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 Thursday, April 20th, 2006

Volume 135

Inquiry Proceedings

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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

and Mr. Robert Kennedy,

Mr. Garrett Wilson, Q.C., **for** Mr. Serge Kujawa

Mr. Pat Loran, Esq.,   **for** the Saskatoon Police Service

Mr. Chris Boychuk, Esq.,   **for** Mr. Eddie Karst

Mr. Bruce Gibson, Esq.,   **for** the RCMP

Mr. David Frayer, Q.C.,   **for** Minister of Justice

                             (Canada), The Hon. Vic Toews

Mr. Alexander Pringle, Q.C., **for** Justice Calvin Tallis

                             (Retired)

Mr. Donald J. Sorochan, Q.C., **for** David Asper

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1   ***Transcript of Proceedings***

2   *(Reconvened at 9:04 a.m.)*

3   COMMISSIONER MacCALLUM: Good morning.

4   ALL COUNSEL: Good morning.

5   ***DAVID ALLAN ASPER, continued***:

6   **BY MR. HODSON:**

7   **Q**   Mr. Asper, we left off on the issue of the police

8   files. If we could call up 004592, and I think we

9   went through this, and in particular this quote

10   here where you suggest in the article that the

11   files did exist on August 16th, 1991, and I think

12   you told us yesterday that you've tried to

13   remember where you got that from, you can't

14   remember, and that someone would have told you

15   that, and likely Tom Vanin. Is that a fair

16   summary of your evidence?

17 *A*   Yes.

18 **Q**   And I just want to draw to your attention what Mr.

19   Vanin has said at this inquiry. If we could go to

20   his evidence at page 22211 and I'll just go

21   through what he had to say and then ask for your

22   response. I asked him the question:

23   "Q   And so when you found that they were

24   missing, were you able to say whether

25   they had been there, maybe had been

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1   destroyed, for example, 10 years ago or

2   20 years or two years ago, were you able

3   to make any determination as to when the

4   files would have gone missing?

5   A   I had a conversation with Dave Roberts

6   and we were talking about the files

7   missing and according to Roberts he

8   interviewed Gus Weir and Gus Weir told

9   Roberts that he was looking for those

10   files more than two years ago and even

11   at that time they were missing and Mr.

12   Roberts relayed this information back

13   to me."

14   And then:

15   "Q   Okay. So put it this way, Mr. Vanin,

16   there was nothing -- is it fair to say

17   there was nothing that you saw or heard

18   in 1991 when you were looking for the

19   Larry Fisher files that suggested they

20   had just vanished or just gone missing?

21   A   No. It appeared to me that they had

22   been missing for a considerable length

23   of time.

24   Q   Okay. And would you have conveyed that

25   information to David Asper?

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1   A   Certainly.

2   Q   Would you have conveyed that information

3   to David Roberts?

4   A   I probably did."

5   And then the next page, I then -- actually,

6   sorry, go to page 22295, and then I specifically

7   put to Mr. Vanin the same article, Mr. Asper,

8   that I read to you, and the quote attributed to

9   you that:

10   "Sometime between Aug. 16 and this past

11   Tuesday the files went missing."

12   And I asked Mr. Vanin:

13   "Q   Did you give any information to Mr.

14   Asper to suggest that between August

15   16th and August 27th, 1991 the Larry

16   Fisher files had existed and had

17   disappeared during that time frame?

18   A   No, sir, and I don't agree with that

19   statement.

20   Q   What don't you agree about it?

21   A   Well, that what I heard from Roberts,

22   that I believe it was from Gus Weir,

23   that Weir had searched for these files

24   years before that, or at least a

25   couple of years before, and the files

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1   were already missing."

2   And so I think from that, Mr. Asper, that Tom

3   Vanin is at least saying, (a), I didn't think

4   they had just gone missing, I knew they had been

5   missing for a while, and two, I certainly never

6   told Mr. Asper that. Is it your contention, sir,

7   that he's mistaken or wrong on that?

8 A   No, my contention is I don't recall. I believe it

9   was Mr. Vanin who would have provided me with that

10   information, but I don't recall, I just don't

11   recall how that came to be.

12 Q   Okay.

13 A   I don't recall even that that's exactly what I

14   said to the journalist.

15 Q   Okay.

16 A   I accept that that's what I said, but I don't

17   recall the circumstances.

18 Q   And just to go back to 004592, and this is to

19   Terry Craig of the *StarPhoenix*, just so that I

20   understand your position, I think you are saying

21   you acknowledge that you would have said this, you

22   just don't have a recollection; is that fair?

23 A   That's right.

24 Q   If we can then go on to 333582, and this is your

25   August 30th letter, 1991 directly to the minister,

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1   and you attach a copy of the August 29th edition

2   of *The Globe and Mail*, it:

3   "... contains an article regarding

4   missing files which is most disturbing.

5   I enclose a copy for handy reference,

6   and emphasize the need for a thorough

7   reopening of the case."

8   Is it fair to say that the missing file

9   allegation, if I can call it that, or the missing

10   file issue, was a matter that you, being David

11   Asper and/or the Milgaard group, or both, put

12   forward to the Minister of Justice as a ground

13   supporting your contention that there had been a

14   miscarriage of justice and in support of your

15   request to have the investigation re-opened?

16   A   No, that's not correct at all. If in fact the

17   files were missing, and we believed that they may

18   be, we were suggesting that it was time for the

19   Department of Justice to move on the matter and

20   perhaps take an interest and get involved, find

21   out.

22   Q   Okay.

23   A   I don't think we were suggesting it was a ground

24   that there was a miscarriage of justice.

25   Q   Okay. And maybe -- I'm sorry, I don't understand.

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1   Was it a piece of information that was relevant to

2   the minister's decision as to whether or not she

3   should re-open the case?

4   A   I suspect what we were thinking there was that we

5   would hope that the Minister of Justice would

6   provide some assistance in attempting to find the

7   files, sequester whatever existed and become

8   engaged. I think that's what we were trying to do

9   here.

10   Q   But is it fair to say, and I'm sorry if I'm not

11   understanding correctly, that two weeks earlier

12   you had filed an application under Section 690

13   saying we would like a remedy?

14   A   Right.

15   Q   And the basis of the remedy was similar fact

16   evidence that Larry Fisher committed the crime.

17   You now are sending to the minister here is

18   information which suggests that the actual rape

19   files for Larry Fisher, so it relates to what you

20   have put forward, have gone missing or appear to

21   have gone missing and you ask, emphasize the need

22   for a thorough re-opening of the case, and I'm

23   just -- are you saying that this letter and the

24   missing file information was not part of the

25   information you put forward to the minister?

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1   A   I don't recall it being that, being used for that

2   purpose at all. My recollection was we were using

3   it as an alarm bell to the Department of Justice

4   to get involved, get to Saskatoon and sequester

5   and get everything that related to this case into

6   their custody.

7   Q   Okay. On August 14th and August 16th

8   Mr. McCloskey and others publicly stated that

9   David Milgaard was framed and there was a

10   cover-up. Would it be fair to say that the

11   missing files, that if the Larry Fisher files went

12   missing right after you filed your application,

13   that that would be information relevant to the

14   question of whether or not there was a frame and a

15   cover-up, it related to that?

16   A   Sure, it could be.

17   Q   And it was relevant -- if someone was going to

18   consider has there been a frame and has there been

19   a cover-up, the fact that the Fisher rape files

20   may have gone missing would be relevant to that

21   issue?

22   A   Yes, but that was not an issue that was raised in

23   our 690 application.

24   Q   The frame and cover-up?

25   A   Right.

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1 Q And that was raised publicly?

2 A Yes.

3 Q But not directly to the minister?

4 A No.

5 Q And why was that?

6 A I can't say. I assume we felt we had sufficient

7 grounds by identifying the true killer.

8 Q Okay. And just on that, and we touched on this

9 yesterday, the allegation of frame and cover-up

10 which I think we went through what that entailed,

11 would it be fair to say that that would call into

12 question the conduct of certainly Saskatoon City

13 Police or some of its officers would have to be

14 involved; is that fair?

15 A Yes.

16 Q And as well the Crown, agents of the Crown, the

17 prosecutor and Mr. Kujawa would have to be

18 involved in that allegation; is that fair?

19 A Yes.

20 Q And I think the allegation was that once they

21 discovered Fisher, the police and the Crown or the

22 government or the state knew that he had committed

23 the Gail Miller murder, or likely had, and took

24 steps to cover it up and so that would involve

25 both the police and Crown officials being

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1   involved; is that fair?

2   *A*   Yes.

3   *Q*   And I think you touched on this yesterday,

4   certainly if that allegation were proven, would

5   you agree that that would be a miscarriage of

6   justice? I think that goes without saying.

7   *A*   Yes.

8   *Q*   And that that in and of itself would be a basis,

9   would you believe that that would be a basis to

10   re-open or to get a remedy under Section 690?

11   *A*   I'm not sure about that. I'm not sure about that.

12   *Q*   You would hope --

13   *A*   I think the fact that Fisher was arrested and the

14   fact that if you assume hypothetically that he was

15   arrested and that the fact of his arrest was kept

16   quiet and held back from the Milgaard counsel,

17   Milgaard counsel and family, in and of itself is

18   kind of meaningless unless you know that Fisher is

19   the perpetrator. We had submitted in our

20   application the assertion that Fisher was the

21   perpetrator, that was the more important

22   information, frankly, for the 690 application.

23   *Q*   Right. So perhaps, if in addition to that,

24   though, but the fact that the state was involved

25   in covering up evidence and taking deliberate

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1   action --

2   *A*   I think that speaks frankly -- my view would be

3   that speaks to the question of damages more than

4   it does to whether -- sure, it speaks to the

5   miscarriage of justice, but the miscarriage of

6   justice occurs because the wrong man was

7   prosecuted because you've identified the right

8   man, the man who was actually the killer.

9   Q   And would it not go further that it would also be

10   a miscarriage of justice because those in charge

11   of Justice didn't take steps to undo the wrong?

12   *A*   Oh, absolutely, yes.

13   Q   If we can go to 039314, and I won't take you

14   through all the articles that followed up on this

15   missing file issue, but you would be aware, Mr.

16   Asper, that the issue of the missing files in

17   Saskatoon attracted a lot of attention in the

18   media; would you agree with that? I think we have

19   in our record lots of newspaper articles on that.

20   *A*   Yes.

21   Q   And I think yesterday I think you used the word it

22   was sensational; is that right?

23   *A*   Yes.

24   Q   Something that grabbed attention?

25   *A*   Yes.

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1   Q   And here's a comment where you say:

2   "Asper said he has sources which lead

3   him to believe the published reports are

4   accurate.

5   "I had heard rumours about it

6   for days now."

7   Do you know what that would be referring to, what

8   the rumours were?

9   A   No.

10   Q   And then you go on about the search for that, you

11   say:

12   "I find it very disconcerting the

13   Saskatoon police are investigating

14   themselves."

15   And I think this relates to the fact that the

16   police are actually looking into whether the

17   files are missing, so that would have been a

18   concern at the time as well, not only that they

19   were missing, but the police are actually looking

20   or investigating themselves?

21   A   Yes.

22   Q   Now, later when the Saskatchewan Police Commission

23   was put in place, or it was asked to do an

24   investigation, did you have the same concerns

25   then, that the Police Commission would be looking

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1   into it rather than the city police?

2   *A*   I don't recall what my view was.

3   *Q*   Now, there's another issue here:

4   "The *Globe and Mail* also reported

5   Saskatoon police are searching for a

6   fifth file of an unsolved sexual assault

7   the day after Miller was killed."

8   And I believe this is referring to the (V4)---

9   assault, and I think what the record shows is

10   that there was not a separate file opened for the

11   (V4)---- (V4)--- complaint, it was part of the

12   Gail Miller file, and I believe the evidence is

13   that it was always on the Gail Miller file, but

14   that when people went to look for the (V4)---

15   file they couldn't find it because there wasn't

16   one, and then I think within a few days or around

17   this time they discovered where it was. Does

18   that sound right, do you recall any of that?

19   *A*   As I say, I'm afraid I don't have any specific

20   recollection of this whole episode.

21   *Q*   And 333594, this is a September 4th, 1991 memo

22   from Eugene Williams to Bruce MacFarlane, and I

23   suspect, Mr. Asper, you may not have seen this

24   document before, but there's just a comment in

25   here, Mr. Williams is relating his recollection of

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1   how he dealt with the files and what he

2   communicated to Mr. Wolch, and I just want to ask

3   you whether that accords with your recollection,

4   and what he says, just by background, this is back

5   after the first application, he says:

6   "I learned that the 1968 sexual assault

7   files were not available. A number of

8   older files had been destroyed, as part

9   of the normal file destruction. The

10   1968 assaults to which Fisher had

11   pleaded guilty had not been microfilmed

12   before they had been destroyed."

13   And then scroll down, he says:

14   "Despite press reports alleging that

15   Saskatoon police files were lost,

16   recently, the police told me in 1990

17   that the files were not available. I

18   relayed that information to Hersh Wolch

19   shortly after I had received it."

20   And are you able to recall, Mr. Asper, whether

21   you would have been aware of that, would Mr.

22   Wolch have informed you of that or were you

23   aware, at least according to Mr. Williams, that

24   this information was conveyed to Mr. Wolch in

25   1990, that the files had been destroyed some time

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1   ago?

2   A   I have a good deal of trouble with that. Although

3   I don't recall the specific incidents as I said, I

4   feel very confident that I would not have

5   responded as I did to the media report unless

6   someone had given me information, and I'm certain

7   that we would have shared that information, and if

8   Mr. Wolch had been told the information that is,

9   that it's alleged he was told in this memorandum,

10   I kind of doubt that we would have responded the

11   way we did.

12   Q   Okay. Now yesterday you recall I went through the

13   August 8th letter to Ellen Gunn and the August

14   14th letter to Kim Campbell of Mr. Wolch where, in

15   both letters, he refers to the fact that they were

16   told there were no files and then they located one

17   file?

18   A   Yes.

19   Q   Remember that?

20   A   Yes.

21   Q   So, again, it appears on those dates, August 8th

22   and August 14, at least according to Mr. Wolch in

23   his letter, that the knowledge at least that he

24   had was that yes, the files had been missing and

25   one was located, and I'm just wondering, does

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1   that -- do you take issue with that or was that

2   your knowledge?

3   A   No, I don't take issue with it but, you know, it's

4   likely that we received information sometime

5   subsequent to those letters that files may

6   exist --

7   Q   So after --

8   A   -- or did exist.

9   Q   So after August 8th or after August 14th, 1991 and

10   before August 30th of '91, when you made the

11   comments, you think you would have got some

12   information to the contrary?

13   A   Well I'm very -- yes. As I say, I'm very

14   confident that I would not have responded, as I

15   say, as I did unless somebody had given me the

16   information, somebody that I relied on.

17   Q   Okay. If we can go to 229820, and there's some

18   further articles here that relate to the missing

19   files issue, but -- 229820, and *Missing files*

20   *skewed review*, and if we can just go here I'll

21   just ask you to comment. What's attributed to

22   you:

23   "'It's very disconcerting the

24   Department of Justice may not have

25   received a full picture of the Milgaard

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1   case from the Saskatoon police

2   department,' he said in response to

3   information released Thursday by city

4   police.

5   'That very well may have

6   affected the approach the minister took

7   (in denying Milgaard's application for a

8   new trial).'"

9   And then over to the right, down here:

10   "'It's all very easy and

11   tempting ...",

12   actually, let me just go back here and I think I

13   can summarize. What information the police had

14   released around this time, Mr. Asper, was that

15   they had discovered a file when they searched

16   that had not been given to Federal Justice on the

17   first application; do you recall becoming aware

18   of that?

19   A   Vaguely.

20   Q   Okay. And in any event you say:

21   "'It's all very easy and

22   tempting to criticize the feds,' ...

23   'But the fact is, we don't

24   know what is the quality of information

25   that the federal Department of Justice

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1   is getting from Saskatoon.'"

2   And I'm just wondering if you wanted, if you had

3   a recollection of that issue being raised that

4   there may have been a file that Mr. Williams

5   didn't have, a partial police file?

6   A   No. I can't recall this.

7   Q   Now do you remember having discussions with

8   Sergeant Pearson in the latter part of 1991 and

9   the early part of 1992 where he was asking you to

10   disclose your confidential source, Mr. Vanin -- he

11   didn't know it was Mr. Vanin at the time --

12   because Sergeant Pearson felt that Sergeant Vanin

13   may have, (a) may have information about the

14   missing files, or (b) may in fact be the person

15   who took the missing files; do you recall those

16   discussions?

17 A   Vaguely.

18 Q   If we can go through a couple of documents that

19   may assist your memory, 056816. And this is

20   Sergeant Pearson's November 26th, 1991 note, and

21   Bill Graham is the fellow who investigated for the

22   Saskatchewan Police Commission, and Pearson says

23   to him:

24   "... that he should go to the source of

25   the Application material ...",

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1   that being your second application to the

2   Minister:

3   "... and ask for the identity of the

4   City Police officer vetted out in the

5   Application. The possibility exists

6   that if the Fisher files were removed on

7   this one occasion, other Fisher files

8   and in fact other police files, may have

9   been removed by this same person. In

10   fairness to all interests in the

11   Milgaard/Fisher investigation, it would

12   be appropriate to have this

13   information."

14   And I think what Sergeant Pearson told us when he

15   testified here is that at this time he knew that

16   the source had actually gone in and taken out of

17   the police station either a copy or the file, one

18   of the Larry Fisher files, which I think he said

19   would have been against, you know, the police

20   protocol. So if someone went in and did that,

21   that if you were looking for a suspect or looking

22   for someone who might have -- be responsible for

23   removing them, the person who had already done it

24   might be a good starting point.

25   A   I get the point.

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1   **Q**   And do you recall those discussions with him?

2   *A*   Yes.

3   **Q**   And maybe I'll just take you through a couple of

4   your letters so that you can comment on that.

5   COMMISSIONER MacCALLUM: Mr. Hodson, could

6   I have the doc. ID, again, of that please?

7   MR. HODSON: Yeah, the doc. ID, this is

8   056743.

9   COMMISSIONER MacCALLUM: Yup.

10   MR. HODSON: That's the lengthy Pearson

11   note and it's page 056816.

12   BY MR. HODSON:

13   **Q**   And just in the chronology here, I don't think we

14   need to review it, at 165470 -- sorry -- 165469 is

15   the doc. ID, and go to 470. And this is a letter

16   December 3rd, 1991 from Theresa Dust, the city

17   solicitor, to Murray Brown that has the Police

18   Commission report dated November 29th, 1991, and a

19   copy was sent to you and Mr. Wolch. So presumably

20   -- and we may go to the next page and just look at

21   the cover page -- is it fair to say that you and

22   Mr. Wolch would have received the report of the

23   Saskatchewan Police Commission into the missing

24   files?

25   *A*   Yes.

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1   **Q**   Do you recall whether you would have taken issue

2   with any of that at the time or did anything with

3   that?

4   *A*   I don't recall.

5   **Q**   056826. This is December 12th of '91, and again

6   Mr. Commissioner, this is part of 056743. Pearson

7   says he:

8   "... met with Police Commission

9   investigators ..."

10   and he:

11   "... asked if they had checked Asper for

12   the source who leaked the file material

13   ...",

14   and:

15   "... apparently the Commission chairman,

16   Laing, contacted Asper asking if there

17   was any more info to be provided, and

18   apparently Asper stated there was not,

19   and the matter rests there."

20   Do you recall whether Bob Laing called you? He

21   was the Chair of the Police Commission at the

22   time.

23   *A*   I don't recall it.

24   **Q**   Okay. 159391. And this is the December 30th

25   letter from Sergeant Pearson to you, and he talks

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1   about, here:

2   "It has been suggested the missing

3   Fisher files may contain information

4   relevant to David Milgaard's case.",

5   and then asks you to provide the missing

6   information. Do you recall getting that request

7   from Sergeant Pearson?

8   A   I don't, not specifically, but I accept that I did

9   or must have.

10   Q   In fact what Sergeant Pearson also said, that one

11   of his thoughts at the time was that the -- I

12   think he was asked the question about whether the

13   missing Fisher files, if they were found who would

14   it benefit, who would it hurt, and he expressed

15   the view that the missing files may have actually

16   been detrimental to David Milgaard's position in

17   the sense -- with respect to the arguments on

18   Larry Fisher. I think what he said is, "look, it

19   could cut either way, it may be that the missing

20   files divulge information unfavourable to the

21   police, on the other hand it may not". Do you

22   recall any discussion with him about that, that

23   umm --

24   A   No. I'm sure that the prospect that it might

25   contain evidence detrimental to David Milgaard,

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1   umm --

2   Q   Actually, sorry, I stated that poorly Mr. Asper.

3   I think what he said is that the police files may

4   adversely affect the position taken with respect

5   to the value of the Larry Fisher files, in other

6   words I think -- and one example might be that if

7   the files were found and there was nothing

8   mentioned about any link to the murder, etcetera,

9   it may respond to a number of the suggestions that

10   were made, is one possibility. If -- I shouldn't

11   have said "to David Milgaard", "to the argument

12   that he had put forward"; do you understand where

13   --

14   A   Yes.

15   Q   Yeah. 057275.

16   A   I have a thought on that one but I won't express

17   it.

18   Q   Pardon me?

19   A   I have a thought on that but I won't --

20   Q   Well, and in fairness I think what Sergeant

21   Pearson was saying is he didn't know what was on

22   the files, and from his perspective he said you

23   shouldn't just conclude that they would be

24   unfavourable to the police, that maybe they were

25   favourable?

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1   *A*   Right.

2   **Q**   And I don't think he was saying that they did

3   contain information that would help the police, he

4   just said it might. 057205 is your letter back,

5   and I think the bottom line here is -- actually

6   there is a comment here about the (V5)--- file.

7   If we can scroll up, you say:

8   "I am enclosing ... photocopies of the

9   entire police report dealing with (V5)--

10   (V5)--- to whom reference is made in the

11   'vetted out portions' of the report that

12   you provided to me. The material that I

13   am sending to you was provided to us by

14   the Saskatchewan Department of Justice.

15   Quite frankly, I am somewhat amazed that

16   you had not been provided with this

17   material, especially since it appears

18   that the (V5)--- file is only one of two

19   ((V3)-------) that remain in existence.

20   In any event, I am providing you with a

21   copy of the file that we have in our

22   possession."

23   And am I correct, Mr. Asper, that the (V5)---

24   file that you are sending here you would have

25   received from Saskatchewan Justice as part of the

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1   disclosure leading up to the reference case?

2   A   I believe so, yes.

3   Q   That's --

4   A   And I say that just because of the date.

5   Q   As opposed to a copy that Mr. Vanin, or whoever

6   else, may have given to Paul Henderson; is that

7   right?

8   A   I'm assuming that, yes.

9   Q   And then you go on to say:

10   "Insofar as the information which is

11   vetted on the second page of the report

12   that you provided to us is concerned, I

13   can advise that this information was

14   provided by a confidential informant,

15   and I am not at liberty to disclose the

16   identity of this person. I can assure

17   you, however, that this informant did

18   not provide us with anything that we do

19   not now have in our possession from the

20   Department of Justice in Saskatchewan."

21   And is that statement correct?

22   A   I assume it is, yes.

23   Q   And I think what you are saying is here's the

24   (V5)--- report, is it implicit or even explicit,

25   lookit, this is all our informant gave us, I'm

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1   sending you everything that he would have shown

2   us?

3   A   I'm assuming it is, yes, correct.

4   Q   056845. And this is just at the bottom where

5   Pearson makes a note saying he received your

6   letter and the (V5)--- file, which he already had,

7   and says:

8   "I have no idea why it was included ..."

9   And on to the next page. And again, just so you

10   are aware, this is what Sergeant Pearson had in

11   his notes and this is what he testified to. He

12   says:

13   "What concerns me about this is that Mr.

14   Asper makes reference in his

15   correspondence as to how 'intriguing' it

16   is that files have gone missing,

17   possibly, in my opinion, by his own

18   source, yet he seems satisfied with

19   leaving this question as it is. I am

20   not sure if there is more that can be

21   done ..."

22   And then we go to 159396, and this is his January

23   14th, 1992 letter to you, and basically says

24   that:

25   "... you describe as 'intriguing' the

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1   fact some of the Fisher files are

2   missing. Is it possible your informant

3   has provided the Fisher files to other

4   individuals? What I find intriguing

5   with this is the fact your confidential

6   informant may actually be the person

7   responsible for the missing files.

8   Without your assistance, we may never

9   know!"

10   And you (sic) say:

11   "You make mention that many interesting

12   points relating to Larry Fisher ...",

13   I'm sorry, that relates I think to the other file

14   materials. So is it fair to say at this point,

15   Mr. Asper, you would have been aware, from

16   Sergeant Pearson, that he was saying, number 1,

17   your confidential source is someone who I think

18   might be responsible for the missing files, and

19   number 2, he may have been the one who gave them

20   to other individuals, and 3, that Sergeant

21   Pearson held the view that the files may be

22   unfavourable to a position put forward as to what

23   might be in the file; do you recall?

24   A   Well, it doesn't say that, the third point.

25   Q   No, no, it --

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1   *A*   And I don't recall the conversation --

2   **Q**   Let, let --

3   *A*   -- regarding what was in the file --

4   **Q**   Let --

5   *A*   -- or what may be in the file.

6   **Q**   Sorry, let me back up and do it in part. So I

7   think you would agree, from this correspondence,

8   that Sergeant Pearson made you aware that he felt

9   Tom Vanin -- although he didn't know who it was --

10   but your source may be responsible --

11   *A*   Oh yes.

12   **Q**   -- for the removal of the files?

13   *A*   Oh yes.

14   **Q**   You knew that?

15   *A*   Oh yes.

16   **Q**   And number 2, what he says here:

17   "Is it possible your informant has

18   provided the Fisher files to other

19   individuals?"

20   So in other words that he has them and by

21   implication, if they were favourable to your

22   position you would do something with them, and

23   that maybe they are unfavourable. Now that's not

24   in the letter but that was Sergeant Pearson's

25   evidence, and my question to you is do you recall

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1   being made aware by Sergeant Pearson that he was

2   raising the issue that lookit, these files might

3   be unfavourable to your position and your source

4   might be the one who took them?

5   A   Well I knew that he was suggesting that the source

6   may have taken the files, but I wasn't aware that

7   -- of his interpretation of why, or what use might

8   be made, or what the contents of the files might

9   contain, --

10 Q   And I don't --

11 A   -- or his views on that.

12 Q   And I don't want to overstate his views. I think

13   what he was saying is it was a possibility and

14   without seeing the files you couldn't tell?

15 A   Right.

16 Q   And, again, you don't recall being made aware of

17   that by him?

18 A   No. I do recall, and I think we had telephone

19   conversations, he wanted to know who the source

20   was.

21 Q   And, ultimately, you didn't provide that

22   information; correct?

23 A   I don't recall.

24 Q   Okay. I think actually in '93 -- and we've heard

25   some evidence -- I think that ended up coming out

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1   through provision of information to the RCMP in

2   '93. I think Sergeant Pearson's evidence was that

3   you never told him who it was at this time?

4   A   I think that's true. My recollection is that

5   somebody was able to read a blacked-out document

6   eventually and get the name.

7   Q   And, again, what were your -- what were your

8   reasons for not disclosing Mr. Vanin to Sergeant

9   Pearson?

10   A   Umm, I didn't -- I wanted to keep my source where

11   he was and, by exposing him, he would be of no use

12   to us.

13   Q   If we could now go back to September of 1991, if

14   we can call up 229822, please. And this is a

15   September 7th, 1991 front-page story I believe in

16   *The Globe and Mail*, at least part of it is, about

17   an encounter that Mrs. Milgaard had with the Prime

18   Minister, Brian Mulroney. And you mentioned this

19   the other day when we were talking about the

20   encounter with Kim Campbell, and there is a fair

21   number of articles, clips, etcetera, that we have

22   received around this time, and I think it received

23   a fair bit of publicity. I don't propose to go

24   through the details, but wondering if you can

25   comment on how this came about and how this fit

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1   into the re-opening efforts?

2   A   We knew that the Prime Minister was visiting

3   Winnipeg and, umm, Joyce, umm -- and by this time

4   the size of the support group had grown quite

5   significantly, umm, across the country, and

6   certainly in Winnipeg. He was visiting Winnipeg,

7   we talked about whether there might be some

8   attempt made to communicate indirectly with the

9   Prime Minister and I implored Joyce and the others

10   to, umm, be very passive, "feel free to make your

11   presence known but do not create a fuss" was, I

12   think, my mildly -- the mildest version of my

13   advice to the group.

14   What happened was quite

15   remarkable, what actually happened was quite

16   remarkable. Mrs. Milgaard and her group had set

17   up outside the hotel, I think you see the

18   depiction in the photograph, and they had a big

19   banner, and there were a number of banners, and

20   Mrs. Milgaard, true to our plan, indicated to I

21   think a security official that there was not going

22   to be any trouble and she was gonna stay back and

23   be passive and 'don't worry'. And my recollection

24   is that she was advised by the security official,

25   "oh, don't worry Mrs. Milgaard, the Prime Minister

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1   would like to speak with you". The motorcade then

2   pulled up, the Prime Minister got out of the car,

3   had clearly been fully briefed on what was

4   happening in the case, certainly laterally, and

5   engaged in a conversation, a very warm and

6   engaging conversation, with Mrs. Milgaard.

7 Q   And, again, I think the nature of the discussions

8   were twofold, and I can maybe just summarize so we

9   don't have to go through all of it, but number 1 I

10   think Mrs. Milgaard expressed concern about

11   David's health and was seeking some assistance in

12   moving him, is that right, within the institution

13   because of his health concerns?

14 A   Yes.

15 Q   And, secondly, about getting the second

16   application dealt with in a timely fashion, or

17   words to that effect, and I think the Prime

18   Minister's response -- and, again, the documents

19   speak for themselves -- but was essentially that

20   he would look into the prison issue and that he

21   would -- he just simply indicated that the Justice

22   Minister is reviewing the matter, and I don't

23   think he said he would be doing anything with

24   respect to that or that he wouldn't -- he wouldn't

25   be stepping in; is that your recollection of what

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1   he was saying?

2   A   Yes.

3   Q   And, Mr. Commissioner, there is -- I don't have

4   the doc. ID here but there is actually a

5   transcript of what Mr. Mulroney and Mrs. Milgaard

6   said, there is a press report, and I'll give you

7   that doc. ID later.

8   But I take it you viewed that as

9   a favourable response from the Prime Minister?

10   A   Yes.

11   Q   And can you tell us a couple of things; number 1,

12   if I can divide it into, I've been using the term

13   'legal avenue', but as far as your -- the legal

14   application under 690, the second one, and then

15   secondly the public part of your campaign, if I

16   can call it that. Just as far as the legal

17   avenue, did you place any significance on this

18   encounter with the Prime Minister?

