ONTARIO SUPERIOR COURT OF JUSTICE

COCHRANE

HER MAJESTY THE QUEEN

against

ANNA WESLEY

****

COURT FILE NUMBER 9281/98

V O L U M E I

ONTARIO SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

against

ANNA WESLEY

P R O C E E D I N G A T T R I A L

BEFORE THE HONOURABLE MR. JUSTICE R. BOISSONNEAULT
on April 26, 27, 28, 29, 30 and May 3 & 4, 1999

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APPEARANCES:

D. Fuller — Counsel for the Crown

G. Charlebois — Counsel for the accused

ONTARIO SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

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E X H I B I T S

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MONDAY, APRIL 26, 1999 11:00 a.m.

THE COURT: This is the matter of Her Majesty the Queen and Anna Wesley. Could Anna Wesley be arraigned?
COURT CLERK: Mr. Charlebois, is that Anna Wesley in the prisoner's dock?
MR. CHARLEBOIS: Yes it is.
COURT CLERK: You stand indicted, under the name of Anna Wesley as follows: Anna Wesley stands charged that she, between September 1st, 1958 and June 30th, 1965, at Fort Albany, Ontario, in the District of Cochrane and now in the said region did assault Luke Mack, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?
MR. CHARLEBOIS: Not guilty.
COURT CLERK: Anna Wesley, further stands charged that she, between September 1st, 1958 and June 30th, 1965, at Fort Albany, Ontario in the District of Cochrane and now in the said region, did cause Luke Mack to eat his vomit, a noxious thing with intent to aggrieve or annoy Luke Mack, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?
MR. CHARLEBOIS: Not guilty.
COURT CLERK: Anna Wesley, further stands charged that she, between September the 1st, 1953 and December 31st, 1956, at Fort Albany, in the District of Cochrane and now in the said region, did assault Edmond Mudd and did thereby occasion him bodily harm contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?
MR. CHARLEBOIS: Not guilty.

COURT CLERK: Anna Wesley further stands charged that she, between September 1st, 1952 and June 30th, 1966, '67 sorry, at Fort Albany, Ontario, in the District of Cochrane and now in the said region, did assault Eli Paul-Martin and did thereby occasion him bodily harm, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?

MR. CHARLEBOIS: Not guilty.

COURT CLERK: Anna Wesley further stands charged that she, between September the 1st, 1951 and June the 1st, 1953, at Fort Albany, Ontario in the District of Cochrane, and now in the said region, did assault Eli Tookate, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?

MR. CHARLEBOIS: Not guilty.

COURT CLERK: Anna Wesley further stands charged that she, between September 1st, 1951 and June the 1st, 1953, at Fort Albany, Ontario, in the District of Cochrane and now in the said region, did unlawfully cause Eli Tookate to eat his vomit, a noxious thing with intent to aggrieve or annoy Eli Tookate, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?

MR. CHARLEBOIS: Not guilty.

COURT CLERK: Anna Wesley further stands charged that she, between October 4th, 1956 and October 5th, 1959, at Fort Albany, Ontario, in the District of Cochrane and now in the said region, did assault Tony Tourville and did thereby occasion him bodily harm, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?

MR. CHARLEBOIS: Not guilty.

COURT CLERK: Anna Wesley further stands charged that she, between September 1st, 1958 and June 30th, 1956, at Fort Albany, Ontario in the District of Cochrane and now in the said region, did assault Daniel Wheesk, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?

MR. CHARLEBOIS: Not guilty.

COURT CLERK: Anna Wesley further stands charged that she, between September 1st, 1958 and June 30th, 1966, at Fort Albany, Ontario, in the District of Cochrane and now in the said region, did cause Daniel Wheesk to eat his vomit, a noxious thing for intent to aggrieve or annoy Daniel Wheesk, contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?

MR. CHARLEBOIS: Not guilty.

COURT CLERK: Anna Wesley further stands charged that she, between April 30th, 1955 and June 30th, 1959, at Fort Albany, Ontario in the District of Cochrane and now in the said region, did assault George Wheesk contrary to the Criminal Code of Canada. Upon this count, how do you plead, guilty or not guilty?

MR. CHARLEBOIS: Not guilty.

COURT CLERK: Hearken to your plea as the court hath recorded them, you have plead not guilty to all ten counts on the indictment. Are you ready for your trial?

MR. CHARLEBOIS: Yes.

COURT CLERK: Thank you, you may be seated.

...JURY SELECTION

MR. CHARLEBOIS: Before the jury is recalled Your Honour,just a small area of housekeeping that I've

spoken with the Crown about. Ms. Wesley is 74 years of age, she walks with the assistance of the cane. As you have noticed, she has extremely bad arthritis in both knees. On top of that, her hearing is not the best, in fact, her hearing is downright poor.

THE COURT: She has to be present for her trial.

MR. CHARLEBOIS: No, no, I'm not suggesting otherwise, but I understand and this actually was a situation that arose at another trial I did in this jurisdiction last year, where the person was not hard of hearing but where the glass made it difficult to hear the testimony and...

THE COURT: You want her to sit elsewhere.

MR. CHARLEBOIS: Yes.

THE COURT: Go ahead, do you have any objections?

MS. FULLER: No, none.

THE COURT: Where do you want to choose?

MR. CHARLEBOIS: Well to place, whatever place she'll best be able to hear the evidence because I can indicate to Your Honour, that when I'm communicating with Ms. Wesley, even in a small room, I have to speak with the volume I'm speaking to you now.

THE COURT: Okay, well Mr. Charlebois, only Ms. Wesley can tell us that so sit her wherever you think is best and I want to know from Ms. Wesley, from the outset, whether she understands every word that is said.

MR. CHARLEBOIS: If I can just...Have you just heard what His Honour just said, what the judge just said? Did you hear what the judge just said to me now?

THE COURT: Well, we will have to sit her close to the witness box. We will have to caution the interpreters to speak loudly.

MR. CHARLEBOIS: The other thing, I'm sorry for interrupting Your Honour, the other thing that she has done, which I think was wise, is the lady seated behind her is not a witness at all in these proceedings, has accompanied her from Moosonee to assist her in walking and also for the supplementary purpose that if there are parts she doesn't understand, her friend or escort will be able to let her know at the end of the day what was said.

THE COURT: Should we not have an accredited interpreter for that?

MR. CHARLEBOIS: No, it's not a question of interpretation Your Honour, it's a question of being able to hear what is being said, not a question of language.

THE COURT: The interpreter will hear it and relate it to her, no?

MS. FULLER: The interpreter, I do not believe, is being used for the purpose of Ms. Wesley.

MR. CHARLEBOIS: No, I believe the interpreter is being used because some of the witnesses will prefer to give their evidence in Cree.

THE COURT: Well I do not mind at all if Ms. Wesley sits right at this side of the counsel table.

MS. FULLER: Your Honour, I wonder then if we could have the jury on that side of the room or have the microphones and have the jury, the witness on that side.

THE COURT: For the last 11 years, my neck is used to being turned this way. There is no problem at all to have the jury on this side.

MS. FULLER: But the microphone, in fact, it might be

better to have their light coming in over their shoulders rather than in their face.
MR. CHARLEBOIS: And where would, would the witnesses still be giving evidence from Your Honour's left?
THE COURT: Oh yes but then...
MR. CHARLEBOIS: I don't much care as long as she can understand and hear.
MS. FULLER: Your Honour, I'm prepared to move and then Mr. Charlebois and his client could be there...
THE COURT: They would not be able to see the witness I am told.
MR. CHARLEBOIS: The jury, good point.
THE COURT: Maybe we can have the witnesses testify here.
MS. FULLER: Yes.
MR. CHARLEBOIS: In there.
THE COURT: Yes.
MR. CHARLEBOIS: Yeah, that's perfect and then, if Ms. Wesley is allowed to sit here, she'll be closer to the witnesses as well.
THE COURT: There is no microphone there, is there any way of installing one before we start?
MR. CHARLEBOIS: It would only be done I guess between now and tomorrow.
THE COURT: Can you hear me Ms. Wesley?
MS. WESLEY: Yes, a little bit.
THE COURT: Just a little bit or if I get closer to the microphone like this, can you hear me?
MR. CHARLEBOIS: Don't look at me, the judge is asking you questions. Ms. Wesley just said to me, what did he say?
MS. FULLER: I believe what we did at the Jane

Kakaychewan trial is that the accused sat in that chair, which is close to the witness, close to the jury...

THE COURT: The only difference between that chair and the prisoner's dock is that piece of glass. Now if she can hear from that chair, fine with me; if she cannot hear in that chair, she will have to sit up here; and if she cannot hear up here, we are going to have, to have someone sitting beside here and repeat every word that is being said so.

MR. CHARLEBOIS: I agree.

THE COURT: Well tell me what you want.

MS. FULLER: Do you want to start with Ms. Wesley...

MR. CHARLEBOIS: We might as well start with the easiest potential solution and then work our way up.

THE COURT: She can sit at counsel table but she is still quite far away.

MR. CHARLEBOIS: Counsel table won't assist her because she's still going to be far away.

THE COURT: Well, I am going to give the opening instructions to the jury. Ms. Wesley speaks English.

MR. CHARLEBOIS: Oh yeah, that's not an issue.

THE COURT: Okay, well she's going to sit beside you and you're going to repeat what I say to the jury. Then, we will figure out what is best for the remainder of the trial, even for the motions, she has to be present for her trial.

MR. CHARLEBOIS: Obviously, I have no difficulty in repeating Your Honour's opening comments to the jury. We'll obviously, for the rest of the trial have to find another solution.

THE COURT: Well obviously, I am just trying to get this

thing on its rails right now.
MR. CHARLEBOIS: That's fine.
THE COURT: So we can do that part.
MR. CHARLEBOIS: Yes sir.
THE COURT: Then we can figure out what is best, maybe we may have to engage someone who is, well it will be English, translated in English to sit beside her and repeat every word. That is the only think I can see.
MS. FULLER: Does Ms. Wesley wear a hearing aid?
MR. CHARLEBOIS: No, she doesn't and I can indicate that her physical condition, since I've dealt with her at the preliminary hearing, it's the first thing I noticed this morning, it's different, it's definitely not as good, both as to the hearing and as to the walking.
THE COURT: Well could you get together with Ms. Wesley, obviously she has given you instructions in relation to the trial.
MR. CHARLEBOIS: That is not a difficulty, I have no trouble communicating with her as long as I speak in the tone of voice that I am speaking to you now.
THE COURT: Well I am telling you, why don't you figure out what you feel is best...
MR. CHARLEBOIS: Yes.
THE COURT: ...for Ms. Wesley so that she understands everything and we will see if we can accommodate...
MR. CHARLEBOIS: Thank you.
THE COURT: Or give an alternative that is as good or better.
MR. CHARLEBOIS: No, that's fine, that's fine Your Honour.
THE COURT: Perhaps she can sit beside you now before I get the jury in.

MR. CHARLEBOIS: Okay, does Your Honour want me to like, whisper at her what you're saying to the jury?
THE COURT: Well, I will let you figure that out. If she can understand your whispers, fine, if she cannot, talk louder.
MR. CHARLEBOIS: Okay.
MS. FULLER: Or she may be able to understand Your Honour, sitting at counsel table.
THE COURT: She may...
MS. FULLER: ...with the microphone.
THE COURT: I will keep this microphone right next to me. Does she know what is going on, period?
MR. CHARLEBOIS: Oh yeah.
THE COURT: Like you might, over the lunch period get the assistance of the police officers and act certain scenarios to see what is best but she must understand everything. You are sure hearing is not required to establish her...
MR. CHARLEBOIS: Fitness.
THE COURT: Fitness to stand trial, do you?
MR. CHARLEBOIS: No.
THE COURT: I am getting worried.
MR. CHARLEBOIS: If it's a question of concern to Your Honour after you dismiss the jury for lunch, if you feel it is incumbent, we can either discuss it in open court or we can discuss it in Your Honour's chambers. It is not a matter of concern to me.
THE COURT: Well you are defence counsel, if it is not a matter of concern to you, I am not going to create...It is simply a matter of hearing...
MR. CHARLEBOIS: I've reviewed the evidence of the preliminary hearing with her in detail, I have no

trouble...The only thing is, is that I have to get close, I have to speak loudly and slowly so that she can see my face move, then she can hear alright and her understanding of the English language is excellent.
THE COURT: Okay, well you work out the details. If we have to give special instructions to those that are testifying, we will and you can look over whether your client is understanding everything that is going on. If you have any problems with it, bring it up immediately. We will bring the jury in.
...JURY ENTERS 12:51 p.m.
THE COURT: Members of the jury, I will now give you my opening instructions after which, as I told you previously, you will be excused for the afternoon. We have matters of law to resolve and it will take all afternoon.

So before you hear evidence in this case, I will explain some basis principles which will be important to your consideration of this case. I will also explain to you that I expect, what I expect will happen during the trial.

The oath you have taken has made you judges of the Superior Court of Ontario for the duration of this trial. Both the accused and the prosecution have selected you to be judges of the facts and to render a verdict in due course. You are judges not only while you sit in this courtroom but for 24 hours a day until this case is concluded and I mention this for several reasons which will soon become apparent.

The judge and jury system is one of the oldest, most important and proudest of our legal traditions. It is a team system where you are the judges of facts and I am the judge of the law. Our respective tasks are of equal importance. No decision or verdict can be reached within our system unless the facts are first ascertained and the proper legal principles are then applied to them.

Although I will be commenting on the evidence at the end of the trial, your view of the evidence must prevail as you are the sole judges of the facts. That means that it is up for you alone finally to interpret the evidence and the credibility of the witnesses. Nothing becomes a fact until you find it to be so. By the same token, I will tell you what the law is. You must accept what I say in that regard for I am the sole judge of the law to be applied in this case.

MR. CHARLEBOIS: I know that Your Honour is speaking into the microphone, Ms. Wesley I whispered to her whether she understood what Your Honour was saying and she said, yes and no, not all of it and certainly, Your Honour is speaking very clearly. I have no trouble hearing you.

THE COURT: Did she hear what I have said so far, yes and no?

MR. CHARLEBOIS: The answer was here and there, not all.

THE COURT: Okay, members of the jury, another basis principle of our law is that a person has to be present for their trial. Now if a person cannot hear what is going on, they are not present for their trial. Rather than continue my opening statement to you, it is not a

long statement, I would prefer to do it tomorrow morning at ten o'clock, the reason being this, we will simply try different things in the courtroom here this afternoon to make sure that Ms. Wesley is present for her trial. Otherwise, it is a nullity, there is no trial. I do not know what we will do but I think between the seven or eight of us here, we can figure something out. There are a variety of things we can try but in any event, that will not be your problem and that is a legal problem, that is the law, not a fact. It is up to me to ascertain that Ms. Wesley can understand and we will, one way or another.

The only thing I will tell you so that you have a bit of knowledge to what will be occurring in the next few weeks...Oh, by the way, I had a look, not your names but your places of residence and I was happy to ascertain that there was only one person who was far enough away, that is Kapuskasing and everybody else coming from Cochrane, Smooth Rock and Iroquois Falls so that will be a little bit easier for you.

So we will proceed this afternoon in solving this problem plus the legal problems that have to be addressed. We will come back tomorrow at, can you come in at quarter to ten or just before quarter to ten so I can give you my opening address and perhaps the evidence could start at ten o'clock. Is that okay or if one person would have an objection, that would be enough for me. No. I would also like to advise you, so you can get your schedules straightened around, that we will stop Friday at twelve thirty, get ready for the

week-end. You, not us, we have other things to do. Then, the week after, we will sit on Monday and Tuesday. I have a very important meeting I have to attend in Toronto, Wednesday, Thursday, Friday. Then, we will continue normally, which is, sitting from approximately ten to four thirty with a break in the afternoon, a break in the morning and an hour and a quarter for lunch. So I hope that gives you some type of an idea as to what you are facing. We might be surprised by one or two other motions but I do not expect them to be very long. So with that, rather than continue my opening address to you, I will simply release you and ask you to be here at 9:45 a.m. tomorrow morning. Thanks again.

...JURY RETIRES 12:40 p.m.

THE COURT: Okay, I am not an audio expert, I would ask counsel, with the help of courtroom staff to devise something so that Ms. Wesley understands everything. It may mean getting someone to sit beside her and repeat everything that is said. We will have to slow the witnesses down, slow ourselves down, whatever so it is one o'clock. How long do you think this motion will take this afternoon?

MR. CHARLEBOIS: I expect it to be fairly lengthy, a lot of case law to consider but Your Honour has already indicated that you may have to reflect on it anyway.

THE COURT: I may but what I am reflecting on now is that case law or not, Ms. Wesley has to understand.

MR. CHARLEBOIS: Yes.

THE COURT: So that is the immediate problem right now and I do not know, we can seek some counsel or advise somewhere, use your imagination, whatever, she has to

understand. How about the simultaneous translation equipment we have, could that work? It could work, maybe, you can try. You will have to experiment. If she has these in her ears, perhaps she could hear everything.

MR. CHARLEBOIS: Even while Your Honour is on the bench, if I can just inquire of her something.

THE COURT: Even now, I mean even at two and a half feet.

MR. CHARLEBOIS: When I'm talking, do you hear every word I'm saying to you right now? Have you ever had something in your ear, a machine, ever try that. Not yet heh?

MS. FULLER: I just think Your Honour that would be more effective because...It is just as far from there to here or here to there. The earphones may, it's more immediate.

THE COURT: You do not want to go over there.

MS. FULLER: If I can avoid it, I would not...

THE COURT: No, no, let's try to figure it out. Let's get the equipment, something, please let me know with the progress you are making.

MR. CHARLEBOIS: The only difficulty I have Your Honour, is I do not know what facilities are available here.

THE COURT: We have adequate facilities...

MR. CHARLEBOIS: No, no, I am not suggesting otherwise Your Honour, I just don't know what is available and what isn't.

THE COURT: Of course you do not, after you see it, you will. Let's try it so can we work, I want some of the staff to bring that equipment out.

R E C E S S

U P O N R E S U M I N G :

THE COURT: Ms. Wesley, can you hear me now? You can hear every word I say now? You will have to wait until my voice is translated. Can you hear me now? For the record, Ms. Wesley has shaken her head. Maybe I can speak in English and you can speak in English.

MS. FULLER: The mic is very distorting. Your Honour, that mic that you are using, that one there I find does distort sound, it gives kind of a strange amplification.

THE COURT: Can I shut if off.

MS. FULLER: Yes, you are almost clear Your Honour without amplification.

MR. CHARLEBOIS: Because you have a voice that carries Your Honour.

MS. FULLER: Yes, you do.

THE COURT: You need it.

COURT REPORTER: Yes.

THE COURT: Ms. Wesley, I am not speaking in the microphone that the interpreter has, can you hear what I say?

MS. WESLEY: Yes.

THE COURT: Every word.

MS. WESLEY: Yes, just as long as you speak loud and slowly.

THE COURT: I will speak slowly and I will ask counsel to speak slowly. Now I am about to hear a motion on the definition of noxious and what evidence I eventually will allow the jury to hear in relation to the definition of noxious. Do you understand that and you are shaking your head yes. Very well. Now Ms. Fuller, do you wish...I am not quite sure how you two

wish to proceed here, do you wish to bring your motion in relation to experts or Mr. Charlebois, do you wish to make representations in relation to the definition of noxious under the Criminal Code?

MR. CHARLEBOIS: My suggested approach Your Honour, would be that the Crown provide you with the C.V.'s of the two experts she intends to call together with copies of each proposed expert reports because I submit that should be the proper starting point that will be the raw data upon which you will be asked to make findings. Once, if you find...

THE COURT: You cannot hear Ms. Wesley, you cannot hear your lawyer?

MS. WESLEY: I hear him but not all the words.

THE COURT: But not all the words, is it possible to obtain another apparatus that I am holding here and speaking in. We may all have to speak in such an apparatus. In any event, perhaps Mr. Charlebois could repeat what he has just said in order that his client may understand what he did say.

MR. CHARLEBOIS: I take it I am not supposed to speak too loudly into this...

THE COURT: Please advise your client, if she does not understand, to tell us immediately rather than wait until she is asked.

MR. CHARLEBOIS: Okay, Ann, if there's anything I say that you don't understand, let us know, pull on my sleeve or something, okay. Did you understand what I just said?

MS. WESLEY: Yes.

MR. CHARLEBOIS: Okay, don't be shy, if there is anything you say or I say you don't understand, stop,

pull on this.
THE COURT: You, me.
MR. CHARLEBOIS: Okay and if there is anything the Crown says later you don't understand, you pull on my sleeve, if there is anything the judge says, pull on my sleeve, okay.
MS. WESLEY: Yes.
THE COURT: Better still, have her tell us out loud.
MR. CHARLEBOIS: Did you hear what the judge said?
MS. WESLEY: Right now.
MR. CHARLEBOIS: Yeah, okay, the judge says don't pull on the sleeve, just say, 'I don't understand, stop', things like that.
THE COURT: Right away.
MR. CHARLEBOIS: Right away.
MS. WESLEY: Yes.
THE COURT: You were saying.
MR. CHARLEBOIS:I believe I will start over Your Honour. I would propose that the Crown file the C.V.'s of the two proposed experts and file as well the two reports which will form the basis for the evidence of the experts if they are allowed to testify. That, in my submission would provide the raw data upon which Your Honour can then hear argument and consider the applicable case law.
THE COURT: Will you please tell the Crown that I may well have the C.V.'s of Doctor Peter Jaffy and Samantha Poisson.
MS. FULLER: No, I believe it's a C.V. of Doctor Peter Jaffy and Doctor Brian Cain.
MR. CHARLEBOIS: Hold on a minute please.
MS. FULLER: And Doctor Brian Cain.

THE COURT: That is correct, Peter Jaffy and I have this yellow report.
MS. FULLER: That is a report of Doctor Jaffy and you should have as well, a report of Doctor Cain with the Queen's University crest on the top of the letterhead. It looks like this Your Honour.
THE COURT: I have it, when I say I have it, would you repeat it for.
MS. FULLER: You have those.
THE COURT: Yes I do.
MS. FULLER: Reports and you have those C.V.'s. I would ask that they be made exhibits to this argument on motion.
THE COURT: Madam clerk, please translate for me, would you please enter the curriculum vitae as exhibits one and two and the reports...
COURT CLERK: May we have them as letters.
THE COURT: Certainly.
MR. CHARLEBOIS: Because they have not been ruled admissible yet.
THE COURT: That is right too.
MR. CHARLEBOIS: They should be letters instead of numbers.
THE COURT: It has been a long day.
EXHIBIT A - Doctor Cain's curricular vitae. Produced and Marked.
EXHIBIT B - Doctor Jaffy's curricular vitae. Produced and Marked.
EXHIBIT C - Report from Doctor Cain. Produced and Marked.
EXHIBIT D - Report from London Family Clinic. Produced and Marked.

MS. FULLER: In terms of how this motion should proceed, the position of the Crown, Your Honour, is that it is a motion with respect to the definition of noxious thing for the purpose of this trial, whether vomitus is a noxious thing within the meaning of the Criminal Code. The Crown's position is that as the courts have uniformly held that the concept of noxious thing should be given its plain and ordinary meaning as something hurtful, harmful, unwholesome or causing or liable to cause hurt, harm or injury, that these are matters of prima facie, matters of medical nature and that evidence of harm be it physical harm or psychological harm would be admissible to assist the court in determining whether or not vomitus is noxious.

As my friend disputes that noxious can include the concept of psychological harm, which is in the Crown's submission, the predominant area of harm, it is the Crown's view that Mr. Charlebois should be making the argument, in effect, objecting to that evidence being called and as the objection is essentially his, I would submit that it would be appropriate for him to articulate that objection in order that I may respond to it.

MR. CHARLEBOIS: I don't have a problem with going first Your Honour, however, this is not a situation in the way of a charter challenge for instance where the defence has the onus of satisfying the court on the balance of probabilities, that a breach has occurred. This is a, my submission, a situation dealing strictly with the admissibility or non-admissibility of propose evidence. And as such, I don't believe that either

party has the onus of convincing you, in other words, the onus doesn't rest on the Crown nor on the defence. It's an evidentiary problem where you will be called upon to deal with the admissibility. On that basis, as I said, I have no problems with going first based on the understanding that I am not carrying the ball here, that Your Honour hears from both counsel and then makes a determination.

At Your Honour's suggestion and in order to assist you in determining this issue, both counsel provided you over the lunch hour with certain case law which both counsel will be relying on.

Three of the counts in the indictment allege that my client caused certain named complainants to eat their vomit, a noxious thing, with intent to aggrieve or annoy these named complainants. This section is governed in the case of the complainant, Luke Mack, by S. 278 of the 1927 Criminal Code and in the case of the other two named complainants, is governed by S. 217 (b) of the new for the time Criminal Code that came into force in 1953, 1954 Statutes of Canada.

I submit that the definition of 'noxious' was decided in this country by the R. V Burkholder, (1977) (Alberta C. A.) 34 C.C.C. (2d) 214 and following which Your Honour was given a copy of.

At page 219 of that decision, they go on to define 'noxious' as being defined in the shorter Oxford dictionary as injurious, hurtful.

THE COURT: Where are we, okay.
MR. CHARLEBOIS: Page 219 Your Honour, starting with paragraph three. I am sorry, I will now draw your attention to the proper passages because of course, my copy is highlighted.
THE COURT: Yes, I have that passage.
MR. CHARLEBOIS: And the following, the following paragraph as well, Your Honour, the one that there is support for the view in Henna. I am relying on those two passages in Burkholder.

Now I submit that 'noxious' has already been defined in Burkholder as a substance that is injurious, hurtful, harmful, unwholesome. Circumstances that may arise and which have to be considered in determining whether a substance is 'noxious' included it's inherited characteristics, quantity administered and the manner in which it's administered. Substances which may be innocuous, such as water to drink or an aspirin for a headache may be found to be a noxious substance in some circumstances. For example, like water is injected into the body of a person by means of a syringe or an excessive quantity of aspirin is administered to a person.

Now if we use Burkholder as our starting point and I submit that we should, we then need to look at whether vomit is a noxious substance and I would like to draw Your Honour's attention to Doctor Cain's report where page three, last paragraph, he goes on to define what vomit consists of.
THE COURT: Sorry, paragraph or page.

MR. CHARLEBOIS: Page three, last paragraph.
THE COURT: Yes.
MR. CHARLEBOIS: Doctor, that last paragraph, I would ask Your Honour to consider it and he goes on to describe what the substance consists of.
THE COURT: Okay. I received these documents prior to this hearing. Tell your client that.
MR. CHARLEBOIS: The judge said that he received the documents, meaning the doctor's reports, just before this hearing.
THE COURT: I read part of them.
MR. CHARLEBOIS: He has read part of them.
THE COURT: And I circled 'C' on the first page of Doctor Cain's report.
MR. CHARLEBOIS: And His Honour has circled 'C' on page one of Doctor Cain's report.
THE COURT: I am sure that I will have copies for myself of all of these documents.
MR. CHARLEBOIS: His Honour says that he is sure that he will have copies in due course of all these documents.
THE COURT: I don't think the jury should get the original of this report because I circled paragraph 'C'.
MR. CHARLEBOIS: His Honour doesn't think that the jury should get the originals of these reports because His Honour has circled paragraph 'C'.
THE COURT: Unless you have no objection, otherwise could other copies be prepared to be the official exhibits.
MS. FULLER: Certainly Your Honour.
MR. CHARLEBOIS: I profess that when I am being called upon to translate all this, I find it very distracting

because I'm trying to think ahead to what you're saying and to what I'm going to say in response.

THE COURT: What do you suggest we do?

MR. CHARLEBOIS: I've never faced this problem before Your Honour.

THE COURT: Neither have I and I am sure Ms. Wesley has not either. She has to know what is being said. Now we may be able to get another apparatus like this.

MR. CHARLEBOIS: See right now, I've lost track of what you wanted me to repeat because my mind, when Your Honour said something, I wanted to respond to, my mind switched to that. You see, what Your Honour just said there of course, well I don't think the jury should get copies of these in any event, if you decide the experts can testify, it's the opinion they give in the box which will be evidence, not the reports.

THE COURT: No problem.

MR. CHARLEBOIS: Should I be continuing now? Can you hear now, everything I say.

MS. WESLEY: Yes.

MR. CHARLEBOIS: Every word.

MS. WESLEY: Yes.

MR. CHARLEBOIS: Can you hear the judge when the judge talks to me, no.

THE COURT: We can only do the best.

MR. CHARLEBOIS: The judge says 'we can only do the best'.

THE COURT: We can, under the circumstances.

MR. CHARLEBOIS: 'We can under the circumstances'.

THE COURT: If you feel Mr. Charlesbois.

MR. CHARLEBOIS: 'If you feel Mr. Charlebois'.

THE COURT: That our present arrangements.

MR. CHARLEBOIS: 'That our present arrangements'.
THE COURT: Are such that you cannot give your client your best defence.
MR. CHARLEBOIS: 'Are such that you cannot give your client your best or her best defence'.
THE COURT: Then we should cease right now.
MR. CHARLEBOIS: 'Then we should cease right now'.
THE COURT: And find a solution.
MR. CHARLEBOIS: 'And find a solution'. I applaud the way in which Your Honour is insisting on Ms. Wesley as she must following every aspect of the trial. I also understand that until I spoke with her today, I didn't realize that her hearing had diminished to that extent since I last saw her in December. I must say that in attempting to convey everything that is being said, I find it very difficult to play the role of facilitator and counsel because I'm trying to do two things at once and we don't even have the jury here today. It's going to be even more difficult when the jury is here.
THE COURT: Difficult or impossible to perform your task the way it should be performed.
MR. CHARLEBOIS: To answer bluntly, if I'm called upon to do, for the next three weeks what I've been doing for the last ten or 15 minutes, I don't think I can do her justice.
THE COURT: Well that is the bottom line is it not?
MR. CHARLEBOIS: I wonder if other options might be available.
THE COURT: Okay, tell Ms. Wesley that I think we should stop now.
MR. CHARLEBOIS: His Honour says, 'I think we should stop now'.

THE COURT: And look into obtaining equipment such as you have in your hand now.
MR. CHARLEBOIS: 'And we should stop now and look at obtaining equipment such as the equipment I have in my hand now'.
THE COURT: And then proceed with the trial.
MR. CHARLEBOIS: 'And then proceed with the trial'.
THE COURT: I see no other solution.
MR. CHARLEBOIS: The judge sees, His Honour sees no other solution. Now have you heard everything, have you understood everything I have just said now.
MS. WESLEY: Yes.
MR. CHARLEBOIS: Because everything I have just said has been exactly what the judge has said to me.
MS. FULLER: Can we get another one of those?
MR. CHARLEBOIS: We'd need more than one, we'd probably need about four or five, one for the judge, one for the witness, one for you, one for me.
COURT CLERK: There is only one in our district, we are trying if we can obtain...
MR. CHARLEBOIS: Quite honestly, I think we will need more than one.
THE COURT: Oh, most definitely.
MR. CHARLEBOIS: I know if I may, the last time I saw...I don't know how many they have around but the last time I saw more than one of these kicking around the courthouse, I might suggest that we attempt to contact Guy Rouleau in l'Orignal. He is the one, he's got some job, he's the head of interpretation for the east region, he's based out of l'Orignal. I don't know how many he has.
THE COURT: I would like to hear from Ms. Fuller on this

point.
MS. FULLER: I agree that if we need something approaching a mic like I'm holding right now that we need more than one and I agree that it is a little distracting to be making your arguments, repeating the court's response. It does seem though that this mic system works for Ms. Wesley and that she does hear. You hear me when I'm speaking into the mic.
MR. WESLEY: Yes.
MS. FULLER: You hear every word I say and that if we had, if we had several of these, there could be one for the witness, one for the judge, one for counsel.
THE COURT: You know, it is my feeling that it is impossible to carry on.
MR. CHARLEBOIS: We'll also need one for the interpreter Your Honour because some of the witnesses will be testifying in Cree.
THE COURT: If we all agree, do you want to tell her that, if we all agree that it is impossible to carry on, let's resume and take care of the details. If it takes eight, if it takes 12, fine. Do counsel agree with me?
MS. FULLER: Yes, I agree Your Honour and if there is anything I can do to assist, I am sure my friend would do anything to assist us, he'll be happy to help the court.
THE COURT: Maybe you can repeat this to the witness, perhaps the jury should be advised not to come in tomorrow while we iron out all these problems. Let's adjourn. I think we should contact the jury, advise them that we are having problems in relation to audio equipment.

MS. FULLER: 'I think we should contact the jury and advise them that we're having problems regarding the audio equipment'.
THE COURT: And we cannot proceed until these problems are rectified.
MS. FULLER: 'And we cannot proceed until these problems are rectified.'
THE COURT: That they should be ready to come back on Wednesday morning.
MS. FULLER: 'That they should be ready to come back on Wednesday morning'.
THE COURT: But they will be called in any event tomorrow afternoon.
MS. FULLER: 'But they will be called in any event tomorrow afternoon'.
THE COURT: I do not think there is anything we can do but adjourn for the day.
MS. FULLER: 'I don't think there's anything we can do but adjourn for the day'.
THE COURT: And hopefully, we can continue tomorrow morning at ten.
MS. FULLER: 'And hopefully we can continue tomorrow morning at ten' without the jury.
THE COURT: Without the jury.
MR. CHARLEBOIS: Does Your Honour need to see counsel at all this afternoon?
THE COURT: If you have something to add to it, fine, good, not necessary.

R E C E S S 4:00 p.m.

TUESDAY, APRIL 27, 1999

U P O N R E S U M I N G : 10:00 a.m.

MR. CHARLEBOIS: Good morning Mr. Charlebois, good morning Ms. Fuller.
MS. FULLER: Good morning.
THE COURT: I am pleased to advise you that I was able to read through the material last night and perhaps gain some insight in what this problem is and I thought I would take a chance at the outset to let you know what I think the problem is so that you can straighten me out if that is not it.

Whether a substance is 'noxious' is a question for the jury to answer. It is a matter of fact, do you agree? No.
MR. CHARLEBOIS: I would submit that it is a matter of fact, that was going to be part of my argument.
THE COURT: Okay so it is a matter of fact and fact of course comes from the evidence and the words describing the effects of the noxious substance are of course, a matter of the English language subject to my comments to the jury and then, if the substance is capable of being 'noxious' or if they find that it is not, it is just up to them.

Now if I understand this motion correctly, Ms. Fuller, her wishes to lead evidence from experts, that the harmful part of this administration of the noxious substance, not only includes physical harm but psychological harm. Have I got it so far?
MR. CHARLEBOIS: I believe you do.
THE COURT: Then let's go, I am prepared to listen to

your submissions.
MR. CHARLEBOIS: I thought I'd just, just before Your Honour came in, I indicated to Ms. Fuller that as prepared and I feel I am quite prepared as is my friend to argue this motion. That although it appears simple on the face of it, it's necessarily going to be a fairly lengthy argument because there are a lot of ramifications to it and I am glad that Your Honour set the day aside so that we could make full and complete arguments on the matter.

I'll perhaps just remind my client, again Ms. Wesley, if there is anything that is said here that you do not understand, that you don't hear I should say, let us know will you because I won't be able to look behind but perhaps raise your hand, alert His Honour somehow.
THE COURT: Ms. Wesley, please speak up if you do not understand, thank you.
MR. CHARLEBOIS: Your Honour, on a ten count indictment charging my client, three of the counts relate to the administration of a noxious substance. One count is governed by old S. 278 of the...
THE COURT: Do I have a copy of that yet? I believe you told me yesterday you would prepare a copy.
MR. CHARLEBOIS: I'd prepare one but I have not as of yet. I can undertake to do it at lunchtime Your Honour.
THE COURT: Okay, okay, two sections.
MR. CHARLEBOIS: One of the counts relates to S. 278 of the old 127 Code.
THE COURT: Yes.
MR. CHARLEBOIS: And the other two counts, because of

their time frame relate to S. 217 (b) of the Criminal Code that was legislated into force in 1954.
THE COURT: Four.
MR. CHARLEBOIS: Nineteen fifty-four.
THE COURT: Um-hum.
MR. CHARLEBOIS: Now I recognize that whether you look at the wording of the 1927 Code or the wording of the 1954 Code.
THE COURT: Okay, just a minute, do these sections, 278 and 217, do they apply to the counts consecutively just so I know?
MR. CHARLEBOIS: Count two, Your Honour, the one involving Luke Mack is governed by S. 217 (b) of the 1954 Code.
THE COURT: Okay.
MR. CHARLEBOIS: Count six involving Eli Tookate is governed by S. 278 of the 1927 Code.
THE COURT: Um-hum.
MR. CHARLEBOIS: And count nine involving Daniel Wheesk is again governed by S. 217 (b) of the 1954 Code.
THE COURT: Excellent, thank you.
MR. CHARLEBOIS: Now the defence recognizes that whether you look at the wording in 1927 or the wording in 1954, that but for the inclusion and exclusion of the word 'unlawfully' the offence is made out the same way.
THE COURT: Okay, well I haven't got the Criminal Code of 1927 nor '54, which one has 'unlawfully'?
MR. CHARLEBOIS: I believe it's 1927 but please bear with me.
MS. FULLER: Nineteen twenty-seven, it is Your Honour.
MR. CHARLEBOIS: The old Code, S. 278, "Everyone is guilty of an indictable offence liable to three years

imprisonment who unlawfully administers to or caused to be administered to or taken by any other person any poison or other destructive or noxious thing with intent to injure, aggrieve or annoy such person". The 1954 Code reads, S. 217 (b), "Everyone who administers or causes to be administered to any person or causes any person to take poison or any other destructive or noxious thing is guilty of an indictable offence and is liable s.s. (B) to imprisonment for two years if he intends thereby to aggrieve or annoy that person". So the wording of the offence is the same whether one looks at the 1927 Code or the 1954 Code.

THE COURT: The exclusion or inclusion of 'unlawfully' does not bear any.

MR. CHARLEBOIS: As far as I am concerned, it surplusage and in fact, that may well explain why it was deleted from the 1954 revision.

THE COURT: Is it in 229?

MR. CHARLEBOIS: It's probably the only thing Ms. Fuller and I agreed on today.

THE COURT: No, is it contained in the 1999 Criminal Code as 'unlawful', no, it just kept on that way after.

MR. CHARLEBOIS: Yeah, I'm almost sure that it is not contained in '99, it's not. Now I submit that the definitive legal pronouncement on what constitutes a noxious thing or a noxious substance was determined by the Alberta Court of Appeal in 1977 in R. and Burkholder, for the record, B-U-R-K-H-O-L-D-E-R.

THE COURT: Okay.

MR. CHARLEBOIS: And I would draw Your Honour's attention in the copy of Burkholder that you were given yesterday to page 219, paragraphs three and four. I am quoting from page 219, paragraph three, "Noxious is

defined in the shorter Oxford Dictionary as injurious, hurtful, harmful, unwholesome and it will be noted that the inclusion of the word unwholesome supports the conclusion that a substance may be noxious if it is not beneficial to morals." In my opinion, there's support for the view in Henna but a substance is a noxious thing if in the light of all of the circumstances, attend upon its administration, it is capable of effecting or in the normal course of events, will effect a consequence defined in S. 229.

Circumstances that may arise and which have to be considered in determining whether a substance is noxious include its inherent characteristics, the quantity administered and the manner in which it is administered. Substances which may be innocuous, such as water to drink or an aspirin for a headache may be found to be a noxious substance in some circumstances. For example, if water is injected into the body of a person by means of a hypodermic syringe or an excessive quantity of aspirin is administered to a person.

THE COURT: Okay, let me ask you this, do the definitions contained in most of the decisions are post 1953, do the definitions under S. 229 apply to the sections that I am dealing with?

