VOLUME III

C A N A D A

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

ALLAN JOSEPH LEGERE

VOIR DIRE PROCEEDINGS held before Mr. Justice David Dickson at the Burton Courthouse, Burton, New Brunswick on the 25th and 26th days of April, A.D., 1991.

APPEARANCES:

Graham Sleeth, Esq.,)
Anthony Allman, Esq.,) for the Crown.
John Walsh, Esq.,)

Weldon Furlotte, Esq.,)
Michael Ryan, Esq., for the Defence.

Nancy Patterson,
Court Reporter.

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COURT RECONVENED ON APRIL 25, 1991 at 9:30 a.m.)

THE COURT: This is a continuation of the trial, of course, and all persons are present who should be. Just before we resume the voir dire session, we will sit in open court here for a minute, which means that if there are media representatives present they can report what goes on. I do this essentially for the reason that I thought perhaps I should confirm the dates so that they can be recorded. The media labour under the restriction that they can't report what goes on a the voir dire session.

We are sitting this week, of course, and will sit all week on one aspect of the voir dire and then we will recess until Wednesday, May 1st, and we will sit again here for the balance of that week. Wednesday, Thursday, Friday and as much of the following week as is necessary to hear further evidence on the voir dire. Then we will recess during the weeks of May 13th and May 20th and we will resume again on Monday, May 27th,to hear further evidence on the voir dire and probably to deal with other matters pertaining to the voir dire. The voir dire as we see it now would be completed on May 31st. The other thing I might state for publication, if necessary, is the fact that the trial date with the jury present is set for Monday, August 26th and tentative arrangements have been made to sit in the theatre of the Oromocto High School which will provide facilities for the number of people we will require to attend for the jury panel. There is no courtroom in the province large enough to accommodate the numbers that we may have to call.

When I refer to the numbers that we have to call I sort of envisage -- I don't know -- perhaps 250 people or something like that being required to attend. I don't see any difficulty about selecting a jury apart from the fact that the trial then is probably going to take 8 or 10 weeks I would imagine and there are a lot of people, of course, who would be called on a jury panel who can't devote that much time to attending at a trial, and we will want to eliminate those people who couldn't spend that amount of time on it. So those are the tentative arrangements.

You know, this trial was started in Newcastle as I alluded to earlier, on December 5th last and an application was made for a change of venue and it was -- I decided at that time or felt that it was expedient to the ends of justice, I believe is the provision of the Criminal Code, that it would be better to try the action elsewhere than in Newcastle. I have seen suggestions in media reports that the court felt that an unbiased jury couldn't be selected in jury. I never entertained any such notion at all about it. There is no reason why an unbiased jury couldn't be selected there, but there were problems there because as I pointed out on December 5th some of the alleged victims concerned with the trial had fairly large circles of friends and so on and it would have been difficult to find the people to serve on a jury there who didn't have some connection or some knowledge. That was the reason why it was changed elsewhere.

Somebody told me on Monday of this week a bill was introduced in the Legislature -- I haven't seen it. I attend at my office every morning at seven o'clock to find out what mail is there and there is still no copy of the bills of the Legislature in my basket at the office. Mind you, it takes more than three or four days for the government mail to get from the Centennial Building to the Justice Building on Queen Street. It is three blocks away. So that will probably catch up with me next week, but I understand the proposal is that to save money the government now suggests that the jurors should all be chosen from the county in which a trial is held. When I moved the trial to this judicial district which comprises the counties of York, Sunbury and Queens, I felt that that would provide a broad-based area for the provision of an appropriate panel for the jury, and now, of course, if this -- I haven't seen this bill before the Legislature. If it does that, of course, it confines the selection to Sunbury County. Perhaps this is fair enough. I don't know. I suppose there is no real reason why a jury couldn't be selected from Sunbury County alone.

Twenty-six years ago I think I tried -- one of the first jury trials I presided over was on this very spot. Not in this courthouse because the original courthouse which had stood here for many years was burned shortly after that, but the old courthouse used to be here. It was a murder trial that involved a fourteen year old youth. There is one

rather amusing story -- perhaps I am talking here so that the media representatives will have something to say about this trial since they can't report the evidence -- the courtroom in the old courthouse used to face this way. The judge's bench was down at that end and you looked up-river sort of. The court crier was an old fellow 94 years old who lived in Oromocto. I remember that because at the opening of the trial I said it must be the first time in history that the age of the court crier is exactly twice the age of the presiding judge plus seven years. I think he was 93 so you can figure out my age at the time. I was a boy judge. The witness sat here. The jury were over there. The jury were having difficulty hearing and seeing the witness who sat here in a chair in front of the bench. The court crier sat there where Mr. Pugh, our clerk, is sitting in front of the bench. And the Clerk of the Court was Colonel Walter Lawson, a lawyer from Minto who had been my commanding officer during the second war in England at the first of the war fifty years ago. He was a hard-bitten old character and could deal with just about any situation. The jury members complained the first day of the trial that they couldn't hear the witness or somebody suggested they couldn't hear the witness so I told Lawson, the court clerk, to move the constable over to the witness chair and to move the witness in the other chair where the jury could hear him. I said 'Implement that this afternoon or during the recess'. I went back in in the afternoon and the

constable was still seated in this chair and the witness had to go to the witness chair. During the recess I asked Lawson, I said, 'What happened, Colonel Lawson?' He said, 'I can't get him to move. I spoke to him but I can't get him to move.' Was the only time I ever saw Lawson in my life nonplussed and unable to deal with the situation. I said, 'Why won't he move?' He said, 'Well, you can't see it from where you are sitting up there because you are too high and you can't see over the front of the bench.' He said, 'But he is chewing tobacco and the only hot air register in the room that he can spit into is beside that chair that he is sitting in.' The old guy was spitting his tobacco in the -- So, Mr. Duplain, you have a story to report.

Well, we will resolve into -- I had another couple of stories too I was going to tell but I will save those for a little later. We will resolve now into the voir dire. You have a witness, Mr. Sleeth or Mr. Walsh?

MR. WALSH: Yes, My Lord. At this point, at this juncture, we would be calling Cst. Laurent Houle. I spoke with defence counsel last evening and again this morning. We have an agreement with respect to some evidence. My Lord, Cst. Houle's testimony would be to the effect -- and I understand defence consents to this for the voir dire -- would be to the effect that on November 26th 1989 he received from then Constable -- excuse me-- from Cpl. Mole two packages marked identification numbers 83 and 84. He took those items into his possession and he turned them over

to Mr. Duff Evers on November 27th 1989 and on December 21st 1989 he received those packages back empty by registered mail.

THE COURT: What date was that?

MR. WALSH: December 21st 1989. Those would be related to the items that have been marked on this hearing on the voir dire, number 16, number 17.

THE COURT: That was the sum and substance of what his evidence would have been.

MR. WALSH: One additional fact, My Lord. On the 25th of March of this year he received from Dr. John Bowan of the R.C.M.P. Ottawa forensic laboratory two items marked 83A and 84A. They are circular containers. I would ask at this time that the items 83A and 84A be marked on this particular hearing.

THE COURT: Those would be VD-19 and VD-20.

MR. WALSH: I have an additional witness now to call.

THE COURT: You are not calling Cst. Houle.

MR. WALSH: No. Defence have agreed to that particular testimony.

MR. RYAN: Yes, My Lord.

THE COURT: Defence are agreeing with that. So Cst. Houle is released. Now, you have another witness.

MR. WALSH: Yes. I would recall Mr. Duff Evers to the stand please.

DUFF EVERS, having been previously sworn on the voir dire. testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

MR. WALSH: Mr. Evers is still under oath, My Lord.

THE COURT: Yes.

Q. Mr. Evers, I am going to ask you if you would please

relate to the court what, if any, further involvement you had in relation to any of the issues we are dealing with on this voir dire.

A. After I had received exhibit number 56 and 69 from Cst. Turgeon --

Q. That would have been in 1986.

A. That's correct. -- I re-examined these exhibits in 1989 from court exhibit 56 or -- sorry -- my exhibit 56, court exhibit VD-2. I removed three human scalp hair from the slides. I put these roots from the scalp hairs in a pill box. I marked the pill box 56A and I gave this pill box containing the roots with root hair sheaths to Cst. Britt on the 25th October 1989.

Q. 56A being marked on this hearing VD-14. I will ask you to look at VD-14 and tell me whether or not you are familiar with it?

A. I identify court exhibit VD-14 by my initials, date and case number. This is the pill box which I put three hair root sheaths in. This is also the pill box I gave to Cst. Britt on the 25th of October 1989.

Q. That would be what kind of hair?

A. This was scalp hair. Also on the same date I re-examined a pill box which I identified as my exhibit 69. I believe court exhibit VD-3. From this pill box I removed three human pubic hairs. I put these pubic hairs in an additional pill box which I identified as exhibit 69A. I gave these to Cst. Britt on the 25th of October 1989.

Q. You had mentioned 69 you believe to be VD-3. Look at this item please and tell me whether that would be the correct exhibit number?

A. This is my exhibit 69. It is court exhibit VD-4. That is the one I removed the three pubic hairs from. I gave them to Cst. Britt on the 25th of October 1989.

Q. You put that into a pill box you have indicated marked 69A.

A. That's correct.

Q. I am showing you an item marked VD-15 on this particular hearing. Would you look at that for me please and tell me whether you can identify that?

A. I identify court exhibit VD-15 by my initials, date and case number. This is the pill box that I put the three pubic hairs in and gave to Cst. Britt on October 25th 1989.

Q. The slides from which you removed the hair and put in the pill box GT56A, are those the slides that were previously introduced into evidence?

A. That is correct.

Q. -- and marked VD-5. I show you VD-5. Could you tell me whether or not you confirm that fact?

A. These are the slides I removed the three scalp hairs from and gave to Cst. Britt. Also with respect to court exhibit VD-5, on June 12, 1990 I re-examined the slides. I removed five human scalp hairs from the slides. I put these in an additional pill box. I gave the pill box exhibit number 56B. I then gave this to Cst. Ron Charlebois on the 12th of June 1990.

Q. I am going to produce -- perhaps I could have it marked for identification.

THE COURT: This is 56B, Exhibit VD-21.

Q. I show you what has been marked VD-21. Would you look at that for me please and tell me whether or not you can identify that?

A. I identify court exhibit VD-21 on my initials, date and case number as well as the exhibit number 56B. This is the pill box which I put five hair root sheaths in. I removed these from the slides. I put them in the pill box and gave them to Cst. Charlebois on the 12th of June 1990.

Q. With respect to those last three items, when was the next time you saw them?

A. Today.

Q. Did you have occasion to have any other involvement in this particular matter relating to the issues we are dealing with today?

A. Yes. On the 27th of November 1989 I received a number of exhibits from Cst. Laurent Houle at the forensic laboratory. Two of these exhibits constituted hair standards, a scalp hair standard and a pubic hair standard, identified as 83 and 84.

Q. I am showing you what has been marked on this hearing, Mr. Evers, as VD-16. Would you look at that for me please and tell me whether or not you can identify that?

A. I identify court exhibit VD-16 by my initials, date and case number. This is the plastic bag that contained a number of human pubic hairs. I received this from Cst. Houle on the 27th of November 1989. The bag contained 28 human pubic hairs. 25 of the pubic hairs I used as a pubic hair sample. The three remaining pubic hairs I put in a pill box which I identified as 83A and retained these for DNA analysis.

Q. What kind of hairs were these that you put in that particular pill box?

A. The pill box contained three pubic hairs. The pubic

hairs were in a pulled condition and contained a root sheath.

Q. What, if anything, did you do with the bag?

A. The bag was returned to Cst. Houle on the 20th of December 1989 registered mail number 324.

Q. I show you the item marked on the hearing as VD-17.

A. I identify court exhibit VD-17 by my initials, date and case number. The exhibit number is 84. I received this from Cst. Houle on the 27th November 1989. The plastic bag contained 75 human scalp hairs. I used 70 of the hairs as a scalp hair sample. The remaining five hairs I put in a pill box. I marked the pill box 84A. I gave the pill box to Dr. Bowan at the forensic laboratory in Ottawa on the 10th of January 1990. The plastic bag, court exhibit VD-17, was returned by registered mail on the 20th of December 1989 registered mail number 324 'Attention Cst. Houle'.

Q. The hairs you put in the pill box 84A, what kind of hairs were they?

A. They were human scalp hairs in a pulled condition and contained a root sheath.

Q. I am going to show you an item marked VD-20 on this hearing. Look at that for me please and tell me whether or not you can identify that.

A. I identify court exhibit VD-20 by my initials, date and case number and exhibit number 83A. This is the pill box which I put three human pubic hairs in from court exhibit 83. I gave this to Dr. Bowan at the forensic laboratory in Ottawa on the 10th of January 1990.

Q. From the time you put the hairs into that pill box until

the time you delivered it to Dr. Bowan in Ottawa whose possession did that particular pill box remain?

A. It remained in my possession in my locked exhibit locker.

Q. I show you item marked on this hearing number 19.

A. I identify court exhibit VD-19 by my initials, date and case number and the exhibit number 84A. This is the pill box which I put five human scalp hair roots in. I removed these from my exhibit 84. I then gave the pill box and contents to Dr. Bowan on the 10th of January 1990. It was retained in my possession until that date.

Q. When did you next see the items that you have identified as 83A and 84A, when did you -- after you delivered it to Dr. Bowan when did you next see these particular items?

A. This morning.

Q. Mr. Evers, could you explain to the court please how you reseal a bag after you have taken things out of it, a sealed bag? When you receive it sealed how would you reseal the bag or how would you remove the items and return the bag?

A. Are you referring to the hair standards?

Q. Yes.

A. Usually I cut or slit the bag with a scalpel or razor blade. Simply seal it with a piece of scotch tape and if I attach a laboratory tag to the bag I usually put it over the piece of tape sealing the bag.

Q. Did you have anything other involvement in this particular matter, Mr. Evers, in relation to the issues we are dealing with here?

A. No, I did not.

MR. WALSH: No further questions, My Lord. Thank you.

CROSS EXAMINATION BY MR. FURLOTTE:

Q. Mr. Evers, when you received the hairs and you say you put them on slides, would you explain for the court what you mean by putting hair samples on slides?

A. Yes. When we receive a scalp hair sample or a pubic hair sample, I am very concerned about contamination and loss of evidence. What I do is I examine the hair standard in a room separate from other exhibits that I might receive. The hairs are put on a slide using permount which is a mounting media. The permount is the same refractive index as the glass allowing me to examine the internal features of the hair. Once the hair is dropped on the permount which is on the slide I then put a glass cover slip over the slide. The slide is then retained in my slide locker until the slide cures in which case it is then put in a box and retained.

Q. So you only examine the hairs after they are put on a slide.

A. Yes. I shouldn't -- I do examine the hairs prior to being put on a slide for the gross features. That is, that I would examine the hair for hair follicle or hair root sheath as I did in 83 and 84. I examined the hairs with a stereo microscope, determined that there was a root sheath and put those hairs in a separate pill box.

Q. How long would this process take?

A. Fifteen, twenty minutes.

Q. Are the hairs treated with anything before you do this?

A. No.

Q. How long would you have the hairs in storage before you would conduct your first tests on the hair?

A. Usually once I have all the unknown hairs, depending on the length of the case, no longer than a week.

Q. Where would you store them? Where would you store the hairs?

A. The hairs are stored on the slides. The slides are --

Q. But that is before they are put on the slides.

A. Yes. They are then put in a slide container which has a lock on it.

Q. Once you receive the hairs you say you could have them for a week before you do your preliminary tests and before they are put on slides.

A. Those are retained in my locked exhibit locker.

Q. When you created exhibits 56A and 69A you would remove the hairs from the slides.

A. Yes, I did.

Q. How is this process done?

A. What I did was I examined the slides to determine whether there were any hairs with a root sheath present. After I determined that there were hairs with root sheaths I then took the slide to a stereo microscope, I broke the slide cover, cut off approximately one or two centimeters of hair. This hair was then transferred to a clean pill box and the pill box was sealed and initialled.

Q. How do you break the shield?

A. I did that with a scalpel.

Q. How many hairs are put on a slide?

A. Depending on the length of the hair and what the hair is going to be used for. With a hair standard I can put as many as ten or twelve hairs on a slide.

Q. I am curious as to when you had the exhibits in your possession why you retained those exhibits in your possession and send empty bags back to the person you received them from?

A. The policy of the forensic laboratories is to retain the hairs on slides for five years. At that time they are destroyed along with the main file. The section has a prerogative of retaining these slides for understudy purposes or testing. The slides are not immediately returned because they are wet or uncured in which case the cover slips would slide off, the hairs would be lost and most of the exhibits would be a mess as this is very sticky.

Q. Did you testify in the Glendenning trial?

A. Yes.

Q. In your testimony I assume hair samples were introduced into evidence.

A. The receptacles that contained the hairs were admitted into evidence.

Q. At the Glendenning trial did you testify that you were handling empty envelopes or that you were handling the hair samples?

A. I don't know whether it came up or not.

Q. Are you saying at the trial in the Glendenning incident you could have given evidence that you were dealing with hair samples but in fact all you were dealing with was an empty bag?

A. I would not mislead the court to assume that the hairs were still in there. If I were asked I would state that the hairs had been taken from the bags and that they were retained.

Q. Were you called in the Glendenning trial to compare the standard hair sample that you had from Mr. Legere to evidence found?

A. Yes.

Q. When you gave such evidence, and I understand all you can testify to is that the hairs are similar, not that they come from the same person.

A. That is right. It is not positive identification.

Q. It is not positive identification. And you can't even testify in court that it probably came from the same person; is that right?

A. I would not state probably, no. What I do state if I am doing a hair comparison is that the hairs are consistent in all respects, that I have performed and conducted tests where I have determined or identified an unknown hair as being consistent with a donor to the exclusion of 199 other individuals.

Q. When you say to the exclusion of 199 other individuals, that is because you conduct tests yourself.

A. That is correct.

Q. And in the test that you conducted you basically had a hair sample and you what, go out and collect at random 200 other samples and see if you can find something similar?

A. The tests were performed a number of times and by a number of individuals within my section. What we did was we took 200 known hair samples and one unknown hair was taken from one of the samples and the donor of that individual was identified.

Q. Was identified.

A. Yes.

Q. And it wasn't similar with any of the other donors.

A. That's correct.

Q. When you find such a similarity all you can testify to is that you would not be able to exclude an individual because of the hair samples.

A. Yes, we can give a positive elimination from the hair sample. If the hair is unique, if it does not fall within the range of the known hair sample, I can state in my opinion it did not come from the same source as the sample, but I cannot give a positive identification.

Q. So most effectively it can exclude suspects.

A. Yes.

Q. That is the greatest effect that the hair analysis does; is that right?

A. It is a good substantial corroborative evidence.

Q. Now, you mentioned that yourself and other members of your lab conducted tests and received some kind of probability factors and you used 200 samples. But in the field of forensics and the broader -- taking all the labs into consideration, is there any other areas of probability? Like, maybe the standard or one in 900?

A. There has been published literature which states probabilities when it comes to human scalp hair and human pubic hair comparisons. I find those probabilities to be optimistic.

Q. You find them to be what?

A. Optimistic. I don't refer to them myself.

Q. What are the figures on that literature?

A. The figures state that if a human scalp hair is consistent with a known hair sample the chances of it coming from someone else is one in 4,500.

Q. One in 4,500.

THE COURT: May I ask this? Is the crown here relying on hair comparison?

MR. WALSH: No, My Lord.

THE COURT: No. What significance is this, Mr. Furlotte? This witness has given no evidence about hair comparison.

MR. FURLOTTE: No, he hasn't.

THE COURT: Well, what is the significance of the questions that you are asking? None.

MR. FURLOTTE: Personal one maybe.

THE COURT: Pardon?

MR. FURLOTTE: Might be a personal one.

THE COURT: Are you interested in hair?

Q. I would assume, Mr. Evers, with the hair samples you still have of Mr. Legere at your lab you still have many hairs with hair roots?

A. There are some I believe, yes. None in regard to 56 and 69.

Q. They have all been used up.

A. They have either been used or are in court.

MR. FURLOTTE: No further questions.

THE COURT: Re-examination?

MR. WALSH: No, My Lord. Thank you.

THE COURT: You were -- you have been at Sackville 21 years?

A. Yes.

THE COURT: Three years at Ottawa before that?

A. Three years in Vancouver and a short time in Ottawa prior.

THE COURT: When did you first come down here?

A. August 1970.

THE COURT: Did you testify before that here? I think I was the first person ever to declare you an expert witness.

A. Probably in the Maritimes, yes.

THE COURT: Be over 20 years ago.

A. Yes.

THE COURT: Because I remember you told about the -- you will remember too that I referred to the famous triple play that the Chicago White Sox baseball players used to use. Tinker to Evers to Chance. Right?

A. That is correct.

THE COURT: Thank you very much.

A. May I be excused?

THE COURT: Yes.

MR. WALSH: My Lord, if I may impose on the court at this moment, at this point in time we have Dr. Fourney present. I would ask that with the court's indulgence that I be able to call him at this point in time. His evidence would be in line and would be relevant.

THE COURT: All right.

MR. WALSH: With your permissino, My Lord.

THE COURT: Sure.

MR. WALSH: I would call Dr. Fourney.

THE COURT: You are not confined, you know, to the order in which you list these.

MR. WALSH: No, but I have given you the list and I --

DR. RON FOURNEY, called as a witness, having been duly sworn on the voir dire, testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

Q. Give the court your name please.

A. Ronald Mitchell Fourney.

Q. And your occupation?

A. I am a molecular genetic specialist with the Royal Canadian Mounted Police. I am currently section head of the Research and Development part of the DNA program for the R.C.M.P.

Q. For Canada?

A. Yes.

Q. I am going to show you at this time, Dr. Fourney, this document. Would you look at it please and just tell me what it is?

A. This document that I hold before me is my curriculum vitae.

MR. WALSH: At this time, My Lord, I would ask that the Doctor's curriculum vitae be marked on this voir dire.

THE COURT: Exhibit VD-22.

Q. With the court's permission I would like to in some aspects lead the Doctor through this document.

THE COURT: Okay.

Q. Dr. Fourney, would you tell the court please briefly what degrees you have? Your educational background?

A. My initial degree is a Bachelor of Science degree in biology. I have a Master's degree in biology. I hold a Ph.D. in biochemistry and I have a number of years after that as a Post-doctoral Research Fellow.

Q. In what field?

A. In the field of molecular genetics and biochemistry.

Q. I see. In relation to DNA what, if any, experience have you gained or involvement have you had with respect to the field -- the area of actual conduct of DNA?

A. Well, the labs that I have always been associated with have been involved in some manner with DNA. As a person

trained in biochemistry it is one aspect of our studies and my doctoral degree was concerned with one aspect of nucleic acid, RNA, and my Ph.D. -- after my Ph.D. my post-doctoral experience was exclusively with DNA where I was involved with not only molecular evolution studies but also involved with diagnostics and the investigation of cancer with respect to molecular relationships in DNA.

Q. I see. And when did you first become involved with respect to DNA typing as it pertains to forensics or DNA typing in general?

A. I joined the R.C.M.P. program in November of 1988 in the capacity as a person specializing in molecular DNA typing and it was -- at that time I was one of two people tasked to develop and set the implementation procedures in motion for the DNA program for the R.C.M.P.

Q. What would your duties entail -- what were those actual duties? What would they include?

A. Well, initially there were only a few of us. There was Dr. Waye and myself and we split up our roles and part of my role was to investigate the type of DNA probes we would use in our program and to implement a validation quality assurance program as well as develop new procedures that would be particularly relevant for forensic application of this new technology. I specialized a lot in adapting some of the previous experience I had in cancer diagnostics and tumor material with my role in forensics and working with the nature of samples that we had available to us.

MR. FURLOTTE: My Lord, may I interfere just one minute

here? Does the crown intend to go through all of this again next week because if they don't I am not prepared for cross examination?

THE COURT: Well, you are calling -

MR. WALSH: I am calling Dr. Fourney. I am going to ask that Dr. Fourney be declared an expert in the field of biochemisty, DNA technology and testing procedures and the purpose of Dr. Fourney's evidence today is to comment -- he is going to be asked questions of whether or not he had been asked to give opinions during the summer of 1989 during the R.C.M.P. investigation into the homocides on the Miramichi. He will be asked questions as to whether or not he gave opinions during that particular time frame on any substances that the R.C.M.P. were offering for DNA testing. He will be asked opinions with respect to any of the substances that were collected following Mr. Legere's arrest as to what is or was or is not suitable for DNA typing. It is all directly related to the issues that I have attempted to develop over the last few days.

MR. FURLOTTE: I don't see where that --

THE COURT: You are doing this essentially for the purpose of showing that Cpl. Mole or whoever it was had been advised that there was a likely comparison.

MR. WALSH: Yes. What we were attempting to develop through Dr. Fourney in this particular matter -- we are not going to be seeking any evidence from Dr. Fourney as to what is DNA typing or what is involved,etc. What Dr. Fourney's testimony is simply going to be involving today is what is or is not a suitable substance for DNA typing; what, if any, opinions he

offered during this investigation relating to substances that were gathered or actually used. It has the purpose of actually explaining to the court why certain substances weren't used, why other substances had to be gathered. It also will provide background for the court as to why these substances or certain substances are important in relation to the claimed rights of police officers to do certain things incidental to arrest on the sole issue that we have before the court today.