19   A   Umm, I -- I think I would have to say that it was

20   a purely political moment. I don't -- I -- for

21   example, nothing came of that encounter that would

22   have amended our 690 application.

23   Q   Sorry, maybe I can phrase it this way. As a

24   result of what Mr. Mulroney said to Joyce Milgaard

25   did you take more comfort that maybe your second

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1   application was being considered more seriously,

2   or more favourably, by the Minister of Justice?

3 *A* Umm, I -- I would have to say we probably did.

4   I -- I would -- I -- my view at the time was that,

5   when the Prime Minister came over to speak with

6   Mrs. Milgaard, he typically -- or -- or -- I think

7   the smart political thing, if there was going to

8   be a bad result, would be for him to not have done

9   what he did, so we interpreted what happened here

10   to mean that the Prime Minister of Canada had an

11   interest in this case, a personal interest. And

12   I've said, and I don't know, but I've said that I

13   do believe that he would not have done this

14   unless, unless something was going to happen.

15 *Q* And, something, you are referring with respect,

16   here, to your application?

17 *A* Yes.

18 *Q* Now let's talk a bit about -- and you've already

19   covered this, I think, when you talked about other

20   information in the media.

21 *A* Yeah.

22 *Q* But tell us about the role this played in the,

23   umm, the re-opening efforts that were geared

24   towards informing and galvanizing the public to

25   influence the Minister to act favourably on your

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1   application?

2 A Well it, it created the ultimate juxtaposition

3   between how Mrs. Campbell, or Ms. Campbell, had

4   treated Mrs. Milgaard and how the Prime Minister

5   treated Mrs. Milgaard, and of course the media now

6   had two sets of images, one of the Minister of

7   Justice brushing Mrs. Milgaard off and the other

8   of a caring Prime Minister speaking to

9   Mrs. Milgaard and offering her some degree of

10   encouragement. What that did was it, I think,

11   isolated the Minister of Justice politically and

12   emboldened more people to come forward.

13 Q And did you -- and when I say "you" it can be you,

14   David Asper, or you the Milgaard group, if it's

15   different please tell me -- but did this incident

16   and the coverage it received with the Prime

17   Minister; did you then take that and take further

18   steps in the public domain to use that to assist

19   your efforts to re-open the case?

20 A I don't know that we took that specific event. I

21   think it, it created other opportunities -- my

22   recollection is that it just created other

23   opportunities, broader opportunities --

24 Q In the media?

25 A -- for us to go -- yes, for us to go and

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1   communicate the message.

2 Q   Okay. Now in this time I want to go through,

3   we're now into September of 1991, we know on

4   November 28th of '91 the Minister --

5 A   My memory is going to get foggy again because I'm

6   having another child about this point.

7 Q   Was it you or your wife?

8 A   My wife.

9 Q   Okay.

10 A   Sometimes it feels --

11 Q   So the -- so I want to go through the time frame,

12   here, leading up to the Minister's decision, and I

13   will take you through some of the document to --

14   to assist your memory, Mr. Asper, but I take it

15   that there appears to be discussions going on, and

16   I think as early as September '91 through to

17   November, between you and Mr. Wolch and Justice

18   officials that appear to be discussions about what

19   type of reference there might be and what type of

20   remedy; is that, is that a fair summary?

21 A   Yes.

22 Q   And when did you -- do you recall when you first

23   heard or got some idea from the Justice officials

24   that your application was going to be looked upon

25   favourably? And I appreciate that until the order

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1   is made you don't know it's gonna happen, but did

2   you get some indication from the Justice officials

3   that lookit, we want to talk to you about how this

4   matter ought to be resolved?

5   *A*   I --

6   **Q**   And I'll take you through the documents, but maybe

7   if you can just give me a general recollection of

8   who told you and when they told you and what they

9   told you?

10   *A*   Well, look, I don't have a specific recollection

11   of the chronology but it wasn't long after the

12   meeting with the Prime Minister, umm, that the

13   tone of the conversations -- and they were

14   telephone conversations -- changed. Umm, ah, and

15   I was part of some of, I was part of some of the

16   conversations, these were generally conducted by

17   Mr. Wolch, umm, I just can't tell you the exact

18   timeline.

19   **Q**   No, that's fine. And, again, --

20   *A*   And part, and I will say part of -- we had to be

21   very careful at this point because, and I don't

22   recall the exact time, but there came a point of

23   extreme sensitivity of the information, umm, where

24   it became clear that the discussions were about

25   re-opening the case and the basis on which the

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1   case might be re-opened. And you are right, we

2   were very cautious, because we hadn't received an

3   order. We couldn't, or we were very reluctant to

4   release the tenor of those conversations to the

5   Milgaards, and certainly not to the public, umm,

6   and yet we'd built up this huge well of public

7   activity and it was, umm, it was a rather

8   difficult period of time.

9   Q   And so, just so that I understand, you would have

10   received some indication from Justice officials

11   that you were likely to get a favourable response

12   to the application?

13   A   I think we were reading that in.

14   Q   Or reading that in?

15   A   Yes.

16   Q   And your concerns, I think you are telling us,

17   were twofold: One, the public I don't know what

18   you want to call it, you can give better

19   adjectives than I, but whatever was going on in

20   the public domain that you had created earlier, I

21   think you said, was still bubbling and growing; is

22   that fair?

23   A   Yes.

24   Q   And were you --

25   A   And we had a choice, I guess, to sort of cut it

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1   off, which would have been highly suspicious, or

2   to try to manage it and keep what was really

3   happening close to the chest.

4 Q   And were you concerned, then, that what had been

5   created -- and I think your words on a few

6   occasions is that once you put it in the hands of

7   the media you lose some control, I think those

8   were your words?

9 A   All control.

10 Q   All control. And was that a concern that lookit,

11   we've got this thing out there that we don't

12   really have control over it, and it might impede

13   what we're now doing with Justice officials; is

14   that what you are saying? Was that a concern?

15 A   Yes.

16 Q   And that if something happened in the public

17   domain or through the media, it might cause the

18   officials to back off, is that --

19 A   Yes.

20 Q   Okay. And so therefore --

21 A   Or at least prejudice the, what we thought was the

22   more positive tone of the conversations.

23 Q   Yeah, and you didn't want to, you didn't wanna

24   tick 'em off; is that fair?

25 A   Right. And Mr. Wolch was often not a happy camper

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1   coming to the office in the morning, seeing what

2   was in the papers.

3 Q   And elaborate on that? I don't --

4 A   Well as -- there was a lot of residual materials.

5   Some journalists came to the story late and there

6   would be reporting, updates of what had happened,

7   he just -- we just couldn't really slow it down

8   and I think what we would have preferred at that

9   point, certainly what Mr. Wolch would have

10   preferred and made it clear to all of us, was that

11   okay, it looks like the train is on the track

12   here, let's just -- let's just get the deal done.

13 Q   And the, and the items that were bothering

14   Mr. Wolch in the morning were articles that were

15   --

16 A   Anything, anything.

17 Q   Okay. But unfavourable towards the, I mean,

18   critical of the Justice department?

19 A   Anything. Even favourable. Anything. His view

20   was "stop it, just stop it, see if we can have

21   silence for a period of time".

22 Q   And you also commented that if you shut it down,

23   that that would raise suspicions; is that right?

24 A   Yes.

25 Q   And I take it you also had a concern that if the

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1   public or the media became aware that you were

2   having discussions or that you were getting

3   somewhere, that that also might impede the

4   progress you were making with Justice officials?

5 A Yes. So as I say, I continued, we continued along

6   as though we weren't having the discussions, but

7   trying to sanitize what was being said.

8 Q Try to put the lion back in the cage or just tame

9   it a little bit?

10 A Just trying to say a lot and say nothing.

11 Q Okay. Now, what about your discussions, you said

12   as well with the Milgaards, I think you said that

13   you were, and please correct me if I'm wrong, that

14   you were concerned about informing your clients

15   about some of this as well; is that -- because of

16   the sensitive nature of it? I'm not sure if I

17   understood that.

18 A Yes.

19 Q And why was that?

20 A We didn't -- well, there was a couple of reasons.

21   First of all, all of us, and I have to confess I

22   think that Mr. Wolch probably managed me as much

23   as anyone else, were at a point of needing hope,

24   wanting hope, wanting a positive result and, you

25   know, it was an emotional period, that the

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1   slightest prospect of hope might be magnified

2   beyond where things actually were, and secondly,

3   as I say, we had to be very, very careful about a

4   risk of any kind of leak and we just made some

5   decisions.

6   Q   Okay.

7   A   To keep the circle very tight.

8   Q   If we could call up 335968, this is one of the

9   recent transcripts, and there's an exchange here,

10   Mr. Asper, that I think touches on what you are

11   telling us, and if we can go to 336045, and I

12   think this is around September of 1991,

13   thereabouts, and here's a discussion between you

14   and Mrs. Milgaard, you say, 'This is very

15   important, okay. Hersh talked to Doug,' and I

16   believe Doug is Doug Rutherford; is that right?

17   A   Probably, yes.

18   Q   'If this gets out, Joyce, we're in deep, deep,

19   deep trouble.' Joyce, 'Okay, it won't get out

20   from me.' 'The thing that they're working on now

21   is the admissibility of the Fisher evidence in a

22   prosecution against David. Okay. And I've got a

23   stack of books in front of me right now, and I'm

24   preparing a memorandum of law on that subject.

25   And you know, the sense was that it's being

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1   treated extremely serious.' And then you go on to

2   say, 'No, they're not saying that at all. What

3   they're saying is, let's just make sure we're on

4   safe ground. Let's find some authority.' About

5   the similar act evidence.

6   And I'll bring up a letter in a

7   moment where you provide that information, but

8   would this be an example where at least --

9   actually, let me call up the document, 131986,

10   this is a September 11, 1991 letter to Mr.

11   MacFarlane and it says:

12   "Further to our telephone conversation

13   of September 11, 1991, Mr. Asper and I

14   have now had an opportunity to review a

15   number of authorities dealing with the

16   use of similar fact evidence by the

17   accused. This was in response to your

18   query whether the criminal conduct of

19   Larry Fisher would be admissible in

20   proceedings against David Milgaard for

21   the purpose of disproving or raising a

22   reasonable doubt as to Milgaard's

23   guilt."

24   And can I take it from the taped conversation and

25   this letter, that around September 11th, 1991

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1   there would have been discussions between Mr.

2   Wolch and Doug Rutherford and perhaps others that

3   were in a favourable light that were moving

4   towards a potential remedy; is that fair?

5   A   Yes.

6   Q   And so here, and in this letter I think one of the

7   issues, is it correct that one of the issues they

8   raised with you is lookit, are you sure that the

9   Larry Fisher rapes would be admissible in a trial

10   against David Milgaard, and the Commission has

11   heard some comment on that; in fact, we've had a

12   research paper done about the admissibility of

13   similar act evidence, sort of an unknown, or a

14   known other perpetrator and the ability to put

15   that in for the defence, and I think that's what

16   this letter deals with, your research that says

17   yes, the standard is much lower for an accused

18   than it is for the Crown in putting in similar act

19   evidence; is that correct?

20   A   Right.

21   Q   So those were the discussions at the time Federal

22   Justice was saying that give us some comfort?

23   A   Yes. These were substantive legal discussions

24   about the law and how the law would be applied if

25   the case were re-opened. It's the first time we

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1   really had these kind of discussions.

2   Q   And then 229827, again this is an article

3   September 12th, the next day, and talks about --

4   talks about problems with the existing system, and

5   again, it appears that there was still some

6   commentary, this may well have been said earlier

7   and reported later, or do you --

8   A   I don't know where this occurred. I don't know if

9   this was an interview or a speech or what.

10   Q   If we can go to 335020, please, this is a

11   transcript from the *Shirley Show*, September 17th,

12   1991, and I think I would be in trouble if I

13   showed the video of the *Shirley Show* again, Mr.

14   Asper, we've seen parts of it, but I'll refer you

15   to parts of the transcript that refer to you. Do

16   you recall appearing on this show, and I think

17   Joyce Milgaard, Neil Boyd, Paul Henderson were on

18   the show and I think David Milgaard was present by

19   telephone. Do you recall that?

20   A   Yes.

21   Q   And if we could go to page 335029 and again

22   there's a question here from Shirley about Deborah

23   Hall. I just want to go through your answer. So

24   this is September 17th, '91 and you go through the

25   background about the event, you say:

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1   "It was alleged by a couple of the

2   witnesses at the trial that in May of

3   '69, during a party in a motel room in

4   Regina, a local news segment came on

5   about 11:15 and there was a story about

6   the Gail Miller murder not being solved.

7   At that point David had been interviewed

8   and provided various samples, bodily

9   fluids, etc., to the police and had been

10   telling his friends about it. When the

11   news story came on some of them started

12   bugging him or ribbing him about it and

13   it's at this point that two of the

14   people in the room testified that David,

15   in a very wild, grand gesture, reenacted

16   the murder of Gail Miller. One said he

17   did it on the bed, the other said, uh,

18   it was on the floor. The jury never

19   heard any evidence to contradict that.

20   We located a lady named Deborah Hall who

21   was at that motel room and participating

22   and watching the events unfold. She

23   says that the people who said that

24   Milgaard reenacted the crime were lyers.

25   She said there was no reenactment."

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1   And let me just pause there, Mr. Asper. At this

2   time was it still your view -- this would have

3   been after the first application and after you

4   would have been aware of Deborah Hall's

5   information that she gave to Mr. Williams. Was

6   it still your view at this time that Deborah Hall

7   was saying that the reenactment didn't happen,

8   that Melnyk and Lapchuk were liars?

9   *A*   Yes.

10   **Q**   And how did you, and I'm just wondering if you

11   can, and I'm sorry if you've already explained

12   this, but what impact did what Deborah Hall say to

13   Eugene Williams have on sort of this contention

14   that it, the reenactment never happened and Melnyk

15   and Lapchuk lied about it when they described it?

16   *A*   What impact did it have?

17   **Q**   Yes.

18   *A*   Well, I think you can look at it two ways, it

19   either added a further lack of credibility to the

20   entire description because her description to Mr.

21   Williams was actually different yet again from the

22   differences between Melnyk and Lapchuk, or it

23   described a crude joke where people reacted quite

24   different according to Deborah Hall than they

25   reacted according to Melnyk and Lapchuk.

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1 Q   And so was your position that maybe Deborah Hall

2   was lying, that her version is not correct?

3 A   No. My position is that Ms. Hall, in her version

4   to Mr. Williams, gave a version of events that was

5   different from Melnyk and Lapchuk, it was still

6   different from Melnyk and Lapchuk. Melnyk and

7   Lapchuk were inconsistent with each other as well,

8   so that either we've got three inconsistent

9   versions of something that happened and you've got

10   questionable validity, that's one version. My

11   interpretation of it was that Deborah Hall,

12   notwithstanding her expansion of what occurred in

13   her description to Mr. Williams continued to

14   describe it as a sarcastic, crude joke.

15 Q   Right, and I guess that's what I -- and so when

16   she says here, or you say, pardon me, there was no

17   reenactment, are you saying that because she

18   viewed it as a joke, then it wasn't a reenactment?

19 A   Yes.

20 Q   So that even though she said yes, there were words

21   spoken and actions taken that could be construed

22   as a reenactment, it wasn't a reenactment because

23   I viewed it as a joke?

24 A   Right.

25 Q   And that when she says Melnyk and Lapchuk were

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1   liars, that because they didn't see it the way she

2   saw it they were lying; is that --

3   A   And I believe -- yes, and I believe Ms. Hall said

4   the way others in the room saw it as well other

5   than Melnyk and Lapchuk, but yes, that's --

6   fundamentally that's my position.

7   Q   And if we can go to the next page, NB is Neil

8   Boyd, and I'll come to his report a bit later.

9   Maybe just tell us a bit about -- how did Neil

10   Boyd, who is Neil Boyd and how did he get on the

11   *Shirley Show* with you and how did he become

12   involved in the matter; do you remember?

13   A   Well, Neil is a criminologist at Simon Fraser

14   University and I can't recall if we contacted him

15   or he contacted us, but he had a student at the

16   time named Kim Rossmo who, in the criminology

17   department, and they offered to, I believe they

18   contacted us and offered to conduct an analysis of

19   the evidence in the case.

20   Q   Okay. Now, Mr. Boyd and Dr. Rossmo are actually

21   both testifying next week, we're going to hear

22   from them about their involvement. So they

23   presumably at this time then -- I'm not sure if

24   it's Dr. Boyd or Mr. Boyd.

25   A   Doctor.

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1 Q   Dr. Boyd -- would have been starting his, he was

2   having some involvement in reviewing the case and

3   that would be why he would be on the *Shirley Show*

4   with you; is that correct?

5 A   Yes, I believe so.

6 Q   And then you go on to say, and again this is

7   talking about the motel reenactment:

8   "You have to understand this, and this

9   has never been sort of reported, David

10   has given his sworn word to the

11   Department of Justice by way of

12   affidavit, in which he denies committing

13   the murder, denies reenacting the

14   murder, denies having blood, and

15   everything else and he's given his sworn

16   word about that."

17   And then David I think says:

18   "That event never took place, really. I

19   was there. The event never took place."

20   So were you as well relying upon the fact that

21   your client at the time was also saying it didn't

22   happen or --

23 A   Well, no, Deborah Hall described something

24   occurring. I was relying on the fact that --

25 Q   Okay. And then if we can go to the next page and

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1   David gives some, I think -- I think David was

2   pressed about lifestyle and what was happening at

3   the time, and then Paul Henderson says:

4   "Let me, let me make one point here I

5   think is very important. A great deal

6   of significance is being attached to

7   this, this motel scene. But keep in

8   mind that both of these witnesses came

9   in at the very last minute, the trial

10   was actually in, in progress when they

11   brought these people..."

12   And then:

13   "Which witnesses are you talking about?"

14   He says:

15   "Melnyk and Lapchuk, the two witnesses

16   attesting to the reenactment in the

17   motel room. Now, in the United States,

18   we see, see this same type of thing

19   happen quite frequently. At the last

20   minute the prosecution can put the icing

21   on the cake will bring in a jailhouse

22   informant. Now, jailhouse informants

23   have been proven to be notoriously

24   unreliable, a prosecution ploy, quite

25   often in the United States, I would

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1   consider this thing, this motel

2   reenactment to be anything other than a

3   prosecution ploy to put the icing on, on

4   the cake, or the case."

5   And then you go on to say:

6   "And the other thing, the other thing

7   that the jury never heard was that six

8   days after David Milgaard was convicted,

9   Craig Melnyk got the lightest sentence

10   ever handed down in Regina for armed

11   robbery and Lapchuk was pending on

12   charges, I believe it was forgery or

13   uttering, or fraud or something, a crime

14   involving dishonesty, and had been

15   previously convicted of conspiring with

16   others to take David Milgaard's

17   identification so they could go and pass

18   cheques."

19   Did you share Mr. Henderson's view about Melnyk

20   and Lapchuk being a prosecution ploy?

21 A   I don't know that I would call it prosecution

22   employ. I do believe -- I did have the belief

23   that they were icing on the cake for the Crown's

24   case.

25 Q   If we can go to 335034, and I simply bring this

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1   up, there's a discussion about Dr. Ferris and just

2   I think your comment here, and I just want you to

3   confirm that that was your position at the time.

4   You say:

5   "And the Crown, and the Crown took this

6   big batch of stuff that didn't make any

7   sense, threw it against the wall to try

8   and make something stick and to leave

9   the jury with the impression that

10   somehow this related to David Milgaard

11   and it didn't. Not only didn't it, it

12   excludes it. The jury never heard

13   that."

14   And I think that's similar to what you told us

15   yesterday; is that correct?

16 A   Yes, yes.

17 Q   So this would have been your view at the time

18   about the, not the Ferris evidence, but the frozen

19   semen and how it was used at trial?

20 A   Right.

21 Q   Now if we can go to 335968 and go to page -- yeah,

22   I think this is around, it says September 9, 1991,

23   it's in that time frame, go to page 986, and

24   there's a discussion here. It looks as though

25   it's a discussion between you and Mrs. Milgaard

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1   and there's reference here to information from

2   Neil Boyd, you say, 'Neil got nowhere with Karst.'

3   'Apparently not.' And then, 'Got nowhere with

4   Caldwell.'

5   And can we take it from this

6   that Neil Boyd, in the course of his, doing his

7   work, would have been in touch with you and you

8   would have been learning from him some of the

9   information he was gathering?

10   A   Apparently, yes.

11   Q   And would it be also fair to say that you would

12   have been giving him information as well to assist

13   him in his work, and Dr. Rossmo?

14   A   I would assume so, yes.

15   Q   And you would have been aware that Dr. Boyd and

16   Dr. -- I think he was Mr. Rossmo at the time, but

17   Boyd and Rossmo were interviewing a number of the

18   key people involved in this matter, both police,

19   Crown and witnesses?

20   A   Yes.

21   Q   And I take it you would be interested in what

22   information they were finding out from these

23   people?

24   A   Yes.

25   Q   Go to 335988, and I'm just going to read a part

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1   here. It looks as though this is where you and

2   Mrs. Milgaard learned that Dr. Emson has changed

3   his view about one of the matters he testified to

4   at trial, and maybe I can just give you a bit of

5   background. This relates to the issue about

6   whether young males would bleed into their semen

7   and whether that was a common occurrence, and you

8   recall at trial I think he said words to the

9   effect that it was not uncommon or something like

10   that. You remember that being his evidence?

11 A   Yes.

12 Q   And I think here Dr. Boyd interviewed him and

13   Dr. Emson said lookit, I've changed my view, I

14   don't think it was very common. Do you remember

15   that coming to your attention?

16 A   Yes.

17 Q   And I just want to go through parts of this, and

18   if we can just go to the bottom half and again,

19   'Boyd told me last night.' 'Well, let's get the

20   bloody statement.' 'I don't think he's going to

21   make a statement.' 'Are they going to print it.'

22   'I don't know.' 'Holy smokes. I mean, this is

23   key.' And then Joyce, 'I know, but Boyd is taking

24   that down from him.' 'Oh, Boyd got it from him.'

25   'Yeah, Boyd, Neil.' And then the next page, 'And

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1   Emson says that Markesteyn is right.'

2   And then again we can just skip

3   through some of this because it deals with

4   relating that information, and then you say,

5   'We've got to find that out. If Justice didn't

6   talk to Emson --' 'That would be great.' '-- but

7   Emson now says that he would testify differently.'

8   'That's exactly what Boyd said to me.' And you

9   say, 'Man, oh, man. When does this stop? Maybe

10   we give that to Yanko. No, you know what, no --'

11   Now, Yanko was a *StarPhoenix*

12   reporter?

13   *A*   Yes.

14   **Q**   And there's an earlier tape that, a transcript

15   from a few days, a day earlier that I haven't

16   shown you, but there was a discussion in there,

17   and I can get the doc ID, Mr. Commissioner, for

18   you, but where you and Joyce Milgaard are talking

19   and she says lookit, Yanko is begging for

20   something, really wants something, what can we

21   give him. Do you remember that happening?

22   *A*   I don't remember it specifically, but it happened

23   a lot.

24   **Q**   Okay. So here when you learn of this, you are

25   saying, 'Maybe we give that to Yanko.' And Mrs.

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1   Milgaard, 'Not until after we'd talk to Boyd.'

2   You say, '-- no, no, you know what, if Boyd will

3   give that to us, we've got to give that to the

4   Globe. We've got to give that to Appleby.

5   That'll be front page. That's unbelievable.'

6   And again, just to comment at

7   this time, it appears, and please correct me if

8   I'm wrong, that Professor Boyd has learned some

9   information from Dr. Emson that's relevant to the

10   re-opening, right, that Dr. Emson is now saying

11   lookit, what I said at trial isn't right?

12   A   Yes.

13   Q   And I would like you to comment on sort of your

14   decision and what to do with it, and it appears

15   that your decision is to firstly decide which

16   media outlet to give it to to get some public

17   exposure; is that correct?

18   A   Well, no. In fact, my -- what this says is get a

19   statement.

20   Q   I'm sorry, yeah.

21   A   Okay. Then we have a discussion about what to do

22   with it. I don't recall what we did with it, but

23   then the discussion was should we give it to

24   Yanko, should we give it to *The Globe and Mail.*

25   It's a discussion. I wouldn't call it a decision.

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1   **Q**   I'm sorry, I didn't mean to miss out the statement

2   part, that's quite clear, that lookit, let's get

3   it verified, let's get the information, but the

4   question is once you have the information, and I

5   can tell you it is in Boyd's report --

6   *A*   Right.

7   **Q**   -- just a comment at this time as to whether, why

8   you wouldn't simply send it to the Justice

9   Minister and say lookit, here's some more

10   information that might be helpful, or -- and again

11   this is just a discussion, but -- or do we give it

12   to the media and put it on the front page.

13   *A*   Well, because I think at this point we were still

14   taking new information, as I said yesterday, with

15   lights blazing ahead of the submission to Justice.

16   **Q**   Okay. If we can go to 33367 --

17   *A*   That was certainly my thinking. I don't know if

18   we did that or not, but that certainly would have

19   been my thinking I assume.

20   **Q**   And, I'm sorry, I can't, I don't know whether

21   there was an article -- I mean, certainly the

22   Emson information went to Justice and I will show

23   you in a moment the report that is sent in to

24   Justice with that information.

25   *A*   Yes. My recollection was we didn't do anything

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1   until we had the entire report.

2   Q   If we can go to 333676, and this is a transcript

3   of a scrum with Kim Campbell October 7th, 1991 and

4   there's a question and answer here that I just --

5   go to the next page -- and it deals with I guess a

6   bit of a systemic issue and I just wouldn't mind

7   getting your comment on it, and you spent some

8   time telling us about your efforts to put public

9   pressure and influence on the minister to make a

10   political decision and I think your evidence has

11   been that you decided to take that tact because

12   you didn't think you were getting a proper

13   response going the other way; is that fair?

14   A   Correct.

15   Q   And so here what she says, and again I think:

16   "Has she sought a meeting with you?"

17   And I think this is talking about Mrs. Milgaard,

18   and she says:

19   "No, she hasn't, but she is free to

20   communicate with my department, and she

21   has done so. But the appropriate way to

22   deal with such cases is when her case is

23   made through her counsel. Every person

24   who applies under those circumstances

25   knows that he will get the same full

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1   fair hearing and that no one is ...

2   lobbying with the Minister and creating

3   a public campaign should not have an

4   influence on my decision. It does have

5   influence on my need to insure full

6   public disclosure of what I do and why I

7   do it."

8   And then goes on to say, and there's some other

9   comments later that I may show you to the same

10   effect where the minister is saying lookit, if I,

11   if the way to get a remedy from me is to lobby

12   and create a public campaign, and I think what

13   she's saying is that's not the basis upon which I

14   should make my decisions, and I wouldn't mind

15   your comment on that, because I think, and

16   correct me if I'm wrong, your position was that's

17   exactly what you were doing.

18 A   Yes. We had come to the view that we were not

19   getting a fair shake at Justice, at the Federal

20   Department of Justice, and we didn't know whether

21   the Minister of Justice was part of that or not,

22   we didn't know what was going on, so the public

23   campaign initially was to get the Minister of

24   Justice's attention on the assumption that he, in

25   the first case, and then she later on, would take

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1   an interest and ensure that proper action was

2   being taken on the Milgaard file.

3   When the minister declined our

4   application, as I said, as you showed me the quote

5   yesterday, she clearly, it was clear to us that

6   she clearly was part of the problem, so that the

7   publicity campaign -- and I think that it was

8   pretty clear to us really from when she brushed

9   past Mrs. Milgaard that the minister was going to

10   be a problem, but there was certainly no doubt

11   about it after she turned down the application,

12   then she became the focal point, and, I'm sorry, I

13   disagree with what the minister says.

14   I think it was -- I think it's

15   perfectly likely that without the public pressure

16   and possibly without the intervention of the prime

17   minister when he met Mrs. Milgaard to establish

18   another public peg, this minister would have

19   ignored the public pressure and would have been

20   content with a flawed process that would have kept

21   David in prison.

22   Q   And let me just explore that a bit further. So

23   putting aside David Milgaard's case for a moment,

24   just the general concept of the Justice Minister

25   saying lookit, in order for me to exercise my

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1   ministerial discretion on this matter, it should

2   not be whether the applicant can mount a great --

3   A   I totally agree with that, Mr. Hodson. I've said

4   at the outset, and I think you can see to their

5   credit the Department of Justice has made some

6   substantial changes to the way it operates in

7   wrongful convictions, with wrongful convictions,

8   you don't have to do this any more.

9   Q   Right. So that was my question. So I think what

10   you are saying is lookit, putting aside what

11   happened to David Milgaard for a moment, in a

12   perfect world a wrongfully convicted person should

13   not have to depend upon the media and getting a

14   public campaign and getting political persuasion

15   to cause the minister to give a remedy, I think

16   you are saying yes, you agree with that?

17   A   Absolutely. If I can give --

18   Q   Yes.

19   A   I want to -- because it invites a fulsome

20   response. As I said at the outset, and I want to

21   be absolutely clear, we began with a very naive

22   view of what was going to happen, and it was an

23   erroneous view of what was going to happen when we

24   filed the original application. When we realized

25   that we were not going to get anywhere and we made

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1   a decision, we made it in good faith in an effort

2   to try and win a new hearing for David. We

3   believed he was innocent, all we wanted was a new

4   hearing. Because we had to resort to the

5   extraordinary means, and by that I mean bringing

6   the media into the activity, there were a lot of

7   things that happened that should never have

8   happened in a 690 process, and I sincerely regret

9   the circus that had to be unleashed in order to

10   get the attention at the political level in order

11   to get the action that we needed, I totally -- I

12   totally regret that.

13   Q   When you say you regreet, regret what?

14   A   None of us -- I didn't want to spend six years of

15   my life having to take conduct of this case with

16   probably three or four of those years full time

17   doing nothing but running a political campaign.

18   Q   Just on -- when you say you regret the circus, are

19   you saying that, and we've heard some evidence

20   from some witnesses that say lookit, I got caught

21   up in that circus and it adversely affected me.

22   Is that what you are referring to?

23   A   We all got caught up in the circus and, yes, there

24   were some people who were adversely affected and I

25   regret that that happened. We are now closer I

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1   think, Mr. Commissioner, to finding out the facts

2   and what people did and what they didn't do will

3   be a matter of fact and people will be judged

4   accordingly, but once you -- but the process we

5   got into is one that sets up hair-trigger

6   comments, emotional comments, spur of the moment

7   reactions and is not always entirely fair.

8   **Q**   And to who?

9   *A*   To the subject of news reporting.

10 **Q**   Okay.

11 *A*   And I said yesterday, there were comments that I

12   certainly made that became the subject of

13   reporting that was unfair, we saw it in Mr.

