Appendix 27

INQUIRY INTO PEDIATRIC FORENSIC PATHOLOGY IN ONTARIO

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VALIN
OVERVIEW REPORT
PREPARED BY COMMISSION COUNSEL

Table of Contents

PART I. OVERVIEW 1

PART II. THE CIRCUMSTANCES SURROUNDING VALIN'S DEATH 4

PART III. THE DEATH INVESTIGATION 10

A. THE POST MORTEM EXAMINATION 10

PART IV. THE ARREST OF MR. MULLINS-JOHNSON AND THE ONGOING INVESTIGATION 20

A. POST- ARREST STATEMENTS OF MR. MULLINS-JOHNSON 21

B. POST-ARREST STATEMENTS OF PAUL JOHNSON AND KIM LARIVIERE 21

C. JUNE 28, 1993 23

D. THE REPORT OF POST MORTEM EXAMINATION 26

E. THE CONSULTATION WITH DR. MIAN AND DR. SMITH 29

F. SUBSEQUENT INVESTIGATION 31

PART V. THE TRIAL 41

A. TIME OF DEATH 42

B. CAUSE OF DEATH 45

C. INJURIES ON VALIN'S BODY AND THEIR SIGNIFICANCE, PARTICULARLY AS THEY PERTAINED TO SEXUAL ABUSE 46

PART VI. THE APPEALS 51

A. APPEAL TO THE COURT OF APPEAL FOR ONTARIO 51

B. APPEAL TO THE SUPREME COURT OF CANADA 51

C. THE JANUARY 19, 2005 REPORT OF DR. MICHAEL POLLANEN 70

D. THE MAY 24, 2005 REPORT OF DR. MICHAEL POLLANEN 87

E. THE AUGUST 11, 2005 REPORT OF PROFESSOR BERNARD KNIGHT 96

F. THE DECEMBER 6, 2006 REPORT OF DR. JAMES FERRIS 106

G. THE REPORTS OF PROFESSOR MILROY, PROFESSOR CRANE AND DR. BUTT 115

H. DNA RETESTING 115

PART VII. MR. MULLINS-JOHNSON'S SECTION 696 APPLICATION GRANTED 120

Part I. Overview

1. Valin was born in Sault Ste. Marie on February 11, 1989, to Paul Johnson and Kim Lariviere. She died at the age of four, on June 26 or 27, 1993, in Sault Ste. Marie. Valin had an older sister and a younger brother, who were six and three, respectively at the time of her death. The family lived together in Sault Ste. Marie, Ontario. William Mullins-Johnson was Mr. Johnson's brother and Valin's uncle. At the time of Valin's death, he resided with the family.

2. On June 27, 1993, Mr. Mullins-Johnson was arrested and charged with the first degree murder and aggravated sexual assault of Valin.[1]

3. On September 21, 1994, after a two-week trial in the Ontario Court (General Division) in Sault Ste. Marie, a jury convicted him of first degree murder. He was subsequently sentenced to life in prison.[2]

4. Mr. Mullins-Johnson appealed his conviction to the Court of Appeal for Ontario. On December 19, 1996, the Court of Appeal, Borins J.A. dissenting, dismissed his appeal.[3]

5. Mr. Mullins-Johnson then appealed as of right to the Supreme Court of Canada. On May 26, 1998, the Supreme Court unanimously adopted the reasons of the majority of the Court of Appeal for Ontario, and dismissed the appeal.[4]

6. On September 7, 2005, Mr. Mullins-Johnson filed an application for ministerial review pursuant to Part XXI.1 of the *Criminal Code*.[5]

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[1] Arrest Details, June 27, 1993, PFP110916; Supplementary Report, June 30, 1993, PFP110894.

[2] Indictment, December 2, 1993, PFP110387, p. 4; Warrant of Committal, September 21, 1994, PFP036161.

[3] *R. v. Mullins-Johnson* (1996), 112 C.C.C. (3d) 117 (Ont. C.A.), PFP003581. Justices Catzman and Labrosse agreed the appeal should be dismissed. Justice Borins dissented and was of the opinion that a new trial should be ordered.

[4] *R. v. Mullins-Johnson* (1998), 124 C.C.C. (3d) 381 (S.C.C.).

[5] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 9.

7. On September 21, 2005, Mr. Justice Watt of the Superior Court of Justice released Mr. Mullins-Johnson on bail pending his application for ministerial review.[6]

8. On July 17, 2007, the Minister of Justice, the Honourable Ron Nicholson, granted the application for ministerial review and referred the case to the Court of Appeal for Ontario on the following terms:

> AND WHEREAS, new information has arisen concerning whether William Mullins-Johnson was guilty or not guilty of the murder of [Valin], which information was not presented as evidence at trial, or on the appeal to this Honourable Court, or on the appeal to the Supreme Court of Canada;
>
> AND WHEREAS, an application for ministerial review (miscarriages of justice) was made to the Minister of Justice by counsel on behalf of William Mullins-Johnson pursuant to Part XXI.1 of the *Criminal Code*, for an order directing a new trial or, in the alternative, for an order referring the matter to the Court of Appeal for hearing and determination as if it were an appeal by William Mullins-Johnson;
>
> AND WHEREAS, I am satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in this case;
>
> I HEREBY respectfully refer this matter to this Honourable Court pursuant to section 696.3(3)(a)(ii) of the *Criminal Code*, based on a consideration of the existing record herein, the evidence already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine the case as if it were an appeal by William Mullins-Johnson on the issue of fresh evidence.[7]

9. That same day, the Court of Appeal for Ontario released Mr. Mullins-Johnson on bail pending the hearing of his appeal, which was scheduled for October 15, 2007.[8]

10. On October 15, 2007, the Court of Appeal, after hearing *viva voce* evidence from Mr. Mullins-Johnson and Dr. Michael Pollanen, and the submissions of counsel, acquitted Mr. Mullins-Johnson. The Court reserved on the issue of whether a declaration of factual innocence should be made.

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[6] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 17.
[7] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 19.
[8] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 19.

11. On October 19, 2007, the Court of Appeal delivered its written judgment. The Court confirmed that Mr. Mullins-Johnson was wrongly convicted, that the "fresh evidence shows that the appellant's conviction was the result of a rush to judgment based on flawed scientific opinion", and that he was "the subject of a terrible miscarriage of justice", but did not make a declaration of factual innocence.[9]

12. In 2005, the Chief Coroner for Ontario commenced a review of certain cases of suspicious child deaths where Dr. Charles Smith performed the autopsy or was consulted ("the Chief Coroner's Review"). All of the parties involved in the Mullins-Johnson case (the Office of the Chief Coroner, the Ministry of the Attorney General and counsel for Mr. Mullins-Johnson) agreed that three of the pathologists who had been asked to assist in the global review of Dr. Smith's work be requested to independently provide opinions on the cause of Valin's death. Professor Christopher Milroy, Dr. John Butt and Professor Jack Crane were selected.[10]

13. Professor Milroy issued his report on May 1, 2006[11], Dr. Butt on June 1, 2006[12] and Professor Crane on September 22, 2006. [13]

14. As part of the global review of Dr. Smith's work, Professor Milroy was also assigned to be the primary reviewer for Valin's case. The results or conclusions of Professor Milroy's work were memorialized in a brief document, which contained a checklist and some commentary on the file.[14]

15. The structure of the Chief Coroner's Review, including its scope and the role played by the various reviewers in each of the cases under consideration, will be the subject of evidence at the Inquiry.

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[9] *R. v. Mullins-Johnson*, October 19, 2007, 2007 ONCA 720.
[10] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 158.
[11] Report of Professor Milroy, May 1, 2006, PFP004096.
[12] Report of Dr. Butt, June 1, 2006, PFP004065.
[13] Report of Professor Crane, September 22, 2006, PFP004089.
[14] Autopsy Report Review Form, December 12, 2006, PFP058511.

PART II. The Circumstances Surrounding Valin's Death

16. On Saturday, June 26, 1993, Mr. Mullins-Johnson, who had been living in the Johnson family home for approximately two months, was asked to babysit Valin and her brother, as Mr. Johnson and Ms. Lariviere were going to a baseball tournament that evening. Valin's sister was spending the night at her Aunt Helen's house.[15]

17. Mr. Johnson and Ms. Lariviere were present for dinner, which took place at approximately 1830. Before dinner, Ms. Lariviere bathed the two children and noted no injuries or bruises to either child. At approximately 1900, Mr. Johnson and Ms. Lariviere left the family home to attend the baseball tournament, leaving Valin and her brother in the care of Mr. Mullins-Johnson.[16]

18. According to Mr. Mullins-Johnson, Valin was falling asleep on the couch at approximately 1930, so he told her to go to bed. She came over, kissed him, and then went to her room to go to sleep. At approximately 2000, he put Valin's brother to bed. While upstairs, he noticed that Valin was asleep and closed her door. He then came downstairs, cleaned up the dishes from dinner and watched television.[17]

19. Ms. Lariviere returned home at approximately 2130 that evening. Mr. Mullins-Johnson, who was watching the Blue Jays' game on television when she arrived home, advised her that both children were asleep in their beds. Ms. Lariviere did some laundry, watched part of the

[15] Typed statement of Paul Johnson, June 27, 1993, PFP110032; Written statement of Paul Johnson, June 27, 1993, PFP110633; Typed statement of Paul Johnson and Kim Lariviere, July 8, 1993, PFP110035; Will say of Paul Johnson, PFP110030; Typed statement of Kim Lariviere, June 27, 1993, PFP110047; Will say of Kim Lariviere, undated, PFP110044; Written statement of Kim Lariviere, June 27, 1993, PFP110643; Typed statement of William Mullins-Johnson, June 27, 1993, PFP109980; Written statement of William Mullins-Johnson, June 27, 1993, PFP110613.

[16] Typed statement of Paul Johnson, June 27, 1993, PFP110032; Written statement of Paul Johnson, June 27, 1993, PFP110633; Typed statement of Paul Johnson and Kim Lariviere, July 8, 1993, PFP110035; Will say of Paul Johnson, PFP110030; Typed statement of Kim Lariviere, June 27, 1993, PFP110047; Will say of Kim Lariviere, undated, PFP110044; Written statement of Kim Lariviere, June 27, 1993, PFP110643; Typed statement of William Mullins-Johnson, June 27, 1993, PFP109980; Written statement of William Mullins-Johnson, June 27, 1993, PFP110613.

[17] Typed statement of William Mullins-Johnson, June 27, 1993, PFP109980; Written statement of William Mullins-Johnson, June 27, 1993, PFP110613.

baseball game with Mr. Mullins-Johnson, had a shower, and went to bed at approximately 2320. When she went to bed, Valin's door was closed and she did not look in on her.[18]

20. Around 2400, three of Mr. Mullins-Johnson's friends, Ken Boyer, Kelly Boyer and Steve Nadjiwon, came by the house.[19] They all watched a boxing match on television and then left at approximately 0130 to look for a party. Mr. Mullins-Johnson returned home at approximately 0300.[20]

21. Mr. Johnson, who went out with friends after the tournament, returned home at approximately 0200. He went straight to bed and did not check in on Valin or her brother.[21]

22. At approximately 0700 the next morning, June 27, 1993, Mr. Johnson and Ms. Lariviere were awoken by a loud noise. Their son [Valin's brother] had fallen down. Mr. Johnson went to tend to his son. Ms. Lariviere went to the washroom, then opened Valin's door to check on her. She noticed that there was vomit on the bed and floor. Ms. Lariviere returned to bed, where Mr. Johnson told her that he had taken Valin's brother back to his bedroom. They shared a cigarette and Ms. Lariviere told Mr. Johnson that Valin had thrown up. The two remained in bed for a period of time and then Ms. Lariviere went to wake up Valin. She described Valin as being face down, on her knees, her arms bent and her bum in the air. When she rolled Valin over, she noticed that Valin's face was purple so she screamed for help. Mr. Johnson ran into the bedroom and saw Valin lying on her back all blue, stiff and ice cold. He undid Valin's pyjamas to

[18] Written statement of Kim Lariviere, June 27, 1993, PFP110643.

[19] The police later collected information from a witness, Ronald Masse, which conflicted with the Boyers' statements as to timing of their visit to the Mullins-Johnson home, see Statement of Ronald Masse, undated, PFP110086. In that same statement, Masse stated that Mullins-Johnson did not mention to him that Steve Nadjiwon was not present. The police warned the Boyers that if they were lying about the timing of their visit, they might be charged as being accessories to the murder, see memo-book notes of Sgt. Welton, July 8, 1993, PFP059401. Mr. Masse later accused Ken Boyer of being involved in Valin's death, see Memo from Special Constable Bourgeois to Sgt. Welton, October 14, 193, PFP059363.

[20] Typed statement of William Mullins-Johnson, June 27, 1993, PFP109980; Written statement of William Mullins-Johnson, June 27, 1993, PFP110613; Statement of Kelly and Ken Boyer, June 28, 1993, PFP110002; Statement of Kelly Boyer, July 8, 1993, PFP110003; Statement of Ken Boyer, July 8, 1993, PFP110006; Statement of Stephen Nadjiwon, June 28, 1993, PFP110097.

[21] Typed statement of Paul Johnson, June 27, 1993, PFP110032; Written statement of Paul Johnson, June 27, 1993, PFP110633.

give her CPR and noticed that her chest was blue. Ms. Lariviere then ran downstairs to call 911.[22]

23. While on the phone with the 911 dispatcher, Ms. Lariviere yelled instructions to Mr. Johnson on how to give Valin mouth to mouth resuscitation. However, Mr. Johnson had difficulty getting Valin's mouth open. He tried pounding on her chest. He then brought Valin downstairs and laid her on a rug to wait for the ambulance. He unzipped her pyjamas while downstairs. Ms. Lariviere placed her hand on Valin's heart and felt it was still warm.[23]

24. The ambulance arrived at 0725. Mr. Johnson met the attendants, Nancie Scott and Robert Weir, and brought them inside the home. Nancie Scott observed Valin lying on her back with significant discolouration to her face and arms. Her chest was a dark, purple colour. Her legs were up in the air in a stiffened position. She found no pulse. Her opinion was that Valin was dead. She called the police and awaited their arrival.[24]

25. Mr. Weir entered the residence, and noted that Valin was on a brown blanket, supine, with her hands and arms elevated and her knees bent. Rigor mortis had set in, and she had blue spots all over her face and body. There was pooling of the blood in her face and arms. He assessed her neck and radial pulse and determined that she was dead.[25]

26. Cst. Brad Clarida and Cst. Romano Carlucci of the Sault Ste. Marie Police Force arrived at the residence at 0748.[26] The ambulance attendants brought them inside. Cst. Clarida

[22] Typed statement of Paul Johnson, June 27, 1993, PFP110032; Written statement of Paul Johnson, June 27, 1993, PFP110633; Will say of Paul Johnson, PFP110030; Typed statement of Kim Lariviere, June 27, 1993, PFP110047; Will say of Kim Lariviere, undated, PFP110044; Written statement of Kim Lariviere, June 27, 1993, PFP110643; Typed statement of William Mullins-Johnson, June 27, 1993, PFP109980; Written statement of William Mullins-Johnson, June 27, 1993, PFP110613; Transcript of 911 call, June 27, 1993, PFP110362.

[23] Typed statement of Paul Johnson, June 27, 1993, PFP110032; Written statement of Paul Johnson, June 27, 1993, PFP110633; Will say of Paul Johnson, PFP110030; Typed statement of Kim Lariviere, June 27, 1993, PFP110047; Will say of Kim Lariviere, undated, PFP110044; Written statement of Kim Lariviere, June 27, 1993, PFP110643; Typed statement of William Mullins-Johnson, June 27, 1993, PFP109980; Written statement of William Mullins-Johnson, June 27, 1993, PFP110613.

[24] Call Report of Nancie Scott, June 27, 1993, PFP110131; Call Report of Nancie Scott, June 27, 1993, PFP110588.

[25] Call Report of Robert Weir, June 27, 1993, PFP110149; Call Report of Robert Weir, June 27, 1993, PFP110663.

[26] Supplementary Report, September 3, 1993, PFP110898, p. 1.

observed Valin lying on the living room floor, wrapped in a blanket. He observed redness in her face. Mr. Johnson advised Cst. Clarida that Valin had been found in her bed in a kneeling position with her head on the bed and her hands beside her head. At trial, Cst. Clarida testified that he "pulled back the yellow blanket to observe the child fully. The child was fully clothed in pyjamas, I noticed her being very stiff. Her knees pulled up and her arms like this, like she had been kneeling on ... on her knees and elbows." Cst. Carlucci observed that there was discolouration and redness to Valin's face.[27]

27. Cst. Clarida then called the coroner, Dr. Crookston, and asked him to come to the scene. He also telephoned Cst. Martynuck and Sgt. Welton, who arrived within minutes and took over the investigation.[28]

28. Dr. Crookston arrived shortly after 0800. He looked at Valin and could see that she was obviously dead. At approximately 0815, he took her rectal temperature, which was 82 degrees Fahrenheit.[29] He took no reading of the room temperature, but later testified at trial that it appeared to be normal room temperature, which was 70 degrees Fahrenheit. Sgt. Welton noted in his memo-book that the room temperature was approximately 70 degrees Fahrenheit.[30]

29. Cst. Biocchi, an identification officer, arrived at 0805. He made observations and took photographs of Valin. He then attended upstairs where he seized samples of the vomit from Valin's bedroom and took additional photographs.[31] Cst. Biocchi did not take a temperature reading in the living room, but estimated, at trial, that it was around 72 degrees Fahrenheit.

30. At 0900, Sgt. Welton interviewed Mr. Mullins-Johnson. He stated:

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[27] Will say of Cst. Clarida, June 28, 1993, PFP110918; Memo book notes of Cst. Clarida, June 27, 1993, PFP110872; Evidence of Cst. Clarida, Case on Appeal, PFP036566, p. 66; Will say of Cst. Carlucci, June 28, 1993, PFP110918.

[28] Will say of Cst. Clarida, June 28, 1993, PFP110918; Memo book notes of Cst. Clarida, June 27, 1993, PFP110872.

[29] Evidence of Dr. Crookston, Case on Appeal, PFP036566, pp. 218-224; Will say of Cst. Martynuck, undated, PFP110055, p. 2; Memo book notes of Sgt. Welton, June 27, 1993, PFP059401, p. 2.

[30] Memo book notes of Sgt. Welton, June 27, 1993, PFP059401, p. 2.

[31] Evidence of Cst. Biocchi, Case on Appeal, PFP036812, p. 188.

The family, Paul, Kim, [Valin's brother] and Valin where gone most of Saturday. Paul had a ball tournament at Strathclair. They got home about 6:00 P.M. I was making supper and had it ready when they got home. I made steak, Kraft dinner and salad. After Kim gave [Valin's brother] and Valin a quick bath we sat down for supper. The kids watched T.V. while eating and after eating Valin lay on the couch and said she was tired. At about 7:30 P.M. I told her to go to bed because she was falling asleep on the couch. She came over and gave me a kiss good night and went up to bed. At about 8:00 P.M. I took [Valin's brother] up to bed and saw Valin sleeping so I closed her door. The kids usually go to bed at 8:00 P.M. After [Valin's brother] went to bed I came downstairs and was watching the Toronto Blue Jays game and cleaned the dishes. Kim came home at about 9:30 or 10:00. Her and Paul had gone back to the ball field after supper as Paul had another game to play at 7:30 P.M. Paul did not come home with her. Kim went to bed at about 11:00 P.M. Around 11:30 or 12:00 midnight three of my friends, Ken Boyer, Kelly Boyer and Steve Nadjiwon came over. We sat around until about 1:30 A.M. and we decided to go for a walk in the Rankin Reserve. At 2:50 A.M. Ken told me the time and I headed home. It took me about five minutes to get home. When I got home everything was fine, all the lights where out. I went to sleep on the couch in the living room where I normally sleep.

A little after 7:00 A.M. I was awakened by Kim who was upset and said Valin was dead. I went upstairs and met Paul coming down. We went back to Valin's room and I saw her on her back with her legs pulled up and arms up by her face. Her body was blue. Kim had called 9-1-I and yelled to Paul and I to do C.P.R. We could not open her mouth. Kim spread a blanket on the floor in the living room and Paul carried Valin downstairs.

I asked [Valin's brother] what Valin got into and he said she took two pink pills with water.

The ambulance attended and then the police arrived.

Q: Was Valin complaining about being sick to you?

A: No.

Q: What was Valin's normal bedtime?

A: Usually 8:00 P.M.

Q: Did any of your friends go upstairs while they where visiting?

A: No, nobody.[32]

[32] Typed statement of William Mullins-Johnson, June 27, 1993, PFP109980; Written statement of William Mullins-Johnson, June 27, 1993, PFP110613.

PART III. The Death Investigation

31. Valin's body was taken to the Sault Ste. Marie General Hospital ("Hospital") for an autopsy at the direction of Dr. Crookston.[33] His Warrant for Post Mortem Examination was directed to the attention of Dr. Rasaiah or Dr. Chawla. Dr. Crookston also directed that a blood culture be done on Valin. He listed the date and time of death as, "93/6/27 0400 (est.)". Under the heading 'Case History', he wrote:

> Fever x 2 days.
>
> Went to bed 1930h on 93/6/26.
>
> Found dead in bed 0700 on 93/6/27, sitting cross-legged and slumped forward, having vomited partially digested food.
>
> Father carried child to living room and attempted CPR.
>
> At scene, cyanosis of face & chest, rigor mortis of arms, rectal temperature 82F.[34]

A. The Post Mortem Examination

32. Dr. B. Rasaiah, the Hospital pathologist, performed the autopsy on June 27, 1993, starting at 1235. Jim Corelli (pathology assistant), Tammy Weir (pathology assistant), Cst. Terry Biocchi, Sgt. Welton and Cst. Martynuck attended the autopsy.[35] Dr. Crookston attended for about 10-15 minutes.[36] A diagram representing the distribution of rigor mortis was completed.[37] Cst. Biocchi took photographs.[38]

33. Sgt. Welton's notes of the autopsy are as follows:

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[33] Evidence of Dr. Crookston, Case on Appeal, PFP036566, pp. 222-223.
[34] Warrant for Post Mortem Examination, June 27, 1993, PFP003842.
[35] Supplementary Report, July 2, 1993, PFP110933
[36] Evidence of Dr. Crookston, Case on Appeal, PFP036566, p. 223.
[37] Diagram, June 28, 1993, PFP110110.
[38] Supplementary Report, July 2, 1993, PFP110933.

12:30 10-7 General Hosp. for P.M.

Tammy WIER assistant to Dr. Rasaiah present.

12:35 Jim Corelli and P.C. Biocchi attend

death within 24 hours

hemorages area of left eye and upper chest below neck

bruise in area of vagina

small bruise on left thigh, lips of vagina and right inner area of vagina & rt thigh

sexual assault kit #02419

13:08 Dr. Rasaiah point out large opening of rectum

1312 Kinghorn advised at home

13:18 advised of hair in area of vagina

13:28 Crosby notified

13:32 Kinghorn arrived

13:35 Pozzo advised

13:37 Lalouette arrived

13:38 Dr. examined deceased

13:44 Lalouette left

13:45 Crookston arrived

13:55 Dr. Lalouette arrived

13:56 Martynuck left

13:57 Dr. Crookston attended and assisted Dr. Lalouette

14:10 Dr. Lalouette left

14:15 Dr. Crookston left

14:15 C.A.S. Lisa Stroyan attended at hosp.

-called by Dr. Crookston

14:36 S/Sgt. Pozzo attended at scene

14:50 Jim Corelli advised that Dr. Rasaiah had called an expert at Sick Children and was told this looks like chronic abuse. [Commission Counsel note: That expert is now thought to be Dr. Mian]

15:00 Dr. Zehr and P.C. Toni from I.D. arrived

Dr. Zehr says size of vaginal opening consistent with penetration

Annual penetration gross. Worst she has ever seen.

Damage indicates ongoing abuse.

...

15:25 did an annus wash

did vaginal wash

15:50 Dr. Zehr left pathology

16:30 Dr. Rasaiah began P.M.

16:50 started to open body

Dr. showed bruising in area of upper chest & neck area

Petical hemorage on lungs & heart

Bruising under scalp area of left side and right side

Bruising in area of pubic area is deep and within 24 hours

Dr. suspects death between 8-10 p.m.

Death is a result of suffocation

Force applied to upper chest area

Small amount of aspirant in tracia

Bruising of tracia

17:30 addressed Kinghorn and Pozzo cause of death.

Hold on bod for 24 hours to be reviewed again

17:45 Toni seized sexual assault kit.[39]

34. Cst. Martynuck's notes of the autopsy were as follows:

1230 At General Hospital for Post Mortem of [Valin] to be done by Dr. Rasiah Rasaiah

Tammy Wier also in attendance

...

-appears as if dead within last 24 hours.

-very suspicious-not natural.

-Large hemorrhages by left eye, & on upper chest just below the neck. (hemorrhages are under the skin)

-going to ask Dr. Hutton to examine in case of physical abuse

-bruising in vagina

[39] Memo book notes of Sgt. Welton, June 27, 1993, PFP059401, pp. 3-7.

-below on left thigh about 1" from anus, bruising near lips of vagina

-bruising on right inner area by vagina and right inner thigh

[diagram drawn by officer]

1308 Rectal opening (when cleaned of feces) is obvious opening blk/purple in colour

1312 hrs Kinghorn notified at home, sexual assault

[Cst. Martynuck left the autopsy between 1:12 and 1:20 p.m. to pick up a sexual assault kit]

advised appears that there is a hair in the vaginal area-to be seized when kit is completed (advised by Welton on return)

1328 hrs Sgt. Crosby notified

1332 hrs Kinghorn arrived

1335 Kinghorn contacted S/Sgt Pozzo to advise

1337 Dr. Lalouette arrived

1338 Dr. Lalouette examined victim- also took swab

1344 hrs Lalouette left

1345 Crookston arrived

warrants for bedding and the bed

check out boys room

want bed and bedding

-want to check the other kids beds

-living room, sexual activity (couch)

1353 Dr. Lalouette returned

1356 Clear from morgue to meet Blair at station Welton to remain at morgue.[40]

35. The hair that was observed in Valin's vaginal area was photographed and seized by Cst. Biocchi.[41]

36. Due to concerns about possible sexual abuse, Dr. Rasaiah asked Dr. Patricia Zehr, a gynaecologist with a specialty in child sexual abuse, to examine Valin.[42] Dr. Zehr arrived at the autopsy at approximately 1455, as did Cst. Toni.[43] Cst. Toni's memo book notes of Dr. Zehr's examination stated:

14:55- attended General Hospital morgue re: autopsy on 4 year old girl [Valin].

Present-

Biocchi

Tammy Weir

Jim Corelli

Dr. Rasaih

Dr. Zehr

In other room-

Welton

Kinghorn

B. Pozzo

[40] Memo book notes of Officer Martynuck, June 27, 1993, PFP110956, pp. 6-9.
[41] Supplementary Report, July 2, 1993, PFP110933.
[42] Consultation Record of Dr. P. Zehr, June 27, 1993, PFP004872.
[43] Supplementary Report, July 2, 1993, PFP110933.

Advised to stay with body-exam done by Dr. Zehr- anal sphincter totally open- no resistance

Vagina larger than normal

Hymen almost all gone-worn smooth

Bruising around vagina and legs right beside

Bruises right hip side and back of hip below knee, inside area below knee, petechiae on left side of face and top chest and down to pelvic and in fleshy area front of vagina

Photos taken of injuries on outside

Inside- bruising heart-petechiae throat, head, chest area

Bruising to trachea[44]

37. Cst. Toni's will say stated:

THAT On the 27th of June 1993, at approximately 1415hrs, I was called at home by Cst. Biocchi regarding a death that was suspicious, and he needed some assistance

THAT I attended at the General Hospital at approximately 1455hrs, and spoke to Inspector Kinghorn, S/Sgt Pozzo and Sgt. Welton in the lunchroom of the lab area

THAT I was instructed to stay at the hospital to maintain continuity of the body, and to photograph and attend the autopsy

THAT Present in the morgue were Cst. Biocchi, pathology technicians Tammy Weir and Jim Corelli, Dr. Rasaiah and Dr. Zehr.

THAT Dr. Zehr examined the childs rectum and vagina, and did washings on both

THAT These two samples were turned over to myself

[44] Memo book notes of Cst. Toni, June 27, 1993, PFP110492, p. 1.

