant, he actually described it as a clear or pale yellow, and doctor (sic) Paynter described it in his evidence as a pale yellow or yellowish, and doctor (sic) Paynter's evidence here was that you had to give it a colour, and I think he said it had that tinge.

The second thing that the Commission has heard is, I think that in the Markesteyn and Merry reports they say "well this test to prove that it's human, we're not sure if it's done", and Markesteyn said he phoned Paynter or phoned the lab person who said he didn't have his notes. Mr. Paynter has testified here saying "Markesteyn never called me, I do have my notes", and we have his notes, and he says, "yes, I did do

the test and I confirmed that it was human and it was not dog urine", and I think Dr. Merry -- and I'm not even going to try and summarize Dr. Merry's evidence -- umm, but I think we've heard some evidence to suggest that testing was done to exclude the possibility that it's dog urine. Were you -- did you follow up on any of that, or was that uppermost in your mind at the time, or was it sufficient for your purposes that it might be dog urine?

A Well, you know, I -- to be honest, at this point in time this was a side show in terms of the larger events that were going on, this was a side show, it became a circus and was a distraction.

Q And what do you mean by that, 'a side show' and 'a distraction'?

A Because the whole, as I say, the whole sensationalization of dog urine -- and of course I got caught up in it -- but it was a side show. We had Larry Fisher under investigation as well as other very much more important things under way.

Q But if the public were led to --

A Now --

Q Oh, I'm sorry?

A Sorry, and I'll just say that it served a purpose

in terms of the public, but in substantive terms I think it would be fair to say that there were other more important things on our mind.

Q And so, if the public were led to believe that evidence at David Milgaard's trial that was used to convict him was in fact dog urine, that would be something that would cause the public to have concerns about the justice system, is that fair, and the fairness of trial?

A Yes. I'm surprised to hear you say that I actually said definitively that it was dog urine, but the intention was certainly to raise the spectre that it might be.

Q The, there is a number of reports where you say it might be, and we may have the opportunity later, there is a video where I believe your words are that "it came from fido", was in the media report, and other --

A Well I think the full quote was, "the jury might have been interested to know that fido was also at the murder scene", if I'm not correct --

Q Well we --

A -- if I'm not mistaken.

Q Yeah, I'll find it for you a bit later.

A Something like that.

Q But I think, and on other occasions it was "possibly", "probably", "maybe", and it varied, and various people said different things, and all I'm saying is I don't want to go through all of the media quotes, but in there there was a range of statements from various people as to whether it was or wasn't. And would you agree, at least, that it was raised out there as a good possibility that this could have been dog urine?

A Sure.

Q And, again, would that, to the extent that the public believed that David Milgaard might have been convicted on the basis of dog urine, really on the thinking that the jury was led to believe that it was semen from David Milgaard when in fact it was dog urine, that had value with you in getting the public to say "something is wrong here"?

A Yes.

Q And as far as going to the Justice Department and saying, "here is a ground, here is a fact for the miscarriage of justice", can you tell us whether the significance of the dog urine issue was as prominent in the legal approach you took with the Minister, saying, "here, on the basis of the fact

that this is dog urine, there is a miscarriage of justice"? I'm trying to get some sense of whether this was more of a public relations ground or whether it was actually put forward to the Minister?

A Well I think it was put forward to the Minister but, as I say, there were other more -- what I certainly considered more substantive --

Q Okay. And I guess when you say, sorry, you put it forward to the Minister, my concern or my question then is, "okay, but you were saying Ferris proves his innocence", that was your front and centre of your first application, "this lump of frozen snow proves David Milgaard is innocent"; to then go to the Minister and say "and it is dog urine", I'm just trying to get you to --

A Well, if it is dog urine, it couldn't be David's either.

Q Okay. So --

A So they're equal, it would lead to the same conclusion.

Q And just --

A And I will just say that, as I say, there were more substantive issues that we were dealing with in -- evidentiary issues that we were dealing

with, or application-related issues, I should say. This had the effect, there is no question, of creating the sensationalism and laying blows, public relations blows, on the Department of Justice.

Q Okay.

A And we laid 'em as much as we could.

Q And, as well, the Saskatoon City Police, because they are the ones who gathered the evidence presumably?

A Collaterally, yes, yeah, of course.

Q And the RCMP, who did the lab work, presumably?

A Yes, collaterally.

Q Yeah. Just back on when you said it led to the same result, and let me just ask you this question because I'm not sure, I think with Dr. Ferris, with his opinion when he says "if it's uncontaminated and it's from the assailant it actually exonerates and proves that David didn't do it", I think that was your position, that it proves that he doesn't do it; if it's dog urine, it's simply taken out of the equation, right?

A Yes.

Q It doesn't prove that David didn't do it so it's -- would you agree that it was of less value

if it was dog urine than if it was semen that excluded him?

A I, well, I might argue that if it were dog urine and tendered by the Crown as semen, and shown to be dog urine, it might undermine the credibility of the Crown in the eyes of the jury.

Q Okay. But again, as far as proving that David didn't commit the crime, if it's dog urine it wouldn't have that same effect; is that fair?

A That's true, yes.

Q Whereas Dr. Ferris' opinion was, if accepted, that it did?

A That's true.

Q 002510. And this is a memo of Mr. Williams to the file, and it looks as though he had communication directly with Markesteyn to getting a copy of the report, and I'm just wondering how -- how that came about or whether you were aware of that?

A I'm sorry, say that again, ask that again?

Q Well, just, it looks from this memo, this is May 29th, --

A Yes.

Q -- this is before the report, and it looks like Dr. Markesteyn -- if we can go to the top of the memo -- that Mr. Williams and Dr. Markesteyn

talked, and I don't know who phoned who, but they talked about the report and Dr. Markesteyn said he would send a copy to Mr. Williams, and I was just wondering how it came about that Mr. Williams would be in touch with Dr. Markesteyn before the report came and whether that was something you had --

A I don't recall.

Q 333433. Again, this is just another memo May 31, 1990, and Markesteyn just says that, lookit, he's sending his report to you, and that Williams said he spoke to you, and you said you'd give him a copy as soon as you got it; is that correct?

A Yes.

Q 106948 is a June 1, 1990 letter from Dr. Merry, and I think this is where, the first written report, at least, about the dog urine. And he says:

> "... I do not believe that the possibility can be excluded that the frozen yellowish substance found near the body of the deceased was dog urine ...",

and then goes on to talk about the testing. And so would that be the genesis? This would be

the -- I mean you may have had an earlier phone call, but the idea that it might be dog urine, that came from either Dr. Merry or Dr. Markesteyn; is that correct?

A Yes. I think the night before or a couple of days before I had a phone call from one of the two doctors, umm, I recall the call because the doctor was very excited, umm, umm, screeching, "what's yellow in the snow, what's yellow in the snow", and then went on to tell me what their report was going to conclude, so I had heard where they were headed before this letter arrived.

Q And was that Dr. Merry or Dr. Markesteyn?

A I can't recall.

Q All right.

A I just can't recall.

Q Now they also go to talk about the test, and if we go to the next page, Dr. Merry says:

> "From the manner in which the test for secretor status was performed it is not possible to be certain if David Milgaard is a secretor or non-secretor of blood group A antigen."

And so this is June 1, 1990, and I think Dr. Ferris, I think his evidence before the

Commission was that when he gave his report in September of 1988, that he would have had communication I think either with you or with Mr. Wolch along the same lines, about questioning whether the secretor test done on David Milgaard was proper; do you remember that?

A I don't recall specifically, but that sounds familiar.

Q And so here, June 1, your expert says, "lookit, don't rely on the secretor test they did in 1969"; is that correct?

A Yes.

Q And did that cause you any concern?

A No. David had always been prepared to do whatever tests and, you know, submit to any tests that were required.

Q And did you consider having a secretor test done on David at this time, after Dr. Merry gave you the report saying, you know, "don't rely on the old one"; did you consider getting a secretor test done?

A I don't recall. I don't think so.

Q Okay. And why not?

A Don't recall. I --

Q If we can go to 155517.

A Maybe we ultimately did at the Supreme Court but I can't recall.

Q Right, and I'll get to that, --

A Okay.

Q -- and there is a few other documents that might assist your memory on that. 155517. And this is Dr. Markesteyn's report of June 4th, 1990, and he will be testifying in the next month or two, and we'll go through this in detail with him. Just a couple points. I think you ended up you provided to him the same information that you provided to Dr. Ferris, is that right, the same background information? I think that --

A Or more, yeah.

Q And what Dr. Ferris told us is that he did not get either Mr. Caldwell's closing address to the jury or Mr. Tallis' closing address to the jury; do you remember that, do you take any issue with that?

A I don't take any issue with it, no.

Q And if we can go to the next page. And, again, here is just the part where Dr. Markesteyn says, lookit, I can't, you asked me to comment on the Crown's theory, and he says:

> "Due to a restriction on my time, compounded by the lack of scale

drawings, ...",

he can't do it, declined your request.

Then to the next page, he talks about window of opportunity, and it looks as though you asked him to comment on the opinion of how long it would take to commit the assault, undress, alleged rape, partial redressing, etcetera. And I believe this would have been related to your position before the Minister that, lookit, there was not enough time, there was not enough of a window of opportunity. I think what you said to the Minister was, "look, he wasn't even there at the time, but worst-case scenario", I think were your words, "he would not have had enough time to do everything that was done to Gail Miller"; is that fair?

A Yes.

Q And would this be to get his opinion on that subject matter, how long it would take?

A I assume so, yes.

Q And then the next page, actually if we can skip ahead to 155522, and this is where we talk about the seminal stains, and he says:

"I share Dr. Ferris' concerns about the integrity and continuity of the samples

of the alleged semen which were recovered on February 4 ... at the scene.",

and then goes on to talk about it. So he raises the same concern as Ferris, saying, "lookit, I don't think this is of any value because it's contaminated"; is that correct?

A Yes.

Q And he then goes on to talk about that it may be of canine origin, and sort of ends up saying:

"We will never know."

And then, if we can scroll down, he actually talks about:

"In order to reach a firm scientific conclusion whether the semen retrieved from the snowbank four days after the assault was indeed human one needs to review the methodology used by the serologist at that time and thus one needs to review the notes that were made at that time."

And it goes on to say:

"I have been informed that the original notes ...",

by Paynter:

"... are no longer available."

And I think Staff Sergeant Paynter refuted that, but would you be relying on Dr. Markesteyn to be doing what he thought he needed to do on this?

A Yes.

Q And then, the next page, he says:

"If this was uncontaminated semen, then this semen cannot possibly be from Mr. Milgaard as he was stated to be an 'A, non-secretor'.",

and then goes on to emphasize the point you made earlier, the judge made it quite clear that there was no evidence to show blood. And then he ends up saying here:

"I must stress, however, my assumption that Mr. Milgaard is an A, non-secretor is based on the evidence submitted at the trial. This assumption could be subject to challenge. The determination of the non-secretor status of Mr. Milgaard, although perhaps acceptable at that time, would now no longer serve as proof of his non-secretor status."

And again, in giving this report to Justice -- and I had asked you this question a few minutes

ago -- were you concerned about Justice saying "well, hang on, both of your experts say David may be a secretor, don't rely on the tests before". So in putting forward the Dr. Ferris report and the Markesteyn report and the Merry report, to the extent that you are going down the path of saying, "the sample exonerates him because he's a non-secretor", how did you deal with the fact that two -- that actually all three of your experts, I think, said to you, "but we're not sure if he's a, we're assuming he's a non-secretor based on a test which we're now telling you may not be reliable"?

A Umm, we weren't saying that the test wasn't reliable, the experts questioned whether the test at the time was reliable.

Q Yes.

A Right.

Q No, but I think, yeah, I think what the experts were saying is that at the trial the experts said he was a non-secretor --

A Right.

Q -- but the experts said --

A The current, the new experts were questioning the validity of that test.

Q Yes, they just said --

A Yes.

Q -- it may not be right?

A Yes, that's correct.

Q And so my question was when you were putting it forward, because the Markesteyn report went to the Minister as did the Ferris as did the Merry, to say "okay" --

A Oh, I see what you are saying. At this point this was a -- this would surely have been of some concern, I think, earlier in the application process. Umm, at this point we believed we had the perpetrator of the crime in Larry Fisher, so it was of less concern.

Q Okay.

A Or of no concern.

Q And so that if the Justice Minister, which she ultimately did, said "look, you are assuming that he's a non-secretor, and initially we don't accept that, but even if we do" -- and we'll get to that in the letter, but that was one of the issues that came back in the response to the first application, didn't it, that "lookit, we don't accept that he's a non-secretor"?