14   Caldwell and to Mr. Tallis, you know, the comment

15   about putting Wilson's statement to him and

16   conjoining it with lack of disclosure to create a

17   story that there might have been prosecutorial

18   misconduct, just -- you know, not intended, but

19   that's the way it comes out, and that's the risk,

20   and it was sort of the basis of the flaw in the

21   system because it was the only way we thought we

22   could get the relief that we needed.

23 **Q**   Okay. And I hesitate to ascribe this position to

24   Mr. Kujawa in light of your dealings with Mr.

25   Kujawa, but one of the positions that he took and

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1   others have taken is that the minute you put the

2   resolution of an issue, a judicial issue, or the

3   resolution of an issue out of a judicial setting

4   and into the public domain, you lose the rules of

5   relevancy, of response and fairness, etcetera,

6   etcetera, so that in a public domain if you have

7   the -- if you try the issue in the public or in

8   the media, the safeguards in the judicial system

9   aren't there that would ensure that what's put

10   forward is relevant, that people have a response,

11   etcetera. Would you agree with that general

12   statement?

13 *A* Yes, I think I absolutely agree with the general

14   statement, but the problem here was we had a

15   system that wasn't capable of responding and we

16   had some humans -- I'm not sure that the system

17   itself was the flaw here, it might have been and I

18   think it is personally, and I have a view on

19   that -- but, yes, there is a big risk, and a

20   better system administered by better people gets

21   better results.

22 Q So just back on the point of -- and I think what

23   you are saying is lookit, we went to have it tried

24   in the public, or the tack that you took, whatever

25   you want to call it when you went the political

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1   route, I don't know what, I don't want to

2   misdescribe it, I think we're probably talking the

3   same things, but when you decided to take a

4   different tact and to get the public galvanized

5   and influence the political decision-makers,

6   whatever you want to call it, when you decided to

7   take that tact was it fair to say that you knew

8   that it was going to get ugly for some people; is

9   that fair?

10 A Yes.

11 Q And that there were -- again, this issue of trying

12   it in the public versus trying it in a judicial

13   setting, that there would be some consequences for

14   some people in doing it that way?

15 A Yes.

16 Q And that your reason for going that route, I think

17   you've told us, is that you attempted to do it

18   within the frameworks of the judicial system or

19   within the legal means, and you didn't think it

20   was working, you didn't think you were going to

21   get a result, and your client was in jail

22   wrongfully; is that a fair summary?

23 A That's correct.

24 Q And so that at that point is it fair to say that

25   you felt you had no choice but to go there; is

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1   that your evidence?

2   A   That's exactly it.

3   Q   And so when we take a step back you say that the

4   system may have failed you at the start, I mean,

5   let's talk about the first part. You said it's

6   either the system or the players, and I think

7   that's probably something that this Commission has

8   spent and will spend some more time on, but I

9   think you are saying it didn't work for whatever

10   reason and therefore you had to go this route in

11   the public, and I think what you are saying is

12   that's not the best way to do it?

13   A   No, it's not, not by any stretch.

14   Q   Okay.

15   A   And I thought, Mr. Hodson, I really -- and I have

16   said this -- I really believed and hoped, because

17   I don't think the Milgaards or anybody else in our

18   society expects perfection from our system, it's

19   -- the justice system is human-based, it's frail,

20   mistakes can and do occur, and we really hoped --

21   and that all of this could have avoided if the

22   Department of Justice had accepted that there

23   might be some legitimacy and done its part, and

24   then the actors in the original investigation and

25   prosecution concede the possibility that a mistake

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1   might have occurred, and I think Sergeant Pearson

2   actually, in his evidence, described this idea,

3   and I've talked about it. If you all get in a

4   room with all the information that everybody has,

5   with no blame, just "let's -- is the -- did a

6   mistake occur and can we fix it and how do we do

7   that" in mind, including the possibility that no

8   mistake occurred, none of this would have

9   happened. None of this entire *Milgaard* case would

10   have happened, especially knowing what you and the

11   Commissioner know now about what existed at the

12   time, at the -- in 1969, 1970, and 1971.

13 Q   And are you talking about information that came

14   forward that became aware to you later as to what

15   was on the police files; is that what you are

16   referring to?

17 A   Yes, yes. And I, I will tell you that if you, if

18   you put aside the notion or this theory of

19   conspiracy or coverup, I -- I think that Mr. Karst

20   and the police officers probably didn't or don't

21   like the idea that the true killer was at large,

22   especially in 1980 in the case of (V10) (V10)-,

23   and I don't think Mr. Caldwell would like the idea

24   that the true killer was at large. And so as I

25   say, if we don't get to blame and just say, "a

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1   mistake occurred and everybody get in a room" --

2 Q Are you suggesting that Mr. Caldwell and Mr. Karst

3   knew that the real killer was at large?

4 A No, I think that -- I don't think -- my suggestion

5   is that if you put aside the question of whether

6   there was a coverup or whether there was some evil

7   motive, you might be able to say to Mr. Karst or

8   Mr. Caldwell and to the original actors in this

9   system, "you know what, maybe a mistake occurred".

10   I don't believe that those people -- I think it's

11   possible that those people actually didn't want

12   the true killer out on the street, but that's what

13   happened, because certain things were missed. And

14   I think if you can talk to people and say, "a

15   mistake was made, we don't have to blame you",

16   then it creates an environment that is far more

17   open to resolving these cases early on, but that's

18   -- that didn't happen, it just didn't happen.

19 Q Are you --

20 A And as a result, as a result you go down a path of

21   "why didn't we have that discussion, why can't we

22   have that discussion", and that's why you start to

23   wonder why you can't have that discussion.

24 Q And I think your position is you would have had

25   it, Justice didn't arrange it, and I anticipate

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1   that Justice may say, "well you didn't ask for

2   it", and again -- and this is -- and, again, and I

3   think you've touched on that already; is that

4   correct?

5   A   Well, yes. And, unfortunately, it created an

6   environment where we were put into an environment

7   where the stakes maybe may have been too high and

8   too public.

9   Q   You talk about saying, and you referred to

10   Mr. Karst and Mr. Caldwell, about them not wanting

11   to have the real killer out there, and is what you

12   are saying is that you don't think that they would

13   have -- are you saying that they wouldn't have

14   deliberately convicted an innocent person so that

15   the real killer is out there?

16 A   I think that's, I think that's probably fair to

17   say.

18 Q   And --

19 A   But I'm saying that, that once you let the genie

20   of this case out of the bottle and it becomes

21   public and there becomes an adversarial process,

22   it gets a little difficult --

23 Q   Well --

24 A   -- to even have that conversation.

25 Q   -- one of the comments that we've heard from some

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1   of the witnesses and mostly from, well,

2   authorities and even from some witnesses, that the

3   witnesses have said, "lookit, I can deal with

4   mistakes, I'm human and I can deal with mistakes,

5   but the moment that someone says I deliberately

6   committed misconduct and deliberately left a

7   guilty person out there", that the stakes change a

8   bit and the reaction changes a bit. Would you

9   agree with that, that the --

10   A   That's my point. That's my point.

11   Q   And --

12   A   If we could have started on the basis of safe

13   environment, "we, the system made a mistake here,

14   for whatever reason we made a mistake, let's fix

15   it quickly", if we could have started there we

16   would not have wound up in a position where sides

17   get taken, you gotta take fixed positions, you say

18   things, people -- things are in the media and then

19   all of a sudden people are in defensive mode, some

20   are attacking, some are defending, and you wind up

21   in a debate.

22   Q   Okay. This is probably an appropriate spot to

23   break.

24   *(Adjourned at 10:29 a.m.)*

25   *(Reconvened at 10:49 a.m.)*

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1   BY MR. HODSON:

2   Q   Call up 157128, please. This is the October 24th,

3   1991 letter from Mr. Wolch to Mr. MacFarlane

4   enclosing the Boyd report, I think is what it's

5   been referred to, or the Rossmo-Boyd report. And

6   he says that:

7   "I would remind you that the authors of

8   the report were not commissioned by us

9   in any way and were fully independent."

10   And was that the case with Boyd and Rossmo?

11 A   Yes. As I say, my recollection is they contacted

12   us.

13 Q   And I think you said, though, but you would have

14   given them information and would have discussed

15   some of their findings with them as they were

16   doing the investigation; is that fair?

17 A   Yes.

18 Q   And Mr. Wolch says:

19   "... I don't know the current status of

20   the matter I will leave it to you to use

21   the report as you see fit. The last

22   thing in the world I want to do is delay

23   the matter any further.",

24   and then talks about meeting. And am I right if

25   I read into that, this is October 24, 1991, would

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1   it be fair to say at this time that discussions

2   with Justice officials were progressing and you

3   were talking about -- and I'll show you some

4   documents about a meeting on November 11th -- but

5   talking about how best to provide a remedy and

6   send this matter to a Court, that things were

7   progressing well, and that Mr. Wolch's comment

8   here is:

9   "The last thing in the world I want to

10   do is delay the matter any further.",

11   is "here is the Boyd report but don't delay what

12   we're talking about in getting a remedy"; is that

13   fair?

14   *A*   Yes.

15   *Q*   However the Boyd report, would you agree, would be

16   another piece of information that you, being the

17   Milgaard group or on behalf of David Milgaard,

18   were putting forward to the Minister to say "here

19   is information that is relevant to the re-opening

20   of the investigation"?

21   *A*   Yes.

22   *Q*   If we can just go to the next page. Sorry, I'm

23   sorry, 130837 is the actual report, and I think

24   Neil Boyd was a Professor of Criminology, or is a

25   Professor of Criminology, and Kim Rossmo was a

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1   Ph.D. candidate at --

2   A   He was also a, I think he was a detective with the

3   Vancouver police at the time as well.

4   Q   Right. And I think Dr. Rossmo was with the

5   Vancouver police, he is now down, I think he is

6   teaching at the Texas State University and is a

7   criminal profiler, etcetera. He will be here next

8   week. I think at the time, though, he was a Ph.D.

9   candidate for Professor Boyd; is that right?

10   A   Yes.

11   Q   And just a couple parts in these reports. If we

12   can go to 130853, and in this report I think Neil

13   Boyd and Mr. Rossmo interviewed a number of

14   people, including Dr. Markesteyn. And in this

15   report it appears, it says:

16   "What Dr. Markesteyn did not consider

17   ...",

18   and we're talking about the issue of this being

19   dog urine, remember the -- his report that it

20   might be dog urine:

21   "What Dr. Markesteyn did not consider is

22   the trial evidence from hair and fibre

23   specialist Victor Malchanko of the RCMP

24   Crime Detection Laboratory; Malchanko

25   told the Court that he found seven pubic

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1   hairs in the semen stain. Dr.

2   Markesteyn now agrees that it is more

3   probable that this was a human semen

4   stain."

5   And, in fact, Molchanko's evidence was that they

6   were human pubic hairs. And, again, do recall

7   being made aware of that, at the time, by Mr.

8   Boyd, or seeing this in the report, that the

9   prospect that it might have been dog urine may

10   not be as valid as you once thought?

11 A Sure.

12 Q And then 130858. And I'm gonna, there is a couple

13   paragraphs here and I'm maybe paraphrasing a bit,

14   but I think what Boyd and Rossmo concluded in

15   their report about Wilson's statement being a lie

16   and a recantation, they seemed to be saying that

17   Mr. Wilson was more -- and I'm paraphrasing -- was

18   more responsible than the police for the fact that

19   he lied. And I'll just read you this part and I

20   want your comment. They say:

21   "According to Ron Wilson, he was simply

22   interested in getting free from police

23   questioning on May 24, 1969, going home,

24   and 'getting loaded'. He was not forced

25   to implicate David Milgaard, but

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1   implicating Milgaard was the easiest way

2   to remove himself from a persistently

3   stressful situation - two months of

4   questioning by police. Wilson was a 17

5   year old delinquent who would usually

6   place his own interests first. He was

7   involved in drugs and crime until the

8   early Eighties, using and selling heroin

9   and LSD, and for 10 years a member of

10   the Regina motorcycle club, the Apollos.

11   Ron Wilson sketches a picture

12   of disenfranchised street youth in 1969,

13   on the fringes of the fledgling hippie

14   culture and on the edge of a criminal

15   lifestyle. They were all involved in

16   using illegal drugs. 'Friends' were

17   passing acquaintances who you ran into

18   in the park, spent a few days with, and

19   who would then disappear for months.

20   Loyalties and allegiances were

21   non-existent, the primary concern being

22   only to look out for yourself -

23   survival, 'better him than me'."

24   And, again, I don't -- I mean Dr. Boyd can speak

25   for himself next week, but certainly in this

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1   report, do you recall reading this report and his

2   conclusions about where he saw, where he saw the

3   problem being with Ron Wilson's evidence?

4 *A* Yes.

5 Q And what was your view on that, did you agree with

6   him, disagree?

7 *A* I think it was -- I thought it was entirely

8   possible. I, you know, I accepted it as a

9   perfectly valid evaluation of what happened.

10 Q And then if we can go to 1308 --

11 *A* I mean the key point, Mr. Hodson --

12 Q Okay?

13 *A* -- is that Wilson didn't tell the truth. Why he

14   didn't tell the truth, you know, was frankly of

15   secondary concern.

16 Q And I think you told us earlier, though, that when

17   Mr. Henderson went out to see Mr. Wilson the

18   thinking at the time was, or the reason that was

19   gonna be put forward to him was that "you were

20   manipulated, coerced and bullied by the police,

21   that's why you lied"?

22 *A* Gotta give him an out, gotta give him a door to go

23   through.

24 Q And so that was put to him as an out, and I think

25   when we went through yesterday, the Minister when

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1   reviewing that was saying "we tested that and we

2   didn't find the reason to be credible, therefore"

3   -- and I know you disagree with that but that

4   seemed to be their reasoning?

5   A   Well I mean look, the Commissioner will make the,

6   make the findings. We can debate what happened on

7   the weekend of May 24th as to whether it was

8   coercive. It may not have been rubber hose

9   coercive, but there's certainly an argument or a

10   discussion one can have about the tactics that

11   were used, and bearing in mind that some of those

12   tactics probably played right into the hand of who

13   this character was.

14   Q   Right. And, again, we'll hear from Professor Boyd

15   on his views. If you can go to 130861, just a

16   couple of other points. I think, in this report,

17   the, and in particular doctor -- well he was not a

18   doctor then -- but Mr. Rossmo did a profiling of

19   the Fisher crimes, is that correct, that he went

20   through and looked at them and analysed them and

21   reached some conclusions, and that would have been

22   part of the work; is that right?

23   A   Yes.

24   Q   And in fact 130866, and I won't go through that

25   because we'll hear from him, but Psychological and

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1   <u>Geographic Profiling of Sex Offenders</u>, and talks

2   about -- and we'll see on the next page this is

3   where the term "punishment rapist" comes in, and I

4   believe this was in part the tact that Mr. Wolch

5   took with Larry Fisher when he testified at the

6   reference, is that correct, some of the

7   information from Dr. Rossmo's work on this point?

8   *A*   Yes.

9   **Q**   And then, finally, 130870. Boyd and Rossmo talk

10   about 690 and they comment on the process and the

11   need for reform. I won't go through it with you,

12   we'll go through it with them, but they provided

13   some commentary on that. Would you have had --

14   and when I say "you" I'm talking about you or

15   Mr. Wolch or the Milgaards -- have had some input

16   into the specific areas that Boyd and Rossmo would

17   look into; do you recall?

18   *A*   Umm, I don't recall, I -- my recollection is that

19   they were pretty independent-minded. Umm, we, we

20   -- and my recollection is that we were pretty

21   responsive to their work.

22   **Q**   If we can go to 336197, and again that's October,

23   we're gonna move into November. And this is a

24   tape October-November 1991, and if we can go to

25   page 336230, and this was a conversation between

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1   Mrs. Milgaard and Mr. Wolch about discussions with

2   Mr. MacFarlane. And if we can go to the next

3   page. And would it be fair to say, at this time,

4   that Mr. Wolch would be having discussions with

5   Mr. MacFarlane and others at Justice? This is, I

6   think, November of 1991, around this -- and you as

7   well?

8   A   Yes.

9   Q   Did Mr. Wolch have the primary relationship or

10   contact with Bruce MacFarlane?

11 A   Yes.

12 Q   And there is a discussion here about, I think,

13   sort of updating Mrs. Milgaard about a discussion,

14   and Mr. Wolch says:

15   "... and I'm telling you this between

16   you and I and, you know, obviously David

17   and I talked about it --",

18   I'm assuming that's you:

19   "... but between you and I, his -- the

20   conversation made me feel optimistic."

21   "... and optimistic in the sense that my

22   reasoned guess is that we'll know

23   something within about ten days."

24   And then the next page there is a discussion,

25   here, about, umm, Mr. MacFarlane confiding in

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1   Mr. Wolch that he was on our side and that it was

2   two to one, or:

3   "It was two to one against. You can --

4   well, the decision-makers were himself,

5   Corbett, and Williams, and it was a

6   split decision, he was on side then so

7   converting him now is irrelevant."

8   I'm wondering what knowledge you have, Mr. Asper,

9   of your own about this idea that Corbett,

10   MacFarlane, and Williams, and we see it in some

11   of the articles, either voted on this or were

12   somehow on one side or the other both on the

13   first or the second application. Are you able to

14   tell us what you knew?

15   A   I didn't know anything specifically in the sense

16   that there was a committee of three that was

17   deciding this application or was deciding on the

18   recommendation of the Minister.

19   Q   Sorry, let's just go back to the first application

20   that was rejected, did you have any information or

21   knowledge about whether the people in Justice,

22   where they stood on it?

23   A   I could guess.

24   Q   And when you --

25   A   I didn't have any concrete information, but I

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1   was -- it seemed pretty clear to me where people

2   stood.

3   Q   And on what do you base that?

4   A   Demeanour, words, --

5   Q   Okay.

6   A   -- attitude.

7   Q   And on the first application did you have any

8   information that, or perception that one or more

9   Justice officials were favourable to your

10   position, --

11   A   Umm --

12   Q   -- or in favour of granting you remedy?

13   A   Well, I can't say that I -- Mr. MacFarlane was by

14   far the most congenial and informative and

15   helpful, I would say. I wouldn't have taken from

16   that necessarily that he had formed a view, umm,

17   but I would feel comfortable in saying that, based

18   on the conversations and interaction with Messrs.

19   Williams and Corbett, that they would not have

20   been favourable to our application.

21   Q   Did you have any information or knowledge on the

22   first or the second application that these Justice

23   officials voted on the matter or that that's how

24   issues were decided by the Justice officials?

25   A   No. No. We -- I think this was the first time,

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1   this transcript that you are showing me would be

2   the first time that we heard that.

3   Q   Okay. Well, and that's what I am trying to get

4   at, did Mr. Wolch advise you of any -- I'm trying

5   to find out what you knew at the time or what

6   information you had at --

7   A   At the time of this conversation?

8   Q   No, this is --

9   A   At the time of the conversation you are showing

10   me, this would have been the first time any of us

11   knew that there had been this vote.

12   Q   Okay, and that's what I am trying to get at, would

13   your -- the information you had about the

14   workings, or whether there was a vote or not,

15   would that come from Mr. Wolch or would it come

16   from any contact you had with MacFarlane, Corbett,

17   or Williams?

18   A   Oh, Mr. Wolch.

19   Q   And what do you recall Mr. Wolch telling you about

20   this issue of where Corbett, Rutherford,

21   MacFarlane and Williams stood?

22   A   I don't recall this specific conversation but, as

23   we were moving closer toward the re-opening, I do

24   recall the general discussion about how the first

25   application had gone.

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1   **Q**   And what -- what -- what do you recall being told?

2   *A*   He just told me that there had been, that there

3   had been a group of three, and that two had voted

4   against us, and Williams and Corbett were the two.

5   **Q**   And who voted for you?

6   *A*   MacFarlane, I believe.

7   **Q**   And this is information that Mr. Wolch told you?

8   *A*   Yes.

9   **Q**   And where did Mr. Wolch tell you he got that

10   information from?

11   *A*   Where were we when he told me?

12   **Q**   No, I'm sorry, where did he get that information

13   from?

14   *A*   Oh, I'm assuming Justice, someone from the

15   Department of Justice.

16   **Q**   Mr. MacFarlane?

17   *A*   I would assume so.

18   **Q**   So you didn't hear anything directly --

19   *A*   No.

20   **Q**   -- other than through Mr. Wolch?

21   *A*   No.

22   **Q**   And so that was your information on the first

23   application, what about the second application,

24   and this is the time frame November of '91; did

25   you have any -- did you learn anything from

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1   Mr. Wolch about where --

2   A   Well --

3   Q   -- he was informed Justice officials were at?

4   A   Well I believe this was early November 1991?

5   Q   Yes.

6   A   I have had my, we have had our baby at this point,

7   and I wasn't working. I don't recall, and I think

8   this is why Mr. Wolch is actually dealing with

9   Mrs. Milgaard, because I wasn't part of these

10   discussions.

11   Q   Yeah, no, and I appreciate you are not part of

12   this call and the reason I put it up there is to

13   find out what you knew about it and whether you

14   could inform us about what information the

15   Milgaard group was getting from Justice officials.

16   A   There wasn't information, there wasn't any

17   information going to the group per se, there was

18   information going to Hersh and my -- and either to

19   me directly or through Hersh and then to Joyce,

20   and you've seen some snippet of it as to what we

21   were talking about with Justice.

22   The principal, as I recall the

23   principal conversation evolved to framing, framing

24   the reference itself as opposed to issues of law

25   that we had been dealing with on Fisher and other

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1   matters.

2   Q   And I'll, and I will take you to some of those

3   documents. If we could go to 165713, this is a

4   news release of November 4th, '91, and there's

5   some other documents that suggest -- and I'll just

6   put this to you, Mr. Asper, and see if you can

7   shed some light on this. I think around this time

8   Mrs. Milgaard was planning to go to Ottawa and do

9   something in Parliament, whether it was lobby or

10   protest or do something, and I think there was

11   some discussion that, lookit, things are

12   progressing to a meeting?

13   A   There was, there was a plan to make a large

14   presence, as large a presence as possible known on

15   Parliament Hill, and we instructed Mrs. Milgaard

16   absolutely to stop it and not do it.

17   Q   And I think there was some information in the

18   media that this was gonna happen; is that right?

19   A   Yes.

20   Q   And this news release says that Mrs. Milgaard has

21   cancelled plans to travel to Ottawa and:

22   "Mrs. Milgaard, who has recently been in

23   ill health due to emotional stress, is

24   very encouraged by this development ..."

25   and it's talking about some meetings. So this

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1   news release would be put out to (a) --

2 A   To stop it.

3 Q   To stop it. Go to 157132. This is a November

4   6th, 1991 letter from Mr. Wolch just confirming

5   that there is a meeting on Monday, November 11th,

6   1991. And if we can go to 157134. And this is a

7   November 7th letter from Mr. MacFarlane, it

8   confirms the meeting and confirms that Rutherford,

9   Williams, and MacFarlane will be present, and then

10   if we can scroll down. He says:

11   "To bring some focus to the discussions,

12   you may wish to give some advance

13   thought to two aspects of the case. The

14   first involves the extent, if any, to

15   which the evidence relating to the

16   actions of Larry Fisher has relevance to

17   the basis on which David Milgaard was

18   convicted for Gail Miller's murder. Put

19   another way, is there a nexus between

20   the activities of Fisher and the guilt

21   of David Milgaard sufficient to permit

22   the Minister to consider that evidence

23   in disposing of the second application

24   for mercy. If you feel that a nexus

25   does exist, what is the nature and

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1   extent of that nexus?"

2   And:

3   "The second aspect of the case concerns

4   the original statement provided by

5   Nichol John to the police in 1969.

6   While John did not adopt portions of the

7   statement on the stand at trial, some

8   aspects of the statement are confirmed

9   by other evidence led at trial. To what

10   extent is the Minister of Justice

11   entitled to take this statement into

12   account in her consideration of the

13   second application for mercy?"

14   And do you recall considering those issues at

15   that time?

16   A   Yes.

17   Q   And I think that the first issue is "tell us how

18   you think the Fisher information plays, is

19   relevant to the second application"?

20   A   Yes.

21   Q   And the second one -- and we haven't talked about

22   this yet -- is "to what extent can the Minister,

23   in considering the application, look at Nichol

24   John's sworn statement of May 24th in light of the

25   fact that she didn't adopt parts of the statement

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1   at trial"; do you remember that being an issue for

2   discussion?

3   A   Yes.

4   Q   And I think, correct me if I'm wrong, what Justice

5   was saying to you, umm, "lookit, I think we need

6   to look at that and what she now says about it,

7   even though it wasn't evidence at trial it might

8   be relevant to the issue today"; is that fair?

9   A   Yes.

10 Q   And do you recall what position you took, or you

11   and Mr. Wolch took, on that?

12 A   Umm, we took two positions. The first position

13   was that Nichol John's statement had to be false

14   because Larry Fisher committed the crime, not

15   David Milgaard. Umm, and secondly, we took the

16   position that even if you accept Nichol John's

17   statement, as we've discussed earlier in my

18   evidence, there were -- there were many, many --

19   the vast majority of the aspects of her statement

20   were just physically, demonstrably not true, not

21   possible.

22 Q   If I could just take a step back, and I think the,

23   the procedural issue was can we even -- can we go

24   behind her trial evidence and look at the sworn

25   statement and test that part of the statement that

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1		wasn't adopted at trial?
2	A	Yeah, but you have to appreciate what -- the first
3		point that I made.
4	Q	Yeah.
5	A	And it's quite clear the Department of Justice was
6		fixated on Nichol John, there is no question about
7		that I don't think, but Nichol -- our first
8		position was that Nichol John's statement is
9		meaningless in the sense that it implicates
10		David -- it purported to implicate, and Justice
11		was looking at it as though it did implicate,
12		David Milgaard for a murder that Larry Fisher
13		committed.
14	Q	Let me try and --
15	A	So our first position was you don't -- it's not
16		relevant any more.
17	Q	Let me try this again. Just for the purpose of
18		framing the issue let's put aside the Larry Fisher
19		issue, and I hear your point on that, and I
20		think -- let me be devil's advocate for a moment.
21		If Justice says "okay, but let's say you are wrong
22		on that", and I know you disagree, --
23	A	Right.
24	Q	-- put that aside, --
25	A	Right.

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1   Q   -- "when we go to the Minister to consider your

2   application for mercy can we go and look at what

3   Nichol John now says in relation to the sworn

4   statement, in other words even though it was not

5   adopted at trial, if she now can shed some light

6   on that and either" -- and she didn't, but let's

7   say for example she says, "you know what, I now

8   remember, and here's why I didn't say it at

9   trial", I think what Justice is saying is can the

10   Minister look at that?

11 *A*   I --

12 Q   Can the Minister consider what --

13 *A*   Right.

14 Q   -- Nichol John now says about her statement --

15 *A*   Right.

16 Q   -- and consider more than what the trier of fact

17   had at the time of trial from her?

18 *A*   Right, I understand, and my -- I don't recall

19   discussing that specifically, but my assumption

20   would be that in light of the fact that we were

21   asking the minister to consider a whole range of

22   things that were beyond the purview of, or beyond

23   the evidence at the trial, that we would have

24   accepted that, although I do recall we were very

25   concerned that we had been excluded from the

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1   entire process during which time Nichol John was

2   questioned and hypnotized and --

3   Q   And I'll get to that --

4   A   And whatever else.

5   Q   -- because I think the evidence at the reference

6   suggests that that matter was looked into, that

7   not only did Nichol John testify, but a doctor,

8   Dr. Fleming testified, and so the Supreme Court

9   and the reference did hear and get into the

10   question of the unadopted portions of her

11   statement.

12   A   Well, I'm not sure how we could argue that

13   information obtained about, from her after the

14   trial should not be considered while at the same

15   time asking the minister to consider a whole bunch

16   of evidence that we had given from other

17   witnesses.

18   Q   So do I take it from that that your position ended

19   up being yes, that's fair game to be considered?

20   A   I think that was our position.

21   Q   Yeah.

22   COMMISSIONER MacCALLUM: By the Supreme

23   Court or by Justice officials before the Supreme

24   Court or by both?

25   A   Well, at this point we were talking about the

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1   Minister of Justice I think alone.

2   COMMISSIONER MacCALLUM: Right. Okay.

3   BY MR. HODSON:

4   Q   And I think maybe if I can just follow up on that.

5   My understanding is that the Minister of Justice

6   was saying I'm going to send an issue to the

7   Supreme Court for advice and if the Supreme Court

8   can consider it, then I can consider it, so one

9   couldn't without the other?

10   A   Right.

11   Q   Is that correct?

12   A   Right.

13   Q   And in fact I think we have seen in some of the

14   announcements, I think Minister Campbell, when she

15   announced the reference, talked about the fact

16   that there were matters that had come to her

17   attention that were not on the public record that

18   had to be put through this reference, and I'm

19   assuming that what she's referring to is the

20   Nichol John information and the hypnosis and

21   things of that nature. Do you agree with that?

22   A   I don't know.

23   Q   Don't know that? I'll maybe show you that

24   document a bit later and we may hear from other

25   witnesses on that point. 334244, or actually,

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1   sorry, go to 004313. The doc ID is 312 but go to

2   313. Actually, no, I'm sorry, let me back up,

3   334244. And this is a letter to Mr. Wolch --

4   sorry, no, let me back up. I'm getting my --

5   that's December 9th. Sorry, if we can go back to

6   157134. Do you recall attending this meeting in

7   Ottawa then on November 11th?

8   *A*   Vaguely, yes. I recall being there.

9   **Q**   And again it would be with Mr. Williams,

10   Mr. Rutherford and Mr. MacFarlane and you and Mr.

11   Wolch?

12   *A*   Yes.

13   **Q**   And do you know what would have been discussed at

14   that meeting?

15   *A*   I just recall -- yeah, I'm sure there was a broad

16   range of issues discussed. I recall Mr. Wolch

17   taking the group through, inch by inch, the

18   Fisher, the chart of Fisher's activities and

19   challenging the Justice officials that he could

20   prosecute Fisher on that basis and that there was

21   some degree of frustration as to why we were still

22   contorting ourselves over what seemed to be such

23   an obvious and plain piece of information that

24   should get over any obstacle.

25   **Q**   And so was the issue there to what extent could

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1   this Larry Fisher information be used in two

2   respects; one, could it have been used at David

3   Milgaard's original trial, and two, is it

4   information that should be relevant to the

5   minister's consideration of your application for

6   mercy?

7   *A*   You framed that in formal terms. Yes, I think

8   that's a fair way to say it.

9   **Q**   And the issue being discussed is Mr. Wolch was

10   saying there's enough information here in my

11   opinion to prosecute Larry Fisher for these crimes

12   and convict him as well?

13   *A*   Yes.

14   **Q**   And therefore that should meet any test --

15   *A*   Yes.