MR. FURLOTTE: I would just -- there is a lot of -- I don't see the relevance of whether or not -- I will not object to this evidence coming in on this voir dire so long as I hold the right that I will be able to challenge his expertise next week or in the voir dire proper on DNA evidence.

THE COURT: Well, why don't you wait until we hear what this witness has to say on --

MR. FURLOTTE: Yes. I don't want the fact that if you are going to declare him an expert witness on this voir dire, that he is automatically going to be declared an expert witness next week.

THE COURT: Oh, well, I am not going --

MR. FURLOTTE: I am not prepared to cross examine him on his expertise.

THE COURT: I don't know. I have never made a practice really of declaring witnesses experts on voir dires. Sometimes if they are giving expert testimony you have to regard them as experts, but there won't be any binding declaration that he is an expert -- you are not seeking that, Mr. Walsh?

MR. WALSH: Well, I was going to ask that he be declared

an expert in the field of biochemisty, DNA technology and testing procedures for the issues on this hearing, and that would reserve the right to Mr. Furlotte to argue on the DNA phase of the voir dire. For the issues here I am asking that he be declared an expert in the field of biochemistry, DNA technology and testing procedures.

MR. FURLOTTE: I just don't see what relevance that has whether or not to/the collection of bodily substances is admissible in court.

MR. WALSH: Well, it is related, My Lord, to the question of what is or is not a suitable substance for DNA technology. That is the sole issue.

MR. FURLOTTE: I would have no problem so long as --

MR. WALSH: I am not asking the court --

MR. FURLOTTE: -- as the evidence is limited to that.

MR. WALSH: That is exactly what it is limited to.

MR. FURLOTTE: If he wants to say he is an expert and he knows what substance qualifies to do DNA analysis and he advised the R.C.M.P. of that, I have no problem with that.

THE COURT: Yes. The field of expertise, how did you describe it?

MR. WALSH: In the field of biochemistry, DNA technology and testing procedures.

THE COURT: Gosh, Mr. Furlotte, from what we have heard already it would seem that he is certainly more of an expert than you and I are.

MR. FURLOTTE: Oh, anybody is a better expert than I am.

THE COURT: Can't we safely qualify him as an expert in those fields? Just on the basis --

MR. FURLOTTE: In those fields but not in the forensic aspects of DNA extractions.

THE COURT: Well --

MR. FURLOTTE: I don't think that is necessary for the purpose here today.

THE COURT: Do these -- Doctor, do these -- the fields of biochemistry and DNA technology and testing procedures, do those adequately describe at least one field of your expertise?

A. It addresses some of the aspects of my expertise.

THE COURT: Yes. I mean your expertise undoubtedly extends to other fields as well.

A. Yes. I deal with other matters, yes, in the capacity of my job.

THE COURT: All right. Well, insofar as it is necessary at this voir dire hearing, I declare you an expert in this field.

MR. WALSH: Thank you, My Lord.

Q. Briefly then, just to complete this, between November 1989 and November 1990 you were in charge of operational support in the Molecular Genetics Section of the R.C.M.P. Central Forensic Laboratory in Ottawa; is that correct?

A. Yes, it is.

Q. And December '90 to the present you are the Section Head of Research and Development of Molecular Genetics Section, R.C.M.P. Central Forensic Laboratory in Ottawa?

A. Yes, I am.

Q. And since November 1989 you have been an Adjunct Professor with the Department of Biochemistry, Faculty of Medicine, University of Ottawa.

A. Yes.

Q. And this CV has been marked on this particular hearing. Dr. Fourney, would you tell the court please what, if any, involvement in terms of what, if any, opinions you provided to the R.C.M.P. in relation to the collection or gathering of any substance related to the matter of homicides on the Miramichi in the summer of 1989 related to the one Allan Joseph Legere?

A. From what I recall we had a question asked of us whether or not certain tissues and samples would be suitable as a control standard or -- of which to judge our future analysis.

Q. And was any particular -- first of all, do you remember the first substance that you were asked to give an opinion on?

A. From what I recall the first substance was a wart tissue that had been exised previous to these undergoings in this particular case.

Q. What, if any, opinion did you give the R.C.M.P. with respect to whether or not that particular substance could be used as a known standard for DNA typing?

A. I had particular reservations dealing with any tissue of this nature whether it be a mole or a wart primarily because there are concerns that I have from my cancer background, plus there are concerns that I have with the particular nature in which these samples are normally treated prior to the time we would actually receive these.

Q. Could you give the court some of those concerns?

A. Well, initially warts in particular, although I am not a pathologist, they are essentially caused by papilloma viruses. These particular viruses have been known to

be involved with some aspects of cancer. When we are dealing with this particular tumor material they could very well be different than the actual normal cells that are growing within the body so if one were to compare tumor material to the normal cells you may in fact get differences.

Q. In what?

A. Well, essentially from two different -- from two different tissues, a tumor material versus a control tissue, from the same person you may get a slightly different result.

Q. How would that --

A. -- to DNA.

Q. DNA. What if, for example, let's exclude the possibility of the material being cancerous. Is there any other reason that you would --

A. Well, yes. In fact the main concern that I have is the fact that I was advised at that time that these were fixed in paraffin-embedded tissues. This is a normal procedure that is used in histological and pathological analysis where a sample is exised, is immediately fixed in a chemical solution to preserve the integrity. From there it is embedded in a petroleum product like a wax so it can be cut into small slivers. The actual fixation process of this tissue can cause problems with DNA typing in the fact that it could affect the DNA structure itself, rendering it either completely unusable or will render it sufficiently degraded or different that it would not give you a particularly good control standard on which to judge the normal tissue you were comparing it with.

Q. Apart from degradation, what, if any, concerns would you have with repsect to a tissue of that sort in the actual typing process itself? What, if anything, could happen?

A. Well, it has been known for instance, in my own experience with working with breast cancer material as well as papers I have read and people I have discussed this with, the actual process of fixation I believe in this particular case was a formaldehyde or formalin-fixed process. It can actually cause DNA to be -- the substance that is used to fix can cause a change in the DNA so that when you finally extract the DNA, if it is not degraded, will have an altered mobility such that it will be shifted in a -- upwards in the gel for instance or it will have a variation in the pattern that you would end up with as composed to normal tissues that would not be treated in this manner.

Q. What could that actually do in a typing test? What could that end up doing?

A. It could -- you could end up actually not being able to match your samples.

Q. With respect to this particular topic nave you have any research or particular interest in that particular type of issue and also whether or not you have ever published in this particular area?

A. Yes. In fact it is a particular interest to me because during my post-doctoral research fellowship as the National Cancer Institute of Canada Fellow, I was tasked -- one of my projects that I worked on extensively was the development of a breast cancer diagnostic procedure of which we looked at formalin, formaldehyde-fixed tissues that were embedded in paraffin, and one

of the concerns I had at that time was to develop procedures to isolate DNA so that we could do further analysis on the DNA, so I had quite a bit of opportunity to work with fixed samples in much the same manner that this mole I believe would have been fixed.

Q. Did this background reinforce the opinions you have given about the use of that type of material in DNA typing?

A. Yes, it does.

Q. And have you had occasion to publish in this particular area on these particular --

A. Yes. In fact there is a fairly recent paper of some of my efforts during my post-doctoral research here where in fact the breast cancer study has been published and it dealt specifically with formalin formaldehyde fixed tissues embedded in paraffin and we matched 79 samples from two different lots of individuals and they are essentially tumor material that would have been handled in the same manner as this particular tissue.

Q. Doctor, did you have occasion to be referred to any other substances for possible use in this particular case?

A. Yes.

THE COURT: Just to deal with the wart material first, you advised what?

A. I advised at that time there was an R.C.M.P. inquiry I believe and there was a fax or a telephone conversation. They were wondering if in fact this tissue would be adequate as a control standard so that we can make all our further evaluations. I suggested at that time that several things could happen with that particular tissue. One, we may not get any DNA whatsoever. Could be very

badly degraded. Two, the DNA that we actually extracted from the material could be altered in such a way that we couldn't make a pattern comparison; and three, it could be degraded and give fairly mixed results. It would be difficult to actually get positive results.

THE COURT: The sum total was 'forget about it'.

A. Exactly.

Q. Were you given any other -- did you give any other opinions to the investigators in relation to this?

A. Yes. At several times, at a later date -- I can't recall the exact time -- I was asked about possibility of using urine, for instance, hair standards that were permount-embedded and just basic questions concerning blood and clotting with relevance to blood control standards.

Q. Okay. Now, let's deal with blood and clotting. What, if anything, can you tell the court with respect to any opinion you gave in relation to that?

A. Well, it is my opinion that as a control substance blood is excellent. It is fairly easy to get. You can get high amounts of DNA and it gives you a very high molecular weight. That is a judgment from us to say that DNA is intact and can be used. The problem with blood is that it has to be properly obtained, and one of our concerns even to this date is that blood is collected in the proper type of hospital control tubes. We use typically what we call EDTA tubes and the whole purpose of this is to prevent the clotting process so that we can have the blood in such a manner that we can work with it. So we actually try to prevent clotting.

Q. Was any information given to you during that particular time period with respect to any substance -- any blood clot substance? Any opinions asked of you in relation to that?

A. At a much later date we were asked if we could work with a clotted substance.

Q. What, if anything, was your opinion with respect to a clotted substance -- blood clotted substance?

A. It is possible to get DNA from a blood clot and it could render high molecular weight DNA but in my own particular experience plus that of other forensic labs and paternity labs in general, they often find that if blood comes in the wrong tube and in fact it is clotted, the DNA is significantly reduced in how much you would get from the sample and sometimes the material itself is either degraded or altered a little bit so that it is difficult to make a comparison. What I am saying is it is not impossible to get a result but it is not what we would consider a prime control standard.

Q. What, if any, concerns would you have about using it in the actual process itself? What you have mentioned, for example, with respect to the wart, there was a possibility of mobility shift. What, if any, concerns would you have with respect to --

A. It has been found on several occasions in our own lab as well as at the F.B.I. that the actual blood clotted tubes can actually give you DNA that would be shifted slightly.

Q. What would that cause in relation to your ability to match?

A. It could very well -- if it is shifted unreasonably or

if it is shifted significantly I should say it could be difficult to interpret the patterns.

Q. Now, apart from blood clots -- and you have indicated the collection of blood -- what about blood, for example, blood taken directly from the nose onto a piece of tissue paper or --

A. Oh. Samples collected on material and allowed to dry are excellent and truly render an intact substance of which we can work with and that is one of the values of this whole procedure is that blood or any biological stain, if it is dried on a material for instance, is excellent to work with.

Q. Tissue paper?

A. Tissue paper. We typically, in the lab now if we get a standard coming into the lab that is blood, we automatically make a stain from it and dry it.

Q. You mentioned you had occasion to give an opinion with respect to urine during this particular matter. Would you tell the court what that was?

A. Well, initially we were -- there was an inquiry made to us 'Can you extract DNA from urine?'. And at that particular time we truly didn't know so we set up a series of control experiments to look at the possibility of getting DNA from urine and my impression from that series of experiments that 100 mls. of urine would render you probably enough DNA to do one or two tests. The problem with that is often we have found that, depending on how the urine was stored, how long it took to process it in terms of when it was collected and when it was actually processed in the lab, could have significant problems with respect to degradation and intactness of the DNA. It is not a good substance to work with.

Q. Was anything tried in relation to this particular case?

A. Yes. I believe Dr. Bowan received a urine sample. It was collected in New Brunswick and we tried a couple of pilot experiments to see if we would get intact DNA and in fact we had problems. There was no significant amount of DNA and we couldn't work with it.

Q. I see. Just for the benefit of everyone here, what aspect of urine would you actually get the DNA out of?

A. Presumably there would be some epithelial cells swept off in the urine of which they would have what we call an intact nuclei and that is where the DNA is housed.

Q. Epithelial cells being what? Would you define epithelial cells?

A. Well, there could be cells probably swept off in the intestinal tract or whatever and this would be what we would try to work with.

Q. The urine liquid itself, would that have contained any cellular material?

A. Presumably, yes.

Q. And that would come from the body?

A. It could come from the body. It could come from bacteria in the urine itself, etc.

Q. Explain please if there are any other substances that can be used in DNA typing. You mentioned hair.

A. Hair is an ideal substance for a number of reasons. Particularly the fact that if you have a pulled hair, that is a hair that has a root sheath, an intact root sheath, you can get significant amounts of DNA from the root part of the hair and hair, because of its nature I presume, dries very quickly and when it dries

it maintains a very intact cellular structure in which we can extract DNA from.

Q. Apart from the root is there any other part of the hair that you could use to DNA type?

A. Not really, no. What we normally associate with hair, the color portion pigment, -- I am not a hair and fibre specialist, but that does not contain significant amounts of DNA.

Q. What part of the hair do you need?

A. Specifically the root section of the hair.

Q. What about hair that just naturally falls out? Is that of any benefit to you?

A. No.

Q. There was -- this morning Mr. Furlotte was asking Mr. Evers about how he mounted his hairs on slides and Mr. Evers I think mentioned the term 'permount'.

A. Yes.

Q. Would you describe for the court if you have any knowledge with respect to that substance and what, if any, effect that would have on the ability to extract DNA from hair?

A. Well, in fact the R.C.M.P. has traditionally had a very strong hair and fibre section and it became obvious that a lot of our control standards may in fact be involved with hair analysis. Often the hair analysis comes in in a manner that is mounted on slide and permount so we quickly set up a series of experiments to look at the possibility of extracting DNA from hair that was fixed in permount and it rendered excellent results. We had no problems with permounted hair provided there was a root sheath.

Q. What, if any, other substances can be used for your forensic DNA typing?

A. Well, one of the best, of course, is semen containing sperm because sperm itself is essentially packaged DNA. We get very high yields of DNA from a small amount of semen. The sperm itself, of course, being the fertilization product that will eventually go on to unite with the female egg, and the fertilization product carries all the DNA material, so it is just a small package of DNA so it is an ideal substance. Epithelial cells that some of us call buccal swabs from the inside of your mouth. If you take a skin scraping with a toothpick you can get enough cells to extract DNA from. Any tissue material in terms of a fragment of skin or what have you would probably give you very excellent DNA.

Q. What about saliva, spit?

A. My own practical experience with saliva is minimal. I prefer to work with epithelial cells or buccal swabs. I don't think saliva would yield a high enough amount of DNA.

Q. The use of these particular -- if you were to have a standard, whether that be hair or blood, from an individual from which you could compare the unknown substance gathered, what kind of comparisons are made in your testing -- what kind of comparisons are made in relation to lane to lane versus gel to gel? What kind of comparisons can you make in that regard?

A. A --

Q. Okay. Perhaps I am not making myself clear. When you received at the lab materials for testing do you have

the benefit of actually testing all your unknown and known substances at the same time?

A. No. In fact in an ideal situation we would like to run everything on one single gel at one time so that you could, one, complete all your tests with whatever you are working with at that time, the same materials, plus it would allow you to proceed with the tests in a much quicker fashion. Unfortunately the nature of forensics is often we are compelled to work with material that comes in at different times primarily because the evidence might have been gathered at a different time. Other groups of individuals may have been examining the evidence, so we are often forced with making comparisons from what you term it from gel to gel simply because the material was not available for the initial part of the examination.

Q. If you were to do your materials at one time that would be all within one gel?

A. Ideally we would like to -- typically in a paternity situation where people have to render an opinion whether a father was in fact the father of a child, they do all their analysis on one gel at one time. That is the ideal situation.

Q. And your comparison would be from what to what in one gel?

A. Typically from lane to lane in a single gel.

Q. And if you get your materials coming in at different times or you run them at different times what would you end up comparing? Gel to gel or lane to lane?

A. Well, you would do both.

Q. Is it possible to do both?

A. Absolutely.

Q. Which is better though?

A. The best way is to compare it within the gel on a lane to lane basis but we are often forced with comparing between gels and we have conducted numerous experiments to know the degree of precision and measurement error that is involved with gel to gel comparisons so I think that we can make a valid comparison regardless.

Q. Finally, I am going to ask you, would you just give the court please a little bit of historical background with respect to how the lab is set up and when it actually got operational. We heard testimony earlier this week from police officers in relation to making requests for DNA and being told that it wouldn't be ready for certain periods of time. Could you perhaps just fill the court in to how the lab got set up and how it became operational? Essentially when it became operational.

A. Well, I may be a little rusty on some of my dates, but from --

Q. Just approximate.

A. -- from my own recollection early in November when I joined the program they had just essentially become initiated into DNA typing.

Q. What year would that be?

A. November 1988. Dr. Waye had only been with them approximately six months and was operating in part of the old serology section at that time and he was just getting set up. Some of the equipment hadn't arrived and part of my role was to take over half the responsibilities of implementing the DNA program and

from there we did an awful lot of investigations and setting up what we term 'data bases' so the actual first case that we did I believe was done -- would have been the McNalley case where we went into court in April of '89. At that time we were still working with the old facilities and there was still considerable questions to be answered with respect to some of the more unusual samples that were going to be submitted to us such as hair for instance, permount, working with certain substances off wallboards and other things, so part of my job, and it still is, is to develop the technologies for the new samples that are continuously being given to us. I believe Dr. Bowan joined us later on that summer.

Q. That be '89?

A. Yes. And part of our role there was to get him familiar with our procedures. Actually Dr. Waye and myself were both involved with training Dr. Bowan in the DNA typing procedures as they existed then and we worked quite closely with him. I believe Dr. Bowan, especially being in hair analysis, was quite interested in pursuing some of the issues we had with respect to permount conditions and hair and we did several little projects at that time just to see what we could get from DNA. The lab was constantly in a flux situation where we were working with old facilities but getting all kinds of new equipment in. We were going to undergo extensive renovations in the early spring of '90 and we were existing in somewhat cramped conditions at the beginning and I just am trying to think exactly when we got into our new lab. Would have been I think in June

1990. From there we were involved with our training program for other members of the Force who were being trained as DNA specialists.

Q. Apart from the McNalley case when would you have actually -- if I could use the colloquial term -- opened your doors to forensic case work?

A. That is a difficult question to answer because we were always somehow involved in case work but I would say our foundation was pretty well set in the fall of '89.

MR. WALSH: Thank you, Doctor. I have no further questions, My Lord.

THE COURT: Do you want to go ahead now or --

MR. FURLOTTE: I would like a short recess.

THE COURT: All right. Take fifteen minutes.

(RECESS: 11:00 - 11:30)

CROSS EXAMINATION BY MR. FURLOTTE:

Q. Dr. Fourney, Cpl. Mole testified earlier that they acted on the preliminary report that came out of your laboratory on November 9th, the preliminary report that was prepared by Dr. Bowan. What was the basics in that preliminary report? Do you recall?

A. I have no idea. It is essentially my position is research and development and Dr. Bowan is in charge of operations.

Q. So you are not aware of what that preliminary report was dated November 1st?

A. No. I can't recall. Perhaps I had seen a draft of it or -- there has been so much documentation in our DNA program I would have to --

Q. Do you know that the preliminary report was done after one probing?

A. I seem to recall that there was a probing that had been successful, yes.

Q. On the D2S44?

A. That sounds correct.

Q. And that probe could not eliminate Allan Legere from bodily substance found on one of the Daughney girls; is that right?

A. If I -- my recollection is correct, that is probably true, yes.

Q. And the preliminary report also warned the R.C.M.P. that --

MR. WALSH: My Lord, at this point in time I might point out that the purpose Dr. Fourney is here today and the relevant issue here is related to the use of bodily -- what particular bodily substances are appropriate. Mr. Furlotte now is attempting to get into the case specific evidence in relation to the result of testing in this particular case which is an issue for next week.

MR. FURLOTTE: My Lord, there was evidence brought up beforehand on the subject matter.

THE COURT: Well, you are not -- Dr. Fourney isn't coming back next week. Is he one of your --

MR. WALSH: Yes, he will be one of them on the DNA voir dire, yes.

THE COURT: Do you want to leave it until then?

MR. WALSH: He didn't actually conduct the test or write that letter that Mr. Furlotte is talking about.

MR. FURLOTTE: But he says he recalls he may have seen the test.

THE COURT: Well, do you want to leave your examination of him until next week or do you want to do it now?

MR. FURLOTTE: No. I feel this is relevant to the matter before the court on this voir dire because Cst. Mole testified that he acted on the preliminary report that came out of the Ottawa lab and I am cross examining Dr. Fourney on the contents of that preliminary report and the reliability that should be placed on it.

MR. WALSH: My Lord, that would have been appropriate I suppose indirectly if Dr. Fourney had wrote the report. He has indicated he never wrote it. He may have seen it. He is not sure but Mr. Furlotte is insisting on continuing up that particular line.

THE COURT: Well, I will permit Mr. Furlotte to continue. If the witness isn't familiar with it perhaps he can say so.

Q. So Dr. Fourney, you do know that the preliminary report was based on the probing of the D2S44.

A. I seem to recall that.

Q. You seem to recall that. Also in that report it warned the R.C.M.P. that they would not be able to give -- say an opinion on identification until they had conducted at least three probes?

A. I can't really make a conclusive statement on the Legere situation but it is the general policy of our program and our procedural applications and operations to conduct more than one test, yes.

Q. And you would not give a positive ID until there was a match on three probes; is that right?

A. I can't say that for sure, no.

Q. You can't say that for sure?

A. No. I would have to see -- each case is dealt with on its own. I would have to look at the information,

the autorads, the details of the samples, the type of yield gels we are dealing with, the extractability of the DNA, the integrity of the DNA. Each case has to go through and be dealt with on its own merits.

Q. That is for -- a matter for interpretation.

A. What is?

Q. When you check the yield gels and the band intensity?

A. Yes. It is a standard protocol that we use at our lab. It goes through a procedural -- there is many steps in DNA and you have to do them in a subsequent order.

Q. But when you interpret an autorad and on a particular probe you take everything into consideration to decide whether or not you have what you call a match.

A. We would have to take everything into consideration, yes.

Q. That is for each individual probing.

A. For the case in general and for each probing, yes.

Q. And for each probing. So for each probing you would declare whether or not you had a match on this probe and generally you would need matches on three different probes before you would give an opinion that there was a positive ID.

A. We can always give an opinion but we would like to see in our program a number of tests run. Typically a case that we would do with DNA typing we would have several probings done. We would most likely -- certainly if it was the final part of the case -- we would probably do sex typing on it and we would also run what we call a monomer for measurement precision error. Then we also go through a whole series of tests to determine prior to this whether it is in fact human DNA, how much DNA we

have there, is it intact DNA, the quality of the DNA, can it be restricted properly, does it give all the results that we would consider valid and reliable. There is a whole series of tests and controls that go into this procedure prior to actually doing what we call --

Q. But that is not what I am getting at, Dr. Fourney. What I am getting at is the preliminary report from November was just given after the probing of the D2S44.

A. Then I would think that would be considered a preliminary report.

Q. Preliminary report. And you would never say that a person was probably guilty because of that one probing would you?

A. On a single probing?

Q. One single probing.

A. No.

MR. FURLOTTE: No further questions.

THE COURT: Re-examination?

MR. WALSH: No, My Lord.

THE COURT: Thank you very much, Dr. Fourney. You may be excused. Now, you have another witness.

MR. WALSH: My Lord, at this time you will note that number 26 is Cpl. Ron Godin.

THE COURT: Yes.

MR. WALSH: I have -- we were going to ask that Cpl. Godin be excused. However, we have shown the defence a booklet of three photographs. They have indicated they would like this booklet entered into evidence and we will concede with their request. It consists of three photographs, My Lord. I would ask the booklet be marked

as one exhibit. Perhaps mark it for identification as one.

THE COURT: VD-23. Are they different photographs of any significance?

MR. WALSH: I was going to comment to the court on that.

THE COURT: I mean do you want them referred to as "A", "B" and "C" or -- perhaps they are never going to be referred to again.

MR. FURLOTTE: I don't think it is necessary.

MR. WALSH: There is already a number on them. "1", "2" and "3".

THE COURT: Cpl. Godin took the photographs?

MR. WALSH: Cpl. Godin, yes, he took the photographs on the day that Mr. Legere was arrested in November 1989. Photograph number 1, My Lord, is of the weapon that was on the ground purportedly discarded by Mr. Legere next to the truck. Photograph number 2 is a picture of the weapon after ammunition had been removed from it. Cpl. Godin's testimony would be -- and I have told this to the defence -- would be that the weapon was loaded. It was cocked and there was a shell in the chamber.

THE COURT: When?

MR. WALSH: At the time that Cpl. Godin took the photograph and he is the one that actually disarmed the weapon. Took the ammunition out of it. On the day of the arrest.

THE COURT: Yes. But this is on route 118 is it you are talking about?

MR. WALSH: Yes. Next to the truck would be the previous testimony. The third photograph is a picture of the upper front of Allan Joseph Legere taken at the R.C.M.P.

station by Cpl. Godin on the same date. That would constitute the evidence of Cpl. Godin with respect to the particular issues on this voir dire, My Lord.