A Right.

Q Next page. And, again, his conclusion was that:

> "... serological evidence at the trial failed to link ... Milgaard with the semen ...",

and:

> "If, to everyone's satisfaction, it was established that the origin of the yellowish patch was unadulterated, uncontaminated human semen, then the presence of the A-antigen in this specimen clearly, from a serological point of view, could not be Mr. Milgaard's."

Did you have any discussions with either Dr. Markesteyn or Dr. Merry around this time about, "lookit, do you really think it's dog urine, or how reliable is this, what further tests should we do?"

A Yes, there was discussion about this, and I believe it was my suggestion that they freeze human semen, that they actually conduct the test, or at least I was certainly -- there was certainly a conversation where that was discussed, because I wanted -- because I knew that it would -- that it had some explosive value, potentially, and I

didn't want it to be a frivolous finding.

Q If we can go to 336785. And Mr. Commissioner, this is the first of the, one of the new transcripts that were added, so parties will not find it on CaseVault yet, and this is tape 102. It says May 17th, I'm -- I'm speculating based on the contents that this is a discussion around June of 1990, and if we can go to page 336796, please. And this is a discussion between you and Mrs. Milgaard and perhaps, it says, Maureen Milgaard, and you're talking about Markesteyn's and Ferris' finding, umm, and 'that could be dynamite', so it may well be before the report is issued but in anticipation of it. I'm not sure it much matters. And you say, 'The problem is ideally, and you know, I talked about this with Hersh, what I would ideally like is for the evidence to be sound, for the integrity to be sound. What we've got now is Markesteyn saying this evidence is junk, this is not even evidence'. And at the bottom, 'Well we have now got', if we can go to the top right, 'No forensic evidence to link him to the scene of the crime and yet, you know, so now you've got to rethink the whole trial without that evidence, or having that evidence but

having it subject to cross-examination.'

And I think this touches on the issue that we talked about earlier, and is it correct that you are saying here, lookit, I'd rather have it to be uncontaminated because then it at least proves innocence as opposed to being contaminated, is that --

A Yes.

Q And then if we could just go to the next page, and this might just give us some assistance as to the time frame, it says, 'So you might as well wait and get this report from Markesteyn before even putting to Ferris about the other'.

And so would it be fair to say this would be a discussion, you would have heard from Dr. Markesteyn and Dr. Merry about what might be in the report about the dog urine, and is that --

A Yes.

Q -- a fair assumption?

A Yes.

Q And then if we can go to 337073, and for the record this is tape 147, this is a new tape, and I think --

COMMISSIONER MacCALLUM: Could I have the

doc. ID, please?

MR. HODSON: Oh, I'm sorry, it is 337073.

COMMISSIONER MacCALLUM: Thanks.

MR. HODSON: Tape 147.

BY MR. HODSON:

Q And I believe it is again around the same time, June of 1990, and if we can go to page 337094, and down at the bottom, and you say, 'By the way, as I'm going through this thing, Ferris has a blood sample from David', top right-hand corner, 'And we've got to get Ferris to confirm', you say, 'We've got to get Ferris to confirm that he is a secretor, a non-secretor'. 'On January 18, 1988 a blood sample was taken from him and sent to Ferris, what do you think, well of course Ferris is out of town now, yeah, he's on holidays or longer', and then Mrs. Milgaard, 'Well how come Justice has just interviewed him then?'

And I think the record shows that Mr. Williams interviewed him on June 12th of 1990, and so that's why I think this is around that date.

And then scroll down to the bottom right, and she says, 'Well I'm sure', you end up saying, 'Sorry, no, it was for the DNA

testing, he got it so he could extract genetic material'.

And just so you know, Mr. Asper, Dr. Ferris testified that he did take blood, but only for DNA, and that he didn't do a secretor test. And then you say -- Mrs. Milgaard says, 'Well I'm sure he must have tested the other two, wouldn't you think so', and you say, 'I don't know that that necessarily follows', and Mrs. Milgaard says, 'Well it would follow to me, if I had David Milgaard's blood sample there and I was going by the fact that he was a non-secretor and I was reading it in evidence, I would be checking it to make sure'. You say, 'One would think so then', and then, 'Well then I think the proper procedure would be to ask him'. You say, 'Yeah', and Mrs. Milgaard, 'Did you?', you say, 'Yeah', 'Okay, and if, I mean if they conclusively approve the other way, the point is another question I've often had is if you're once a secretor' and you say, 'Are you always a secretor?', 'Always a non-secretor, do you ever change?', you say, 'No, you don't, although what they're saying now is that', and Mrs. Milgaard, 'With the new technology', and then she says, 'I'm not so

concerned, I mean the way the Markesteyn report reads on that sample it doesn't matter', 'In any event it doesn't matter'. And then Mrs. Milgaard, 'But it would be a question you should ask him', 'I would agree', 'Okay', and you say, 'All right'. And I'm just wondering if you ever did follow up with Dr. Ferris, then, to get the secretor test done on David?

A I don't -- no, I don't think so.

Q His evidence is that he was not asked to do it.

A Yeah. I don't think so.

Q And then I guess the next question is why not.

A I don't know.

Q If we could then go to 157075, and this is the letter where you communicate Dr. Markesteyn's report to Mr. Williams and this is where you say, the report:

> "... goes further to suggest that the samples used to link David to the scene of the crime could well have been dog urine, which could have caused the results suggesting the presence of sperm and/or blood. Assuming that these samples were in fact semen, Dr. Markesteyn confirms that they could not

have come from David Milgaard."

And then here:

"There is a clear perception that it is only in response to public pressure that your Department seems to show any interest in this case. Moreover, the truth of the matter is that the Applicant has had to do all the work with virtually no resources available to him."

I'm just wondering if you can elaborate on that comment?

A No, I can't. We had done all the investigation as far as we were aware up to that point and the only time we got any response really from the Department of Justice was when we resorted to the public arena.

Q And I guess that's what -- if you could elaborate or give me some particulars, you say that it's only in response to public pressure that your department seems to show any interest in this case, whether you can recall, whether anything specifically you were referring to at the time. Are you able to --

A I can't recall anything specific.

Q But it was to the effect that whenever you made noise in the media, they did something; was that your perception?

A Yes.

Q If you can go to 229913, and this is June 6th of 1990, so this is two days after the report, and I think this is the *StarPhoenix*, the front page, "Key evidence in conviction called flawed," and I think the second paragraph:

> "Alleged semen found in the snow at the scene four days after the murder, which was linked to Milgaard, could have been contaminated by dog urine."

And then goes on to cite the report. It says:

> "... investigators failed to eliminate the possibility that the two yellowish frozen lumps were dog urine."

And then scroll down:

> "The evidence doesn't exclude it (as dog urine)," Markesteyn said from Winnipeg."

Presumably in an interview.

> "There are various sources of yellow stains in a snowbank."
>
> David Asper, Milgaard's lawyer, is more blunt about the report.

"It concludes that what Penkala found in the snow could very well be dog urine," said Asper."

And again, would that be an accurate -- do you have any reason to dispute that that's what you would have said?

A No.

Q And so at this point your position, at least publicly, was lookit, it could well have been or likely -- I'm sorry, it says could very well be dog urine?

A Yes.

Q And Markesteyn at least above seems to be saying --

A Well, that wasn't my conclusion, that was the conclusion of the report.

Q And if you can scroll to the right-hand side:

"The report "seriously eliminates the value of the forensic evidence," according to Asper."

And so again just at this time, and I know we've covered this, you are saying okay, this is, eliminates the value of the forensic evidence. Were you in effect, at least publicly, saying okay, well, Ferris, when Ferris says it

exonerates, were you sort of abandoning that pitch or were you going to try and run both horses?

A I think we were running both horses, absolutely, and in fact there was a third horse that got introduced to this which was the integrity of the gathering of the sample in the first place which we should have actually, I think in hindsight, played with a little bit more vigour.

Q And can you explain that?

A The fact that these samples weren't found until four days after the crime had been committed and that the scene had been extensively trampled and contaminated.

Q Is that something different than what Dr. Markesteyn and Ferris were saying, is lookit, they are contaminated because the scene was trampled?

A No, but Dr. Markesteyn raised that in his report and it was just another aspect that we really hadn't emphasized in my view, and certainly, one that certainly would tend to affect the credibility and the integrity of the samples in their entirety.

Q If we can then go to 159853, this is Mr. Lett on

June 6th, the same date, and a couple of quotes here, here's where Dr. Markesteyn says:

> "I was not convinced myself that enough was done to make sure that it was, indeed, human semen," the top coroner said. "I'm not saying it was dog urine; I'm saying how do you know it isn't? No tests were done to exclude urine."

And then down at the bottom Markesteyn said:

> "... the technology was available in 1969 to conclusively analyse the two yellowish spots, but the tests were never performed.
>
> Asper said after reading the Markesteyn report it seems entirely likely that his client was convicted partly on the basis of dog urine left in the snow after the murder."

And again, would that be an accurate recording of what you would have said at the time or your position at the time?

A I can't say that's an accurate recording. That's not in quotes.

Q Okay. And again, I think you said yesterday that you talked to the media a fair bit and you said

two things, one, I can't tell you what I said on a given occasion, and two, I may have said far more than what was printed?

A Yes.

Q Is that correct?

A Yes.

Q And I'm just wondering generally, what is attributed to you here, would this have been what you were thinking at the time or may have been saying at the time?

A Look, we keep coming back to this, but I'm just going to tell you my view of the evidence was that there were shaky witnesses in Wilson, John and Cadrain, there were latecomers to the party named Melnyk and Lapchuk. The other credible people who testified at David's trial provided evidence that did not link him to the crime and so the only thing of any potential scientific validity, whether it was science or not, was this semen sample, and my view was that it played a very significant role at the trial, and irrespective of the interpretation that either side tried to put on it, I read it as being important, and if you take away the unsavoury witnesses, that's all that's left, and if that piece of evidence is

either exculpatory or of so little value as to be worth nothing, then all you are left with is the unsavoury witnesses.

Q Right. And again, and I guess my question was is whether what's reported on June 6th, was that --

A And that's my thinking, yes, absolutely.

Q Yes.

A Absolutely, that was my thinking.

Q And so to the extent that it's dog urine, it serves its purpose either way, if it's dog urine or if it's uncontaminated semen, either way it does not connect David Milgaard to the crime?

A Well, if it's dog urine it serves a better purpose because it really undermines the credibility of the Crown.

Q Okay, let's just pursue that a bit. So the fact that it's dog urine, would your position then be lookit, suggesting that some type of misconduct took place, or was it just an error? I'm not sure what you mean by saying affecting the credibility of the Crown.

A If I was a juror and the Crown attorney was asking me to link and convict David Milgaard on the basis of what -- and the Crown was suggesting that this was semen and it were determined that it was

potentially dog urine, I would look with a jaundiced eye at everything else the Crown attorney was telling me.

Q Let's skip ahead though to the re-opening which is where this information comes out, in 1990.

A Right.

Q And I just want you to explain -- you said that the value of it being dog urine was in addition to that it wasn't a link, it also undermined the investigation, and my question was were you, did you see the fact that it might be dog urine or that it was dog urine as somehow tainting the rest of the investigation?

A Whose investigation?

Q The police investigation.

A The original investigation?

Q Yes.

A Potentially, yes.

Q And so that you might say to the public lookit, he was convicted on dog urine, you know, don't you think that that -- that if there's a problem there, there's a problem elsewhere. Do you follow?

A Yes.

Q Is that what you were --

A Yes.
Q -- alluding to?
A That was part of our theme overall, which was -- that was part of our theme overall.
Q And so again on the dog urine thing, one scenario could have been if it was dog urine, that there was some mistake in the lab or the testing, I hesitate to use the word innocent mistake, but something was mistaken along the way or something deliberate?
A Yes.
Q And what was your thinking on that issue?
A I wouldn't have had a view on what was in the mind of the offeror of the evidence, what was in my mind was that the evidence was such a mess that it was, that we were certainly justified at this point to go back and have a court look at it.
Q Okay. I'm sorry, maybe I didn't ask the question well.
A I wasn't ascribing motive to the Crown or to the police or to anybody else.
Q But was it a case of saying okay, you had already called into question the conduct of the police in the investigation prior to this time?
A Yes.

Q And the conduct of the prosecutor, that had already been called into question?

A I'm not sure about that.

Q Okay. But certainly the investigation, the work done?