THAT Bruising was noted on the body of the child

THAT These included the front area of the vagina, on the thighs just beside the vagina on both sides, the right hip area side and back (3), just below the right knee on the inside, petichiae bruising on the entire left side of face, chest and down abdomen to pelvic are, bruise under chin left side and bruises on left temple area

THAT All of these were photographed

THAT During the autopsy, I also photographed bruising on the inside which included petichiae bruising on the heart, bruising in the throat, head, chest and trachea areas

THAT At 1745hrs, I received all exhibits that had been seized from Jim Corelli which included sexual assault kit #02419, clothing, and bedding from the hospital

THAT At 1754hrs, I left the hospital and attended at the station.[45]

38. Dr. Zehr's consultation record, authored that same day, stated:

[Valin] is a 4-year-old female child who was found in her home unresponsive this morning at 0700 hours. Ambulance was sent for, but when they arrived the child was dead. Apparently she was found in her bed wearing underpants and a full-length zippered sleeper lying in the knee-chest position with her bum in the air on her haunches and her face down. The coroner was called and the body was then removed by the Arthur Funeral Home and then brought to the hospital. I was asked to see the child by Dr. Rasaiah because of some suspicious findings of query sexual abuse.

The child had already been examined several times before I got there and had had a skeletal series done to look for any evidence of fractures. She had dry swabs taken from the vagina and the rectum for semen as well as Chlamydia and GC studies done by Dr. Crookston. Apparently one adult pubic hair was found in her genital area and that was taken for forensic evidence.

When I saw the child she was lying in the dorsal supine position. I do not have her height and weight present, but that has been documented. Her face showed evidence of petechiae primarily around the left side of the face and around her neck and a lot on her trunk going down into the abdominal area. There were red and white markings on her body and arms, but whether that was an indication, of trauma or lividity, that is pooling of the blood once dead depending on the

[45] Will say of Cst. Toni, June 29, 1993, PFP110352.

position that they are in, is unclear. Her legs also showed evidence of some bruising and petechiae around the knees and there were some areas that looked a bit like abrasions on the tops of the knees. There is petechiae along the mons with bruising in the vulvar area on the inner thighs and around the labia majora.

I was asked particularly for my opinion regarding the genital area of this prepubertal female and I examined her in the dorsal frog-leg position. With the police photographer I documented the hymen in this position. It was somewhat attenuated with very little hymenal tissue. The orifice was larger than one would expect for a 4-year-old being approximately 8mm. There was a small nubbin of hymenal tissue at eight o'clock. Using a nasal speculum I did look up into the vagina, but did not see any obvious hemorrhage or bruising. As swabs have already been done, I proceeded to do vaginal washings for forensic purposes.

I then examined the child in the knee-chest position similar to the way that she was found and was immediately struck by the gross gaping of the anus. It measured 1cm horizontally and 12mm vertically. There was no tone to the anal sphincter. The edges were attenuated and rolled which to me is pathognomonic of chronic anal intercourse. I can think of no other reason that the anal tone would be so destroyed and the edges of the sphincter so attenuated other than repetitive penetration, most likely penile although other instruments could have been used. The hymen in the knee-chest position showed that there was a small amount of hymenal tissue going along the left edge of the hymen. Again the hymenal orifice was enlarged at about 7mm. Washings were attempted to be taken from the rectum, but it was a bit difficult to get all the returns, but a small sample was obtained.

In summary, this is a 4-year-old female child who was found dead in her home this morning. Forensic evidence is being collected and the police are investigating. My opinion is that this child shows evidence of chronic sexual abuse. The anal findings are pathognomonic of sexual abuse and it looks to me like it has been ongoing for some time. The vagina also shows evidence of penetration of some sort. There is no obvious laceration or scar tissue along the posterior fourchette or around the perineal body, but the hymenal orifice is larger than you would expect in a 4-year-old. The hymen is almost completely worn away as well which would support my premise that penetration has occurred vaginally as well. It is difficult to assess this little girl's mouth as her jaws were closed, but we did do a dry swab for forensic purposes to look for any semen.

I understand that the cause of death has not yet been determined. I do not know if she was sexually assaulted recently, but I have no question in my mind that she has been abused sexually for some time.[46]

[46] Consultation Record of Dr. P. Zehr, June 27, 1993, PFP004872.

39. Blood was taken from Valin's heart and submitted for blood culture screening. A Ministry of Health laboratory in Sault Ste. Marie issued two reports on the blood culture growth, after seven and fourteen days, respectively. There was no culture growth.[47]

40. Lung tissue was also taken and submitted for screening. The forensic laboratory subsequently concluded that:

> Rare bucocyte seen
>
> No organisms seen
>
> No acid alcohol fast
>
> Bacteria seen
>
> Few colonies micrococcus species which may be contaminants.[48]

41. A sexual assault kit was also done on Valin.[49] Subsequent testing revealed that no DNA was found on Valin's body, nor did she have any sexually transmitted diseases.[50]

42. That same say, Dr. Duffin, a radiologist at the Hospital, issued his Diagnostic Imaging Report on the post mortem skeletal survey done on Valin. He found no fractures or abnormalities.[51]

[47] Laboratory Reports, June 28, 1993, PFP110115, PFP110118.

[48] Laboratory Report, June 30, 1993, PFP110124.

[49] Memo book notes of Cst. Toni, June 27, 1993, PFP110492, p. 2.

[50] Report of Sandra Lindel, October 5, 1993, PFP036071, pp. 1-3; Laboratory Reports, various dates, PFP110120, PFP110121, PFP110122, PFP110123.

[51] Diagnostic Imaging Report, June 27, 1993, PFP004915.

Part IV. The Arrest of Mr. Mullins-Johnson and the Ongoing Investigation

43. At 1800, Officers Martynuck, Welton, Blair, Kinghorn, Clarida, Biocchi, Toni, Kates, and Pozzo met to discuss the autopsy findings. In her memo book notes, Cst. Martynuck wrote, "death between 8-10 p.m. Arrest to be made by Welton and myself."[52]

44. Officers Martynuck and Welton arrived at Valin's house at 1830 to arrest Mr. Mullins-Johnson and also to execute a search warrant for the seizure of a number of household items. Cst. Martynuck met with Ms. Lariviere in the living room and explained "what the investigation had revealed i.e. sexual assault over a period of time and death by asphyxiation."[53]

45. Sgt. Welton arrested Mr. Mullins-Johnson at approximately 1830. He was charged with first degree murder and aggravated sexual assault.[54]

46. While Mr. Mullins-Johnson was being arrested, the police were also executing search warrants at the Johnson residence and seized, *inter alia*, the bedding from Valin's room, her mattress, her clothing, her teddy bear, the couch from the living room, hair samples, Kleenex, fecal matter, track pants and other clothing of Mr. Mullins-Johnson, garbage from the upstairs washroom, and fingernail clippings from Valin.[55] Cst. Toni also reattended at the home for further forensic investigation and made a video of the scene.[56] Cst. Biocchi accompanied her, took additional photographs and collected further evidence, including swabs from Valin's bedroom.[57] While Cst. Toni was at the Johnson residence, she received information from

[52] Memo book notes of Officer Martynuck, June 27, 1993, PFP110956, p. 12.

[53] Memo book notes of Officer Martynuck, June 27, 1993, PFP110956, p. 12.

[54] Arrest Details, June 27, 1993, PFP110916; Supplementary Report, June 30, 1993, PFP110894.

[55] Warrants and records of seized items, June 27, 1993, PFP110185, PFP110186, PFP110189, PFP110190, PFP110326, PFP110400.

[56] [56] Memo book notes of Cst. Toni, June 27, 1993, PFP110492, pp. 2-4; Will say of Cst. Toni, June 29, 1993, PFP110352, pp. 1-2.

[57] Supplementary Report, July 2, 1993, PFP110933.

pathology assistant Corelli that the "sperm tests were negative at the hospital." She later reattended at the Hospital to take additional photographs of Valin.[58]

A. Post- Arrest Statements of Mr. Mullins-Johnson

47. Officers Martynuck and Welton drove Mr. Mullins-Johnson to the police station. According to the memo book notes of Cst. Martynuck, on the way, Mr. Mullins-Johnson was, "crying, sobbing, hysterical." According to Officer Martynuck's notes, he told the officers:

> I didn't do it. I wouldn't hurt that little girl. You got nothing, you got fuck all, what have you got on me, man, nothing, you got fuck all. I didn't touch her, she went to bed & that's that.[59]

48. They arrived at the station at 1840. Upon arrival, Sgt. Welton explained the time and cause of death to Mr. Mullins-Johnson. According to Cst. Martynuck, Mr. Mullins-Johnson replied:

> I was doing dishes, watching T.V. I put [Valin's brother] to bed at 8. Valin went to bed by herself. I was the only other person in the house.[60]

49. While at the station that evening and the following morning, Mr. Mullins-Johnson was interviewed on several occasions by Officers Martynuck and Welton. He repeatedly denied any involvement in Valin's death.[61]

B. Post-arrest Statements of Paul Johnson and Kim Lariviere

50. Subsequent to Mr. Mullins-Johnson's arrest, Valin's parents were each interviewed a second time. Mr. Johnson's interview took place at 1855. He stated:

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[58] Memo book notes of Cst. Toni, June 27, 1993, PFP110492, pp. 2-4; Will say of Cst. Toni, June 29, 1993, PFP110352, pp. 1-2.

[59] Memo book notes of Officer Martynuck, June 27, 1993, PFP110956, p. 13; Memo book notes of Sgt. Welton, June 27, 1993, PFP059401, pp. 8-9.

[60] Memo book notes of Officer Martynuck, June 27, 1993, PFP110956, p. 13.

[61] Memo book notes of Officer Martynuck, June 27, 1993, PFP110956, pp. 14-36, 46-48.

> My brother Bill has babysat my children pretty well from the time that they were born. My kids have always liked him. About three months ago, tops, Bill moved in with us. He has babysat for us a few times since then. Last night Bill was babysitting for us. My wife and I left at 7:00 P.M. and I didn't see the kids again until this morning. Bill was there alone with the kids when we left. I saw my daughter on the bed this morning. She was on the side of the bed nearest the door about six inches from the edge of the bed.
>
> There was vomit beside her, up toward the pillow. She was curled up and was face down on the bed with her bum in the air. She has had other babysitters too and has never complained about any of them.[62]

51. Ms. Lariviere was re-interviewed at 1900. She told police:

> Billy started babysitting for me when [Valin's sister] my oldest, was about 1 1/2 to 2. [Valin's sister] is 7 in November. He never did live with us until the last 2 1/2 months. He did stay with us once for two weeks but I didn't have any children at the time. He would babysit twice a month before he moved in. Billy moved in about 2 months ago, 2 1/2 at the most. It was the middle of the month when he moved in. He wouldn't babysit too often because ball season hadn't started. He babysat once a week or twice a week at the most. I played ball in Garden; I wouldn't bring the kids because of the flies. I usually brought them when I played in Rankin unless it was a late game. Last night the kids had a bath at 6:00. I washed their hair and they played in there. They came down and started eating supper at about 6:20 or 6:30 P.M. We left about 5 to 7:00, within that 5 minute span we left. Billy was there by himself. I came home between 9:30 and quarter to 10. I got a tea and I sat down and watched the ball game. Billy was laying on the couch. I put a load of wash in. I went downstairs. I sat down I watched the rest of the ball game. I watched some of TSN Sports. I went upstairs, went to the washroom, Valin's door was closed. I went to bed. Billy was downstairs. I heard him leave about 11:30 or quarter to 12. I didn't hear anyone knock on the door. He left the light and T.V. on. I never heard anyone else. At 7:00 right on the dot I got up. [Valin's brother] fell. Paul went downstairs. I got up and went to the washroom. Valin's door was closed. I opened it. There was barf over the bed. She was bent over. When I first looked at her her feet were this far apart (showing approximately 1 foot) from her headboard. She was on her knees facing the foot of the bed. Her bum was on her feet. Her head was either on her hands on the bed or on the bed with her hands beside her face. She was on her covers. Her covers were folded on an angle. I pulled her over on her back. She was cold. Her pyjamas were done up. I just backed up and started to scream and Paul came in the room. I ran downstairs and I called 911. Billy woke up and was asking "what's wrong". I told him something was wrong with Valin. He ran upstairs, pulled ?????? downstairs, and I spread a blanket.

[62] Written statement of Paul Johnson, June 27, 1993, PFP110635.

> The children loved staying with Billy. There was no problem leaving them with Billy. Valin complained about a sore "frog", meaning vagina. I said "let me see" and I checked her and her vagina wasn't red or anything.
>
> Her underwear was always soiled on her backside. I just thought it was because she wasn't wiping her bum.[63]

52. At 2000 on June 27, 1993, the Sault Ste. Marie Police Force issued a press release, which stated:

> At approximately 7:34 am on June 27,1993 Police Officers responded to a call for assistance to an east end residence. On arrival officers found that a four year old female had died overnight under what the officers considered suspicious circumstances.
>
> Dr. Crookston, Coroner attended the scene and ordered an autopsy to be conducted.
>
> Investigation has resulted in the arrest of William David Mullins-Johnson, age 22. Mullins-Johnson has been charged with first degree murder and aggravated sexual assault. The accused will be remanded in custody to appear in bail court on Monday, June 28th, 1993 at 1:30 p.m.[64]

C. June 28, 1993

53. Between 1155 and 1235 on June 28, 1993, Dr. Rasaiah, Cst. Martynuck, Cst. Toni and Jim Corelli took a second view of Valin's body at the morgue. Cst. Martynuck made the following note in her memo book:

> 1210 bruising on right side of face-cheek area
>
> -bruise on upper right outside of thigh/ hip area
>
> ...

[63] Typed Statement of Kim Lariviere, June 28, 1993, PFP110882.
[64] Press release, June 27, 1993, PFP110535.

1235 Rasaiah finished. Took some biopsy's[65]

54. Cst. Toni's will say statement regarding this event stated:

> THAT At 1200hrs, I attended at the General Hospital morgue where I met with Dets. Welton and Martynuck and Dr. Rasaiah and Jim Corelli
>
> THAT The body was examined again, and photographs were taken of the bruising that had become more prominent
>
> THAT More samples were taken from bruising areas of the deceased by Dr. Rasaiah.[66]

55. Sgt. Welton noted, "Dr. points out bruising on right side of face much more visible."[67]

56. That same day, the police prepared a 'Homicide/Sudden Death Report,' which stated:

> Between 1900 hours on the 26th of June 1993 to 0000 hours the 27th of June 1993, the accused, Bill Mullins-Johnson sexually assaulted the deceased, [Valin], age 4 years old in the residence at [address]. The accused also inflicted injuries resulting in Valin being suffocated. On the 27th of June 1993 at 1830 hours, the accused was arrested … for first degree murder and aggravated sexual assault.[68]

57. Also on June 28, 1993, Dr. Crookston issued his Coroner's Investigation Statement. He classified Valin's death as a "homicide," with the medical cause of death being "asphyxia." He wrote:

> Autopsy revealed gross anal dilation and scarring, ecchymoses and subcutaneous hemorrhage of thighs, dependent lividity, and signs of asphyxiation. Hymen crescentic, attenuated. Pathologist estimates time of death to be approximately 21:00 on 93/6/26. Examined also by Dr. P. Zehr, a gynaecologist with expertise in child sexual abuse. Photographs taken by police, copies to be sent to Dr. M. Mian, Director of the Suspected Child Abuse and

[65] Memo book notes of Officer Martynuck, June 28, 1993, PFP110956, pp. 53-54.

[66] Willsay of Cst. Toni, June 29, 193, PFP110352, p. 2.

[67] Memo book notes of Sgt. Welton, June 27, 1993, PFP059401, p. 17.

[68] Homicide/Sudden Death Report, June 28, 1993, PFP03668.

> Neglect Team, Hospital for Sick Children, Toronto. Drug screen negative. … Police have charged William Mullins-Johnson with sexual abuse and murder. [69]

58. That same day, the police submitted the items seized under warrant from the Johnson home, to the Northern Regional Forensic laboratory for analysis. Under the heading 'Case History' was written:

> 4 year old [Valin] was found in her bed by a parent at approximately 0730hrs on the 27 Jun 93, deceased. She had vomited on her bed. She was wearing underpants and one-piece pyjamas. At the autopsy, it was revealed that she had been repeatedly sexually abused vaginally and anally. She died as a result of asphyxiation.
>
> The accused is the uncle who lives at this address and was babysitting at the estimated time of death.[70]

59. On June 28, the police interviewed Ms. Kathy Labrecque, who stated that Valin would often come to her home to ask for food as she was hungry. She also reported seeing Valin and her brother outside of the home naked. She was concerned that the children were not getting sufficient supervision.[71]

60. On June 30, 1993, the Sault Ste Marie Police Force, prepared a Supplementary Report. It stated, *inter alia*:

> Dr. Crookston ordered a Post Mortem on the deceased which took place at the General Hospital on June 27, 1993. The Pathologist, Dr. Rasaiah, advises that the deceased died as a result of suffocation, and estimates time of death between 20:00 hours and 22:00 hours, June 26, 1993. Dr. Rasaiah requested Dr. Lalouette and Dr. Zehr examine the deceased, and it was determined that Valin had been sexually assaulted, and had been sexually assaulted on an on-going basis for an extended period of time.

[69] Coroner's Investigation Statement, June 28, 1993, PFP003664.
[70] Case Submission, June 28, 1993, PFP005016.
[71] Statement of Kathy Labrecque, June 28, 1993, PFP110038.

> On June 27, 1993, at approximately 18:30 hours, the accused, William Mullins-Johnson, was arrested at 66 Robin Street for Murder and Aggravated Sexual Assault.[72]

61. On July 2, 1993, Det. Welton met with Dr. Rasaiah and showed him the vomit that was seized from Valin's bed. According to Det. Welton, Dr. Rasaiah advised him that, "In my opinion it is not consistent with what I found examining the stomach contents." His opinion was that the vomit was from someone else.[73]

62. On July 9, 1993, the police interviewed Jeff Lariviere, Kim's brother, who reported, *inter alia*, that on June 27, 1993, Mr. Mullins-Johnson would not look at him when they spoke, which was unusual because he always made eye contact before. According to Jeff, Mr Mullins-Johnson "was acting weird as if he was worried about something."[74]

D. The Report of Post Mortem Examination

63. On July 13, 1993, Dr. Rasaiah issued his Report of Post Mortem Examination. He noted the following abnormal findings:

(a) Petechiae of face, neck and upper chest.

(b) Haemorrhagic mucosa upper and lower lips

(c) Cutaneous injuries

(d) Petechiae visceral pericardium, visceral pleura, thymus, brain and laryngeal mucosa

(e) Oedema and congestion of lungs

(f) Dilated vaginal opening

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[72] Supplementary Report, June 30, 1993, PFP110891, p. 2.
[73] Memo book notes of Det. Welton, July 2, 1993, PFP059401, p. 22.
[74] Statement of Jeff Lariviere, July 9, 1993, PFP110043.

(g) Markedly dilated rectal opening.[75]

64. He determined the cause of death to be "cardiorespiratory arrest due to asphyxia."[76]

65. On July 14, 1993, the Northern Regional Forensic Laboratory issued its toxicology report on the blood samples taken from Valin at autopsy. There were no positive findings.[77]

66. On July 16, 1993, a warrant was issued permitting the police to search Mr. Mullins-Johnson's cell at the Sault Ste. Marie District Jail and seize his bed sheets, blankets and bedding, hair care utensils, toothbrush, razor blades, clothing, paper cups, reading material, urine and eating utensils.[78] In support of the issuance of the warrant, Sgt. Welton set out his grounds for belief as follows:

> At the early stages of the investigation it appeared that the victim had become ill and regurgitated on the bed.
>
> Prior to leaving the scene, police seized a number of exhibits including the vomitus on the bed; and, subsequently, Valin's pyjamas were seized at the post mortem examination.
>
> At a post-mortem examination conducted by Dr. Rasiah at the General Hospital at approximately 12:30 p.m. on June 27th 1993 it was discovered that Valin had been the subject of extended sexual abuse over an extended period of time. During the course of the autopsy, Dr. Rasiah examined the contents of Valin's stomach.
>
> The time of death was determined to be between 7:00 p.m. and 10:00 p.m. on June 26, 1993 and the cause of death was asphyxiation caused by pressure being applied to the chest area.
>
> As a result of post-mortem examination and statements taken from all persons present in the residence during the evening and night of June 26, 1993, William David Mullins-Johnson was arrested by myself for the murder of [Valin] and I firmly believe that William David Mullins-Johnson had exclusive opportunity based on the time of death and that according to his statement he was alone with the children during this time period.

[75] Report of Post Mortem Examination, July 13, 1993, PFP003199

[76] Report of Post Mortem Examination, July 13, 1993, PFP003199.

[77] Report of Susan Rimek, July 14, 1993, PFP036075.

[78] Information to Obtain Search Warrant, July 16, 1993, PFP110205, p. 2.

Since that time, Dr. Rasiah has examined the vomitus seized from Valin's bed and states that this vomitus was not regurgitated by the victim.

Sandra Lindell, Pathologist, Northern Centre of Forensic Sciences advises me that they are able to do DEOXYRIBONUCLEIC ACID (also known as D.N.A.) analysis of the vomitus located on the bed. It is my belief that the accused person regurgitated on the bed while he was placing the victim on the bed.

In order to complete a D.N.A match, the Centre of Forensic Science must have a control sample to match the subject samples.

William Mullins-Johnson has been incarcerated in the Sault Ste. Marie District Jail since his appearance before the Justice of the Peace on June, 28th, 1993 and continues to be an inmate at the facility.

I have consulted with the Superintendent of the District Jail who has agreed to assist us in our investigation. He has advised me that the accused Mullins-Johnson has been confined to a solitary cell since his incarceration.

At my direction, the cell of the accused (cell Q-5 at the District Jail) was given a thorough cleaning on Tuesday, July 13th 1993 while he was at court. I am advised by the District Jail Superintendent and do believe that the accused was issued brand new clothing, bedding and toiletry items upon his return from the Court House. I am also advised by the District Jail Supervisory personnel and do believe that the accused was locked in his cell (cell Q-5) continually since his return from the Court appearance and no one else has entered the cell since his return. I am further advised by the District Jail Supervisory personnel and do believe that the toilet in the accused's cell was prevented from being flushed since the late evening on Thursday, July 15th, 1993.

I am advised by the District Jail Supervisory personnel and verily believe that William Mullins-Johnson has been supplied with "clean" newly purchased reading material in cell Q-5.

I am further advised by District Jail Supervisory personnel and verily believe that William Mullins-Johnson is being fed by the use of disposable paper plates and cups and plastic eating utensils which are, after use by William Mullins-Johnson, being retained and held by Tony Hocking, Security Lieutenant at the District Jail, either in an area adjacent to cell Q-5 in the main jail building or in Mr. Hocking's office located in a portable building on the grounds of the District Jail adjacent to the main jail building.

From my training, experience and from my discussions with the forensic biologist from the Centre of Forensic Science, I believe that the cell, toilet, toiletry items, bedding and clothing that was issued to and/or used by William Mullins-Johnson

> will contain samples of hair, saliva and secreted body fluids or substances of William Mullins-Johnson that will enable a D.N.A analysis to be completed and matched with the subject material, namely the vomitus.
>
> A positive D.N.A. match of any such hair, saliva and/or secreted body fluids or substance will afford evidence to place William Mullins-Johnson in direct contact with the area where the victim was located at a point in time subsequent to her going to bed and proximate to the time of death.[79]

67. The items were seized on July 16, 1993, pursuant to the warrant.[80] The seized items were then submitted to the Northern Regional Forensic Laboratory for analysis.[81] On July 22, 1993, a further submission was made to the Northern Regional Forensic Laboratory.[82]

68. On August 5, 1993, James Corelli, a laboratory technician at the Sault Ste. Marie General Hospital, wrote to Glen Wasyliniuk, Crown Attorney, North Region. He wrote:

> I am forwarding to you copies of the warrant for Post-Mortem as well as Dr. Zehr's report. The reason for this is that we are not sure if you have already received these copies.
>
> Also, I am submitting to you copies of the reports we received pertaining to bacterial, viral, and GC studies we requested. As you will notice, all came back negative. I sent swabs, blood, lung tissue and brain tissue, all areas which would predominantly show infections.[83]

E. The Consultation with Dr. Mian and Dr. Smith

69. Dr. Rasaiah initially consulted Dr. Mian, Director of the Suspected Child Abuse and Neglect Team ("SCAN Team"), Hospital for Sick Children ("HSC"), for her opinion. Dr. Mian, in turn, consulted Dr. Charles Smith for his assistance. They reviewed the autopsy photographs and co-authored a report, dated August 6, 1993. The cover letter to the report stated:

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[79] Information to Obtain Search Warrant, July 16, 1993, PFP110205, pp. 4-6.

[80] Supplementary Report, August 1, 1993, PFP110897; Memo book notes of Sgt. Welton, July 16, 1993, PFP059401, pp. 28-30.

[81] Case submission, July 16, 1993, PFP110481.

[82] Case submission, July 22, 1993, PFP110431.

[83] Letter from Mr. Corelli to Mr. Wasyliniuk, August 5, 1993, PFP110013.

Thank you for asking us to provide you with our opinion in this case. Enclosed please find our joint report regarding this unfortunate child.

With regards to the issue of the management of future cases, there is some merit in considering transfer of the body to a specialized forensic pathology center for these cases which are medico-legally complex. There is, in fact, work being done by the Chief Coroner's office on developing guidelines for the management of such cases province-wide.[84]

70. The report stated:

... Dr. Rasaiah requested a second opinion because of bruising in the genital area, the large vaginal and anal openings with the appearance of abnormal contours, suggestive of sexual abuse.

The child's face and upper chest show evidence of petechiae and small bruises. If these are confirmed by histologic examination, their pattern is consistent with an asphyxial mode of death, resulting from chest or abdominal compression.

The bleeding on the calvarium is consistent with direct trauma or blows to the head.

The anus is gaping with a large opening. The size in and of itself is difficult to judge in a post-mortem examination. The limited number of views and the low magnification, do not allow for any definitive findings. However, the views available are suspicious for the presence of fissures at the 1, 4, 6 and 8 o'clock positions (given that this is based on an assumption of orientation, these positions may not be accurate). The one at 6 o'clock seems freshest, the others appear to have evidence of more healing. The histologic examination would assist in clarifying these observations, since the finding of tearing, hemorrhage or inflammation would confirm the presence of acute and/or healing fissures. In the absence of a history of severe constipation, these findings would be suggestive of anal penetration, likely forceful, by a round, blunt object. The position in which the child was found is suggestive of sodomy.

The inner thighs and perineum show evidence of bruising. If these are confirmed histologically they are very suspicious of non-accidental trauma or a sexual nature, by their position alone. The external genetalia appear otherwise normal.

The hymen itself is seen at low magnification; the close up is of poor quality and does not allow for a more detailed examination. The hymenal configuration is difficult to determine, it may be annular or crescentic. The rim which is visible appears to be adequate with smooth edges. In the absence of multiple views and

[84] Cover letter, August 6, 1993, PFP132681.

> magnification it is not possible to comment with any further accuracy. It should be noted that a normal examination of the hymen, neither confirms nor denies the possibility of sexual abuse.
>
> CONCLUSION:
>
> This child's photographs show findings, which if confirmed by the post-mortem examination, indicate death by asphyxiation, trauma to the head and injury to the perineum and anus. In the absence of a reasonable explanation by history, they indicate non-accidental trauma, including sexual abuse. [85]

71. The Commission has no written record of any communication between the police or coroner and Drs. Mian and Smith following receipt of their report.

F. Subsequent Investigation

72. On September 10, 1993, the Medical Certificate of Death was issued. It classified the death as a homicide and stated, "Presumed to have been asphyxiated during sexual assault." [86]

73. On September 27, 1993, the Centre of Forensic Sciences ("CFS") issued its report on the DNA comparison between the vomit found on Valin's bed and Mr. Mullins-Johnson's DNA. The report stated, "The vomit on the pillow (B1) did NOT come from William MULLINS-JOHNSON (B50 x 1). [Valin] (B35) cannot be excluded as a source of the vomit (B1)."[87]

74. Mr. Terry O'Hara (as he then was) and Ms. Jennifer Reid, both from Kingston, Ontario, represented Mr. Mullins-Johnson. They, in turn, retained Dr. Frederick Jaffe of Mississauga, and Dr. James Ferris of Vancouver.

75. On September 29, 1993, Dr. Jaffe wrote to Ms. Reid. In his letter, he stated:

> I have read the material you sent me concerning the above matter. The assessment of the forensic aspects of this case is made difficult by the lack of photographs taken at the scene and, particularly, at autopsy. There are also

[85] Report on [Valin] by Dr. Mian and Dr. Smith, August 6, 1993, PFP003220.
[86] Medical Certificate of Death, September 10, 1993, PFP003673.
[87] Report of Pamela Newall, September 27, 1993, PFP036063.

some unresolved questions. Was the vomit retained and analysed ? What were the results of the examinations of the vaginal, anal and oral swabs ? You mention in your letter "blood on the front of the body". What was the source of the bleeding ? Whose blood was it ?

The forensic evaluation of the case resolves itself into the following areas :

1. What was the medical history of the deceased?

The autopsy showed extensive haemorrhaging in the form of petechiae and larger bruises of the skin and some internal organs. These were not associated with any deep injuries or any external lacerations of the skin. Did this child have a bleeding tendency? Vomiting is not usually associated with asphyxial states. Whose vomit was it? Dr. Rasaiah reports yellow mucoid material in the nose, bronchi and stomach. Was this vomit?