MR. CHARLEBOIS: I'm sorry Your Honour, I don't quite understand the question.

THE COURT: Well 223, 278 and 217, do not read exactly as I do in S. 245 okay, are the decisions decided under 245, for the most part, apply to the two previous sections?

MR. CHARLEBOIS: From what I can see in my 1999 Martin's Your Honour, the only two sections referred to are the

only two annotations referred to in Martin's '99 refer to Burkholder, which is a decision that I've just brought to Your Honour's attention and to a decision, a British decision called Marcus of which my friend gave each of us copies yesterday. So my submission would be that yes, Burkholder is as applicable to the 1999 wording as it was applicable to the 1954 or to the 1927 wording. Because the thrust of Burkholder is to address the definition of a noxious substance or a noxious thing and the common thread that runs through all three enactments, 1927, 1954 and 1999 is noxious thing or noxious substance. So the defence submits that Burkholder is the case by which Your Honour should be guided in looking to determine what a noxious thing is.

Now I have had occasion to review very carefully the reports prepared by the Crown's proposed expert witnesses, Doctors Jaffy and Cain. The bottom line here is, I don't have a problem with part of Doctor Cain's report and I will indicate in a second the portions that I don't have a problem with. I do have a problem with the balance of Doctor Cain's report and the entirety of Doctor Jaffy's report and that is the basis for the motion.

THE COURT: Okay, just let me locate them.

MR. CHARLEBOIS: Now looking at Doctor Cain's report.

THE COURT: Hang on there, okay, that is the...Okay, I have Doctor Cain's report.

MR. CHARLEBOIS: Doctor Cain's report is the one dated March 2nd Your Honour.

THE COURT: Yes, now you will have substitute copies for the exhibits, will you?

MR. CHARLEBOIS: Well for purposes of the motion, I believe they've already been entered as exhibits, I

will be, I mean, at the time that Your Honour makes a determination.
THE COURT: It will not matter.
MR. CHARLEBOIS: It will be either one or the other.
THE COURT: Yes, okay, Doctor Cain's report.
MR. CHARLEBOIS: Dealing with Doctor Cain's report, I admit that he touches but first of all, for purposes of the record, it would appear that Doctor Cain is a medical doctor and from the C.V., that he has spent a large portion of his time as an emergency room physician. As such, I take no exception to the fact that Doctor Cain, as could for that matter, any medical practitioner in Cochrane describe to us what vomitus consists of and what its inheritent characteristics are or what its immediate physical effect is, if it is ingested or aspirated. Any doctor can tell us that.

Now dealing with Doctor Cain's report, where and I believe this is where we stopped yesterday when we got into the audio problems, I would like to draw your attention to page three, the last paragraph.
THE COURT: Um-hum.
MR. CHARLEBOIS: I've actually broken down Doctor Cain's report into two paragraphs or portions that I believe I cannot, in good conscious, take issue with. Page three, last paragraph, I don't find objectionable and I find is relevant to the issues before the court, before the jury, "Vomitus consists of gastric juices partially digested food and bacteria. It is important to note that because of the highly acidic nature of the gastric juices, vomitus itself is quite acidic. Children tend to vomit somewhat more readily than adults. In the

case before us, it is probably that being forced to eat their own vomitus, the children would be crying, gagging, gasping and trying to catch their breath all at the same time. This increases the likelihood of aspiration, that is the introduction of small amounts of vomitus into the windpipe." Then, if Your Honour will turn to page four, paragraph three, the one that starts with 'Apart from aspiration', "Apart from aspiration, vomitus is noxious in its effect on the esophagus or gullet while the stomach has a built in protective mechanism to prevent harm from acid, the esophagus does not. Because of its acidity, vomitus is irritating to the esophagus, think of adult heartburn and would no doubt be noxious in that respect." I don't have a problem with that either.

Next paragraph, "Finally in a child who has just vomited, the likelihood of vomiting again is greatly enhanced by being required to eat the vomitus. Forceful vomiting can cause tearing of the internal lining of the esophagus with subsequent haemorrhaging." I don't have a problem with that either.

Because I believe that the three paragraphs that I have just read from Doctor Cain's report are relevant to the issues raised in Burkholder, which I feel is the decision that should guide you in determining what's noxious and what isn't. They're relevant to the issues raised in Burkholder because Burkholder talks about the inherent characteristic of the substances and the manner in which its administered.

THE COURT: But I do not decide whether the substance is noxious, that is up to the jury.

MR. CHARLEBOIS: Yes.

THE COURT: Okay.
MR. CHARLEBOIS: In my submission, so if I find that Burkholder or I should say, if you find that Burkholder is the case that should guide you, I don't think I could argue in good conscience that the three portions of Cain's report that I've just read should not be admitted. However, I would like to argue and forcefully that the balance of Doctor Cain's report and the entirety of Doctor Jaffy's report should not be admitted because they don't touch on those issues. The balance of Cain's report deals with psychological harm, psychological trauma, submits that page two, "This type of abuse falls in the same category as childhood sexual abuse, leaves a lifelong scar on the individual. In the vernacular, that's pushing it in my submission and doesn't bear on the issues the jury has to decide.

I've got a major problem with all of page two of his report where he deals with the psychological trauma. I have a problem as well with the other harmful effects which start at the bottom of page two and go on for half of page three where there are many potential causes of vomiting, administration of a noxious substance. I've deal with the part, the three paragraphs I take no exception with, there is no suggestion in the will say statement of the witnesses, nor in the evidence gathered at the preliminary hearing, that the vomiting was caused by any of the named suggestions at the top of page three that start with infections and end with the disturbing visual occurrences.
THE COURT: What are you telling me there now?

MR. CHARLEBOIS: I'm sorry.
THE COURT: So what are you saying there, that you did not have any disclosure.
MR. CHARLEBOIS: No, that's not what I'm saying Your Honour, I'm saying that the evidence we have is that these children vomited and the suggestion made by the Crown is that these children vomited as a result of being administered a noxious substance, their own vomit and not due to drugs, irritation at the back of the throat, bowel obstruction, they have no evidence of that.
THE COURT: Well is that the narrow problem we are dealing with?
MR. CHARLEBOIS: Oh no, it's much wider than that.
THE COURT: No, is it a narrow problem we are dealing with, whether psychological harm is within the definition of harmful?
MR. CHARLEBOIS: That's probably, yeah.
THE COURT: The ultimate.
MR. CHARLEBOIS: I am sorry.
THE COURT: Is that the ultimate thing we are dealing with?
MR. CHARLEBOIS: Yes, I can give you me bottom line right now, Your Honour.
THE COURT: Yeah.
MR. CHARLEBOIS: And then flesh it out because I've got a lot of case law to cover. My bottom line is this, that either Doctor Cain testifies as to the three paragraphs that I have talked about or in the alternative, to prevent them from coming from Kingston to here for that limited purpose, those three paragraphs can be read on consent by the Crown into the

record or even, an amended copy of the report can be filed as an exhibit and given to the jury dealing with the three paragraphs that I find not objectionable and then, it's up to the jury because what will the ultimate issue be here? The ultimate issue is going to be whether or not my client in fact administered this noxious substance to these people, to the named complainants.

THE COURT: Evidence stacks.

MR. CHARLEBOIS: And I don't feel, I don't think, that as a matter of law, it's necessary or desirable and I think the case law...That's where Ms. Fuller and I part company in two different directions, I feel that the case law doesn't support going any further that than and my friend entirely disagrees and that is where Your Honour will have to make the decision.

THE COURT: Going any further than what, I have missed that now.

MR. CHARLEBOIS: That my submission is going to be that it's going to be, it's something where the jury doesn't need expert evidence in order to decide the fact. In other words, when we have a full jury here, Your Honour, I think all of the members of the jury, everyone in this courtroom when we have the full jury here, witnesses, spectators, whatever, all of us at some point in our lives, have vomited. We all know what it tastes like, we all know what it feels like and we all know what happens if you unwillingly swallow some of it in the course of retching.

THE COURT: So I guess you have to agree that it is not wholesome.

MR. CHARLEBOIS: I'm sorry.

THE COURT: I guess you will have to agree that it is not wholesome.

MR. CHARLEBOIS: I'm prepared, I'm prepared to admit that vomitus is unwholesome, I'm prepared to admit that vomitus meets the requirements of Burkholder and I'm prepared to admit that vomitus is a noxious substance. Hence, what do we need the experts for? It then becomes, the issue then becomes did my client compel these students, the three named students to eat their vomit and with what intent?

THE COURT: Is the Crown entitled to lead evidence to show how harmful it might be?

MR. CHARLEBOIS: I can't prevent the Crown, in spite of an admission to lead evidence as to how harmful it might be, as long as and that's what my submission is going to be, the harm is limited to the short term direct physical harm and that you can't start delving 40 years later into, well this is abuse and as a result of this, these people's lives were wrecked etcetera, etcetera, that's too much of a stretch.

THE COURT: To do analogize say with sexual assault, would the Crown then be entitled to lead evidence to show how traumatizing or not traumatizing this action may have been...

MR. CHARLEBOIS: It's been addressed, it's been addressed by the Supreme Court of Canada, Justice Sopinka in Mohand, it's been addressed by the Ontario Court of Appeal in a decision that I just read in the O.R.'s last week...

THE COURT: Well wasn't Mohand just simply that you cannot put witnesses up there to tell me he is not the type of guy to do it?

MR. CHARLEBOIS: No, it goes well beyond that Your Honour. I'll be getting into a discussion of Markwark, Mohan and B.M. but basically, those cases are saying is, and again the Crown, the Crown feels that a different interpretation should be put on the cases, I believe those cases stand for the proposition that you don't stick an expert in there unless the expert is going to bring to bear evidence or matters that are outside the scope of the ordinary experiences of members of the jury. And in fact, Mohan and B.M. deal specifically with cases where the Crown sought to bring witnesses dealing with some effects of, long term effects of abuse, things like that and they weren't allowed to. Well they were allowed to by the trial judge and then...

THE COURT: I must have Mohan all wrong because I thought defence tried to do that.

MR. CHARLEBOIS: In defence, yeah, in Mohan, you're right, it was the defence, Doctor Bray was the name of the expert. Anyway, my point is this, we have this jury here. I'd lay money that all of those 12 people at some point in their lives have vomited, we all have.

THE COURT: Have they all vomited under the circumstances that are alleged in this case?

MR. CHARLEBOIS: No but those circumstances are going to be evidence, the witnesses, the complainants are going to testify as to the circumstances under which they vomited and what they were then compelled to do according to their evidence.

THE COURT: How about the harm that they felt either at the moment, five minutes later, two weeks later, three weeks later...

MR. CHARLEBOIS: Can't stretch it that far...
THE COURT: Twenty years later.
MR. CHARLEBOIS: That's my submission, can't stretch it that far.
THE COURT: They cannot give evidence to that effect.
MR. CHARLEBOIS: That's stretching noxious beyond what it is intended to be stretched. I mean, the noxious substance cases, when you go back to the old case law from the 1927 Code and the 18 something Code, they dealt mostly with the administration of poison, nobody was trying to stretch it into psychological harm.
THE COURT: Well not as much is known about psychological harm back then.
MR. CHARLEBOIS: I'm sorry.
THE COURT: Not as much was known about psychological harm back then as is now I would think. I do not have any expertise on that right now but that is something that has been delved in to a great extent rather recently in our jurisprudence. I do not know how you can separate, I just do not know how you can separate physical harm from psychological harm from an action or an experience.
MR. CHARLEBOIS: It's a stretch to suggest that because some kid was compelled in 1951 to eat his vomit, that as a result of that, he suffered life long psychological harm, it's just a stretch.
THE COURT: Maybe you should testify.
MR. CHARLEBOIS: I'm sorry.
THE COURT: And if it is a stretch, you know, maybe evidence could establish that, I do not know.
MR. CHARLEBOIS: I feel that it is inadmissible evidence, I feel that it is inadmissible evidence on

the basis and perhaps if I may Your Honour, can I go back...

THE COURT: Could I just ask you this, you can go back and go over your cases, you say it is inadmissible for the doctors to testify that psychological harm may have come about because of these actions. Will it be inadmissible evidence for the alleged victims to testify about that?

MR. CHARLEBOIS: Yes.

THE COURT: Oh, I see.

MR. CHARLEBOIS: It is a matter for victim impact statements if we ever get to a point of the imposition of sentence.

THE COURT: Then we can never fully canvas what harmful means.

MR. CHARLEBOIS: Well Mohan and B.M. suggest, well Mohan is where Justice Sapinka establishes the parameters for expert evidence and where the Court of Appeal in B.M. as last week, this is when we saw it, I saw it in the O.R.'s, approves of Sapinka's test in Mohan because basically, before you stick an expert on the stand in any case, and particularly three or four places in Mohan and in B.M., the courts, whether it is The Supreme Court or the Court of Appeal talk about particularly with a jury because of course, if you hear inadmissible evidence, you've been a trial judge for a long time, it is easy for you to disabuse your mind of evidence that you then ruled to be inadmissible. With a jury, it is totally different and both Mohan and B.M. say, you've got to be careful before you stick an expert up there because you get an expert with impressive credentials, the jury may give far more

weight to his or her evidence than it requires, point number one. Point number two, The Court of Appeal and The Supreme Court of Canada both go on to say, don't both with an expert because of this potential problem of they being awed by the expert unless the expert is going to testify to something that is outside the scope of the ordinary experience of the members of the jury.
THE COURT: Well I would think that it would be outside the scope of the ordinary member of the jury to hear from someone that has the C.V. of Doctor Jaffy and the C.V. of Doctor Cain when we see all that they have done in relation to abuse and that type of thing, you know, would it not?
MR. CHARLEBOIS: It is not whether their credentials are impressive or not impressive.
THE COURT: It is what they have to say.
MR. CHARLEBOIS: It is what they have to say and what they have to say does not go outside the scope, in my submission, of ordinary members of the jury because they are being called for the purpose of establishing what a noxious substance is.
THE COURT: That is not my impression from the reports anyway, they are being called specifically to deal with the consequences of the administration of the noxious substance. I guess this is your objection.
MR. CHARLEBOIS: The consequences, as far as I am concerned, everything except for the short term physical, in other words, I was compelled to eat my vomit, as a result of that, I got sicker, I vomited more, my throat was burning, I mean whatever, that can come from the witnesses themselves. They are the ones who lived it. Now to go any further than that is to

take this trial, in my respectful submission outside the scope that it is suppose to take. This trial is not outside the scope of members of the jury. We're not talking a complicated trial, we're not talking forensic accounting, we are talking whether my client committed assaults on those people. That's not hard for a jury to understand, whether somebody was assaulted or not assaulted and also, whether or not my client compelled these people, the complainants to eat their vomit and what her intent was. Again, that's not difficult for members of the jury to understand. They don't need, in my submission the assistance of an expert and the only reason I can see an expert being called in this case is to graphically gross out the jury.

THE COURT: To graphically gross out the jury, no, I do not want to do that or does anyone here, I do not think, want to do that.

MR. CHARLEBOIS: So the problem...

THE COURT: But, how about giving the jury all of the facts.

MR. CHARLEBOIS: Well they have to be facts that are relevant, they've got to be facts that are admissible and the test set out by Sepinka in Mohan is a complex four part test. First, you've got to determine whether this is evidence that is relevant and admissible and I am submitting it isn't and then, if you go on to determine that it is evidence that ordinarily would be relevant and admissible, that it has some probative value, you are going to have to go on and consider whether or not the probative value to be getting by the members of the jury is outweighed by prejudicial effect

on the members of the jury. And then, if you are able to get beyond that hurdle or that legal hurdle, then Your Honour has to consider whether the exclusionary rule applies. That's step three in Sopinka's test.

So my point is this, and then perhaps I'll get back to consideration of the legal points I want...I'm just trying to distill it in simplest essence here because it is not easy. If I recognize that vomitus is a noxious substance, if I agree to admit the three paragraphs that I have read into the record of Cain's report, then the jury has before it an admission by the defence that vomitus is a noxious substance. At that point, their determination then has to be whether my client administered it or did not administer it with a criminal intent. They don't need help from experts in making that determination.

THE COURT: Well they need more help than you will give them and it will have to be an admitted statement of facts I would think.

MR. CHARLEBOIS: I am sorry.

THE COURT: Would it not have to be an admitted statement of facts?

MR. CHARLEBOIS: What, that vomitus is a noxious substance.

THE COURT: Yes.

MR. CHARLEBOIS: I do not have a problem in admitting that vomit is a noxious substance. The debate is going to centre in this trial as to whether or not my client administered it.

THE COURT: Whether or not you client administered it.

MR. CHARLEBOIS: That is right.

THE COURT: Well I would imagine that, that would be an essential element to the charge.

MR. CHARLEBOIS: No, I agree, all I'm prepared to admit is that vomit is a noxious substance because it is unwholesome and Burkholder says that falls within the definition of noxious substance. As far as I am concerned, end of story, end of admission. We then get into a consideration of okay, we all know that it is noxious, the jury knows that it's noxious, the defence has admitted that it is noxious so therefore, let the witnesses testify as to she did this to me, let the accused at some point, if she feels like providing or she feels it is in her best interest to provide an explanation or whatever, provide the explanation or not and then counsel go to the jury to see whether it's been proven beyond a reasonable doubt.

THE COURT: And does your admission stand if the opposite happens?

MR. CHARLEBOIS: I'm sorry, I don't quite follow.

THE COURT: Does the admission stand if the court rules that the Crown can tender expert evidence? I can tell you that we are passed the point of trading or negotiating.

MR. CHARLEBOIS: I'd be prepared to admit that vomit is a noxious substance, I'm not prepared to go on and admit all of the psychological effects that these two experts, particularly Jaffy's report that it has on people.

THE COURT: Well tell me this, are you prepared to admit that vomitus is a noxious substance regardless of my finding on any of these questions of expert witnesses, similar fact evidence, whatever?

MR. CHARLEBOIS: Well similar fact evidence is a different kettle of fish.
THE COURT: You know what I mean, are you telling me that you totally, completely, you will not change your mind, this is it, you will tell the jury, listen, this is noxious, is that what you are telling me or are you telling me, I will tell the jury that if and if and if.
MR. CHARLEBOIS: No, I'm prepared to admit that vomitus, whether it's in the course of Ste-Anne's or whether it is in the course of me being sick in the washroom at lunch hour is a noxious substance.
THE COURT: You are telling me that yourself and on behalf of your client will tell the jury, I admit that vomitus is a noxious substance.
MR. CHARLEBOIS: Yes.
THE COURT: It is still a matter that a jury will have to consider and arrive at a conclusion but I am sure they will be helped along by your admission.
MR. CHARLEBOIS: Yes.
THE COURT: So that is step one. Step two, how far do I go into the harm?
MR. CHARLEBOIS: I submit it's got to be limited to the three paragraphs I read from Cain's report.
THE COURT: I will ask you again, in your view, is a complainant in a sexual assault case limited to describing the act itself and the subject be successfully constrained from adding anything?
MR. CHARLEBOIS: You mean about the long term effects.
THE COURT: Long term effects, circumstances on which it happened.
MR. CHARLEBOIS: No, not circumstances under which it happened Your Honour because circumstances under which

it happened are relevant to a determination of guilt or innocence.

THE COURT: Okay.

MR. CHARLEBOIS: That, they can talk about, that I was in the dining room and this is what happened and this is what she made me do, the circumstances are relevant and as a result of her making me do that, this is what then happened and in the ensuing, a few minutes and ensuing hours.

THE COURT: I would be concerned about this thought, that if the experts would get up and testify and say that there are long term effects, here they are, I'll list them for you, on and on and on, and the complainants get up and testify and not mention a word of it, then, I do not know off the top of my head, I mean me having concerns.

MR. CHARLEBOIS: Well I've got concerns with all of Jaffy's report. It seems to have been culled, it makes no reference to Ste-Anne's, it seems to have been culled from some book somewhere on long term effects of abuse, period. It's not helpful at all to the court, it's not helpful at all to the jury. It's got no relevance, no probative value.

THE COURT: Jaffy's report.

MR. CHARLEBOIS: Further more, Doctor Jaffy is a psychologist, he's not a medical doctor, he doesn't know any more about vomit than Your Honour or I do.

THE COURT: Well attack his qualifications. One thing I would wonder about though is a doctor giving a legal definition of what the word means but the bottom line, your submission is that whatever long term harm this may have had or may not have had is not a proper

subject for this trial, has no probative value to the crime involved and is highly prejudicial, correct?
MR. CHARLEBOIS: That's correct but I would like to flush out the argument.
THE COURT: Oh, start flushing.
MR. CHARLEBOIS: I think the point where Your Honour began to ask me questions, I was in the process of, in the argument that I'd structured to admit that I didn't have a problem with the three paragraphs of Cain's report but I had a problem with the balance of his report and the entirety of Jaffy's report because in Jaffy's report, doesn't address at all the issues of the inherent characteristics of the substance and the manner in which it's administered so he doesn't touch at all on what Burkholder indicates are the defining points or issues in what is a noxious substance.

Now the reason why I'm arguing at the emotional psychological effects of the allegation are not relevant therefore, not admissible are because of this: if Your Honour turns to B.M., page 22.
THE COURT: Okay, just a minute now, page 22.
MR. CHARLEBOIS: B.M. on page 22, The Ontario Court of Appeal quotes what approval and accepts of the test for the admissibility of expert evidence is that promulgated by Mr. Justice Sopinka in 1994 in Mohan. And if you read all of page 22, paraphrased just as Sopinka held at the admission of expert evidence depends on the application of a) a properly qualified expert b) relevant c) necessity in assisting the trial of fact and d) the absence of an exclusionary rule.

Now I'd invite Your Honour to take a look now at page 27 in B.M. now that I've listed the four factors to be considered according to Justice Sopinka. Under the heading of relevance, page 27 (b), Your Honour, Justice Sopinka refers to two aspects of relevance, probative value and legal relevancy. Probative value is the tendency of testimony to establish facts and issue. The second aspect referred to by Justice Sopinka in Mohan is the concept of legal relevancy and he refers to that as a cost benefit analysis. Evidence that is otherwise logically relevant may be excluded on this basis if its probative value is overborne by it's prejudicial effect.

THE COURT: Where are you reading from now?

MR. CHARLEBOIS: Well from my notes Your Honour as I have paraphrased it.

THE COURT: Okay.

MR. CHARLEBOIS: I've paraphrased it to make it simpler and then, I'll be reading from the actual text but you will find that my paraphrasing is contained at page 27 and actually, to assist Your Honour, it's the very last paragraph, the one that's in small type.

THE COURT: I am looking at it.

MR. CHARLEBOIS: About the middle of it and perhaps, rather than read from my paraphrased notes, I'll read from the text. Twenty-seven 'G', "Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis if its probative value is overborne by its prejudicial effect if it involves an ordinate about of time which is not commenced with its

value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability."

Now if Your Honour turns to page 28 of the, top paragraph, what The Court of Appeal does is simply repeat almost word for word what I have just read out of Mohan. Then, at paragraph 'C', "A further concern noted by Sebinka, J. with respect to expert evidence is the danger that the evidence will be misunderstood and distort the fact finding process. As he explained, "Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. In my view, however, a trial judge should be particularly cautious in excluding expert evidence, expert defence evidence on the basis of a cost benefit analysis."

And then, last line of paragraph 'E', "As McGlauglin expressed or subsequently explained in C. Boyer, the exclusionary rule only operates to exclude defence evidence where the prejudicial effect of the evidence submitted outweighs its probative value."
Now, I think we've got to put that in the context, they refer not to just expert evidence but expert defence evidence and further down, they go on to indicate that if the defence wants to tender an expert, the judge should be cautious in excluding the evidence of the expert because you exclude the evidence of the expert, it prevents the defence from making full answer in

defence and of course, nobody wants that.

It is different in my submission when the Crown wants to put the expert up there, not the defence because then, we are left with the paragraph that I have just read about dressed up in scientific language, impressive antecedents virtually infallible and more weight than it deserves.

I'd like to draw Your Honour's attention, again, page 28, paragraph 'H'. "Nevertheless, as Sepinka J. explained, the rule retains a particular significance for expert evidence because of the greater danger of misuse of that evidence and therefore, the greater likelihood that the evidence will distort the fact finding process.

Now I'd argue, Your Honour that the psychological impact of the allegations of noxious substance are not relevant because if you look at the case law at Burkholder, it's not necessary for the Crown in establishing proof of these three counts. It's not necessary for the Crown to prove that my client's actions did in fact aggrieve or annoy the complainants because it's the intent which much be proven and not the effect. Authority for the proposition is found in Burkholder, page 221 or sorry, Burkholder, page 220, third paragraph so if the Crown is not compelled to prove that the actions of the accused did in fact aggrieve or annoy, just that it's the intent which must be proven and not the effect, where does the psychological harm or impact enter into it at the stage

of guilt or innocence. I concede that it has merit, if we ever get to a sentencing or submission stage.
THE COURT: To come back to the sexual assault cases, is it different than those cases? It seems to me that I hear that all the time.
MR. CHARLEBOIS: Well maybe defence counsel don't object to it. All the cases that, all the cases that I have read, The Courts of Appeal and The Supreme Court of Canada put the onus on the defence to object at trial, don't sit there and let all this evidence come in and then, when your client is convicted, holler at The Court of Appeal stage. Every last one of them puts the onus on defence counsel to argue it at this stage and that's what I'm doing.

In my submission, Your Honour, is that the psychological evidence or harm that would be addressed by Doctor Jaffy, who, if I can open a parenthesis here, isn't going to help us at all with the physical effects of vomitus because he's not a doctor, he's not a medical doctor. He doesn't know any more about it than you or I. All he can talk about is the psychological harm or effects. It's not a relevant issue for the jury in their deliberations, it's redundant and in my submission, inadmissible.
THE COURT: How about Doctor Cain?
MR. CHARLEBOIS: No, Doctor Jaffy, the psychologist.
THE COURT: Okay, Doctor Cain, oh you have your paragraphs set out, okay, thank you.
MR. CHARLEBOIS: Yes and where Doctor Cain addresses psychological trauma, again, doesn't address a relevant issue in my submission for the jury and their

deliberations, it's redundant and inadmissible. I do recognize however that those paragraphs of Doctor Cain's report that deals with the physical consistency of vomitus, everything I've talked about earlier.
THE COURT: The three paragraphs.
MR. CHARLEBOIS: Yeah, I have no problem with that.
THE COURT: I am clear on that.
MR. CHARLEBOIS: I submit as well, that Your Honour must be guided by Justice Sopinka's concern with respect to expert evidence the danger that the evidence will be misunderstood, that it will distort the fact finding process, that the jury might accept this evidence as being virtually infallible and have more weight than it deserves.
THE COURT: Do you have anything to, say I would allow one or two witnesses to testify, the experts as to the order in which they should testify?
MR. CHARLEBOIS: No, that's up to the Crown.
THE COURT: Well I do not know how they can speak of a void, out of a void. I am just wondering about the alleged victims.
MR. CHARLEBOIS: Now the order of the witnesses, of course, is for the Crown to choose. I've got no say in that.
THE COURT: No, I am just asking a comment, with one expert getting up and saying, okay, anyone that would go through this would have these symptoms, psychological symptoms for the rest of their lives.
MR. CHARLEBOIS: Oh no, no, no, no.
THE COURT: Just out of...
MR. CHARLEBOIS: T.E.J. Ontario Court of Appeal precludes that...

THE COURT: So I guess that answers my question from your side.

MR. CHARLEBOIS: And it's conclude to E.J. conclusive on that point, you just can't get into that.

THE COURT: Can you tell me how long, how much longer you will be?

MR. CHARLEBOIS: Still some time Your Honour, only because I'm attempting to answer fully the questions you put to me and then go back to those parts of my argument that I haven't touched on.

THE COURT: Well I did not ask you for your excuses, I just asked for the time, in case, so I can.

MR. CHARLEBOIS: I'm probably going to be on my feet til about noon.

THE COURT: We are going to take a break then.

R E C E S S 11:06 a.m.

U P O N R E S U M I N G : 11:28 a.m.

MR. CHARLEBOIS: At the point where we broke, Your Honour, I had touched on three of the, three of the four parameters mentioned by Justice Sopinko, Mohan. I'd spoken about properly qualified expert, relevance, necessity in assisting the trier of fact and that leaves the absence of an exclusionary rule to talk about.

THE COURT: Can you hear, Ms. Wesley, can you hear me?

MS. WESLEY: Yes.

MR. CHARLEBOIS: I'd like to draw Your Honour's attention still in B.M., page 28, the last paragraph where The Court of Appeal, again quoting from approval from Mohan, indicated "Nevertheless, as Sopinka J. explained, the rule retains a particular significance

for expert evidence because of the greater danger of misuse of that evidence and therefore, the greater likelihood that the evidence will distort the fact finding process."

Where I'd like to deal with necessity is where, in B.M., and again, in B.M. just seems to be a dissection and trisection of Mohan, I'd like to draw Your Honour's attention to page 31 of B.M., under the heading necessity, 'C' where The Court of Appeal states paragraph 'G' Sopinka J. explained the test for necessity in Mohan at page 413, "What is required is that the opinion be necessary in the sense that it provide information which is likely to be outside the experience and knowledge of a judge or jury. In R. v Abbey as stated by Dickson, the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature." And still in that paragraph, about four lines down, "In order for expert evidence to be admissible, the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it if unassisted by persons with special knowledge."

Now again, my point is that and I don't want to belabour that Your Honour because I think it's important to, for the court to understand that my argument here is based on the fact that the evidence, all of Jaffy's evidence or proposed evidence and that part of Cain's that falls outside the physical harm don't, in my respectful submission, meet any of the four parameters outlined by Sopinko in Mohan. So it's not just a matter of they meet three and don't meet the

fourth, in my submission, they infringe all of the four step test and that is why they should be ruled inadmissible except for a portion of Cain's report or evidence.

Now the last case that I want the court to consider is Marquard, M-A-R-Q-U-A-R-D, again, Supreme Court of Canada, 1993 and I'll be reading from the relevant passages in Marquard but the reason I bring Marquard to your attention is that I feel that those portions or I submit that those portions of Cain's report and all of Jaffy's reports are very prejudicial and find the complainants were victim of abuse and the prejudicial effect clearly outweighs any probative value.

And again, Marquard refers again to Mohan and the use to be made of expert evidence only if the testimony goes beyond the ordinary experience of the trier of fact. So, abuse or not abuse is only a matter for the court to determine, if we ever get to the point of sentencing. My client is not charged with abuse, my client is charged with assault and administering a noxious substance, no more and no less.

The effects, the context, not the context in which the noxious substance is alleged to have been administered, that's relevant, that's pertinent, that's admissible but the context of the residential school, the abuse factor if I can use that word is only relevant if we get to the sentencing stage. Not at this stage and that is why the psychological trauma outlined by Cain and the entirety of Jaffy's report are very prejudicial and they have no probative value, they have no

probative value to assisting this jury in determining whether or not a noxious substance was administered.

And again, it's in Marquard that Justice McGlauklan puts the onus on defence counsel to object in timely fashion to what it feels is inadmissible evidence.

Draw Your Honour's attention in Marquard, page 226, paragraph 'H', the last paragraph, at the top of page 227, I'd ask you to consider that in your decision, "In this case" or rather, I'll go up to paragraph 'G', second last paragraph, "Prior abuse of the child was not an issue at trial. There is no evidence suggesting a child had been abused before the incident in question. The only relevance of the evidence was to explain the child's reaction to her injury. The potential prejudice of the evidence was that it suggested that the appellant, the person who had custody of the child had systematically abused her. In this case, the relevance of the evidence was tangent", I can't pronounce that word but anyway, it's there "and it's probative value of the issues at trial was low. On the other hand, it was potentially very prejudicial implying as it did that the child was a victim of long term abuse, a proposition wholly unsupported by the evidence. It's prejudicial effect greatly outweighed any probative value it might have had on this issues the Crown has placed before the jury and it should not have been admitted."

Now I'll just sum up the portions that I would like the court to consider and then, I will get into a short

consideration of other, more practical problems dealing with the experts. I hope to have made it clear to the court why I feel the evidence should not be admitted. The relevance, if you find it's not relevant, it's not admissible. If you find it's relevant, you then have to get into a balancing act of probative value prejudicial effect which I submit, here that the prejudicial value for reasons I've already alluded to far outweighs the probative value and thirdly, it Your Honour finds that the probative value outweighs the prejudicial effect, then you have to apply the test of necessity. Is it really something that's going to help this jury arrive at a proper determination of guilt or innocence on the noxious substance issue when these experts are going to talk about psychological harm, if you allow them to talk about psychological harm. How is that going to help the jury decide? It won't. What it will do, in my submission is taint the jury and they are likely to give far greater weight to the evidence of experts flown in from southern Ontario on these issues than would otherwise be the case.

And finally, I draw the attention of the court, one is from Belleville and one is from Kingston, London, sorry and one is from Kingston. Finally, on this point, I reiterate that I feel that it's an issue that the jury can deal with on their own. The defence admits vomit is a noxious substance and I can make that admission and whatever point in the trial Your Honour feels is appropriate, in front of the jury and then it becomes a consideration of the Crown calling its three witnesses who apparently were compelled to do this, setting the forum as to where it happened, how it happened and what the effects were on them when it happened at the time

and then, leave it up to the jury as to whether or not my client did it and secondly, whether she did it with intent to aggrieve or annoy. And I can undertake to this court and I can reiterate in my address to the jury that the defence admits that vomit, per say, is a noxious substance. Now let's turn to, did she do it? Yes or no. And if she did it, did she do it with intent to aggrieve or annoy and leave it at that.

Now the more practical matters that I wanted to address now that I've dealt with the legal issues are the following: my initial communication received from the Crown in connection with these reports was on the 22nd of February, 1999 when the C.V.'s were sent to me, along with a note that the reports had not yet been received and would be sent as soon as they were received.

In the letter that the Crown sent me on the 22nd of February, "Please find enclosed C.V.'s from Doctors Jaffy and Cain who will be called by the Crown as expert witnesses, 'on the issue of whether vomitus is noxious'. I'm waiting the reports, will forward them to you as soon as they arrive." No issue is taken with the fact that on the 4th of March, I received Cain's report and on the 11th of March, Jaffy's report.

Now as Your Honour also knows from the conference calls that were held to narrow the issues in this trial, a great deal was discussed at these conference calls about the Crown position on the expert evidence proposed and the defence position. Ms. Fuller and I had further telephone conversations late last week on

this issue, the last one on the 23rd of April which was last Friday, in the middle of the afternoon.

Subsequent to this last telephone conversation I had with the Crown on Friday afternoon of last week, a letter was faxed to my office, very late Friday afternoon, 23rd of April, faxed at 4:30 p.m. Friday afternoon so a little more than 48 hours before this trial was to start. "This is to confirm our conversation of today concerning the expert evidence to be tendered by the Crown on the Wesley prosecution. You expressed some concerns that Doctors Cain and Jaffy may stray beyond the perimeters of their report. You are right, they may. Experts provide an opinion to a general question without assistance or elaboration from the Crown. Here, their opinion shed light on the important issues of physical, psychological harm caused to the children in the care of Anna Wesley by her behaviour in the context of the children's environment and circumstances. I expect to explore these issues fully in order that the insights of Doctors Cain and Jaffy can assist the judge and trier of fact on the issues of assault and noxious substances with a view of establishing that psychological harm is within the perimeters of consideration in these criminal matters."

Now, I have a number of problems or concerns. The first one is this, the most basic one. A suggestion on the part of the Crown that Cain and Jaffy could discuss psychological harm on the issue of assault was never brought to my attention until I got this fax. I admit that after I got the two reports on the 4th of March and

the 11th of March, that a reading of the reports made it clear that the Crown wanted to get into a consideration of psychological harm in as much as it related to the noxious substance counts. Nothing to do with the assault counts and the first I heard of psychological harm expertise in relation to the assault counts was when I returned to the office late Friday afternoon and this fax was waiting for me at 4:30 p.m.

Now, if we go back to psychological harm in as much as it relates to noxious substance, when the C.V.'s were sent to me on the 22nd of February, '99, the short covering letter only indicated that the doctors would be called by the Crown as expert witnesses on the issue of whether vomitus is noxious.

Now I assumed that to mean whether vomitus was noxious in the physical sense. Now, that's how I read it but I also recognized it when I got the reports. I then became alive to the issue that the Crown also wanted to get into a consideration of psychological harm in connection with those three counts, not in connection with the assault counts which form seven of the ten counts in the indictment. It's also obvious that I haven't had a chance to do anything with that between Friday night and the start of this trial, particularly when one considers that I live in Ottawa and it took me the better part of Sunday to drive up here.

Now that being said, perhaps and before I sit down, let's look at the global picture. I've referred to the admission I'm prepared to make in front of the jury, I won't repeat it. What then is there to be gained by

allowing either of these experts to testify. In my submission, nothing. It won't help the jury determine whether or not the substance was noxious if the admission is made. It will unduly lengthen the trial and it will complicate the trial. If the court is predisposed to allowing the witnessed to testify, Jaffy or Cain, given the last letter sent to me by the Crown, and especially the first paragraph, "You express some concerns of Doctors Cain and Jaffy may stray beyond the parameters of their report, you're right, they may" and if you admit their evidence or rather, if Your Honour's ruling is that one of them or both of them are allowed to testify, we are going to have to get into a consideration...We are going to have to have a voir dire when they get up here, to hear exactly what the Crown proposes to ask of them, get their answers so that Your Honour can...

THE COURT: Is that letter part of an exhibit in this...

MR. CHARLEBOIS: No but I can copy it and make it an exhibit.

THE COURT: I do not know what it says.

MR. CHARLEBOIS: I can show it to Your Honour now.

THE COURT: Well show it to me just so I can have an idea what you are talking about. Okay, she is saying, she is going into psychological harm.

MR. CHARLEBOIS: Yeah, she also, the Crown also suggests in the letter that the experts may stray from what is in the report.

THE COURT: Yes, they may but they may not be allowed.

MR. CHARLEBOIS: Now my point is this, first determination Your Honour has to make is whether they're going to be allowed to testify.

THE COURT: Right.

MR. CHARLEBOIS: If you find that they are allowed to

testify, we are going to need a voir dire when they get up here in the absence of the jury to hear exactly what they're going to say and how far they're going to stray so that Your Honour can then set them straight.

THE COURT: You can bring an application at that time.

MR. CHARLEBOIS: No but I'm just trying to paint the global picture here. If you allow them to testify, they can't get up here and start testifying in front of the jury. We'll need a voir dire to hear what they want to say...

THE COURT: That is four time you have told me that.

MR. CHARLEBOIS: Okay and of course, the reason for that is that if they are allowed to testify and they stray, because they are experts, that evidence in front of the jury can be grounds for a mistrial which we all want to avoid.

THE COURT: We do, I do.

MR. CHARLEBOIS: The last point that I want to make in connection with these experts are, considering that neither Jaffy nor Cain in their reports address the psychological harm in connection with the assaults but just with the noxious substance. I have no idea of what they're going to say on that point. That point was only brought to my attention late Friday afternoon and if you allow them to testify on that point, the only proper remedy is going to be to grant me an adjournment because I recognize it's been alive to psychological harm since March 4th and 11th in connection with noxious substance, not in connection with the assaults.