A I know there's a quotation that has been referred to with earlier witnesses that purports to call into question the conduct of the Crown. I don't read it that way.

Q And, I'm sorry, I'm not sure what you are referring to.

A This is a quote, I believe it's a Dan Lett quote regarding the Wilson statement, the disclosure of the Wilson statement, where it's asserted that I alleged misconduct of the Crown in that circumstance.

Q Okay, and we'll get to that.

A Yeah.

Q But again, just back, let's talk about the police, was the fact that it might be dog urine, did that assist your position, at least in the public domain, of saying lookit, the police did not do a good job in this investigation, here's another component, and sort of have that impact?

A Yes.

Q If we can now turn to the interviews of witnesses, and again I want to talk about May of 1990, and it appears that at some point in May of 1990 a decision was made by your group, if I can call it that, and I mean you and Mr. Wolch and Mrs. Milgaard, David Milgaard and I think Paul Henderson and McCloskey, whoever was involved, but a decision was made to interview the three main Crown witnesses, Cadrain, John and Wilson; is that correct?

A Yes.

Q And I think as well the documents suggest maybe Melnyk and Lapchuk, although I don't think that happened until later, I think Paul Henderson or McCloskey said lookit, let's interview them as well?

A Yes.

Q And what prompted that decision, why May of 1990 that you had decided to go interview those witnesses?

A I guess by that point we had expected that it would have been done by the Department of Justice. We had provided them with the Fisher information and weren't satisfied with the pace with which it was being digested by the Department of Justice,

we were not getting to any sort of conclusion and we decided to just pull out all the stops, and we had abandoned any thought that Justice was going to work with us earlier and I guess I'm not sure why that particular time.

Q And I guess, and you may have touched on this earlier, but why the interviews wouldn't have been done before you filed your initial application?

A We thought that that's what Justice would do.

Q So you thought Justice would interview the three in May of 1990, you decided, okay, well, they hadn't or they weren't or whatever, now we're going to go do it; is that correct?

A Yes.

Q Now, as far as the application itself, I think the initial application raised issues, at least one of the grounds put forward is a miscarriage of justice was the Nichol John statement and we went through that and your initial letter said lookit, her statement wasn't evidence, we can prove that it's actually impossible, but we're not. Justice comes back and says give us what you've got and you respond saying okay, here's why her statement isn't valid, so the Nichol John statement, the May 24th statement was part of the application;

correct?

A Yes.

Q And it does not appear that there was anything explicit or express in the application to the minister that, at least at this time, May of '90, that said Albert Cadrain's evidence or Ron Wilson's evidence is a ground put forward as being a miscarriage of justice; is that fair?

A That's true.

Q So you hadn't said Justice, one of the grounds of our application is Cadrain had psychological problems and lied and Wilson lied, I mean, they weren't specifically there; is that fair?

A That's true.

Q And notwithstanding that, I think you've told us, maybe just confirm, that even though that wasn't part of the application expressly, you expected that Federal Justice would interview those people?

A Yes.

Q And can you just elaborate on why you thought that?

A It was my view that if the Department of Justice were interested in determining whether there had been a miscarriage of justice in David's case, it would take what I considered to be the very basic

steps of interviewing all of the witnesses or certainly the key witnesses, and that would have been Nichol, Ron and Albert and Melnyk and Lapchuk.

Q And again, I think we've heard evidence that Mrs. Milgaard had, and I think you indicated you had them as well, transcripts and tapes of interviews of all of these people, Melnyk, Lapchuk, Albert Cadrain, Nichol John and Ron Wilson that had been conducted in the early '80s. I asked you this question with respect to Nichol John, but with respect to those five witnesses, was there any reason that you did not provide those tapes and transcripts to the minister in December of 1988 when you filed your application, saying here's what they told us, do with it what you will?

A I don't recall why that decision was made.

Q And let's just talk generally, and I'll go through some documents with you, but what was your, again at this time we're going to go interview them and I think Paul Henderson ended up being the person chosen to go interview; is that correct?

A Yes.

Q What was your objective or what were you trying to get from these people?

A Well, in a perfect world we would have gotten clear and complete recantations of the incriminating evidence that they provided at the trial and in so doing an admission that they had lied.

Q And before Mr. Henderson went out to see Wilson, Cadrain and John, in your mind, Mr. Asper, had you concluded that they had lied at trial certainly with respect to the incriminating evidence?

A Yes.

Q And did you have any thoughts as to what had prompted them to lie?

A Yes.

Q And what were they?

A That the police had assisted them in their recollection of the events.

Q Assisted meaning what?

A I don't know necessarily. I wasn't prepared to make any kind of conclusions about the nature of the assistance, but somehow these people went from -- somehow these people went to incriminating David and if David didn't commit the crime, something helped them along the way.

Q Let's just talk a moment about Albert Cadrain for a moment. I think the critical part of his

evidence was his observation of what he thought was blood on David's pants; is that correct?

A Yes.

Q And had you given any thought that there might be an explanation of that evidence, that he could have been truthful and yet, and that be consistent with David not having committed the crime; namely, that he saw something that looked like blood, or that it was blood but completely unrelated to Gail Miller?

A No, because David always maintained that he did not have blood on his pants.

Q Okay.

A There was a, there was an explanation that at one point David had offered which was that in getting the battery for the car in Regina, he had spilled some battery acid on his clothes or something to that effect.

Q And again, just going into these interviews, and what we know from the record is that in 1981 Ron Wilson was interviewed twice by telephone by Joyce Milgaard and we've played the tape and saw the transcript and I think in those interviews -- you would have looked at those at some point did you?

A At some point, yes.

Q And I think I saw you describe them somewhere as being, he was very close to recanting at that point; is that --

A It looked like it, yeah.

Q That he was -- he looked favourable at that point?

A Looked like it, yeah.

Q And I think the Nichol John evidence, the interview with Tony Merchant and Mrs. Milgaard, you would have read that as well?

A At some point, yeah.

Q And I think in that interview we've read it and heard it as well, that she continued to say that I don't recall specifically that time frame, but I would have told the police the truth or something to that effect; is that fair?

A Yes.

Q That it wasn't favourable to your position; is that --

A Right.

Q And third, that the Albert Cadrain interview by Peter Carlyle-Gordge in 1983, which I think he stuck to his evidence at trial and was quite, I think, adamant about his evidence, and so that was not favourable; is that fair?

A Right.

Q So how did you -- you said in an ideal world you would get all three of them to recant, and how did you think that might happen?

A We tested a whole bunch of different approaches and I discussed this both with Joyce and with Paul Henderson as to how to approach these particular witnesses and in the end we left it to Paul, Paul Henderson to make the approach and to have the discussion and to try to give them an opportunity to come clean basically.

Q Did you give any thought to inviting either Eugene Williams or Sergeant Pearson to go with Mr. Henderson to participate in the interview, the initial interview?

A No.

Q And, sorry, I asked that question badly. You didn't consider. Was it something that you thought of and said no, we're not going to do that, or is it something that never came to mind?

A No, we did not consider that.

Q And again, was that something that you might have considered in hindsight or would you have -- if someone would have raised it at the time, lookit, let's get a police officer or someone from Federal Justice to come and be there in case we get

something good?

A We might have considered that, but I don't recall it.

Q I want to go through some of the documents that touch on this issue. The first one is 336785, is the doc ID, again this is tape 102 and I think it says May 17th, and go to page 336792, and down at the bottom, this is a discussion I think between you and Mrs. Milgaard about who you are going to get, and I'll just go through parts of this, but it's whether you get Paul Henderson, McCloskey or someone local, and Mrs. Milgaard says, 'Well, I have really given it a lot of thought and, like, Paul is not an impressive figure, as far as I'm concerned. I think that, with Jim, he would have been great by himself, like, my own assessment, and I'm being very truthful, David, is everything that I did up there I could have done on my own without Paul.'

And I think that's referring to the Linda Fisher interview; is that right?

A I don't know.

Q And did you have concerns about Paul Henderson after the Linda Fisher interviews? Do you remember anything about that?

A I don't recall having concerns about him, no.

Q And then the top right-hand page and as well there's some further discussion, Mrs. Milgaard says, 'The other concern that I have is that if we have him up, like, I realize Jim is going to pay him, but my thought was that if we got someone in Saskatoon maybe they would have better connections, like, in finding people and everything there.'

And it would appear that one of the issues discussed was do we get someone local or do we bring in Paul, or bring in Centurion Ministries?

A Right.

Q And then if we can go to the next page, and again the parts I've skipped over are further discussions about who might come in. If we can just actually scroll up a bit, you say, 'I know exactly who I would love to get to go and do this, but they are two, they are active police officers in Winnipeg and I don't know if they would do it,' and you -- scroll down, you say, 'These are the two smoothest guys in the whole world. They get blood from a stone, and I've seen how they operate, and they can play the game, and they're

smart. They are real smart.' And etcetera.

Go to the next page, 'And if you tell them what you want they will get it, even if what they were getting is a lie, they'll get it.' Mrs. Milgaard, 'Oh, well, we don't want that.' 'Well, listen, we don't know that it's a lie, first of all.' 'No, but I mean --' and then you say, 'But, I mean, if you get Cadrain saying of course I didn't say anything, I was afraid that Fisher was gonna kill me, we take that down and we run with it, whether it's true or not, because, you know, how are we going to know whether it's true or not.' Mrs. Milgaard, 'Well, I think the only way, we've just got to be very truthful in everything. His number is 985 --' and scroll down, Mrs. Milgaard, 'Make any mileage for herself by lying or taking lies.' You say, 'No, I'm saying if we get a statement from these people, we don't know whether they are telling the truth or not.' Mrs. Milgaard, 'I realize that, but, you know, anyhow, I mean, if they say, they give us a statement denying that there was any impropriety, how do we know that that's the truth?' 'I see what you are saying.' 'Well, you know, so, you know, we're not sitting as judge on these

statements so that, you know, whoever we send there we say, we tell them up front what our theory is, I mean, we have to because they don't know anything about the case.'

I'm wondering if you can just elaborate on that discussion, Mr. Asper, and explain what your thinking was?

A Well, as I say, we were brainstorming and bouncing all kinds of ideas. The point here was, and I was trying to explain to Joyce, that if Paul went in and got a statement from these witnesses and they were, and they were lies -- if they were factual -- in fact determined to be lies, that we wouldn't know that they were lies until a judge had adjudicated that they were lies, but this was -- I have to say this was sophistry with Mrs. Milgaard because it was just, it was simply sort of trying to sort out what the outcome might be of these witness statements.

Q And would it be a case of saying okay, well, if we get from Cadrain, for example, saying I didn't say anything, I was afraid Fisher was going to kill me and that you knew that was a lie, that you would still be able to use the statement?

A Well, no, my point was we're not in a position to

know whether it's a lie or not.

Q And so if you got a statement that was unfavourable, though, which you had in the past, you said, well, lookit, that is a lie and you said Nichol John's statement is a lie, right, you would be in a position, you were in a position to say lookit, that's a lie?

A Well, we would decide, I would assume we would decide what to do and how to interpret the statements after we got the statements, but this was sophistry, this was going back and forth with Joyce in an hypothetical sense.

Q And again these are your words, I want you to -- was it a case of you saying lookit, if we get a favourable statement, whether it's true or not may not matter, because we're not the judges of truth, but we'll be able to use it; is that a fair reading of it?

A Yes, yes, that's true. And I have to say that I was, you know, I -- and I have seen this transcript. I think it's entirely possible that I was motivated, at this point, by being prepared to serve up to the Department of Justice what, in my view, was served up to the jury for a meal at the trial of David Milgaard.

Q Meaning what; a lie?
A Lies.
Q And so that, if you got what you knew to be a lie from Albert Cadrain that assisted David Milgaard, you were prepared to give that to Federal Justice to assist in the re-opening?
A I think it was in my mind.
Q Yeah. And is that, in fact, what happened?
A Umm, no.
Q And how, how do you know that?
A No, because I -- because when Paul Henderson went to get the statements he was under no instructions from us other than to obtain a statement, get what these people said, and we would turn it over to the Department of Justice.
Q And so again just on this point, was your thinking, and I say this was on your mind, the fact that you felt that lies had convicted David Milgaard, that if, for example that if Albert Cadrain ended up giving you a favourable statement that you thought might have been a lie or had a good idea it might be a lie, but if it was favourable, it was a thought in your mind that "okay, well, if it can assist David Milgaard I'm prepared to use it"; is that correct?

A In -- for the purpose of this discussion, yes, for the purpose of the discussion that you have cited to me, and I think probably beyond that, I was of a mind to consider that.