2. Signs of remote sexual abuse. This seems fairly clear. There is old damage to the hymen, rectum and anus. (The dilation of the anus must be interpreted with some caution as this may be due to post mortem flaccidity but there is microscopic evidence of old trauma and the body was in rigor when examined).

3. Signs of recent sexual abuse. This resolves itself into two questions:

Did sexual abuse occur a) before death

b) after death.

There is little in the pathological findings to indicate recent sexual activity in the anus and rectum apart from some deep areas of haemorrhage, and nothing in the vagina. In this connection, the results of the examination of the swabs will be important.

In the absence of relevant pathological findings and the results of laboratory tests the question of pre- or post mortem sexual penetration cannot be resolved.

4. The cause of death. The post mortem examination did not reveal any natural cause of death nor a traumatic cause. If the findings in the nose and bronchi indicated aspiration of vomitus, this might account for death. However, normal individuals do not aspirate vomitus. Was this child unconscious? The edema of the brain might suggest this.

The many petechiae which Dr. Rasaiah found might well be post mortem in origin but this could only be confirmed on the basis of photographs.

> This is as far as I am able to assess the pathological findings at this time. If you should receive any further material, I'd be glad to look at it. It might possibly help if I could have a look at Dr. Rasaiah's microscopic slides. I am sorry that I seem to have raised more questions than I have answered.[88]

76. On October 5, 1993, the Northern Regional Forensic Laboratory issued its report on all of the materials that had been sampled for blood and/ or semen, including swabs and washings from Valin's body, Valin's pyjamas, Valin's bed, the bed coverings, the hospital sheets, the couch where Mr. Mullins-Johnson slept, the clothing of Mr. Mullins-Johnson, the materials seized from his cell and various hairs. No semen was found on any part of Valin's body, clothing or bed. The hair found in her vagina at autopsy was non-human. No hairs or semen were found as a result of a "pubic hair combing" of Valin. Semen was found on the couch cushions, the inside front of Mr. Mullins-Johnson's track pants, and the undershorts and one sheet from his cell.[89]

77. On January 29, 1994, Dr. Jaffe wrote to Ms. Reid, as follows:

> I have read the additional material you sent me concerning the above matter. I shall briefly discuss some of the pathological points which arise.
>
> Position of the Child
>
> Dr. Zehr attributes great significance to the fact that the child was found "lying in the knee-chest position with her bum in the air" (Consultation Report p.1), and that "it is a very common position that children can assume who have been sodomised" (p.9).
>
> Actually, there is some uncertainty in the records concerning the child's original position.
>
> "Mother stated ... found her in a sitting position in bed with her head over to her legs" (Unusual Circumstances and/or Sudden Death Report). Also "..sitting cross-legged and slumped forward" (Dr. Crookston, p.39).
>
> Dr. Rasaiah stated that the distribution of the lividity showed that the child had been in the knee-chest position (p.56) but he had stated earlier that the lividity does not become "fixed" for 12 hours (p.55). If the body had been moved before

[88] Letter from Dr. Jaffe to Ms. Reid, September 29, 1993, PFP003232.
[89] Report of Sandra Lindel, October 5, 1993, PFP036071, pp. 1-3.

that time the lividity would have shifted and one could not draw any conclusions from it.

Time of Death

Postmortem lividity and rigor mortis have long been discredited as indicators of the time of death. The Moritz formula which Dr. Rasaiah uses to determine the time of death on the basis of the body temperature was popular in the days of the surrey with the fringe on top, the Keystone cops and the 5 [cent] cigar. It is now known that the internal body temperature describes a sigmoid curve as it falls and requires a much more complex mathematical treatment. In any event, the internal body temperature is useless without an accurate determination of the environmental temperature. The precision with which Dr. Rasaiah fixed the time of death lacks a scientific basis.

Anus

The anus is a muscular sphincter which contracts during rigor mortis and relaxes in the subsequent vascular flaccidity. Dr. Zehr and Dr. Rasaiah do not appear to have taken this into account, even though Dr. Rasaiah in his Autopsy Report (p. 6c) indicated that rigor was in the process of passing off.

Drs. Smith and Mian from the Hospital for Sick Children are more circumspect. "The anus is gaping with a large opening. The size in and of itself is difficult to judge in a post-mortem examination". However, they also find 4 fissures in the anus (on the basis of photographs!) which no one had noticed before.

In this connection it is interesting that Dr. Rasaiah examined the vagina and anus and TOOK TISSUE SPECIMENS from these areas before Dr. Zehr did her examination (p.63).

Age of Bruises

Dr. Rasaiah is again very dogmatic but I agree that most of the bruises seem recent (within the final 48 hours). He mentions that, as the bruises age, haemosiderin appears but he does not appear to have made any stains for iron which would have detected early haemosiderin formation.

Sexual Abuse

There appears to be general agreement that there had been "chronic sexual abuse" (p.4) but that there was "no indication of recent sexual abuse" (Dr. Rasaiah, p. 77) and "I do not know whether she was sexually assaulted recently"

(Dr. Zehr, Consultation Record, June 27, 1993). All laboratory reports were negative.

Cause of Death

The body showed many recent bruises of the head, lips, neck, chest and genital areas. These were not associated with deep injuries but were undoubtedly traumatic in origin. They lacked specific characteristics (finger marks, fingernail scratches etc.) and seem to have been caused by blunt trauma, insufficient to have caused death.

There were many petechial haemorrhages, the significance of which is notoriously difficult to assess, especially as petechial haemorrhages can arise after death. The term "asphyxia" (i.e. lack of oxygen) is not helpful as everyone who dies, irrespective of cause, dies of lack of oxygen. The body showed no indication how such an asphyxia might have been brought about.

The most abnormal organs were the lungs which were edematous and haemorrhagic. This may represent an early acute pneumonia. Bacterial and viral cultures were negative but aspiration of stomach acid (Mendelson's Syndrome) remains a possibility.

The various experts seem to ignore the two days' fever before death (Warrant for Post Mortem Examination. Dr. David Crookston, Coroner).

In summary then, we have a 4 year old girl who seems to have been sexually abused in the past and to have been recently subjected to repeated minor blunt trauma. She died after a mild illness of two days' duration. The cause of death remains conjectural.[90]

78. On May 18, 1994, Dr. Rasaiah wrote to Dr. Ferris. He stated:

The enclosed autopsy slides from above case are being sent to you at the request of Kingston Ontario lawyer, Jennifer Reid. Please notify us, if you also require the paraffin blocks,

Please return slides after completion of your review.[91]

79. On June 22, 1994, Dr. Rasaiah sent the slides and blocks from Valin's autopsy, as well as his autopsy report, to Dr. Smith for his expert opinion. This was done at the request of Mr.

[90] Letter from Dr. Jaffe to Ms. Reid, January 29, 1994, PFP036128.
[91] Letter from Dr. Rasaiah to Dr. Ferris, May 18, 1994, PFP003932.

Wasyliniuk.[92] The Commission does not have any documentation that the police or Crown requested a written consultation report from Dr. Smith.

80. On June 31, 1994, Dr. Ferris wrote to Mr. O'Hara. He stated:

> The opinions expressed on the interpretation of petechial haemorrhages by Dr. Rasaiah are not entirely correct. It is very significant, in this case, to recognise that almost all of the petechial haemorrhages are seen in areas of lividity and as such must be interpreted as a postmortem phenomenon occurring after death and in no way related to the cause of death.
>
> Microscopic examination confirms that the bruising of the cheeks, face and the pubic area, described by Dr. Rasaiah, are not in fact antemortem injuries but are as a result of postmortem leakage of blood into the tissues caused by postmortem lividity. This is a frequent finding in bodies which have lain face down for several hours after death and must also be considered the explanation of the alleged 'bruises' on the centre of the upper chest. This explanation also accounts for most of the sub-scalp 'bruising' seen on the photographs. In my opinion Dr. Zehr was wrong to describe the petechiae over the mons pubis and top part of the external genitalia as bruising.
>
> However, I believe that there is evidence of one area of bruising on the under-surface of the left side of the scalp and that there is a distinct bruise on the left side of the neck just below the jaw margin. These are within areas of petechial haemorrhage but can be identified as distinct from the petechiae related lesions.
>
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[92] Letter from Dr. Rasaiah to Dr. Smith, June 2, 1994, PFP003934.

'bruising' seen on the photographs. In my opinion Dr. Zehr was wrong to describe the petechiae over the mons pubis and top part of the external genitalia as bruising.

However, I believe that there is evidence of one area of bruising on the under-surface of the left side of the scalp and that there is a distinct bruise on the left side of the neck just below the jaw margin. These are within areas of petechial haemorrhage but can be identified as distinct from the petechiae related lesions.

There are pathologically significant petechial haemorrhages on the face. These are tiny diffuse and uniformly distributed on the face, and eyelids and are of a type characteristically associated with asphyxial deaths caused by compression of the neck structures, the significance of these petechae will be discussed under a separate heading below, dealing with the cause of death.

Cause of Death:

There appears to some doubt as to the precise mechanism of death. Dr. Rasaiah appears to attribute death to airway obstruction as a result of suffocation and smothering and although I am unclear as to the definitive basis for this interpretation, it seems to be based in part on the presence of bruising of the face and lips. In my opinion the discoloration of the lips is not due to bruising but is a direct consequence of postmortem change. I have also concluded that the 'bruises' to the cheeks are not true antemortem injuries and therefore there is no definitive evidence of the degree of facial compression necessary to indicate a smothering death.

The external bruising on the left side of the neck is consistent with the application of blunt force to the neck. There is fresh bruising in the deep structures of the neck adjacent to the thyroid gland caused by compression of the neck structures. These injuries were sustained at or around the time of death and when taken in conjunction with the facial petechial haemorrhages can be reasonably interpreted as evidence of manual strangulation. The nature and extent of these injuries is consistent with the application of a relatively minor force and it is entirely possible that death occurred rapidly and possibly unexpectedly as a result of vagal inhibition. This is a mechanism of death which occurs when the vagus nerve in the neck, which is located immediately adjacent to the thyroid gland, is stimulated and leads to reflex slowing or stopping of the heart.

Sexual Assault Injuries:

The interpretation of the changes in the vagina and rectum are difficult. Dilatation of the vaginal and anal orifices at postmortem must be done with extreme caution since the sphincter muscles around theses openings often dilate after death. Nevertheless, there does appear to be evidence to suggest repeated penetration of the anus and probably the vagina before death. There is however no evidence, in the material available to me, of fresh injury to the vagina sustained immediately prior to death. I believe that the rectal laceration seen on microscope examination can be interpreted as evidence of anal penetration several hours before death.

Other bruises to the limbs may be supportive evidence of the nature of such sexual assaults although none of these bruises have been sustained at the time of death.

Dr. Rasaiah has based his determination of the time of death on the presence of postmortem lividity, rigor mortis and rectal temperature. He is mistaken in his use of the term 'fixation' as applied to postmortem lividity. Fixation of lividity has nothing to do with the absence of skin blanching upon the application of external pressure but is used to describe the fixation of blood in the tissues, after approximately 10-15 hours, when the position of the body is changed. Lividity is the discolouration of the skin produced when after death blood drains by gravity to the under surfaces of the body. If the position of the body is changed shortly after lividity develops the blood will re-position itself to the new under surfaces of the body. If the position of the body is not changed for 10 to 15 hours then the blood will have become 'fixed' in the tissues and will not be seen to drain to the new under surface. There is no valid evidence in this case as to the extent of fixation, if any, of the lividity.

The extent and speed of onset of rigor mortis (postmortem stiffening) in any individual is very variable and this is particularly true of infants and children. Assessment of postmortem stiffening is very subjective and can be significantly modified by moving of the body. As a consequence, assessment of rigor mortis by a pathologist who sees the body for the first time in the mortuary should be discounted as a means of determining the time of death.

Determination of the time of death based on rectal temperature is very inaccurate and while it may be of investigative value to the police it is of no real evidential value. In fact such calculations can be very misleading. I have enclosed a copy of a section of a textbook 'The Essentials of Forensic Medicine' by Polson, Gee and Knight for your information and this current textbook describes the dangers of relying on such calculations better than I can recount.

> In this particular case there is no evidence of the room temperature except the subjective impression of the Coroner that the room temperature seemed normal and he guessed that it was about 70 degrees F. I have included below a table of time of death based upon rectal and environmental temperature developed for investigative use by the Department of forensic medicine at Charing Cross and Westminister Medical Schools. We have found this table helpful but of no real evidential value.
>
> ...
>
> If for example we use this table and assume that the rectal temperature was 82 degrees F. (Approx. 27 degrees C.) at 0800 hours and that the environmental temperature was 70 degrees F. (21 degrees C.) then the above table gives an approximate time since death range of 8 - 16 hours. If we allow for a possible variation of 2 degrees each way in the environmental temperature, the time since death range would be 6 - 18 hours prior to 08.00 hours. On this basis alone the precise estimation of time of death given by Dr. Rasaiah is not only misleading but also quite wrong.[93]

81. he then summarized his conclusion as follows:

(a) The child appears to have died as a direct result of neck compression.

(b) The compression force was not great and death may be sudden and unexpected and may be due in part to vagal inhibition.

(c) The petechial haemorrhages on the chest, pubic area and some of the sub-scalp petechiae are due to post-mortem lividity.

(d) There is evidence of chronic repetitive anal and vaginal penetration.

(e) There is no evidence of injuries to the anus or vagina which might have occurred during the course of the final assault recent laceration of the anal mucosa.

(f) Most of the areas of bruising are not associated with the fatal episode.

[93] Letter from Dr. Ferris to Mr. O'Hara, June 31, 1994, PFP036150, pp. 4-7.

(g) Accurate determination of the time of death based on the evidence available is not possible. The best estimation of the time of death would be between 6 and 18 hours before the time of the Coroner's examination at the scene. [94]

[94] Letter from Dr. Ferris to Mr. O'Hara, June 31, 1994, PFP036150, p. 8.

PART V. The Trial

82. The Commission does not have a copy of the transcripts of Mr. Mullins-Johnson's preliminary hearing.

83. The trial of Mr. Mullins-Johnson commenced on September 6, 1994, before the Honourable Mr. Justice Noble sitting with a jury in the Ontario Court of Justice (General Division).[95] In preparation for the trial, the police and Crown compiled a Crown brief, which included details about Mr. Mullins-Johnson, including his criminal record and prior involvement with mental health professionals. His criminal record included a conviction for break and enter in January, 1989, for which he was sentenced to two years less a day. He served his sentence at the Thunder Bay Correctional Centre and in Brampton at the Ontario Correctional Institute. While in custody, and after being released on parole, Mr. Mullins-Johnson was seen by several mental health professionals and/or parole officers. Their impressions and assessments of Mr. Mullins-Johnson were included in the Crown brief.[96]

84. The key pathological issues at trial were:

(a) the time of death;

(b) the cause of death; and

(c) the injuries on Valin's body and their significance, specifically as they pertained to the issue of sexual abuse.

85. The Crown theory was that Valin was the victim of chronic, sexual abuse, and died during the course of a sexual assault at a time when only Mr. Mullins-Johnson was present. Drs.

[95] Case on Appeal, PFP036566, p. 18. The Crown sought to lead the evidence of two young girls as similar fact evidence. The trial judge rejected the Crown's application. A non-publication order was issued preventing the publication of the girls' identities or any information that would identify them. Accordingly, they are not named in this report.

[96] Address History of Accused, undated, PFP110432; History of Accused, undated, PFP110433; Probation & Parole points of Interest, undated, PFP110436; Information from Counsellors in 1986, undated, PFP110442

Rasaiah, Smith and Zehr were called as expert witnesses by the Crown in support of that position.[97]

86. The defence called Drs. Jaffe and Ferris.[98]

87. The evidence of each of the experts on the three key trial issues is set out in detail in the facta filed in relation to Mr. Mullins-Johnson's appeals at the Court of Appeal for Ontario and the Supreme Court of Canada.[99] This overview report contains a brief summary of each of the expert's evidence on the key, pathology issues in chart form below.

A. Time of death

Dr. Rasaiah	Dr. Smith	Dr. Jaffe	Dr. Ferris
Dr. Rasaiah testified that there was no accurate or precise manner to determine the time of death based on the scientific evidence at that time, but that there were a number of approaches that pathologists could use to determine the time of death. The first is the temperature of the body. For every hour, there is a drop in body temperature of 1.5	Dr. Smith testified that pathology is not an exact science and that there is considerable variation in what can affect changes or the rate of change that a body undergoes after death. In addition, all of the studies and experiments available at the time dealt with adults and not children, therefore the science with respect to children was even	Dr. Jaffe testified that no good method had been established to determine the time of death.[105] Body temperature has the advantage of being capable of measurement, but there are so many variables that it is not sufficiently accurate to come to a conclusion. Children cool more quickly than adults. Because there are so many variables, body	Dr. Ferris testified that the determination of the time of death by any method, although of investigative value, is of very limited evidentiary value. He did not believe that one could accurately determine the time of death from almost any method in an unobserved death.[107]

[97] The *curriculum vitaes* of Drs. Rasaiah and Smith, filed as exhibits at the trial, can be found, respectively at PFP036048 and PFP036088. This Commission does not have a copy of Dr. Zehr's *curriculum vitae*.

[98] The *curriculum vitaes* of Drs. Jaffe and Ferris, filed as exhibits at the trial, can be found, respectively at PFP036125 and PFP036134.

[99] Appellant's Factum at the Ontario Court of Appeal, March 8, 1996, PFP036484; Respondent's Factum at the Ontario Court of Appeal, October 15, 1996, PFP036533; Appellant's Factum at the Supreme Court of Canada, January 7, 1998, PFP136042; Respondent's Factum at the Supreme Court of Canada, May 8, 1998, PFP059606.

degrees Fahrenheit. The environmental temperature is taken into account as well as whether the child has some underlying natural disease. Using Dr. Crookston's reading of the deceased's temperature, which measured 82 Fahrenheit shortly after 0800, the time of death was calculated to be 2100.[100]	more imprecise.[101] He stated, "I don't pretend for a moment that I can help you establish a time of death within the precision of an hour or several hours."[102] He testified that the time of death could be more or less than Dr. Rasaiah's estimate of 15-17 hours prior to autopsy. He testified he was very reluctant to make a statement as to the time of death based on the body temperature as recorded by Dr. Crookston.[103] He further testified that caution was warranted in the area of a determination of time of death and that it is easier to mislead than to be accurate in this area.[104]	temperature had become discredited as an accurate way of determining time of death.[106]	
The second method of estimating time of death is to look at post mortem staining.		Dr. Jaffe testified that while lividity becomes fixed after a period of time, it is not an	With respect to post mortem lividity, Dr. Ferris testified that he did not believe that

[100] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 60-62.
[101] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 99-100.
[102] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, p. 100.
[103] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 107-109.
[104] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 115-116.
[105] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 164-165.
[106] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 165-166.
[107] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, pp. 40-41.

Post mortem staining begins around two hours after death and is fixed around 12 hours. Given the fixed post mortem staining on the front of the body at the time of autopsy, Dr. Rasaiah concluded that the body had been in that position (face down, kneeling in excess of 12 hours.[108]		instantaneous event. It happens over a number of hours. Therefore, it is not a reliable method of estimating time of death.[109]	method had any validity at all.[110]
The third method of estimating time is the extent of the rigor mortis. At the time of autopsy, 1255 on June 27, there was no rigor mortis in the face or neck but it was present in the upper limbs and lower limbs and based on that, he estimated time of death as having occurred 15-17 hours before that time (i.e. 2000 to 2200 on June 26, 1993).[111]		Dr. Jaffe testified that the degree of rigor mortis present is a subjective evaluation and therefore cannot be used as a reliable tool to estimate time of death.[112]	
Dr. Rasaiah opined that the time of death was between 2000-2200 on June 26, 1993. He acknowledged that the level of accuracy		Dr. Jaffe was not prepared to draw a conclusion as to time of death.[114]	Dr. Ferris did not draw a conclusion as to time of death during his evidence.

[108] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 62-67.
[109] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, p.165.
[110] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, pp. 41-42.
[111] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 67-69.
[112] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, p. 165.

in giving such an estimate was low and did not claim that his estimate was an accurate and precise method.[113]			

B. Cause of death

Dr. Rasaiah	Dr. Smith	Dr. Jaffe	Dr. Ferris
Dr. Rasaiah testified that the cause of death was a lack of oxygen, causing the heart to stop (cardio-respiratory arrest due to asphyxia).[115] He categorized this as an unnatural cause of death and testified that he found no evidence of a natural cause.[116] Dr. Rasaiah concluded that there was a mechanical obstruction either to the nose and mouth, neck or upper chest.[117]	Dr. Smith testified that Valin did not die a natural death. She died of asphyxia.[119] He agreed with Dr. Ferris' report that death was possibly due to manual strangulation.[120] He testified that there was no evidence that Valin died from aspirating her stomach contents.[121] Dr. Smith testified that he could not tell the mechanism, which stopped the oxygen flow to the body.[122]	Dr. Jaffe testified that Dr. Rasaiah's diagnosis of asphyxia rested upon shaky grounds. He saw no clear cause of death, only a number of possibilities.[123] He could not exclude manual strangulation.[124] He suggested that the possible cause of death was inhalation of acid from the stomach.[125]	In his report, Dr. Ferris stated that Valin appeared to have died as a direct result of neck compression.[126] At trial, Dr. Ferris testified that the cause of death in this case was a problem. He felt it was reasonable to say that there was no definitive cause of death that had been established.[127] He found no evidence of natural disease.[128] There was no definitive, easily

[113] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 79, 105-106.
[114] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, p.166.
[115] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, p. 70.
[116] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 70-71.
[117] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 50-53.
[118] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 142-143.
[119] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 71-72.
[120] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 72-75.
[121] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 75-77.
[122] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, p. 116.

He acknowledged that it was possible that Valin got stomach acid in her lungs after extreme vomiting and that caused a build up of fluids in her lungs, which led to her death. However, no vomit was found in the lower air passages or lungs and, therefore, he concluded that the vomit was not the problem.[118]			identifiable cause of death. All he could say was that the mechanism of death was not a severe force.[129] His view was that the cause of death was undetermined.[130] However, he agreed that the external and internal bruising to the neck, sustained at or around the time of death, taken in conjunction with facial hemorrhages "can be reasonably interpreted as evidence of manual strangulation."[131]

C. Injuries on Valin's body and their significance, particularly as they pertained to sexual abuse

Dr. Rasaiah	Dr. Smith	Dr. Zehr	Dr. Jaffe	Dr. Ferris
Dr. Rasaiah examined Valin's genitals at autopsy. The vaginal opening appeared to him	Dr. Smith did not see any abnormalities with respect to the vaginal area (he and Dr. Mian	Dr. Zehr testified that there was evidence of sexual assault on Valin. Her conclusion was	Dr. Jaffe testified that the petechial hemorrhages seen in the photos clearly occurred post	

[123] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 168-169.
[124] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 200-201.
[125] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 177-178.
[126] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 32.
[127] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 31.
[128] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 21.
[129] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 34.
[130] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, pp. 46-47.
[131] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, pp. 53-55.

to be markedly dilated.[132] The anal opening was, in his view, excessively dilated notwithstanding that there may have been some dilation of the anal muscles post mortem.[133]	viewed photos taken at autopsy). He described the hymen as appropriate in size shape and thickness. Dr. Smith concluded that the vagina appeared normal.[134]	based on the gross abnormalities of the anal-rectal area with changes and gaping; changes which looked as though there had been penetration of some kind; trauma around the monds, the labia, the inner thighs and the anus.[135] Dr. Zehr testified that the size of the anal gaping was abnormal. The normal folds around the anus were missing and it appeared very smooth and attenuated, which was characteristic in children that had been sexually assaulted or sodomized. She stated that repeated penetration with a penis or object	mortem. The chest revealed a textbook picture of post mortem hemorrhages.[138] The large hemorrhages, which appeared to be bluish in colour, were caused by some form of blunt impact and were sustained before death, possibly at the time of death. His opinion was that the bruises were 36 hours or less in age.[139] The gaping in the anus was perhaps a bit more than one would expect simply by post mortem relaxation.[140]	

[132] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 71-72.
[133] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 71-72.
[134] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 88-89.
[135] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 21-22.
[136] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 24-25.
[137] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, pp. 29-30.
[138] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 171-172.
[139] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 172-173.
[140] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 175-176.

		would create these symptoms.[136] Dr. Zehr testified there may have been penetration of the vaginal area, but not to the degree of the anal area, if there was.[137]		
Dr. Rasaiah testified that there was nothing about any of the injuries to the sexual organs that suggested that they were recent.[141]	Dr. Smith testified that there was evidence of recent sexual abuse. He stated that he found fresh bruises in the anal area and, microscopically, one laceration in the cells, which line the rectum-anal region. He described this as evidence of a fresh laceration and evidence of at least recent, if not fresh, bleeding or bruising into the area. With respect to the laceration, there was no healing associated with it and therefore it occurred at the	Dr. Zehr was unable to provide a timeframe for when the sexual abuse took place, but stated "there have been multiple episodes or it's been fairly long-standing to get this degree of change in the tissues." It was her view that Valin had been sexually assaulted chronically over a period of time but there was nothing to indicate that it had happened recently.[143]	Dr. Jaffe saw no recent injuries to the anal opening, but did see some old damage. He saw no fissure. With respect to the area that Dr. Smith described as having fecal matter, Dr. Jaffe regarded it as a post mortem artefact and not a recent injury. It could have occurred after death or by the coroner taking Valin's temperature rectally.[144] Dr. Jaffe agreed in cross-examination that in his report, he thought the bruises were pre mortem but at	Dr. Ferris testified that the hemorrhage around the neck structures might have occurred within 30 minutes of death.[146] The bruising around the pubic and vaginal areas were clearly sustained several hours prior to death, either 8-18 hours or even 6-24 hours before death.[147] He found no evidence of fresh injury to the vagina.[148] With respect to the anus, he testified that he noted injury to

[141] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, p. 144.

[142] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 82-87.

[143] Case on Appeal at the Supreme Court of Canada, Vol. II, PFP036812, p. 25.

[144] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 176-177.

	time of death or shortly before. There was also a hemorrhage associated with it, which suggested that the deceased was alive when the injury occurred. Based on the bruising and the laceration, it was his opinion that sodomy did occur. Based on the perimortem bruising and fissuring as well as the position of the body, it was his conclusion that this was typical of the type of injury that one would expect in a child who had been subjected to anal intercourse.[142]		trial he believed they were classical post mortem bruises.[145]	that area and was of the opinion that it was probably sustained some hours prior to death. The rectal laceration seen microscopically can be interpreted as evidence of anal penetration 8-18 hours prior to death.[149] There was nothing to indicate that there was a very fresh injury occurring in and around the time of death. The inside of the anus revealed an area of chronic ulceration, consistent with an injury or infection happening days or weeks before the death, but not an acute episode occurring at the time of death.[150] He saw no acute

[145] Case on Appeal at the Supreme Court of Canada, Vol. III, PFP037014, pp. 190-195, 204-205.
[146] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 22.
[147] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 22-23.
[148] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 55.
[149] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 55.
[150] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, pp. 26-27.
[151] Case on Appeal at the Supreme Court of Canada, Vol. IV, PFP037225, p. 46.

				fissure. He saw no evidence of any sex related activity that could be described as occurring at or around the time of death.[151]

88. On September 21, 1994, Mr. Mullins-Johnson was convicted of first degree murder and sentenced to life in prison with no eligibility for parole for 25 years.[152]

[152] Indictment, December 2, 1993, PFP110387, p. 4; Warrant of Committal, September 21, 1994, PFP036161.

Part VI. The Appeals

A. Appeal to the Court of Appeal for Ontario

89. Mr. Mullins-Johnson appealed his conviction to the Court of Appeal for Ontario. On December 19, 1996, the majority (Catzman and Labrosse, JJ.A.) dismissed the appeal. Justice Borins dissented. He would have granted the appeal, quashed the conviction, and ordered a new trial.[153]

B. Appeal to the Supreme Court of Canada

90. Mr. Mullins-Johnson then appealed to the Supreme Court of Canada.[154]

91. On October 8, 1997, in advance of the hearing at the Supreme Court of Canada, Michael Lomer, appellate counsel for Mr. Mullins-Johnson, wrote to Crown counsel, Scott Hutchinson. He stated:

> As you may recall, DNA typing was done on some samples during the above-noted trial. Specifically, stains were prepared from the vomit found on the victim's sheets and pillow. The pillow stain results indicated that [Valin] could not be excluded as the source of the vomit and that William Mullins-Johnson was not the source of the vomit. The stain prepared from the sheets was not examined. The relevant report from the Centre for Forensic Sciences can be found at p. 846 of the Case on Appeal.
>
> We have retained the services of Dr. John Waye from IDENT in Hamilton. He advises that there are a number of far more discriminating tests that can be done on these samples. Specifically, the CFS now routinely types the following additional loci: LDLR, GYPA, HBGG, D7S8, GC, FES, vWA, THO1, F13.
>
> I am writing to request that you instruct CFS to perform the above-noted typing on the sheets and the pillow stains and that Dr. Waye be permitted to observe the procedure. With respect to the stain from the sheets, since it was not examined at all, DQA1 will of course have to be typed as well. I would appreciate

[153] *R. v. Mullins-Johnson* (1996), 112 C.C.C. (3d) 117 (Ont. C.A.), PFP003581.
[154] Letter from Mr. Lomer to Mr. Hutchinson, January 2,1997, PFP059594.