So the bottom line here Your Honour is, why compound

and complicate this trial, not to prevent the Crown from properly presenting its case but because it's going to add nothing to the determination that the jury has to make, particularly if I admit, as I am prepared to, that the vomit is noxious. Let's leave it at that.
THE COURT: You told me that.
MR. CHARLEBOIS: Unless you have any questions Your Honour, those are the points I would ask you to consider.
THE COURT: Thank you very much Mr. Charlebois, Ms. Fuller.
MS. FULLER: I will not be discussing the law in any detail.
THE COURT: Could you address the assault matter right off. It seems rather simple.
MS. FULLER: Yes I can Your Honour, when I spoke with Mr. Charlebois, the first time I realized he took objection to my letter but when I spoke to him in Friday, he indicated that well you know, the report, you'd better not be going beyond the report and just what is in the report and nothing more than what is in the report and I must say, I was at a lost to understand what...
THE COURT: If I hold that your two experts or one expert can testify, I do not care what is in the report. He is going to testify, objections will be made, I will make rulings.
MS. FULLER: Your Honour, I just want perfectly clear the suggestion of Mr. Charlebois that, of the threat of a mistrial if witnesses who give expert reports say more than is in the report, they always say more than what is in the report because counsel...

THE COURT: And some of it is entirely prejudicial and from there flows mistrials.
MS. FULLER: I agree.
THE COURT: I do not even want to talk about that.
MS. FULLER: Okay, counsel don't interview their experts before they ask for a report but in any event, I had thought Your Honour that what, I tried to figure out what my friend was getting at and what the problem was and I figured, I know, I've got it, he thinks I'm going to call these experts to give evidence about the psychological reasons for failure to make recent complaint, that's what I thought he was probably getting at obliquely. So I wrote this letter to make it perfectly clear that we are talking about psychological harm. There will be, because of the nature of the reports, where the doctors talk about psychological harm and physical harm, that both are considered aspects of harm and well-being, each charge will inform the other in the sense that the jury will receive evidence that they can use throughout the trial. So there will be areas of overlap and I just want to make it perfectly clear, something that I would have thought Mr. Charlebois would have figured out. So that's all I can tell you.
THE COURT: So that is the only way that the assault would come into it, is by way of overlap.
MS. FULLER: Yes, yes and I expect it will.
THE COURT: And it would not be emphasized at all on your part, it is going to be something that it would just be there, period, because of the fact that, of the time frame and that type of thing.
MS. FULLER: And also because of their analysis, that in

these instances of administrating a noxious substance, you have a combination, Your Honour, of distress on the part of the children, neglected their basic needs, responded to with violence and it just so happens that in the assaults, you have instances of neglect to the children's basic needs, either because of illness or because of injury and the response is one of violence so they each inform the other and...

THE COURT: Don't you have a duty to advise defence that you will be calling expert witnesses in relation to specifically the psychological affect of an assault and not telling the defence simply because it is part of the whole thing satisfies that duty? Do you understand?

MS. FULLER: Well I am just advising the defence that the medical doctors will be giving evidence about the inter-relation between the physical and psychological harm and I fully expect to be able to benefit from that with respect to the, how the evidence will also shed light on the physical assaults themselves but the physical assaults themselves, I had not intended to go to...It has never been my intention to go to the experts and say, would this physical assault have also resulted in psychological harm.

THE COURT: So I guess you are just going to leave it alone.

MS. FULLER: Well as I say, I am not doing that, that's not my intention.

THE COURT: You are not, it is not your intention to leave it alone.

MS. FULLER: No, it is my attention not to question.

THE COURT: Okay so what I wrote was, 'sent to Mr.

Charlebois in a letter then', well it was not a misprint, it was just something that you wrote and you did not think about that much.

MS. FULLER: It's just a heads up that, actually, a courtesy to Mr. Charlebois that there probably will be areas that the jury, by simple inferences will be able to say, that's funny, that's kind of what we have here as well.

THE COURT: You know, it has been very clear from the start that your position was going to be that the noxious substance matters, by the mere nature of the fact that they are harmful have a physical and a psychological component.

MS. FULLER: Yes.

THE COURT: At the last minute, you tell me assault too.

MS. FULLER: Well...

THE COURT: So he is not prepared for that at all.

MS. FULLER: Well Your Honour, it's in the case law, it's in the case law, I sent him the case law that psychological or actually no I am sorry, I didn't send the case law, it's in the case law that harm, bodily harm includes psychological harm and physical harm. That's what our courts have said in the last ten years. I shouldn't have to also tell Mr. Charlebois that, that's included, that he should know that. I assumed that Mr. Charlebois is familiar with the case law and he realizes that the Crown can lead evidence that the jury can consider with respect to both aspects.

THE COURT: Why did you find it necessary to tell him that you would bring this up in connection with the noxious business?

MS. FULLER: I didn't find it necessary to tell him, I

just, I advised him whom my experts were and what their evidence would be. It just so happens...
THE COURT: In relation to the noxious thing.
MS. FULLER: Pardon?
THE COURT: In relation to the noxious charges.
MS. FULLER: Yes because they're...
THE COURT: So why tell him that and not tell him about the assault matters until the very last minute, just because the law says you can bring it in?
MS. FULLER: No, I'm not adducing, I'm not leading evidence through my experts with respect to psychological harm caused by physical assault. I'm not leading that evidence.
THE COURT: Well if that evidence comes out even accidentally, I will tell you, I will be opened to a motion.
MS. FULLER: Well then I will strenuously...
THE COURT: Unless you want an adjournment right now so that he can look into the nature of the assaults and see if he needs a doctor to rebut any of the evidence that might come out. Fairness is fairness.
MS. FULLER: Your Honour, this is not an issue in my respectful view when we're talking about unfairness, we're talking about...The reports speak for themselves, the reports say that if you look at incidents of neglect, of a child's basic needs and you combine that with coercive violent actions, you have a compound damage to that child. That's what the reports say. That's what the facts will also suggest in terms of the physical assaults. Now we're not going to not hear that evidence for the noxious substances because Mr. Charlebois might argue that, that could also...The jury

could also extrapolate and use that same conclusion with respect...
THE COURT: No, we walked in here this morning, talking about whether two experts who are going to testify as to the harmful psychological effect in relation to three counts of administering noxious substances. Here I am talking about assaults.
MS. FULLER: Well I'm not talking about assaults, the question is raised by Mr. Charlebois.
THE COURT: So we will not touch assaults then during the trial.
MS. FULLER: I will not be directing the experts with respect to the physical assaults in this case.
THE COURT: And you will be advising your expert that to do so would possibly create great problems.
MS. FULLER: I will advise them that they can only give evidence with respect to the combined effects of physical and psychological harm for noxious substances.
THE COURT: Do not say that so fast, say it again.
MS. FULLER: That they can only give evidence with respect to the dynamics and the combined effects of physical and psychological harm for noxious substances.
THE COURT: Is that okay?
MR. CHARLEBOIS: On the last point I raised, yes.
THE COURT: That is okay.
MS. FULLER: That component, yes.
THE COURT: That component combined with I think is what the Crown is telling you has psychological effects later on.
MS. FULLER: I'm sorry, could Your Honour please repeat that. Your voice trailed off there.
THE COURT: If I understood the Crown correctly is that

necessarily, in explaining the harmful psychologic effects, it is quite possible and quite understandable that the other component of assaults will have to be brought in or will have to be mentioned otherwise, it does not make sense. Is that what I heard?
MS. FULLER: Yes because the forced administration as is in many cases assault and caused by the shoving of the spoon down the throat of the or the mouth of or the hitting at the same time that this is taking place so there's...It's the context of the evidence.
THE COURT: Let me say it is too bad you did not explain that to Mr. Charlebois right and how long has this been going on?
MS. FULLER: He's had the reports Your Honour.
THE COURT: No, how long has the matter been going on?
MS. FULLER: Oh, I don't know, a long time but don't forget, until November, I was under the understanding that this was a judge alone trial and my position was that I didn't need similar fact evidence for a judge alone trial but for the change and the decision by Mr. Charlebois not to honour his undertaking, I would not be calling this evidence and it is only then that I really addressed my mind, I really should be because the amount of knowledge and the experience of the general public with these situations is necessarily less than that of a general division judge, a superior court judge of northern Ontario. So I was put in the position of directing my mind to different issues and that is why we have expert evidence.
THE COURT: How about the submission made by Mr. Charlebois that we will have to have a dry run on this.
MS. FULLER: Oh, I think that is fine, that will be part

of...Mr. Charlebois, I believe wishes to perhaps limit the area of expertise of those witnesses and so would probably want to question them.

THE COURT: Okay.

MS. FULLER: I haven't addressed my mind, Your Honour, to how that plays out but I will. I know that Doctor Jaffy will be here Thursday by about noon and I know that Doctor Cain is coming in Friday night, Thursday night, sorry, Wednesday night. He's changed his plans, he's coming in Wednesday night.

THE COURT: As I mentioned it, any of these doctors examined the victims?

MS. FULLER: No and that is...

THE COURT: Will they hear any evidence coming from the victims?

MS. FULLER: I don't know, you see, the position of the Crown is that it would be oath helping if we had an expert to come in, examine the victims and say, essentially, the jury should believe this, this victim because you see, I've examined them and they exhibit all the signs of...

THE COURT: No, no, the doctor would not be up there to say they should be believed or not, here are the symptoms that I have gathered, subjective symptoms that I have gathered from the victim and based on what he tells me, here is my conclusion.

MS. FULLER: Well the legal issue here, Your Honour, is either harm or potential for harm and this is the case of, in my respectful submission, expert evidence where hypothetical are put to the experts and on the basis of the hypothetical, they give opinion evidence of the potential, of actual and potential harm caused in these

circumstances based on their expertise.
THE COURT: I am very, very curious to know, probably will ask how many cases they have had of patients or abused people, alleged abused people that have been forced to eat their vomit.
MS. FULLER: I am sure, none of them has had a case such as that. There is nothing in the facts, with my respectful submission, Your Honour, that creates a special sub-category of victim. The discrete facts themselves are simply a manifestation of certain behaviour in a certain relationship from which inferences can be drawn. We do not, in my respectful submission require experts to have, have had experience with and in fact, this is the problem that the court got into with the suggestion in Mohan that there was a special category of doctors who offend and that they are, they're the group that we should be giving an opinion on and the court said no. No, that's not, that isn't the law and there is no basis for the suggestion that there would be a special category.
THE COURT: Listen, if I come to the conclusion that the probative value of the evidence to be given by doctors as to the meaning of harmful.
MS. FULLER: Yes.
THE COURT: In its psychological sense outweighs the prejudice...
MS. FULLER: Yes.
THE COURT: ...that will not be the end of it there, they cannot just come up here and testify to anything.
MS. FULLER: I agree Your Honour.
THE COURT: And I am very concerned about that now.
MS. FULLER: Well.

THE COURT: Has there been full disclosure of their evidence in relation to psychological impact as far as the related assaults and what it does to the psychological impact from eating a noxious substance? I mean, where am I here?

MS. FULLER: Well, there is no expectation, reasonable expectation to require the complainants in this case to have any real insight into their, the extent, the degree, the gravity of the harm done to them. These are matters not within and the way that when we are in the middle of something, we often are the least able to appreciate the whys and the wherefores and the extent of the problems that we're in.

THE COURT: Well you will have to convince me very, very much that the evidence of the victim, if non-existent, will be substituted for the evidence of an expert as to how he should be feeling. I cannot.

MS. FULLER: Well Your Honour, the...

THE COURT: The victim is the victim, you know, you get into a personal injury situation, the victim is the victim. They tell you what they feel, the doctors get up and say, I agree, they should be feeling that way or, I don't.

MS. FULLER: Yes.

THE COURT: Here, we are having doctors saying, well here is what these people should be feeling, good-bye, I am going back to London.

MS. FULLER: Well no Your Honour, that's not what, in my respectful submission they will be saying, they will be saying that these circumstances in the relationship, relationships of the children and the environment would result in the potential for psychological harm and in

all probability, would result in psychological harm. It is...
THE COURT: If I say yes, we will cross that when it comes from but I am going to do reading for a few days.
MS. FULLER: Thank you Your Honour. Where I want to and I focused the inquiry is not on the case law but rather on the charge before the court. The question of course is whether forcing children to eat their vomit makes the vomit a noxious thing and what Your Honour has to be satisfied is, is that evidence is relevant, necessary and not subject to an exclusionary rule.

Now Mr. Charlebois says it's not relevant, the evidence of psychological harm but in order to determine relevance, we have to consider the nature of the offence.
THE COURT: I do not think there is any problem, the fact that harm is not exclusively physical harm.
MS. FULLER: But the reason it's important to consider the nature of the offence and the analogy offered of sexual assault is that the last time I checked, harm was not an ingredient, an essential element of the *actus reus* as sexual assault and therefore, it is arguable...
THE COURT: Sexual assault you are talking about.
MS. FULLER: Yes, it is not an essential ingredient. The Crown does not have to prove that the victim was traumatized. The Crown does not have to prove that there was harm done to the victim by the intentional application of force for sexual purpose without consent. That is not the *actus reus* of sexual assault and that is why the analogy of whether or not a victim

could give evidence of harm at a trial is an apt one because it can be. It may be relevant to other issues, the fact that the victim is traumatized may be relevant to the issue of consent, may be relevant but it may be prejudicial, maybe more prejudicial that it is probative. It may cause undue sympathy for the victim depending on the scope and the extent of such evidence because the Crown doesn't have to prove harm.

THE COURT: But aggrieve and annoy are the words that are described in the cases as hurtful, harmful, unwholesome, is it not?

MS. FULLER: Your Honour, that is why I am going through the section, aggrieve and annoy are part of the *mens rea*, they are not part of the *actus reus* and it is incredibly important distinction. The Crown did not lay with intent to cause bodily harm. That would have just made more work for the Crown than was necessary. But regardless of the intent and the Crown is satisfied with and the court and the trier of fact can be satisfied with a less onerous intent being proven. But the *actus reus* has nothing to do with the *mens rea*, the *actus reus* is that you administer either a poison, that's not vomit, any other destructive thing, that's not vomit or a noxious thing. That is the *actus reus* and the...We know that the meaning of noxious is determined by the case law. In Burkholder, it is anything that is injurious, hurtful, harmful, or unwholesome. In Marius, it is anything potentially harmful in the sense of being you know, capable of causing injury.

THE COURT: So what are you telling me then, the *actus reus* is the administration of a noxious substance but

the *mens rea* is that as to agree or annoy, period.
MS. FULLER: Yes.
THE COURT: I do not have any trouble with that.
MS. FULLER: That is correct, because it says, 'Administer a noxious thing with intent to aggrieve or annoy'.
THE COURT: Right.
MS. FULLER: So we don't have to worry about aggrieve or annoy, it's not at least, well the Crown has to worry about it of course, I have to be able to satisfy the court but that is the least of my problems among the problems that I shoulder as the prosecutor in this case. And what we're really dealing with is what, what we mean by noxious, what is the definition of noxious that the jury hears evidence on. Your Honour, I've read to you what is said...
THE COURT: Well I can tell you what your doctor says, your doctor says that noxious is generally held by the courts to mean hurtful, harmful or unwholesome.
MS. FULLER: Well I provided...
THE COURT: I hope he does not testify to that.
MS. FULLER: I provided the, as I thought it was appropriate, provided my expert...
THE COURT: Yes, I know, I am kidding.
MS. FULLER: I provided them with that definition but the point is, I didn't make this up, I didn't say I've got a case with a lot of psychological harm, that's where I'm going. The courts have told me I have to prove harm. That's my *actus reus*, that's what noxious means so for my friend to say it is irrelevant is curious, since it is the *actus reus* of the offence. Harm is not a consequence...

THE COURT: What is the difference between hurtful and harmful?
MS. FULLER: Well I don't know.
THE COURT: Just semantics.
MS. FULLER: I don't know, I think they are probably the same, harmful, hurtful, I think they're really the same and the courts...
THE COURT: And it is funny that they add a word like unwholesome.
MS. FULLER: Yes, I think unwholesome expands the context of what we mean and takes it beyond the ambit of the adjisdum generis rule of poison.
THE COURT: Listen, I do not think, before we get to the jury on noxious all right.
MS. FULLER: Right.
THE COURT: I do not think that we will have too much trouble...I will draft that part of my charge, let you have it, let you look over, mull over it, suggest changes, whatever you want but as you say, we start with the *actus reus* and the noxious substance and then the *mens rea* with intent to aggrieve or annoy, we get into the aggrieve or annoy part. I do not think we will have any problem there. As a matter of fact, if you want to submit that part to me so I can work with it too, I would be glad to receive it. I do not think we are going to have any problems there. I think our big problems are the witnesses.
MS. FULLER: The witnesses, all right, well the...
THE COURT: What are they going to do and what has been disclosed to Mr. Charlebois as to what we are going to do?
MS. FULLER: Well...

THE COURT: These are my concerns.
MS. FULLER: Well these are the, there are the same witnesses...
THE COURT: No, no, that is what I am talking about.
MS. FULLER: Yeah, they gave evidence.
THE COURT: The witnesses we are talking about today here, of course the victims will all be or alleged victims will all testify and that is fine as they should.
MS. FULLER: All right.
THE COURT: I am still a little befuddled about exactly what they are going to do and exactly how, what they are going to do or the jury. Can they testify, on avoid?
MS. FULLER: On a voir dire.
THE COURT: On avoid.
MS. FULLER: On avoid.
THE COURT: They have not spoken to anybody other than receive information from yourself.
MS. FULLER: Your Honour, the courts have accepted evidence of battered women syndrome, have accepted evidence, which is, we're talking generally about what the effect is in these situations.
THE COURT: I would be very pleased to receive a case or two because I have not dealt with the battered women syndrome.
MS. FULLER: The courts have delved as well with cases of non-disclosure and late disclosure. What are the reasons?
THE COURT: Sure has.
MS. FULLER: What are the reasons for non-disclosure and late disclosure? Frankly, I felt that this was one of

those cases where the evidence really does give enough information for the court on the non-disclosure.
THE COURT: I would appreciate receiving one or two decisions on testimony say on the battered women...Not necessarily only on that but where the expert simply gets up, speaks about personal things or would have spoken with the persons and gives a general opinion. I would not mind seeing that. You can, can you give me anything...
MS. FULLER: Yeah, it won't be difficult.
THE COURT: Can you just drop them into my chambers after we are done? That is about the only two things...
MR. CHARLEBOIS: We'll have to hunt them down Your Honour, we'll have to hunt them down.
THE COURT: Oh, I will wait.
MS. FULLER: Yeah, in fact, I have a couple that I can find fairly quickly actually. But the evidence of the experts is evidence in response to hypothetical questions, whether or not, in these circumstances, there could be harm caused and what the nature of that harm is. And, that is evidence that their experience both as leading, the leading, one of the leading clinical psychologist in this country who deals with child abuse on an ongoing basis, gives evidence I think every week and it is evidence that a family physician, who is head of the family medicine program at Queen's University, associate professor and who has practised, as I understand family medicine as opposed to emergency medicine most of his career and who has set up programs here in the north and understands the culture, has actually attended the residency and acted as a locum doctor.

THE COURT: I am not doubting your words, just give me a case or two.
MS. FULLER: All right.
THE COURT: Nor am I precluding you from giving me a case or two on that particular situation on expert evidence.
MS. FULLER: The suggestion that is more prejudicial, I didn't really understand what the prejudice was, what we mean by prejudice. It is highly probative evidence of psychological harm, it is highly probative to the issue of harm. If it is prejudicial in the sense that it establishes an issue before the court, makes the Crown's case stronger, that is not the definition of prejudicial that we have to deal with here and my concern is that if all of this evidence is not before the court, it will cause distortions, serious distortions for the trier of fact and not allow them the basis for the appropriate conclusions on the facts and for the appropriate inferences to be drawn from there. My friend says, don't go there, don't go there, stay in the shallow end of the pool more or less but the problem, Your Honour is, that the complainants are here and I am here because Anna Wesley, Luke Mack and Eli Tookate and Daniel Wheesk were involved in behaviour that the Crown's argument is, represents the most harmful dehumanizing of all of the counts before the court and if left to my friend, he would argue, well let's just, let's just look at the physical aspects and where will that lead us? Well I'll tell you where it will lead us, it'll be cross-examination of the doctor, well Doctor Cain's so you say that could cause a tearing of the esophagus, yes, that could cause

aspiration in the lungs...
THE COURT: It has never been said yet but I think the biggest red flag that I see is the whole question of residential schools and I think this is what Mr. Charlebois may feel is highly prejudicial when we look at separate actions of an accused but I can deal with that later.
MS. FULLER: The accused finds herself in an environment and has to respond to that environment.
THE COURT: I think the environment is the biggest objection. Whether it is relevant or not, I am not going to deal with it now, I will deal with it during the trial and I will have a look at it in the meantime but this is not what we are talking about today.
MS. FULLER: No.
THE COURT: We are talking about witnesses that will talk about psychological harm, witnesses that are experts, witnesses that will answer to hypothetical questions, witnesses, experts that have not spoken to the patients, that is what we are dealing with.
MS. FULLER: These are, this is evidence that a jury, in my view, on their own, could not be expected to come to the appropriate conclusions on, they have not, they cannot factor and absorb the combined circumstances and the dynamics of being isolated, of being culturally disenfranchised, of being linguistically disadvantaged, of being terrorized, of being powerless.
THE COURT: I do not think it is fair either.
MS. FULLER: I beg your pardon.
THE COURT: It is not fair either, that they should be in judgment of a system rather than an accused.
MS. FULLER: Well Your Honour, I think they are only in

judgment of discrete acts and those discrete acts are in circumstances that the Crown submits the accused is well aware of, the terrible powerlessness and hopelessness of the children, that these actions were committed on. Those are the circumstances. This is not a case of somebody spitting in the soup.
THE COURT: Okay, is that it on witnesses, on the experts?
MS. FULLER: Well I hadn't thought I was finished.
THE COURT: I am just asking.
MS. FULLER: No.
THE COURT: Digressing right now, let's talk about the expert witnesses and if you have anything else to add to it, please.
MS. FULLER: I do have a concern with respect to this qualified admission. The position of the Crown is the defence cannot describe facts that the Crown should rely on and then admit to them and of course, the leading...The reason I didn't hand this case out is because I had not thought my friend was going to be making or attempting to make admission. The case of R. v Castiliani where of course it essentially says you can't, the defence can't fashion an admission in a way that is useful. The defence and that is...
THE COURT: What?
MS. FULLER: The defence cannot fashion an admission in a manner that is useful or helpful to the defence.
THE COURT: How is it useful to the defence that he admits, listen, it is noxious?
MS. FULLER: It is extremely useful to the defence.
THE COURT: How?
MS. FULLER: To say, there is only, they are only

physical consequences that can be considered and we admit that there was, that there is physical noxiousness and that there was physical harm...
THE COURT: He did not say that, that was an admission, I believe your admission to be is that vomit is a noxious substance and we leave from there. There are no other admissions to this point but he can, I guess, if he wishes to as it goes but he cannot give the jury an law.
MS. FULLER: No, he can admit that it is a noxious substance but it is not for the defence to limit the parameters of the harm to that of physical harm.
THE COURT: The defence can limit what he wants, I cannot see that. I would simply tell the jury, listen, defence has admitted but here are the elements that you have to consider but consider the fact that he has admitted. Then, the defence went this far and I am telling you that is law, disregard it.
MS. FULLER: Well I don't know that he can Your Honour, I don't know that there can be a qualified admission and I believe the case law says, if you're going to make an admission, it has to be...The Crown has to indicate the fact...
THE COURT: Can I tell him not to admit that it is noxious?
MS. FULLER: No.
THE COURT: There we go.
MS. FULLER: But the Crown can take the position...
THE COURT: That listen, that admission of noxiousness is simply a ploy, you can do what you want.
MS. FULLER: Well the Crown can take the position that an admission of noxiousness to physical...Well I

suppose if Your Honour is going to, if Your Honour has ruled that evidence of harm in the 1990's, in this country, includes psychological harm which I believe the case law makes clear.

THE COURT: I suspect very much that I will unless somebody can show me that it is not, psychological harm, physical harm. Psychological harm in many cases are a lot worse than physical harm.

MS. FULLER: Yes, that being the case then a qualified admission on Mr. Charlebois's part may not be all that helpful. I am prepared to...

THE COURT: He is entitled...

MS. FULLER: ...concede that.

THE COURT: Well we are not talking about experts right now.

MS. FULLER: No because the expert evidence, if Your Honour rules that the expert evidence, the experts can give evidence on the aspects of psychological as well as physical harm caused by administering a noxious thing in these circumstances, then I should sit down.

THE COURT: Well I still would appreciate receiving a couple of decisions in relation to and I am not limiting it to the battered women syndrome but just give me an idea how the evidence comes in that way because I have not had that much experience in this area.

MS. FULLER: I think I understand Your Honour's position, you would like some evidence where expert evidence is being given with respect to...

THE COURT: Totally hypothetical question.

MS. FULLER: Theoretical issues as opposed to the complainants or the accused, individuals personally

involved.
THE COURT: Also, I should add, total hypothetical questions when it is apparent that evidence was available to that doctor to make a more certain diagnosis or whatever. Well no, that is fair. I know it takes a long time to stay (Unclear) Cochrane but if we are going to do it, we are going to do it right.
MS. FULLER: Yes, all right, it's a different opinion, Your Honour, it's an entirely different opinion being sought, there are two types of opinion and the one in my view would be oath helping and the other is, an opinion as to whether or not...
THE COURT: Which one is oath helping?
MS. FULLER: Well to have an expert examine a complainant, a victim and then get up in the witness stand and say, you know, I examined that victim and it's true, she has been, she or he has been psychologically damaged by this.
THE COURT: I do not know if there is anything wrong with this but if there is, fine.
MR. CHARLEBOIS: When are we resuming, there are a few things I would like to say in reply at the appropriate time, sorry.
THE COURT: Certainly.
MR. CHARLEBOIS: I don't know if Ms. Fuller is finished.
THE COURT: Well do not ask me, you ask her.
MR. CHARLEBOIS: No because Your Honour appears to be ready to break for lunch.
THE COURT: What Your Honour appears to be doing up here should not be a subject of your, okay.
MR. CHARLEBOIS: No...
THE COURT: The clock is here, I took at it, I can break

for lunch at one thirty.

MR. CHARLEBOIS: No no, that is not what I am suggesting sir, I just wanted, before, whatever time you felt was appropriate, I would just like a right...

THE COURT: Yeah, I think I would like to finish this before lunch.

MS. FULLER: Okay, as I say, the major problem with excluding this evidence on a number of fronts is that it causes serious distortions of the facts and the harm and the criminal acts that were done and serious distortions of the inferences the jury might otherwise draw if they heard the full evidence and those are inferences regarding whether or not you would remember something as insubstantial as a tummy ache if we do not hear that there is psychological issues involved or you would be dealing with something where there was a potential for aspiration but it didn't occur so I guess there hasn't been any harm done so there would be, where this conduct would result in a feeling of worthlessness and powerlessness in these children that would make it, frankly, highly unlikely, that they would assert themselves or feel that they had any right to complain or can do anything about this because I can assure you, my friend will be suggesting to these complaints that an adverse, that they should've complained and that an adverse inference should be drawn from their failure to complaint.

In so many ways, Your Honour, by withdrawing this evidence from the jury, we are left with a scenario of what I would call too little too late and if somebody were...The Crown would not have laid charges of this

nature in 40 to 50 year old scenarios unless there had been evidence of actions that were extremely harmful and affecting the integrity, seriously affecting the integrity of the parties before the court.

THE COURT: Thank you very much, Mr. Charlebois.

MR. CHARLEBOIS: A few points I'll just join dealing with this. A suggestion was initially or was made at one point in the Crown's submission that until I indicated that this trial remain a trial by jury and not by judge alone, the Crown had no intention of calling experts plies in the face of this letter the Crown sent me on the 4th of November, which is before we began the Belanger trial, where she was seeking an opinion from a Doctor Gray, here in Cochrane. I could remind the court and particularly the Crown that it is only the conclusion of the Belanger trial, November 23rd that I indicated that there would not be a re-election so to suggest to this court that the Crown had no idea what...

THE COURT: Is this going to help me decide anything here?

MR. CHARLEBOIS: No but I took objection as well...

THE COURT: Okay, you know...

MR. CHARLEBOIS: ...to the undertaking, I didn't undertake...

THE COURT: I am not here to listen about bickering between lawyers.

MR. CHARLEBOIS: Very well, I'll go on to other things.

THE COURT: Yeah, the case.

MR. CHARLEBOIS: As we have beaten to death today Burkholder and the definition of noxious in Burkholder as being harmful etcetera, etcetera, etcetera, if I

admit noxious, or that vomit is noxious...
THE COURT: I thought you did.
MR. CHARLEBOIS: Yeah, it does fulfill the criteria of harmful and the other four criteria mentioned in Burkholder, including harmful. Therefore, what's the purpose of having the expert to tell us what harm is if there is an admission of noxious as being harmful. And, we are getting far afield if these experts are going to be talking about powerlessness, hopelessness and all the rest of the psychological ramifications of this, it is going to grossly distort, in the jury's view...
THE COURT: Well before we grossly distort the jury's view, I was asking both of you to give me some decision, some direction in just how much we can rely on total expert evidence that is...
MR. CHARLEBOIS: When they haven't seen the complainant.
THE COURT: Right, I have not seen anything. You are just asking hypothetical questions. You can but I would like to see what the limits are.
MR. CHARLEBOIS: Now, in the last point I want to make, towards the end of the Crown's submission, unless I didn't hear properly or misunderstood the words, I felt the Crown said, that the experts, if they're allowed to testify may be getting into the realm of why these complainants did not earlier report. Now, if I didn't misunderstand that...
MS. FULLER: He did.
MR. CHARLEBOIS: I misunderstood, enough said, they're not going to be going there.
THE COURT: She said that you may attack the witnesses, you are not, on the fact that they did not report it

sooner.

MR. CHARLEBOIS: Yes but I also thought that the experts might be testifying as to what the symptoms would be or why they wouldn't report etcetera, etcetera and that goes outside the scope of the report. I haven't prepared for that.

THE COURT: The Crown shook her head to the negative that her experts will not testify as to the reason why the witnesses waited so long to report or the alleged victims.

MR. CHARLEBOIS: Thank you.

THE COURT: Okay, I will wait in my chambers to see what you are going to do.

MS. FULLER: I bet your pardon.

THE COURT: I will wait in my chambers to see what you can rustle up on the battered women syndrome. I would just assume finish this now so we can go home and start reading it again.

MR. CHARLEBOIS: It's not something I'll be able to rustle up in the next ten minutes Your Honour.

THE COURT: No, no, how about the next half hour?

MR. CHARLEBOIS: I'll do the best I can.

THE COURT: Sure, if you cannot, you cannot.

MS. FULLER: Okay.

THE COURT: No problem.

R E C E S S 12:42 p.m.

U P O N R E S U M I N G 9:38 a.m.

Wednesday, April 28, 1999

THE COURT: We are now in the third day of what appears to be a rather lengthy and perhaps complicated trial and I have not even given my opening statement to the

jury yet and the accused here...I have not even given my opening address to the jury yet. I asked counsel to be present here and ready to start at nine thirty this morning. We are eight minutes over. Tomorrow will be 15 minutes over if I can anticipate the way in which matters will go. From now on, when I set a time to start, I want you both here, witnesses, accused, whatever ready to go. We are not going to unduly lengthen this trial for the sake of tardiness because the trial will be long enough to start with. Am I understood?

MS. FULLER: Yes Your Honour, I apologize Your Honour.

R U L I N G

Boissonneault, J. (Orally):

The accused is charged with administering or causing to administer a noxious substance to wit: the person's own vomit with the intent to aggrieve or annoy that person. In my opinion, the law suggests that vomit is capable of being a noxious thing and that the determination of whether it is a noxious thing should be left to the jury as a question of fact.

These alleged offences date as far back as 1951. Since then, the Criminal Code has been slightly re-worded but it is conceded, I believe, and I agree that the present charge as defined in the present S. 245 (b) has the same effect as it did in the previous sections.

The *actus reus* is established in the first part of the section which refers to administration and noxious and that the word noxious should be understood in the same way regardless of whether it is applied under the previous S. 229 (a) or S. 229 (b) or its predecessors.

R. v Burkholder is the authority for the fact that the *mens rea* required for the offence is as follows: one, proof that the accused deliberately administered a substance which she knew to be noxious; and two, that she foresaw that such harm might arise from the act of administration of a substance she knew to be noxious. Burkholder further states that noxious is defined in the shorter Oxford dictionary as injurious, hurtful, harmful, unwholesome and it will be noted that the inclusion of the word unwholesome supports the conclusion that a substance may be noxious if it is not beneficial to morals. That is a quote from Burkholder.

The Crown wishes to present experts that "Harm or harmful" as contemplated by Burkholder, are not only that the substances that are aggrieving or annoying but also substances that are physically and psychologically harmful. In my view in this respect, the circumstances surrounding the administration ultimately requires a finding that the evidence surrounding its administration is relevant. I find that this type of evidence is not only relevant but necessary for the jury to effect a proper analysis of the charges as related to all of the evidence. I do not find that any prejudice to the defence compels me to exclude this evidence.

As to the scope of the expert evidence, I cannot help but mention the decision of R.v Russel,(1998)(Ont.C.A.) for the authority, for the principle that experts evidence could be supportive of complainants' testimony. Of course, the case is also authority that

a jury could also be told that they could reject expert evidence although the case reminds us that we should be cautious in doing so.

The issue of administrating noxious substances with a view of establishing physical as well as psychological harm is within the purview or ability of proper qualified experts. They should be allowed to testify as to both physical health and emotional health as they are both included in the concept of harm, injurious or hurtful as set out in the Burkholder decision. Therefore, on the question of whether the experts mentioned by the Crown for whom documents have been filed will be allowed subject to cross-examination I suppose on the qualifications, to testify. If I find them to be experts in the field, they will be allowed.Is there anything else before we bring the jury in?

MR. CHARLEBOIS: Different judges have...

THE COURT: I am sorry.

MR. CHARLEBOIS: I said different judges have different practices in terms of objections. Some prefer the objections to be made at a time when the witness and I am referring now to the Crown's first witness, testify, even if it involves shuffling the jury in and out to deal with the objection, other judges prefer to deal with the objections, if they can be anticipated beforehand so that the jury is prevented as much as possible from shuffling in and out. I don't know what Your Honour's practice is.

THE COURT: My practice is to let counsel run their own case. If we do get into difficulties, you can be

assured that I will make comments but the only thing I can say about objections is that once an objection is made by one party, I want the other party to stop talking so I can listen to the whole objection, then listen to the other lawyer's response and then I make a ruling. Once I make a ruling, I want it to be it. I do not want to start rehashing any of my rulings or listen to any comments about my rulings. You both know where you can go if you feel my rulings are illegally incorrect and that is the proper place to go, not to reargue them here. Is that sort of clear?

MR. CHARLEBOIS: That is quite clear. I take it from that, rather than dealing now with part of Constable Delguice's evidence which I feel may or may not be relevant, I gather Your Honour would rather, let's hear him, if I find...

THE COURT: I will give my opening to the jury, have the witnesses take the stand, give their evidence. If anything is objectionable to you, get up, object and then I am sure Ms. Fuller will stop, I will listen to your objection, listen to her reply, make a ruling and we will continue.

MR. CHARLEBOIS: Does Your Honour prefer to deal with objections with the jury present or absent. I'd just like to get a feel because I've never appeared before you...

THE COURT: Well if we are going to talk about, if we are going to talk about leading questions or hear say, I do not mind the jury being present but I do not want the jury present for objections which relate to evidence that may or may not be admissible. I do not want the jury to hear any evidence that is potentially not admissible.

MR. CHARLEBOIS: Find so...

THE COURT: And definitely evidence is declared not admissible.

MR. CHARLEBOIS: So if I feel at a point, an objection is being made on evidence that may or may not be admissible, I should ask Your Honour to ask the jury to leave and then deal with it.

THE COURT: I just said, if you are going to deal with an objection, dealing with evidence that may or may not be admissible, I would prefer to hear that objection in the absence of the jury, hear Ms. Fuller's reply, make my ruling, call the jury back. If I rule against the evidence, it is not mentioned, if I rule in favour, we just continue.

MR. CHARLEBOIS: That's fine.

THE COURT: Do you have any difficulty in those regard Ms. Fuller?

MS. FULLER: None.

THE COURT: Thank you. Anything else before we bring out the jury?

MS. FULLER: Your Honour, I wonder in this case, which is fairly complex whether or not the jury would be permitted to take notes.

THE COURT: Have you discussed this with Mr. Charlebois?

MS. FULLER: Mr. Charlebois just briefly eluded to it at the end of the day yesterday and indicated to come up and my view is, with so many counts and so many dates and it is complicated and difficult for them.

THE COURT: Well there are ten counts, there are how many victims or alleged victims.

MR. CHARLEBOIS: Seven.

MS. FULLER: Yeah, there are seven victims, there are

ten counts. I'm a little concerned that and it is very easy to do, to think, well now, is that, was that Eli Paul-Martin or Eli Tookate.

THE COURT: Very easy to do, the only problem with taking notes is that sometimes, it detracts from their attention of what the witnesses testified to. That is what we have to weigh every time but in any event, do we have to address this problem now or can I address the jury without them taking notes of my opening instructions.

MS. FULLER: Certainly Your Honour.

THE COURT: Let's give the opening instructions, take a little break and get these things straightened out.

MS. FULLER: Okay.

THE COURT: Bring the jury in please.

...JURY ENTERS 9:45 a.m.

...JURY POLLED

THE COURT: Members of the jury, good morning, thank you for being here. Of course we had to call you up the day before last because it did not appear that the evidence would start at this time for some very cogent and real reasons. I would like to mention one however, there was a difficulty in the accused's hearing through the systems that we have here but I am pleased to advise you that this was rectified by some ingenious person, not me, some ingenious person...I do not know what he did, how he made it work but if you recall that little microphone that we were using, it was stuck up in one of the speakers up there and now, everybody can hear everything that is going on in this courtroom. I cannot explain that feed of engineering but it works.

I will now, we also after we had that problem fixed, I heard a long motion yesterday and arrived at a decision I just delivered to the court and now, I will start my opening instructions to you again. Before I start, just let me say this, the only sure thing about jury trials is that their schedules are more than likely uncertain, if you know what I mean. There is just no control over that and we just live with it. So before you start hearing the evidence in this case, I am going to spend a few minutes explaining some basic principles which will be important to your consideration.
I will also explain what I expect will happen during this trial. The oath you have taken has made you judges of the Superior Court of Ontario for the duration of this trial, just as I am. Both Ms. Wesley and the prosecution have selected to be judges of the facts and render a verdict in due course. You are judges, not only while you sit in this courtroom but for 24 hours a day until the case is concluded and this is for several very important reasons which will become apparent in a few minutes.

The judge and jury system is one of the oldest, most important and proudest of our legal traditions. It is a team system where you are the judges of the facts and I am the judge of the law. Our respective tasks are of equal importance. No decision or verdict can be reached within our system unless the facts are first ascertained and the proper legal principles are applied to them.

I will be commenting on the evidence at the end of the

trial during my charge to you. I wish to emphasize that your view of the evidence must prevail as you are the sole judges of the facts. That means that it is for you alone finally to interpret the evidence and the credibility of the witnesses. Nothing becomes a fact until you find it to be so.

By the same token, when I tell you what the law is, you must accept what I say in that regard for I am the sole judge of the law to be applied in this case. It would be wrong for you to decide this case on the basis of what you think the law is or should be unless it coincides exactly with my instructions to you.

As judges, you have a duty to preserve the integrity of our system. One of the most basis principles upon which that integrity rests is that a judge will decide questions of fact only on the evidence presented in open court. You are to take nothing into consideration that is not presented to you as evidence in this trial. You are not to permit anyone to talk to you about this case outside this courtroom apart from your fellow jurors, in the jury room.

If anyone attempts to do so, tell such person emphatically that you cannot talk about it. If the person persists, report it to me through the sheriff's office and an officer will be attending you and I will deal with this.