Q And then, if we can just go to the next page, I think this is --

COMMISSIONER MacCALLUM: I just want to be sure I understand you. You say -- are you telling me that you were prepared to consider using the statement which you knew to be a lie in support of the Section 690 application?

A No. That's the point. I -- umm, we -- the point was we wouldn't know, we couldn't know if they were lies, we couldn't make that finding, but we were prepared to take what we got, whether it was ultimately a lie or not. But not knowingly submit a lie.

BY MR. HODSON:

Q But again, if I could just ask, when you say you couldn't know whether it's a lie or not, what would the difference be between you looking at Albert Cadrain's statement in 1990 and saying, "I can't tell if it's a lie or not", versus you looking at Nichol John's May 24th, '69 statement and saying, "well I know that's a lie "?

A Because, in my opinion, her statement in May of 1969 was not physically possible.

Q Okay. So that, again, if you have got an Albert Cadrain statement in 1990 you would do some analysis in your own mind to say "well is that feasible, is that true"?

A Yes, absolutely, absolutely.

Q And, but again, and if you concluded, "you know what, it doesn't smell of being truthful, I don't think it checks out, but I'm still prepared to use it, I may still be prepared to use it to assist David"; is that what you are saying?

A Yes.

Q And then you go back and say, well, you could, "because how would I know if it's a lie or not?"

A Yes.

Q I guess that's the question. On the one hand you are saying "some statements I can tell, but other statements I can tell, but really I can't tell"?

A Yes. I mean let's just be clear, though, I mean in -- on the specifics facts here. Cadrain implicated Milgaard by saying there was blood on his pants. If, if Cadrain were to say, "I didn't, I lied, I didn't see blood on his pants", how am I supposed to -- how are we supposed to know whether

that was a lie? Because if that was the truth then by definition, you well know the problem, and we've got into the problem with Wilson at the Supreme Court. If, if Cadrain says that he didn't see blood on Milgaard's pants, that means that he lied at the trial.

Q If you can just go back a page earlier, and I think where we are still -- is your comment here, you say, 'even if what they're getting is a lie', which presupposes that you know what you have got is a lie, and I think that's the question. I suppose if Albert Cadrain said, "lookit, I really did see blood, but I'm prepared to give you a statement that says I lied and I didn't see blood" --

A I would not have used the statement under those circumstances. No chance.

Q Okay. We'll maybe come back to this a bit later. If we can go to the next page.

A I want to be clear about that, Mr. Commissioner, because you asked about that.

If Cadrain had openly offered to lie to support our case, and we knew about it, no chance.

Q I guess that the question, then, is what, what

statements, if you thought they were lies, would you use?

A I wouldn't use statements that I thought to be lies.

Q Okay. I, and I'm sorry, I thought you had said earlier that if you got a statement, I think you said that "if we" --

A No, no, no, you're -- use present and future tense.

Q Okay.

A A statement that I receive today, I can believe it's true and accurate, that is later judged to be false, which means that the statement, when I got it, was as false as it was when it was later judged to be false, I don't know that it's false when I get it.

Q Okay. And I think, when we started down this path, I think what you said is that you were prepared to use what was put before the jury?

A What we got.

Q What was used, put before the jury in David Milgaard's trial, and then I think you said "lies"?

A Yes.

Q And so then that's how we got down this. And then

I thought I heard you say that yes, if there was a statement that you thought was a lie that didn't sort of pass the smell test, that you were prepared to use that because, and I think what you said was the sophistry was, "well who am I to say whether it is true or not, I got it", and --

A No, no, I'm not saying -- I'm not -- I'm not stating myself clearly.

If we received a statement from Cadrain that we believed was an outright lie in 1990, we weren't going to submit it. The discussion here with Joyce was a hypothetical discussion about what to do with statements that were lies, that were actual lies that we determined, that we could see were lies, or whether we would try to elicit lies from witnesses.

Q Okay.

A And we didn't do that.

Q If we can just go, again, to the end of this discussion, is I think you end up saying, 'I want the world's best statement-taker, that's who I want, and it's actually funny, Hersh, Hersh has been sort of letting his mind', and then the tape ends.

So, again, would that have been -- was a decision then made to get Paul Henderson, was he considered --

A I assume so. I don't know.

Q If we can go to 337359. This is tape 176, and it says May of 1990, I think it's around the same time. And if we can go to the next page, and I think there is a similar discussion here, Mr. Asper, I'll just go through it, about McCloskey, and I'm not sure if this is before or after the earlier discussion, it's on a different tape. And you say, 'In my view it would be great, and I don't know how open he is to this' -- and I think you are talking about McCloskey or Henderson, 'But it would be a very positive starting point for them to have a chat with Cadrain and get a statement from Cadrain to the ex -- sort of saying, I mean I was talking to Hersh about this and, you know, I mean it would be just wonderful if we could get a statement from Cadrain saying 'yeah, I knew it was Fisher, lived in the basement, you know, I didn't want to say anything about it because I figured he'd kill me', you know, something like that, and then 'I saw Fisher come home with blood on him', you know, something

like that', Mrs. Milgaard says, 'Well that would be nice', you say, 'And then 'and that, you know, when the cops came and asked me about Milgaard, you know, it was easy for me to get off the hook with Fisher by just pointing it at Milgaard'', Mrs. Milgaard 'wouldn't that be great', 'okay', and then you say, 'So I mean you can even lead him to believe that, even if he's lying, you know, you can, you can have a chat with him to plant the story in his mind, you know, to give him an easy out from the questioning with McCloskey and, you know, I'm going say that to Jim'. Scroll down. 'But I think, you know, the other thing is that Wilson should be seen, and Nichol if possible, that's a big jump in geographic location.'

And, again, can you elaborate on that discussion, Mr. Asper?

A Yes. We were playing out questioning scenarios as to how to approach these witnesses and to test their recollection, to prod their recollection, that's all we're doing here.

Q And the part here, here you say, 'Lead him to believe that even if he's lying and plant the story in his mind'.

Would that be the story that "lookit, here is your out, Mr. Cadrain, if you say it was really Fisher and you saw Fisher with blood and you were scared of him, plant that idea in his mind so that it would be easy for him to say "yes, I lied, and here's the reason", even if what you planted in his mind wasn't true?

A Yes. This was part of, this was part of a larger discussion that we had far beyond this limited telephone conversation, which is that if we're correct, if we were correct and for whatever reason Wilson, John and Cadrain had not spoken the truth at the trial, they may need a re -- they may need an explanation as to why they did that, because the consequences were so serious, and so we were constantly playing out different scenarios as to how, how they might explain away what they did.

Q And was one of the things you discussed is planting or giving them an out?

A Yes.

Q In other words --

A Yes.

Q And even if the out wasn't true, giving it to them so it would be easier for them to recant?

A Yes.
Q And is that what happened?
A I don't think so, no.
Q Okay. Well how, what, was it -- from the discussion stage, and I think there was some discussion with Mr. Henderson, what happened between this discussion and what Mr. Henderson did then?
A Well, I wasn't there, but my understanding is Mr. Henderson went and basically had a preliminary conversation with these witnesses, I wasn't there for that conversation, and then took a statement as a narrative.
Q And so if, for example, Mr. Cadrain would have said, "okay, I lied at trial and the reason I lied is because I saw Mr. Fisher with blood, and he came home that night and I was scared, and when the police came it was easy for me to say Milgaard", and if he had given you that type of statement and you knew that the explanation wasn't correct, is that something you would have used in your efforts?
A Umm, I can't tell you. I mean that's hypothetical, I'm -- I can't tell you.
Q Okay.

A I doubt it, but I can't tell you that one way or the other.

Q Well here you are saying it would be great if you could get this, and so you are saying, "if we could get Albert Cadrain, if we could, if we could give him this out about saying it's Fisher", would it being fair to say that if you could get that, that you would use it, or are you saying no, you don't think so?

A I don't think so. And I have to say, Mr. Hodson, that this -- this -- these 15 lines of conversation are taken within a broader context of conversations that were occurring within our office among counsel, between investigators that we were talking to just in the course of our daily work, and it was a constant process of trying to evaluate how to approach these witnesses and what approaches to take.

Q Okay.

A And so, you know, I think you have to put that into -- this into a much larger context.

Q Okay. And so tell me more about who else was involved in the discussions, and what else was discussed, and what other considerations or ideas, strategies, were discussed?

A I would say that every senior lawyer in our firm was involved with the, with the discussions. There were several friends who were helping us in the investigation, friends of Mrs. Milgaard, who we would brainstorm with.

Q And again, just so that I'm clear, on the narrow issue of how to approach Cadrain, Wilson and John?

A Yes.

Q And would it be focused on what strategies should be used in questioning these people?

A Umm, I'm not sure it was focused on specific questioning strategy as it was more psychology of how to approach them.

Q Were you kind of --

A To dislodge them from fairly fixed positions.

Q Did you have any discussions or any, or was any consideration or concern expressed that if, for example, you got a recantation, but that in getting the recantation a lie was planted with the witness, for example, or the witness made a statement that was later proven to be untrue, that that might somehow taint the recantation?

A Absolutely.

Q And tell me about those discussions?

A Well we -- notwithstanding the, sort of the wide

breadth of discussion that we had as to how to approach these witnesses, we were pretty conscious of the fact that if we were successful in having them change their evidence it would have profound importance and, umm, and we wanted the statements to be credible and have high, a high level of integrity.

Q Okay. And that if that's the case, then, I'm just wondering about the, umm, I guess the comments here, then, about even if they're lying and to plant -- and just go down to the bottom -- about planting the story in his mind. Did you not have concerns that if -- I guess if -- let me put it this way; if what was discussed here on this page in fact was utilized in getting the statement from Cadrain or Wilson, would you agree that that might jeopardize the validity of that statement and its credibility?

A Yes, Mr. Hodson, and it wasn't used.

Q Okay. And if we can go to 156873. And just to follow up, this, it looks like May 22nd you wrote to Robinson Investigations to find them, and again there is a letter 156871 -- and, sorry, I don't mean to have that -- the last letter I had up said "here's Wilson, John, Cadrain, and here's the

information we had", and here is Robinson Investigation that gave information about where these people were. It looks like on May 22nd you asked them to look for the witnesses, and I think Paul Henderson interviewed Dennis Cadrain on May 26th, Ron Wilson on June the 4th, and tried -- or got ahold of Nichol John's father on June 7th or 8th, and is it fair to say that there wasn't a problem in locating these three witnesses?

A That's true.

Q I shouldn't say "a problem", but --

A Yeah, that's true.

Q And, in fact, here -- and I think we see this in Mr. Henderson's interview with Ron Wilson -- they tracked him down in Nakusp, B.C. And he says:

> "I contacted Kal Tire ... and the phone was answered by Dale Wilson. I then confirmed I had the right Ronald Dale Wilson and then convinced him to give me his home phone number so he could be called at home."

Next page:

> "Dale stated he didn't really want to talk to anyone but gave me his home phone number ... and stated he is off

Mondays if anyone wants to get ahold of him."

And I think that's in fact what happened, Mr. Henderson went there on a Monday, and I think Mr. Wilson was in part expecting him; is that -- based on Robinson's initial contact with him; is that correct?

A Yes, yes.

Q This is probably an appropriate spot to break, Mr. Commissioner.

(Adjourned at 2:57 p.m.)

(Reconvened at 3:17 p.m.)

BY MR. HODSON:

Q If we could call up 337359, please. And this is tape, I think, 176, and if we can go to page 337378, it says May 20th on the date, 337378, and I think it is around May 20th. It's also, there's some reference in here to the Victoria Day May long weekend in the discussions with Mr. Henderson, so I think it's around that time, Mr. Asper. So it would be right, I think right, May 22nd is when you wrote to the private investigators and May 26th is when Mr. Henderson first met with Dennis Cadrain, so I think this is right, right around the time these things were

being set up. Umm, and there is a discussion here about who's going to go with Mr. Henderson, whether it's Joyce Milgaard, and there's one reference here, umm, I think Mrs. Milgaard wanted to go, you say, 'You know, you won't even pick it up. The other thing is I suppose Paul, and you're, you know, you're the pro at obtaining statements here, psychologically my sense is that these people may not particularly feel comfortable admitting to shafting David in front of David's mother', 'Right'.

So, again, would that be one of the discussions, again, about who goes and who's at the statement, what's the best scenario to get these interviews done?

A Yes.

Q And so that was one of the considerations that I take it was discussed but said, "no, we're not gonna send Joyce Milgaard with Paul Henderson"; is that right?