> it if this matter was treated on an urgent basis, given the time required to perform the tests and the fact that this appeal will be inscribed for the winter session.[155]

92. Mr. Hutchinson replied on October 15, 1997. He stated:

> While you ask that this matter be "treated on an urgent basis" I do not propose to drop everything and deal with your present request. Firstly, this form of testing has been available for many, many months: secondly, I am not certain where these exhibits are or whether they remain under the jurisdiction of the court (in which case an application under section 605 of the Criminal Code would be necessary): and thirdly, (without meaning to be more dense than usual) I am not sure how additional testing would be relevant.
>
> Please contact me by telephone so that we can discuss this and other matters.[156]

93. On January 7, 1998, Mr. Lomer sent his factum to Mr. Hutchinson. In his cover letter, he asked, "Would kindly advise as to the status of the DNA testing at your earliest convenience."[157]

94. On February 16, 1998, Mr. Hutchinson wrote to Mr. Ray Prime, Acting Director, CFS. He said:

> William Mullins-Johnson was convicted of first degree murder on September 21, 1994. On December 19, 1996 the Ontario Court of Appeal (Mr. Justice Borins, dissenting) dismissed his appeal. Mr. Mullins-Johnson's appeal to the Supreme Court of Canada will likely be heard in June of this year.
>
> At Mr. Mullins-Johnson's trial a fair bit of scientific evidence was adduced on behalf of the Crown.
>
> Most of this scientific evidence related to the cause and time of death. However, there was some trace evidence which was examined and which formed part of the case for the Crown. This included vomitus found near the victim's body and semen stains found elsewhere in the house. DNA analysis was conducted in respect of these samples and an opinion provided based on the DQA1 system. (For your reference I have enclosed copies of the report prepared by the Centre of Forensic Sciences together with the report prepared by the Northern Regional Forensic Laboratory.)

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[155] Letter from Mr. Lomer to Mr. Hutchinson, October 8, 1997, PFP059580; *R. v. Mullins-Johnson* (1998), 124 C.C.C. (3d) 381 (S.C.C.), PFP004199; Order, May 26, 1998, PFP110382.

[156] Letter from Mr. Hutchinson to Mr. Lomer, October 15, 1997, PFP059577.

[157] Letter from Mr. Lomer to Mr. Hutchinson, January 7, 1998, PFP059575.

> As this appeal sits awaiting argument in the Supreme Court of Canada I have been asked by defence counsel to seek further testing with respect to the items previously tested by the Centre of Forensic Science. In particular I would ask that the vomitus stain and the blood stain from the victim ([Valin]) be re-tested in additional profiling systems. As I understand defence counsel's concern, the DQA1 system, while successfully excluding his client as a source of the vomitus, is of limited discriminating value in ensuring that the vomitus is not the product of some other person besides the victim (the only other realistic suspect in this case is the victim's biological father).
>
> Based on my own understanding (however limited) of this form of testing I am inclined to agree with defence counsel and therefore I would ask that these samples be further tested in the manner I have suggested. I leave it to the Centre and the scientific experts assigned to this matter to determine what profiling systems and what form of testing are the most useful in the circumstances.
>
> With this all in mind I would, therefore, ask that you assign this matter to a scientist at your earliest convenience and ask them to contact me so that we might discuss how best to proceed. As I note above, this matter is to be heard in the Supreme Court of Canada in June, 1998 and it would be unfortunate if this testing could not be completed prior to that time.[158]

95. Dr. Prime responded on February 26, 1998. He advised that Pamela Newall had been assigned to conduct the requested re-testing.[159] On April 24, 1998, Ms. Newall reported her findings. She concluded that, "The DNA STR profile of the vomitus on the pillow comes from a female and matches the DNA profile from V. JOHNSON at 9 STR loci."[160]

96. Ms. Newall's report was faxed to Mr. Hutchinson that same day.[161] Mr. Hutchinson forwarded the report to Mr. Lomer on April 28, 1998.[162]

97. Mr. Mullins-Johnson's appeal to the Supreme Court of Canada was heard and dismissed on May 26, 1998.[163]

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[158] Letter from Mr. Hutchinson to Dr. Prime, February 16, 1998, PFP059568.

[159] Letter from Dr. Ray Prime to Mr. Hutchinson, February 28, 1998, PFP059567.

[160] Report of Pamela Newall, April 24, 1998, PFP003717, p. 2.

[161] Fax cover page, April 24, 1998, PFP059561.

[162] Letter from Mr. Hutchinson to Mr. Lomer, April 28, 1998, PFP059562.

[163] *R. v. Mullins-Johnson* (1998), 124 C.C.C. (3d) 381 (S.C.C.), PFP004199; Order, May 26, 1998, PFP110382.

98. On April 3, 2001, Mr. Lomer, in his capacity as a private citizen, wrote to Dr. James Cairns, then the Chief Coroner for Ontario, as follows:

> I am writing to you with respect to Mr. Mullins-Johnson who was convicted of first degree murder some time ago. I was counsel with respect to his appeal to the Court of Appeal for Ontario and his subsequent appeal to the Supreme Court of Canada. I did not do his trial. Dr. Charles Smith was the pathologist. I am no longer Mr. Mullins-Johnson's lawyer and have not been since the hearing of the case in the Supreme Court of Canada a couple of years ago. However, it is a case that has always caused me a nagging doubt with respect to his guilt.
>
> I am writing this letter by memory but there were three main issues of interest to pathology at the trial and they were:
>
> 1. Cause of death.
>
> 2. Time of death.
>
> 3. Whether the deceased child had been sexually assaulted at or about the time of death.
>
> There were four pathologists involved in the case and it was only Dr. Smith who testified that the child was sexually assaulted at or around the time of death. Dr. Smith was the only one of the four who saw the microscopic artifact that was the basis for his conclusion that the child died during the course of a sexual assault. As you are no doubt aware the law is that a jury can accept or reject the evidence given by any expert witness. The jury clearly accepted the evidence of Dr. Smith and rejected the evidence of the two pathologists called by the defence. Otherwise the jury could not have convicted Mr. Mullins-Johnson of first degree murder. One of the defence pathologists was Dr. Ferris. I am concerned that this is another of those cases where Dr. Smith's opinion is at odds with what is generally accepted by pathologists practicing in this area. If that is so, then a miscarriage of justice of the most serious sort may well have occurred. As well, if Dr. Smith's opinion was overreaching then the potential number of suspects would increase to include the child's mother.
>
> I read in the Star that there is going to be a review of the professional conduct of Dr. Smith by your office. If that is to be the case, and I have no reason to disbelieve what I read in the newspaper, I am alerting you to this case. It is my view that this is another case of Dr. Smith's that ought to be looked at in the interests of justice.
>
> I have no instructions to request anything on behalf of Mr. Mullins-Johnson and I do not purport to act for him. Simply put, I am writing as a private citizen

> concerned about a case that I was extremely familiar with. Any materials I have I would be happy to turn over to you.[164]

99. On December 28, 2001, Mr. David Bayliss, on behalf of the Association in Defence of the Wrongly Convicted ("AIDWYC"), wrote to Dr. Cairns. In his letter, he stated:

> It is now well known in the legal community that the Office of the Chief Coroner is undertaking a review of Homicide cases in which Dr. Charles Smith has been involved as an expert witness.
>
> AIDWYC is presently investigating the case of William Mullins-Johnson as a potential wrongful conviction. Mr. Mullins-Johnson was convicted of 1st degree murder in the death of his four year old niece in 1994. His appeals to the Ontario Court of Appeal and the Supreme Court of Canada were dismissed. I have attached these reported decisions with this letter.
>
> There were four pathologists involved in the case including Charles Smith. Dr. Smith was the only one of the four who was of the opinion that the child died during the course of a sexual assault. He was not the pathologist who conducted the autopsy. Since the jury convicted of 1st degree murder, they must have accepted the evidence of Dr. Smith.
>
> Time of death and cause of death, that is, whether or not the child was killed or died as a result of a non-inflicted death, were also issues in the case. Clearly, therefore, Dr. Smith's opinion may also have motivated the jury's finding of homicide.
>
> On behalf of Mr. Mullins-Johnson, AIDWYC requests that the coroner's office review Dr. Smith's work in the Mullins-Johnson case. Although the case is no longer before the courts, it is certainly ongoing in the sense that an innocent man may be imprisoned because of an opinion by a doctor whose reliability in other cases is under scrutiny by his own colleagues. As such we suggest fairness dictates that Mr. Mullins-Johnson receive the same consideration being extended to accused persons who are presently before the courts.[165]

100. On January 7, 2002, the sections of Valin's pillow, top sheet, white sheet and yellow bedspread that had been tested before trial at CFS were returned to Cst. Biocchi. [166]

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[164] Letter from Mr. Lomer to Dr. Cairns, April 3, 2001, PFP003936.

[165] Letter from Mr. Bayliss to Dr. Cairns, December 28, 2001, PFP115660.

[166] Letter from Ms. Hagerman to Cst. Biocchi, January 7, 2002, PFP059698.

101. On February 27, 2003, James Lockyer, on behalf of AIDWYC wrote to Sean Porter of the Ministry of the Attorney General, Crown Law Office Criminal. He stated:

> Further to our telephone call two weeks ago, I am formalizing my request, on behalf of AIDWYC, for your assistance in this case. You seem to be the appropriate Ministry contact in this case given the nature of the request and that you are a member of the CFS Advisory Board.
>
> AIDWYC is involved in a preliminary investigation of the conviction of Mr. Mullins-Johnson and has enlisted the help of Dr. Bernard Knight, a pathologist of international repute, to assess the pathological aspects of the case. As part of his examination, Dr Knight has requested that the microscopic material examined by the Crown pathologists be made available to him. Dr. Knight would like to view the original slides examined by Drs. Rasaiah and Smith or, if the originals are not still available, re-cuts from the same paraffin blocks.
>
> The deceased in the case was [Valin], a four year old girl. The autopsy was conducted at the Sault St. Marie General Hospital and specimens in the case were submitted to the Northern Regional Forensic Laboratory. NRFS reference numbers associated with the file are:
>
> O.F.N. 184433-2, Lab. File No. 3167-93[167]

102. Mr. Lockyer also requested copies of a number of the involved officers' notes.[168]

103. On March 4, 2003, Carol Brewer, Deputy Director, Crown Law Office Criminal, replied to Mr. Lockyer. She advised that Mr. Porter was away from the office, and that Mr. Phillip Downes, who had worked on the appeal, would be assigned to assist AIDWYC.[169]

104. On March 13, 2003, Mr. Downes wrote to Mr. Lockyer and advised him he was assigned to the file and would, "be taking steps to secure the material you have requested without undue delay."[170]

105. On March 28, 2003, Mr. Downes wrote to the trial Crown, Mr. Wasyliniuk. He stated:

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[167] Letter from Mr. Lockyer to Mr. Porter, February 27, 2003, PFP059544.
[168] Letter from Mr. Lockyer to Mr. Porter, February 27, 2003, PFP059544.
[169] Letter from Ms. Brewer to Mr. Lockyer, March 4, 2003, PFP059559.
[170] Letter from Mr. Downes to Mr. Lockyer, March 13, 2003, PFP059556.

> A couple of weeks ago I told you about the inquiry from Mr. James Lockyer in relation to the above matter. Mr. Lockyer is conducting a preliminary investigation of the conviction of Mr. Mullins-Johnson on behalf of the Association Defence of the Wrongly Convicted (AIDWYC). A copy of his letter to Shawn Porter of this office is attached. I have been asked to assume responsibility for responding to Mr. Lockyer's request.
>
> You will recall that on September 21st, 1994 William Mullins-Johnson was found guilty of the first degree murder of his 4 year old niece, [Valin]. On December 19th, 1996 the Court of Appeal dismissed the appeal against conviction, and on May 26th, 1998 the Supreme Court of Canada dismissed his further appeal.
>
> The Sault Ste. Marie Police investigated this case and while it is not absolutely clear from the material I have, it would appear that Detectives Martinyuk and Welton were involved in the investigation.
>
> As you can see from Mr. Lockyer's letter, he is requesting at this stage some police notes and some material from the autopsy performed on [Valin]. While I have retrieved all of the materials relating to the appeals, the kind of material requested by Mr. Lockyer is, I presume, still the in the possession of the police and the Northern Regional Forensic Laboratory.
>
> I understand that it is the general practice to provide the material requested, subject to any ongoing privacy concerns. I would greatly appreciate your assistance in locating the requested materials. There is no suggestion at this time of any wrongdoing by either the Crown or the police and as a result it would seem appropriate to seek the assistance of the Sault Ste. Marie Police in obtaining the requested materials. If there is an individual assigned to assist I am happy to speak to him or her directly.[171]

106. That same day, a letter was sent on behalf of Mr. Wasyliniuk to Insp. Toni. Enclosed was the letter from Mr. Downes. He asked that Insp. Toni retrieve the requested items.[172]

107. On April 3, 2003, (now) D/Sgt. Martynuck sent an email to fellow officers Ault, Biocchi, Carlucci, Dubas, Gioia and Toni. It stated:

> A letter has just been rec'd from the Crown Law Office via Glen Wasyliniuk regarding the Mullins-Johnson murder conviction in the death of [Valin] from 1993. The request is from a Mr. Lockyer who acts on for of Mullins-Johnson on behalf of the Association Defence of the Wrongly Convicted.

[171] Letter from Mr. Downes to Mr. Wasyliniuk, March 28, 2003, PFP059542.
[172] Letter from Mr. Wasyliniuk to Inspector Toni, March 28, 2003, PFP059548.

> The Ontario Court and the Supreme Court of Canada have upheld the murder convictions and there is no suggestion at this time of wrongdoing by our Service or the Crown. The request has been made to obtain the notes from the above officers in the matter. The offence occurred on June 27th 1993.
>
> Glen is requesting your notes to be forwarded to me ASAP. I am attaching what your role was and the information that is believed to be in your notes. If you have any questions please do not hesitate to contact me.
>
> 1) Randy Ault- your notes related to your escort of Mullins-Johnson-no date provided
>
> 2) Terry Biocchi-your notes on your investigation
>
> 3) Romano Carlucci-notes of the investigation
>
> 4) Mark Dubas-notes when you escorted Mullins-Johnson-no dates provided
>
> 5) Rob Gioia-notes from securing the crime scene
>
> 6) Cathy Toni-notes related to taking phone of body and crime scene, assistance in investigation.[173]

108. Officers Ault, Toni, Gioia and Carlucci all replied to the request.[174]

109. On May 21, 2003, Mr. Lockyer wrote to Mr. Porter. He sought an update on the requests of February 27, 2003.[175]

110. On June 4, 2003, Dr. Rasaiah sent a letter to S/Sgt. Carlucci. He stated:

> On the 15th of May 2003 at 1200 hours, I received a fax from you requesting the slides and blocks on [Valin].
>
> This is notify you that the microscopic slides were first sent to Dr. Frederick Jaffe of Mississauga, Ontario, who returned the slides on 20 December 1993.

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[173] Email from D/Cst. Martynuck, April 3, 2003, PFP059538.

[174] Email from Officer Ault, April 6, 2003, PFP059537; Fax from Officer Gioia, April 7, 2003, PFP059466; Fax from Officer Toni, April 15, 2003, PFP059516; Fax from Officer Carlucci, May 7, 2003, PFP059454.

[175] Letter from Mr. Lockyer to Mr. Porter, May 21, 2003, PFP059534.

> The microscopic slides were then sent to Dr. Rex Ferris of the Vancouver Hospital and Health Sciences at the request of Kingston, Ontario lawyer, Jennifer Reid.
>
> On the 22nd of June 1994, the microscopic slides and tissue blocks were sent to Dr. Charles R Smith of the Hospital for Sick Children, Toronto, at the request of Crown Attorney, Mr. Glen Wasyliniuk. Our records show that the microscopic slides and tissue blocks were not returned.
>
> On the 3rd of June 2003, I telephoned Dr, Charles Smith who indicated to me that he would look for the slides and blocks.[176]

111. On July 15, 2003, Mr. Wasyliniuk wrote to Mr. Downes, as follows:

> Enclosed is some of the material requested by AIDWYC.
>
> I am advised that the police notes enclosed are all the notes available. Sgt. Jane Martynuck of the Sault Police Service advises that she has checked with the officer's and police personnel named in the request and obtained all the notes in existence.
>
> The pathological evidence requested are the slides examined by Dr. Rasaiah and Smith for the prosecution. Please note Dr. Rasaiah's enclosed correspondence indicating that the slides and tissue blocks were sent to Dr. Charles Smith and not returned. The correspondence also indicates that Dr. Frederick Jaffe and Dr. Rex Ferris, who both testified for the defence, had received the slides earlier than Dr. Smith.
>
> I enclose my entire file. If there are further questions that I can be of assistance with please call.[177]

112. On October 14, 2003, Mr. Downes wrote to Dr. Rasaiah. He stated:

> I am Crown counsel responsible for responding to the request by defence counsel for the slides and blocks on [Valin].
>
> On June 4, 2003 you wrote to Staff Sgt. Carlucci of the Sault Ste. Marie Police Service indicating that you had asked Dr. Smith if he had that material. A copy of your letter is attached for your convenience. May I inquire as to whether you have you heard from Dr. Smith on this issue? If not, would you be kind enough to

[176] Letter from Dr. Rasaiah to S/Sgt. Carlucci, June 4, 2003, PFP003997.

[177] Letter from Mr. Wasyliniuk to Mr. Downes, July 15, 2003, PFP059533.

> either contact him again or provide me with contact information so I can do so myself.[178]

113. Dr. Rasaiah responded the next day. He wrote:

> Thank you for your faxed letter dated 14th October 2003.
>
> As I had indicated in my letter dated June 4, 2003, I had telephoned Dr. Charles Smith to return the tissue slides and blocks on [Valin] (Autopsy number A-93-51), but I did not receive any response.
>
> I called Dr. Charles Smith's office on the 14th of October at 10:00 a.m. and left a message with his secretary but Dr. Charles Smith did not return my call.
>
> [Dr. Rasaiah provided contact information for Dr. Smith.][179]

114. On October 31, 2003, Mr. Downes wrote to Dr. Smith. He stated:

> I understand that in June, 2003 Dr. Rasaiah contacted you about these slides. The Crown has been asked to provide them to defence counsel who are looking into Mr. Mullins-Johnson's conviction for the murder of [Valin].
>
> I would be very grateful if you could advise me of your knowledge as to the whereabouts of this material or could provide them to me so that they can be given to defence counsel.[180]

115. On December 29, 2003, Mr. Downes drafted a memorandum to file regarding a telephone call he had with Dr. Smith that day. The memo stated:

> Spoke by telephone to Dr. Smith @ 9:45 a.m. today.
>
> He had requested his assistant to search the archive for the material. Their first search had proved fruitless. He thinks the samples may not be there. He will take another look when his assistant returns next week.
>
> I asked Dr. Smith to let me know by way of letter what his final position was on the whereabouts of the material. He agreed to do so.[181]

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[178] Letter from Mr. Downes to Dr. Rasaiah, October 14, 2003, PFP059529.

[179] Letter from Dr. Rasaiah to Mr. Downes, October 15, 2003, PFP059527.

[180] Letter from Mr. Downes to Dr. Smith, October 31, 2003, PFP059524.

116. On January 6, 2004, Mr. Bayliss, on behalf of AIDWYC, wrote to Mr. Downes. He stated:

> I write on behalf of Mr. Mullins-Johnson and the Association in Defence of The Wrongfully Convicted.
>
> As you know, this file sat for almost a year in your office with our letters unresponded before you took it over. You explained that the delay was due to the fact that Sean Porter, who had carriage of the file, was in Ireland and no one at your office attended to this file when he left. You were very apologetic when you contacted me and assured me that immediate action would be taken to provide the materials we were requesting. The required materials, detailed in out letter of February 27, 2003, included slides from the autopsy which we wish to send to another pathologist who is assisting AIDWYC in reviewing Mr. Mullins-Johnson's case.
>
> You have now had carriage of the file for almost a year. You have asked us to be patient and have undertaken to provide the materials to us without unnecessary delay. We have been patient but your undertaking has not been kept. Mr. Mullins-Johnson continues to reside in the penitentiary with little progress on AIDWYC's investigation of his case over the last two years. This delay has been due to the failure of your office to provide the materials we have requested.
>
> Please keep in mind that AIDWYC is investigating Mr. Mullins-Johnson's case because of the possibility that he was wrongly convicted of first degree murder of a child. It seems to me that this possibility should be sufficient to motivate you act expeditiously without letters and phone calls from me.
>
> Would you please advise me of the status of the missing materials at your earliest convenience.
>
> Thank-you for your anticipated cooperation.[182]

117. Mr. Downes replied on January 12, 2004. He wrote:

> Thank you for your letter of January 6, 2004.
>
> I understand your frustration over the delay in receiving the materials you have requested. When I had to be away from the office for personal reasons in the late fall I had hoped that I would have a favourable response from Dr. Smith to my repeated requests for the forensic material. He informed me on December 29, 2003 that he has been unable to located the slides. I have asked him to conduct

[181] Memorandum, December 29, 2003, PFP059523.

[182] Letter from Mr. Bayliss to Mr. Downes, January 6, 2004, PFP059521.

> a further search and he has agreed to do so and provide me with a written response to my requests. I will be in contact with him again this week if I have not heard from him.
>
> In the mean time, I enclose copies of the police notes I have received from the Sault Ste. Marie Police. A summary chart of your request and our response is attached.
>
> Where you asked for "any further notes" I cannot say at this time whether the notes I am providing now were or were not provided originally. I am simply providing you with the notes forwarded to me from the Sault police in response to your letter.
>
> I do appreciate the important efforts that AIDWYC is undertaking in reviewing Mr. Mullins-Johnson's conviction and I apologize for the delay so far. I should point out that while you suggest that there is correspondence relating to your request dating back some two years, the earliest request we have is February 27, 2003 to Mr. Porter. If you are aware of earlier letters please let me know so that we can complete our records.[183]

118. Mr. Downes also provided a chart listing the officers involved in the case and the status of the disclosure of their respective memo-book notes to AIDWYC.[184]

119. Mr. Bayliss wrote again to Mr. Downes on January 20, 2004. He stated:

> Thank you for your letter of January 12, 2004. You are in fact correct that our first correspondence to Mr. Porter was on February 27, 2003, so that the delay is eleven months not two years as I stated in my letter…
>
> …
>
> With respect to the microscopic slides which are required by our expert to assess the physical evidence that we have in furtherance of AIDWYC's investigation of this matter, it is disconcerting to hear that Dr. Smith has been "unable to locate" the slides. As you have indicated that you will be asking Dr. Smith to look for the slides again and provide written report with respect to his efforts, I wonder if you might also ask him if there are blocks of tissue from the autopsy from which new slides can be made if the originals have been lost.

[183] Letter from Mr. Downes to Mr. Bayliss, January 12, 2004, PFP059397.

[184] Letter from Mr. Downes to Mr. Bayliss, January 12, 2004, PFP059397.

> You have also included in a subsequent telephone call that you will have an officer investigate the whereabouts of the slides. I would also ask that you have this officer look into the availability of tissue blocks from which new slides can be taken.
>
> Given that we have been delayed for a year now waiting for these materials, we are hopeful that they can be provided in the near future.[185]

120. On January 28, 2004, Mr. Downes wrote to Dr. Smith, as follows:

> I understand from our recent telephone conversation that you have so far been unable to locate any of the microscopic slides examined by you in this case.
>
> I would greatly appreciate it if you could confirm, in writing, whether this continues to be the case and whether, if the slides are not available, you have any knowledge of whether the tissue block from the autopsy is nevertheless available from which new slides could be generated.
>
> I would appreciate hearing from you at your earliest convenience.[186]

121. That same day, Mr. Downes wrote to D/Sgt. Martynuck. He requested an update on several specific officers' notebooks. He then stated:

> Dr. Charles Smith has been unable to locate the microscopic material examined in the course of this ease. It is obviously of some concern to everyone if this material cannot be located. Consequently, I would like to have this issue investigated to determine what happened to the forensic material after the trial to try and determine, as quickly and as thoroughly as possible, where this material is. If the original slides are not available, can new slides be generated from tissue blocks from the autopsy?
>
> It is of some importance that we get to the bottom of this as quickly as possible. I would be grateful if you could let me know at your earliest possible convenience whether you are in a position to undertake this investigation.[187]

122. Mr. Downes also wrote to Mr. Bayliss on January 28, 2004. He stated:

> Thank you for your letter of January 20, 2004 (received January 26, 2004).

[185] Letter from Mr. Bayliss to Mr. Downes, January 20, 2004, PFP059395.

[186] Letter from Mr. Downes to Dr. Smith, January 28, 2004, PFP004000.

[187] Letter from Mr. Downes to D/Sgt. Martynuck, January 28, 2004, PFP059361.

> With respect to the notes, the table attached to my letter of January 12, 2004 provides the position of the Sault Ste. Marie Police in response to your request. My understanding is that where no notes have been provided, there were none made. I have, however, asked them to clarify or provide more information on those officers where it is indicated that notes are not available.
>
> With respect to the forensic material, I have written both to Dr. Smith and the investigating officer with a view to determining both the whereabouts of the original slides and the availability of the tissue block from which new slides might be generated. I have urged on them both the need for prompt attention to these requests and will advise you of any response.[188]

123. On January 30, 2004, (now) Sgt. Toni drafted a memorandum to S/Sgt. Carlucci, which stated:

> On the 29th of January 2004 you asked me to check with the hospital to see if any samples were available from the [Valin] homicide in 1993. On the 30th of January 2004 at 1130am I spoke with Jim Corelli who was the pathology assistant on the case. He advised me that three or four months ago Sgt. Martynuck had asked him the same question and they had researched their files. He had found items from every file around that case number, except that one. IE: if it was case number 110, they found 109 and 111, but not 110. They determined that they had sent everything to Dr. Charles Smith, including slides and block tissues. They had received a letter back from him acknowledging receipt of the items and still have this letter. They have never received any of the samples back. They keep these items for approximately 20 years, and also make records of when items are received back. There are no notations in this file that anything was received back. He advised me that Dr. Rasaiah was not working today, but he would ask him about it again on Monday.[189]

124. On February 2, 2004, Sgt. Toni drafted a second memorandum to S/Sgt. Carlucci. She wrote:

> Further to my report from the 29th of January 2004, I spoke to Dr. Rasaiah today about this case. He advises that there is not a letter in the file from Dr. Smith acknowledging receipt of the samples, but rather his letter to Dr. Smith when he sent the items, which includes an indication that he was sending them all (slides and blocks) on the advise of the Crown Attorney Glen Wasyliniuk. He was reluctant at the time, knowing that if he sent everything and they got lost, that he would lose everything. He advises they do regularly send slides and/or blocks of tissue to different doctors such as this. The common practice is that the

[188] Letter from Mr. Downes to Mr. Bayliss, January 28, 2004, PFP059388.

[189] Memorandum from Sgt. Toni to S/Sgt. Carlucci, January 30, 2004, PFP059381.

> reviewing pathologist prepares a report on his findings, sends a report to the Crown Attorney, or whoever requests the review, as well as a copy to the original pathologist (Dr. Rasaiah in this case). This is usually accompanied by a notation thanking them for loaning the items, and that they are being returned. When the items are received back at the lab, there is a notation made in the file, and the tissues are replaced in storage. These items were never returned, nor was he ever given a copy of Dr. Smith's report. He has no idea to this date as to what Dr. Smith concluded.
>
> Dr. Rasaiah advises that if the Crown Attorney reviewing this case wishes to call him, he would be happy to talk to him about it. [Emphasis in original.][190]

125. On February 4, 2004, Sgt. Toni drafted another memorandum to S/Sgt. Carlucci. It stated:

> On the 04th of February 2004, Louise O'Neill from Superior Court advised me that she had recalled the file of William Mullins-Johnson and there are no document exhibits with the courts.
>
> Also, I reviewed the two boxes of document evidence and two boxes of physical evidence and did not find any of the items such as a report from Dr. Smith or any biological samples.[191]

126. On February 27, 2004, Mr. Downes wrote to Mr. Bayliss, as follows:

> Please find enclosed some follow-up material. I trust that the covering letter to me from S/Sgt. Carlucci is self-explanatory.
>
> I have also enclosed a copy of my letter to Dr. Smith dated January 28, 2004. I have not received a reply. It appears from S/Sgt. Carlucci's letter and the attached documents that Dr. Smith is best placed to provide information about the whereabouts of this material. I am considering what other options are available to us to obtain the material or further information about it from Dr. Smith and will keep you advised.[192]

127. On March 16, 2004, Mr. Downes again wrote to Dr. Smith, as follows:

> Please find enclosed a copy of my letter to you of January 28, 2004.