THE COURT: Okay. Then you have another --

MR. WALSH: Yes. This will be I expect my final witness, My Lord. Cst. Ron Charlebois.

CST. RON CHARLEBOIS, called as a witness, having been duly sworn on the voir dire, testified as follows:

DIRECT EXAMINATION BY MR. WALSH:

Q. Give the court your name please.

A. Yes. My name is Ron Charles Charlebois. I am a member of the Royal Canadian Mounted Police presently stationed in Moncton.

Q. Would you tell the court please what involvement you had in this particular matter dealing with the issues on this voir dire beginning with the date, time and place?

A. With respect to this voir dire I became involved on November 24th at approximately six o'clock.

Q. What year?

A. 1989. On that date I received a phone call advising me of Allan Legere's arrest.

Q. What were your duties at that particular time?

A. My duties were investigative duties. I was assigned -- I was part of an investigative team that was formed in Newcastle to investigate the murders of Annie Flam, the Daughney sisters, and of Father Smith.

Q. Who did you receive this telephone call from?

A. I received the telephone call from my sargeant who was the NCO in charge of Moncton GIS.

Q. Who was?

A. Sgt. Vince Poissonier.

Q. As a result of that call what, if anything, did you do?

A. I contacted Cpl. Kevin Mole. At that time he was a Constable. And subsequent to that Kevin Mole and I proceeded to Newcastle detachment. We were both informed that we would be given the responsibility of interviewing Mr. Allan Legere.

Q. Who informed you of this?

A. Sgt. Poissonier.

Q. Then what, if anything, happened?

A. As I said we proceeded to Newcastle detachment. We arrived around 6:25 thereabouts. We had a short conversation with then Sargeant Johnston and subsequent to that conversation we proceeded to the cell area where Allan Legere was being kept.

Q. The person you are referring to as Allan Legere, is he in court?

A. Yes, he is. He is seated in the prisoner's dock. He is seated in between two uniformed R.C.M.P. officers.

Q. What was the -- what did he look like at that particular time and what was his state of dress when you entered?

A. I was preceded into the cell area where he was incarcerated by Sgt. Johnston and Cst. Mole. Prior to entering I had a short conversation with Cst. MacPhee. When I entered I first saw Allan Legere. He was naked. He was shackled. His ankles were shackled and his hands were handcuffed behind his back.

Q. Was he wearing anything?

A. No. As I said, he was naked but he had a brown woollen blanket that was over his shoulders. Draped over his shoulders. I had seen photographs. I had never spoken

or seen Allan Legere in person prior to that date but I had seen numerous photographs of him. I saw him on television during the Glendenning trials and it appeared to me he had lost a considerable amount of weight. His hair was short. He had no moustache. I remarked that his legs were thin. His upper body -- I remarked that he also had very broad shoulders and a thin waist. One other thing I did remark is that he had sort of a rash on each cheek and if I recall correctly it was more pronounced on his right cheek. When I entered he was just commencing his conversation with Cpl. Mole and Sgt. Johnston and I guess the best way that I could describe it is that it appeared to me that it was like three brothers, long lost brothers, that were reuniting for the first time in a long time at a family reunion. Appeared to be very jovial. A lot of joking around that was going on. One of the first things that Allan Legere said to Cpl. Mole, he remarked about Cpl. Mole's haircut. At the time it was quite short and standing on end. He asked Cpl. Mole, he said, 'Kevin, what in hell did you do to your hair?' and Kevin in turned asked him the same question. He responded, 'Shave and a haircut, $22.00 in Montreal'. I must add that he was extremely talkative and his conversation was very animated.

At around that same time shortly after we had entered he embarked on a conversation about Bolduc. Referred to him as Bolduc and referred to him as a fucking Frenchman and he said he had kicked him in the head. If I recall correctly he had questioned us as to whether he could do that. Didn't really go into

details as to what had transpired but he had questioned us as to whether he could do that and he was advised that since we didn't know the situation we really couldn't comment on it. At 6:47 exactly --

Q. Why do you say exactly?

A. Because I was taking notes at the time.

THE COURT: Sorry. What time?

A. 6:47.

Q. You say taking notes. Were you able to take notes verbatim?

A. No. Well, I was attempting to take notes verbatim but it was impossible because he was talking too fast.

Q. Who was talking too fast?

A. Allan Legere. At 6:47 Cpl. Mole advised Allan Legere -- he read from his standard police card -- he advised Allan Legere that he was under arrest for the murder of Annie Flam. After that he read the standard police caution and followed that standard police caution with the secondary warning. He asked Allan Legere if he understood both the cautions and Allan Legere responded, 'Yeah, yeah.' It appeared to me that he fully understood what was said to him but at the same time it seemed like he was more interested in conversing with Sgt. Johnston. After that at approximately -- at exactly 6:55 Cpl. Mole told Allan Legere that he wanted to take hair samples from him.

Q. What, if any, conversation were you able to note between 6:47 and 6:55 between the time that you say Cpl. Mole gave him the charter warning and 6:55 when he -- at this point in time? What, if any, conversation were you able to note from Allan Legere at that point in time?

THE COURT: Charter warning. Police warning. Charter rights. The witness has only referred to the warning. There was nothing about -- don't we understand charter rights -- doesn't that refer to the statement of the lawyer, entitled to consult a lawyer?

MR. WALSH: Sorry, My Lord, I thought -- perhaps just to clarify the situation.

Q. At 6:47 what did --

A. At 6:47 Cpl. Mole read to Allan Legere his charter rights. He advised him that he was under arrest for the murder of Annie Flam and he informed him of his rights to counsel.

Q. Did he do --

A. I don't know. Maybe I forgot that.

Q. Sorry. Did he do anything else at that point in time?

A. Immediately following that he informed him of the police caution and the secondary police caution.

Q. What, if any, acknowledgement did Mr. Legere give to the charter rights that were given to him?

A. I cannot say whether he responded immediately after the charter rights, okay, but at the end of the secondary police caution he stated that -- he said, 'Yeah, yeah' which I interpreted as Allan Legere understanding everything that was read to him.

Q. Okay. You have indicated the next time was 6:55 and I was at the point where I was going to ask you what, if any, conversation were you able to note between 6:47 and 6:55 in relation to Allan Legere?

A. As I mentioned, there was a lot that was said. Allan Legere was talking non-sensically. At that point in time I think he would have made reference to being

chased by a dog or dogs during the summer. He would have made reference to the dogs sniffing him and also he would have made reference to being shot at by an R.C.M.P. dog handler. He inquired as to whether the dog handler had reported firing first. He also commented to the effect that he could have shot him if he wanted to but instead he shot over his head. As I mentioned, at 6:55 Cpl. Mole requested Allan Legere that he wanted hair samples or he was going to take hair samples from him and Allan Legere's answer to that was, 'You know how I feel about that, Kevin. I am not consenting.' Shortly thereafter Kevin Mole was proceeding to take the hair samples, asked him if he wanted to assist and Legere remarked something to the effect, 'Do what you have to do but I am not helping you.' At that juncture Cpl. Mole proceeded to take hair samples from Allan Legere. He started by taking hair samples from his scalp, by pulling and cutting. Then he proceeded to take pubic hair samples from Allan Legere. During this period of time Allan Legere was conversing with Sgt. Johnston. This is something that struck me as being quite unusual because it appeared that Kevin Mole was invisible. He was talking to Mason Johnston and Kevin Mole was collecting the hair samples and Legere was not reacting in any way.

Up until that point in time I had been presented to Allan Legere by Cpl. Mole but I did not embark into any conversation with them. After the hair samples or right around the time that the hair samples were being taken, I was standing near the cell door and I noticed that he had a cut on his forehead right around here. (indicating) Right around the middle. And I asked him,

'Where did you get the cut?' This would have been after the charter. And he responded that he had fallen on some ice in Montreal.

From approximately seven o'clock, 6:55, 7:00, up until 7:25 when we brought him to the interview room Allan Legere continued to talk, talking quite fast and talking in an animated fashion. He explained to us how he had escaped in Moncton. He made reference to the lady he had abducted in Moncton stating that he was really surprised because she had refused to get out of the car on Mountain Road in Moncton and was more concerned about getting something out of the back of the car. He made reference at that same point about being provided with a key by one of the guards at the Renous Institute or Penitentiary. He went on to explain about living in the woods, how he had moved from place to place on a nightly basis, how he had lit his fires only during the day so he wouldn't be caught. He mentioned he had encountered someone on the bridge, I think the Morrissey Bridge, and the person, while walking by had said 'Hi, pal' but he at that moment thought he had said 'Hi, Al' and was seriously contemplating throwing him over the bridge.

Q. This bridge you mentioned, the Morrissey Bridge, where is that for the record?

A. The Morrissey Bridge is located in between Chatham Head and Newcastle.

Q. In relation to any of the charges he is presently facing here where would this bridge be?

A. The Morrissey Bridge is located in the same general area as the Smith murder scene and it is located in the same general area as the Daughney murder scene.

Q. Are they on the same side -- this bridge spans what?

A. Spans the Miramichi River.

Q. And these scenes, are they, for the record, on the same side of the river or opposite side of the river?

A. Opposite side of the river, yes.

Q. Continue please.

THE COURT: Sorry. I don't just follow that. What is on the opposite side of the river?

MR. WALSH: He said that the bridge was in the same vicinity as the Smith and Daughney murder scenes and I asked him what side of the river the Smith and Daughney murder scenes were. Were they on the same side or opposite side of the river from each other.

THE COURT: Yes. The Smith was at Chatham Head.

MR. WALSH: Yes.

THE COURT: And the Daughney was where?

MR. WALSH: In Newcastle.

THE COURT: Oh. Yes.

MR. WALSH: I was being some/what redundant, My Lord, but for the purpose of the record I wanted to make it clear.

Q. Continue, Officer.

A. Okay. In addition to what I have already said Allan Legere, during that time frame, had mentioned that he was checked on a train in Quebec. Said that he thought it was over at that point in time. He had -- as he had done with a lot of other things he repeated himself quite often and he had mentioned that twice in the cell area. On the second occasion, after 7:15 when he was provided with coveralls, he actually showed how he raised the sleeve of his arm when checked by police officers, two police officers, on the train.

Q. Did he say where the train was?

A. No, he did not. He just said Quebec. Other than that he mentioned he had stayed at an expensive hotel in Montreal. He referred to it as being a swanky hotel. At one point in time he made the comment 'I shouldn't have done as much as I did. I could have done more. I really got the people riled up'. He had made reference also to the abductions in passing.

Q. What abductions are you referring to?

A. The truck driver and taxi driver. He said that the taxi driver was getting on his nerves because he was so upset and crying. That is basically it.

Q. Would you describe for the court please -- you have indicated this is what was said in that time period. Describe for the court please how it was being said? Was it one-sided? Was there an interview being conducted? Was it question-answer? Could you explain what was actually occurring?

A. No. Actually -- I guess the best way to describe it he was entertaining us. He seemed to be getting a lot of pleasure out of it. He seemed to be extremely happy to be speaking to Cpl. Mole and Sgt. Johnston at the time. There was very little interruptions. At one point in time when he was describing how he was living in the woods I think that is probably the only time there was any questioning, and Sgt. Johnston and Cpl. Mole was asking him different questions as to how he survived and so forth and so forth. But the remainder of the conversation was basically Allan Legere telling a story.

Q. What happened next?

A. Okay. At approximately 7:25 after he was provided with coveralls, I exited the cell area and ensured that the path leading to the interview room was clear and returned back to the cell area and assisted Cpl. Mole in escorting him to the interview room.

Q. What was his dress at that time and what, if any, restraint equipment did he have on?

A. He did not have any restraining equipment on and he was dressed in blue coveralls.

Q. Continue please.

A. Okay. We arrived at the interview room, as I said, at approximately 7:25 and engaged in some small talk.

Q. Who went into the interview room?

A. Cpl. Kevin Mole, myself and Allan Legere. In the interview room there were three chairs. There was a desk approximately the same size as the desk in front of you and on that desk was a tape recorder.

Q. Constable, at this point in time you are aware of the fact that the crown is not intending to elicit any statements from Allan Joseph Legere from this point forward.

A. That's correct. I understand.

Q. I would ask you to please relate to the court as it relates to any charter rights, any conversation or anything you perhaps did in relation to that particular matter?

A. Yes. With respect to the voir dire, next part of the investigation that is pertinent is that at approximately 8:35 I activated the Uher tape recorder.

Q. Where was that?

A. That was placed on the desk. It had been set up prior to our arrival. Cpl. Kevin Mole, for the record, and

he explained this to Allan Legere, advised him of the murders that we were investigating him for.

Q. Which ones?

A. He informed him that we were investigating him for the murder of Annie Flam, the murder of Donna and Linda Daughney, and also the murder of Father Smith. Following that he re-read the police caution and also the secondary warning to Allan Legere and he asked Allan Legere if he understood both and he said yes, he did.

Q. What, if any, charter notice was given at that time?

A. The charter notice was repeated to Allan Legere. Sorry. I omitted to say that. When he informed him that we were investigating him for the four murders, he followed that by informing him of his right to counsel. As I mentioned, Allan Legere acknowledged that he understood what was said to him, but at no point in time did he at that moment or at 6:47 did he make a request to speak to counsel.

Q. Okay. Continue please.

A. That was at 8:30. The next incident that would be pertinent to the voir dire hearings occurred at approximately 9:30. At that point in time Allan Legere was provided with a breakfast that was -- Sgt. Johnston had retrieved. At around that same juncture Allan Legere asked if he could blow his nose. He asked Cpl. Mole if he could blow his nose and Cpl. Mole advised him yes, and he said he would go get a kleenex in the next room. He exited the room. He came back a few minutes later with a green waste paper basket and a roll of toilet paper. He provided the toilet paper to Allan Legere and Allan Legere continued to eat his breakfast

and on numerous occasions to blow his nose.

Q. Apart from yourself, Cst. Mole, Mr. Legere, what if any other person entered that room at any time that morning?

A. The only other person that -- okay. The only other person that I can recall -- there were two persons that entered that room. No, there was one person that entered that room. Not entered but was in the doorway that morning and it was Sgt. Johnston and the reason for that is Allan Legere had requested that he retrieve his eye glasses. I am certain it was his eye glasses. I am not too certain whether he had asked for his teeth, his false teeth, at that time. The only other time that anybody else had contact with him was at 12:42 when Cst. Ron Godin entered the room.

Q. There was evidence earlier this week from Cst. Mole with respect to a doctor. Do you know anything about that?

A. Oh, yes. Sorry. Yes. After Allan Legere had finished his breakfast at approximately 9:45 Dr. Cole arrived in the room. He was escorted into the room. Now, as to the type of examination that he conducted on Allan Legere I do not know because I had exited the room at that moment.

Q. Continue please.

A. Okay. Now, that is at 9:45. At approximately 10:15 Allan Legere had made a statement to the effect of 'When am I going to get counsel?' or something to that effect. He said, 'The guy this morning said he was going to get me a lawyer.' That surprised us because we were unaware of that and from thence on, from 10:15 on to approximately 12:20 when he did finally contact

counsel, we engaged in numerous conversations. I think there was three or four conversations where Legere had made reference to getting a lawyer.

Q. What was the nature of the conversation from your part?

A. Well, before I get into that maybe I should explain the nature of the conversation from his part. He on three or four occasions inquired as to --

MR. FURLOTTE: My Lord, I thought the crown was not going to get into any statements made by Mr. Legere after 7:25 when he was brought into the interview room and now they are going into conversations with Mr. Legere.

MR. WALSH: It is not for the purpose, My Lord, of any incriminating statements. It is with respect to the issue of the charter -- any rights he may have requested or obtained or been denied. That is the only purpose behind this is to explain what, if any, requests he made for counsel and what, if any, replies the officers -- what, if any, opportunity the officers provided him. I don't wish to elicit any so-called incriminating or exculpatory statements.

THE COURT: Well, you had, Mr. Furlotte, cross examined Cpl. Mole on that aspect hadn't you?

MR. FURLOTTE: Yes, I had.

THE COURT: So isn't it reasonable that this witness should be able to relate that if the crown wants him to? I think so. Go ahead.

A. Repeat the question please.

Q. All right. Could you tell the court -- after 10:15 you had indicated you wanted to explain certain things that Mr. Legere had said in relation to his request for a lawyer. Explain that please.

A. As I mentioned, on three or four occasions during that time span he inquired as to when he was going to be provided with a lawyer, but he always -- we told him that he could most certainly have a lawyer, but then he himself always continued to question and make remarks to the effect that no one would represent him. In the interview room at the time there was a telephone book and we advised him there was a phone list there. He was shown the phone list and he made remarks to the effect that there was no on in the Newcastle area that would represent him and that they were all a bunch of flunkies and that they were altogether or something to that effect. He said at one point in time that he thought he should be provided with the best lawyer available. Anyway for our part Cpl. Mole informed him that it wasn't our responsibility to tell him who he should consult and that is basically it. Now, what occurred is that at -- when we first entered the room there wasn't a telephone there so we provided him with a telephone, and because he wasn't satisfied with the lawyers in the Newcastle area, at one point in time at approximately 10:45 he made reference to Fredericton lawyers. I think at that juncture I had to ask him if he wanted a telephone book with Fredericton lawyers. He said -- he responded, yes, that he would. So I made attempts -- made inquiries to see if I could get a Fredericton phone book and I couldn't.

THE COURT: This was elsewhere in the building?

A. That's correct. Anyway I returned to the interview room and we got into conversation of trying to get a fax of a list of Fredericton lawyers, which I subsequently did and I provided to him at approximately ten to twelve.

Q. Then what, if anything, happened?

A. When he was provided with this list he leafed through it and -- it is unclear to me as to how he came about choosing Mr. McNeil, but I do recall that Cpl. Mole had made a phone call for him. He had contacted a lawyer by the name McNeil in Fredericton. Just prior to that after he was given the faxed section of lawyers the conversation took place with respect to a lawyer by the name of Evans and I had suggested to him that maybe he should contact him and he could refer him to someone else.

Q. Continue please, Officer.

A. So that was -- okay. At 12:20 that occurred. He was passed the telephone and Cpl. Mole and I had exited the room. The next time that I came into contact with Allan Legere was at 12:42 when I brought Cpl. Ron Godin,who was and still is a member of the Bathurst Ident. Section, into the room. Cpl. Ron Godin informed Allan Legere that he wanted to take a photograph of him or photographs. I am not quite certain how many he took and Allan Legere asked him what it was for and Cpl. Ron Godin informed him that it was for investigative purposes. That is basically it.

Q. You testified earlier about Cpl. Mole getting kleenex and going out for some kleenex. Do you know what, if anything, ever happened to that and what, if anything, did he bring back to the room, and what, if anything, that you saw happen to it?

A. Yes. As I mentioned, he was provided with a kleenex at approximately the same time that he had received his

breakfast. There is one thing I must add. When I was describing Allan Legere, he had a welt under his right eye and when we brought him -- while he was in the cell he made reference to Bolduc. While in the cell and also in the interview room on numerous occasions he complained about his eye being sore and that is why arrangements were made for Dr. Cole to examine him. Anyway he blew his nose on a number of occasions and he discarded -- after he was finished blowing his nose he discarded the kleenex and his plate into the waste paper basket that was provided by Cpl. Mole.

Q. Where did the kleenex come from?

A. Not the kleenex. It was toilet paper actually that / he had used to blow his nose and he, as I mentioned,discarded that in the waste paper basket.

Q. Where did he get the toilet paper from?

A. From Cpl. Mole.

Q. Continue.

A. Now, I guess basically the next thing is we left the -- we escorted Allan Legere out of the interview room at approximately 2:15, in that area, and we brought him down to the cell area to have his photograph and fingerprints taken. It is a room set aside in the general lock-up area where this is done, so Cpl. Mole and I proceeded to take his photographs and fingerprints. It was Cpl. Mole that took his photographs and I followed by taking two sets of fingerprints.

Q. Then what did you do, if anything?

A. Really nothing that is of relevance to this voir dire. I was in and around the cell area up until the late evening. I had exited the cell area at approximately

seven o'clock or in that area. There is one thing, I know that Allan Legere had opportunity in the cell area to consult counsel. The first time would have been around three o'clock and the second time would have been around four. I don't know who he consulted the first time, but I know that after he got off the phone the second time he -- I learned that he was speaking to David Hughes and he made some off the cuff remark that --

MR. FURLOTTE: Objection. I thought we were not going to get into anything he said.

MR. WALSH: I am not going to ask you to elicit anything further on that, Officer.

A. Okay.

Q. Did you have any occasion to have any contact -- did you have anything to do with any bodily substance pertinent to this particular voir dire?

A. Yes, I have. On the 27th of November at exactly 2:12 p.m., 1412 p.m., I received a plastic bag containing toilet tissue from Cpl. Mole. He gave me this plastic bag containing the tissue at the major crime unit in Douglastown.

Q. And what was in the bag?

A. It was toilet tissue.

Q. I am going to show you this particular item that has been marked on this particular hearing VD-18. Would you look at that for me please and tell me whether or not you can identify it?

A. This bag is similar to the bag I received from Cpl. Mole on the 27th of Novmeber at 1412. It is similar in that it contains toilet tissue that appears to have

soil marks on it. It is a similar style of a plastic bag. It is not the zip-top that we usually use. It also is marked item 335.

Q. What, if any, significance does that item have in relation to what you received back then?

A. It is the exact same number, item number, that I had received. Now, the bag itself does not contain -- does not bear my initials nor the time and date, but there is a reason for that. The purpose of me having this bag is that I was instructed to deliver this to Dr. Bowan.

Q. Where?

A. In Ottawa at the R.C.M.P. headquarters at the Central Forensic Laboratory which I did, and when I had received it at 1412 I was in quite a hurry. Just after one o'clock that same afternoon on the 27th I had received some urine samples. I had received three containers of urine samples purportedly from Allan Legere from Cst. Greg Davis who is the exhibit custodian. I was to deliver the urine samples and item 335 to Dr. Bowan. As I mentioned, I was in quite a hurry. When I received this exhibit I placed it in a styrofoam cooler that I had that was provided to me by Newcastle Detachment. Inside the cooler was ice and I placed the urine in the cooler and also upon receipt I had placed this exhibit. I sealed the cooler with tape and then I proceeded directly to the airport in Chatham. Now, the reason I was in a hurry is because I was -- my flight was scheduled to leave at approximately 2:45 that afternoon. I do have -- just for confirmation -- a copy of an exhibit report which is standard procedure. It is an

exhibit report that describes 335 and was filled out by Cpl. Mole and on the back it has the movement of exhibits and it says 'Turned over to Cst. Charlebois at Newcastle Detachment on the 27th November at 1412, Monday' and it is signed by myself and Cpl. Mole. I was provided with the original of that exhibit report by Cpl. Mole and I had signed it and I brought the exhibit report with me to Ottawa and I had Dr. Bowan sign it when I turned over the exhibits to him.

Q. Did you in fact turn this particular item over?

A. Yes. I turned over the whole cooler containing this particular item and the three containers that purportedly contained urine samples from Allan Legere and they were marked items 331, 332, and 333. I turned these items over to Dr. John Bowan at 1945 that evening.

Q. When did you next see this particular item, 335, which is now marked on this particular hearing as VD-18?

A. This particular item was returned to me on the 25th of March 1991 at 11:30 by Dr. John Bowan in Moncton, New Brunswick.

Q. Did you have occasion, Officer, to have any connection with any other bodily substances that are pertinent to this particular period?

A. Yes. On the 12th of June 1990 at exactly 1542 or 1545 I should say, I was provided with a small pill container by Duff Evers who is in charge of the hair and fibre section of the Sackville Forensic Lab. I had travelled to Sackville and he had provided me with this container which he had marked 56B.

Q. I am showing you an item marked VD-21 on this hearing.

Would you look at that for me please and tell me whether or not you can identify it?

A. Yes. This container is similar to the container that was provided to me by Duff Evers on the 12th of June at 1542. Sorry. It bears my initials, RCC, and it bears date of the 12th of June 1990, 1542 hours. I recognize Dr. Bowan's signature and also Duff Evers' signature.

Q. What, if any, item number is that particular --

A. It is referred to as item 56B.

Q. What did you do with that particular item?

A. I delivered that particular item to Dr. Bowan in Ottawa at our headquarters the morning of the 15th of June 1990 at 1010 hours in the a.m.

Q. When next did you see this particular item?

A. I received this particular item back from Dr. Bowan at the same time as item 335. That was on the 25th of March 1991 at 11:30 a.m.

Q. Did you have any other involvement in relation to the issues here?

A. No.

Q. You indicated previously in your testimony that you had difficulty writing everything down that was being said. Was what was being said by Mr. Legere -- could you understand it?

A. Oh, yes, most definitely.

MR. WALSH: I have nothing further. Thank you, My Lord.

THE COURT: Cross examination?