A Yes.

Q And then I think as well, we'll see it a bit later, there was some reference to Dan Lett possibly going; was that discussed?

A Yes.

Q And I think, just further down -- and -- and what was the thinking there? I mean that didn't happen, but what was the thinking, there, of having Dan Lett go with Paul Henderson?

A I don't recall specifically, other than I'm guessing that we wanted to have a witness, and I -- another party there to witness the circumstances of the taking of the statement.

Q And so what would be your concern if you didn't have someone there to witness the circumstances?

A That it would be the witness' word against Paul's if there was some --

Q I see.

A -- dispute.

Q And, again, so Dan Lett, that would have been one person to go as being someone who was not in the Milgaard group that could go and observe?

A Yes.

Q If we can go to the next page, and again this looks to be a three-way call between you and Mrs. Milgaard and Paul Henderson, did -- do you recall if -- was it a three-way phone call, or were you present with Mrs. Milgaard on the phone and Mr. Henderson was on the other line; do you remember?

A Mr. Hodson, I don't recall these phone calls specifically.

Q Okay. Were you aware that you were being taped by Mrs. Milgaard?

A No.

Q If we go down to the bottom, here, and Mrs. Milgaard says, 'But the major one that we need is Cadrain', and you say, 'I think, you know, and Paul, I think that the first person that we should go to is Cadrain. I think that he's probably the most likely to respond, umm, to the new scenario, that being, quote, "we understand that you were scared of Fisher, we know that Fisher did it and you can be a hero or a bum", quote'. And let me just pause there.

As far as the new scenario, what did you mean by that, being 'the new scenario'?

A Well, again, that was a scenario that we were discussing about how to approach these people and see if they had anything to say?

Q And, again, the 'We understand you were scared of Fisher, we know that Fisher did it and you can be a hero or a bum', on that last, I guess with Cadrain he would have had -- he lived in the same house as Fisher so he at least knew who Fisher

was; is that fair?

A Yes.

Q Wilson and John, on the other hand, did you have any reason to think that they had any connection to Fisher or any knowledge of Fisher?

A No. But I think at one point we discussed a scenario where I -- where the approach with them would be on the basis that we knew who really did it, "it wasn't David, therefore you must not have been honest at the, or truthful at the trial, so you can now be a hero by coming clean".

Q And I think we see that in the limited transcript we have of Paul Henderson's interview with Dennis Cadrain, I think when he first thought it was Albert Cadrain, and I think we see it elsewhere; that what Mr. Henderson put forward is "lookit, we know, we know David is innocent, we know Larry Fisher did it, it's gonna break and at that point you're gonna be branded a liar, so come forward now and tell us, and recant your evidence and you'll be a hero as opposed to being on the other side once it breaks". Was that the type of scenario that you were thinking that --

A Well, I'm not sure it was "recant your evidence", I think it was "tell the truth".

Q Okay. So that that was one of the, and I can't recall the words you used earlier, trying to give these witnesses some reason to -- to be cooperative with you; is that fair?

A Yes, to make it easier for them to, to tell the truth.

Q And so if your premise going in, which I think you told us, is that they lied at trial, and you had your theories about why they lied, that in order to get them to tell the truth and say, "okay, I lied", you needed some, umm, something to assist them to get to that point; is that fair, some reason?

A Yes.

Q And one of the reasons was to say "lookit, if you don't, it's gonna break and you're gonna be, you know, branded", I think you say, "hero or bum", I think Mr. Henderson used different language but along the lines, "lookit, if you tell the truth now you will be a hero, if you don't you are gonna be branded a liar, because we're gonna get to the point where we show David is innocent and Fisher did it"; is that fair?

A Yes, yes.

Q And so here, then, Mrs. Milgaard says, and this is

about Albert Cadrain, 'He's not real bright', Henderson, 'Uh-huh', and you say, 'You know, I think he can be shaped reasonably easily throughout the course of an interview with him, and once we get that, I mean, that's our ace in the hole, then we go to the other two who are tougher to crack a little bit, I think, and say "not only do we know who did it, but Cadrain now agrees".' End quote.

And let me pause there. What did you mean by saying, 'He can be shaped reasonably easily throughout the course of an interview'?

A Well I think that my -- or I'm, I'm assuming that my view there was that Cadrain was the least intelligent of them and would be the easiest for Mr. Henderson to question.

Q And I guess the word, when you say, 'He can be shaped reasonably easily', what did you mean by "shaped"?

A I -- I'm assuming that refers to the beginning part of the interview, which is to give him an out, is to provide him with an out, to either be a hero or a bum.

Q And are you saying you think, because he, because

of his level of intelligence, he might be easier to get a favourable statement out of?

A Umm, that would be the implication, but he would be easier to convince that, by telling the truth, he could be a hero.

Q Okay. And then you go on to say, 'Then once you have that we go to the other two who are tougher to crack and say "not only do we know who did it but Cadrain now agrees".'

Would that be a case of saying, okay, if I can get one of the three to recant then we can use that with the other two to say, "lookit Wilson, lookit John, Cadrain has now told us he lied at trial and, you know, get on the wagon or you" --

A To play one against, one off against the other, yes.

Q Yes. And so is that one of the strategies, that lookit, let's -- and I hesitate to use the word pick the weakest link -- but let's start with Cadrain and if we can get him, he's the easiest one, and then we can use him, if we get favourable results, to go on to Wilson and John?

A Yes, that was one, this was one scenario that was discussed. I have to emphasize, again, that this,

these were very intensive and day-long discussions that were going on among many people, as I said, including the senior people in our firm. There was the possibility of not disclosing what the others had said, or even potentially handing the statement over, and not simply paraphrasing but handing the statement over to each person as they were interviewed. There were a whole bunch of different scenarios discussed.

Q Sorry, when you say "handing it over", so you are talking about Cadrain, Wilson and John, about handing over the statement of --

A Of the others.

Q I see. Okay.

A There were a whole variety of scenarios discussed here.

Q And then I think there is a discussion about Lapchuk and Melnyk as well being interviewed, but I don't think they were interviewed at this time, is that right?

A I think that's true.

Q I think Lapchuk was a bit later, and I don't think Melnyk ever was interviewed by Mr. Henderson, is that right?

A I think that's true.

Q And would it be -- would it be a function of the timing, I think we will see that it took a couple of weeks for Mr. Henderson to go through this, would it be a case that he ran out of time to do Melnyk and Lapchuk or he didn't get to them on this go-round; are you able to shed any light on that?

A I don't recall what happened there.

Q If we can then go to 337381. Again, this is the same tape, I think the same discussion. And there is a discussion here about the media becoming aware of what you are doing. Now I think earlier you talked about having Dan Lett go with you, so presumably he would be aware about what you were doing, that was abandoned or decided you weren't going to take him along, or can you shed any light on that?

A I can't recall. My recollection is that Dan wouldn't go, that he would not go, and did not want to become a witness himself to the proceedings.

Q Okay. Because there actually, there are some comments here about making arrangements and it looks like the last minute, so it was a case where Dan Lett said I'm not prepared to get involved

because I would be a witness?

A I think so.

Q And would it follow then that if he became a witness, he couldn't report on it any more; is that --

A Potentially.

Q Potentially that was one of the issues?

A Right.

Q And did you consider sending anybody else then as a witness?

A I don't recall.

Q So here you talk about, you say, 'Secondly, I know that there are at least three reporters who will probably be calling hotels and checking out to see for Joyce and my name -- around Regina and Saskatoon. One is a reporter in Saskatoon, and the other is that Donna Friesen in Regina. I mean, they were bugging me all last week asking me when Joyce and I are going to Saskatoon.' And Henderson says, 'And you don't want anybody to know.' And you say, 'No, no, no, not until we're ready to let them know?'

And it appears here that your concern is that the media are going to find out that Joyce and you or Mr. Henderson are out

interviewing these witnesses and they are going to put a story out before you are done the interviews; is that fair?

A Yes.

Q And then the top, the top right-hand side of this page, and you say, 'I mean, I think what we should keep it, lay really low and then if we get something, you know, I think we do an interview with, like, and bring Cadrain, you know, if he cracks and he comes on side, he will feel very good about himself because he is going to be, he's going to crack on the basis that he's going to be a hero, and, you know, I think it's very powerful if you can get him to do it and get him on side so much that he's prepared to sort of publicly do his mea culpa, you know.' And Mrs. Milgaard, 'Yeah, and do it with someone like Colleen Wilson.'

So as part of this interviewing process, was there a media component to this as well, as to if you get a favourable statement as to using the media -- I mean, I think what you are saying is, if I read it right, we don't want the media to know we're out there until we get a product and then once we get the product, we'll then use the media to publicize it; is that a fair

reading of that?

A Yeah. I can't say specifically. I can't say specifically what we had in mind there, but if we were -- look, if we were successful with what was being undertaken here, there truly was nothing left of the Crown's case and there was a media component to this, no question.

Q And so again, and we'll see this a bit later when we see what happens with the Wilson and Cadrain statements, but would it be fair to say at this stage in advance of the interviews, that one consideration or one part of the plan, if I can call it that, was that if we get a favourable statement, how do we publicize that statement in the media to assist David's re-opening efforts; is that fair?

A Yes. You'll see the -- it was at such a preliminary stage where Mrs. Milgaard is referring to Colleen Wilson. Colleen used to have an afternoon chat show on STV here in Saskatoon. To the extent that a media strategy developed, it was far bigger than that.

Q But just so that I'm clear, would one of the components be let's go out, let's interview these three witnesses and then if we get a favourable

statement, that we will consider publicizing it in the media as you mention here?

A Yes. Well, the answer is yes to that.

Q If we can go to 050412. This is part of the transcript between Paul Henderson and Dennis Cadrain and I think Mr. Henderson's evidence is he had taped his interview, I think this is by telephone, with Dennis Cadrain, and we've gone through this with him, I just have a couple of questions, and I think initially Paul Henderson thought he was talking to Albert Cadrain and says, you know, we mean absolutely no harm and then talks about Larry Fisher and then finds out it's Dennis Cadrain. And then if we can just skip ahead to 050414, and the previous tape I showed you talked about the new scenario about Fisher and here Mr. Henderson says, and he's talking to Dennis, but he says:

> "Larry Fisher is the guy who committed the murder. We know what happened to Albert, we know what happened to Nichol, and Ron Wilson, they were, they had, a lot of pressure put on them by the police back then."
>
> "They were kids, they were children.

And they were manipulated, coerced, threatened, a lot of things happened to them that should not have happened to people."

And again, was that, and I think Mr. Henderson told us that was his view at the time and that that's his view as to why, or was his view as to why the witnesses lied at trial. Did you -- was that the same view as yours, did you share that view?

A Yes.

Q And was this -- you said there was many discussions at these meetings before the interviews. Was it -- was the tact that you decided on taking, when I say you I'm talking about the collective group, to take with these witnesses, to go in and say lookit, (a), we know Fisher is the killer and therefore David is innocent, (b), we know you lied, and (c), we know what happened to you, you had a lot of pressure put on by the police, you were manipulated, coerced, threatened, etcetera, and that your out witness is the police made you do it and therefore come clean, tell us the truth, recant, because the police are the ones that made you lie. Was that,

in a nutshell -- I mean, I think that's what Mr. Henderson said he was putting forward. Was that in a nutshell the end product of your discussions, lookit, that's the tact to take with these people?

A I would agree with that, yes.

Q If we can just go ahead to page 050419, just at the bottom, and again this is the conversation May 26th between Dennis Cadrain and Henderson, and he talks about:

> "Larry Fisher is under a lot of pressure to confess. The R.C.M.P. is talking to him. But (unintelligible) a couple of weeks ago said they didn't want him talking seriously until after he had his conjugal trailer visit with his new wife. Now, we've heard today that he's confessed. That may be true or may not be true, it may be a rumour, may be a fact, but, if he's, if he has confessed or if he confesses down the line, which I think he probably will --"

Etcetera. Mr. Henderson wasn't able to tell us, I think he said someone would have told him. Do you have any information that at this time, that there was any information from anybody that Larry

Fisher had confessed or was this part of the questioning process to let the witnesses think that Mr. Fisher had confessed and therefore the scenario you were painting for them of being a hero or a bum was actually more imminent than not?

A I don't recall getting any information that Fisher had confessed and it was certainly not, at least as far as I was involved, part of any interrogation strategy.

Q And then again just on the next page, I think this is where Mr. Henderson explains to Dennis, he says:

> "... down the line ... because the R.C.M.P. is convinced that he's the person."