[190] Memorandum from Sgt. Toni to S/Sgt. Carlucci, February 2, 2004, PFP059382.
[191] Memorandum from Sgt. Toni to S/Sgt. Carlucci, February 4, 2004, PFP059383.
[192] Letter from Mr. Downes to Mr. Bayliss, February 27, 2004, PFP059354.

I would be very grateful if I could receive a reply at your earliest convenience.[193]

128. On April 7, 2004, Mr. Downes sent an email to D/Sgt. Martynuck. It stated:

> Would you be able to look into my request below. You might pass on this email to Staff Sgt. Romani Carlucci who was kind enough to undertake some follow-up work on the Mullins-Johnson request and provided further material which was greatly appreciated.
>
> There is one further area in which I would appreciate some assistance and which I feel, given the situation involving the whereabouts of the forensic material, requires that this be done by the police and not by Crown counsel.
>
> We have so far been unsuccessful in locating the forensic material that seems to have last been in the custody of Dr. Charles Smith in Toronto. I have written and spoken to him repeatedly and have given consideration to what means are available to compel information or material from him. I think at thus stage, however, it would be prudent to contact the coroner's office, either locally or the chief Coroner's office in Toronto and see if they can shed any light on this issue. The autopsy was conducted at the Sault Ste Marie General Hospital and is number A-93-51. Specimens were apparently also sent to the Northern Regional Forensic Laboratory under reference number OFN 184455-2, Lab File No. 3167-93.
>
> We are looking for the slides taken from the original tissue block or the block itself from which new slides might be taken.[194]

129. On April 8, 2004, D/Sgt. Martynuck forwarded the email to S/Sgt. Carlucci.[195]

130. On April 13, 2004, Mr. Downes wrote to Mr. Bayliss. He stated:

> On March 16, 2004 I sent Dr. Smith a registered letter asking for a response to my earlier letter requesting his written response to my questions about the possible whereabouts of the forensic material in this case. I have not heard back from him. I have asked the police to conduct inquiries with the office of the Coroner in the event that they might be of any assistance.
>
> If you see fit to pursue any particular procedure or course of action I would be pleased to co-operate.[196]

---

[193] Letter from Mr. Downes to Dr. Smith, March 16, 2004, PFP059349.

[194] Email from Mr. Downes to Officer Martynuck, April 7, 2004, PFP110452.

[195] Email from Officer Martynuck to S/Sgt. Carlucci, April 8, 2004, PFP110452.

131. Mr. Bayliss replied on November 15, 2004. He wrote:

> I enclose a copy of your letter to us dated April 13, 2004. With respect to this letter could you please advise:
>
> -Has Dr. Smith responded to your registered letter dated March 16, 2004;
>
> -Has the coroner's office been of any assistance in locating the slides or tissue;
>
> -Has there been any other development of significance since April, 2004.
>
> Obviously, our office and AIDWYC, which is investigating this case, are concerned that Dr. Smith's negligence appears to have brought any investigation of this aspect of the case to a standstill.
>
> Could you please contact me at your earliest convenience to discuss the matter.
>
> Thank you for your anticipated co-operation.[197]

132. On November 17, 2004, Mr. Downes wrote to Dr. Barry McLellan, Chief Coroner. He stated:

> We have received a request from Mr. James Lockyer and Mr. David Bayliss in relation to the above individual. They are conducting a preliminary investigation on behalf of the Association Defence of the Wrongly Convicted (AIDWYC) into the conviction of Mr. Mullins-Johnson.
>
> On September 21, 1994 William Mullins-Johnson was found guilty of the first degree murder of his 4 year old niece, [Valin]. On December 19th, 1996, the Court of Appeal dismissed the appeal against conviction, and on May 26th, 1998, the Supreme Court of Canada dismissed his further appeal.
>
> The Sault Ste. Marie Police investigated this case and have provided assistance over the last eighteen months or so in locating material requested by Mr. Lockyer and Mr. Bayliss.
>
> AIDWYC has enlisted the help of Dr. Bernard Knight to assess the pathological evidence in the case. As a result, we have been asked if Dr. Knight could view

[196] Letter from Mr. Downes to Mr. Bayliss, April 13, 2004, PFP059346.

[197] Letter from Mr. Bayliss to Mr. Downes, November 15, 2004, PFP059345.

> the original slides examined by Dr. Rasaiah and Dr. Charles Smith in this case or, if the originals are not available, "re-cuts from the same paraffin blocks".
>
> I understand that the autopsy was conducted at the Sault Ste. Marie General Hospital and specimens in the case were submitted to the Northern Regional Forensic Laboratory under reference number O.F.N.184433-2, Lab File No, 3167-93.
>
> I and Sgt. Romano Carlucci of the Sault Police have made requests to various parties, including the Regional Coroner, Dr. Legge, Dr. Smith, and Dr. Rasaiah but have been unable to locate any of the forensic material. Dr. Legge suggested that we seek your assistance in determining the whereabouts of this material from Dr. Smith. I would be grateful if you could provide any assistance you can at your earliest convenience.[198]

133. On November 24, 2004, a post-it note was written and attached to the June 22, 1994, letter from Dr. Rasaiah to Dr. Smith, in which Dr. Rasaiah indicated he was sending the [Valin] slides and blocks to Dr. Smith, at the request of Mr. Wasyliniuk, for Dr. Smith's expert opinion. The post-it note read:

> DZ spoke to Dr. Rasaiah
>
> -once materials were sent, no response from CRS
>
> -no report was issued to Dr. Rasaiah
>
> -he was not allowed to hear CRS' testimony so does not know what was said[199]

134. That same day, James Corelli sent a fax cover page to Sgt. Toni, which stated, "[H]ere is copy of our cover letter to as to when we sent slides and blocks. [A]pparently if needed we have a letter stating he did receive-however I believe [illegible] may have a copy of ltrs as well."[200]

135. On November 26, 2004, Dr. Cairns and Dorothy Zwolakowski met with Dr. Smith to discuss the missing slides. On November 29, 2004, 20 slides were located in Dr. Smith's office.

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[198] Letter from Mr. Downes to Dr. McLellan, November 17, 2004, PFP003995.

[199] Post-it note, November 24, 2004, PFP003935.

[200] Fax cover page, November 24, 2004, PFP110453.

The OCCO took possession of the slides on November 30, 2004, at which time the Crown was notified.[201]

136. On December 1, 2004, Mr. Downes sent a fax to Mr. Bayliss, which stated, "I would like to update you on the status of my inquiries but I have been unable to reach you by telephone. Please give me a call so that we can talk."[202]

137. On December 10, 2004, Mr. Downes wrote to Mr. Bayliss to advise him that the slides had been found:

> I am writing to tell you that Dr. McLellan's office has been successful in locating some of the original autopsy slides from Mr. Mullins-Johnson's trial. It appears, however, that there are still some slides outstanding, which may be relevant for your purposes.
>
> Dr. McLellan's office is in the process of reviewing the slides and searching for the remaining ones. They will also be taking steps to ensure that a proper record of the slides is created prior to releasing them to you. I understand that they hope to be in a position to have them sent to you in early January. I will advise you as soon as possible.[203]

138. On December 14, 2004, Mr. Wasyliniuk sent the complete set of photographs taken by the Sault Ste. Marie Police Service to Mr. Downes.[204]

139. On January 10, 2005, Mr. Bayliss wrote again to Mr. Downes. He stated, "Can you please advise with respect to the availability of the slides and/or tissue blocks now that you have met with the coroner?"[205]

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[201] Case contact log, undated, PFP003662.
[202] Fax cover page, December 1, 2004, PFP059337.
[203] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 112.
[204] Letter from Mr. Wasyliniuk to Mr. Downes, December 14, 2004, PFP003962.
[205] Letter from Mr. Bayliss to Mr. Downes, January 10, 2005, PFP059327.

C. The January 19, 2005 Report of Dr. Michael Pollanen

140. On December 7, 2004, Dr. Barry McLellan, the Chief Coroner for the Province of Ontario contacted Dr. Michael Pollanen. At that time, Dr. Pollanen was provided with 20 microscopic slides prepared by Dr. Rasaiah from the post mortem. He subsequently was also provided with the autopsy photographs. On the basis of those materials, as well as the autopsy report of Dr. Rasaiah and the consultation report of Dr. Ferris, Dr. Pollanen was asked to address the following questions:

(a) Is there evidence of acute penetrating anal trauma?

(b) Is the cause of death mechanical asphyxia?

(c) What is the time of death?[206]

141. On January 19, 2005, Dr. Pollanen issued his report. With respect to the first question, whether there is evidence of acute penetrating anal trauma, Dr. Pollanen wrote:

> The central issue in this case, in my view, is that there is no evidence of acute anogenital injury and that this diagnosis was mistakenly advanced at trial. In addition, the diagnosis rests on a shaky foundation that does not stand up to scrutiny by review.
>
> ...
>
> My review of the post-mortem photographs does not disclose evidence of acute anal trauma. Furthermore, the study of McCann et al is informative, reconciling observations of Drs. R, M and S. The post-mortem appearance of the anus in children is notoriously difficult to interpret. Most of the pitfalls involve overinterpretation of post-mortem changes and normal anatomical structures.
>
> ...
>
> As is discussed in detail below, Dr. S's diagnosis of sodomy is based on his histologic observation of a laceration in the anorectal tissues.
>
> ...

[206] Report of Dr. Michael Pollanen, January 19, 2005, PFP004202, pp. 2-6.

> My review of the relevant histologic slides is described in table below. There is no histopathologic evidence of injury to the anus, anorectal junction, or vagina in the microscopic slides available for my examination. The observations of "ulceration", "laceration," and "hemorrhage" made by other pathologists are, in my view, attributable to autolysis or artefacts related to dissection or tissue preparation for microscopy. Similarly, the observations of "fibrosis", "capillary proliferation" and "chronic inflammation" are normal histology or minimal deviation from normal histology that have no forensic importance.
>
> ...
>
> In conclusion, based on the reviewable evidence available to me I find no evidence of acute penetrating anal trauma in [Valin]. I find no evidence of old trauma, but this cannot be excluded, since anal mucosal trauma may heal without apparent residual lesions such as scarring.[207]

142. With respect to the cause of death, Dr. Pollanen stated:

> Much of what Dr. R. describes as trauma in his autopsy report are post-mortem artefacts related to lividity. These lividity artefacts range from petechial hemorrhages and Tardieu spots to larger pools of hypostatic hemorrhage in the subcutaneous fat and dermal-subcutis interface. This is from prone positioning of the body and the development of intense rigor mortis (gravitational pooling of the blood after death). This phenomenon is well known and is described in standard textbooks. It is commonly observed in forensic autopsies, but can be quite alarming to those who have not become acquainted with it. It is most problematic in the ventral neck and scalp, where it simulates the hemorrhagic lesions of strangulation and subcalpular bruising, respectively.
>
> In my view, Dr. R and Dr. S have misinterpreted many of the Tardieu spots and larger hypostatic hemorrhages as bruising. This misinterpretation has had the effect of overemphasizing the forensic importance of these findings i.e. artefacts have become evidence of injury.
>
> ...
>
> Mechanical asphyxia by external compression of the nose and mouth, or chest compression cannot be excluded as a cause of death. However, the main support for this conclusion seems to be an essentially negative autopsy i.e. the differential diagnosis includes asphyxia not because there are positive findings that allow one to make that conclusion, but rather because the possibility cannot be negated.

[207] Report of Dr. Michael Pollanen, January 19, 2005, PFP004202, pp. 7-15.

...

In my view, given the essentially negative autopsy, it is reasonable to consider mechanical asphyxia, as a cause of death. On the basis of the same line of reasoning, it is also prudent to consider natural causes...

...

Therefore the essentially negative autopsy supports death by mechanical asphyxia or an undiscovered natural cause. If the pathologist offers a conclusion of mechanical asphyxia, then it is largely based on circumstantial evidence and the belief that most of the expected natural causes of death have been excluded by the post-mortem (i.e. diagnosis by exclusion). The circumstantial evidence might include consideration of situational factors and background information that are, in my view, outside of the proper consideration of the pathologist. Interpretation of situational factors, in my view, are more properly interpreted by the trier of fact than the pathologist.

...

In conclusion, based on the reviewable evidence available to me, I give as a cause of death *unascertained* which means that both natural and un-natural causes of death are objectively possible. In general, the pathologist's decision on the cause of death can be powerful evidence in a trial. If the determination of the cause of death falls short of reasonable certainty, then the court benefits from an unambiguous explanation of the uncertainty. This is not tantamount to an expression of ignorance, but it is in accordance with the importance the courts place on the independent and objective evidence of a pathologist in criminal proceedings. [Emphasis in original.][208]

143. With respect to the time of death, Dr. Pollanen stated:

Like the other issues in this case, determination of the time of death is a recurrent challenge in forensic pathology...

...

Suffice it to say that the prevailing view now is that the determination of the time of death by the pathologist is seldom useful as strong evidence in criminal proceedings for three main reasons:

-The non-predictability of the rate of post-mortem changes

[208] Report of Dr. Michael Pollanen, January 19, 2005, PFP004202, pp. 15-20.

> -The lack of reproducible standards that allow correspondence between a postmortem interval and a postmortem change
>
> -The wide variation in opinions among similarly qualified and reasonable pathologists even when confronted with the same facts in a case
>
> Thus, the pathologist's determination of the time of death is usually subjective and little weight should be placed on it. Any significant reliance on postmortem observations and temperature-based methods of determining time of death, particularly if it is used to narrow a 'window of opportunity' for the commission of a crime, is fraught with hazard.
>
> ...
>
> In summary, the prevailing view now is that the determination of the time of death by pathologic evidence must be treated with the utmost caution.[209]

144. Dr. Pollanen concluded by stating:

(a) I disagree with the medical argument that was used at the trial to conclude that [Valin] was sodomized.

(b) Hypostatic artefacts have been over interpreted as bruises and petechial hemorrhages.

(c) The cause of death has not been ascertained by the postmortem examination.

(d) If the cause of death is mechanical asphyxia, then the major support of that determination is an essentially negative autopsy, rather than positive anatomical evidence.

(e) The medical argument that was used at the trial to conclude that [Valin] died between 8:00 and 10:00 p.m. on Saturday, June 26, 1993 must be interpreted with the utmost caution.

(f) Based on the materials that have been made available there is little that can now, retrospectively, be done to clarify some of the outstanding issues (i.e., it is my

[209] Report of Dr. Michael Pollanen, January 19, 2005, PFP004202, pp. 20-21.

> understanding that post-mortem blood samples, formalin-fixed tissues and the wax blocks are no longer available). Theoretically, the tissue on the existing microscope slides is a DNA source for [Valin].[210]

145. On January 24, 2005, Dr. McLellan left Mr. Downes a voicemail message advising that Dr. Pollanen had completed his report. The message was subsequently passed on to Mr. Ken Campbell, Deputy Director, Crown Law Office Criminal.[211]

146. On February 3, 2005, Mr. Bayliss left a message for Mr. Downes, which stated:

> Ms. Vanderlaan, my name is David Bayliss. I'm counsel for someone named, William, his first name, and Mullins-Johnson is the last name. Phil Downes is working on it. It's an AIDWYC potential wrongful conviction case.
>
> We are trying to locate slides that Dr. Smith apparently lost.
>
> Phil was having a meeting with the Coroner who had found something that might be what we are looking for. I think that took place just prior to Christmas. And I have sent Phil a letter and sent him a voice-mail today asking him what came of that and whether the slides and/or tissue blocks are now available.
>
> And I'm now just leaving this message with you to make sure that Phil gets it because I know he is involved in a long trial. So if he's not checking his messages, hopefully, you will call him.
>
> My number is: 416-788-5250.
>
> Again, we are, you know, very anxious to find out the result of Phil's meeting.[212]

147. The message was passed along to Mr. Campbell.[213]

148. On February 4, 2005, Mr. Bayliss wrote to Mr. Campbell. He wrote:

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[210] Report of Dr. Pollanen, January 10, 2005, PFP004202, p. 22.
[211] Transcript of voicemail message, January 24, 2005, PFP059326.
[212] Transcript of voicemail message, February 3, 2005, PFP059325.
[213] Transcript of voicemail message, February 3, 2005, PFP059325.

> I understand this file has now been assigned to you as a result of Mr. Downes involvement in [another matter].
>
> As you will see from the correspondence history of the file, we have been attempting for some time to obtain possession of the slides from the autopsy of [Valin], for examination by an expert. These were apparently "misplaced" by doctor Charles Smith who last had them, according to police information.
>
> As a result of our attempts and media interest in this situation, some slides in relation to the matter were obtained by the chief coroner, Dr. McLellan. Mr. Downes wrote to me on December tenth, 2004, advising of this information. The letter also stated that the slides that were available would be provided to us sometime in early January. Mr. Downs undertook to advise me as soon as the slides were indeed available.
>
> It is now February 4. By letter dated January 10, 2005, I wrote to Mr. Downes requesting information arising out of his meeting with the coroner. As a result of a voice mail message left on February 3, I was advised that you are now assigned to the file. It is unfortunate that Mr. Downes, who I understand actually met with Dr. McClellan, could not have advised me of the results of that meeting.
>
> Be that as it may, could you please advise at your earliest convenience what, if any, slides or tissue blocks are now available.[214]

149. On February 8, 2005, Mr. Campbell left a message for Dr. McLellan asking that he call him about the Mullins-Johnson case.[215]

150. On February 11, 2005, Mr. Campbell wrote to Mr. Wasyliniuk. He stated:

> I met with Dr. James Cairns, the Deputy Chief Coroner of Ontario, this morning. He provided me with a ***Report*** that has been prepared by Dr. Michael Sven Pollanen in connection with this case. He also briefed me about the contents of the ***Report***. I have enclosed a copy of that ***Report*** for your consideration.
>
> I have also enclosed, for your assistance, a thick, red-bound, tabbed volume of materials that, I think, contains a copy of ***all*** of the expert evidence that was adduced by the parties at the trial of this matter (i.e. all of the Reports, CV's and Transcripts of *viva voce* evidence). Hopefully, this volume of materials will help you in recalling this case, and in understanding and assessing the potential significance of the new ***Report*** by Dr. Pollanen.

[214] Letter from Mr. Bayliss to Mr. Campbell, February 4, 2005, PFP059324.
[215] Action Memo, February 8, 2005, PFP003955.

> Further, for your information, after my meeting with Dr. Cairns this morning, I quickly briefed Paul Lindsay, the Acting Assistant Deputy Attorney General of the Criminal Law Division, and Carol Brewer, the Acting Director of the Crown Law Office - Criminal, and provided them both with a copy of this new ***Report***. Given the potential significance of this new ***Report*** on this case, I thought that they needed to be advised of this information as soon as it was available.
>
> I anticipate that very early next week I will provide defence counsel in this case with a copy of this ***Report***, and advise them that the Crown has no objection to the defence obtaining the original tissue slides from the Coroner's Office in the event that they still want to have their own expert examine this case. While the defence will, no doubt, be pleased with the content of the new ***Report***, my guess is that they will still want to have their own expert conduct another examination of the available slides.
>
> I trust that, for the time being at least, this is satisfactory. If it is at all possible, I would like to discuss this case (and the significance of this new ***Report***) further with you early next week, in order to best assess our next steps in this case. [Emphasis in original.][216]

151. On February 14, 2005, Dr. McLellan wrote to Michal Fairburn of the Crown Law Office Criminal, who had been assigned to the file. He stated:

> I enclose a copy of my letter of February 14, 2006, sent to Dr. Butt and Professors Milroy and Crane, with respect to the review of materials arising from the autopsy performed on [Valin]. I also enclose, for your information, the Revised Inventory List of Attachments.
>
> Thank you for meeting with me on January 27, 2006 to discuss the appropriate materials to be included for this review. I will forward a copy of the reports arising from this review to your and Mr. Lockyer's attention when received.[217]

152. A duplicate letter was sent to Mr. Lockyer that same day.[218]

153. On February 16, 2005, Mr. Campbell wrote to Mr. Bayliss and enclosed a copy of Dr. Pollanen's report. His letter stated:

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[216] Letter from Mr. Campbell to Mr. Wasyliniuk, February 11, 2005, PFP059322.
[217] Letter from Dr. McLellan to Michal Fairburn, February 14, 2005, PFP058614.
[218] Letter from Dr. McLellan to Mr. Lockyer, February 14, 2005, PFP116544.

> On Friday, February 11, 2005 I was provided with a ***Report*** prepared by Dr. Michael Sven Pollanen of the Office of the Chief Coroner in connection with this matter.
>
> It seems that your request for production of the microscopic slides in this case set in motion a series of events that led to something of a review being conducted by Dr. Pollanen of at least some of the available materials in this case, and the preparation of this ***Report***.
>
> Pursuant to my continuing obligation to make full and complete disclosure to the defence, I have enclosed, for your consideration, a copy of this ***Report*** by Dr. Pollanen.
>
> Please understand that you are being provided with this ***Report*** on the condition that it will be used only for the purposes of advancing the position of your client on an application to the federal Minister of Justice in proceedings launched pursuant to Part XXI.1 of the Criminal Code, and it will not be distributed or otherwise disseminated to the media or any members of the public. As summarized in the ***Martin Report***, these conditions are part of the normal, implied duties of defence counsel with respect to Crown disclosure materials. If you disagree, however, with my understanding of these duties, I would greatly appreciate it if you would please return the enclosed ***Report*** to me so that we can take steps to arrive at a common understanding as to your obligations in this regard. [Emphasis in original.][219]

154. On February 17, 2005, Dr. Pollanen sent a memorandum to Dr. Barry McLellan in which he provided a list of other forensic pathologists who might be appropriate for reviewing the death of Valin. He recommended:

> Professor Stephen Cordner- Australia
>
> Professor Jack Crane- Northern Ireland
>
> Dr. Peter Ellis- Australia
>
> Dr. Stephen Leadbeatter- United Kingdom
>
> Professor Christopher Milroy- United Kingdom

[219] Letter from Mr. Campbell to Mr. Bayliss, February 16, 2005, PFP059281.

Professor Derrick Pounder- United Kingdom[220]

155. He also noted that he would have recommended Professor Bernard Knight but for the fact that Dr. Knight may have already been retained by a party in the proceeding.[221]

156. On March 10, 2005, Mr. Bayliss replied to Mr. Campbell's letter of February 16, 2005. He wrote:

> Given the report of Dr. Pollanen, we feel that Mr. Mullins-Johnson is now in a position to bring an application under section 696 of the Criminal Code of Canada. I am in the process of providing an opinion to Legal Aid Ontario requesting a funding for this procedure.
>
> While I will, as you have requested in your covering letter, keep the report confidential at this point, I feel it is at least my duty to remind you of obligations the Crown has to other persons affected by the actions of Dr. Charles Smith. I know that two persons in particular, Mr. Kporwodu and Ms. Veno, have their appeals on reserve with the Ontario Court of Appeal. It seems to me that the report of Dr. Pollanen in Mr. Mullins-Johnson's case would be admissible as fresh evidence on that appeal. I ask you to consider your obligation to disclose the report to those defendants and any others whose lives have been and continue to be affected by of Dr. Smith's opinions.[222]

157. On March 17, 2005, Mr. Campbell received a letter from Ms. Marlys Edwardh, counsel for Anthony Kporwodu. She was seeking, for the purposes of the Kporwodu appeal at the Court of Appeal for Ontario, a copy of Dr. Pollanen's report in the Mullins-Johnson case.[223]

158. Mr. Campbell responded to Ms. Edwardh the following day. He wrote:

> I am sorry that I missed your call yesterday afternoon. However, I did receive your letter in connection with the above-noted matter which, I take it, outlines the nature of your inquiry in writing. Permit me to respond.
>
> As you know, I am not Crown counsel assigned to this case. Crown counsel on this appeal are, of course, Michal Fairburn and Jennifer Woollcombe. They are the counsel from this Office who prepared and argued the appeal on behalf of the

[220] Internal Memorandum from Dr. Pollanen to Dr. McLellan, February 17, 2005, PFP003957.
[221] Internal Memorandum from Dr. Pollanen to Dr. McLellan, February 17, 2005, PFP003957.
[222] Letter from Mr. Bayliss to Mr. Campbell, March 10, 2005, PFP085003.
[223] Letter from Ms. Edwardh to Mr. Campbell, March 17, 2005, PFP059279.

Crown in this case. Indeed, I know only very little of the factual circumstances of this case, or the legal issues it raises. Accordingly, I am, as I am sure you can appreciate, extremely reluctant to interfere in it, especially given that Ms. Fairburn is currently away from the office (and out of the country) on vacation, and is unavailable for consultation.

But perhaps I may be of some assistance to you, pending Ms, Fairburn's return, by providing you with some details with respect to the *R. v. Mullins-Johnson* matter. You are quite right that Dr. Pollanen has, quite recently, prepared a *Report* in connection with the *R. v. Mullins-Johnson* case. It is entitled "*Report and Opinion on the Death of [Valin]*" and it is dated January 19, 2005. [Valin] is, of course the name of the young child who Mr. Mullins-Johnson stands convicted of murdering.

As its title would suggest, this *Report* by Dr. Pollanen is not, at least as I understand it, a "review of the post-mortem examination of Dr. Charles Smith" in this case (as your letter suggests). Indeed, I understand that it was Dr. Bob Rasihah who performed the autopsy on the deceased in this case. Rather it is a *Report* in which Dr. Pollanen offers his own views and opinions on a number of the important forensic pathology issues in this case (based primarily on a review of the microscopic slides from the post-mortem examination), and comments upon the nature of the evidence of all of the expert evidence that was adduced by both parties (Crown and Defence) at trial. While it would certainly be fair to observe that, in this *Report*, Dr. Pollanen disagrees with important aspects of the expert opinion of Dr. Charles Smith, it would be equally fair to observe that Dr. Pollanen also expressed views that differed in material respects with key aspects of the other expert opinion evidence in this case.

Having said that, I feel obliged to also tell you that, even with respect to the *R. v. Mullins-Johnson* case, I am presently at something of a disadvantage. This was an appeal that I had no involvement in, and which was argued, both in the Court of Appeal and the Supreme Court of Canada, by Mr. Scott Hutchison of our office. I have only relatively recently taken over the matter in anticipation of an eventual application by the accused under s. 696.1 of the Criminal Code to the federal Minister of Justice. I have not yet had an opportunity to familiarize myself with the trial evidence in the case, or the details of the expert evidence that was adduced on the forensic pathology issues in the case. It was only very shortly after taking over carriage of the case, that I received the *Report* by Dr. Pollanen and quickly disclosed it to Mr. David Bayliss who, I am sure you are aware, is counsel for the accused in *R. v. Mullins-Johnson*.

I should also tell you that I received some advance notice of your disclosure request, and have been contemplating my disclosure obligations in this regard. More specifically, on the afternoon of March 11, 2005 I received a letter from Mr. Bayliss suggesting that I might have a disclosure obligation to provide copies of the Report by Dr. Pollanen to "other persons affected by the actions of Dr. Charles Smith", and specifically suggesting that this *Report* might be "admissible

as fresh evidence" in connection with the appeal in *R. v. Kporwodu and Veno*. I take it that you and Mr. Bayliss have been speaking.

Early this week I spoke to Ms. Woollcombe in an effort to understand how this *Report* by Dr. Pollanen in *R. v. Mullins-Johnson* might be relevant to the issues in *R. v. Kporwodu and Veno*. I must confess that its relevance was not immediately apparent to me. While I profess no detailed knowledge of the circumstances of the *R. v. Kporwodu and Veno* case, I thought that the Crown appeal related to whether the trial Judge had erred in staying the proceedings as a result of a perceived violation of s. 11(b) of the Charter of Rights. Unfortunately, my conversation with Ms. Woolcombe did not greatly assist me in understanding the potential relevance of the *Report* of Dr. Pollanen. I say this meaning no disrespect to Ms. Woollcombe. It is just that, notwithstanding her involvement in the R. v. *Kporwodu and Veno* appeal, she also had considerable difficulty understanding how this *Report* by Dr. Pollanen might be relevant to your case. However, she did mention that it was Ms. Fairburn who argued the points that seemed to relate most closely to Dr. Smith.

Accordingly, even after my discussion with Ms. Woollcombe I failed to understand the relevance of the *Report* by Dr. Pollanen to your case. While Dr. Smith was clearly an expert witness who was involved in both *R. v. Kporwodu and Veno* and *R. v. Mullins-Johnson*, I remain quite unclear as to how the mere existence of a subsequent expert opinion (that of Dr. Pollanen), which conflicts with the expert opinion expressed at trial by Dr. Smith (amongst others) in *R. v. Mullins-Johnson* is relevant to your appeal, let alone admissible as "fresh evidence".