CROSS EXAMINATION BY MR. FURLOTTE:

Q. You arrived at the Newcastle police station approximately what time on the 24th?

A. On the 24th at approximately 6:25.

Q. You got there at 6:25.

A. Approximately, yes.

Q. Who was the first people you saw when you arrived?

A. I can't answer that. There were a number of people there.

Q. What part of the building did you go to when you first arrived?

A. I went to the general office of the building.

Q. Who was in the general office?

A. I cannot recall with certainty who was there.

Q. Was Cpl. Mole there?

A. He had accompanied me to the Detachment. I had said that.

Q. Pardon?

A. Cpl. Mole had accompanied me to the Detachment.

Q. So you arrived with Cpl. Mole.

A. That's correct.

Q. So when Cpl. Mole put in his notes that he was there at 5:55 then he would be wrong.

A. I think Cpl. Mole explained that yesterday that he wasn't paying too much attention to his notes.

Q. Was Sgt. Johnston in the office when you arrived?

A. Sgt. Johnston -- we encountered Sgt. Johnston prior to going down to the cell area. He came back up to the general office area and spoke to Kevin and I.

Q. What time was that?

A. That would have been between approximately 6:25 and 6:40.

Q. Between 6:25 and 6:40. Because you got there at 6:25.

A. That's correct.

Q. So how long after you got there did you meet with Sgt. Johnston?

A. It would be just a matter of minutes.

Q. Just a matter of minutes. When Sgt. Johnston says he was in the cell talking to Allan Legere from 6:20 to 6:35 then he must be wrong about that also?

A. What did Sgt. Johnston say?

Q. Would you say that Sgt. Johnston must be right and you are wrong?

A. Would you repeat that? What did Sgt. Johnston say?

Q. Sgt. Johnston testified that he was in the cell talking to Allan Legere from 6:20 to 6:35 and you said that you met with Sgt. Johnston just a matter of two minutes after you arrived.

MR. WALSH: He didn't say the word two minutes, My Lord. Mr. Furlotte is starting again.

Q. You say it was a matter of a few minutes. What do you call a few minutes?

A. I just said to you that we encountered Sgt. Johnston beweten the time that we had arrived at approximately 6:25 and 6:40. If Sgt. Johnston was talking to Allan Legere from 6:20 to 6:35, as you say, to me it is entirely possible that I encountered him between 6:35 and 6:40. I am giving you approximate times. I told you during my testimony that my exact times are at 6:47 when he was given the charter, okay, and at 6:55 when the seizure of hairs --

Q. All right. That is when you were taking notes.

A. Right.

Q. Right. You didn't take notes before you went to the cell.

Q. Cst. Mole testified -- Corporal now. He was a Constable then. Cpl. Mole testified that when he first arrived he went to the office and met with Sgt. Johnston. He thought it was at 5:55 but now we realize he is probably wrong.

A. Yes. I think he said that on the stand.

Q. He said there was a meeting there with Sgt. Johnston for quite a while.

A. He said quite a while?

Q. Well, --

A. I don't know if he did say that.

Q. And after Cpl. Mole left and called Nina Flam's daughter. Do you recall that?

A. I don't recall if he spoke to Nina Flam after he spoke to Sgt. Johnston or before. I don't know.

Q. The meeting in the office between yourself, Cpl. Mole and Sgt. Johnston, how long did it last?

A. Oh, just a matter of a minute or two. Couple of minutes.

Q. A minute or two.

A. Yes.

Q. What was the topic of that conversation?

A. The topic of that conversation was Sgt. Johnston explained to us that Allan Legere was talking quite a bit and was making reference to being checked on th train and in the woods and things of that nature.

Q. Was there any mention about whether Allan Legere had requested a lawyer?

A. No, none whatsoever.

Q. You mentioned that when you met with Allan Legere in the cell after you read him his rights at 6:47 that the conversation between 6:47 and 6:55 -- the references was

that Mr. Legere was being chased by the dogs and they were sniffing him, that he was being shot at by the dog handler and he shot back at the dog handler in self-defence.

THE COURT: I don't think there was any reference to self-defence. The word 'self-defence' wasn't mentioned in the testimony.

Q. Or that he had -- he mentioned that he had shot at the dog handler.

A. Yes. He said he shot over his head. He said he could have shot him if he wanted to but he shot over his head.

Q. Right. He was quite -- you say mostly he was talking to Sgt. Johnston at this time.

A. Yes. He was talking mostly to Sgt. Johnston. He was referring a lot of his conversation to both Sgt. Johnston and Cpl. Mole.

Q. But this is all stuff that Sgt. Johnston claimed that Allan Legere told him when he was in the cell by himself.

A. It is very possible. As I just said during my testimony stuff that he told us in the cell he had repeated before he left the cell and he also had repeated it once or twice when we were upstairs.

Q. Now, you said you were taking handwritten notes in the cell while conversation was going on between Sgt. Johnston and Mr. Legere. Sgt. Johnston did not care to reveal his notes to me that he said he had taken. Would you like to reveal your notes?

A. No.

Q. Do you have your notes with you?

A. Oh, I have my notes with me. How do my notes --

Q. What would the harm be in that?

MR. WALSH: My Lord, at this point in time Mr. Furlotte -- we went through this yesterday. Mr. Furlotte has -- this officer has not used his notes in this courtroom to refresh his memory. He has indicated he does not want to give him his notes and I don't know of any right he has to actually have his notes so I don't know why we would engage in this particular dialogue.

Q. Did you read your notes before coming into court today?

A. Oh, most definitely.

Q. How long ago?

A. I didn't read -- I have a process that I follow to prepare for a trial. I don't care to divulge it to you.

Q. Is it not reliable?

A. Oh, it is very reliable.

Q. What is the difficulty in divulging it then?

A. There is no difficulty. It is just that I don't think it is any of your business. I will just say that -- I don't even know if my notes would even be admissible in court because I have consulted certain people. At this particular junction I find it very difficult writing into a notebook, small notebook, especially if someone is conversing as fast as Mr. Legere was so I was writing on a note pad and if I were to show it to you you probably wouldn't understand it anyway. Okay? Before I left Newcastle Detachment that particular day I had transcribed those notes from that pad only my notebook. When I was questioning my superiors as to whether I couldn't refer to my notes under those circumstances I was told that probably I wouldn't be able to. But that is not the issue. The issue is what I am telling you is the truth and I hope that you are not questioning my credibility.

Q. I believe there was testimony earlier about somebody, when they asked Mr. Legere for his hair samples, and they were quite taken aback because, geez, he never had anybody refuse hair samples before.

A. Umm hmm.

Q. So he was quite taken aback because Mr. Legere refused him.

MR. WALSH: Excuse me. What time frame is he talking about, My Lord?

THE COURT: Yes.

MR. FURLOTTE: That would have been in '86.

MR. WALSH: Cst. Charlebois I don't know if he even was in New Brunswick in '86.

A. I can answer that actually. I can answer that.

Q. It is just that I have never in court before had police officers refuse defence counsel to see their notes. Is this a change in --

A. No, it is just a matter of principle. I have nothing to hide, Mr. Furlotte. It is just a matter of principle.

MR. WALSH: My Lord, again, I don't want to interrupt cross examination but --

MR. FURLOTTE: Well, don't. This is an experienced police officer. He is quite capable of answering questions.

MR. WALSH: My Lord, I thought we had settled the issue. If in fact the court wishes -- I just want to make it clear whether or not he is required to give up his notebook. If he isn't then I don't know why Mr. Furlotte continues to come back to it and come back to it.

THE COURT: Well, I think Mr. Furlotte understands that he is not required to give it.

Q. You spoke to Cst. MacPhee before you went into the interview room.

A. That's correct.

Q. And Cst. MacPhee did not advise you that Mr. Legere had requested a lawyer?

A. No, he did not.

Q. Not that you remember.

A. No. I am certain he did not.

Q. You checked your notes beforehand and that is not in your notes either.

A. If he had advised me it would be in my notes.

Q. If he had advised you it would be in your notes.

A. Yes.

Q. You mentioned while most of the conversation was going on in the cell area between Mr. Legere and Sgt. Johnston and Cpl. Mole, you were sitting there taking notes of what went on.

A. Yes. Well, I was trying to take the best notes as possible. It was a very difficult task.

Q. WAs Cpl. Mole taking notes also?

A. No.

Q. Was Sgt. Johnston taking notes also?

A. No.

Q. When Cpl. Mole and Sgt. Johnston did up their report later on did they basically rely on your notes to state what happened?

A. No, they did not. No.

Q. Or just from memory.

A. They relied on certain times.

Q. On your notes.

A. Yes.

Q. But not the contents.

A. No. Actually the truth of the matter, I have seen Kevin Mole's notes since then and his notes are much better than mine.

Q. Except for times. 5:55. He is out half an hour there.

A. That's right. He explained that to you yesterday.

Q. You mentioned here that in the conversation Mr. Legere stated something to the effect that he shouldn't have done as much as he did and could have done more but he really got the people riled up. Sgt. Johnston testified he wasn't talking there in relation to the homicides that were committed in the Newcastle area but rather to the abductions.

A. Yes. I don't know what that made reference to but, yes, it was around the same time that he was talking about the abductions. Now, whether it involved everything I do not know but he did say that.

Q. Sgt. Johnston testified in his opinion he was not referring to the homicides that were committed. That it was to the immediate offences.

A. Yes. If he testified that I can't argue with it.

Q. So you don't know what he was referring to.

A. No, I do not.

Q. Would your notes cover the topic of conversation that took place for that roughly hour and a half period that the tape recorder didn't cover?

A. No, it wouldn't because we were relying on the tape recorder. That was the purpose --

Q. You didn't take notes during that period of time.

A. No. I may have taken down a couple of items and so forth but that was the whole intention of the tape recorder, and as a matter of fact up until the time that we had activated the tape recorder a lot of the conversation related to getting Allan Legere's concurrence to use it. He didn't want us to use it and I think Cpl. Mole

testified to the effect that once we did use it he seemed to change a bit.

Q. Do you recall whether or not Mr. Legere asked for a lawyer during that --

A. No, he did not. The first time Mr. Legere mentioned anything about a lawyer, as I have testified, was approximately 10:15 when he said that he had asked the other officer for a lawyer, and he asked 'When am I going to be provided with one?' or something to that effect.

Q. When he notified you that he had requested a lawyer, much to everybody's surprise, why didn't you cease questioning Mr. Legere and do the best you could to get him a lawyer?

A. Well, partly because of his actions in that he kept on rambling on and he said that he would never be able to get someone to represent him. How could someone with my name be represented or get a lawyer, and at one point in time he made reference to letters he had sent to a Court of Appeal judge by the name of Angers or something like that and Supreme Court judge.

Q. Yes, but he expressed this opinion that there was no way he would be able -- that no lawyer in the Newcastle area would represent him. He was sure of that wasn't he?

A. Yes.

Q. And he would need a lawyer from outside the Newcastle area so he wanted the Fredericton area.

A. Yes. Yes.

Q. And of course, basically your response was, well, we don't have the Fredericton phone book. That was at 10:15. Right?

A. No. The reference -- it is all in the transcript but to the best of my recollection the first reference to getting a Fredericton phone book was around 10:45.

Q. And it took them what, 10:45 to 12:20 to get a copy of the yellow pages with lawyers faxed in from Fredericton

A. Faxed in, yes.

Q. You knew at that time anything Mr. Legere was telling you you would never be able to get into evidence because he wasn't given access to a lawyer.

A. No, I don't know that.

Q. What did you think?

A. As has been explained it is not our attempt to try and get anything in and I guess it would be Your Lordship that would decide that.

Q. You have got quite a smile on your face, Cst. Charlebois. But you felt --

A. There is nothing --

Q. -- you felt at the time you wouldn't have a chance in hell of getting it into evidence.

A. There is nothing that was said that would serve any useful purpose for us nor for you. That is probably the main reason why the crown has decided not to attempt to get it in.

Q. Because it wouldn't serve any useful purpose.

A. That's right. Maybe it was useful, stuff that was said in the cell area.

Q. Do you mean like what is on the taped interview was -- did he basically repeat any of the same stuff?

A. Oh, yes.

Q. But this way it is on tape and wouldn't serve a useful purpose; is that it?

A. That's right. Otherwise I think the crown, if they felt that it was useful, they would attempt to get it in.

Q. Isn't it true, Cst. Charlebois, that the feelings at the time amongst the police officers was that you would never be able to get any statements he made into evidence but you made use of the situation in order to obtain the information regardless.

A. No. There is nothing that happened from 7:25 on, okay, to 2:15 that would be useful. Okay. A lot of what was said there was said in the cell area. Okay. And most certainly those things assisted us in our investigation. We don't have to try and get them in.

Q. At what time did you cease to question Mr. Legere?

A. Would be when we brought him down to the cell area.

Q. You said you were around there until 7:00 in the evening.

A. That's right. Yes.

Q. Was Mr. Legere being questioned until 7:00 in the evening?

A. No. He was being -- we spoke to him during that period of time but there was no questioning whatsoever.

Q. At least not on tape.

A. No.

Q. You quit taping at what time?

A. We quit taping with the Uher recorder at 2:15 when we left that room.

Q. What times were you in either the interview room with Mr. Legere or in the cell area talking to him for the whole day of November 24th?

A. What are you asking?

Q. Could you tell the court the time periods that you were in either the cell talking to Mr. Legere or in the interview room talking to Mr. Legere on November 24th?

A. No. All I can say to you is that we brought him down that afternoon approximately 2:15 and we took his fingerprints, took photographs of him and then we placed him in the cell. Now, from approximately 2:30 until I left the cell area later that evening around 7:00, 7:15, I had numerous conversations with Mr. Legere. Actually a lot of the time I was listening to him. He was provided with a newspaper and I think he was given another meal and so forth.

Q. He had his supper.

A. Yes. But I can't account for you what transpired during that period of time because I wasn't taking notes.

Q. I don't want you to account for it. It is not necessary but just the fact that the same process kept up form 6:30 in the morning until 7:00 that night.

A. What do you mean? The same process?

Q. You were getting information out of Mr. Legere.

A. Yes. No, no. Actually you are right. The same process did continue as what occurred from 6:30, 6:35, 6:40, up until 2:15 up until 7:30, was all the same story. That we were basically listening to what Mr. Legere had to say.

Q. Oh, but yous asked your questions too.

A. Well, no, actually we didn't ask that many questions. Whenever we made reference to the murder investigations Mr. Legere would change the subject.

Q. Was that during the taped interview too that you didn't ask him any questions?

A. You are talking 2:15 -- up until 2:15?

Q. No. I am talking from -- what was it? 10:00 in the morning until 12:20. The transcript that I have.

A. No, there was questions asked about the murders, yes.

Q. But where there is no transcript there is no questions. Is that what you are trying to tell me?

A. I cannot account for that. Okay. I told you the Uher was activated at 8:35. We were relying on that Uher tape recording and were very disappointed that it didn't turn out.

Q. After Mr. Legere asked for a lawyer at 10:15 -- I have on page 17 of the transcript, page 17 and 18 -- page 37 of the transcript I have a comment from you. It says: "I am putting pieces together. We are going to obviously be moving to court with this. Okay. Putting pieces together."

A. Umm hmm.

Q. Okay. Again you say: "Okay. We put all the pieces together. I am quite confident it is going to point to you."

A. Umm hmm.

Q. And you say: "If you are a reasonable person you would admit to that."

A. Sure.

Q. So you kept after him. This is during the taping.

A. Yes. I just explained to you that I am not denying we didn't question him. You asked me to agree and I am telling you we didn't question him very much and with respect to that statement there, I am saying we are putting pieces together. We didn't put too many pieces together once Mr. Legere was arrested. Okay. At that point in time other than physical evidence. A lot of our pieces were put together before that. Okay. I would imagine that that statement itself makes reference to the pieces we had put together beforehand.

Q. Cst. Charlebois, you were getting a lot of information out of Mr. Legere after he asked for a lawyer that helped you put your case together; is that right?

A. That is not true.

Q. That is not true?

A. No. If it was, as I mentioned earlier, I would suspect that the crown, if it was that important to the case, I suspect that the crown would endeavour to try and get it in as evidence.

Q. But because of the information you got from Mr. Legere and that you didn't need Mr. Legere any more because then you were able to go to the other sources and have them verify what Mr. Legere was telling you.

A. Yes. I explained to you at 6:47 he was given the charter and also the secondary warning and regular police caution. I explained to you the statements he made with respect to Montreal, okay, and so forth.

Q. Were you in court when I questioned Cpl. Mole?

A. Not for the entire part of it, no.

Q. What about for the end of it?

A. I was in and out actually.

Q. Lucky you.

A. Yes.

Q. The last question I put to Cpl. Mole, because of the process of the statements that you were taking from him and continuing to question him after he had asked for a lawyer, I asked him if that was really acting in good faith and he couldn't answer the question. I will ask you the same thing. Cst. Charlebois, were you acting in good faith when you were taking that statement for a ten hour period?

A. Without hesitation, we were acting in good faith at all times. Okay. I think that if Mr. Legere was honest he would admit that we were very fair with him.

Q. You are having a hard time saying that without laughing.

MR. WALSH: That is not an appropriate comment.

A. I am laughing at your question actually.

Q. The record doesn't show his face, My Lord.

A. Yes.

Q. So let the record show that the witness is having a difficult time saying this without laughing.

A. I am smirking at your question because do you expect that even if I were dishonest that I would answer that and say, yes, I think we were. No. I am being truthful to you right now. We showed good faith all the time. We feel that we play within the limits of the law and my smirk is because of the question.

Q. Would you admit that the circumstances could look as if you weren't acting in good faith?

A. Mr. -- the reason that there was a delay from the time that Mr. Legere mentioned about a lawyer to Kevin and I, and when he consulted a lawyer at 12:20 was because of his -- because he could not decide who he wanted to contact. If at the time at 10:15 he says, yes, okay, I am going to contact a lawyer and I have one in mind and so forth, he would have been provided a telephone and the privacy to do so. That is all.

Q. If that was the case then there would be no problem with admitting the transcript into evidence of the whole interview would it? Which, of course, is what you don't want to do.

MR. WALSH: My Lord, that is not his --

THE COURT: Well, let's move on to something else. The crown doesn't want to put the transcript in. I don't know what is in the transcript. I gather probably there is nothing more than what has come out in evidence.

Q. Aside from Cst. MacPhee you met, did you see Cst. Bolduc around the area?

A. No, I didn't. When we entered the cell area Cst. MacPhee was the only one there.

Q. Who else did you see around that area?

A. No one else.

Q. You said there was so many people a while ago that you can't remember who they all were.

A. I am not talking cell area. I am talking about the general office area.

Q. General office.

A. It is completely apart and when I -- as I mentioned, as I testified, prior to bringing Allan Legere up to the interview room I made sure that there was no one else in the area.

MR. FURLOTTE: No further questions.

THE COURT: Re-examination?

MR. WALSH: No, My Lord.

THE COURT: Thank you very much then, Constable. You may be excused. Do I understand,Mr. Walsh, that is the close of the crown's case?

MR. WALSH: My Lord, it was the crown's intention that -- and subject, of course, to your opinion --we believe we have succeeded in covering the areas we wanted to cover in terms of the actual items that have been marked on this particular voir dire. It was the crown's intention

to track -- apart from the other items -- with respect to the bodily substances it was the crown's intention to track the individual bodily substances purported to be of Allan Legere used in DNA typing up to the point where they were handed over to the lab in Ottawa for DNA typing. Next week we will lead into the DNA typing. But it was our intention on this voir dire to lead the items up to that particular point on the issue for the purpose of the court in determining the legal questions involved, and with that the crown closes its case.

THE COURT: Is the defence prepared to indicate whether you are going to call evidence on this portion of the voir dire?

MR. FURLOTTE: We will not be calling any evidence.

THE COURT: Can we go on after lunch with argument on this?

MR. RYAN: No, I can't, My Lord, and I probably will be presenting the argument. I have three hours' worth of work to do before I am ready. I apologize to the court. My understanding earlier this week when we were talking about re-arranging the schedule, that the argument was not going to carry on until a later date.

THE COURT: Well --

MR. RYAN: But I can be ready for first thing tomorrow morning. And I will be.

THE COURT: Let's do it tomorrow morning then.

(COURT IS ADJOURNED. 1:05 p.m.)

(COURT RECONVENED AT 9:30 a.m. ON APRIL 26, 1991)

THE COURT: Now, this is the continuation of the same trial. We have the same persons present with the exception of Mr. Furlotte. He has been excused. He won't be here this morning. We were going to hear argument on this first aspect of bodily substances. Who is speaking for the crown? I would hope at an early stage of your presentation you would try to identify -- you would identify as clearly as possible the actual subjects of the voir dire on which rulings have to be made.

MR. WALSH: Fine.

THE COURT: Perhaps also you could indicate if there has been evidence given by any of these witnesses on this aspect of the voir dire that you wouldn't be presenting or seeking to present at the trial proper. I have in mind perhaps particularly evidence which involves some conjecture as to Mr. Legere's involvement in these homicides insofar as it justified the attitude of the police officers at the time.

The other thing I might ask you is this. Do you require or desire that the defence be required to state what items it may object to before you start or -- you are aware of --

MR. WALSH: Yes, My Lord. I don't require that, My Lord. I am fully cognizant of what issues the defence -- or at least the initial objections that defence have taken and I feel that in the law there is some obligation on the crown in accordance with some of the law to identify some aspects of those issues.

THE COURT: I remember one voir dire I had over the admissibility of evidence once where there were quite a range of subjects involved and the crown presented its arguments and then defence counsel said, well, we really have no objection to these items at all with the exception perhaps of one or something like that. The court still has to be satisfied that the evidence is properly admissible but it simplifies it somewhat if there is agreement.

Well, you go ahead then and then we will have a short recess and then call on Mr. Ryan.

MR. WALSH: Thank you, My Lord. My Lord, the crown's argument this morning with respect to the admissibility of the bodily substance standards of -- what the crown purports to be from Allan Joseph Legere. The argument we have this morning I would suggest is facilitated by two facts. One is that the crown has filed a pretrial brief with this court and with the defence in which it has attempted to outline the path that it intended to follow this week in relation to the evidence it wished to call and the reasons for that evidence and the legal principles associated therewith. The crown attempted to identify the legal principles that would govern the questions of the legal admissibility of these substances.

As well the crown's argument we would suggest is facilitated by the fact that the testimony is recent and is in large extent unnecessary to reiterate it in any large detail. It is as fresh in your mind as it is in anyone else's in this particular courtroom.

The other benefit we have is that I understand that we have not a daily transcription of evidence but we will have quiet a recent transcription of evidence should the court require clarification on any particular aspect of the evidence or should counsel have any disagreement with respect to any particular aspect, the court would be able to satisfy itself quite quickly on that.

With respect to this aspect of the voir dire, the voir dire -- the issues are dictated to a large extent by one of the initial Charter cases. That is Collins and the Queen from the Supreme Court of Canada which Your Lordship would be very aware of. In Collins they told the legal community how these matters are to be addressed. They began by saying that while the accused bears the burden of persuading the court -- that in this case 'his' -- Charter rights have been infringed or denied, once the accused has demonstrated that the search was a warrantless one the crown has the burden of showing that the search was, on a balance of probabilities, reasonable, in accordance with section 8 as the term 'reasonable' is meant in that section.

Secondly, this voir dire is governed by the other point that was made in Collins and that is if a search or seizure is unreasonable within the meaning of section 8 the burden is on the accused under section 24(2) to establish on a balance of probabilities that to admit the evidence could bring the administration of justice into disrepute.

The subject matter here entails in essence three general substances. They could be divided in greater detail but in essence they involve scalp and pubic hair taken in 1986. They involve scalp and pubic hair taken in 1989 and they involve the blood on a kleenex found in 1989.

THE COURT: Toilet paper.

MR. WALSH: Toilet paper, yes, My Lord. You are quite correct. On toilet paper in 1989. The crown in providing a foundation for argument on the legal admissibility did at the same time provide a foundation with respect to the continuity of the exhibits as they would impact on any questions of a legal admissibility and at this hearing the crown sought to prove up those items to the point where they were turned over for DNA typing.

All of these substances, My Lord, were either taken without a warrant or in one particular instance, with a warrant which was subsequently determined that a warrant was not available in law. Therefore, in accordance with Collins, the crown would be required to show, on a balance of probabilities that the seizures, whatever the seizures would be here, are reasonable and within the meaning of section 8 -- the legal meaning of 'reasonable'. That would apply --- however, does not apply to the blood on the toilet paper. That, in the crown's opinion, did not constitute a seizure within the meaning of the section 8 of the Charter. We have outlined that point in our brief.

The Dyment case, Mr. Justice LaForest formerly of the Court of Appeal of this province, had in Dyment pointed out that there is a difference between evidence that is seized and evidence that is gathered in the course of an investigation. He pointed out that he drew the line, so to speak, where an accused would no longer have an expectation of privacy associated with the item. If there was ever, I would suggest, My Lord, respectfully, a case demonstrating where something "was abandoned" or something which an accused would no longer have an expectation of privacy associated therewith, would be this particular issue here. This case where Mr. Legere blew into a toilet paper and threw it into a garbage can. I could not imagine any clearer example of something that came within the ruling of Mr. Justice LaForest or the understanding or the contemplation of his ruling. And I would refer the court to the Dyment decision of the Supreme Court of Canada on that point. The argument could be made I suppose that somehow the blood on the kleenex is connected to the kick which Mr. Legere received at the time of his arrest, and the argument could be made that therefore there is some illegality associated with that particular kick, therefore the substances in some fashion should be excluded. The substance being the blood on the kleenex.