16   **Q**   -- of getting that evidence in on either a trial

17   or an application for mercy?

18   *A*   Yes.

19   **Q**   And the Justice position was what?

20   *A*   Justice didn't see it that way.

21   **Q**   Were they expressing concern that it would be

22   relevant at a trial of David Milgaard if there had

23   been a new trial or --

24   *A*   My recollection is that Mr. Williams was debating

25   with us whether in fact there was similar acts.

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1   **Q**   I believe there's a reference that at that meeting

2   they showed you the tape of Nichol John's

3   hypnosis. Do you remember that?

4   *A*   I don't recall that.

5   **Q**   And I'll find the document a bit later, but I

6   think she was hypnotized twice, one by a Dr. Pulos

7   in Vancouver and then later by a Dr. Orne in

8   Philadelphia in early '92. Do you recall being

9   aware of that or viewing any of the hypnosis?

10   *A*   Generally I recall it, but I don't -- I don't

11   recall seeing the tapes.

12   **Q**   At this November 11th meeting, or at any other

13   discussion or meeting around this time, do you

14   recall what the Justice officials, what weight or

15   what view they were taking with respect to Nichol

16   John and the evidence she might be able to give at

17   that time?

18   *A*   Well, my recollection, and it's very general, is

19   that Mr. Williams, as I've said before, seemed to

20   be fixated on Nichol John's evidence and seemed to

21   take it at its face value. Not the evidence at

22   the trial, but the statement in which she claimed

23   to see David commit the murder, and he was bound

24   and determined to elicit that and that that was

25   the truth.

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1   Q   If we could go to 157138. While that document is

2   coming up, at the November 11th meeting were there

3   discussions about a remedy and about sending it to

4   a Court and, if so, what Court and what question?

5   Do you remember any of that?

6   A   I think there was some general discussion about

7   that.

8   Q   And would it be fair to say, and I'll go through

9   Section 690 a bit later, but there were really

10   three potential remedies, actually a fourth, but

11   three remedies, one would be to direct a new

12   trial, and that would be 690(a), (b) would be to

13   send it back to the Court of Appeal as if it were

14   an appeal, and (c) would be to send a reference to

15   a Court of Appeal for advice, for an opinion for

16   the minister; correct?

17   A   Right.

18   Q   And the fourth one I think is what happened, that

19   it ended up going to the Supreme Court because

20   690(c) didn't specifically allow the minister to

21   send it to the Supreme Court, they relied on the

22   Supreme Court Act to send it there, but it was

23   basically the same purpose. Is that your

24   understanding of what happened?

25   A   Yes.

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1   Q   So back to -- so would there be discussions about

2   should this be a new trial, should it be an

3   appeal, should it be a reference? Do you remember

4   any of that?

5   A   I recall there being a problem with Saskatchewan

6   as a venue because of Justice Tallis' presence on

7   the Court of Appeal, I think there was some

8   discussion about the feasibility of a trial given

9   the passage of time and the unavailability of

10   witnesses and exhibits, but I don't recall us

11   getting to the discussion of where a reference

12   might occur.

13   Q   Was your position, do you recall, at the time,

14   that an appeal, the 690(b) remedy, which would be

15   to send it to allow you to bring an appeal, did

16   you -- I think there's some documents which

17   suggest you said no, we don't want that, we want a

18   reference because on an appeal we bear the onus of

19   proof, etcetera. Do you recall that?

20   A   I don't recall that, but that --

21   Q   I'll show you some documents.

22   A   I accept that as being the case.

23   Q   This is a November 14th letter from -- actually,

24   this one is from you to Mr. MacFarlane and this is

25   where you indicate you are going to set forth your

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1   position with respect to the witness, Nichol John.

2   You say:

3   "In our view, the manner which Ms. John

4   testified at the trial was considerably

5   more harmful to Milgaard's defence than

6   if she had testified true to her

7   statement of May 24, 1969. The

8   statement is a blatant lie which is

9   contradicted by Wilson, the police and

10   common sense."

11   And I think what you are saying here, Mr.

12   Milgaard would have been better off if she had

13   adopted the statement at trial, that was your

14   view at the time?

15   A   Apparently.

16   Q   And so again would this be a response coming out

17   of the November 11th meeting?

18   A   It looks to be, yes.

19   Q   Then if we could also go to 157141, and again this

20   is a letter of the same date by you to Mr.

21   MacFarlane -- no, I'm sorry, 157141, November

22   14th, same date, from you to Mr. MacFarlane, you

23   say:

24   "Further to our meeting in Ottawa, I

25   have contacted Professor Neil Boyd, and

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1   have requested that he provide me with a

2   transcript of his interview with Ronald

3   Dale Wilson. He is agreed, and I assume

4   that it is on its way to me. Once I

5   have received it, I will in turn forward

6   it to you."

7   And then:

8   "Insofar as the Centurion Ministries

9   material relating to Fisher, it seems

10   that what you have is a complete and

11   transcribed version of notes made during

12   the conversations with the various

13   victims. As I believe I indicated to

14   you during our meeting, we did not want

15   to structure the interviews with the

16   victims as a statement-taking session,

17   and wanted to make these individuals

18   feel as comfortable as possible.

19   Consequently, we have no further

20   material to provide you in that

21   respect."

22   And then you talk about a further meeting. And

23   so do we take it from this that at your meeting

24   of November 11th Justice asked for disclosure of

25   some items from you?

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1   *A*   Yes.

2   **Q**   And the first one was Neil Boyd had interviewed

3   Ron Wilson, is that right, and there was I think

4   a, you are saying you are going to get a

5   transcript?

6   *A*   Yes.

7   **Q**   And as well they were looking for information from

8   Centurion Ministries; is that right?

9   *A*   Yes. You can see they are starting to work with

10   us here.

11   **Q**   Go to 336312 and this is a tape -- just for the

12   record, the redacted means that there's parts of

13   this transcript that were personal and irrelevant

14   so they've been removed before they were put up.

15   If you can go to 336352 and there's a discussion

16   here between you and Mrs. Milgaard, I think it is

17   mid November, 1991. In fact, we can go to the

18   next page and you say here, 'And -- you know, and

19   I guess then the other question was, should the

20   reference under "C" simply be a broad was there a

21   miscarriage of justice, or should it enumerate --

22   should it be framed sort of as follows: After

23   considering the following things, and then list

24   all the things, is it your opinion that the

25   conviction of David Milgaard was a miscarriage of

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1   justice? Now, the problem there was, that when

2   you enumerate all the things to consider, it might

3   be difficult and might require subsequent

4   references by the Minister if new things arise, so

5   I'm not sure how you actually word it.'

6   And then if we can go ahead to

7   page 336358 and this is a further discussion on

8   this issue, and you say, 'Well, I asked David

9   about it when I went up to see him. I asked him

10   to think about the scope, like what does he want

11   out of this hearing? Does he want to deal with

12   the evidence? Do we want to include police

13   misconduct? You know, do we want the whole

14   charade. It'll be -- because --' and then, '--

15   you've got to remember a reference under "C" the

16   way we're thinking will blend -- the evidentiary

17   questions --' if we can scroll down. 'It'll blend

18   the evidentiary issues, you know, (i.e., you know,

19   what evidence is there left against David, if

20   any), but also can speak to questions of police

21   misconduct, non-disclosure by the Crown --' 'All

22   that stuff,' '-- the whole thing. Now, let me ask

23   you a question,' and it carries on.

24   And just for the record, if we

25   bring up 335463, go to the next page, and can you

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1   confirm, Mr. Asper, that when you are talking to

2   Mrs. Milgaard about (a), (b) and (c), that you are

3   referring to the Section 690 provision? When you

4   talk about (c), you are talking about a reference

5   to a Court on any question which desires the --

6   A   Yes.

7   Q   Yes?

8   A   Yes.

9   Q   And so do I take it from that conversation that

10   what you were discussing with Mrs. Milgaard, and

11   even with David Milgaard, is what is the scope of

12   the reference we want or we would like to have,

13   and that under a (c) reference, that it would

14   cover police misconduct, Crown misconduct as part

15   of it; is that a fair --

16 A   Potentially, yes.

17 Q   Potentially. And do you recall whether that was

18   your desire, to go under (c) and have a reference

19   that would be perhaps broader?

20 A   I don't recall.

21 Q   Go to 157143, and this is a November 19th, 1991

22   letter from you to Mr. MacFarlane, and it says:

23   "Further to our recent meeting --"

24   Which I'm assuming was the November 11th, but

25   might there have been a following meeting or do

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1   you remember?

2   A   I don't think there was.

3   Q   And again you mention here, this is about Nichol

4   John, and keep in mind that I showed you that

5   letter earlier where Justice said to you lookit,

6   what is the scope of what the minister and/or a

7   Court can inquire into with respect to Nichol

8   John, and you say:

9   "While we can totally sympathize with

10   the desire to refresh her memory, our

11   view is that it is being aimed in the

12   wrong direction. If her memory was to

13   be refreshed it should be in the area of

14   the police interrogation and the

15   suggestions that were made to her in

16   order to obtain the false statement."

17   And then you enclose a number of articles there,

18   and then you say:

19   "It is our view that to hold back the

20   decision now while awaiting some

21   assistance from hypnosis would not be

22   fruitful because the options are the

23   following:

24   1. There will be no recall.

25   2. In the event of recall, and

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1   presumably recall negative to David

2   Milgaard, you would be confronted with

3   firstly, the problem that hypnosis does

4   not necessarily bring out the truth, and

5   secondly, how do we obtain an

6   opportunity to confront the sudden

7   recall?"

8   And I'm wondering, Mr. Asper, at this time we

9   have seen from other documents that around this

10   time Federal Justice had set up one hypnosis of

11   Nichol John, had arranged for her to meet a

12   Dr. Fleming, a Dr. Perry I believe, or for

13   Dr. Perry to review something, and then in

14   January another hypnosis. Am I correct that one

15   of the matters being raised here is that Justice

16   said we might wait to have a reference or a

17   remedy until this work is done?

18 *A*   Yes.

19 *Q*   And tell us what you recall about their decision

20   on that?

21 *A*   I think they wanted to just wait until they had

22   completed all their work with Nichol John, I think

23   that was their position.

24 *Q*   Before sending it to a court or granting a remedy?

25 *A*   Right.

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1   **Q**   And your position is don't wait because it's not

2   going to matter?

3   *A*   Right.

4   **Q**   Is that fair?

5   *A*   Right.

6   **Q**   And as well it appears that you raised the issue

7   here that rather than, I'm paraphrasing, rather

8   than looking at how to get the memory out, maybe

9   you should look at how the memory got in there; is

10   that fair?

11   *A*   Yes.

12   **Q**   If we can go to 147145, page 3, I want to go

13   through this part with you because it relates to

14   the scope of the reference. Is it fair to say

15   that Federal Justice invited you, or when I say

16   you, I mean the Milgaards, you and Mr. Wolch, to

17   provide your thoughts or position on the scope of

18   a reference for their consideration? They were

19   seeking input from you?

20   *A*   Right.

21   **Q**   And you say:

22   "Should the Minister decide that this is

23   a matter that requires re-opening, we

24   appreciate the dilemma posed as to the

25   most appropriate manner of re-opening.

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1   We appreciate how difficult the matter

2   is considering that this case is unlike,

3   in terms of its number of issues, other

4   cases, such as Nepoose. In a general

5   sense our view is that an inquiry that

6   is not hampered by strict rules is the

7   best way to determine the issues and we

8   would like to avoid duplicity of effort.

9   Accordingly, if the Minister feels that

10   justice would best be served by an

11   inquiry whose mandate is to answer

12   specific questions, we would certainly

13   voice no objection.

14   Presumably this discussion is

15   confined to the parameters of Section

16   690 of The Criminal Code, and within

17   that section we take the view that

18   subsection (c) is probably the

19   preferable approach because of its wider

20   latitude. It seems that the Marshall

21   experience has taught that a subsection

22   (b) reference may not necessarily

23   resolve the many issues as to the reason

24   for a wrongful conviction. We have

25   given this matter a great deal of

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1 thought, and ultimately are persuaded by

2 the following passage from the report of

3 the Commission of Enquiry into the

4 Marshall matter:

5 "As a practical matter, this decision to

6 refer under Section 617(b) left Marshall

7 with the burden of preparing and

8 presenting the case to prove his own

9 innocence. This reinforced the

10 adversarial nature of an appeal, and it

11 served to limit the issues canvassed

12 before the Court. Although both

13 Governments felt that a full public

14 airing was essential, the Section 617(b)

15 appeal effectively confined the public

16 hearing to the facts of the incident,

17 and precluded a complete examination of

18 why the wrongful conviction occurred.

19   Given that all parties agreed

20 that a Section 617(c) reference was

21 preferable, that fresh evidence should

22 be admitted, that a full airing of all

23 issues was necessary, and that

24 appropriate executive action could

25 follow with respect to any or all of

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1   those issues, we believe it is

2   regrettable that officials in the

3   Department of Justice were influenced by

4   the views of the Chief Justice in

5   determining the final form of the

6   Reference."

7   And again, is it fair -- that would have been

8   your position put forward, Mr. Asper?

9   *A*   Yes.

10   Q   And so I think the Marshall Enquiry, I think in

11   that case it ended up, was supposed to be a (c)

12   reference, it went to a (b) reference and I think

13   the Commission of Enquiry later said that that

14   placed a higher burden on Mr. Marshall; is that --

15   *A*   That's correct.

16   Q   Paraphrasing. So here, and secondly, I think in

17   the Marshall Enquiry, what they said is if you go

18   to a (c) reference, you can look into why --

19   *A*   It's the last sentence of the first paragraph, why

20   the wrongful conviction occurred.

21   Q   Yeah, I'm sorry. And so in this case your

22   position, if I'm correct, is go under (c) and have

23   a reference and deal with all issues?

24   *A*   Yes.

25   Q   And if we can go to the next page, you say:

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1   "Finally, insofar as the Wilson

2   transcript is concerned --"

3   And you recall the last letter I showed you they

4   asked you to get the transcript of the Boyd

5   interview of Ron Wilson?

6 A   Yes.

7 Q   You say:

8   "Insofar as the Wilson transcript is

9   concerned, it is our understanding that

10   although Professor Boyd provided us with

11   a copy of same, his understanding with

12   Wilson was that the discussion was only

13   for the purpose of the preparation of

14   Professor Boyd's report, and

15   consequently we are not at liberty to

16   provide it to you. Indeed, we are not

17   even supposed to have it. We can advise

18   however that it really does not shed any

19   new light on anything except perhaps to

20   explain in greater depth why he lied at

21   David Milgaard's trial. The reason is a

22   combination of selfishness and fear."

23   And I take it that despite the request from

24   Federal Justice, the transcript of Professor

25   Boyd's interview of Ron Wilson was not provided

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1   to them?

2   A   That appears to be the case.

3   Q   Do you have any recollection?

4   A   No.

5   Q   If we can call up 336312, this is tape 47, and

6   it's around November 19th, 1991 which I think is

7   the date of the letter, if we can go to 336361,

8   it's a discussion between you and Mrs. Milgaard,

9   you say, 'I got a transcript of that conversation.

10   It's -- you know, it's really nothing. You know,

11   he says that he and David had been taking acid the

12   day of the trip and he can't remember whether they

13   were coming down when they left or just on their

14   way up.' Mrs. Milgaard, 'Well that's something

15   that --' and you say, 'I don't think that that

16   really matters.' Mrs. Milgaard, 'I don't even

17   think that that's true.' You say, 'Well, I don't

18   think it matters.' Mrs. Milgaard, 'Then why are

19   we putting this in. This could be a real

20   negative. That wasn't in the report.' You say,

21   'It wasn't in which report.' 'His report.'

22   'Wilson's report.' Mrs. Milgaard, 'Boyd's

23   report.' Mrs. Milgaard, 'Don't give them

24   something that they don't need. What positive

25   aspect is there of it.' You say, "Oh, I mean, the

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1   whole -- I mean, he gives a pretty detailed --'

2   and Mrs. Milgaard, 'But they have the Boyd

3   report.'

4   And it appears -- I think that's

5   all on that transcript that relates to it. Was

6   the reason the transcript of Professor Boyd's

7   interview of Ron Wilson was not provided to

8   Federal Justice because of this reference to,

9   where Wilson said that he and Mr. Milgaard were on

10   acid on the trip, or the trip to Saskatoon?

11   A   I don't recall. Based on my correspondence with

12   Mr. MacFarlane, it looks like we weren't supposed

13   to even have it, let alone disclose it, and that

14   may have been on the basis of some promise that

15   Mr. Boyd had made to Mr. Wilson or Mr. Watson.

16   Q   Do you recall if that transcript of Ron Wilson's

17   interview was provided to Federal Justice or

18   included in the Supreme Court reference?

19   A   I don't recall.

20   Q   I don't know the answer to that, I'll maybe check,

21   or check over the break to see whether that was

22   listed in the reference materials. You don't know

23   whether it was or not?

24   A   I don't.

25   Q   Go to 157840, this is the minister's letter I

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1   think of November 28th, and it talks about your

2   letter and also the November 11th, '91 meeting and

3   your submissions, and then it goes on to talk

4   about the remedy she's going to provide, and if we

5   can go to 157842, this is the order and it goes on

6   to the preamble, and then if we can just go to

7   the -- actually, just at the bottom, the hearing,

8   submit to the Supreme Court for hearing and

9   consideration the following questions:

10   "(a) upon a review and consideration of

11   the judicial record, the Reference Case

12   that will be filed before this Court,

13   and such further or other evidence as

14   the Court, in its discretion, may

15   receive and consider, does the continued

16   conviction of David Milgaard in

17   Saskatoon, Saskatchewan for the murder

18   of Gail Miller, in the opinion of the

19   Court, constitute a miscarriage of

20   justice?

21   (b) depending on the answer to the first

22   question, what remedial action under the

23   Criminal Code, if any, is advisable?"

24   Now, do you recall, Mr. Asper, would you have

25   had, and when I say you, let's include Mr. Wolch,

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1   have had some input into the framing of the

2   reference and the questions?

3   A   I don't think -- I think we were invited to give

4   the Department of Justice our view, but once the

5   Department of Justice had decided what it was

6   going to do, I don't think we were part of it.

7   Q   And the reason I ask, your letter to Mr.

8   MacFarlane that says we would like a reference

9   under section (c), other than the fact it's to the

10   Supreme Court instead of a Court of Appeal, it

11   would appear that that's what the minister

12   ordered; is that correct?

13   A   Not quite.

14   Q   Okay.

15   A   The minister ordered a reference under the Supreme

16   Court Act.

17   Q   Right. But apart from the fact that it was under

18   the Supreme Court Act, because she couldn't do it

19   under 690 to the Supreme Court?

20   A   Right.

21   Q   And so in order to send it to the Supreme Court,

22   it's my understanding that she had to go under the

23   Supreme Court Act?

24   A   Right.

25   Q   And apart from that distinction, was it

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1   essentially what you had put forward as the scope

2   of the reference that you would like?

3   A   Well, I guess the answer is yes except that other

4   than when we actually got to the hearing, my

5   recollection is that we were more circumscribed as

6   to the issues than we would have preferred.

7   Q   Okay. And that was in discussions with Mr. Lamer,

8   Chief Justice Lamer?

9   A   Yes.

10   Q   And we'll get to that. And so --

11   A   So that the 690(c) could have specified the scope

12   and specified the issues I think, whereas in what

13   happened we were at the discretion of the Chief

14   Justice.

15   Q   And as far as the scope of the question I guess

16   would be had there been a miscarriage of justice;

17   correct?

18   A   Yes.

19   Q   And putting aside for a moment what the Chief

20   Justice later said, was it your view, at least

21   when the order was granted, that this would allow

22   an inquiry into any matter that pointed to a

23   miscarriage of justice?

24   A   Yes.

25   Q   So (a), proving David Milgaard is innocent could

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1   be one, (b), police misconduct could be a

2   miscarriage of justice; correct?

3   A   Yes.

4   Q   Crown misconduct could be a miscarriage of

5   justice?

6   A   Yes.

7   Q   And so at least when the order was granted, is it

8   fair to say it was your view that you could put

9   anything forward as far as a grounds for the

10   miscarriage of justice to get a remedy?

11   A   Yes. Initially, yes.

12   Q   And then I think what you are saying is later you

13   felt that the Court, I think your words were,

14   circumscribed?

15   A   Yes.

16   Q   And can you just elaborate on that?

17   A   My recollection, and I really can't be precise,

18   and I'll tell you why in a minute, the Chief

19   Justice wanted to be very precise and very focused

20   on specific issues and did not want to turn the

21   reference into an inquiry into all of the issues

22   and so some issues that we wanted to raise such as

23   the role of the police were basically not allowed.

24   Q   And can you tell me, how did that discussion take

25   place, was it something you put forward in writing

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1   or did you just -- what did he say that caused you

2   to conclude that?

3   A   Well, I think these were discussions among counsel

4   prior to the reference.

5   Q   In the presence of the Chief Justice?

6   A   Yes, and the Chief Justice was giving direction to

7   counsel.

8   Q   When you talk about the role of the police, it's

9   my understanding, at least from reading Ron

10   Wilson's evidence at the Supreme Court and

11   Inspector Roberts' evidence, that certainly the

12   role of the police in getting Wilson's statement

13   was a matter before the Court; is that right?

14   A   Yes.

15   Q   And so when you say, I think you said the role of

16   the police was an issue that you couldn't get

17   into?

18   A   The overall -- yes, the overall role of the police

19   and the police conduct of the file and subsequent

20   to the conviction of David Milgaard.

21   Q   Okay.

22   A   Now, I will tell you, because we're moving to the

23   Supreme Court, and I was remarking the other day,

24   I have not read the evidence from the Supreme

25   Court and I have to be candid with you, that other

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1   than Milgaard's escape while in Ottawa and a

2   couple of moments during the proceedings, I have a

3   very flawed recollection of what happened at the

4   Supreme Court.

5   Q   And is there, I mean, is there a particular reason

6   for that?

7   A   Well I have a feeling that I had done most of my

8   job at that point, and we handed the ball to

9   Mr. Wolch and let him run with it, --

10   Q   Okay.

11   A   -- and other than providing a support role this

12   was Mr. Wolch's turn to go to work.

13   Q   And why was that decision made?

14   A   He was older and wiser and more experienced in the

15   courtroom.

16   Q   You realize you will be cross-examined on that

17   point, Mr. Asper.

18   A   I have truth on my side.

19   Q   The -- so, and I think we saw some reference to

20   that in some articles, that around this time a

21   decision was made that Mr. Wolch would take over

22   the lead on the matter; is that right?

23   A   Yes, he was a clearly more experienced counsel.

24   Q   And so what role did you play in not only the

25   actual hearings but the preparations and the

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1   meetings and the conduct of the reference case?

2   A   Umm, I guess I would describe it at that point as

3   a support role, cataloguing, organizing, helping

4   Mr. Wolch prepare. We spent a significant amount

5   of time with, I think, a couple of psychiatrists

6   preparing for Larry Fisher and trying to get into

7   the mindset of how to approach that evidence given

8   its importance, but I was, I was in a support

9   role.

10   Q   And did you appear in Court on the record as

11   co-counsel with him; were you present during all

12   the evidence?

13   A   Oh yes.

14   Q   And were you present at all of the meetings of

15   counsel with Chief Justice Lamer?

16   A   I believe so, yes.

17   Q   And I'm not going to ask you any questions about

18   the evidence that was given during the reference

19   but I do intend to go through your recollection of

20   the discussions amongst counsel and the Chief

21   Justice on some of the preparatory things.

22   A   I'll do my best. Sorry, I should also add the

23   Launa Edwards moments were, the Launa Edwards

24   moments stick out in my mind as well, but there's

25   big gaps between.

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1   Q   And I think you interviewed her on January 8th,

2   1992 in Vancouver; is that right?

3   A   No, I just remember her with the Chief Justice.

4   That was a special moment.

5   Q   If we could go to 334170. And I just want to

6   point this out, I told you earlier that this was

7   Kim Campbell's press conference -- or sorry --

8   Minister Campbell's press conference on November

9   29th announcing the reference, and I have told you

10   there was another remark she had made similar to

11   what she said at the scrum on October 7th, and I

12   just want to read it to you and I think it's

13   similar to what you said before. Go to the next

14   page. And she says:

15   "I am aware of the substantial amount of

16   public concern and interest that Mr.

17   Milgaard's application has aroused. I

18   wish to make it clear that I do not

19   exercise my discretion in favour of an

20   applicant based on the amount of public

21   exposure through the media that a

22   particular case may receive. Indeed, it

23   would be quite improper for me to do so.

24   Decisions of this nature must be based

25   on a full understanding of evidence, not

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1   media reports. That being said, this is

2   a difficult case which, given the

3   growing public interest and concern, I

4   have now decided deserves a judicial and

5   public examination."

6   And, again, I think there is reference, there's

7   even reference, sending it to the Court, of words

8   to the effect of the growing public interest and

9   concern. And I think this is similar to what she

10   said before. And would you agree, Mr. Asper,

11   with the qualification you gave before about why

12   you had to go this route, that is it fair to say

13   that you would agree with the Minister's view

14   about how, in a perfect world, these applications

15   should and should not be dealt with?

16   A   Yes.

17   Q   Go to 334244. And this is a letter, I think it's

18   December 9th, I'm not sure if there is a date on

19   there but I think it's December 9th, 1991 from

20   Mr. MacFarlane -- or confirming that there will be

21   a meeting on Monday, December 9th:

22   "... to discuss some of the procedural

23   issues concerning the Milgaard

24   Reference."

25   And then scroll down. It says:

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1   "I attach a list of issues that we may

2   wish to discuss. They range from some

3   fairly broad and important questions, to

4   the narrow and somewhat mundane."

5   And then if we can just go to 004313, it is a

6   similar letter to Ellen Gunn, Department of

7   Justice, and I -- do you recall attending this

8   meeting on December 9th, '91 with, presumably,

9   Mr. MacFarlane and either Ms. Gunn or it might

10   have been Murray Brown by this time?

11   *A*   I don't recall. I know there were a number of

12   preliminary meetings. There were a range of

13   logistical issues that we had to deal with, --

14   **Q**   If we could go --

15   *A*   -- as Mr. MacFarlane says, as well as substantive

16   issues. They, like they didn't have a witness box

17   in the Supreme Court, there was issues about how

18   we were going to build a witness box and where we

19   were going to put it.

20   **Q**   If you can go to 004312 and go to 314, this is the

21   list of issues, I think, that Mr. MacFarlane

22   prepared. Based on your answer about the witness

23   box, which I think is one of the issues might be

24   raised in here, but procedural questions, do you

25   think you would have attended this meeting with

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1   Mr. Wolch?

2   A   I think so.

3   Q   And so, if we can just quickly go through this,

4   (a) Interventions in the Reference, we know that

5   Mr. Fisher applied and was granted standing. Do

6   you recall what other discussions you would have

7   had about interventions?

8   A   No.

9   Q   (b) was Mutual disclosure; what do you recall

10   about what was discussed there?

11   A   I don't, I don't recall the specific discussions.

12   Q   There is some later correspondence, I think from

13   Murray Brown and perhaps from some others, that

14   there was a general agreement of full and mutual

15   disclosure from all parties; would you agree with

16   that?

17   A   Yes.

18   Q   And I think both Federal Justice and the Attorney

19   General of Saskatchewan both turned over to you

20   everything they had or everything they said they

21   had; is that correct?

22   A   I assume so, yes.

23   Q   And would it be fair to say you received a large

24   volume of documents?

25   A   Oh, we were -- there was a huge volume of

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1   documents came in.

2 Q   And I think you received the Saskatoon City Police

3   file for the Gail Miller investigation; is that

4   right?

5 A   I believe so, yes.

6 Q   And the prosecutor's file; do you recall receiving

7   that?

8 A   Probably.

9 Q   And Mr. Williams, his files, or some of --

10 A   I don't -- yeah, probably.

11 Q   And what, what did you turn over to Federal

12   Justice or Saskatchewan Justice, what do you

13   recall?

14 A   I can't recall.

15 Q   And in particular we had talked earlier about the

16   1981 taped interviews of Ron Wilson; do you recall

17   if those were provided or whether the Justice

18   departments for Saskatchewan and federal were made

19   aware of those tapes or provided copies of them?

20 A   I can't recall.

21 Q   And the Nichol John interview by Tony Merchant; do

22   you recall if that was --

23 A   I have no recollection of that.

24 Q   And what about Peter Carlyle-Gordge's files and

25   his interviews and notes?

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1   *A*   I don't know. I just don't recall.

2   **Q**   And as far as some of the taped interviews that

3   we've had --

4   *A*   I assume there must have been some correspondence

5   --

6   **Q**   Yeah.

7   *A*   -- listing what we were turning over.

8   **Q**   Who would have been responsible from your group,

9   then, to coordinate what was given over to the

10   ministers?

11   *A*   Well I assume between Hersh and I and Joyce, and

12   we may have had an articling student or two

13   involved by this point, I can't say for sure.

14   **Q**   Composition of the Court; do you recall anything

15   --

16   *A*   We were, I will say we were on a very short leash,

17   and we certainly -- I do recall the need to get

18   prepared extraordinarily quickly, umm, and we

19   needed, because Mr. Wolch had not been as keenly

20   or intimately involved in the run-up to the

21   reference we needed to get him as completely

22   prepared for the witnesses as possible, so I may

23   have been more working with Mr. Wolch on witness

24   prep than on documents, I just can't say.

25   **Q**   And to the extent that the Commission has the file

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1   documents and the correspondence from you or your

2   firm to, I think it was from Frater that was

3   coordinating it, that would provide us the

4   information we need as to what was sent and what

5   was not sent?

6 A Yes.

7 Q And, apart from the correspondence, are you

8   telling us that you don't have any recollection

9   and can't tell us what was or wasn't sent without

10   referring to a piece of paper?

11 A That's correct.

12 Q And is it fair to say that the -- we can rely upon

13   the correspondence back and forth to reflect what

14   was provided and what was in the Supreme Court

15   reference document, the official record, or the

16   reference file; is that fair?

17 A That's correct.

18 Q Composition of the Court; was there any issue

19   there?

20 A Don't recall it.

21 Q And, again, we'll speed through some of these.

22   Timing of the hearing, I think there's some

23   reference we see where the, I think it was Chief

24   Justice Lamer who wanted to start right away in

25   mid-January, is that correct?

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1   *A*   Yes.

2   *Q*   And that was a little quicker than you and others

3   had contemplated; is that fair?

4   *A*   Yes.

5   *Q*   Responsibility for calling witnesses; what do you

6   recall being discussed there?

7   *A*   Umm, well I, I seem to recall there was an issue

8   about who, umm, whose witnesses these were, the

9   people who would come before the Court were, who

10   would prepare the witness list, and I think this

11   is what the discussion was about.

12   *Q*   And do you remember what was resolved or what was

13   agreed to or not agreed to?