Nevertheless, after speaking with Ms. Woolcombe, I resolved to speak to Ms. Fairburn about the matter upon her return to the office from her vacation next week before reaching any final conclusion about my disclosure obligations. Having now received your letter dated March 17, 2005 requesting disclosure of the *Report* by Dr. Pollanen (and understanding the urgency of your request), I will certainly speak to Ms. Fairburn at the first available opportunity. You will then be contacted as soon as a final decision has been reached with respect to whether or not the *Report* of Dr. Pollanen will be forthcoming to you by way of disclosure.

In the meantime, however, I would greatly appreciate it if you would kindly try to articulate precisely the relevance of the *Report* of Dr. Pollanen in your outstanding appeal. That is the issue that I am presently labouring with, and will need to speak to Ms. Fairburn about. In your letter yesterday you say that, on your appeal, "the competence of Dr. Smith is very much in issue" and that this is tied to the appropriateness of the stay of proceedings imposed by the trial Judge. If it is any assistance to you, I can tell you now that the *Report* by Dr. Pollanen, while certainly offering an opinion that differs in important aspects from much of the expert opinion evidence adduced at trial (including that of Dr. Smith), the *Report* does not, at least as I read it, directly challenge the competence of Dr. Smith.

> I trust that, for the time being at least, this is satisfactory. I hope that you understand that, at this point in time, knowing so little about the issues in *R. v. Kporwodu and Veno*, and not that much more about *R. v. Mullins-Johnson*, I am simply not in a position to immediately disclose the *Report* by Dr. Pollanen to you, especially in the absence of Ms. Fairburn. I think that her perspective on this issue is absolutely vital to a fair and proper resolution of this disclosure issue. Given that she will be available sometime next week, I hope that you will be content to wait until then for a final answer to your disclosure request. [Emphasis in original.][224]

159. On March 24, 2005, Ms. Edwardh wrote to Ms. Fairburn and again requested a copy of Dr. Pollanen's report.[225] On March 30, 2005, Ms. Fairburn responded to Ms. Edwardh. She wrote:

> I have carefully considered your disclosure request made in correspondence dated March 24, 2005. As it was received late in the afternoon on the day before a four day weekend, I was unable to follow up until everyone returned to work on March 29, 2005. Please consider this my response.
>
> I have discussed this request with Kenneth Campbell (Senior Crown counsel with current carriage of the *Mullins-Johnson* matter), Scott Hutchison (Crown counsel on the *Mullins-Johnson* appeal in the Court of Appeal and Supreme Court of Canada), Glen Wasyliniuk (the trial Crown), Philip Downes (Crown counsel on the appeals and Crown counsel responding to disclosure requests until January 2005), and Dr. James Cairns of the Office of the Chief Coroner. Jennifer Woollcombe and I have also reviewed the *Mullins-Johnson* appeal file. I have also reviewed Dr. Michael Pollanen's report dated January 19, 2005. Notwithstanding your careful and detailed letter, I am of the view that the report and related information you have requested are irrelevant to the *Kporwodu and Veno* appeal. To the extent that the other information you have requested, like when the "controversy" in the *Mullins-Johnson* case arose and when the Crown became aware of the "controversy", assists in demonstrating why the Dr. Pollanen report is not relevant to the appeal, I have decided to disclose it in this letter. I will not be disclosing the report.
>
> While I agree with most of the factual assertions in your letter, I cannot agree with a few critical facts. The suggestion that during the course of the trial John McMahon instructed Rita Zaied to "... obtain and disclose to the defence files in the possession of the Crown Attorney's office wherein Dr. Smith had prepared post-mortem reports and/or offered opinions related to cause of death" is not an accurate characterization of the evidence. You have the copy of the e-mail that Mr. McMahon sent out to the Crown Attorney's system dated November 26,

[224] Letter from Mr. Campbell to Ms. Edwardh, March 18, 2005, PFP059270.

[225] Letter from Ms. Edwardh to Ms. Fairburn, March 24, 2005, PFP059263.

2002. For your ease of reference, it is contained at Volume 11, Tab "M1" of the Appeal Book. In that e-mail, Mr. McMahon focused on "... information relevant to the ***competence or credibility*** of Dr. Charles Smith". You indicate that the defence did not receive information regarding the *Mullins-Johnson* case. This was because the Crown did not have concerns about the competence or credibility of Dr. Smith in the case. I have taken the liberty of speaking with both Glen Wasyliniuk who prosecuted Mr. Mullins-Johnson and Scott Hutchison who appeared for the Attorney General during both appeals. Neither Crown counsel had any concerns, at all, about the competence or credibility of Dr. Smith in the *Muffins-Johnson* prosecution or on appeal.

You also suggest that I argued that the defence did not "need" the OCCO files that related to the cases on the 17 case-list chart because, with the "chart", there was sufficient evidence to attack the reliability and credibility of Dr. Smith at trial. My argument was not that the chart could be used to attack credibility and reliability, but, rather, that the chart gave an opportunity to focus the disclosure/production request. My position was also that the material contained in the OCCO files of each of the cases reflected on the chart was irrelevant to the trial issues in *Kporwodu and Veno*. Finally, it was my position that, at a minimum, the Crown position at trial, as it related to the content of the underlying files, was arguable. The *Mullins-Johnson* case is not reflected on the chart because it was not reviewed, at all, until very recently. As you know, Dr. Pollanen's report is dated January 19, 2005.

You also indicate in your letter that you understand that "... the controversy surrounding this case came to light in 2001 and has been under investigation ever since." Allow me to convey the information I have learned regarding how and when the "controversy" in the *Mullins-Johnson* case came to light. As indicated above, while I feel under no obligation to disclose this information (for lack of relevance to the *Kporwodu and Veno* appeal) I believe it will assist you in concluding that the Dr. Pollanen report of January 19, 2005 has no relevance to the appeal. For this reason I am prepared to disclose the following information.

As indicated above, neither Mr. Wasyliniuk nor Mr. Hutchison had any concerns, at any time, regarding the opinion expressed by Dr. Smith in the *Mullins-Johnson* case. As indicated in Mr. Campbell's March 18, 2005 letter to you and supported by the material filed in the *Mullins-Johnson* appeal (facta, appeal books and transcript), Dr. Smith was one of many experts in the case. While Dr. Smith's opinion was challenged in some respects at trial, it was not challenged on the basis of competence or malice, but, rather, in the classic way: Crown expert says X and defence expert says Y.

I have learned from Dr. James Cairns that a letter was sent by Michael Lomer to the Office of the Chief Coroner on April 3, 2001. Mr. Lomer had been counsel to Mr. Mullins-Johnson at both the Court of Appeal for Ontario and the Supreme Court of Canada. (The Supreme Court of Canada dismissed his appeal on May 26, 1998.) I have reviewed this correspondence. Mr. Lomer specifically indicates

that he is writing as a "private citizen", as he was not retained by Mr. Mullins-Johnson and had no instructions to write *on his behalf. This letter questioned whether Dr. Smith's work in the Mullins*-Johnson case should be reviewed. Dr. Cairns satisfied himself that Dr. Smith did not conduct the autopsy. We understand from Dr. Cairns that based on his understanding of Dr. Smith's role in the case and given the content of Mr. Lomer's letter, no action was taken by the Office of the Chief Coroner.

While there may have been a "controversy" about Dr. Smith's testimony in the *Mullins-Johnson* case in 2001, as you suggest in your letter, as I understand it from Dr. Calms and Crown counsel with carriage of the prosecution and appeals, that "controversy" was not shared with the Crown or, according to Dr. Cairns, the Office of the Chief Coroner. To the best of my knowledge, based on my discussions and a review of the *Mullins-Johnson* file in this office, there were no issues about Dr. Smith's evidence until fairly recently. I have not heard or seen anything in my many inquiries that would suggest that the case has been "under investigation" since 2001.

I note that by correspondence to Shawn Porter, Crown counsel in the Crown Law Office - Criminal, dated February 27, 2003, James Lockyer indicated that AIDWYC was involved in a preliminary investigation of the conviction of Mr. Mullins-Johnson. To this end, Dr. Bernard Knight had been enlisted to assess the pathological aspects of the case. A request was made for the original slides, or the re-cuts from the same paraffin blocks. Note that in the letter there is no concern expressed about the competence or credibility of Dr. Smith. There was also a request for a number of police officers' notes. Philip Downes, Crown counsel with the Crown Law Office - Criminal, took carriage of the *Mullins-Johnson* file and pursued fulfilling AIDWYC's request. David Bayliss eventually took the matter over for AIDWYC. Philip Downes took steps to locate the material originally requested by Mr. Lockyer. Mr. Downes had difficulty in locating the material. On November 17, 2004, Mr. Downes sent a letter to the Office of the Chief Coroner, Dr. Barry McLellan, asking for his assistance in locating the material requested.

On December 10, 2004, Mr. Downes wrote to Mr. Bayliss and informed him that Dr. McLellan's office had been successful in locating some of the original slides and were in the process of reviewing the slides and searching for the remaining ones. As you know, Dr. Pollanen, the Medical Director of the Toronto Forensic Pathology Unit in the Office of the Chief Coroner, authored his report in relation to the review on January 19, 2005.

I believe that this sets out an accurate chronology as it relates to what you characterize as the *Mullins-Johnson* "controversy". I can assure you that there is nothing in the report of Dr. Pollanen that, in any way, undermines the above-history of the case.

> I remain unable to determine any relevance to the *Kporwodu and Veno* appeal. The indictment in this matter is stayed. The credibility and competence of Dr. Charles Smith's findings in relation to another murder case, from 1994, is irrelevant to the appeal from a s. 11 (b) stay of proceedings. The review of Dr. Smith's (and other experts work) was triggered as a result of AIDWYC's request for the slides in the *Mullins-Johnson* matter. This request, made February 27, 2003, did not mention any concern regarding Dr. Smith's opinions in the case. The slides were not located until late 2004. I remind you that the indictment in the *Kporwodu and Veno* case was stayed on June 23, 2003. (It is also worthy of note that despite the fact that Dr. Pollanen's report is dated January 19, 2005, the Crown was not contacted by Dr. McLellan until January 24, 2005. While a message was left that the report had been prepared, the Crown did not learn the contents of the report until, at the earliest, February 10, 2005 and Mr. Campbell did not come into possession of the report until February 11, 2005.)
>
> I hope that this information will shed some light on the evolution of the "controversy" in the *Mullins-Johnson* case. Having regard to this information, I am sure you will agree that it bears no relevance to the outstanding appeal.
>
> As a practical matter, I note that you wrote to Mr. John Kromkamp on March 18, 2005 and asked that he advise the Court of your disclosure request and the fact that a fresh evidence application may be brought or an application for some other form of relief. I know that you are keenly aware of the fact that this is a murder appeal from a stay of proceedings for unreasonable delay. The Crown is most anxious that the appeal not be placed in a holding pattern for long. In light of this fact, I expect that you will either communicate with Mr. Kromkamp and let him know that you are satisfied that the Crown has no disclosure obligation or that an application will be brought immediately. I look forward to hearing from you. [Emphasis in original.][226]

160. The commission has been advised by the Ministry of the Attorney-General that Ms. Edwardh did not pursue the matter after receiving Ms. Fairburn's letter.

161. On March 30, 2005, the Toronto Star published an article about Dr. Smith in which it indicated, *inter alia*, that he had lost tissue samples in the Mullins-Johnson case.[227]

162. On April 7, 2005, Dr. McLellan prepared a memorandum for Assistant Deputy Minister Glen Murray. It stated:

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[226] Letter from Ms. Fairburn to Ms. Edwardh, March 30, 2005, PFP059257.

[227] Article, Toronto Star, March 30, 2005, PFP084981, pp. 2-3.

On July 27, 1993, [Valin], a 4-year-old girl was found dead in her bed. A medical-legal autopsy was performed by Dr. Rasaiah from Sault Ste. Marie and he gave the cause of death as "cardiorespiratory arrest due to asphyxia".

Dr. Charles Smith, a consulting Crown pathologist, opined that there was evidence of perimortem sodomy. Dr. Smith was a pathologist at the Hospital for Sick Children and the Medical Director of the Paediatric Forensic Pathology Unit (at HSC) at the time.

On September 21, 1994, William Mullins-Johnson was found guilty of the first-degree murder of his 4-year-old niece ([Valin]).

On December 19, 1996, the Court of Appeal dismissed the appeal against conviction.

On May 26, 1998, the Supreme Court of Canada dismissed a further appeal.

The Association in Defence of the Wrongfully Convicted enlisted the help of another pathologist (Dr. Bernard Knight from England) to assess the pathologic evidence in this case. Dr. Knight requested access to the autopsy tissues in order to review the microscopic findings.

Dr. Barry McLellan, Chief Coroner, was contacted by Philip Downes (Crown counsel), on November 17, 2004 requesting assistance in locating the slides and paraffin blocks arising from this case. Up until this time, Mr. Downes had been unsuccessful in locating the slides and tissues through Dr. Smith.

In early December 2004, Dr. McLellan did locate the original slides at HSC (not all slides) but could not locate the tissue blocks. It appears that these tissue blocks (and the missing slides) went missing some time after being sent to Dr. Smith at the time he provided his consultation.

In order to ensure that the slides that would be of greatest value to a consultant pathologist (such as Dr. Knight) were available, Dr. McLellan requested the assistance of Dr. Michael Pollanen, Medical Director of the Toronto Forensic Pathology Unit, to catalogue the slides. Dr. Pollanen expressed concern on reviewing the slides that there was no evidence of anal trauma. A meeting was therefore arranged with Mr. Downes to provide this information as well as to recommend that Dr. Pollanen prepare a report detailing his findings.

Mr. Downes agreed that such a report should be prepared. Dr. Pollanen authored his report in relation to the review on January 19, 2005. Dr. Pollanen disagreed with the medical argument that was used at trial to conclude that [Valin] was sodomized. He also provided his opinion that the cause of death had not been ascertained by the postmortem examination.

This information is now in the hands of Kenneth Campbell (Senior Crown counsel) who has assumed carnage of this matter, as Mr. Downes is involved in another long case.

The Office of the Chief Coroner has provided a list of other consulting Forensic Pathologists who may be positioned to provide another opinion on this matter should Crown counsel wish to pursue this option.

The report of Dr. Michael Pollanen has been disclosed to Defence counsel (by Crown counsel).

Recent media attention has focused on the fact that tissue blocks went missing after being sent from the original pathologist to Dr. Charles Smith. The contents of Dr. Pollanen's report have not been made public and would at this time be considered as confidential disclosure.

The Office of the Chief Coroner has announced (through an article published in the Toronto Star on March 31, 2005) that an audit will be performed of all tissue samples arising from autopsies on all homicides and criminally suspicious cases conducted at the Hospital for Sick Children since 1991 (when the HSC Forensic Pathology Unit opened). The audit will include cases where it is known that tissues were sent to HSC for pathological consultation on homicide and criminally suspicious cases, where the primary autopsy was done elsewhere. This audit is in part based on the concern of the OCC about the missing tissue arising from the autopsy of [Valin].

It is likely that Dr. Pollanen's report will be used in order to argue that Mr. Mullins-Johnson has been wrongfully convicted.

If it is determined that Mr. Mullins-Johnson has been wrongfully convicted, the potential exists that there will be a request for some form of public inquiry into:

1. Dr. Smith's involvement in this case; or

2.Dr. Smith's involvement in all homicide and criminally suspicious cases; or

3. All paediatric homicide/criminally suspicious cases where autopsies were conducted at the Hospital for Sick Children (over some defined period of time).

Dr. Smith is not conducting any autopsies for the Office of the Chief Coroner but remains a staff pathologist at the Hospital for Sick Children.[228]

[228] Memorandum from Dr. McLellan to Glenn Murray, April 7, 2005, PFP116014.

163. On May 6, 2005, an additional ten glass slides and 28 paraffin blocks were located in Dr. Smith's office at the HSC. A message was left for Mr. Campbell on May 9, 2005, advising him of this discovery. The slides were to be turned over to Dr. Pollanen.[229]

164. On May 9, 2005, Mr. Campbell wrote to Mr. Bayliss. He stated:

> I was just contacted by the Coroner's Office and advised that, just this past Friday (May 6, 2005), the review being conducted by the Coroner's Office in conjunction with the Hospital for Sick Children, turned up some 28 Paraffin tissue blocks and 10 microscopic slides in relation to this case. They were discovered, I understand, in Dr. Charles Smith's Office. These are the materials that, initially, were thought to be missing or lost. These materials have now been provided to Dr. Michael Sven Pollanen for his review and consideration.
>
> I thought that I should disclose this important development to you as soon as I became aware of it.
>
> Of course, I am providing you with this information pursuant to my continuing disclosure duties, and on the condition that it will be used only for the purposes of advancing the position of your client on an application to the federal Minister of Justice in proceedings launched pursuant to Part XXI. 1 of the Criminal Code, and on the understanding that it will not be distributed or otherwise disseminated to the media or any members of the public. I thank you for your continuing kind co-operation in this regard.[230]

D. The May 24, 2005 Report of Dr. Michael Pollanen

165. On May 9, 2005, Dr. Pollanen received the newly found set of paraffin blocks and microscopic slides from the Office of the Chief Coroner. He examined those items and on May 24, 2005, issued a supplementary report. In his report, Dr. Pollanen concluded that:

(a) The cause of death is unascertained. But, there are unexplained recent contusions of the lower limbs including the upper inner thighs and buttocks.

[229] Case Contact Log, May 9, 2005, PFP003661.
[230] Letter from Mr. Ken Campbell to Mr. Bayliss, May 9, 2005, PFP0059254.

(b) The histologic findings in the neck, thought to represent evidence of strangulation are Pinsloo-Gordon hemorrhages. Therefore, the findings have no medicolegal importance and cannot be used as evidence for strangulation.

(c) The histologic findings in recut histologic preparations of the anorectal tissues are indicative of post-mortem artefacts. Therefore, the findings have no medicolegal importance and cannot be used as evidence for sexual assault.

(d) The tissue in the paraffin blocks is a DNA source for Valin.[231]

166. On May 31, 2005, Mr. Campbell sent a copy of Dr. Pollanen's Supplementary Report to Mr. Bayliss. In the covering letter, he wrote:

> Further to my letter of May 9, 2005, please find enclosed a copy of the ***Supplementary Report and Opinion on the Death of [Valin]*** that has recently been prepared by Dr. Pollanen of the Coroner's Office. While the Report is dated May 24, 2005, I was first notified of the existence of this Report (and able to obtain a copy) just yesterday afternoon.
>
> ...
>
> In light of the contents of the original ***Report*** by Dr. Pollanen, and the contents of his recent ***Supplementary Report***, I have reached the conclusion that it is appropriate for the Crown to now take steps to have this entire case (and, more specifically, the expert opinion evidence adduced at the trial of this matter) carefully reviewed by another, independent forensic pathologist. I am sure you will agree that the opinions that have been expressed by Dr. Pollanen are cause for concern about this matter. Nevertheless, there are still aspects of the case that remain unconsidered and unexplained. I think that the time has come for the Crown to take steps to have a more fulsome and comprehensive review undertaken with respect to this entire case. As I mentioned to you in my letter of March 15, 2005, I have spoken with Dr. Jim Cairns in this regard, and he too thinks that this is a wise course of action.
>
> I will, of course, endeavour to keep you advised of my progress on this important issue, and will alert you to any further developments. However, I trust that, for the time being at least, this is satisfactory. [Emphasis in original.][232]

[231] Supplementary Report and Opinion on the Death of [Valin], May 24, 2005, PFP003610, p. 2.
[232] Letter from Mr. Campbell to Mr. Bayliss, May 31, 2005, PFP059251.

167. That same day, the Toronto Star reported that missing evidence in the Mullins-Johnson case had been found in Dr. Smith's office.[233]

168. Mr. Campbell also sent a copy of the report to Mr. Wasyliniuk on June 6, 2005.[234]

169. On June 7, 2005, CBC News reported that the Chief Coroner for Ontario had ordered a review into 40 cases involving Dr. Smith.[235] That was followed by a similar report from CTV News on June 8, 2005.[236]

170. On June 28, 2005, Mr. Bayliss sent an email to Dr. Pollanen, which stated:

> We are dealing with Dr. Bernard Knight on this case. In fact, our original request made 3 years ago for the slides and tissue blocks were for the purpose of allowing Dr. Knight to provide us with an opinion. He has reviewed your report and agrees with your analysis, but feels he should look at the slides himself in order to base his opinion on complete materials. He originally thought that the photos in your report would be sufficient but is now concerned that his opinion could be undermined if he has not reviewed the original materials.
>
> Dr. Knight is in Cardiff Wales. While he could look at the slides quickly, they would need to be transferred there and back. If there is a concern about transporting the precise re cuts you looked at could fresh cuts be made for Dr. Knight's purposes?
>
> We are pressed for time so could you respond at your earliest convenience.[237]

171. Dr. Pollanen replied via email that same day. He wrote:

> Thank you for your email. I anticipate that there will be no issue with providing the materials that you wish to have reviewed. The Chief Coroner is the best person to organize the transfer of the slides which are currently in my evidence

[233] Article, Toronto Star, May 31, 2005, PFP034601.
[234] Letter from Mr. Campbell to Mr. Wasyliniuk, June 6, 2005, PFP059250.
[235] Article, CBC News, June 7, 2005, PFP058644.
[236] Article, CTV News, June 8, 2005, PFP058650.
[237] Email from Mr. Bayliss to Dr. Pollanen, June 28, 2005, PFP003660.

locker. I have sent him this email and he will follow up with you directly or via the Crown.[238]

172. On June 29, 2005, Dr. Pollanen wrote to Dr. McLellan. He stated:

> This letter should read in conjunction with my report and supplementary report on the death of [Valin]. Please provide the Crown with a copy of this letter. In this letter I address: (1) further discussion of an issue raised in my first report (sudden natural death); and (2) logistic issues related to review of microscopic slides by other pathologists.
>
> **Sudden natural death from channelopathy?**
>
> In my report I indicate the following:
>
> > In my view, given the essentially negative autopsy, it is reasonable to consider mechanical asphyxia, as a cause of death. On the basis of the same line of reasoning, it is also prudent to consider natural causes. Based on the scene photographs, one possible occurrence is sudden natural death during sleep.
> >
> > Sudden natural death could have been due to a primary arrhythmic disorder. It is beyond the scope of this report to discuss the full range of recently discovered mutations that can cause sudden cardiac death in children. These defects range from mutations in genes that encode ion channel proteins ('channelopathies') and the contractile proteins of the sarcomere. The current state-of-the-art in forensic pathology practice in North America is that we do not search for these mutations in cases of sudden unexplained death.
>
> Thus, in my view, sudden natural cardiac death related to an arrhythmia is at least as possible as homicidal death by mechanical asphyxiation, based on autopsy appearances. The main difficulty with the sudden cardiac death hypothesis is that this possibility is as speculative as the diagnosis of mechanical asphyxia. But, unlike the mechanical asphyxia diagnosis, there have been recent advances that make the sudden cardiac death hypothesis at least partially testable on scientific grounds. The testability is related to the recent discovery of ion channel mutations ('channelopathies') that cause sudden cardiac death in young individuals. These genetic syndromes are incompletely characterized, but many of the mutations that cause the long QT syndrome (LQTS) and the related disorder known as the Brugada syndrome have been recently discovered.

[238] Email from Dr. Pollanen to Mr. Bayliss, June 28, 2005, PFP003660.

> The genetic basis (DNA testing) for sudden natural death by arrhythmia due to LQTS was first published in March 1995. Prior to March 1995, it was not possible to test for LQTS mutations. In addition, the genetic testing for LQTS and Brugada syndrome is still not a routine procedure in forensic medicine, but would be considered to be in the transitional stage between 'research' and 'routine practice'. Undoubtedly, 10 years from now postmortem mutational analysis (molecular forensic pathology) will become commonplace and more mutations will become known.
>
> ...
>
> On this basis, I would advise that the paraffin block of liver from the postmortem of [Valin] be used for DNA testing to determine if a LQTS mutation is present. This would, at least partially, allow the sudden cardiac death hypothesis to be tested using an objective scientific method. There are various laboratories that can provide the testing and I will supply the details upon request.
>
> **Review of slides**
>
> It is my understanding that (an) other pathologist(s) may wish to review the slides from the postmortem of [Valin]. I will fully facilitate this process.
>
> Essentially, the slides from the postmortem can be divided into three groups: (1) the original critical slides from the anogential tissues; (2) the original routine slides of other tissues and organs; (3) recut slides from all blocks, i.e., these recuts encompass all slides including the anogenital tissues. The review pathologists should have access to the recut slides, including the slides of the anogenital tissues. In addition, it might be necessary for the reviewing pathologists to examine the original critical slides from the anogential tissues, since many of the key issues are based on these slides. These slides are unique and irreplaceable. On this basis, the security of these slides must be assured. I suggest the recut slides be transported to the reviewing pathologist(s) first. If the reviewing pathologist(s) need to examine the original critical slides from the anogential tissues, we can then make provisions to ensure these slides are not lost in transit.[239]

173. That same day, Mr. Bayliss wrote to Mr. Campbell. He stated:

> As you know we, on behalf of Mr. Mullins Johnson and the Association in Defence of the Wrongly Convicted, have been attempting to secure slides from the autopsy of [Valin] for review by our own expert witness, Dr. Bernard Knight. Our first letter to your office requesting the slides was sent on February 27, 2003,

[239] Letter from Dr. Pollanen to Dr. McLellan, June 29, 2005, PFP004242.

> some 28 months ago. Our request eventually precipitated the location of the slides and the report of Dr. Pollanen.
>
> All of the biological materials collected at the autopsy have now been located. I have spoken to Dr. McLellan and he has advised me that fresh cuts have been taken from the tissue blocks and they are ready to be shipped immediately. Dr. McLellan feels that your consent is required for this so I write formally requesting that you provide it so that the materials can be shipped forthwith to Dr. Knight in Wales.
>
> Time is now of the essence and we respectfully request that you address this matter without delay. I can provide the sipping details for Dr. Knight as soon as your consent is provided.[240]

174. The next day, Mr. Bayliss left a phone message and emailed Mr. Campbell requesting that he give his permission for the slides and blocks to be released by the OCCO to Dr. Knight for his review.[241]

175. On July 6, 2005, Dr. McLellan wrote to Dr. Knight and sent him the slides and blocks. In his letter, he wrote:

> I have been advised that you have been retained by Mr. David Bayliss to review materials arising from the autopsy of [Valin] and that you have requested the microscopic slides arising from this case.
>
> Enclosed with this letter are recut slides from all original tissue blocks. Original slides from the anogenital tissues, as well as original slides from all other tissues and organs, are currently being held in secure storage in the Forensic Pathology Unit at the Office of the Chief Coroner. In order to ensure ongoing security of the original slides, these recut slides have been prepared.
>
> Please return the slides to my attention once you have had the opportunity to review them. If you feel the need to review any of the original slides, special arrangements will need to be made to ensure that these slides are not damaged or misplaced.[242]

176. That same day, Dr. McLellan wrote to Mr. Campbell. He wrote:

---

[240] Letter from Mr. Bayliss to Mr. Campbell, June 29, 2005, PFP116755.

[241] Transcript of voicemail message of Mr. David Bayliss to Mr. Ken Campbell, June 30, 2005, PFP059248; Email from Mr. David Bayliss to Mr. Ken Campbell, June 30, 2005, PFP059247.

[242] Letter from Dr. McLellan to Dr. Knight, July 6, 2005, PFP003954.

> I enclose a copy of a letter dated June 29, 2005 addressed to my attention from Dr. Michael Pollanen.
>
> Dr. Pollanen raises two issues in his letter. The first is his recommendation that post mortem tissue from [Valin] be used for DNA testing to determine if the death may be the result of a channelopathy. The second matter is that of the specific slides to be sent to Dr. Bernard Knight. I am in the process of arranging for recut slides from all original tissue blocks to be sent from our office to Dr. Knight in the next few days. If there is a request made by Dr. Knight, or any other pathologist, to examine the original slides from the anogenital tissues (or any other tissue), special arrangements will need to be made to ensure that these original slides are not damaged or misplaced. I will inform you if I am made aware that Dr. Knight has requested the original slides.
>
> Please advise me as to whether you would like to have the DNA testing performed as per Dr. Pollanen's suggestion.[243]

177. On July 13, 2005, Dr. Knight received the blocks and slides.[244]

178. That same day, Dr. Knight wrote an email to Mr. Bayliss seeking some guidance concerning the material he had received. He wrote:

> In fact, I have this evening started to look at the slides. I already have encountered a snag, in that the 28 slides (numbered 1 to 29, as there seems to be no 27) only have these sequential serial numbers, but without any key to their origin, it is very difficult to know what I am looking at, especially as the object of the exercise is to compare Dr Pollanen's opinion with the slides he commented upon in his report.
>
> The major organs, like spleen and brain, present no difficulty, but some anonymous bits of muscle and subcutaneous tissue cannot be firmly matched with samples from the neck and anal region, etc.
>
> Is there no list indicating where each numbered slide came from at the autopsy?
>
> In Dr Pollanen's first report there is a list giving numbers from 1 to 9, plus two B5s, (e.g. 5 & 6 were anorectal junction) but I do not know if these nine numbers correspond to the re-cuts which I have received…and 9-29 are not so listed.