Another problem you most definitely will encounter is this, your family and friends will undoubtedly be interested in what you are doing. While you may tell

them that you are a juror on a particular type of case, you are to tell them that I have instructed you not to discuss anything about the case beyond that point. I am sure they will respect your position. You do not want to hear comments that can affect your independent judgment as applied to the evidence you hear.

Those of us involved in the criminal justice system know full well and I can assure you that very often, something is said at or near the very end of a trial that puts an entirely different perspective on the evidence heard earlier. The law requires you to decide whether the accused is guilty or not guilty based on your consideration of all the evidence, the arguments of counsel and my charge as to the applicable law.

Next, I recommend that you be cautious about discussing any conclusions concerning the case until you retire, at the end of the trial, to your jury room. It is only then that you will have the necessary perspective to render a just verdict. If you express the premature opinion to your fellow jurors, you may find it difficult to change your mind even though the evidence may warrant it.

As judges, you are not partisans, you are not advocaats for either side, you are not investigators, you are not inquisitors. Our system knows as the adversarial system, that is, we, as judges, sit back and listen carefully to the evidence as they experienced lawyers present the same to us. We leave it to them, the decisions regarding witnesses to be called and

questions to be asked.

If despite these comments that I am making now, you feel compelled to ask any questions of a witness, you can only do that through me and we will take care of that at the time but only through me.

There are two other basic principles which are fundamental to your role as jurors and these will be gone over in my charge in a little more detail. They are the requirement for proof beyond a reasonable doubt and presumption of innocence. The requirement for proof beyond a reasonable doubt means just what it says, no person accused of an offence can be found guilty unless the Crown proves each and every essential element and I will explain to you later what an essential element is, of that offence beyond a reasonable doubt.

Similarly, our system of law requires that an accused person be presumed or considered to be innocent. Anna Wesley has no obligation to prove that she is not guilty or to explain the evidence offered to you by the Crown. The law presumes her to be innocent until you decide otherwise. Accordingly, the accused is in law, deemed to be as innocent as anyone else in this courtroom and she will remain in that status unless or until you find otherwise.

Now as to the procedure that is usually followed at a criminal trial, when I have concluded that these opening instructions, we will probably break to briefly

discuss a few problems of evidence and otherwise, not for long. I will then invite, when you are back in, invite counsel for the Crown, Ms. Fuller who is sitting nearest you at counsel table, to introduce the case to you and in so doing, she will no doubt state what she expects the evidence of the Crown will be. You must always bear in mind that such an address is not evidence, it is only given to assist you in following the evidence which will be given from the witness box.

When she is finished that opening address, she will then proceed to call witnesses. She will question them. When she is finished the questioning of the witness, Mr. Charlebois, seated to my right, who is counsel for Anna Wesley, then will have the opportunity of cross-examining that witness. The purpose of cross-examination of course is to test the evidence given and sometime bring out new facts.

When counsel for the Crown has called all the witnesses that she intends to call in support of the Crown's case, then Mr. Charlebois will have the right to make an opening statement to you if he so desires.

As the case proceeds, I may be called upon from time to time to make rulings on the admissibility of evidence tendered by the parties as I did yesterday. On some occasions, I may rule in your presence, on others, I may ask you to retire. Counsel usually know what will be objected to and when they get to that point in the evidence, or such matters are about to arise, they will indicate to me that they will need a legal ruling as to

the admissibility of certain evidence. You will be asked to retire to your jury room while I listen in your absence, the legal argument or even perhaps to the very testimony that is proposed to be put before you as evidence.

If I come to the conclusion that it offends the rules for the admissibility of evidence, that you will never hear it and it will not form part, any part of what you have to consider.
On the other hand, if I have to decide, if I decide that it is properly admissible, the evidence will be then repeated if necessary or given to you for the first time when you are recalled from your jury room. Then, it will become part of the evidence before you.

You may be sure that you will hear all the evidence that I rule to be legally admissible but you will not be troubled with evidence that I rule to be legally inadmissible and please do not speculate on the specific reasons you are being excluded.

Now every word I say during this trial is on record, all my decisions are subject to review. When the evidence is concluded, each counsel will address you making his and her submission as to the finding you should make. This will be followed by my charge in which I shall give you the law and show you how to apply the law to the facts as you find them. Then, you will be asked to retire to consider your verdict.

It is of utmost importance that you follow the evidence

carefully and form your impression of the various witnesses from the demeanour, their attitude, the content of their testimony. You must eventually decide that what you believe on the basis of your review of their evidence as many witnesses will be relying only on memory and I stop now to tell you that we have placed a copy of the indictment on everyone of your chairs, you see them. You will note and you have heard that the allegations start about in 1951. So as many witnesses will be relying only on memory, you may find discrepancies in witnesses testimony.

It would be surprising if such discrepancies did not appear, often they are of little importance. Of course, a deliberate falsehood however is another matter and usually will seriously affect the credibility of a witness.

In addition to oral evidence, there may be documents, photographs, other tangible things introduced as exhibits in this trial. I do not know, we just have to await the outcome of the evidence. You will have the opportunity to examine these items as they are brought forward and they will go with you, to your jury room, when you ultimately retire to consider your verdict.

During the trial, unless something very unusual occurs and you are given copies of whatever, including the indictment you have, I ask you to leave the indictment on your chair. It is simply a aid and there may be other aids for you to follow the evidence correctly, not to start your deliberations immediately without

having heard any or some or even most of the evidence.

During the trial, counsel may refer to a preliminary hearing. Before this trial began, a preliminary hearing, I presume was held before a provincial court judge and a number of witnesses were examined and cross-examined under oath. Nothing is decided in that type of inquiry as to whether an accused is guilty or not guilty. Where any reference made to the transcript of evidence at the preliminary hearing, you should know that the transcript is a written record of testimony of the various witnesses who testified under oath before the provincial court judge and will not become part of the evidence unless counsel from either side applies to have the same or part of the same part of the evidence, at which time I will decide yes or no, for various reasons.

I mentioned earlier that as judges, we are not private investigators, you as finders of fact must mannish all or any present information and prejudice from your mind. You will not seek to gather your own evidence during the trial. I will also ask you, though we do not have many newspapers around, I would also ask you not to read, listen, or to observe any news stories about the case while it is in progress. It can only serve to confuse what you have heard in the witness box, which is what counts.

So you must rely solely on the evidence given in this courtroom and ignore anything in the media or any other rumours floating around. Remember, the parties have no

opportunity to cross-examine or test the accuracy of such sources, which in itself, is unfair.

I must now draw your attention to a provision of the Criminal Code that prohibits the juror, at any time, during the trial or afterwards, disclosing anything that has taken place or has been said in your jury room with respect to this trial or the evidence. To do so is a serious offence. In this way, the law protects the confidentiality of your deliberations and encourages you to express freely your opinions to your fellow jurors with confidence, that no one else will ever be aware of your comments or how you voted. Now this does not mean that after this trial is all over, what has happened in this courtroom that we are all going to hear, is subject to this rule. It is what goes on in that jury room that you cannot discuss with anyone, to encourage you to express freely your opinions and know that nothing will come out of there. What occurs in here is, of course, public, unless I make an order of non-publication and non has been be forth to me yet.

Please, if you have any difficulty in hearing a witness, let me know at once. I will see that the situation is remedied. It is essential that you hear everything and I will ask you now, have you heard everything I have said so far? No problem.

During the trial, would you please take the same chairs you presently occupy each time you enter the courtroom. I am sure you have been told that.

Now ultimately, you must select the foreperson as your representative to preside over your deliberations, after you have hear the evidence, the submissions and my charge but I would suggest that you do not do so until you get to know each other a little better. It looks like you might have a little bit of time for that. Later when you have made that decision, give the name to the sheriff's officer so we will have the person's name for the record.

Now I propose, this is a proposal on my part and you have seen what has happened so far, so, take this as something I would try to do, I propose to sit from 10:00 a.m. to 4:30 p.m. with a mid morning break and a mid afternoon break and a lunch break of approximately one and a quarter, one and a half hours. We will sit in the afternoon until four thirty. This may sound a little early to you but I am sure, as you go along, you will realize that trying to absorb everything that goes on in here may be a little more taxing than you may think but anyways, I find it taxing beyond four thirty and I will try to break about that time.

I am advised that it is necessary for us to stop on Friday at twelve thirty. We will then resume on Monday and Tuesday, I will be absent Wednesday, Thursday, Friday. Beyond that, I cannot tell you exactly what is going to happen, other than the fact that I will try to sit from ten to four thirty. You are free to leave during lunch time and at the close of the day until you retire finally to reach your verdict, at which time, you will be sequestered. After you have heard my charge, you will then be sequestered which means, you will be kept together and away from the public. If

need be, we may have to put you up overnight, I hope not but if need be, this is what we will have to do but we will take care of that when we get there.

Try to be here five or ten minutes before the resumption of the trial every morning, as counsel will. Finally, I stress the importance of keeping an opened mind and remaining fair and impartial throughout, listening to the evidence as it is presented without prejudice, without bias, and without sympathy. This duty is one of the best traditions of our legal system, the law expects no more from you and will expect no less.

Now, I will ask you to resume to your jury room and deal with one problem, well not a problem but asked counsel their feelings on one thing. We may call you in right away and then send you back so can the jury be brought into...

...JURY RETIRES 10:24 a.m.

THE COURT: Okay, the reason I spoke as I did in the last few minutes, quite frankly, since Ms. Fuller mentioned about the foolscaps and pencils or whatever, of course we have ten counts, we have seven accused (sic), we have a trial that will take quite awhile and we have a trial that will be interrupted, not only by half days or a few hours but three days next week. I cannot anticipate what will occur later on but if I have ever seen a case where perhaps it would be a good idea to let the jury have writing paper and writing material and explain the dangers to them, that it might be advisable under these circumstances and I would like

to hear your comments in relation to the same.
MR. CHARLEBOIS: I would like a short opportunity to pull R. v Menard out of the library. It was a situation arose in a trial in general division in Ottawa by justice...
THE COURT: Mr. Justice Sublier's case.
MR. CHARLEBOIS: That is correct.
THE COURT: Pull it out.
MR. CHARLEBOIS: I am sorry.
THE COURT: Pull it out and we will have a look at it.
MR. CHARLEBOIS: Thank you, it is R. v Menard.
THE COURT: If I recall, there was a lot more than foolscaps involved there.
MR. CHARLEBOIS: Yeah well before I say anything, it's a short case, I'd like an opportunity to pull it and read it, it won't take me long.
THE COURT: Pull it, read it, give it to Ms. Fuller and let me have it and we will come back and I make a ruling.
MR. CHARLEBOIS: Thank you.

R E C E S S

U P O N R E S U M I N G :

THE COURT: Mr. Charlebois, I understand that you have no objection that the jurors be in possession of a copy of the indictment and that they can take the same into the jury room provided it does not leave this courthouse at any time.
MR. CHARLEBOIS: That is correct Your Honour because they are going to be provided in the course of the deliberations anyway with the indictment as a matter of course.
THE COURT: Yes.

MR. CHARLEBOIS: So I don't have a problem with that.
THE COURT: I also propose to let them have foolscaps and pens, what do you say to that?
MR. CHARLEBOIS: I do have a problem with that Your Honour, I realize that, that is entirely within your purview in making the decision. The reason that I am objecting to it is that it has the risk, and my submission is, that some jurors may be visual people who choose not to take notes and to rely on looking at the witnesses instead of taking notes. Other jurors may prefer to take notes rather than look at the witnesses and the risk, as I see it, is that when they begin to deliberate, the ones who have chosen not to take notes but to rely on what they look at and absorb of the witness's evidence may be unduly influenced and defer to those jurors who have chosen to take notes and in my submission, that will not put all jurors on an equal footing. In my respectful submission, the jury should rely on its individual and collective memory in arriving at a verdict coupled with the submissions of counsel at the end and obviously, Your Honour's charge because I know Your Honour will be taking meticulous notes.
As authority for the proposition that they should not be given notes, I would ask Your Honour to consider R. v Andrade,(1985)(Ont. C.A.),volume 18 C.C.C. (3d)41, with a very strong bench comprised of Mr. Justice Martin Holden and Corey as he then was. The Andrade decision has also been quoted with approval in Canadian Criminal jury trials which was written by Granger Charron and Chumack. The Charron in question, now being a judge of the Ontario Court of Appeal and this

book was written in 1989. At page 222, under jury participation, note taking, on page 223, the learn authors comment with approval on the Andrade decision and I will just, without wanting to belabour the point, I would just like to quote from Andrade as it is reported in Canadian Criminal jury trials at page 223. "The practice in Canada is not uniform with respect to jurors taking notes and judges encourage note taking by jurors, others discourage it. The arguments commonly advanced against note taking are these: the juror who was taking notes may exercise an undue influence over those jurors in their deliberations or rather over other jurors in their deliberations and when a dispute arises in the jury room with respect to the evidence, jurors will tend to defer to the note taker. A second argument is that the juror's notes may be incomplete and he or she may emphasize unimportant matters overlooking important ones. It was also said that taking notes may distract the juror's attention resulting in the juror paying insufficient attention to the demeanour of the witness or that the juror's concentration on note taking may cause him or her to overlook important testimony."

Now the said matter was addressed again in Andrade, a decision that I would encourage Your Honour to consider and just by means of a anecdotal evidence or submissions if you will, I had occasion in 1993 to be involved in a case that lasted five weeks, a jury trial, the longest trial so far in my career and not precluding this one lasting that length or longer, it was a 27 or 32 count indictment, some 32 witnesses were

called and although it is certainly not binding on Your Honour, your brother Mr. Justice Cusson, did not allow the jury at that point to take notes but rather wanted them to rely on their memory. Those are the submissions I would ask you to consider.

R U L I N G

BOISSONNEAULT, J. (Orally):

Thank you very much. I believe that in this particular case with the ten different counts, the seven different alleged victims, as well as what I expect to be a truncated trial, this jury will be in and out, this jury will be away for three days next week, that as an aid memory, I will permit them to have foolscap and pencil available. I will explain the risks to them and hopefully, being the 12 reasonable jurors they are, they will take my direction. Bring the jury in please.

MR. CHARLEBOIS: Just a couple of quick housekeeping matters before we recall them. I would be asking Your Honour to make an order excluding witnesses because we are getting into the evidence.

THE COURT: Okay.

MR. CHARLEBOIS: And also, there was one indictment, the one that was particularized on Monday or the one that was read to the jury on Monday on which a plea of not guilty was entered, I would just like to ascertain, I believe there's at least one other older indictment floating around, is that the case because there was the indictment upon which Your Honour made an endorsement back in November I believe.

THE COURT: Well if there are different indictments

floating around, I would think that counsel should take care of that.
MR. CHARLEBOIS: Well I believe we have to invite Your Honour to withdraw all indictments except the one on which the trial is taking place.
THE COURT: Withdraw all indictments except that one on which she made a plea of not guilty.
MS. FULLER: Your Honour, the indictments are my territory and I will look after that.
THE COURT: Take care of your territory. Bring the jury in please. Are we ready to start?
MS. FULLER: Yes we are.
THE COURT: Can I have a copy of the indictment madam clerk?
MS. FULLER: Your Honour, I would ask that Sergeant Delguidice be, as the first witness and the investigating officer be allowed to stay.
THE COURT: I do not know if that should be done in the absence of the jury but the warning be read, the warning for exclusion of witnesses.
MS. FULLER: Yes.
THE COURT: In the absence or now.
MS. FULLER: I do not think it matters Your Honour.
MR. CHARLEBOIS: I do not have a problem with that.
THE COURT: Very well. Thank you for your patience but we have had one or two things. I have made an order that all witnesses in this matter be excluded from the courtroom until they testify and that they do not speak about their testimony to potential witnesses which is a standard application at the beginning of practically every criminal trial. Could the warning be read out please?

COURT CLERK: The order of His Honour, all witnesses with the exception of the parties to the action will leave this room and remain in the witness room until their name is called. You will not discuss any matter concerning the case with any witness or party who has previously testified in this case and any witness who has testified in this case will not communicate with any witness or party who have yet to testify. Will counsel ensure their witnesses leave the courtroom.
THE COURT: I guess if counsel know who their witnesses are, they will be able to.
MR. CHARLEBOIS: We can proceed.
THE COURT: We can proceed. Members of the jury, the second matter that we looked into was brought up by myself. Normally, you are not left with any material. Normally, we would expect you to rely on your good memory until the end of the trial to recall and arrive at the facts even if they are not to my recollection. I will allow you to take your indictments back to the jury room. I will also, since I think this is going to be a lengthy trial and since I think you understand some days in between not sitting, your memory could be affected. I have also ordered that you be provided with foolscap and writing material. Now there are risks involved and there have been decisions up to the Court of Appeal, the Supreme Court of Canada as to what these risks may be and I want to emphasize them to you and I want you to realize what the impact could be. There may be some of you that will not touch your foolscap and you rely on your own memory as to what occurred. There may be some of you that will use your foolscap. At the end of this trial, while you are

deliberating, there is a danger that those who took notes will not be on an equal footing with the rest and these notes may be relied on by others. This should not happen.

Secondly and the big danger is that if you busy yourselves or try and take every word down which I hope you do not, you are going to miss a lot of what is going on here in the witness box. Do not forget that I use the word demeanour in describing how you arrive at your conclusion of credibility. You have to see and hear the witness. Now the only reason the foolscap should be used would be to jot the odd thing down that you just do not want to forget but I am going to allow you to have that foolscap and the writing paper. Do not use it as an attempt to try to do what the court reporter is doing or even all the notes...You will see me taking notes all the way through. It is not the purpose of it. The purpose is simply to serve as an aid to you.

Now another danger is that if you, the more information you bring into the jury room with you may lead to tempt you to or rather conclusions but we do not know what goes on in the jury room but if anybody tries to tell me that 12 jurors that are together for four weeks did not discuss the evidence at all, I do not know, say sure. To discuss the evidence, no problem, do not arrive at conclusions, you have heard my opening remarks, wait til you hear everything, then you deliberate, then you deliberate with a view at arriving at a conclusion. These are simply aids, there are

seven people involved that are alleged victims, it may be difficult for you to keep them as who is who, there are ten counts. That is a fair number of counts. The reason for letting you have the indictment and you would have it anyway at the end of the trial, is to keep track and my purpose in letting you have the foolscap is to keep track, period. Could they be distributed?

By the way, I forgot to add it, none of that material leaves the courthouse. You do not take that home, you do not take sheets of it home, it must remain here at the place where you sit I suppose when you are gone or on your lap when you are hearing evidence and also rest assured that those are probably the last comments I am going to make about this. If you are writing in, I will not say don't write too much and if you are not writing enough, I will not say, write a little bit. You heard my admonitions, you heard the risks involved, I will leave it up to your good sense.

Now, I would like to call on Ms. Fuller to make her opening statement. You will recall, in my opening instructions, Ms. Fuller is going to give you an outline of her case but it is not evidence, it is just to enable you to follow the evidence better as it comes in.

MS. FULLER: If it please the court, members of the jury, my name is Diana Fuller and I am here to prosecute these charges on behalf of the Crown. These charges arose out of a very large investigation and within...

THE COURT: Ms. Fuller, I am sorry.
MS. FULLER: And within that investigation of other matters, allegations that arise before the court by way of counts in the indictment came forward. These were allegations of what in nonlegal terms, you would probably call physical or psychological abuse and there are allegations made by former aboriginal students at the Ste-Anne's residential school in Fort Albany, on the James Bay coast. During our time there, back in the 50's and the 60's, these allegations are that, while they were there, there was a caregiver, the person who looked after them when they were not in school and that her name was Anna Wesley with a religious name of Sister Marie Immaculata.

The evidence that I expect you to hear from the Crown witnesses is that violent and coercive acts were committed against these witnesses when they were children and that they were committed by the accused before the court.

Now this is my opportunity to give you what is an overview of the evidence and to make a few remarks that may be of assistance to you. As Your Honour has said, I have to caution that these remarks are an introductions and I cannot guarantee that the witnesses will say what I anticipate them to say. They may say more, they may say less. Whatever you hear is inconsistent with what I thought or even if it is not even established, never mind inconsistent, then of course you will disregard anything that I have suggested you might hear.

I will not be outlining the evidence count by count but only generally speaking. The context of these allegations and you will hear in the evidence arise as a result of the Catholic church through the Oblate priests, establishing a residential school for Native children on the west coast of James Bay at Fort Albany. It was called Ste-Anne's and it was operational as a residential or boarding school from shortly after the turn of the century until the early 70's. It was a school that ran from kindergarten through grade eight. It also had an orphanage component to it, if there were children who had no one to look after them.

As I have said, the concept was initiated by the Oblates and it was run by the Oblates priests and brothers and the Sisters of Charity who were also known as the Grey nuns.

You will hear evidence of how circumstances, philosophy and geography necessitated that the school be a boarding school for most of the children and how most of the children stated there throughout the year with the exception of Christmas and summer holidays, except for the orphans and those children who had nowhere else to go.

You will hear how even Fort Albany children often, if not for the most part boarded there because again, of the nature of the school and because their families were often trappers and the trapping involved them to be away during the winter, away from Fort Albany.

You will hear how this school was then responsible for the general upbringing and education of these students.

This brings us to Sister Mary Immaculata and you will hear evidence that, that was at the time, Anna Wesley, the accused before the court, that she was a gardienne des garçons, a monitor or caregiver of most or all of the male students during those years, that is, during the early 50's through to the early to mid 60's. This is the time period when these allegations are said to take place.

You will hear how it was her responsibility to look after the boys before school at mealtime, from after school till bedtime and on the weekends. Other than their teacher, this women was the person responsible for making sure that they were cleaned, dressed, fed, did their chores, behaved, were polite, were looked after when they were sick, injured, upset.

You will hear that among the boys under her care, were these people, Luke Mack, Ivan Mudd, Eli Paul-Martin, Eli Tookate, Tony Tourville, Daniel Wheesk, George Wheesk. I expect these seven men to give evidence of her treatment of them as little boys, of being insulted by her. As well, I expect you to hear that in the same environment, Luke Mack, Eli Tookate and Daniel Wheesk happen to be sick happen to be sick to their stomachs while in the dining room, at different periods, not at the same time as each other and that they vomited into their bowl or plate and that they were forced to eat their vomit along with the food by the accused before

the court.

I expect you to hear evidence from both a clinical psychologist and a family physician that being forced to eat one's vomit in front of one's piers in these circumstances could cause physical and psychological harm to a child and that, that evidence will assist you in assessing the case before you.
You have this indictment, a copy of this indictment and you will note that these allegations are framed through the Criminal Code in two ways, either as assault or assault occasion bodily harm or as administering a noxious thing with intent to aggrieve or annoy.

But how did it all start? This is a long time ago. You will hear evidence of a school reunion and healing conference that took place in Fort Albany in 1992 or 1993 and that, that was the event that gave rise to the breaking out of this information of these allegations and resulted in submissions before the Royal Commission on Aboriginal issues and resulted in a lengthy investigation, actually, a five year investigation by the Ontario Provincial Police with respect to this school, this residential school.

We are talking then about matters that happened a very long time ago. We are asking witnesses to recall events from 30, 40 years or 50 years ago and as His Honour has told you, mistakes are bound to be made on details, just as inconsistences may show up. Your responsibility of course is to use your accumulated experience to decide whether an inconsistency is

important or whether it is merely to be expected, whether a mistake suggests the lack of honesty or just an honest mistake.

Whether you can accept, from your own experience, the person may be vague and unsure of details but still be clear and certain on the harmful act itself. I would only ask you, in this process, that you use your own experience, your own common sense, your own knowledge of human nature. Ask yourself whether or not there have been events in your life, that because of their unfairness, or joyfulness, or painfulness, are unforgettable to you, although you may have forgotten the details.

I would ask you to bear in mind that witnesses are not evaluated by their education, by their, how articulate their language is, by their socioeconomic background, they are evaluated by your impressions of their reliability and of their honesty, their sincerity. Thank you.

THE COURT: Thank you Ms. Fuller.

MS. FULLER: My first witness would be Detective Constable Delguidice.

DETECTIVE CONSTABLE GREG DELGUIDICE: SWORN

EXAMINATION IN-CHIEF BY MS. FULLER:

Q. Officer, I understand that you are with the Ontario Provincial Police.

A. That's correct, yes.

Q. Stationed here in Cochrane.

A. Yes.

Q. And that you hold the rank of Detective Constable.

A. Yes.

Q. And how long, sir, have you been with the Ontario Provincial Police?

A. Since September 6, 1988.

Q. And I understand through time and circumstances, you have become not only one of the investigating officers but in fact the investigating officer in this matter.

A. That's correct, yes.

Q. And could you tell us, officer, briefly, how you became involved?

A. In November of 1992, I was assigned by my supervisors to assist in the investigation and allegations that were made at uh, as a result of the Fort Albany Residential School.

Q. And I understand that this arose, this request for an investigation arose initially out of a school reunion or healing conference that was organized in Fort Albany.

A. Yes.

Q. And could you tell us something about that.

A. In August of 1992, there was a uh school reunion healing conference organized in Fort Albany, hum, by that territories First Nations people for the former students of Ste-Anne Residential School.

Q. And could you tell me where Ste-Anne's Residential School is located?

A. It's located in Fort Albany, Ontario, which is approximately 250 kilometres north of Moosonee, on the west shore of James Bay.

Q. And it's in the District of Cochrane.

A. Yes.

Q. The judicial District of Cochrane. Can you tell me how long this conference lasted?

A. I believe it lasted approximately a week.

Q. Can you tell me what took place at this conference?

MR. CHARLEBOIS: Unless Detective Constable Delguidice was at the conference, anything he can tell us would be hearsay. He can indicate a conference took place and as a result of what happened at the conference, that the O.P.P. were then asked to take certain steps.

THE COURT: I do not know yet if he was so we will let the Crown carry on.

A. I was not at the conference.

MS. FULLER: Q. Thank you.. Now as a result of what took place at the conference, I understand that issues arose that were taken further.

A. Yes, hum, on November 6th, 1992, Chief Edmund Metatawabin, as he then was, attended at the #15 District Headquarters at South Porcupine, the Ontario Provincial Police Headquarters and requested that an investigation be undertaken into some allegations of physical and sexual abuse.

Q. And I understand that within this same time frame, Chief Metatawabin had already given evidence at the Royal Commission on aboriginal issues.

A. That's my understanding, yes.

Q. All right, as a result of this request what was the response of the Ontario Provincial Police?

A. An investigation was undertaken.

Q. And during that investigation, how long was that investigation, officer?

A. Uh from November of 1992 until mid 1996 before all allegations were, were completely investigated.

Q. All right, now this involved approximately how many

interviews and how many interviewees?

MR. CHARLEBOIS: What's the relevance of that, Your Honour?

MS. FULLER: Your Honour, it is the scope and of the investigation and it assists in the narrative, in my view, of how these matters came to the attention of the police.

THE COURT: Well more to the point, I would think if this man was the investigator in charge and has personal knowledge of what occurred...

MS. FULLER: It's his investigation.

THE COURT: ...I do not see anything wrong with that.

MS. FULLER: Q. How many interviews were taken?

A. Approximately 900 interviews.

Q. How many people were spoken to?

A. Approximately 700.

Q. Okay. Now in what I would call the day-to-day business of police investigations, how does a complaint arise and what is the usual course, if there is such a thing, of police involvement?

A. Normally, if there's an allegation made, the victim generally comes to the police to complain.

Q. All right, and what was the method, or to put it in another way, was that what happened in this case and dealing specifically with the allegations before the court but also generally with respect how the matters were investigated?

A. No. There was one complainant that originally came forward, that being Chief Metatawabin. Afterwards, there was a list of names provided to us of potential victims and we attended to those potential victims to interview them.

Q. And as a result of this, I understand was not 700 people but a dozen or so people.

A. That's correct.

Q. And as result of speaking to them, did other people come forward or did you go and speak to other people?

A. As a result of the original interviews that we did, other names came out of potential victims or witnesses...

Q. Uh-hum.

A. ...and that, if you could say, snowballed to the 900 people or 700 people or so that we interviewed.

Q. And with respect to the complainants before the court, did they come to you or did you go to them?

A. We went to them.

Q. Now officer, in the course of this mammoth investigation, I understand that you were able to digest a history of the school and of its status during the time in question.

A. Yes.

Q. Could you just briefly outline for us the background of that school?

A. Yes. It dates back to the turn of the century. In fact, to give you a history of the area, in 1892, there were three Oblates of Mary Immaculate that attended the area, known today as Fort Albany. They attended there to instill a religion into the area people and as a result of going there, they set up a mission and in 1902, the Sisters of the Grey Cross, as they were then known attended the area to enter into a mission partnership with the Oblates of Mary Immaculate. At that time, a mission was set up at the area of Fort Albany and in 1903, on June 25th, the first Albany Residential School was opened.

Q. So this would be then the Oblate priests and brothers.

A. That's correct, yes.

Q. That was a male order.

A. Yes.

Q. And the Sisters were called what?

A. The Grey Nuns, Sisters of the Grey Cross, I believe it was.

Q. And did they have another name as well?

A. In time they became known as the Sisters of Charity of Ottawa.

Q. Okay. Can you tell me what the structure was and how it evolved until we get to the early 50's?

A. Originally, the mission at Fort Albany was built closer to the bay on the, on the Albany river and annually, there are Spring thaws and floods and over the years these floods would basically wipe out the community and eventually the community was moved further inland. As well as the floods, there were also a series of fires that happened and in the end, the Albany Residential School, the building as it stands today was erected and put into full use in 1954.

Q. Also within Fort Albany.

A. Yes.

Q. Now I understand that Fort Albany is a, is a community, not a large community.

A. No, it's not.

Q. Could you tell us something about the community?

A. There are approximately 1,500 Cree natives that reside there.

Q. And so it is primarily a Cree community.

A. Yes, it is.

Q. And can you tell me how accessible Fort Albany is from other communities in the North?

A. It's quite isolated. There are no roads with the exception of a winter road, uh...

Q. There are no roads then.

A. There were no roads then, no.

Q. And there are still no roads.

A. There's still no roads again with the exception of a winter road.

Q. Yes.

A. Access is either by barge in the summertime or air plane.

Q. And that would be barge going from where to where?

A. From Moosonee or to all points up the coast.

Q. By barge in the summer or...

A. By air plane.

Q. And could you tell me what the names of the communities are that are close-by and what we mean by close-by?

A. Fort Albany is on the south shore of the Albany river. On the north shore approximately seven kilometres north of there is the community of Kashechewan. North of that, again approximately 250 kilometres, is the community of Attawapiskat. North of that, approximately 400 kilometres, would be the community of Peawanuk. And again north of that, right near the Manitoba border would be the community of Fort Severn. South of Fort Albany would be, the closest community would be Moosonee, approximately 250 kilometres away.

Q. All right. Now we've talked about, well, if you had access to an air plane you can get there and you can get there by boat, you've indicated during the summer months and there was a winter road if you had a motor vehicle. What about a train?

A. The closest train would run from Cochrane here to Moosonee. There were no trains that went to Fort Albany.

Q. This school then was run as a Catholic Residential School.

A. Yes.

Q. And can you tell me what the catchment area would have been for the school? Where did it draw its students from?

A. For the most part from the communities that I mentioned on the west coast of James Bay. And there were also other students from around the northwestern Ontario area.

Q. All right and can you tell me what and I'm talking about during the 50's and 60's - what industry there was in Fort Albany?

A. There was relatively no industry in Fort Albany.

Q. What, what employment opportunities were there in Fort Albany?

A. There would be employment through the church being at the school or the church or the hospital that they run or trapping.

Q. I understand that at one time there was a sawmill as well.

A. Yes. I understand there was a sawmill that was built by the Oblates.

Q. So that, apart from trapping, your opportunity of employment generally speaking was the school, the hospital or the sawmill.

A. That's correct.

Q. And that these were run by the church.

A. Yes.

Q. And, in terms of, of infrastructure, what type of a community was it in terms of sewer and water and telephone and how developed was it in terms of its infrastructure?

MR. CHARLEBOIS: Can I ask as to what the relevancy of this type of evidence might be Your Honour?

MS. FULLER: Yes, Your Honour, the position of the Crown is that this evidence is relevant in terms of how

advanced the community was, what the options and choices of the families were. What the options and choices of children who went to that school happened to be. What the socioeconomic conditions were.

THE COURT: Go ahead.

MS. FULLER: Q. Yes, could you tell me how advanced the infrastructure was?

A. Not very advanced at all. Even to this day there isn't full sewage systems within the community. The residences are small and sometimes, in my experience in investigating, the residences now are certainly not adequate, one, two bedrooms at most. There are exceptions to that, of course, but for the majority.

Q. Were there telephone lines?

A. No, there was not.

Q. Was there electricity?

A. There was, I believe, yes.

THE COURT: Are you talking about the present now or the past?

MS. FULLER: Now I'm talking about the 50's and the 60's or the 60's.

THE COURT: Okay, I got the no telephone here.

MS. FULLER: No telephone, yes.

THE COURT: After that.

MS. FULLER: Q. Was there electricity?

A. It's my understanding there was, yes.

Q. Was there sewer and water?

A. At the school, yes, there was.

Q. For the general population.

MR. CHARLEBOIS: Well, Your Honour, again, how does the constable know that? He probably wasn't even born in the 50's.

MS. FULLER: The constable, Your Honour, in my submission may know that from his five year investigation of this matter from the hundreds of photographs he has of Fort Albany and of Ste-Anne's during that period. His photographs of the, the homes of the community.

MR. CHARLEBOIS: In which case, it becomes hearsay.

THE COURT: And I do not know, if you come to a conclusion after investigation of a general community as to its infrastructure, I do not know that it is inadmissible. I do not know just how relevant it is and what probative value it has nor do I know what prejudice it has. I will let you go for a while.

MS. FULLER: I'll try to narrow my scope.

Q. How would you describe the socio -- in terms of socioeconomic conditions this community back then, from your investigation and from everything you've seen and read about the community?

A. Poorly developed.

Q. And the, the income level of people.

A. Again, the majority of people there were poor.

Q. The education opportunities.

A. From Kindergarten to Grade 8 at Ste-Anne Residential School.

Q. Is there a high school?

A. There are no high schools in the Fort Albany area. There were no high schools in the Fort Albany area.

Q. Yes. I understand that from the records, you saw that the average student population increased from what, from its opening to its closing, what were the parameters of the population, the school population?

A. On opening day in 1903 there were 32 students.

Q. Yes.

A. And that population grew at times to upwards of 285, I believe...

Q. All right.

A. ...sometimes as close as 300.

Q. And that would be in relationship to the beginning, once it opened and when it closed, when would the highest level of student population be?

A. The highest would have been near its closure.

Q. Okay, and can you tell me what year it actually closed?

A. In 1976, the concept of residential schools was revoked by the Government of Canada and that's when Ste-Anne closed its doors, Ste-Anne Residential School as it then was.

Q. And from the school records, were you able to form an opinion as to the percentage of students who were boarders as opposed to day students?

A. The majority of students were boarders.

Q. And what were some of the reasons for that?

A. Because of the geographic location of the residences being outside of Fort Albany and within within Fort Albany the reasons for them being boarders would be it was a residential school firstly and also because of during the winter time, there was still trapping going on and the families, the parents of the students would be out of the community for the winter. They spent the winter on their trap lines and that dictated that the students needed to be in school.

Q. And when you say because it was a residential school, it was a residential school, you mean that the concept of it was that it be a residential school.

A. That's correct.

Q. Meaning a boarding school, is that what you mean by residential?

A. That's correct.

Q. Was this boarding school, who were from the records apparently the children, from what cultural background?

A. Primarily from the Cree First Nations background.

Q. And if not Cree, what?

A. The students from northwestern Ontario were of Ojibway descent.

Q. And from the records who were...What was the cultural background of most of the Crees...

A. Most of the priests....

Q. ...in other words were they, would they have been mostly aboriginal or non aboriginal?

A. Non aboriginal.

Q. And of the nuns.

A. Nun, mostly non aboriginal.

Q. I understand that there were a few aboriginal nuns though.

A. Yes.

Q. And the brothers.

A. Again mostly non aboriginal.

Q. And I understand that in addition to brothers, sisters, priests there were some lay people that were hired in the school...

A. Yes.

Q. ...to assist in running the school.

A. Yes.

Q. Can you tell me the range of the ages that apparently were in the school?

A. They would be from age six to whatever age they graduated in Grade 8. As well with the orphanage there would

be younger children.

Q. All right, were you made aware of how the, how the children came to arrive at school at the beginning of the year?

A. Yes.

Q. And how did they get there?

A. Either by air plane or by barge if they were from other communities.

Q. Now I understand that as a result of the execution of search warrants and the review of archives, you were able to obtain some of the historical records.

A. Yes.

Q. What about school records? How much luck did you have there?

A. We were unable to obtain any school records.

Q. Why is that?

A. Because over the years floods in the area destroyed most of them.

Q. And with respect to hospital records.

A. That's the same as with the school records.

Q. Now I understand that from your investigation of the journals and the school records that apparently when circumstances permitted, Fort Albany students were permitted to go home on weekends.

A. Yes.

Q. And I understand that from the school records, you were able to determine if someone by the name of Anna Wesley whose religious name was Sister Mary Immaculata.

MR. CHARLEBOIS: Would you let the police officer give the evidence. I haven't been objecting to these leading questions. They're more than leading. I mean, they're suggestive of the answer of a yes or a no. They were on non-contentious issues. I've kept my

mouth shut. Could we get the evidence to come from the police officer, please, and not from the Crown Attorney?

THE COURT: Thank you very much.

MS. FULLER: I wouldn't have thought that directing the officer to the nature of the document...

THE COURT: Well usually non-contentious issues can be let in but if Mr. Charlebois objects, I have to uphold his objection. It is leading.

MS. FULLER: Thank you, Your Honour. I'm going to hand you a document and I'm going to ask you to tell us what this document is..

THE COURT: Do you have a copy for the court?

MS. FULLER: I don't, Your Honour.

THE COURT: Henceforth, if anyone produces documents to any witness, would you have a copy for me, please?

MS. FULLER: I will.

A. It's a personnel file, part of a personnel file for Anna Wesley.

Q. And where, what does it indicate with respect to the matters before the court?

A. It indicates that it's Sister Anna Wesley who is also known as Sister Marie Immaculata.

Q. And does it indicate...

THE COURT: What does it indicate?

MS. FULLER: Q. Yes. Does it indicate when she, this Sister Immaculata first became a part of the school?

A. Yes, it does.

Q. And what does it indicate with respect to that issue?

A. It firstly indicates that she attended there in primary school. It also indicates that on the 27th of July,

1951...

THE COURT: Hang on for a second please. Tell her or Miss Wesley, I want you to tell me immediately if you have difficulty hearing. Do not wait.

MS. WESLEY: I find it so far from microphone and I can't hear him.

THE COURT: Can you hear me now?

MS. WESLEY: Yes.

THE COURT: Please tell me immediately if you cannot hear. Do not wait, please, tell me immediately. We will rectify the matter right away.

MS. WESLEY: Yes.

THE COURT: Thank you.

MS. FULLER: Q. What does this document or archive indicate with respect to Anna Wesley on July 27th, 1951?

A. It has an entry here that she arrived at, at Albany on that date and held the office of - and there's a notation in French - gardienne des garçons.

THE COURT: What date? I didn't get that.

A. The 27th of July 1951 as arriving.

THE COURT: Okay.

MS. FULLER: Q. Is there a reference to...What is the next reference with respect to Anna Wesley?

A. The next reference down would be 1963 arrival at Fort George.

Q. At what is the next reference?

A. And the next reference is secularisation 10 July 1972.

Q. And what does secularisation mean, officer?

A. I'm not quite sure.

MS. FULLER: I would ask that, that be made an exhibit, Your Honour.