14   *A*   I believe we agreed that they would be Department

15   of Justice witnesses and we would give them lists.

16   *Q*   The federal department?

17   *A*   Federal Department of Justice, and we would give

18   them a list of who we wanted to call, and then

19   there would be a discussion among counsel and with

20   the Chief Justice as to who --

21   *Q*   Who would go first?

22   *A*   -- who would go first.

23   *Q*   And I think we see that in some of the documents

24   there's correspondence from Mr. Frater to others

25   saying "give me your witness list"?

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1   *A*   Right.

2   *Q*   And do you recall, Mr. Asper, was there any, at

3   any time during the reference was there any

4   witness that you or Mr. Wolch or your group wanted

5   to call at the reference that either the Court or

6   other parties objected or that you were not able

7   to call?

8   *A*   Well I don't recall any specific witnesses, but I

9   think there was a, sort of a class of witnesses,

10   they being the original investigating officers at

11   the trial, that I think we were interested in

12   talking to.

13   *Q*   Okay, I'm sorry, that were not -- my question was

14   whether there was any witnesses that you wanted to

15   testify that either -- the Court said "no, we

16   won't hear from them"?

17   *A*   Yes, I believe that we were looking to call a

18   group of witnesses that would have allowed us to

19   explore the entire evolution of the police

20   investigation both before and after the trial.

21   *Q*   There are some documents that suggest Ray Mackie

22   was in Arizona and Charles Short was ill and

23   couldn't attend; is that what you are referring

24   to?

25   *A*   That may be it, yes.

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1   Q   And Mr. Karst did testify; correct?

2   A   Yes.

3   Q   And so -- and the documents I think reflect

4   this -- but the reasons that Mr. Short and

5   Mr. Mackie may not have attended were illness and

6   out of the country. But, apart from that, did the

7   Chief Justice, do you recall the Chief Justice of

8   the Court ever saying "no, you can't call that

9   witness"?

10   A   No, I don't think it was in response to a specific

11   witness, it was issue -- issue-based, and then,

12   you know, witnesses attached to an issue.

13   Q   And then, okay, were there any issues that the

14   Chief Justice of the Court said "you know, you

15   can't get into that issue, therefore you can't

16   call that witness"?

17   A   Yes. My recollection is that the Chief Justice

18   made it quite clear that we were not going to

19   conduct a *de facto* inquiry into the original

20   investigation, into the conduct of police or

21   prosecution at the original investigation or in

22   the couple or three, four years following the

23   conviction.

24   Q   And even if that area of inquiry gave rise to a

25   potential miscarriage of justice, was the Chief

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1   Justice saying that you still couldn't get into

2   that?

3   A   That's my recollection, yes.

4   Q   Yes. And that would be based on the meetings

5   with --

6   A   Yes, the Chief Justice and counsel.

7   Q   And, again, so the calling of witnesses Federal

8   Justice would coordinate and you could give lists,

9   and presumably subject to the Court's overriding

10   ability to deal with that, is that fair?

11   A   Yes.

12   Q   Costs. It's my understanding that Federal Justice

13   covered the legal expense or cost for you and

14   Mr. Wolch to prepare for and conduct the hearing;

15   is that correct?

16   A   Yes.

17   Q   And, as well, perhaps some other parties?

18   A   Yes.

19   Q   Contents of the Reference Case. Do you remember,

20   we have seen volumes of that, and is it fair to

21   say that whatever piece of paper you wanted to put

22   in on the record you could put in on the record?

23   A   Pretty much, yes.

24   Q   And I'll show you some documents where I think you

25   are sending to Mr. Frater, throughout the process,

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1   additional documents as you discover them in the

2   documents you've received from Federal and

3   Provincial Justice; is that right?

4 *A*   Right.

5 *Q*   Relevance of the Section 690 process to the issues

6   on the Reference. And is it correct, Mr. Asper,

7   that -- or let me ask you this; what did this

8   relate to?

9 *A*   I -- I can't say for sure, but I -- I suspect that

10   we would have wanted that as part of the broader

11   inquiry, as to what happened in our application.

12 *Q*   And maybe let me put it a different way. When I

13   read that I thought it might be the following

14   issue, that in the reference are you limited to

15   only put forward miscarriages of justice that were

16   raised in your first two applications, or could

17   you go beyond your first two applications? Now

18   that was only my read of it but --

19 *A*   That may have been, but I think that the point you

20   are raising may have arisen under a different --

21 *Q*   Okay.

22 *A*   -- heading.

23 *Q*   And what do you recall, if anything, about whether

24   or not the Supreme Court was prepared to hear

25   concerns about the 690 process?

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1   A   My, well my -- we didn't hear any. As I say, the

2   Chief Justice was very -- wanted a very narrow

3   hearing.

4   Q   And were you, you talked before about being

5   circumscribed a number of issues; do you recall

6   whether or not the Court -- and presumably these

7   would be in discussions because I don't, I wasn't

8   able to find any documents that set out that

9   information, now maybe I don't even have them all,

10   but presumably those would be in discussions

11   between the Chief Justice and counsel where these

12   limits may have been put on?

13 A   Yes.

14 Q   And were there any limitations put on to say "well

15   you can't raise that issue because you didn't

16   include it in your first two applications"?

17 A   There may have been those kinds, yes, that may

18   have happened.

19 Q   Do you recall that happening?

20 A   No, I don't.

21 Q   Do you recall anything else about the meeting or

22   these issues?

23 A   No.

24 Q   Probably an appropriate spot to break.

25   *(Adjourned at 12:00 noon)*

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1   (*Reconvened at 1:34 p.m.*)

2   MR. HODSON: Mr. Commissioner, before we

3   start, I have been informed yesterday that I

4   misspoke when I indicated that order of counsel

5   for examination of Mr. Asper had been agreed upon

6   and it was my mistake. I had -- I don't know

7   where I got it from, but I had indicated that

8   there was agreement that Mr. Wolch and Ms. McLean

9   would go second last and third last. That has

10   not been canvassed or agreed upon by counsel, so

11   I simply wish to point that out, and rather than

12   deal with the issue right now, perhaps at the end

13   of today we can maybe address the issue of order

14   of cross-examination so that people know. I'm

15   hopeful by the end of today I'll give a better

16   indication that either I'm done or very close to

17   done, and so rather than deal with the

18   cross-examination now, the order of

19   cross-examination, that maybe at 4:30 or at 4:25

20   we can ask counsel to address that. I can assure

21   everybody that unfortunately I will still be up

22   here at 4:25, so no one is going to be asked to

23   be called upon today.

24   COMMISSIONER MacCALLUM: All right.

25   BY MR. HODSON:

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1   **Q**   Mr. Asper, this morning we talked about the Neil

2   Boyd interview transcript of Ron Wilson and I

3   asked you whether that had been provided to

4   Federal Justice and put in the reference case, and

5   I did check, or I had one of our staff check over

6   the lunch hour and I'm advised that that

7   transcript is not on the reference case materials,

8   and again, do you take any issue with that?

9   *A*   No.

10   **Q**   And would it seem from that that it would not have

11   been provided to Justice officials; is that a fair

12   assumption? That if it had been provided, it

13   would have been put in the reference?

14   *A*   I assume so, yes.

15   **Q**   If we can just go back, and again we were talking

16   about this issue of the scope of the Supreme Court

17   reference and I went through the privy council, I

18   think it was the privy council order that said it

19   would be, to look into or advise on matters

20   relating to a miscarriage of justice, and I think

21   we've gone over the last couple of days and gone

22   through in some detail what had been put forward

23   on David Milgaard's behalf as representing a

24   miscarriage of justice, and I think what you said

25   is, you know, for example, the Ferris information,

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1   the Deborah Hall information and I think you

2   pointed out, lookit, we didn't have to prove

3   David's innocence, although that's what it did, we

4   simply had to prove a miscarriage of justice or

5   some basis. Is that fair?

6 *A*   Yes.

7 **Q**   And so when we get to the Supreme Court reference

8   case, am I correct that what the Federal Minister

9   is doing is saying okay, rather than have me

10   simply listen to all these grounds and consider

11   whether there's a miscarriage of justice, I'm

12   going to send it to the Supreme Court and let them

13   have a reference hearing and they can sort out

14   some of these issues and give me their advice as

15   to whether or not there's a miscarriage of

16   justice. Is that a general way of stating it?

17 *A*   Yes.

18 **Q**   And so again I think some of the things that you

19   talked about in your evidence about the

20   miscarriage of justice, number one, obviously if

21   David Milgaard is innocent, then his conviction is

22   a miscarriage of justice; agreed?

23 *A*   Yes.

24 **Q**   Two, if he didn't have a fair trial, whether it be

25   through disclosure or whatever other reason, I

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1   think you told us that would be a miscarriage of

2   justice?

3   A   Or appeal I would add, yes.

4   Q   Or appeal, I'm sorry, and thanks for clarifying

5   that. If his Court proceedings were not fair and

6   whether the trial and subsequent appeals were not

7   fair or there wasn't proper disclosure, that would

8   be a miscarriage of justice; agreed?

9   A   Yes.

10   Q   And I think just on that point, the fact that I

11   think the record shows that it was after his

12   conviction but before his appeal was argued, that

13   Larry Fisher confessed to two of the assaults;

14   correct?

15   A   Yes.

16   Q   And so again, when it gets to the time of the

17   appeal, I think one of the positions put forward

18   from time to time was that when Mr. Milgaard, his

19   counsel argued his appeal before the Saskatchewan

20   Court of Appeal, the state, if I can call it that,

21   or the Crown or the authorities had information

22   about Larry Fisher, about sexual assaults that

23   Mr. Tallis didn't have?

24   A   Yes.

25   Q   And the failure to disclose that was one of the

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1   grounds of saying there's a miscarriage of

2   justice; is that fair?

3   A   In the end, yes.

4   Q   And if we just go through quickly some of the

5   grounds again that were put forward as being a

6   miscarriage of justice in the earlier applications

7   that I think were raised in the reference, and one

8   is the significance of the frozen semen, the

9   forensic evidence, the Dr. Ferris information, and

10   we've covered that in great detail, but I think

11   basically you are saying it was used to convict

12   Mr. Milgaard when it should have either exonerated

13   him or at least been neutral; is that fair?

14 A   Yes.

15 Q   And I'll talk a bit about what actually happened

16   at the Supreme Court, but that was again I think

17   saying there's a miscarriage of justice because

18   the frozen semen evidence either went in wrong,

19   was used wrong or interpreted wrong?

20 A   Yes.

21 Q   Or was incomplete?

22 A   Yes.

23 Q   And third -- or second, the motel room reenactment

24   evidence, again I think you told us that was put

25   forward as a miscarriage of justice in that Melnyk

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1   and Lapchuk lied at trial and if that were true,

2   that would be a miscarriage of justice?

3   A   Yes.

4   Q   And secondly, if they were paid, paid witnesses by

5   the Crown, that would be a miscarriage of justice?

6   A   Yes.

7   Q   And that if the Crown didn't --

8   A   Paid and not disclosed as such.

9   Q   Okay.

10   A   Yes.

11   Q   And if the Crown didn't call two witnesses who

12   would have refuted their evidence, namely, Deborah

13   Hall and Ute Frank, that would be a miscarriage of

14   justice I think was your position; is that

15   correct?

16   A   Yes. I mean, you are describing each element as

17   though each element alone is a miscarriage of

18   justice and I don't think that's correct. It's

19   cumulative.

20   Q   Sorry.

21   A   Some stand on their own, some are cumulative.

22   Q   And I didn't mean to suggest that, Mr. Asper, so

23   thanks for clarifying that, that the cumulative of

24   what you put forward as being a miscarriage of

25   justice had a number of components and these are

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1   all components; is that a better way of putting

2   it?

3   *A*   Right.

4   **Q**   And another one was that the event didn't happen

5   and therefore the evidence is fabricated and that

6   would be a component of the miscarriage of

7   justice, being the motel room reenactment?

8   *A*   Right.

9   **Q**   And I think as part of that as well that you had

10   alleged -- when I say you, people on behalf of

11   David Milgaard -- alleged misconduct by both the

12   police and the Crown in both the gathering and

13   presentation of the motel room evidence; is that

14   fair?

15   *A*   Of the motel room evidence?

16   **Q**   Yes, Melnyk and Lapchuk.

17   *A*   I don't recall that as being a specific ground.

18   **Q**   Okay. Well, were you not saying at least in the

19   first application, and again later, that Melnyk

20   and Lapchuk lied at trial, that they were paid, or

21   they were induced and there was two witnesses who

22   could have refuted them that the police knew about

23   and the Crown knew about, but they chose not to

24   call them?

25   *A*   Well, the sin there it seems to me, Mr. Hodson, is

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1   if in fact they were paid, it would be not

2   disclosing that they had received favourable

3   treatment on sentencing.

4   Q   Put aside the issue of being paid, just the fact

5   that Melnyk and Lapchuk -- I had read, or

6   understood what you said earlier, that somehow the

7   Crown and the police had committed some wrong in

8   the manner in which they gathered the evidence

9   from Melnyk and Lapchuk and presented only two of

10   the four witnesses.

11   A   Yes, I was definitely concerned that the other

12   witnesses had not been presented, but I don't

13   recall making, putting in issue how Melnyk and

14   Lapchuk came to testify.

15   Q   Okay. And, I'm sorry, I thought the fact that

16   they -- would you not characterize the failure to

17   call two witnesses who you say refute what they

18   say as being a wrong?

19   A   I would argue that part of it, yes.

20   Q   Okay. And then Wilson, John and Cadrain, I think

21   just so that I have it right, where they fit into

22   the components of the miscarriage of justice is

23   you say that they lied at trial because they were

24   manipulated, coerced, threatened or wrongfully

25   influenced by the police; is that fair?

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1   *A*   I think those sound like the words we used.

2   **Q**   Or similar --

3   *A*   Or Mr. Henderson used.

4   **Q**   And so -- but certainly the position or the ground

5   put forward is that the police caused witnesses to

6   fabricate evidence?

7   *A*   Yes.

8   **Q**   And so certainly police misconduct would be a

9   component of that allegation; is that fair?

10   *A*   Yes.

11   **Q**   And as well I think there was some discussion

12   about -- in addition to that, Inspector Roberts,

13   and maybe that's included in the police influence,

14   that Inspector Roberts in conducting the polygraph

15   interview somehow also wrongly coerced,

16   threatened, manipulated or did something wrong in

17   influencing fabricated evidence; is that fair?

18   *A*   Yes.

19   **Q**   And as well, is it also fair to say that in

20   advancing this, that one of the components of the

21   miscarriage of justice is the Crown put forward

22   this evidence of Nichol John, Ron Wilson and

23   Cadrain when it was wrong and ought to have been

24   not put forward?

25   *A*   Yes.

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1   Q   And then last on this point, and this came out in

2   August of 1991, that the police framed David

3   Milgaard presumably by getting these three

4   witnesses and Melnyk and Lapchuk I think were

5   included to give false evidence; is that correct?

6   A   Yes.

7   Q   And that that would be a miscarriage of justice or

8   a component of it?

9   A   Yes.

10   Q   And that as well that when the police and

11   authorities or Crown discovered Larry Fisher and

12   his convictions, that they knowingly covered them

13   up to prevent the discovery of a wrongful

14   conviction?

15   A   Yes.

16   Q   And that that would be a miscarriage of justice

17   that had been advanced at least in the public in

18   August of 1991; is that right?

19   A   Yes, that's correct.

20   Q   And the fourth one I think that was put forward

21   was the, I call it the impossibility argument that

22   we've talked about, saying lookit, if I can get in

23   the door, this isn't new evidence, but it's a

24   miscarriage of justice because if you go through

25   this all and look at it again, there's no way

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1   David Milgaard could have committed the crime and

2   therefore it's a miscarriage of justice to be

3   convicted when he couldn't have done it?

4   A   That's correct.

5   Q   And lastly, the Larry Fisher component, and as I

6   understand what you are saying, number one, he was

7   the killer, therefore David Milgaard wasn't, and

8   it would be a miscarriage of justice to convict

9   the wrong person?

10   A   Yes.

11   Q   Two, and this may be alternative or in addition,

12   that David Milgaard was denied the opportunity to

13   raise these related sexual offences and Larry

14   Fisher before his jury and that it would have or

15   could have led to an acquittal?

16   A   And the Court of Appeal.

17   Q   And, I'm sorry, the Court of appeal. Before the

18   courts?

19   A   Yes.

20   Q   And that would be, number one, that the offences

21   themselves were not disclosed, number one; number

22   two, the fact that the offences had been tied or

23   related to the murder by the police had not been

24   disclosed; and three, when Fisher confessed to

25   those offences, that that was not disclosed to Mr.

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1   Milgaard before his court proceedings were

2   completed, including the appeal?

3   A   Yes.

4   Q   And that if disclosed, would have or could have

5   affected the verdict?

6   A   Yes.

7   Q   So again, that would be one of the components of

8   the miscarriage of justice?

9   A   Yes.

10   Q   And again I think you described that the

11   miscarriage there would be improper disclosure by

12   police and/or Crown?

13   A   Yes.

14   Q   And two, I think cover-up by police and/or Crown

15   when they learned of the Fisher confessions?

16   A   Yes.

17   Q   The last one I just want to raise in there as well

18   is (V4)---- (V4)---, I think that, whether that's

19   part of the Larry Fisher or just part of the

20   general disclosure, that was one of the grounds

21   saying the information on (V4)---- (V4)--- was not

22   disclosed and that might have, or that might have,

23   or would have, I think, in your submission, have

24   affected the result and therefore there was a

25   miscarriage of justice because of the disclosure?

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1   *A*   Yes.

2   **Q**   And as well I think, and I'll show you this in a

3   later document, but once you received copies of

4   the police files and the prosecutor's file, is it

5   fair to say that you would have expanded the

6   disclosure submission on a miscarriage of justice

7   to say that there was a bunch more information

8   that was not disclosed that should have been

9   disclosed that would have affected the verdict and

10   that became I guess an additional component to the

11   miscarriage of justice?

12   *A*   I believe that's true, yes.

13   **Q**   And what I'm talking about there is I think there

14   were a number of people who observed or didn't

15   observe things in and around the area, some other

16   assaults that had been reported in the months

17   prior, and I'll show you a document that will

18   assist you on that, but generally you recall that

19   being a ground put forward?

20   *A*   Yes, I do.

21   **Q**   Now, for the Supreme Court reference itself, I've

22   gone through again in a fairly summary fashion, we

23   spent a number of days talking about all these

24   things, but would it be fair to say that you, and

25   when I say you, counsel on behalf of David

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1   Milgaard, were free to put forward evidence and

2   submissions and documents with respect to all of

3   the miscarriages of justice or all of the

4   components of the miscarriages of justice that you

5   had alleged or discovered or were discovering?

6   A   Mr. Hodson, my recollection is that we were not

7   given the kind of, the scope that you've just

8   described in what we were allowed to present to

9   the Supreme Court, but I really do not have a

10   specific recollection. My only general

11   recollection is that the Court was, seemed to be

12   very unwilling to get into the question of why did

13   it happen or what gave rise to the issues, the

14   assertions that we were making.

15   Q   And are you able to give me an example of one of

16   the areas where the Court said no, we're not going

17   to get into that?

18   A   I can't recall.

19   Q   And so again, just on that point, did you -- was

20   it your understanding, though, that if there was

21   this why did it happen question that related to a

22   component of what you said was a miscarriage of

23   justice, that you were precluded from putting that

24   forward?

25   A   That was my understanding, yes. That's my

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1   recollection.

2   Q   And so that even though you had arguments or

3   evidence on a miscarriage of justice, the Court

4   would not let you put that evidence forward?

5   A   Right.

6   Q   And that's -- and, I'm sorry, that's based upon

7   what directive or information, where did you --

8   A   My recollection is that this occurred during

9   conversations in the Chief Justice's chambers

10   where he was providing direction to counsel.

11   Q   Okay. And I'll show you --

12   A   And I also seem to recall that the Department of

13   Justice lawyers were pretty active in narrowing

14   the, or they were very keen in narrowing the field

15   as well.

16   COMMISSIONER MacCALLUM: Is that federal or

17   provincial or both?

18   A   Federal.

19   BY MR. HODSON:

20   Q   Now, as far as the documentary evidence, the

21   reference documents, let's break this down into

22   three areas. The first one would be the

23   documentary evidence, and I think you told us that

24   lookit, you could pretty much put in whatever you

25   wanted by way of documents; that is correct?

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1   *A*   I think so, yes.

2   **Q**   And two, the witnesses, I think you told us that

3   you could put forward the witnesses you wanted to

4   call, you pretty much had free rein but for the

5   fact that you indicated the Court had given this

6   direction about areas that the Court did not want

7   you to go; is that correct?

8   *A*   Yes.

9   **Q**   And third, I suppose when a witness was on the

10   stand, the scope of areas you could cover with

11   that witness, was there some limitation on that do

12   you recall? Let me give you --

13   *A*   I don't recall specifically. I do recall that --

14   my recollection is quite unreliable about this, so

15   I won't even attempt to reconstruct it.

16   **Q**   On issues relating to the scope?

17   *A*   Right. Just -- Mr. Hodson, just generally, the

18   whole Supreme Court proceeding.

19   **Q**   Okay. My understanding is that as far as the

20   positions taken, that it was discussed and fairly

21   early on decided that the Attorney General for

22   Saskatchewan would defend the conviction, I think

23   those were the words used, do you recall that, and

24   that it would be an adversarial hearing from

25   that --

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1   A   Well, I don't know. I don't recall. I do recall

2   one, at one point Mr. Justice Sopinka interrupting

3   counsel for either the federal government or the

4   provincial government and chastising them for

5   behaving in an adversarial manner, but I don't

6   recall the --

7   Q   And perhaps I'm misstating it by being

8   adversarial, but I think your position was saying

9   the conviction is unsafe, the Attorney General for

10   Saskatchewan, their position was to defend that

11   conviction?

12 A   I believe so, yes.

13 Q   And maybe it didn't have to be in an adversarial

14   fashion, but --

15 A   Yes.

16 Q   Now, I'm not going to go through the list of

17   witnesses, but I do want to ask you with a couple

18   of witnesses that were not called, and start with

19   Mr. Caldwell. Do you recall why he was not called

20   as a witness at the reference?

21 A   Well, I would have to assume it was because we

22   were not allowed to, we were not going to be

23   allowed to look into prosecutorial -- the

24   prosecution and the conduct of the prosecution as

25   part of the reference.

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1   **Q**   And you are talking disclosure?

2   *A*   Yes.

3   **Q**   Or the lack of disclosure?

4   *A*   Well, yes. I assume that would -- yes, that would

5   clearly be one of the issues.

6   **Q**   And what about Mr. Kujawa, do you know why he was

7   not called as a witness?

8   *A*   Again, no, I don't. I can't recall off the top of

9   my head.

10   **Q**   And as far as the missing police files, and I

11   believe the Police Commission had issued its

12   report in November of '91, I don't recall whether

13   there was anything directly, it may have been in

14   the reference books, in fact, it probably was, but

15   there was certainly no witnesses on that issue.

16   Do you recall why that evidence or information was

17   not put forward?

18   *A*   No, I don't.

19   **Q**   And Jim McCloskey and Paul Henderson had both, in

20   August of 1991, stated that based upon their

21   review and investigation, they had concluded that

22   David Milgaard had been framed and there was a

23   cover-up, and do you know why neither

24   Mr. McCloskey nor Mr. Henderson were called?

25   *A*   I don't.

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1   Q   I just want to call up 115417, and this is just an

2   example, this is December 11th, '91, this is a

3   letter from Robert Frater. Do you recall Mr.

4   Frater?

5   A   I do.

6   Q   And my understanding is he was a Federal Justice

7   lawyer who was the person responsible for

8   assembling the reference case books and dealing

9   with some of the documentary issues and perhaps

10   some of the witness issues; is that right?

11 A   Yes.

12 Q   And we see a number of letters, and I won't go

13   through them all, I'll just point out this one,

14   where he would communicate with the parties saying

15   here is Volume I, here's what's going in and does

16   anybody else want documents to go in and there's a

17   fair bit of correspondence back and forth, and

18   that's how the reference case, the documents were

19   compiled; is that right?

20 A   Yes.

21 Q   And just go to 115419, and we've got all these on

22   the record, Mr. Asper, but he would send out

23   Volume I, tab 1, and I think by the time you were

24   done you were into 26 some volumes; is that right?

25   It kept growing throughout the reference?

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1   *A*   Yes.

2   **Q**   Go to 213342. This is a memo from you to your

3   client David Milgaard regarding I think a number

4   of matters, and bail I don't think we need to get

5   into, I think there was some discussion about

6   whether he could get bail or not and there was

7   some legal constraints; is that right?

8   *A*   Yes.

9   **Q**   And if we can go to the next page, this might

10   assist you, this is just talking about -- and

11   again this is December 12, '91, three days after

12   your meeting in Ottawa, and you say to Mr.

13   Milgaard:

14   "As you know, Hersh and I met in Ottawa

15   with officials from the Federal

16   Department of Justice, as well as the

17   Saskatchewan Attorney General on

18   December 9th and 10th. The purpose of

19   these meetings was to begin the process

20   of defining what is about to happen in

21   the Supreme Court.

22   It is the view of the

23   Department of Justice that the

24   proceeding should be "adverse" in

25   nature, meaning that there will be two

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1   sides to the argument. This is not

2   surprising since one of the basic

3   principals of the criminal justice

4   system is the truth somehow is more

5   likely to emerge as a result of the

6   testing of witnesses through the

7   adversarial process. Consequently,

8   Saskatchewan will be taking the view

9   that your conviction was safe.

10   It would appear that the role

11   of the Department of Justice will

12   essentially be neutral, bearing in mind

13   that it is they who have after all

14   sought an opinion."

15   And let me just pause there. Would that be an

16   accurate report of what was discussed and

17   concluded at least at the December 9th and 10th

18   meeting?

19   A   Yeah. As I say, I don't recall it, but I accept

20   that as an accurate report.

21   Q   "Some of the other issues that we

22   discussed involved full and complete

23   disclosure by the Feds and the Province

24   of Saskatchewan of everything that they

25   have relating to both your case and

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1   Larry Fisher. This process I expect

2   will begin within the next few days, and

3   I am confident that we will receive

4   everything that there is to get. All

5   parties have agreed to make full

6   disclosure, and I think that this is a

7   very major step for us in trying to

8   understand how you came to be convicted

9   in the first place."

10   And again, the disclosure, all parties, and I

11   think you've told us David Milgaard, or you as

12   his counsel, had agreed to make full disclosure

13   as well; is that correct?

14 A Yes.

15 Q Go to the next page, and again this is still

16   reporting on the December 9th and 10th, it says:

17   "Later in the afternoon, we had a

18   meeting with the Chief Justice of the

19   Supreme Court of Canada, a gentleman by

20   the name of Chief Justice Antonio LaMer.

21   He is very anxious to get this case

22   rolling, and wants to provide the

23   Court's opinion to the Minister of

24   Justice at the very latest by the

25   beginning of April."

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1   And then goes on to talk about some dates, and

2   you say:

3   "We were all somewhat surprised by the

4   eagerness of the Court to get this case

5   going, but I can tell you that neither

6   Saskatchewan nor the Feds will rush us

7   in any way and we will take as much time

8   as necessary to get this case prepared."

9   Now, I'm wondering, there's nothing mentioned in

10   this report to Mr. Milgaard about what else might

11   have been discussed with Chief Justice Lamer. Do

12   you recall, Mr. Asper, would this have been the

13   meeting where he may have made the comments

14   providing limits or -- and I'll take it to you,

15   or show you a bit later the January 16th, there's

16   a transcript of proceedings in Court that were

17   transcribed where there were some discussions and

18   in that transcript is where he says lookit, this

19   is not a Royal Commission of Inquiry, and I'll

20   take you to that. Are you able to tell us

21   whether the meeting of December 9th or 10th

22   described in this memo is the meeting where Chief

23   Justice Lamer provided limits or whether it was

24   the later meeting in open court.

25   A   I seem to recall that we got notice from him at

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1   this meeting. Maybe not as specific as it later

2   became, but we had, we were -- my recollection is

3   he was pretty clear from the outset that this was

4   going to be a narrow hearing.

5 **Q**   And you think it would have been at the very first

6   time you met with him where you would have heard

7   him --

8 *A*   That's my recollection.

9 **Q**   Okay. Again, 165384, this is a letter from Mr.

10   Beresh on behalf of Larry Fisher to you and Mr.

11   Wolch where he sought standing for the reference,

12   and I think Mr. Wolch on behalf of David Milgaard

13   opposed that application; however, standing or

14   partial standing was granted. Is that correct?

15 *A*   Yes.

16 **Q**   335410, this is a letter from Mr. Wolch to Mr.

17   MacFarlane December 18, 1991 and it relates to

18   Mr. Tallis, or to Mr. Justice Tallis, and a couple

19   of things, one, the disclosure of his interview

20   with Eugene Williams, and two, how he would give

21   evidence at the reference case itself, and we've

22   heard from Mr. Justice Tallis on that point and

23   gone through the documents. Do you have any

24   recollection, Mr. Asper, of any issues that

25   related to either obtaining Mr. Williams'

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1   interview, memorandum and/or how Mr. Tallis would

2   testify, who would question him and the scope of

3   questions?

4   A In a general sense I recall there being an issue

5   on the questioning of Mr. Tallis, but I don't have

6   any specific recollection.

7   Q If you could go to 115617, please, and this -- go

8   to the next page, please. And this is a letter

9   from Henry Brown of the Gowling firm who was an

10   agent for Murray Brown or for the Attorney General

11   of Saskatchewan and it's the only document I could

12   find in our database that talks about what may

13   have been discussed before the Supreme Court on

14   December 19th, 1991 on the application brought by

15   counsel for Larry Fisher, so I apologize putting

16   to you an agent's report to counsel for another

17   party, but I'm wondering if this might assist your

18   memory. Do you recall if you were present at the

19   formal hearing where Mr. Fisher sought standing or

20   is it --

21   A I don't recall.

22   Q Is it possible Mr. Wolch would have attended

23   without you?

24   A We may have attended with an agent. I don't know.

25   Q I think Mr. Wolch was present, at least the

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1   records show that. Is it possible he went and you

2   didn't? No recollection?

3 A   No.

4 Q   Again, I won't go through this, but this letter

5   talks about at least Mr. -- well, actually, Mr.

6   Brown's report to Mr. Brown about what was

7   discussed and it appears there may have been some

8   discussion during the Fisher standing hearing that

9   may have touched on the scope of the reference.

10   Do you have any recollection at all of what may

11   have been discussed?