[243] Letter from Dr. McLellan to Mr. Campbell, July 6, 2005, PFP003772.

[244] Email from Mr. David Bayliss to Dr. Pollanen, July 13, 2005, PFP116745.

I think it essential that I can be confident that I am looking at the same slides as the other pathologists and wonder if the Coroner's Laboratory has an index list giving the tissue origins which correspond to these numbers.

Some of the slides, even though they are new re-cuts, are slightly difficult to examine, as the mounting medium has shrunk due to air under the cover-slips, as Dr Pollanen mentioned in his study of the originals - but his were old stored slides, not new recuts. However, this is a minor problem compared to my ignorance of the site of sampling.

Sorry to raise a problem, but I have to be sure what I am looking at, vis-à-vis the opinion of other pathologists.[245]

179. Dr. Knight's questions were passed on to Dr. McLellan and Dr. Pollanen.[246]

180. On July 14, Dr. Pollanen wrote to Dr. Knight. He stated:

In my review, I had to reconstruct the sampling of the histologic slides, since there is no master list of blocks/slides in the autopsy report. Here are my suggestions to clarify:

1. The label B5 refers to the fact that the specimen (in this case a section of lymph node) was fixed in B5 fixative solution, rather than formalin. Thus, the label of B5 does not relate to a block or tissue site.

2. The original blocks were labeled with sequential numbers of two types. First, labeling with 1, 2, 3, 4, etc., and then other blocks labeled with 1, 2, 3, 4, etc, but the latter series had the numbers circled. The circled numbers referred to series of 9 slides that have the most medicolegal relevance. It is possible that the recut slides do not reflect this block labeling, i.e., I believe the slides are labeled sequentially by block number, but the slide numbers are not circled in the recut set. However, it should be possible to reconstruct the origin of the slides, as I did. I have not specifically described the sections of the galae, etc. (as I indicated in my report), as I was concentrating on the anogential tissues.

3. The original slides in the series of 9 slides have three labels in addition to the numbers listed above. The labels are handwritten and read: 2 = margin of vagina; 5 = anorectum and 6 = anorectum as indicated in table on page 4 in my report. In the original autopsy report the 'anorectum' is further expanded as indicated also in my report starting on pg 7. Also, I describe the exact number of tissue pieces and histologic composition of each slide in my report starting on page 7. Thus, it

[245] Email from Dr. Knight to Mr. David Bayliss, July 13, 2005, PFP116739.

[246] Email from Mr. Bayliss to Dr. McLellan, July 14, 2005, PFP116739.

should be fairly easy to determine the origin of the slides, i.e., slide 2 that is "margin of the vagina" has two pieces of tissue: skin with hair, and non-keratinizing stratified squamous epithelium (i.e., vaginal mucosa). Even without my direct attribution of slides the squamocolumnar junction of the rectum etc., can be readily found.

4. The 'hemorrahge' in the neck tissues is visible in the sections of the neck viscera, which should present no problem for location.

5.The reconstruction of slides etc, sounds daunting but once the information from all sources is considered, the logical sequence of the slides is readily apparent and unmistakable. This requires correlation of all documents.

6. If my explanations have made the situation more difficult to understand (i.e., as email sometimes does) I will be happy to speak with Professor Knight on the telephone and we can go through each of the slides one by one. It took me some hours to consolidate the histologic record the first time I attempted it.

Please note that I did not explicitly label the slides for Professor Knight, as I thought that part of the review process would include an independent reconstruction of the pathological materials, as I had done. Please let me know if I can be of any further assistance. If the problem is intractable I have a solution: the entire lot of material (blocks, original slides with labeling etc., can be photographed (gross) with digital photography and emailed so that Professor Knight can piece together the record by visual inspection of the composition of the original slides and blocks (i.e., exactly the way I did it). This issue sometimes arises in review cases and this case is no exception; it is a good that the slides are not too numerous![247]

181. On July 15, 2005, Dr. Knight replied to Dr. Pollanen via email. He wrote:

Many thanks for your prompt and helpful reply to my query about the slide labelling.

I rather suspected this would be the case, but on the off-chance that there was a key list, I thought I would enquire.

I will go though them carefully and hopefully will be able to match slides with descriptions. The shrinkage of the mountant is a little odd, in new re-cut preparations, as it is marked in some of them, obscuring the edges of the sections, but the central parts are mostly clear.

[247] Email from Dr. Pollanen to Dr. Knight, July 14, 2005, PFP116741.

Many thanks, I will get back to you if I have real problems.[248]

182. On July 20, 2005, Dr. Prime sent Mr. Campbell a complete list of the materials in the possession of the CFS in relation to the Mullins-Johnson case.[249]

E. The August 11, 2005 Report of Professor Bernard Knight

183. On August 11, 2005, Dr. Knight[250] wrote to Mr. Bayliss.[251] With respect to the time of Valin's death, he stated, *inter alia*:

> The pathologist who conducted the autopsy of [Valin] was Dr. Rasaiah, who appears from the documents to have been a hospital pathologist with no professional qualifications in forensic pathology. This may well explain his outdated appreciation of the methodology and quality assurance aspects of estimating the time since death.
>
> However, the defects in attempting to determine the time of death began with the coroner, Dr. Crookston, who made the elementary error of failing to measure the ambient temperature at the scene of death, thus frustrating any hope of scientifically assessing the time of death from body temperature.
>
> ...
>
> [R]igor is now discarded by all experienced pathologists as anything more than the most approximate of pointers to the time of death.
>
> ...
>
> [I]t is patently obvious that rigor is next to useless for determining the time since death.
>
> ...
>
> In the context of [Valin], Dr. Rasaiah's contention that on the basis of rigor mortis, death must have occurred from 15 to 17 hours prior to the autopsy, is frankly ludicrous.

[248] Email from Dr. Knight to Dr. Pollanen, July 15, 2005, PFP116734.

[249] Letter from Dr. Prime to Mr. Campbell, July 20, 2005, PFP059676.

[250] Dr. Knight's *curriculum vitae* can be found at PFP058555.

[251] Report of Professor Bernard Knight, August 11, 2005, PFP003620.

> In relation to postmortem hypostasis…the settling of the blood in the tissues due to gravity is an even worse indicator of time since death than rigor mortis.
>
> …
>
> It is in the use of *body temperature* that Dr. Rasaiah's opinion is most flawed.
>
> The failure of Dr. Cookston to measure the ambient temperature at the scene (which modern knowledge has shown must be taken close to the body because of the variable micro-environments at a scene) invalidates any hope of even the most modest accuracy attainable through temperature calculations.
>
> …
>
> [I]t is patently obvious that [Valin] died less than 36 hours before Dr. Crookston's examination, but the point along the 0-36 hour scale is extremely uncertain. [Emphasis in original.]
>
> …
>
> Overall, I feel the child died later than other pathologists suggested, though the times of both Dr. Smith and Professor Ferris partially overlap this period – and Dr. Jaffe overlaps everyone.[252]

184. On the issue of the cause of death, Dr. Knight wrote:

> [I]n my opinion, the majority, if not all, of the skin haemorrhages, both small petechiae and larger ecchymoses, are undoubtedly post-mortem in origin.
>
> …
>
> I am unable to offer a definitive cause of death, having read all the autopsy findings. The presence of petechial hemorrhages in the skin of the face and trunk, given the deep frontal hypostatis, is not diagnostic. Dr. Rasaiah describes petechial haemorrhages on the upper eyelids, but given the marked facial hypostatis, these cannot safely be ascribed to compression of the neck. He fails to mention the very important observation that there were no petechiae in the whites of the eyes or inside the eyelids, which, if they exist in a case, are more useful as indicators of compression of the neck.

[252] Report of Professor Bernard Knight, August 11, 2005, PFP003620, pp. 2-9.

> There appears to be a bruise on the outside of the neck, under the left side of the jaw which cold be due to hypostatis, as discussed above. There is also a deep haemorrhage in the tissues of the neck on the left side of the larynx, which has to be interpreted with extreme caution, as this area is prone to post-mortem artefactual haemorrhages (the Pinsloo-Gordon artefact). These findings can occur from natural pressure on the neck, but are certainly not diagnostic of it, especially in the absence of petechiae or other haemorrhages in the interior of the larynx, root of the tongue and whites of the eyes.
>
> The possibility of 'suffocation' (obstruction of nose and mouth) cannot be either confirmed or excluded.
>
> ...
>
> In relation to the major organs of the body, I agree with the other pathologists and am satisfied that no natural disease process is observable in the materials supplied. This is not to say that natural diseases did not cause or contribute to death, but none was seen. Specifically, multiple sections of the heart muscle revealed no disease process such as myocarditis, which can cause sudden death. [253]

185. Dr. Knight also reviewed Dr. Pollanen's reports of January 19 and May 24, 2005. He concluded that:

> [I]t is my opinion that his conclusions are entirely valid. His detailed tabulated descriptions of the microscopic sections that he reviewed and the photographs incorporated in his report, give me no reason to dispute his interpretation that there was no evidence of recent trauma to be seen in the ano-rectal area of the deceased. They are at variance with the interpretation of Dr. Rasaiah and in such a difference of fact and opinion, I strongly favour the views of Dr. Pollanen.[254]

186. Dr. Knight reviewed the autopsy slides from the anal and vaginal region of Valin. It was his opinion that:

(a) I saw nothing that could be accepted as evidence of an ano-rectal tear.

(b) There was no extra-vascular extravasation of blood (haemorrhage) in any of the sections to indicate or suggest recent acute trauma…

[253] Report of Professor Bernard Knight, August 11, 2005, PFP003620, p. 10 & 13
[254] Report of Professor Bernard Knight, August 11, 2005, PFP003620, pp. 12-13.

(c) There was patchy advanced post-mortem autolysis, especially damaging the lower rectal lining.

(d) There was some patchy mild chronic inflammatory changes, unrelated to acute trauma and within normal limits for the perineal/rectal area.

(e) The vaginal area showed no abnormalities.

187. Dr. Knight concluded:

> [T]here is nothing in the histological material made available to me, that supports the infliction of either a tear in the anal margin or acute trauma of any sort to the anal region.[255]

188. Dr. Knight's report was forwarded to Dr. Pollanen on August 31, 2005.[256]

189. On September 2, 2005, Dr. Pollanen called a meeting at the Coroner's office so he could brief counsel on the case. Present were Dr. Pollanen, AIDWYC counsel and Al O'Marra, counsel to the Chief Coroner. For 150 minutes Dr. Pollanen expressed his opinions on the case, accompanied by a photograph and Power Point presentation, and answered questions from counsel.[257]

190. On September 7, 2005, Mr. Mullins-Johnson filed an application for Ministerial review pursuant to Part XXI.1 of the *Criminal Code*.[258] The Minister subsequently appointed Professor David Paciocco of the University of Ottawa to assist him in his determination of the application.[259]

191. On September 14, 2005, Dr. Pollanen wrote to Professor Jack Crane, State Pathologist for Northern Ireland, Professor Christopher Milroy, Department of Forensic Pathology, Sheffield

[255] Report of Professor Bernard Knight, August 11, 2005, PFP003620, p. 14.
[256] Letter from Mr. Lockyer to Dr. Pollanen, August 31, 2005, PFP003896.
[257] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 16.
[258] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 9.
[259] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 17.

University, England and Dr. John Butt, Consulting Forensic Pathologist, Vancouver, British Columbia. He stated:

> Thank you for agreeing to review the autopsy of this 4-year-old girl who died in her residence in Sault Ste. Marie, Ontario in 1993. To facilitate the review process, I will provide a brief chronological summary of the case.
>
> In 1993, [Valin], a 4-year-old girl was found dead in bed in her residence. An autopsy was performed by a local hospital pathologist and the cause of death was given as 'asphyxia'. Anal abuse was raised as an issue. Dr. Charles R. Smith was the consulting pathologist on the case and opined that the child was sodomized just prior to death. The uncle, William MULLINS-JOHNSON, was arrested and convicted of 1st degree murder. The verdict was upheld in the Court of Appeal and the Supreme Court and he is currently serving a life-sentence. The Association in Defense of the Wrongly Convicted (AIDWYC) launched a post-conviction investigation of the case and has subsequently sought a post-conviction remedy, i.e., application to the Federal Justice Minister under s.696. AIDWYC made a request of the Chief Coroner that pathological materials from the autopsy be made available for review by an independent forensic pathologist retained by AIDWYC. Prior to release of the materials, the Chief Coroner asked me to review the case. I gave the opinion that the pathological evidence presented at trial was flawed (see my report for the details). AIDWYC then had Sir Bernard Knight review my reports and the original autopsy and consultation reports (see his report for details).
>
> On this basis, the Attorney General wishes to have an independent review of my opinion and has requested that this occur under the auspices of the larger review process that is currently underway on the work of Dr. Smith.
>
> Accompanying this letter is an inventory list and a set of review materials needed to review this case. The items do not include the original set of histologic slides, but a set of recut slides has been prepared and can be circulated among the reviewing experts.
>
> We will make appropriate arrangements for you to review the original slides if you deem it necessary, but representative photomicrographs are given in my report. Although Dr. Smith was the main crown pathologist, another pathologist actually performed the postmortem and some of the review issues relate to the autopsy and opinions of the original pathologist. Furthermore, Dr. Rex Ferris was a defense pathologist involved with the case and forms an integral part of the pathological evidence as I have described in my reports.[260]

[260] Letters from Dr. Pollanen to Professors Crane and Milroy, and Dr. Butt, September 19, 2005, PFP003835; PFP003840; PFP003838.

192. On September 15 and 16, 2005, the *Toronto Star* and *The National Post*, respectively, reported on the Mullins-Johnson case and his application to be granted bail pending the ministerial review.[261]

193. On September 16, 2005, Dr. Rasaiah wrote to Dr. Pollanen and requested two unstained sections from the tissue blocks of Valin's autopsy and a copy of the autopsy photographs.[262]

194. On September 19, 2005, Dr. Rasaiah, in a letter to Mr. Kenneth Campbell, Director, Crown Law Office Criminal, responded to Dr. Pollanen's report. In his cover letter, he stated:

> As you know, I have requested copies of the slides and photographs for review. In my practice in the United States, I deal with Dr. Werner Spitz, who is the recognized authority in North America and not Dr. Bernard Knight, who is an expert from Wales. Dr. Spitz's assistance could be sought, if indicated or necessary.
>
> I would also like to inform you that I am prepared to rebut Dr. Pollanen's report in court.[263]

195. In the attached report, Dr. Rasaiah set out his qualifications, then stated the following:

(a) a pathologist who is both a forensic pathologist and a clinical pathologist has a distinct advantage over a forensic pathologist only;

(b) the investigation into Valin's death was a thorough one and not a quick diagnosis;

(c) the autopsy was undertaken with the utmost care and he, as the pathologist conducting the autopsy, was best able to distinguish between a bruise and post-mortem staining (as opposed to a determination based on photographs);

(d) Drs. Ferris, Jaffe, Smith, Rasaiah, Pollanen and Knight found no evidence of a natural cause of death;

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[261] Article, Toronto Star, September 15, 2005, PFP059245; Article, The National Post, September 16, 2005, PFP059243.

[262] Letter from Dr. Rasaiah to Dr. Pollanen, September 16, 2005, PFP116642.

[263] Letter from Dr. Rasaiah to Mr. Campbell, September 19, 2005, PFP004836.

(e) with respect to determining the time of death, it is known in the pathology field that this is an estimate. The most reliable indicator is body temperature. The criteria of temperature, rigor mortis and post-mortem lividity are used internationally and are in all the leading text books;

(f) the article on which Dr. Pollanen relied (Post-Mortem Findings in Children by Dr. John McCann et. al.) to question Dr. Rasaiah's conclusions with respect to the anus has significant shortcomings;

(g) there are inconsistencies between Professor Knight's report and textbook with respect to the value of petechial hemorrhages as indicators of asphyxia; and

(h) the findings of Dr. Rasaiah were supported by Dr. Zehr and even, on some key issues, by the defence experts, Drs. Jaffe and Ferris.[264]

196. On September 21, 2005, Dr. Rasaiah again wrote to Mr. Campbell. This letter was written to rebut the conclusions drawn by Dr. Knight in his report of August 11, 2005. In his letter, Dr. Rasaiah noted that:

(a) while Dr. Knight stated that the time of death was between 0-36 hours, it was known what time the parents had left the home [i.e. less than 36 hours];

(b) the neck of Valin was carefully examined and dissected only at the end of the autopsy. Therefore, there would be no Prinsloo-Gordon artefact;

(c) the possibility of suffocation could not be either confirmed or excluded by Professor Knight;

(d) petechiae are not always due to obstruction of the large veins in the neck, there are other causes including cardiac failure;

(e) he queried who prepared the slides for Professor Knight as Professor Knight, in his report, indicated that the slides were improperly mounted;

[264] Report of Dr. Rasaiah, September 19, 2005, PFP004838.

(f) whether Professor Knight was reviewing the appropriate slides and not those from another case;

(g) that there is no evidence, contrary to media reports, that the death was due to natural causes;

(h) the absence of literature references in support of Professor Knight's conclusion that bruises on Valin's thigh could be from riding and falling from a bike; and

(i) the absence of any comment by either Dr. Pollanen or Dr Knight on the presence of hemorrhages in the lungs, thymus gland, peritracheal tissue and brain. [265]

197. That same day, Mr. Mullins-Johnson was granted bail by Justice Watt of the Superior Court of Justice.[266] CBC News reported his release.[267]

198. On September 26, 2005, Dr. Rasaiah wrote a third letter to Mr. Campbell. He stated:

(a) some of the photographs clearly showed bluish and reddish bruising in the upper high and vulvar area;

(b) the histological examination of the anorectal area showed traumatic injuries and Dr. Pollanen was mistaken;

(c) Dr. Pollanen was mistaken in concluding that there is no evidence of neck trauma;

(d) the methodology of the autopsy precluded a finding of Prinsloo-Gordon hemorrhages;

(e) neither Dr. Pollanen nor Professor Knight commented on the sections of the brain, which was a major omission;

[265] Letter from Dr. Rasaiah to Mr. Campbell, September 21, 2005, PFP003637.
[266] Recognizance of Bail, September 21, 2005, PFP058970.
[267] Article, CBC News, September 21, 2005, PFP116665.

(f) no histological interpretation was given by either Dr. Pollanen or Professor Knight with respect to the thymus;

(g) neither Dr. Pollanen nor Professor Knight commented on the six hematoma which are clearly visible and due to blunt force trauma; and

(h) he is disappointed that the expert reports were released to the public before input by him, particularly "when the accuracy and validity of the consultation reports are in question." [268]

199. On September 28, 2005, Dr. Pollanen wrote to Dr. Rasaiah. He stated:

> As you may know, a comprehensive set of materials has been prepared for this case to facilitate external review. Therefore, an additional set has been prepared for you, based on your request of September 16, 2005. The materials are provided with this letter.
>
> However, a set of unstained slides has not been included. One set of duplicate slides has been prepared and is currently circulating among the international reviewers. The original set of slides are in the Toronto Forensic Pathology Unit. You are welcome to attend my office at any time to review the slides.[269]

200. On October 7, 2005, Dr. Rasaiah responded to Dr. Pollanen. He wrote:

> Thank you for your telephone call this morning. You indicated that you are unable to send me either the unstained or stained recut slides because of decisions made by others.
>
> On the 28th of September 2005, you sent me a comprehensive set of material made to facilitate external review and included photographs but not the microscopic slides.
>
> I would like to know who the "others who had made a decision not to send me the recut slides" are and the reasons for not doing so.[270]

201. On October 11, 2005, Dr. Pollanen wrote back to Dr. Rasaiah. He stated:

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[268] Letter from Dr. Rasaiah to Mr. Campbell, September 26, 2005, PFP003640.
[269] Letter from Dr. Pollanen to Dr. Rasaiah, September 28, 2005, PFP116641.
[270] Letter from Dr. Rasaiah to Dr. Pollanen, October 7, 2005, PFP116630.

> Thank you for your letters of October 5 and 7, 2005. This response summarizes our telephone conversation on October 7, 2005.
>
> I have no objection to providing access to histologic preparations from the postmortem of [Valin]. As I indicated in my previous letter, you may attend this office at any time to examine the original slides. Alternatively, a set of recut slides is circulating with international reviewers and can be made available for your examination, once the slides have been returned to Canada.
>
> Therefore, there is no immediate plan to prepare a new set of recut slides. I have discussed this matter with the Chief Coroner and he concurs.
>
> It is important for you to know that no one is attempting to limit your access to the slides and it would be a mistake to think that was the case. In addition, it should also be clear that every effort has been made to share with you the results of the review process that has taken place to date, including my reports and the report of Sir Bernard Knight.[271]

202. On October 20, 2005, Dr. Rasaiah wrote again to Mr. Campbell. He stated:

> I have read the Inventory List of Attachments which was sent by Dr. Michael S. Pollanen to external reviewers to facilitate their review on the death of [Valin]. This list was provided to me by Dr. M. Pollanen on September 28, 2005.
>
> I am surprised and concerned to see that my court testimony and the report and trial evidence of Dr. Pat Zehr, Obstetrician and Gynecologist, were not included in the list.
>
> As all the information was not provided to the external reviewers, they will be unable to provide an informed opinion.[272]

203. On October 24, 2005, Dr. Pollanen wrote to Mr. Campbell. He advised that he would not make any additional written comment on the Valin case unless his views were requested. That was because it was "the only reasonable position to take given that the case is now under ministerial review and review by an external panel of pathologists." He then set out some

[271] Letter from Dr. Pollanen to Dr. Rasaiah, October 11, 2005, PFP116629.
[272] Letter from Dr. Rasaiah to Mr. Campbell, October 20, 2005, PFP058605.

information with respect to the location of the slides of the autopsy and the procedure in place to maintain their continuity.[273]

F. The December 6, 2006 Report of Dr. James Ferris

204. On December 6, 2005, Dr. Ferris, [274] who had testified on behalf of Mr. Mullins-Johnson at his trial, wrote to Mr. Lockyer. He stated:

> Following my involvement in this case in 1994, I was so concerned about the outcome of the trial and a possible miscarriage of justice that I retained all of my original file including all of my hand-written and typed notes and these are available if required.
>
> At that time, I was instructed by Mr. Terry O'Hara. Mr. O'Hara was unwell before and during the trial and much of my pre-trial briefing and consultations were with his relatively inexperienced junior, Ms. Jennifer Reed. My information from Mr. O'Hara was that it could be assumed that the child [Valin] had been the victim of chronic sexual abuse and had apparently been murdered. However, he was also of the strongly held opinion that Mr. Mullins-Johnson was not guilty of this murder, and I was asked to deal specifically with the issues relating to the timing of death and any injuries that might have been present on the body of [Valin]. Issues relating to the cause of death did not form a major part of my instructions.
>
> It was my understanding that the evidence of sexual abuse was based on examinations by Dr. P. Zehr and supported by Dr. Marcellina Mian and Dr. Charles Smith from the Toronto Hospital for Sick Children. The main purpose of my review of the microscope sections, taken from the areas of the vagina, anus and adjacent tissues at postmortem examination, was to attempt to confirm these opinions alleging sexual abuse.
>
> I was also unable to support the criteria used by Dr. Rasaiah to establish the cause of Valin's death as due to suffocation and smothering. It was my opinion that there was doubt as to the precise mechanism of death, however based on the criteria which I will discuss below, it was my opinion that if this was a case of murder, then a possible mechanism would be the application of relatively minor compressing force to the neck resulting in vagal inhibition and reflex cardiac arrest.

[273] Letter from Dr. Pollanen to Mr. Campbell, October 24, 2005, PFP003928.

[274] Dr. Ferris' updated *curriculum vitae* can be found at PFP058529.

> It was my opinion at the time of writing my 1994 Report that the accurate determination of the time of death based on the observations recorded at the time was very difficult if not impossible and that the opinion on time of death expressed by Dr. Rasaiah was "*not only misleading but quite wrong*".
>
> …I welcome this opportunity to review and clarify some of the opinions given by me at the time of the trial of William Mullins-Johnson.
>
> There is no doubt that at that time, my opinions were unduly influenced by the apparent authoritative opinions given by Drs. Smith and Mian who strongly supported the observations and opinions of Dr. Zehr. I was concerned at that time with the opinions expressed by Dr. Smith in the Mullins-Johnson case and since that time I have found myself disagreeing with his forensic pathology opinions expressed in several cases and this experience including his work on the Louise Reynolds case has made me extremely cautious about the quality of his forensic pathology work.
>
> I am now aware that Dr. Smith's professionalism has been questioned by others, and I was clearly in error to accept so readily his opinions in the Mullins-Johnson case. Similarly, in retrospect I was wrong to have accepted Mr. O'Hara's assumption that [Valin] had been the victim of sexual abuse and murder.[275]

205. Dr. Ferris later concluded:

> Having reviewed all of the evidence and materials referred to above, it is clear that my opinions were unduly influenced by my instructions from Mr. O'Hara and my ready acceptance of the opinions of Drs. Zehr, Mian and Smith. It is now clear to me that those influences reduced the level of objectivity of my opinions that would normally be expected from a Forensic Pathologist of my experience.
>
> Further, when I was attempting to clarify and explain the limitations of such evidence, my difficulties and caution in reaching my conclusions as expressed in court were interpreted as inconsistency and contradiction.
>
> **It is now my opinion that there is no reasonable evidential foundation on which to determine the cause of [Valin's] death.**
>
> **It is now my opinion that there is no reasonable evidential foundation on which to conclude that [Valin] had been the victim of either chronic or recent sexual abuse.**

[275] Letter from Dr. Ferris to Mr. Lockyer, December 6, 2005, PFP003648.

> **It is now my opinion that there is no reasonable evidential foundation on which to base the time of [Valin's] death.** [Emphasis in original.][276]

206. On December 8, 2005, Dr. Pollanen gave his power point presentation on Mr. Mullins-Johnson's case to Mr. Campbell, Ms. Fairburn and Det. S/Sgt. Dickinson of the Sault Ste. Marie Police Service.[277]

207. On December 9, 2005, Dr. Rasaiah examined the blocks and slides on Valin at the OCCO. On December 12, 2005, he wrote to Mr. Ken Campbell. He concluded that:

> Re-examination of the slides confirmed histological findings reported in my post-mortem report A-93-51 reported on July 13, 1993. [278]

208. On December 12, 2005, Michal Fairburn wrote to Det. S/Sgt. Dickenson. She stated:

> Thank you for coming to Toronto to attend the meetings with Dr. Pollanen and Dr. Rasaiah. We look forward to receiving your notes so that we can make disclosure. Please send them as soon as they are typed. In addition, as a result of the meetings, Mr. Campbell and I are of the view that it is very important that the international reviewers have available to them most of the photos in the case. Could you please have a full set of photos reproduced and sent to us as soon as possible? We don't need the ones of the outside or inside of the house. What's relevant for the purposes of the review is photos of the bed and all photos of Valin (including those taken while she was still at home and those taken at autopsy).
>
> In addition, would you mind following up on the two CFS issues we discussed:
>
> a) confirming that the hair found at autopsy was in fact of non-human origin; and
>
> b) where Mr. Mullins-Johnson's control sample came from and where it has been stored over the last 12 years.[279]

209. On December 15, 2005, Dr. McLellan requested that genetic testing be done on a sample of Valin's tissue for the presence of Long QT Syndrome.[280]

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[276] Letter from Dr. Ferris to Mr. Lockyer, December 6, 2005, PFP003648.

[277] Letter of Ms. Fairburn to Prof. Paciocco, December 19, 2005, PFP110288.

[278] Letter of Dr. Rasaiah to Mr. Campbell, December 12, 2005, PFP003643.

[279] Letter from Ms. Fairburn to Det. S/Sgt. Dickenson, December 12, 2005, PFP110287.