THE COURT: What exhibit are we at?
CLERK OF THE COURT: Exhibit number one.
THE COURT: Very well, exhibit number one, the records from the Fort Albany School.
EXHIBIT NUMBER ONE - Records from the Fort Albany School numbered as 6047 - Produced and Marked.
MR. CHARLEBOIS: Can I just, for the sake of my records, inquire, Your Honour, from the constable, is that the one that bears the notation 6046 or 6047? It should have a little number on there.
CLERK OF THE COURT: It's 6047.
MR. CHARLEBOIS: Okay. And it's four pages. There's writing on them. There's two pages writing on each side.
CLERK OF THE COURT: Yes.
MR. CHARLEBOIS: Okay. Thank you.
THE COURT: Can I see it, please? Is the document admitted for the limited purpose for which it was put to the officer as a docket admitted completely?
MR. CHARLEBOIS: I'm not quite sure if Your Honour's question as to the limited purpose.
THE COURT: Well, I have all kinds of dates here. I have a birth...There is date of birth, there is dates of baptismal, I have her date of first communion. I have her date of confirmation, all of that is on this document that I have...
MR. CHARLEBOIS: May I please...
THE COURT: ...plus other information.
MR. CHARLEBOIS: May I please quickly review the copy, your copy of the document because mine is on different pages and I'll be able to answer that immediately, Your Honour? I don't have a problem with the entire

document being made as an exhibit, Your Honour.

THE COURT: The entire document number, exhibit number one, is admitted as evidence including all the information contained therein. Thank you. By the way, as I told you, you will be getting copies of every exhibit that is entered in this trial.

MS. FULLER: Q. Officer, I understand that there was a, another archival document that bears the control number 6046 that is similar to the document that has been made exhibit one with a slight variation and I would like to show it to you.

A. Yes.

Q. And with respect to Ms. Wesley's tenure at Ste-Anne's residential school, what does that document indicate?

A. That document indicates that she arrived in Fort Albany again on the 27th of July 1951 as gardienne des garçons. Then the next entry is in 1962, arrival at Ottawa, maison mère, and held the office of aide garde-malade. Then again in 1963, arrival at Fort George in the office of soins des malades.

MS. FULLER: I would ask that, that be made exhibit number two.

THE COURT: Exhibit number two. Any objection, Mr. Charlebois?

MR. CHARLEBOIS: I don't have any objection, Your Honour. Perhaps the only comment I'd make is that I would have no difficulty if Your Honour translated those occupations or job titles into English for those members of the jury who may not be bilingual.

THE COURT: I am not an interpreter.

MR. CHARLEBOIS: It's just a comment, Your Honour.

THE COURT: But I am not but you admit this document as exhibit number two with all of the information it contains therein.

MR. CHARLEBOIS: Again, I will review it briefly but I believe the answer is going to be yes.

THE COURT: Did you ever see it before?

MR. CHARLEBOIS: I have, Your Honour, but I have a lot of documents and my documents are in a different format and I just want to make sure of the format that is being produced as an exhibit.

THE COURT: I am just wondering if we are going to have to take so much time into introducing documents that are non-objectionable, I guess, we are going to have a time with the documents that are objectionable.

MR. CHARLEBOIS: I don't think that Your Honour will be hearing of too many other exhibit or documentary exhibits. I can foresee one possibly two more. That's fine. That can be made an exhibit.

THE COURT: Exhibit number two.

EXHIBIT NUMBER TWO - Records from the Fort Albany School numbered as 6046 - Produced and Marked.

MS. FULLER: Q. Now, officer, I understand that in addition to these documents that are entitled "Obédiences", first of all, do you know what an obédiences means in English from the French, I understand that you are a Francophone person.

A. Yes.

Q. And your understanding of obédiences.

A. Yes, it's basically, hum, posting of sorts.

Q. Like an assignment.

A. An assignment, yes.

Q. The, I understand that in addition...

THE COURT: I am simply telling, Mr. Charlebois, I would not have known that.

MS. FULLER: I wouldn't have known it except for the

preliminary hearing myself Your Honour.

MR. CHARLEBOIS: If I had a problem with it, Your Honour, I would have objected.

MS. FULLER: Q. In addition to these documents, I understand that there were journals or archives kept at the school of basically the day-to-day matters kept on a monthly basis, on a yearly basis.

A. Yes.

Q. And that some of those were destroyed by fire but some were not.

A. Yes.

Q. Now from your acquaintance with those archives with respect to the period from exhibit one, July of '51 until '62 or '63 what is your understanding of Anna Wesley's capacity at the school during that, those 11 or 12 years?

A. Hum, she was in charge of looking after the boys.

Q. Thank you. Can you tell me, officer, who replaced her when Anna Wesley left?

A. It's my understanding that Brother Lauzon, Charles Lauzon did.

Q. And are you aware of that as well from the journals and documents kept by the church?

A. From the journals and from statements.

MS. FULLER: All right, those are all my questions. Thank you.

...JURY RETIRES 11:55 a.m.

R E C E S S

U P O N R E S U M I N G:

THE COURT: I am just as delinquent as you are. We must speak directly into the microphone.

Walk over, give it to the witness. Don't talk to him on the way and on the way back. We must. As I say, I was as delinquent in not speaking directly into this microphone so it is just a matter of getting use to it. Did you hear me, Ms. Wesley?

MS. WESLEY: Yes.

THE COURT: Thank you. Please go ahead. Bring the jury in.

...JURY ENTERS 12:05 p.m.

CROSS-EXAMINATION BY MR. CHARLEBOIS:

Q. I just have a couple of points I want to cover with you, detective constable. At one point in your evidence before the jury, you mentioned that the school building was destroyed by fire. Is that correct?

A. Yes.

Q. And was that the structure that was built in 1939?

A. Yes.

Q. And my understanding is that it burned to the ground in...I'm just ascertaining there seems...Is there a problem with her understanding?

CLERK OF THE COURT: I think she just wanted to correct you on the date. She can hear perfectly well.

MR. CHARLEBOIS: Q. That, that school burned down or that school building burned down in 1954. Is that right?

A. No, I believe there was a period of time before 1954 that the the previous school had burned down. The now, the school that was built in 1954 was built in stages.

Q. Okay. Now the school that was built in 1954 is still the building that's there today, is that right?

A. Yes, that's right.

Q. Do you know from your investigation when the former building burned down, the one that was there before 1954?

A. I believe it was 1939.

Q. You believe it was...

A. Nineteen thirty-nine.

Q. Okay. Now...

A. August 22nd, 1939.

Q. Okay. In 1939, there's a fire and a new school is built or a new building is built.

A. Over a period of time, yes.

Q. Okay. Then that building burns again or that building built after 1939 in stages burns in 1954, right?

A. No, it didn't burn in 1954.

Q. What burns in 1954?

A. Nothing as far as I know with regards to the school.

Q. What about the children's residence or dormitory?

A. That's quite possible, I don't have any information on that burning.

Q. Your Honour and the members of the jury have heard reference to journals or chroniques, I would just like to I take it you've reviewed these chroniques, detective constable.

A. Certain references to them, yes.

Q. Okay. With the court's,if the court feels that it is appropriate to do so there's one passage dealing with 1954, April 1954 which is in French which I propose to put to the constable who is bilingual and then I would propose to translate it into English for the members of the jury. If my translation is inaccurate, I'm sure Your Honour who is also bilingual will correct me.

THE COURT: Do you object, Ms. Fuller?

MS. FULLER: No, Your Honour, I'm content that the

record be corrected on this issue.

MR. CHARLEBOIS: Q. At page 139 of the chroniques, it covers the period 1938 and 1960, it has listed "Avril 1954, le 9, grande alarme ce matin a 4 h 30. La résidence des enfants est réduite en cendres dans l'espace de quelques heures. Il n'y a aucune perte de vie mais tout le contenu de la maison est brûlé.".

Well first of all, are you familiar with that passage I've just read in French?

A. I am now, yes.

Q. Were you before I put it to you?

A. No, I wasn't.

Q. Okay. And Your Honour, members of the jury, I take that passage in French for those of you who are not French speaking to read, "9 April, 1954, big alarm this morning at 4:30. The children's residence burns to the ground within a few hours. There is no loss of life but the entire content of the house is burned.".

MR. CHARLEBOIS: Does Your Honour accept that, that's accurate?

THE COURT: Yes, I do.

Q. So was the children's residence, detective constable, and the school were they one in the same building or were they separate buildings?

A. I'm not sure between 1939 and 1954 when that other school was built, the new school that's now in operation.

Q. Now the only other point I wanted to deal with you is in connection with the statements that you took in connection with the investigation. The Crown was asking you about the procedure that was followed, the witnesses you interviewed. In the course of you taking statements from witnesses, who would write out the statements, the police

officer or the witness?

A. The police officer.

Q. And after the statement had been written by the police officer, would the witness be given an opportunity to read it, make changes before signing it?

A. Yes.

Q. And was this the procedure only employed by yourself or was it the same procedure, to your knowledge, employed by all the investigators in this investigation?

MS. FULLER: Objection, Your Honour, unless this investigator was with those officers he couldn't give evidence on that point.

THE COURT: Well he was asked if, to his knowledge, all other police officers had the witnesses read the statement and make changes. If he can answer as the chief investigating officer, I will permit the answer. If he can answer as the chief investigating officer giving instruction to those working under him, I will permit him to answer.

A. Yes, it was common practice that all the investigators write the, write out the statements themselves.

Q. Now when a witness was telling his story to the police officer...We'll deal firstly with the statements you took, would you write down everything the witness said?

A. They're paraphrased.

Q. But anything dealing with reported incidents dealing with the school or treatments suffered at the school, you would write down that, whatever the witness told you.

A. Yes.

Q. And again, to your knowledge, were those the parameters set out for the other investigators in this case?

A. Yes, they are.

Q. And what about a situation if a witness would ask you in the course of reviewing his statement after it had been taken down by the police officer, well I want you to take that out. I want you to take this portion out of the statement. Do you recall that occurring for one thing?

A. I don't recall that occurring, no.

Q. If that situation had arisen, what would you have done?

A. It would have been my practice and it still is my practice if that occurs to cross-out that portion that the witness wants removed, to initial it myself and ask the complainant to initial it and put in a section as to why they wanted it removed.

Q. The statement would not be re-written deleting the portion the witness wanted deleted.

A. No, I would not do that.

MR. CHARLEBOIS: Thank you, Detective Constable. Those are my questions.

THE COURT: Re-examination.

MS. FULLER: No re-examination.

THE COURT: Thank you very much, sir.

MS. FULLER: I would like to call Luke Mack to the stand.

MR. CHARLEBOIS: Before that witness is sworn, Your Honour, and in the presence of the jury I'm prepared to admit the following that Anna Wesley, my client, the person who is in the courtroom today was indeed the nun known as Sister Mary Immaculata and that she toiled at the Ste-Anne's Residential School in Fort Albany between the years 1951 - and I'm sorry, I'm saying something here...

MS. WESLEY: I can't hear you because you are not in

front of the mike.

THE COURT: I am sorry, thank you. We will get use to it. Start over.

MR. CHARLEBOIS: I'm prepared to admit, Your Honour, for the members of the jury and before this court that Anna Wesley, my client, the woman who is in court today was the nun known as Sister Mary Immaculata, that she was a soeur grise de la Charité d'Ottawa or a grey nun at the time and that she toiled at Ste-Anne's Residential School in Fort Albany between the years 1951 and 1962 and that the position she occupied was supervisor, monitrice des garçons or supervisor of the boys. From that admission, Your Honour, stands not only in relation to Mr. Mack but in connection with the other witnesses that the Crown will call throughout this trial, well those witnesses obviously who were at the school at the time.

THE COURT: This should facilitate your task a bit.

COURT INTERPRETER: Do you need an interpreter?

MS. FULLER: Yes, the Crown is asking for a Cree interpreter to be sworn.

THE COURT: Very well.

ANGELA SHISHEESH: INTERPRETER AFFIRMED - Cree\English

LUKE MACK: SWORN

Testifies through interpreter.

EXAMINATION IN-CHIEF BY MS. FULLER:

Q. Mr. Mack where were you born?

A. Winisk, Ontario.

Q. And where is Winisk?

A. In Hudson Bay.

Q. What's your date of birth?

A. Pardon.
Q. What's your date of birth?
A. September 2nd, 1951.
Q. I understand that you spent most of your childhood at Ste-Anne's Residential School, in Fort Albany.
A. Yes.
Q. Do you recall how old you would have been when you went?
A. About five years old.
Q. And who brought you there?
A. My aunt Mary Williams.
Q. And why did she bring you there?
A. Because there was no, nobody to look after me.
Q. What language did you speak when you went there?
A. Cree.
Q. At that time, did you speak any other languages?
A. No.
Q. How long did you live there?
A. Since how long did you say?
Q. Yes. How long were you there, Until when?
A. Till 1966.
Q. Okay. And did you finish grade 8 there?
A. Yes.
Q. And from there, where did you go?
A. Kirkland Lake, Ontario.
Q. And was that for high school?
A. Yes, K.L.C.B.I.
Q. While you were at Ste-Anne's, where did you spend most of your Christmas'?
A. Fort Albany.
Q. And where did you spend all of your Christmas'?
A. Ste-Anne's school in Fort Albany.

Q. Where did you spend most of your summer holidays?

A. Fort Albany, Ste-Anne's school.

Q. You were raised as a Roman Catholic in the school.

A. Yes.

Q. And what was the religious background of the people who looked after you when you were a young child? What was their religion, your aunt and others who looked after you before you went there?

A. Roman Catholic.

THE COURT: I'm sorry. I did not understand that. What was the answer?

A. Roman Catholic.

MS. FULLER: Q. Without telling them their names, do you remember the teachers that you had at Ste-Anne's? Do you remember them, generally, the teachers?

A. Can you speak louder?

Q. Do you remember the teachers, your teachers at Ste-Anne?

A. Perhaps then, not really.

Q. Did you have different teachers every year or most years?

A. I remember their names but...

Q. All right. Now I don't have to remember their names. Do you just or do you remember what it was like with your teacher?

A. Yes.

Q. Were you afraid of your teacher?

A. No.

INTERPRETER: He's having a hard time to hear you.

MS. FULLER: Q. How did your teachers treat you when you were there?

A. Fairly, just ordinary teachers I would say.

Q. While you were there, who was the first person to look after you other than why you were in class?

A. Anna Wesley.

Q. Do you see her in court today?

A. Yes.

Q. And where would she be?

A. She sitting right, she's sitting right, right there.

MS. FULLER: The person who answered to the charge, Your Honour.

THE COURT: Indicating the accused.

MS. FULLER: Q. After all this time, how is it that you can recognize her?

A. Because I was there most of the time, seven days a week, hey, day after day.

Q. And besides you being there who else was there? Was she there when you were there?

A. Pardon.

Q. Was she there when you were there? Was Anna Wesley there when you were there most of the time?

A. Yes.

Q. Anna Wesley I understand was in charge of the boys' dormitory.

A. Yes.

Q. And was so for a number of years. She was for a number of years in charge.

A. Yes.

Q. Do you remember who took over after Anna Wesley, if anyone and why you were still there? Did anybody else look after you other than Anna Wesley?

A. Brother Lauzon, Charles Lauzon.

Q. And do you remember when that would be, roughly?

A. Not really.

Q. Would you have been, do you remember if you would have been, it would have been when you were at the beginning of your stay there or towards the end of your stay there?

A. It was the end of my stay.

Q. All right. When Brother Lauzon looked after you, would you have been under 10 or over 10. Can you tell us that?

A. Over 10.

Q. How did you get along with him?

A. There wasn't any problem.

Q. What was he like?

A. Understanding.

MR. CHARLEBOIS: Your Honour, I have an objection to make. It might be better to be heard in the absence of the jury.

THE COURT: Very well. I will have to ask you to excuse yourselves for a few minutes.

CLERK OF THE COURT: Members of the jury, you are excused for a few minutes.

...JURY RETIRES

THE COURT: I think you had better speak into the mic.

MR. CHARLEBOIS: Thank you, thanks for reminding me. It is no doubt for the remainder for the Crown to explore what its witnesses, their relationship with Anna Wesley, whether they were afraid of her, not afraid of her, things of that nature, to get into an exploration of the relationship of any witnesses, including Mr. Mack, with people thereafter, a period of time that is not covered by the indictment and a period of time where the accused was not even present at the school, in my submission, is not admissible, it is not relevant and a comparison of how Brother Lauzon may have treated

Mr. Mack for instance almost becomes evidence of good character or bad character if tempered with how the...
THE COURT: Bad character of whom?
MR. CHARLEBOIS: Of the accused as compared with...I am sorry, let me start that over. The accused has not yet put her character in issue. My submission is, that by allowing Mr. Mack to testify about his relationship with someone else who came along after the accused was no longer at the school is not domain to the proceedings before the court, that it is proper for the Crown to explore with this and the other witnesses their own relationship with Ms. Wesley, whether they liked her, got along with her, were afraid of her, whatever but not how they got along with caregivers who were then there after she left.
THE COURT: Why?
MR. CHARLEBOIS: Because I submit that it may not be the Crown's intention, it almost becomes an introduction whether conscious or otherwise and I am not suggesting that it is conscious on the part of the Crown, to put the character evidence and bad character before the jury.
THE COURT: Well my understanding of bad character evidence is that they can only be given one way and it is certainly not related to what is going on here now but I will listen to Ms. Fuller respond to your objection prior to making a ruling.
MS. FULLER: Your Honour, the position of the Crown is that how this and other witnesses were treated by others at Ste-Anne's is very (Unclear) to the hearing both in terms of the narrative, in terms of examining the issue of bias, in terms of arguments that will be

made by my friend, that, on issues of credibility, on issues of non-disclosure, on suggestions that they were trouble makers, suggestions that they were punished because they behaved worse...
THE COURT: Well we do not know that yet, do we?
MS. FULLER: Well we do not know that, well I do know that Your Honour because I did a preliminary hearing so I do know where we are going. I do know that there will be a S. 43, unless I am very much mistaking, argument made and evidence that these witnesses had attended the school and got along with other people, weren't afraid of their other teachers, weren't afraid of their other monitors or caregivers is certainly (Unclear) to how appropriate the discipline of, if you want to call it discipline, the accused may have been, particularly since one of the arguments that I anticipate being made, that was made...
THE COURT: Said yes.
MS. FULLER: ...is the argument that with so many people to look after, you...
THE COURT: I said yes.
MS. FULLER: Oh, yes.
THE COURT: I cannot see how the good character of a position in authority has any reflection on the bad character of another position of the same authority. As to its probative value, not that heavy; as to its prejudicial value, how can someone else's good character be prejudicial to an accused. I will allow the question.
...JURY ENTERS
THE COURT: Thank you, Madam Clerk. Go ahead, Ms. Fuller.

MS. FULLER: Q. Thank you, Your Honour. You've told us that Brother Lauzon looked after you, looked after the boys and therefore you when you were there after Anna Wesley left. Can you tell us what he was like from your point of view?

A. Understanding, I don't know what more to say.

Q. All right, were you afraid of Brother Lauzon?

A. Of what?

Q. I speak quickly. I'm sorry. Were you afraid of Brother Lauzon while you were there?

A. No.

Q. How did he treat you?

A. I was treated good by him.

Q. During the summers, did Anna Wesley sometimes go on a vacation, a retreat?

A. Yes.

Q. And who looked after you then?

A. Sister Maria Goretti.

Q. And how did she treat you?

A. All right.

Q. And were you afraid of her?

A. No.

THE COURT: Can I have the last name again, please? Sister Mary...

MS. FULLER: Q. Goretti I believe. There wouldn't be many students there in the summer, I understand.

A. No.

Q. Did Anna Wesley look after you in the summer when she wasn't on vacation?

A. Yes.

Q. And were you treated any differently by Anna Wesley during the summer than during the winter?

A. No. No.

Q. There were other, other than Anna Wesley, I understand there were other nuns and priests and brothers at the school.

A. Yes.

Q. Were you afraid of them?

A. No.

Q. Do you have an idea of what kind of a child you were?

MR. CHARLEBOIS: I'm not sure that's a proper question, Your Honour. That's for something for others to judge.

THE COURT: Perhaps it is something for others to judge but I think we all have an idea of what we think we are like. I will let you ask the question.

MS. FULLER: Thank you.

Q. What kind of a child were you?

A. Good boy.

Q. I want to ask you about some specific events that you told the police officer about.

A. Yes.

Q. I understand that all children of the school had to take cod liver oil.

A. Yes.

Q. And how was it given out, the cod liver oil, how did you take it?

A. It was given by a spoon.

Q. And who gave it?

A. Anna Wesley.

Q. And if you wouldn't or couldn't take it by spoon, was there another way that you got the castor oil.

A. Yes, she use to put it in the porridge in a bowl, inside a bowl of porridge.

Q. Do you remember an incident in which the castor oil

on the porridge made you sick?

THE COURT: Now wait a minute. Now I think we were talking about cod liver oil and castor oil. Is it the same thing?

MS. FULLER: I'm sorry. Cod liver oil. I don't think they are, Your Honour. I'm sorry.

THE COURT: I never tasted either.

A. Yes, I got sick.

Q. And when you got sick where did this take place? Where did you have the porridge with the...

A. In the dining room.

Q. ...cod liver oil?

A. In the dining room.

Q. In the dining room. And when you got sick, did you vomit?

A. Yes.

Q. And where did you vomit?

A. In my bowl.

Q. And why did you vomit in the bowl?

A. Because I had no...I didn't want to vomit on the floor.

Q. Why not?

A. I didn't want to eat it from the...In other words I was scared.

THE COURT: I did not get the first part.

MS. FULLER: "I didn't want to it from the, in other words, I was scared.".

Q. You didn't want to eat it from where?

A. I was scared.

Q. What were you afraid of if you vomited on the floor of the dining room?

A. I might get, to get hit by the nun, Anna Wesley.

Q. And why did you think that, that if you vomited on the floor you would get hit by the nun, Anna Wesley?

A. She, she use to do that all the time.

Q. Did the, when you vomited into the bowl what did Anna Wesley do?

A. Make me eat it.

Q. And how did she make you eat it? What did she do that made you eat it? What did she do or say?

A. She was yelling.

Q. What was she yelling?

A. Because I wasn't eating.

Q. Because you weren't eating what?

A. My vomit.

Q. And what did she tell you to do?

A. Eat it.

Q. And other than telling you this, did she do anything to you?

A. She hit me.

Q. Where did she hit you?

A. My face.

Q. Was she saying anything else to you other than telling you to eat it?

A. Yes.

Q. What things was she saying?

A. You bastard, wild dog, some other words, names.

Q. Some other...

A. Hum some other names and...

Q. What type of names, good names, bad names?

A. Bad names as usual.

Q. Had she called you bastard before?

A. Yes.

Q. And can you tell me whether or not your mother and

father were married?

A. No. Rephrase that.

Q. Were your mother and father married?

A. No. I can't hear sometimes. I'm sorry.

Q. That's all right. How, when this happened, Luke, you were there from the time that you were five until you were, in 1966, say 15, and you told us that Brother Lauzon was there part of the time. In that time frame, if you think about that, do you have an idea of how old you were when this happened, when you were forced to eat your vomit?

A. Before 10.

Q. Under 10.

A. Under 10, before 10.

Q. Were you in grade school yet?

A. Yes.

Q. And do you know how old you were when you started Grade one?

A. No, not really.

Q. Did you start in kindergarten at the school?

A. Pardon.

Q. Did you start the school in kindergarten? When you were at, when you first went to the school were you put in kindergarten?

A. There was no kindergarten that I remember.

Q. All right. When you started school or when you got there and you were about five years old, were you in a nursery or were you put in grade one, do you remember?

A. There was no nursery school then.

Q. Okay, the, when you were first there, the first year that you were there when you were five years old, were you in some kind of school, classroom environment that first year?

A. Yes.

Q. All right. Do you and I know this hard so if you can't help us, you know, just say you don't know but do you know if, do you remember if you would have been older than five or six when this happened?

A. Yes.

Q. All right. Older than five or six and younger than 10.

A. Younger.

Q. What did you do when she told you, when she hit you and told you to eat your vomit and called you names, what did you do?

A. I, I, I eat.

Q. You ate it. When she was speaking to you and calling you these names and, and telling you to eat it, what was her tone of voice?

A. Like screaming.

Q. Were the, were the other, your other school mates and the other children in the dining room when this happened?

A. Yes.

Q. How did this make you feel as a person forced to eat your vomit in front of the others in the dining room?

A. I was, I, I didn't like myself.

Q. How did it make your stomach feel when you were forced to eat your vomit after throwing up the first time?

A. I was sick.

Q. I want to direct your mind to another incident that you spoke to the police about.

THE COURT: If you are going into a new area perhaps this would be a good time to take the lunch break. We will resume at 2:15 p.m.

...JURY RETIRES

1:00 p.m.

R E C E S S

U P O N R E S U M I N G:

THE COURT: I would like to, it is going on twenty after three, I said this morning that I was going to name a time that I want to start, we should start at that time. There will be enough interruptions in this trial that are going to be time consuming. If we get into the habit of coming in here five, ten minutes after I said when we are going to start, this trial will be going on next September. So I would think that counsel are in charge of the witnesses and in charge of their interpreters, in charge, on and on. It is to start at two fifteen, you do not start looking for them at twenty after two.

COURT CLERK: I was told we have three Cree interpreters here Your Honour because certain interpreters just cannot interpret for certain people so I am not sure...

THE COURT: Well that was a problem we canvassed two days ago. We could take shorter breaks and then, in that way, we could be late a little bit. Here we go. Are we ready or is there anything counsel wanted to bring up at this time? Bring the jury in please.

...JURY ENTERS 3:20 p.m.

THE COURT: If my notes are correct, we left off as to how the witness's stomach felt and his answer was, "I was sick", if my notes are correct.

MS. FULLER: Yes, I believe so, Your Honour.

MS. FULLER: Q. Luke, I understand you spoke to the police about another incident at the school when you had a bad cold or cough. Do you remember that?

A. Yes.

Q. And who was looking after the boys in the dorm when that happened?

A. Anna Wesley.

Q. And how old would you have been when this happened if I use 10 years old as a, a touch stone, would you have been older than 10 or younger than 10?

A. Below 10. Ten.

MS. FULLER: I'm sorry. Was that below 10?

A. Below...

MS. FULLER: Ten.

A. Ten.

Q. All right and can you tell me if anybody was with you?

A. Yeah we were two, there were two of us.

Q. Who was with you?

A. Leo Loone.

Q. And what were you doing that got you in trouble?

A. We were coughing.

Q. Were you allowed to cough?

A. I didn't think so.

Q. Was it during the day or during the night?

A. At night.

Q. Where would Anna Wesley be sleeping when you and the other boys were asleep in the dorm?

A. There was, there was a room for her where she, where she use to sleep.

Q. How close to the dorm was it?

A. Very close.

Q. And why were you coughing?

A. I must have had a cold.

Q. What did Anna Wesley do?

A. She make me get up.

Q. Get up from where?

A. From my bed.

Q. Yes and go where?
A. To make me, she make me kneel down.
Q. Where?
A. On the floor.
Q. Was this in the dorm or outside the dorm?
A. Right inside the dorm.
Q. And how were you dressed?
A. The way we were dressed is sort of a nightgown.
Q. And what was it, what was it like where you were kneeling?
A. It just felt the way I had felt before when I was told to kneel on the floor. Of course the floor was really cold.
Q. Did Anna Wesley say anything or do anything to you other than make you kneel on the floor?
A. She hit me.
Q. Where did she hit you?
A. On my face.
Q. With what?
A. Her hand.
Q. Was this before you went to kneel on the floor or while you were kneeling on the floor?
A. Before kneeling on the floor.
Q. How long did she tell you to kneel on the floor?
A. It seems like it was almost a whole night. It was a very long time that I knelt on the floor.
Q. Did she leave you...Were you alone or with somebody else on the kneeling?
A. There were two of us.
Q. Would that be you and Leo?
A. Leo. The two of us Leo and me.
Q. And after she told you to kneel on the floor, did

she go away?

A. She went back to her room where she sleep.

Q. Did she come out to check on you?

A. Only if some, only if somebody coughs.

Q. While you were kneeling on the floor, did you fall asleep?

A. Once maybe twice, I don't know.

Q. What woke you up?

A. She hit me.

Q. This area where you were kneeling, was it close to the beds or somewhere else?

A. Close to the wall.

Q. Okay. Did Anna Wesley at any time direct you to go back to your beds?

A. I don't know.

Q. Okay.

A. I can't seem to recall.

Q. Did you stop coughing?

A. Yes a little.

Q. Did Leo stop coughing?

A. He was forcing himself not to cough.

Q. Okay. Now there was another incident that you told the police about that I understand happened during the winter when you were outside.

A. Yeah.

Q. And you had to go to the bathroom. Do you recall that?

INTERPRETER: Can you repeat that, please?

Q. And you had to go to the bathroom. Do you recall that?

A. Yes. I was, we were, we were playing outside during the winter.

Q. And when you were outside and if you had to go to the bathroom where were the washrooms?

A. Inside.

Q. If it was during the recreation period or recess or a time you were suppose to be playing outside, could you go into the school and use the washroom?

A. During our recreation, during the time we were not allowed to go in because the doors were locked.

Q. What did you, what did you do?

A. I couldn't go in and I shit my pants.

Q. What happened to you?

A. I shit my pants.

Q. When you went inside did Anna Wesley become aware of this?

A. She caught me because she could smell me.

Q. And what did she do?

A. She hit me.

Q. Where?

A. On my face.

Q. How many times?

A. I don't know.

Q. Did she say anything to you?

A. Wild dog.

Q. Anything else?

A. She called me all kinds of names like wild dog, bastard, anything, anything at all.

Q. What was her tone of voice?

A. She was yelling.

Q. How did this make you feel?

A. How did I feel? Can you ask me that again?

Q. How did this make you feel, the way you were treated in this incident?

A. Like an animal.

Q. How old would you have been during this incident?

A. Before nine, no, before 10 years old, not even 10 years old yet.

Q. Again, would you have been older than five or six or would you have been younger than seven or eight or do you know?

A. Between seven and before 10.

Q. You indicated that you were afraid of Anna Wesley.

A. Yes, I was afraid of her.

Q. How afraid of her were you?

A. I, she use to hit me all the time.

MS. FULLER: If I can just have a moment, Your Honour.

THE COURT: Certainly.

MS. FULLER: Those are all my questions.

Mr. Charlebois will have some questions.

THE COURT: Thank you, Ms. Fuller.

CROSS-EXAMINATION BY MR. CHARLEBOIS:

Q. How old were you when Anna Wesley left the school?

A. Maybe 12 or maybe 13, I don't know exactly.

Q. Was Anna Wesley, well while the time she was there till she left, sorry, was she the only nun who looked after you and the other boys?

A. She was the only one.

Q. How many boys did she look after?

A. More than 100.

Q. And she looked after them seven days a week.

A. Yes.

Q. From early in the morning and all night.

A. She, she use to sleep too.

Q. But if a boy got sick in the middle of the night,

she would look after one of these 100 or more boys, right?

A. I don't recall if she ever did that.

Q. When she wasn't sleeping, she was looking after the boys seven days a week.

A. She was there.

Q. These boys that she looked after all alone, they went in age from how old to how old.

A. From five till maybe 12 years of age.

Q. Well you yourself were there until you were about 15 were you not?

A. May, hum, around.

Q. Was she also looking after boys as old as 16 or 17?

A. I don't recall.

Q. Were some of the older boys bigger than her?

A. I don't, I, I don't really know.

Q. Were there boys there, Mr. Mack, at the time who were the size that you are today as a man?

A. I can't say anything to that. I can't recall during, during that time I didn't know whether if there were big boys or bigger than.

Q. Were there boys there that were bigger than you when you were a boy?

A. Yes. That's all I can say, yes to that.

Q. Were there boys there who were bigger than the nun?

INTERPRETER: Excuse me, did you say nun?

MR. CHARLEBOIS: Yes, then the nun. I should rephrase that.

MR. CHARLEBOIS: Q. Were there boys there who were bigger than Anna Wesley?

A. During, during them days there must have been but I don't...

MR. CHARLEBOIS: I'm sorry. I missed the last part of

your answer, please.

A. During them days there must have been but I don't, I don't recall if they were big boys. There must have been some.

Q. Today, as a man, as a man in your 40's, do you agree that it was a big job for one nun to look after more than 100 boys alone?

A. To my knowledge, she was looking after more than 100 boys. During that time when she was looking after the boys I don't think it was hard for her because she use to use of hitting, hitting the boys all the time so that's what, that's what I think right now, it couldn't have been that hard if she would hit the boys all the time.

Q. You told us that you got along better when Brother Charles Lauzon replaced her, right?

A. Yes.

Q. When Brother Lauzon took over, you were older and more mature than you had been when you got there, right?

A. When, when the sister left, when Brother Lauzon took over, Brother Lauzon was capable of dealing good things, he was doing good things to, to me and that's why I was happy.

Q. Brother Lauzon was not only a man but he was also a very large man, is that right, at the time?

A. He was huge.

Q. He was much bigger than Anna Wesley, right?

A. Yes.

Q. Did you listen better to Brother Lauzon than you had to Anna Wesley partly because Brother Lauzon was a man?

A. Brother Lauzon was, was always very directive and he would never, he would never hit me and that's why I had to listen to him.

Q. Did you also listen better to him due to the fact

that he was a man and a very big man?

A. No because brother, no because he was so nice.

Q. You also mentioned this morning that in the summertime Anna Wesley would go away for short periods of time. Is that right?

A. Yes.

Q. And whoever was looking after you in the summertime had a lot less boys to look after. Is that right?

A. Yes.

Q. Because most of the large group of boys were gone home to their families, right?

A. Yes most, most of them were, went home.

Q. How many would be left in the summertime, Mr. Mack, that you can remember?

A. Around 12.

Q. There were rules at that school just like there are rules at any other school. Is that right?

THE COURT: Maybe you should establish that he knows about other schools and rules therein otherwise it is a little unfair.

MR. CHARLEBOIS: Q. Well we heard this morning, Mr. Mack, that after you finished at Ste-Anne's, you went to high school in Kirkland Lake, right?

A. Yes.

Q. Did you go to any other schools except Ste-Anne's and the high school in Kirkland Lake?

A. That's the only.

Q. Were there rules to follow at Ste-Anne's?

A. There was, nine o'clock was the class, class when it started and at 12 o'clock was when we, when it's finished and I had, I had to go back where I was because I was not, the classrooms were not in that where I was staying.

Q. Because you were living at the school full-time, did you and the other boys who attended the school have a set of rules to follow?

A. Yes over, where I went to the school in Kirkland.

Q. Were there rules to follow also at Ste-Anne's, Mr. Mack?

A. Yet I was there at Ste-Anne's and I was there all the time from morning, we use to get up in the morning. We use to go for breakfast. We use to go for, we use to go to school and then all around the clock so how am I suppose to know if there was, if there was something to follow.

Q. While you were there, did you know that there were things you were allowed to do and things that you were not allowed to do? Those are rules.

A. When I went in as a little child, I didn't know. There was never no direction as I was, as I was there. When I first stepped into that school and as the years came, that's all I remembered was I was told to stay there to learn, to go to school.

Q. I just want to be clear on your evidence on this. You're telling us that when you got there, you didn't know the rules. That's fine. But you're there for close to 10 years. You didn't learn what the rules were there for 10 years.

A. I don't, I don't think I was given the rules.

MR. CHARLEBOIS: I'm sorry. Could you repeat that answer, please?

INTERPRETER: I don't think I was ever given a rule.

MS. FULLER: Perhaps it might assist the witness, Your Honour, if my friend could give an example of the type of rules he's referring to.

MR. CHARLEBOIS: That might be helpful.

THE COURT: Well, it is your cross-examination.

MR. CHARLEBOIS: Q. Was there a rule, for instance, do you know what the word "rule" means, Mr. Mack?

A. Yes.

Q. Okay. Was there a rule, for instance, that you had to line up to go into the dining room?

A. The only, the only thing I could recall is it's time to get up, line up. It's time to eat. It's time to go to bed.

MR. CHARLEBOIS: So as not to confuse the witness, Your Honour, and before I move on to my next question, I just want to make sure.

Q. You do know what a rule means, is that right, Mr. Mack?

A. Yes.

Q. Did you ever break any rules while you were at Ste-Anne's and Sister Anne was looking after you?

A. I don't remember.

Q. Would you agree with me if I suggest to you that it would be difficult to spend close to 10 years in that school without breaking some of the rules some of the time?

A. I don't know. I don't know how I would have break any, any rules at all. To tell you this what you're talking about.

Q. Okay. I don't understand the Cree language, Mr. Mack, so I may be missing something here in the translation but are you saying that the 10 years or so that you were there, you never broke the rules?

A. I may have broke the rules without knowing it.

Q. Was it Anna Wesley's job, from what you could tell as a boy there, to make sure that the rules were followed?

A. She never told us anything about as far as I know, myself.

Q. Let's deal with the time you claim that you were playing outside in the wintertime and had to use the bathroom, okay?

A. Yes.

Q. And actually just before we talk about that, in the time that you were at the school, did the place where you slept, the dormitory, did it burn down at one point while you were living at the school?

A. That was before I was there when that happened.

Q. So during the time that you were there, your dormitory, the place where you slept, was always in the same building for all the time you were there.

A. They, they had changed the dorm where we were staying, as I recall. I don't, I don't remember exactly when.

Q. Okay. Do you mean by that, that in the close to 10 years that you're there, there was no fire but at one point you stopped sleeping in the same building and began to sleep in a different building?

A. Prior to that there was, there was a building that was burned down but as of today the school where I was it's still standing today.

Q. At night, were you allowed to use the bathroom?

A. Sometimes.

Q. What do you mean by that, sometimes?

A. Before we would, before going to bed, we would line up again so we can go and use that bathroom before going to bed.

Q. Now the picture I have is that at night, you've got over 100 boys all sleeping in the same dorm or room. Is that right?

A. It's pretty hard for me to describe and recall exactly how it was in that dorm, in the dormitory because they

use to be in sections, and those sections were kind of small.

Q. So it was not one big room then, Mr. Mack?

A. No, not the, not the old one.

Q. What about the new one?

A. The new one was they had a big, they had two big dormitories.

Q. Two for the boys.

A. Yes.

Q. So they split up the boys into two groups in the new dormitories.

A. Yes.

Q. And how old were you when you changed from one dormitory to splitting up the boys into two dormitories?

A. I can't say anything to that because I don't know.

Q. When the boys were split up into two rooms or two dormitories, did another person start looking after the second dormitory?

A. I can't recall to that.

Q. At night, if you needed to go to the bathroom during the night, could you just get up out of your bed and go?

A. Yes. But I don't recall when they, when the, when this came about, the two dormitories. I don't know how long she was there at that time.

Q. Okay. But what I want to establish with you is that at night, during the time you were there and during the time Sister Anna was there, if you needed to go to the bathroom during the night, do you agree with me you just got out of your bed, you went to the bathroom, did your thing and then went back to bed?

THE COURT: I believe he answered that question already. He said "yes". "Could you go up to the bathroom at night? Yes.". I mean, are we going to

beat this to death?

MR. CHARLEBOIS: Some of the answers given by the witness, Your Honour, are then tempered by other things that he says in the course of giving the answer.

THE COURT: Are you telling me that proper cross-examination is to keep repeating the same question in the hope to get a different answer.

MR. CHARLEBOIS: Not until you get a different answer but if you get a witness who is obviously having difficulty understanding some of the questions when the problem is further compounded by translation, I want to make sure that the answers that I am being given are in response to the question.

THE COURT: Number one, I do not know how you can comment on translation at all and I cannot...

MR. CHARLEBOIS: I'm not suggesting....