12 A   No.

13 Q   156827, this is a letter from Mr. Brown to Mr.

14   Wolch and it talks about:

15   "Further to your assurance to us of full

16   disclosure, I am writing to request

17   copies of the following materials:

18   (a) any statements from witnesses or

19   potential witnesses that you have not

20   already sent to the Federal Government;

21   and that you will rely on or may rely on

22   in your presentation to the Supreme

23   Court; and

24   (b) copies of any tape recorded

25   interviews or transcripts of such

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1   interviews and in particular any such

2   tape recordings or transcripts of such

3   tape recorded interviews conducted by

4   Paul Henderson."

5   And do you recall, Mr. Asper, request being made

6   for, again specifically for the Henderson

7   interview of Ron Wilson, do you recall that being

8   a matter that was requested on a number of

9   occasions?

10 A I don't recall the request being made, but if it

11   says it was made, it was made.

12 Q And it would appear, and I could be wrong on this,

13   but it would appear that at least a couple of the,

14   I think the 1981 Wilson transcripts, the Neil Boyd

15   interview of Ron Wilson, and possibly the Nichol

16   John interview by Tony Merchant -- I'm not sure

17   about that -- the records suggest that those may

18   not have been provided to either Saskatchewan

19   Justice or Federal Justice. Are you able, do you

20   know if that was the case, and if so why not?

21 A I don't recall, umm, I -- you know, I just don't

22   recall.

23 Q 157226. December 23, 1991 letter -- 157226. It's

24   a letter December 23, '91 from Mr. Williams to

25   Mr. Wolch and he says:

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1   "Accompanying this letter are materials

2   on file that is being disclosed for the

3   purposes of the reference to the Supreme

4   Court of Canada. The majority of these

5   documents were provided to you on

6   October 1, 1990. However, at your

7   request, I reviewed the materials on

8   file and am disclosing these materials

9   to you."

10   And then it talks about other arrangements with

11   the A.G. of Saskatchewan. We have not been able

12   to determine, from at least the documents we

13   received, what -- what might have been sent with

14   this letter. Are you able to tell us, Mr. Asper,

15   whether, in preparation or at the time right

16   before the Supreme Court reference, whether the

17   documents you received from Federal Justice were

18   the same as what you had been given on October 1,

19   1990 when you met with them?

20   A   I can't recall.

21   Q   002671. Go to the next page. A letter December

22   24, 1991 from Murray Brown to Mr. Wolch, and

23   Mr. Brown says:

24   "After reading the scientific reports

25   you filed with the Minister of Justice

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1   and consulting with the R.C.M.P. crime

2   lab personnel, it would appear that Mr.

3   Milgaard's status as a non secretor is

4   not established. I am informed that the

5   test used to determine that

6   characteristic in 1969 has subsequently

7   proven to be unreliable. This confirms

8   information given the federal Department

9   of Justice by Colin Terry ...",

10   I think that should be Colin Merry:

11   "... of the University of Manitoba and

12   the statement to that effect in the

13   report of Dr. Markesteyn.

14   I would like to know therefore,

15   whether you have made any recent effort

16   to have Mr. Milgaard's blood tested to

17   determine his secretor status. If you

18   have, would you please advise us as to

19   the results of such tests? If you have

20   not, do you intend to do so?"

21   And, again, you will recall I read to you

22   yesterday the Dr. Merry and Dr. Markesteyn

23   reports, or their comments in June of 1990 --

24   actually in their reports where they both said,

25   you know, the secretor status or the secretor

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1   test in '69 wasn't valid; you recall us looking

2   at that?

3   A   Yes.

4   Q   And then if we can go to 336391. And I think up

5   until this point -- I had asked you this question

6   earlier, Mr. Asper, and you said it wasn't until

7   around the reference that you thought about doing

8   the secretor test; is that right?

9   A   That was my recollection, yes.

10   Q   And so here, if we can go to page 426, this is

11   tape number 49, it's around, it says December

12   '91/January '92, and there is a discussion here

13   between you and Mrs. Milgaard. You say, 'And I

14   think what I will do is I will set up a secretor

15   test when he comes out on -- to our office',

16   and I think you are talking about David Milgaard,

17   'I don't want to go, do it through the

18   institution, we'll hire a private doctor, I've

19   got to figure out how we do it, like what lab,

20   well I've got to because, you know, we need a

21   doctor, I suppose, to receive the sample, provide

22   it to the lab so that we have continuity'. And

23   then Mrs. Milgaard, 'What about Markesteyn?' And

24   you say, 'Yeah, maybe yeah. I wouldn't mind

25   doing it, though, in a way that it's -- if he is

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1   an A secretor, that we don't have to make it part

2   of it.'

3   And let me pause there. When

4   you say "make it part of it" are you talking

5   about the reference case?

6   A   I assume so, yes.

7   Q   And why would you be saying that?

8   A   I -- I don't know, Mr. Hodson. I don't recall

9   this conversation at all.

10   Q   Okay. And Mrs. Milgaard says, 'He's not going to

11   be an A secretor', and you say, 'Well who knows',

12   'Well he can't change from a non-secretor to a

13   secretor', and you say, 'What if the test was

14   wrong'. Mrs. Milgaard, 'What do you mean what if

15   the test was wrong', and you say, 'What if the

16   original test was wrong or what if the

17   sophistication of today's testing shows him to be

18   a secretor'.

19   And, again, do you have any

20   recollection, then, of this issue coming up and

21   getting him tested?

22   A   No.

23   Q   If we can go to 156833. This is your response to

24   Mr. Brown confirming that David Milgaard has not

25   had his blood tested. You say:

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1   "This whole issue arose for us the very

2   first time when we received from the

3   Department of Justice in Ottawa the

4   opinions it solicited with respect to

5   this matter. The question of whether

6   David Milgaard is in fact a non-secretor

7   was never raised with us by the Federal

8   Department of Justice, and it comes

9   somewhat as a surprise given the fact

10   that in his Affidavit submitted in

11   support of the first application, David

12   undertook to take any tests whatsoever

13   in order to establish his innocence. It

14   is puzzling to say the least that we

15   were never apprised of any real doubt as

16   to David's status, and we have always

17   operated on the basis that the test

18   performed by the RCMP at the time was

19   accurate."

20   And you will recall yesterday, Mr. Asper, in

21   going through the reports from Markesteyn and

22   Merry in June of 1990 to you saying "the secretor

23   status is in doubt", and I believe -- and I stand

24   to be corrected -- but at the October 1990

25   meeting with the Justice officials -- maybe I'll

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1   ask you again. At that meeting do you recall

2   Federal Justice officials saying to you "we

3   question whether David is a secretor or not"?

4   A   I don't recall that.

5   Q   And so, again, what you say here, that -- I mean

6   are you saying today that up until January 3,

7   1992, Federal Justice had not raised with you

8   their concerns that David Milgaard may not be a

9   secretor?

10   A   That seems to be the import of that paragraph.

11   Q   And that's --

12   A   I don't recall, I mean I just don't recall, Mr.

13   Hodson.

14   Q   Okay, no, no, that's fine, I --

15   A   So that seems to be the import of the paragraph.

16   Q   And then you say:

17   "If we are to have David tested, we

18   would appreciate knowing in advance your

19   position as to the two possible results.

20   For example, if David is confirmed as a

21   non-secretor, will it be your position

22   that therefore he is excluded as the

23   perpetrator? Conversely, if he is

24   determined to be a secretor, will it be

25   your view that this result would somehow

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1   be inculpatory?"

2   And I take it that you were trying to get some

3   idea from Mr. Brown how he was gonna use the

4   result?

5 A   Apparently, yes.

6 Q   Any recollection of this?

7 A   No.

8 Q   Then the next page. It appears at this point, as

9   well, that you have raised the -- you say:

10   "As you are aware, there are those who

11   hypothesize that the alleged semen was

12   in fact urine of some form. It should

13   also be noted that human urine, male or

14   female, can also carry spermatozoa.",

15   and then goes on to talk about that. And so is

16   it fair to say at this stage, January 3, 1992,

17   the prospect of it being dog or human urine was

18   still a live issue at least in your mind?

19 A   Apparently, yes.

20 Q   177869. This is a letter January 6, 1992 to Ken

21   Watson, counsel to Ron Wilson, and it appears it's

22   from you sending him copies of police reports,

23   preliminary inquiry transcript, trial transcript,

24   transcript of interview with the Federal

25   Department of Justice, and the transcript of the

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1   interview with Professor Neil Boyd, all relating

2   to Dale Wilson, and then trying to arrange a time

3   to meet with him to interview him with a view to

4   preparing him to testify. And I think Mr. Wilson

5   testified, as well, that he had a meeting in

6   advance of the hearing. What was your -- I mean

7   obviously, with Mr. Wilson, it appears that you

8   would have met him and prepared him to testify as

9   you would a witness in a case; is that fair?

10 A   Yes.

11 Q   And were there some witnesses that you -- that you

12   did that with and others you didn't? I mean, and

13   let me --

14 A   I don't recall.

15 Q   You had said earlier one of the issues in the

16   December meeting was whose witnesses are they, who

17   calls them, who prepares them, and who puts them

18   forward?

19 A   Right.

20 Q   Was that ever resolved?

21 A   I don't recall.

22 Q   Umm, and the reason I ask that, there seemed to be

23   in the record the odd time where a witness would

24   be called and counsel would, at least on the

25   record, would stand up and they weren't really

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1   sure who should lead the witness and in what

2   order. Do you recall that coming up?

3   A   No, I don't.

4   Q   If we can go to 336439. This is a transcript,

5   this relates to Launa Edwards, and you mentioned

6   her earlier, Mr. Asper. I think in January of

7   1992 you attended an interview with her; is that

8   right?

9   A   Yes.

10   Q   And, just for the record, she was George Lapchuk's

11   ex-wife and she had come forward with information

12   saying that George Lapchuk had lied at trial. And

13   there were some issues between her and

14   Mr. Lapchuk, umm, that you were -- you were

15   inquiring about, as to whether that might have

16   been some motive for her to be coming forward; is

17   that a fair --

18   A   Sounds like it.

19   Q   One thing that you were looking at?

20   A   Sounds like it.

21   Q   And she testified at the Supreme Court reference I

22   believe?

23   A   Oh yes.

24   Q   And one of the issues there was her relationship

25   with Mr. Lapchuk, which I think was described as

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1   somewhat stormy?

2   A   Yes.

3   Q   And so here is a discussion, I'm -- I think this

4   is tape 49, I think it is early January 1992,

5   January 8th is the day of the statement Mr.

6   Henderson took. And the discussion with you and

7   Mrs. Milgaard, and 'Paul Henderson just called',

8   and Mrs. Milgaard says, 'She says that, you know,

9   he told her on more than one occasion that they

10   perjured themselves, that David never said that,

11   that they lied'. And this is Launa Edwards saying

12   that George Lapchuk said that, okay, that's the

13   context. I don't want to have to read the earlier

14   part. And you say, 'I'll phone him'. And then

15   the next page, and it's again a continuation of

16   the conversation. If we can then go actually

17   here, Joyce says, 'But she says that on more than

18   one occasion he had said that both he and Melnyk

19   had perjured themselves at the trial'. And then

20   the next page you say, 'What I am concerned about

21   is her motive, like why is she coming forward now,

22   because she wants to get back at him for being

23   abusive'. And then the next page you say, you are

24   talking about her statement and you say, 'I don't

25   want any of that in her statement, I don't want

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1   any, I mean, you know, I don't want any of the

2   statement-taking that's gone up, on up to this

3   point that, you know, that I believe that David is

4   innocent, blah, blah, blah, it's got to be

5   straight and factual because if it shows bias on

6   the part of the statement-taker'. Next page, and

7   if we can just scroll down here, Mrs. Milgaard

8   says, 'And the point is, is, is it because it's

9   Centurion, is Centurion Ministries, one of their

10   investigators is doing it, does it become tainted

11   somehow'. And you say, 'Well the whole thing is

12   tainted by Centurion, if Centurion is the taint

13   then the whole thing is tainted.' Joyce, 'Or no,

14   let, let's say the other information they take,

15   but now we have more information, If it was

16   another investigative person, like for instance if

17   it was something, someone like Kim Rossmo working

18   private duty'. And then on the next page you say,

19   'But on the other hand why shouldn't that be

20   Centurion', 'Well', and you say, 'You know, I mean

21   I have -- you know, anybody, you know, the

22   statements that have been taken up to this point

23   have been, you know, horrendously biased'. And

24   then, 'Which is fine, I'm prepared to have

25   credentials with Paul and Jim challenged until the

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1   cows come home'.

2   Can you elaborate on what you

3   meant by saying 'the statements that have been

4   taken up to this point have been horrendously

5   biased'?

6   A   I, well no, I -- well, like I don't recall the

7   conversation, so I can reconstruct from a couple

8   of pages back and surmise that I was concerned

9   that the statements contained information, the

10   statements that were being obtained by Centurion

11   contained information that was extraneous to the

12   statement -- to the information, the core

13   information of the statement such as, as I've said

14   there, claims of David's innocence.

15   Q   Okay. Now I think at this point, I don't know

16   that the statement had been taken yet from Launa

17   Edwards, and so when you say 'the statements that

18   have been taken up to this point' what statements

19   were you referring to?

20   A   I suppose I'm referring to Wilson, and I can't

21   recall, whatever else Centurion had been involved

22   with.

23   Q   And what was your concern that they would be

24   horrendously biased?

25   A   Well just containing statements of belief in

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1   David's innocence as opposed to, as I said,

2   straight and factual statements about whatever

3   they were being questioned about.

4   Q   And would it be a concern that someone might look

5   at the statement and say, because of the statement

6   of belief of David's innocence, that somehow might

7   detract from the factual matters?

8   A   Yes.

9   Q   And then 156836. It's a letter January 8, 1992 to

10   Mr. Brown, and attached is the statement of Launa

11   Edwards, and you say:

12   "I was in Vancouver on January 6 ... and

13   had the opportunity to interview

14   Ms. Edwards following her preparing the

15   enclosed statement."

16   And the attached statement, which I don't need to

17   go to, was taken by Paul Henderson, so it appears

18   that -- is it right that you and he attended, he

19   took the statement and you observed or

20   interviewed, or can you shed any light on that?

21   A   I don't recall.

22   Q   Do you recall meeting with her out in Vancouver?

23   A   Yes, I think I do.

24   Q   And was Mr. Henderson there?

25   A   I can't recall.

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1 Q   115797. This is a letter from Chief Justice Lamer

2   January 13, 1992 to Mr. Wolch saying that:

3   "Mr. Claude Alain, of our Court staff,

4   informs me that Mr. Fainstein, of the

5   Federal Department of Justice, is having

6   difficulty obtaining from you the list

7   of witnesses you would like the Court to

8   hear. It is imperative that this

9   information be conveyed to Mr. Fainstein

10   so that subpoenas may be issued. It

11   would be unfortunate if we were to lose

12   this week of sittings.

13   While it the Court's, and only

14   the Court's decision to call or not to

15   call witnesses, it was agreed during our

16   meeting in earlier December that we

17   would let counsel of parties granted

18   status under s. 53(6) of the *Supreme*

19   *Court Act* indicate to the Court which

20   witnesses they feel should be called."

21   Again, did you take any issue with what Chief

22   Justice Lamer, as he then was, said in this

23   letter about how witnesses would be called?

24 A   No.

25 Q   And again, I may have asked you this earlier, but

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1   do you recall any witnesses that you put forward

2   to the Court as witnesses you wished to call where

3   the Court said "no, we don't want them called"?

4   A   I don't recall.

5   Q   105664. Next page, please. Again, here's

6   Mr. Frater asking for a copy of the tape recording

7   of the Ron Wilson interview with Mr. Henderson,

8   and you've already told us you have no

9   recollection of where or how that tape -- where it

10   went; is that --

11   A   That's true.

12   Q   If I can now move to the interview of Mr. Justice

13   Tallis, we've heard evidence from Mr. Tallis that

14   he interviewed with Eugene Williams in I believe

15   March of 1990 or thereabouts, still part of the

16   first application, and he gave Mr. Williams a

17   summary of what David Milgaard had told him back

18   in 1969-1970 and his reasons for not having David

19   testify. And he then indicated that prior to the

20   Supreme Court reference he would have had a

21   meeting with, he said he had an early meeting with

22   you and Mr. Wolch but it was fairly brief, and I

23   think you've confirmed that, that it was a fairly

24   general discussion; is that right?

25   A   Yes.

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1   Q   With not much information passing?

2   A   Right.

3   Q   And then he talked about a second meeting around

4   the time of the Supreme Court reference and I

5   believe he said it may have only been with

6   Mr. Wolch; do you remember?

7   A   No, umm, Mr. Wolch had all the dealings with Mr.

8   Tallis, full -- after the meeting that I attended

9   Mr. Wolch had all the dealings with Mr. Tallis, I

10   don't believe I had any other dealings with him.

11   Q   And do you recall becoming aware in, well,

12   whenever the meeting was, let's say January of

13   1992, around the time of the reference,

14   learning -- learning what it was that Mr. Tallis

15   was gonna say that David Milgaard had told him

16   back in 1969?

17   A   Vaguely. I vaguely recall Mr. Wolch talking about

18   it but I, I don't know, I can't place when or

19   where.

20   Q   And just a couple of items. What I think Mr.

21   Tallis -- do you recall Mr. Tallis' evidence at

22   the Supreme Court reference, and in particular

23   what he attributed to David Milgaard as what David

24   Milgaard telling him about certain facts was

25   different than what David Milgaard's evidence at

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1   the Supreme Court was on a couple of points; do

2   you remember that being an issue?

3   A   I -- Mr. Hodson, I do not recall the Supreme Court

4   proceedings, and I have not had an opportunity to

5   read the transcripts.

6   Q   Okay, no, no, and let me give you an example. One

7   of the, one of the items that Mr. Tallis said

8   David Milgaard told him back in 1969 was that when

9   they left Saskatoon that he in fact did throw the

10   compact or a bag, cosmetic bag or a compact -- I

11   can't recall which -- out the window after Nichol

12   John had found it. And he said "yeah, I did, I

13   don't know where it came from and I don't know why

14   I threw it out", that was Mr. Tallis' evidence at

15   the Supreme Court and here, and in Mr. Milgaard's

16   affidavit of November 29, 1986 he stated that

17   didn't happen, and when he testified in the

18   Supreme Court he said it didn't happen. Do you

19   remember that coming up around the time of the

20   reference case, that Mr. Tallis was gonna

21   contradict what Mr. Milgaard had said in his

22   affidavit?

23   A   I don't recall that, no.

24   Q   And similarly about the motel room re-enactment,

25   that, I think Mr. Tallis' evidence was that when

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1   this information came to light he asked David

2   about it and David said, "I was in the motel room,

3   I was stoned, I don't recall what happened but

4   what they say could have happened and, if it did,

5   it would have been a joke" or "a crude joke", or

6   something like that. Do you recall learning that

7   that would be Mr. Tallis' evidence?

8   A   No, I don't.

9   Q   And again, I apologize if I've covered this area

10   in whole or in part, but when it came down to the

11   decision-making as the reference went on, and what

12   witnesses to call, what not to call, was that your

13   decision or Mr. Wolch's or a joint decision; can

14   you tell us how that happened?

15   A   Umm, my recollection is, as I said, that once we

16   got to the Supreme Court there was a -- a -- we

17   had a very short time frame within which to brief

18   Mr. Wolch as comprehensively as we could, and it

19   was his, and he was -- he was managing the case at

20   that point and he was making the decisions. We

21   may have had some input, but as far as my

22   recollection goes he was making the decisions, and

23   making decisions as to witnesses and tactics and

24   strategy.

25   Q   So which witnesses would be called, what would be

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1   covered with each witness, things of that nature,

2   those were Mr. Wolch's, he was looking after that?

3 A   Yes. I mean he certainly consulted with us but he

4   was -- he was -- he had to deal with the witnesses

5   so that was his call to make.

6 Q   And when you say "he had to consult with us", who

7   is the "us", you and Mrs. Milgaard?

8 A   Yes.

9 Q   002623. Again, this is a letter from Murray Brown

10   to Mr. Fainstein on the issue of witnesses, and

11   just talking about -- I think at this time

12   Mr. Brown was saying lookit, I haven't got

13   Mr. Wolch's list so I don't know what we're gonna

14   do, but he says:

15   "We can understand that the Court ...",

16   or he says:

17   "... assume for the sake of so

18   indicating, that Mr. Wolch may wish to

19   have the following witnesses called:",

20   and there is a couple on here, Dr. Ferris and Dr.

21   Markesteyn, and they were not called as witnesses

22   at the reference; correct?

23 A   I don't recall.

24 Q   And do -- I think February 5, 1992 the secretor

25   test of David Milgaard was completed that showed

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1   he had -- that showed he was a secretor; do you

2   recall learning about that?

3   *A*   Right, I do.

4   Q   And was that the reason that Dr. Ferris and Dr.

5   Markesteyn were not called as witnesses?

6   *A*   I don't recall.

7   Q   158496. And this is a lengthy letter from

8   Mr. Wolch to Chief Justice Lamer about witnesses,

9   and again, I don't propose to go through all of

10   it. Are you able -- maybe we can go to the second

11   page. Would you have had input into this, Mr.

12   Asper, about -- and what he is talking about is

13   the order of witnesses, the grouping of witnesses,

14   things of that nature?

15   *A*   I may have. I don't recall.

16   Q   And he talks here, it looks at this point about:

17   "... time frames, as well as some views

18   as to how this impacts on the calling of

19   Drs. Ferris and Markesteyn and perhaps

20   Dr. Emson before the Court."

21   And it would appear that, at least at this point,

22   the plan was to call them; are you able to

23   comment on that?

24   *A*   Looks like it, but I don't recall.

25   Q   Next page, Discussion with David Milgaard, and I

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1   think there was some concern expressed about David

2   Milgaard's -- umm, I'm not sure what the right

3   term is -- but his, whether he was mentally or

4   physically able to testify. Do you recall that

5   being due to his condition there might be concerns

6   about his ability to give evidence?

7 *A*   Yes.

8 **Q**   And what do you recall about that?

9 *A*   Well in a general sense, and I can comment sort of

10   over a period of time knowing him, and the

11   psychiatric record I think bears it out, David was

12   susceptible to losing his lucidity and he was

13   susceptible to periods of being out of touch with

14   reality, and there had been an enormous amount of

15   stress in the weeks and months pre -- immediately

16   preceding the Supreme Court hearing and he had

17   been, let's say, up and down in the -- in the --

18   in that period leading up to the hearing, and we

19   were concerned about his ability to hold it

20   together.

21 **Q**   And do you recall if that had been conveyed to the

22   Court?

23 *A*   I believe it was, yes.

24 **Q**   And I believe that -- and I'm not sure if this is

25   anecdotal or direct evidence -- but that Chief

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1   Justice Lamer had indicated at some point to

2   counsel that the first witness he wanted to hear

3   was David Milgaard; is that right?

4   A   Yes, yes.

5   Q   And did that catch you a bit off guard?

6   A   Well, umm, I -- I can't say that. I don't recall

7   that, that event, I -- I know it happened but I

8   just don't recall having any -- I don't recall it

9   occurring or having a reaction to it.

10   Q   And so there would have been a concern around this

11   time, though, whether David Milgaard would --

12   would be -- would be able to handle testifying; is

13   that fair?

14   A   Yes.

15   Q   And did you have concerns about his -- his, umm,

16   as far as testifying, his ability to recollect

17   facts?

18   A   Oh, I'm not sure it was so much his ability to

19   recollect facts as his ability to stay

20   clear-headed and focused, --

21   Q   And --

22   A   -- irrespective of whether he had good or bad

23   recollection.

24   Q   And maybe let me put it this way; do you recall

25   whether he had difficulties with distinguishing

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1   between what he recalled happening, what he

2   thought happened, and what he might have been told

3   had happened, or what he thought must have

4   happened, --

5   A   Well, --

6   Q   -- that type of thing? --

7   A   -- yeah, I think that's a fair assessment. And I

8   do recall, I think it was in this period

9   immediately before the hearing he was getting more

10   absences from the day parole, from the prison, and

11   I, I was doing a lot of the driving around. And

12   you may be right, because we were discussing, and

13   we were discussing all of the information of the

14   case, it was coming at us like a blizzard. And I

15   have to say, though, that he -- it -- I think the

16   problem was, my recollection is the problem was

17   less trying to recall on the basis of bits and

18   pieces of information gathered over time than it

19   was his reaction to having to recall in the first

20   place.

21   Q   And so, just again on the point about what -- and

22   in fact he ended up giving evidence, and I think,

23   did you spend some time to prepare him for the

24   giving of evidence?

25   A   We tried, yes.

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1   Q   And did you have a concern or did you observe that

2   there may have been some challenges distinguishing

3   between what he recalled and perhaps what he had

4   read or been informed may have happened?

5   A   That's probably accurate. I don't recall, but

6   that's probably accurate.

7   Q   Did you have concerns -- and again, not that, I'm

8   not suggesting that he was intending to tell

9   things that were not true -- but did you have

10   concerns that the reliability of what he was

11   saying may have been affected by what had gone on

12   in his life for the last 20 years?

13   A   Oh, certainly, certainly. Look, the best we could

14   say to David -- and I do have a recollection of

15   Hersh, and it may have been in Ottawa, trying to

16   calm him down and just tell him to just tell it as

17   best he could remember it, because David was

18   extremely agitated through this whole period and

19   the period leading up.

20   Q   I saw a reference in one transcript or one

21   document where -- and I think it was attributed to

22   you -- that you may not have advised, in advance

23   of David Milgaard testifying, that you didn't tell

24   him what Mr. Justice Tallis was gonna say David

25   had told him; do you remember that?

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1   *A*   Don't recall that.

2   **Q**   And, I mean, is that possible? And I think the

3   comment was that maybe for that reason, that you

4   didn't want to get him agitated or confused, that

5   you wouldn't tell him what you had heard Mr.

6   Tallis was gonna say; do you recall that at all?

7   *A*   I don't, but it's possible.

8   **Q**   157294, and this is January 29th, '92, your letter

9   to Rob Frater, and again just -- there's a couple

10   of statements here, and we've referred to these on

11   a number of occasions, (V11) (V11) (V11)--, (V9)

12   (V9)----, (V6)--- (V6)-, these were all statements

13   on Mr. Caldwell's file that were assaults or

14   attempted assaults in and around the time I think,

15   or prior to Gail Miller's murder, and it would

16   appear that you were asking that those go on the

17   reference case record; is that correct? Do you

18   recall --

19   *A*   I don't recall this, but yes, that's what I was

20   doing.

21   **Q**   And I think when we take a look at the legal

22   argument that was filed with the Court at the end

23   of the case, I think these were referred to as

24   saying lookit, there was non-disclosure, these

25   statements the Crown had and they didn't give them

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1   to us. Do you recall that being one of the

2   grounds?

3   *A*   No, I don't.

4   *Q*   009799, this is January -- go to the next page, a

5   letter from Murray Brown to Fainstein with a copy

6   to Hersh Wolch, and this talks about again witness

7   lists and he says:

8   "We would expect that the Court would

9   want to hear from Detectives Short,

10   Mackie & Karst, Deborah Hall and Ute

11   Frank."

12   And I think there's some later correspondence

13   that indicates Detective Short was ill and Mr.

14   Mackie was out of the country, so does this

15   assist your memory at all as to who wanted these

16   people called? It looks like Mr. Brown may have

17   wanted them called, and you. Do you know?

18   *A*   It doesn't ring a bell.

19   *Q*   165771, this is a letter to Kim Rossmo from you

20   with the RCMP, a profile sheet prepared with

21   respect to Larry Fisher, and I think what's being

22   referred to there, Mr. Asper, is that in late

23   1991, based on your second application, the RCMP

24   did a profile sheet or a comparison of those rapes

25   and it appears you are sending this to Mr. Rossmo

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1   for his review?

2   A   Yes.

3   Q   And was Mr. Rossmo retained as an expert or an

4   assistant to assist you in the preparation of the

5   case?

6   A   Yes.

7   Q   165773, this is a letter February 5, 1992 from Mr.

8   Wolch to a Dr. Fred Shane sending materials about

9   Nichol John and asking him -- let me just find

10   where the -- it appears that you are seeking some

11   expert advice from him with respect to Nichol

12   John. Do you recall that?

13   A   Yes.

14   Q   And what -- who was Dr. Shane and what was he

15   doing for you?

16   A   He's a forensic psychiatrist in Winnipeg and he

17   was obviously consulted on the Nichol John

18   hypnotism. I think he did, he's familiar with

19   hypnotism in his practice.

20   Q   And do you recall what he advised you or what

21   his --

22   A   No, I don't.

23   Q   Go to 165682, and this is just for the record,

24   February 3, 1992, this is the lab report

25   confirming that David Milgaard is an A secretor.

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1   You recall learning of that information, is that

2   correct, around that time?

3   A   At some point, yes.

4   Q   Did that surprise you?

5   A   I think it would be fair to say nothing was going

6   to surprise me by this point.

7   Q   And why is that?

8   A   It had been a long haul.

9   Q   165774, this is another letter from, this one is

10   from you to Dr. Shane and you are sending the

11   transcript of Ron Wilson and Nichol John from the

12   Supreme Court hearing as well as the investigation

13   reports, and those investigation reports I think

14   are the key ones that dealt with, where the police

15   reported on their dealings with Nichol John and

16   Ron Wilson, it says:

17   "I hope this documentation will assist

18   you in preparing an opinion with respect

19   to the Nichol John evidence."

20   Does that assist you at all in telling us what

21   the opinion was you were seeking from him and

22   what it was?

23   A   No.

24   Q   165775, and Dr. Shane, I don't think there's

25   anything put forward to the Court, the Supreme

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1   Court from Dr. Shane?

2   A   Well, I have a feeling that this was for a verbal

3   consultation with Mr. Wolch and I in preparing

4   closing argument, that's my recollection, to the

5   extent it exists.

6   Q   Now, Dr. Fleming testified. Is it possible that

7   it might have been to assist with questioning him?

8   A   It might have been for that too.

9   Q   165775 is a letter February 10th to Dr. Merry

10   sending the lab report and you ask him:

11   "Is it possible that an individual can

12   at one time be a secretor and at a later

13   time be a non-secretor?"

14   And whether the ingestion of drug affects the

15   testing for secretor status and what is the most

16   reliable testing procedure available. Were you

17   questioning or challenging the results of the

18   secretor test or were you simply just verifying

19   that they were right?

20   A   I don't recall challenging. I mean, I don't

21   recall writing this letter. It looks to me like

22   we're trying to verify what they did.

23   Q   009854. I apologize, Mr. Asper, going through all

24   the Supreme Court matters. I know you say you

25   don't have a recollection of many of the events;

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1   however, you are the witness that I have to ask

2   about these things, so 009854 --

3   A I don't know why. It's odd, it's the most recent

4   part and it's gone, it's gone from my memory.

5   Q Well, I'll go through some of these documents and

6   we'll see if they might assist what happened.

