

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

HER MAJESTY THE QUEEN

- and -

ALLAN JOSEPH LEGERE

TRIAL held before Honourable Mr. Justice
David M. Dickson and a Petit Jury at Burton, New
Brunswick, commencing on the 26th day of August,
A. D. 1991, at 10:00 in the forenoon.

APPEARANCES:

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

Weldon J. Furlotte, Esq., for the Accused.
.....

VOLUME XIV - Pages 3,743 to 3,937 incl.

October 9 and 10, 1991.

VERNA PETERSON
COURT REPORTER

1

0

(COURT RESUMED AT 9:30 a.m., OCTOBER 9, 1991.)

(ACCUSED IN DOCK.)

(JURY CALLED - ALL PRESENT.)

5

THE COURT: Now, Sergeant Kennedy?

SERGEANT ROBERT KENNEDY resumed stand:

CROSS-EXAMINATION BY MR. FURLOTTE CONTINUED:

10 Q. Sergeant Kennedy, I believe yesterday we left off
when you were giving me measurements that you had
taken of the insoles found in a pair of work
boots?

A. That's correct, yes.

15 Q. Now, before we get back into that today I just
want to verify a few points here. Your opinion is
that the casts of Mr. Legere were compared with
the insoles of the boots found in Bathurst?

A. That's correct, yes.

20 Q. And you're of the opinion that Mr. Legere probably
wore those boots and made the impressions inside
the boots?

MR. ALLMAN: That's a misquotation, the expression was
highly probable.

Q. That it's highly probable?

25 A. Yes, I believe what I said was that the impression
- the cast that was taken from Allan Legere and
the insole of the boot were compared and it was my
opinion that the impression inside of the boot was
made by Allan Legere or someone that would contain
30 the same foot morphology combined with the same
accidental characteristics as found in my examina-
tion.

Q. Because all the characteristics precisely matched?
I believe you were using the word precisely?

- 5 A. Yes, because all of the characteristics, the indentations and the sweat areas precisely matched, yes.
- Q. Precisely matched, so as far as you're concerned because they were so either precisely matched or so similar that it's highly unlikely anybody else's feet could match as well?
- 10 A. It's, yes, highly unlikely that somebody else could have done the impression.
- Q. And you're basing that opinion simply on your eyesight being able to put the mold onto the insole that you showed with the infrared -
- 15 A. No, I believe I said that my conclusions were reached after a physical comparison, which is something that the Forensic Identification Section uses to analyze an object, to compare an object, and to evaluate it and come to a conclusion. It's not just placing one thing on top of the other, it's using eyesight, calipers, overlays, different lighting techniques, several matters come into being - not just laying on top of the other or eyesight.
- 20 Q. O.K., but you didn't use the measurements that you had taken to support that opinion?
- A. It's found that measurements aren't as accurate as one would think when we're doing a physical comparison because the insole is a rounded material. You asked me earlier to place the cast on top of the insole here. Well, it's quite difficult to do because we're on a flat surface. The insole falls away from the molded material, therefore it has to be held up and bent into position. The boot would hold it in such a
- 25
- 30
- 35

5 position and the foot would lie flatter and the
boot would conform to the foot, so to rely on
measurements alone, no, it wouldn't be accurate.
The measurements were taken strictly as part of a
study that I mentioned I did, and the only reason
for it was to show that feet are different, not
that one matches the other but that feet are
10 different, and that was the sole purpose of the
measurements being taken.

Q. But could you use the measurements, say, to
support your opinion even though you had formed
the opinion before you took the measurements?

15 A. No, I didn't want the measurements to support my
opinion, my opinion was drawn. Any physical
comparison that's made, the same scientific
techniques take place, and the scientific
techniques do not involve figures with a ruler or
20 measurement unless it's trying to show the Court
the diameter of some hole, but the calipers would
help, I guess, if you want to have a measurement.
The calipers, showing the relationship between a
mark on the heel to the toe, using the calipers to
25 place it in a certain area would be helpful, but
to know that it's 110 millimetres or so away, we
don't use that.

Q. When did you form your opinion?

A. The date?

30 Q. Yes.

A. I don't recall what day it was. I've been working
on this case for the past year. It was well
before then but the exact date I don't recall.

Q. You've been working on this case since when?

35 A. For the past year.

- Q. For the past year?
- A. That's correct, yes.
- 5 Q. What did you do the first year, say from whenever you took the casts in November 24, 1989?
- A. Well, for the first several months when I had the casts I didn't have the boots. When I had the boots - Serology had the boots. When Serology
- 10 finished with the boots I brought them to Dr. Bettles who examined the boots before I had a chance to take them apart, so other work was being done before I had a chance to actually go into it. I suppose it's part of my investigation but I'm
- 15 talking strictly making up charts, evaluating the evidence, and I'd say approximately for the last year.
- Q. You brought the boots to Dr. Bettles sometime in June of 1990?
- 20 A. And again, I believe, in November.
- Q. I have a copy of your report where you formed the opinion, where you concluded the foot of Allan Legere could have and probably did make the wear marks on the bottom of these boots, and that's
- 25 dated December 31, 1990.
- A. Yes, that was part of my evaluation.
- Q. Yes, that's approximately two months after Allan Legere had actually been charged with the offence?
- A. Mm-hmm.
- 30 Q. So is it only at that time that you were really able to conclude -
- A. No, I believe you have a second report where I did other work and another evaluation with the top part of the boot. I also did a cross-comparison
- 35 with the Gorilla boot later in the year, and I

think you have my second report on that.

Q. That would be that come whenever you prepared
5 these here pictures that are basically in
evidence there now?

A. That's right, yes.

Q. How much time have you spent on this case?

A. Well, it's not the only thing I had to work on.
10 I was asked that not long ago by our financial
branch to find out the number of hours and I'd
have to look that up. I really don't know. I've
handled a hundred cases this year besides this
case. I have a murder trial coming up next week
15 in Sussex so I'm doing work on that. This is not
the only case I had during the whole year nor was
it the only case I had during the previous year.

Q. Would it be safe to say you spent at least six
months full time on this case?

A. It would be safe to say that I spent the last
20 year, six months, working on it. Full time I - I
haven't taken calls at night time but during the
day, as I said, for the past year I've handled
about 80 or 90 cases besides this one, one of
25 which is a murder coming up that happened a
month ago. Another was an attempted murder which
happened three weeks ago, so I've been working on
it for the past year but not strictly on this
thing, no.

Q. Is it safe to say you've also been working on
30 upgrading your expertise for this particular case?

A. I've been with the Forensic Ident. Section for the
past 20 years and I'm constantly trying to upgrade
my qualifications. I don't think it ever stops
35 when you're in a scientific field, and yes, I've

been trying to upgrade my qualifications not only in footwear but in other avenues.

5 Q. Would you have been considered an expert in comparing, say, feet, by using casts or whatever means, to the inside of footwear before the Allan Legere case?

A. It's not my decision to qualify myself as an expert, it's up to the courts. Would I have attempted to bring that into court; yes, I would. Footwear identification inside of a boot again falls back on a scientific basis of physical comparison which I've done for the past 20 years. I have been qualified in courts in Nova Scotia, Saskatchewan and New Brunswick to give expert opinion on physical comparison, which this is. It just happens that it's a -

Q. But not this type of physical comparison?

20 A. Not this type, no. The premise is a physical comparison.

Q. Before November of 1989 you'd have never attempted to be declared an expert to be able to compare this type of evidence, would you?

25 MR. ALLMAN: I'm going to object. I think the last question was irrelevant, as to whether he considers himself an expert or not. The fact is he's been qualified as an expert today and yesterday by this Court to give this evidence which he's giving now. What he could have done back in November, 1990, doesn't matter.

30 THE COURT: That's quite right, isn't it, Mr. Furlotte? Makes utter sense, you know, good common sense. We don't really care what -

35 MR. FURLOTTE: That's all I'm trying to get at, My Lord,

common sense.

THE COURT: Well, O.K., that puts an end to your
5 question, then, if you apply common sense.

MR. FURLOTTE: So basically you said you're always in
training to improve your expertise?

A. That's correct, yes.

Q. And as far as for being able to compare the
10 physical evidence of actual feet dimensions and
characteristics as to inside of boots you're still
looking to improve your expertise on that?

A. I'm looking to improve my expertise in photography
which I've done for the past 20 years.

Q. Now, this type of evidence that you're giving your
15 opinion on, it's not like fingerprint evidence
which is supposedly positive identification?

A. No, I believe fingerprints would be the only means
of positive identification known at the present
20 time.

Q. So this type of comparison is not positive identi-
fication?

A. I don't think we have the database to say that it
could be positive, no.

Q. And I thought I understood you to say in direct
25 examination that there are no two footprints
alike? Did you make that statement or did I
misunderstand?

A. No, I think you misunderstood.

Q. So it's possible that there are two footprints the
30 same?

A. The possibility exists, yes.

Q. And that the measurements that you make on feet,
the 16 different measurements on each foot, that
35 it's possible that you could find two feet to come

up with those same measurements?

A. There is a possibility, yes.

5 Q. You haven't found it yet?

A. I haven't yet, no.

10 Q. And you're using those 16 points of measurement as identifying characteristics to be able to either include a suspect with evidence or to exclude a suspect with evidence?

A. No, I'm not.

Q. Could you do that?

15 A. I guess that would be another study if somebody wanted to take that. My only reason for taking measurements as I find they're not as accurate as physical comparison would be is to do a study to show that taking measurements with inked impressions on a flat surface, if I can find two feet that are similar, and that was my only
20 intention in doing that, and in fact I didn't find two feet that are the same. To measure something on ink on a flat piece of paper and measure it in a boot would be difficult because of the contours so therefore you get away from the measurements
25 and physically - that's why it's called a physical comparison, you physically compare a molded impression along with an inked impression if you have it for any other details that you might have with the molded impression inside of the boot, and
30 it's done over a period of time under different lighting using different equipment until a conclusion is drawn, and the measurements can't enter into it. The measurements strictly and only are for a study that I've done to show that feet are
35 different.

- Q. That's all you've used it for?
- A. That's all I've used it for.
- 5 Q. I understand the foot impression inside of the boot, you take it from the sweat marks, the indentations and the sweat marks, to outline the foot?
- A. Take it from the indentation, yes, and the sweat
- 10 marks, that's correct, yes.
- Q. And the sweat marks would not extend to any great degree beyond the impression of the foot?
- A. Depending on the boot and shoe I suppose it could, yes.
- 15 Q. So you don't know how far the sweat impression may extend beyond the actual length of the boot?
- A. Depending on the boot, no, I don't know how far it would extend beyond the toe. It wouldn't extend beyond the boot because it would be
- 20 contained in the boot.
- Q. O.K., I'm sorry, it would extend beyond the actual length of the foot?
- A. Yes, I imagine that would depend on the circumstances, whether he sweat a lot, I guess. Sweat
- 25 usually has a tendency to go down and make a mark as in this case.
- Q. And maybe also extend beyond the size from the length but the width?
- A. I suppose there is a possibility in some boots
- 30 that you might find that. I'd have to see it.
- Q. So it might be difficult to find also where is the centre of the heel in an insole?
- A. In some boots?
- Q. In some boots?
- 35 A. I would imagine it would be in some boots, yes.

10

Sgt. Kennedy - Cross

Q. Or the centre of the toes on an insole?

A. In some instances I imagine it would be, yes. If
5 I couldn't, I wouldn't compare it.

Q. So when you're setting a cast on an insole to see
if you can get a comparison it's really difficult
to tell whether or not you're lining up with the -
you may be lining up with the sweat marks but that
10 doesn't mean the sweat mark outlines the foot that
was in the boot?

A. No, I have to say again is that I did not put the
cast over the insole to do a comparison. That was
strictly for chart purposes, for purposes of the
15 video to show the Court how the contours of the
feet line up. My comparison was made with an
insole with a cast material side by side taking
into consideration foot formations, deformations,
the shape and size of toes, their relationship to
20 each other, using overlays as I showed here to
ensure - I've used acetate paper to do even
fingerprints to draw out areas and lay it over to
line up, but to drop or to lay cast material on
top of something, it proves - to me I can't see
25 anything so I can't make any comparison with that.

Q. So you use the overlays like on the charts that
you have? You take a photograph of the bottom of
the foot, is that right?

A. Correct, yes.

30 Q. Use it as an overlay and put it over the photo-
graph of the insole?

A. Yes. When I'm trying to find certain character-
istics just to line it up and see how it lines up
with, let's say, a mark in the heel, calipers were
35 used to line it up, overlays to orientate it one

11

Sgt. Kennedy - Cross

5 toe to the other, drawings of going around the
different areas as tracing a hand, putting the
mark where I found it, overlaying it, trying to
line it up, side by side comparison.

Q. O.K., but if you can't depend on these sweat marks
as being an accurate description or an accurate
measurement of the foot that was in the boot, what
10 good does it do to put an overlay on a photograph
of the foot?

A. Well, I didn't say that the sweat marks weren't an
accurate representation. What I said was, and I
believe what your question was, is it possible.
15 Yes, it is possible to find a sweat mark that is
not represented properly in a boot. It is
possible. It's possible that the ball area is not
going to be represented in some boot but I
wouldn't compare it. If I couldn't find the sweat
20 mark that was suitable, then the object becomes
unsuitable for comparison and I wouldn't compare
it. It would be a no-ident, it would be - this
boot in particular didn't have areas that I
couldn't read. The areas I could read were
25 indented and they were -

Q. O.K., so under those conditions it wouldn't be
safe to make a comparison, if you couldn't find
the sweat mark to -

A. I'd have to see the boot you're talking about.
30 I've compared physical evidence that looked
terrible and we were able to find enough
characteristics in it to come to a conclusion.

Q. O.K., would you give me an example of something
which would take place which you would say well,
35 because of this it's inconclusive, I will not form

an opinion?

A. A brand-new pair of boots that nobody wore.

5 Q. And there was no sweat marks in it?

A. Yes, that would be a time when I would say I could not form an opinion as to somebody wearing it.

Q. O.K., and what if there were partial sweat marks in it?

10 A. I'd have to see the partial sweat marks and make an evaluation of the sweat marks.

Q. Is there anything in a comparison, say, between the mold of a foot and a sweat mark in a boot which would cause you to say there is an exclusion? What criteria would you need to, say it doesn't fit, it's somebody else's foot?

15

A. Size 6 foot with a size 12 mark.

Q. You would need that much of a discrepancy?

A. Pardon?

20

Q. You would need that much of a discrepancy?

A. No, I'd have to see the boot you're talking about and evaluate it.

Q. So you have no standards is basically what you're saying, then? There's no such standards as to what the minimum differential is before you would draw an exclusion?

25

A. Yes, the standard is the basis on which we do physical comparisons. We have to evaluate every characteristic to see if it matches the other characteristic, and I'd have to see the characteristic or the pattern you're talking about to compare with somebody to say that no, I can't compare this or no, it doesn't match.

30

Q. O.K., you also say that you're an expert in comparing fingerprints?

35

- A. I am a fingerprint technician.
- Q. And in taking fingerprints or analyzing fingerprints, comparing them, there may be a few similar characteristics on different prints belonging to different people, just a couple of different ones?
- 5
- A. A few similar?
- 10
- Q. Or a couple of similar ones?
- A. In fingerprints, when we do fingerprint identification, it's an exact science, and if we find a characteristic in one and a characteristic in the other it's a definite characteristic, it's not similar or close. Each characteristic is pointed out and a conclusion is drawn from enough of these characteristics in agreement.
- 15
- Q. O.K., but I thought you mentioned earlier, too, that in the courts, like the fingerprints, some of the courts are saying you need ten different characteristics to match up before a positive identification?
- 20
- A. No, I didn't say that. What I said was that there are no set number of characteristics. Some courts have - ten is what some courts rely on, but there's no basis, I've seen a lot less.
- 25
- Q. Not for the technician himself, you wouldn't hold yourself to ten?
- A. No, I would not.
- 30
- Q. O.K., what if you found fingerprints with two similar characteristics and there was a third that was totally different? Would you say that that's an exclusion or, rather, it's just inconclusive?
- A. Well, I'd have to see the print you're talking about to find out what you're calling totally
- 35

14

Sgt. Kennedy - Cross

different. I'd have to see a print. I mean, I can't rasion in my mind what you're talking about.

5 Q. O.K., so you can't describe any standards that you would use to draw exclusions on physical characteristics?

A. Sure, any characteristics that don't match when I make my physical comparison, then I will make a
10 conclusion on those characteristics when I do my comparison.

Q. And if it doesn't match you would exclude that person?

A. If the foot doesn't match, then yes, I would
15 exclude that person, definitely.

Q. In the pair of Gorilla boots you didn't make any measurements on the insoles of the Gorilla boots?

A. No, I didn't, no.

Q. But were there any better identifying characteristics in the Gorilla boots that were not present
20 in the Greb boots?

A. No, I wouldn't say better. The indentations in the Gorilla boots were more predominant in the sole than were in the Greb boots. They were
25 deeper because it was softer material. I guess I was able to see some of the phalanges, toes, a little better because of the indentations than I was able to in the Greb boot, but other than that, no.

30 MR. FURLOTTE: My Lord, I'll be cross-examining this witness now on the measurements that he took of the casts of Mr. Legere's feet and the insoles that were found in the Greb boots, and for the benefit of the Court and jury the Crown consents
35 that we present to the Court the photocopies of

Sgt. Kennedy - Cross

5 the measurements taken by Sergeant Kennedy so
that the Court and the jury will be able to
follow along with our discussion on the measure-
ments taken.

MR. ALLMAN: I have no objection to this item being put
in as an exhibit. In fact, we just made photo-
copies for Mr. Furlotte and for the jury.

10 THE COURT: Does the Crown agree that it would be bene-
ficial to the jury to have this material before
them to follow along with?

MR. ALLMAN: My own feeling is that given the evidence
15 that this witness has already given, namely that
the measurements are not used to make these
comparisons and were purely used for the
statistics that he used to put into his computer,
I don't think it is of any assistance, but then
if my learned friend feels that it is of assis-
20 tance and he wants to put it in, I have no
objection, and if he wants to put it in I
certainly don't see any reason why the jury
shouldn't have copies.

THE COURT: Let's mark it as an exhibit. You're marking
25 it as an exhibit?

MR. FURLOTTE: Yes. Two different photocopies, one of
the measurements of the casts and one of the
measurements of the insoles. Maybe I'll ask the
sergeant to depict which is which here. I think
30 I know but -

A. This was made from the mold and this was made from
the insoles. The one with 000 is the one from the
mold, and they're accurate, I photostated those
just five minutes ago, or a half-hour ago.

35 THE COURT: The list of measurements from mold would be

Sgt. Kennedy - Cross

Exhibit D-2, and the list of measurements from the insoles of the Greb boots would be Exhibit D-3.

5 For the jury, I might point out the one with the three zeros at the top is D-2. You might care, perhaps, to write on that copy D-2, and the other one is copy D-3.

MR. FURLOTTE: You have your copies with you, Sergeant?

10 You could look at the exhibits, I guess, so looking at D-2, that's the measurements of the casts of Mr. Legere's feet?

A. That's correct, yes.

15 Q. And up at the top, "length". Is that the length of the whole foot?

A. Yes, that's the length of the longest toe.

Q. Maybe I'll get the casts for you here. I show you Exhibit P-137, demonstrate with that where the measurements are taken.

20 A. The measurement on this was taken from the top of the toe to the heel area on the cast.

Q. And the B width would be where?

A. That's called the ball width, it would be across here.

25 Q. And then the H width would be the heel width?

A. Heel width across here.

Q. Now, the centre of the heel to the first toe would be the big toe or -

30 A. The centre of the heel to the first toe would be the centre, optical centre of the heel, to the optical centre of the toe which would be the dead centre of the toe, to the centre of the heel which is -

Q. And the first toe would be the -

35 A. That's the first toe right here, second, third,

fourth and fifth.

5 Q. And then over to the right we have the border of the heel to the centre of toes again?

A. No, that's the border of the heel to the border of each toe, drawing a straight line across, coming up and measuring to the top outside border of each toe to the outside border of the heel.

10 Q. O.K., maybe I'll bring both casts over for you also, and the one of the right foot which is P-136, maybe if there's any explanations. Now, I notice in your measurements -

15 THE COURT: May I ask here, is D-2 one foot and D-3 the other foot?

A. No -

THE COURT: Oh, no, you explained it. These are both left foot, are they?

A. No, D-2, Your Honour, is measurements taken -

20 THE COURT: Oh, you've got both left and right foot, yes, L and R, yes, I see.

A. Yes, and then D-3 would be the insole.

THE COURT: D-3 is the insole, I see.

25 Q. O.K., in D-2 on the casts I notice that the measurements here that you have that on the second left toe - from the heel centre to the second left toe, that's 224 millimetres?

A. Mm-hmm.

30 Q. And that second toe here measures to be longer than the first toe from the heel centre which is 216 millimetres, is that correct?

A. Mm-hmm.

35 Q. So in your measurements here you have on the left foot the second toe longer than the first toe from the heel centre?

- A. Mm-hmm.
- Q. By eight millimetres, is that correct?
- 5 A. The second toe, yes, O.K., go ahead, I follow you.
- Q. O.K., so the second toe is shorter than the first
toe by eight millimetres?
- A. The second toe from the optical centre.
- Q. From the optical centre of the heel would be eight
10 millimetres shorter than the first toe?
- A. Yes, according to my measurements there, that's
correct. I could check it.
- Q. Now, if we go over to the measurements of the heel
border, again measuring the heel borders to the
15 toe border, am I right?
- A. Mm-hmm.
- Q. You find - oh, wait now, I'm sorry, I guess I'm
getting that wrong here the first time. The
second toe - let's start over again. From the
20 optical heel centre to the optical toe centre for
the second toe, it's 224 millimetres?
- A. That's correct.
- Q. O.K., and for the first toe it's 216 millimetres?
- A. That's what's written there, yes.
- 25 Q. So that makes the second toe longer than the first
toe?
- A. That makes the measurement from the optical centre
of the heel to the optical centre of the first toe
longer, right.
- 30 Q. Would that also indicate that the toe should be
longer than the first, the second toe should be
longer than the first toe?
- A. No, not necessarily. When you do an optical
centre as you see here, the toe is a small circle.
35 The optical centre would be here. The toe is a

Sgt. Kennedy - Cross

5 large circle with the optical centre. Now, the
optical centre shown here obviously is higher than
the optical centre here, it's about a few milli-
metres higher, but yet the toe being much bigger
is longer, so if you take the optical centre of a
marble and then take the optical centre of a beach
10 ball, the optical centre is in the same spot but
the beach ball is bigger. The same thing happens
here, the optical centre of a small toe is here
but the outside border is smaller than the outside
border of the optical centre of a large toe,
making the large toe longer.

15 Q. O.K., so in this case the optical centre of the
toes -

A. - are different.

20 Q. - are different. The centre would be longer than
the actual - when you compare the centres to the
length of the toes you would get the second toe
larger in optical centres, or at least further
away?

A. Yes, the optical centre of the first phalange,
the second phalange, the second toe, would be
25 longer. The overall length of the foot would have
the first phalange, the toe, being longer, so if
you're taking your foot size you would go from the
toe to the heel rather than the first toe to the
heel even though the optical centre is further up.

30 Q. O.K., that's fine. Now, in measuring the insoles
and comparing them to the feet, O.K., so if we're
comparing the full length the left insole or the
left length of the foot, the insole would be
longer than the cast by two millimetres when
35 you're comparing lengths? The impression made in

Sgt. Kennedy - Cross

5 the insole compared to the casts of Mr. Legere's feet, the left insole would be longer than the cast by two millimetres?

A. The left insole wouldn't be longer. My measurements showed that they were two millimetres difference but as I said, the reason you don't measure lengths and widths when you're doing a physical comparison is for that reason. You're measuring something on a flat surface which this insole would be flat, trying to curve it around the foot. The molded impression is already curved and hard so you're going to get a difference, and that's - when I said earlier about doing the computer program I searched minus or plus five millimetres which would give me a ten millimetre difference to allow for an error of measurement because measurements on rounded surfaces, curved surfaces, are quite difficult to get accurately, and that's the main reason why it's not used when a physical comparison was made, and it wasn't used in this instance.

Q. O.K., but that's for the left foot the insole was longer, but for the right foot it shows that the cast is longer than the insole by two millimetres?

A. Well, yes, but I didn't say the insole was longer, I said my measurements were different. I have to -

Q. O.K., your measurements are different.

A. And the measurements are different in the other one, yes.

Q. O.K., your measurements are different in the other one also by two millimetres but in the opposite direction?

- A. The opposite direction, that's correct, yes.
- Q. So how would you explain that phenomenon?
- 5 A. I just explained the phenomenon. When you're measuring curved surfaces with indentations and different areas it's hard to get a proper measurement unless you did a computer scan of all the curves and valleys. I believe there is a
- 10 technique at our research centre in Ottawa to do that. I didn't think it was necessary in this case because I wasn't using it as a comparison so I used a ruler which is a straight object over a rounded object, and your measurements are going
- 15 to be different.
- Q. Did you use a ruler or - didn't you first use calipers?
- A. Calipers are used to take the distances on top of a ruler. Your distances is from a ruler. I use
- 20 my protractor to get the distances transferred to a ruler. Your measurements are taken from the ruler.
- Q. Did you use a caliper to go from the optical centre of the heel to the optical centre of the
- 25 toes and then measure the distance that you got with the caliper on a ruler?
- A. That's correct, yes. I used the same ruler. I think you asked yesterday, I used the same ruler each time I did all -
- 30 Q. So the caliper can get you all around the curved surfaces?
- A. No, the caliper still goes in a straight line. A caliper measures a straight distance, a caliper doesn't measure - if you take a caliper and go
- 35 across a ravine that's a mile deep and ten feet

Sgt. Kennedy - Cross

- 5 wide, the measurement with a caliper is going to be ten feet, but if you had to walk it you'd have to walk a mile down and a mile back up so it wouldn't give you a true distance. I'm saying the same thing here is I'm measuring a straight line with a straight line. You're getting valleys, curves, which you lose on your insole, so trying
- 10 to make the insole conform and hold it in a position so that it would be relative to that you're going to lose some of your distances, and as I said earlier, that's why we don't use that as an accurate means to make a comparison when we do a comparison between any physical match.
- 15 Q. But your calipers measures just as if you had a perpendicular line straight up from the centre here and a perpendicular line straight up from the centre of the toe?
- 20 A. That's correct, yes.
- Q. And you measure directly across?
- A. That's correct, yes.
- Q. So it wouldn't matter what the surface was curved like, whether it was concave or convex, by using your calipers you eliminate the error that you
- 25 might get if you tried to go in and out of all the curves?
- A. Using two like objects, you're right, two immovable objects, you're right.
- 30 Q. Two immovable objects?
- A. Mm-hmm.
- Q. So again, on the left foot you found that the insole between the points measured longer and on the right foot you found that the casts measured
- 35 longer?

Sgt. Kennedy - Cross

- A. Yes, I -
- Q. In the length of the cast -
- 5 A. I had obtained different measurements in both, correct.
- Q. Now, the B width when you compared the insoles with the casts, and this is one I'm very concerned with, maybe you can explain it. I believe the B
- 10 width in the casts is - for both the right and left foot is 59 millimetres?
- A. Pardon me?
- Q. 59 millimetres?
- A. In the mold?
- 15 Q. In the mold?
- A. That's correct, yes.
- Q. Now, that's for your heel width, or no, that's - sorry, let's take the ball width.
- A. Mm-hmm. What width are we taking?
- 20 Q. Let's take the ball width of the casts.
- A. O.K., right.
- Q. The ball width for the left foot is 104 millimetres?
- A. Mm-hmm.
- 25 Q. And the ball width for the insoles is 100 millimetres?
- A. Right.
- Q. Again a difference of four millimetres?
- A. Right.
- 30 Q. So if you were able to use measurements, and you say you're not, but let's say if you were able to use measurements, it would indicate that the person's foot was four millimetres wider than the casts and the impression that was left in the
- 35 insoles?

Sgt. Kennedy - Cross

- 5 A. Yes, measuring in this instance, as I said, would show a difference of four millimetres because of the difficulty in measurement, and that's why we do not use the measurement.
- Q. And this would be a difference of roughly four per cent?
- A. Would be a difference -
- 10 Q. Difference of four millimetres and 100 millimetres that would be roughly a difference of four per cent?
- A. Right.
- 15 Q. Now we'll go to the heel width. O.K., the heel width in the cast for both the left and right feet is 59 millimetres?
- A. Mm-hmm.
- 20 Q. It's the width of supposedly Mr. Legere's heel. Now, the width in the insole for the left cast is 63 millimetres?
- A. 63 in the left and 60 in the right, correct.
- 25 Q. So in the left heel, again, we have a difference of four millimetres, but this time with a measurement of only 59 millimetres which is roughly 6.6 per cent difference?
- A. Correct.
- Q. Would that be right?
- A. The measurements on the paper, that's correct, yes.
- 30 Q. So in the heel width it looks as if, if you were able to use measurements, it looks as if Mr. Legere's foot is 6.6 per cent narrower than the impression that was left in the insole; would that be correct, if you were able to use measurements?
- 35 A. You mean if I was able to use measurements for the

comparison?

Q. Yes.

5 A. Yes, but I don't use the measurements for physical comparison.

Q. No, you don't, you -

A. Well, I can't answer your question, then, I don't use them.

10 Q. I know you're not using them, but I'm saying if they could be used, if somebody else wanted to use them, it would be a 6.6 per cent difference?

A. There's a 6.6 per cent difference on the figures on the paper but they're not used when making a physical comparison because they're not accurate enough to be used.

15 Q. O.K., we'll get to the physical comparison after, but 6.6 per cent difference is a big discrepancy, would you admit that, if it was a valid discrepancy?

20 A. You keep asking me if it's a discrepancy, and I think I explained the discrepancy. Whether it's big or not, I don't find it big, no. It's a discrepancy because of the curvature of the insole we're working with.

25 Q. If you were comparing two footprints just by measurements as - or you had the casts of two different feet and the only difference was the difference in width of the heels, 6.6 per cent difference would be enough to exclude them and say that they are different, would it not?