However, that presupposes that what happened to Mr. Legere was unwarranted, unjustified and/or illegal. The court, if it reviews -- and it is I expect fresh in the court's memory -- the testimony of Cpl. Barter, Cpl. Lutwick, of the truck driver, Brian Golding, as to

the circumstances that were present there -- it is different in the light of this courtroom to actually reiterate the details of that particular incident, but the circumstances that was facing those people on that particular occasion, certainly, I would suggest, My Lord, justify the actions of the police officers on that particular case. They were in a very, I would suggest to describe it, very dangerous. Potentially dangerous situation. They were faced with they weren't sure who. They knew that they were looking for a particular man. They knew from the evidence of these police officers that the person they were looking for was an escapee. That he had been in prison for murder. That at least on the grounds that they had and what they had been briefed on, that this person was a major suspect in relation to multiple homicides. They were faced with a potentially very dangerous situation. The actions that they took to control that situation I would suggest was borne out by the evidence.

With respect, My Lord, and again the argument on the blood on the toilet paper and the legal issues there I have set out in the crown's brief.

With respect to the hair that was taken in these particular circumstances the first question for the court is whether this hair, either in 1986 or in 1989, was taken within -- lawfully, as that term is meant within section 8 of the Charter. Was the hair taken in 1986 lawfully taken, and was the hair taken in 1989 lawfully taken.

Now, with respect to the items taken in 1986, the scalp hair taken and the item taken by the warrant

subsequent, the Legere decision which has been filed with this particular court has ruled on the admissibility of those. At least the admissibility of the hair taken following his arrest, the scalp hair taken without the warrant, and it has ruled on the admissibility of hair taken on July 1st of that year by a warrant. We have entered into evidence evidence of pubic hair taken subsequent to his arrest by a warrant but was not introduced in the Legere decision. However, the same principles would apply inasmuch as that was taken before the July 1st warrant.

One thing I would ask the court to reconsider is although the Legere decision has concluded in the circumstances of the evidence as the record was developed in that particular case, although that decision has concluded that the scalp hair taken from Mr. Legere was not taken in accordance with section 8 -- it was illegally obtained -- and that they have concluded, based on other case law, that a warrant is not available to remove bodily substances outside the special requirements of the code for breathalyzer-type situations. I would ask the court to reconsider the record associated with the scalp hair that was actually taken. In Mr. Justice Angers, I believe, in the Legere decision pointed out that for their purposes the rest was a fair accompli and as a result he left the issue of whether or not hair could be taken as an incident of arrest to a later day. He simply indicated that on the record they had the rest was a fait accompli in 1986. The scalp hair then -- it could not be argued that it was taken as an incident of arrest. We attempted to develop, particularly through Staff Sargeant Johnston,

a record to indicate that in fact it was taken as an incident of arrest. That Staff Sargeant Johnston, you will remember the evidence, when they arrested Mr. Legere, that he had a number of things that he had to do. That they were in the process -- they had information coming in. They were in the process of obtaining warrants to search houses for the gathering of evidence, and his evidence I would suggest pointed out that when he could get to that particular aspect he went to Mr. Legere and then Mr. Legere objected. He sought legal advice. Staff Sargeant Johnston and his investigative staff sought legal advice and by the time all of those things transpired, yes, there was a considerable period of time that had elapsed between the time it was actually taken and the time he had been arrested.

The case law is also clear that the seizure does not have to be contemporaneous with the arrest as long as it is incidental to it. There is a decision I have referred to in my brief in relation to the Ontario Court of Appeal decision in Miller in which an item was seized eighteen hours after the arrest. They have referred to American case law in which this has been looked at in depth in terms of the time frame following an arrest, and the most recent search and seizure text in Canada, Hutchison and Morton, point out at page 3-23 that once an arrest has been made and the accused taken into custody the right to make a search continues. What was facing, at that point in time Sgt. Johnston, was a situation where he had a man under arrest but he had a number of things to do in the investigation by the time he could get to it.

I would ask the court to reconsider whether or not, on the record that we have developed in this particular situation, whether or not the scalp hair taken from Mr. Legere in 1986 was taken incidental to an arrest. However, if the court concludes that the decision in the New Brunswick Court of Appeal, that that hair was taken illegally still applies, then likewise the reasoning associated with the fact that you couldn't get a warrant and the pubic hair we have taken in 1986 was obtained with a warrant.

THE COURT: Well, you are saying there that the New Brunswick Court of Appeal had different evidence before it than we have here as to the circumstances? I haven't read that recently.

MR. WALSH: Well, from the New Brunswick Court of Appeal, from the record that -- at least what the New Brunswick Court of Appeal pointed to as evidence, they indicated that / the arrest was a fait accompli. Now, it may be what we attempted to establish is on the record for this court. That in fact it was not a fait accompli. That the arrest was still continuing -- the officer, because of the seeking of legal advice by Mr. Legere, by the officers attempting to seek legal advice, by the fact that the officers were doing things that was in part of their investigation, executing a warrant and that, that in fact when they got around to that particular aspect of the arrest it was still incidental to the arrest. I ask the court to consider that, but even if this court concludes that the hair -- that the rulings of the New Brunswick Court of Appeal associated with the scalp hair and the rulings of the New Brunswick Court of Appeal in Legere as related to the warrant on July 1st would have

equal application to the warrant that was executed previous to that. I would suggest that the hair is still, for argument that I will give in a few minutes, is still admissible under the rulings of that particular court. The Legere decision has said that that hair would have been taken illegally in the sense of section 8. The other issue, when we are dealing with solely the question of whether or not the hair was taken lawfully, the other issue is related to the hair, scalp and pubic hair, taken by Cpl. Mole in 1989. I would think, My Lord, that the evidence is clear that that was taken incidental to an arrest. The evidence would be clear on that point. It is also I would suggest both in 1986 and 1989 clear that the police officers would have had reasonable and probable grounds to affect an arrest both in '86 and 1989 and on the authority of Cloutier and Langlois of the Supreme Court of Canada once police officers have reasonable and probable grounds and have affected an arrest, they are entitled to search for means of escape, weapons and for evidence.

There is no added requirement that they have reasonable and probable grounds to search. They get their grounds from the arrest and what flows from the arrest is the right to search.

If the court concludes -- and if you look at the evidence, for example, of Cpl. Mole both in 1986 and 1989, the grounds for the arrest were clearly outlined for this court by him as to why this man was arrested on those particular occasions, and if the court -- I would ask the court to look at the warrants

that were filed in the summer of '89. To look at the grounds that were being relied on at that point in time.

I would suggest, My Lord, that it would be clear that these officers had every reasonable and probable ground to arrest this particular man.

Now, the question is, if in fact the court concludes that the arrest either in 1986, 1989, if the searches and seizures were taken incidental to the arrest, the question becomes would such a seizure, even though incidental to arrest, would it be authorized in the law. I am attempting to follow here the dictates of the Supreme Court of Canada as to how to approach these issues. If you look first of all at the case law existing up to the present, you will see from Langlois and Cloutier that the police officers have a right to search for evidence. You will note that the Alderton decision in the Ontario Court of Appeal rules that police officers have, as an incident of arrest, the right to take pulled scalp hair, plucked scalp hair. You will note that Mr. Justice Russell of the Queen's Bench of this province has ruled recently in The Queen -vs- Jonathan Paul -- he has followed Alderton and ruled that police officers have that right, and you note, My Lord, that the Legere decision has not ruled on that. They left that issue to another day. It was not a live issue for them in that court at that time.

Apart from the existing case law, My Lord, Cloutier and Langlois points out that when you are looking at a claimed right of police officers to do something pursuant to the common law, you must look at a number of aspects. What is claimed here, apart from the case law,

what is claimed here by -- and the case law certainly supports the crown's position that the police officers have a right to take plucked hair as an incident of arrest, but we would also point out that apart from the case law that the common law would authorise -- the case law obviously interprets the common law, but an original consideration would be whether or not, apart from the case law, they had that right incident to an arrest to do waht they did in this particular case.

In Cloutier and Langlois -- and if I may be permitted just to a brief quote. I have referred to it at page 20 of my brief. Madame Justice L'Heureux-Dube in that particular decision said this:

> "In determining the exact scope of a police power derived from the common law, this court often had recourse to considerations of principle, and the weighing of competing interests involved. Competing interests are important factors in determining the limits of a common law power. When the power in question comes into conflict with individual freedoms, it is first necessary to decide whether the power falls within the general scope of the duty of peace officers. This duty, clearly identified, must historically have been recognized by the courts as tending to promote the effective application of the law."

I would ask the court to refer back, to remember, the evidence of Staff Sargeant Johnston with respect to his training. The fact that in 1986 this was the first time he had ever been refused the right to take hair. That he used the seizing of hair samples as an investigative aid. It was an important investigative aid. The other thing I would ask the court to reflect back on is the evidence of Mr. Evers who provided historical background associated with, in this country and particularly in this province, how long hair has been

recognized by the courts as an important evidentiary item. Mr. Evers reflected back in the early '50's I believe he said before -- when it was first actually started to be used. He has given evidence of the number of actual cases and the number of -- that he would actually handle in the run of a year and in fact the R.C.M.P. lab have a particular section associated with hair and fibre. Historically there is certainly an historical precedent for the common law claimed right of police officers to take hair.

Secondly, Madame Justice L'Heureux-Dube goes on:

> "The Court must determine whether an invastion ofindividual rights is justified. It is therefore necessary in this second stage to determine whether an invastion of individual rights is necessary in order for the peace officers to perform their duty, and whether such an invastion is reasonable in light of the public purposes served by effective control of criminal acts, on the one hand, and, on the other hand, respect for the liberty and fundamental dignity of individuals."

I would ask the court to reflect back on the evidence of Dr. Fourney and the evidence of Mr. Evers. Recently forensic technology is dynamic. It is ever changing and Dr. Fourney's testimony would indicate that root hair is a very important source for DNA forensic typing and the claimed power of identity associated with that type of forensics. So what is happening is that there has been an even more important need, an added need, to have the police officers -- to give them that right to obtain that particular substance. It is reasonable and the intrusion associated is minimal compared -- when we are looking at the public's need to be protected.

I would also ask you just to reflect back on the manner in which Sgt. Turgeon, Cpl. Brennan and Cpl. Mole took the hair. It was done -- they met at least the very minimum requirements of dignity. They did nothing to Mr. Legere that would be considered to be untoward in any fashion. So the manner in which these things are taken is important in looking at this particular right.

If the court was to conclude that, yes, at common law they have that right. The case law supports it. Is it reasonable? Well, what the crown attempted to do, My Lord, as set out at page 24, is to provide a basis for assessing whether it should be reasonable. At page 24 the crown has pointed out that the reasonableness of the common law's authorization of such seizures as an incident of arrest should depend on two key factors. Whether independent of the reasonable and probable grounds necessary to affect arrest, there exists reasonable and probable grounds to seize the bodily substance from the accused. Now, the crown is suggesting perhaps go even farther than the Supreme Court of Canada said is necessary. They say that once the arrest is affected on reasonable and probable grounds, the search derives from the arrest. You do not need independent justification, but the crown is arguing that, look, they should be entitled to take a bodily substance from the accused such as plucked hair. Perhaps add another factor. Do they have, independent of the arrest, reasonable and probable grounds to want this hair -- to believe this hair is important? Again I would ask you to reflect on the evidence of Cpl. Mole associated with why they wanted the hair. The evidence of Sgt.

Johnston. Whey they wanted the hair in 1986. Why they wanted the hair from this man in 1989. Certainly a substantial reasonable and probably grounds for that.

THE COURT: It wasn't for DNA purposes in 1986.

MR. WALSH: Not in '86, no, but it was for a purpose related to the case they were investigating. It was for an investigative purpose. It was for an evidentiary purpose and that is the key factor. What were the reasonable and probable grounds for wanting it? It wasn't simply a fishing expedition. In fact it wasn't. It was directly related to items that they had seen at the scenes of those crimes that they wanted to make comparisons. It was a very reasonable need that they had.

The other aspect we had asked the court to review is that in addition to reasonable and probable grounds to seize, the crown suggested that one consideration is whether the bodily substance seized was epidermal in nature as opposed to sub-epidermal; meaning on top of the skin surface as opposed to under the skin surface, and therefore, we are not suggesting here today that the police have a right -- and obviously the law would not support it -- have a right to draw blood as an incident of arrest. What we are suggesting, there is a distinction to be made between items of these particular natures. That plucked hair is a justifiable and a very minimal intrusion under the circumstances.

Since the crown's brief has been prepared there has been a recent report from the Law Reform Commission of Canada. It is Volume One, Title 1, 33, Recodifying Criminal Procedure. In that particular report

they say something that is very interesting. In there they are now recommending to Parliament that police officers, even apart from incidental to an arrest, the police officers be required to obtain a warrant or have the authority to obtain a warrant to seize certain bodily substances as investigative aids. We have suggested -- a warrant is not available at this time. We are suggesting though that the police officer should have reasonable and probable grounds which is consistent with the Law Reform Commission's recommendation of a warrant. You would need reasonable and probable grounds. But a number of the items that they are suggesting that police officers now have a right to obtain or should have a right to obtain is hair. The taking of hair. Their reasoning for suggesting that is consistent with the position we have taken here, and at page 62 of the report they say:

"The inclusion of each -- "

-- that is the substances they are suggesting can be taken --

> "-- represents a balancing of the potential probative value of evidence that may be obtained through its use against the intrusion it involves."

So what they are simply outlining is, look, with reasonable and probable grounds the intrusion is minimal and the need is great and the value is great.

I am hesitant. I did it in the brief. I am hesitant in some courts to suggest that we juxtapose or look at the American position, but there is some need in search and seizure cases to do so inasmuch as the Supreme Court of Canada has pointed out that the purpose of the Fourth Amendment of the American Constitution is

the same purpose that section 8 of our Charter is, and that is to protect people and not places. So their intent is the same. I have set out in the brief the American position. They have gone much farther than we are even suggesting here. They have, as a right under the Fourth Amendment, to actually obtain blood. Most of the DNA hearings and the DNA cases in which DNA is looked at are hearing derived from applications from prosecutors to obtain blood standards from accused people, and the courts are looking at, well, what is the value associated. So the American position to some extent is something that can be looked at. We are not asking to even go that far.

The other issue is were the seizures carried out in a reasonable manner. Again I would ask you to look at the evidence of Sgt. Turgeon, Cpl. Brennan and Cpl. Mole.

If these hairs, either the hairs taken in '86 or in '89, were not taken incidental to arrest or if they were and the court concludes that taking hair incidental to arrest is unreasonable within the meaning of section 8, then obviously we must look at the so-called exclusionary provision of the Charter of Rights under section 24.

Very briefly -- and I have set it out in my brief on law -- we would ask the court to look -- we have an unusual situation here. We have hair that was taken for another crime in 1986 that was used in a separate crime a number of years later. In that regard we ask the court in our written argument on law to look at what the connection is between 24(1) adn 24(2). Was

the hair used in 1989 for DNA typing, but obtained in 1986 for another crime, was it used -- in the words of the Charter. Was it obtained in a manner that infringed one of the right? I would ask the court to consider that in its deliberations, and again I have set it out in our argument on law.

Now, going to the next aspect of section 24, if the court concludes that, for whatever reason the court relies on, that any of the taking of these hairs, whether in '86, whether it be the scalp or pubic hair, or in '89 the scalp and pubic hair, was taken in such a fashion that it is not reasonably taken under the meaning of section 8, then should the evidence be excluded -- and this is where the onus is different. The onus then is on the accused to show on a balance of probabilities that it was and would -- excuse me -- could bring the administration of justice into disrepute.

The Collins case clearly pointed out that there are a number of groups of factors that the court must consider in assessing itself or assessing that particular aspect. The first factor is set out in the brief on law at pages 11 to 15. The first group of factors that the Collins' decision says the court must look at is as to the fairness of the trial. One of the key elements there is whether real evidence--the items in question were real evidence that existed irrespective of the violation of the Charter and its use would not normally render the trial unfair. What they are pointing out there is that although there may be a violation of a Charter right, if the evidence that was obtained existed irrespective, then it would not

under the first group of factors, tend to make the trial unfair. An example would be, for example, if a gun was seized but it was seized in circumstances in which a person's Charter right had been violated, the actual gun existed irrespective and the court would conclude that is real evidence and under that factor it should not be excluded. It would not tend to make the trial unfair.

What you have here is an issue with respect to the hair in 1986 that was used in 1989. The crown's argument is that that hair was real evidence that existed irrespective of any Charter violation. It was pre-existing real evidence. It was hair held in slides in the R.C.M.P. Forensic Lab in Sackville, and it was certainly pre-existing real evidence. In 1989 the hair is removed from the body of Mr. Legere and the question becomes, well, is that real evidence?

In the brief in law we have pointed out that that is in fact -- we have argued why we consider -- the crown -- considers that to be real evidence. There is case law to support that particular position. Again since the writing of that brief the Law Reform Commission, in the report that I pointed out, has made another interesting comment when they were listing all the things that they suggest police officers should be able to do as a warrant and one of them being hair. They say:

> "The procedures for which a warrant may be issued --"

-- and this is their recommendation.

> "-- are those designed to obtain real evidence (in the sense that term was used by the Supreme Court of Canada in the Collins case)."

That is a clear indication that the Law Reform Commission of Canada interprets the Collins' decision on real evidence to include hair taken from the body. It existed irrespective. It is not similar to the line-up evidence in which the accused is involved in the construction of evidence. His hair existed irrespective.

THE COURT: What page was that of the Law Reform report?

MR. WALSH: That is I believe at the same page. 64, My Lord, if I am not mistaken. 62, My Lord. Page 62 of the Law Reform Commission report.

The second group of factors, and probably the most important group in relation to the determination of whether 24(2) applies and whether the evidence could bring the administration of justice into disrepute, involves the seriousness of the violation -- of the Charter violation. At pages 16 and 17 of the crown's brief -- perhaps if I may indulge -- at page 16 the crown took the following position:

> "The Crown intends to lead evidence as to the grounds upon which these hair samples were seized back in 1986, as to the reasons for the use made of the samples in the course of the investigation in 1989, in order to assist the court in assessing the seriousness of any violation as contemplated by the Supreme Court, and also in assessing whether or not the police were acting in good faith."

Again at page 17 the crown took the position that:

> "Likewise in keeping with the Collins' test the Crown intends to lead evidence with respect to the urgency and/or necessity associated with using these samples in the investigations as well as evidence pertaining to alternative investigatory techniques used and/or available to the police during the investigation. It is the Crown's position that such evidence will be favourable to the Crown in the assessment of the seriousness of any Charter violation."

The evidence of Cpl. Mole, Staff Sargeant Johnston, Sgt. Germain, Dr. Fourney all relate to these issues. The police officers had reasonable and probable grounds which the Supreme Court of Canada has said is a key element in assessing the seriousness of the violation. If the police officers have no such ground it makes the Charter violation serious, but in these particular circumstances the police officers had reasonable and probable grounds to do what they were doing. They relied on crown counsel's advice. They relied on law of the Ontario Court of Appeal. They relied on the New Brunswick Court of Appeal. They relied on exercising search warrants. I would ask the court to look at the manner in which those search warrants were drafted as to what the police officers were attempting to comply with the elements of the law. They were driven at the end in 1989, in October 1989, these police officers had exhausted all avenues of attempting to obtain a known bodily substance of Mr. Legere so that they could use in DNA typing. Cpl. Mole made it very clear that in his opinion and for the reasons he outlined, that Mr. Legere was for him the person who purpetrated these crimes and he had been driven to that. He had even after his lab had told him that there was hair available to be a known standard for DNA typing in June 1989, even after he had been told that he went to the extent of trying to find the knife that had been used to stab Mr. Legere previously to see if he could get some blood off it to use that as a standard, because he was aware that the issue of that hair was alive in the Supreme Court of Canada.

Now, that is an example of a police officer who is conducting himself in, I would suggest, the finest manner. He is showing the utmost respect for the law. They go to the extent of getting a warrant to obtain a fixed tissue so that they wouldn't -- after they were told that hair couldn't be used they went and got a fixed tissue. They did it by a warrant. An extensive warrant.

I would ask the court to please look at that.

That option was no longer available to them. They were told by the lab. You heard Dr. Fourney's testimony. Then they attempted to use the ELISA technology to -- perhaps it was not as specific for them -- they attempted to use the ELISA technology. They didn't go up and go into anybody's office -- the prison and say, look, I want his blood grouping, which they needed. He makes -- Officer Mole makes a request under section 8 of the Privacy Act. Then to get whether or not there would have been a form -- he didn't ask for the blood grouping type. He asked if there would be a form. Then they go to the extent through Sgt. Germain of getting another warrant. And then the ELISA technology tells them it can't help them. In October of 1989 they had nothing left. They had complied with the law. They had done everything humanly possible in their investigation to obtain a substance for this -- what they considered to be a very, very important testing procedure.

When the court assesses the seriousness of these particular -- even if the court does consider any of these substances were taken in violation -- surely the

police officers have met, on the record presented in this case, have met a high standard.

The final group of factors is whether the disrepute that would be associated with excluding the evidence and under these particular -- or including the evidence and under all the factors that I have outlined certainly the good faith, all of these go to whether or not the court should exclude the items here. As I pointed out previously, My Lord, the balance of probabilities under 24(2) lies with the accused, but even if -- I would go so far, My Lord -- even if the onus was different the crown would have met that onus as well.

The case law we have outlined in our brief. It is not necessary to repeat. The case law on when the courts -- when they are looking at 24(2) we have listed at the end of our brief the recent Supreme Court of Canada decisions and when they would exclude evidence under that provision, and I would suggest that the circumstances of the cases in which they would exclude have no resemblance to the record that has been developed before this court this week.

On February 4th at the hearing we pointed out the fact that the crown was attempting to show and introduce into evidence these bodily standards. We pointed out the fact that they are a critical part of the DNA typing obviously. Without the standards there is nothing to compare it to. We pointed out through Dr. Fourney there is the lane to lane comparison and that the hair in '86 was at that time put in one gel and a lane to lane comparison was to be made, and that the items taken in 1989 are put in another gel for a gel to gel comparison.

These items are critical. An important piece of evidence that the court -- and that must be considered in the assessment, as to the importance of the evidence in this particular regard, in assessing whether the administration of justice could be put into disrepute.

The crown submits that the evidence that has been provided or been elicited for the record this week demonstrates clearly that not only has the letter of the law been complied with, but more importantly the spirit of the law, as demonstrated through the evidence of all these police officers has been complied with.

Finally, you had asked me at the beginning, My Lord, to at some point give direction as to what evidence we would not be -- at least the evidence we would not be eliciting at a trial. I would point out that the best way I perhaps could do that is to point out that on these hearing, as this court is aware, it was important to elicit reasonable and probable grounds and that requires bringing in all different kinds of sources of information. Now, obviously once the court makes any rulings on a legal admissibility and should the court rule that these substances are admissible, then it is not necessary and certainly not relevant before a jury, since you have already made your legal determination, for any evidence to be elicited that I believe would require reasonable and probable grounds to be put before the jury. Because the only reason to do that is for a legal question, and it is not necessary. So any evidence associated with reasonable and probable grounds is really not relevant before the actual jury. And the evidence related to, well, what alternative

investigative techniques and why these techniques were being carried out is not relevant for the jury. The warrants, for example, are not relevant for the jury. Sgt. Germain's testimony would not be relevant for the jury. Any of the evidence that is related solely to legal questions is not relevant for the jury. The factual basis though and the factual foundations obviously for the crown's presenting its case to prove that Mr. Legere has committed these crimes obviously would be relevant.

THE COURT: Well, if a police officer were to avoid showing reasonable and probable grounds in his direct testimony/ at the trial before the jury, if the defence were to cross examine him on whether he had reasonable grounds to do something, that would open the way for crown on re-examination to bring out all his reasons for reasonable and probable grounds. Would you agree with that?

MR. WALSH: Not really, My Lord. I hadn't addressed the issue but I will try right now. I would reserve the right to perhaps make an argument later on that, but it would seem to me that for defence counsel, under these circumstances, to cross examine a police officer in the trial proper on his reasonable and probable grounds would be an extremely dangerous tact to take, but the most important thing for the court is whether it is relevant. Although he certainly has the right -- defence counsel have the right to cross examine it has to be related to --

THE COURT: Well, I don't think it is -- I quite agree with you. It might be very poor tactics for the defence

to take but I think a court would be very reluctant to prevent the defence from cross examining on those grounds if they wished to do it.

MR. WALSH: Well, the other argument would be --

THE COURT: Perhaps we are just speaking --

MR. WALSH: No, but apart from perhaps poor tactics -- you know, it is not for me to say, but the other aspect the court would have to consider is whether or not what was happening was relevant to what the jury's consideration. Is there anything that would be -- if they were getting into, for example, what law they relied on, would that be a relevant concern for the jury? Because it is certainly nothing I could see that would be required for them to take into consideration in determining the factual admissibility as opposed to the legal admissibility.

THE COURT: Well, if the defence were to want to show that a police officer acted maliciously -- they might want for some purpose to show that a police officer had acted extremely maliciously in doing something or other and might want to get into that.