7   Sorry, 009853 is the doc ID, this is the second

8   page, and this is actually a letter to your agent

9   for filing, but it is -- if we can go to the next

10   page, it's submissions of counsel on behalf of

11   David Milgaard as to the test to be employed on

12   the reference, and I can give you a bit of

13   background. It's my understanding that at some

14   point Chief Justice Lamer or the Court, the

15   question was raised, okay, what is the test that

16   the Court applies on this reference. Do you

17   recall that being raised as an issue or coming up?

18 A Yes, I recall it coming up.

19 Q And I think what happened is the parties were

20   asked to make written submissions, perhaps even

21   oral submissions, but certainly written

22   submissions as to what should the test be, and

23   then the Court rendered a ruling on that which

24   I'll show you in a moment. Do you remember that

25   happening?

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1   *A*   Yes.

2   **Q**   And this is a brief for submissions filed. Would

3   you have played a part in preparing this do you

4   know?

5   *A*   My recollection is that we referred this to

6   another lawyer in our firm who was familiar and

7   had expertise in appellate matters and that she

8   would have driven the composition of this

9   document. We may have had input, but she would

10   have authored it I think.

11   **Q**   And if we can go to 009859, just a couple of --

12   paragraph 14, and the submission that you and Mr.

13   Wolch made on behalf of the Milgaards is, submits

14   that:

15   "... the approach used in Truscott --"

16   Meaning the reference,

17   "-- should be used on this Reference.

18   That is, the Court should hear and

19   consider all relevant new evidence,

20   whether admissible under a test for new

21   evidence or not; should weigh this

22   evidence along with the evidence at

23   trial; should determine what, if any

24   evidence is credible; and should

25   determine whether all of the credible

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1   evidence causes the Court to doubt the

2   correctness of the conviction."

3   And again, do you recall that being the position

4   put forward at the time?

5   A   Generally, yes.

6   Q   And go to 009862, and the closing paragraph you

7   say:

8   "The words "miscarriage of justice" do

9   not lend themselves to easy definition.

10   It is obviously a broad concept. It is

11   submitted that examples of miscarriages

12   would be situations where it is proved

13   on balance that the convicted person is

14   innocent; where it is proved on balance

15   that the trial evidence was false or

16   fabricated; or where it is proved on

17   balance that another is responsible for

18   the crime. If the Applicant can meet

19   this test, it is submitted that the

20   Reference question should be answered in

21   the affirmative."

22   And I think that's similar to what we discussed

23   earlier today about the various things that could

24   make a miscarriage of justice; is that fair?

25   A   Right.

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1 Q 305225 -- actually, let me just back up. Sorry,

2   before I call up that reference, if we could call

3   up 208523, and this is the transcript for January

4   16th, 1992, if we can just go to the next page, or

5   actually the third page, and this is before the

6   five member panel of the Court, and it has you

7   listed as being in appearance, and I think this

8   was the opening, I don't think there's any

9   witnesses, but this is where remarks were made.

10   Do you recall attending that session?

11 A I do.

12 Q And if we could go to 208528, and I'm just trying

13   to identify, Mr. Asper, if we can, at which of the

14   meetings it was that Chief Justice Lamer had put

15   forward these limits you had talked about, and

16   this is him speaking and he says:

17   "Pursuant to this --"

18   And I think it was the order,

19   "-- I had three meetings with the

20   lawyers; two in my chambers and one in

21   public. At the first meeting where all

22   counsel were present except Mr. Fisher's

23   counsel, a certain number of decisions

24   were made which I would like to

25   reiterate now so that they may be

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1   endorsed by the Court. Some of those

2   decisions that were made have to be made

3   by the Court. It is not sufficient that

4   they be made by a Judge of the Court.

5   All lawyers here present -- and I need

6   not repeat -- are representing parties

7   that have been granted status under

8   Section 53(6) of the Supreme Court Act,

9   which I believe should be read for the

10   benefit of all."

11   He goes on to read it. And then:

12   "Of course Mr. Fisher's counsel was not

13   there because our second meeting was to

14   determine whether he would be granted

15   status, which he has. At that meeting

16   it was decided that (1) the attorneys

17   representing the Attorney General for

18   Canada would adopt a neutral position in

19   the Reference;"

20   And then some information about contacting the

21   Court. There's an issue, if we can scroll down,

22   about Mr. Iacobucci being on the Court, and then

23   if we can go to the next page, he then talks

24   about the second meeting that Mr. Fisher was

25   given status, and then:

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1   "The right to cross-examine witnesses

2   will be determined on an ad hoc basis as

3   matters develop. We will hear you on an

4   ad hoc basis whenever you feel you

5   should be allowed to put questions. In

6   this regard, it is to be remembered --

7   and I reiterate this -- that this is not

8   a trial; this is not a rehearing of an

9   appeal; nor is it a Royal Commission of

10   Inquiry into certain matters. It is a

11   Reference that is governed by very few

12   sections in the Supreme Court Act and a

13   couple of sections in our rules of

14   Court."

15   And the next page, just scroll down:

16   "We have been asked by Cabinet to assist

17   them in exercising their power of mercy,

18   which is an administrative power. We

19   are entitled in that regard to do most

20   of what Cabinet itself could do. We

21   intend to proceed judicially, though I

22   think we could not necessarily go that

23   route."

24   And then talks about the rules of evidence not

25   being applicable.

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1   Is that -- are you able to tell

2   us, would those be the comments that you were

3   referring to or were there previous comments that

4   would have been --

5   A   Well, if my recollection is correct, my

6   recollection would be that there was a meeting in

7   which the chief was quite pointed, more pointed

8   than he is on the record. He is being on the

9   record in this proceeding.

10   Q   Okay. So that this -- it was not --

11   A   This is a fair, I think, reflection. I just have

12   a recollection at one of the meetings that he was

13   quite, as I say, pointed.

14   Q   And that was in his chambers do you think?

15   A   I believe so, yes.

16   Q   If we can go to 305225, and this is the February

17   28th, '92 order of the Supreme Court that set out

18   the test, and I'll just quickly go through -- if

19   we can go to page 3, parts of it, under (a), I

20   think they say that if the Court is satisfied

21   beyond a reasonable doubt that David Milgaard is

22   innocent, that that would be a miscarriage of

23   justice and there would be a certain remedy, I

24   think a pardon, free pardon; (b), they said that

25   if on the preponderance of evidence they found

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1   David Milgaard is innocent of the murder of Gail

2   Miller, that that would be a miscarriage of

3   justice and that they would grant a remedy or be

4   open to apply to re-open an application for leave

5   to appeal. Next page, three, that:

6   "The continued conviction of David

7   Milgaard would constitute a miscarriage

8   of justice if there is new evidence put

9   before this Court which is relevant to

10   the issue of David Milgaard's guilt,

11   which is reasonably capable of belief,

12   and which, taken together with the

13   evidence adduced at trial, could

14   reasonably be expected to have affected

15   the verdict."

16   And in which case they would consider ordering

17   the conviction be quashed and to direct a new

18   trial. So would this provision here being, okay,

19   if you couldn't prove David Milgaard's innocence

20   either on a balance of probabilities or beyond a

21   reasonable doubt, if you could show or have

22   evidence that could reasonably be expected to

23   have affected the verdict, you would get -- there

24   would be a miscarriage of justice and you could

25   get a remedy. Is that a fair reading of that?

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1   A   Yes.

2   Q   And I'll come back to that when we get into the

3   decision.

4   216144, this is a letter

5   February 13, 1992 from Tony Merchant to Mr. Wolch

6   enclosing a copy of his file, and I believe Mr.

7   Merchant's evidence was that this was the first

8   time he had been, I think he said the first time

9   he had been asked for his file by you or Mr. Wolch

10   and, if not that, it was certainly when he first

11   delivered it. Do you recall that being the case?

12 A   I don't recall this at all.

13 Q   And do you know why Mr. Wolch had asked for it or

14   what was in the file?

15 A   No, I don't recall.

16   MR. HODSON: This is probably an

17   appropriate spot to break, Mr. Commissioner.

18   *(Adjourned at 2:53 p.m.)*

19   *(Reconvened at 3:21 p.m.)*

20   BY MR. HODSON:

21 Q   I'll turn now, Mr. Asper, to what we've called the

22   script document, which is the five page police

23   document. You are familiar with what I'm talking

24   about?

25 A   Yes.

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1   Q   116619, and this is a letter from Mr. Wolch to

2   Murray Brown saying:

3   "I'm enclosing the first page of four

4   pages which appears to be a summary

5   which was found in the Miller file. I

6   believe David Asper provided a copy of

7   this to Eric sometime ago and asked if

8   he could determine who prepared this

9   particular summary."

10   And then actually if we can go to 006799, and

11   this, we'll just quickly, the first four pages

12   are police summaries. Then if you can go to the

13   last page, 803, this is the summary document, and

14   we've been through this document on a number of

15   occasions, Mr. Asper, with a number of witnesses,

16   so I don't propose to go through it. Can you

17   tell me, what is your recollection of when and

18   how this document was found and what

19   significance, if any, you placed on it?

20 A   My best recollection is that we came across it

21   while we were in Ottawa at the Supreme Court

22   hearings and we just came across it as we were

23   reviewing documents. Assuming that to be the

24   case, or irrespective of when we found it, when we

25   did find it, it hit us like a ton of bricks.

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1   Q   And why is that?

2   A   Because somebody had prepared the script of what

3   the witnesses were going to say in order to

4   implicate David and create a case against, on

5   which a prosecution could be conducted.

6   Q   And what caused you to conclude that?

7   A   I'm not sure I understand your question.

8   Q   Okay. I think you said that you found the

9   document and you said that this was a script

10   document that the police used to put together the

11   case and to get the witnesses' evidence; is that

12   right?

13 A   Yes.

14 Q   And did you know at that time who prepared the

15   document, when they prepared it and what the

16   purpose was?

17 A   No. We may have known when it was prepared -- the

18   date on it, but I don't think we knew who prepared

19   it.

20 Q   Would it be fair to say that based on your reading

21   of it or Mr. Wolch's reading of it, reading of the

22   document itself without any other information, you

23   concluded that it was a document that may have or

24   was used by the police to influence or coerce or

25   manipulate witnesses' testimony?

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1   *A*   Yes.

2   **Q**   And did you ever find out any more than -- let me

3   rephrase that. I think it was used at the Supreme

4   Court, if I'm not mistaken, for that purpose, and

5   certainly in the media there's some report that

6   says this is a document, and I think the word

7   "smoking gun" was used from time to time, look,

8   this is a significant document that shows or

9   proves what we've been saying all along, that the

10   police coerced these witnesses, words to that

11   effect. Is that a fair summary?

12   *A*   Yes.

13   **Q**   155018, this is Fred Shane's report back and he's

14   got two articles on post-traumatic stress disorder

15   and some literature. Scroll down:

16   "Also - N.B! - did she have flashbacks

17   before Milgaard situation. Often

18   individuals with traumatic backgrounds

19   such as hers may have psychological

20   sequalae --"

21   I'm not sure if I'm saying that right,

22   "-- in the form of flashbacks. Also -

23   N.B. to ask Dr. Fleming when did

24   Nichole's flashbacks begin?"

25   And then a bill, go to the next page, for $3,200

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1   for services rendered. I wasn't able to find any

2   other report of Dr. Shane. Do you know if there

3   was any other written report provided?

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

5   sent us material to read and then to use.

6   Q   Do you remember his conclusions of what he said

7   about Nichol John?

8   A   No.

9   Q   155546, and this is February 18, 1992 from Dr.

10   Merry back to you and just says David Milgaard

11   always was and always will be a blood group A

12   antigen secretor all the time and then goes on to

13   talk about the testing procedure. Is it fair to

14   say at this point that you would have accepted

15   that David Milgaard was a type A secretor?

16   A   Yes.

17   Q   228041, there's a couple of documents here, this

18   is around February 18, 1982, "Police created

19   game-plan for Milgaard: lawyers." And this is

20   during the reference, but I think it's comments

21   made by you outside the hearing room.

22   "Milgaard's other lawyer, David Asper,

23   said the document appears to be an

24   attempt to "connect the dots" between

25   the murder and theory. Key witnesses

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1   changed their stories to along the lines

2   of the theory after they were brought

3   back to Saskatoon, requestioned and

4   driven around the murder scene, he said.

5   "I think it's more than

6   coincidence that Wilson and John bought

7   into the theory. Up until the little

8   trip to Saskatoon they were adamant that

9   nothing had happened, and then over a

10   two-day period, magically, their stories

11   mirror the document," Asper told

12   reporters."

13   And so again that would be an accurate statement

14   of what your view was at the time about where

15   this document fit into what the police were

16   doing?

17 A   Yes.

18 Q   And again 004258, and just again a similar

19   comment, this is Mr. Roberts, that:

20   "I think the police theory is set out in

21   this document and that [key witnesses]

22   bought into the theory."

23   The police had two points, the death and they had

24   their own theory:

25   "They had to connect the dots,"

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1   Mr. Asper said, adding that someone put

2   the theory to paper and the police were

3   then instructed to round up the required

4   witnesses."

5   And again, was that your view at the time, that

6   last part, that someone put this on paper and

7   instructed the police to round up the required

8   witnesses?

9   A Yes.

10   Q And what was that based on?

11   A Somebody putting the theory on a piece of paper

12   and going and getting Wilson and John and getting

13   them to mimic what was on the piece of paper.

14   Q And the source of that, or the basis, was it based

15   on your reading of the document and your belief

16   that that's what happened or must have happened or

17   was there some other piece of information in

18   addition to the document that led you to the

19   conclusion that --

20   A I believe the document itself has a list of

21   suggestions, one of which is that they be

22   re-questioned.

23   Q Right. No, and I'm sorry, I guess apart from the

24   document, when you made this comment that someone

25   put the theory to paper and the police were then

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1   instructed to round up the required witnesses,

2   were you relying solely on --

3   A I think I was just saying what I think must have

4   happened.

5   Q Okay. Based on what you read in the document?

6   A And common sense and what actually happened.

7   Q Okay. So what you knew about the case, common

8   sense, reading the document, but was there any

9   other piece of information where you heard police

10   officer X say this is what we did?

11 A No.

12 Q Okay. 169905, this is a memo February 24, 1992

13   from Bob Harris. Do you remember Bob Harris

14   calling you?

15 A No.

16 Q Bob Harris was the fifth motel room visitor and he

17   gave evidence before this Commission of Inquiry in

18   a manner similar to what's in your memorandum

19   here, and I don't propose to go through it other

20   than asking about your recollection, but you don't

21   recall him?

22 A No I don't.

23 Q 157427. This is a March 2, 1992 letter from you

24   to Mr. Frater and you are saying that:

25   "... I can advise that we will be

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1   seeking to call Kim Rossmo, who is a

2   Vancouver City Police Officer ...",

3   and you give particulars, and:

4   Also ... ask ... arrange for the

5   presence of (V4)---- (V4)--- and (V10)

6   (V10)- (V10)--. I believe that Mr.

7   Williams of your office, or Sgt. Pearson

8   ... will know where to reach ..."

9   them. And I'm wondering, I don't think

10   Kim Rossmo testified at the Supreme Court and I'm

11   wondering what happened between this letter and

12   why he didn't testify?

13 *A*   I don't know.

14 **Q**   And I think Dr. Rossmo, or Kim Rossmo, prepared a

15   video re-enactment; is that right?

16 *A*   I can't recall.

17 **Q**   117085, I'm sorry, the doc. ID is 117084. And

18   this is a letter of Mr. Wolch to Mr. Frater, again

19   about witnesses, and:

20   "Detective Sergeant Mackie and

21   Lieutenant Short - are these witnesses

22   to be called and if so; When? I

23   appreciate that Officer Short apparently

24   is not healthy and may have to be

25   excused. I do not know what the

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1   circumstances are regarding Mackie. I

2   think he played a fairly significant

3   role in the case. I am particularly

4   interested in pursuing the identity of

5   the author of the summary that was

6   prepared prior to the arrival of

7   Inspector Roberts. I do not know if

8   Mackie or Short can shed any light on

9   this subject but I think all efforts

10   should be made to find the author if at

11   all possible."

12   Again, does this assist your memory at all about

13   Short and Mackie being witnesses?

14   A   No.

15   Q   The five-page document, I think you said that it

16   was used by the police and they were instructed to

17   go out and get witnesses to fit their evidence to

18   the script; would it be fair to say that that

19   would be the suggestion, that that would fit in,

20   be similar to what you were already saying about

21   Wilson, John, and Cadrain, that the police

22   wrongfully influenced their testimony, would the

23   script document be another component of that?

24   A   I think the script document is just, is just the

25   evidence of what we were saying.

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1   Q   Right. So that it's part of the same miscarriage

2   of justice that you'd been talking about, it was a

3   piece of evidence that you were relying upon to

4   say "there's police misconduct, they wrongfully

5   influenced witnesses, and that's a miscarriage of

6   justice"?

7   A   That's correct.

8   Q   Next page. And, again, there is a reference here

9   about doctor -- or Kim Rossmo, again from

10   Mr. Wolch, and about the preparation of a video.

11   And, again, do you have any recollection about

12   anything further than what's in the document?

13   A   No. I don't recall this.

14   Q   Now there is also an affidavit of Joyce Milgaard

15   that Mr. Wolch says, he expects to have it filed,

16   and he says:

17   "As indicated ... Joyce is prepared to

18   testify if required and the same would

19   apply to Paul Henderson;"

20   Are you able to shed any light as to why Joyce

21   Milgaard and Paul Henderson did not testify or

22   were not called as witnesses?

23   A   I can't recall.

24   Q   010127. This is an affidavit of Joyce Milgaard

25   that was filed with the Supreme Court, it was

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1   sworn on February 29th, 1992. If we can go to

2   page 010130, in her affidavit she swears that:

3   "I am advised by Mr. Wolch that this

4   Court is interested in determining what

5   disclosure was made available to Justice

6   Tallis at the time and given that the

7   files apparently are either lost or

8   destroyed I have reviewed the material

9   ...",

10   etcetera, and it goes on to talk about some

11   attachments. Does this accord with your

12   understanding, Mr. Asper, about this issue being

13   before the Court, namely that the Supreme Court

14   was interested in determining what disclosure was

15   made available to Justice Tallis at the time?

16 *A*   I, Mr. Hodson, I accept that that was an issue. I

17   do not recall it.

18 **Q**   Okay. If we can go to 301002.

19 *A*   I may have post-traumatic stress disorder from the

20   Supreme Court hearing, that may be it.

21 **Q**   301002 is a March 11th, 1992 report of Sergeant

22   Pearson to Mr. Eugene Williams, and the evidence

23   we heard from Mr. Caldwell and Sergeant Pearson is

24   that I think around late February/early March 1992

25   that Sergeant Pearson was asked to go and

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1   interview Mr. Caldwell, I believe with a view to

2   having him testify at the reference hearing. And,

3   in particular, Mr. Caldwell went to review his

4   prosecution file to identify or to find out

5   whether the five-page script or theory or whatever

6   document -- I can't recall what name we've decided

7   to call it but I think you've referred to it as

8   the script document -- and whether that was on his

9   file at the time or in 1991?

10   COMMISSIONER MacCALLUM: Just on that

11   subject, Mr. Hodson, I don't know whether it's

12   been generally conceded that Detective Mackie was

13   the author of that document or not, if that's the

14   belief then we -- it could be referred to as the

15   "Mackie summary".

16   MR. HODSON: Yeah. And in fairness I

17   think, I know it's been called a number of

18   different things, Mr. Mackie did testify, I

19   believe, that he did prepare it.

20   COMMISSIONER MacCALLUM: That he did?

21   MR. HODSON: That he did, yes, that he

22   prepared it or he believed he did.

23   COMMISSIONER MacCALLUM: Well, excuse me,

24   it just seems that -- I remember an issue arising

25   at one time about referring to it as a "smoking

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1   gun", which I objected to on the basis that it

2   was a loaded term, no pun intended. But now it's

3   being called a script, which is probably also

4   loaded although not in the same way, and I have

5   some concern about that being repeated --

6   MR. HODSON: Yeah, sure. And in fairness

7   to Mr. Asper I think I called it --

8   COMMISSIONER MacCALLUM: -- to the extent

9   that it becomes a concession or is viewed as a

10   concession. So if we could -- let's call it the

11   "Mackie summary" for now, --

12   MR. HODSON: Sure.

13   COMMISSIONER MacCALLUM: -- and, if it

14   develops that it is not his composition, then

15   we'll have to say so.

16   MR. HODSON: Okay.

17   BY MR. HODSON:

18   Q   And I apologize, I think, Mr. Asper. I put it to

19   you initially as being the script document, but I

20   think we're on the same page that it's the Mackie

21   summary, if we can call it that.

22   In any event, I wanted to ask

23   you about your recollection about these matters

24   involving Mr. Caldwell as a witness, and I think

25   Mr. Caldwell said that he was -- in fact I think

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1   he even went to Ottawa and thought he'd be called

2   and ended up not being called; do you recall those

3   circumstances?

4   A   No, I don't.

5   COMMISSIONER MacCALLUM: That was Caldwell

6   not being called?

7   MR. HODSON: Yes.

8   COMMISSIONER MacCALLUM: Okay.

9   BY MR. HODSON:

10   Q   And would that be something that Mr. Wolch would

11   have dealt with?

12   A   Yes.

13   Q   Go to 301105, which is I think part of this

14   document. And this is a handwritten note that is

15   attached to Mr. Caldwell's statement at the time,

16   and we've heard evidence from Mr. Caldwell about

17   this, that at the, I think it was the preliminary

18   hearing, he's got Mrs. Miller, Mary Marcoux and

19   Albert Cadrain -- I think it was actually Peggy

20   Miller who also testified to this effect --

21   hearing Nichol John in the witness room say:

22   "I don't know why he didn't kill me too

23   - I was right there + saw it all, but

24   I'm not going to say nothing".

25   And I think this was a note that was discovered,

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1   I'm not sure, but it may have been discovered

2   around February-March of '92 when Mr. Caldwell

3   was reviewing his file. Do you have any

4   recollection of becoming aware of this note that

5   Mr. Caldwell found on his file?

6   A   No.

7   Q   If we can go to 159537. This is a letter dated

8   March 21, 1992 from a fellow by the name of

9   Michael Breckenridge, and just go to the next

10   page, we'll see his name and signature, go back to

11   the first page, it's addressed to Mr. Wolch. And

12   March 21 would be, I think, right around -- I'm

13   not sure if there were still witnesses left, but

14   it would be around towards the end of the

15   reference case. You're familiar with who Michael

16   Breckenridge is, Mr. Asper?

17   A   Yes.

18   Q   And can you tell us, what is your recollection of

19   when he contacted Mr. Wolch or you and what you

20   people did with that information, or what you did

21   or Mr. Wolch did, or what you know was done with

22   it?

23   A   I don't recall.

24   Q   What do you remember about Mr. Breckenridge and

25   what he had to say?

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1   *A*   Umm, well he, umm, I think he was the one who

2   first alleged the coverup in the Attorney

3   General's office, that it involved Roy Romanow,

4   and that's about all I can recall.

5   Q   Okay. And I'll maybe go through some of the

6   documents and see if this might assist you. He --

7   this is the first letter, March 21, and let me

8   pause.

9   I think at this time, back in

10   August of 1991, at least Mr. McCloskey and Paul

11   Henderson had publicly stated that David Milgaard

12   had been framed and that there was a coverup by

13   Justice officials in the handling of the -- in

14   concealing the Fisher matter from police,

15   Milgaards, public, etcetera; correct, that was

16   the --

17 *A*   Correct.

18 Q   And in fact it was Mr. Kujawa who handled both the

19   appeal of the David Milgaard matter and the Larry

20   Fisher matters; correct?

21 *A*   Right.

22 Q   That was known around that time as well?

23 *A*   Right, we knew that.

24 Q   And so the allegation was, correct me if I'm

25   wrong, that in particular Mr. Kujawa would have to

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1   be part of the coverup because you were saying he

2   had both files and covered up the Fisher file and

3   kept it from Mr. Tallis and from the Milgaards;

4   correct, that would be the basis?

5   A   Right. Right.

6   Q   So here's a letter March 21 saying he's been:

7   "... watching with interest the David

8   Milgaard case since I worked in the

9   Attorney Generals Dept. in Sask. at the

10   time of those cases (Fisher and

11   Milgaard)."

12   He talks about:

13   "My job was to process the criminal

14   files."

15   He talks about Kujawa and Romanow, then scroll

16   down, he says:

17   "I remember delivering both cases to

18   Serge at the same time. The general

19   feeling in the Dept. at the time was

20   that these were to high profile cases

21   that the N.D.P. could appear to get

22   great political mileage from ...",

23   etcetera. And then the next page.

24   "Today, I would suggest that there is a

25   cover up by the present administration

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1   to hide the sins of the Blakeney

2   regime."

3   And would you have become aware of this letter

4   when Mr. Wolch received it around -- or when he

5   received it? Do you know when he received it,

6   would it have been around March 21?

7   A   You know, I, the only thing I can recall about

8   this whole thing, frankly, was not believing that

9   Mr. Romanow would be involved in anything such as

10   was being alleged.

11 Q   And why do you say that?

12 A   Umm, because I knew Mr. Romanow, had a huge amount

13   of respect for him, and I believe he was involved

14   with the Victoria Conference constitutional

15   preparations at the time. And I don't think

16   Mr. Breckenridge says it in this letter, but when

17   the time frame became obvious, I -- my

18   recollection is that Mr. Romanow was trying to

19   recreate the constitution with the Prime Minister.

20 Q   And so did that cause you to doubt

21   Mr. Breckenridge's story?

22 A   It made me wonder whether Mr. Romanow could be

23   involved, I just --

24 Q   Okay.

25 A   And that's my -- and as I say, it may not be off

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1   this communication, but that's my only general

2   recollection of this whole incident.

3   Q   And so the fact that Mr. Breckenridge says

4   Mr. Romanow was involved in this coverup, and you

5   say "well I know he wasn't there at the time, he

6   was fixing the constitution", --

7   A   That was my thinking.

8   Q   -- right, your thinking --

9   A   Yes.

10   Q   -- that therefore he couldn't have been involved,

11   that caused you to say "well, okay, he wasn't

12   involved", but did it cause you to say "well maybe

13   Mr. Breckenridge isn't right with anything he

14   says"?

15   A   No, frankly it -- I, as I recall this, it made us

16   wonder whether Mr. Kujawa might have been aware of

17   the Fisher information at the time he was

18   prosecuting Milgaard's appeal, and whether there

19   may have been a disclosure issue.

20   Q   And so if -- can we assume that this letter, or do

21   you know whether this letter would have been

22   received around the time it's dated, March 21,

23   '92?

24   A   You know, this is, the letter is a reminder, but I

25   can't speak to the details of when it was received

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1   or when I saw it.

2   Q   And I guess the question is that here is a letter

3   from someone who says he worked there at the time

4   that brought both files, the Fisher and Milgaard

5   files, to Mr. Kujawa at the time, and says there

6   was a coverup, which is consistent with what

7   Mr. McCloskey and Mr. Henderson had stated

8   publicly in August of '91; correct?

9   A   That's correct.

10   Q   And I'm wondering why you wouldn't have put this

11   information before the Supreme Court, for example,

12   or taken steps to say "okay, here", because if

13   what Mr. Breckenridge is saying is true that would

14   be a miscarriage of justice; would you agree?

15   A   Yes.

16   Q   And so I'm wondering what happened and why this

17   wasn't put forward to the Supreme Court when it

18   was received; are you able to tell us?

19   A   I don't know. I don't know. It's possible it's

20   something that we looked at and decided wasn't

21   worth pursuing at that point.

22   Q   Okay. We'll come back to Mr. Breckenridge in a

23   moment.

24   I now want to turn to 218223.

25   And this is a copy of the final submission or the

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1   argument put in on behalf of David Milgaard before

2   the Supreme Court, and is it fair to say that you

3   would have been involved in some way in either the

4   preparation of this or the input into what was put

5   forward to the Court?

6 A   Yes.

7 Q   And if we can go to 218228, and this is page 4,

8   and when I say "you" I'm referring to you and

9   Mr. Wolch, if you're okay with that, or counsel.

10   It says:

11   "It is submitted that the Milgaard case,

12   like that involving Donald Marshall, is

13   an example of a situation where lack of

14   disclosure has been an important

15   contributing factor in causing a

16   miscarriage of justice."

17   And that would be an accurate statement; is that

18   correct?

19 A   Yes.

20 Q   And:

21   "Counsel for Milgaard submits that the

22   following relevant information was

23   withheld:",

24   I'm not going to go through this all because it

25   goes on for about five pages, but a couple of

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1   them here. One talks about the Crown theory of

2   where it took place, and listed in the

3   argument -- if we can go to the next page -- are

4   a number of names of witnesses, and I believe

5   it's a summary of a bunch of information that you

6   gleaned from police reports, is that fair, --

7 A   It --

8 Q   -- or witness statements?

9 A   -- looks like it, yes.

10 Q   And, again, the next page is again a number of --

11   information, and go to the next page, it goes

12   right up to x). So, again, one of the grounds of

13   miscarriage of justice put forward to the Supreme

14   Court was that there was a lack of proper

15   disclosure by the Crown and here are all of the

16   pieces of information that should have been

17   disclosed that weren't that constituted a

18   miscarriage of justice; is that a fair summary?

19 A   Yes.

20 Q   And here we talk about the (V4)--- information,

21   and again, I think you told me yesterday you don't

22   recall much of the (V4)--- details?

23 A   I don't.

24 Q   And if we can scroll down to number 4, raised is

25   the fact of (V9) (V9)----, another nurse who was

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1   attacked, and again this was an individual who

2   made a complaint. I don't think this was ever

3   connected to Larry Fisher but it was on the police

4   files, so again, that would be one matter; is that

5   correct?

6   A   Yes.

7   Q   And then number 5 is the rape of (V1)--- (V1)-,

8   which is the, one of the Larry Fisher rapes, and

9   then the next page the (V2)----- rape, which was

10   the second Larry Fisher rape, and those two would

11   be put forward as grounds to say "lookit, this is

12   information that the Crown didn't disclose"?

13 A   Yes.

14 Q   And then number 7 is the bone-handled hunting

15   knife and how it was held, or dealt with, again

16   there was an allegation that that was part of the

17   lack of disclosure; is that correct?

18 A   Yes.

19 Q   And I think if we can just go to the bottom, you

20   say:

21   "It is submitted that the lack of

22   disclosure allowed the Crown to advance

23   a theory that could not be effectively

24   challenged."

25   And then it goes on to give the details as to

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1   that. If you can go to 218234, you then conclude

2   by saying:

3   "It is therefore submitted that lack of

4   disclosure caused a miscarriage of

5   justice."

6   *A*   Yes.

7   Q   And:

8   "The Crown was allowed to advance a

9   theory that the Defence could not

10   effectively rebut."

11   *A*   Yes.