30 A. You're asking me a hypothetical question. I'd have to see the casts that you're referring to. I don't make an evaluation on one characteristic. I think we discussed fingerprints before, it's

5 the same idea. It's not one characteristic that
makes the ident. or takes it away. We do an
evaluation of the whole area of many, many
features of the foot and whether one discredits
that identification or not, I'd have to see that
characteristic.

10 Q. All right, you said that you collected from over
900 people?

A. That's right, yes.

Q. And you took casts of their feet or measured
them?

A. No, I took inked impressions of their feet.

15 Q. Inked impressions of their feet, and you measured
them and you formed some kind of a database and
you found that no two people had a foot that
matched?

A. In that database, correct.

20 Q. In that database, so if in that database out of
the 16 measuring characteristics that you took
two people had identical measurements except for
the width of the heel which they differed by 6.6
per cent, without knowing that those measurements
25 come from two different people you would conclude
that those measurements come from two different
people because the width of the heel would exclude
one from the other?

A. No, I would not conclude that. My database is set
30 up that I searched plus or minus five millimetres.
A plus or a minus five millimetres is a ten
millimetre difference, and we're discussing 59
millimetres and I give it a value of ten. That
can go anywhere from 49 to 79, so that print would
35 come out with several others. I would then

Sgt. Kennedy - Cross

physically compare the soles of the feet that I've
inked and make an evaluation from that. That's
5 precisely why that when I did my computer program
I didn't put in an exact measurement because it's
almost impossible to take somebody's foot five
times and get the exact measurement five times
even on an inked surface, so you have to put in an
10 error, and I've put in a plus or a minus five
error. I've even gone up as high as plus or minus
ten error, and the only reason for that is to have
more people fall in the range of being close to
the same to see if I could get somebody even
15 close, and it was found that they couldn't, but
those are not used in a physical comparison for
forensic purposes for court. It's strictly a
study to find out the differences between feet.

Q. O.K., so if you allow a plus or minus five milli-
20 metre error because you don't get the same
measurements all the time, on controlled ink blots
what would you use for a plus or minus measurement
for error on something like an insole, which is
not a very good impression?

25 A. As I said earlier, we don't use a measurement when
we're doing a physical comparison, so there's no
plus or minus error on a physical comparison.

Q. Granted you don't use measurements, but you will
admit there's lots of room for error when you even
30 do your other physical comparison like the casts
on the insole?

A. Lots of room for error?

Q. You should be using more than plus or minus five
millimetres on an insole?

35 A. I don't use measurements, I don't use a plus or

minus five anything. I don't know if you understand the process used in -

5 Q. O.K., let me try it again. If you feel it's appropriate to use a plus or -

THE COURT: Well, no, just let him answer the question. You were interrupted.

10 A. I just don't think you understand the process we go through to make a physical comparison. We evaluate the overall - first of all I guess we can relate it to footwear. You take the class characteristics, is it a foot by a human or is it a horse? If we realize that they're both two
15 human feet, then we start. Do they have five toes; yes. Are they about the same length; relatively the same length. Can we go into other features of the foot for the placement of the toe, is it crooked, is it straight up and down, is it
20 turned sideways, is the second phalange overlapping the first toe, is it separated, or is it longer, is it shorter? Is it shorter than the third phalange, is it shorter than the fourth one, is the fourth one wrapped up in and around? We go
25 over every feature from the top down. We don't measure the features because there is a variability when you're measuring from a cast and you're measuring from a mold unless, I suppose it could be looked into, the computer that they have
30 in Ottawa that might measure all these contours and come out with a proper reading. We didn't use that, I don't think anybody so far in the study of footwear has used it, so -

Q. And it is a relatively new study, this area?

35 A. Well, what do you call new? I think it's in its

Sgt. Kennedy - Cross

5 infancy but I've known about it for the past ten
years and probably longer. I know there are
studies being done and had been done in 1946 by
the American army to find out if they could
standardize boots for the American army. They
wanted to have the left and right foot fitting so
perfectly that it would go and they found that
10 they couldn't - after 6,000 people that they had
no study at all, that feet were so variable and so
different that they couldn't standardize boots.
That's in 1946, I believe it was, so it's in its
infancy according to the make-up of the world but
15 not new as of last year.

Q. Just to get back, you realize that through your
precise measurements, supposedly, they are not
so precise because there's room for error?

A. They're not precise measurements, right.

20 Q. They're not precise measurements?

A. That's correct.

Q. So when you have controlled casts and when you
have controlled bare footprints onto ink pads and
on paper similar to the way you take fingerprints,
25 under these controlled circumstances you realize
there's room for error when you're doing your
measurements?

A. Measurement error, correct, yes.

Q. And for the purposes of comparing?

30 A. I don't compare with measurements.

Q. No, not for the purpose of the evidence you gave
the Court today, but for your experiments in your
collection of foot impressions to determine that
so far you haven't found two people with feet
35 similar to - totally similar to one another?

30

Sgt. Kennedy - Cross

- A. Similar, that's correct, yes.
- Q. And you use measurements for that comparison?
- 5 A. Yes, that's correct.
- Q. So when you say that you haven't been able to find two people who have a foot identical you admit that the method you're using to come to that conclusion or come to that fact if you haven't
- 10 found any yet, you're using measurements?
- A. That's right, yes.
- Q. Which are not very accurate?
- A. That's correct.
- Q. Which you could measure the same person three,
- 15 four, five times and come out with different measurements?
- A. That's correct, yes.
- Q. And you would put that same person's measurements into the computer and when you searched your
- 20 computer you couldn't find them because you put in different measurements?
- A. If we use the exact measurements, that's correct, yes.
- Q. So when you search your computer to tell you that
- 25 none of them match, actually you're saying you could put the same person's foot in there two, three, four times and your computer would still tell you you're not getting a match?
- A. If you're using the exact measurement, that's
- 30 correct, yes.
- Q. Yes, O.K.
- A. But that's why a plus and minus five is used to include the errors that might be -
- Q. So the fact that you couldn't find people out
- 35 there with the same foot characteristics, it's

Sgt. Kennedy - Cross

really irrelevant because you couldn't even find it on a person with the same foot?

5 A. No, I don't agree with you at all. When I say that we're having trouble measuring inked impressions, I don't mean we're out by 59 millimetres. I'm talking about a millimetre here and a millimetre there, and human error. I've also gone
10 through the computer and couldn't find, as you say, a group of measurements after 32. When I punched the numbers through to find out I found that I made the error. Rather than 150 I put in 250, so yes, you get error both human and measurement-wise, but in measurement-wise using a plus
15 or minus five, you get a big enough field that your error is not going to be ten millimetres, hopefully not, and if it is, then yes, you're going to miss that small area.

20 Q. Is there any reason why you, rather than go plus or minus five, that you don't go percentage-wise? You know, a two millimetre error on a distance of 20 millimetres is far different from a two millimetre error on something that measures 200
25 millimetres.

A. But I didn't go two millimetres, I went five millimetres plus or minus which is ten millimetres, which is ten per cent on 100 millimetres. It's 20 per cent on a 50 millimetre
30 width. I didn't want to have to go into a computer and give me percentages, I found it easier to go in with a plus or a minus five. I'd also gone through with a plus or minus eight, I expanded it. Time doesn't permit me to finish
35 what I've started. I don't think in the next two

Sgt. Kennedy - Cross

5 or three years I'll be finished the whole study
that I would like to do, and it will be maybe down
the road a wider plus or minus eight.

Q. It may be a plus or minus eight down the road
further?

A. Just to see how many we can filter through the
computer system.

10 Q. For yourself you give yourself a plus or minus
five per cent margin for error?

A. I don't give myself a plus or minus five error, I
give the searching capabilities of the computer to
gather more people and compare more people to have
15 the same measurements so that I'm getting a bigger
feedback than having the exact measurements and
it's coming back after two inputs saying that we
have him. I want to be able to put more measure-
ments in to compare more people, and a plus or
20 minus five did that for me.

Q. I understand you run Mr. Legere's measurements
through your computer?

A. Yes, I did.

Q. Yes, and with no measurement for error you weren't
25 able to extract anybody who had feet similar to
Mr. Legere?

A. When I used the exact measurements of Mr. Legere
after one input - I believe one or two inputs,
only Mr. Legere's print came out of the base of
30 1,800 feet, so therefore I expanded the base to
plus or minus five to give me a better chance of
finding somebody else, and it took - I forget
right offhand, I can check what I gave you there -
after five or six inputs out of 32 only Mr.
35 Legere's footprints came out, so I expanded it

Sgt. Kennedy - Cross

- even further to a plus or minus seven to see if I could expand the area to find people that are even close to that measurement, and after, I believe, ten inputs, only Mr. Legere's print came out. I expanded it even further to plus or minus ten so we would really get somebody to come in, and I had to then put all 32 measurements in, and after -
- 5
- 10 Q. You say all 32 measurements, is that 16 of each foot?
- MR. ALLMAN: Are you finished that answer?
- A. Sixteen in each foot.
- Q. So you're putting both feet in?
- 15 A. Both feet in, and after 32 I believe I got seven respondents and I checked all seven and found one was Legere and the rest were so far off that it didn't match anyway because of the plus or minus ten which is a 20-millimetre error.
- 20 Q. You also used a plus or minus eight millimetre error?
- A. Yes, I did.
- Q. And when Legere's measurements were not in the computer with a plus or minus eight measurement you come out with - after the 32 characteristics you come out with two respondents?
- 25 A. Is that what it says there?
- Q. It's what I have.
- A. If I could read it?
- 30 Q. O.K., up here.
- A. That's correct. I put - I ran Mr. Legere's measurements through the computer when I knew his measurements were not in there. I wanted to see if I could find anybody that would have the same -
- 35 close to the same feet. I started with a plus or

Sgt. Kennedy - Cross

5 minus ten. I started with the outside and after
32 measurements I did get seven respondents. I
checked all seven and again they were nowhere
close to the measurements, with a plus 20 milli-
metre difference you find that, so I started
dropping down. I did a plus or a minus eight and
again after 32 measurements I got two respondents
10 back, so I checked the two respondents and again
it's a 16 millimetre difference, there were none
close. I then went -

Q. What do you mean by none close?

A. With a 16 millimetre difference they were at the
15 border of the 16 millimetres, 16 millimetres
meaning that some of the ball width rather than
being 60 might have been 72 - or 70. It's a
16 millimetre difference. Then I went with a plus
or a minus seven and from then on, plus or minus
20 seven, five, and two. With a plus or minus seven
after ten entries I got zero respondents, the
computer told me that that measurement was not
there with a 14 millimetre difference. I then
went with a plus or minus five which is a ten
25 millimetre difference, and after eight measure-
ments I got zero respondents. Using the exact
measurements after two entries the computer came
back and said zero respondents, that the print
was not on file. I knew they weren't there anyway
30 because I didn't put them in, and it was then I
entered them and did the other sides of the study.
It was strictly a study, this told me nothing
about the comparison, the comparison had already
been made, and my conclusion had already been
35 drawn. This was done on the 30th of September,

1991.

- 5 Q. And once you put Mr. Legere's measurements into
the computer you did it again?
- A. That's right.
- 10 Q. And once with Mr. Legere's measurements in the
computer with a plus or minus ten the computer
kicked out six respondents and one of them was
Legere?
- A. That's correct, yes.
- 15 Q. So why is it that your computer, when Legere's
measurements are not in it with a plus or minus
ten millimetre for error - with his measurements
not in it the computer will kick out seven
20 respondents but with his measurements in it your
computer only kicks out six respondents and one
of them is Legere. With Legere's measurements in
it it should have kicked out eight respondents,
shouldn't it?
- A. Good question. It kicked out six. I'm not sure
if one was Legere meaning it kicked out seven and
one was Legere, six plus Legere, and it dropped
one because - I have no idea, that's what it did
25 kick out, you're right, yes. It kicked out either
six or seven after 32 with his prints being there
and it kicked out seven when his prints weren't
there after 32. Yes, you're right, correct.
- Q. Hard to understand?
- 30 A. I find computers hard to understand, you're right.
- Q. Again back to the measurements. When we compared
the centre heel to the first toe, and we're
comparing them from the casts to the insoles, the
measurements from the centre heel to the first toe
35 on the insole is shorter by two millimetres than

the measurement on the cast for the left toe, left foot, would that be right?

- 5 A. From the centre of the heel to the first toe?
Q. Centre of the heel to the first toe.
A. On the left foot? Yes, the measurements come out two centimetres different, yes.
Q. Yes, the insole would appear to be shorter by two
10 millimetres?
A. The measurement was shorter.
Q. The measurement was shorter?
A. Yes.
Q. But the measurement you have recorded on the
15 insole is shorter?
A. That's correct, and I explained why the variation.
Q. And the measurements from the centre heel to the second toe, it's the cast that shows a shorter measurement by one millimetre for the left foot?
20 A. The measurement was different by one millimetre, right, yes.
Q. So sometimes the measurement appears shorter on the insole, sometimes it appears shorter on the cast, so it's not consistent, shortness or
25 discrepancy?
A. That's what we discussed, even with inked impressions there are going to be differences after two or three inked impressions. Now we're talking about molded impressions where the
30 measurement depends upon a lot of factors, what you're measuring. Yes, there is going to be a difference, you're right.
Q. And the centre heel to the third toe, again we're back to the insole being shorter than the cast by
35 two millimetres on the left foot?

Sgt. Kennedy - Cross

- A. The measurements were shorter, yes.
- Q. And then the centre of the heel to the fourth toe
5 we switch again back to the cast being shorter by
two millimetres on the left foot?
- A. The cast wasn't shorter, the measurements were
shorter. I took the measurements, yes.
- Q. And on the centre heel to the fourth toe, I guess
10 I can't say for the fourth toe on the right foot
because it appears that there is no toe on the
right foot, according to the -
- A. Question mark.
- Q. - according to the insole.
- 15 A. I couldn't get a measurement from it. I didn't
know exactly where I could get the measurement
from, right, so it was left as a blank.
- Q. As a blank?
- A. Mm-hmm.
- 20 Q. But was there a toe impression there or a stain
mark for a toe on the insole?
- A. Nothing that I could get a measurement from. I
believe I showed you earlier that there was an
area I said that - a couple of areas when I was
25 talking that I could see a faint thing that could
be a sweat mark but I wasn't sure, and if I'm not
sure I didn't put it in.
- Q. O.K., now, is there a sweat mark for the fourth
right toe in the Gorilla boots?
- 30 A. Oh, yes, all the toes are there.
- Q. Is it possible the person who wore the Greb boots
had a toe missing?
- A. You're asking me is it possible?
- Q. Yes.
- 35 A. It didn't record. I suppose anything is possible.

I don't believe so but -

- 5 Q. If that was the case would it exclude Mr. Legere from wearing the boots?
- A. If I was able to determine that whoever wore these boots was short one toe and Mr. Legere was not, then that would definitely exclude Mr. Legere. I didn't make that finding.
- 10 Q. And again the centre heel to the centre of the fifth toe, again we're back from the insole being shorter by three millimetres than the cast on the left foot?
- A. The measurements were shorter, yes.
- 15 Q. The measurements were shorter, so does it not appear that through the measurements if we're going to go on mostly the left foot from the centre heel to the centre marks of the toes, it's almost as if you could draw the toes like that on
- 20 the cast up and down a profile and then the profile would be just the opposite on the insole, meaning the first toe on one would be longer than the other, the second toe would be just the opposite?
- 25 A. But obviously looking at the insole it's not that way, and that's precisely why we do not use measurements to do any comparisons.
- Q. O.K. Now, could you explain why these discrepancies may appear on an insole?
- 30 A. What discrepancies?
- Q. Why is it you can't get this precise measurements on an insole? Why don't toes stain consistently on them?
- A. Toes do stay consistent. As I said earlier, the
- 35 insole is a flexible, floppy piece of material.

Sgt. Kennedy - Cross

5 To put it on top of a cast one must take the
insole and wrap it around to make it fit to see
how everything lines up. In the boot the shoe
wearer has weight bearing on the shoe, the shoe is
tied around the foot, it wraps the foot in and
conforms to the foot, so when we're measuring that
we're measuring it outside the constricted area,
10 the cast is not a weight-bearing cast because
there's no medium we could find yet to have a
weight-bearing cast made because it would go right
through the medium we're using. Many variables
come into what -

15 Q. What do you mean, a weight-bearing cast?

A. That's when you're standing on your feet, it's
called weight bearing.

Q. Well, when you took the casts of Mr. Legere's feet
he was standing on his feet, was he? Was he
20 standing up on the foam?

A. No, he was not standing on the foam. When we do a
cast I take the individual's legs with both hands,
I have him put weight on it until it goes halfway
through the foam, it's a very soft foam. As soon
25 as he stopped that I pulled his foot out and take
the cast from that.

Q. So actually, then, when you're going to compare
casts as you have in this case to impressions made
in insoles you don't care whether you use the same
30 criteria? Why don't you use a stand-up, weight-
bearing cast?

A. I just finished saying there's nothing we have
found yet that would give us a standard weight-
bearing cast, and this does an excellent job and
35 it's suitable for comparison purposes when we're

Sgt. Kennedy - Cross

doing a physical comparison. It's standard, used by most experts in the field.

5 Q. Again when you - in the measurements that you had from the border heel to the border of the toes, rather than go through every one, do you know whether or not you come up with the same inconsistencies between the measurements as you did
10 from the centre heel to the centre of the toes?

A. Definitely, yes.

Q. And on the second toe and on the fifth toe there was discrepancies of five millimetres?

A. You lost me, where are we at now?

15 Q. O.K., the border heel for the first toe - I lost myself, don't feel bad - or the second toe, the border heel for the second toe, on the cast for the left foot it's 268?

A. Mm-hmm.

20 Q. And for the left foot on the insoles it's 273?

A. Mm-hmm.

Q. So there's a discrepancy there of five millimetres?

A. Correct, yes.

25 Q. And for the fifth toe, again for the left foot, we have 230?

A. Mm-hmm.

Q. And for the insoles you have 225?

A. That's right, yes.

30 Q. Another discrepancy of five millimetres?

A. Five millimetres.

Q. Which five millimetres in a discrepancy of 225 or 230 is roughly two per cent?

A. Approximately, yes.

35 Q. O.K., for the physical discrepancies maybe we

Sgt. Kennedy - Cross

could see - or your physical comparisons, there
is no discrepancy as far as your evidence goes and
5 I understand - I believe what, chart 'D' where you
had the overlays, maybe we could have a look at?

A. I don't know which one you want. There's an
overlay there and there's one there. -

10 Q. O.K., let's try 'F', see what's on that. O.K.,
this is the insole for the left -

A. That's the bottom part of the boot on the left.

15 Q. Why do we have the overhang here over the insole,
or the bottom part of the boot, I should say,
that's not the insole, but again here we have the
insole and it appears that the foot is much wider
than the insole itself?

A. That's correct.

20 Q. Is that common?

A. Yes, extremely common. Every shoe overlaps on
the side. Even your own overlaps the side of the
sole, it bulges out on the side. On your same
area on your shoe I can't see the sole at all, it
overlaps by three or four millimetres, I would
say from here.

25 Q. So there's no way you can tell whether or not that
is a good physical match from comparing a cast to
an insole?

30 A. When you're comparing a physical match you don't
compare things you can't see. You don't compare
one if the other is not able to take the - in this
instance, the sweat. I'm comparing things that I
could see, I'm comparing things that it touched
against, not something it didn't touch against.

35 Q. What is this mark up here in the corner?

A. I'm taking that to be a sweat - heat where the

Sgt. Kennedy - Cross

dirt ends up going to the top of the toe when your boots get dirty and wet and sweaty.

5 Q. That couldn't have been somebody's toes beforehand or -

A. Up there?

Q. Up there.

A. There's no indication that anybody's toe was up
10 there. There's no indentations or anything.

Q. Again the toe appears to be out over the edge of the insole for the right foot?

A. Yes, extremely common. Most shoes that fit anybody half-decent will have the toe come out to
15 the side, shoes are made that way. A lot of shoes are made that way, some aren't.

Q. So anybody who has size a 9 or 9 1/2 foot you'd probably get these overhangs in the centre of the instep area and the toe area?

A. On most shoes you will get the overhang.
20

Q. So if you were going to compare my casts, say I have a size 9 1/2 foot, you would get a similar overlay?

A. Well, if I could get your casts I would compare them, I would tell you.
25

Q. Now, this is the first time I've seen these, as far as you know, except from yesterday like everybody else? I haven't viewed these charts before that you know of?

A. You have a booklet that I gave you.
30

Q. Yes, but the booklet doesn't have the overlay.

A. That's correct, yes.

Q. Now, I guess this is P-149 and photograph #5 where you have the overlay fitting in. That's on the
35 insole itself, is it, the left foot insole itself?

- 5 A. It's not a removable insole, the bottom of the boot here is here and it's not a removable one, it's a fixed insole where this one was a removable one from the Greb boot.
- Q. And this is a size 12 Greb boot?
- A. That's marked a size 12, yes.
- 10 Q. And this inlay here in #6 is a photograph of what?
- A. Of the insole from the Greb boot down behind Keddy's in Bathurst.
- Q. The insole itself?
- A. That's one of my comparisons I made.
- 15 Q. Oh, that's the insole from -
- A. - the Greb boot.
- Q. - the Greb boot in Bathurst fitting over the sole of the Gorilla boot?
- A. That's correct, yes, to show the similarities.
- 20 Q. But yet when you have the inlay of the foot impression it's much shorter than the insole?
- A. Definitely. The insole was longer than the foot here, too. The foot ends right about here on the insole. The ball of the foot starts here so the foot starts in approximately the same place. The
- 25 insole goes up much further in any boot. Your insole is longer than the foot, especially if the boot is bigger than your foot your insole would be much longer, if the insole fit the boot.
- 30 Q. Let's have a look at 'I'. O.K., now, Sergeant, when you say it's highly probable that Allan Legere has made the impressions inside the Greb boots, is there any way you can rely on some figures to come to that conclusion as what the chances are, one in 100 or one in 200?
- 35 A. No.

Q. So you don't know if the chances are any better
than one in 200 that somebody else could have made
5 those impressions?

A. Chances of one in 200 that somebody made them?

Q. Yes.

A. I can't give you a mathematical figure of any sort
but if you're asking my opinion, it would be a lot
10 higher than one in 200, but what it is I don't
know.

Q. You haven't got a clue?

A. I don't know, I -

Q. There's no way you can figure that out?

A. Mathematically myself?
15

Q. Mathematically.

A. No, there's no basis for it that I know of.

Q. And there's been no studies done that you know
of that have attempted to do that?

A. Not that I'm aware of, no.
20

MR. FURLOTTE: My Lord, I'd like to set this witness
aside until I've had a chance to view the other
two casts that were taken of Mr. Legere's feet,
and depending on if I see anything in them I'd
25 like to be able to recall this witness for
further cross-examination just on the additional
two sets of casts that he had taken. I'll
attempt to see them -

THE COURT: They're not before the Court, are they?

MR. FURLOTTE: Pardon?
30

THE COURT: I say they're not in evidence?

MR. FURLOTTE: No, those are not in evidence but -

THE COURT: Well, haven't you really had an opportunity
before now? When did you know about the other two
35 casts?

MR. FURLOTTE: Well, My Lord, like I say, I was not
prepared for this type of evidence from these
5 witnesses and I'm just doing this as I'm standing
up here going by guess and by gosh and I did not
have time to consult with other expert witnesses
about this type of testimony or to look at the
evidence as exhibits. There's a lot of exhibits
10 that have been put in here today because of this
type of evidence which was not in the original
exhibit list which was presented to me by the
Crown so -

THE COURT: Where are these other sets now?

15 MR. FURLOTTE: I expect the sergeant has them in
Fredericton somewhere.

MR. ALLMAN: I understand they're in his locker in
Fredericton but I would point out he was
questioned about these during the course of his
20 cross-examination and he indicated that he didn't
use them in the course of making any of his
comparisons. Moreover, Mr. Furlotte has certainly
been aware of their existence and has had the
opportunity to view them any time these several
25 months, and I would object not because I have
anything that I want to hide but simply because
we've been almost three hours in cross-examination
of this witness and I don't see any point in going
into what I would regard as further irrelevant
30 material.

MR. FURLOTTE: My Lord, the Crown is quite right, I was
in possession of material which does disclose that
there was three sets of casts taken but as I've
told the Court many times I have not had time to
35 prepare for this case myself and other co-counsel

Sgt. Kennedy - Cross

5 was expected to do this portion of the trial which
has been dumped onto my shoulders at the last
minute so -

MR. ALLMAN: I'm getting a little tired of this constant
discussion of Mr. Furlotte not being prepared in
the presence of the jury. The charge in this case
was laid on December 4, 1990, and Mr. Furlotte was
10 present at that time. I know he's had problems
but that's a fact.

THE COURT: December 5th.

MR. ALLMAN: 5th, I apologize, Your Lordship is correct.

THE COURT: Well, it's sort of an unusual request. Have
15 you completed all of -

MR. FURLOTTE: My Lord, it's just that this witness gave
evidence that there was an indentation in the heel
of the cast that is an exhibit and that the other
casts - I understood him to say that the other
20 casts disclose some form of indentation also, and
I'd like to be able to view those casts and see
if -

MR. ALLMAN: I don't understand him to say that.

THE COURT: May I do this? This is a rather unusual
25 request. Can you make available the other sets of
casts for Mr. Furlotte's -

A. Yes, I can go back to Fredericton at noon and
bring them back.

THE COURT: - examination this afternoon and say first
30 thing tomorrow morning, if after having examined
those this evening you can -

MR. FURLOTTE: Well, we're hoping to get through this
today, My Lord.

MR. ALLMAN: He can have them back at lunch time, Mr.
35 Furlotte can look at them over lunch time and

Sgt. Kennedy - Redirect

then we'll see if he feels the need to renew this application.

5 THE COURT: All right. Well, I'm not making any ruling on it, I'm just saying let's take that step of having them made available and giving you the opportunity to examine them. You may feel that it would be pointless to ask further questions.

10 MR. FURLOTTE: Yes, that's right.

THE COURT: And I may say that if I do permit questions to be asked on them I'll put a very strict limit on the number of questions you can ask on them.

MR. FURLOTTE: I expect it will probably be two or three
15 at the most.

MR. ALLMAN: Can I redirect now because it's quite possible that this witness is completed?

THE COURT: Pardon?

MR. ALLMAN: I take it it's very possible that this
20 witness is completed and I'd like to redirect at this time.

MR. FURLOTTE: Yes, I believe that would be appropriate.

THE COURT: All right, you redirect subject, of course, to the right if other questions are asked to
25 re-examine further.

REDIRECT EXAMINATION BY MR. ALLMAN:

Q. I understood you to say in answer to a question of Mr. Furlotte's that in your opinion it was highly
30 unlikely that somebody other than Allan Legere wore those boots and when he tried to press you on a figure you said - he put the figure one in 200 and you said it would be what, if you were pressed?

35 A. Oh, I said it would be a lot higher than that but

I couldn't give a figure.

Q. Mr. Furlotte took you through the measurements and
5 I don't think we need to go over again the fact
that as I understood it you explained to the jury
there are problems taking the measurements and you
didn't use the measurements in your comparisons?

A. That's correct.

10 Q. You were aware of those figures at all times when
you - since you formed your opinion and up to
today?

A. Oh, yes, I knew that the figures existed. I made
them up myself.

15 Q. Do you feel that those measurements that you've
been taken through this morning are of any
assistance or of any relevance to the jury in
their consideration?

A. Well, they weren't of any assistance to me at all,
20 I didn't use them, and no, they don't change any
evidence that I gave.

Q. That was the next question I was going to ask, do
any of those measurements cause you in any way to
change any of the opinions you've expressed to me
25 or to Mr. Furlotte?

A. No, they do not.

MR. ALLMAN: Thank you.

THE COURT: The witness is concluded subject to the
reservation that we made earlier. Thank you very
30 much. I think we'll have a recess now. What is
the Crown's program here as far as -

MR. ALLMAN: Two more witnesses.

THE COURT: Altogether or -

MR. ALLMAN: Altogether.

35 THE COURT: You had two others named, are they being -

MR. ALLMAN: I believe we will be dealing with them today
by way of - we propose to deal with them by way
5 of affidavit evidence under the Canada Evidence
Act.

THE COURT: We'll recess, then, and is there anything
that we can send the jury out with to keep them
working during the recess? I hate to see them
10 idling their time away. I guess not.

(BRIEF RECESS - COURT RESUMED AT 11:35 a.m.)

(ACCUSED IN DOCK.)

(JURY CALLED - ALL PRESENT.)

15

THE COURT: Now, Mr. Allman, another witness?

SPECIAL AGENT WILLIAM BODZIAK, called as a
witness, being duly sworn, testified as follows:

20

DIRECT EXAMINATION BY MR. ALLMAN:

Q. What is your full name, please?

A. William J. Bodziak.

Q. And what city do you live in, Mr. Bodziak?

A. Washington, D.C.

25

Q. And what's your occupation?

A. I'm a special agent of the FBI. I'm assigned to
the laboratories, an examiner of questioned
documents, footwear and tire tread evidence.

MR. ALLMAN: My Lord, with Mr. Furlotte's permission I
30 propose to lead this witness through his
curriculum vitae.

THE COURT: Yes.

Q. I understand that you were appointed a Special
Agent with the FBI in 1970?

35

A. That's correct.

50

S/A Bodziak - Direct

Q. Some 21 years?

A. Yes.

5 Q. Trained at the FBI Academy and served as a Special Agent in FBI offices in New Haven, Connecticut, Baltimore, Maryland, and Hyattsville, Maryland?

A. Yes, sir.

10 THE COURT: Don't you think, Mr. Allman, you better get him to tell us what the FBI is?

Q. Oh, yes, what does FBI stand for, just in case the jury don't know?

A. It's the Federal Bureau of Investigation.

Q. And that is what?

15 A. That would, I believe, be the equivalent of the Royal Canadian Mounted Police in the United States.

Q. A federal force in the United States?

A. Yes, sir.

20 Q. I understand that you have held a supervisory position in the FBI Laboratory in Washington, D.C., a position you presently hold since 1973?

A. That's correct.

25 Q. And in the course of that time in general terms, not limiting yourself necessarily to footwear, are we talking tens, hundreds or thousands of cases that you would have been involved in?