Right here, and Mr. Pearson didn't agree with that, he said he thought he was a suspect. Do you have any information to suggest that at the end of May, 1990, that the RCMP were convinced that Larry Fisher was the culprit?

A No, I don't.

Q And what was your understanding of Mr. Pearson's position at this time, or the RCMP position as to whether or not Larry Fisher was the culprit?

A I don't recall exactly. I think it would be fair to say that Sergeant Pearson thought he was a suspect.

Q Okay. And then here's where Mr. Henderson says:

"Now, when he does --"

And he's talking about confessing,

"-- what that means is, that all the witnesses against David suddenly become liars. Now here is Albert's chance to beat them to the punch."

"Come forth and say, the bastards made me do to. And I feel badly about it and I want to clear my conscience and help this guy that I've been worried about, heartsick about all these years. He was my pal, the pricks made me do it."

Again, is that the type of strategy then or questioning technique that had been discussed amongst the collective group as a method to give these witnesses an out on a recantation?

A In a general sense, yes.

Q If we can go to 048357, and this is a transcript, we've seen this already, of Mr. Henderson, and as far as I can tell, what I think this is is that Mr. Henderson telephoned Joyce Milgaard to give

the results of his interview with Albert Cadrain and Dennis Cadrain, and I won't go through this transcript, but then there's a second -- sorry, let me back up. So this document is the transcript between Joyce and Mr. Henderson. Then if we can go to 048385, I think what happened here is then Mrs. Milgaard phoned you I believe, I'm just speculating based on the transcripts, but played to you the tape of her conversation with Mr. Henderson and recorded both that tape and her discussion with you because we'll see the transcript repeated and then you have some comments from time to time, so whether I'm right or not on that, I think that's what it shows, and there's just some questions here about -- do you have a recollection of hearing a recording of Paul Henderson saying here's what I got from Albert and Dennis Cadrain?

A No.

Q And let's just go to 048387. Actually, just go back to the previous page and, you know, he's talking about, I think Henderson is simply reading off what Dennis Cadrain said in his statements, and then we go to the next page, here's where you come in, you said "oh God," and then down here,

"Unbelievable." And here, this is when Henderson says:

> "... what convinced ah' Dennis that his brother was not of sane mind is when Albert told him, sometime around the time of the prelim ... that he was seeing visions, and he saw, looked up in the clouds and saw David, and saw the Virgin Mary. She was standing on a serpent and the serpent was David Milgaard."

And I think this is the first time the visions, the fact that Albert was seeing visions came about. Do you remember hearing about that from Mr. Henderson?

A Yes.

Q And again just on the next page you say:

> "Do you want to stop the tape right there for a second."

And that's why I say I think Mrs. Milgaard was playing the tape. And then if we can scroll ahead to page 048391, and this is where, and again this is the conversation between Mrs. Milgaard and Mr. Henderson, and I think Mr. Henderson said lookit, Albert Cadrain will not

back off his original statement about seeing blood. Mrs. Milgaard asks:

> "So there was no way you could swing him around?"

And Mr. Henderson says:

> "Well no, I wouldn't try to. That would be manipulation and he's going to swing right back."

And so again, do you recall being made aware that lookit, Albert Cadrain will not change his -- I shouldn't say not change his, he is adamant that what he said at trial about the blood is true. Do you remember that being --

A Oh, yes, absolutely.

Q Then go to page 048394, and here's where I think the call between Mr. Henderson and Mrs. Milgaard ends and then you and Mrs. Milgaard carry on about what to do in getting hospital records, I think they relate to Albert Cadrain. Then the next page and you say, again talking about what was said there:

> "... that's unbelievable. I mean there's so many things that are being said there."

And you say:

"One he's crazy."

And then go on to talk about what the other family members may have seen, and I think Mr. Henderson's evidence was at this time based on his interview, that he felt that Albert Cadrain had some, and I can't recall what his words were, but that he had some mental issues at the time and that he really wasn't -- I can't recall if he used this word, reliable, or he had some psychiatric issues and that what he was saying at the time was not very reliable. Would you agree with that being the assessment of your -- your assessment of him as well based on the information you had?

A Yes.

Q And then the next page, and then there's a discussion here about, Mrs. Milgaard:

"I mean if we go public with that. What would the Justice Department do at that point?"

You said:

"Let me sleep on this because it may be the type of thing where we send what we have to Justice with a letter."

"Saying um this is getting deeper and

deeper and deeper and you people aren't doing anything ..."

"And we've had to. And you've got seven days before we start trying this thing in the media. And we start making these, I mean whatever the words are, whatever the exact words."

"The message then is, here's what we found out while you guys have been lolly-gagging around. Here's your Markesteyn report. Here's the Cadrain stuff. Now get off your butt."

So let me just pause there. Actually, just go to the --

A The top of it.

Q Pardon me?

A I see the top of it, we were trying to take Meech Lake off the front page.

Q "An' you got seven days and we don't care about Meech Lake. You know."

And I take it Meech Lake was a competitor in grabbing news headlines at the time?

A It was a bad deal for Canada anyways.

Q So if we just go back on the, this information about Cadrain, it would appear that when you first

became aware that, (a), Albert Cadrain was currently suffering from some psychiatric illness, number 1; number 2, he had seen some visions, according to Dennis Cadrain, around the time of David Milgaard's trial; three, that he had been admitted into a psychiatric hospital, I think it was 1973 the records show, but within a few years after, that that was the type of information that would be of assistance in challenging David's conviction. Is that fair?

A Yes.

Q And here it looks like you are thinking how do we use this in the public, how do we get this out there, and would it be fair to say that that would be to assist David Milgaard's efforts to re-open the case and, as you said before, to get the public behind you to influence the politicians or the authorities to make a favourable decision on the re-opening; is that --

A Yes.

Q And can you tell us at this time, were you -- is it correct to look at this and say that instead of going first to Federal Justice with this, here's the information, follow it up, you were now in the position of saying no, we're going to go, we're

going to go public first, go to the media, then give it to Justice, put some pressure on there and turn up the heat a bit; is that correct?

A I think that's probably fair to say, yes.

Q And can you explain what your thinking was and why you would do it that way?

A Because the other way wasn't working.

Q And so if Justice found out, for example, and we'll see this when we get to a few examples, that they find out in the newspaper that a witness has recanted or that, you know, there's something wrong with the case, was that part of your plan, to say okay, we'll get it in the media, in the public eye and put the heat on so you don't have time to respond or deal with it; is that one of the strategies?

A Yes.

Q And what were you hoping to achieve by that?

A We were trying to put the spotlight on the Department of Justice. When the information got filed, we were going to file it in the spotlight of the television cameras in the hope that it would put the Department of Justice in the position of having to do something about it.

Q Now if we can go to 048398, this is part of the

same transcript, you have -- there's a discussion here, and this is before Paul Henderson has gone to see Ron Wilson, and Joyce Milgaard says:

"Don't forget we hopefully will have the statement saying Ron Wilson lied."

"From the CBC reporter."

"Is she gonna do it?

"She's quite willing to do it providing CBC has no objections."

And I think it's referring to Donna Friesen. Do you recall the name Donna Friesen?

A Yes.

Q And do you recall what information she might have had about Ron Wilson or what this is referring to?

A No, I don't.

Q There's another tape, and I'll bring it up in a minute, that suggests someone got a call saying Ron Wilson told me he lied and that it was traced back to Mrs. Cadrain, that would be Albert's mother's address. Does that assist your memory at all?

A No.

Q And then to page 048400, again I think this is just talking strategy and here we see the Markesteyn information come up:

"Hopefully we'll get Markesteyn sometime this week ... we'll send it to Ottawa. Okay ... our receiving it, and our sending it to Ottawa will go without any media attention."

"While that process is underway we will continue to develop um the Cadrain, Wilson line here. With a view to let's say a week Monday. Or a week Wednesday. Whatever day it is. Having a news conference. And telling the media about Markesteyn and Cadrain and whatever we get from Wilson."

"All at the same time."

"All at the same time and just dump it."

"Sounds good to me. Talk to, I'll talk to Hersh but I think that we need ... to get this Salina."

So again that would be a part of the plan to publicize the information?

A Yes.

Q Go to 054362, this is a memorandum May 28th, 1990 from Paul Henderson to you I think setting out the background of his interview, and I take it it's a memo that you would have received at the time from

him? Do you remember or --

A Yes.

Q And there's a couple of points here, 054364, there's some discussion here about, and I think I can, rather than going through it, maybe just quickly paraphrase. I think what Dennis Cadrain told Paul Henderson initially, that on the morning that David came, David Milgaard came to their house, that his sister Celine had been home and younger brother Kenny had been home and that Celine said that Dennis had checked and Celine said she had never seen any blood on David Milgaard's clothing and there was some discussion here in this memo and some further interviews where I think the thinking was okay, well, she never saw any blood and I think Dennis also said the police talked to her and she told them that and I think there was some discussion about, okay, well, was this evidence that was suppressed, etcetera, and some follow-up. Do you recall that being something you were pursuing?

A No.

Q And what we've heard before the Commission, Celine Cadrain did testify, it's now Celine Armstrong, she said she was home that morning, but she was in

bed and that by the time she got up David had changed his clothes and so she did not observe the clothing that Albert observed where he said he observed blood. Do you remember learning about that at any point?

A No.

Q There's also mention in this memorandum, go to page 054366, about information that I think Mr. Henderson got either from Dennis on Albert about halos and Albert seeing -- some information -- what do you recall at the time, what did you -- what did you make of that information and how did you think it best to use that in your efforts to have the investigation re-opened?

A I have to be careful as to when my thinking evolved, because I can't say for certain that what I'm about to say occurred at this point or later, but that Cadrain started the ball rolling on the Milgaard investigation with his comments that he had seen blood on Milgaard's pants. If Cadrain was not a reliable witness and was as looney as Mr. Henderson's information suggested, that whatever Cadrain said was not reliable and whatever flowed from that may be fruit of a poisonous tree.

Q And so if I can maybe just take a step back, I think when you went out -- before you went out or Mr. Henderson went out to see Albert Cadrain, I think you said lookit, our belief is that he lied or the others lied and that he was pressured by the police; correct?

A Yes.

Q And I take it you wouldn't have had any inkling about any psychiatric problems he might have had before Mr. Henderson went out to see Dennis or Albert Cadrain; is that fair?

A That's correct.

Q And then once Mr. Henderson met Dennis and Albert Cadrain, at some point, maybe not on May 28th, but around this time, you would have become, you would have concluded that based on what you read and what you were told, that lookit, Albert Cadrain had psychological or psychiatric problems around the time of trial and therefore he was not a credible witness because of those problems; correct?

A Yes.

Q And that in 1990, in May when Mr. Henderson was talking to him, those problems may well have been worse; in other words, his credibility in 1990 may

have been worse than his credibility in 1970. Is that fair?

A That's correct.

Q Because his mental illness may have gotten worse; is that your understanding?

A Yes.

Q And so did -- was it fair to say that your approach with respect to his evidence changed from being okay, you lied because the police made you lie, to okay, we now know about your mental condition, your evidence isn't reliable?

A Well, Cadrain had also said some fairly explosive things in his statement and we didn't know whether they were true or not and it was very difficult to discern where the truth lay in what he was saying and where his recollection was. We knew that, from the evidence that Cadrain had been interrogated, I believe he had testified that he had been stripped naked in a prison cell in Regina when he had been picked up an a vagrancy charge, so that we did know from the time of the trial I believe, or the preliminary inquiry, that there was, there were some heavy-handed tactics used with him. When he later gave the statement to Paul Henderson that he had suffered this

incredible interrogation, I think he talked about spitting blood, it seemed very serious, it was difficult to know whether that was true or not, but there was some relationship to some prior incidents with Cadrain and his relationship with the police had made it seem reasonable.

Q And --

A But on the other hand -- but let me finish. On the other hand, we've got these halos and these visions and you just don't know what to make of the whole thing.

Q And I guess let me put it this way, that the plan going in was to say the reason you changed your evidence and lied at trial was because the police coerced you, and I think with Mr. Cadrain what you found out was that no, he wasn't prepared to change his evidence, I mean, if the police coerced him, he went in saying I saw blood and he went to trial saying I saw blood?

A Right.

Q And the question I think that has been posed to some is, well, how could you coerce, bully and put through mental hell and torture a witness who comes in and says --

A And doesn't change his story.