12   Q   And do you recall there being any restriction or

13   limitation imposed by the Court as far as the

14   evidence that you could put forward, either by

15   documents or witnesses, on the issue of disclosure

16   by the Crown?

17   *A*   Don't recall that, no.

18   Q   If we can go to 218235. Under The Present State

19   of the Evidence, The Original Witnesses, you say:

20   "It is the position of David Milgaard

21   that highly coercive and improper police

22   tactics led to the witnesses, Wilson,

23   John and Cadrain, eventually giving

24   statements that incriminated Milgaard."

25   And again, we touched on this before, but that

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1   would be the position you argued to the Court,

2   that the police had acted -- police misconduct in

3   that they had coerced and used improper tactics

4   to cause the evidence to give -- or the witnesses

5   to give false evidence?

6   A   Yes.

7   Q   And, again, was there any restriction imposed by

8   the Court as far as the documents or witnesses or

9   scope of examination to advance that argument?

10   A   I -- I don't recall. I don't think so but I don't

11   recall.

12   Q   And then to page 218237, talking about Nichol

13   John:

14   "She provided an incriminating statement

15   after coercive police questioning."

16   And was there any restriction by the Court as far

17   as the documents, evidence, or witnesses you

18   could put forward to establish that Nichol John

19   had been coerced by the police?

20   A   Not that I recall.

21   Q   And the next page, please. And again, I think

22   this summarizes what you are saying about what,

23   what you were saying was a miscarriage of justice

24   with respect to how the police treated Nichol

25   John. You call it, here:

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1   "... the investigative summary ... which

2   'predicts' what she would say ...",

3   "The pressure imposed upon her by being

4   in custody and subjected to the highly

5   objectionable techniques of Inspector

6   Roberts",

7   and then a:

8   "... conversation with Wilson ..."

9   So, again, that would summarize the miscarriage

10   of justice you are putting forward at least with

11   respect to Nichol John?

12 A Yes.

13 Q 218240, actually go to 218242, and this is the

14   summary. It goes through the evidence of Hall and

15   Frank, etcetera, but it concludes:

16   "It is therefore submitted that when the

17   motel room evidence is submitted in its

18   entirety, the most that can be said is

19   that David Milgaard, under the influence

20   of drugs, made a statement in a manner

21   and in circumstances consistent with

22   sarcasm and poor taste."

23   And I'm wondering at this point, Mr. Asper,

24   whether -- and I hesitate to use the word "your

25   position" or "the position on behalf of David

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1   Milgaard" -- was the position on behalf of David

2   Milgaard with respect to the motel incident at

3   the conclusion of the Supreme Court reference

4   that something happened but it was said as a

5   joke, or was it still that nothing happened, or

6   are you able to --

7   A   I don't -- I don't recall. It looks to be that

8   something happened in poor taste.

9   Q   Okay. But do you have any recollection that --

10   A   I don't, but I don't have any recollection.

11   Q   If we can go to 157482. This is a letter from you

12   to, or actually from Mr. Wolch to Mr. Frater, and

13   again I think it says after March 26th, '92, so

14   this would be towards the tail end, and it's

15   enclosing documents. And what, what's being

16   enclosed are the documents that relate to Larry

17   Fisher's, the correspondence and the documents

18   relating to Larry Fisher's arrangements to plead

19   guilty in Saskatchewan back in 1970-'71 in

20   correspondence with, here we see with Kenneth

21   McKay, Lawrence Greenberg, etcetera. And we've

22   been through all these documents; do you know why

23   these documents were being put in at this time?

24   A   I don't.

25   Q   Do you know if it was to support the contention

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1   that there was some coverup or miscarriage of

2   justice arising from how Larry Fisher was dealt

3   with in Saskatchewan?

4   A   I don't know.

5   Q   008879. This is the Supreme Court decision of

6   August -- or pardon me -- April 14, 1992, and I

7   would say that the judgement obviously speaks for

8   itself, but would it be fair to say that following

9   this judgement, Mr. Asper, there was some ongoing

10   commentary/debate with the Government of

11   Saskatchewan officials and possibly even Federal

12   Justice about just what this decision meant for

13   David Milgaard?

14   A   Yes.

15   Q   And I think some disagreement as to what it said,

16   what it didn't say, what it should have meant, or

17   etcetera; is that fair?

18   A   I, yes, I -- yes, there was debate, yeah. I can't

19   recall the details of it.

20   Q   And I think you expressed at a later occasion,

21   although the effect of the decision was that your

22   client, Mr. Milgaard, was released from prison,

23   would it be fair to say that it did not resolve

24   all of his outstanding concerns?

25   A   That's correct.

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1   Q   And can you elaborate on that? I mean I can take,

2   I'll take you through parts of the judgement, but

3   is there anything that specifically --

4   A   My recollection was that the Minister took the

5   judgement, referred the case back for a new trial

6   in Saskatchewan, the Saskatchewan Department of

7   Justice stayed proceedings, and the stay left the

8   state of David's innocence in limbo, and that was

9   coupled with comments made, as I recall, by

10   various officials that supported the original

11   conviction.

12 Q   And --

13 A   And so my recollection of the time was that this

14   had not cleared David.

15 Q   And in fairness I think, after this decision, you

16   publicly, and with government officials as well as

17   Mr. Wolch, debated what this meant as far as

18   whether there had been misconduct, whether this

19   cleared David Milgaard, whether this meant they

20   should re-open the investigation, and is it fair

21   to say that the judgement left some issues open --

22 A   Very much so, yes.

23 Q   -- that would have been relevant to Mr. Milgaard's

24   quest, number 1, to clear his name, but 2, to --

25   that affected the re-opening of the investigation

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1   into the death of Gail Miller?

2   A   Yes, I think that's correct.

3   Q   And I want to go through parts of this decision

4   with you. And I don't want to ask you to

5   interpret it, Mr. Asper, I appreciate that it's a

6   decision of the Supreme Court, but there are parts

7   in here where I would like to get your comment

8   about what it meant to your position and what

9   steps you took after that. And so if we could

10   just go through, go to page 008 -- just go to the

11   next page and we'll quickly go through. The next

12   page sets out the order-in-council materials which

13   we have seen. If we can go to the next page, it

14   then sets out the test, and I went through the

15   test with you as to whether you could prove

16   innocence on a -- beyond a reasonable doubt or

17   balance of probabilities, and what would happen.

18   And then if we can go to the next page, no, next

19   page. And the Court stated:

20   "It is appropriate to begin by stating

21   that in our view David Milgaard had the

22   benefit of a fair trial in January of

23   1970. We have not been presented with

24   any probative evidence that the police

25   acted improperly in the investigation of

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1   the robbery, sexual assault and murder

2   of Gail Miller or in their interviews

3   with any of the witnesses. Nor has

4   evidence been presented that there was

5   inadequate disclosure in accordance with

6   the practice prevailing at the time.

7   Milgaard was represented by able and

8   experienced counsel. No error in law or

9   procedure has been established. At the

10   conclusion of the first trial, there was

11   ample evidence upon which the jury,

12   which had been properly instructed,

13   could return a verdict of guilty."

14   And if we can just go back to the previous page,

15   this commentary in this decision I believe was

16   used by certainly the Government of Saskatchewan,

17   and indeed Saskatoon City Police, to say that

18   "essentially we have been vindicated"; is that a

19   fair summary?

20   A   Yes.

21   Q   And I am wondering if you could -- and was that

22   disputed by you, and if so, on what basis?

23   A   Well I don't recall the specific, the specifics of

24   what happened after the decision in terms of what

25   we said, but it -- it's a little incongruous that

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1   the Court could find a miscarriage of justice and

2   the Minister of Justice order a new trial and the

3   Supreme Court have said that there was a fair

4   trial in the first case, in the first instance.

5   Q   I think, and I stand to be corrected, I think what

6   the Court actually said is, not that there had

7   been a miscarriage of justice, but if he didn't

8   have an opportunity to present information before

9   a jury, it would be a miscarriage of justice, I

10   think that's what it says?

11 *A*   I understand that, but to the extent that the

12   evidence, or the material existed at his trial, at

13   the time of his trial in 1970, how could the trial

14   have been fair would be our view.

15 Q   And so again is it fair to say, Mr. Asper, and

16   certainly subsequent correspondence details it,

17   that you and Mr. Wolch and the Milgaards, although

18   the decision resulted in Mr. Milgaard getting out

19   of jail, is it fair to say you took issue with the

20   reasoning and the conclusions?

21 *A*   Yes.

22 Q   And this would be one, and again I'm reluctant to

23   get into debating or interpreting the decision,

24   but I just want to understand from you, it's fair

25   to say that the decision did not resolve issues

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1   and may have created as many issues as it

2   resolved; is that fair?

3   *A*   Yes.

4   **Q**   And again the comment here:

5   "We have not been presented with any

6   probative evidence that the police acted

7   improperly ..."

8   Or in their interviews with any of the witnesses,

9   and I believe at the Supreme Court reference

10   Inspector Roberts testified, Detective Karst

11   testified and Wilson, John and Cadrain testified

12   about those interviews, and again, I believe that

13   the authorities, or some authorities after this

14   decision said your allegations that those three

15   witnesses were interviewed improperly, or their

16   evidence was coerced, has been decided by the

17   Supreme Court against you; is that correct?

18   *A*   Yes.

19   **Q**   And did you take issue with that?

20   *A*   Yes.

21   **Q**   And on what basis?

22   *A*   My recollection is that to the extent that, I

23   believe the witnesses John and Wilson had shaped

24   or conformed their story to the Mackie summary.

25   In my view that was evidence of improper conduct.

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1   **Q**   No, I'm sorry, maybe I didn't --

2   *A*   And I disagree with the judgment.

3   **Q**   Okay, no, and I guess that's fine, and I think, if

4   I can take a step back, this Commission of Inquiry

5   is looking into the conduct of the investigation,

6   the conduct of the trial and the re-opening and

7   information that was available, and I think from a

8   number of the documents and a number, from some of

9   the witnesses, this decision dealt with all three

10   of the prongs of our Terms of Reference, and do I

11   take it, Mr. Asper, that you did not and do not

12   accept the Supreme Court of Canada's finding as

13   it's stated here, that the police did not act

14   improperly in their interviews with any of the

15   witnesses?

16   *A*   That's correct, I do not accept that finding.

17   **Q**   And is it because you just don't agree with it?

18   *A*   I don't agree with it. I don't think the evidence

19   supports that finding.

20   **Q**   So just so that I'm clear, what you are saying is

21   the evidence was there, they reached the wrong

22   conclusion?

23   *A*   Yes.

24   **Q**   And similarly they talk about inadequate

25   disclosure in accordance with the practice

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1   prevailing at the time and I think they concluded

2   that there was not, that there was proper

3   disclosure at the time. Based on the principles

4   at the time, is it fair to say that you disagree

5   with the conclusion because you think it's wrong?

6   A   Yes.

7   Q   And go to the next page, the paragraph here where

8   the Court says:

9   "In our view, this evidence, together

10   with other evidence we have heard,

11   constitutes credible evidence that could

12   reasonably be expected to have affected

13   the verdict of the jury considering the

14   guilt or innocence of David Milgaard."

15   And what the Court is referring to there is the

16   Ron Wilson recantation and the Larry Fisher

17   information, and they say:

18   "Our conclusion in this respect is not

19   to be taken as a finding of guilt

20   against Fisher, nor indeed that the

21   evidence would justify charging him with

22   the murder of Gail Miller."

23   And again, this was relied upon by I think the

24   authorities subsequently with respect to whether

25   the investigation into the death of Gail Miller

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1   should have been re-opened and Mr. Fisher had

2   been followed up; is that fair, and --

3 *A*   Yes.

4 *Q*   And do you take issue or do you disagree with this

5   conclusion of the Court?

6 *A*   Which one?

7 *Q*   The latter part, and maybe that's not a fair

8   question because they are saying their conclusion

9   should not be taken -- they are not prepared to

10   find the guilt of --

11 *A*   Sorry, I think that's reasonable in as much as --

12 *Q*   I'm not sure that's a fair question, Mr. Asper.

13   COMMISSIONER MacCALLUM: The paragraph

14   which preceded, the top one, referred to Ron

15   Wilson's evidence at the Supreme Court?

16   MR. HODSON: Yeah. If we can just actually

17   scroll up a paragraph, I'm sorry, I should have

18   read that:

19   "However, fresh evidence has been

20   presented to us. Ronald Wilson, a key

21   witness at the trial, has recanted part

22   of his testimony. Additional evidence

23   has been presented with respect to the

24   alleged motel room confession. More

25   importantly, there was evidence led as

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1   to sexual assaults committed by Larry

2   Fisher which came to light in October

3   1970, when Fisher made a confession."

4   So actually, I'm sorry, it's actually all three.

5   COMMISSIONER MacCALLUM: No, I'm asking you

6   whether in our view this evidence, they are

7   referring to the "More importantly, there was

8   evidence led as to the sexual assaults," or are

9   they referring as well to Ron Wilson. It's hard

10 to believe that they are referring to Ron

11 Wilson's evidence before the Supreme Court in as

12 much as they asked that he be charged with

13 perjury.

14   MR. HODSON: I think, and maybe I can

15 assist here. I think what the Court is saying,

16 and again we maybe all have our own

17 interpretations of this, that's why I was

18 reluctant to get into this, but that there's

19 three grounds, one is the fresh evidence, being

20 Ron Wilson has recanted part of his testimony,

21 number 1; additional evidence has been presented

22 with respect to the alleged motel room

23 confession, and that would be Hall, Frank and

24 Harris; and more importantly, there was evidence

25 led as to sexual assaults committed by Larry

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1   Fisher which came to light in October, 1970, and

2   then I think the Court says this evidence, being

3   that paragraph, together with other evidence we

4   have heard, constitutes credible evidence that

5   could reasonably be expected to have affected the

6   verdict of the jury.

7   COMMISSIONER MacCALLUM: Well, I don't know

8   if I'm ever going to have to decide this, but you

9   can see my concern. I really don't know how they

10   can describe the first two items as credible

11   evidence without making findings of credibility

12   and I think elsewhere they said they weren't.

13   MR. HODSON: Yeah. I think,

14   Mr. Commissioner, they had -- again, I think the

15   decision itself, what they later on say is we're

16   not prepared to make findings because this may go

17   back before a Court and I think there was some

18   reluctance to put -- I think that was their

19   explanation, some reluctance to put in detailed

20   findings because they didn't want to affect any

21   subsequent proceedings.

22   COMMISSIONER MacCALLUM: Which, on the

23   other hand, the evidence of the sexual assaults

24   committed by Larry Fisher is a more objective

25   matter to deal with.

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1   A   Well, and I was going to say that the confusing

2   part to me, if you go back to the first part of

3   the decision, was that if you take the name of the

4   perpetrator out of the sexual assaults, that

5   information was available at the time of the trial

6   and the name of the perpetrator, or some of the

7   information, because he committed a crime after

8   the Gail Miller murder, and the name of the

9   perpetrator was certainly available at the appeal

10   hearing, and so if the Supreme Court said, and I

11   said take the name out, if the perpetrator could

12   have affected the verdict and the information was

13   available at the time of the trial, how could the

14   trial have been fair is my problem.

15   BY MR. HODSON:

16   Q   Yeah, and I think that's what I was getting to,

17   Mr. Asper, that -- and I think that's the position

18   you took after, and when I say you, I mean you and

19   Mr. Wolch and the Milgaards, that if there was a

20   fair trial and the Fisher information is what

21   gives Mr. Milgaard a right to have a new trial

22   because it would affect the verdict, how could it

23   have been a fair trial, and I think that's,

24   without getting into the debate, that was the

25   issue that I think you and the Attorney General of

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1   Saskatchewan and perhaps even Federal Justice

2   locked horns on a bit later; is that fair?

3 A   Yes.

4 Q   And then just down at the bottom, you will recall

5   the test that I have set out, they say:

6   "As to the first, we are not satisfied

7   beyond a reasonable doubt that David

8   Milgaard is innocent of the murder of

9   Gail Miller."

10   Secondly:

11   "As to the second, we are not satisfied,

12   on the basis of the judicial record, the

13   Reference Case and the further evidence

14   heard on this Reference, on a

15   preponderance of all the evidence, that

16   David Milgaard is innocent of that

17   murder."

18   And I think on that point, Mr. Asper, I believe

19   after this decision, authorities took the

20   position that Mr. Milgaard had not been believed

21   by the Court or he had failed in establishing his

22   innocence on a preponderance of evidence; is that

23   correct?

24 A   Yes.

25 Q   And again, is this a conclusion that you took

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1   issue with?

2   *A*   Yes, but I don't recall the specifics on that one.

3   **Q**   And then scroll down, and, Mr. Commissioner,

4   here's the comment I had referred to earlier, they

5   say they are going to quash the decision, they

6   say:

7   "In light of this decision, it would be

8   inappropriate to discuss the evidence in

9   detail or to comment upon the

10   credibility of the witnesses."

11   And so I think that is where they said here's our

12   result, but because we're quashing it and there

13   might be another trial of somebody, it would be

14   inappropriate to comment on the evidence that

15   might be presented, and I believe, Mr. Asper,

16   that was an issue that caused some concern to you

17   and others after; is that fair?

18   *A*   Well, again, as the Commissioner noted, it was

19   pretty obvious to everyone who the Court believed

20   and who it didn't believe and the previous

21   paragraph that we highlighted respecting Fisher I

22   think made it pretty clear, notwithstanding that

23   there was a disclaimer, you know, that the Court

24   said, well, we're not convicting him here, but --

25   **Q**   And here they say:

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1   "Without being exhaustive it will

2   suffice to observe that there is some

3   evidence which if accepted by a jury

4   could implicate Milgaard in the murder

5   of Gail Miller."

6   And again, that was something that was relied

7   upon by the authorities subsequent with respect

8   to your interaction with them regarding the

9   re-opening and dealing with the conduct of the

10   investigation and trial; is that fair?

11 A   Yes. I think my comment was to ask somebody to

12   identify that evidence for me.

13 Q   And again to page 889, this might assist,

14   Mr. Commissioner, just on this point, they say:

15   "While there is some evidence which

16   implicates Milgaard in the murder of

17   Gail Miller, the fresh evidence

18   presented to us, particularly as to the

19   locations and the pattern of the sexual

20   assaults committed by Fisher, could well

21   affect a jury's assessment of the guilt

22   or innocence of Milgaard. The continued

23   conviction of Milgaard would amount to a

24   miscarriage of justice if an opportunity

25   was not provided for a jury to consider

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1   the fresh evidence."

2   And then they go ahead to recommend that, and

3   then as well to the next page, they go on to say

4   set aside the conviction and order a new trial,

5   but that it would be open to the Attorney General

6   of Saskatchewan to enter a stay, and if the stay

7   is not entered, a new trial proceeds and a

8   verdict of guilty is returned as against Mr.

9   Milgaard, then we would recommend that the

10   Minister of Justice consider granting a

11   conditional pardon to David Milgaard with respect

12   to any sentence imposed, and I think the latter

13   part of that judgment as well was relied upon by

14   the Attorney General for Saskatchewan in their

15   decision that they took shortly after the

16   decision; is that correct?

17 A   Yes.

18 Q   And in fact I think what happened is, if we can go

19   to 020392, and this is the Government of

20   Saskatchewan position saying:

21   "Given the decision of the Supreme Court

22   of Canada earlier this week, we have

23   decided it is not in the best interest

24   of the people of Saskatchewan or of the

25   justice system to proceed further with

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1   this case.

2   The Supreme Court's ruling said

3   that, while it did not find David

4   Milgaard innocent of the rape and murder

5   of Gail Miller, it feels further

6   evidence which might or might not impact

7   a jury decision has been brought to

8   light and should be examined."

9   And then they go on to talk about entering a

10   stay. And then the next page you'll see they

11   quote fairly extensively from the decision about

12   what was said. And I take it, Mr. Asper,

13   following this there were, and I think if I can

14   summarize here, was the position of David

15   Milgaard going back to the government in effect

16   lookit, I want to either -- I want to be

17   acquitted, I want a trial, I want to be found not

18   guilty?

19   *A*   Yes.

20   Q   And why was that?

21   *A*   Because a stay allowed the people who believed in

22   David's guilt to keep pointing to the stay and to

23   the Supreme Court decision and perpetuate this

24   idea that David had committed the murder and that

25   the trial and everything had been just perfect at

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1   his original proceedings.

2   Q   And so following the decision I think from the

3   documents, it looks like, on behalf of David

4   Milgaard two things happened, or two concerns were

5   raised. Number one, Mr. Milgaard said I want to

6   be found not guilty or found innocent, or to

7   remove the limbo, the legal limbo I'm in about

8   whether I've committed the crime or not, and

9   secondly, I'm not satisfied that my allegations of

10   misconduct and wrongdoing had been addressed; is

11   that fair?

12   A   Yes.

13   Q   And so both of those continued notwithstanding

14   what the Supreme Court of Canada said?

15   A   Yes.

16   Q   And the Government of Saskatchewan, I think their

17   position, and we'll hear some witnesses on this,

18   were that they disagreed with your views on both,

19   number one, saying we're entering a stay and it

20   means what it means, and secondly, on the

21   misconduct, that the Supreme Court had dealt with

22   those issues; is that fair?

23   A   And that there's no need for an inquiry or any

24   further questions to be asked.

25   COMMISSIONER MacCALLUM: Excuse me, Mr.

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1   Hodson. Mr. Asper, let's just be clear that the

2   result of a new trial would never be the finding

3   of innocence or a declaration of innocence.

4   A   It would be an acquittal.

5   COMMISSIONER MacCALLUM: It would be a

6   finding of guilty or not guilty.

7   A   Right.

8   COMMISSIONER MacCALLUM: All right. And

9   even the latter doesn't imply innocence.

10   A   In law it does. Better than a stay, it's better

11   than a stay.

12   COMMISSIONER MacCALLUM: All right, it's

13   better than a stay, but we have been bedeviled

14   throughout this Inquiry by the confusion in the

15   press and elsewhere about the distinction to be

16   made in criminal law between a verdict of not

17   guilty or a finding of innocence, or a

18   declaration of innocence. Innocence doesn't play

19   a part in our criminal trial process, it's not a

20   finding.

21   BY MR. HODSON:

22   Q   I think, Mr. Asper, I recall some commentary that

23   you made in the media, that, and in fact you maybe

24   even said this at the start of your evidence, that

25   you were simply looking for an acquittal for David

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1   Milgaard?

2   A   Oh, look, given what we've gone through, I was

3   prepared to take what we got.

4   Q   Meaning?

5   A   Once we got David out of prison, we had the luxury

6   of seeking more, but up until that point, the

7   pressure I felt was to find some way to have the

8   conviction set aside and get him out of prison.

9   Q   Right. And then what followed with the stay in

10   place is that he had not been found not guilty and

11   that I think later on there was a comment by the

12   Justice Minister of the day, Mr. Mitchell,

13   suggesting that he was guilty. Do you recall

14   that?

15   A   Yes.

16   Q   I think it was maybe a year or two later.

17   A   Yeah.

18   Q   And so that was the issue that Mr. Milgaard wanted

19   some closure on that issue; is that fair?

20   A   Yes.

21   Q   And then as far as the wrongdoing and the Inquiry,

22   we saw in some of the later documents that the

23   Milgaards were requesting some further review.

24   Now, you made the comment, and I think just a

25   minute or so ago, that you thought you had enough,

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1   or that getting him out of jail was enough. Could

2   you elaborate on that?

3   A   Look, I mean, I knew when we started the height of

4   the mountain that we had to climb and the fact

5   that we were able to get as close to the top of

6   the mountain as we did without, you know, a grand

7   sweeping declaration of innocence, but to have the

8   conviction set aside and have David freed from

9   prison on April 12th I believe, or 16th, 1992,

10   that was a good day, I was happy that day. The

11   day after and the week after in the calmness and

12   coolness of time with David a free person, I guess

13   we had the luxury to think about the larger

14   meaning and larger objectives.

15   Q   And what were they?

16   A   Innocence, actual factual innocence, how to

17   establish it, how to go about it, how to find out

18   what happened, what really happened, what gave

19   rise to the wrongful conviction, but you'll see by

20   this point I was personally completely out of gas

21   and I left the practice shortly after this.

22   Q   And that would have been in June of --

23   A   Late June, yes.

24   Q   Now if we could call up 328294, and I'm not going

25   to take you through all the media, there was a

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1   fair bit of media following the Supreme Court

2   decision and David Milgaard's release from prison?

3   A   Yes.

4   Q   And would it be fair to say that you would have

5   talked extensively to various media over the

6   course of the next couple of weeks?

7   A   Yes.

8   Q   Now, this is a transcript of a discussion

9   involving you and Mr. Kujawa. Do you recall that

10   shortly after Mr. Milgaard's release, and I think

11   actually there's two transcripts, one was maybe

12   television, one was radio, where you and Mr.

13   Kujawa I think had a disagreement over what the

14   Supreme Court of Canada decision meant. Do you

15   recall that?

16   A   Yes.

17   Q   And we've gone through, we've actually watched the

18   tape and we've heard Mr. Kujawa's evidence. What

19   is your recollection, what was the significance of

20   that, was there something in what Mr. Kujawa said

21   that caused you concern?

22   A   I have a recollection, and I'm not sure if it's, I

23   think it must be this transcript, where Mr. Kujawa

24   admitted that prior to the prosecution of the

25   Milgaard appeal, he had an opportunity to review

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1   both the Fisher and the Milgaard files and said

2   that he did not connect the two.

3   Q And we went through those interviews and Mr.

4   Kujawa, I think his evidence was that he did not

5   connect, that he literally did not have the two

6   files and consciously look at the Milgaard case

7   and the Fisher case and say okay, they are not

8   connected, he said he simply didn't connect them,

9   and I take it that your perception or

10   understanding of what he said in the debate with

11   you was otherwise, you felt that what he was

12   saying is that I had the two and I made a decision

13   not to disclose Fisher to the Milgaards?

14 A I'm not sure if he said that he made the decision

15   not to disclose it, I can't recall that part. My

16   recollection is he said he just didn't connect the

17   two.

18 Q Right, okay, and that's -- yeah, that was his

19   evidence.

20 A Now, by implication he didn't disclose them,

21   but --

22 Q Right. And so that your understanding, based on

23   that exchange, is that he had never connected the

24   two files or the two -- never connected Fisher as

25   being involved in the Gail Miller murder?

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1   *A*   Right.

2   **Q**   If we can go to 026936 -- sorry, 935. This is a

3   very lengthy letter from Mr. Wolch to The

4   Honourable Bob Mitchell, and I don't propose to go

5   through it, it's a very lengthy statement of I

6   guess his interpretation of the decision and what

7   it meant and criticism of the government's action.

8   At this time were you still -- was Mr. Wolch sort

9   of carrying the lead on this front in the dealings

10   with the Government of Saskatchewan or were you

11   involved as well?

12   *A*   I don't recall. My general recollection is that I

13   started to recede and Mr. Wolch was carrying this.

14   **Q**   If we can go to 219270, this is an article in *The*

15   *Globe and Mail* May 2nd, 1992, so this would be a

16   couple of weeks after the Supreme Court decision,

17   and it says:

18   "For Milgaard supporters it is not a

19   question of whether there was a cover-up

20   in the Fisher investigation, but how

21   far-reaching it was: The frightening

22   question about this is, how many people

23   were involved in it? Mr. Milgaard's

24   lawyer, David Asper, asked that they

25   find it implausible that the Crown could

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1   simultaneously handle the Fisher and

2   Milgaard cases without at least

3   considering the similarities. Who was

4   calling the shots and why?

5   "I can't understand why the

6   Saskatoon police wouldn't want the glory

7   of Larry Fisher's arrest," says Mr.

8   Milgaard's senior counsel, Hersh Wolch."

9   And it goes on to give his, he says:

10   "My own theory was the authorities

11   believed Milgaard was guilty. But if

12   Fisher appeared in public in Court in

13   Saskatoon it might stir up people into

14   asking questions."

15   And at this time, Mr. Asper, were you of the view

16   that there had been a cover-up?

17   A   It appears so, yes.

18   Q   And based on what you've already told us, was

19   there anything in addition to what you've already

20   told us that you were --

21   A   No.

22   Q   And what was the cover-up?

23   A   The arrest, taking of guilty pleas and

24   incarceration of Larry Fisher without disclosing

25   those facts to the Milgaard, to Milgaard's counsel

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1   or to his, or to Milgaard himself.

2   **Q**   And who do you believe was covering up, which

3   individuals or which offices were involved?

4   *A*   Well, I'm guessing as to what was in my mind here,

5   but it would have involved potentially

6   co-operation between police and Crown.

7   **Q**   So Mr. Kujawa, Mr. Caldwell and police officers?

8   *A*   Yes.

9   MR. HODSON: This might be an appropriate

10   spot to break, Mr. Commissioner. I can advise

11   the parties, I've got one or two small areas left

12   to go, hopefully no more than half an hour

13   tomorrow morning.

14   As far as speaking to the order

15   of counsel, I understand Mr. Frayer has asked

16   whether we can speak to that in the morning, is

17   that right, because Ms. Knox is not here and Mr.

18   Kennedy doesn't have instructions. I am simply

19   relaying the information, so I understand that

20   there is not agreement on the order of counsel.

21   COMMISSIONER MacCALLUM: All right. Here's

22   something to think about overnight, counsel. If

23   I'm forced to decide, you know, if you can't

24   agree on who should, on the order of examination,

25   I'll bear in mind these factors; one, that the

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1   Milgaard counsels, both Mrs. Milgaard and David

2   Milgaard's counsel have had access to the rather

3   extensive tapes which have only recently been

4   produced to the other parties. I will, in

5   general terms, allow parties whose interest is,

6   require parties whose interest is not really

7   adversely engaged by this witness' testimony to

8   go first. I don't think there's any argument

9   that the witness' counsel, in our practice so

10   far, has been allowed to go last, so that would

11   be Mr. Sorochan, and I will be guided as well by

12   the stance taken by this witness at the start of

13   the testimony; namely, that it was warfare

14   against the authorities that he name certain bad

15   guys and that there were no rules for the

16   engagement, the gloves were off, so the subject

17   of those allegations of course should in my view

18   have the tactical advantage, if indeed there is

19   one, of going towards the end of the list of

20   cross-examiners. I don't have to have argument

21   on this now, they want it to be addressed in the

22   morning.

23   MR. WILSON: I was just going to advise the

24   Commissioner that there is at least partial

25   agreement and enough to keep things going

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1   tomorrow.

2   COMMISSIONER MacCALLUM: Okay.

3   MR. HODSON: Thank you.

4   COMMISSIONER MacCALLUM: But Mr. Frayer

5   wants to address it in the morning you said.

6   *(Adjourned at 4:28 p.m.)*

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5   contain a true and correct transcription of our shorthand

6   notes taken herein to the best of my knowledge, skill, and

7   ability.

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