THE COURT: Just a minute. The Crown can not. We have a qualified accredited Cree translator. We accept what happens. I do not know what great difficulty he is having.

MR. CHARLEBOIS: I'm not suggesting...

THE COURT: But I am just coming back to saying, proper cross-examination is not asking the same question over and over again in the hope that. Continue.

MR. CHARLEBOIS: May I go on to the other question, the next...

THE COURT: About the bathroom again at night.

MR. CHARLEBOIS: I'm sorry.

THE COURT: Go ahead.

MR. CHARLEBOIS: Q. Did you need to get permission from the nun before you went to the bathroom at night?

A. That, that time.

Q. No, at any time at night, did you need to get permission to use the bathroom?

A. I don't remember when that was open. I was there.

Q. When what was open?

A. The new school.

Q. That's not what I'm asking you about right now.

A. I don't know if she was there.

Q. At night, when you needed to use the washroom, did you need to get permission or just go?

A. No.

Q. Now when you were outside playing in the wintertime...

THE COURT: Okay, you are going on to a different subject. Perhaps this would, you are going on to a different subject matter, perhaps this would be a good time for the afternoon break. We will break for 15 minutes and return.

...JURY RETIRES 3:25 p.m.

R E C E S S

U P O N R E S U M I N G

THE COURT: Anything before we bring the jury in?

MS. FULLER: No, Your Honour.

THE COURT: Bring the jury in please.

...JURY ENTERS 3:37 p.m.

THE COURT: Thank you, Madam Clerk. Mr. Charlebois.

MR. CHARLEBOIS: Q. The day that you defecated in your pants or shit in your pants to put it in your words, you and the other boys, you told us, were outside playing, right?

A. Yes.

Q. This was during the day.

A. Yes.

Q. Why couldn't you get into the school to go use the

bathroom?

A. The doors were locked.

Q. Were the doors always locked when you were playing outside?

A. Like I said, the doors were always locked so nobody could get in, not all the time, sometimes.

Q. Was there a supervisor, somebody looking after the boys when they were playing outside?

A. No.

Q. Who came to let the boys into the school when the playtime was over?

A. It was Anna Wesley who, who was always opening the doors.

Q. In what room did she smell you inside?

A. As you, as you get in, as we get in to change to go for, to go for, to go to the dining room to go and eat.

Q. At that time you told us that you were between, you were more than seven and less than 10, right?

A. Yes.

Q. When you claimed that you were hit, was it slaps?

A. It was, she uses her, her hands, left or right. She use to have a ring but I don't recall which hand she uses to, meaning slapping.

INTERPRETER: Because that's what I asked him to differentiate between hitting and slapping because in Cree slap and hitting is the same.

MR. CHARLEBOIS: Q. Okay. Now what were you telling us about a ring, the nun had a ring.

A. Yes, they use to wear rings.

Q. All the nuns or just this nun.

A. Yes, they use to where rings to show that, the permanent, being a nun.

Q. How many rings did Sister Anna wear?

A. One.

Q. When you claimed that she slapped you after she smelled you, did she then tell you to go to the washroom?

A. Yes.

Q. And did she send you to the washroom to clean up yourself and to wash your pants?

A. Yes as far as, as far as I know.

Q. And after you had washed your pants, did you rejoin the other boys?

A. No.

Q. What did you do?

A. She sent me to bed.

Q. Do you remember what time of day this was?

A. It was close to evening during supper time.

Q. Did it appear to you that day that you were slapped and sent to bed as punishment for having soiled your pants?

A. That's what it looks like.

Q. And you never soiled your pants afterwards, after that incident in the time that you were at the school, is that right?

A. That's the only time I know when that incident happened as far as I remember. I don't, I don't, I can't remember everything. I think it was only one time that incident happened to me. I don't know. I can't recall everything.

Q. Let's go on to the other matter you talked about when you had, when you had the cough and you were made to kneel. I want you to focus your mind on that now, okay.

A. What do you want me to say about where to talk about it.

Q. I'll ask you a few questions about it, okay.

A. Okay.

Q. Was it you and Leo who had a cough or just Leo?

A. Both of us I'm telling you. I am saying that because I'm not too sure about it.

Q. I don't quite understand. What exactly do you mean by that, Mr. Mack? What are you not sure about?

A. I guess both, both of us were coughing and I guess that's why she made us get up.

Q. You told us this was at night so all the other boys were either sleeping or trying to sleep. Is that right?

A. As far as I know, it seems that everybody was either trying to sleep but nobody was moving around.

Q. And do you agree with me if I suggest that if you and Leo were coughing, that would disturb the other boys trying to sleep?

A. That I can't answer.

Q. Do you remember that incident, the one we're talking about now very well, the one about you being made to kneel for coughing?

A. All I know is I was kneeling and falling asleep and being hit again and still kneeling.

Q. Were you slapped for coughing that night?

A. You mean while I was in bed or while I was kneeling.

Q. At any time that night.

A. I was slapped while I was kneeling down when I was just about dozing off.

Q. Do you know or do you suspect why you were made to kneel that night?

A. By coughing.

THE COURT: I did not hear that, I am sorry.

INTERPRETER: By coughing.

THE COURT: Okay.

MR. CHARLEBOIS: Q. Now as I understand what you said before the break, you almost fell asleep one or two times and when you did, according to your evidence, Sister Anna would hit you. Do you remember telling us that?

A. Yes.

Q. And by hit, you mean slapped again.

A. Slapping. To me slapping and hitting is the same.

Q. But just so we're clear for this jury these were slaps not punches, right?

A. Slap, very hard one. She use to, she use to slap really hard.

Q. And did it appear to you that the reason you were being slapped is because instead of continuing to kneel, you were starting to fall asleep?

A. Yes.

Q. Were you eventually sent back to your bed or did you stay kneeling all night?

A. That, that part I don't remember but I know I was kneeling there all night.

Q. What part do you not remember, Mr. Mack?

A. Whether if she had sent me to bed.

Q. Okay, so your best memory then is that you continued to kneel all night and did not go back to bed, right?

A. Yes.

Q. So did Sister Anna spend, from what you could see, all night watching you and Leo so the two of you didn't fall asleep?

THE COURT: I do not believe that was his testimony. I believe his testimony was that Sister Anna went back to her bedroom at one time.

MR. CHARLEBOIS: I'm asking him a question, Your

Honour.

THE COURT: You cannot put evidence to him that is contrary to what he testified to...

MR. CHARLEBOIS: I didn't suggest...

THE COURT: ...and suggest, and suggest to him that, that is what happened. You can confront him with it but you cannot say, "your evidence was that" when his evidence was not that. It is unfair cross-examination and serves to do nothing but confuse me and the jury.

MR. CHARLEBOIS: I don't believe that's what I said to the witness, Your Honour.

THE COURT: That is how I heard so you can ask your question again, go back to what he originally said. Put it to him that he is wrong.

MR. CHARLEBOIS: To what he originally said.

THE COURT: To what he said in the direct examination. Do not suggest to him that what he said in examination in-chief is wrong or is not what he said.

MR. CHARLEBOIS: I don't believe that's what I said to the witness, Your Honour, but I...

THE COURT: Well I am telling you that is what you said to the witness. Now continue questioning and at least put his evidence to him correctly. Challenge him if you feel it is incorrect. Challenge him if you feel hh has contradicted himself but do not tell him what his evidence was in-chief in an erroneous manner. That is not proper cross-examination and that is what your question was so proceed.

MR. CHARLEBOIS: Q. Do you remember if the nun stayed up all night watching you and Leo?

A. No.

Q. Is it your evidence, however, that every time you

began to fall asleep there she would be to slap?

MS. FULLER: Objection, Your Honour, that wasn't her, his evidence. The evidence was once maybe twice while he was kneeling she came out.

MR. CHARLEBOIS: I'm not suggesting that that was his evidence in-chief. I asked him, is it your evidence that...

THE COURT: Now that, go ahead.

MR. CHARLEBOIS: That's what I just asked him.

THE COURT: I said, go ahead. I do not want to argue with you every time I have something to say.

MR. CHARLEBOIS: Q. Are you telling us, Mr. Mack, that every time you would begin to fall asleep there she would be, the nun, to slap you?

A. I don't know if she was sleeping that night but as far as I know she came and slapped me twice that night.

Q. Now let's go back to the first incident you told us about, the one about being sick in the dining room, okay.

A. Okay.

Q. Do you remember if that day you had taken your cod liver oil by the spoon or whether the cod liver oil had been placed in your bowl of porridge?

A. As far as I remember, she had put it on my bowl. I'm not too sure about the other time.

Q. The time that I'm talking about is the time you told about the jury about being sick in your bowl of porridge, okay. That's what I want you to focus on.

A. Now you really, now I'm really confused. Nothing seems to be, said what I had said before.

Q. This morning you told us about being sick in the dining room and throwing up in your bowl of porridge after you had taken cod liver oil, okay.

A. Yeah.

Q. That's what I want to talk about. That day. That incident, okay.

A. Yeah.

Q. On that day, do you remember if you had swallowed the cod liver oil or if it had been put in your porridge before you got sick?

A. It happened so many times but the one I wanted to talk about and I know about it and I, and I'm not really sure about it but it happened.

Q. At the time that you got sick and vomited inside your bowl, do you know where the nun was?

A. She was right there.

Q. Wasn't part of her job to look after all the boys in the dining room?

A. Of course because she was the one that was giving me that cod liver oil.

Q. But she was giving it to all the other boys also. Is that right?

A. Yes.

Q. Where in the dining room was the nun when you threw up into the bowl?

A. She was right there.

Q. Right there in the dining room or right there next to you.

A. Right beside me.

Q. Now there's something I'm not quite sure about. You told the Crown and the jury and I'm sure Your Honour will correct me if I've made the wrong note here - "I was sick when I was forced to eat it". Do you remember telling us that?

A. That's exactly what I said. But I can't remember everything because I, because there's been a lot of questions

being asked, being asked to me.

Q. Now what you were told to eat, Mr. Mack, or were you told the following, to eat what was in the bowl and did the bowl consist of porridge and what you had vomited together?

A. Yes.

Q. So it was a mix of the two substance, the food and the vomit.

A. Yes.

THE COURT: And I guess in fairness, the cod liver oil.

MR. CHARLEBOIS: Q. Now when you told the members of the jury, "I was sick when I was forced to eat it", by "eat it", you mean eat the combination of cod liver oil, food and vomit, right?

A. Yes.

Q. What, what do you mean, Mr. Mack, by "I was sick"?

A. Of course they were trying to force me to eat my vomit.

Q. Were you sick a second time?

A. Yes but I, but I didn't vomit as far as I remember.

Q. What do you mean then by when you say, "I was sick"?

A. After eating my vomit when I was told to eat it.

Q. What happened?

A. I, I forced myself to eat it.

Q. But is it fair to say that you did not throw up again?

A. No, that's what I'm trying to tell you. But I couldn't, but I couldn't express myself. But if I had, was able to express myself...

INTERPRETER: Oh.

A. I go, that's what I'm trying to tell you right now but you don't seem to understand what I'm, what I'm trying to

differentiate between being sick vomiting after eating my vomit, I got sick. But I did not vomit.

Q. What form did your sickness take at that point?

A. I was forcing it down, forcing to keep it in.

Q. And what did you do after the meal was finished?

A. Nothing, there was nothing I could do.

Q. Well after the meal was finished and all the boys left the dining room, did you follow the other boys?

A. Yes.

Q. Were you able to complete all of the regular activities after you finished eating the vomit that the other boys did that day?

A. Yes.

Q. Are you presently working, Mr. Mack?

A. No.

Q. How long has it been since you've worked?

A. More than 10 years ago.

Q. Do you have a criminal record, Mr. Mack?

A. Yes.

THE COURT: Perhaps I should have a look. Have you seen it Ms. Fuller?

MS. FULLER: I beg your pardon Your Honour?

THE COURT: Seen it.

MS. FULLER: Yes I have Your Honour.

THE COURT: Okay, no objection, go ahead. Do you have another copy?

MR. CHARLEBOIS: I don't have another copy.

THE COURT: To repeat myself again, I suppose you will tender the criminal record as an exhibit. If you are going tender any document in writing as an exhibit, I would appreciate very much receiving a copy before you do so.

MR. CHARLEBOIS: If I can make a photocopy of it when we break.

THE COURT: No, that is fine, I have read it but we talked about it yesterday, we talked about it this morning. It seems to me that I always get a copy of a document, that the original was intended to be entered as an exhibit and I just do not have it in this trial.

MR. CHARLEBOIS: It wasn't my intention to enter the document as an exhibit. It was simply my intention to put the record to Mr. Mack, to ascertain whether in fact it is his record and then simply to paraphrase the number of convictions and the years of the convictions and leave it at that.

THE COURT: All the more reason why I should have a copy of it.

MS. FULLER: Your Honour can have my copy.

THE COURT: Okay but as long as I have something to look at while you paraphrase it.

MR. CHARLEBOIS: The last part please.

THE COURT: I said, as long as I have something to look at while you are paraphrasing it.

MR. CHARLEBOIS: Q. Thank you. Mr. Mack, I'm showing you a two page document. Would you take a look at that please and could you tell us whether that in fact is your criminal record?

THE COURT: Just a minute please.

MR. CHARLEBOIS: Q. I'm showing you a two page document Mr. Mack, would you take a look at it please and could you tell us whether that indeed is your criminal record?

A. I'm just going to take my time reading it over. It's all my criminal offences.

MR. CHARLEBOIS: Because the record will not be made an

exhibit Your Honour, I simply propose to paraphrase it for the witness.

THE COURT: Very well.

Q. The convictions Mr. Mack, they start in Moosonee in 1969, is that correct?

A. Yes.

Q. And they finish in 1995 in Toronto, is that right?

A. Yes.

Q. And I can show it to you again if you feel the need but would you agree with me that there are convictions on 18 different dates between 1969 and 1995?

A. He wants to look at them over.

Q. Sure and while you're looking, what I would suggest is that between 1969 and 1995, you were convicted on 18 different dates of 29 different criminal offences.

MR. CHARLEBOIS: I might indicate Your Honour while the witness is looking at the record that, that will be the end of my cross-examination of this witness..

THE COURT: Just as a matter of interest, does your paraphrasing shut the door on this criminal record?

MR. CHARLEBOIS: On.

THE COURT: This criminal record. I think maybe we had better discuss it in the absence of the jury after this is finished, well after you are through re-examination. If I have any questions, then we will ask the jury to wait a minute or two. Okay, you wish to paraphrase what is in the record.

MR. CHARLEBOIS: Yes please.

THE COURT: Go ahead.

MR. CHARLEBOIS: Q. Now that you've checked it carefully with the assistance of the interpreter, you do agree that is your record, right Mr. Mack?

A. Yes.

Q. And you agree that there's 27 convictions on 18 different dates there.

A. Yes.

Q. And that the offences range from break, enter and theft, wilful damage, fail to comply with a recognizance, am I going too fast for the interpreter, attempted theft of a car, mischief, possession of property obtained by crime under $1000, fail to appear in court, causing a disturbance, assault and finally, assault with a weapon. Is that a fair summary of what's on the record?

A. Yes.

Q. And that the sentences range from an absolute discharge in certain cases to time spent in jail on other cases.

A. Yeah.

Q. Just one last point or two Mr. Mack, when you told us that you had not been working for some ten years now, how do you support yourself, do you get a disability, are you on welfare, how do you live?

A. Disability pension.

MR. CHARLEBOIS: Thank you Mr. Mack, I have no further questions.

THE COURT: Thank you very much Mr. Mack. Prior to going into re-examination by Ms. Fuller, I wonder if you could give us two minutes and we will finish this shortly.

...JURY RETIRES 4:45 p.m.

THE COURT: Ms. Fuller, it just seems to me that the most serious offence in terms of the lengthiest sentence happened in 1969, some two years after he left Ste-Anne's. Then, the record is full of absolute

discharges, conditional discharges, 15 days, one year suspended, probation, probation, three weeks, the most serious after this I guess is five months in 1995, four years ago. I will leave it if you are happy to leave it. Thirty days, 45 days, 30 days, five days, absolute discharge, absolute discharge, absolute discharge, absolute discharge, 60 days, one day suspended sentence, probation, suspended sentence, probation, conditional discharge, probation, six months, 15 days, one year suspended.

MS. FULLER: If I could just see the record. Do we have a copy?

THE COURT: I have marked it here, you know, in fairness to the jury, you may want to point that out. I am not running this case, you are.

MS. FULLER: Yes, I think I would rather do that then file the record Your Honour and I only have a couple of questions.

THE COURT: Is that satisfactory?

MR. CHARLEBOIS: Not really because as long as the witness admits to the convictions on the record, then that handles the matter. I mean, I don't intend...

THE COURT: You mean to tell me that if somebody gets an absolute discharge for a crime in 15 years for the same crime, that as long as it is admitted...

MR. CHARLEBOIS: It doesn't go to credibility of the witness unless the witness disputes something that's on the record. Mr. Mack has admitted the entries on the record...

THE COURT: No, I think that is unfair.

MR. CHARLEBOIS: I'm sorry.

THE COURT: If Ms. Fuller brings the application, I

will listen to it because I think it is patently unfair to simply highlight those matters that one side of this advisory system feels should be highlighted. When I read it closely, it struck me that, I do not know where he was getting all those absolute discharges for but I'm sure it was not for break and enters that netted him $50,000.

MR. CHARLEBOIS: There's a few comments I'd like to make in the absence of the jury.

THE COURT: The jury is not here.

MR. CHARLEBOIS: No, I realize that. On more than one occasion today, Your Honour has mentioned in front of the jury that I am doing things that are either improper or...

THE COURT: You can tell me that tomorrow morning all right. Right now, we are dealing with the criminal record and I am giving Ms. Fuller the opportunity of doing something. Then we will proceed to the re-examination and then we will proceed to any questions that I may or may not have. Now if you do not like the comments I make about what you are doing, I told you before that my rulings, if they are improper and you feel they are affecting the case, you know where to go and I will be the first one to encourage you.

MS. FULLER: Your Honour, my suggestion would be that I would just ask that the court file as a not review, file the record and then we don't really get into an issue of whether...

THE COURT: No, they can read it for themselves.

MS. FULLER: Yes, I'm content to do that Your Honour.

THE COURT: That is what we wanted, they can even talk about those offences that are offences in relation to

honesty and what not.

MS. FULLER: I'm content to do that Your Honour.

THE COURT: Okay, well bring the jury in.

...JURY ENTERS 4:50 p.m.

THE COURT: Ms. Fuller, do you have anything in reply?

MS. Fuller: No.

THE COURT: Do you have any objection to that Mr. Charlebois?

MR. CHARLEBOIS: No Your Honour.

THE COURT: Okay, re-examination.

RE-EXAMINATION BY MS. FULLER:

Q. Just a couple of questions Mr. Mack. I didn't see anything on your record but could you tell us, have you ever been convicted to lying in a court of law?

A. No.

Q. And it was suggested in cross-examination that you have a pretty limited income. My question is, do you have anything to gain by being here and giving evidence today?

A. No.

COURT INTERPRETER: I explained it clearly what you just said. His lodging is paid for and his meals but he doesn't gain no other.

MS. FULLER: Q. Advantage of being here today other than we're paying his expenses. There is no advantage in him being here today but we are paying for his expenses while he's here as a witness, is that what he's saying?

A. He says, I don't know what you're talking about, you guys are the one that asked me to come up here so.

MS. FULLER: Thank you.

THE COURT: Mr. Wesley, I have two questions just to clarify two things in my mind, tell him that.

COURT INTERPRETER: Excuse me, can you repeat the question, you said Mr. Wesley.
THE COURT: Mr. Wesley, I only have...
COURT INTERPRETER: Mr. Mack.
THE COURT: Mr. Mack, I only have two questions or two areas of questions that I would like to clarify. Do you know whether the school officials or supervisors knew that your mother and father were not married?
A. They were aware of it, yes.
THE COURT: I would like to ask you one more question. It relates to your denial of breaking of rules, you said you

did not break the rules to the best of your recollection. All I want to know is, do you know why you did not break the rules?
A. Like I said, I don't know what you're talking about.
THE COURT: Any questions arising out of mine?
MS. FULLER: No Your Honour.
THE COURT: Very well, ladies and gentleman of the jury, we did not finish at four thirty but we did finish this witness. If you would be back here tomorrow for ten o'clock, we will go on to the next witness.
...JURY RETIRES 5:00 p.m.
MR. CHARLEBOIS: Just so that Your Honour and the Crown in planning for the rest of the week know, on the basis of the ruling that you made this morning on the expertise, I will not be challenging the qualifications of Jaffe and Grey (sic) but I will be requesting a voir dire, not on their qualifications but on the evidence that they propose to lead...

THE COURT: On the admissibility.
MR. CHARLEBOIS: On the admissibility before obviously they testify in front of the jury but by admitting their qualifications, it will shorten the process.
THE COURT: It certainly will and I thank you and Ms. Fuller, when do you expect to have the experts here?
MS. FULLER: Doctor Kain is coming in this evening, Doctor Jaffe is coming in tomorrow afternoon, should be here tomorrow my noon.
THE COURT: Okay well this is going to take a while. How about the jury? I wish I would have been told that a little earlier because we have them coming in at ten o'clock now.
MR. CHARLEBOIS: Well Your Honour, your ruling was only made this morning, then we moved on to witnesses right away so...
THE COURT: No, I am not pointing a finger, I am just talking about logistics right now. What do we tell the jury and half are out the door I can guarantee you.
MS. FULLER: I had intended on calling one more complainant before I call the...
THE COURT: One more complainant should last the morning.
MR. CHARLEBOIS: That's fair.
THE COURT: Then the motion on the admissibility of the evidence of Doctor Kain and Doctor Jaffe.
MS. FULLER: Yes, that would get me into problems wouldn't it? Well then, I won't be doing that Your Honour.
THE COURT: Can we start at nine tomorrow morning?
MS. FULLER: Yes.
MR. CHARLEBOIS: Only tomorrow, it creates a problem

for me because there's a matter that, there's a matter that I, I had to reach the law society by 4:30 p.m., that's gone so I've got to reach them tomorrow morning and nobody answers the phone there until nine.
THE COURT: Five after.
MR. CHARLEBOIS: Sorry.
THE COURT: Hoping that your problems are small, five after.
MR. CHARLEBOIS: There's not problems.
THE COURT: What is this, is it going to be a long conversation?
MR. CHARLEBOIS: No, 9:30 a.m.
THE COURT: That is a long conversation.
MR. CHARLEBOIS: Yeah but it's just that I've got to make it from the hotel, from the hotel I then have to get here, get gowned and I also want to, whatever time you say, I want to make sure that I'm in that seat.
THE COURT: The doors are opened here at 8:30 a.m. I was up this morning at six o'clock looking at that motion. If you can have your call in at nine, as soon as you are done, if you have done everything else you could before, we could...
MS. FULLER: He can call from my office, from the Crown's office upstairs.
THE COURT: Okay, how is that?
MS. FULLER: So we can be here.
THE COURT: And then that way, we can get going on the motion. Do you have a lot of material to submit?
MR. CHARLEBOIS: I'm not submitting anything on the motion. What I would propose is that if I admit the expertise of Jaffe and Kain, that these witnesses then give their evidence in-chief that the Crown proposes to

lead, I cross-examine them and then I make my submissions on what portion I feel is admissible.
THE COURT: Oh, we do not have to do this at nine.
MR. CHARLEBOIS: No.
THE COURT: Okay, we can start at ten o'clock, complete your phone call to the law society...
MR. CHARLEBOIS: But in the absence of the...Sorry, I interrupted you, go ahead.
THE COURT: Would we take the evidence in the absence of the jury?
MR. CHARLEBOIS: It seems to me that we should because we don't know what the experts yet are going to say. We don't know if they are going to be going outside the parameters of their report. I understand that, that may very well be the case.
MS. FULLER: Well Your Honour, I've already indicated that I would not be examining witnesses beyond the parameters of their opinions and the report is there and my questions will be...
THE COURT: I would expect that otherwise you would have to serve an amended document...
MS. FULLER: Yes...
THE COURT: ...to defence.
MS. FULLER: Yes and...
THE COURT: And I could just rule it, well if you see what is coming is not in the report, you get up and object, I have to uphold the objection. Otherwise...
MS. FULLER: What is in the report is what I'm calling, is the evidence I'm calling, that's it, that's all.
THE COURT: If you start elaborating on it, there will be good cause for...
MR. CHARLEBOIS: For an adjournment.

THE COURT: An adjournment or a sustained objection.
MS. FULLER: Yeah.
THE COURT: An adjournment.
MR. CHARLEBOIS: I feel an adjournment would be proper if we go outside the parameters of the report, if the evidence is deemed admissible. Why don't we cross that bridge when we get to it?
THE COURT: I am going to deal on a if and when basis on every point. If you want to make motions on mistrials, on adjournments, or whatever, I will deal with it as it happens.
MR. CHARLEBOIS: That's fine.
THE COURT: If Ms. Fuller presents the evidence that is contained in the reports of the experts, we are home free.
MS. FULLER: That is my intention Your Honour.
MR. CHARLEBOIS: On the basis of that, we'd be starting at what time tomorrow?
THE COURT: Ten o'clock. I just thought that the motion would take an hour but there is no motion until we hear the evidence and if we go beyond the parameters, here is your objection. Ten o'clock.

A D J O U R N E D

THURSDAY, APRIL 29, 1999

U P O N R E S U M I N G :

THE COURT: Anything counsel wish to bring up before we call in the jury
MR. CHARLEBOIS: No Your Honour.
MS. FULLER: No.
THE COURT: Bring the jury in. Ms. Fuller.

...JURY ENTERS 10:00 a.m.

MS. FULLER: The Crown calls Tony Tourville to the stand.

TONY TOURVILLE: SWORN

EXAMINATION IN-CHIEF BY MS. FULLER:

Q. Mr. Tourville, where were you born?

A. Hearst Ontario.

Q. And what is your date of birth?

A. October 5th, 1950.

Q. Where did you spend your early childhood?

A. At Ste-Anne's residential school, Fort Albany.

Q. And you arrived at Fort Albany, at Ste-Anne's school at approximately what age?

A. Nineteen fifty-four when I was approximately four years old.

Q. And before then?

A. I had lived in different logging communities in the Hearst area.

Q. Why were you sent to Ste-Anne's?

A. Because I was a ward of the Children's Aid.

Q. Did you have siblings?

A. Yes I did, three sisters and two brothers.

Q. And were they sent to Ste-Anne's as well?

A. For the most part, yes.

Q. You stayed at Ste-Anne's until when?

A. Up to the summer of '61.

Q. After that, I understand that a foster home was found for you and your brothers and sisters.

A. Yes, I spent the later years of my life in foster homes.

Q. So you would've been at Ste-Anne's until you were

ten or 11.

A. I believe so, yes, I was about 11.

Q. I understand that Ste-Anne's school, the building is the same building that is there today.

A. Yes it is, yes.

Q. And that it now operates as a regular school along with some other offices.

A. Yes, as a regular public school.

Q. Was there someone who looked after the boys at Ste-Anne's when you weren't in school or playing outside?

A. It was Ann Wesley.

Q. Do you see her in court today?

A. Yes I do.

Q. Where would she be?

A. She's sitting right there.

MS. FULLER: Indicating the accused.

Q. Now I understand that Ste-Anne's was a boys and girls school but that the boys and the girls were pretty strictly segregated for most things.

A. Yes it was.

Q. What languages did you speak when you arrived at the school?

A. I think it was mostly English when I arrived there. Of course, I was only four so I can't.

Q. What language did you speak when you first arrived there?

A. It was English.

Q. You were raised in English.

A. Yes.

Q. Do you speak other languages?

A. Well I speak French and I used to speak Cree at one time.

Q. And when did you speak Cree?

A. I learned it mostly when I was up in Fort Albany.

Q. All right so when you arrived at the school, you arrived as a person who's first language was English.

A. It's hard to remember because like I said, I was only four years old. The languages that I spoke at the time, I don't have much recollection.

Q. All right but the people who looked after you until you were four, whether your mother or your relatives, what language did they speak to you?

A. Actually, maybe I might be wrong, my mom was Cree so maybe I use to speak Cree also, sorry.

Q. All right to the extent that a four year old...

A. Pardon.

Q. ...speaks languages, to the extent that a four year old speaks languages.

A. Yes.

Q. While you were at Ste-Anne's, did anyone else have the care of the boys when they weren't in school, in class than Anna Wesley while you were there?

A. Well in the classroom, it would be, they had various...

Q. Teachers.

A. Teachers.

Q. But other than the teachers, when you were out of class, was there anyone else who was the caregiver other than Anna Wesley?

A. No, for the six years I was there, it was Ann Wesley at all times.

Q. All right, where did you spend your Christmas?

A. Fort Albany.

Q. At Ste-Anne's.

A. At the school.
Q. Where did you spend your summer holiday?
A. Again at the school.
Q. Did you have visitors at the school?
A. Not too often, no.
Q. Did you have anywhere you could have gone if you weren't happy with the school?
A. No.
Q. When you were there in the summertime, how large or small a group of children would there be to be looked after and I'm talking about just the boys?
A. It would be from six to ten boys.
Q. And who would look after you for the most part during the summer?
A. It would be Ann Wesley.
Q. And would she take a couple of weeks holidays or a retreat of some kind normally in the summer?
A. Yes usually in the summer she would be gone for two weeks on her holidays.
Q. And when she was there during the summer, did she treat you any differently than she treated you in the winter?
A. No, we had the same treatment year round.
Q. Would someone else take over from her when she was on holidays?
A. Yes, there would be.
Q. And what was it like then, when someone else was in charge of the boys for those weeks?
A. It would be completely different. We would be able to relax and be normal kids when she was gone.
Q. How did you get along with your teachers?
A. Very well.
Q. I understand you were a good student.

A. I like to think so, yes.
Q. Were you afraid of your teachers?
A. No.
THE COURT: Were you afraid of what?
MS. FULLER: Your teachers.
THE COURT: Okay.
MS. FULLER: Q. How did they treat you?
A. Fairly decently.
Q. The other priests and sisters and brothers, were you afraid of them?
A. No I wasn't.
Q. And how did you get along with them?
A. Again, we weren't afraid of them and they treated us well.
Q. I understand that you've seen a fair amount of Anna Wesley in your adult years since settling in Moosonee.
A. Yes I have.
Q. And how is that?
A. Several years ago, maybe five, six years ago, I acquired a building from the Catholic church up in Moosonee and it's an apartment building and at that time, Ann Wesley was staying there. So when I purchased the building, I've let her remain as a tenant.
Q. And is she still a tenant in that building?
A. Yes she is.
Q. I understand you don't live in that building.
A. No I don't live there, no.
Q. After charges were laid and the allegations made, did either she give you notice or you give her notice?
A. No.
Q. When you were at the school, how did you get along with Anna Wesley?

A. Well I tried to remain invisible as much as possible.

Q. And why is that?

A. Because I was terrified of her.

Q. And why were you terrified of her?

A. Because she subjected us, to myself, to a lot of beatings and punishments.

Q. We can really only hear about matters that affected, we can really only hear about your relationship and the treatment that you received at this trial.

A. Um-hum.

Q. How easy was it to remain invisible?

A. It was very hard.

Q. Why?

A. Because Ann would at time discipline you for any reason whatsoever, whether you deserved or not.

Q. All right. I'd like to move to an area where we would be describing an incident that you told the police about. I understand that while you were growing up, from time to time, the boys would get colds or coughs or flus and often a lot of boys would get sick.

A. Yes.

Q. And were you one of them?

A. Yes I was.

Q. And do you recall an occasion where you had a cold and you were in the dorm and you were coughing?

A. Yes I do.

Q. And everybody else it seemed that was coughing.

A. Yes.

Q. And why were there so many boys coughing in the dorm?

A. Well because once one boy would get a cold or the

flu or whatever, being in a close environment, everybody would get it.

Q. Did someone get angry about this?

A. Yes, Ann did.

Q. And how do you know that she was angry about it?

A. Because her residence was right next to the dormitory where we all slept.

Q. This would be a room where she slept.

A. She had a little room there, off to the side.

Q. Yes.

A. And she came storming out of her room yelling at the next person that would cough would get it.

Q. And in terms of her tone of voice again.

A. Well you could tell she was in a rage because all this incisive coughing was disturbing her sleep.

Q. So the next boy who coughed was going to get it.

A. Yes.

Q. Who was the next boy to cough?

A. It was me of course.

Q. Could you help it?

A. No, no.

Q. What happened when you coughed?

A. Well the way we slept in the dorm is, we had to sleep with the blankets over our head and I had coughed and I was just hoping that she hadn't heard me but all of a sudden, the blankets were yanked over, off my head, off my face and then she proceeded to beat me up with her fist.

Q. And where, in what area of your body was she beating you?

A. My face.

Q. And did you suffer any physical injuries as a result of that?

A. Well just the usual bruises and bloody nose.

Q. And was there any evidence of a bloody nose?

A. Yes, when I woke up in the morning, my blankets were soaked of my blood.

Q. And because at night it would be dark.

A. It would be dark yes in the dorm.

Q. Was there any doubt that the person who was beating you was Anna Wesley?

A. No there was no doubt whatsoever.

Q. Can you tell me Mr. Tourville how that made you feel about yourself, getting punched in the face in the middle of the night for coughing?

A. Well it makes you feel pretty worthless, very unwanted and very scared.

Q. Did you complain to anybody about this?

A. No.

Q. Did it even occur to you?

A. No, no, the last thing you would do in Fort Albany is to complain to any superiors or whatever.

Q. I'm sorry, about how old were you during this incident?

A. We were staying in the older part of the dormitory so I must have been about six years old.

Q. And do you recall being young at the time?

A. Being young.

Q. Yes, quite apart from the fact that you were staying in the old portion of the dormitories, do you have an impression of yourself as being of a certain again when this happened?

A. Oh yes, yes.

Q. So you were a little boy.

A. Yes I was.

Q. Do you remember an incident Mr. Tourville that involved your getting struck in the dining room?

A. Yes I do.

Q. And about how old would you have been?

A. About seven years old.

Q. And what was it that you did wrong?

A. Well I got caught in the act of trying to slip some gristle from my plant onto my friend's plate.

Q. And this would be a friend who was sitting where?

A. Pardon me?

Q. Where was the friend sitting?

A. He was sitting right next to me.

Q. All right.

A. This was in the summer.

Q. It was in the summer so how many people would have been in the dining room?

A. There would have been only about eight of us, maybe ten at the most.

Q. Okay and did Anna Wesley see you do this?

A. Yes she came in at the wrong time and caught me.

Q. And what did she do?

A. There was a big caldron with a metal soup ladle that you see in any institution.

Q. It would be like an institutional pot.

A. Yeah, yeah, the stainless steel or whatever and then she grabbed that and hit me over the head and face with it a couple of times.

Q. And did you suffer any physical injuries as a result?

A. Well again, just the usual fat lip and bruises.

Q. And how did this make you feel at the time?

A. Again, I felt as I did all the time, I was

worthless.

Q. And feeling that way, when you left the dining room, did you go somewhere?

A. Yes we went outside. It was after supper.

Q. After supper and do you remember where you went?

A. Yes, there was a set of swings there and I went and sat on it while the other boys were playing around.

Q. And you just sat on the swing.

A. I sat on the swing, yes.

Q. And how were you feeling?

A. Again, feeling dejected.

Q. Okay, did someone come along?

A. Yes, there happened to be a young priest up that was visiting for the summer. He happened to come by the playground and see me sitting there.

Q. And what did he do?

A. Well he just came up to me and he started talking to me and I guess he noticed that I was sitting by myself and.

Q. So you chatted with him.

A. No, I didn't exact chat with him, he did most of the chatting.

Q. Did you complain to him?

A. No, no.

Q. Did you think of it as an option, complaining to him?

A. No you didn't have that option in Fort Albany.

Q. At the end of the day, who would you have to see, that evening?

A. It would be Ann.

Q. And the next evening.

A. It would be Ann again.

Q. And the next evening.

A. It would be the same.

Q. While you were sitting on the swing and the priest was talking to you, was he speaking to you in a kindly way?

A. Pardon me.

Q. Was he speaking to you in a kindly way?

A. Yes he was.

Q. While he was talking to you, did you get summons somewhere?

A. Well after he left.

Q. Yes.

A. After he walked away, I was summons by Ann Wesley.

Q. In what fashion, how did you know that you were meant to go somewhere? Did she call?

A. Well yes, she called me quite loudly to get back inside the building.

Q. All right and did you go?

A. Ah yes.

Q. And where did she call from?

A. She called from the main entrance, the entrance we used to use at that time.

Q. Did you go inside?

A. To come inside, yes.

Q. And what happened when you got inside?

A. Well as soon as I got inside, she started slapping me all over, pushing and drag me, direct me upstairs and being slapped now and again as I was going up the stairs or whatever, dragged.

Q. Yes.

A. And being shoved into a little room that was full of shoes that the charitable organizations had sent for the Indian kids.

Q. All right, when you say full of shoes, you mean all

over the floor or...

A. All scattered the floor and a mishmash of shoes and what not.

Q. And was there any reason for you to be in that particular room, why she wanted you to go to that particular room, was there any reason?

A. I don't know why I was taken there.

Q. Um-hum, did anything happen while you were there?

A. Yes, she grabbed one of the shoes that was lying there and proceeded to hit me some more for good measure I guess.

Q. And where was she hitting you?

A. Again, all over my face, head, body.

Q. And was she saying anything while she was hitting you?

A. Not to my recollection, no I can't remember if she said anything.

Q. Was there any reference made to your conversation with the priest?

A. No there was no reference that I can remember.

Q. All right, do you have any idea why you were being punished at that time or not punished, just struck?

A. The incident with the priest you mean, talking to the priest.

Q. I'm just wondering, when you were struck, slapped going inside and then you were hit repeatedly with the shoe, were you given any idea as to why you were being struck on that occasion?

A. No I wasn't. I just assumed I was being punished, I was being slapped around and what not because I was talking to a priest and that I might have said something to him.

Q. I understand that while you were there and while

you were outside playing, at some point you sprained your ankle.

A. Yes I did.

Q. How old would you have been?

A. Again, I would be seven or eight years old.

Q. What time of year was it?

A. It was in the summer.

Q. So again, not many kids at the school.

A. No, just the usual six or ten of us.

Q. Okay, who was looking after the boys?

A. It was Ann Wesley.

Q. And about how many people were there, boys were there?

A. Like I said, six or ten.

Q. Okay and what exactly happened to your ankle?

A. To the best of my recollection, I was playing on the swings and you know, we used to swing and jump off the swings and stuff.

Q. And you fell.

A. And I fell and twisted my ankle a bit.

Q. And could you tell by looking at it that it was sprained?

A. Well just by walking on it, it was very tender, I could barely walk on it.

Q. All right, you were playing outside that day.

A. Yes, it was in the evening, in the afternoon.

Q. Late afternoon or evening.

A. Late afternoon, yeah.

Q. And the injury to your ankle caused you to do what?

A. Well I had a slight limp.

Q. And what was the next action or activity that the children were meant to do?

A. Well after supper, Ann Wesley decided to take us for a walk to the local graveyard which is about a 15 minute walk each way.

Q. Now can you tell me whether it would have been apparent that you injured your ankle before you went for the walk?

A. It would have been very apparent because there was only six or eight of us, maybe ten in the group and I was lagging behind the others, trying to keep up to them.