Q And doesn't change his story.
A Yes.
Q And did that cross your mind, did you consider that when you looked at Albert Cadrain?
A I think that yes, I think that in the end we came to the conclusion that Mr. Cadrain was more a sympathetic character and may not have been in his right mind at the time.
Q Let me just go back up. So again if the approach is, okay, Mr. Cadrain, and as we've seen in the discussions you had with Mrs. Milgaard and what Mr. Henderson said, and I think what he's told us is okay, Albert Cadrain, we know you lied, we know Fisher did it and we know the reason you lied is the police coerced, manipulated, pressured and bullied you and that's why you lied, they did all these things to you, they did it to Nichol, they did it to Ron. Henderson does that the first go-round, he comes back and Albert says okay, no, no, I'm not changing my story, I saw blood, but by the way, here's a bunch of information that says I may not have been credible. Mr. Henderson then goes back and says, okay, Albert, I'm not going to try and get you to change, I'm not going to try and say okay, you lied about the blood because

you're not going to change, instead I'm going to get some information that tends to lessen the credibility of that and gather information from Dennis and from you that talks about your mental state so that that would undermine the value of his evidence at trial, so a bit of a change in tact; is that fair?

A Yes.

Q And then when Albert gives his statement though, he says, okay, well, I've had all these problems and, oh, by the way, I was manipulated, coerced and bullied by the police; correct?

A Yes.

Q But he didn't change his evidence?

A Right.

Q So I'm just wondering if that was a concern to you, that he may have picked up the suggestion that I was manipulated, coerced and bullied, but didn't pick up the second part and that's why I lied. Do you follow?

A Yes. I can't explain that, I really can't, and as I say, I think you could argue that he was coerced and manipulated, or certainly he was treated badly, let's say, with his first encounter with the police.

Q And you are referring -- is that to the Regina police?

A Yes.

Q I think that's where the vagrancy charge was.

A Right, right.

Q Okay. We'll actually come back to this and I think in fairness when we get to his statement. So again, just so that I'm clear, at some point, whether it's May 28th, but around this time, I think what you are saying is lookit, we felt that we had a better way to attack the credibility of Albert's statement and rather than saying he lied and was bullied by the police, his mental condition was such that his evidence wasn't reliable?

A Yes.

Q If we can then go to 335929. And this is tape 17, this is one of the new tapes, this is around May of 1990. And if we can just go to the next page, and there's just a bit more information here about the CBC reporter, Mr. Asper, I'm just going to see if this jogs your memory at all. If we can go to 335947. I'm sorry, the doc. ID is 335929, and this is before Ron Wilson has been contacted, and there is a discussion here, 'Well I'm not going to

worry about Nichol but I really think this CBC reporter' 'who' 'Donna', 'yeah', 'Donna was talking to -- hold onto your hat -- a woman that phoned in that had left her phone number and wanted to remain anonymous, and it was Mrs. Cadrain, yeah, the mother on Confederation, and in her talk with her she said that Ron Wilson had told her that he had lied at the trial.'

And then the next page, and then I think you discuss, 'I got a phone call', and I think you're talking about what you could get from Donna, 'I got a phone call, the woman was, remains, wanted to remain anonymous but she left me a number, I traced back the number and discovered that it was Mrs. Cadrain. In this conversation this anonymous caller indicated that Ron Wilson had said he had lied at the trial. Period. If that sends, these, that focus is now on Wilson and gets somebody', I think that should be, there are some typos there, 'Off their butts', I presume that should be two t's in the "butts", that's how you are using that, Mr. Asper, 'Going and talking to Wilson, and then next thing get, if you can, could you tape your conversation with Dennis Cadrain'.

And let me just pause there on the Donna comment. Does that assist you at all? And let me just add, it's something further that it was talked about in -- as using an opener with Ron Wilson to say, "lookit, we know you told somebody, Mrs. Cadrain, or phoned somebody, we have information where you have admitted to lying"; does any of that ring a bell?

A No, it doesn't.

Q And then, down here, you talk with getting Joyce to tape the conversation with Dennis Cadrain and you say, 'Get Dennis to give a statement describing how he believes that Albert was mentally incompetent, well, and worked over by the police, and well, this is what he was going to get from him when he was out there'.

Now let me just pause there. On what basis, at this time, are you saying that you should get a statement from Albert that he was worked over by the police?

A I, I don't know when this occurs, I don't recall this.

Q Okay. And I think it's around -- because the two tapes, if we can go to the next page -- well, sorry, back, 'Well this is what he is gonna get

from him when he was out there, yeah, get that, Dennis to give that statement, because he never suspected that we could have a news release with both of these tapes', and again it's a bit garbled, and then you say, 'Well, no, what I was going to say and what I would do is we would say, we would say we would tape both of them and we would say to the Department of Justice look, you know, we've given you the Ferris stuff by the way, March-April' -- actually that should be Markesteyn, that's a typo -- 'Has not completely his report', Joyce says, 'He's not okay', and so I think this puts it before June 4th, which is before the Ron Wilson interview. But, again, any recollection of any of that?

A No.

Q Then to page 335951. And, again, you are talking about, 'You then can put to Wilson everything, let him read the statement if he wants', and at this time, May 26th of 1990, you got a statement from Dennis Cadrain that talked about Albert's mental problems; do you remember that?

A Yes.

Q Okay.

A Oh, I remember Dennis' statement, sure.

Q Yeah. And so I think what this is talking about is using Dennis' statement --

A Right.

Q -- with Wilson; is that right?

A Right.

Q And then here, 'But you could certainly, you know, psychologically put to him, look, we know who did it and we have a fairly reliable source who knew you at the time who related to us the conversation where you admitted to lying'. And, again, I think that ties back to the Donna Friesen thing, but you don't have a recollection of that?

A I have a feeling, Mr. Hodson, that this page relates to the previous page where I was saying to Joyce, it looks like, "can you talk to Donna Friesen, get her to get a statement from Mrs. Cadrain who called that Ron Wilson was lying", and that -- and that the statement that's referred to on the page you've got on the screen refers to the Donna Friesen conversation.

Q Okay. I'm sorry. So --

A I think that's what it refers to.

Q Okay, fair enough, so in other words --

A And that the attempt here with Wilson is not to show him the Dennis Cadrain statement but to show

him the Mrs. Cadrain statement.

Q Okay. If we can just go to the bottom, there is another part here I could maybe read, and you talk about how it goes, 'The other thing, we could approach him by telephone', you think about phoning, and then you say, 'I wouldn't think that you would want to be putting Cadrain's information to him over the telephone', and that's why I thought it was referring to the Cadrain information?

A It may be right. I think the, I think the better effect, frankly, in terms of questioning Wilson would be to put to him Mrs. Cadrain, and 'Cadrain's information' in the last sentence there may relate to Mrs. Cadrain, not to Dennis. I don't know but I'm trying to reconstruct here.

Q Okay. And then if we can go to 335953, and this is again a conversation, I think Mr. Henderson -- actually, if we can go back a page, it says, 'Joyce leaves phone, Paul continues conversation with David Milgaard', so I'm not sure if, again, this is a three-way call or whether you're, you and Mrs. Milgaard are together phoning Paul Henderson; do you know?

A I don't. I don't recall any of these

conversations.

Q And so here, just to put this in time frame, Paul Henderson says, 'Yeah, right, we certainly are. I was very encouraged last night with my conversation with Dennis. I think that Dennis could do us some good.'

And I think that conversation was May 26th of 1990 --

A Okay.

Q -- so I'm assuming this is around May 27th.

A Okay.

Q And you talk about, 'Well, you are in the wrong province', and I think he's in B.C., because you thought Wilson was in Saskatchewan; didn't you?

A Yes.

Q And then you say, 'And if Wilson winds up not saying anything at least what we've got in the bank is an anonymous call to this reporter, traced back to Mrs. Cadrain, where, in the latest conversation that Wilson had with her where Wilson admits to lying at trial'. And then the next page, 'Well, Joyce has the conversation with Donna on tape, doesn't she?' 'I don't know'. 'I think she does'. 'Okay'. 'Well most', Paul says, 'Well okay, well most things up here are taped?' David

'Yeah'. Paul, 'But then of course Donna wouldn't know that it was taped.' David, 'Well, too bad for Donna.' Paul, 'Well, yeah, anyway'. And then David, 'And similarly with Dennis, you know, if you could Dennis to say that Albert was really messed up and the police really did a number on him, and then, you know, he believes that Albert was saying just whatever the police wanted him to say, that's something'. And then Paul, 'Well we have Dennis on tape, we taped him last night'.

And, again, can you elaborate on that discussion with Paul about what you were trying to get Dennis to say?

A I don't -- I don't recall this. I mean I must have had some information about Albert in what I said there.

Q And I think the information you had is I played for you earlier the tape where I think, on May 26th, you and Joyce Milgaard talked and she played you the tape where Paul Henderson reported on his interview?

A Right.

Q So this would be the next day?

A Right.

Q And I'm just wondering, here, about the comment,

'To get Dennis to say that Albert was really messed up and the police really did a number on him and, you know, he believes that Albert was just saying that whatever the police wanted him to say'.

And, again, was this something that you were putting forward as, umm, a lever, or something to get Albert Cadrain to give a favourable statement, or was this information that you thought had happened, or I'm just trying to understand where this came from?

A I don't know. I can't put it into context.

Q And then the next page, again you and Mr. Henderson, 'Yeah, that would be wonderful, and even if he could put to Albert, I mean even blank in terms of, you know, we understand that your recollection may as well be demented in your mind based on what you said at the trial, but are you prepared to admit that it might not have been what really happened, are you prepared to admit that', and then Paul Henderson, 'He might have been influenced by the police in terms of', and then you, 'That's right, and that's now believed happened might have been the product of what you were told by the police, and even if he says well

that's possible, I was so messed up at the time, you know, that's something.'

And, again, were you thinking that perhaps the police had told Albert Cadrain that he saw blood?

A I -- I -- I assume so.

Q And again, just to go back, and I think the question; if what you're saying here is okay, well if Albert Cadrain says "lookit, I was a product of what the police told me and that's why I said what I said", I'm just wondering, in light of the fact that he went in -- and I appreciate what you said earlier, he was in Regina on a vagrancy charge, but as far as the Saskatoon City Police -- that he went in and voluntarily gave a statement saying, "I saw blood on David Milgaard and I think he killed Gail Miller", I'm just wondering how -- how that fits in with this thinking that, okay, well the police -- umm, that that information was the product of what the police told him. Do you follow?

A I -- yes. I'm not sure I understand your question.

Q Well the question is I'm trying to understand, you're talking to Mr. Henderson about presumably

what, what Albert might say?

A Right.

Q And you talk, and I think what you are saying here -- and please correct me if I'm wrong -- that Albert might be prepared to say, or that Dennis might be prepared to say that, "lookit, Albert was worked over by the police, and that as a result of that" --

A Oh, I see what you are saying.

Q -- "Albert's statement that he saw blood on David was a product of what he was told by the police"?

A Yes. We were discussing the possibility that what happened to Albert was possibly what happened to Nichol John and Ron Wilson.

Q And I guess my question was, --

A Right.

Q -- okay, and how did that -- I mean the Wilson --

COMMISSIONER MacCALLUM: Excuse me.

MR. LORAN: Mr. Commissioner, this witness has continually referred to what happened to Nichol John and Ron Wilson as if it were an established fact. We've heard from those witnesses and I don't think that there's any evidence to suggest that these witnesses were abused by the police. If this witness has direct

knowledge of any evidence to support these allegations, we could hear from that evidence -- we could hear from him with regard to that evidence, but otherwise I'd object to these references to something which is not established in evidence.

COMMISSIONER MacCALLUM: Well I understand him to be saying that they believed, he believed at the time that that's what happened, not that -- you are not stating it now as a fact that it happened, and am I right about that?

A Yes sir.

COMMISSIONER MacCALLUM: Yes. That was his state of mind at the time.

MR. LORAN: Thank you, Mr. Commissioner.

COMMISSIONER MacCALLUM: I hope everybody understands that.

BY MR. HODSON:

Q Yeah. And I think, Mr. Asper, on that, just back on the --

A Yes. I think it's very important, Mr. Commissioner and everyone, to understand we're talking about what was in my mind in 1990 in the heat of this moment, and that's --

Q Yeah. And I think, let me just contrast Cadrain

with Wilson and John, because I think with Wilson and John they had initially given statements to the police that were not incriminating; correct?

A Yes.

Q And then later gave incriminating statements?

A Yes.

Q And I think the theory, or your thinking at the time was, okay, well the police coerced, manipulated, bullied between statement 1 and statement 2; correct?