A. Since 1973 thousands of cases.

30 Q. Specifically with regard to training in the area of footwear and impressions of that kind, I understand you received your initial basic training in this topic from 1973 until 1976?

A. That's correct.

35 Q. That you've completed a course in Forensic Photography at the FBI Academy, Quantico,

Virginia in 1975?

A. That's correct.

5 Q. That you've compiled or read over 300 bibliographical references on the topics of footwear, barefoot, and also tire tread impressions?

A. That's correct.

10 Q. You visited as a part of your training such footwear manufacturing facilities as Nike, Converse, Saucony, BATA, Cherokee, Adidas, LaCrosse Rubber Company, New Balance, and a number of others?

A. That's correct.

15 Q. You've visited, as part of your training, facilities which manufacture dies, molds, and the outsole materials utilized in manufacturing footwear outsoles, such as Monarch Rubber Company, Quabaug Rubber Company, Compo Mold Company, Nike Research Facility, and others?

A. That's correct.

20 Q. You've attended footwear conventions and shoe fairs for the purpose of meeting footwear manufacturers?

25 A. That's correct.

Q. You've visited Firestone Rubber Company, Goodrich Rubber Company, Kelly Springfield, Goodyear Tire and Rubber Company, Bridgestone Rubber Company and others?

30 A. That's correct.

Q. Attended a one-week course in 1981 at the FBI Academy in Quantico, Virginia, on the collection and preservation of physical evidence?

A. That's correct.

35 Q. I understand that you also participate as either

an organizer or attender of conferences at which you've made presentations or given instructions on the topics of footwear and footwear impression evidence?

A. That's correct.

Q. You presented two days instruction to the State of Illinois examiners in 1982 on footwear and tire tread impression?

A. That's correct.

Q. Two days instruction in 1983 on the same topic to the Pennsylvania State Police?

A. That's correct.

Q. Organized and hosted two technical conferences on footwear and tire tread impression examinations at the FBI Academy in April, 1983, and April, 1984?

A. That's correct.

Q. Made a presentation at the American Academy of Forensic Science meeting in February, 1984, on the "Manufacturing Processes for Athletic Shoe Outsoles and their Significance in the Examination of Footwear Impression Evidence"?

A. That's correct.

Q. A presentation on footwear impression evidence to the general session of the Annual Pedorthic Symposium in 1984?

A. That's correct.

Q. Presentations at the Footwear and Tire Tread Class at Michigan State Police Academy in 1985?

A. That's correct.

Q. Since 1985 you've created and routinely taught a class for examiners entitled, "The Detection and Examination of Footwear Impression Evidence" at

your academy in Quantico, Virginia?

A. That's correct.

5 Q. Presentation at the Florida Department of Law
Enforcement in 1986?

A. That's correct.

Q. Presentation at the Florida Chapter IAI meeting;
what's that?

10 A. The International Association for Identification.

Q. And that was in Florida in 1986?

A. That's correct.

Q. Organized a seminar on footwear and tire tread
evidence at the International Association of
15 Forensic Sciences in Vancouver, Canada?

A. That's correct.

Q. Minnesota IAA Chapter meeting, you made a
presentation in September, 1987?

A. That should read IAI.

20 Q. I'm sorry, IAI?

A. Yes, sir, that's correct.

Q. A seminar on Footwear and Tire Track Evidence,
you made a presentation in Florida in 1988?

A. Yes, sir.

25 Q. A presentation at the American Academy of
Forensic Science in 1989 on "Discrimination of
Individuals Based on their Barefoot Impressions"?

A. That's correct.

Q. Attended and made presentations to the Shoe and
30 Tire Track Section of the International Association
for Identification meetings in Florida, 1989,
Tennessee, 1990, St. Louis, Missouri, 1991?

A. That's correct.

Q. You presented two days of training in these topics
35 at the Northwest Association of Forensic Science

meeting in Jackson, Wyoming, in 1990?

A. That's correct.

5 Q. And a similar presentation to the California Association of Criminalists in 1990?

A. That's correct.

10 Q. And a similar presentation to the Victoria State Forensic Crime Lab at Melbourne, Australia, in 1990?

A. That's correct.

Q. And a similar one in Adelaide, Australia, in 1990?

A. That's correct.

15 Q. And a similar thing - I'm not reading all these in detail - at the Anne Arundel County Police Department in Millersville, Maryland?

A. That's correct.

20 Q. With regard to your training experience were you involved in a three-day course on examination of barefoot impressions with Dr. Louise Robbins at the FBI Academy in Quantico, Virginia in 1983?

A. Yes, sir, that's correct.

Q. And instruction by Irving Millier at the same academy in 1983 and 1984?

25 A. That's correct.

Q. And a further presentation on comparison techniques of barefoot impression evidence by a gentleman called Dr. Owen Lovejoy of Kent State University in 1984?

30 A. That's correct.

Q. I understand you are concerned with something called the Foot Research Group, Inc., that deals with the individuality of barefoot impressions?

A. That's correct.

35 Q. In 1986 you collected the impressions of 500

persons' feet and prepared a computer study resulting from that?

5 A. That's correct.

Q. You are aware of the extensive literature from many other countries concerning barefoot examination and comparison of abandoned shoes to feet of suspected wearers?

10 A. Yes, sir, I am.

Q. In approximately how many cases would you have conducted examinations involving barefoot or socked-foot evidence to be compared with abandoned footwear?

15 A. Approximately 50 to 60 different cases.

Q. And have you ever given expert testimony in courts in regard to that topic?

A. Yes, I've been called on eight occasions to give expert testimony.

20 Q. What states or what locations have you given testimony?

A. I've given states - with regard to barefoot evidence in Alaska, twice in Delaware, once in Pennsylvania, once in Tennessee, twice in New York.

25 Q. And on the wider topics that you deal with, not just that single topic but your general area, I take it you've given evidence in other states besides?

30 A. On topics other than barefoot?

Q. Yes.

A. Oh, yes, sir.

Q. Do you hold any degrees from any university?

A. Yes, I do.

35 Q. What's that?

- 5 A. I have an AB Degree in Biology from East Carolina University and I have a Master's Degree in Forensic Science from George Washington University.
- Q. Are you a member of the American Academy of Forensic Science?
- A. Yes, sir.
- 10 Q. And a member of the International Association for Identification which you already talked about?
- A. Yes, sir.
- Q. And in fact are you currently the Chairman of that association's Footwear and Tire Track Committee?
- 15 A. Yes, sir, I am.
- Q. And you mentioned your familiarity with the literature on this topic; have you in fact written any books yourself on identification?
- A. I've written a book entitled, "Footwear Impression Evidence", on footwear impression.
- 20 MR. ALLMAN: My Lord, subject to any objection I would ask that Mr. Bodziak be declared an expert in the field of identification with special reference to feet and footwear comparison.
- 25 THE COURT: Yes, any cross-examination or any questions you'd like to ask, Mr. Furlotte, on the question of qualifications?
- MR. FURLOTTE: Just a few, My Lord. Dr. Bodziak, when you stated that you gave expert opinion evidence in court before in relation to barefoot evidence was that - I believe you mentioned four or five different states?
- 30 A. Yes.
- MR. FURLOTTE: And was that barefoot evidence in relation to a comparison of feet to footwear or was that
- 35

barefoot evidence left at the scene of a crime?

5 A. In seven of those testimonies it was foot to
footwear.

MR. FURLOTTE: Foot to footwear?

A. Yes.

10 MR. FURLOTTE: And the book you wrote on footwear, is
there anything in that book about the evidence
you're going to give today comparing foot to
footwear?

A. No, that's actually another topic that's big
enough for another book.

15 MR. FURLOTTE: O.K., which you have yet to write, I
assume?

A. No, sir.

MR. FURLOTTE: No further questions.

MR. ALLMAN: I'd renew my motion.

20 THE COURT: Yes. Well, I would declare the witness an
expert in the field of, let's call it forensic
identification with particular reference to foot
and footwear identification. Does that describe
what you're about to do?

A. Yes, it does, My Lord.

25 THE COURT: Or at least the expertise that you're about
to - I was just thinking what a terrible thing it
would be if an expert like that were troubled with
corns. Do you have corns?

30 MR. ALLMAN: I don't apprehend any problem, My Lord,
since the next witness is a podiatrist. He could
probably cure him. I propose to lead a little
bit, My Lord, with my learned friend's permission,
which he's already indicated I can do. You were
in court when you heard the previous witness,
35 Sergeant Kennedy of the Royal Canadian Mounted

Police?

A. Yes, sir, I was.

5 Q. And I understood from that witness that he got into contact with you regarding this case?

A. That's correct.

Q. Had discussions with you?

A. That's correct.

10 Q. And ultimately provided you with a number of pieces of evidence?

A. That's correct.

Q. In particular a pair of Greb Kodiak work boots?

A. That's correct.

15 Q. Which have been entered in court which I'm now showing you. See if you can recognize those, P-133.

A. Yes, these are the boots that I examined.

Q. And also a pair of Gorilla work boots, P-121.

20 A. Yes, these are the boots that I examined.

Q. And also plaster casts which he indicated to you were impressions of the feet of Allan Legere?

A. Yes, I examined these casts and there was also four other casts which were brought to me.

25 Q. And did he bring you any other material or anything else that you used?

A. Yes, he brought me the two bread bags and he also brought the insoles from the Greb Kodiak work boots and also the videotape which was shown in court yesterday.

30 Q. The insoles being P-141 and P-140?

A. Yes, sir.

Q. The bread bags being P-138 and P-139?

A. Yes, sir.

35 Q. Did you, using this material which Sergeant

Kennedy had given to you, perform certain tests and comparisons for yourself?

5 A. Yes, I did.

Q. And in connection with what you're about to tell us about those tests and comparisons do you have some charts or other demonstrative material that you want to make use of?

10 A. Yes, I do.

Q. Where is that material?

A. They are right here leaning against the jury box.

Q. Are they in the order that we want to go through them?

15 A. Yes.

MR. ALLMAN: Could this be marked for identification, please?

THE COURT: Yes, the next letter is 5C.

20 Q. I'm showing you now an item that's been marked by the Court as 5C for Identification. Can you look at it and tell me what it is, please?

A. Yes, 5C has four photographs which has a written description above them. On the left as you face 5C is a reverse photograph of the cast of the
25 right foot of Allan Legere which is the same cast which you just showed me, and going to the right on the chart the next -

MR. ALLMAN: I'll put the chart up here. I know it's not in but it doesn't make sense if the jury -

30 THE COURT: Oh, no, it should go up on the board.

A. May I stand up?

THE COURT: Yes, and use your little pointer there.

A. O.K., if I might start again, Exhibit 5C is a chart which shows four photographs taken by me
35 in the laboratory. On the left side facing that

S/A Bodziak - Direct

chart is a reverse photograph of the cast of the
right foot of Allan Legere. May I have that cast
5 to show how that was prepared? O.K., to make a
reverse photograph which is done for demonstration
purposes the cast is photographed, in this case
with some oblique light to give some better
contrast to the cast, and the negative of the
10 photograph is turned around so that the cast can
be reviewed in reverse to make it easier for
comparison of, for instance, the big toe versus
the fifth toe and the left to right sides with
what you would see in an insole, which would be
15 made in this configuration rather than in the one
which is turned around as you photograph it.

The second photograph next to the cast on
Exhibit 5C is an enhanced colour photograph of the
insole taken from the right Greb Kodiak boot, and
20 this was represented to me as the questioned item.
In other words, the question posed to me was what
person wore this boot and did the characteristics
agree with the exemplars of the feet of Allan
Legere, and that is why this is marked questioned,
25 because it would be a questioned item brought to
me.

To the right of that is an insole of the
right Gorilla boot of Allan Legere, and this is a
colour photograph showing primarily the stained
30 areas, and to the right of that is a photograph of
the same Gorilla boot taken from Allan Legere,
this time a black and white photograph with a low
light source that enhances or darkens some of the
depressed areas in that boot. If I could have -
35 well, at this time I won't be demonstrating, I've

just got out the charts.

5 Q. No, at the moment we're just concerned to get it into evidence.

A. Attached to the photographs of the insole on this chart are identical tracings for illustration purposes to enable me to better refer to areas as I'm talking of characteristics which I observed in those insoles.

10 Q. So they're just tracings on top there?

A. That's correct.

MR. ALLMAN: Subject to any objection I'm going to ask that that be entered as an exhibit and we'll come into the details about what it means later.

15 THE COURT: Yes, and that would be Exhibit P-152.

MR. ALLMAN: Could you mark this item for identification, please?

CLERK: 5D, My Lord?

20 THE COURT: 5D. Is this the same type of thing?

MR. ALLMAN: Yes.

THE COURT: Why couldn't it be marked as an exhibit now?

MR. ALLMAN: I'd like to offer it as an exhibit. Mr. Furlotte indicated he wanted me to go through the process of having them identified first, explaining -

25 MR. FURLOTTE: Well, My Lord, maybe if we could just clarify if he took the photographs himself and if he did the tracings himself on the transparencies.

30 MR. ALLMAN: I'll ask you a general question. With regard to all the charts, all the photographs and all the tracings and so on, on those two items and on the two that I can see parked in front of the jury, are they all work that you did yourself?

35 A. Some of the photographs I took myself. Some of

5 them are photographs which were taken under my
 supervision with our photographic people because
 they required multiple-hour exposures.

Q. Do they all accurately represent the scene that
 you saw?

A. Yes, sir, they do.

10 MR. ALLMAN: I would ask that all these items be marked
 as an exhibit.

THE COURT: And I haven't seen these, the subject matter
 are the items that have been referred to already
 in evidence, the casts, the inner soles, the
 boots?

15 MR. ALLMAN: Yes, My lord.

THE COURT: Is that O.K., Mr. Furlotte?

MR. FURLOTTE: Yes.

THE COURT: P-153, then, we'll call this, without
 bothering to give it an identification letter.

20 MR. ALLMAN: Third series of photographs, P-154. I'm
 going to put back where you found them, where I
 found them, all those items which are now P-152
 to P-155, and can you, using those items where
 it's appropriate to do so and any of the other
25 exhibits where it's appropriate to do so, please
 explain the background to what you did and what
 you in fact did?

A. O.K., may I first use this drawing to explain
 some -

30 MR. ALLMAN: I'll get that marked for identification.

THE COURT: Perhaps the witness could say, Mr. Allman,
 what this is just generally.

MR. ALLMAN: I'm sorry, My Lord?

35 THE COURT: Could the witness say what this is just
 generally so that -

MR. ALLMAN: Could you tell us what that is in general terms?

5 A. Yes, this is a drawing of the top view of the 26 bones of the human foot.

THE COURT: This is just a specimen foot?

A. Yes, My Lord, yes.

THE COURT: Not a particular foot?

10 A. No.

THE COURT: Can we mark that as an exhibit?

MR. FURLOTTE: Well, My Lord, I'll allow this in as an exhibit but I don't want it to be construed that I'm going to allow all types of this - photographs or aids as exhibits.

15

THE COURT: Let's mark it 5D for Identification.

MR. ALLMAN: Oh, I understood it will be allowed, it will be entered as an exhibit. Mr. Furlotte indicated he agrees to it being entered as an exhibit and certainly I'm not going to hold it as a precedent against him. Of course it doesn't mean that any future items are guaranteed to go in, so I'd ask it be entered as an exhibit.

20

THE COURT: P-155.

25 CLERK: P-156, My Lord.

THE COURT: Where did 155 come from? Oh, there were three charts. This would be P-156, then. This would be sketch of bone structure of typical foot.

A. Yes, My Lord.

30 MR. ALLMAN: Human foot.

THE COURT: Human, typical human foot. Right or left?

A. I believe that's a right.

THE COURT: Right.

MR. ALLMAN: I'm showing you now P-156 and I understand that you wanted to begin your explanation with

35

reference to that. Very well, could you carry on using that to explain what you're going to say?

5 A. The diagram which is marked P-156 is a drawing depicting the 26 bones of the human foot, and I thought that before explaining the basis of my opinion and the observations that I made during my examination that some orientation to the Court
10 explaining some basic terminology would make that more understandable.

The area of the foot which we're primarily concerned with in the insole is the forefoot which includes the five long bones of the foot which are
15 known as metatarsals, and then the bones of the foot, two in the first toe and three in each of toes two through five which are known as phalanges, and the phalanges make up the toes and the long bones or metatarsals are equivalent to
20 the palm or the back of the palm of the hand, what runs through that part of your hand. There are a lot of other bones in the mid-portion of the foot which is the ankle area and also back in the talus and calcaneus. The calcaneus would be the heel.

25 I have drawn with red around the tips of the phalanges just to give an orientation of what the fleshy part of the foot - that would be around those areas and that would be the tips of the toes, and there has been reference or will be
30 reference to the ball area of the foot, and the ball area of the foot is around the large first metatarsal where it connects with the large toe, and it's the bulge of the joint between that phalangeal and metatarsal head which results in
35 the bulge in your foot. This is an area where

S/A Bodziak - Direct

occasionally people will get a bunion and it's
this portion which bears quite a bit of weight
5 when the weight is transmitted from the person
through the foot. On the outer side there's also
a bulge of skin around the fifth metatarsal head
and the positioning of where these metatarsal
heads are as well as the amount of weight in a
10 particular person that each of them bear, that
controls that shape which is the metatarsal head
area that comes out in the footprint.

Another thing, if I could make a drawing on
this piece of board that this is attached to to
15 explain one other -

MR. ALLMAN: With His Lordship's permission?

THE COURT: Yes, sure.

A. I'm afraid I'm not much of an artist but in
looking at the insoles of shoes, O.K., the toes
20 will - and the ball, this metatarsal area all
across here, and of course the heel which is in
most instances the first to strike the ground and
bears a lot of weight, these will all have
depressions. They will have depressed areas and
25 they will also have stained areas which result
from heat, perspiration, wet socks, socks that
might bleed, and other dirt and material that
through the life of the shoe or the use of the
shoe will get into there and be ground in or
30 otherwise cause staining, so what there is in the
insole of a shoe is in the form of depressions
through the greater weight-bearing areas and
stains. There is a reflection of the foot of the
person that has been wearing that shoe. In this
35 particular case, if I may now refer to chart

S/A Bodziak - Direct

number P-152, and if it's possible may I have the insoles and the Gorilla boots?

5 MR. ALLMAN: The insoles?

A. Yes. Thank you. First the insole of the right Greb Kodiak boot contains depressions, most predominantly of the ball area and the metatarsal area of the foot, of the heel, and also of the
10 toes. The toes are hard to see in this room lighting and without the ability to touch them but with the use of oblique light and a very soft touch an examination is possible to determine the exact positions of where those toe pads left
15 depressions in this particular boot. Likewise, in the insole of the right Gorilla boot of Allan Legere there are also similar depressions of the ball area, the heel, and of the toe areas, and there is some staining in this particular boot and
20 those again through oblique light, through feeling those depressions and examination it is possible to locate the positions of those toes.

In making a comparison I noticed several toe areas and pressure areas and in some cases the
25 stained areas were sufficient to further enhance that although a lot of the stained areas in the questioned insole were somewhat blurred and hard to distinguish. I observed at the 5-toe area which is marked by #1, this refers to toes 1, 2,
30 3, 4, 5, and I have small arrows pointing to those areas correspondent with the positions reflected in the Gorilla boot of Allan Legere and I was also able to supplement that examination with the casts that I had on hand, but since this is an accumula-
35 tion of repetitive stepping based on the exemplars

S/A Bodziak - Direct

I had I primarily was examining the insole of the Gorilla boot worn by Allan Legere with the questioned boot.

5
10
15
20
With regard to the toes, I'll come back and talk later about the respective placement of these toes with the use of the acetate tracing, but let me go through the other features first. Number 2 refers to a space that is between the first toe and the second toe depression, and it's a prominent ridge, first in the Gorilla boot. This is a very, very prominent ridge that can be seen actually through staining because it's lighter here in the middle, and it can actually be felt very easily that there's a distinct separation, and in looking at this characteristic in the insole of the Greb Kodiak boot again there is a slightly lighter area but a very prominent ridge between there.

25
Looking at the cast, in this case a reverse cast of Mr. Legere's foot, it can be seen as pointed by #2 that the first toe and the second toe have a distinct space or gap between them and it is this that accounts for that ridge or that shoe working its way up in between the depressions made by the first and second toes.

30
35
Looking at #3 this refers to - again first looking on the Gorilla boot, this refers to the ridge, the raised ridge which forms in front of the heavy weight-bearing area of the metatarsals up here, but behind the weight of the depressions caused by the toes, and depending on the exact length of each of these metatarsals and toes and other reasons for these to vary from individual to

S/A Bodziak - Direct

individual, the resulting shape of the non-
pressure area will change from foot to foot and
5 person to person. In this case the shape is
rather pointed and it can be traced all the way
from the left side of the shoe to the right. This
can also be seen to some extent with regard to
staining in the colour photograph and also can be
10 traced with regard to staining and depressions in
the insole of the Greb Kodiak boot.

Looking at #4 this refers to the large ball
area of the foot which is beneath the first meta-
tarsal head, and the pattern both in staining and
15 depressions across the metatarsal areas from the
first through fifth metatarsals. The shape behind
this ridge made by the ball of the foot and the
metatarsal heads corresponds in the right Gorilla
boot of Allan Legere and the right insole from the
20 Greb Kodiak boot.

Number 5 refers to the heel area and the
indentations in the heel area and the position and
their relative positioning with regard to these
features also agree.

Looking at the tracings, this identifies the
areas where I have located the depressions in the
Greb Kodiak boot and in the Gorilla boot of Allan
Legere, and this is for demonstration purposes.
Better seen here because I have marked the
25 positions more visibly for demonstration purposes
of where the depressions are. It can be seen that
with regard to the toe placement, specifically the
second, third and fourth toe relationships, that
the third toe in relation to the second is about
30 two-thirds of the way back on that toe and the

S/A Bodziak - Direct

5 right side of the second toe and the left side of
the third are almost a straight line from toe to
heel. Then looking at the third toe, this
position drops slightly behind the - I'm sorry,
the fourth toe, this toe position is slightly
behind the third toe and pretty much even with the
back of that toe, and I'm pointing that out now
10 but I will compare it with the other foot later
on.

The interrelationship of the positioning of
the five toes, the resultant contour in the ridge
between that, and the size and shape and pattern
15 which is left by the metatarsal heads, these are
initially determined in a person genetically in
the embryonic stage, but even then perhaps through
nutrition problems or other problems these things
can take a change and through life, through the
20 use of that person's foot, any injuries or any
other problems or just basically the weight of the
person, a number of other things will influence
greatly how these bones grow and problems that
might cause weak ligaments which may cause, for
25 instance, the toe to bend inward, and this weaken
and this to stick out like a bunion. One person
may have a second metatarsal that's much longer
resulting in the second toe to be much further up
here, so the combination of lengths of the
30 phalanges and metatarsals, the robustness of the
heads of those, and a number of literally innumer-
able physiological and genetic combination of
characteristics will result in a tremendous
variety of positioning and shape and sizing of a
35 person's foot. Even though generally speaking

S/A Bodziak - Direct

5 feet have five toes, a ball and a heel, and most people will regard them pretty much alike, when you take a real close look at them their degree of individuality is extremely significant.

10 Looking at the next chart, this chart is P-153, this chart on the left is again a reverse cast of the left foot of Mr. Allan Legere, and on the next photograph is a colour photograph with some slight oblique lighting of the insole from the Greb Kodiak boot which is in this case the questioned insole. To the right of that is a colour photograph of the boot taken from Allan Legere known as the Gorilla boot, and to the right of that is also a black and white photograph of the same boot with oblique lighting to show some of the indentations better. These insoles also had depressions and stains in them with, upon examination by oblique light, a special photographic means, actually feeling the impressions and noting exactly where they were and then comparing them through overlays and directly with dividers against - making comparisons between the questioned and the known boots and supplementing that with the cast of the whole foot of the left foot of Allan Legere. I also am pointing out certain features which I observed and have numbered one through five, and #1 is referring to the positions of the five toes and with regard to the relative positions of those toes, in this particular case the second toe and the first toe are touching. There is no ridge at all between the first and second toe as there was in the right foot, there is no ridge in that area in the

15

20

25

30

35

5 Gorilla boot, and likewise there is no ridge or
area between the first and second toes in the
insole of the Kodiak boot.

10 With regard to the positioning of the third
toe to the second toe, its positioning is about
halfway back and to the side of that toe, and with
regard to the fourth toe's position in connection
with the third toe it is not behind but rather to
the side and about three-fourths of the way back.

15 Looking at #2, which I believe I've already
mentioned, there is no ridge present there either
in the Gorilla boot or in the Kodiak boot, and
there is - in looking at #3 there is a raised
area. I think if I put this up it might be
better. There is a raised area that again is
caused by the depressions of the metatarsal region
and the toes, and the resultant ridge between them
20 is a non-pressure area, and if I might, just to
give emphasis to this particular characteristic
alone, place chart #152 beside it, looking at
just #3 you can see the big difference in the
contour of that area, and again I will mention
these features a little later.

25 Q. Just before you go on, Mr. Furlotte kindly
pointed out to me and I think you've used the
expression Gorilla boot, which refers to one boot,
and also Greb and Kodiak. There aren't three lots
30 of boots, are there?

A. The Greb boots are called Greb Kodiak boots,
they're the same boot, and the Gorilla boots are
the boots which were taken from Mr. Allan Legere.
Looking at #4, the metatarsal region, again this
35 particular pressure region under the first

S/A Bodziak - Direct

metatarsal and through the fifth metatarsals and the resultant stains and shapes that resulted in both the Gorilla boot and in the Greb Kodiak boot corresponded with each other in terms of their size and their shape and their positioning. In addition, the heel area depressions in the insole of the Greb Kodiak boot and the impression in the Gorilla boot also corresponded. Again I also used the cast of Mr. Legere's feet to corroborate certain features in this examination.

Chart #P-154 shows photographs of the upper portion of boots and I made a comparison with the cast of Mr. Legere's feet both in the Gorilla boots which he was wearing and the Kodiak boots which were questioned, and by taking the cast and putting it in the boot this way there are certain stains which could be observed and certain features, some which I've mentioned, which were also found to correspond, and since they were in the same boots I would expect them to correspond, but it's a way of cross-checking. The numbers one refer to three of the toes, the large toe can be seen. Number 2, particularly on the right boot, refers to a raised ridge which again because of the separation of the first and second toe results in the upper working its way down between the top of the toes just like the insole worked its way up between the depressions of the bottoms of those toes.

Number 3 refers to the fifth toe which rests somewhat on its side and makes a little bit longer impression, and the #4 and #5 refer to the inner and outer or the first and fifth metatarsal

bulges, and so the upper of the shoe, and there's been some discussion so far on that - the upper of the shoe to accommodate the foot will stretch where those bulges are and in some cases may even roll over on one side or the other depending on the foot make-up of the person.

5
10
15
20
25
30
35

Q. Based on the combination of these characteristics and my experience and study with regard to the relationship of these characteristics I know that any one of these features will be shared by many members of the general population. For instance, if you would correlate the distance from the rearmost portion of the heel to the longest tip of the toe, the maximum foot length, if I might use that term, which could be correlated with a person's shoe size in general terms. Even in the most common of sizes of feet or shoes you're probably talking about 13 to 14 per cent of the general population that would have that size. If you were more specific to measure in millimetres with a metric grid the distance between here and the tip of the toe in a research project such as Sergeant Kennedy has referred to and such as I have done, that would even be more restrictive, and that characteristic alone will probably reduce in the most common of sizes a person to under ten per cent of the general population. Of those people in theory in the general population which share this measurement, give or take a safe margin because you're talking about the wicking action of the stains and shoes that might have a heel versus shoes that might be flat and other features, but within a very safe margin of those that have that

S/A Bodziak - Direct

5 first measurement, if you then check any other
measurement on the foot, and let's say the width,
the maximum width along the bulge of the first
metatarsal head with the bulge of the fifth
10 metatarsal head, and that maximum distance across
there, and you say how many of those persons would
then have the combined two characteristics, then
again it would rapidly reduce to a much lower
number, and the more characteristics of shape or
size or characteristics such as the degree and the
15 position and the shape of this border area, the
more these characteristics that can be included in
the examination, then the much, much smaller
remainder portion of the population will have
these combined characteristics. It could be
likened to a person who was first measured at
20 six-foot-four and all persons in six-foot-four
were the same with regard to that measurement but
they certainly were maybe only five or ten per
cent of the population. Then out of those how
many had brown hair and so forth, the colour of
eyes, the size of their ears and so forth, and
25 this is essentially what is happening with regard
to this kind of an examination.

Now, based on these characteristics and my
observations and demonstration that the left foot
and the right foot do not match but differ with
30 regard to the relative positions of toes 1, 2, 3
and 4, the fact that the right foot is slightly
larger and that's corroborated by a slightly
darker staining in the insole and uppers of both
the questioned and known footwear, the exact
35 positions of these toes, the position and shape

of the metatarsal area, and the position and shape
of the heel. Based on these combined character-
istics of the left foot alone and the right foot
alone these would rapidly reduce the possible
number of persons who could have these, but when
you combine the left and right it much, much more
rapidly reduces the chances of another person
having both those left foot and right foot
characteristics. Because of this extremely close
correlation between the questioned and the Gorilla
boot of Legere and his casts and these different
features, I'm of the opinion that Mr. Legere's
feet wore the Greb Kodiak boots or it would have
to be another person who shared not only all of
the characteristics which are visible of the right
foot and the left foot but the same combination of
left and right.

That opinion would be expressed based on the
morphological or the size and shape features that
were expressed in the insole and the upper of the
questioned Greb Kodiak boots with the Gorilla
boots taken from Mr. Legere and the casts of his
feet. There was a couple of other items that I
was asked to look at and which in fact readily
observed when I saw the evidence, and they
pertained - which is shown on P-153 with a large
red arrow in the heel area, a hole that is in
the - a hole which is in the heel area of the left
insole taken from the Kodiak boot and a discolor-
ation which is reflected on chart P-154 with the
heel of the left foot of Mr. Legere, and that
would be in a regular photograph, and then the
reversed photograph made on chart P-153 also

S/A Bodziak - Direct

probably not sheer coincidence but is probably related to this insole and to the foot of Mr. Legere. However, in looking at this evidence by itself within the limits of my examination I could not make any further determination about that.