Q. What would there be about your walk that would give it away?

A. I can't hear you again.

Q. What would there be about your walk that would indicate?

A. Well like I said, I probably had a slight limp.

Q. Okay, did you tell Anna Wesley that you didn't want to go on the walk?

A. No.

Q. Would that be the kind of thing you would do?

A. That's not something you do up in Fort Albany, no.

Q. So did you go on the walk with the others?

A. Yes I did.

Q. And were you able to walk?

A. Yes I was.

Q. And how did you feel physically walking?

A. Well I was in some pain, some discomfort.

Q. And again at this point, were you limping?

A. Yes I was.

Q. Now were any inquiries made to you about why you were limping or what was wrong?

A. No none whatsoever.

Q. And on the way back, was there a request made by

Anna Wesley for the children to do something?

A. Yes, there was a deep ditch running parallel to the road we were walking on, coming back from the cemetery, and out of the blue, she told everybody to jump over the ditch.

Q. And how much difficulty did that pose for you?

A. Well a great difficulty, when she tells you to jump over a ditch or whatever, you do it.

Q. And did you jump?

A. Yes I did.

Q. And what was the result?

A. The result was I aggravated the injury.

Q. Now when you say you aggravated the injury to this sprain that you had, to what extent was your ankle injured?

A. It was serious enough that I ended up in the local clinic for about a week, five days.

Q. This is a clinic, it would be the hospital that was run by the nuns.

A. The hospital, they had a little hospital in Fort Albany.

Q. And what was done to your ankle?

A. It was bandaged up.

Q. And were you allowed to not put weight on it and just rest?

A. Yes, like I said, I stayed there for approximately five days until the nun that was in charge of the hospital released me.

Q. And what was it like being in the hospital?

A. It was like a little holiday.

Q. There was an incident I understand when you were obliged to stand in the corner for doing something.

A. Yes there was.

Q. And how old were you?

A. I must have been about six.

Q. And in what room of the building was it?

A. It was in the rec room, recreation room.

Q. And what time of year was it?

A. I don't remember the time of the year, it might have been in the fall.

Q. All right, was Anna Wesley in the room when you were in the room?

A. Yes she was.

Q. And were there others in the room, were there others in the room?

A. Others, yes, the rest of the kids.

Q. And do you recall what Anna Wesley was doing while you were being made to stand in the corner for something?

A. Yes she had me stand in the corner and she was working on some plants behind me on a table.

Q. And do you know if there, was there any top soil or soil being handled?

A. Yes, she was putting some flowers or plants and working with soil and what not.

Q. Was anybody else in the room working with soil and plants?

A. No there was just her.

Q. And what were you expected to do in the corner other than stand in the corner? Were you given any special instructions?

A. No, just to stand in the corner.

Q. And did you do anything else other than stand in the corner?

A. No I did not, no.

Q. And what happened to you?

A. Well all of a sudden, I felt, I was struck from

behind with both her hands over my eyes.

Q. Both of them.

A. Both of them at the same time, yes

Q. Who's hands?

A. Ann Wesley's.

Q. And was there anything on those hands?

A. Yes, they were covered with mud or whatever.

Q. And what was the result of that?

A. Well I staggered around trying to get all this mud and stuff out of my eyes and blinded. With the force of the hit, I was dazed, seeing stars and what not.

Q. Did you stay in the corner?

A. Yes I had to remain in the corner.

Q. I understand that you gave evidence at a preliminary hearing back in May of 1998.

A. Yes I did.

Q. And you told that court about the incident involving the plants and the coughing in bed and the soup ladle and the shoe. You told the court those incidents.

A. Yeah.

Q. And I understand as today, Anna Wesley would have heard your evidence.

A. Yes.

Q. And I understand that after the preliminary hearing, you were approached by Anna Wesley.

A. Yes she did.

MR. CHARLEBOIS: Just a minute please Mr. Tourville. At this point Your Honour, I have an objection to make and I think it better be made in the absence of the jury please.

THE COURT: I would ask the jury to retire for a few minutes.

...JURY RETIRES

MR. CHARLEBOIS: On Tuesday, I think it was Tuesday morning of this week, I was given either by the Crown or by the investigating officer a statement that was obtained, I understand it was Monday of this week, on the 26th by the constable from Mr. Tourville in relation to a conversation that allegedly was initiated by my client with Mr. Tourville a few days after the preliminary inquiry. Other than this, is very late disclosure of something that would have occurred almost a year ago. Over and above that, I think even before we get into a disclosure issue, we get into a relevance issue. How relevant would any comments or conversation that would have taken place between Mrs. Wesley and Mr. Tourville, the witness, subsequent to the preliminary assist the jury in determining whether or not she's guilty of the offence alleged against her with the person of Mr. Tourville. That's the first point, is the point of relevance; the second point is a point of late disclosure. I am not alleging late disclosure on the part of the Crown to me. I recognize that the Crown and the police disclosed it to me the next morning after they had it. The question is, why did Mr. Tourville wait almost a year, in fact until the evening of the first day of the trial to disclose it to the police so there's late disclosure on that basis. For those reasons, I would submit whether Your Honour accepts one or the other argument that I am making, that Mr. Tourville be precluded from talking about this conversation. Obviously, if I bring it out in cross-examination, it would properly be the subject of re-examination. If in the course of this trial, at some

point Ms. Wesley decides to testify, it's brought out in her evidence, then it would be proper for the Crown to recall Mr. Tourville to give evidence in reply.
MS. FULLER: Hardly Your Honour, if the accused were to take the stand and the Crown were then to say, to cross-examine on a statement that could've been brought out in the Crown's case, the Crown be precluded, the Crown is expected to adduce all of its evidence in-chief. The suggestion that we would call reply evidence on the matter of a statement by the accused surprises me. With respect to late disclosure, the witness has no obligation and no reason to phone up after a preliminary when he's continuing with his life in Moosonee to tell the Crown about a conversation that he had with Anna Wesley. There is no duty on the witness and there's no expectation, reasonable or fair expectation that a witness would do that. What is reasonable is that when questioned by the Crown about anything that may have happened between the preliminary and now and he indicates, at first opportunity he's asked, well yes, there was a conversation in which she approached me. That is assumed, as I can know, as soon as I can disclose and that disclosure was given promptly, immediately after that was disclosed to me.
THE COURT: Is there any reason why I cannot hear the disclosure?
MS. FULLER: I don't know Your Honour, my friend has suggested that there is an issue of relevance but he has not alluded to the nature of the conversation.
MR. CHARLEBOIS: I don't have any difficulty if Your Honour hears the exchange and then makes your ruling.
THE COURT: Let's hear the exchange then.

MS. FULLER: The accused approached Mr. Tourville...

MR. CHARLEBOIS: May I perhaps suggest that my friend just continue to ask the questions of Mr. Tourville, let's see what he has to say and then...

THE COURT: Perhaps.

MS. FULLER: Certainly.

MS. FULLER: Q. Mr. Tourville, could you tell us about the exchange between you and Ms. Wesley?

A. Yes, a few days after the preliminary investigation, the preliminary hearing, I had to go to the apartment building where Ann Wesley is staying, I had to deal with one of the clients, one of my tenants or whatever and Ann had, was coming out of the building and she called me and came over to me and she put her hand on my arm, shoulder and told me that there was no hard feelings and that everything would be as usual.

Q. And did you respond?

A. No, I did not, no.

MS. FULLER: That is the nature of the conversation Your Honour.

R U L I N G

BOISSONNEAULT, R. (Orally):

I do not think that there is a disclosure problem under the circumstances. The Crown disclosed the evidence as soon as it was practicable after the Crown received the evidence. I do not know what duty there is upon a witness to disclose every conversation with an alleged accused in a trial in which he is involved. In any event, I find the statement very innocuous. It could have some probative value, in my view, very little and it could have some prejudicial value, in my view, very little but in any event, admissible.

MS. FULLER: Thank you Your Honour. Perhaps Mr. Tourville could...
MR. CHARLEBOIS: Yes, perhaps the witness could be excluded for the next, we bow to Your Honour's ruling but my friend had suggested something else this morning and rather than have the jury go out again in five minutes, let's get a ruling now on the other problem.
MS. FULLER: It's another issue.
MR. CHARLEBOIS: Could I ask that the witness be excused for this next portion please?
THE COURT: Certainly.
MS. FULLER: The Crown is intending to adduce evidence of Mr. Tourville with respect to the rule of Ste-Anne's and this arises from the cross-examination of the witness, Luke Mack and starting to piece together of the defence through the questions taken.
THE COURT: What rule are we talking about here?
MS. FULLER: The rules, the rules, the lengthy cross-examination and discussion of what were the rules at Ste-Anne's, what were you expected to do and not expected to do and Luke Mack did...
THE COURT: You would have to go for breakfast, go to classes, that type of thing.
MS. FULLER: Yes and Luke Mack's difficulty in understanding a concept of there were definite rules and you knew what they were and if you obeyed them, you were fine and if you did not obey them, you got in trouble and it is clear from Luke Mack's evidence that this was all knew to him. He did not think that, that school was run by rules.
THE COURT: When he was there.
MS. FULLER: Yes, he was there and in view of that,

which may be, may raise questions and make people wonder in the jury, why he was there, he wouldn't say that there were rules, that he thought of a structure where you had to abide by these rules and if you did, you were fine and if you went over, you were punished. The problem is...

THE COURT: That is the function of the jury.

MS. FULLER: It is but they have to be given evidence to explain situations that may not be the same as when the rest of us here were in school and Mr. Tourville and others are able to discuss the issue of rules in the sense of, there were no real rules, there was not, there was a rule that if you wanted a piece of bread, you had to put your hand up for a piece of bread but you didn't know whether you were going to get a piece of bread or whether you were going to get struck. That is the issue. The rules were according to Anna Wesley and they changed, they did not relate necessarily to speaking in class, you could be punished for being hurt, for being sick, for wetting the bed, for...

THE COURT: Coughing.

MS. FULLER: For coughing. This is the and how they learned the rules or didn't learn the rules according the whim of Anna Wesley.

THE COURT: What does this witness's testimony have to do with Mr. Mack's testimony?

MS. FULLER: Well it's all about, it helps the jury to understand, especially in a case where a section...

THE COURT: The jury has Mr. Mack's testimony, whatever he says is what they will, from his evidence, they will establish what facts they wish to establish. What are you asking me about this witness?

MS. FULLER: Well I would be asking this witness, in his own right in any event, about the rules because of the section...
THE COURT: We went through the rules...
MS. FULLER: Section 43 defence.
THE COURT: Just a minute, we went through the rules yesterday, nobody objected, everything was fine, what is the big deal about the rules now?
MS. FULLER: I want to go through them again with respect to this witness and with respect to every witness because, in the case of assault by a person standing in local parentis, the...
THE COURT: Well listen, I hear that you want to go over it again and what you are telling me, I guess, is that you are expecting an objection. Let's hear the objection and then you can reply to it.
MS. FULLER: Thank you.
MR. CHARLEBOIS: I learned for the first time this morning, after we had left Your Honour's chambers and while I was going to gown that Mr. Tourville that the Crown intended to lead evidence from Mr. Tourville about for instance, that one night, his brother crawled into bed with him and I forget whether it's Mr. Tourville or the brother or both that wound up getting hit by the nun, that they would get, if they got their hand up for bread or something, that sometimes they'd get the bread and sometimes they'd get struck, well, first of all, in connection with Mr. Tourville's brother, Mr. Tourville saw his brother get struck and he is not a named, he's not a named complainant, the brother, and we get into a discussion of whether that evidence is admissible, permissible.

The other stuff about this incident where the brother might have gone into bed with him and either Mr. Tourville was struck or this thing about hand up and getting the bread, none of it is in a statement of the, in the statement of Mr. Tourville that was disclosed. When I initially took on this case, none of that was disclosed by Mr. Tourville at the preliminary inquiry so minutes before the witness is called to testify, I am made privy to fresh information, potentially disclosing further assaults. That is definitely prejudicial to my defence of Ms. Wesley and this information is disclosed to me casually as we are walking down the hallway. There is no written documentation...

THE COURT: What you are telling me is that we have a problem of disclosure here, that is basically what it is.

MR. CHARLEBOIS: Disclosure one, and two in connection with the brother being struck, well then, the brother is not a named complainant so how relevant is it?

THE COURT: Okay, I will hear Ms. Fuller's reply now and I would like to ask one question. I do not know, I did not count but there were several instances or evidence of several instances that could be found to be assaults under the Criminal Code. I have, if I read it correctly, I might have to read it again, I have one count of assault against Mr. Tourville between such and such and such and such and how am I going to charge the jury as to which one it is, is it every one of them, is it an ongoing thing, is it...I am puzzled when I saw the count and I saw all of the evidence for all of the assaults. Maybe you could comment on that now. It

might be premature on my part but I will deal with this objection. I think it is a bit related of having allegations of several assaults and having one count before the jury of an assault that occurred in a time period. How do I explain it to them?

MS. FULLER: Well you will recall Your Honour that when this matter was first to proceed, my friend made an application for particulars.

THE COURT: Yes.

MS. FULLER: And part of the basis for that particular was, application was that there were a number of incidents.

THE COURT: Yes, okay.

MS. FULLER: Mr. Charlebois abandoned that application for particulars and indicated that he would not be bringing an application for particulars. Quite apart from that, in my respectful submission, the case law is clear that when we are dealing with ongoing relationships...

THE COURT: Okay, if you are satisfied, fine, we can go over it, I cannot change anything now but we will be very careful in the pre-charge...

MS. FULLER: The charge to the jury, yes.

THE COURT: ...session that these points be very, very carefully connected. Now, dealing with Mr. Charlebois's specific objection to having extraneous evidence, I guess, to the effect of the, the effect that the atmosphere that permeated that particular institution and I think that is what he was getting at, putting in that evidence now towards this atmosphere that was not given to him previously, am I, do I understand your objection correctly?

MR. CHARLEBOIS: Perhaps only partly Your Honour.
THE COURT: Oh, you want to complicate it for me.
MR. CHARLEBOIS: The statement that Mr. Tourville gave to the police around 1992 or 1993 is lengthy and in it, he does disclose the atmosphere and the climate and the fear. It's these new allegations, the bread, the most particularly the brother crawling into bed and getting struck or Mr. Tourville getting struck. I can't be sure about it because it was quickly told to me in passing. That's what I have a problem because...
THE COURT: You do not have any problem in leading evidence as to the atmosphere that permeated this institution but you do have a problem in not having this flushed out until very, very recently, not giving you an opportunity to check it out, on and on, do I understand correctly now?
MR. CHARLEBOIS: The atmosphere...
THE COURT: Or are you going to complicate it again for me.
MR. CHARLEBOIS: No I don't choose to complicate anything for Your Honour.
THE COURT: I want to know what you are getting at.
MR. CHARLEBOIS: What I'm getting at is, Mr. Tourville can tell us how he felt, he certainly can't comment on how the other students felt.
THE COURT: I agree.
MR. CHARLEBOIS: Secondly, I don't want Mr. Tourville testifying about, well, you know, hand up for bread, maybe you got bread, maybe you got slapped and I certainly don't want him testifying about the incident in bed with the brother. None of that was disclosed.
THE COURT: Okay, those are two incidents, you do not

want anything about the bread, why?
MR. CHARLEBOIS: Because it may be evidence of a further assault that was undisclosed.
THE COURT: Asking for bread.
MR. CHARLEBOIS: No, being slapped if you.
THE COURT: Oh, there was a slap accompanying this, asking for bread was there?
MR. CHARLEBOIS: Well it's kind of hard to tell because I've got nothing in writing, I was told this casually as I'm walking from your chambers to get gowned.
THE COURT: Disclosure rules are very, very clear. The evidence to be adduced should be given to you in good time but I have not heard your response yet.
MS. FULLER: Thank you, Your Honour. We can only disclose when matters arise. Yesterday, it became clear that for Mr. Charlesbois, the issue of students understanding of the rules of the school was important, what the rules were, what you got punished for, that a supervisor was entitled upon you when you broke the rules. It occurred to me after that, that this is an area that needed special attention because the last witness had a real problem with understanding that there were rules, specific rules to be honoured and if you honoured those rules, you'd be protected. The evidence of Luke Mack and the evidence of Tony Tourville and the evidence of all of the complainants was to the effect that this was not an institution where there were rules, it was a way of life, that you did not act, you did not speak out, you did not assert yourself whether you were sick, whether you wanted, you were hungry because you did not know whether you were breaking a rule because the rules were ad hoc, they

were according to the whim of Anna Wesley. So I asked Mr. Tourville, this morning at seven o'clock, which is when we had our continuation of our interview, to give me an example of what kinds of things, what he meant when he said, you never knew what was prohibited and what wasn't prohibited that could cause you to be punished and he gave five examples and the one was, if you asked for a piece of bread, you were told that, you could ask for a piece of bread and you would put your hand up for one slice or two slices. If you put your hand up, sometimes you'd get a piece of bread but sometimes you'd get slapped so who knows what the rule was.

In terms of how he found out about the rules, on his first day at the school when he arrived with his brother, Alphonse, and his siblings, he and Alphonse were in the same dorm, his brother Alphonse obviously was lonely and frightened and crawled into bed with Tony Tourville, Tony being four, his brother being five and in the middle of the night, Anna Wesley came along and tore him out of bed and beat the brother in front of Tony for obviously breaking a rule, being frightened and lonely on your first day at the school.

He gave an example of being at midnight mass, all the little children and falling asleep and as they left midnight mass, all getting slapped. They didn't know, they didn't know it was a rule, that you didn't fall asleep at midnight mass when you were barely more than an infant.

THE COURT: I do not have any problems with that

evidence, I have problem with disclosure.

MS. FULLER: Well Your Honour, the Crown could have adduced from all of their complainants...All of these complainants, hundreds of anecdotes about cruel and dehumanizing treatment, saw (Unclear) treatment by Anna Wesley. The Crown didn't because it would be unfair to...

THE COURT: To whom?

MS. FULLER: It would be unfair to the defence, in my respectful submission to adduce evidence of every, every particular offence that isn't a part of the indictment...

R U L I N G

BOISSONNEAULT, J. (Orally):

Okay listen, I think that *Stinchcombe* covers that very, very well and the following cases cover it very, very well. It is not the evidence that only the Crown deems to be relevant that goes to the defence but all of the information really, surrounding the offence. In this particular case, it seems to me that it will be or has been so far, by the evidence adduced by the Crown, that there is an oppressive type of atmosphere there and it seems and I find that evidence admissible but I do not find evidence admissible because it is in breach of all of the *Stinchcombe* principles as established, that the Crown be obliged to only advise defence counsel, number one, what she intends to use or what you intend to use and not mention the others and most certainly, not the information that should have been readily available years ago on the very day of the trial because my witness only told me last night. I think that is not proper disclosure and I do not say the evidence is

admissible otherwise but it is admissible at this very late stage of the trial, to expect defence counsel to do anything about that information other than sit there and accept it and try to discredit it and how he could do that without any information on his part I find to be very difficult. So I will rule that the conversation between the witness and or the alleged victim and witness and Ms. Wesley at the apartment is admissible. Any evidence that should have been available to the Crown to put forth the theory of the atmosphere at that school that was not divulged to the defence, Mr. Charlebois before this morning or yesterday morning, as being inadmissible.

MS. FULLER: Your Honour, I wonder then if I might, I will be addressing with Mr. Tourville with the permission of the court, general questions about, I would just like to advise Mr. Tourville perhaps before the jury comes in that I will be asking him about his understanding of the rules and what you could get punished for without giving us examples.

THE COURT: I cannot comment on what Mr. Charlebois knows but after these four, three, two years or whatnot, I am sure the Crown has divulged with the general, general what?

MS. FULLER: General atmosphere.

THE COURT: Atmosphere was, the things that the defence has been advised about either through the preliminary hearing, through statements from the police, through what you divulged to him. What I am saying is that it is not admissible as being unfair is the defence being told this morning, Mr. Tourville is going to testify now because he told me last night that his brother

jumped in bed with him and got slapped. Where is the brother, where is anything that the defence can so do you understand my ruling? Go ahead, you have been going through general information all the way along and Mr. Charlebois has not objected properly so. Mr. Charlebois presumably had that information, it should go to the jury. But if you want to put in new wrinkles and new details at the last minute that should have been available a year or two or three ago, I say it is not fair to the defence.

MS. FULLER: And if I could perhaps just advise Mr. Tourville that not to give specific examples, just to be on the safe side.

THE COURT: Mr. Tourville is your witness.

MS. FULLER: Thank you but I'd like to do it without, well I could do it in the presence of the jury, that is fine Your Honour.

THE COURT: Well if defence is satisfied that the Crown coach the jury to a certain extent, in order to ascertain that nothing untoward happens here, that the jury should not hear, I am satisfied too. Are you okay?

MR. CHARLEBOIS: Did you say coach the jury or coach the witness Your Honour?

THE COURT: Coach the witness, not to get into things that he should not get into.

MR. CHARLEBOIS: I don't have a problem with that.

THE COURT: In the view of my ruling.

MR. CHARLEBOIS: Yes, I don't have a problem with that.

THE COURT: Very well, let's bring the witness in. You can tell him what the gist of my ruling was and carry on with the evidence after the jury comes in.

MR. CHARLEBOIS: And when the...
THE COURT: It is quarter after eleven, do you think this might be, let's do this...
MS. FULLER: I am almost done Your Honour.
THE COURT: Oh, you are almost done.
MS. FULLER: And actually, after the witness is done, if the opportunity arises, I wonder if the Crown and I could see you very briefly in your chambers.
THE COURT: Excellent, we will do the witness. Mr. Tourville, I have ruled that the conversation between you and Ms. Wesley at the apartment is admissible.
A. Yes Your Honour.
THE COURT: Go ahead.
MS. FULLER: Q. Mr. Tourville, with respect to the examples that we discussed this morning of anecdotes, things that you just told me this morning for the first time, for instance the piece of bread, when you first arrived at the school and your brother climbed into bed with you, falling asleep at midnight mass, wetting the bed, getting shoe polish is because that information wasn't known by the defence or the Crown until now, I would ask that when we discuss the rules, we only speak generally and we don't get into anecdotes unless they are things that have already come up in your statement or the preliminary hearing.
A. Okay.
...JURY ENTERS 11:00 a.m.
MS. FULLER: Q. Mr. Tourville, dealing with an incident in which you bumped into Anna Wesley shortly after the preliminary hearing and a brief conversation took place, had there been any exchange between you and Anna Wesley other than this conversation? In other words, was there any reason for the conversation...

THE COURT: I am sorry.

COURT CLERK: The microphone will have to be closer to Mr. Tourville, she can't hear him.

THE COURT: Which one, the black one or the white one, okay. Try it now, just test, Mr. Tourville, will you say a few things.

A. Can you hear me now.

ANNY WESLEY: Yes.

THE COURT: Great.

MS. FULLER: Q. I will put it another way, you saw Anna Wesley at the preliminary hearing.

A. Yes I did.

Q. And you saw Anna Wesley a few days or a week later.

A. Yes I did.

Q. Had you seen her between those two events or had any business with her between those two events?

A. No I did not.

Q. And would she have had any reason that you are aware of to talk to you about anything other than the preliminary hearing on that date?

MR. CHARLEBOIS: Your Honour, I don't think that Mr. Tourville can answer as to what Mrs. Wesley's state of mind would have been.

THE COURT: I agree with you, just what happens.

MS. FULLER: Q. Can you tell me what the conversation was and what she did?

A. Approximately four days or a week after the preliminary hearing, Ann Wesley approached me as I was, she was coming out of the apartment building that I own and she told me, she put her hand on my arm, upper arm and told me words to the effect that there was no hard feelings and it would be back to as usual.

Q. And what, if anything, was your response?

A. I probably just met, yes okay or whatever.

Q. You didn't engage her in further conversation.

A. No, no.

Q. When you were at the school, had Anna Wesley ever showed any physical affection towards you?

A. No she did not.

Q. I'd like to discuss generally the subject of what rules there were at Ste-Anne's and how you found out about them. When you arrived at the school, did anybody take you aside and tell you what they were?

A. No.

Q. And without giving us any examples, can you tell me how you found out about what the rules were?

A. We didn't know what the rules were, there was nothing posted in as far as rules of behaviour wise or otherwise. The only way we found out about the rules that existed or Ann's rules would be by disciplined, if we broke one.

Q. From your experience, was there any set of rules that if you obeyed them, you wouldn't get punished and if you disobeyed them, you would?

A. No, there was no such thing, as you follow a certain amount of rules, it would be, like I say, Ann's rules and it could be any and there were many of them.

Q. Was there anything you couldn't get punished for?

A. In my experience, no, punishment was constant.

MS. FULLER: Those are all my questions, thank you Mr. Tourville.

THE COURT: Thank you very much Mr. Tourville. The next state of course is for your cross-examination but it is now twenty-five after eleven. I know you have had a

couple of rest but we have not so we will go for our morning break. You are excused for now. Fifteen minutes. I will see counsel.

R E C E S S

...JURY RETIRES 11:24 a.m.

U P O N R E S U M I N G :

THE COURT: Bring the jury in please.

...JURY ENTERS 11:33 a.m.

THE COURT: Members of the jury and this will be very short, one of our counsel is not feeling well and for the time being, we will simply adjourn till two o'clock and see if things change for the better. In any event, we will resume at two and see what happens.

R E C E S S

...JURY RETIRES 11:34 a.m.

U P O N R E S U M I N G :

THE COURT: Ready for the jury.

MR. CHARLEBOIS: Yes Your Honour and thank you for your indulgence this morning.

THE COURT: Very well, bring the jury in please.

...JURY ENTERS 2:00 p.m.

THE COURT: Members of the jury, because of some recent developments, we are going to proceed this afternoon but perhaps in a little unorthodox fashion. The cross-examination of Mr. Tourville is going to be postponed until well, whenever, perhaps next week or perhaps tomorrow, I do not know. What we will accomplish this afternoon though is hear the evidence of an expert and

see how things go. Oh by the way, since we are going to stop tomorrow at 12:30 p.m., would you have any objection to starting tomorrow morning at 9:15 a.m.? I know there is one person from Kapuskasing, that is the one...It is okay with you. Is it okay with the rest of the jurors? Thank you very much.

MR. CHARLEBOIS: Your Honour, before my friend calls the next witness, I see that Mr. Tourville is in court and we do have an order excluding witnesses. I wonder if Mr. Tourville might be instructed, to be kind enough to leave the courtroom please.

THE COURT: Mr. Tourville, originally or at the start of the trial, I made an order that all witnesses be excluded until they testify and that they do not speak to anyone of their testimony after they do. That order remains in effect so I must ask you to leave the courtroom and be assured that we will give you a lot of time before you will be called upon to be cross-examined by the defence.

A. Okay.

THE COURT: Thank you sir.

MS. FULLER: Just with respect to that issue Your Honour, Doctor Kain has been here to observe however that was with my friend's consent as an exception of the order.

MR. CHARLEBOIS: I don't have any difficulty if Doctor Kain remains in court. Doctor Kain is not a witness directly related to the proceedings as Mr. Tourville is for instance.

THE COURT: Can you hear all of this Ms. Wesley?

ANNA WESLEY: Yes.

THE COURT: Thank you.

MR. CHARLEBOIS: And the other thing that I would like to indicate to Your Honour and to the members of the jury is that the defence recognizes in this case that the vomitus or the substance known as vomit is indeed and in fact a noxious thing or a noxious substance.

THE COURT: And I will remind the jury also that all matters of fact which is what defence counsel was talking about a minute ago is properly your jurisdiction so you will still have to decide. As far as the doctor remaining in the courtroom, you are quite right, I appreciate your consent. It is usual that the experts do remain in court and that an order excluding witnesses does not apply to them unless there are some extraordinary circumstances.

MS. FULLER: Thank you Your Honour, I'd like to call Doctor Peter Jaffe to the stand.

DOCTOR PETER GEORGE JAFFE: SWORN

EXAMINATION IN-CHIEF BY MS. FULLER:

Q. Doctor Jaffe, I understand that you have a Bachelor of Science degree from McGill University in psychology.

A. Yes.

Q. A Masters degree in clinical psychology from Western. A. Yes.

Q. A Ph.D in clinical psychology again from the University of Western Ontario.

A. That's correct.

Q. And I understand that you are presently adjunct professor in both the departments of psychology and the departments of psychiatry, actually adjunct professor in psychology and associate professor part time in the department of psychiatry.

A. That's correct, I just got promoted to professor last month, I didn't update.

Q. We'll update your curriculum vitae. I understand that presently, you are the director of the London Family Court Clinic.

A. Yes.

Q. And that you have been for 24 years.

A. Yes.

Q. And could you tell us please what that is?

A. The Family Court Clinic is a children's mental house centre that specializes in issues that bring children and families into the court system so we see children who are victims of abuse and violence or children who are, in some cases, perpetrators of violence so we deal with those victims and perpetrators as victims of witnesses in the court system.

Q. I understand Doctor Jaffe that you are involved both with clinical work, with direct contact with clients in addition to research training and presentations.

A. That's right so my work involves either seeing children, families directly usually at referrals from lawyers and judges and by court order or involving research on issues that may bring children into the court system. For example, the impact of violence on children's long term development. Those kinds of issues might be involved in research and also in training professionals who are involved in the field such as lawyers and judges and also front line professionals like family doctors and teachers who might be involved on issues around child abuse.

THE COURT: Ms. Fuller, I would just like to ask the accused, can you understand the testimony?

MS. FULLER: Q. In fact, sir I understand that you are on your way to a conference just on the issue of the impact of

witnessing violence in abusive situation.

A. Yes, next week there's involving a four day conference in the U.S. actually, New Mexico on the issue of how children are affected when they witness violence in their families.

Q. I understand that you've given evidence in court at all levels in several provinces in this country as well as in the United States.

A. That's correct.

Q. And that you've done so over 100 times.

A. I don't know the exact count but it's over 100.

Q. And that the areas in particular that relate to this proceeding that might be of interest and your main would be areas of violence and other abusive behaviour towards children as well as the impact of violence against children, short term and long term affects.

A. That's correct.

Q. And that I understand as well that you're, in your area of expertise, when we're talking about crimes of violence that you include other crimes of either of other natures of abusive situations, either psychological abuse as well as physical abuse.

A. That's correct, usual...Perhaps to clarify, we often use the terms violence and abuse interchangeably because when we first hear the word violence, we usually think about physical acts, somebody getting kicked or punched and the reality. If you look at experiences of children who are abused, and there's usually different forms of abuse, physical which we all know and associate with violence, there's also sexual abuse and there's also psychological abuse so maybe things that we do to intimidate children and make them feel worthless, humiliate them. Those are things that are part of a

broader definition of abuse so parents telling a child every day that they are stupid, ugly and worthless would be an example of psychological abuse. There is no violent act being committed but you are humiliating them, degrading children and undermining their self-esteem so that would be an example of psychological abuse.

Q. Now in terms of violence, if we think of violence is interfering with the physical integrity of a human being, what would we think of in terms of psychological abuse or harm?

A. In general, when we're talking about even physical and sexual abuse and psychological abuse, we're concerned not only about the act but also the impact of the behaviour. So with psychological abuse, we're concerned about things that are done to children which may affect them in terms of their self-esteem, how they think about themselves, their ability to trust other people, interact with the people around them so we look at psychological impact we're talking about, ways that may affect how they feel and how they think in all spheres of their life.

MS. FULLER: Your Honour, in view of the fact that my friend is not disputing the expertise of Doctor Jaffe, I would ask that I be allowed to put certain hypothetical to Doctor Jaffe and ask his opinion.

THE COURT: Since you are not objecting to Doctor Jaffe's expertise, I do not have any problems in declaring Doctor Jaffe an expert in child violence, psychological, physical child abuse, abusive children, that entire area.

MR. CHARLEBOIS: That's fine.

THE COURT: Did I miss any?

A. I think that probably covers it Your Honour.

THE COURT: Thank you.

MS. FULLER: Q. Yes, Doctor Jaffe, we are here and when I contacted you originally, I advised you that we were here, would be here today concerned with allegations that the accused before the court forced children under her care, at a residential school, to eat their vomit while in the dining room and in front of their piers and that this was after having thrown up for whatever reason. And that I asked you to assist the court within that context, on the issue that the court faces, that the trier of fact faces with respect to whether or not vomitus in those circumstances is a noxious substance. I also advised you that from my humble point of view, that noxious was generally held by the courts to mean hurtful, harmful or unwholesome and then to look at the context of these facts and apply them to notions of harm, wholesomeness and hurtfulness. And I would ask you, if you could assist the court in an opinion as to whether the circumstances described, just described bring this behaviour within the definition of noxious and to what degree. And first of all, perhaps we should start with a definition of harm.

A. When we think about abuse of children and the harm of children, as I mentioned before, children can be harmed in a variety of ways. Obviously, if they are struck physically, one can leave wounds, one can break an arm or a leg. They are very clear visible signs of harm. We deal with issues around psychological abuse or how children may be affected in other ways. There is often scars that we can't see unless you know, you talk to children or look at some of their emotions and behaviours so one, in my view, one definition of harm beyond the things that we can clearly see in terms of physical wounds would be how children see themselves, you know, how they view themselves, how they view the world around themselves. For example, whether they're able to trust other people, whether

they're able to interact freely in the community without fear. It's all the things that we'd want to see for children as part of a normal healthy development. Anything we do to arrest that often can be looked at as forms of abuse and the impact of abuse.

So a short answer to your question, coming back to the basic question is, forcing an individual to eat their own vomit would certainly fall within the definition of psychological abuse.

Q. Could you just briefly outline for us the needs that a child has for healthy development, from which a departure can be taken?

A. I think when one looks at issues like abuse and the impact of abuse, it's probably good to stop and reflect what we'd want for a normal healthy child, their development so again, if you look at the basic needs of children, to grow up in our society, you want to make sure children are fed and clothe properly just to deal with the elements, that they're given basic nourishment, that they're given beyond the basic necessities, are also given love and attention. They are told that they are valued as they are growing up. They are also allowed to participate in normal community activities in order to reach their potential.

So it's important we think about abuse to not only think about what goes wrong but think about what we'd expect for things to go right for normal children as they develop.

Nobody has a perfect life but you'd hope that for every child that's born in Ontario, you'd want to make sure or anywhere in the country, you'd want to make sure that they have their basic needs met.

When we talk about abuse, often a good way to look at abuse is ways in which normal development is arrested in a sense that they're not given basic nourishment, they're not...Their trust of adults is violated in terms of way they're treated, physically the way they're treated, emotionally. For example, just to give an psychological example, children you know who are never hugged or kissed, never told that they are loved, one can create abuse by doing nothing, by simply ignoring a child, leaving him in a corner, never giving him any praise, attention, never a hug. You know, throughout the first ten years of your life, you're going to be creating an individual who has a lot of difficulties and in fact, that in itself is a form of abuse by acts of omission rather than something you've done to them so I just use that as a contrast because usually in our heads, when we think about abuse, we think about hitting somebody by doing absolutely nothing and not giving them things that they need to develop properly.

Q. When experts attempt to assess whether or not psychological harm has been done, what are the two focal points for inquiry?

A. When one looks at formal definitions of abuse, there's two major criteria you look at. One is, you know, what is the act that's been committed to a child or against a child, whether or not that act has violated any common sense or any basic community standard so that would be one definition, so...

Q. So the behaviour for the action itself would be one of the focuses.

A. Yes.

Q. And the other would be the...

A. So going beyond behaviour, the other important factor would be knowing the relationship between the person committing the act and the child. So, and in that

circumstance, if there is a power deferential between the two, if you have a parent and a child or a school teacher and a young child in elementary school, you have a clear power deferential in terms of who is the adult and who is in authority and who is the child. So, definition of abuse usually involves those two things. Number one, what is being done to the person or the child and number two, what is the difference in power in terms of size, in terms of maturity between the two parties.

Q. Does your concept of relationship extend to the total circumstances surrounding in a context of the relationship?

A. Yes, again, when you look at the relationship between a child and somebody who may abuse them, obviously the impact is much more serious when there's a trust relationship so obviously, a stranger on the street who passes a child and says something mean or hurtful, that may be easily dealt with. However, if the person who is making comments or involved in abusive behaviour is somebody who is in a trust position, if it's a parent or a step-parent, a teacher, a minister, somebody who has...A daycare worker, somebody who has care and control of that child, then it's clearly a significant difference in the power between the two and also, there's a relationship of trust.

Q. In a sense that the child is entrusted to that person's care.

A. Yes, the child is dependant on that person. Obviously if the person who is abusing you is one parent or both parents, then obviously you're dependant on those parents to raise and nurture you so you're put in a very vulnerable position in that circumstance.

Q. And if a child were in a residential school and

someone were assigned to look after that child along with other children, when those children were not in the classroom, would that be the type of relationship you are describing?

A. Yes and again, when you look at positions of trust, it would include you know, what you just described and again, that would be a situation where children would be even more vulnerable because in a residential school, the parents aren't there every day keeping an eye of things, you're not going home in the evening to tell your parents what happened at school so that would be a situation where there would be a relationship of trust and children would be in an extreme way in a vulnerable position.

Q. Can you tell me what would be the salient factors for consideration with respect to the behaviour itself that was being assessed as to whether it caused harm or not?

A. Again, if you look at the behaviour itself, obviously but the earlier definition of the behaviour clearly violates community standards or any common sense so if there's an issue...You don't have to be a psychologist to worry about and clearly eating vomit would be one of those issues, something that anybody could relate to as a parent...When I say related to the parent, we can relate to it because anyone who's had a child and was throwing up and is sick, not only is that child in a situation where you would never consider them eating their own vomit but what they need from you is your very best as a caring nurturing parent, to reassure them because obviously, they're indicating that they are in some distress by having vomited. So I think one important thing to gage is the behaviour itself, also, the context of the behaviour. As I mentioned, the more vulnerable the child is, you know, the more serious the abusive behaviour...For example, a child that's having a bad day in school, you first year of high school and

you have four teachers and one teacher gives you a bad time one day and says something mean to you, you can go home and tell your parents about it. You may have three other teachers who appreciate you, you have friends, you have a support system. However, if you're a child you know, in a context of a residential school where you don't, we have no power, adults are in charge of you, you can't go home in the evening and tell your parents what happened to you, you'd be in a totally vulnerable position.

Q. Now how does or are there elements where control is a factor in your assessment?

A. Part of, when we think about abusive behaviour against children, it's not just the individual act of abuse or violence, it's also, it would also be the meaning of that act. Because at the end of the day, a lot of what we see in abuse and violence is really ways to control and humiliate or dominate someone. So part of the issue for example, in taking the example before the court of eating vomit, asking somebody to eat their own vomit is like taking total control over an individual where you're basically saying to them, no you've got control of what goes into your body but I can control what comes out of your body because I'm going to put it back in. So there's an ultimate statement being made about how much control and domination you know, one adult can have over a child and this is, again, this is not uncommon in my work unfortunately. You know, I see parents you know, who've made their children eat feces, who've made them drink urine as a way of punishing them for accidents they have for bed wetting so those are all examples of not just punishing a child, but abusing a child in a way of having total control and domination over that child.

Q. To what extent would your assessment of the risk of harm be affected by the degree of humiliation afforded by the

behaviour and it being a publicly done action?

A. Again, a way to look at abuse being more severe is when it's done in a public form. For example, in the context you described earlier, when somebody is being abused in front of their piers and not only impacting a child directly, you're also putting them on display, you're humiliating them, you're degrading them in front of their piers and the fact, not only you're affecting that child, they are also affecting the children that are witnessing that behaviour. A lot of what we've learned over the years on the area of child abuse is when you abuse children in a home or in a school, in any kind of setting, not only are you impacting that child who's the immediate victim, but you're also impacting the children who were witnesses to it. Because what you are doing is you're creating a climate of fear and terror when other children can see what's possible if somebody misbehaves or what's possible in terms of somebody's absolute control and domination over someone else.

Q. And in a climate like this where the allegation is that the accused in front of other children, forced children to eat their vomit, what would that tell the child about their ability to deal with the environment and with the person and with the world around them?