A I think it was between statement 2 and statement 3, but yes, that's the point.

Q Or between non-incriminating and incriminating?

A Yes. It was the May 24th incident.

Q Yeah, exactly. With Cadrain, however, the first statement was incriminating and his evidence was incriminating?

A Well my understanding is, in fact, the first statement in Regina was not incriminating.

Q Okay. So if we go back, then, the statement in Regina as being incriminating -- or non-incriminating, the statement in Saskatoon to the police was incriminating; was this thinking here that somehow, between the time that he was in the Regina police cells for vagrancy and when he

went into the Saskatoon City Police on March the 2nd, 1969, that the police had somehow coerced or worked him over and told him what to say?

A Yes.

Q And was that your thinking at the time, or a possibility, or --

A It was a possibility, yes.

Q And so when you went to Albert Cadrain, or when Paul Henderson did, one of the theories was, or one of the things that was put to him to say "here's your out" is "okay, somewhere between the time when you went to see -- or when you were picked up on vagrancy, between then and when you went in on March 2nd, 1969 and gave police the statement, the police made you do it, they coerced you, they bullied you, manipulated, and that's why you ended up lying"?

A Yes.

Q And 335956. And this is the discussion, again with Mr. Henderson, and this is where he talks about -- again, there is a few typos here still. Paul, 'Now he expects a call from us?' 'Yes, he does', and this is Ron Wilson. 'I don't know exactly how that came about', and that should be 'Skip trace company contacted him and he said well

I suppose they will be calling me, or something to that effect, he said well the best time to reach me is Monday. He didn't exactly sound like he was looking forward to the call but he acknowledged that he knew that it was coming.'

And I connected that to the Robinson Investigation report where Mike Brecht says "lookit, I traced him and he confirmed and he seemed to be expecting, expecting a call", and is that fair, that was your understanding, that Mr. Wilson was -- didn't try and avoid Mr. Henderson or you people and was prepared to talk?

A That's true.

Q And, again, a discussion here. Paul, Paul says, 'Now what we could use is we could use this hearsay revelation that he told', and I'm assuming that's referring to the Mrs. Cadrain/Donna Friesen information, you say, 'Except, you know, I said to Joyce, you know, the problem is that it intensifies the conversation and, you know, he could sort of hang up and disappear. I was wondering if you can't, again I'll sort of see your judgement here, you're the pro, but just wondering if maybe try the honey approach, have a nice chitchat with him, lay the we know who did it

and you know who, we got to sort of get yourself out of this mess here, Mr. Wilson, why don't you just tell us what really happened'. And then Paul, 'Well we used some real strong logic on Dennis last night'. 'Yeah, for a minute I thought I was talking to Albert'. Paul, 'But the point is I said look, this guy is going to confess later, and like we heard that he may already have confessed and, you know, that leaves three people out there, the three perjurers, and if you want to desert the sinking ship now is the time to get off', 'Yeah, and then Paul could even say the devil made me do it, you are gonna come off looking good'. 'Yeah'. 'That's, well you know, judge, I guess if you can talk to Wilson, sort of feel him out, you know, and if you think you can sort of grab him by the throat, do it.'

So, again, would this be a similar discussion about what approach Paul Henderson might use with Ron Wilson?

A Yes.

Q And, again, you'll see a reference there where he refers to the fact that, you know, 'we heard that he may have already confessed, Larry Fisher', do you remember any -- does that refresh your memory

at all, this discussion?

A No.

Q 156718. This is a letter June 4th from you to Dennis Cadrain, and it attaches a release of information to try and get Albert's medical history, do you remember sending that letter out?

A No. I accept that I did. I don't remember sending it.

Q And I guess the -- we don't have, we don't have any record of any response. It looks like you tried to get Albert's hospital records about his hospitalization in 1973 and sent a release out, and I -- I -- I think Dennis Cadrain said that he didn't send it back, and I can't recall his evidence specifically, but do you remember anything about that; whether there was any further discussion or further efforts to get Albert's hospital records?

A No.

Q Now I want to turn to -- we're done with that document -- to Ron Wilson. And we have heard from Ron Wilson before the Commission, we've heard from Paul Henderson regarding the taking of the June 4th, 1990 statement, and I think it was at a motel or hotel in Nakusp, or in that area in B.C., and I

think the evidence is they met for the day, I think around eight hours give or take, and Mr. Wilson signed the statement of June 4th, 1990 where he recanted some of his incriminating trial evidence and said that he lied at trial because he was coerced, manipulated, and bullied by the police. And do you recall, again, your discussions with Mr. Henderson at this time, do you remember him getting back to you in the course of any of this Wilson interview, or did you basically leave it up to him during that -- for that day?

A Oh, I certainly left it up to him for that day. Umm, I think that night he probably called me.

Q And would it be fair to say that Ron Wilson's statement, his recantation, was a significant piece of information in your -- in your quest?

A Yes.

Q And I think what Mr. Henderson said, or his evidence was that when he met with Mr. Wilson, he outlined that the Larry Fisher evidence indicated the case was going to turn and, and, "we think you lied, and we think the reason you lied is because the police manipulated, coerced and bullied you, and here is your chance to be", I'm not sure if he

used the word hero, but "here is your chance to be" --

A Get it off your chest.

Q -- "get it off your chest". Would that have been consistent with your recollection of how -- of what the approach was to be with him?

A Yes.

Q Now both Mr. Henderson and Mr. Wilson testified that at least part of the interview was taped by Mr. Henderson and -- or a good part of it. Did you ever listen to the tape of the interview between Paul Henderson and Ron Wilson?

A If I did I don't recall.

Q And do you know what happened to the tape?

A No.

Q And I think the Federal Justice and the Supreme Court, or as part of the Supreme Court process, requested that tape for the Supreme Court reference and it wasn't produced, and the RCMP in their 1993 investigation also asked Mr. Henderson for the tape and it wasn't produced, and we have asked Mr. Henderson for the tape and I don't think he can locate it, although he might still be -- be making efforts to find it. Umm, do you know, do you have any knowledge or information as to what

may have happened to that, the tape or tapes of that interview between Mr. Wilson and Mr. Henderson?

A No.

Q Now after this statement was obtained from Ron Wilson the documents suggest, and maybe the evidence confirms this, but it looks as though Ron Wilson's statement, or at least its contents, were provided to Dan Lett of the Winnipeg *Free Press* before it was sent to Federal Justice, and that Dan Lett interviewed Ron Wilson either the day of the statement or the next day, and so that a story could run, I think -- and I'll show you the stories in a moment -- I think within a day or two after the statement, umm, and I think his story ran the same day or the morning that Federal Justice would have received the statement from you, or close. Do you recall that being the scenario?

A Yes.

Q And can you tell us, was that -- was that done deliberately, or can you elaborate on what was happening?

A I can only guess. Umm, I can only guess.

Q Well is it -- I'm prepared to hear your guess if

it's based on --

A I think this was Dan's reward, as a journalist, for the work that he had done up to that point, and his reward was the scoop.

Q And so, again, --

A I think that's what it was.

Q And, okay, so the scoop being, "here's Ron Wilson's statement, you get to see it, you get to interview him before anybody else even knows about it, namely Federal Justice or any other media outlet"?

A Yes.

Q And was there any -- the fact that --

A I can't be sure of that, but I don't have another explanation at this moment.

Q Was there any desire to have the statement appear in the media either contemporaneously or with -- when Federal Justice received it?

A Oh, as I -- yes. As I said, by this point our view was that anything that we did should be marched into Justice with blaring horns so that the public would see that information was coming in, and we felt that it would put Justice in a position of having to do something about it.

Q And so was your desire, then, to be -- and in one

scenario, and I think earlier on in the process it would be, "here is your information, we'll give you a chance to deal with it and then publicize it", was the approach now, "lookit, we're going to publicize it as soon as we get it, and we might even publicize it before we give it to you"?

A Yes.

Q And, again, that was done deliberately to put some pressure on them; is that right?

A Yes.

Q Now, after Paul Henderson interviewed Ron Wilson, did you have occasion to talk to Ron Wilson?

A Yes, I did.

Q And can you tell us when that was, and how it came about, and what you recall of it?

A I think it was, umm, when Paul was finished with Wilson, either that night or the next day.

Q And, and what was the nature of your discussion?

A Umm, I thanked him, umm, for his candour. Umm, he wanted to speak with David to apologize, umm, and I agreed to facilitate that conversation --

Q And so you --

A -- or to try to facilitate it.

Q -- so you arranged to have Mr. Wilson contact Mr. Milgaard; is that right?

A I think I did, yes.
Q Now there is also some reference in the documents to efforts being made by either you or Mr. Wolch --
A And, sorry, to get counsel.
Q Oh, sorry?
A To get counsel for Mr. Wilson, right.
Q That was my question, to get counsel?
A Right.
Q And, again, was that something that you talked to Mr. Wilson about?
A Yes.
Q And can you tell us, what do you recall about that discussion?
A I suggested that he might want to get counsel, that this would be a matter that would attract significant attention, including from the Department of Justice and from the media, and that he may want to have counsel. He was very reluctant, he didn't quite understand it, and I just suggested that he go get counsel.
Q And then we know that Mr. Watson ended up being retained; did you or Mr. Wolch assist in identifying or finding Mr. Watson or arranging that?

A I think we did, and I certainly had numerous conversations with Mr. Watson just about what was, what was all going on and what I thought Mr. Wilson's potential exposure was.

Q And so, again, would you have been -- did you initially contact Mr. Watson before Mr. Wilson did, do you know, or --

A I don't recall. I can't recall.

Q And I think, and I'm not sure if this is in evidence or whether it was in one of the documents about, but was it a *pro bono* effort by Mr. Watson for Mr. Wilson; do you know?

A I believe he applied to the Department of Justice -- actually, it may have been *pro bono* in the first phase.

Q And then at the Supreme Court there was a --

A And then at the Supreme Court he got funding.

Q And as far as getting counsel, were you concerned at all about -- you mentioned Federal Justice; did you think Mr. Wilson needed to have counsel for -- let me back up. Presumably, when you sent the statement of Ron Wilson to Federal Justice, you would have believed that they would have followed up with it; is that fair?

A I don't want to sound facetious, but it was not a

foregone conclusion.

Q But that it was likely that Eugene Williams would want to interview Ron Wilson, was that --

A We were, yes, we were hoping so.

Q And was one of the reasons, was one of the reasons you thought Mr. Wilson should get a lawyer was to deal with any interview by Eugene Williams?

A I think the principal concern was that Mr. Wilson may have some liability for perjury, and that there may be some legal issues that he would want some advice on, that would have been our primary thinking, and of course in dealing with Justice and the, all the others that were surely bound to come his way.

Q Were you concerned that Federal Justice or the police or the authorities would sit down with Ron Wilson and -- and question him in a way that might undo his recantation, for example; was that something that concerned you?

A Umm, no, no, that was not our concern at all. We wanted Wilson, he was off on his own, to have somebody he could talk to on an independent basis and have representation, both as to potential criminal and civil liability as well as, as I say, to the hordes that were no doubt going to descend

upon him, and among that included the Department of Justice and potentially the RCMP.

Q And when you say "hordes" are you referring to the media perhaps?

A Media, and by this point I think there were authors starting to circle, and yes, there were -- there was -- there could have been a lot of people coming his way.

Q Did you -- do you recall any discussions with Mr. Watson about -- we'll see in some of the documents, and we've already heard evidence that Mr. Wilson for a while, or Mr. Watson took the position that they would not be interviewed by Eugene Williams and not interviewed by Federal Justice?

A Yes.

Q Did you remember that?

A Yes, yes.

Q And did you have any discussions with either Mr. Wilson or Mr. Watson about that?

A Yes, I would. I believe I discussed with Mr. Watson my view that Justice, on the basis of the discussions I had had with other witnesses, seemed to be taking a relatively aggressive approach with the witnesses, and that he might

be -- want to be wary of that.

Q And "the other witnesses", would that be --

A Deborah Hall, Linda Fisher.

Q Yeah. And did you ever tell Mr. Watson that you didn't want him or Mr. Wilson to be interviewed, in other words "don't be interviewed by Mr. Williams"?

A No, no.

Q And so, to the extent that they took that position, that would come from either Mr. Wilson or Mr. Watson?

A Yes.

Q And I think, and I think there is also a document or a transcript where it indicates you maybe even called him and urged him to attend an interview; is that right?

A That's probably true, yes.

Q That's probably an appropriate spot to break, Mr. Commissioner.

(Adjourned at 4:27 p.m.)

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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.

_____, CSR
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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