I was also asked to look at the bread bags which have already been demonstrated, and these are my chart which is P-155, and this is a photograph, again with the bread bag positioned over the hole in the toe and in the heel area which does fit over the discolored spot. Certainly this bag can be positioned in many different ways and if a person were to put this on and off several times that would account for it, but there are wear areas in this part of the bag, there are stretch areas, and wear areas and stretch areas in the heel in that plastic which tend to show that that was the portion of the bag that was on the bottom of the foot, and I understand, it was represented to me, that this bag was in fact found in the Greb Kodiak boots, and so there's a likelihood that it was used as such in that. I have no other conclusions to make about this other than the fact that it is possible that these are associated.

Q. Just going back for one moment, you gave an opinion and you explained about how the chances went down according to the number of characteristics you found. That opinion, if I understand you right, related to the morphological characteristics?

A. That's correct.

Q. And then you factor into your - an additional

S/A Bodziak - Direct

- 5 factor in which was what you were doing when you
were talking about the mark on the heel and the
hole in the insole?
- A. That's correct.
- Q. So those are cumulative, not -
- A. That's correct, they would be independent and they
10 would agree with one another. There would be no
inconsistency of one with the observation of the
other.
- Q. Is there anything else to tell us about the charts
or -
- A. I think I've covered it.
- 15 Q. O.K., do you want to sit down, or whatever suits
you. Just so that the jury are clear about this,
my understanding is that although you had
consulted and discussed with Sergeant Kennedy,
what you have just done and what you have just
20 described represents your own observations, your
own feeling, etc.?
- A. Yes, sir, it does. In fact, Sergeant Kennedy
brought me the evidence on April 8, 1991. After
he showed me the evidence and I got an under-
25 standing of the request I asked for time, most of
the rest of the week. I met with him each day but
most of the time I spent by myself examining the
evidence.
- Q. And your opinion, the opinions you've expressed
30 so far, are your own independent of Sergeant
Kennedy or -
- A. Yes, they are.
- Q. On the other hand, you have been in court during
the last day and a half and you've had the oppor-
35 tunity to hear Sergeant Kennedy give evidence?

A. Yes, I have.

Q. What's your comment upon the opinions expressed
5 by Sergeant Kennedy?

A. I'm in agreement with his conclusion which
parallels mine.

MR. ALLMAN: Thank you.

THE COURT: Now, I think we'll recess for lunch, it's
10 quarter to one, and we'll go on with cross-
examination after lunch. You shouldn't discuss
this with anyone under our court rules until all
your evidence is completed. I'm sure your rules
are the same.

15 MR. BODZIAK: Yes, sir, thank you.

(LUNCH RECESS - RESUMED AT 2:00 p.m.)

(ACCUSED IN DOCK.)

20 MR. FURLOTTE: My Lord, before we call in the jury, I
viewed the second and third set of casts taken by
Sergeant Kennedy and I would like to recall
Sergeant Kennedy and have those casts put into
evidence so he can refer to them and I'd also like
25 to be able to use those other casts in cross-
examination of Mr. Bodziak and Dr. Bettles, so I
believe the Crown has some submission to make as
to whether or not the second and third sets of
casts will be put into evidence, but I require
30 them.

MR. ALLMAN: And my submission is he already covered the
matter in cross-examination of Sergeant Kennedy
and Sergeant Kennedy indicates these casts were
not useful and were not used in any measurements
35 or comparisons. To the best of my knowledge they

have not been used by Mr. Bodziak or Dr. Bettles,
and I would think they were irrelevant and the
only thing they're going to do is mislead the
jury.

MR. FURLOTTE: Dr. Bodziak did have the three sets of
casts in his examination.

THE COURT: Well, I will rule in favour of the
defendant's application and I will direct that
Sergeant Kennedy resume the stand to be cross-
examined and there will be re-examination on that.
Those casts would appear to me to have - those
molds, rather, whatever they're called, would
appear to me to have limited value, but however,
if the defendant wants to put them in as a
defence exhibit he may do that and may cross-
examine, and he may use them to cross-examine
this witness. What is the best procedure here?
Why not stand this witness aside very briefly
and -

MR. ALLMAN: Yes. I think that should be done in the
presence of the jury, though, just so that -
otherwise they're going to wonder why he isn't -

THE COURT: Oh, I'm sorry, I didn't realize they weren't
here. However, that's not important, we'll -
yes, it's got to be done in the presence of the
jury, of course, but wouldn't this be the best
thing to -

MR. ALLMAN: Yes, otherwise he won't be able to be asked
questions about them by Mr. Furlotte.

THE COURT: Yes, and I'll explain this to the jury very
briefly when they return. Had you made this
application, Mr. Furlotte, in the presence of the
jury? I think it was.

MR. FURLOTTE: It was to have Sergeant Kennedy recalled.

It was in the presence of the jury, yes.

(JURY CALLED - ALL PRESENT.)

5

THE COURT: I might say to the members of the jury at
this point, you will recall that just before
lunch - Mr. Furlotte had asked me earlier, I
guess, when Sergeant Kennedy was on the stand -
10 Mr. Furlotte had requested that he be enabled
to cross-examine Staff Sergeant Kennedy further in
respect of the other two sets of casts which he
said he made and didn't use, and I have heard very
briefly further representations just before you
15 came in now on that point and I am ruling that he
should have the opportunity to do that. I believe
the casts are available, Staff Sergeant Kennedy is
available, and I think the proper course would be
to stand this witness aside just temporarily for a
20 few minutes and we'll recall - the Crown can
recall Staff Sergeant Kennedy and make him avail-
able for these further questions. I'd like to
point out as I did this morning that you don't
anticipate asking very many questions on these?

25 MR. FURLOTTE: No, just a couple of questions. I don't
expect to be long.

THE COURT: Well, if it gets out of hand I will step in.
Would you please resume your seat for the moment,
Mr. Bodziak?

30 MR. ALLMAN: I will recall Sergeant Kennedy strictly for
cross-examination on that matter.

35

SERGEANT ROBERT KENNEDY, having already been sworn, testified as follows:

5 CROSS-EXAMINATION BY MR. FURLOTTE:

Q. Sergeant Kennedy, I believe you now have the second and third set of casts that you made of Mr. Legere's feet?

A. That's correct, yes.

10 Q. Could I have the second set, please?

A. The second set that was made?

Q. I believe the ones in evidence now were the first set?

15 A. First set. I'm guessing at this part because my first set was the one that was the best set so I used it. That I think is the order, second and third, but -

Q. So you used the best set out of - that you cast?

A. That's correct, yes.

20 Q. And this might be the second set that you -

A. I believe it to be the second set, yes.

MR. FURLOTTE: I'd offer to put these in as an exhibit, My Lord.

25 THE COURT: Exhibit D-4, the left foot is D-4, and right foot is Exhibit D-5.

Q. And this would be the third set of casts?

A. I believe them to be the third, second or third, one or the other.

30 THE COURT: Exhibit D-6 would be the left foot. These are the left and right feet respectively of the third set of casts.

A. That's correct, I believe to be the third set. The second and third, that's the order I believe them to be.

35 THE COURT: Exhibit D-7, right foot.

83

Sgt. Kennedy - Cross

- Q. Sergeant, you have the three set of casts before you?
- 5 A. Mm-hmm.
- Q. And on the left foot for each of the casts how many would show a heel indentation?
- A. On the left foot?
- Q. On the left foot of each cast.
- 10 A. The only one that shows a particular indentation is the one that's in as an exhibit. The other two has no discernible that I would call an indentation. As I said earlier in previous evidence is that I looked under a microscope, there was some areas that appeared to have some indentation but
- 15 not big enough or not good enough to me to say that it was an indentation so I discounted it as being such.
- Q. Now, when you say you looked under a microscope to see if there was some areas of indentation and you said there was some areas, but that would be areas other than the heel area?
- 20 A. Well, that's the problem, it was in the same area as the heel area which appeared to be but also other areas that were a little consistent with that, too, so I just discounted it as being an indentation. Could have been, but I couldn't say it was.
- 25 A. Well, that's the problem, it was in the same area as the heel area which appeared to be but also other areas that were a little consistent with that, too, so I just discounted it as being an indentation. Could have been, but I couldn't say it was.
- Q. Now, in the three different casts do the bottom of the feet appear to take a different shape when you compare the casts?
- 30 A. The first cast I believed to be my best cast when I made it because everything seemed to work out well, that's why I remember it being the first one. The next two, the first - I believe the
- 35

Sgt. Kennedy - Cross

second one, the green-coloured one, Mr. Legere pushed his foot completely down through the material, as you can see the thickness of it, and it flattened the bottom. The material also came up between the toes and you can see the material, and moved the toes around. When that happened I was quite sure that it wouldn't be a good cast. The next one didn't really go down too deep with one of his feet. I felt that one of his toes may have moved, I wasn't sure, but I kept them separate, these two separate, but after it was made it was found that it really didn't move too much and it was a half-decent cast but still the first one was my best cast.

Q. O.K., the part on the heel area which made a small indentation and left - here we have a little black mark -

A. It's a dark mark, yes. The actual colour is a reddish-brown.

Q. After that - we're supposing that that - whatever made that mark had been on Mr. Legere's heel at one time or another, you're supposing that, are you?

A. Well, the fact of where it is, yes, it's a good possibility that it was on his heel.

Q. There's a slight coincidence that it may have been something in the casting material but the more probability is that it was something attached to Mr. Legere's heel at one time?

A. No, I wouldn't say a slight possibility something was in the casting material. If it was on his foot and not related to the nail hole, then it would be a coincidence that it would end up in

Sgt. Kennedy - Cross

that spot, but I still say that I don't think it was anything in my casting material.

5 Q. O.K., and Mr. Legere, I believe there is evidence in that when he was in the cell area in the morning he had been strip searched and left naked in the cell area for quite some time?

10 MR. ALLMAN: I hesitate to interrupt but I understood this was going to be on the topic of these new casts, we weren't into what happened to Mr. Legere in the cell earlier on.

15 MR. FURLOTTE: The cast, and it's in relation to the indentation made on the heel of the first cast and the absence of indentations on the heels of the second casts. Could it be possible that Mr. Legere -

THE COURT: I forget the question. Do you?

A. I think he was leading up to it, I'm not sure.

20 Q. There was evidence that Mr. Legere was stripped naked in the morning in the cell area and he was left naked in the cell area for quite some time.

A. I heard the evidence in court on that but I didn't know that before then.

25 MR. ALLMAN: That question was asked and he got the answer that this witness brushes people's feet off. This has nothing to do with the two new casts.

MR. FURLOTTE: If Mr. Legere had picked up something -

30 MR. ALLMAN: I'd like a ruling, I'm objecting to this question.

THE COURT: Where are you leading, that he may have picked up something on the floor in the morning or -

35 MR. FURLOTTE: On the bottom of his feet while he was

walking around.

THE COURT: Well, let's forget about him being naked and
5 all that stuff because that doesn't enter into it.
He had bare feet in the cell, right?

MR. FURLOTTE: He had bare feet in the cell.

THE COURT: O.K., let's start from there.

MR. FURLOTTE: Is it possible Mr. Legere could have
10 picked up a foreign substance on the bottom of his
feet in the cell area before you took the casts?

A. Yes, he could have picked up anything on his feet.

Q. It would appear from your experience that whatever
made the indentation in the heel on the first set
15 of casts did not remain on his foot or it wasn't
there when you took the second and third casts?

A. That's correct, yes.

MR. FURLOTTE: I have no further questions.

THE COURT: Re-examination?

20

REDIRECT EXAMINATION BY MR. ALLMAN:

Q. When you talked about those three sets of casts
you described the first as being the best; best
in what sense?

25 A. Taking the foot casts many things can ruin a cast,
the slight movement of the toes, the feet, the
bending down of the toes, the sideways movement of
a foot, and it takes the person that's taking the
cast to really watch and feel for any movement in
30 the foot. It's not hard to feel a movement up
through the legs because the tendons will move,
and holding it tight enough you can feel any
movement, and you try to keep it straight up and
down. The first one appeared to go really well
35 and I couldn't feel any movement or any bending of

Sgt. Kennedy - Redirect

5 the toes. The next one was straight down in the
cast which I figured wouldn't give me a good cast
because it went really too deep. The next one I
thought I felt a movement on his toes, that's why
I kept it separate. There's a small indication
there that it may have moved on one of his toes
but it was still a good cast and I couldn't say if
10 he did or didn't.

Q. Let me put it this way, which in your opinion
represents the most accurate depiction of Mr.
Legere's foot?

A. The cast I brought into court here today -
15 yesterday.

Q. With regard to the question that Mr. Furlotte
asked you relating to what he asked you earlier
about Mr. Legere's feet, did I understand you to
say earlier that you make it a practice to brush
20 the foot of people when you're taking casts?

A. Yes, when the sock comes off I just rub the
bottom slightly to knock any large foreign
material off and then take the cast.

Q. If there was an indentation on the foot and you
25 put it in the foam or whatever it is the first
time, would it be possible that some of the foam
would adhere into the indentation having the
effect of smoothing it off?

A. There's a possibility of that, yes.

30 MR. ALLMAN: Thank you.

THE COURT: I take it that when you selected the films
that you prepared for your charts that you
rejected some that had been over-exposed and some
that had been under-exposed?

35 A. I've taken hundreds of photographs of the casts

in different lighting and over-exposed, under-
exposed, and trying to get the most reliable that
5 I could bring to court here today, yes.

THE COURT: Before you selected the ones you used?

A. That's correct, yes.

THE COURT: Any questions arising out of that?

MR. ALLMAN: No.

10 THE COURT: Thank you very much. You're excused.

SPECIAL AGENT BODZIAK RESUMES STAND:

CROSS-EXAMINATION BY MR. FURLOTTE:

Q. Now, Mr. Bodziak, I understand that you say
15 you've collected foot samples from 500 people?

A. That's correct.

Q. To form a database?

A. That's correct.

Q. And when did you start that?

20 A. In 1986, May of 1986.

Q. Now, what was the purpose of that?

A. To learn more in a forensic sense about the indi-
viduality of the human foot. There were many
studies that had been written that reflected the
25 individuality of the human foot but they were for
either footwear companies, the U.S. or Canadian
armies, people studying Hansen's disease or
diabetes which causes problems in the feet, for
companies that were trying to learn more about the
30 sizing of ski boots, but none of them except a few
small ones to which I didn't have access truly
studied it in the forensic sense so that I would
have firsthand information to apply to casework.

Q. Was it formed for any purpose to be able to
35 eventually draw some degree of probability of

matching or not being able to match a person's feet?

- 5 A. No, I wouldn't use it for casework, I simply used it as a learning mechanism.
- Q. Simply as a learning mechanism?
- A. That's correct.
- Q. Now, when you were identifying the different morphological characteristics of the foot I believe - which chart were we into, would that be P-153?
- 10 A. I can't see it really from here. Do you want me to stand up?
- 15 Q. Well, yes, maybe. Was that the chart you were using when you were explaining the different morphological features?
- A. I used that one and I used P-152.
- Q. O.K., for this purpose we can just use P-153, it's up in place. Now, I believe you mentioned that for the first feature, say the size of the foot as in this particular case, it might fit into about ten per cent of the population?
- 20 A. Yes, I was speaking generally at that point to give an understanding of what I meant by a combined occurrence of different size and shape features.
- Q. So to match one of these features it might fit in with about - ten per cent of the people might match the length of the foot?
- 30 A. That's correct.
- Q. And then for the width of the foot, say the ball area, out of those ten per cent maybe what, 50 per cent would only match the same ball width?
- 35 A. Well, it would vary. If you're talking about the

- size foot of a size 6 to begin with, then there'd be a lot less amount to begin with. If you were talking about a size 13 or 14 it would be -
- 5 Q. O.K., let's stay with a size 9 or a size 9 1/2 as in the case of Mr. Legere, so basically with Mr. Legere it would be maybe ten per cent of the population, men, women, children, the works, that would have a size 9 to 9 1/2?
- 10 A. It's 9 1/2, I'd have to refer to my information on that, but it's within a couple of per cent of ten per cent.
- Q. Yes, O.K., we're just going to speak generally
- 15 here. Now, to measure the width of a person with size 9 to 9 1/2, that wouldn't be reduced again by, say, ten per cent of the ten per cent that was left?
- A. I wouldn't know by memory exactly what percentage that particular size and those particular features would reduce it in this particular case. You can call it 50% or you can call it ten per cent, the combined occurrence that I'm explaining is still the same, so you may call it whatever you want.
- 20 Q. I'm just trying to understand the principles behind the - so say in Canada there's 20 million people, ten per cent would be two million, so there might be two million people with a size 9 to 9 1/2 foot like Mr. Legere?
- 25 A. Hypothetically speaking.
- Q. Hypothetically speaking, and then if we were to measure across the ball of the foot for the width there might be 50% of those two million which would have the same width?
- 30 A. If you want to use that figure.
- 35

- Q. So there could be a million people with the same characteristics as one in three here or - no, at least the - let's just go with the length and the width across the ball.
- 5
- A. O.K.
- Q. So out of those million people with the same length and width across the ball another good percentage might have the same width across the heel?
- 10
- A. Sure.
- Q. And let's say it's 50% again, we might be down to half a million people which would share three characteristics of Mr. Legere?
- 15
- A. O.K.
- Q. And basically the principle is you reduce it that way?
- A. That's correct.
- 20
- Q. And you add in all the characteristics?
- A. That's correct.
- Q. To get down to a smaller probability?
- A. That's correct.
- Q. And in this case did you find Mr. Legere's heel of the cast matched precisely the width across the heel of the insole?
- 25
- A. As I stated in my direct testimony, I relied on the insole primarily of the Gorilla boots in my exam and I used the casts just for the general appearance and characteristics such as the spacing of the toes that I could observe and corroborate, but I felt that the best comparison medium was the Gorilla boot since the impression that it reflected was the same type of impression as was in the questioned boot, the Kodiak boot.
- 30
- 35

Q. Right, but then again, we know the Gorilla boots came off of Mr. Legere's feet, he was wearing them at the time of his arrest?

5

A. That's precisely why I'm using them as a known exemplar.

Q. So how many identifying characteristics or morphological characteristics were you able to make between the cast of Mr. Legere's foot with the insole of the Greb boot, Kodiak boot?

10

A. Well, let's use the right foot first, if I might. We can start with -

THE COURT: This is chart number?

A. P-152, Your Honour. In the study which I made, and when you do a study that extensive you get accustomed to feeling comfortable with those same features, so in the study that I did I had 44 measurements or characteristics for each left and right foot, and what I did was I took a grid and placed it so that the centre line of the grid came through the optical centre of the heel through the optical centre of the second toe, and then I brought the base line of that grid up so that it just raised the rearmost portion of the heel, and then I marked the optical centres of all the toes using the perpendicular lines of the grid, the mostly interior portion of each of the toes. Of course the optical centre of the heel - or excuse me, the width of the heel, the minimal width of the arch - bear in mind these were inked impressions - the maximum distance across the ball, the distance from the rearmost centre of the heel to the most bulging area of the first metatarsal-phalangeal joint, the distance from

15

20

25

30

35

here to the most bulging area of the rearmost
centre of the heel to the fifth metatarsal-
5 phalangeal joint. We also measured the distance
on a digitized tablet which would enable us to
trace and measure a distance by moving that across
the tablet from this reference point of the first
10 metatarsal head along this route that the contour
made to the fifth metatarsal head, and the reason
for doing that would be because some feet have a
very direct route and some have a more tortuous
route, and with the limitations of our computer
15 equipment we couldn't plot each point along that
line and quantify it to make an inner comparison
but we did know that the ones that had the more
tortuous routes would be longer than the ones that
had the more direct routes of that contour, so we
measured the distance by tracing that on the
20 digitized tablet and we were able to have a longer
distance for a more tortuous route and we could
quantify it that way.

We also observed whether or not the toes each
printed, whether or not the toe stems each
25 printed, again this being an inked impression, and
we were able to measure the X, Y coordinates of
the position of the five toes, so on that metric
grid we could ask the computer to inter-compare
and ask a question regarding the relationship, for
30 instance, of toe 2 to toe 3, which is something
that you couldn't do by just measuring the length,
so after that we divided the foot from across this
straight line between the first and fifth meta-
tarsal-phalangeal joints and we took the portion
35 of the foot pad that was toward the toes of that

and we measured the square millimetres of that
area and we did the same for the rear portion of
5 the foot pad behind that, those connecting lines,
and then we also from the line through the centre
of the second toe through the optical centre of
the heel and down through the rear of the heel, we
measured all of the area of the foot on this side
10 which is known as the medial side or the side on
the inner side of your feet, and we measured the
metric square area on the outer side. In total
there were 44 different characteristics which we
could ask of each foot. With 500 in the database
15 it would typically take anywhere from three to
five to eliminate or identify one.

And now explaining how my study was used,
looking at a much more limited object, in this
case, to find all of those features which I've
20 just mentioned, I've relied on the positioning of
the heel on the optical centre, the area which
is the first and fifth metatarsal head joints or
bulges, the optical centre of the third, fourth,
and fifth toes, my observation of the peaks and
25 contours of this area behind the toes even though
in the sense that an inked impression would be you
couldn't take an exact measurement of that. You
do know from experience that it's different from
foot to foot and from left foot to right foot of
30 one individual and the distance between the heel
and the fifth metatarsal-phalangeal joint, the
distance from the heel to the first metatarsal
joint, the distance from here to each of the
optical centres of the toes.

35 Because of the bleeding and the wicking

S/A Bodziak - Cross

5 action of this absorbent insole and the sweat
stains spreading out and the discolorations I did
feel that I could get as accurate a measurement
from the tips as I could from the optical centre,
and since those are pretty close I just went with
the optical centre.

10 The only other thing that I could observe and
use as a characteristic would be the relationships
of the positions of these toes and, as I pointed
out in the left foot, the relationships of toes 2,
3 and 4 to each other were different significantly
than the right boot, and also the space on the
15 right boot between the first and second toes was
very prominent and did not exist on the left boot,
or the left foot.

Q. Now, I understood Sergeant Kennedy's testimony to
say that he didn't feel it was appropriate to try
20 and compare the foot impressions, the casts, with
the insoles by using measurements, that they
weren't - I guess he didn't say they weren't
reliable but I understood from his testimony that
it was probably not a reliable method to do it
25 that way?

A. Well, you have an extra added chance of error when
you do that because if you're measuring a
questioned item with the known item, then there's
always a possibility for variations or human error
30 or misinterpretation of the questioned as well as
the known, so you're adding those together, and
it's better to take a divider which does not have
a scale on it but it's just a two-pointed object
like a compass, and to measure points in a sense,
35 not inches or millimetres but just a fixed

5 distance, and then take it over to the other and
verify that in fact that is in agreement, and the
other method is to take acetate drawings or
10 photographs such as were on Sergeant Kennedy's
chart which are transparencies that enable you to
see the characteristics of one and look through it
and superimpose it over the characteristics of the
other and then to make that kind of comparison,
and that allows a more direct comparison without
the element of possible error in measurement.

Q. O.K., you were in court when Sergeant Kennedy
testified?

15 A. Yes.

Q. And as I went through the different measurements
of the casts and of the insoles showing the
discrepancies. Did you obtain the same discrep-
ancies when you did your measurements?

20 A. I didn't do any measurements.

Q. You didn't do any measurements. I though you said
you were making all these measurements from -

A. That was in my research project in 1986.

Q. Oh, you were talking about your research project?

25 A. Yes.

Q. Oh, I thought you were talking about this
particular -

A. No, I was first showing all of the things which I
did that I was familiar with in doing for that
30 research project, and then the ones in this case,
the areas which I compared I didn't measure. I
used those as areas of comparison understanding
the significance that they would have on my
opinion.

35 Q. O.K., I'm sorry, I misunderstood. I thought when

S/A Bodziak - Cross

5 you were explaining that out you were explaining
all the different measurements in 44 different
areas that you had to the cast of Mr. Legere's
foot and the insole of the Kodiak Greb boot, but
that's not the case?

A. No.

10 Q. I see in the overlay here where it shows the -
this is the foot area in red? Is that the foot
in red?

15 A. This is a drawing only for the purpose of
demonstrating and being able to call the Court's
attention to areas where through oblique light
and feeling those depressions I found those
positions, and to demonstrate in a method that
would enable persons in this court to see what
I'm talking about. This is not an item that was
used as an examination item, although that method
20 of examination is certainly an acceptable one.

Q. This is an insole of the right Kodiak Greb boot?

A. That's correct.

25 Q. And I understand Sergeant Kennedy's testimony that
he couldn't find an indentation or a sweat area
for the fourth toe.

A. I had no problem finding it

Q. You had no problem finding it?

A. No, and I felt it just a moment ago, it's still
there.

30 Q. The physical comparisons that you did make in
order to come to the conclusion that probably Mr.
Legere's feet in the Greb boots, the Kodiak Greb
boots, what were those exact physical -

35 MR. ALLMAN: I hesitate to interrupt but again I think
Mr. Furlotte is misstating the witness's

conclusion. I don't think it was probable, I thought he said highly probable.

5 MR. FURLOTTE: This witness did not say highly probable.

MR. ALLMAN: I think he did. Well, ask him.

MR. FURLOTTE: Nice of you to lead him.

MR. ALLMAN: Ask him the question.

10 MR. FURLOTTE: O.K., the characteristics that you found in your comparisons between the insoles of the boots or the boots, and the casts, which ones did you use to come to the conclusion that Mr. Legere's feet were probably the ones in the Greb boots?

15 A. The ones which I have demonstrated and which I have marked with these numbers and acetate grids.

Q. So then it's these five characteristics?

A. Well, now, each toe would be a point, which the relationship of the toes, the difference, would be
20 a significant point as well, because not only is their distance from the heel significant but their position laterally and their relationship is significant, and those are independent features. In other words, two people could have
25 the same distance between the heel and these two toes but the relationship of those toes to each other could be different because of the size of the toes or because of one toe being over and under another, so their length and their lateral
30 position are an independent. This contour here behind the toes in front of the ball, the shape and features of the first and fifth metatarsal-phalangeal joints known as the ball of the foot or the metatarsal region and the positioning of
35 the heel, of course, used to set all of these up

to begin with.

5 Q. But wouldn't all the people who have size 9 or
9 1/2 which would have a similar length foot of
Mr. Legere also have a ball in their foot which
would make some kind of an indentation and sweat
mark in this area?

10 A. They don't have a ball in their foot, sir, they
have a primary metatarsal-phalangeal joint which
because of the biomechanics of the feet when a
person walks in most people transmits a major
portion of the weight, and it's much larger, I
15 presume to evolution, to support that weight, and
as a result of it bearing that weight the skin and
the surrounding tissue is also built up much
firmer and much thicker, so you wind up with what
you call the ball of the foot, and it therefore
leaves a bigger indentation and it leaves a
20 specific shape.

Q. But everybody has that?

A. Everybody has one, of course, but not everybody
has one like this, and the distance, for instance,
from the heel to where this takes place, even in a
25 size 9 or 9 1/2, whichever you choose, may be here
on one person and it may be here on another person
with the make-up and difference being in the
distance of the toes. For instance, from the heel
to this joint may be, let's just say for
30 discussion purposes, 200 millimetres, and the
distance from here to the tip of the phalange may
be 50 millimetres to give an overall length of 50
millimetres, but on another person the heel from
here may be 185 millimetres, and then from here
35 would be 65, they have a much longer toe, so it's

not just the size and shape here but it's also its relationship to the other feature.

5 Q. O.K., what I don't understand, then, I guess, and maybe you could clue me in here, is why is it so important that this is the distinct shape and size, this area here to Mr. Legere's feet, but then again when we get to the width of the heel
10 area Mr. Legere's foot is not as wide as the impressions made in the insole but that's not important? Why is this important to include Mr. Legere, but the discrepancy here of about 6.6 per cent, Mr. Legere's heel is narrower than the
15 impression made in the insole, why is that so unimportant?

A. I have no discrepancy of 6.6 per cent, sir, I don't know -

20 Q. Well, I'm just going by the measurements that I got from Sergeant Kennedy.

A. Well, I did my examination and I didn't use measurements. I used superimposition -

25 Q. O.K., the superimposition here shows that there's at least quite a space between the heel and the insole?

A. Well, let's take the - I prefer to use the Gorilla boot but, you know, for purposes of putting it inside -

30 Q. I don't care about the Gorilla boots, Mr. Legere was in those.

A. May I finish. I don't think you know what I was going to say.

Q. No problem with them.

35 A. O.K., I said for comparison, but you didn't let me finish. If we want to get the right cast here and

S/A Bodziak - Cross

we want to get this insole and the boot that goes
behind this insole, then when we line all those up
5 you'll see the heel fits in there fine. I mean,
there's no discrepancy. Now, I presume that
there's been some discussion this morning on the
inconsistencies or variabilities in casting. This
particular cast, you can see right along here that
10 there's - you can see the edge, meaning that
there's a little bit of twist in that cast and it
wasn't perfectly straight down, and therefore if
you measure across here you're actually measuring
something a little on angle, so if you do it
15 straight on from a photograph, you know, you're
not going to get a perfect replication here, but
even what you have fits right over that insole and
right over the Greb Gorilla boot behind it.
There's nothing there that's a difference.

20 Q. Do you agree that the stain areas, then, in an
insole can spread wider than the actual foot?

A. I stated that they will wick out sometimes.
There's other colours in here, there's some -
correct me if I'm wrong but it looks like some
25 purples, there's some whiter areas and darker
areas up here, there's like a halo, and there's
areas that are probably lighter because they're
unworn and others that maybe something wet or some
sweat or something caused that. Now, I can't,
30 short of having a crystal ball, look into this and
tell you the whole history of this insole in terms
of what caused those stains. I can only look at
the features which are in there. If the stain is
clear, then I can use that in my exam. If it's
35 not, then I rely on the depression. I used the

most reliable things in here which was a combination of both of those, but simply because this
5 insole doesn't perhaps have as clear an impression as this one or as some insoles I've seen where it literally looks like an inked impression in the insole, that doesn't eliminate the possibility of using the depressions and still making these
10 comparisons.