210. On December 19, 2005, Ms. Fairburn wrote to Prof. Paciocco, who had been asked by the Minister of Justice to provide an opinion on the Mullins-Johnson s. 696 application. She stated:

> I acknowledge receipt of your letter dated November 30, 2005. Your comments are very helpful. In the event that "new" evidence comes to light, whatever that may be, we will bear your comments in mind and address the questions you raise.
>
> On Thursday December 8, 2005, Ken Campbell and I met with Dr. Michael Pollanen, Medical Director of the Toronto Forensic Pathology Unit in the Office of the Chief Coroner for Ontario. Also present at the meeting was a police officer from the Sault Ste. Marie Police Service, Detective Staff Sergeant Scott Dickinson. Dr. Pollanen gave a powerpoint presentation, which elucidated upon his Report and Opinion on the Death of [Valin] and his Supplementary Report and Opinion on the Death of [Valin]. Both these reports are contained within the record provided by AIDWYC at volume 5, tabs C1 and C2. Detective Staff Sergeant Scott Dickinson took notes of the meeting. I will forward a copy of his notes once I have received them, but understand he is off work until the new year. I understand from the officer that he wishes to type out his notes before providing a copy.[281]
>
> During the meeting, Dr. Pollanen provided us with a number of articles and documents:
>
> Michael S. Pollanen: *Subtle Fatal Neck Compression*, 136 Med. Sci. Law (2001) vol. 41, No. 2 (enclosed)
>
> Michael S. Pollanen: *A Triad of Laryngeal Hemorrhages in Strangulation: A Report of Eight Cases*, Journal of Forensic Sciences 614 (copy of article does not contain full citation) (enclosed)
>
> Michael S. Pollanen, D. Noel McAuliffe: *Intra-cartilaginous laryngeal haemorrhages and strangulation*, Forensic Science International 93 (1998) 13 (enclosed)
>
> CD Rom with Powerpoint Presentation
>
> Guidelines on Autopsy Practice for Forensic Pathologists, 2005

[280] Requisition Form, December 15, 2005, PFP003732; Informed Consent, December 15, 2005, PFP003730;

[281] Officer Dickinson's typed notes can be found at PFP110333, pp. 5-7.

Other than the Guidelines on Autopsy Practice for Forensic Pathologists (which are contained at volume 5, Tab D of the AIDWYC record) the Crown was not previously in possession of any of these materials. I note that the CD Rom contains very sensitive and graphic images, not only of [Valin], but other deceased individuals and their body parts. I have not enclosed a copy of the powerpoint presentation, which was provided to us at the end of the meeting. To have real meaning and context, I believe the presentation needs explanation by Dr. Pollanen. Nonetheless, I would be happy to forward a copy if you wish.

On December 9, 2005, Ken Campbell and I met with Dr. Bihubendra Rasaiah.[282] As you know, he was the pathologist who conducted the original autopsy on [Valin]. His post-mortem report is located at pp. 126-136 of volume 1, tab A of the AIDWYC record. Dr. Rasaiah provided the following materials:

Examination of Modern Legal Medicine, Psychiatry and Forensic Science, pp. 81-2 (copy does not contain full citation) (enclosed)

Handbook of Forensic Pathology, Craniocerebral Trauma, Subscapular Hemorrhages (copy does not contain full citation) (enclosed)

David Ellison, Seth Love, *Neuropathology*, 11:14 (copy does not contain full citation) (enclosed)

J. Thomas Stocker, Louis P. Dehner, *Pediatric Pathology*, pp. 438, 441-2 (copy does not contain full citation) (enclosed)

Dr. Rasaiah also provided a copy of the Consultation Record of Dr. Patricia Zehr (which is found in the AIDWYC materials at volume 1, tab 1, pp. 194-6).

Following our meeting with Dr. Rasaiah, he attended at the Office of the Chief Coroner for Ontario to view the original slides and blocks. On December 15, 2005, we received a report from Dr. Rasaiah, dated December 12, 2005. It is also enclosed with this letter.

While meeting with Dr. Pollanen on December 8, 2005, he advised that a group of three experts will be considering the forensic results in this case. He indicated that the experts are Professor Jack Crane, State Pathologist for Northern Ireland and Professor of Forensic Medicine at Queen's University, Belfast, Dr. John Butt, a consulting forensic pathologist and former Chief Medical Examiner for Nova Scotia, and Dr. Chris Milroy, Home Office Pathologist and Professor of Forensic Pathology, University of Sheffield. While we understand that the review has not

[282] Officer Dickinson's typed notes of the December 9 meeting can be found at PFP110333, pp. 7-10.

yet begun, we are hopeful that we will have a result before the end of February.[283]

211. On January 17, 2006, Dr. McLellan wrote to Mr. Lockyer. He stated:

> I write to acknowledge receipt of your letters of January 12 and 13, 2006, regarding the review of materials arising from the case of [Valin].
>
> As discussed with you on the telephone yesterday, I will be asking my assistant, Katherine Stephen, to arrange a meeting with yourself and Ms. Fairburn to review which materials have been sent to the external reviewers and to discuss the additional materials that are appropriate to forward at this time.[284]

212. A duplicate letter was sent to Ms. Fairburn that same day.[285]

213. On January 18, 2006, Ms. Fairburn wrote to Det. S/Sgt. Dickinson, as follows:

> There are two things that I need and I am hoping you can assist.
>
> (a) Could you please provide me with an inventory of the contents of the garbage pail seized from the upstairs washroom
>
> (b) Could you please provide a continuity chart as it relates to the following items:
>
> (i) Mr. Mullins-Johnson's trackpants that he was wearing at the time he was arrested…;
>
> (ii) [Valin's] fingernail cuttings taken at the time of autopsy (…never submitted to CFS);
>
> (iii) Two pairs of male underwear (one white and one blue) seized from laundry pile (…never submitted to CFS); and
>
> (iv) Garbage pail and its contents seized from upstairs washroom.[286]

[283] Later from Ms. Fairburn to Prof. Paciocco, December 19, 2005, PFP110288.
[284] Letter from Dr. McLellan to Mr. Lockyer, January 17, 2005, PFP116567.
[285] Letter from Dr. McLellan to Ms. Fairburn, January 17, 2006, PFP116574.

214. On January 27, 2006, counsel for Mr. Mullins-Johnson and the Crown Law Office Criminal met with Dr. McLellan. It was agreed by all parties that three of the pathologists who had been asked to assist in the global review of Dr. Smith's work be requested to separately provide opinions on the cause of Valin's death. Professor Milroy, Professor Crane and Dr. Butt were chosen.[287]

215. On January 30, 2006, Ms. Fairburn wrote again to Det. S/Sgt. Dickinson. She stated:

> Pursuant to my letter dated January 18, 2006, I wonder if you have had a chance to check on the contents of the garbage pail seized from the upstairs washroom? In addition, could you please let me know when you will have a chance to complete the continuity chart as it relates to the items listed in that correspondence? We can't submit any of those items to the CFS for testing until the continuity chain is completed…[288]

216. On February 7, 2006, Ms. Fairburn again wrote to Det. S/Sgt. Dickinson. She stated:

> Pursuant to my letters of January 18 and 30, 2006 (of which I attach a copy for your reference), I wonder if you could contact me? Time is moving on and the CFS cannot conduct any testing until the continuity issues have been addressed…[289]

217. On February 14, 2006, Dr. Barry McLellan wrote to Drs. Butt, Milroy and Crane.[290] He stated:

> I write in follow-up to my letter of January 16, 2006 with respect to the review of materials arising from the autopsy performed on [Valin]. I indicated to you at that time, that there would be additional materials sent to you for the purposes of this review. I now enclose these additional materials, as well as a Revised Inventory List of Attachments.
>
> As you are aware, a set of recut slides was prepared in this case and has been, or will soon be made available, for your review. In Dr. Pollanen's covering letter of September 28, 2005, he indicated that you may be provided with an

[286] Letter from Ms. Fairburn to Det. S/Sgt. Dickinson, January 18, 206, PFP110324.

[287] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 158.

[288] Letter from Ms. Fairburn to Det. S/Sgt. Dickenson, January 30, 2006, PFP110323.

[289] Letter from Ms. Fairburn to Det. S/Sgt. Dickinson, February 7, 2006, PFP110322.

[290] The *curriculum vitaes* of Professor Milroy, Dr. Butt and Professor Crane can be found, respectively, at PFP058454, PFP058425, and PFP058513.

> opportunity to review the original slides if you deemed this was necessary for your review. In this particular case, we will be asking each of you to review the original slides. In order to facilitate this process, the original slides will be brought to you in the secure custody of a police officer. You will be contacted in the near future to determine the best date and time for these slides to be made available for your individual review.
>
> I included a Backgrounder document (arising from a Press Conference held November 1, 2005) with my previous letter of January 16, 2006. The external review of the case of [Valin] commenced prior this announcement. You will note on page 3 of the Backgrounder document that for those cases requiring external review in future, each case will initially be reviewed by one external pathologist. If concerns are raised by this reviewing pathologist, the materials will also be reviewed by two further external pathologists. It also indicates that if the review requires the involvement of three pathologists, these pathologists will then meet and discuss their findings to reach consensus opinions.
>
> In the case of the review of materials arising from the autopsy performed on [Valin], I will require each of you to prepare individual reports. I will not be arranging for the three of you to meet to discuss your findings, in order to reach consensus opinions. You may, however, at any time during the review of materials, and prior to completing your report, communicate with one or both of the other two reviewers, if you feel this would assist you in reaching your conclusions.
>
> In reviewing this case (and in reviewing future cases), I require your opinions on three specific areas:
>
> (a) Do you feel that the important forensic pathology examinations were conducted?
>
> (b) Do you agree with the facts reported as arising from the examinations performed?
>
> (c) Do you feel that the conclusions reached with respect to the cause of death are supported by the materials that were provided for your review? [291]

218. On February 24, 2006, Christine Fontanella, from the lab that was testing Valin's DNA for the Long QT Syndrome, sent an email to Katherine Stephen and Dorothy Zwolakowski advising that:

[291] Letter from Dr. McLellan to Drs. Butt, Milroy and Crane, February 14, 2006, PFP003100.

> Unfortunately, we were unable to extract enough usable DNA from [Valin's] sample. We have exhausted all possibilities at this point and will not be able to proceed any further unless you have additional blood or tissue samples for us to work with. Please let me know if you do and we can make arrangements to try and extract usable DNA for our test.[292]

219. On March 6, 2006, Dr. McLellan wrote to Ms. Fairburn. He stated:

> I write in response to your letter of February 23, 2006 in which you requested an estimate as to the timeline for the three forensic pathology experts to complete their reports with respect to the death of [Valin].
>
> I am currently making arrangements for the original microscopic slides to be delivered to Dr. Butt and Professors Milroy and Crane, in keeping with my letter of February 14, 2006. The slides will be transported in the secure custody of Det. Sgt. Tom Girling. Once I am aware of Det. Sgt. Girling's travel arrangements, I will correspond with you and Mr. Lockyer.
>
> As you are aware, the three forensic pathology experts cannot complete their report until they have had the opportunity to review the original microscopic slides. The three experts are all aware of the urgency of this review. Once they have had an opportunity to review the microscopic slides, I will contact them individually to determine when their reports will be complete. I will correspond with you and Mr. Lockyer once I have this information.
>
> I appreciate the fact that there is time pressure to completing these reviews and I will continue to take steps to ensure the review process is completed as soon as possible.[293]

220. On March 21, 2006, Dr. McLellan wrote to Mr. Lockyer. He stated:

> In follow-up to my letter of March 6, 2006, I write to inform you that Det. Staff Sgt. Tom Girling departed for the United Kingdom on March 18, 2006, carrying with him the original microscopic slides arising from the autopsy conducted on [Valin]. These original microscopic slides will be made available to Professors Milroy and Crane for their review.
>
> I understand that Dr. Butt will likely be in Toronto sometime during the first two weeks of April for other purposes. He has been contacted and will review the original microscopic slides when he is in Toronto.

---

[292] Email from Ms. Christine Fontanella, February 24, 2006, PFP116476, p. 1; Letter from Dr. Pollanen to Dr. McLellan, July 4, 2006, PFP058627.

[293] Letter from Dr. McLellan to Ms. Fairburn, March 6, 2006, PFP058622.

> Once I am aware that the three forensic pathology experts have reviewed the original microscopic slides, I will be contacting them to determine when their reports will be complete.[294]

G. The Reports of Professor Milroy, Professor Crane and Dr. Butt

221. Professor Milroy issued his report on May 1, 2006[295]. Dr. Butt issued his report on June 1, 2006.[296] Professor Crane replied on September 22, 2006. [297]

H. DNA Retesting

222. Meanwhile, continued efforts were being made to have further DNA testing done on some of the items originally seized as part of the investigation. On August 1, 2006, the OCCO published a specific protocol for additional DNA testing to be done in the Mullins-Johnson case.[298]

223. On September 26, 2006, Mr. Lockyer wrote to Ms. Fairburn regarding the August 1, 2006 protocol. He stated:

> I have now reviewed the draft Centre of Forensic Sciences' protocol. I have no problem with its contents but for one matter. In my opinion the work should be done in Toronto and not Sault Ste. Marie for three reasons:
>
> 1. The results need to be, as far as possible, beyond reproach. In this regard Mr. Newman himself should be asked to do the work, something I first suggested in my letter of April 3, 2006.
>
> 2. The impetus for this testing was begun by Inspector Pluss of the Sault Ste. Marie Police Service. The testing being conducted is so 'remote' that it would likely be rejected by the Centre of Forensic Sciences in normal circumstances. Bearing in mind as well Dr. Rasaiah's unsolicited second, third and fourth opinions on his views of the pathology of the case, Mr. Mullins-Johnson has cause for concern that the authorities in Sault Ste. Marie perceive themselves to

[294] Letter from Dr. McLellan to Mr. Lockyer, March 21, 2006, PFP058625.
[295] Report of Professor Milroy, May 1, 2006, PFP004096.
[296] Report of Dr. Butt, June 1, 2006, PFP004065.
[297] Report of Professor Crane, September 22, 2006, PFP004089.
[298] Protocol for Additional Testing, August 1, 2006, PFP058702.

have a lot at stake in this case. He, and I, would feel a lot ' safer' if the work was done in- a place far removed from Sault Ste. Marie by a person who has had no previous association with it.

3.Last and not least I will be designating an expert for Mr. Mullins-Johnson pursuant to the protocol. He/she will be from Toronto and consequently if the work is done in Sault Ste. Marie it will significantly increase the time and cost for that expert. On the other hand, to ship the items to be examined to Toronto seems a minimal inconvenience.[299]

224. On October 19, 2006, Ms. Fairburn wrote to Det. S/Sgt. Dickinson. She stated:

As a follow-up to my e-mail message to you and Inspector Pluss yesterday, I am requesting that the following exhibits be forwarded to the Centre of Forensic Sciences in Toronto for testing:

a. Mr. Mullins-Johnson's trackpants that he was wearing at the time he was arrested (CFS # B37, SSMP #38)

b. Two pairs of male underwear (one white and one blue) seized from laundry pile (SSMP #60 - never before submitted to CFS)

c. Garbage pail and its contents seized from upstairs washroom (SSMP #57)

d. [Valin's] fingernail clippings taken at the time of autopsy (SSMP #3A (left hand) and 2B (right hand) - never before submitted to CFS).

The items should be directed to the attention of Jonathan Newman, the head of the biology section in Toronto. As indicated in my e-mail message to you yesterday, there is a premium on getting these items to the lab as quickly as possible. Provided they are received at the CFS soon, the biology work can be completed by the end of November to middle of December. We have provided this date to Professor Paciocco as the date when he will receive the Crown's position with respect to the case. Anything you can do to get the samples to Toronto as soon as possible would be most appreciated.[300]

225. That same day, Ms. Fairburn wrote to Mr. Lockyer. She stated:

We take no objection to the testing being done in Toronto, as you requested in your letter dated September 26, 2006. I have consulted with Mr. Jonathan

[299] Letter from Mr. Lockyer to Ms. Fairburn, September 26, 2006, PFP058689.

[300] Letter from Ms. Fairburn to Det. S/Sgt. Dickinson, October 19, 2006, PFP058691.

> Newman on this issue, and we agree that the convenience of your expert is a valid consideration. Mr. Jonathan Newman has very kindly agreed to do the required forensic work. As I indicated in my call to you on October 13, 2006, provided Mr. Newman receives the items soon, subject to the availability of your expert, he believes that he can have the testing completed by the end of November to mid-December. The Sault Ste. Marie Police Service has agreed to transport the items to Toronto. I am informed that this can be done probably by mid-next week. I expect to have confirmation of that fact soon and will let you know the exact date once I hear from Inspector Art Pluss. The items will be directed to the specific attention of Mr. Newman.
>
> As per your request of me during our conversation last week, Mr. Newman informs me that your expert is welcome to be present when the items are unpackaged. Once Mr. Newman is in possession of the sealed items, we will coordinate a mutually convenient date for all.[301]

226. It would appear that the DNA re-testing was conducted on November 8, 2006. [302]

227. On November 22, 2006, Dr. Jonathan Newman, Biology Section Head, CFS, issued his Preliminary Report.[303]

228. On March 23, 2007, Ms. Fairburn sent an email to Dr. Knight, which stated:

> As I indicated in the message I left for you earlier today, I am a Crown Counsel working on the above case. In a letter to Mr. David Bayliss dated August 11, 2005, you provided your opinion with respect to a number of forensic pathology issues in this case.
>
> In the letter, you make reference to having reviewed twenty-seven re-cut slides provided to you by the Office of the Chief Coroner for Ontario. On page 13 of the report, you indicate that the slides carried "serial number A-53-91" and were individually numbered 1 to 28, although there was no slide number 27. Would you be kind enough to consult your notes and confirm the slide numbers you were dealing with? The reason I ask is that the serial number for the slides in this case was actually A-93-51. While having spoken with Dr. Michael Pollanen, it appears that this is likely a transposition error in the report, it would be very helpful if you could confirm the slide numbers you viewed. To this end, could you please send me a communication by letter or e-mail to confirm? My e-mail address is…

---

[301] Letter from Ms. Fairburn to Mr. Lockyer, October 19, 2006, PFP058694.

[302] Letter from Mr. Lockyer to Ms. Fairburn, November 1, 2006, PFP058700.

[303] Preliminary Report of Dr. Newman, November 22, 2006, PFP058739.

> While I appreciate how very busy you are, your prompt attention to this inquiry would be most appreciated. We are endeavouring to have submissions done in this case in the very near future and this is one of the few issues that remains outstanding. Thank you for your assistance.[304]

229. Dr. Knight replied to Mrs. Fairburn the next day. He wrote:

> Thanks for your phone call and Email.
>
> I am afraid that I cannot help you at all in this matter, as I have absolutely nothing left in the way of documentation about the Mullins-Johnson case. I have been retired for eleven years and have no office or secretarial facilities. I gave up offering forensic expertise years ago and became involved in Mullins-Johnson as a personal favour, as with the Truscott case, though I can't remember the circumstances.
>
> I have no hard copy of any reports now and the electronic version on my home computer was lost when it fatally crashed a considerable time ago. There were never any 'notes' about the slides, as I always write directly into a final report.
>
> As to the slide numbers, I would be surprised if the numbers I quoted in my report were incorrect, unless it was an undetected typing error.
>
> Whatever the numbers, I recall that I agreed in every respect with Dr Pollanen's interpretation of the slides.[305]

230. On April 2, 2007, Mr. Newman released his final report on the DNA testing. He concluded:

> 1. A single source male DNA profile suitable for comparison was obtained at up to 9 STR loci from the following items:
>
> 5-2 Acid phosphatase positive area C from trackpants
>
> 5-3 Acid phosphatase positive area D from trackpants
>
> 5-4 Acid phosphatase positive area E from trackpants
>
> 5-5 Acid phosphatase positive area (original testing) from trackpants

[304] Email from Ms. Fairburn to Dr. Knight, March 23, 2007, PFP058631.
[305] Email from Dr. Knight to Ms. Fairburn, March 24, 2007, PFP058631.

7-2 Bloodstain on outside, front of white underwear (epithelial fraction only)

7-3 Cut-out of fabric from inside, front of white underwear (epithelial fraction only)

2. No DNA other than that attributable to [Valin] (B35) was obtained from the right (item 4-2) hand fingernail clippings from her.

3. In addition to DNA attributable to [Valin] (B35) a trace amount of DNA (one allele) was detected on the left hand fingernail clippings (item 4-1) at one locus only. This allele cannot be attributed to the donor of the male DNA profile determined from items 5-2 to 5-5, 7-2 and 7-3, described above.

4. The DNA profile from the amylase positive area A from the trackpants (5-7) is a mixture, a major source of DNA and a trace amount of DNA comprising the minor source. The major DNA profile can be accounted for by the same male DNA profile observed in samples 5-2 to 5-5, 7-2 and 7-3.[306]

231. On April 4, 2007, Ms. Fairburn sent an email to Dr. McLellan in which she wrote:

I understand that Dr. Rasaiah is no longer on the roster of pathologists used by OCCO. Is this correct and since when? Prior to that occurring (if I am correct) what would be the correct way to characterize his relationship with OCCO? i.e. Contract, on a roster, employed by ... Thank you for your ongoing assistance.[307]

232. Dr. McLellan responded to Ms. Fairburn that same day. He stated:

Dr. Rasaiah is still conducting coroner's autopsies at the Sault Area Hospital. Criminally suspicious cases and homicides are no longer autopsied in Sault Ste. Marie.

Dr. Rasaiah conducts these autopsies under Coroner's Warrant on a fee for service basis (as do all other pathologists who conduct coroner's autopsies at Ontario hospitals).

I hope that this is the information you were looking for.[308]

[306] Report of Dr. Newman, April 2, 2007, PFP058754.

[307] Email from Ms. Michal Fairburn to Dr. McLellan, April 4, 2007, PFP058634.

[308] Email from Dr. McLellan to Ms. Fairburn, April 4, 2007, PFP058634.

Part VII. Mr. Mullins-Johnson's Section 696 Application Granted

233. In April, 2007, Ms. Fairburn and Mr. Campbell of the Ministry of the Attorney-General filed their submissions to the Minister on Mr. Mullins-Johnson's s. 696 application. They stated:

> In the unusual circumstances of this case, and bearing in mind Dr. Ferris' recantation of critical aspects of his evidence, Dr. Smith's credibility and reliability difficulties, and the sheer weight of the new expert opinion evidence, the Minister of Justice should order an appeal. At that appeal, Mr. Mullins-Johnson should be acquitted.[309]

234. On Friday, April 27, 2007, Attorney-General Michael Bryant called publicly for an acquittal in Mr. Mullins-Johnson's case.[310]

235. On July 17, 2007, the Minister of Justice, the Honourable Ron Nicholson, granted the application for ministerial review and referred the case to the Court of Appeal for Ontario on the following terms:

> AND WHEREAS, new information has arisen concerning whether William Mullins-Johnson was guilty or not guilty of the murder of [Valin], which information was not presented as evidence at trial, or on the appeal to this Honourable Court, or on the appeal to the Supreme Court of Canada;
>
> AND WHEREAS, an application for ministerial review (miscarriages of justice) was made to the Minister of Justice by counsel on behalf of William Mullins-Johnson pursuant to Part XXI.1 of the *Criminal Code*, for an order directing a new trial or, in the alternative, for an order referring the matter to the Court of Appeal for hearing and determination as if it were an appeal by William Mullins-Johnson;
>
> AND WHEREAS, I am satisfied that there is a reasonable basis to conclude that a miscarriage of justice likely occurred in this case;
>
> I HEREBY respectfully refer this matter to this Honourable Court pursuant to section 696.3(3)(a)(ii) of the *Criminal Code*, based on a consideration of the existing record herein, the evidence already heard, and such further evidence as this Honourable Court in its discretion may receive and consider, to determine

[309] Submissions of the Ministry of the Attorney-General, April 2007, PFP135700, p. 93, para. 211.
[310] Article, CBC News, April 27, 2007, PFP116325.

> the case as if it were an appeal by William Mullins-Johnson on the issue of fresh evidence.[311]

236. That same day, Mr. Mullins-Johnson was re-released by the Court of Appeal for Ontario on bail pending the hearing of his appeal.[312]

237. On September 6, 2007, counsel for Mr. Mullins-Johnson filed their factum in the Court of Appeal for Ontario. Counsel for Mr. Mullins-Johnson sought an acquittal and a declaration of factual innocence from the Court.

238. The Respondent, the Crown Law Office Criminal, filed its factum on October 3, 2007. The Crown supported an acquittal for Mr. Mullins-Johnson, but submitted that the Court of Appeal should not make a declaration of factual innocence.

239. The appeal was heard on October 15, 2007. After hearing *viva voce* evidence from Mr. Mullins-Johnson and Dr. Michael Pollanen, and the submissions of counsel, the Court of Appeal acquitted Mr. Mullins-Johnson. The Court reserved on the issue of whether a declaration of factual innocence should be made.

240. On October 19, 2007, the Court of Appeal delivered its written judgment. The Court confirmed that Mr. Mullins-Johnson was wrongly convicted and that he was "the subject of a terrible miscarriage of justice", but did not make a declaration of factual innocence.[313] The Court stated:

> [20] We agree with the submissions of Crown counsel about the fresh evidence as expressed in para. 12 of their factum:
>
> > There is no doubt that the new expert opinions in this case are credible and highly cogent. They go to the very core of whether there was an offence committed in this case. The opinions have been provided by some of the leading Canadian and international experts in forensic pathology and pathology. The opinions not only have a profound impact

[311] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 19.
[312] Appellant's Factum at the Ontario Court of Appeal, September 6, 2007, PFP135543, para. 19.
[313] *R. v. Mullins-Johnson*, October 19, 2007, 2007 ONCA 720.

> on the reliability of the jury verdict reached at trial, it is submitted that they are dispositive of the result.

[21] Finally, in their excellent factums the parties have fully reviewed for us the entire body of evidence aside from the expert evidence. In short, without the expert evidence there is no case against the appellant and no evidence of a crime. The non-expert evidence, if anything, is inconsistent with guilt and, again, is not indicative of a crime. Now that the trial expert evidence has been completely discredited, there is no case against the appellant and he is clearly entitled to an acquittal.

THE DECLARATION OF INNOCENCE

[22] The fresh evidence shows that the appellant's conviction was the result of a rush to judgment based on flawed scientific opinion. With the entering of an acquittal, the appellant's legal innocence has been re-established. The fresh evidence is compelling in demonstrating that no crime was committed against [Valin] and that the appellant did not commit any crime. For that reason an acquittal is the proper result.

[23] There are not in Canadian law two kinds of acquittals: those based on the Crown having failed to prove its case beyond a reasonable doubt and those where the accused has been shown to be factually innocent. We adopt the comments of the former Chief Justice of Canada in *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken*, Annex 3, pp. 342:

> [A] criminal trial does not address "factual innocence". The criminal trial is to determine whether the Crown has proven its case beyond a reasonable doubt. If so, the accused is guilty. If not, the accused is found not guilty. There is no finding of factual innocence since it would not fall within the ambit or purpose of criminal law.

[24] Just as the criminal trial is not a vehicle for declarations of factual innocence, so an appeal court, which obtains its jurisdiction from statute, has no jurisdiction to make a formal legal declaration of factual innocence. The fact that we are hearing this case as a Reference under s. 696.3(3)(a)(ii) of the *Criminal Code* does not expand that jurisdiction. The terms of the Reference to this court are clear: we are hearing this case "as if it were an appeal". While we are entitled to express our reasons for the result in clear and strong terms, as we have done, we cannot make a formal legal declaration of the appellant's factual innocence.

[25] In addition to the jurisdictional issue, there are important policy reasons for not, in effect, recognizing a third verdict, other than "guilty" or "not guilty", of "factually innocent". The most compelling, and, in our view, conclusive reason is the impact it would have on other persons found not guilty by criminal courts. As

Professor Kent Roach observed in a report he prepared for the *Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell*, "there is a genuine concern that determinations and declarations of wrongful convictions could degrade the meaning of the not guilty verdict" (p. 39). To recognize a third verdict in the criminal trial process would, in effect, create two classes of people: those found to be factually innocent and those who benefited from the presumption of innocence and the high standard of proof beyond a reasonable doubt.

[26] Nothing we have said in these reasons should be taken as somehow qualifying the impact of the fresh evidence. That evidence, together with the other evidence, shows beyond question that the appellant's conviction was wrong and that he was the subject of a terrible miscarriage of justice. We conclude these reasons by paraphrasing what the president of the panel said to Mr. Mullins-Johnson at the conclusion of the oral argument after entering the verdict of acquittal: it is profoundly regrettable that as a result of what has been shown to be flawed pathological evidence Mr. Mullins-Johnson was wrongly convicted and has spent such a very long time in jail.

[27] We can only hope that these words, these reasons for judgment and the deep apology expressed by Ms. Fairburn on behalf of the Ministry of the Attorney General will provide solace to Mr. Mullins-Johnson, to his mother and to everyone who has been so terribly injured by these events.

DISPOSITION

[28] Accordingly, in accordance with the terms of the Reference and s. 696.3(3)(a)(ii) of the *Criminal Code,* we admit the fresh expert evidence, allow the appeal, quash the conviction for first degree murder and enter an acquittal.

[29] We wish to thank all counsel, defence and Crown, for their assistance not only in preparing the materials for this court and for their oral submissions but in assisting Mr. Mullins-Johnson in his pursuit of the acquittal that he so justly deserves. And, while all the experts deserve thanks, we wish to express special appreciation to Dr. Pollanen whose diligence set in motion the chain of events that led to this acquittal.[314]

[314] *R. v. Mullins-Johnson*, October 19, 2007, 2007 ONCA 720.