MR. WALSH: Yes.

THE COURT: I suppose one aspect -- and I am not trying to suggest, you know, what the defence should do or shouldn't do -- one aspect might be the examination on the kicking of the accused when he was arrested and they might endeavour there to show that that was a malicious thing and so on and the crown might in re-examination might want to get into the reasons, the background information, the agony of collision if you want to call it that that you referred to earlier and so

on at that point to show that perhaps a misjudgment had been made or it may have amounted to more than misjudgment, but you might want to get into the background there.

MR. WALSH: Yes.

THE COURT: That would be an example perhaps.

MR. WALSH: Yes, My Lord, I could foresee that happening. Again from the crown's point of view it is -- when it comes to actual --

THE COURT: You are not going to be going into reasonable and probable grounds.

MR. WALSH: No. It is not relevant to what the jury has to decide once the court makes its conclusions. A lot of the evidence -- and one of the things we were very aware of as a result, and that is part of the reason why we provided the legal brief and part of the reason why we provided it to the defence -- we wanted to chart out where we were going so all parties understood why we were bringing in these sources of information and these sources of evidence that would normally not go before the jury to assess the legal question. It would be dangerous for me on my feet today to suggest to the court, well, we won't be using this witness, and we won't be using that witness. There may be other reasons important for the jury that we would need to use it. I can simply point out to the court that it would not be the crown's intention to elicit any evidence that was simply required and only relevant to the question of legal rights on the trial proper.

THE COURT: If there is any witness who has testified here at the voir dire who you didn't require to call or didn't

propose to call, I think you should advise the defence of that so that they can determine whether they want him called. I think once you list these people on an indictmetn then they must be made available to be examined.

MR. WALSH: Oh, yes. For example, just to give you -- the clearest example I can think of right now is Sgt. Germain. Sgt. Germain is not going to be on any -- has not and will not be on any,that we know of, any indictment list because his evidence was related to the investigative techniques, the warrant and things of that particular nature. That is probably the clearest example I can give, but the defence will be made fully aware of all the witnesses that we intend to call and if there are any witnesses that they believe -- they thought we were going to call, they can certainly inquire.

THE COURT: Another thing that crown and defence should be agreed on and that is whether -- if it is pertinent, mind you, and that may depend on the ruling in this, but for instance Cst. Houle wasn't called. You agreed on what he was going to say.

MR. WALSH: That's correct.

THE COURT: Does that agreement extend over to the trial if it becomes pertinent or --

MR. WALSH: Well, the problem we have is that -- as Your Lordship is probably aware. In a case of this size there are a number of -- we are only dealing with a limited number of items here. Some of these officers have greater involvement in terms of the items that they actually would have handled so we wouldn't really have

similar circumstances. Cst. Houle, for example, would have handled quite a large number of items so -- but we will attempt -- the crown certainly will do anything we can to facilitate the trial in terms of any agreements that we can make. If I may have a moment, My Lord. (Pause) My Lord, that would conclude my responsibilities here. Mr. Sleeth, however, would wish to address the court on the oral statement which is the other aspect of this particular voir dire.

THE COURT: Fine. Mr. Sleeth?

MR. SLEETH: My Lord, before doing so you had mentioned that you might want to break and give Mr.Ryan an opportunity -- he might want, while it is all fresh in our minds, to address the issue of bodily substances. If he wants to do that. I want to be fair.

THE COURT: Do you --

MR. RYAN: Makes no difference, My Lord. I was prepared to finish after the crown at one time.

THE COURT: Well, I think we will go ahead with you, Mr. Sleeth, first. Do you want a break for a few minutes? How long do you --

MR. SLEETH: I expect I would be about half an hour, My Lord.

THE COURT: Let's take a little break here for ten minutes.

(RECESS: 10:45 - 11:10)

THE COURT: Now, Mr. Sleeth.

MR. SLEETH: My Lord, before beginning I would note I have just passed to my learned friend, Mr. Ryan, and to the Clerk of the Court two recent decisions from the Supreme Court of Canada. Judgments in Smith and the

judgments in Evans to which I will be making some reference.

If it pleases the court, My Lord, I would like, first of all, to give sort of a little sketch or road map or where and how I intend to proceed. I want to make reference first of all to the statements which we will be submitting are admissible in law and then I propose, My Lord, to briefly examine some elements of law which would affect statement-taking and what was being done by the police officers and how they were acting at the time, and finally, My Lord, I intend to review briefly some of the facts and some of the actual statements which were made. Some of the declarations made by Mr. Legere. These things are all fresh in our mind right now, My Lord, and I do not propose to regurgitate four days of testimony to you, but I do intend to mention some highlight statements which I believe to be significant. I would note again, My Lord, that we are interested in submitting to you, firstly, that statements made by Mr. Legere between approximately two o'clock on the morning of the 24th until 7:25 when he was taken to the police interview room in Newcastle, all his declarations are admissible. I might note at the outset that the statements made to the truck driver are I think automatically admissible anyway. He wasn't a detainee. He was the detainer and he wasn't in custody at that time. Those statements were alluded to during the voir dire for other reasons to show the later reasonable and probable grounds for police officers to be acting.

THE COURT: Something that occurred to me --

MR. SLEETH: Yes, My Lord.

THE COURT: -- during the voir dire was the -- perhaps there is no necessity for it on the voir dire I suppose. The young lady, the R.C.M.P. officer, who allegedly had been apprehended in Sussex was it? She wasn't called as a witness on the voir dire.

MR. SLEETH: No, My Lord.

THE COURT: Were there statements made there as well?

MR. SLEETH: There were.

THE COURT: Are you calling her as a witness --

MR. SLEETH: On this? No, My Lord.

THE COURT: She is not being called as a witness.

MR. SLEETH: No.

THE COURT: I don't mean at the voir dire. At the trial proper.

MR. SLEETH: At the trial. Oh, yes.

THE COURT: She would be a witness.

MR. SLEETH: Yes, My Lord.

THE COURT: But would there not have been conversations that she would be testifying to?

MR. SLEETH: Yes, My Lord, but at that time Mr. Legere would not have been a person in custody or a person speaking to a person in authority with a power to do anything to him at that time. The person, if you want to call it a person in authority, at that moment was Mr. Legere.

THE COURT: Umm.

MR. SLEETH: As I said earlier when referring to the truck driver, Mr. Legere at that time was the detainer. Not the detainee.

THE COURT: Well,I only raise it -- I was wondering if there were any question --

MR. SLEETH: It is a good question, My Lord, because -- up to now, as with most other people, all the court can operate on is newspaper reports or what you see in there. Nothing -- no evidence is put before you as to what might come from her.

My Lord, you again heard how Cpl. Barter and other stopped the accused, arrested him. You then heard along scenario related by a series of police witnesses about what was done to him afterwards. Again I repeat. We are not going to be attempting or asking you to rule on any remarks which were made after 7:25 in the interview room. Those remarks, any remarks made there, were introduced solely to set the full scenario and deal with probable cause or reasonable and probable grounds and good faith. But I would note, My Lord, that under the pre-Charter rules all statements made by Mr. Legere were voluntary. I would submit that to you. I would submit for instance that the reference made in his testimony by Cst. Charlebois indicates just how voluntary everything was. He talks about the meeting that took place with Mr. Legere, Cst. Mole, I believe he would have been at that time, and Sgt. Johnston at that time. Was just a family reunion of old friends. All the evidence we have heard here, My Lord, would indicate, My Lord, that all the decisions to speak, to make utterances, came from Mr. Legere. He was the one who was, as Cst. Bolduc referred it to, a motor mouth. He was the one who couldn't be stopped, as Sgt. Johnston put it. He was the one who elected to make every single utterance. He was not questioned. All that happened was that occasionally there was an opportunity

for a police officer to put a question in the midst of this flow of verbal remarks coming from Mr. Legere.

My Lord, the police, I would submit, are not in fact compelled to refuse to listen to any person who persists in talking when that person would appear to have declined his right to a lawyer.

A series of opportunities were given to Mr. Legere, My Lord, which should have alerted him at the time to his need for counsel. He was given cautions. He was given Charter notices and Mr. Legere was at all times -- and this was the significance of one of the remarks made to the truck driver, and I will be coming back to the law on that point, My Lord -- he was at all times a person who, as he put it to the truck driver, knew that he was a suspect for three or four murders and then went on to add -- but when he was asked whether it was so he would not confirm or deny. He said, 'Doesn't matter. He would be framed anyway'. I submit those words are particularly significant, My Lord, as to the consciousness of this man about his status before he even met with Cpl. Barter of the need he would see to have counsel because of the suspicion and because of the possibility of framing. That will all be significant, My Lord, when we turn to the Smith and Evans judgments.

A series of warnings, My Lord, Charter warnings and cautions, were read. The police I submit are not -- as I said a moment ago and I would like to turn to some elements of law here -- they are not obligated to refuse to listen to a person who may have declined his opportunity for a lawyer.

I would refer, My Lord, first of all in the decision of R -vs- Smith (J.L.) I refer to it that way, My Lord, because you have now, as does Mr. Ryan, a copy of a more recent Smith case, but the one I am referring to Smith (J.L.) is reported at 99 National Reporter, commencing at page 372. It is also contained in 1989 6 Western Weekly Reports, 289. This case involved an accused who was arrested and charged with robbery. He was advised of his right to counsel and he caused a two-hour delay getting to the police station. Mr. Justice Lamer, as he then was, noted -- and I am referring to page 377:

> "In the case at bar the police on the way between home and the police station, advised the Appellant of his right to retain and instruct counsel. The Appellant expressed several wishes but never expressed a wish to retain and instruct counsel."

At no time in all the evidence which we have heard here, My Lord, did the accused, up until about 10:15, talk about very seriously retaining and instructing counsel. We have suddenly got into the business of faxes. Reference to Newcastle lawyers not being good enough for him. Up until that time there may have been mention at 6:35 of counsel but that was all. There was no diligent pursuit by him whatsoever.

At page 378 His Lordship continued:

> "The police officers in these circumstances were justified to continue their questioning and to act as they did. This court in Regina -vs- Tremblay clearly indicated at page 439 that the duties imposed on the police officers as stated in Manninen were suspended when the arrested or detained person is not reasonably diligent in the exercise of his rights."

And continued on for a good reason why this would be so.

For a court that is sometimes criticized for being overly academic, his reason, as stated in paragraph 14, was very trenchant. Right on point.

> "This limit on the rights of the arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain."

Again here, My Lord, there was no diligent effort on the part of this individual to obtain counsel. The police were then entitled to continue speaking with him. They were not required to cease any commentary or any talk with this man who was persistent in his determination to speak with them.

In Mannenin, My Lord, which was alluded to in the Smith case -- R -vs- Mannenin, 1987 1 Supreme Court Reports starting at page 1233. Specifically at page 1241, there it was noted by Mr. Justice Lamer again:

> "It is not disputed that the respondent was informed of his right to retain and instruct counsel without delay. Further, the sufficiency of the communication is not challenged. The respondent's comment on being informed of his right to counsel, was: 'Prove it. I ain't saying anything until I see my lawyer. I want to see my lawyer.'"

This was, I would submit, as His Lordship indicated:

> "There could hardly be a clearer assertion of the desire to exercise the the right to counsel."

There was no such assertion here,My Lord,at any time until possibly around ten o'clock when it became clear that this man did in fact appear to want counsel. The police officers at all times were not dealing with a situation where the accused had asserted a right, a fundamental right, recognized under sections 10(a) and 10(b) of the Charter.

Being reasonably diligent, My Lord, in seeking counsel was first set out I believe by a person not normally seen as particularly pro-crown, Madame Justice Wilson, in the early decision, Regina and Black. It is found, My Lord, in 98 National Reporter at page 281. I would refer specifically, My Lord, to comments made by Madame Justice Wilson at page 289 where she said:

> "If the accused or arrested individual exercises the choice of not requesting an opportunity to retain and instruct counsel and speaks to the peace officer, the statement obtained is not inconsistent with the Charter."

The same notion is to be found, My Lord, in another judgment also from the Supreme Court of Canada. Regina and Tremblay. Tremblay is a very short judgment, My Lord, and it is found in 79 National Reporter commencing at page 153. I would note the comments made in that judgment by the court. Again by Mr. Justice Lamer, now Chief Justice Lamer, at page 156. He noted that there was a finding made by the trial judge as a matter of fact that the accused in that case was:

> " -- was deliberately attempting to make the investigation difficult and was actively obstructing it."

And went on further to note:

> "... the duties set out in this court's decision in Manninen imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath."

And continued on further:

> "While the police's hastiness does not change the fact that the detainee's right to counsel was violated -- "

-- which I submit was not the case here --

> "-- the reasons therefor make it understandable..."

Here, My Lord, the accused again was constantly chattering, made no request for the presence of counsel.

My Lord, in the more recent Smith judgment, a copy of which I have just furnished to the court and to my learned friend, court was dealing with a situation which arose from Nova Scotia. It is Supreme Court of Canada case number 21769, Norman MacPherson Smith, decided the 28th of March 1991. In that case, My Lord, -- it is a Nova Scotia case -- the accused had been involved in a drinking spree with two friends and the victim. apparently a fight broke out in the course of which the victim beat up the accused. The accused left. The accused came back a few moments later armed with a shotgun. The victim, with more courage than sense, chose to taunt the accused and was shot. When the police arrested the accused he was told at that time that he was being arrested and he was being questioned in relation to a shooting incident. They did not tell him at that time that in fact the victim had died which would be a much more serious situation. Her Ladyship at page 14 of her judgment noted -- she was dealing with whether or not there was in fact a waiver here, a waiver of the procedural safeguards. She noted first at page 14 that:

> "In the initial stages of an investigation the police themselves may not know the precise offence."

THE COURT: Where is that on page 14?

MR. SLEETH: About the middle of the first paragraph, My Lord.

THE COURT: Oh, yes. I have it now.

MR. SLEETH:

> "In the initial stages of an investigation the police themselves may not know the precise offence with which an accused will be charged. Moreover the words of the Code may be less helpful to a lay person than more common parlance in communicating the extent of jeopardy."

And continued:

> "Finally the degree of awareness which the accused may be reasonably assumed to possess in all of the circumstances may play a role in determining whether what the police said was sufficient to bring home to him the extent of his jeopardy and the consequences of declining his right to counsel."

At the foot of the page she continued. In the last paragraph about five lines down:

> "The accused need not be aware of the precise charge faced nor need the accused be made aware of all the factual details of the case. What is required is that he or she be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not."

The emphasis -- and Madame Justice McLaughlin along with Madame Justice Southen in another case give us an indication that the ladies are very realistic on these.

> "The emphasis should be on the reality of the total situation..."

At the very foot of page 14, My Lord.

> "...as it impacts on the understanding of the accused rather than on technical detail of what the accused may or may not have been told."

And she noted further at page 16, My Lord -- and this brings the case closer to our own. Page 16 the second paragraph:

> "Any lingering doubt about the seriousness of Smith's situation would have been erased by the conduct of the police upon arrest. As he came out of the house he was met by three

> officers covering him with their rifles. He was then made to kneel while handcuffs were affixed."

When Mr. Legere ran into the roadblock he met armed police officers. He was handcuffed. He also received a foot in the head. The seriousness of the situation would have been very clear at that moment to a man who only a few hours before had been commenting to a truck driver that he was a suspect in three or four murders and the police might try to frame him.

She noted further, My Lord, immediately after that paragraph that:

> "This evidence viewed as a whole is capable of supporting the inference that Smith was aware that his situation was one of the most grave seriousness."

I would submit, My Lord, that the same is true in this case. Mr. Legere, with those surrounding circumstances, mentioned earlier by his comment to the truck driver, had to be aware of the grave seriousness of the situation, and yet still did not make a persistent and diligent effort at all to retain counsel.

Finally, My Lord, by way of contrast, to show how different situations can be, in the most recent judgment of the Supreme Court of Canada on the issue of right to counsel, the case of Wesley Gareth Evans. Case 21375 of the Supreme Court of Canada as yet unreported but judgment rendered on the 18th of April 1991. This particular case, My Lord, involved a person who was a borderline retard. The police were suspicious that his brother was involved in a murder -- two brutal murders. Repeated stabbings of two women. They were aware that the accused felt he was involved in some narcotics operations. They arrested him supposedly on

on the narcotics. That is what they told him, but their purpose was totally different. Their purpose was to actually get evidence about a murder. Subsequently in the course of questioning they acquired evidence against Evans himself. I offer this case, My Lord, because of the contrast to the situation that reigned here. At page 6 of that judgment -- I am referring only to the headnote on this because I only want to brief the contrast.

> "The violation of the accused's right to counsel was very serious. The police, despite knowledge of the appellant's deficient mental status -- "

That was one.

> " -- and despite his statements to him that he did not understand his right to counsel -- "

That was two.

> " -- proceeded to subject him to a series of interviews and other investigative techniques."

That was three.

> "Moreover they lied to him in the course of the interviews -- "

That was four.

> "-- falsely suggesting his fingerprints had been found, and finally -- "

Five.

> " -- the pressure they were under to find a suspect led them .. did not justify their conducting repeated and dishonest interrogations of this weak person --"

-- as he was described in the judgment.

> " -- in violation of his Charter."

That is on page 6, My Lord, of the headnote.

I only offer Evans, My Lord, to show the contrast with what was taking place here where we had an adult

person who, in the words of Sgt. Johnston who has known him for years, knows the system and was not to be seen in any way as being a retard, as was the case in Evans.

My Lord, the statements themselves and the scenario that unfolded. As you heard the evidence shows, first of all from Brian Golding, that around two o'clock in the morning near Sussex he was taken at gun point by the accused. He was told by the accused -- the statement was made by the accused that he was a suspect in three or four murders. He didn't deny or confirm that when asked about it but indicated to Mr. Golding that he felt he would be framed. He described himself as a survivor and said that he had been in the woods in the Newcastle area. I would submit that is important, My Lord, and was all voluntarily made by the accused.

He was stopped by Cpl. Barter up in the Newcastle area around 5:45. He was placed under arrest for escaped lawful custody. He was given a police caution and then he was given a Charter. This was the first time, My Lord, the police officers came in contact with the accused. He indicates that he understands them all. He is quite unlike Evans. He is quite unlike the situation that reigned in other ones that I had referred the court to earlier. He doesn't at that moment request counsel. Doesn't ask for the assistance of a lawyer at all.

We have a series of blocks that now impose themselves, My Lord. The first one was the two o'clock to five o'clock truck ride. That I would submit is admissible in itself. We now enter into block number two.

The arrest scene. At about 5:45 he is given his first Charter, his police caution and he is told why he is in custody. He indicates that he understands them all. He comments to the police officer, to Barter, that he is not a problem. He never hurt the policeman did he? 'I could have hurt lots of you and I never hurt the guy with the dog.' I would submit all those statements, My Lord, were voluntary and were not in violation of any Charter right. The police officer was not required to suspend everything and stop listening to this man who was so persistent and determined to speak and did.

At the scene, My Lord, Cpl. Barter was aware of the existence of a firearm. He had seen the firearm exit. He was aware, My Lord, that he was dealing with a dangerous man. He exercised caution. At one moment he felt that man was moving and he gave him a kick to the head. He described that as being the most efficient way to keep the man under control. A man he knew was dangerous. I submit it was quite realistic for him to do so and I would submit further, My Lord, that it is fairly obvious -- on June 17th, My Lord, I and Mr. Patel will again be renewing for the second time the prosecution of a young man in Fredericton over the shooting of a police officer. Manual Aucoin. Manual Aucoin was not cautious as he should have been. He didn't know that man had a weapon. We are now dealing with a second murder case over that. My Lord, in this case Barter took no chances. There could be another weapon so he used his foot. There was an even more efficient way he could have used which,thank heaven, he didn't. He had a pistol in his hand. He could have

shot Mr. Legere. He elected to use I submit minimum force. Justified force in the circumstances.

Significantly, My Lord, we find as the time progresses, Mr. Legere, while he makes mention of being kicked, when he finally meets with a doctor, police officers who are there find that there is no special reason to be alarmed about Mr. Legere's physical condition. There is no evidence that would show us -- and it stands uncontradicted, My Lord -- of the need to suddenly rush him to a hospital or any expression that this man was seriously injured. I would submit then that there was just minimal force that was used here and that minimal force, My Lord, did not violate a 10(a) or 10(b) Charter right. That minimal force did not result in the extraction, the coercing or the eliciting of any of these statements. It did not change the voluntary nature of all of these statements which the accused continued to persist in making to various police officers.

Cpl. Lutwick, My Lord, was the other police officer at the arrest scene. He confirmed the warnings and the Charter and the reasons for arrest. He confirmed the condition of the accused. He confirmed what Barter had already said. That force -- minimal force I submit -- had been used. He also confirmed the fact that the accused again was speaking and appeared to be anxious to continue talking.

We then turn, My Lord, briefly to Cst. Dugas. She was called as a standard part of a voir dire to the fact that she related that the rights had been read. That she was able to identify Mr. Legere and was able to

show as well from her testimony that at that time and at that scene Mr. Legere, as the others were all able to say, made no special requests. There is no evidence, not a scin tilla of evidence, before us to show that he attempted to retain or instruct counsel or that in any way he was being brutalized or having elicited from him any of these statements or any of these remarks. There was no questioning then, properly so, to properly describe it, taking place. It was just Mr. Legere doing a lot of talking.

The same, My Lord, is true of Cpl. Vesey, called for the same purpose. Dealing with the voluntary aspect and also by its absence shows there was no effort by Mr. Legere to retain and instruct counsel.

Cst. MacPhee, My Lord, arrives. He ultimately along with Cst. Bolduc, the French officer, takes custody of Mr. Legere from Cpl. Barter and the others, places Mr. Legere in a marked police vehicle, reads to him the Charter notice. Indicated that it is understood. He also knew that Barter had given a police caution. There is no indication here, My Lord, once more from any of these witnesses that Mr. Legere in any way, shape or fashion is wanting to retain or instruct counsel or falls under the Evans situation that he is a borderline retard or has any difficulties. We must infer that he understood his need for counsel. We know later on from Sgt. Johnston that this was a man who understood the system.

In light of the totality of the circumstances again, My Lord, as covered in Smith -- the Nova Scotia Smith case -- I would submit that along the lines set forth by Madame Justice McLaughlin, he understood the situation.

If he had wanted to retain and instruct counsel he could have done so, and in line with the earlier cases I referred to, he chose not to. The police were not obligated to stop it and put everything into suspense.

Cst. MacPhee noted, after he had given the Charter notice, there were comments made about how he -- and he noted that Mr. Legere understood the Charter notice for escaped lawful custody. Mr. Legere said, 'It is no wonder I hate you guys so much. They are laughing. They wouldn't do it to me if my hands were free.' He and Bolduc then proceeded to take Mr. Legere back to the police station.

In the course of that trip Mr. Legere notes that 'I was in Montreal.' Both these police officers, by the way, do not see any serious grave injury on the face of Mr. Legere although Cst. Bolduc does note that he had seen some redness. Not yet a black eye.

At the police station, My Lord, Mr. Legere is then placed in a cell. Sgt. Mason Johnston had numerous dealings with Mr. Legere in past years. He testified that he was curious because he had heard so much from various people that he didn't look the same and was very different, so he went down to take a look. Not to question the man. He wasn't there for the purpose of eliciting any statements. He was there to look.

We are now looking at a time period, My Lord, around 6:20 or so. 6:20 to 6:35. The first thing that happens is that Legere speaks to Johnston. His first comment is: "Come here,you short little fucker. I want to talk to you."

Now, he asks Johnston to come to him. Johnston doesn't go over for the purpose of questioning. Johnston didn't go down there for the purpose of questioning.

In the discussion that then took place with Legere, Legere spoke about how -- in a conversation which Johnston described him as 'dominating'."He was dominating the conversation as usual. As long as I have known him you couldn't stop him." He was told how he had stayed in the woods, made friends with the squirrels. Dogs got close to him. He could have shot policemen. There were helicopters overhead. That he was seen once by a guy on the Kelly Road and he was seen by another person on a railroad bridge. That he was nearly caught on a train in Quebec. The train was stopped and the police had him roll up the wrong sleeve. They were stupid because they had him roll up the wrong sleeve. He was asked, was Johnston by the accused, for water. When requested it was provided. He also noted how Cst. Mole came in and the first reaction then was that -- an exchange over haircuts and the comment by Mr. Legere "Shave and haircut in Montreal, $22.00." When he testified Cst. Mole would also note that he had stayed in a swanky hotel.

Cst. Mole's testimony, if I may for a moment, My Lord -- at 6:47 Cst. Mole entered the cell to give a Charter warning. Cst. Mole, after the exchange, then noted at 6:47, and the time was given to him by Charlebois because Cst. Mole did not have his watch with him, he read his Charter to him and indicated that he was being placed under arrest now for the murder of Annie Flam. The accused indicated that he understood this

He was read the police caution that he did not have to say anything. He understood that as well. Charlebois again was providing the times for this.

He also went to obtain hair samples from the accused at that time. Told Mr. Legere "You know the routine", and was answered to that that he was not consenting. He was asked if he would help with the hair routine and responded that he would not help but the hair was taken. He commented about having lost a case of beer to Mole. That he hadn't seen anyone all summer. Joked about his having the paper delivered and also related the types of food that he had been eating. That he had been eating better possibly than the others. He talked non-stop according to -- that was a direct quote from Cst. Mole.