Q. Somebody with a foot the same length as Mr. Legere's, roughly the same width, and it's difficult to tell the exact measurements from an insole of a person's foot?

15 A. I don't do that as a routine matter of examination so I won't - I don't see where it would be that difficult but I don't do that so I really can't tell you, and in this particular case I didn't do it so I can't -

20 Q. Sergeant Kennedy stated that the comparisons matched precisely, the cast with the insole matched precisely. Would you say the same thing?

A. That the measurements -

Q. If the comparisons matched precisely?

25 A. I'm saying that I made my comparison primarily with the Gorilla boot and I used general features of the cast, and the cast does correspond so closely that you can - and I think this was very evident in the videotape yesterday - you can take
30 and see the contours and how nicely they do fit, but my examination was primarily and my demonstration primarily deals with the Gorilla boot which is the closest medium to the questioned matter, to the questioned insole, and my
35 comparisons are between there and the reason I

- 5 chose to do that was because you don't get involved in variability and reproducibility problems in taking casts.
- Q. O.K., from your comparisons, and you say it was involved mostly with the Gorilla boot, the comparisons of the impressions that you were able to make, would you say it's more likely that Mr. Legere's feet were in the Gorilla boots than they were in the Kodiak boots?
- 10 A. I'm saying that the characteristics that I can observe in the Gorilla boot agree -
- Q. This is the Kodiak boot.
- 15 A. I'm sorry, the Kodiak boot, questioned boot, agree with the Gorilla boot.
- Q. Totally?
- A. They are not the same.
- Q. Do they agree totally?
- 20 A. Everything that I can see - I'm limited, bear in mind, by the detail that I can either see or feel in this insole. If it doesn't appear here, then there's nothing to make a comparison with. Everything that I was able to physically see or feel or otherwise record in the questioned Greb Kodiak boot corresponds with the respective characteristics of the left and right feet of Mr. Legere as evidenced by the Gorilla boot.
- 25 Q. O.K., but you were able to see more characteristics in the Gorilla boot? Now, if I get you right, you say anything you found in the Kodiak boot you were able to compare and find it in the Gorilla boot?
- 30 A. That's -
- 35 Q. In the Gorilla boot was it more detailed or

precise?

5 A. That would be the same as if we had an inked
impression of Mr. Legere's feet. It doesn't
matter if I could see more or less. In this case,
yes, I can see more, but it doesn't matter in the
exam. If there was absolutely no recording of
10 these three toes, then I would not have been able
to use those either unless I wanted to go back and
use them from the cast.

Q. O.K., this Gorilla boot appears to be fairly
well-worn, the impressions?

A. Are you asking me?

15 Q. Yes.

A. It has some wear in it. You know, again as to how
well-worn it is -

Q. Is this a crack across the sole?

A. No, that's not a crack, that's where the manu-
20 facturer has added material and glued that over
the top.

Q. So that is not a break in the -

A. I'm sorry, this here - I'd have to see. There's a
shadow covering that so I can't see it without
25 looking at the boot. This is a piece of material
that's been added.

Q. Well, just up this ridge here?

A. Yes, I know that is but that has a shadow over it
so I can't see the joining feature of that. If
30 you want to show me that I can tell you.

Q. Well, maybe we better look at the Gorilla boot
itself. I don't know either, I'm just guessing.
That must be just a piece of material, is it?

A. That's the wrong one. Both of them are - they're
35 not breaks, they're material problems. This is

5 like a buckle and this is a separate piece of material; in other words, like a patch that's been put over, and then this is like a ridge, but I wouldn't call them breaks. It's just like a crease. it doesn't enter into the examination so -

10 Q. The two holes up at the top in the sole here, do you know what those would be, nail holes?

A. Looks like some rust marks. It's probably a staple or nails that are coming through the toe area.

15 Q. Were there any insoles in these boots or is this it?

A. This is the way I received them.

Q. This is the way you received them, so you would refer this as the insole rather than the sole or -

20 A. Yes, this is referred as the insole and this is referred as the outsole.

Q. Now, looking at that insole as is it would look as if that was worn for a fairly lengthy period?

25 A. Well, first, if you were asking me about wear, some people wear their shoes more on the outside than the inside. Some people wear their shoes more on the inside than the outside. I personally wear my uppers out before I wear the bottoms out, and I know people that do the opposite, so if you look on the outsole first there's not a great deal of wear. There's a little bit of wear on the heel. As to what that translates to in terms of a person, whatever they were doing while they were wearing the boots and to time, you know, whether it's weeks or months or days, I wouldn't be able to comment because there's so many variables

35

involved, and on the insole, if the person frequently had dirty feet or dirty socks, then
5 this is not a whole lot of stain, so it depends.
One person could be wearing these for a long period of time on a carpeted surface and there wouldn't be as much wear as if they were wearing them with wet feet running around outside, so it's
10 really sheer speculation to start talking about the extent of wear in general terms such as well-worn or not well-worn. There's just really no way to discuss that.

Q. So as an expert you can't tell whether a pair of
15 boots was worn on a normal basis, average, for a day or for a month?

A. If you give me definitions of what a normal basis is and what well-worn means, what unworn means, all that, I'll tell you where it fits. What I'm
20 saying is there's no standardized way because of the variables between shoes, shoe materials and persons in terms of defining wear, but if you were to make up a list of terminology, then I could tell you where that would fit there. Again this
25 has nothing to do with the examination.

THE COURT: What was that exhibit number, Mr. Furlotte?

MR. FURLOTTE: It's Exhibit P-121, which is the right
Gorilla boot. Now, you mentioned the shape of
30 people's feet can - different factors can determine the shape of a person's foot and one I believe you mentioned was genetic?

A. That's correct.

Q. So basically families, brothers and sisters, may
share the same shape of the foot?

35 A. There are commonalities in racial and ethnic

features speaking in general terms of feet.
Anthropologically there's been studies of tribes
5 and of Indians and the Asiatic regions of the
world, I have seen those in a general sense that
refer to certain features. However, that's in a
sense of a rounded foot versus a rigid foot and
things of that nature and they really didn't get
10 into specifics as we are looking at it here. I
could tell you that my study of 500 feet involved
different racial and ethnic groups and we didn't
see any significant features that would have
caused us to have to account for that, simply
15 because at least in the United States there's such
a mixture if you go back generations that if you
were to take an impression of a person's feet that
was an American Negro or an American Caucasian or
American Mongoloid that had been living there for,
20 say, two or three generations, there's probably
going to be in most cases, or at least a signifi-
cant proportion, mixed blood, so you've got such a
mixture of ethnic and racial features, and I think
that's pretty prevalent in a lot of areas of the
25 world, that there's just no way that you could
factor that in, and we have never come across
anything that was significant that would make a
difference where we would say all people of a
certain ethnic or race will have similar features.
30 They're still going to have all of the variables
and differences and they're going to have all of
the environmental and nutritional and genetic
types of influences on their feet as well and
they're going to differ as much from people in
35 their own ethnicity or race as they are other

races, so we just don't even factor that in.

5 Q. But generally the shape of the toe area here
 where you've got - I don't know what you would
 call that shape here, it wouldn't be round, would
 it, or how would you describe it?

 A. You're talking about some kind of a perimeter
 touching the tips of the toes?

10 Q. Yes.

 A. I guess it's been too long since I took the
 geometry course, I -

 Q. But anyway, you may get a square type shaped foot,
 the toes coming across more of a square basis?

15 A. I've had feet that the fifth toe doesn't print,
 the third and second toe doesn't print, I've had
 where the third toe was longer than the first two.
 There's a significant percentage where the first
 and second, one is longer than the other, either
20 the first or second. There is quite a combination
 of interrelationships between toe placement and
 the fifth toe seems to have a greater independence
 of the first four but there's a lot of inter-
 relationship variances among these four as well.

25 Q. But families and the children of the family are
 more apt to have the same shape foot than from a
 different family and a different family would have
 maybe a different shaped foot?

 A. I have no reason to believe that.

30 Q. You have no reason to believe that?

 A. We've had individual twins and they're different,
 and their left feet are different than their right
 feet, and that's because they've just gone through
 a lifetime of different environmental and
35 nutritional and activities where their feet have

5 just - the plantar surface of their feet after
millions and millions of steps and stress and the
body's reaction to that have - one may play a lot
of tennis and another doesn't when they're young.
One may have broken a foot and the other didn't,
there's all sorts of things like that in just
general terms and specific terms that can cause
10 differences between the left and right feet and
feet of individual twins, and all of the studies
that have been done on them are ones that I'm
aware of. Their feet are different, too.

Q. One other point I understood in your direct
15 testimony is when you were describing about one
measurement, the size of the person's foot, the
length, total length, when you mentioned maybe
ten per cent of the people would fit into that
general category, but then measurements will
20 restrict or reduce that category maybe down to -
you didn't say a percentage but it would restrict
it down to a narrower group of people?

A. Yes, when you get to this many characteristics
it's going to reduce it to such a theoretical low
25 number that it enables me to render the opinion,
and my report reflected this wording, that it's
highly probable that it's Allan Legere's feet.

Q. So you'd come up with a better opinion if you do
the measurements rather than the generalities?

A. I was referring to the things I observed, not
30 measurements, and I thought that's what you were
asking me about.

Q. No, I just want to get back to your example. You
said the measurements would be more precise or
35 more restrictive in reducing the field?

- A. On an inked impression. Are you referring to my study or this examination?
- 5 Q. I'm referring to your study.
- A. Oh, my study, I had 44 features on each foot that would be entered into the computer and that you could ask that computer how many other persons' feet have within whatever parameter I wanted to
- 10 make it, characteristics one, two, three, seven and eight, or whichever one of those measurements or observations that I observed, and in that base of 500 people whose left and right feet I had, just asking it with regard to one foot, normally
- 15 two or three in the extreme foot sizes and in more common foot sizes, 5 or 6, immediately segregated that one single foot from all other 499 in that database, and I had blind tests that were given to me of impressions that were in the database and
- 20 impressions that were not in the database and I was asked to determine if the feet were there and it was very quick and easy, so you know, that's working with inked impressions where we did take measurements on a digitized tablet, but as I
- 25 explained before, in casework not only can you not get a crisp, clear reporting in all cases of where a characteristic begins and ends and therefore prohibits a precise measurement, but you are not going to take that necessarily and test it against
- 30 a population base of 500 people, simply because I would be accused of that not representing the general population, and I would agree.
- Q. When you compared the boots and looked for the different characteristics and you found lots of
- 35 characteristics that - at least some

S/A Bodziak - Cross

characteristics that match between the casts and the insoles of the Kodiak boot, is that right?

5 I know your main study was on the Gorilla boots but you did find some matching characteristics of the Kodiak boot, between the insole of the Kodiak boot and the cast?

A. The general contouring as was shown in the video-
10 tape, yes, that would be consistent, but you know, probably limited to that.

Q. Did you find any characteristic at all that didn't match?

A. Nothing which I would call a difference.

15 Q. Nothing that you would call a difference?

A. That's right.

Q. Is there something there that somebody else might call a difference?

A. If they didn't understand what a difference was
20 they might call it a difference. For instance, this is a non-weightbearing impression. Could I have this cast and show you?

Q. That's the right foot?

A. Either foot is fine. This is the right, yes.
25 This is a reverse photo but I can draw your attention to this cast, O.K. If this cast - I don't know, maybe if I put it up here - that's a cast of the foot and you can see that the toes aren't touching the ground. It's a cast of the
30 wholeness of the foot. It's not a cast where the weight of the person caused these toes to come down and touch the surface, it's not a cast where all of the weight-bearing areas are flat, O.K., so whereas it does give a general recording of the
35 feature and relationship - this is the left and

5 this in the right, the space between the first and
second toe and things of that nature in terms of
it being a weight-bearing impression which will
reflect the same precise dimensions in the same
precise configuration as the weight-bearing
impression in the Gorilla boot, it won't be
exactly the same, but that's not a difference,
10 that's what you would expect.

Q. That's what you would expect?

A. And certainly any time you have both you're much
better off.

15 Q. But other than that you didn't find any
differences?

A. That's not a difference, that's - one's a cast and
one's an insole, and you could compare that alone
with the insole. It's just much more difficult to
do that.

20 Q. And there's no way you can put any number to the
degree of probability that it's Mr. Legere's feet
that were in those boots?

A. No, each foot individually, as I stated before,
would either be Mr. Legere's foot or another left
25 or right foot, depending on which insole we're
talking about, that was wearing that boot, and
when you consider the combination of the left and
right which are not alike, then it becomes highly
probable that it's his pair of feet and more
30 unlikely that it could be another person. I can't
say that it wouldn't be another person and I can't
attach any kind of mathematical probability to it
because there's no statistics that I could draw on
which would - accepted in the forensic science
35 community that would enable me to do that.

- Q. Now, you say it was probably Mr. Legere's foot in the Kodiak boot but you can't say how long Mr. Legere may have worn those boots except that they were well-worn?
- 5
- A. For the same reason that I explained to you with regard to the Gorilla boot and what you mean by well-worn, worn, and how long it's worn, because of the lack of uniform definitions of what you mean when you ask that question to me and because of the fact that I could wear a new pair of boots like this on carpeting for years and the bottom may not receive as much wear as if I wore them outside for two weeks, so you just can't make determinations. There is definitely good, distinct wear characteristics here that match with the the good distinct wear characteristics in the Gorilla boot.
- 10
- 15
- 20
- Q. Could somebody have worn the Kodiak boots before Mr. Legere?
- A. I can't eliminate that possibility.
- Q. Could somebody have worn the Kodiak boots after Mr. Legere?
- 25
- A. For a short time, possibly. There's nothing that is breaking this ridge down or deteriorating any of these depressions. There's nothing there that would lead me to believe that, but the changes wouldn't take place instantly and so I can't rule out that possibility.
- 30
- Q. Especially in the Kodiak boot because it's a harder surface than the Gorilla boot?
- A. In either boot, in either boot.
- Q. But the Gorilla boot, where it has a softer sole, a second person wearing them may - it may show up
- 35

quicker?

5 A. Yes, the Gorilla boot is a leather sole, this is a
cloth sole, and they may be soft leather but I
wouldn't know whether one is softer than the
other. They're both soft.

10 Q. So basically you don't know whether Mr. Legere
wore those boots in October of 1989, November of
1989, or -

A. I'm only making a comparison between this insole
and this insole. I'm not speculating nor do I
have personal knowledge of anything else, sir.

15 Q. Do the Gorilla boots look more worn than a person
who may have sat in a hotel room for a week and on
a train for a day rather than walking around and
running through the woods?

A. You're asking me the same question. I can't
answer it any further than I have before.

20 Q. You're the expert and you can't form an opinion on
that?

THE COURT: Oh, well, that's an impossible question, Mr.
Furlotte, you're asking.

25 MR. FURLOTTE: No, well, if an expert can't answer it
then I'm sure nobody else can.

THE COURT: Well, even experts get stumped sometimes.

A. I explained why I couldn't answer that.

30 Q. Now, you mentioned on the heel of the left foot,
of the cast, this spot that was on there, was the
spot still on the cast when you examined it or was
it removed?

A. It's still on the cast when I examined it, it's
still on the cast right now.

Q. It's still on the cast right now?

35 A. Well, there's a mark on that cast, yes.

- Q. Is that what it looked like when you had it?
- A. Well, I got a picture of it, what it looked like
5 when I had it. You know, I took a picture under a
microscope to try to determine what it was, and I
have that picture if you want to see it. That
would probably be the best way of answering that.
- Q. O.K., that little indentation in there, that's a
10 small little - that little hole was there when you
examined it?
- A. It's very, very tiny, if you want to call it an
indentation. It's almost like there was some
matter that kind of got stuck, it's almost a
15 surface indentation, it's very, very tiny. It's
hard to even say it's an indentation but it's
certainly not sitting on top of the cast, it's
mixed in with it. As to whether or not it's an
indentation or just kind of pushed into the same
20 plane it's hard to say.
- Q. The bread bags that you examined, could you tell
how long they may have been worn inside the
boots?
- A. No, I can't.
- 25 Q. Or how many steps may have been taken?
- A. No, I can't.
- Q. Could it be for more than a couple of days?
- A. I just stated I can't tell, sir.
- Q. Sergeant Kennedy brought you this evidence and
30 exhibits on April 8, 1991?
- A. That's correct.
- Q. That's just this spring?
- A. That's correct.
- MR. FURLOTTE: I have no further questions.
- 35 THE COURT: Re-examination?

116

MR. ALLMAN: I have no re-examination. May this witness safely be excused? I understand he wants to return to Washington.

5 THE COURT: How far is Washington?

MR. BODZIAK: Oh, tomorrow morning.

THE COURT: All right, you're excused. Thank you very much, have a good journey back. Thank you very much for coming. Now we'll have a recess but
10 before that may I just inquire, you have one more witness, do you, Mr. -

MR. ALLMAN: I have one more witness. I don't expect to be very long with him. I have no way of knowing how long my learned friend will be.

15 THE COURT: Do you envisage, Mr. Furlotte, that we might finish this afternoon or -

MR. FURLOTTE: I expect we'll finish this afternoon. I checked out of my hotel, I'm sure we'll finish.

THE COURT: I've promised the jury I'll have them away
20 from here by half-past four in the afternoon so I don't want you to let down on that, so the jury will go out, please. I'm just wondering, do the jury feel that there'd be any advantage in taking this opportunity to look at - this may be the last
25 opportunity you have before your final session, so Mr. Sears, would you take those out, please?

(JURY WITHDRAWS.)

THE COURT: There was another small point I meant to
30 bring up and that was the last witness did make some hieroglyphics on that big piece of cardboard, I can't very well see it from here, but should that be made an exhibit, was that intended as an exhibit?

35 MR. FURLOTTE: It was made during the course of direct

117

examination.

MR. ALLMAN: It was just an evanescent demonstration, I
don't think it needs to be an exhibit, but if Mr.
5 Furlotte has any concerns about it you'll have to
extract the top one and make an exhibit of the
underneath one. Personally I don't think it's
necessary but whatever Your Lordship wishes.

THE COURT: Well, why don't we just pretend he was
10 pointing at the sketch which already is an
exhibit, because it seems -

MR. ALLMAN: The drawing to me is just a representational
drawing of a theoretical human foot, and we all
know what a human foot looks like.

15 THE COURT: I'm not sure I do now. All right, we won't
bother with that. The other exhibit, Mr. Pugh,
if you wouldn't - I didn't mean that you really
have difficulty putting your shoes on in the
morning, you know.

20 MR. LEGERE: Oh, no, he didn't. Oh, no, he didn't.

(BRIEF RECESS - RESUMED AT 3:45 a.m.)

(ACCUSED IN DOCK.)

(JURY CALLED - ALL PRESENT.)

25

THE COURT: Now, you have another witness, Mr. Allman?

DR. KEITH BETTLES, called as a witness, being
duly sworn, testified as follows:

30 DIRECT EXAMINATION BY MR. ALLMAN:

Q. What is your name and where do you live, please?

A. Keith Bettles, Prince Edward Island.

MR. ALLMAN: My Lord, with my learned friend's consent I
propose to lead this witness through his
35 curriculum vitae.

THE COURT: Fine.

- Q. Mr. Bettles, I understand you come from England?
- 5 A. Correct.
- Q. Lancashire?
- A. Correct.
- Q. And were educated in that country?
- A. Correct.
- 10 Q. And that you entered into the School of Surgical Chiropody in Berkshire, England, and completed the surgical chiropody course setting up private practice in England in 1981?
- A. Correct -
- 15 Q. I'm sorry, until then?
- A. I emigrated in 1981.
- Q. When did you set up your practice in England?
- A. 1977.
- Q. And then four years later you emigrated to Canada?
- 20 A. Correct.
- Q. When you emigrated to Canada were your qualifications as a chiropodist, that is to say your British qualifications, evaluated and passed by the Canadian Consulate before you were allowed to
- 25 emigrate?
- A. That's correct.
- Q. And upon emigrating to Canada did you work at Queen Elizabeth Hospital in the Physical Medicine Department for 18 months?
- 30 A. That's correct.
- Q. The Queen Elizabeth Hospital is where?
- A. In Charlottetown, Prince Edward Island.
- Q. After your 18 months in the hospital did you open a private practice in Prince Edward Island?
- 35 A. Correct.

- Q. In 1983 did you join the Canadian Podiatry Association?
- 5 A. Yes, I did.
- Q. Again on the basis of an evaluation of your British qualifications?
- A. Correct.
- Q. Are you still a member of the Canadian Podiatry Association?
- 10 A. Yes, I am.
- Q. Do you hold any office in that?
- A. I am the Provincial President for the - actually it is now the Canadian Association of Foot Professionals. It is still the same body.
- 15 Q. And you're the Provincial President?
- A. Yes.
- Q. Have you attended seminars in Nova Scotia in order to upgrade and continue your education in this sphere?
- 20 A. Yes, I have.
- Q. Have you lectured to physicians and nurses in connection with the area with which you deal?
- A. Yes, I have.
- 25 Q. Where would you have done that?
- A. In Charlottetown and various points of Prince Edward Island.
- Q. Does the nature of your work involve not only medicine for or dealing with feet but also the making and fitting of devices, feet orthopedic devices, is it, or orthotic devices?
- 30 A. Orthotic.
- Q. What does that mean, what's an orthotic device?
- A. It's a biomechanical device to re-alter the structure of the foot.
- 35

- Q. And approximately how many patients do you have on your patient list at the moment?
- 5 A. Approximately between four and a half to five thousand.
- Q. And about how many patients per week would you get to examine?
- A. Approximately about 50 to 60.
- 10 Q. Have you ever been called upon to give expert evidence in courts in Canada in the sphere of podiatry or chiropody?
- A. Yes, I have.
- Q. Where was that?
- 15 A. That was in Sydney, Nova Scotia, 1984.
- Q. And was that in connection with comparison between footwear and foot impressions?
- A. Yes, it was.
- Q. Subject to any objection, My Lord, I'd ask that this witness be declared - oh, just one question, what's chiropody, what's podiatry, and what's the relationship between those two words?
- 20 A. Chiropody is the old original British term for it and podiatry is the American term.
- Q. They mean the same thing?
- 25 A. They mean exactly the same.
- Q. And what's that?
- A. It's the study of the foot or the lower limbs.
- Q. And I suppose the association has changed its name to foot professionals because people don't know what chiropodists and podiatrists mean?
- 30 A. People have - chiropody, people have difficulty with chiropractors, and so the Americans changed it to podiatry to ease the situation a little.
- 35 MR. ALLMAN: Subject to any objection I'd ask this

Dr. Bettles - Direct

5 witness be declared an expert in chiropody/
podiatry and specifically entitled to give expert
opinion evidence on footwear and foot impression
comparison.

THE COURT: You might want to change from podiatry
because on paper it looks like idiot. Any
questions?

10 MR. ALLMAN: I thought it had something to do with what
you eat.

THE COURT: Any question, Mr. Furlotte?

MR. FURLOTTE: When you say you gave expert testimony in
court before in Sydney in 1984, what was that
15 expert testimony about?

A. That was on a sexual assault on a 15-year-old
girl.

MR. FURLOTTE: Well, I'm just not particular about the
facts of the case but just in relation to the
20 evidence that you gave, the comparisons.

A. The comparison was that - to take the inner sole
of a sneaker found at the scene of the crime and
match it with a suspect, with a cast on the feet
of a suspect to see if that suspect had actually
25 worn the shoe.

MR. FURLOTTE: No further questions.

THE COURT: I would declare the witness for the purpose
of this trial an expert in the field of podiatry.

MR. ALLMAN: Before we get into any specifics about this
30 case could you just give the jury some idea of -
give them a little lecture about feet and what
makes feet work and what changes feet?

A. Well, the reason why we have feet is because if we
didn't have feet we'd fall over, so therefore the
35 foot is basically like a cathedral roof, if you

Dr. Bettles - Direct

5 like to put it that way. It's a series of arches,
26 bones, tendons, muscles, etc., and as the
weight compresses onto the foot the arches will
compress and act like a spring. What will
rearrange the foot is the different muscle,
muscular or structures of the skeletal body. If
somebody has a disc disorder, a hip disorder,
10 knee, anything like that, it will change the
function of the foot and it will bring about
different pressures on the different parts of the
feet, therefore determining why we get thicker
parts of the feet and why we get the different
15 structures in the feet itself.

Q. I noticed that as you came in you had a number of
plaster example feet. Are they of any assistance
to explain any of this to the jury?

A. Yes, it would.

20 MR. ALLMAN: I don't know whether it's necessary to make
these an exhibit or not, My Lord, because I take
it he probably wants to take them back with him.

A. It's the people in next-door want them back.
These are three different aspects of the foot.
25 This one is classed as the normal foot. This is
why, because all the bones, all the tendons, the
arches, are all in perfect contour, or near enough
perfect contour, and as I suggested before, that
we have an arch here, we have a lateral arch, we
30 have a transversal arch, and we have an arch there
which forms like a cathedral roof, so that as the
weight compresses down onto it, then it acts just
like a spring, just like on a car. You can tell
people that have this condition, they walk - you
35 have seen old people like - they walk heavy and

Dr. Bettles - Direct

down, so that is the idea of that.

5 That is when the tendons through wear,
sometimes wear, sometimes we can be born this way,
is that the tendons weaken, the arches come down,
and that is the flat foot, and you can see the
difference between the two from there. You can
see the position of the toes, see the position of
10 the toes from the dorsal aspect.

Now, on the other hand, this is the reverse
to the flat foot, this is called the pes cavus.
This is when the arch is extremely high or above
normal, and in this condition is that the tendons
15 are tighter, therefore they're pulling the arch
up. What they do is they pull the bones back, and
because when we put the weight down we are not
putting some of the weight down on this lateral
edge here, we tend to put a lot of the weight down
20 on these areas here. Consequently, in a lot of
cases or most cases, that you will get a callused
area. It's nature's way of compensating for the
extra weight which that particular person is
putting on these particular areas.

25 Also you'll notice that as the foot comes
back and the tendons have retracted, the toes
have retracted, you can see the difference in the
toes because the tendons are outside their normal
sphere, so therefore they retract the toes and
30 instead of putting the weight down evenly on the
underneath side of the toe which is designed for
the weight bearing is they're tending now to put
them down more on the edges of the toes.

Q. I want to ask you a certain number of questions
35 about feet in general. I take it we are to some

- 5 extent the feet that nature gives us, what we
start out with, and could be one of those kinds
that you've just demonstrated?
- A. Yes.
- Q. Can accidents to the feet, physical accidents to
the feet, alter the way we walk and therefore the
impression we make?
- 10 A. Yes, they certainly can.
- Q. Can our feet vary or change according to, for
example, the nature of work we do?
- A. Yes, they can.
- Q. What about the various sports we may or may not
15 play?
- A. Sports will bring about, different pressures will
bring about the changes, too.
- Q. What about the type of footwear that we habitually
choose to wear, boots or shoes or sneakers?
- 20 A. Shoes have a contributing factor to the changes
of the foot.
- Q. What about an injury to another part of the body,
say an injury to the hip or an injury to the knee?
- A. Injury to the hip, knee, other parts of the body,
25 will bring about changes to the foot because we
are bringing about different pressures on the
foot.
- Q. So those are the sort of things that over the
years will make my foot or a person's foot
30 develop in a certain way?
- A. Correct.
- Q. With regard to this particular case, I understand
that on the 24th of November, 1989, you were the
individual who supplied Sergeant Kennedy with the
35 foot foam at his request?

Dr. Bettles - Direct

- A. That's correct.
- Q. And subsequent to that did Sergeant Kennedy visit
5 with you and provide you with some items for you
to examine?
- A. That's correct.
- Q. Specifically were those items the footwear,
P-133?
- 10 A. Yes, P-133 I examined on the 14th of June, 1990.
- Q. Insoles P-140 and 141?
- A. Insoles P-140 and 141 again I examined on the 14th
of June, 1990.
- Q. And plaster casts, P-136 and 137?
- 15 A. That's correct, P-136 and 137 are what I examined
on the 14th of June, 1990.
- Q. Can you just describe in general terms the nature
of the examination you made of all those items?
- A. The examination I made on these items were that on
20 visual optical is that the difference between the
left and the right is that this foot has a callus
area along here and -
- Q. That's P-what?
- A. Sorry.
- 25 THE COURT: Or better still, it's the right foot.
- A. This is P-136, and the left foot - we noticed,
too, that there was a separation between the
second and the first phalangeal joint and on the
left foot we noticed a small mark in the heel and
30 the ball area, and also there was a mark, it
seems to have gone a little bit now, probably with
wear, off there, but there was a small mark just
down on the lateral edge of the lateral arch.
- Q. Did you make comparisons between the plaster casts
35 and the other objects that were provided to you?

A. Yes, I did.

Q. Explain what you did.

5 A. The comparisons I made were that we took the
insoles of the boot and the inner soles of the
boot and the sole of the boot, and on the sole of
the boot we noticed - we observed that there was a
small rusty nail that was sticking out of the heel
10 area of the left foot, and the inner sole of that
boot was worn away to correspond with the nail
hole. Upon placing the cast upon both the sole
and the inner sole we noticed that the mark did
line up. I took a pair of calipers and I did -
15 and I measured from the posterior calcaneal, which
is the back of the heel, to that spot, and from
the spot to the lateral edge, and I did the same
with the inner sole and they all lined up. I did
it again with the callused area here which lined
20 with a crack in the leather sole of the boot.

Q. With regard to that last matter, what did you
describe it as being on the cast?

A. That would be like a callused area. I take it to
be a callused area.

25 Q. And you mentioned also that on the boot there was
a crack?

A. There was a crack just in that area, possibly from
wear, with the constant drying and wet, dry, wet,
dry, and just in that point it weakens the sole so
30 therefore it could crack the leather sole.

Q. Could there be a causal relationship between the
crack on the sole and the callus on the foot?

A. Very well, yes.

Q. You indicated you used calipers and you took
35 measurements. Did you do anything else in terms

Dr. Bettles - Direct

of angles or measurements of that kind?