A. The message is not only that an individual you know, has no power and control over their own life including things that their vomiting out of their body but they are totally dominated within that environment. The domination is so powerful that other people can watch it happen and nothing can be done to stop it so it also reflects you know, the ultimate power and control of not only the perpetrator but also the powerlessness of the victim in those circumstances. Again, if you can, sorry, I'm always conscious that when we think

about eating vomit, it's something that's out of the average person's experience, I'm sorry so I always think about other examples that we could think of in terms of how people are affected by witnessing things and in terms of control and domination. So for example, if you're in a classroom, if you're one of 30 students in a classroom and a teacher picks out one particular student and degrades them, humiliates them, tell them that they're stupid and worthless, that you know, they have no chance of ever graduating from high school and they have no business being in that school, if they swat him in the back of the head, if they abuse them verbally and physically, and nobody says or does anything, the teacher comes back to work every day, nobody in the class says anything and that's allowed to continue, there's a very powerful message to that student who is being abused because the message is, that you're totally powerless that you're silenced, that other people can watch and nothing happens.

Q. So anything goes.

A. Yes anything goes, again, whatever standard of rules there are, that there's no clear rules, even in that classroom, within that school.

Q. Dealing then with these facts where you have children in a residential school away from home, forced to...Who are ill, who throw up and are forced to eat their vomit in a public setting, in front of their piers, what is your analysis of the risk of harm>

A. You're describing a situation where the risk of harm would be great. Obviously in my job, in my testifying in this case, I'm not involved in assessing the individual victims. I haven't met the alleged victims before the court so all I can talk is in general about how abuse affects children as they grow into their adult years, both the short term and

the long term effects.

Q. And what are the factors that you use or the criteria that you use to assess whether or not there will be harm?

A. Well you look at the likelihood of short term and long term harm. You're looking at a number of risks in protective factors. By risk factors, you're looking at what are all the factors in a child's life that likely to make them vulnerable. For example, if a child, an example used before about the child who was abused by a teacher, if that child was also going home and being abused by both parents, if that child is poor and has access to any resources, if that child has no friends or family in the area, doesn't have an uncle or a grand-father they can turn to, that would be an example of a number of risk factors, not only is the child being abuse but they also have no safe harbour anywhere in their life and they don't have people watching out for them and reaching out to make sure they have a support system. If on top of that, just give you an example, if the child has learning disability, if the child has learning problems and already is feeling frustrated with school work, that just adds to, it's another risk factor so if you add up all the risk factors, what it means is the likelihood of harm is much greater, both in the short term and the long term. At the same time, what we also look, what we know from our clinical work and for our research, there also may be a number of protective factors which are the opposite of the risk factors. So if that child does have a caring uncle or grand-father that lives next door or down the street, you know, if there's another teacher in that school who is an advocate for the child, if that child has financial resources or somebody who volunteers to tutor that child, to help them with their learning problems. There may be a number

of protective factors that minimize the harm that's created both in the short term and the long term.

Q. And in the case of a child who is the resident of a or the boarder in a residential school who is isolated from their family most of the year, how would you assess the protective factors?

A. The protective factors would be minimal and the risk factors would be severe. I couldn't, it's hard to picture a circumstance for a child that would be worse, that to be taken away from your family and to live in a residential school, to be told you know, that your belief systems, your culture, your language isn't valued, to be uprooted to that extent, to not be able to go home every night, you know, to be able to deal about that and then, in that context, to be abused, that would be an example of probably some of the worse risk factors which would make the likelihood of significant short term and long term effects quite severe. So by short term and long term effects I'm referring to, poor self-esteem, depression, running away, even looking at things such as abuse of alcohol and drugs. As a child grows into an adult, you're looking at serious problems in terms of marital relationships, potentially sexual relationships, so you're looking at a number of areas that can impact somebody who's been abused. And in fact, there's a research in this area, it's quite developed, looking at these risks and protective factors and trying to predict short term and long term adjustment and only as the research develop but there's certainly a lot of work being done, looking at just the issue of residential schools. For example, looking at you know, long term effects just at being at a residential school and how that may affect aboriginal persons in the short and long term, terms of future adjustment.

Q. How would you describe the degree of vulnerability

of a child in this environment?

A. I would say the degree of vulnerability is extreme.

Q. And the prospect of, how would you describe the prospect or likelihood of being forced to eat one's own vomit in these circumstances as being hurtful or harmful to that child?

A. It would be an extremely, be harmful abuse to experience and again, especially harmful abuse to experience in the context of being in a residential school above the other factors. So you know, in a way, you could almost say that the last person in the world you'd ever want to abuse, I don't think anybody would want to abuse any child but the people who are most vulnerable would be those that would be most dependant such as those children in residential schools and in fact, they would require, if anything, the highest standard of care because of the needs that they would already be presenting. I mean, you know, and I think about children of this age, children are abused at various ages. Just think about how hard it is for some children to just have a sleep over. I always try to put this into my, being a parent myself, having three sons and trying to put this into every day experience and I can think about you know, my children sometimes when they were younger, just getting them to sleep over to friend's house was a big achievement, let alone being sent away you know, to a different school where they had to live and they couldn't practice their religion, they couldn't you know, they couldn't practice their beliefs, they couldn't be emersed in their culture and that would be, obviously, a difficult circumstance.

Q. So if what you're saying, if I understand you correctly, the greater the deprivation and risk factors in terms of analysis, the greater you would expect the harm to be?

A. Yes the greater the harm and again, that's been

repeatedly shown in the literature with any number of abusive experience whether they be psychological, physical or sexual.

MS. FULLER: Thank you Doctor Jaffe.

THE COURT: Mr. Charlebois.

CROSS-EXAMINATION BY MR. CHARLEBOIS:

Q. Would you agree Doctor Jaffe that what you've discussed with the members of the jury and with us this afternoon are factors in a general sense, factors you might expect to see in that type of abusive relationship?

A. Yes, many of them would be general factors.

Q. Can we agree as well that in any life experience whether positive or negative, that each individual is likely to react differently than the next individual? For instance, in the case of a death for instance, one child may react differently to the death of a parent than his brother or sister will?

A. Yes I agree that individuals have their own coping styles and people respond differently to different life events.

Q. And finally in connection with this case, can we agree that at no time have you either examined or assessed Luke Mack, Tony Tourville, George Wheesk, Daniel Wheesk, Eli Tookate, Eli Paul-Martin and, well that's six any way? You haven't examined or assessed any of the complainants in this particular case, is that right?

A. That's correct.

MR. CHARLEBOIS: I have no further questions Doctor Jaffe.

MS. FULLER: No re-examination Your Honour.

THE COURT: Okay, you have listed what I presume to be not an exhaustive list of future problems given the situation described.

A. Yes.

THE COURT: Would you add to that list problems with the criminal law system?

A. Problems such as being victimized by going through the system, potentially.

THE COURT: Well you testified as to the victimization, under what circumstances, I am not listing them now but you did say, 'I would expect that there would be problems with alcohol, drugs, marital etcetera.' Would you add to that list problems with the criminal law system?

A. One of the, if I have your question right, but one of the other common symptoms also would relate, could be post-traumatic stress disorder where the issue become difficult to talk about, where somebody might have nightmares or flashbacks every time they sit down at breakfast and they, you know, they see a food related to the food that was related to them, being forced to eat their vomit. They could have memories of every day. It could make them depressed and withdrawn. They might have trouble in the justice system to be able to come to court and clearly articulate...

THE COURT: I am not talking about articulation.

A. Okay.

THE COURT: I am talking about getting there.

A. Oh getting there, most...In terms of getting to the system, along the way, most...Many people who are severely victimized in childhood never show up in the court system because along the way, they've jumped off the bridge. They may have alcohol abuse that is so severe that they may not be able to function enough to actually show up in court as a witness. They can keep their first appointment with the Crown attorney but not the second.

THE COURT: Let us talk about earn their way to court.

A. Sorry.

THE COURT: Is one of the symptoms, can I add or I am asking you, would you add to your list of the symptoms a greater propensity to get into trouble with the law.

A. Yes definitely, sorry.

THE COURT: That is what I am talking about.

A. Sorry Your Honour, I was being a bit thick there. Clearly one of the side effects is not only being depressed but also acting out, being aggressive, getting into fights, ending up in the justice system as a perpetrator of violence so that's definitely, that's especially true if you look at the general issue of residential schools and what may happen down the road to adults who are raised in residential schools. There's a very strong correlation with both, both young offenders and also with adult criminality.

THE COURT: My question was probably nebulous. I was trying to be too careful. Are there any questions arising out of mine?

MR. CHARLEBOIS: Not out of me Your Honour.

MS. FULLER: No Your Honour.

THE COURT: Thank you very much sir. Do you want to take a break?

MR. CHARLEBOIS: Maybe just to confer very quickly with the Crown attorney.

THE COURT: We are getting close enough to the mid afternoon break. I just wondered if you know, if you want to, if you think we should have it now, we will have it now.

MR. CHARLEBOIS: Let's have it now please.

THE COURT: Okay, 15 minutes.

MR. CHARLEBOIS: I can say with little bit of glee that it is probably the first time since I've been

coming up to Cochrane or I've undertaken to be brief with a witness and I have been.

THE COURT: My most sincere congratulations.

R E C E S S

U P O N R E S U M I N G :

THE COURT: Members of the jury, I believe we have taxed counsel's ability to continue enough this afternoon. So we will have to resume tomorrow at 9:15 a.m. To give you an idea as to what will occur tomorrow, another expert, Doctor Kain will testify at 9:15 a.m. and I am told that this should last for 45 minutes or so.

Okay, there is nothing we can do. We will resume then at 9:15 a.m.

...JURY RETIRES

A D J O U R N E D

U P O N R E S U M I N G :

Friday, April 30, 1999

THE COURT: Anything before we bring the jury in? Bring the jury in please.

...JURY ENTERED AND POLLED

THE COURT: Next witness.

MS. FULLER: Doctor Brian Kain to the stand please.

DOCTOR BRIAN FORRESTER KAIN: SWORN

EXAMINATION IN-CHIEF BY MS. FULLER:

Q. Doctor Kain, I understand you have Bachelor of Arts degree from McMaster University.

A. That's true.

Q. And that you have a Master's degree in philosophy

from McMaster University.

A. That's correct.

THE COURT: Doctor Kain, we have been having problems having the accused hear, not only the testimony but whatever we have to say. I would ask you to raise your voice a bit and ask Ms. Wesley, did you hear Doctor Kain's words?

ANNA WESLEY: Yes.

THE COURT: Well, that is fine I guess.

A. I'll try and speak louder.

MS. FULLER: Q. I understand that you received a Canada Council Fellowship to study in German and Philosophy in Germany.

A. That's true.

Q. That was before your studies of medicine and that you received your M.D. from Queen's University at Kingston in 1971.

A. I did.

Q. I understand that thereafter, you did a residency in the department of psychiatry at Queen's University.

A. Well firstly, after medical school, I did an internship, that included medicine, obstetrics and gynaecology, paediatrics and so on. Then the following year, I did a year of residency in the department of psychiatry as a trainee in the outpatient child and family of counselling unit.

Q. Now is a residency in the department of psychiatry necessary in order for a physician to become a family physician?

A. No.

Q. This is something extra that you did on your own.

A. Yeah.

Q. And why did you do that?

A. I was interested in the area and I thought it would be useful in the family medicine to have some additional expertise in child and family counselling.

Q. As well I understand that you became a member of the College of Family Physicians in 1976.

A. That's true.

Q. And I understand that you have practised family medicine in rural settings.

A. Yes I have. I practised for two years in a rural area north of Kingston in the Rideau Lakes area, in a very small clinic which served about five small villages. And since 1971, I actually, the last month of my medical school undergraduate training was spent in Moose Factory and I've been involved with delivering services to native communities in the James Bay, Hudson's Bay area since '71.

Q. And I understand that as well, you have been, offered your services as a community physician to group homes and to the developmentally disabled.

A. That is correct.

Q. And that you had hospital privileges, have had hospital privileges at the Moose Factory General Hospital.

A. Yes as well as the hospitals in Fort Albany and Attawapiskat.

Q. I understand that you have been a sponsor and clinical teacher for nurse practitioners.

A. Yes, I enjoy that very much. I actually sponsor four nurse practitioners and supervise their clinical education.

Q. And that you became an assistant professor in the department of family medicine at Queen's University in I believe it was 1975 and an associate professor in 1986.

A. That's correct.

Q. I understand that in terms, among the things that you have taught are psychosocial aspects of medicine in community health.

A. That's true.

Q. I understand that you were the director of the residency program, the department of family medicine from '81 to '92.

A. Yes.

Q. And the coordinator of the Queen's University in Moose Factory medical program from '82 to '89.

A. Yes.

Q. And that this is a remote northern Ontario program with nine full time physicians and numerous staff.

A. And the trainees, we send both undergraduate and postgraduate students to Moose Factory.

Q. And I understand this is the largest program of its type in north America.

A. It's not the largest but it was the first university program in Canada to be established to deliver services to native communities.

Q. I understand that you, between 1983 and '92, you were the director of family medicine and emergency medicine program.

A. That's correct.

Q. At Queen's.

A. I established the program in our department in emergency medicine. I also established a program in women's health, a one year program.

Q. Now in 1990, I understand that you initiated and developed a residency program in aboriginal health issues.

A. That's correct, it's a one year program, it still exists.

Q. And that you maintained your interest and participation as an advisor at Queen's University in the Moose Factory program.

A. That's correct.

Q. I understand that from 1992 to '94, you were the director of postgraduate program, a postgraduate program in aboriginal health with the department of family medicine.

A. That's correct.

Q. And that you have taught medicine in the context of society. You've been on a comity of medicine and society.

A. Yes.

Q. That from '87 to 94, you were the deputy chief of family medicine at Kingston General Hospital.

A. That's correct and Hotel Dieu Hospital.

Q. And Hotel Dieu Hospital, that from '86 to '90, you were on the northern Ontario committee, council of Ontario faculties of medicine.

A. That's correct and in fact, that was the committee that was responsible for the establishment of training programs in family medicine in both Thunder Bay and Sudbury.

Q. And that you in fact, you were the chairman of the northern Ontario committee between '87 and '90.

A. That's correct.

Q. I understand that you were Ad Hoc committee for programs for native students in 1986.

A. Yes.

Q. And that between '77 and '79, you were on the Ontario council of health committee on mental health services.

A. That's correct, that was a committee that went around the province and listened to ordinary people vent their frustrations about problems with the mental health services in the province.

Q. As a family practitioner and professor of family medicine in Kingston Ontario, you have quite a good acquaintance with northern Ontario Doctor Kain.

A. Yes.

Q. And finally I understand that among your community activities, you are the medical director of a medical relief project in Ethiopia.

A. That's correct, we established a medical camp with Kingston personnel and in 1985, we had the privilege of raising about two million dollars in eight weeks and we had a team in the field in Ethiopia for about ten weeks.

Q. In 1989, you were volunteer physician with Mother Teresa's Mission with the Sisters of Charity in Calcutta.

A. Yes, I had the great honour and privilege of working with Mother Teresa in her home for the destitute dying in Calcutta.

Q. Doctor Kain, as a family medicine practitioner and associate professor of family medicine, can you tell us what you teach and practice concerning the concept of health?

A. Well I'm sure as the jury knows and certainly everyone in this room would know, health nowadays is more than just the absence of disease. We look up on health as being both mental and physical but we look upon good health as having a positive outlook so maybe 100 years ago, when health was looked upon as, if you didn't have a disease, you were healthy, nowadays, we look at both the physical, mental and we are more proactive about saying we should have positive on the memory side.

Q. All right, on the perspective of medical science, what is accepted in the concept of harm to health and well being.

MR. CHARLEBOIS: Perhaps Your Honour, just before we

get into the evidence of Doctor Kain, as I had indicated earlier, I'm not challenging his qualifications as an expert in the field of family medicine but I think for purposes of the record, he should be so qualified by Your Honour before we go on to his evidence.

THE COURT: In which field is it your submission that Doctor Kain should be qualified in? On the evidence, by the way, is the curriculum vitae an exhibit.

MS. FULLER: It is not Your Honour.

THE COURT: It is not, you are not tendering it as an exhibit. Okay, in what field?

MS. FULLER: That would be in the field of family medicine.

THE COURT: Pardon.

MS. FULLER: In the field of family medicine as an expert in the field of family medical practice.

THE COURT: Um-hum.

MS. FULLER: And I will be exploring with Doctor Kain what that includes, to discuss more specifically concepts of harm, physical harm and psychological harm.

THE COURT: Is there an aboriginal component in there? That is why I am asking?

MS. FULLER: I believe Doctor Kain could be certainly considered an expert in the area because of his extensive and very experienced in native health and care...

THE COURT: Okay, on Doctor Kain's evidence, I certainly hold that he is an expert in family medicine. On the evidence I heard, I certainly hold that he would also qualify as an expert in family medicine including aboriginal health so I so find that is sufficient.

MS. FULLER: Yes, thank you Your Honour.

MS. FULLER: Q. From the perspective of medical science, what is accepted in the concept of harm to health and well being Doctor Kain?

A. Well in the context of this case and in general, one can look upon physical harm of course. One can look upon, look at psychological harm, one can look at sexual violence. All of these things need to be considered individually and yet, together because they often go hand in hand.

Q. Doctor Kain, do you teach medical students how to recognize and treat different types of abuse whether it be physical abuse, sexual abuse or psychological abuse as they present themselves to a family practitioner?

A. Yes we do and in fact, as you no doubt know, it's the law in this province, that if you suspect a child has been physically abuse for example, then you must report that suspicion to the local Children's Aid Society or the police or some other authority so we teach these things to residents and nowadays, with the greater awareness of the degree of sexual abuse in all communities, we also teach residents to routinely inquire of all their female patients, whether they have experienced in their life any form of sexual abuse.

Q. All right, with respect to this case, in preparing to give evidence in this matter, did you have the opportunity to discuss the case at hand with a gastroenterologist and in particular, a paediatric gastroenterologist?

A. Well let me, before I say yes to your question, let me say that in preparing to come here, I did several things. I thought about the case first and gave it quite a bit of thought and I did some reading and then I thought, not being a paediatrician or a gastroenterologist, I thought it would be nice to bounce my thoughts off of somebody who was so I did

indeed spend about an hour with a paediatric gastroenterologist and that sort of confirmed in my mind that I'd been thinking along the right track.

Q. The right track.

MR. CHARLEBOIS: Well Your Honour, any evidence or any information of Doctor Kain, notwithstanding his expertise would have gleamed from the paediatrician as clearly hear say, because in that domain, notwithstanding that Doctor Kain has been qualified as an expert, rules of evidence remain the same as do the rules of hear say.

R U L I N G

BOISSONNEAULT, R. (Orally):

Well you know, if we want to push that to its absolute logical conclusion, I guess every doctor that has had anything to say to Doctor Kain since he entered medical school would not be admissible here. I would not treat a consultation with an expert by another expert in a field as repeating hear say. I would think that consultation would be purely a scientific fact finding mission and I am prepared to admit the evidence of Doctor Kain's inquiries relative to the subject matter at hand.

MS. FULLER: Q. Thank you Your Honour. In any event Doctor Kain, I understand as a result of that consultation, that was merely confirmatory of your own diagnosis and your own opinion as to...

A. That is correct, I can reassure counsel that I accept full responsibility for everything I say here. It's not somebody else's opinion.

Q. I understand Doctor Kain that you did not have the opportunity to consult medical charts and that you did not

discuss the allegations with any of the complainants.

A. That's correct.

Q. And I understand that however though, that you made inquiries as to medical charts or records, hospital records, medical records for the students and you were advised that they were all destroyed.

A. That is true.

Q. Now in the providing of your opinion Doctor Kain, I understand that you were given the following information as the basis of that opinion. First, that the complainants were Cree or Ojibway boys who lived at Ste-Anne's residential school throughout the school year, except for the Christmas holidays in most cases, Christmas and summer holidays in most cases. When the children first enter the school between the ages of five and eight, they do not speak English and the language of instruction was in English. Secondly, that at times, residential children were ill at meals and would vomit in the dining room and it is alleged that the accused, then a Cree Sister of Charity, would force the child to eat the vomit and finally, that noxious is generally held by the courts to mean hurtful, harmful or unwholesome. Is that the general information that you were provided with?

A. That's correct.

Q. Within this context Doctor Kain, how significant was the position of the accused as the guardienne des garçons or care giver of these children and why?

MR. CHARLEBOIS: Well Your Honour, I wonder, I've got a few, I've got an objection to make. It might better be heard in the absence of the jury before we go any further.

THE COURT: I would ask you, members of the jury, to go back to your jury room for a few minutes. Mr.

Charlebois.

...JURY RETIRES

MR. CHARLEBOIS: Your Honour, what I submit and I am submitting it quite forcefully is that Doctor Kain can obviously tell us because he's been qualified as an expert, as to physical characteristics of the vomitus. He can also tell us in general terms as to what psychological effect and or harm may have come or might likely to have come from being compelled to eat the vomitus but, in the absence of having examined any of the named complainants and he's already established that he has not, in the absence of having looked at any medical records in connection with these seven complainants and again, he has admitted that he has not, how can Doctor Kain notwithstanding his expertise give any opinion as to what the relationship might have been between the accused at the bar and the complainants? Doctor Kain wasn't there. It seems to me that only evidence can come, that evidence rather can only come through those people who were there, whether there were other care givers or whether obviously they were the complainants and we have already obtained evidence on that point from the two complainants who've testified so far and I expect it we'll hear more of the same next week from the other complainants. I submit that to allow Doctor Kain to provide opinion evidence on that basis, in a vacuum, goes beyond the terms of his report but more importantly, goes beyond the parameters of the ruling that you gave on Tuesday, Tuesday or Wednesday.

THE COURT: Well just a minute now, you told me a lot there in a few minutes. Number one, are you telling me

that it is incumbent upon the doctor to have had examined the seven alleged victims, read their charts before he would be allowed to testify here?
MR. CHARLEBOIS: No not at all.
THE COURT: Okay, well what are you telling me?
MR. CHARLEBOIS: What I'm suggesting rather to Your Honour is that he can tell us in general terms because he hasn't examined anybody connected with this case, the physical characteristics of the vomitus are, the...
THE COURT: Well listen, I have to understand your objection so let me interrupt. You are telling me the doctor cannot tell us other than in general terms about vomitus or its effects because he has not examined them. I have not heard a bit of evidence yet where the doctor specifically gave evidence as to any results to any of the...Not results but consequences to any of the alleged complainants to-date. What I understand the doctor to have told us, which is very little, was the start of his response to a hypothetical questions posed by the Crown.
MR. CHARLEBOIS: As I indicated Your Honour, I don't have any difficulty with the doctor later on in his evidence giving us the physical characteristics. I don't have any difficulty with the doctor giving us in general terms, the potential or likely or possible psychological harm that might come of being compelled to do this but if, unless I misunderstood the question that the Crown was putting to the expert, it dealt with...
THE COURT: Well what is the question?
MR. CHARLEBOIS: I understood the question to be and I didn't write it down, going on memory here.

THE COURT: Well it's rather important that we know exactly what the question is if that is what you're objecting to.
MR. CHARLEBOIS: Could I then please ask through Your Honour the Crown repeat the question?
THE COURT: And then we will hear your objection, okay, would you repeat the question?
MS. FULLER: Yes Your Honour. Within the context of the information that you were provided with...
THE COURT: Which you were provided with.
MS. FULLER: Which I read to the court, yes.
THE COURT: No, I am just repeating your words, in that context, okay.
MS. FULLER: In that context, which is the hypothetical, within that context, how significant was the position of Anna Wesley to the children and why. In other words, the basis of the opinion, the relationship...Your Honour will recall that as Doctor Jaffe...
THE COURT: Was that your question or are you telling me what you were trying to talk about?
MS. FULLER: Yes.
THE COURT: I would like to know specifically what the question is and I will rule on it and if I rule that it is not admissible, then you can rephrase it and if I rule that it is admissible, Doctor Kain can answer it.
MS. FULLER: The question was, within the context of the information that he was provided with which was read into the record, how significant was the position of Anna Wesley as the care giver to these children and why and obviously, I would like to make submissions after my friend.

THE COURT: How significant, this is what you are objecting to, how significant the position of Anna Wesley was in the context of what you have given the doctor as information.

MS. FULLER: Yes.

THE COURT: I think I have to uphold that objection because I do not think Anna Wesley came into your question at all.

MS. FULLER: Yes she did.

MR. CHARLEBOIS: She did Your Honour, I recall that.

THE COURT: Well then, I did not hear the question again.

MS. FULLER: Within the context of the information that I provided Doctor Kain with, to form the basis of his opinion, how significant was the position of Anna Wesley as the care giver to these children and why was it so significant?

R U L I N G

BOISSONNEAULT, R. (Orally):

I just used the wrong word there. Before the doctor can tell us how significant Anna Wesley's position was in this context, I think that the question would have to be put to him, whether he knows Anna Wesley's role, was it put to him in a hypothetical, what did she do. That is a question which is put to the doctor that really, so far, I have not heard any evidence to support and he would be answering in a void so just put it differently.

...JURY ENTERS

MS. FULLER: All right, thank you Your Honour.

THE COURT: Well do you want to say something or what?

MR. CHARLEBOIS: Yes, it seems and of course, it's for

Your Honour to rule but just to prevent the jury from shuffling in and out, I am objecting to Doctor Kain giving evidence on potential power differential if that's where the Crown is headed, between the accused at the bar and the complainants for the following reasons. One, Doctor Kain wasn't there at the time. Two, Doctor Kain has not examined any of the named complainants to form an opinion as to what this power differential may have been or not been and three, Doctor Kain has been qualified as an expert in the field of family medicine. We can't go any further than that. Particularly in my submission, when we're dealing with an expert and the weight of the evidence of the expert can carry in front of the jury may well be more than the weight of a non-expert or ordinary witness.

THE COURT: Okay, could Doctor Kain testify as to Anna Wesley's position, if he heard some evidence as to that position or if he was given a hypothetical, could he?

MR. CHARLEBOIS: If he could testify that she was the care giver or the primary care giver?

THE COURT: No no, the effects of being a care taker. If he was given a hypothetical as she was the caretaker and hypothetically speaking, if she did this and did that, what is your conclusion? Is there anything wrong with that?

MR. CHARLEBOIS: Not given the fact that you've qualified him as an expert, no.

THE COURT: Well our problem then is phrasing the questions and phrasing of objections. You know, I do not see the great problem there as long as it is properly done.

MS. FULLER: Your Honour, I'll furnish a bit more

information.

THE COURT: Pardon me.

MS. FULLER: Then I would furnish a bit more information.

THE COURT: Well not information, hypothetical to him but he did hear some information. I believe I saw you sitting in court doctor.

A. Yes that's correct Your Honour.

THE COURT: All day yesterday, how may witnesses did you hear?

A. Two.

THE COURT: One was a medical.

A. Yes.

THE COURT: Okay, there you go, go ahead.

MS. FULLER: Q. Doctor Kain, you I understand have been informed and you have heard evidence that Anna Wesley was the primary if not sole care giver of the children at Ste-Anne's for much, if not all of the term that the children were at the school. Within this context, how significant was her position as care giver to these children and why?

A. Well when I thought about this situation, the thing that strikes you right off the bat is this total isolation of the children there, removed from their families and in some cases, removed from their language at a very tender young age, five, six, seven and taken to a community probably far from their home. So, they are totally dependant on others and I suppose in this particular case, they were totally dependant, 110 percent on Ms. Wesley.

Q. And how significant is that in your assessment of the consequences of the treatment of these children by Anna Wesley?

A. Well exceedingly significant because they had no

one else to turn to besides the primary care giver and if that relationship is not a beneficial loving, nourishing relationship, then they're out on a limb, there's no one.

Q. In your opinion Doctor Kain, what types of harm can be caused by a child being forced by the care giver in this case, Anna Wesley, to eat his vomit in this context, in the context of a residential school?

A. Well if it helps, sort of in my own mind separated harm in this situation into psychological harm and the possible physical harm of being forced to eat your vomitus.

Q. Dealing first with psychological harm, Doctor Kain, what is in your opinion the likelihood of harm being caused and the factors that allow you to come to that opinion?

A. I think the likelihood of severe life long psychological damage, from being forced to eat your vomitus at that age, with no other supports around, in front of your piers is exceedingly high. I can't imagine a child or a person being unaffected by this. It is just such a gross injustice on an individual that I would say 99.9 percent of people would carry that scar, that emotional scar throughout their life. And for that reason, I think this is an act and I don't say this lightly but I think it's an act that comparable to gross physical abuse or gross sexual abuse because it leaves a life long scar. In fact, all three of those areas, being forced to eat your own vomitus, gross physical abuse, gross sexual abuse, they all sort of leave the victim with the same sadden, negative feelings, with a sense of worthlessness, despair, isolation, anger so that in my mind, the severity of being forced to eat your own vomitus is (Unclear) physical and sexual abuse.

Q. And again in terms of feelings doctor, in your opinion, this act produced feelings of shame and humiliation.

A. Absolutely.

Q. And how does that affect your opinion, what is the significance of that?

A. Well it's very hard to lead a normal life sort of speak if all of your emotional baggage is negative. Without a sense of self-worth, without a sense of reasonable self-image, you don't develop normally into a normal adult and you don't develop normal relationships with people. You often times run into problems with depression, with acting out behaviour, you run into problems with the law as the judge mentioned yesterday so there are may consequences of this emotional baggage, this negative emotional baggage that people would carry for years.

Q. So in terms of...In addition to short term effects of feels of worthlessness and shame and anger and whatever, in terms of long term effects then, if we could just go through them again and when I say effects, I don't mean necessarily just the feelings but effects in terms of people's lives.

A. Well I guess the biggest, badest effect is...There's a very potent and dangerous combination of negative feelings if you have a sense of worthlessness, you have no positive self-image, a sense of shame and a sense of anger. That's when people take their lives or they hack their bodies or they do silly things to themselves, because the anger in general is focused inward on the person that they don't like so these people are at great risk for suicide, alcohol abuse, drug abuse, abnormal interactions with other people and so on.

Q. Now you also eluded to problems with the criminal law. Why would that arise?

A. Well brought up with such negative emotional baggage, haven't learned the rules of society and they don't behave according to any set of rules so they run afoul of the rules and society does not take likely to that. I guess

another effect is the perpetuation of violence from generation to generation, that if you're brought up in a violent atmosphere, you're much more likely to be violent yourself with children if you have children or other people.

Q. Now dealing with the issue of physical affects of being forced to eat one's vomit or the risk involved, the physical harm. First of all, would you tell us Doctor Kain what is the body doing when we vomit?

A. Well a simple quick look at it would say that the body, in throwing up, in vomiting is automatically rejecting something that it doesn't like and that in fact happens and I'm sure we've all experienced it but vomiting can be caused by many, many things. For example, chronic anxiety and fear can cause vomiting. I recently had a long talk with a resident doctor in our program who was terrified of the supervisor that she, the supervising position she was assigned to and every morning during her rotation, she would get up and vomit. Not because she had something physically wrong with her but because she was terrified of working with this person so fear, anxiety, all sort of physical things like chronic paid can cause vomiting, raised intracranial pressure can cause vomiting. Infections, particularly in children, viral infections. We often see a kid with a cold who is vomiting as well. Irritation at the back of the throat can cause vomiting so there are many, many different causes of vomiting but in this context, assuming that it's highly unlikely the children were fed contaminated or putrid food. I mean, that would be pretty unusual, and assuming that that is not the case, then I would assume these children would vomit because either the smell of food or the sight of food or something like fear or anxiety.

Q. Or a bug, a flu bug.

THE COURT: I did not hear you.

MS. FULLER: Q. Or a flu bug.

A. Or being sick.

Q. Being sick and could diet also affect...

A. Change in diet.

Q. Yes, going from a native diet to a different cultural diet.

A. Yeah.

Q. All right, what does vomitus consist of?

A. Vomitus consists of partially digested food and secretions most of which are acidic in nature, that help the body start the digestive and absorb the process and of course, bacteria. I could go on but I think maybe I should just stop there. It's an acidic mixture of partially digested food and gastric secretions.

Q. And just so we have an idea, an orange is acidic, to what extent are we talking acidic?

A. It's very acidic. The stomach gas is an acid before you eat. The PH of the stomach or the measure of acidity, you remember back in high school, a normal neutral PH is seven and something higher than that, say a PH of eight or nine is a base and something lower than that is an acid so acid rain might fall at, I'm not an expert on acid rain but it could fall at maybe a PH of five. The PH of the gastric juices and it's mostly hydrochloric acid, before you eat is about two so it's a very nasty juice. You wouldn't want to drink a glass full of hydrochloric acid with a PH of two.

Q. And does hydrochloric acid have an odour?

A. It has more of a irritating essence I guess, it's not the odour that bothers people but it is very irritating on the airway, so that if you were to put hydrochloric acid in a glass and inhale over it, it would probably start you coughing.

Q. When most of us have vomited or have been close to

people who vomited, it seems to be the smell that causes us often of gag. Is it the smell or is it the essence?

A. Well it's probably a combination of things, the smell, the sensation, a combination of things.

Q. All right, could you tell us the potential or risk for physical harm from being forced to eat one's vomit?

A. Yes, I could try not to be too wordy, I think basically two kinds of harm from being forced to eat your own vomit is one would be the potential for damage that comes from aspirating or having some of the vomitus go down your windpipe instead of your gullet so if you've ever had a glass of water and a little bit went down your windpipe, you know it starts you to cough. Well, vomitus is much, much more irritating than water because of its high acid content and its particular matter, little particles of digested so the physical problems associated with aspiration and in this particular case, I would...I have no idea what the consequences were in these individuals but it would be easy to see how a child forced to eat his own vomitus might aspirate.

Q. Why is that?

A. Because I can imagine the child sitting there, let's say at breakfast time, being forced to eat this terrible material that he's just thrown up, crying, maybe quietly, maybe not but here is an unhappy camper, a five or six year old crying, trying to eat this, knowing that he has to, there's no option. And as you know, if you had children or seen children cry, they cry and they gasp for air and they cry some more and they cry some more so in the midst of forcing down this vomitus and crying and gasping for air, I would think the chance of aspiration is pretty significant.

Q. And in addition to crying, as we all know when people vomit, they often gag. How does that affect your

ability to consume something that you've just thrown up?

A. It just makes it, it makes the vomiting reflex twice as strong. I mean, I can't imagine a child who has thrown up and vomiting...If you've ever seen a child vomit...Children do not do it voluntarily. It is not a pleasant thing for a child. They don't like the sensation of vomiting and they sure feel badly about the mess it makes and I can't imagine seeing a child in distress over having vomited, being then forced to eat that vomitus. It would just double the stimulus for vomiting again.

Q. But in terms of, my question is directed in terms of the gag reflex, how does that affect our propensity or the possibility of aspiration?

A. Gagging would enhance the possibility of aspiration and the child would be gagging, trying to put this stuff down a second time or maybe even a third time.

Q. And what are the problems that arise from aspiration?

A. Well the problems with aspiration are really, depending on the anatomy of the airway, where the aspirant or the acid and the food particles land so you can have problems right at the back of the throat, the opening of the airway or the larynx and in severe cases, the larynx can go into spasm, shut off. Your airway shuts down and in some cases, children die so that's one complication, not a very common one in a five year old, more common in an infant. A more common complication would be spasm of the larger tubes going to the lungs, the bronchial tree and if you've ever had wheezing or you know of somebody who's had asthma or has trouble with asthma, that's the kind of thing that I'm talking about. The hydrochloric acid, the pepsin, the gastric juices is terribly, terribly irritating on these mucosa or the covering of bronchial tree

and so when it hits that area, the bronchial tree can only react in one of two or three ways. It causes acute inflammation and contracture of the muscles around the bronchial tree so what you get is acute, an acute asthmatic attack. And, it sometimes settles down by itself quickly, and sometimes it doesn't.

Then the third and perhaps most troublesome complication of aspiration is the well known condition called aspiration pneumonia and that occurs when portions of the aspirant or in this case, the vomitus go a little bit further down into the lungs so that they're actually in the lung tissue. Of course, the vomitus has bacteria in it. The lung tissue is pouring out mucus to try and relieve itself of this noxious material and infection starts. Usually within a couple of hours, the child has a high fever and it needs to be treated very aggressively with antibiotics and often time, oxygen and bronchial dilators and so on. So aspiration pneumonia is a nasty piece of business. It's not uncommon. We see it on a regular basis I guess but I've never run across it from somebody being forced to eat their own vomitus but that would be a real possibility.

And then the fourth possibility would be less likely and that is empyema or a lung abscess and that's when a bit of bacteria gets way, way down into the bottom and starts to fester and the abscess grows and that of course is a life threatening condition as well but that's not very common. So looking at physical, just to go back, looking at physical harm associated with being forced to eat your own vomitus, those are the things that I would consider possible in terms of the respiratory tree, lung problems so I could summarize them, an acute spasm of the larynx, spasm of the bronchial tree or asthma,

aspiration pneumonia and then unlikely but still possible, empyema.

Now I'd like to stay with the physical damage but move on to the oesophagus itself. The oesophagus is just a tube that connects the back of the throat to the stomach and unlike the stomach, it is not designed to handle acid so it has no protective mechanism for acid. The stomach has several mechanisms which prevent it from being dissolved in its own juices so to speak, the oesophagus does not, so that the first thing is, the oesophagus is irritated when it is forced to have acid go up or down so it's irritating to the oesophagus to throw up an acid mixture and of course, doubly irritating to be forced to eat that acidic nature so if you've ever had heartburn, that's what I'm talking about. The oesophagus is crying out, it doesn't like it. So esophagitis, irritation of the oesophagus is one problem. Another problem and I don't suggest that this is the case in this particular context but...I don't know the details so in repeated bouts of assault by the acid in the vomitus...In other words, if this was sort of a reoccurring thing for a child, that happened every few days and he had to repeatedly swallow his own vomitus, then you can get a degree of ulceration and inflammation in the oesophagus, I mean big ulcers, less likely to happen than just irritation and soreness of the oesophagus.

A third complication and this is not uncommon is vomiting, especially in children, is a very forceful thing. There is a lot of contraction of muscle, in the diaphragm, in the chest wall. It's a great complicated physiological process to vomit and it's very forceful in children and at some times, because of the force of the vomiting, they actually tear the lining of

the oesophagus or the mucosa, the inside lining of the oesophagus and they bleed from that and that's called a Mallory-Weiss syndrome and it's not uncommon at all and so the child then starts throwing up blood. In severe cases, you can actually lacerate or transept the oesophagus completely which just normally fail but that's pretty uncommon.

Q. Assuming Doctor Kain, even if we were to assume here that none of the above physical effects occurred other than what you've said is obviously non-avoidable, irritation, even if none of those physical consequences, severe physical consequences occurred after the complainants were forced to eat their vomit, what is your opinion as to whether this act is an inherently harmful act?

A. Well it's definitely, I mean there's no doubt about it, it's definitely inherently harmful.
It would be inherently harmful for 99.9 percent of all people because we react emotionally in the same way to such a gross indignity. And if I may, you know many people who are raped do not get pregnant but that doesn't make the raping any less vicious so even if the children had no aspiration, no Mallory-Weiss syndrome, nothing but a little irritation, that doesn't make this a pleasant bit of business. This is nasty and people are built the same way emotionally. We come into the same, into the world with the same sort of brain pathways and we react in general, in the same way and I could say 99.99 percent of people would be scared for life by this. This is a very unhealthy hurtful, harmful thing to do.

MS. FULLER: Thank you doctor.

THE COURT: This may be an appropriate time to take the morning break.

MR. CHARLEBOIS: If Your Honour so wishes, sure. I don't think I'll be long with the expert. I'm in Your