Later, My Lord, Cst. Mole would warn again. This time about murder and the Charter warning and he happened, as he said, to select the Flam murder. At about that time it appeared Mr. Legere also talked about having been chased by a dog. He said he was chased several times by different dogs. That the dogs even got to know him -- at least one dog got to know him and once a dog got close to his behind and he told the dog -- he used a foul expression there -- to leave and it did.

At 7:25, My Lord, the accused then was taken to an interview room. We are not attempting to elicit any statements that were made by the accused from that time on. Throughout though, My Lord, from the testimony of all of the witnesses, including Charlebois and others, the accused at all times wanted to speak. I return to

the testimony of Cst. Charlebois. Cst. Charlebois had also noted a comment made to Mole about the shave and a haircut, $22.00 in Montreal. He noted that he was attempting to take notes from 6:47 on. He was attempting to take notes but it was virtually impossible. The accused was speaking too fast.

He noted that at that time, 6:47, Mole told the accused he was under arrest for the murder of Annie Flam and also told to -- he had a right to a lawyer and given a police caution about statements. He did not act rapidly at that time, My Lord, for this either. He never did until around ten, which is much later on. He also was able to make reference -- because he overheard the remark made by Mr. Legere about being chased by a dog and the dog sniffing him. He also overheard a comment by Mr. Legere that the dog handler had fired first. At 6:55 when Mole requested samples of his hair Legere was told -- said to him, "You know how I feel about that, Kevin. I am not consenting." And that he would not help for that. He went on to talk about how he had fallen on ice in Montreal, according to the testimony of Cst. Charlebois. He also explained how he had escaped in Moncton, according to the testimony of Cst. Charlebois, making reference to the lady in Moncton because she refused to get out of the vehicle. He went on to explain how he had lived in the woods moving from place to place and lit fires only in the daytime so he wouldn't be caught. How he had seen a person on the Morrisey Bridge and there was considerable testimony elicited about where the Morrissey Bridge is, located between Chatham and Newcastle. That this

individual had called him 'pal' or 'Al' and he had even contemplated throwing that person over the bridge.

Cst. Charlebois also overheard him saying that he stayed at a swanky hotel in Montreal, and further heard him say -- this was a direct quote -- "I shouldn't have done as much as I did. I could have done more. I got the people all riled up." He noted when asked about how all these things were being said, and asked specifically 'was it a question and answer session?', Cst. Charlebois responded 'He seemed to be entertaining us. He seemed extremely happy to be talking to Sgt. Johnston and Cpl. Mole.'

Later on statements, My Lord -- we know that later on the accused finally went into a rigmarole about Newcastle lawyers. He was provided with a fax list of Fredericton lawyers. He indicated -- at no time indicated a deep and pressing and urgent desire to instruct and retain counsel. Eventually counsel was obtained for him, but at no time, My Lord, did he pursue this.

I would submit, My Lord, (a) under the standard rules we know -- I would submit we know -- that all of the statements made here by Mr. Legere were statements not elicited from him but those which he chose to volunteer. He was at no stage coerced. He was at no stage promised any favour and there was no threat made to him.

THE COURT: Where does their relevance to counts in the indictment arise, Mr. Sleeth?

MR. SLEETH: Okay, My Lord. All of these statements, My Lord, will do the following: in combination with other

evidence, they will place Mr. Legere in the area where the murders took place. Some of them will place him in the area where the murders took place. Other statements, My Lord, such as the references to Montreal, will be consistent with the testimony that will be given by other witnesses and even physical evidence which will be offered to show a flight to Montreal by train, staying in a hotel in Montreal, My Lord. The Queen Elizabeth. A swanky hotel. All of those taking place, My Lord, after the murder of Father Smith. They will also link, My Lord, with testimony which we will be hearing from two police -- from police officers from Levis, Quebec, about having boarded a train and searching for Allan Legere. That they had people roll up their sleeves because they were trying to stop this man, Allan Legere, who they had been advised by the R.C.M.P. was possibly fleeing by train and would go by way of Levis.

The evidence, My Lord, as to dogs being by and staying in the woods and staying at different locations. This will be linked, My Lord, with testimony from police officers who will be able to relate how dogs were used in the search for Allan Legere through the woods. How on one occasion there was firing, an exchange of gun fire, My Lord. They will be able to relate to you how a person was pursued through the Chatham area by police dogs. I would submit, My Lord, those will all link with these statements which become corroborative with what is going to be related by these witnesses.

I have taken those statements out, My Lord, those particular ones to highlight certain of the remarks of Mr. Legere. I would submit, My Lord, most respectfully, that every statement he made, everything he said from the time he came into the hands of Cpl. Barter, was admissible under every known pre-Charter rule and under the rules that exist since the Charter. That he was consistently warned. That his rights were never abused. That he chose not to exercise the right to retain and instruct counsel and that this was a person who very clearly, (a) knew the system, as stated forcefully to this court by a person who has known him for years; (b) was a person who himself had stated to another witness before he ever contacted the police he knew himself to be a suspect in something very serious, and went on then to say he feared he might be framed. I can think of two no more serious circumstances under which a person would realize that it would be necessary to retain and instruct counsel when stopped by the police. Certainly also seeing all these police officers armed, heavily armed, when they stopped him would also link directly to the judgment which I referred to earlier, My Lord.

In all these circumstances, My Lord, I respectfully submit those statements are all admissible. I would submit, My Lord, the rule has always been as well that on voluntariness the crown must speak first. We have abridged the rule somewhat here. If there were a Charter issue the procedure would normally be that Mr. Ryan would argue that first and then the Charter would be further argued by the crown, but it may be a

little easier that we do it this way. I would note though in concluding, My Lord, that we also have Cst. MacPhee who noted at one stage that there was mention of a lawyer, and the reason that he did not himself -- because there was a lot made of that by cross examining counsel, the reason he did not himself go dashing off for a lawyer was because he was there in a custodial role. His duty was simply to keep an eye on Mr. Legere at the time and he fulfilled that function. I would note further, My Lord, that that was not mentioned to other police officers, and furthermore that Mr. Legere never pursued it beyond that point. There was just the one brief mention.

You see, My Lord, Mr. Legere, in the words of Cst. Charlebois, was entertaining everybody. There was mention made by him of a lawyer from time to time. He didn't pursue it. It is not totally unlike the situation in Tremblay, My Lord. Note further, My Lord, that there was mention made I believe by Cst. Charlebois that, you made a mistake now. You are in trouble. And then reference to the lawyer.

What Mr. Legere had done, My Lord, was keep on talking all the time and an occasional mention of a lawyer, never pursued. One cannot define the full purpose if it was to stall police, but in any event, he did not fit with the requirement that he diligently pursue that right, as set out ever since Black and ever since Madame Justice Wilson. He did however -- if I can go back and conclude with Cst. MacPhee -- he did caution Mr. Legere. He may not have gone dashing out to a phone but he then immediately gave him a police

caution that anything he said could be used against him. This was done repeatedly by various police officers, but Mr. Legere persisted. He couldn't be stopped, as Sgt. Johnston said. You couldn't get a word in edgewise. It was all voluntary. His Charter rights were not violated, and, My Lord, if you feel that there had been a violation of section 10(a) or 10(b), I would submit that the Collins scenarios then applies. Collins was referred to by my learned friend. It is cited in his brief provided to you earlier. And this would fit in the inclusionary wing of section 24(2) of the Charter. There would be no massive violation of the rights. There would be no flagrant violation of the rights of the accused. The circumstances were such that the remarks by him are not all highly prejudicial, though they would be of assistance to the crown's case but their exclusion, My Lord, I would submit, would work harm to the administration of justice and to the repute of the system of justice, because I don't believe, and I would submit, there has not been, if there ever was, a violation. There has not been a flagrant denial or violation of this man's rights. When he insisted, when he became determined, as he became more agitated and became more determined to have a lawyer, efforts, very serious efforts, were made at that stage. He was provided with faxed copies. He was playing, I would submit, My Lord, you can infer, there was a game being played by him. There is nothing to contradict the testimony of these police officers that he did not pursue his rights under the Charter. There is nothing to indicate that.

Under those circumstances, My Lord, I would submit all the statements to the police are admissible and I refer the highlighted ones to give an indication of flavour of what was being said. To give the court an indicator as well of why those statements would be of use to the crown at the actual trial phase proper. Thank you, My Lord.

THE COURT: Thank you very much, Mr. Sleeth. Mr. Ryan?

MR. RYAN: My Lord, I have not had the opportunity to review the Norman MacPherson Smith case. I did have a quick look at it while we were in. Perhaps if I could have maybe fifteen minutes and I would suggest instead of breaking for lunch that we have fifteen minutes and then come back and carry on, if that is acceptable to the court.

THE COURT: It is with me. Crown have no objection to that?

MR. SLEETH: No, My Lord.

THE COURT: We will take about fifteen minutes or whatever time. You let me know when you are ready.

MR. RYAN: Thank you, My Lord.

(RECESS: 11:50 - 12:15)

THE COURT: Mr. Ryan?

MR. RYAN: Thank you, My Lord. My Lord, I propose to address my remarks firstly on the submission as given by crown counsel Walsh on bodily substances and advise the court that, you know, I have had an opportunity to review the material in a brief provided by Mr. Walsh, and concerning the exhibits or substances which are

scalp and pubic hair taken from Allan Legere in 1986, scalp and pubic hair taken from Allan Legere in 1989, and blood which was found on toilet paper cleaned from Allan Legere in 1989.

THE COURT: Sorry. Did you say you hadn't had a chance to review --

MR. RYAN: Yes. I have had, My Lord. I have reviewed that.

With respect to the scalp and pubic hair taken in 1986, My Lord, it is the defence's submission that at the time of the arrest of Allan Legere a considerable number of hours had past since the arrest. The crown has contended through their witnesses that the investigating officer was busy doing many other things that precluded him from making an immediate or instantaneous demand of these samples from Mr. Legere. That is understandable in the course of an investigation once a prime suspect has been apprehended that the investigating officer would be concerned with other duties as well, but it appeared that the necessity to obtain these scalp and pubic hair samples from Mr. Legere forced -- at a very late evening hour -- forced the investigating officer to make a determination that he was going to need legal counsel because Mr. Legere had refused the granting of the samples. At that point in time Mr. Legere had spoken to counsel and he was again requested to provide samples and upon the second request Mr. Legere said, 'No, I am not going to consent to the samples being taken.' At that point, this is when legal counsel was sought.

The crown referred to the Alderton case in which an opinion was given to Mason Johnston, Sgt. Johnston, I believe and the indications were he was told -- or he and Cpl. Mole were told that, yes, you go ahead and take the samples based on the findings in this court case I have here, but there is a limitation. The limitation was actions of violence. There was an indication to the officers that they could not go beyond a certain expectation in removing these hairs. If the accused were to put up a fight, struggle, what have you, then they could not forceibly wrench these hairs out during the course of a scuffle. That would be my impressions of the case law at that time, as the situation had found itself in 1986, but when they returned to the area where the accused was, they told him they were taking these samples, and that was a matter which was going to happen regardless of whether the accused objected or not. They did not tell him he had a right to resist. That he didn't have to give them those samples. They told him they were going to take them, and they started taking them. The officer described how he brought his hands into play in pulling a number of beard hairs from the facial area of Mr. Legere, and then how he was attempting to take numerous -- not one or two hairs being plucked out, but a number of hairs grabbed between the fingers and thumb and forcibly removed from the head of Mr. Legere. At that point the officer indicated to Mr. Legere that, you know, there seems to be a problem with this. You seem to be in some discomfort, and I would submit pain would be the right attitude from the subjective point of view from Mr. Legere. So Mr. Legere was given the opportunity to assist.

Assist he did. Pulled hair samples from the head and the face were taken and they were removed. Placed in a bag and transported to a location for analysis.

On that point, My Lord, I would submit that this was not really an incident of arrest. It was more to the fact that a time period had elapsed and it was something that was done for analysis of a certain comparison test. As an incident of arrest, as the crown claims it to have been, then why were later situations -- and we have seen this when the case came to Court of Appeal of New Brunswick and warrants had been used to obtain hair samples at later dates -- it would appear that the Court of Appeal has in fact in the Province of New Burnswick said that these hairs were taken illegally and as such the crown is now asking this court to make a determination of seomthing that the Court of Appeal did not really relate to. Those aspects of the Court of Appeal were appealed by Mr. Legere's counsel to the Supreme Court of Canada but in October of 1989 the Supreme Court of Canada dismissed the appeal because Mr. Legere was at large. Those factors really haven't been determined beyond an initial Court of Appeal decision which really did not deal with the issue and it would be the submission from the defence, My Lord, that the indications from the Court of Appeal of New Brunswick was if they weren't going to deal with those items, there it really didn't matter. Well, it did matter. It matters now. It matters now because hairs that were taken from Allan Legere in 1986 have been used in some fashion and are used in evidence against him for cases that have arisen in 1989. The fact that

those hairs were inexistence and still floating around the Sackville lab indicates that those hairs were not used as an incident of arrest in this situation. Fine. It was okay for the Glendenning crimes that were being investigated at the time, but not for anything that happened afterwards.

THE COURT: But your argument would be that the Court of Appeal in New Brunswick has made a finding that the taking of those particular hairs was done illegally.

MR. RYAN: It was done illegally.

THE COURT: While that doesn't apply to this case one cannot only say the circumstances were so similar, the circumstances were the actual circumstances weren't they?

MR. RYAN: That's right.

THE COURT: So you would say that I would be bound in determining whether they were taken illegally or not by the judgment of the Court of Appeal.

MR. RYAN: That is my point. Yes, My Lord.

THE COURT: Now, I appreciate that the crown's -- the crown, of course, say, well, at the same time the Court of Appeal have said it wasn't -- the evidence shouldn't be excluded and was properly not excluded under section 24(2) but they go beyond that even. They say, of course, well, there is a new circumstance arising. These hairs -- we don't go at this stage to see how they were obtained. They were on file in the Drug and Hair Fibre Section and we don't have to go back of that. They were found incidentally. But you would say that I am bound by the Court of Appeal finding that --

MR. RYAN: That's correct.

THE COURT: -- that they were illegally taken.

MR. RYAN: I can't get away from that fact that the higher court has made a decision with respect to the seizure of those hairs at that time.

THE COURT: Well, you wouldn't really want to get away from that would you?

MR. RYAN: No. No. But again I also put forth the argument, My Lord, that Mr. Evers of the lab stated that he retained those hairs as a prerogative of the laboratory. Well, what authority did he ever have to keep any substances? I don't know, but he had them and now he is bringing them forth in a case against Mr. Legere in 1991.

THE COURT: What you are arguing is the sort of badge of illegality remains with those hairs.

MR. RYAN: It didn't disappear, My Lord. That's correct. And it flows through until this point in time. Now.

THE COURT: The crown would perhaps say, well, Mr. Legere should have asked for the hairs back again when that trial was concluded and you would reply, well, why should he have to.

MR. RYAN: Well, why should he have to, My Lord? In any event, My Lord, with respect to the situation it would appear that the Court of Appeal of New Brunswick has further said in the Legere case that a peace officer, even with reasonable and probable grounds, cannot get or receive a warrant upon request to a judge for the seizure of these hairs, and the indications are, My Lord, as far as the defence is concerned, well, if a Justice cannot make such an order how can the police do it

except by using the incident of arrest. Bringing us to the 1989 situation again, as an incident of arrest we are talking about hairs which were taken without the consent of the accused, because he flatly said, 'You know I am not consenting to it.' -- talking about hairs that were combed and taken and pulled from the accused while he is in his cell after he has been strip searched in conditions where there were other officers around and he has been subjected to -- and I would suggest as part of his search, My Lord -- subjected to a quick internal exam to see if he was carrying any contraband, barefoot and supposedly with a blanket around him, and again he has been told that these hairs are going to be taken. So they take them.

My Lord, given that situation and given some of the case law which the crown has cited here about searches and seizures as incidents of the arrest, most of the case law that we have before us is case law dealing with objects that are either weapons or contraband or narcotics of some sort. We are not talking about a piece of human hair. We are talking about other objects and human hair, although it is attached to the body, you are not really parting with it. You are loosing it. It is gone once that substance is taken away from you. If a person who happens to be bald, has no hair, would they have the right to try to gain pubic hair from that person? This is what the crown is asking the court to rule on and say that it is in fact admissible. That as part of an incident of search that anybody who is in a serious situation, facing serious crimes, be stripped and pubic hairs could be

pulled away from them, just to be taken for analysis or usage in some fashion or other.

The indications are, My Lord, that pubic hair and head hair are items that have life, and that life is contained in the root sheaths. That life, once it is removed,is dead. Even for a small matter like a hair that is the accused's. It doesn't belong to the police. It doesn't belong to the crown prosecutor's little evidence bag or the police officer's evidence bag. It belongs to the accused. It was taken against his will.

Why would a crown counsel in the Newcastle area rush, at somewehre between 6:00 and 6:30 in the morning, rush a handwritten consent form to the police? Why would he feel that that was necesary? Why would the police ignore it? Oh, well, I know Allan, says Mason Johnston. He wouldn't pay any attention to that. Well, maybe he wouldn't, and it seemed quite evident that once the request or the demand was being made on Allan Legere for hairs, that he wasn't going to consent.

THE COURT: Oh, I think I would have to accept that Sgt. Johnston didn't really feel that the accused wouldn't feel a consent was necessary. He didn't want to muddy the waters by exposing the consent form. Wouldn't that be about it?

MR. RYAN: I think that is exactly right, My Lord. If given the consent form he would probably antagonize Mr. Legere to the point that maybe this well of talking that had been going on for some considerable time would dry up. Would stop. Start thinking about counsel. Start thinking about his rights. That is a possibility, My Lord, that a consent form would engage

one's mind immediately to a form. Signing. I am giving up something. What are my rights?

I would make a very minor point with respect to the actual taking of hair, My Lord, from any person although the officers have testified in 1989 in the cell on November 24th Allan Legere had had hair removed from him by an officer and the officer and the other officers who were in the cell all witnessed that he didn't seem to flinch or make a move. It didn't seem to bother him at all, and I would suggest, My Lord, whether he moved or he flinched or not, that some pain was occasioned to Mr. Legere and I would further suggest that if there is pain caused to somebody, then there is some violence being used on them. I would suggest, My Lord, that given the spirit of Alderton that the words 'violence or a force', that the pulling or plucking of hairs -- plucking sounds so nice, My Lord. It is something that somebody does in order for a cosmetic feature, but the plucking of hairs in itself, especially pubic hairs, is going to cause some pain. It is going to cause some discomfort. No question. That in itself is a force that is used that shouldn't necessarily occasion an accused given the circumstances.

THE COURT: As I understand it, you say that the taking of hairs should be treated exactly on the same footing as the taking of blood.

MR. RYAN: Yes, My Lord. I really do put that forth. What is the next step, My Lord? If the crown has the investigative wish that they would like in obtaining from accused persons hair, what is next? Blood. That is exactly what the Law Reform Commission is saying. You

know, well, let's go to hair. But the next step on the same page I think Mr. Walsh said -- but actually I think it was two pages later or very soon after they made the suggestion that Parliament should enact some sort of force that would allow the taking of hair from accuseds -- very soon after they go the extra step, and that is blood. That is something that Canadian courts really haven't accepted I don't believe and I am not sure whether Parliament will accept it.

The Law Reform Commission is, I would suggest, My Lord, stating to the public and Parliament that these things should happen prior to anybody saying, well, what good is it? Is there going to be some benefit from allowing hairs to be used in analysis in what I would presume is going to be DNA testing? As Parliament -- or have all the courts in Canada perceived DNA testing as something that is legitimate in facing criminal situations. That will be something that I am sure that both sides, defence and crown, will be arguing quite vigorously in the up-coming weeks, My Lord.

My Lord, I would suggest that the police do not have proper authority to take hair samples in this situation, either scalp hair or pubic hair. Although they say it is a method in which they are enabled to continue their investigation and it is something of evidence being obtained, the material that is being obtained is strictly belonging to the individual that it is being derived from.

THE COURT: What about nail clippings? That would be the same wouldn't it?

MR. RYAN: I would think so too, My Lord. That would be

something that -- now, I wasn't quite clear on Dr. Fourney's testimony yesterday, but he was speaking about different substances and what could be used and what couldn't be. I didn't recall him saying nail clippings, but my understanding, having read some of the material, is that nail clippings also would have DNA.

THE COURT: Well, it is living tissue.

MR. RYAN: It is living tissue. That's right.

THE COURT: Do nail clippings continue to live after they are clipped?

MR. RYAN: I don't know whether they are alive -- now, it is living tissue while it is still at the cuticle and I don't know what happens when it gets lengthier than the end of your finger, My Lord. I honestly don't know.

THE COURT: Does hair continue to grow on a dead person?

MR. RYAN: I don't think so, My Lord.

THE COURT: What about fingernail dirt or scrapings under a fingernail?

MR. RYAN: Scraping under a fingernail. Now, I can envisage situations, My Lord, where that is going to be important. Especially when you have got a situation where wood fibres or something that are belonging to a specific location could be seen. Once they are seen, you know, I think the police would have the authority to scrape underneath the fingernails because a red board or red clay was in the vicinity of a crime and the red clay was visible under the fingernails. I think the police would have a right to go that extra step because it is something that they know about. But that is an extra step I believe

My Lord, with respect to the issue of the blood which was obtained by Cpl. Mole I believe in the interview room where Mr. Legere had been placed from sometime at 7:00 in the morning until 2:15 or so in the afternoon, there is evidence before the court that Mr. Legere had been kicked in the face by one of the officers at the scene where he was arrested. There is evidence before the court that when breakfast time came somewhere between 9:00 and 10:00 -- and I am guessing it is 9:30 -- a doctor attended on the scene in the interview room and was allowed to approach Mr. Legere to make an examination. Officers stood in the doorway and an exam was conducted very briefly by I think Dr. Cole was the name. He was wearing a surgical mask and approached the accused and put his hand on the accused's cheek around his eye area and felt around it a bit and then departed. It seems that this examination occurred while Mr. Legere was having his breakfast. He had requested from Cpl. Mole a tissue or something to blow his nose and Cpl. Mole came back with toilet paper for the accused to blow his nose on. Cpl. Mole also had given us testimony that he had been in contact with the Ottawa laboratory on a number of occasions and the Sackville lab on numerous occasions and had made many inquiries about DNA testing and the availability and what types of substances could be tested to find DNA. Cpl. Mole was quite aware, My Lord, that blood was a good sample that could be used, but he was also aware that clotting blood could not be as good a sample for DNA testing and identification. He was able, through some of his cunning and good fortune,

to obtain some toilet paper that had been used by Mr. Legere to blow his nose and the first bit of toilet paper ended up on the accused's breakfast plate. The indications are from the crown that this would be a discarded substance. Discarded in by a fashion by the accused. Cpl. Mole later testified that he had obtained a garbage can and the garbage can he placed in such a fashion as to have the accused use that garbage can as a disposal unit for any tissues that he was blowing his nose on. From that particular scenario, My Lord, we have a situation which I would refer to as evidence-gathering. In a large fashion it is gathered in a garbage can from material that, if the accused had been in the cell area, he probably would have flushed down the toilet. He couldn't flush it down the toilet because Mason Johnston was very busy turning off pipes and buying portable potties for other substance gathering of the accused.

At this situation, My Lord, while the accused is out of his cell area, material evidence was trying to be gathered by the investigators so that they can use it in DNA testing.

THE COURT: Yes, but you don't blame police officers for trying to trick suspects do you?

MR. RYAN: Don't blame them at all.

THE COURT: People that commit offences trick their victims. Without reference to this case or any other case. And surely trickery is a two-sided thing isn't it?

MR. RYAN: Yes. I agree with that, My Lord, but coming to the point that by the time that breakfast was over,

and I am assuming that it is somewhere after 9:30 and before quarter after 10, we are at a situation where we are just about to have a demand by the accused for a lawyer. At that point a demand. Okay. I am going to use that terminology, My Lord, because the crown is indicating through their witnesses and through the way their case has been presented, that Mr. Legere didn't want a lawyer for a long time. He didn't care whether he had counsel or not. He wanted to talk and he wanted to do things but he didn't have counsel while he was in that interview room from 7:45 in the morning until 2:15 in the afternoon. He did not have the benefit of counsel -- to anything that happened that morning.

My suggestion, My Lord, is that counsel would have probably advised Mr. Legere on many factors including evidence-gathering by the police, and the police obtaining or using the pieces of kleenex which maybe, if Mr. Legere had been counselled, might have retained on his person.

In any event, My Lord, with respect to the blood issue, Mr. Legere certainly was blowing blood the morning of the 24th and the reason he was blowing blood is he received a kick in the face. Nothing Mr. Legere did to himself, but something that was occasioned on him by the arresting constables.