5 A. Yes, I did overlays of them. I did an overlay
using a transparency from the point on the heel
to each of the phalangeal toes - each of the
phalanges. I did the same again from the hole
in the inner sole and put them both together and
with a slight variation they more or less matched.
10 There was just a slight variation. Again is -

Q. To what would you attribute that?

A. Well, we contribute that to that when the body is
in full weight-bearing position the foot will
spread a little bit and with the constant motion
of walking whereas this - when you take a cast it
15 has to go straight down and straight up.

Q. Did you make any other specific observations
regarding your comparisons between these items,
that is to say the casts, the insoles and the
20 boots?

A. The comparisons I made were that the person who
made the casts and the inner soles could be the
same person or another person with - somebody on
a global basis, another person with the same
25 morphological make-up.

Q. Morphological, I think that was the word that
Sergeant Kennedy used?

A. Yes.

Q. In addition to the morphological characteristics
30 is there also an accidental characteristic that
these two people would have to have in common?

A. The accidental characteristics would be things
like this and the -

Q. You're pointing, I think, to the mark or indenta-
35 tion?

- A. The mark on the heel would be an accidental,
because we're not born with that. We're born with
5 the toes and the arches and the accidental would
be things like the mark on the heel, the object in
the heel, and possibly the callus there.
- Q. If in fact the callus were caused by the cracked
sole?
- 10 A. That's right.
- Q. So your opinion was that it could have been Mr.
Legere or somebody possessing the same morpho-
logical and accidental characteristics?
- A. Correct.
- 15 Q. How many patients did you say you have now?
- A. I have between four and a half to five thousand.
- Q. Over the years that you've been seeing different
patients could you venture a guess how many pairs
of feet you've seen?
- 20 A. I have an ongoing practice and in England I had
possibly about the same amount. As these are
repetitive in returning you could multiply that
by many, many thousands.
- Q. How do you keep a system for knowing who your
25 patients are when somebody calls up and says, "I
want to see the doctor"?
- A. I keep medical files on them.
- Q. When somebody does call and says, "Can I see Dr.
Bettles", what would you do?
- 30 A. Ask my secretary immediately to pull the file,
that's her job.
- Q. And when you look at a file on a patient what
does that tell you?
- A. Well, in some cases, and it has happened, Mrs.
35 So-and-So wants to speak or she's done this, and

Dr. Bettles - Direct

- 5 you can't put a face to the name, and as soon as
 the file's been pulled and you can see the
 characteristics of the foot, which I have written
 down, my observations of that particular patient,
 it's come to me - the face has come back to me.
- Q. So you get the face from looking at the character-
 istics of the foot?
- 10 A. Yes. There was one - am I allowed to tell you
 about the one when I was in study?
- Q. If you think it would be helpful.
- THE COURT: You've got our curiosity aroused anyway, you
 better let us have it.
- 15 A. This lady was talking and she was saying things
 and I thought, well, I don't remember you at all,
 and she was saying things which would make that
 we had met before but I couldn't remember a face
 at all, and as soon as the feet were presented to
20 me I recognized the woman.
- Q. Given all the various things you've told us about
 before that over the years make our feet what they
 are, can you just give me a general comment upon
 the extent to which people's feet, I mean from one
25 person to another, are dissimilar?
- A. I'm sorry, would you repeat that question?
- Q. Yes. You told us earlier on about the things that
 make our feet what they are, the original foot and
 then the things that happens to them during our
30 lives. How different or similar are people's
 feet?
- A. They can be so different, just like faces. Each
 person has a face, people have feet, and they can
 be just as different.
- 35 MR. ALLMAN: I have no other questions.

THE COURT: Mr. Furlotte, cross-examination?

5 CROSS-EXAMINATION BY MR. FURLOTTE:

Q. Doctor, I've heard of leg men so it's safe to say
 you're a foot man?

A. Correct, that's what people call me.

THE COURT: Perhaps both.

10 A. Perhaps both, you never know, do you?

Q. You mentioned something a nail protruding through
 the insole in one of the boots?

A. The left of the Greb boot.

Q. How many nails were protruding?

15 A. Just the one.

Q. Just the one?

A. That was the only one I observed.

Q. Now, I noticed you mentioned that you thought it
 was a rusty nail?

20 A. Correct.

Q. Now, were you in court when Sergeant Kennedy
 testified?

A. Yes, I was.

Q. He testified that he didn't know whether it was a
25 nail or a staple?

A. It's hard to say but, see, I sell shoes, too, so
 therefore I probably know a little more of the
 make-up of the shoe, and what they do tend to do
 is they tend to use what they call a tingle tack,
30 it's a small tack, in them.

Q. How high was the tack sticking up?

A. I didn't measure.

Q. Would it be sticking into the heel of the person
 who wore it?

35 A. Yes.

- Q. Would that not cause a callused area of the heel?
- A. That would cause a break in the stratum of the skin.
- 5 Q. And working back and forth would it not cause a callus?
- A. It could do.
- Q. It would likely cause a callus?
- 10 A. It could do, yes. It could do.
- Q. Did you examine the three sets of casts that Sergeant Kennedy took?
- A. Yes, I did.
- Q. Do you see any evidence of a callus on the heel of Mr. Legere's left foot?
- 15 A. Not on the heel.
- Q. Not on the heel. Just to go over your evidence, I notice you state the purpose of feet, that if we didn't have feet we would fall over?
- 20 A. Correct.
- Q. But people do walk on stilts?
- A. Very difficult.
- Q. Very difficult, but you can walk on stilts without falling over?
- 25 A. You can walk on stilts without falling over, yes, with a little bit of practice.
- Q. Now, you mentioned that when you compared the casts and the insoles that it could have been the same person who wore the boots or some other person with the same morphological characteristics?
- 30 A. Correct.
- Q. And how many morphological characteristics did you check between the casts of Mr. Legere's feet and the boots?
- 35

- A. You mean since I did that?
- Q. No, not since you did that. When you did the
5 comparison between the casts of Mr. Legere's feet
and the boots, the Greb boots, how many morpho-
logical characteristics did you compare?
- A. All as I had at that time was the cast and the
boot.
- 10 Q. You didn't have the insoles?
- A. Sorry, the boots, the insoles, the inner soles
and the casts.
- Q. O.K., so you compared the morphological character-
istics?
- 15 A. I compared the characteristics which were visible
on both the inner sole and the cast.
- Q. How many were visible?
- A. On the left foot, as I say, was that the mark on
the heel of the left foot and the callused area
20 on the right foot and the position of the
phalangeal toes - of the phalanges.
- Q. Did you check the width of the heel of the cast
compared to the width of the impression made in
the insole?
- 25 A. It's hard to do off a cast, to check, because you
have to have a little bit of error on - there's a
little bit of human error, of error, in the
casting material, because when you - we took the
photographs of the cast, and when we took the
30 photographs on the different light and we took the
inner soles on the different lights, both luma-
light and ultraviolet light to enhance the
different pressure areas and the sweat areas, and
it was the photographs that we took the measure-
35 ments from and not the inner soles themselves

because the inner soles would cause too much error.

- 5 Q. So that way you would be able to cut out all the contours that were actually in the insoles?
- A. No, not really. Not really.
- Q. The photograph would be a flat surface?
- A. It would be a flat surface but what we're trying
10 to produce here is the sweat areas. The higher parts would give a lighter impression or no impression at all.
- Q. Would you say out of the characteristics that you did check for the most notable one which was
15 similar to draw a comparison would be the alleged accidental characteristic in the heel?
- A. That one there.
- Q. This one here?
- A. Mm-hmm. That was most prominent was the
20 characteristic on the heel. Again the sweat areas on the photographs under the luma-light and the ultraviolet light, we're talking of casts here, it's easier to work off the photographs, and what we did was to take the sweat areas, the heavier
25 sweat areas, and the indentations in the insole of the boot and line them up with the contours of the cast. That's what we did with the contours.
- Q. But the characteristics that you would be relying on, I suppose most, to form the opinion that Mr.
30 Legere had worn the boots would be the accidental characteristic in the heel?
- A. Not only that one at all.
- Q. Not only but -
- A. Not only that one, no.
- 35 Q. No, I'm not saying it's the only one, I'm saying

it's the most favourable one.

A. It was one of many.

5 Q. One of many. You wouldn't say it is the one you depended on most?

A. No, sir.

Q. You took pictures of the bottom of the cast area?

A. Yes, we did.

10 Q. And you took pictures of the insole?

A. The inner sole and the insole separately.

Q. Right, so when you measured the distance of the mark in the heel of the left foot with the edges of the heel area how many different edges did you measure the heel area with from the centre of the mark?

15

A. From the centre of the mark, one to the posterior of the calcaneal and one to the lateral edge of the calcaneal.

20 Q. And where would that be on Exhibit P-137, the left foot cast?

A. I would prefer, with your permission, to use my - what I did, I took a photograph of the cast and I drew around the foot itself, and with your permission I could use that.

25

Q. Please do.

MR. ALLMAN: My Lord, if the witness is going to refer to these they better be put in as defence exhibits.

THE COURT: Well, perhaps the descriptions could be given first and they can be put in then, if they are referred to.

30

A. All it is, My Lord, is that I put on the photograph of the cast, which is that - what I did, I just put that on there and just lined everything up and marked just on there just to give me a

35

better -

- THE COURT: Mr. Furlotte, would you stand here so - the
5 jury want to see the photograph. Could you hold
it up again, please?
- A. It's basically the same as the photograph, it's
just that I outlined the outer edges, that's all.
- Q. O.K., I notice when you lined it up here the hole
10 on the photograph of the heel and the other one
did not line up, or did they?
- A. Yes, it did. It was just the way I was holding
it.
- Q. Just the way you were holding it?
- 15 A. Mm-hmm.
- Q. O.K., so the outline was what you took off the
photograph itself?
- A. Yes.
- Q. So it would have to line up?
- 20 A. That's right, that particular photograph.
- Q. I notice you're showing two marks on the heel
there rather than one.
- A. That's two marks.
- Q. Two marks?
- 25 A. Mm-hmm.
- Q. Are there two marks on the cast?
- A. No, there isn't. One may be a slight flaw in
the - same as you get - you can see them here,
they're just maybe a photography -
- 30 Q. No, I'm talking about in the heel area.
- A. Yes, that's not quite as dominant. That just may
be a slight flaw, it's not showing.
- Q. That might be a slight flaw in the photograph
itself or -
- 35 A. Yes, that's why we didn't take off that one, we

left that alone. I didn't take any measurements at all of that.

5 Q. O.K., what happens when you put the overlay that you took off the photograph - what happens when you put that over the photograph of the insole?

A. They match.

Q. Could you line it up?

10 A. Mm-hmm. It's hard to do when you're holding them like this because if you turn them you can -

Q. How do you know you're lining up the toes properly?

A. On this one we don't really, we're taking it off
15 the ball area here, and the pressure marks here. Actually I used the ones that Sergeant Kennedy had. These have been through the mill a little bit, they got damp, so to begin with I was using the ones that Sergeant Kennedy used which are the
20 ones in the exhibits here. Maybe they would be better to - you can see there where the inner sole has spread. You can see where the inner sole has spread due to the compression, and what an inner sole will have a tendency to do is as it flattens
25 down it will ride at the side of the shoes and you can see the line around here.

Q. So would you put the overlay again for me, please? So basically what you're doing, Doctor, is you line up the hole - you're lining up the holes in
30 the heels and wherever the rest of it falls, that's acceptable?

A. No, it's not. What I did, these was pinned and I drew around that, all of that; not just the hole, I didn't start from the hole, I drew all around
35 and put the mark on there as I put the marks on

Dr. Bettles - Cross

the rest. I didn't line the hole up and then
line everything with that.

5 Q. Now, when you line up the holes in the heels it
seems to be a great deal of distance between the
big toes, or the toes, and the end of the sole.

MR. ALLMAN: I'd be obliged if Mr. Furlotte would ask
questions and stop giving evidence.

10 MR. FURLOTTE: I'm allowed to lead the witness.

THE COURT: Well, that's all right.

MR. ALLMAN: You've got to do it in the form of a
question.

THE COURT: Well, you're putting that as a question?

15 MR. FURLOTTE: Yes, I'm putting it as a question. When
you line up the hole in the heel, does there
appear to be a great deal of distance between the
toes and the end of the insole?

A. You mean from here to here?

20 Q. Yes.

A. Yes.

Q. And about how much would that be, approximately,
measurement?

A. Measurements on this, I determined that this would
25 be about a 9 foot. From the tip of the toes, the
extent of the toes, to the posterior of the
calcaneal would be a 9 foot. The inner sole of
the Greb boot was a size 11 so therefore you would
have that space, the extra space in there.

30 Q. So it's about what, two inches?

A. I would say probably about an inch or something
like that because -

Q. Maybe you could show it to the jury?

A. Mm-hmm. See, what we have to realize, too, is
35 that some of this would ride up.

- Q. O.K., and if we put the left cast onto the left insole - this is the left insole?
- 5 A. It's the left insole.
- Q. And if we put the cast on how much space do we have at the end?
- A. Just about the same.
- Q. You can line that up, Doctor.
- 10 A. That's -
- Q. O.K., do you have your compass on you, by any chance?
- A. Yes, I do.
- Q. Could you take it out and measure the distance
- 15 in the heel to see -
- A. But basically what I did, I didn't do it this way. I did a drawing from the photograph here. We didn't do it this way at all. I took that photograph, that photograph there, and what I did,
- 20 I didn't bother doing it this method at all. What I did, I put that on there like that, I stapled them both together, and I drew around that photograph, not that. I drew around that photograph.
- Q. O.K., can I see that a minute?
- 25 THE COURT: Here's a stapler, Doctor.
- A. Thank you.
- MR. ALLMAN: We've been talking about these items for some considerable time and they're still not an exhibit. They really should be made - because
- 30 the witness keeps talking about this and that and it won't reflect on the record what it is.
- MR. FURLOTTE: Well, I think we should put them into evidence, My Lord.
- THE COURT: You have no objection, Mr. Furlotte, to them
- 35 going in?

MR. ALLMAN: No.

THE COURT: This would be Exhibit D-8. How would you
5 describe this, Doctor?

A. One is a photograph and one is an overlay.

THE COURT: Yes, but it's a photograph of the foot?

A. Yes, it is.

THE COURT: The left cast.

10 A. That's the left cast and the left overlay.

THE COURT: And an overlay of the -

A. Of the left cast; not the inner sole, the cast.

THE COURT: Yes, the photograph is of the cast and the -

A. - overlay is just an outline drawing of that
15 photograph.

THE COURT: Oh, I see.

A. That's all it is. Basically all it is, it's
just to give me the outside edges.

THE COURT: Of the foot?

20 A. Yes. All these have been produced before.

THE COURT: Yes, but then you have to go on from there
to something else?

A. Well, now that that's stapled I can't go on - I
can't take it from there to -

25 THE COURT: Let's mark this D-8.

MR. FURLOTTE: Let's mark them separate rather than
staple them together.

THE COURT: Can you unstaple the bottom?

A. I can unstaple them, My Lord, so now we have a
30 photograph -

THE COURT: Yes, well, let's call that D-8, the photo-
graph itself.

MR. FURLOTTE: Yes, we'll have the overlay as D-9.

THE COURT: That's that cellophane overlay, so the
35 cellophane overlay will be D-9, and that shows,

140

Dr. Bettles - Cross

witness, just the outline of the foot -

A. Yes, just the outline.

5 THE COURT: - from the cast?

A. No, from the photograph of the cast.

THE COURT: And then the next?

A. Photograph of the left inner sole.

10 THE COURT: Photo of left inner sole, D-10. Is that
about everything that you're going to be using,
Mr. Furlotte?

MR. FURLOTTE: I don't know what other goodies he's got
there, My Lord.

15 A. That's the right foot. I did the same on the
right foot, too.

Q. O.K., we'll just deal with the left foot. O.K.,
would you take the overlay now and put it again
on D-10?

20 A. See, you can't just line that hole, you have to
line -

Q. You have to line the heel area down to that?

A. Yes, you cannot just take that hole in there, you
have to line the heel and the width of the ball of
the foot, the metatarsal head area.

25 Q. When you line the hole area, if you line the hole
area with the heel, shouldn't the outline of the
heel follow the imprint in the insole?

A. There's stretching in the inner sole.

Q. There's stretching in the insole?

30 A. There's flattening and compression in the inner
sole.

Q. So that's why the insole appears to be imbedded
wider than the heel?

35 A. It seems to be a little wider than the heel
because after compression - when you first buy -

Dr. Bettles - Cross

- when these shoes were first made the inner sole would be a certain width, that I can't tell you, and with the constant wear and walking on them you would flatten it out and it has nowhere to go but just up the sides of the shoe, and that's why it would appear to be a little bigger, but you can see, you can still see the line around.
- 5
- Q. Yes, you can see the edge there, but the overlay falls inside the edge so it looks as if actually, then, the width of the heel and the sides of the heel is smaller than the imprint in the insole?
- 10
- A. Mm-hmm, that's because the inner sole will have stretched a little through the compression.
- 15
- Q. Now, if you take your compass, have them lined up, now maybe we can compare the distance between the - now, would you compare the distance that you have left between the heel and the back of the insole?
- 20
- A. Between the heel and the back of the insole?
- Q. Yes, once that's lined up on the -
- A. I don't know if this has any significance because this is just where it's ridden up the side of the boot with the compression.
- 25
- Q. O.K., it's just that it seems that there's a lot -
- A. This had no bearing at all on the measurements at all of this because what it would do is as the inner sole compresses it would just slightly ride up the side of the boots. That had nothing to do with the measurements at all.
- 30
- Q. Is that the same for the front between the toe and the edge of the insole?
- A. It would wear, it would expand.
- 35
- Q. O.K., if you put this where it belongs, line it

5 up, the indentations, does it appear that there's a greater distance in the overlay between the edge of the toes and the edge of the photograph of the insole than there is when you actually have the cast on the insole?

10 A. Yes, but if you take a photograph of that and you take a photograph of that, which is that there, and you take a photograph of that there, that is exactly the photograph of that there. That is a photograph of that inner sole, that is a photograph of that there. We didn't do it -

15 Q. O.K., but the photograph of the inner sole is actually bigger than the inner sole itself, is it not?

A. No, what that is, that's an element of shadow. We're taking an element of shadow there.

Q. O.K., still appears a bit longer?

20 A. Very, very minimal. Very minimal.

Q. Quarter of an inch?

A. No, I wouldn't say that because you're taking in the shadowed area here.

25 Q. No, but this is not the shadowed area here right at the edge, is it not? Right there?

A. Well, all I can tell you is that I'm not a photographic expert, maybe we should get that, but that is the photograph taken of that inner sole, that is the photograph taken of that cast, and we didn't deal with the casts, we dealt - or I dealt with the photographs of those.

Q. O.K., now that you've got your compass out would you measure the distance between the hole and the edge of the cast, the edge of the foot?

35 A. I'd prefer to do it on that than the cast itself

Dr. Bettles - Cross

because that's the one I took my measurements from.

5 Q. This one here? O.K., would you measure the distance to the side to the cast with your compass? O.K., now measure the same distance on the insole. Again there's about a quarter of an inch difference?

10 A. I would say somewhere about a 3/16ths of an inch, eighth of an inch or 3/16ths, but again we're talking -

Q. And again try it on the insole itself rather than the photograph. Again there's about a quarter of an inch difference?

15 A. Not a quarter of an inch.

Q. Three sixteenths?

A. Maybe a 3/16ths, but again as I say, I stress that some of this will have ridden up the side of the boot, or could have travelled up the side of the boot due to compression.

20 Q. But it could be, Doctor, that it doesn't precisely line up?

A. I would say it precisely lines up, or more or less. To within given reasons.

25 Q. To within 3/16ths of an inch?

THE COURT: No, he has explained that by saying that in the boot the inner sole would ride up the side of the boot and that would make a difference in the measurement.

30 Q. Would it be safe to say, then, Doctor, that you couldn't say that it lines up exactly; close but not exactly?

A. Very, very close.

35 Q. Just a few more questions, Doctor. Can you tell

how long these particular boots have been worn?

A. That would be impossible.

5 Q. Did you examine both pairs of boots or just the one pair?

A. I examined the Gorilla boots, too.

Q. You examined the Gorilla boots, too?

A. Not too extensively but I did examine the Gorilla
10 boots, too.

Q. But the degree that the Gorilla boots were worn, could you give any indication as to how long they may have been worn?

A. Absolutely impossible.

15 Q. Now, you mentioned that feet can be different just as much as people's faces?

A. That's correct.

Q. And again they could be almost as similar as people's faces?

20 A. There's similarities in all feet.

MR. FURLOTTE: I have no further question.

REDIRECT EXAMINATION BY MR. ALLMAN:

Q. Just two. You were asked a question about a
25 callus and the possibility of a nail causing a callus on the heel. Would the extent of the damage inflicted upon the heel, if any, depend on how deep or shallow the nail was going into the heel?

30 A. Yes.

Q. Given your explanation as to the insoles riding up, do the 3/16ths, the couple of 3/16ths measurements that Mr. Furlotte pointed out to you, matter?

35 A. Not in my opinion, it doesn't.

145

MR. ALLMAN: Thank you.

THE COURT: Thank you very much, Doctor, and you're
excused. Thank you for coming. Those feet, do
5 we need those?

MR. ALLMAN: I don't think so, My Lord. They were just
demonstrative aids, unless Mr. Furlotte wants
them in.

MR. FURLOTTE: No, I don't see any point.

10 THE COURT: There are three, they wouldn't be much use to
anyone.

DR. BETTLES: They're all right feet, My Lord, no left
feet.

MR. SLEETH: My Lord, excuse me, My Lord, just one thing
15 before we conclude. Witness #236, I believe it
is, Alice Garner, if I can just have about sixty
seconds of the jurors' time and yours, My Lord,
I've spoken to Mr. Furlotte and I'm prepared to
introduce for acceptance as evidence two
20 affidavits, one from Alice Garner, who's the
Registrar General of Vital Statistics for the
Province, accompanied by an affidavit of Kathy
MacKay in accordance with Section 30 of the Canada
Evidence Act, Business Documents. Miss Garner
25 would have been called, My Lord, to produce the
original registration of birth for Allan Joseph
Legere. The Evidence Act under Section 30
provides an alternate means and I have here a
true copy with her accompanying affidavit
30 explaining that it's a true copy, and the affi-
davit of a Kathy MacKay who made the copy, a
requirement of Section 30 of the Canada Evidence
Act. That will eliminate the need of one witness,
My Lord.

35 THE COURT: Is the best idea to make those exhibits? To

mark them as exhibits would be the simplest thing.

MR. SLEETH: Perhaps, My Lord, if it could be 157, I believe we're up to, 157A and 157B, since they really accompany one another.

THE COURT: P-157A is the affidavit of Alice Garner.

MR. SLEETH: And attached thereto is a true copy of the certificate of birth and 157B, My Lord, would be the affidavit of a Kathy L. MacKay.

THE COURT: P-157B, well, we'll so mark those, but to save time in order to get those before the jury why don't you read those to the jury? Read them to the Court and the jury can hear them. The jury will have a chance to examine them later but this is the easiest and the simplest way of communicating the contents.

MR. SLEETH: Certainly, My Lord. I could read them. I'm only thinking they'll take a few minutes and we were talking earlier, or My Lord was talking earlier, of breaking at 4:30. We're past it.

THE COURT: Oh, well, the jury should have this information. They don't mind, I'm sure, taking another minute or two. Read them first to save time and then the Clerk can mark them - slowly, though.

MR. SLEETH: Yes, My Lord. My Lord, the first is the affidavit of Alice Garner which will be 157A. It is entitled: "Canada, Province of New Brunswick, In the Court of Queen's Bench of New Brunswick, Judicial District of Fredericton, Between Her Majesty the Queen and Allan Joseph Legere, Affidavit".

"I, Alice Garner of the Village of New Maryland in the County of York in the Province of New Brunswick, Civil Servant, make oath and say:

1. That I am the Registrar General of Vital Statistics for the Province

of New Brunswick.

- 5 2. That the Office of the Registrar
 General of New Brunswick is an
 Institution of the Government of
 New Brunswick.
- 10 3. That in the usual and ordinary
 course of business the Office of
 the Registrar General of New
 Brunswick maintains a system of
15 registration of births, still
 births, marriages and deaths
 throughout the Province of New
 Brunswick.
- 20 4. That the original registration forms
 of births, still births, marriages
 and deaths are arranged, indexed and
 kept by my office as a record in the
 usual course of business.
- 25 5. That this system of registration of
 births, still births, marriages and
 deaths is the official system and no
 other system of registration of births,
 still births, marriages or deaths shall
30 be maintained or continued in the
 Province of New Brunswick as an official
 system. All births, still births,
 marriages and deaths must be recorded
 within this system.
- 35 6. That this system for officially
 recording all births in New Brunswick
 has existed and been maintained within
 the Province since 1888 and became
40 compulsory in the 1920s.
- 45 7. That in 1948 all births in New Brunswick
 were required to be recorded and regis-
 tered, and would presently be arranged,
 indexed and kept by my office as a
 record in the ordinary course of
 business at the Centennial Building in
 the City of Fredericton in the County of
 York in the Province of New Brunswick.
- 50 8. That I have personally examined and
 reviewed the birth registrations for
 February 12th, 1948, February 13th,
 1948 and February 14th, 1948 and have
55 established to my satisfaction that
 there was only one child born to Louise
 Legere on those dates namely Joseph
 Allan Legere as indicated by the
 original REGISTRATION OF A LIVE BIRTH,
60 Reg. No. 002703, birthplace Chatham,
 New Brunswick, the birth occurred at
 home on February 13th, 1948 as recorded
 in the said REGISTRATION OF A LIVE BIRTH
 certified at Chatham, New Brunswick
65 February 21st, 1948, in the ordinary
 course of business and maintained in my
 office in the Centennial Building in
 Fredericton, New Brunswick, in the
 ordinary course of business as Regis-
70 trar General of Vital Statistics for

the Province of New Brunswick.

- 5
9. That I have personally read a certain affidavit signed by my secretary Kathy L. MacKay dated August 15th, 1991 in which she describes the process of making a true copy from an original
- 10 REGISTRATION OF LIVE BIRTH maintained in the ordinary course of business in my office. That I know full well and recognize the signature of Kathy L. MacKay affixed to the said affidavit.
- 15
10. That on the afternoon of the 13th day of August, 1991, at approximately 4 o'clock in the afternoon as stated in her affidavit and confirmed hereby I did instruct Kathy L. MacKay, my secretary, to personally prepare a true copy from the original REGISTRATION OF A LIVE BIRTH of Allan Legere referred to in paragraph 8 of this my affidavit, (the said registration being one which in the usual course of business is registered, indexed and maintained at my office), by making a photocopy of the said registration.
- 20
- 25
- 30
11. That at that time I received from her a photocopy sheet together with a stamp and red ink stamp pad which would create the following markings:
- 35
- THIS IS A TRUE COPY OF THE ORIGINAL
DATE _____
PER/PAR _____
- 40
- CECI EST UNE COPIE VRAI DE L'ORIGINAL
- 45
- which I thereupon stamped as a true copy using the stamp provided by my secretary and using the red ink pad provided for me at that same time as well certifying the paper to be a true copy and at that time I did also affix to the true copy my indented seal.
- 50
12. That the document attached hereto with red stamp printing and the written numbers and words of August 13, 1991 and my signature, and the seal of Office of the Registrar General of Vital Statistics is the document provided to me upon my request by my secretary Kathy L. MacKay and referred to in her affidavit.
- 55
- 60
13. That I recognize and certify the said document to be a true copy in all aspects of the registration examined by me and referred to in the preceding paragraph 8 of this my affidavit.
- 65
14. That at the time I personally searched the original records of the Office of the Registrar General of Vital
- 70

5 Statistics as related in paragraph 8
of this my affidavit I did also
determine from verification and
examination of the said records that
on February 13th, 1948, there were only
two other male persons born in New
Brunswick, namely one Delbert William
10 Gilks and one James Herbert McEvoy.

15 15. That as stated earlier, by action of
law and practice the usual ordinary
course of business required and still
requires the registration with my
office of all information in respect
of all births, still births, marriages
and deaths to be recorded and maintained
in my office.

20 16. That it is not reasonably practical to
present all the records filed in my
office to establish by way of
elimination that Louise Legere did not
25 give birth to another male child on the
same day as "Joseph Allan Legere".
Such a birth would by law have had to
be recorded and filed with my office.
Diligent and careful search made by me
30 personally discloses that no such
record exists.

35 SWORN TO BEFORE ME ON THIS
17TH DAY OF AUGUST 1991, AT
THE CITY OF FREDERICTON,
COUNTY OF YORK, PROVINCE
OF NEW BRUNSWICK",

40 before a commissioner of oaths, signed Alice
Garner.

45 THE COURT: Well, now, Mr. Sleeth, I really had thought
that probably the affidavit might contain one
paragraph or I wouldn't have invited you to read
50 that, but that has attached to it the affidavit of
Kathy MacKay, is it, and also a birth certificate,
I gather?

55 MR. SLEETH: Yes, My Lord.

60 THE COURT: Could you just give us the very brief
synopsis of -

65 MR. SLEETH: The MacKay document, My Lord, relates how
she made a photocopy, how at the time, at the
making of the photocopy, she did present to Alice
Garner the red stamp pad with the red ink and the
70 like, and saw at that time the affixing of the

150

seal as well of the Registrar to this true copy.

5 THE COURT: Those are just formalities to comply with the
requirement of the Canada Evidence Act?

MR. SLEETH: Exactly, My Lord.

10 THE COURT: And the birth certificate itself, just give
a very -

MR. SLEETH: it is attached to the affidavit, My Lord.

THE COURT: Just the bare essentials.

MR. SLEETH: The bare essentials of the birth certifi-
15 cate, My Lord, which is 002703 set forth the full
name of a child, Joseph Allan Legere, born in the
Sub-Health District of Northumberland County,
Chatham Parish, Chatham, New Brunswick, and sets
the date of the birth as being the 13th of
20 February, 1948, My Lord. There is space as well
on the -

THE COURT: And the mother's name?

MR. SLEETH: The mother's name was Louise Legere, My
Lord.

25 THE COURT: Was what?

MR. SLEETH: Louise Robichaud, My Lord, and above it is
marked Legere. Further is marked Racial Origin,
French, and in the space for Single, Twin,
Triplet, there is a check mark in section four
30 for single, indicating a single birth.

THE COURT: Right. Well, that's all for that.

MR. SLEETH: Thank you, My Lord.

THE COURT: Now, what else? That is your last witness
before - so you're striking out those two persons,
35 you're not calling them personally?

MR. SLEETH: That would be Ms. Garner.

THE COURT: Oh, yes, and you had another witness, 237?

MR. ALLMAN: She is, I believe, unwell at the moment,
and we're keeping an eye on the situation and if

151

she gets fit to give evidence we'll call her, and if she doesn't we won't.

THE COURT: But her evidence would be brief?

5 MR. ALLMAN: Her evidence I would think would be very brief.

THE COURT: And then apart from that you have five witnesses the Crown proposes to call and those all deal with the DNA aspect?

10 MR. ALLMAN: Correct.

THE COURT: And I think it was pre-arranged by agreement of counsel and after discussion with the Court that we would not call - some of them are coming from outside and they would be here on Tuesday after Thanksgiving?

15

MR. WALSH: That's correct, My Lord.

THE COURT: Which means we have nothing prior to that to do so we will adjourn now until next Tuesday morning at 9:30 and this is a five-day break so I do especially caution you, please, not to do anything at this stage of the trial to cause any reason for question as to conduct or anything else, and we will see you back at that time. You are on call tomorrow and Friday. You'll probably never get a call but you're on duty is what I'm telling you.

20

25

Thank you, we'll see you on Tuesday.

(JURY WITHDRAWS.)

30 MR. FURLOTTE: My Lord, I was wondering if we could deal with the other matters, the motion for the mistrial and the issue as to whether or not the Court will order Sergeant Poissonnier to appear for cross-examination? They're very short matters, in my opinion, and maybe we could take

35

152

a short recess and deal with it or whatever you wish.

5 MR. ALLMAN: I'm assuming from that that Mr. Furlotte
doesn't intend to call evidence on the motion
for a mistrial? Otherwise it couldn't be short.

MR. FURLOTTE: Just Mr. Legere.

MR. ALLMAN: I don't think that will be short. At least,
I wouldn't count -

10 MR. LEGERE: It will be, it will be.

MR. ALLMAN: My Lord, I repeat, I have no idea, of
course, what Mr. Legere is going to be saying,
but I have information and it may well be -
depends on what Mr. Legere says. I do not think
15 we can guarantee it's going to be short.

THE COURT: Yes, if there's going to be evidence I think
we'd have to do it tomorrow morning, 9:30
tomorrow morning, and let's deal with the
Poissonnier matter then at the same time.
20 Presumably it will be - the whole hearing will be
reasonably brief tomorrow morning?

MR. FURLOTTE: Yes.

THE COURT: Well, you don't know, Mr. Allman, you say?

MR. ALLMAN: I really don't know because I can't say
25 what Mr. Legere is going to say. Sorry to
inconvenience Mr. Furlotte and if I could do it
now, I would, but I don't feel it's safe.

THE COURT: We will recess now until 9:30 tomorrow
morning.

30

(COURT ADJOURNS TO 9:30 a.m., OCTOBER 10, 1991.)

35

1
0 (COURT RESUMED AT 9:30 a.m., OCTOBER 10, 1991.)
 (ACCUSED IN DOCK.)

THE COURT: We're assembled this morning with the jury
 excluded and this is of course a voir dire
5 sitting and nothing that occurs can be reported
 until after the whole trial is over. There were
 two points, one was the question of whether the
 defence could require Sergeant Poissonnier to
 testify, or to make himself available for cross-
10 examination. The other thing was the application
 for - as I understand it for an order for a
 mistrial. Any particular order you want to do
 these things in?

MR. ALLMAN: They're both Mr. Furlotte's matters, he can
15 raise whichever he wants.

MR. FURLOTTE: We could deal with Sergeant Poissonnier
 first, I imagine it would be a shorter matter.

THE COURT: All right.

MR. FURLOTTE: Well, My Lord, basically Sergeant
20 Poissonnier was on the original witness list
 back in January of 1991. He was also in the
 police brief as to the will-say statement as to
 what type of evidence he was going to give which
 was on continuity of the photo line-up which was
25 prepared after Mr. Legere's arrest.

 The position of the defence is that we
 would like to cross-examine on his continuity of
 the photo line-up and also on other matters. Time
 and time again the Crown has consulted with me
30 that there's certain witnesses that they would
 rather dispense with that's on the witness list
 and they would consult with me and some I agreed
 to. The ones I did not agree to, they made it
 their point to get that witness here in court and

Voir Dire

prepare him for cross-examination, but for one
reason or another they want to keep Sergeant
5 Poissonnier off the witness stand, and I feel I
have a right to cross-examination because it is
part of my defence, it was part of their case, and
I don't feel the Crown should be able to remove a
witness from the witness list at any time they
10 want to.

As stated, I have not had the benefit of a
preliminary hearing and I have not had the benefit
of this witness's testimony at a preliminary
hearing and I would like the benefit of his
15 testimony at a trial.

THE COURT: Thank you very much, Mr. Furlotte. Mr.
Allman?

MR. ALLMAN: Well, I listened with some interest to that.
Mr. Furlotte's feelings are no doubt of interest
20 and what Mr. Furlotte would like is no doubt of
interest, but what we're concerned with here is
what the Crown is legally obliged to do, and I
didn't hear any legal authority on that point
whatsoever.

I'd like to begin by making a couple of
factual and a couple of legal points. The first
factual point with which Your Lordship is already
acquainted is this, Sergeant Poissonnier's name
was on an original witness list, it was not on the
30 witness list that Mr. Furlotte was given for trial
or that Your Lordship was given for trial; that's
a fact. What it means we'll come to in a moment,
that's a fact. He knew before this trial began
that we were not calling Sergeant Poissonnier.
35 He was advised as to Sergeant Poissonnier's

Voir Dire

evidence as he has been advised as to all our
witnesses' evidence, and I will just so that Your
5 Lordship has the background, read the will-say
statement of Sergeant Poissonnier that on 89-12-18
at 0942 hours he received a photo line-up from
Constable Marc Proulx, sealed it in an envelope
and secured it in a filing cabinet, that the same
10 day, six or seven hours later, the photo line-up
was turned over to Corporal Ron Godin. That is
the evidence of Sergeant Poissonnier. That photo
line-up is in evidence, there is no need whatso-
ever to call Sergeant Poissonnier to discuss the
15 continuity of an item that's in evidence.

The next factual point I want to make is
this, the reason Sergeant Poissonnier's will-say
is so brief is also the reason we don't want to
call him. He has virtually no direct evidence
20 that he can give. He was the investigating
officer. If I can use an analogy, he was like
a general in charge of a campaign. The general
doesn't shoot bullets, he tells people what to
do. That's what Sergeant Poissonnier did. He
25 would tell a policeman, go and get a statement
from so-and-so, he'd tell a policeman, go and see
about seizing such-and-such, but he didn't do any
of that himself. I will return to that point in
a moment.

30 I'm going to turn from those factual points
that I've made to the law. The first point is
this, there is nothing - and I'm going to deal now
with the question of the witness list and the
indictment - there is nothing in the Criminal
35 Code, not a word, that requires the Crown to

Voir Dire

5 provide the defence with a witness list. If Mr. Furlotte can point me to a section of the Criminal Code that requires me to do that, I'll like to hear from him, I don't know it. I would like to refer Your Lordship to the decision of The Queen against Arseneau, which is reported in 9 NBR, 2nd, at Page 391, a decision of Judge Stevenson.

10 Interestingly enough that case also happened to concern a direct indictment preferred by an agent of the Attorney General, signed by the Attorney General, and this is what Judge Stevenson said on Page 395 regarding the matter of witness lists on the indictment.

"In those jurisdictions where grand juries still prevail, the names must be endorsed on the bill of indictment",

20 I'm omitting some words as I go along.

25 "There is no similar requirement in those jurisdictions where there are no grand juries. Since the abolition of grand juries in New Brunswick in 1959 prosecutors have as a general practice continued to endorse indictments with the names of prosecution witnesses. While it is a good practice, it is not a requirement of the law and an omission to endorse the names would not be fatal to an indictment. Conversely, the endorsement of the names is surplusage."

30
35 So the fact that we gave Mr. Furlotte a witness list and then an amended witness list was not a requirement and it is surplusage and it in no way binds us to call the witnesses on that list. Even if we'd only given him the one list we're not obliged to do it, so in my submission the witness list is a red herring.

40
45 Now I'm going to turn from that to the next topic. Assuming that the witness list is a red hearing as I submit it is the next question comes then, does this Court have the power to compel the

Voir Dire

Crown to call Sergeant Poissonnier. Bear in mind that of course Mr. Furlotte certainly has the right to call him. The question we're discussing here is can we be made to. On that topic I'm going to refer Your Lordship to Ewaschuk Criminal Pleadings & Practice in Canada, 2nd Edition, specifically Paragraph 12.4060:

"In the absence of oblique motive", and no oblique motive has been assigned today, "the prosecutor may call the witnesses he chooses and need not call all the witnesses to the unfolding of the narrative of the crime in question". It quotes a number of cases, Lemay and The King - I'm not going to give the citations, they're all in Ewaschuk - Lemay and The King, which is a Supreme Court of Canada decision; Caccamo and The Queen, which is a Supreme Court of Canada decision. It also quotes the latest and I think the most leading case on this topic, a decision of the B.C. Court of Appeal called Cunliffe and Bledsoe. In that case this issue also arose and this is what the B.C. Court of Appeal said:

"There is no duty on the prosecution to call witnesses whose evidence may be adverse to the prosecution or supportive of the defence."

I pause there to remark I don't think Sergeant Poissonnier's would be either but -

THE COURT: I'm sorry, would you just read that again?

MR. ALLMAN: Yes.

"There is no duty on the prosecution to call witnesses whose evidence may be adverse to the prosecution or supportive of the defence. Rather the prosecution has discretion as to what witnesses it should call."

And they said that:

Voir Dire

5 "In this case it was not appropriate
for the trial judge to direct the
Crown to call those witnesses. Rather
the Court should have called the
witnesses itself so as to permit them
10 to be cross-examined by both the Crown
and the defence."

Now, that's witnesses whose evidence may be
adverse to the prosecution or supportive of the
15 defence, but the basic line to this is there is no
duty on the Crown to call witnesses. There is a
duty to disclose and we have disclosed, and if
20 there's more questions that Mr. Furlotte ever
wanted to ask Sergeant Poissonnier outside of
court he's very welcome to.
25

I want to return to a remark in Ewaschuk,
the fact that the prosecutor has a discretion is
30 in the absence of oblique motive - and I said that
I heard no oblique motive attributed to the
prosecution in this case. Just in case there's
any doubt about that I would like to explain what
the prosecution's motive for not calling Sergeant
35 Poissonnier is and that returns to the point I
made earlier. Sergeant Poissonnier did not have
very much to do himself with this case in the
sense of actually going out and doing things,
taking statements, etc. What Mr. Furlotte wants
40 to do with Sergeant Poissonnier is what he's done
with numerous other witnesses, investigate the
investigation. We have from time to time had to
object to that. Whoever calls Sergeant
Poissonnier, if anybody does, whether the Crown is
45 ordered to, whether the Court calls him as the
Court's witness to be cross-examined by both
parties, or whether in the end of the day Mr.
Furlotte calls him, I expect to object to about
95% of Sergeant Poissonnier's evidence.

Voir Dire

5 If Mr. Furlotte asks him, what did Sergeant
Smith say when he came back from this mission, or
what do you know about some other case, it's all
going to be hearsay, it's all going to be
irrelevant and we'll object to it all, whether we
call him or Mr. Furlotte calls him. The bottom
line to all this is he is an irrelevant witness.
10 I don't mean he isn't important, he was a very
important man in this investigation, but in terms
of the admissible evidence that he can give,
whoever calls him, he is not an important witness,
he is an irrelevant red herring witness, and we
15 will take that position whoever calls him. I am
saying this because I want Your Lordship to
understand that there is no oblique motive. We
are not hiding Sergeant Poissonnier because we are
scared of something he's got, we are hiding
20 Sergeant Poissonnier - we are not hiding him at
all, we are not calling Sergeant Poissonnier and
we don't believe Your Lordship should compel us to
call Sergeant Poissonnier for the motive that I
have just given.

25 If Mr. Furlotte wants to talk to Sergeant
Poissonnier as to any of our witnesses at any
time outside the court he's very welcome to do.
He can get any information from Sergeant
Poissonnier he wants. If after he's done that
30 he feels that Sergeant Poissonnier is adverse,
his evidence would be adverse to the Crown, or
would be supportive of the defence, Mr. Furlotte
can call him, but it would put us in a totally
false position if we have to call a witness that
35 we do not need and indeed that we positively feel

Voir Dire

should not be called, and I don't believe that the Court should require us to do that.

5 THE COURT: Thank you very much, Mr. Allman, and Mr. Furlotte, any reply?

MR. FURLOTTE: Well, My Lord, first of all Mr. Allman states that Sergeant Poissonnier as a matter of fact is not on the witness list attached to the
10 indictment. As you're aware Mr. -

MR. ALLMAN: The last one.

MR. FURLOTTE: The last indictment. As you're aware, Mr. Legere was charged and the indictment was laid on December 5, 1990. At that time there was no
15 witness list -

MR. ALLMAN: There's no argument about that, I agree, he was on an early witness list, he wasn't on the final witness list.

THE COURT: You took him off the later list, yes. There
20 have been two or three lists, as I recall.

MR. ALLMAN: Yes, they've been amended from time to time.

THE COURT: I don't think there's any question about the factual situation.

MR. FURLOTTE: O.K., My Lord. As far as the Crown states
25 that there is no oblique motive on its part for so-called hiding Sergeant Poissonnier, it is true that the defence's main reason for wanting to call Sergeant Poissonnier is to investigate the investigation. As was brought out in the evidence
30 the statements of the Williamses and the composite drawing that was provided in court by witnesses which were just uncovered during the trial, a couple of weeks after the trial started, somewhere around September 15th, I asked the witness who did
35 the composite drawing as to who did he give the

Voir Dire

5 composite drawing to and discussed that possible
suspect, and he stated that he gave that to
Sergeant Poissonnier. As statements made by the
Crown, the Crown was never made aware of the
statements or the evidence of the Williamses,
including the composite drawing, until September
15th. I would like to know why that was never
10 brought to the Crown's attention until September
15th, why it was never brought to the Crown's
attention until after the evidence given by Mr.
Manderson who in the will-say statement
originally said that he was going to identify the
15 person that he saw outside the Daughney residence
that morning as strongly - or as resembling one
of the composite drawings of the long thin-faced
man with the weird looking hat on top of his head.
When Mr. Manderson come to trial in direct
20 examination he said he wasn't able to make that
connection to say that the person he saw strongly
resembled that individual. Then and only then
did the evidence of the Williamses become known to
the Crown Prosecutor and the defence that there
25 was another man seen outside, close to the
Daughney residence on that same morning, and that
composite drawing is into evidence. I would like
to be able to ask the sergeant as the chief
investigator of the Daughney case as to why all
30 of a sudden this evidence is of such importance
and why he was hiding it from the Crown Prosecutor
and why it was not disclosed to the defence.

MR. ALLMAN: I have to object to that. There's no
evidence at all of that. I object to the word
35 hiding.

Voir Dire

MR. FURLOTTE: Maybe it was a complete oversight, but I believe one of the other witnesses said that yes, they did consider at first and thought it was of no importance or of little weight to be given to the case, and then all of a sudden it does have a lot of weight.

I would also like to be able to ask that sergeant, it's investigating the investigator, why didn't he investigate - or if he did investigate further the appearance of that composite drawing and particularly the comparing of that composite drawing to the composite drawing of the assailant of Mr. and Mrs. Russell some two weeks prior to October 13th, which happened on October 1st, the Russell incident. Since there is such a close resemblance of both composite drawings what investigation did he take place to get further identifications of that particular suspect from the witnesses in the Russell case. I believe yes, that there is evidence that the Crown does not want to come before this Court which would assist in proving Mr. Legere's innocence; not just in creating a doubt, but which could probably prove his innocence in Father Smith's case. If the Crown knows of such evidence, does not want to disclose that to the defence voluntarily, I don't feel I should have to come to court to get a court order for them to disclose that evidence. If the Crown wants to take the chance on my bringing it out that it's being hid on cross-examination, let them run the risk. The jury can take all that into consideration. If it makes the Crown look bad, too bad,

Voir Dire

that's my position. I think the Crown knows that
this is probably going to come out one way or
5 another and this is a tactical maneuver on their
part and if I call Sergeant Poissonnier as part of
the defence, then they get the opportunity to
cross-examine Sergeant Poissonnier and present a
lot of leading questions. It's a tactical
10 maneuver on the Crown's part and I would submit
to the Court in all fairness not to allow them to
get away with it.

MR. ALLMAN: I suppose it's a tactical maneuver on Mr.
Furlotte's part also. I mean the question is who
15 should call this witness. We're not stopping this
witness being called.

THE COURT: What about what Judge Stevenson has to say in
the Arseneau case about -

MR. ALLMAN: Incidentally, I should leave with Your
20 Lordship copies of both those cases. I've given
them to my learned friend, Arseneau and Cunliffe
and Bledsoe.

THE COURT: Are you familiar with that case?

MR. FURLOTTE: My Lord, I just briefly read the headnotes
25 on it and it's not in line with what we're arguing
here. It's whether or not the names in the
indictment were to effect the validity of the
indictment, and I believe from the Arseneau case
the argument was that because a name was not on
30 the witness list, then that did not invalidate
the indictment, the indictment was still good,
or if a person was to remove a name from a
witness list, that would not invalidate the
indictment. We're talking apples and oranges
35 here.

MR. ALLMAN: He's correct in that but the reason why
5 is because there doesn't have to be a list at all
and I repeat, if my learned friend can show me the
section of the Criminal Code that required me even
to give him a list, I'd appreciate that.

MR. FURLOTTE: My Lord, I think the standard practice of
10 all the courts has been in the past, whether it's
in the law or not, that the Crown if they do not
call a witness that they have on the witness list,
or that they had prepared for trial, they at least
present them for cross-examination of the defence.

MR. ALLMAN: And if Mr. Furlotte has authority for that
15 he can quote it to you.

THE COURT: Well, I'll take this matter under considera-
tion, I want to read the Arseneau judgment.
Mentioning Arseneau, someone made the comment to
20 me some days ago that they thought that the only
resemblance they could see in one of the sketches
that had been published on television was a
resemblance to Rose Arseneault, and you know, I
saw it myself the next time I saw the sketch.
25 I'm not detracting from the attractiveness of Miss
Arseneault.

Well, I will think about that and I'll
deliver a decision on that at the first of the
week. Now, the other point? You have another
30 application, Mr. Furlotte?

0

Voir Dire

MR. FURLOTTE: Yes, My Lord, I have a motion for a
5 mistrial and in that I believe it will be
 necessary to call at least one witness. I'd like
 to call Mr. Legere.

THE COURT: I want to know what your application is about
 first, please.

10 MR. FURLOTTE: O.K. My Lord, basically the motion for
 the mistrial is that it is the position of the
 defence that the jury has been unduly influenced
 prejudicial to the accused because of a relation-
 ship that was formed between Lois Gaunce and - I
15 forget Miss Keleher's first name -

MR. ALLMAN: Pamela.

MR. FURLOTTE: - Pamela Keleher, which last week
 contributed - I suppose more than contributed but
 was a cause of Juror Moorcraft being excluded from
20 the jury and as a juror. Basically I want to show
 what kind of -

THE COURT: Are you able to elaborate on that at all as
 to why it would have entitled one to a mistrial,
 for an order for a mistrial?

25 MR. FURLOTTE: Yes, My Lord. Basically, My Lord, as a
 result of what happened last week the position of
 the defence is that the jury will assume Mr.
 Legere instigated the pipeline, so-called pipe-
 line, being from, as the Crown put last week,
30 Legere to Gaunce to Keleher to Moorcraft and to
 possibly other members of the jury, other jurors.
 The jury, I submit, will assume that there was an
 attempt by Mr. Legere to tamper with the jury or
 to influence the jury or a juror and therefore the
35 jury would now draw an adverse inference of guilt

Voir Dire

upon Mr. Legere, that they will probably suspect
him and strongly suspect him as being the instiga-
5 tor of what happened last week.

As was brought out into evidence last week by
Sergeant Poissonnier that there were complaints by
members of the jury, at least four on one
occasion, two on another occasion, which could
10 possibly bring the number to six if the two on the
other occasion, on one occasion, were not two of
the same four, so therefore we have at least four,
possibly six, who were raising complaints because
of the relationship formed by Miss Keleher and
15 Miss Gaunce. Possibly even all the members of the
jury have recognized it and voiced complaints to
someone or amongst themselves at one time or
another. However, we are only aware of at least
four and maybe six.

20 I would submit, My Lord, also, because of
what happened last week, that this is going to be
discussed amongst the jurors and probably already
has been discussed amongst the jurors, and what
position they've taken on it nobody knows, but one
25 can only assume that it's probably not favourable
towards Mr. Legere, that Mr. Legere is going to be
highly prejudiced by this.

The ordering of Lois Gaunce from the court
room and not to have any contact with the friends
30 or family members of the remaining jurors, that
fact being made known to the jury leaves little
doubt that the jury will assume Mr. Legere made an
attempt to tamper with the jury. The Crown's
position at that time last week was that after all
35 the evidence was in, and I argued that yes, the

Voir Dire

appearance of that really didn't look good and it
may prejudice the Crown's case. If the jury was
5 to feel that there was an improper relationship
between Lois Gaunce and Miss Keleher that may
prejudice the Crown's case in that, heaven knows,
if we ended up with a hung jury, that someone
would think that it was Mr. Moorcraft that was the
10 member who hung the jury up, or even if a not
guilty verdict came in the public and heaven knows
who is going to think that well, maybe Mr.
Moorcraft got to the rest of the jurors because
Mr. Moorcraft had been gotten to by Mr. Legere.

15 Mr. Allman I believe was quite right when he
asked the Court to order Mrs. Gaunce to stay away
from the court room and Miss Keleher to stay away
from the court room in the absence of the jury
because as Mr. Allman stated, the jury might put
20 two and two together. That was his argument to
you at the voir dire on the ordering of Gaunce and
Keleher from the court room.

However, when the jury was returned, and I'm
sure you forgot all about it and for some reason
25 or other because everything was coming so quick
and so important to instruct the jury properly, I
believe, My Lord, you inadvertently forgot and
told the jury that you had ordered Mrs. Gaunce and
Miss Keleher from the court room and the reasons
30 why.

THE COURT: Oh, I didn't forget, I did that deliberately.

MR. FURLOTTE: You did it deliberately?

THE COURT: I didn't want them to be under intimidation
through the presence of people.

35 MR. FURLOTTE: Of Mr. Legere.

Voir Dire

THE COURT: Pardon?

MR. FURLOTTE: People, and including - you know, people,
5 and it looks as if -

THE COURT: No, I didn't say that.

MR. FURLOTTE: No, but you also told the jury that Mrs.
Gauce was Mr. Legere's girlfriend which is not
the case. Mrs. Gauce is simply a supporter of
10 Mr. Legere, and not so much a supporter of Mr.
Legere in particular but because she disagrees
with the way the proceedings have taken place
against Mr. Legere and all the publicity in the
newspaper before he went to court, and as a
15 citizen she recognized, rightly or wrongly, that -

MR. ALLMAN: I'll expect Mr. Furlotte is going to be
going into the witness box to testify to all the
relationship between Mrs. Gauce and Mr. Legere.
This is counsel's assertion, it's not evidence.

20 MR. FURLOTTE: Well, My Lord, I think the Court can take
judicial notice on all the publicity that Mr.
Legere had received, and there's no evidence that
Mrs. Gauce is any more than a supporter of
attempting to get Mr. Legere a fair trial rather
25 than being his girlfriend, but with the jury
thinking that Mrs. Gauce is Mr. Legere's girl-
friend, that makes it look all the worse that
maybe Mrs. Gauce was acting particularly on
behalf of Mr. Legere and having contact with Mr.
30 Legere that maybe it's Mr. Legere that instigated
her to get in contact with friends of the jurors
to get to the jurors, but I believe the evidence -
the jury doesn't know this, but I believe the
evidence was that it was Keleher who approached
35 Gauce to discuss certain aspects of what was

Voir Dire

going on in the jury room.

5 My Lord, I believe, and the matter maybe is preliminary as to the evidence Mr. Legere would give if he takes the stand, is basically that since this happened he had -

THE COURT: Well, you needn't get into that. You're going to call Mr. Legere, are you?

10 MR. FURLOTTE: Yes.

THE COURT: Yes. I'm not asking you to argue this fully, actually, at the present time. I just wanted sort of a preliminary statement as to what grounds it was based on.

15 MR. FURLOTTE: Yes, O.K., the preliminary statement is that there is little doubt in the minds of the public that the jury will assume Mr. Legere was guilty of jury tampering as that is the opinion that they have likely formed themselves. As you
20 stated to the jury yourself, that the important - when you discharged Mr. Moorcraft you said that the important thing in a trial of this nature is that the jury be impartial and that they must manifestly be seen to be impartial. The position
25 is at this time Mr. Legere is not only innocent until proven guilty of the charges before this Court, he is also innocent until proven guilty of any alleged jury tampering or any thoughts or
30 notions by the jury that Mr. Legere may have been guilty of jury tampering.

In the exclusion of the juror I readily admitted that it may prejudice the Crown's case because of the appearance. I submit, My Lord, that in this case basically it will be that the
35 appearance that the jury will likely presume Mr.

Allan Legere - Direct (Voir Dire)

Legere guilty of jury tampering or at least
attempting to jury tamper, that they will draw an
5 adverse inference against Mr. Legere and likely to
prove to the Court and to everybody that Mr.
Legere's interference or assumed interference did
not get to them and they're more apt to come back
with a guilty verdict just to show that they were
10 not influenced by it. It's severely prejudicial
to the accused and we hope to be able to prove
that.

THE COURT: I'm not going to call on the Crown, there's
nothing to answer at this point. I was simply
15 getting the statement of the ground. Would you
like to call Mr. Legere? You want to call Mr.
Legere now as a witness in the matter?

MR. FURLOTTE: Yes.

THE COURT: Then following that I will ask you to review
20 the application in the light of that evidence and
so on and then I'll give the Crown an opportunity
to reply and then yourself -

MR. ALLMAN: I may wish to adduce evidence.

THE COURT: You may wish to, all right. You'll be asked
25 at that point if you wish to. The accused will
testify from the box.

ALLAN JOSEPH LEGERE, being duly sworn on the voir
dire, testified as follows:

30 DIRECT EXAMINATION BY MR. FURLOTTE:

Q. So would you state your name for the Court,
please?

A. Allan Joseph Legere.

Q. Now, Mr. Legere, would you tell the Court what you
35 know about the relationship of Lois Gaunce and

Allan Legere - Direct (Voir Dire)

Pamela Keleher and when you became aware of their relationship?

- 5 A. Well, first of all, I'd like to clarify that.
 Mrs. Gaunce is a happily married woman and not a
 girlfriend of mine except an acquaintance and just
 one of the very few who are not anti-Legere, and
 last Thursday, I think it was - or pardon me, it
10 was September 26th, Mrs. Gaunce mentioned to me in
 the court room here, kind of lip-reading, that she
 would be down to see me Friday about my pictures
 that I'd given to her, and she visited me at the
 Atlantic Institution on Friday, the 27th of
15 September, and after we discussed paintings she
 mentioned this Miss Keleher who I hadn't never
 talked to Miss Keleher. Actually, that's when I
 asked, I said, "She looks a lot like my old girl-
 friend from '86", and then she told me that she
20 was a friend of the jury, a Mr. Moorcraft. Then I
 was told that Miss Keleher was being supplied
 information from Mr. Moorcraft to the effect of
 what days the jury were in my favour, and there
 was another juror who I never got the name of, a
25 friend of Moorcraft's, who were being discussed
 more than with the other ones, but basically Miss
 Keleher knew exactly what days the jury were
 choosing to be on my side or against me, and I
 said to Mrs. Gaunce, I said, does she not - "Does
30 Moorcraft know that's illegal", and she said, "Is
 it". Like, I don't think Keleher or Mrs. Gaunce
 knew it was illegal, so I said, "Don't talk about
 it any more", I said, "because this place here is
 all bugged and there are tape recordings", so on
35 Saturday, the next night, I called Mr. Furlotte

Allan Legere - Direct (Voir Dire)

and there was no answer, there was a tape recorder
on, so I left the message I'll get a hold of him
5 Monday, so Monday morning, on September 30th, I
called for Mr. Furlotte and I told him exactly
what I just told the Court. I can't tell the
Court any more because I don't know any more. I
have not given any messages back to Miss Keleher
10 because I knew that something was going to blow up
soon but Mr. Furlotte didn't know how to approach
it and I didn't know how to approach it. Actually
I thought it would be grounds for a mistrial
because I never heard of it before, jurors telling
15 citizens what's going on in the jury room. That's
the only knowledge I have of it other than what -
in fact, in my opinion, it should not be Miss
Keleher or Gaunce who are being castigated and
thrown out of the court room, it should be Mr.
20 Moorcraft should be penalized for it for breaking
his oath. It's not the girl's fault. That's
about all I've got to say on it.

Q. And what effect has this had on you since it broke
loose?

25 A. O.K., I returned to that Atlantic Institution
Friday, and upon arrival I said, "I'd like to make
a phone call to my mother", and he said, "We just
got word from Art Robson in Moncton Headquarters
that you're not entitled to visits or phone calls,
30 everything's cut off". I said, "Why, am I being
suspected of jury tampering". He said, "That's
the idea around here", and that was the shift
supervisor and I wasn't allowed to call anybody,
couldn't even call my mother, and that's the only
35 two people I ever call, ever call, so I'm being

Allan Legere - Cross (Voir Dire)

5 blamed for jury tampering and I can't even have a
visitor. In fact, he turned my visitor away on
Saturday past, so the public feeling, the public
pulse right now is that I must be having a pipe-
line to the jury, and I think they feel it, too.
That's about all I can tell you about this.