The point of the defence, My Lord, and the crown has already alluded to it, that without the kick in the face and without the ensuing blood coming from Mr. Legere's nose, we don't think that any blood would have been able to be obtained but for that kick. Now, there is no medical evidence before the court with respect to Mr. Legere's condition, but there is one

item, and that item is vivid and it is found -- it is the third picture in VD-23 exhibit and, My Lord, if you have not seen the picture I would encourage you to do so. What is called a 'discoloration' by some of the officers under Mr. Legere's eye, is actually a lack of coloration. There is no color there. It is totally black. That is a picture that was taken the afternoon of Mr. Legere's arrest.

There was some evidence before the court of the nature of the kick in the face. If I may, My Lord, I would suggest that evidence obtained as a result of police officers exuberance at any point in time could in fact bring the administration of justice into disrepute. For the reasons that I have stated and for the numbers of what I believe to be contrary evidence as against the rights of an accused, I would suggest, and I would ask this court, to make rulings with respect to the bodily substances that would deny these items to be entered an exhibits. I would ask and rely on this court to enforce Mr. Legere's right under the constitution and under the Charter, and ask you to find in favour of the defence's submission not to have these items entered as exhibits.

THE COURT: You are going to deal with the statements as well?

MR. RYAN: Yes, My Lord. On November 23rd, My Lord, we have evidence that Allan Legere seemed to have been in a situation where he was in flight. There is indications that he advised a truck driver by the name of Brian Golding that he had been in Saint John earlier that day; that he had commandeered a taxi and had it drive

him towards the Newcastle area; that he had later commandeered another vehicle with a female driver and at the time that Mr. Golding actually appeared on the scene in Sussex, Mr. Legere had just lost his drive. It departed the scene. Mr. Legere approached Brian Golding and ordered him to get in his truck, which was a semi-truck with a cab and trailer. Conversation was had between Brian Golding and Allan Legere. Mainly Allan Legere talking. And throughout this whole situation where -- during that late evening and early morning hours, the noon hours, it appears that Allan Legere was talking. Talking. Talking. Motormouth one witness said. Couldn't shut up another witness said. He didn't stop talking, but he did stop talking at one point according to Mr. Golding, and Mr. Golding indicates that Mr. Legere stopped talking for a lengthy period of time. And on one occasion for certain that he can remember he had to wake Allan Legere up. The man was tired. He was asleep. Here he was in what officers have described as a hijacking situation. An abduction. Here the principal participant in that hijacking, that abduction, is asleep. Well, the suggestion, My Lord, is that Mr. Legere in fact must have been a tired person in order to fall asleep while cruising around in a hijacked vehicle. Later on at 5:20 or 5:40 in the morning the indications are that he was awake and he was aware that a policecare or a police vehicle was moving up fast behind him, in that vehicle. Mr. Legere finally told Mr. Golding to stop. The vehicle that was coming behind them was positively identified by Mr. Golding at that point in time as a police vehicle.

Mr. Golding stopped the semi-truck cab which he was driving and leaped out of it, and apparently moved pretty fast in order to get back to the police vehicle and the two officers, Lutwick and Barter. At this point there has been evidence, My Lord, that officers Lutwick and Barter had pretty well identified who that passenger was. They were darned sure that this was the suspect that they had been looking for for many weeks. With their knowledge of who was in that vehicle, they approached and they approached with caution on both sides of the cab of that trailer and they were shouting orders to Mr. Legere to get out of that vehicle. But not just get out. Hands up. That type of thing. The hands were shown out the cab door according to both officers and then the hands withdrew and a weapon came out. Then the appearance of Mr. Legere in the doorway of the truck cab and he was ordered to come out. Straight down with a step ladder that let into the cab. He replied something to the effect that he couldn't do it. It was too difficult. But that is what he was ordered to do. He was ordered to stand still. He was ordered to kneal down. He was ordered to lie down. In a fashion such as that. One, two, three. Do it. And he did so with his hands outstretched over his head on the ground face down.

Then the officers separate. One officer, Officer Barter, went back to his vehicle to get the handcuffs. It is not known whether Officer Lutwick had handcuffs. There didn't appear to be any conversation between the two of them but with Officer Barter going back to the police vehicle, Cpl. Lutwick was faced with the

individual on the ground who seemed to be moving around a bit. At least his head is moving because, although Officer Lutwick told the prisoner to stop moving, the prisoner moved again, and he was forced to put his boot on the prisoner's head. He did so on two occasions, if I remember his evidence correctly, My Lord.

Then Officer Barter came back from the police vehicle. Presumably with his handcuffs. Also at the same time Cpl. Lutwick moved back taking his foot off the prisoner's head. The prisoner, of course, moved his head again. Now, one officer, the officer facing him, says that the prisoner was trying to rise. The other officer has only said he moved his head, but in any event if the prisoner was trying to rise and he had his hands coming in towards his body and not outstretched from his head as they had been, then the obvious place to put an aim to kick on a person who is supporting themselves with the arms, is in the arm. Not in the face. If the arm was kicked out, the support would be lost and the prisoner would be on the ground as he was supposed to be. But, if the head was only raised, then there is no reason to aim a kick at all. But this particular prisoner did not heed the warning and the instruction 'Don't move'. There was a movement so there was a kick. Other officers were rushed to the scene as fast as they could. Mr. Legere wasn't talking now but soon he would start.

While Mr. Legere is being handcuffed and he has got his face down, he is told by Officer Barter of his rights. He is given a warning. At that point the only crime that was being identified to the prisoner was that of escaping lawful custody.

The crown says that Mr. Legere, being experienced and knowing some things about the law should have maintained and demanded his right to a lawyer at that time. Well, he had just been kicked in the face and given the circumstances, he had been booted in the face, the first thing he asked for when he had time and he was over by the police vehicle which was later to transport him to Newcastle, he asked for a doctor. He talked about a doctor. That was more important to him right at that moment. Not counsel. Where was he going to get counsel out on highway 118? From that point forward, My Lord, it appears that Mr. Legere was given charter warnings and police warnings and numerous to him by different officers and it seemed that every officer that came in contact with him wanted to give him a warning.

Cst. MacPhee even stated he gave him a warning on three occasions I believe, My Lord. I may be wrong. Two for sure that I know that happened in the Newcastle jail but I also thought perhaps when he put him in the car that there was another warning. For sure he gave two warnings. Mason Johnston, at the scene of the search, where Mr. Legere was searched and his clothing taken away from him, approached Cst. MacPhee and said -- at least this is Sgt. Johnston's indication -- is that he wanted to make sure from MacPhee that Mr. Legere was given his Charter warning. MacPhee says at this point in time, 'Oh, yes', according to Sgt. Johnston.

Sgt. Johnston didn't ask MacPhee anything or any other time whether Mr. Legere requested a lawyer, whether he wanted one, whether there was an indication

from Mr. Legere that he wanted a lawyer, and Cst. MacPhee's testimony is that after that point Mason Johnston had an interview or a discussion with Legere. Now, the indications are from the crown witnesses, the police officers, that Mr. Legere was the one that initiated the discussion. For a period of fifteen minutes Mason Johnston and Allan Legere talked. There were numerous things said and for the fifteen minute period Allan Legere apparently blurted out many things that Mason Johnston was able to recall. But it took Mason Johnston 25 minutes to tell us that in court the other day. I am not referring to the fact that Mason Johnston was on the stand for 25 minutes, My Lord. I am referring to the fact that Mason Johnston's direct testimony as to what was being said took him 25 minutes to get out.

Now, if we are to believe the police officer's evidence from Cst. MacPhee, Mason Johnston left the area and then Cst. MacPhee went back to Allan Legere and gave him his warnings again., Why would he do that? According to Cst. MacPhee this is the time that Allan Legere says 'I want a lawyer'. This is the time at 6:35 a.m. Well, at 6:35 a.m., My LOrd, numerous things are happening. People are in the general offices. Cst. MacPhee says he had a very serious guard duty that he had to perform and couldn't leave. Couldn't go anywhere. He was also tagging exhibits that he had just seized from Mr. Legere. Primarily his clothing, but the other officers attend and nobody asks Cst. MacPhee about whether Mr. Legere said anything to him when he was given his Chrater warning. Cst. MacPhee assumed he didn't have to tell anybody. We don't know what he

actually could have done, My Lord, but he should have done something. The evidence is that the sargeant in charge of the station should have been told that Mr. Legere wanted a lawyer. That didn't happen. He also should have told the station sargeant that Mr. Legere was looking for a doctor, because this had been told to Cst. MacPhee a number of times .

From the point of Officers Charlebois, Johnston and Mole attending in Mr. Legere's cell to take these hair samples at apparently 6:47 a.m. according to Cst. Charlebois' watch, Mr. Legere had done nothing but talk. Talk, talk, talk, talk, talk. He talked all the way on that drive from the arrest scene to the Newcastle Detachment and the two officers in the car with Mr. Legere were Cst. MacPhee and Bolduc. Mr. Legere, for whatever reason, identified Cst. Bolduc as the person who had kicked him and indications are that Mr. Legere identified him as the person that kicked him and said something to the effect that 'you wouldn't have done that to me if my hands weren't tied'. 'If my hands were free I believe is the correct quote, My Lord.

Now, I believe it was Cst. MacPhee's testimony that even Cst. Bolduc read Mr. Legere his rights, and Mr. Legere, being the person who had received a boot in the face, indicates that he understands or acknowledges. The crown is saying -- if I gather Mr. Sleeth's argument correctly -- that Mr. Legere, once he has been told at any point in time, that he has a right to counsel, has to make a diligent pursuit to find counsel or to obtain counsel or request counsel or demand counsel. I am not 100% sure how we do that when

he is in a policecar, when he has been arrested on highway 118, when he is taken to the Newcastle Detachment and is in a cell with his hands cuffed behind him naked with a blanket or without a blanket or whatever. How does he diligently pursue counsel? Does he have to stand there and yell for it? I am not 100% sure how anyone expects a person to diligently pursue when many many peace officers with guns out, with much commotion going on, in areas where it is impossible to obtain counsel? Didn't even appear to be a phone anywhere near the cells where Mr. Legere was being first interviewed and searched.

In considering the circumstances,My Lord, the defence maintains a very tired Allan Legere was on highway 118 with his face down when he received a kick in the face on the morning of November 24th. Somebody who, according to the witness who was with him for three hours prior to the arrest, had booze or alcohol on his breath. A person who had been avoiding the police for many months. A person who was surrounded by police officers at a point in time and the defence submits that from the point that a kick in the face was delivered to to Mr. Legere there is probability that he could not expect to have any of his particular rights or privileges or even his opportunities for counsel to be adhered to at that point in time, and they weren't going to be adhered to. It is evident that even when Mr. Legere officially makes a request to a bona fide police officer, nothing happens.

I would suggest, My Lord, that evidence is before the court with respect to a transcript which was made from

a tape recording which apparently worked for a period between 0950 hours to 1220 hours, and at roughly 10:15 a.m. as asked by Mr. Furlotte in cross examination, the officers who were in attendance at that meeting, have agreed that a quote as follows occurred -- Mr. Legere was talking about his eyeglasses and was blowing his nose, and says: "Listen, tell me something." Cpl. Mole says: "Yep, anything you want to know." Mr. Legere: "Ah, okay. How come they never got me -- never got me a lawyer?" Cpl. Mole says: "Who?" Mr. Legere says: "I asked the fucking cop this morning. A lawyer. Get me a fucking lawyer. Talk to a lawyer." Charlebois says: "Oh, do you want to see a lawyer?" Sorry. The 'oh' is not there. "Do you want to see a lawyer?" Mr. Legere says: "Well, no one else would get me one yet."

Is it not conceivable at the time Allan Legere told Cst. MacPhee at 6:35, according to Cst. MacPhee's notes, that he wanted a lawyer, is it not conceivable that Allan Legere thought somebody was getting him a lawyer?

THE COURT: I just want to point out that those parts of the transcript aren't in evidence.

MR. RYAN: No.

THE COURT: Although they follow very closely the oral --

MR. RYAN: They have been testified to in the oral --

THE COURT: -- they follow the oral testimony.

MR. RYAN: Yes, My Lord. And that is all I am -- I agree. But, My Lord, my point I think on this part of it is that it would appear in that exchange the two officers and Allan Legere, that this wasn't the first time he asked

for a lawyer. In his mind it wasn't the first time he asked for a lawyer. And responses from Cst. MacPhee according to his testimony was that Allan Legere asked him for a lawyer, and he said 'I can't do anything about that now.' Allan Legere said 'Can I get a doctor?' and he says 'I can't do anything about that now.' Allan Legere says 'Can you take the cuffs off?' and he says 'I can't do anything about that.'

The indications are, My Lord, that Mason Johnston coming along later says, look, I will see about getting the cuffs off, and I will see about getting you a doctor. Those things were followed through. At 9:30 or so a doctor does appear. Something that Mr. Legere has asked for from the same officer, MacPhee. Isn't it reasonable to expect that in the subjective point of mind of that person that when he asks 'Why didn't you get me a lawyer' that he actually thought a lawyer was being arranged. Then there follows a discussion between the officers and Mr. Legere about a list of lawyer from the Newcastle area and obtaining lists from Fredericton, but all along there are questions being directed to Mr. Legere. All along they are still attempting to not stop the proceedings, not return Mr. Legere to the cell and let him dry up. He has been too talkative.

There is an incident, My Lord, of Mr. Legere talking and talking through different phases, and he seems to be repeating the same things, and the officers, many of them who had notes but wouldn't reveal them, many of them who made notes later on, have indicated that Mr. Legere said a number of things and talked about

different aspects of his recent days or his past escaped months. Nobody knows when these things happened. But it is clear that questions were being asked and certain questions were being asked just to elicit further responses, further dialogue. The only person who really didn't try to ask questions appears to be Cst. Bolduc, but the other investigating officers, they wanted information and that was the plan. To get information so that hard evidence could be found against this person.

It really amazes me, My Lord, that crown counsel don't appear to be concerned about Mr. Legere's rights at a certain point in time at 6:35 in the morning. They seem to be concerned about his rights at 10:15 when it is on tape and had been transcribed that there was a request and it was known to the investigating officer, but there doesn't seem to be any concern over this point in time at 6:35.

My Lord, if I may refer to a number of cases that I suggest reflect quite clearly on the situation. I would start with Regina -vs- Manninen as referred to by Mr. Sleeth earlier. I will give the citation again, My Lord, if you wish. 34 C.C.C. (3rd) 385. In that case the accused stated that he would not say anything to the police until he had a lawyer and that he wanted to see a lawyer. The police continued questioning and -- they continued questioning and elicited information with the accused. The Supreme Court of Canada in that case, My Lord, although they did say many other things, the principle I think elicited here is that once the

accused had made the request for the lawyer and demanded to see the lawyer that the police should have ceased their questioning and my point being, My Lord, that after Allan Legere requested a lawyer at 6:35 questions were asked in an information-gathering process. Now, it didn't form an interrogation. I am not trying to indicate that, but Mr. Legere had been quite talkative and they wanted to get this material. They probably should have gotten to the point of getting a tape recorder and a stenographer right there in the cell where Mr. Legere had been searched. He was telling them so much so fast. Couldn't stop. But they didn't do that.

Also, My Lord, I would refer the court to an earlier decision. 1986. Clarkson -vs- The Queen. I find that at 25 C.C.C. (3d) 207. I raise the case, My Lord, in the fact that Allan Legere by not saying anything to certain officers when he was read his rights, did not waive his right to counsel. Did not deny himself the availability of counsel. He just didn't make a comment and the Clarkson case, My Lord, I would propose stands for the principle that -- a situation where a waiver is being deemed or thought of by the police or investigating officers is not 100% seen when no comment at all is made. The waiver would have to be a clear and unequivocal waiver according to the Supreme Court of Canada. Allan Legere saying nothing is not clear and unequivocal.

The Clarkson case was built on a decision, My Lord, proposed in the case of The Attorney General of Canada and Korponey found at 65 C.C.C. (2d) at page 65.

That is where the statement of a clear and unequivocal effort or acknowledgement by the accused waiving procedural safeguard of counsel.

In the case of R -vs- Bridges et al, My Lord, which is a British Columbia Supreme Court -- found in 58 C.C.C. (3d) page 1, the court found that the accused had a right to counsel and found that the right to counsel was an entrenched right now under the Charter and basically that he accused, as a person who is being detained by peace officers, has to be informed by those peace officers of the availability of counsel to the point where -- as was done later on in the morning in Mr. Legere's case -- the point that telephone lists of lawyers were provided. These telphone lists, My Lord, now as I have been given to understand, it is apparently the practice that duty counsel or legal aid lawyers are provided for accused persons who come into conflict of the law so that even at three o'clock in the morning a person can speak to counsel immediately because there is an urgency there, and I would submit, My Lord, it is fairly clear that on the evidence before us during this voir dire that although Cst. MacPhee may have felt that he had other duties, he certainly had also a duty to the accused and when he was told that counsel was requested he should have done more than just ignore what the accused said and carry on with his guarding duty, especially when it was quite obvious that other officers were already in the cell area with Mr. Legere.

My Lord, it is the contention of the defence that whatever Mr. Legere said after he received a kick in the head and was transported to the Newcastle Detachment

would not be admissible and should not be admissible as statements voluntarily made. Sure. He said them. He was talking, but the situation that in that person's fact of life as he was that morning, makes it clear that he could be very well just talking and that is all. The talking for him to just keep these officers off of him. He has got kicked in the face now. That is once. Just don't let them do it again and he just keeps talking.

The situation at the Newcastle jail area after Mr. Legere has been stripped and searched is that other conversation carries on and other facts are brought up and Mr. Legere is in a situation where he is confronted by an acquaintance. Now, Cst. Charlebois says it was like old friends meeting. Mason Johnston and Kevin Molè and Allan Legere. Gosh. It seems very difficult that the prime two investigators and police officers who are responsible for Mr. Legere to be doing Dorchester Penitentiary time and then later Renous Penitentiary time are old friends of the accused. They are acquaintances. They are people he knows. I am sure he will talk to them because he knows he can talk to them and he makes requests of Mason Johnston and Mason Johnston indicates he will see what he can do and he starts doing things like finding doctors and indicating that his handcuffs will be removed when Kevin Mole shows up, which happens. It does happen a few minutes later. 15, 20 minutes later, but Mason Johnston and Kevin Mole are not Allan Legere's old friends. Again, Mr. Legere already requested a lawyer when these officers come back in to read him his rights again. He has already requested

a lawyer in his own mind. How many times does he have to do it?

The crown contends he has to keep on, if I read what a diligent pursuit for counsel -- and I say that is not the law, My Lord. Diligent pursuit of counsel. That is not the law in Canada. The law in Canada is when an accused person asks for counsel, counsel should be and will be provided in the circumstances, and the circumstances are here that we got many more years to bring that case to trial that they arrested him for in 1989. There was no immediate demand. There was no evidence that was going to be lost. If Mr. Legere had half an hour, an hour, whatever, to try to find counsel, nothing lost. Only gained.

Thank you, My Lord.

THE COURT: Thank you very much, Mr. Ryan. Do the crown wish a brief opportunity for reply?

MR. SLEETH: Just if we could have a couple of minutes, My Lord, before responding? I however can respond directly to one thing. There is an error I submit in remarks by my learned friend. It was I am sure quite unintentional. That is the exchange with Mason Johnston took place, by the testimony uncontradicted of Mr. Johnston, and initial conversations with Mole sometime between 6:20 and 6:35 and the request to MacPhee for a lawyer then took place after that first meeting with Johnston.

Secondly, My Lord, the thrust of the crown's argument with respect to Mr. Legere and his right to counsel was that he did not diligently exercise that right. He had opportunity and he didn't do the one thing

that would be very simple. 'I want a lawyer. Get one. He didn't exercise it in the fashion which is called for in the judgments that were referred to you by myself. A perfect example of doing exactly the reverse and pursuing diligently the rights is that one referred to by myself. Manninen. Also referred to by my learned friend.

I believe I would still ask for a couple of minutes. We would like to consider if there was another thing we would like to address the court on.

THE COURT: We will take another -- how long do you want?

MR. SLEETH: I wouldn't think more than five minutes, My Lord.

THE COURT: We will do that then. I guess we should go back --

MR. RYAN: Five minutes. We could send them out, My Lord.

THE COURT: We could send you out and we will stay here.

MR. SLEETH: Quite simple. If you will excuse us, My Lord.

(COURT AND CROWN WITHDRAW.)

(RECESS: 1:30 - 1:35)

MR. WALSH: My Lord, I only have the one issue or aspect to comment on in rebuttal with respect to learned defence counsel's argument and that is with respect to the Legere matter. If the badge of illegality is to follow the New Brunswick Court of Appeal decision in Legere, so should the badge of admissibility which the Court of Appeal also ruled in that particular case. New Brunswick Court of Appeal should not be half right and half wrong when it comes to the argument in that particular case.

Thank you, My Lord.

THE COURT: Just to follow you there, you are saying that even though the Court of Appeal has said it was illegal, they have said it --

MR. WALSH: They have also said it was admissible.

THE COURT: That it was admissible at the same time. And what you are saying is you have to follow the second part of their --

MR. WALSH: That's right. What one badge applies so does the other one. They can't be at the same point half right and half wrong. Thank you, My Lord.

THE COURT: I know that puts an end strictly to the argument but, Mr. Ryan, anything you want to reply to there?

MR. RYAN: No, My Lord.

THE COURT: Just as a matter of interest, what do you have to say about this very last point? I think you would acknowledge that if one does accept the Court of Appeal's ruling on the first part -- I am bound by it.

MR. RYAN: You are bound by it. That's right, My Lord. You are --

THE COURT: Bound by the ruling on the second part.

MR. RYAN: The matter, from my point of view, My Lord, is that the defence maintains that the improper procedure or improper seizure of the hairs in '86, it was improper and that is the end of it. I understand what the crown is saying but I disagree.

THE COURT: Insofar as those items the seizure or the obtaining or the taking of those hairs at that time, I think I am bound by the New Brunswick Court of Appeal there. I can't say, well, look, Alderton changes it because it can't change it for me because the New Brunswick Court of Appeal has decided it really. There

is the other aspect that you argue, and I am not commenting on that aspect at the present, that this happened to be there in the files and was available. You don't have to look to the source or the way it was obtained. Well, that concludes this aspect of the voir dire. The exhibits here, these are two of them which I borrowed this morning. I had looked at the photographs earlier this morning as a matter of fact, Mr. Ryan.

One comment I was going to make here. I am not going to come up with any early decision on any of these matters raised in the voir dire. I have tried over one hundred jury trials. One of them has been sent back for retrial. That was a case where the Supreme Court of Canada changed the law about two years after I decided it so the law here remains moot until the trial before the jury begins, and I think what is -- you know, if I make a ruling today or tomorrow and a month from now the Supreme Court of Canada says the law is now changed or puts a different interpretation on it, that throws out anything I have done, and it throws out the trial, of course. So what I propose to do is I will wait until the proper time before making a decision on this. Normally a voir dire would precede the trial proper by a matter of hours or a matter of days at most and this problem wouldn't arise, but I certainly won't keep it open. If there are new decisions that have a bearing on these issues I would ask both parties to let me have copies of those in the meantime and if either party desires it or if I should myself require it, I will reconvene the voir dire and

hear further argument on those matters that are relevant. The only other point I was -- actually what I will very possibly be doing insofar as ruling on these voir dire questions is concerned is I will probably indicate to counsel, perhaps by letter, a few days before the jury selection or not very much before the jury selection the disposition that I will probably make and I will probably not actually make an order or a finding until the jury has been selected and we resolve into a voir dire immediately, -- resumption of this voir dire, at which time I will give an oral judgment touching on these points. In that way counsel, particularly the crown, will have an indication of course of what witnesses to call and they would have some guidance there. If counsel have any difficulty with this they can raise that at the end of the DNA evidence, but I thought I should advise you now what is happening.

(COURT ADJOURNED UNTIL MAY 1, 1991 AT 9:30 a.m.)

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF FREDERICTON

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

ALLAN JOSEPH LEGERE

AFFIDAVIT

1. THAT I am a stenographer duly appointed under the Recording of Evidence by Sound Recording Machine Act.

2. THAT this transcript is a true and correct transcription of the record of these proceedings made under Section 2 and certified pursuant to Section 3 of the Act.

3. THAT a true copy of the certificate made pursuant to Section 3(1) of the Act and accompanying the record at the time of its transcription is appended hereto as Schedule "A" to this affidavit.

SWORN TO at the City of Fredericton in the Province of New Brunswick this 6th day of May, A.D., 1991.

BEFORE ME:

A COMMISSIONER OF OATHS

Nancy M. Patterson

Commissioner of Oaths
My Commission Expires
December 31, 1995

SCHEDULE "A"

RECORDING OF EVIDENCE BY SOUND RECORDING MACHINE ACT

CERTIFICATE

I, Nancy Patterson, of Harvey Station, New Brunswick certify that the sound recording tapes labelled

R -vs- Legere

initialled by me and enclosed in this envelope are the record of the evidence (or a portion thereof) recorded on a sound recording machine pursuant to Section 2 of the Recording of Evidence by Sound Recording Machine Act at the trial (voir dire) held in the above proceeding on the 25 & 26 days of April 1991 at Fredericton, New Brunswick, and that I was the person in charge of the sound recording machine at the time the evidence and proceedings were recorded.

DATED at Fredericton, N.B. the 26th April 1991