10 THE COURT: Thank you very much. Now, do you want to
cross-examine, Mr. Allman?

CROSS-EXAMINATION BY MR. ALLMAN:

Q. Mrs. Gaunce is a supporter of yours, is she?

A. I would say that, yes.

15 Q. Did you ever propose marriage to her?

A. Marriage to her?

Q. Yes.

A. I don't think I could propose marriage to her.
Maybe joking around once in a while, that's
20 about it.

Q. Did you ever say, "I think the best thing you
could do is marry me, really" -

A. Oh, I said -

Q. Can I finish? "- then I could focus on you
25 totally. See, I can't focus on you totally
unless I do have you because if I focus on you
totally". Did you ever say that to her?

A. Yes, I did. Yes, I did, but she just laughed
at me and said, "Now, Allan, don't be too
30 serious now". She's a very, very serious woman,
she doesn't flirt. I do the flirting.

Q. When Mrs. Gaunce told you about the situation
between Keleher and the juror, did she say
to you that she could arrange to have a meeting
35 with her - "I could arrange that, I think, if you

10

Allan Legere - Cross (Voir Dire)

wanted that?

5 A. No, I don't think it came out that way, Mr. Allman.

Q. And did you say to her, "Yeah, like if she was telling you what's going on"?

A. I don't recall saying that.

10 THE COURT: I'm sorry, Mr. Allman, what is this conversation that you're quoting? Who was this?

A. I think that's -

MR. ALLMAN: I'm asking him about a conversation that I believe took place between him and Mrs. Gaunce at the Atlantic Institute at Renous.

15 A. That would take place on September 27th.

Q. You don't recall that bit?

THE COURT: But I mean this isn't as a result of bugging, surely?

A. It was bugging, it was bugging.

20 MR. ALLMAN: I'll ask him about that. You said a moment ago in answer to Mr. Furlotte that you understood that all your conversations were liable to be bugged, didn't you?

A. I never said that.

25 Q. You used the word "bugged" to Mr. Furlotte.

A. I used that word, yes.

Q. Are there large signs at the Atlantic Institute that say to people taking part in conversations there that you must expect to have your conversations overheard and intercepted?

30

A. It says it could be.

Q. So you were perfectly well aware of the fact that your conversation with Lois Gaunce could and might be intercepted?

35 A. Yes.

11

Allan Legere - Cross (Voir Dire)

Q. And, in fact, in the course of that conversation with Mrs. Gaunce did you tell her something to the effect, keep it down or whisper because we might be bugged?

A. Well, I always told her that.

Q. Did Mrs. Gaunce on a number of occasions say to you in respect of the situation between her and Miss Keleher that she could arrange further meetings?

A. I don't recall that because it's impossible for Miss Keleher to visit me.

Q. No, no, arrange meetings between her and Miss Keleher.

A. I don't recall that. She may have said that, I don't recall, because that was the first time I knew she ever met her.

Q. Did you tell Mrs. Gaunce that you were going to call and tell Mr. Furlotte, "See, I will tell him. What if Tom talked to Mary and Mary talked to June, June, Mary knows Tom"?

A. Repeat that?

Q. Did you tell Mrs. Gaunce that you were going to tell Mr. Furlotte, "See, I will tell him. What if Tom talked to Mary, Mary talked to June, June, that Mary knows Tom"? Did you say that to Mrs. Gaunce?

A. I don't recall, I may have.

Q. I suggest what you were doing there was discussing with Mrs. Gaunce precisely what you're saying in court today, that maybe people are talking about this outside?

A. Yes, I may have been referring to that, which would be true.

12

Allan Legere - Cross (Voir Dire)

- Q. Did you tell Mrs. Gaunce to, "Get closer, invite her over for supper, I don't care what you got to do. No, no, no, you get no flies with sugar, sugar and vinegar"?
- 5
- A. Who was that directed to?
- Q. Did you say to Mrs. Gaunce, "You can do a good thing, get closer, call her, invite her over for supper. You get no flies with sugar, sugar and vinegar"?
- 10
- A. I don't recall that. I may have said that, I don't recall it.
- Q. Do you recall saying to Mrs. Gaunce, "No, no, no, gain her trust"?
- 15
- A. Who was I referring to?
- Q. Miss Keleher.
- A. Was it Miss Keleher that I was talking to about that or was it -
- 20
- Q. I'm asking you, did you tell Mrs. Gaunce at that conversation -
- A. I can't - there was several people that we were discussing that day. It was about pictures and about a woman at the gallery.
- 25
- Q. Your answer then is that you do not recall telling Mrs. Gaunce to get closer to Miss Keleher and gain her trust?
- A. I don't know if I was referring to Miss Keleher.
- Q. Did you tell her to get closer to somebody and gain somebody's trust?
- 30
- A. I don't recall that.
- Q. Did you tell her, discussing this situation, that, "It sounds good, eh, you know, that sounds good to me, that sounds good, keep that under your hat. It could mean something, I tell you that
- 35

13

Allan Legere - Cross (Voir Dire)

fucking much. Oh, my God, get close to everything".

5 A. That was the time I was talking to Mrs. Gaunce on that Saturday?

Q. I'm asking you, do you think you said to Mrs. Gaunce -

A. I may have.

10 Q. Did you tell her that, "if this pans out it could put an awful curve in it"?

A. I think I was referring that time to the jury.

Q. Well, that's what we're talking about now?

A. Yeah.

15 Q. O.K., so you were talking about the possibility -

A. The possibility that it could affect the whole trial, yes, because I told her - I think if you'll look in the statement further - how many other people did she tell?

20 Q. Did you tell her that, "It would be a shame to lose this now, it might happen to be some good", and did you say, "Hey, like I say, that would throw a fuck into that so bad, so bad"?

A. Yes, I did say that. It's not every day you see
25 a jury member telling people what's going on in the jury room. I've never heard of it before and I've been through a few trials.

Q. And it was about then, wasn't it, by the way, that
30 you said to Mrs. Gaunce - or Mrs. Gaunce said to you, whispering, "Yeah, but what if they've got all this taped"?

A. Well, I knew they had it taped pretty well. When I go in the room they all tape it.

Q. When Mrs. Gaunce told you about this, of the
35 situation, your basic position was that you were

14

Allan Legere - Cross (Voir Dire)

happy because you -

A. I was happy.

5 Q. I'm sorry?

A. I was happy.

Q. Because you thought you saw the possibility of using this to argue for a mistrial? Is that about right?

10 A. Well, I never thought of a mistrial argument but I thought it would just blow the doors right off it because it was so illegal.

Q. You told the Court as you left this court room, I think it was last week, that the juror in question was on your side; was that your perception?
15A. The perception was he may have been. I was rushed out kind of fast, I did make an error in my sentence. I meant to say he may have been on my side. From what I've heard he may have been on my side.
20

Q. Do you have any evidence that in fact any member of the jury does hold any of the opinions that you claimed they might hold?

A. From what I was told, yes.

25 Q. The evidence, then, is what Lois Gaunce told you that somebody else told her?

A. I think your best bet is to have them up on the stand here, find out from them.

Q. The evidence you have as to what the jury's state of mind is what Lois Gaunce told you that somebody else had told her, do I have that right?
30

A. Well, that's the way I heard it, yes.

MR. ALLMAN: Thank you.

THE COURT: Re-examination, Mr. Furlotte?

35

15

Allan Legere - Redir. (Voir Dire)

REDIRECT EXAMINATION BY MR. FURLLOTTE:

- 5 Q. Aside from you finding out from Mrs. Gaunce what Miss Keleher was saying to Mrs. Gaunce, was there anybody else that Miss Keleher told this to?
- A. I don't know.
- Q. Besides Lois?
- A. I really couldn't tell you. I never spoke to -
- 10 Q. O.K., now, when you stated that Mr. Moorcraft may have been on your side or was on your side, how did you conclude that, that Mr. Moorcraft may have been on your side or was on your side? Was that from what Lois Gaunce told you or is that from
- 15 something else?
- A. Well, according to Miss Keleher he didn't always agree with the other jurors and he was against it, he was against what a lot of jurors were thinking and he found some of them prejudicial and he
- 20 wouldn't agree with them and that's why I got the inference he was on my side because he wouldn't always agree with the way they were looking at the case, and he was like a holdout, and he was telling to Miss Keleher he didn't think what was
- 25 going on in the jury room was fair and he didn't agree with them and they didn't like it.
- Q. Now, you mentioned you told myself on Monday morning what Lois Gaunce had told you?
- A. Mm-hmm.
- 30 Q. And you thought it would be grounds for a mistrial?
- A. I thought it would be grounds for a mistrial. I thought it highly improper.
- Q. Right, and what did I tell you?
- 35 A. You told me that you weren't sure yet of the

Allan Legere - Redir. (Voir Dire)

5 rulings on it, the rules on law, and that you will
look into it. In fact, I did mention maybe you
should get a hold of the Crown Prosecutors or the
judge and you said you'd look in your law books
and see if you could come up with something but
right now you didn't know what to do about it
because it's been the first time you've come
10 across it.

Q. And what did you feel that should be done with Mr.
Moorcraft on Monday? When you told me what did
you want me to look into to get - to have happen
to Mr. Moorcraft?

15 A. I thought he should be expelled and at least put
on the stand to tell how much he knew and how many
people he did tell about it. It wasn't the girl's
fault. He should have shut his mouth and not the
girl's.

20 Q. So you would have been happy for a mistrial, I
assume, from what you told Mr. Allman?

A. Well, during the jury selection there was six
people who said that they were prejudiced or in
other words they had to form their opinion, and
25 we couldn't expel them because we ran out of
peremptorials, so if it would have been a
mistrial it would have been happy for me because
maybe I would have got twelve instead of six that
were not prejudiced.

30 MR. FURLOTTE: No further questions.

THE COURT: There was just one question I wanted to put,
Mr. Legere, to you, and that is in one of your
statements before the Court you said that you had
information that Mr. Kearney and Mr. Allman had
35 gone into a washroom at the same time.

17

Allan Legere - The Court

A. O.K.

THE COURT: Where did you get that information?

5 A. Well, I'll tell you, I got it from Mrs. Gaunce. She was at the same restaurant and it was the first week I had Mr. Kearney on and I couldn't get him to work for me but she was sitting beside Kearney and Mr. Allman and they were in the wash-
10 room and they came out of the washroom and they were arguing, it seemed like they were arguing bitterly. Then they waited for some other people to come out of the washroom, then when they cleared the washroom they went back in and had a
15 further conversation and I said, "That doesn't look good", I said, "because I got him for a lawyer and", I said, "he shouldn't be playing with a prosecutor during a trial", and that's one reason why I wanted him off my case.

20 THE COURT: Any questions on that point?

MR. FURLOTTE: I have no questions.

MR. ALLMAN: Only that it's not factually correct. I mean Mrs. Gaunce's version of events.

MR. LEGERE: So you were in the washroom with him, were
25 you?

MR. ALLMAN: That part is correct.

THE COURT: Well, I'm not concerned with the washroom aspect of it. Well, now, that's all the evidence you want to call?

30 MR. FURLOTTE: That's all the evidence I would be calling.

THE COURT: That's the close of your case in support of your application, Mr. Furlotte?

MR. LEGERE: There was one other guy, Your Honour, there
35 was one other juror that had been in deep

18

conference with Mr. Moorcraft, and I don't know which one it is but he was sharing the same views. Now he's probably scared away, too.

5 THE COURT: Any cross-examination or otherwise, or examination?

MR. FURLOTTE: My Lord, maybe if I could just have one - I don't think it would be proper for me to take the stand as to what - I'm not sure what the Court would like to know -

10 MR. ALLMAN: What do you want to say? I might agree to it.

MR. FURLOTTE: Just basically like the statement as to what Mr. Legere told me Monday morning and what I did about it and what my instructions to him were and what my thoughts were on it.

15 MR. ALLMAN: I think that's already come out from Mr. Legere, what he told Mr. Furlotte.

MR. FURLOTTE: Well, not what he told me but what I instructed Mr. Legere as to what the implications might be.

20 THE COURT: I don't think we're concerned with that, Mr. Furlotte, surely? I mean your advice to him as to what the implications might be, what bearing does that have on the outcome? You can say this in argument if you want to.

MR. FURLOTTE: Yes, O.K.

THE COURT: I must say - what day did I meet with counsel in chambers on this matter?

30 MR. ALLMAN: Wednesday, I think.

THE COURT: Wednesday, yes. I had the impression from you, Mr. Furlotte, that you knew absolutely nothing about this, that it came as a total shock.

MR. FURLOTTE: I felt like I was run over by an 18-wheel truck when it come out in court about the

35

relationship between Mrs. Gaunce and Miss Keleher.
That is something I didn't know anything about.

5 THE COURT: No, I don't mean in court, I mean when I
spoke to counsel in chambers and said that I was
concerned about this. As a matter of fact,
counsel asked to meet me in chambers, but you knew
nothing about this. That was on Wednesday.

10 MR. FURLOTTE: Yes, and I was getting the impression in
chambers that there was an attempt by Mrs. Gaunce
to interfere with the jury and that is not the way
it was explained to me by Mr. Legere. Mr. Legere
explained that Lois Gaunce had been telling every-
body, not just in particular Lois Gaunce. I
15 didn't know about a private meeting -

MR. LEGERE: Not Lois. Lois wasn't, Keleher was.

20 MR. FURLOTTE: I didn't know about a private meeting
between Gaunce and Keleher, which is what I had
learned for the first time on that day from the
Crown Prosecutor. I learned quite a bit from the
Crown Prosecutor before we actually went into
your chambers, so it's not what was just discussed
in your chambers but I had known a lot of the fact
situation before I went into chambers. That's why
25 I felt run over by an 18-wheel truck because the
last thing I want is a mistrial in this case
because I want to go home and get on with my life,
but basically when Mr. Legere advised me of that I
told him that it's not grounds for a mistrial just
30 because a juror is out telling people what's going
on in the jury room. That doesn't take away from
the jury's ability to render a fair decision. I
told him I would look into the law about it but I
didn't think there would be any law that would
35 support a mistrial on account of that, but when I

was told the facts by the Crown Prosecutor, then
yes, then the facts were such that it would be
grounds for a mistrial and that's why I felt run
5 over by an 18-wheel truck.

MR. LEGERE: I must tell you, Your Honour, I didn't know
the facts the day of the meeting in malls and
that, I had no idea of that stuff.

THE COURT: Yes. Well, the evidence aspect of this has
10 got to be terminated here sometime. I'm
interested in whatever Mr. Legere has to say but
is there anything more that you want to ask Mr.
Legere on this?

MR. FURLOTTE: No, My Lord.

15 THE COURT: So that must be the end of that, Mr. Legere.
Have you argued or do you want to argue, Mr. -

MR. ALLMAN: Well, just with regard to the evidence
aspect of it. It's perfectly apparent to Your
Lordship that we have a tape of Mr. Legere's
20 conversation. However, I don't feel it's
necessary to put it in, it's available if anybody
wants it. I think Mr. Legere admitted or
inferentially admitted the things that were
in there, sufficient for my purpose to argue.

25 THE COURT: So you're not calling evidence?

MR. ALLMAN: No.

THE COURT: Now, Mr. Furlotte, do you want to sum up
your arguments?

MR. FURLOTTE: Yes, My Lord. Well, basically, My Lord,
30 the evidence between last week and this week is
that Miss Keleher formed a relationship with Mrs.
Gaunce initially, it wasn't initiated the other
way around, and Mrs. Gaunce being like any normal
human being would be curious as to what was going
35 on in the jury room, be it just for her own

Mr. Furlotte

curiosity or her curiosity which could be passed
on to Mr. Legere that I'm sure we all would like
to know of discussions taking place in the jury
5 room. There's nothing wrong with that. However,
there is something wrong with going out and
proceeding to deliberately find out what's going
on in a jury room.

The position of the defence is that Mr.
10 Legere did absolutely nothing to try and create a
mistrial. If he had, if he deliberately attempted
to tamper with the jury, then my position would be
let him suffer the darned consequences, and if the
jury is able to draw an adverse inference because
15 he was attempting to tamper with them, then I
think it would be right for them to do so also,
but unfortunately Mr. Legere had nothing to do
with jury tampering, it never crossed his mind,
but when a piece of information came to him which
20 he recognized it was wrong for a jury member to
do, immediately he thought, geez, maybe this might
be grounds for a mistrial. Again, Mr. Legere not
knowing anything about the law thought that, well,
if I can get a mistrial, which it never crossed
25 his mind before - if I can get a mistrial, then I
would have a better chance at getting a more fair
trial. Whether Mr. Legere is right or wrong as to
whether or not he's getting a fair trial at this
particular proceeding, that's irrelevant. The
30 question is that he does believe he's not getting
a fair trial at this particular proceeding for a
number of different reasons, and if we could start
all over again, then he might have the opportunity
to get additional counsel and other factors taken
35 into consideration and he would have a better

Mr. Furlotte

chance at trial. This way he feels he has no chance whatsoever.

5 You can't blame a man for almost, you know, looking at a bonus being thrown at his feet, and if he wanted Mrs. Gaunce to keep her eyes and ears open as to what else is being said as to whether or not he could prove that this juror was talking about what's going on outside the jury room in 10 order to make a motion for a mistrial, then there's absolutely nothing wrong with that. When Mr. Legere consulted with myself Monday morning after his - he contacted me at the first opportunity that he heard this - he was under the 15 impression that Mr. Moorcraft could be thrown out and because he may have contaminated the rest of the jurors or that the public was contaminated as to what was going on in the jury room it might be grounds for a mistrial, I advised Mr. Legere that 20 I didn't think that any such thing could prevent the jury from rendering a just decision, it would not have any bearing on their deliberations. I'm quite sure that the jury is discussing matters throughout the trial in the jury room before final 25 deliberations, just preliminary discussions, and personally I don't see anything wrong with that and just because the public might know what's being said in the jury room, it wouldn't interfere with a fair trial.

30 I advised Mr. Legere that that was my feelings, that however, to please him I would research the law just to confirm my suspicions that it was not grounds for a mistrial. Aside from that, on Tuesday I asked Mr. Kearney to - I 35 told him my position, the fact situation, that a

Mr. Furlotte

jury member was out telling everybody what was
being said in the jury room, and I told him my
opinion is that it would not be a fair trial but
5 I asked him what his opinion would be and also
whether or not he would do some legal research
into the matter, and then Wednesday it came to my
attention that there was a special relationship
between Mrs. Gaunce and Miss Keleher which had
10 direct connection to the juror, and I was advised
of that by a Crown Prosecutor before we went into
your chambers and needless to say I was quite
demoralized. One, it appeared to me immediately
that Mr. Legere was probably behind the whole
15 damned thing, which upset me to no end. However,
once all the information came out in court from
Sergeant Poissonnier it's apparent that there's no
evidence that Mr. Legere was behind it, Mr. Legere
denies having - not knowing anything about it. It
20 appears that the relationship was formed by Miss
Keleher to Mrs. Gaunce as her interest in - I
don't know why she contacted Mrs. Gaunce, whether
she just contacted Mrs. Gaunce to get on friendly
terms to find out more about Allan Legere so she
25 could relate it back to the jury member - it was
a pipeline but we don't know why the pipeline was
formed in the first place, whether it was just out
of idle curiosity or whether - heck, we don't
know, maybe Mr. Moorcraft had ulterior motives to
30 get the pipeline to get to Mr. Legere to find out
what's not going on in the court room, it's all a
matter of speculation, but basically in the end
the speculation is that the jury, because of what
they've been told, that Lois Gaunce is Mr.
35 Legere's girlfriend, that they've been ordered

Mr. Furlotte

from the court, to make sure that Lois Gaunce
 doesn't have any contact with their friends or
 family, it almost looks as if - it doesn't almost
 5 look as if, it definitely looks as if Mr. Legere
 instigated the whole episode which took place last
 week and since, I believe, September 24th that the
 police first noticed a relationship.

10 It's terribly prejudicial to Mr. Legere
 because of what the jury - the adverse inference
 that the jury is going to take from this. There's
 no way we can put all our arguments in a defence
 and run before the jury and defend Mr. Legere's
 position before them. It's not only that we can't
 15 do it, it's not even proper to do it. We have to
 assume in the appearance of justice that the jury
 is going to presume that Mr. Legere instigated the
 whole thing and attempted to tamper with the jury.

20 As far as for the law for a mistrial, in
Ewaschuk's at Page 17-12, Paragraph 17:1080, under
 the powers to declare a mistrial it states -

25 "A trial judge in a jury trial possesses
 an inherent discretionary power to
 declare a mistrial where inadmissible
 evidence is disclosed to the jury which
 may cause material prejudice to the
 right to a fair trial to either Crown or
 accused",

30 and they put as an example,

35 "inadvertent disclosure during the Crown's
 case of the accused's prior record or
 association with known criminals."

40 Even if a jury knows an accused's prior record or
 an association with known criminals, you know, if
 that's grounds for a mistrial because that may
 cause prejudice to the accused, what was this
 45 going to do to Mr. Legere when the jury are going
 to assume that he was jury tampering? Heaven
 forbid.

Mr. Furlotte

5 And then under Paragraph 17:1090 it
says, when a mistrial is necessary. It states:

10 "Where inadmissible evidence is adduced in
either immediately instruct the jury to
disregard it, or, if it is of so prejudicial
a nature that the jury would not be able
15 to disregard it, the trial judge should
discharge the jury and order a new trial."

My Lord, in this particular case there is
20 absolutely nothing or no way that you could
properly instruct this jury to totally disregard
it and that they could follow your instructions.
25 It would be merely paying lip service to a hope
that we could get through this trial when we are
so close to the end of it. I want to get through
30 this trial as much as anybody, I'm sure Mr. Legere
would like to get through this trial as much as
35 anybody, he's going through a trial one way or
another. As I explained to Mr. Legere, there's no
40 way that, you know, another jury would probably be
able to be picked and do a better job than this
jury would have been able to do in the first
45 place and it's very unfortunate and there would be
really nothing to gain from starting a new trial
in the absence of being able to erase this
50 prejudicial effect from this jury's mind. It's an
unfortunate situation for everybody, not only the
55 Crown and the taxpayers and Mr. Legere, but the
appearance here is that this jury has been just
contaminated to a point that there's just no
60 returning into being an impartial jury.

THE COURT: Thank you very much. Mr. Allman?

65 MR. ALLMAN: Mr. Furlotte's address contained a number of
assertions. I know of no evidence to justify
70 those assertions.

Mr. Allman

MR. FURLOTTE: Common sense, My Lord.

MR. ALLMAN: There's no evidence that the jury has been
5 contaminated. That was what was discussed at the
last session. There is evidence - evidence -
that the jury were concerned, because as you
recall from the last evidence, four of them were
concerned about what they could see going on.
10 That, in the Crown's submission, shows that the
jury are keen to be and to appear to be impartial.
They could see a situation developing that was
jeopardizing that situation and they very
properly drew it to the attention of a sheriff or
15 deputy sheriff. That is the exact reverse of an
indication that they have been contaminated.
It's an indication that they are determined to
remain uncontaminated. There is no evidence that
the jury has attributed any blame to Mr. Legere in
20 this matter, that is pure speculation on counsel's
part. I am at a loss to understand what evidence
has been adduced today that alters the situation
from last week, at which time Your Lordship said
there was no valid reason for a mistrial. The
25 only additional information or evidence we have
today came from Mr. Legere and that is to the
effect that he understood from Lois Gaunce some-
thing that Keleher had told Lois Gaunce, which is
as far from being evidence as to what's going on
30 in the jury's mind as anything you can sensibly
imagine.

On our application to discharge the juror we
called evidence, limited evidence to establish the
limited amount of information we had. Mr.
35 Furlotte has called no evidence to show that any

Mr. Allman

5 other member of that jury is other than impartial
and he's called no evidence to say that anybody
regards them as anything other than impartial
except for Mr. Legere's assertions.

10 Those are the main points I wanted to make.
A couple of other points. Mr. Legere seems to be
confused because he thinks he's entitled or might
get on another occasion a pro-Legere jury. He's
not entitled to a pro-Legere jury, we aren't
entitled to a pro-Crown jury. We're all entitled
to an impartial jury and I submit the way the jury
has behaved so far is a vivid demonstration that
15 they are impartial.

Mr. Furlotte referred you to Ewaschuk, those
two paragraphs. That is talking about inad-
missible evidence being disclosed to the jury.
What inadmissible evidence has been disclosed to
20 the jury? I don't know of any evidence that's
been disclosed to the jury, everything took place
in the absence of the jury. The only thing Mr.
Furlotte can refer to is Your Lordship's ordering
Gaunce and Keleher to leave the court, and it
25 seems to me that that's the appropriate thing to
have done, in fact Mr. Furlotte agrees it was
appropriate, and you can't do that sort of thing
and keep the jury in the dark about what's going
on. When you did do that you issued a warning, a
30 very clear warning to the jury that they should
not draw any inferences against either the Crown
or Mr. Legere, and I submit that that was the
appropriate thing to do.

35 The other matter I wanted to point out is
that it seems to me, at any rate, from Mr.

Mr. Allman

Legere's statements today that what he did when he heard about this situation from Mrs. Gaunce was to encourage her to get closer and see what else might come out of this. I'm certainly not asserting that he positively absolutely tampered with the jury, but I think he did look upon this as a promising situation ripe for use in some way, and to allow a mistrial now, which is precisely what Mr. Legere wanted when he heard from Mrs. Gaunce and wanted her to see if she could get to happen, would be improper. There is no reason why that jury can't adequately deliver and appear to deliver an impartial verdict.

I did consider suggesting to Your Lordship that you might want again to give them some instruction about that, but on second thoughts I don't think it's a good thing to do. By now, and certainly three or four weeks from now when this case finishes, the incident about the juror will have been so long ago and they'll have heard so much about alleles and Hardy-Weinberg and excess homozygosity that anything they've - this will be long ago in their memory. The Crown would respectfully submit there's no valid reason whatsoever for a mistrial.

THE COURT: Thank you very much. Any reply to that, Mr. Furlotte?

MR. FURLOTTE: Well, My Lord, I don't know where Mr. Allman gets the idea that Mr. Legere is demanding or wants a pro-Legere jury. Mr. Legere just wants a jury that is able - who has not formed the opinion as to his guilt. He doesn't even request a jury to presume him innocent, just a jury who's

going to have an open mind. Mr. Allman now says
it was proper for you to tell the jury that you
had ordered Mrs. Gaunce from the court room and
not to have any contact with them because you
5 can't keep the jury in the dark, but he sure
changed positions in a hurry because at the time
that he requested the order of Mrs. Gaunce he
requested from you to do it in the absence of the
10 jury so that the jury couldn't put two and two
together, meaning so that the jury would not think
that Mr. Legere was behind it. Well, My Lord,
there's no getting out of it, the jury knows or
thinks Mr. Legere was behind all this and there's
15 nothing is going to erase that from their minds.

THE COURT: Thank you very much. Just on the last point,
I'm a little - was that your purpose, Mr. Allman?
I didn't take that to be your purpose, actually.

MR. ALLMAN: I honestly don't recall now, My Lord, what I
20 told you to do or had asked you to do, whether I
asked you to discharge them in the absence of the
jury or not.

THE COURT: You asked me to discharge them in the absence
of the jury but my recollection was that you gave
25 a different reason, or another reason, I can't
recall what it was.

MR. ALLMAN: My memory is not good enough to be able to
tell Your Lordship exactly what I said on that
occasion, but certainly -

30 THE COURT: I have a transcript of what was said on that
date and I asked the -

MR. ALLMAN: If Your Lordship wants to check it I have no
problem with that, but in any event, my point is
not when you discharged them but what you did
35 about it afterwards, and I guess the bottom line

30

is that's a position in Your Lordship's discretion. I can see arguments for not mentioning it to the jury, I can see arguments for mentioning it to the jury. I think it was something in your discretion.

5
10
15
20
THE COURT: I'm totally convinced that it was the proper thing to mention it to the jury, otherwise I wouldn't have done it. Well, I'm going to think about this. I'll get my thoughts together on this matter and I'll deliver a decision on this application as on the Poissonier matter on Tuesday, the 15th, when we resume. We'll take an opportunity for a voir dire either during the morning or the afternoon. Sometimes if I want to have something typed up I may have to have it done in the morning and won't have it available till the afternoon, but sometime that day we'll take a few minutes outside, but we'll go on on Tuesday morning as we normally would.

25
30
35
MR. ALLMAN: There was one other matter I was going to mention before Your Lordship goes. Your Lordship has on a number of occasions mentioned to the jury that they should disregard whatever they see or hear in the media. I'm mentioning this now so Your Lordship can think about it over the weekend. I would be grateful if you could do the same to them again sometime on Tuesday. I read a report of the trial in the paper this morning. I make no complaint against the general slant of it, so to speak, I think it's biased against the Crown but I'm sure one always sees these things through one's own perceptions, but there were at least four what I regard as factual inaccuracies, at least one of which is very important, in it, and

31

I would respectfully ask Your Lordship again to remind them that what counts is the evidence they hear in court, not the information they obtain from the media.

5 THE COURT: But you were happy with yesterday's report in the same newspaper?

MR. ALLMAN: As I say, I don't object to reports having a slant, but what I object to is factual inaccuracies, and there were four what I regard as factual inaccuracies, and I told Mr. Furlotte if there's factual inaccuracies that are adverse to the defence in this report or any other report I would hope he would refer them to you, too. There were four serious factual inaccuracies in that report.

10 THE COURT: I notice inaccuracies from time to time. I think on the whole the media have done a very good job of reporting the trial. I follow the reports, certainly in the provincial papers, closely because I like to know what is being printed about it only insofar as it might mislead somebody later on, but I don't want to talk to the jury about every - I will warn them, I will be warning them again and probably several times, perhaps, before the trial is over, about the danger in accepting totally what does appear in newspaper reports, but I think most of the inaccuracies will iron out when it comes time for the addresses to the jury and the charge to the jury.

15 MR. ALLMAN: Fine, My Lord, that's settled.

20 THE COURT: However, I'm obliged to you for your comment. Well, now, we'll adjourn till Tuesday morning, October 15th, the day after Thanksgiving.

35

(COURT ADJOURNS TO OCTOBER 15, 1991.)